

# GUIDELINES FOR CHANGE IN CIRCUMSTANCE (17.3)



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## 1. INTRODUCTION

1. The Credit Industry Forum (CIF) identified a challenge with the operational handling of debt review matters where there is a change in the financial circumstance of the consumer(s). The National Credit Act 34 of 2005 (NCA) in its regulations makes specific reference to various prescribed forms such as Form 16, 17.1, 17.2 and others and makes no provision for a form or process that may be utilised by debt counsellors to inform credit providers of changes in the consumer’s financial circumstances. However, some credit providers often allow the use of the industry developed Form 17.3 (annexed hereto as Annexure “A.1”) which brings to the credit provider’s attention the consumer’s change of circumstance.
2. Since no formal process currently exists for consideration of change of circumstance applications, credit providers often make ill informed decisions on such applications. The risk being, that a consumer may be placed in a worse off position as a consequence of a lack of thorough investigation into the consumer’s plight.
3. Following an intensive review process of this challenge by the CIF, the National Credit Regulator (“the NCR) is pleased to announce that the paper developed by the CIF with proposed operational solutions has been signed off and issued as guidelines to be applied by all industry participants effective immediately.
4. Please note that the amendments to the NCA, its regulations or case law supersede provisions made in this guidelines and will when necessary be amended.

## 2. GUIDELINE PRINCIPLES

1. The guidelines are intended to outline the position which credit providers are encouraged to adopt when they receive a Form 17.3 indicating a change of circumstance. Credit providers are encouraged to act in good faith and in a reasonable manner when considering the Form 17.3’s received.
2. The guidelines distinguish between a Form 17.3 received before the debt review matter is set down in court or the National Consumer Tribunal (NCT) for a hearing, after set-down but before a court order or NCT order is granted and after a court order or NCT order is granted.
3. Further distinction is drawn between the temporary and complete loss of income as prevailing circumstances, as well as the impact of marriages in community of property on joint income.
4. A Form 17.3 notice may also be utilised to inform the credit provider of the death of the consumer under debt review or the death of the consumer’s spouse (if the consumer was married in community of property).
5. It must be noted that it is difficult to compile an exhaustive list of possible change in circumstances however; a few common examples of change of circumstance will be discussed below as well as possible supporting documentation that may be requested.
6. Further, it must be noted that the Form 17.3 process in respect of **secured credit agreements** versus **unsecured credit agreements** may result in varying approaches by both the debt counsellor and the credit provider. It may be easier to propose solutions, in the event of a change in the consumer’s financial circumstances, for unsecured credit agreements than secured credit agreements.
7. A change in a consumer’s financial circumstances can result in either long or short-term consequences.

As a guide, it is proposed that a delay / reduction in repayments towards credit agreements for a period of less than three (3) months could be considered a short-term change in financial circumstances and that a longer period could be considered a long-term change in financial circumstances and this should be considered when receiving a Form 17.3 request.

8. The prevailing principle is that a consumer who alleges a worsening change in circumstance should provide supporting documentation to the request in order to assist credit providers in reaching an informed decision to the request.
9. In instances where a consumer has in place a credit life insurance policy that covers the event that created the change in circumstances, such as credit life insurance policy for loss of income due to retrenchment, the consumer's proposal must include the amount that he will receive under this policy and indicate how this amount will be used to reduce or settle his over-indebtedness. Should the consumer have taken an insurance policy through the credit providers insurance carrier, the credit provider should assist the consumer in lodging the claim with the insurer.

### **3. APPLICABLE PROVISIONS OF THE NCA**

1. The following provisions of the NCA were considered in drafting these guidelines:

#### **Section 106(6)(b) of the NCA provides:**

*"If the consumer exercises the right under subsection 4(a), to substitute an insurance policy of the consumer's own choice, the credit provider may require the consumer to provide the credit provider with the following directions-*

- a. ...
- b. *a valid direction to the insurer in the prescribed manner and form, naming the credit provider as a loss payee under the policy up to the settlement value at the happening of an insured contingency, and requiring an insurer, if an insured event occurs, to settle the consumer's obligation under the credit agreement, as a first charge under the proceeds of that policy at any time during the term of the credit agreement."*

#### **Section 79 of the NCA provides:**

2. *A consumer is over-indebted if the preponderance of available information at the time a determination is made indicates that the particular consumer is or will be unable to satisfy in a timely manner all the obligations under all credit agreements to which the consumer is a party having regard to that consumer's:*
  - a. *financial means, prospects and obligations and;*
  - b. *probable propensity to satisfy in a timely manner all the obligations under all the credit agreements to which the consumer is a party, as indicated by the consumer's history of debt repayment.*

### **4. TIMELINES**

**Important to note:** It should be noted that the issue of a Form 17.3 does not suspend the 60 business days in which debt review matters should be brought to a Magistrates' Court or the NCT.

Credit providers will endeavor to respond to the complete and accurate Form 17.3 request received from the debt counsellor within 10 (ten) business days from receipt thereof.

In the event that a credit provider refuses / fails to respond to a debt counsellor within the 10 (ten) business days' period, the debt counsellor may proceed with the debt review process, including:

1. Referral of the debt review application to the Magistrates' Court or NCT;
2. Supplementing the relevant debt review court or NCT application papers; or
3. Launching applications for the variation of the debt review order in adherence with the Magistrates' Court Act(MCA) and the NCT Rules.

## **5. VARIOUS SCENARIOS AND PROPOSED SOLUTIONS**

### **(1) BEFORE SET-DOWN**

#### **a. Temporary loss of income.**

Where the consumer loses his/her income temporarily and where it is reasonably foreseeable that income will resume in the near future. Maternity leave and incapacitating illness or injury are examples that can be mentioned in this category.

Examples:

#### Maternity Leave:

It is recommended that the debt counsellor should submit the Form 17.3, annexing the following documents:

- Proof of the incident, namely, a doctor's letter confirming pregnancy;
- Letter from the employer confirming the period of maternity leave, what remuneration the consumer will be receiving during this period, and any impact the leave may have on overall remuneration. The letter must further indicate whether or not the original remuneration will resume upon her return from maternity leave.

If the consumer has the right to claim UIF, the debt counsellor should inform the consumer to do so.

These documents must be accompanied by a new proposal that will clearly indicate how the consumer will catch up on their obligation should payment concessions be granted. The consumer on maternity

leave should indicate the instalment she will be able to afford while on maternity leave.

The debt counsellor will submit a proposal with recommendations to the credit providers and provide feedback regarding:

The time period of impact of the change in the consumer's financial circumstances;

The repayments the consumer will be making towards credit agreements during this time period; and

The date(s) upon which the consumer's financial circumstances will be reviewed or the date upon which repayments as per normal will again commence or proceed.

Incapacitating illness or injury:

It is recommended that the debt counsellor should submit the Form 17.3, annexing the following documents:

- Proof of the incident, namely, a doctor's letter confirming injury or illness, the period of incapacity and proposed return date to work,
- A letter from the employer stating what remuneration the consumer will be receiving during this period, as well as any impact the incapacity may have on the consumer's level of employment upon return i.e. has the injury negatively impacted the consumer's ability to perform in their pre-leave capacity and as such has had a negative impact on remuneration;
- An affidavit (meaning a written statement of fact which is deposed to under oath) or documentary evidence (for example a letter from the employer or compensation commissioner) from the consumer stating the value of their compensation claim or payout.
- An affidavit (meaning a written statement of fact which is deposed to under oath) or documentary evidence (for example a letter from the insurer) from the consumer stating the value of their insurance claim or pay-out, or
- An affidavit (meaning a written statement of fact which is deposed to under oath) or documentary evidence confirming that no insurance exists;
- Confirmation from the debt counsellor that the consumer will still be over-indebted even after any claim/payout referred to above has been paid out, alternatively, a new proposal incorporating any such claims.

All documents must be accompanied by a new proposal that will clearly indicate how the consumer will catch up on their obligation should payment concessions be granted.

**b. Complete loss of income**

This is where the consumer loses his/her income and where it is not clear whether the income/ employment will resume in the near future. Dismissal or retrenchment may be mentioned in this category.

**Examples:**

Dismissal or retrenchment:

It is recommended that the debt counsellor should submit the **Form 17.3**, annexing the following documents:

- Proof of the incident, namely a letter of dismissal or retrenchment from the employer,
- A letter confirming the package to be paid out from the loss of employment, whether it is from the former employer or South African Revenue Services (SARS);
- Whether the consumer has any insurance that covers these circumstances, if so, all details relating to such policies;
- Should the consumer have taken an insurance policy through the credit providers insurance carrier, the credit provider should assist the consumer in lodging the claim with the insurer;
- In the event the consumer opted to take an insurance policy with an independent insurer, the consumer should proceed to lodge the claim with the insurer;

If the consumer has the right to claim UIF, the debt counsellor should inform the consumer to do so.

The debt counsellor will submit a proposal with recommendations to the credit providers and provide feedback regarding:

- The time period of impact of the change in the consumer's financial circumstances.
- The repayments the consumer will be making towards credit agreements during this time period; and
- The date(s) upon which the consumer's financial circumstances will be reviewed or the date upon which repayments as per normal will again commence or proceed.

Some consumers have credit insurance which undertakes to cover loss of employment or retrenchment. The payout from these insurance policies should be set out in the proposal, and a portion thereof should be utilised in reducing the consumer's indebtedness.

#### Consumers with no ability to make payments

Debt review is a process that caters for consumers who have some ability to meet their obligations given a reduction in repayments. Therefore, consumers who have no ability to make any payment will not be in a position to negotiate a reduced repayment plan as there is no income. In these circumstance, the debt counsellor should include the position (as to whether there is certainty regarding future income or not) in the Form 17.3 notification as per the information supplied by the consumer and credit providers may use their discretion and consider the matter based on its own merits and take the actions which are appropriate in the circumstances.

#### **c. Marriages in Community of Property/Dissolution of Marriage in Community of Property**

Consumers married in Community of Property (COP) are assessed jointly and therefore, both incomes are taken into consideration when a proposal is negotiated between the debt counsellor and credit providers.

The financial circumstances of consumers married COP will inevitably be affected should there be a change in circumstance on any of the parties. To attend to this, it is imperative that debt counsellors reassess the financial circumstance taking the joint marital estate into account. Should the consumers still be over-indebted, a new proposal should be drafted accordingly.

In the event of the dissolution of a marriage in community of property, the consumers' financial situation will again have to be reassessed and a proposal be drafted in accordance with the consumers' finances.

Where the court has issued a divorce decree and awarded either of the parties a property that was bonded jointly to both parties while they were married, the joint income must still be considered in any proposal. It is a common misconception that the divorce decree absolves the party who no longer has the property from their payment obligations. In terms of a home loan credit agreement both parties remain jointly and severally liable even if they are divorced<sup>1</sup>.

A decree of divorce (court order) does not release a consumer from their debt obligations (credit agreements) for which the consumer is contractually, jointly and severally liable - even a court order which stipulates that only one of the consumers will take over the debt. Consumers should ensure that correct processes are followed to release them from the credit agreements which jointly and severally binds them to the debt.

In the event that one of the spouse either experience a temporary or complete loss of income, the consumers' ability to satisfy their repayments in accordance with the agreed debt review restructure, is negatively impacted. This results in reduced income being available for repayment.

The debt counsellor must therefore, annex to any Form 17.3, supporting documentation that substantiates the alleged incident and provide the necessary documentary evidence where necessary. The debt counsellor will submit a proposal with recommendations to the credit providers and provide feedback regarding:

- The time period of impact of the change in the consumers' financial circumstances;
- The repayments the consumers will be making towards credit agreements during this time period; and
- The date(s) upon which the consumers' financial circumstances will be reviewed or the date upon which repayments as per normal will again commence or proceed.

Any Form 17.3 notification submitted by a debt counsellor to credit providers must be accompanied by a new debt restructure payment plan/proposal if the change in financial circumstances results in a material change to the current debt restructure plan/proposal.

## **2. POST SET-DOWN, BEFORE COURT ORDER OR NCT ORDER**

In addition to the documents that must accompany the Form 17.3 in the instances listed above, the consumer must ensure that his/her attorneys have filed in the NCT application or court application, a supplementary affidavit in compliance with Rule 55A of the MCA which provides for a change of circumstance to be brought to the attention of the court in instances where the debt counsellor has certainty regarding the

<sup>1</sup> Kindly refer to the Guidelines for Joint Mortgage Bonds / Mortgage Agreements NCR number 1 of 2019 dated 12 April 2019 for guidance.

impact of the change and there is a material change to the proposed debt restructure plan/proposal; ensuring that the court or NCT is aware of the most accurate position and is not misled by the facts on affidavit before it.

The supplementary affidavit must also be served on all credit providers/respondents (including those who have not entered appearance in the matter). It should be noted that leave to supplement must first be granted by a court before the service and filing of the supplementary affidavit. It is suggested that a prayer be inserted in the notice of motion requesting leave to supplement the papers if the consumer's circumstances change. The prayers and draft court order or NCT order should be updated accordingly.

### **3. POST COURT ORDER OR NCT ORDER**

In instances where a restructure has been affected in compliance with a court order or NCT order, a distinction between temporary and complete loss of income is rendered invalid as both situations present the same challenge.

The Form 17.3 does not override a court order or NCT order and if consumers are not paying according to the court order or the NCT order, the said consumers would be in contempt of court or the NCT and the consequences encapsulated in section 88(3) of the NCA may materialise.

It is therefore, recommended that when there is a material change of circumstance, the consumer should lodge an application to court or the NCT, to vary the court order or NCT order<sup>2</sup>, with a new proposed payment plan, accompanied by supporting documentation in substantiation of the alleged change in circumstance. This is especially important where the change in the consumer's financial circumstances has a material impact on the repayments towards credit agreements. The rules of court or the NCT must be followed in this regard as it relates to substantive and procedural requirements of the application.

A credit provider may, based on its own discretion and risk appetite, consider Form 17.3 Change in Circumstances requests by debt counsellors after debt re-arrangement orders were granted. The credit provider may consider the facts of the matter and the relevant supporting information and / or documents provided and make a decision.

### **4. DECEASED ESTATES**

The debt review process comes to an end when the consumer who applied for debt review passes away or if the spouse of the consumer passes away when married COP.

In these instances, the debt counsellor should notify the credit providers via a Form 17.3 with a certificate of death attached and update the DHS with the deceased status.

The surviving spouse (when married COP) and the executor of the deceased estate remains liable for the payment of the relevant credit agreements.

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<sup>2</sup> An NCT order can only be amended after the amendments to section 165 by the National Credit Amendment Act of 2019 has become operative.



The executor of the deceased estate would be responsible to administer the deceased estate – including the settlement of any claims against the deceased estate.

## **6. CONCLUSION**

The above guidelines are issued to mitigate the risk of making uninformed decisions on behalf of both the consumer and credit provider where a change in financial circumstance is applicable.

It is to be noted that credit providers reserve their rights to either accept or decline a Form 17.3, based on a holistic assessment of the consumer's profile and behavior within debt review. In the event that a 17.3 application is declined, credit providers reserve their right to terminate a credit agreement from the debt review process in terms of section 86(10) of the NCA or enforce the credit agreement where section 88(3) applies, in instances where the consumer is in default.

It is equally important to bear in mind, especially when considering instances of permanent loss of income, that once a consumer's financial situation is altered, debt counselling may no longer be the best remedy for the said consumer.