2020/296

Credit Contracts and Consumer Finance (Lender Inquiries into Suitability and Affordability) Amendment Regulations 2020

Patsy Reddy, Governor-General

Order in Council

At Wellington this 30th day of November 2020

Present:
The Right Hon Jacinda Ardern presiding in Council

These regulations are made under section 138 of the Credit Contracts and Consumer Finance Act 2003—

(a) on the advice and with the consent of the Executive Council; and

(b) on the recommendation of the Minister of Commerce and Consumer Affairs made in accordance with section 138(1BA) of that Act.

Contents

Regulations

1 Title

These regulations are the Credit Contracts and Consumer Finance (Lender Inquiries into Suitability and Affordability) Amendment Regulations 2020.

2 Commencement

These regulations come into force on 1 October 2021.

3 Principal regulations

These regulations amend the Credit Contracts and Consumer Finance Regulations 2004 (the **principal regulations**).

4 New regulations 4AA to 4AO and cross-headings inserted

After regulation 4, insert:

Assessment whether likely that credit or finance will meet borrower’s requirements and objectives

4AA Lender must collect and assess information

(1) This regulation applies for the purposes of section 9C(3)(a)(i) and (5A) of the Act.

Lender must collect information

(2) The lender must make reasonable inquiries to enable the lender to determine all of the following aspects of the borrower's requirements and objectives before a lender enters into an agreement or makes a material change to an agreement (to the extent that the following aspects are relevant to the material change):

(a) the amount, or credit limit, of credit or finance that the borrower seeks:

(b) the purposes for which the credit or finance is to be used or is intended to be used:

(c) the term of the credit or finance or, if the agreement is a revolving credit contract, whether the borrower requires credit on an ongoing basis:

(d) if the agreement will include any non-avoidable fees or charges for any additional goods or services that were not part of the borrower's stated purposes for which the credit or finance is to be used or is intended to be used (*see* subclause (4)), whether the borrower requires those goods or services and accepts their costs:

(e) if the agreement will provide for any fees or charges to be financed under the agreement, but those fees or charges could be paid for separately (for example, premiums for insurance related to the credit or payment for extended warranties or repayment waivers to be financed), whether the borrower wants that outcome and accepts the additional costs of the fees or charges being financed:

(f) if the agreement will require the borrower to make 1 or more lump sum payments (instead of, or in addition to, any regular payments), whether the borrower wants to make lump sum payments in preference to regular payments:

(g) if the agreement is a credit sale and the property that is the subject of the credit sale is not to be given or sent within 20 working days of the agreement being entered into, when the borrower wants possession of that property:

(h) if the borrower is entering into an agreement where money received under that agreement will be used to pay all or part of the unpaid balance on an existing agreement (**refinancing**), the borrower's objectives in refinancing and, to the extent that the lender is aware of additional costs that will be charged to the borrower as a result of refinancing, whether the borrower accepts those costs in order to achieve those objectives:

(i) if the agreement is a reverse mortgage,—

(i) the borrower's requirements and objectives in relation to meeting future possible needs, including aged care, whether the borrower wants to leave equity in the residential premises or other property to the borrower's estate, and the extent to which the value of the residential premises or other property enables those requirements and objectives to be met; and

(ii) the borrower's preferred form of payment of the advance or advances (for example, lump sum, regular payments, or both).

Lender must assess information

(3) The lender must then make the assessment required by section 9C(3)(a)(i) of the Act (which is to be satisfied that it is likely that the credit or finance provided under the agreement will meet the borrower's requirements and objectives), taking into account the results of complying with the obligations in this regulation and other reasonable inquiries required by section 9C(3)(a)(i) of the Act.

Interpretation

(4) In subclause (2)(d), **non-avoidable fee or charge**, in respect of any additional goods or services that were not part of the borrower's stated purposes for which the credit or finance is to be used or is intended to be used, means a fee or charge that applies whether or not the borrower uses those goods or services after the agreement has been entered into (for example, this may include a fee or charge for matters such as airpoints or travel insurance, but does not include a fee or charge that can be avoided by not using the goods or services such as an ATM charge or a charge for foreign exchange transactions).

4AB Additional requirements for certain waivers, warranties, and insurance

Purposes and application

(1) This regulation applies, in addition to regulation 4AA,—

(a) for the purposes of section 9C(3)(a)(i) and (5A) of the Act, to the extent that a repayment waiver or an extended warranty is to be financed under an agreement or under a material change to an agreement, in order for a lender to assess whether it is likely that the credit or finance provided under the agreement will meet the borrower's requirements and objectives; and

(b) for the purposes of section 9C(5)(a)(i) and (5A) of the Act, in order for a lender to assess whether it is likely that a relevant insurance contract will meet the borrower's requirements and objectives.

Lender must collect information

(2) The lender must make reasonable inquiries to enable the lender to determine the following aspects of the borrower's requirements and objectives:

(a) whether the borrower requires the waiver, warranty, or insurance, which must include inquiries into all of the following:

(i) whether the borrower has existing cover, or existing rights under the Consumer Guarantees Act 1993, that may protect against some or all of the risks for which the borrower is seeking cover:

(ii) whether the borrower's employment status, residency, or age may make them ineligible to claim some or all of the benefits under the proposed waiver, warranty, or insurance:

(iii) the benefits and cover that the borrower requires; and

(b) whether the borrower accepts the costs of the waiver, warranty, or insurance.

Lender must assess information

(3) After taking into account the results of complying with the obligations in this regulation and other reasonable inquiries required by section 9C(3)(a)(i) and (5)(a)(i) of the Act, the lender must then make the assessment required by those provisions of the Act (which is to be satisfied,—

(a) to the extent that the amount of credit or finance relates to the repayment waiver or extended warranty, that it is likely that the credit or finance provided under the agreement will meet the borrower's requirements and objectives; or

(b) that it is likely that the insurance provided under the relevant insurance contract will meet the borrower's requirements and objectives.)

Assessment of likelihood of substantial hardship

4AC Purposes

Regulations 4AD to 4AO apply for the purposes of section 9C(3)(a)(ii) and (5A) of the Act.

4AD Outline

(1) Regulations 4AE to 4AO set out requirements for making reasonable inquiries about whether it is likely that the borrower will make the payments under the agreement without suffering substantial hardship, which in general terms are as follows:

1	If the borrower will rely on income to make the payments under the agreement, or if the agreement is a high-cost consumer credit contract,—	regulation 4AF applies and full income and expense estimates are required (*see* regulations 4AJ to 4AN)
2	If the lender knows that the borrower will rely on means other than income to make the payments under the agreement,—	regulation 4AI applies
3	If both 1 and 2 apply,—	both regulation 4AF and regulation 4AI apply.

(2) Exceptions and a presumption also apply (*see* regulations 4AG, 4AH, and 4AO).

(3) This regulation is only a guide to the general scheme and effect of regulations 4AE to 4AO.

4AE Interpretation

In this regulation and regulations 4AC to 4AO, unless the context otherwise requires,—

bank account means any account with a registered bank or other financial institution that is of a type that is ordinarily used for the payment of relevant expenses

income means net income from any source after tax, KiwiSaver or other superannuation contributions, and other similar deductions

listed outgoings means any of the following:

(a) fixed financial commitments, including accommodation costs, insurance, rates, body corporate fees, school fees, and child support that is payable under the Child Support Act 1991:

(b) payments of any debts (whether existing debts or payments under the agreement being entered into or materially changed):

(c) living expenses, including utilities, food and groceries, personal expenses (including clothing and personal care), other costs associated with dependants if applicable (such as child care), medical expenses, and transport expenses:

(d) any regular or frequently recurring outgoings (for example, savings, investments, gym memberships, entertainment costs, or tithing) that are material to the estimate of relevant expenses and that the borrower is unable or unwilling to cease after the agreement is entered into or materially changed

relevant expenses—

(a) means any listed outgoings that are in respect of the relevant period (whether or not they fall due to be paid in or after the relevant period); but

(b) in the case of a consumer credit contract that is not a high-cost consumer credit contract, may exclude any listed outgoings to the extent that the lender knows that the borrower will rely on means other than income to meet those outgoings

relevant period means the period starting with the date on which the agreement is likely to be entered into or materially changed and ending with the earlier of 1 year after that date or the date on which the agreement is likely to terminate.

4AF General rule: full income and expense estimates required in certain cases

(1) This regulation applies to—

(a) a high-cost consumer credit contract; and

(b) a consumer credit contract unless the lender knows that the borrower will rely wholly on means other than income to make payments under the contract.

(2) The lender must—

(a) make reasonable inquiries to enable the lender to estimate over the relevant period—

(i) the borrower's likely income on a weekly, fortnightly, or monthly basis (*see* regulation 4AJ); and

(ii) the borrower's likely relevant expenses on a corresponding basis (*see* regulations 4AK to 4AN); and

(b) be satisfied on reasonable grounds that it is likely the borrower will make the payments under the agreement without suffering substantial hardship, because the borrower's likely income exceeds their likely relevant expenses and 1 or both of the following applies:

(i) there is a reasonable surplus to adequately address the risk that likely income may be overestimated, that likely relevant expenses may be underestimated, or that the borrower may need to incur other expenses that cause them to suffer substantial hardship:

(ii) the lender's estimates of likely income and likely relevant expenses include reasonable buffers or adjustments to adequately address the risk that likely income may be overestimated, that likely relevant expenses may be underestimated, or that the borrower may need to incur other expenses that cause them to suffer substantial hardship.

4AG Exception to general rule if obvious no hardship

Regulation 4AF does not apply if—

(a) the lender makes inquiries that are sufficient to establish that it is obvious in the circumstances of the particular case that the borrower will make the payments under the agreement without suffering substantial hardship, so as to make the inquiries required by regulation 4AF disproportionate; and

(b) the agreement is not a high-cost consumer credit contract.

4AH Exception to general rules for certain variations and replacements of existing contracts

(1) Regulations 4AF and 4AI do not apply if—

(a) the lender is varying (or proposing to vary) an existing consumer credit contract with a borrower or replacing (or proposing to replace) an existing consumer credit contract with a borrower, in whole or in part, with a new consumer credit contract with the same lender; and

(b) the lender will not make an additional advance to the borrower under the varied or replaced contract that the lender did not take into account when previously satisfying itself as to the matters in section 9C(3)(a) of the Act; and

(c) either—

(i) the borrower's total credit limit will not increase under the varied or replaced contract; or

(ii) the borrower's total credit limit under the varied or replaced contract will increase only to the extent reasonably necessary to allow for the postponement or reduction of existing repayments to reduce financial difficulties that the borrower is experiencing or reasonably expects to experience.

(2) In this regulation, unless the context otherwise requires, **total credit limit** is calculated as follows:

$$a + b$$

where—

a is the maximum unpaid balances permitted under all revolving credit contracts between the lender and the borrower

b is the unpaid balance on all other credit contracts between the lender and the borrower immediately before the variation or replacement.

4AI General rule in other cases

(1) This regulation applies to a consumer credit contract if the lender knows that the borrower will rely, wholly or in part, on means other than income to make payments under the agreement (for example, if the borrower will rely on the proceeds of the sale of an asset to pay a bridging loan).

(2) The lender must—

(a) make reasonable inquiries into any other means by which the borrower intends to make payments under the agreement; and

(b) be satisfied on reasonable grounds that it is likely that those other means will enable the borrower to make those payments under the agreement without suffering substantial hardship.

4AJ Lenders must estimate borrower's likely income

(1) This regulation applies for the purposes of regulation 4AF.

(2) The lender, when estimating the borrower's likely income under that regulation, must—

(a) make an estimate of the borrower's likely income in accordance with subclause (3); and

(b) ask the borrower about any likely changes to their income.

(3) An estimate of the borrower's likely income under subclause (2)(a) must be based on either or both of the following:

(a) asking the borrower about each source of income and then—

(i) verifying this based on reliable evidence; or

(ii) if verification is not reasonably practicable, considering whether the source and amount are realistic; or

(iii) if the borrower will not rely, wholly or in part, on that income to make the payments under the agreement, disregarding that income; or

(b) recent and reliable information that the lender holds about the borrower's income, and confirming with the borrower that the amounts reflect the borrower's income.

(4) The lender must estimate the borrower's likely income after taking into account the results of complying with the obligations in this regulation and other reasonable inquiries required by section 9C(3)(a)(ii) of the Act.

4AK Lenders must do initial estimate of borrower's likely relevant expenses

(1) This regulation sets out the first stage of an estimate of likely relevant expenses under regulation 4AF(2)(a)(ii).

(2) The lender, when estimating a borrower's likely relevant expenses under that regulation, must—

(a) make an initial estimate of the borrower's likely relevant expenses based on 1 or more of the following:

(i) asking the borrower about their relevant expenses:

(ii) obtaining from the borrower recent transaction records, for a period of at least 90 days, from the bank account or accounts from which those expenses have been paid, and confirming with the borrower that the amounts reflect the borrower's likely relevant expenses:

(iii) recent and reliable information that the lender holds about the borrower's relevant expenses, and confirming with the borrower that the amounts reflect the borrower's likely relevant expenses; and

(b) ensure that the information used to make the initial estimate is obtained in sufficient detail to minimise the risk of relevant expenses being missed or underestimated to an extent that is material to the estimate; and

(c) make reasonable inquiries, in accordance with subclause (3), about whether any financial commitments may have been omitted from the initial estimate.

(3) **Reasonable inquiries** under subclause (2)(c) must include,—

(a) in the case of a high-cost consumer credit contract, obtaining a credit report and obtaining from the borrower recent transaction records, for a period of at least 90 days, from the bank account or accounts from which expenses have been paid:

(b) in the case of any other consumer credit contract, either or both of the following:

(i) in the case of a borrower who has an existing consumer credit contract with the lender, asking the borrower whether they have taken on any additional financial commitments since the most recent consumer credit contract with that lender was entered into or materially changed:

(ii) obtaining a credit report, unless the lender has already obtained a credit report within the preceding 60 days or, since obtaining the last credit report, has been continuously subscribed to a service that sends notifications to the lender that are relevant to identifying the borrower's financial commitments.

(4) In this regulation, unless the context otherwise requires, **obtain a credit report** means to obtain from a credit reporter (within the meaning of the Credit Reporting Privacy Code 2020) credit information that is relevant to identifying the borrower's financial commitments.

4AL How to calculate certain relevant expenses

(1) This regulation is part of an estimate of likely relevant expenses under regulation 4AF(2)(a)(ii).

Revolving credit contracts

(2) Relevant expenses in respect of a payment under any revolving credit contract that has a credit limit must be determined as if—

(a) the borrower will make regular monthly payments calculated as if the credit limit is borrowed (and, for a credit card, as if those borrowings are at the relevant purchase interest rate); and

(b) in the case of a credit card, the borrower will make payments equal to—

(i) the minimum required payment or an amount sufficient to repay the credit contract within no more than 3 years, whichever is greater; or

(ii) if the information required to make either calculation in subparagraph (i) is not readily accessible to the lender, at least 3.8% of the credit limit; and

(c) in the case of a revolving credit contract that is a home loan, the borrower will repay the credit contract within no more than 30 years; and

(d) in the case of any other revolving credit contract, the borrower will make payments sufficient to pay, within a reasonable period, the total amount advanced to the borrower under the contract.

Calculation if lump sum payments required

(3) Subclause (4) applies if any credit contract requires the borrower to make 1 or more lump sum payments (instead of, or in addition to, regular payments).

(4) Relevant expenses must be determined as if lump sum payments are spread evenly over the period—

(a) that begins on the following date:

(i) the date on which the contract under which the lump sum payments are required is or was entered into; or

(ii) the date on which the borrower is or was most recently required to pay a lump sum payment under that contract; and

(b) that ends on the date on which the borrower is required to make the lump sum payment.

Examples

Example 1

On 1 November 2021, B enters into a consumer credit contract that requires them to make a lump sum payment of $5,200 on 1 November 2022. The lender under that contract, when estimating the relevant expenses in respect of that contract, must assume that B will contribute $100 each week.

Example 2

On 1 December 2021, D enters into a consumer credit contract that requires them to make a lump sum payment of $4,000 on 1 February 2022. D intends to sell their car to pay the loan, and so intends to rely wholly on means other than income to make the $4,000 payment. The contract is not a high-cost consumer credit contract. The lump sum payment is not a relevant expense (*see* regulation 4AE) and therefore does not need to be evenly spread.

Example 3

On 1 October 2022, E enters into a consumer credit contract that requires them to make 2 lump sum payments of $5,200 each, the first on 1 October 2023 and the second on 1 October 2024. E applies for further credit on 1 April 2023. The lender under the new April 2023 contract must estimate the relevant expenses in respect of the existing October 2022 contract as follows.

The first lump sum payment due on 1 October 2023 must be spread evenly between 1 October 2022 and 1 October 2023 (ie, the lender must assume that E has relevant expenses of $100 each week between 1 April 2023 and 1 October 2023 in respect of the first lump sum payment).

The second lump sum payment due on 1 October 2024 may be spread evenly—

- between 1 October 2022 and 1 October 2024 (ie, the lender may assume that E has relevant expenses of $50 each week between 1 April 2023 and 1 October 2024 in respect of the second lump sum payment); or

- between 1 October 2023 and 1 October 2024 (ie, the lender may assume that E has relevant expenses of $100 each week between 1 October 2023 and 1 October 2024 in respect of the second lump sum payment).

4AM Lenders must adjust initial estimate of borrower's likely relevant expenses

(1) This regulation is the second stage of an estimate of likely relevant expenses under regulation 4AF(2)(a)(ii).

(2) The lender must, to the extent that the initial estimate was based on asking the borrower about relevant expenses under regulation 4AK(2)(a)(i), or if there is a significant risk that the initial estimate materially underestimates relevant expenses, do 1 or more of the following for the affected expenses:

(a) verify the amount of the expense with reliable evidence, which may include all or any of the following:

(i) recent transaction records, for a period of at least 90 days, from a bank account from which those expenses have been paid:

(ii) a copy of a contract or invoice:

(iii) any other reliable evidence:

(b) for benchmarkable expenses, use the higher of the initial estimate and the benchmark:

(c) if neither of the steps in paragraphs (a) and (b) is reasonably practicable, adjust the expense by estimating a reasonable cost for the expense.

(3) The lender must consider whether the relevant expenses are at a level that would be below a reasonable minimum cost of living for a person in similar circumstances to those of the borrower and, if so, increase the amount of the expense to a reasonable minimum cost.

(4) *See* regulation 4AN for benchmarkable expenses.

(5) The lender must estimate the likely relevant expenses after taking into account the results of complying with the obligations in regulations 4AK and 4AL and this regulation and other reasonable inquiries required by section 9C(3)(a)(ii) of the Act.

4AN Benchmarkable expenses

(1) An expense is a **benchmarkable expense** if it, individually or as a group of expenses, is an expense for which the lender may use statistical information about household expenditure, including utilities, food and groceries, and transport expenses (including fuel, warrant of fitness, vehicle registration, vehicle repairs, and vehicle maintenance).

(2) Statistical information can be used only if it meets the following requirements:

(a) it must be based on statistical information about individual or household expenses that has been collected and analysed using a robust statistical methodology (for example, based on the Statistics New Zealand Household Economic Survey):

(b) it must be recent:

(c) it must be reasonable to use in the circumstances, including that there must be a low risk that the benchmark will be materially lower than the particular borrower's likely relevant expenses.

4AO High-cost consumer credit contracts: presumption of substantial hardship

(1) This regulation applies in the case of a high-cost consumer credit contract if the lender has reasonable evidence that the borrower has been in default in any payment under 1 or more consumer credit contracts in the preceding 90 days.

(2) There is a presumption that a borrower will be unlikely to make payments under a high-cost consumer credit contract without suffering substantial hardship.

(3) However, the lender may rebut the presumption by proving, on the balance of probabilities, that—

(a) the borrower has remedied the default in payment; or

(b) the borrower will be able to immediately remedy the default in payment, in addition to meeting their other relevant expenses.

Michael Webster,
Clerk of the Executive Council.

Explanatory note

This note is not part of the regulations, but is intended to indicate their general effect.

These regulations, which come into force on 1 October 2021, amend the Credit Contracts and Consumer Finance Regulations 2004.

Lender responsibilities to make reasonable inquiries

New regulations 4AA to 4AO apply for the purpose of section 9C of the Credit Contracts and Consumer Finance Act 2003, which requires lenders to make reasonable inquiries before entering into agreements, so as to be satisfied that it is likely that the credit or finance provided under the agreement will meet the borrower's requirements and objectives and that the borrower will make the payments under the agreement without suffering substantial hardship. These requirements will also apply before lenders make a material change to agreements.

The new regulations prescribe—

- inquiries that must be made:

- processes, practices, and procedures that a lender should follow when making reasonable inquiries:
- the way in which the results of the inquiries must be taken into account:
- circumstances that would prevent a lender from being satisfied as to a matter.

Issued under the authority of the Legislation Act 2012.
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These regulations are administered by the Ministry of Business, Innovation, and Employment.

Wellington, New Zealand:

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