

# Malawi's new Financial Consumer Protection Act

**WORKSHOP July 25<sup>th</sup>, 2017**

*Ros Grady, Senior International Consultant*

*Financial Inclusion **Regulatory Design***

*gradyros@gmail.com*

# Agenda

1. Scope of Application
2. Regulatory & Supervisory Authority
3. Licensing and registration
4. Financial Consumer Protection Principles
5. Treat Consumers and Security Providers Fairly
6. Transparency
7. Financial Service Design and Suitability
8. Responsible Lending
9. Data Protection
10. Consumer Recourse and Remedies
11. Related Insurance and Sales Contracts
12. Transitional Provisions and Consequential Amendments



# 1. SCOPE OF APPLICATION

# 1. Scope of application(1)

- Commencement
- Objectives
- Key definitions:
  - Financial consumer
  - Financial service
  - Financial service provider
  - Security

# 1. Scope of application (2)

- FCP Act applies:
  - To a “financial institution” under FSA and entities regulated by Payments Act and Foreign Exchange Act
  - If business carried on by the provider
  - If charge for financial service
  - Irrespective of whether provider in or outside Malawi
- Act prevails over any inconsistent laws
- FCP Act will not apply to extent specified in Directives



## 2. REGULATORY & SUPERVISORY AUTHORITY

## 2. Regulatory & supervisory authority (1)

- FCP Act to be a “financial services law” for purpose of Financial Services Act (FSA)
- Registrar of Financial Institutions:
  - to be regulatory and supervisory authority for purposes of FCP Act
  - will have all powers and functions under FSA for purposes of FCP Act



### 3. FINANCIAL SERVICE PROVIDER OBLIGATIONS



# 3. Financial service provider obligations

- All providers must be licensed or registered as required by FSA
- Ongoing obligations include:
  - Compliance with Act
  - Ensure employees, agents are trained and competent to provide financial services and understand and apply FCP Principles
  - Maintenance of adequate systems and procedures
  - Display certificate of licensing / registration on website and physical premises
  - Include licensing /registration number and name in all advertising, contracts etc.



## 4. FINANCIAL CONSUMER PROTECTION PRINCIPLES

# 4. Financial consumer protection principles

**Overarching Principles apply to all stages of relationship with a financial consumer or a security provider:**

- Treat consumers and security (collateral) providers fairly
- Transparency
- Financial service design
- Financial Service Suitability Assessment
- Responsible lending
- Data protection
- Consumer and security provider recourse



5. TREAT CONSUMERS &  
SECURITY PROVIDERS FAIRLY

## 6. Treat financial consumers and security providers fairly (1)

*“Treat consumers and security providers fairly: A financial service provider must treat all financial consumers and security providers fairly and respectfully and not engage in misleading, deceptive, discriminatory, abusive or aggressive treatment;”*

## 6. Treat financial consumers and security providers fairly (2)

### **Monetary obligations:**

- Fees and charges not payable unless disclosed
- Application / establishment / prepayment / enforcement fees to be reasonable estimate of costs
- Third party fees not to be “loaded”
- ATM fee must be disclosed immediately before transaction
- Fees and charges and interest rates to be published
- Prohibited monetary obligations cannot be recovered and interest at rate specified in Directives must be paid on amounts due to financial consumer

## 6. Treat financial consumers and security providers fairly (3)

- Unfair terms in standard form contracts are void
- 10 business days cooling off right
- Reasons for refusal to provide a financial service to be provided
- Account closure requests to be processed in 5 business days
- Requests re cancellation of direct debits and unauthorized debits to be processed in 5 business days

## 6. Treat financial consumers and security providers fairly (4)

- Discrimination based on personal attributes prohibited
- Harassment to apply for / acquire a financial service prohibited
- Visits to home /place of employment for sales purposes require consent
- Remuneration and commission schemes not to be inconsistent with Principles and not to encourage over-indebtedness
- Planned service disruptions to be notified 10 business days in advance



## 6. Treat financial consumers and security providers fairly (5)

### **Monetary obligations (credit contracts)**

- Interest must be calculated on basis of unpaid daily balances
- Default charges only to be applied to amount in default while default continues and must not exceed reasonable costs of default
- Interest cannot be debited to account before relevant day
- Credit contracts can be prepaid early
- Payments to be allocated first to clearing any amount in arrears and to highest interest charge
- Consumer can request allocation of payments

# 6. Treat financial consumers and security providers fairly (6)

## **Enforceable contracts and securities:**

- **Contracts and securities** to be in writing; signed (guarantees can be in mortgage documents); and copy given to consumer / security provider
- **Mortgages** void in certain cases e.g. does not describe or identify property; or charges all property; or secures more than credit contract or guarantee plus reasonable enforcement expenses; or purports to cover remuneration or retirement benefits
- **Guarantees** void in certain cases e.g. secures more than credit contract and reasonable enforcement expenses or limits right to indemnity and is not enforceable in relation to future credit contract unless consent given and copy of contract provided



# 6. TRANSPARENCY

## 6. Transparency (1)

*“Transparency: A financial service provider must ensure that financial consumers and security providers are provided with accurate, simple and clearly expressed information about the features, risks, terms and cost of any financial service or security they are considering;”*

## 6. Transparency (2)

- **Format requirements:** legible, simple, clear, minimum font, print, English or Chichewa or local language relevant to customers
- **Explanations of features, risks, terms and costs:** must be provided if clear consumer / security provider does not understand and on request and given in language that can be understood
- **Risk of security:** must in any event be clearly explained in a language that can be understood with recommendation for legal advice

## 6. Transparency (4)

- Short form, standardized, comparable Key Facts Statements as per Directives
- Copy of transaction and contractual information to be provided on request
- Periodic statements of account for debit and credit facilities and other specified services
- Transaction receipts for payments
- Unilateral changes to contracts and securities:
  - Void unless provided for in contract
  - 5 business days notice for changes to variable rates
  - Other changes must be notified at least 20 days before change

## 6. Transparency (5)

- Advertising – requirements for accurate, simple, clear advertisements which are not misleading or deceptive and disclosures concerning interest and fees and charges
- Provision for electronic contracts and disclosures
- Copies of documents on request
- Notices to be sent / given to last known location
- Tolerances and assumptions provided for disclosures

# 6. Transparency (6)

## **Credit contracts**

- Copies of documents relating to credit contracts to be provided on request
- Minimum disclosure requirements for credit contracts
- Effective interest rates to be calculated and disclosed as per Directives
- Statement on amount owing to be provided on request
- Disputes as to liabilities to be dealt with promptly



# 6. Transparency (7)

## **Other financial services**

- Deposit product disclosures
- Insurance policy disclosures
- Pension products:
  - disclosures
  - Member information to be on-line
- Investment services



# 7. FINANCIAL SERVICE DESIGN

# 7. Financial service design

*“Financial service design: A financial service provider must ensure that the financial services they provide are designed and marketed having regard to the financial objectives, needs, capacity and behaviours of financial consumers in the target market and with a view to minimizing the risk of harm to those financial consumers.”*

# 7. Financial service design

- Financial services to be designed with financial objectives, needs and capacity of target market in mind
- Design requirements cover need to:
  - Identify relevant risks
  - Define target market
  - Specify process for authorization and introduction of new financial service



## 7. FINANCIAL SERVICE SUITABILITY ASSESSMENT

# 7. Financial service suitability assessment

*“Financial service suitability assessment: A financial service provider must ensure that the financial objectives, needs and capacity of a financial consumer are considered before providing them with a product or service. ;”*

# 7. Financial service suitability assessment

- Written policies and procedures required to determine whether financial service meets financial objectives, needs and capacity
- Provide personal advice on request or if apparent it is needed
- Personal advice to be recorded with details of advice, fees and charges, commissions and any potential conflict of interest



# 8. RESPONSIBLE LENDING



# 8. Responsible Lending (1)

*“Responsible Lending: A financial service provider must only provide a credit facility to a financial consumer after:*

- (i) a reasonable assessment of the ability of the financial consumer to repay the credit without substantial hardship; and*
- (ii) verifying the information on which they rely to assess the financial consumer’s creditworthiness.”*

## 8. Responsible Lending (2)

- Credit provider must have policies and procedures to determine whether a credit facility and any related product (e.g. insurance) is reasonably likely to:
  - meet financial objectives, needs and capacity
  - be able to be repaid without substantial hardship
- No unsolicited offers of credit or credit limit increases
- Directives may also be made providing further details of these requirements

# 8. Responsible Lending (3)

## **Payroll deductions:**

- Void if in excess of amount that can be deducted under Employment Act
- Repayment deemed to be made as soon as amount deducted from payroll – even if credit provider never receives it
- Credit provider liable for refunds of excess deductions plus interest
- Payroll deduction to be cancelled on termination of credit contract
- All fees to be disclosed as if payable under credit contract
- Debtor can seek modification of payroll deduction for hardship
- Mortgage provisions may apply

# 8. Responsible Lending (4)

- **Hardship applications:**

- May be made on basis of unemployment or other reasonable cause
- Credit provider must respond in 7 business days
- Enforcement postponed in interim
- If credit provider refuses then court application may be made
- Can apply to credit contract, security, payroll deductions

- **Debt collection:** harassment prohibited unless permitted by law e.g.

- Threats to seize property which is not collateral
- Physical threats
- Third party disclosures (except when required by law e.g. to credit bureaus)
- Public shaming
- Calling at a place of employment

# 8. Responsible Lending (5)

## **Enforcement**

- No enforcement proceedings unless default notice given
- Must give 30 business days to remedy default
- Default notice must specify:
  - Full details of default
  - Action to remedy default
  - Consequences of not remedying default
  - Notice of right to make hardship application
- Notice must meet format and content requirements in Directives
- Default not remedied if later default of same kind in notice period which is not remedied

# 8. Responsible Lending (6)

## Repossession and sale of mortgaged goods

- Mortgagor must not assign or dispose of mortgaged property without credit provider's consent or court order
- Mortgagor has to advise of location of goods in 7 business days of request
- Credit provider needs occupier's consent or court order to enter home
- Court may order delivery of mortgaged goods to credit provider
- Within 7 business days of repossession credit provider must give notice with:
  - Estimate of value based on best price reasonably obtainable
  - Advice re hardship application
- Mortgagor has right to nominate purchaser
- Otherwise goods must be sold for best price reasonably obtainable – cannot do so sooner than 21 business days after notice given

# 8. Responsible Lending (7)

## **Repossession and sale of mortgaged goods (cont.)**

- Following sale debtor must be:
  - Immediately credited with proceeds less amount owing and reasonable sale expenses
  - Notified of gross and net proceeds of sale and amount credited

## **Surrender of mortgaged goods**

- Mortgagor can return goods and require sale
- Sale to be at best price reasonably obtainable
- Crediting of proceeds same as for repossession

# Responsible Lending (8)

## **Guarantees:**

- Guarantor can withdraw:
  - Before credit provided
  - After if signed credit contract differs materially from one given to guarantor
- Guarantor can limit application of guarantee of continuing credit contract (e.g. overdraft or credit card) to future liabilities
- Guarantor not liable for new liabilities under amended credit contract without specific agreement in writing or change to interest rate or fees under contract or deferral or waiver for up to 90 days or approved by court



# Responsible Lending (9)

## **Guarantees:**

- Guarantee not to be enforced unless:
  - Credit provider has a judgement against debtor which has been unpaid for 30 business days
  - Debtor cannot be located;
  - Debtor is insolvent; or
  - Court order



# 9. DATA PROTECTION

# 9. Data Protection (1)

## Section 18 (1)(d):

*“Data Protection: The personal information of financial consumers and security providers must be kept confidential and secure by a financial service provider.”*

# 9. Data Protection (2)

- Confidentiality and security of information to be ensured through application of documented policies and procedures
- Use and disclosure of information to be consistent with original purpose of collection or express and informed consent
- Regulations may be made relating to:
  - Privacy disclosures
  - Right of access
  - Correction of information
  - Complaints about misuse of data
  - Privacy policy of financial service provider



10. FINANCIAL CONSUMER &  
SECURITY PROVIDER RECOURSE

# 10. Financial consumer and security provider recourse and remedies (1)

*“Financial consumer and security provider recourse: Financial consumers and security providers must be provided with easy access to an accessible, transparent, effective, prompt and free internal complaints system and they must be made aware of any available external dispute resolution service (including any financial ombudsman service or a service provided by the Registrar).”*

# 10. Consumer and security provider recourse and remedies (2)

## **Internal complaints processes and procedures:**

- All financial service providers to have processes and procedures for transparent, free, effective, prompt and free internal complaints system
- To include rules on lodging, recording, assessing and answering complaints
- Directives may be made specifying details
- Register of complaints to be maintained
- Refunds following complaint to be paid within 2 business days
- Periodic reports of complaints data to be made to Registrar

# 10. Financial consumer and security provider recourse and remedies (3)

## **External dispute resolution**

- Registrar's role applies to disputes not covered by a financial ombudsman scheme
- Financial consumer must first approach provider with complaint
- FCC's decision is binding on credit provider
- Process to be accessible, transparent, effective, prompt and free
- Registrar to publicize service
- Registrar's decision to be binding on financial service provider
- Regulations to be made with details of processes and procedures
- Financial service provider to also notify financial consumers about dispute resolution role of Registrar / financial ombudsman



# 10. Consumer and security provider recourse and remedies

## **Other remedies:**

- Court may order compensation for breach
- Financial service provider liable for acts and omissions of representatives
- Contract or security not void or unenforceable because of breach except as specified
- Unconscionable contracts can be re-opened by court



## 11. RELATED INSURANCE AND SALES CONTRACTS

# 12. Related insurance and sales Contracts (1)

- Financial service provider or supplier cannot require insurance other than:
  - Insurance required by law
  - Mortgaged property insurance
  - Prescribed insurance
- Financial consumer cannot be required to have policy with particular insurer
- Mortgaged property insurance only to be financed for 1 year
- Insurance premiums not to be debited more than 30 business days before due
- If insurance offer rejected financial service provider must notify financial consumer and credit financial consumer with any premium paid

# 12. Related Insurance and sales contracts (2)

- If credit contract terminated any related insurance contract is also terminated and debtor must get rebate of premium from financial service provider
- Supplier cannot require credit from a particular credit provider
- Financial service provider cannot require purchase of any product or service as condition of acquiring a financial service
- Rules re liability for related sales / credit contracts to be in regulations



## 12. TRANSITIONAL PROVISIONS & CONSEQUENTIAL AMENDMENTS

# 12. Transitional provisions and consequential amendments

- FCP Act will apply to financial services; securities and payroll deductions entered into or given after Act commences
- Will also apply to existing facilities but not in respect of acts or omissions before Act commences
- Consumer Protection Act not to apply to financial services
- Unfair trading provisions in Competition and Fair Trading Act not to apply to financial services



THANK YOU!