GOVERNMENT NOTICE NO. 46

FINANCIAL SERVICES ACT

(CAP. 44:05)

FINANCIAL SERVICES (FAIR TREATMENT OF FINANCIAL CONSUMERS BY FINANCIAL INSTITUTIONS) DIRECTIVE, 2018

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IN EXERCISE of the powers conferred by section 34(2) of the Financial Services Act, I, DR. DALITSO KABAMBE, Registrar of Financial Institutions, make the following Directive—

PART I—PRELIMINARY

Citation

1. This Directive may be cited as the Financial Services (Fair Treatment of Financial Consumers) Directive, 2018.

Application

2. This Directive applies to all financial institutions regulated by the Registrar of financial institutions under the Act.

Interpretation

3. In this Directive, unless the context otherwise requires—

"Board" means the highest body of authority in a financial institution responsible for strategically guiding the institution, effectively monitoring management and properly accounting to shareholders;

"financial consumer" in relation to a financial service, means—

(*a*) (i) a natural person, not acting in the course of business; or

(ii) a sole trader, partnership, trust club or charity (not being a body corporate), with an annual turnover in its previous financial year of MK250,000,000 or less; or

(iii) an incorporated body that—

(I) had an annual turnover in its previous financial year of MK250, 000,000 or less; and

(II) is not a body corporate that is a member of a group of companies with a combined annual turnover (in the previous financial year of the group of companies), of greater than MK250, 000,000 that—

(A) is a customer of a financial institution;

(B) is a person or body to whom a financial institution has offered to provide a financial product or service, or

(C) has sought the provision of a financial product or service.

(*b*) an actual or potential beneficiary of a financial product or service; and

"key facts statement" means a short form, standardized disclosure document prepared by a financial institution in relation to a financial product or service which—

(*a*) summarizes the key terms, annual percentage rate and other fees and charges;

(*b*) can be used to compare the product offers of different financial institutions; and

(*c*) is in a format and contains the content, which is specified in the Registrar's directive on disclosure.

(2) Any term used in this Directive, and which has been defined in the

Act has the meaning ascribed to that term under the Act.

PART II—OBJECTIVES

Objectives

4. The objectives of this Directive are to—

(*a*) set minimum requirements on fair treatment of financial consumers;

(*b*) promote fair outcomes from financial products and services; and

(*c*) promote financial consumer trust and confidence in the financial institutions and financial products and services.

PART III—BOARD AND MANAGEMENT OVERSIGHT

Board and management oversight

5.—(1) The Board and management of a financial institution shall be responsible for adherence and compliance with the requirements of this Directive.

(2) A financial institution shall have a written policy on fair treatment of financial consumers approved by the board.

(3) The Board shall ensure that management is implementing the policy on fair treatment of financial consumers.

PART IV—SPECIFIC REQUIREMENTS

Financial consumer protection principles

6. A financial institution shall comply with the following financial consumer protection principles at all stages of its relationship with a financial consumer or a security provider—

(*a*) treat a financial consumer and a security provider fairly, respectfully and not engage in misleading, deceptive, discriminatory, abusive or aggressive treatment;

(*b*) ensure that a financial consumer and a security provider are provided with accurate, simple and clearly expressed information about the features, risks, terms and cost of any financial product and service or security they are considering;

(*c*) ensure that the financial products and services it provides are designed and marketed having regard to the financial objectives, needs, capacity and behavior of a financial consumer in the target market and with a view to minimizing the risk of harm to the financial consumer;

(*d*) ensure that the financial objectives, needs and capacity of a financial consumer are considered before providing him or her with a finance product and service;

(*e*) ensure that the presentation and recommendation of the most suitable product options from the range available is provided to the financial consumer;

(*f*) 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) taking reasonable steps to verify the information on which it relies on to assess the financial consumer's creditworthiness;

(*g*) ensure that the personal information of a financial consumer and a security provider is kept confidential and secure; and

(*h*) provide a financial consumer and a security provider with easy access to an accessible, transparent, effective, prompt and free internal complaints system and be made aware of any available external dispute resolution service (including any financial ombudsman service or a service provided by the Registrar).

Communication with a financial consumer

7.—(1) A financial institution shall—

(*a*) ensure that there is consistency between the terms and conditions of a financial product and service disclosed to a financial consumer in a key fact statement and the actual terms and conditions applied on the financial consumer; and

(*b*) not bind a financial consumer to a financial product and service beyond the term of a financial product and service.

(2) A financial institution shall make special arrangements when dealing with people with special needs.

Unfair terms

8.—(1) A financial institution shall ensure that terms of a contract concluded with a financial consumer are fair.

(2) A term of a contract or security is to be considered as unfair if the term—

(*a*) reflects a significant imbalance in the parties' rights and obligations;

(*b*) causes detriment to the financial consumer or security provider;

(*c*) is not required to protect the financial institution's legitimate interests;

(*d*) allows the financial institution to unilaterally change the terms of the contract or security without expressly describing the circumstances in which that change may be made;

(*e*) waives any protection provided for by this Directive;

(*f*) purports to avoid or modify any provision of this Directive; or

(*g*) limits the right of a financial consumer or security provider to take legal action against the financial institution.

(4) Any clause of a standard form contract or security for a financial product and service or related security that is unfair as provided for by this paragraph is void.

(5) A contract or security is in a standard form if it has been prepared by or on behalf of the financial institution and has not been subject to full and genuine negotiation with the financial consumer or security provider concerned

Prohibited fees and charges

9. A financial institution shall not accept or seek to recover, a fee or charge—

(*a*) unless the fee or charge has previously been disclosed to the financial consumer in accordance with this Directive;

(*b*) for an application for a financial product and service, or the establishment of a contract—

(i) to the extent that the fee exceeds a reasonable estimate of the financial institution's administrative costs of assessing the application or establishing the contract; or

(ii) if the application for the financial product and service is declined;

(*c*) for a fee or charge payable to a third party more than the amount payable to that third party;

(*d*) for a partial or full early payment under a credit contract to the extent that the fee exceeds a reasonable estimate of—

(i) the administrative costs of the early payment; and

(ii) in the case of an early payment under a fixed annual percentage rate contract, the financial institution's loss arising from the early payment (if any);

(*e*) for enforcement expenses beyond those reasonably incurred by the financial institution; or

(*f*) to the extent that the amount or type of the fee or charge is prohibited under this Directive.

Publication of fees, charges and rates

10.—(1) Subject to this Directive, a financial institution shall publish the following information in relation to a financial product and services it makes available to a financial consumer—

(*a*) itemized fees and charges;

(*b*) any applicable annual percentage rate; and

(*c*) the standard terms and conditions.

(2) A financial institution shall publish the information referred to in subparagraph—

(*a*) in at least 2 newspapers of wide circulation in Malawi on 30 June and 31 December in each year or, if that day is a public holiday, the following business day; and

(*b*) on the financial institution's website.

(3) The Registrar may publish the fees and charges, annual percentage rates and other terms and conditions of a financial product and service in any manner designed to facilitate the ability of a financial consumer to understand, and make a comparative analysis of the information.

Interest on savings

11. A financial institution shall calculate interest applicable on the financial consumer's savings on daily basis.

Account closure

12.—(1) A financial institution shall promptly process within 5 working days any request from a financial consumer—

(*a*) as to the steps and time lines for closing an account relating to a financial product and service; and

(*b*) to close an account.

(2) When a contract is terminated, a financial institution shall, within 5 working days—

(*a*) pay to the financial consumer or at his direction any money due to the financial consumer; and

(*b*) cancel any direct debit authority covering repayments.;

(3) A financial institution shall not impose a fee or charge for the closure of an account that exceeds the administrative costs incurred by the financial institution to process that request.

Direct debits and unauthorized debits

13.—A financial institution shall promptly process within 5 working days any—

(*a*) instruction from a financial consumer to cancel a direct debit authority relevant to an account with the financial institution; and

(*b*) complaint that a direct debit or any other debit to an account was unauthorized or otherwise irregular.

(2) A financial institution shall not direct or suggest that a financial consumer first raise the request or complaint with the person to whom the direct debit payment is due.

Discrimination

14.—(1) A financial institution shall not directly or indirectly discriminate against a financial consumer or a security provider, because of a personal attribute of that person or of any person associated with the financial consumer or security provider, except as expressly permitted by any written law.

(2) For the purposes of this paragraph—

(*a*) the personal attributes of a person include his age, gender, race, ethnicity, political or religious affiliation or beliefs, marital status, or disability;

(*b*) direct discrimination occurs if a financial institution treats, or proposes to treat, a financial consumer or security provider unfavorably because of a personal attribute he has or any person associated with him has; and

(*c*) indirect discrimination occurs if a person imposes, or proposes to impose a requirement, condition or has a practice or a policy or relies on a technique of data analysis that has, or is likely to have, the effect of disadvantaging a person based on a personal attribute.

Prohibition on harassment

15. A financial institution shall not—

(*a*) harass a financial consumer to apply for or acquire a financial product and service or to provide a security;

(*b*) visit a financial consumer at home or his place of employment to encourage him to apply for a financial product service except with the consent of the relevant person; or

(*c*) initiate any other action for marketing purposes which involves direct contact with a financial consumer without consent in circumstances specified in a Registrar's directive.

Remuneration of representtives

16. A financial institution shall ensure that remuneration and commission schemes for a representative does not incentivize the representative to treat any financial consumer or security provider inconsistently with financial consumer protection principles and in particular, but without limitation, do not encourage over-indebtedness.

Service disruptions

17.—(1) A financial institution shall notify a financial consumer to whom it provides a financial product and service of any—

(*a*) planned action that is likely to disrupt those financial products and services including a network disruption;

(*b*) proposed cessation of the financial products and services; or

(*c*) planned closure of physical premises from which the financial products and services are provided.

(2) A financial institution shall give the notice referred to in paragraph (1) must be given at least 10 working days before the relevant event.

Changes in interest rates, fees and charges

18. A financial institution shall give notice to a financial consumer, in writing or by electronic means of changes in—

(*a*) interest rates immediately after implementation of the change; and

(*b*) fees, charges or other key terms and conditions of a financial product and service immediately after implementation of the changes.

Consumer data protection

19. A financial institution shall take all necessary measures to protect the confidentiality and security of data and records of a financial consumer.

Communication of reason for declining to offer a service

20.—(1) Where a financial institution declines to sell a product or offer a service to a financial consumer, the financial institution shall provide reasons for the rejection to the financial consumer.

(2) A financial institution shall return to a financial consumer all original supporting documents for an application to buy a financial product or use a service that has been rejected except to the extent prohibited by any written law.

(3) A financial institution shall return to the financial consumer all documents submitted by the financial consumer as collateral to a credit product that has been repaid in full.

Collateral charging and discharging

21.—(1) A financial institution shall—

(*a*) have a policy that outlines collateral qualifications, charging, discharging and the methodology of disposing seized collateral from defaulters; and

(*b*) disclose the policy to all its borrowers.

(2) A financial consumer may choose an approved valuer of his choice if the credit facility being sought requires collateral to be valued prior to being granted the facility:

provided that the valuer is among the approved list of valuers of the financial institution providing the credit facility.

Debt collection procedure

22.—(1) A financial institution shall not use debt collection practices that are outside the terms and conditions of a credit contract.

(2) A financial institution shall inform the financial consumer in writing of its intention to foreclose a property pledged as collateral for a credit facility.

(3) A financial institution shall take all steps to be as transparent as possible to the financial consumer in the process to foreclose property.

Financial consumer refunds

23.—(1) Where—

(*a*) a financial consumer has lodged a request for a refund for a—

(i) failed transaction;

(ii) cancelled transaction; or

(iii) erroneous transaction; and

(*b*) the financial institution has acknowledged that the request for a refund is *bona fide*,

of the financial institution shall process and pay the refund within 5 working days of the financial consumer lodging the request.

(2) A financial institution shall pay any amount of refund which remains unpaid in breach of this paragraph with interest at the ruling Reserve Bank of Malawi base rate plus 10% on each day that the refund remains unpaid.

(3) A financial institution shall notify a financial consumer, within 5 working days of receipt of the request for refund, if the financial institution establishes that the request for a refund for a failed transaction, cancelled transaction, or erroneous transaction is not *bona fide*.

PART VII—ENFORCEMENT

Monetary penalties

24.—(1) The Registrar shall impose the following monetary penalties for violations of this Directive, sections 62 and 63 of the Act—

(*a*) a fine not exceeding K50,000,000 if the violation is committed by a financial institution; and

(*b*) a fine not exceeding K10,000,000 if the violation is committed by individuals who are members of the Board or management.

(2) In addition, a penalty of K50,000 may be imposed on the financial institution or individual for each subsequent day for which the violation continues after being notified by the Registrar of the violation.

(3) The financial institution or individual shall pay the penalty in subparagraph (1) through a bank certified cheque or electronic transfer payable to the Reserve Bank of Malawi within 10 working days after being notified of the violation.

Administrative penalties

25. In addition to the monetary penalty imposed in paragraph 24(1) hereof, the Registrar may impose directions or administrative penalties as provided for under the Act and other financial services laws.

Dated this 29th day of June 2018

D. KABAMBE, PhD
Registrar of Financial Institutions

(FILE NO. FIN/PFSPD/03/04)