MALAWI

Diagnostic Review of Consumer Protection and Financial Literacy

Volume II
Comparison with Good Practices

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MALAWI

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CONSUMER PROTECTION IN THE BANKING SECTOR

Overview

The banking sector in Malawi is relatively small, with several types of ownership. There are eleven deposit-taking commercial banks in Malawi, two of which remain State-owned (see Table 1). They provide a range of commercial banking services including acceptance of demand, savings and time deposits, foreign exchange services and provision of short- and medium-term loan facilities to consumers.

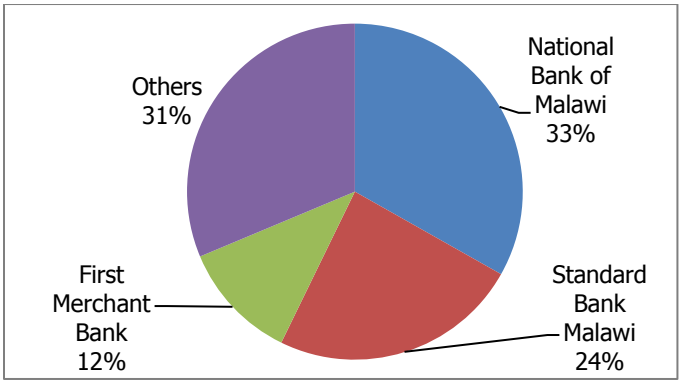
Table 1: Ownership and Outreach of Banks in Malawi

Bank	Major Shareholder	Network
National Bank of Malawi	Press Corporation Limited (Malawi)	25 branches
Standard Bank Malawi	Standard Bank of South Africa Limited (South Africa)	8 branches, 10 agencies
NBS Bank	NICO Holdings Limited (Malawi, South Africa, USA)	13 branches, 16 agencies
First Merchant Bank	Zambezi Investments Limited (Malawi)	7 branches, 15 agencies
Nedbank	Nedbank Group (South Africa)	n.a.
Indebank	Government of Malawi (Malawi)	4 branches, 4 agencies
Malawi Savings Bank	Government of Malawi (Malawi)	5 branches, 36 agencies
Opportunity International Bank Malawi	Opportunity International (USA)	5 branches, 7 agencies
Ecobank Malawi Limited	Ecobank Transnational Incorporated	3 branches
International Commercial Bank	ICB Financial Group Holdings AG (Switzerland)	3 branches
FDH Bank	FDH Financial Holdings Limited (Malawi)	4 branches, 2 agencies

Source: Websites of banks

The Malawian banking sector is also highly concentrated. The three leading banks, namely National Bank of Malawi, Standard Bank of Malawi and First Merchant Bank, hold 70 percent of the assets and deposits in the banking sector in the country (see Figure 1).

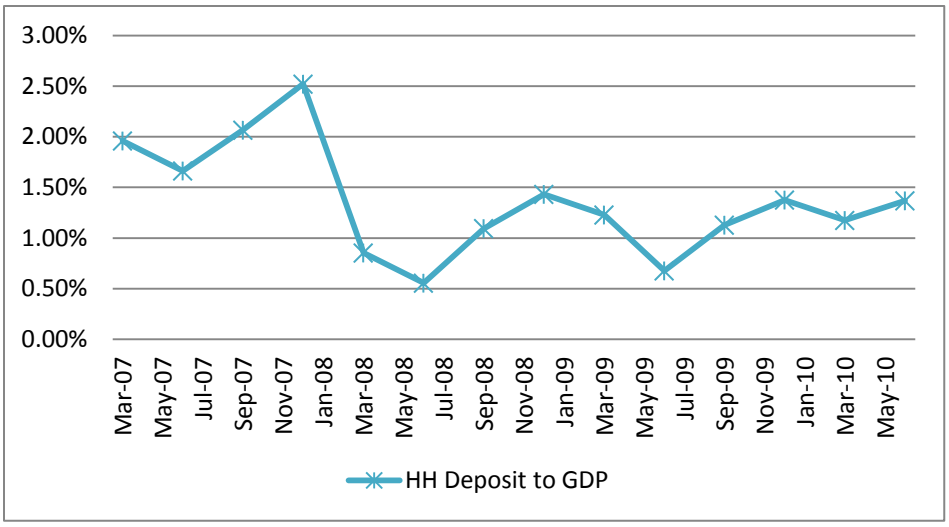
Figure 1: **Distribution of Assets across Banking Sector in 2010**



Source: Reserve Bank of Malawi

Despite recent economic growth, the level of financial inclusion is extremely low in Malawi. Most Malawians use financial services indirectly through family and friends and other informal sources. Figure 2 shows that deposits made by households have generally remained below 2% of GDP from 2008-2010.

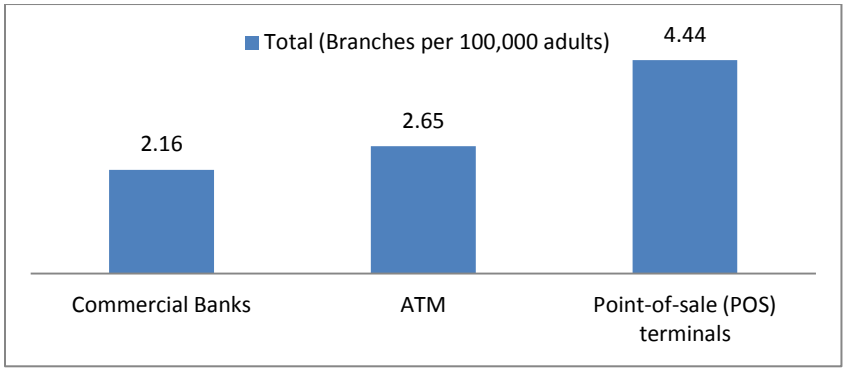
Figure 2: Ratio of Household Deposits to GDP



Source: Reserve Bank of Malawi

The depth of financial access can also be gauged from the supply side. On average, there are only 3 sources of banking facilities available for every 100,000 Malawians across the country, as seen in Figure 3 below. These facilities include branches of commercial banks, ATMs and Point-of-sale terminals. This analysis, however, is limited by the geographic distribution of the banking services, which can drastically affect the choices made by individuals.

Figure 3: Access to Financial Services



Source: CGAP (2010)

Despite the existing limited infrastructure, Malawian consumers are interested in utilizing banking services. A FinScope survey found that the major reason for utilizing banking services is that individuals seek to secure their savings from theft and to avoid excessive spending themselves.

Legal and Institutional Frameworks

The Competition and Fair Trading Act (CFTA) of 1998 includes the protection of consumers as an explicit objective. The CFTA gives explicit protections to consumers, particularly prohibiting persons to engage in misleading conduct, unconscionable conduct and misleading or deceptive advertising.

The Consumer Protection Act (CPA) of 2003 deals with consumer protection issues in general, but also covers banking services explicitly. The CPA defines "service" as "service of any description which is made available to potential users and includes the provision of facilities in connection with […] banking". The CPA includes provisions regarding consumers' rights, obligations of the Government with a view to protecting consumers, and requirements for suppliers or traders of goods or services (e.g. banks) regarding consumer protection matters. The CPA also includes provisions on consumer contracts, to ensure that they are not "unfair or ambiguous" and that consumers are provided with clear and understandable information.

The Financial Services Act (FSA) of 2010 provides for the regulation and supervision of the entire financial sector of Malawi. The FSA provides the Registrar with the power to issue Directives relating to the conduct of the affairs of financial institutions, including in relation to requirements aimed at protecting financial consumers from abusive practices. It also includes a section on market practices of financial institutions, which contains several provisions related to consumer protection issues, such as those related to misleading and deceptive conduct.

The Reserve Bank of Malawi (RBM) has also issued two Directives under the FSA that deal with consumer protection issues. They are the Directive on Customer Due Diligence for Banks and Financial Institutions of 2005, and the Directive on Disclosure of Information by Banking Institutions of 2011.

With three statutes dealing with consumer protection in respect of banking products and services, there is need to resolve the potential and real conflicts among the statutes, and provide a coherent and comprehensive framework for consumer protection in banking. Unless the CFTA and the CPA are amended so as explicitly *not* to apply to banking products and services, the RBM's Directives and regulations and institutional arrangements regarding business conduct in banking products and services are at risk of being undermined.

The RBM is the regulatory and supervisory authority for the banking sector. The RBM was established by an Act of Parliament in 1965 [1] as the authority responsible for ensuring monetary stability, maintaining financial system stability and managing foreign exchange. From the outset, the RBM set prudential regulations for all banks licensed under the Banking Act[2] and has supervised these banks with a view to ensuring that prudential regulations are followed. By the terms of the FSA, broad additional powers have been granted to the RBM's Governor, as Registrar, to issue directives to regulate and supervise the business conduct of Malawi's banks. As these directives are forthcoming, the RBM will need to develop a more or less substantial and wholly independent capacity to carry out business conduct supervision of all banks, with penalties attaching to transgressions of its rules.

The CFTA provided for the establishment of the Competition and Fair Trading Commission (CFTC), but it has never been fully implemented. The CFTC has only had several "interim" arrangements and four of its seven members who are not *ex-officio* still remain to be appointed. Thus, the CFTC has not been able to apply and enforce the CFTA properly.

The CPA provided for the creation of the Consumer Protection Council (CPC). However, no step has ever been taken to establish the CPC. In fact, no funding from any source has been provided for the purpose of constituting the CPC, so the CPA's provisions, to date, have never been applied or enforced.

[1] Laws of Malawi - Cap. 44:02 – Reserve Bank of Malawi Act, as amended

[2] See Laws of Malawi - Cap. 44:01 as amended. Although banking licenses are issued by the Minister of Finance, the RBM processes all applications to establish a bank in Malawi and makes a recommendation to the Minister.

Comparison with Good Practices for the Banking Sector

SECTION A	CONSUMER PROTECTION INSTITUTIONS
Good Practice A.1	***Consumer Protection Regime*** **The law should provide clear consumer protection rules regarding banking products and services, and all institutional arrangements should be in place to ensure the thorough, objective, timely and fair implementation and enforcement of all such rules.** **a. Specific statutory provisions should create an effective regime for the protection of a consumer of any banking product or service.** **b. A general consumer agency, a financial supervisory agency or a specialized financial consumer agency should be responsible for implementing, overseeing and enforcing consumer protection regarding banking products and services, as well as for collecting and analyzing data (including inquiries, complaints and disputes).** **c. The designated agency should be funded adequately to enable it to carry out its mandates efficiently and effectively.** **d. The work of the designated agency should be carried out with transparency, accountability and integrity.** **e. There should be co-ordination and co-operation between the various institutions mandated to implement, oversee and enforce consumer protection and financial system regulation and supervision.** **f. The law should also provide for, or at least not prohibit, a role for the private sector, including voluntary consumer organizations and self-regulatory organizations, in respect of consumer protection regarding banking products and services.**
Description	As indicated in Annex III, the law of Malawi does not yet provide clear consumer protection rules regarding any financial products and services, including those of banks. In the result, an effective regime for the protection of consumers seeking or acquiring banking products or services remains to be created. The purpose of the CPA[3] was, ostensibly, to create the general CPC to protect consumers in Malawi regarding their acquisitions of goods and services of any kind, including those of all financial institutions. This law, however, has never been operationalized and the CPC, therefore, exists only on paper. Also, many of the theoretical powers granted to the CPC are quite unreasonable. Notwithstanding the existence of the CPA, there is an apparent continuing lack of political will to give life to any aspect of the CPA. Secondly, in addition to its primary responsibilities to seek out anti-competitive agreements or behavior and punish the perpetrators, the CFTC has certain powers aimed at protecting consumers in respect of the acquisition of goods and services of any kind, including those provided by banks and other financial institutions. In particular, Section 43 includes provisions prohibiting unfair trading practices by persons (including financial institutions) in relation to consumers. The CFTC, however, has been badly hampered by a prevailing lack of Commission members, skilled staff and budget. As a result, in the some 13 years of its existence, the CFTC has yet to inquire into, let alone make any ruling regarding, any matter of consumer protection. Without referring to either the CPA or the CFTA, a third statute, namely the FSA was enacted in 2010. This law grants sweeping powers to the Governor of the RBM, as Registrar, to issue so-called Directives in respect of the conduct of all regulated financial institutions in respect of their dealings with consumers. The drafting of appropriate Directives is, however, only just

[3] See Laws of Malawi, Chapter 48:10. This Act was published in the Official Gazette and came into force on October 21, 2004.

	beginning. Also, unless one or more statutory amendments are made, in order to avoid a conflict between any Directive and the requirements of the CPA and CFTA, this legislatively subordinate work will need to be circumscribed to accord with these laws that deal explicitly with consumer protection. Thus, while a fledging Consumer Financial Education and Protection Unit (the "CFEP Unit") within the RBM is, apparently at least, to grow to be responsible for implementing, overseeing and enforcing consumer protection regarding all financial products and services, the law, as it stands, gives greater power, at least in theory, to the CPC and the CFTC. Given the above, no government agency has, to date, collected and analyzed data (including inquiries, complaints and disputes) regarding any consumer protection issue, whether in the financial sector generally or in Malawi's banking system in particular. As indicated, the CPC has never been created and the CFTC has been chronically underfunded. It remains to be seen whether the CFEP Unit will be funded adequately to carry out its mandates efficiently and effectively. By all appearances, this Unit is being launched with the aim of operating with transparency, accountability and integrity, although its compliance with these aims will need to be assessed objectively on an on-going basis. As for coordination and co-operation between relevant institutions, there has been very little, if any, so far at least. Finally, although the CPA does provide a role for the private sector in respect of consumer protection, as indicated, this statute remains a dead letter. And while the FSA does not expressly provide for such a role, this and all other financial sector laws do not prohibit a private sector role in these respects.
Recommendation	Careful consideration needs to be given to avoiding a clash between what is apparently being considered as the future work of the CFTC in respect of the application and enforcement of the CPA and the work of the RBM's CFEP Unit.[4] Unless this happens, any Directive issued by the Registrar that deals with matters of consumer protection runs the risk of being declared invalid if it contravenes any CFTA or CPA provision.[5] Thus, three possibilities present themselves. ***The first would be to amend the CPA and CFTA.*** Regarding the CPA: a) remove all reference to the words "bank" and "insurance", b) repeal Section 28 dealing with banking and financial services and financial transactions; and c) add a provision to the effect that the CPA does not apply to any financial institution, as defined in the FSA. At the same time, Section 43 of the CFTA would need to be amended to remove its application to all financial institutions. ***A second possibility would be to prescribe the CPA as a financial services law[6] by means of an amendment to the FSA or CPA***. In accordance with Section 61 of the FSA, the market practice provisions in its Part VII, many of which deal with consumer protection, would then prevail over those in the CPA. This approach, however, would not deal with inconsistencies between the CPA and the specific consumer protection provisions in the CFTA and any other financial services law. ***The third alternative would be to draft and enact a new statute dealing exclusively with consumer protection matters in respect of financial products and services of any kind***. Although this would ultimately be the best solution, it is recognized that it will likely be a long

[4] See the Consumer Protection Bill, 2010, dated 24 November 2010, drafted by Kenyatta Nyirenda.
[5] A law will take precedence over an RBM Directive in respect of the same subject matter.
[6] See subsection 2(1) of the FSA for the definition of "financial services law"

	time in coming. Since the legal, regulatory and institutional frameworks remain unclear and need attention, a high level of understanding needs quickly to be realized among the RBM, the Ministries of Finance, Industry and Justice, and the Law Reform Commission, the CFTC, etc., to the effect that the RBM plays the exclusive, or at least the primary, role in matters of consumer protection regarding all licensed financial institutions, including banks. Only the RBM is ready, willing and able to take the lead in these respects. But, in order to ensure the RBM's ability and capacity to perform these functions, Section 43 of the CFTA and the entire CPA must no longer apply to any aspect of the acquisition and delivery of financial products and services. Otherwise, forthcoming RBM Directives in conflict with these laws can be struck down, since all laws take precedence over any regulation or Directive or other statutory instrument. The sections of the CFTA dealing with consumer protection and all of the CPA can then be carefully re-considered, assessing their relevance to the financial sector and, in places, significantly re-formulated as RBM Directives.[7]
Good Practice A.2	***Code of Conduct for Banks*** **a. There should be a principles-based code of conduct for banks that is devised by all banks or the banking association in consultation with the financial supervisory agency and consumer associations, if possible. Monitored by a statutory agency or an effective self-regulatory agency, this code should be formally adhered to by all sector-specific institutions.** **b. If a principles-based code of conduct exists, it should be publicized and disseminated to the general public.** **c. The principles-based code should be augmented by voluntary codes of conduct for banks on such matters as facilitating the easy switching of consumers' current accounts and establishing a common terminology in the banking industry for the description of banks' charges, services and products.** **d. Every such voluntary code should likewise be publicized and disseminated.**
Description	No statutory code of conduct exists for commercial banks in Malawi. Nor has any code of conduct been agreed among commercial banks on a voluntary basis. However, as part of the activities of the Bankers' Association of Malawi (BAM) and with the support of the Financial Inclusion in Malawi Program (FIMA)[8], a Financial Inclusion Taskforce[9] drafted a "Charter" in 2010. Among other topics, the Charter sets out the basis of an agreed financial literacy program as part of the Government's broader financial inclusion program. It is anticipated that this Charter will be signed by the Chief Executive Officers of all 11 of Malawi's commercial banks by end-2011. The Charter encourages a more proactive approach to financial inclusion on the part of the banks. In addition to its work on financial literacy and consumer protection, the Taskforce is to prepare further memoranda of understanding among Malawi's banks in respect of banking products, procedures, channels and governance. The activities of this Taskforce may, therefore, lead to a voluntary Code of Conduct for all banks, at least in respect of the matters the Taskforce has been considering.
Recommendation	The activities of the Taskforce are to be encouraged and supported, with a view to the early adoption by all banks of mutually agreed positions on matters of relevance to consumers, including financial literacy and inclusion. These matters are likely to include how to facilitate the easy switching of consumers' current accounts and the establishment of a common

[7] The question would need to be the extent to which the CFTA and the CPA are deemed relevant, if at all, for the conduct of financial institutions, including banks, in their dealings with consumers.
[8] See Vol. 1 Para. 29 for a description of the FIMA Program.
[9] This Taskforce is made up of individuals appointed by the CEOs of Malawi's eleven commercial banks (March 2010).

	terminology in the banking industry for the description of banks' charges, services and products. Every such voluntary code should be widely publicized and disseminated together with the signed commitment of each bank to comply with its terms. In addition, there should eventually be a principles-based, statutory Code of Conduct for banks that is devised in consultation with BAM and the Consumers Association of Malawi (CAMA) and then also publicized and disseminated to the general public. The performance of the banks in accordance with the requirements of the Code would then need to be monitored by the RBM or BAM. Codes of banking practices have been adopted and enforced by many developed countries, such as Australia, Canada, New Zealand and the United Kingdom, as well as by the Special Administrative Region of China known as Hong Kong, and by some middle-income countries such as South Africa. These codes are principles-based and their compliance is monitored by the regulatory authority, as in the case of Hong Kong, or subject to the jurisdiction of the ombudsman, as in the case of South Africa and Australia.[10] The codes generally comprise the following: • Governing principles and objectives of the code • The banking ombudsman scheme and mechanisms to deal with complaints • Good conduct relating to communication, privacy and disclosure • Product and services • Issues relating to checks • Issues on provision of credit • PINs and passwords • Cards, liability and merchant card services • Internet banking • Other services such as foreign exchange services • Statements and account information
Good Practice A.3	***Appropriate allocation between Prudential Supervision and Consumer Protection*** **Whether prudential supervision of banks and consumer protection regarding banking products and services are the responsibility of one or two organizations, the allocation of resources to these functions should be adequate to enable their effective implementation.**
Description	In conflict with at least the theoretical responsibility of the CPC to deal with matters of consumer protection regarding banking products and services, the RBM has responsibility, in fact, for both prudential and business conduct supervision of commercial banks. Prudential supervision of banks within the RBM is the responsibility of 4 managers, 8 supervisors and 13 additional professional staff who are employed in a Department headed by the Director of Bank Supervision. Although the RBM hopes to add a further complement of 15 professional staff members to prudential supervisory functions by 2013, the prudential supervisory work of the RBM has apparently been performed reasonably adequately over many years.[11] In addition, the CFEP Unit was established in RBM in 2010 under the Micro-Finance and Capital Markets Supervision Department. The training of certain of its staff as supervisors of business conduct will be required. Until the CFEP Unit can be expanded and made fully professional, it will inevitably rely on those within the RBM with experience of prudential

[10] For examples of codes of banking practices, see: https://www.fnb.co.za/legallinks/legal/cobp.html and http://www.bankers.asn.au/Default.aspx?ArticleID=446

[11] Concerns are raised by some private banks that the two banks that are owned in whole or in part by the State may be subject to more superficial supervision, as well as more lenient treatment when any discrepancy or violation of requirements is detected.

	supervision of commercial banks. The Director of Bank Supervision and the Director of Micro-Finance and Capital Markets Supervision both report directly to the RBM's General Manager for the Supervision of Financial Institutions. For the time-being, the General Manager reports to the Deputy Governor who, in turn, reports to the RBM's Governor/Registrar. Given the RBM's shortage of financial and human resources, its prudential supervisory staff members have, by default, been required, in theory at least, to measure the extent to which banks are complying with their responsibilities under the RBM Directive on Customer Due Diligence for Banks and Financial Institutions of 2005.[12] The purpose of this Directive is, in part, "to ensure that all banks and financial institutions uphold the same standards so as to level the playing field between institutions that have already adopted formal Know Your Customer (hereinafter referred to as KYC) principles and those that have not yet done so".[13] There is only one further RBM Directive of relevance to banking consumers, namely the Directive on Disclosure of Information by Banking Institutions.[14] It remains, therefore, for the RBM to formulate and circulate draft Directives to all relevant stakeholders so as to deal extensively, among other matters, with consumer protection *per se*, as well as with such issues as the treatment of changes in interest rates and charges and the practices of banks that are unfair to consumers.
Recommendation	Consumer protection issues must not be ignored by the RBM. If a bank provides a bad or unfair service, this may damage its reputation, as well as customer loyalty and confidence. This may also indicate weaknesses in management and internal controls and expose the bank to financial loss, e.g. as a result of "mis-selling" of investment products. Thus, the RBM has a distinct interest in encouraging standards of good banking practice, whereby banks act fairly and reasonably in relation to their customers. The RBM, however, must be careful not to intervene in matters that are best dealt with through competitive market forces or resolved through the courts so as to avoid placing an undue regulatory burden on the industry. In the face of very scarce resources, the RBM should employ its best efforts to obtain donor funding to assist with the necessary increase in capacity and output of its CFEP Unit.
Good Practice A.4	***Other Institutional Arrangements*** **a. The judicial system should ensure that the ultimate resolution of any dispute regarding a consumer protection matter in respect of a banking product or service is affordable, timely and professionally delivered.** **b. The media and consumer associations should play an active role in promoting banking consumer protection.**
Description	*Judicial system* The Commercial Division of the High Court was created in Blantyre in 2007 and, since then, its performance in disposing of commercial matters has steadily improved. This Division has quickly established a reputation for professionalism. That said, no cases involving disputes consumers have with their financial institutions have either been initiated in the Commercial Division or disposed of in that Court on appeal from a lower court. This Court will not accept any case at first instance in which the sum in dispute is less than MKW 2 million. Also, the cost in court and lawyer fees required of a consumer in taking his or her dispute to the Commercial Division of the High Court is considerably greater than proceeding, at first instance, in the General Division of the High Court.

[12] See RBM Directive No. D01-2005/CDD
[13] Part II, Section 1 6)
[14] See RBM Directive No. D01-2010.DR which was approved for printing on January 21, 2011

	Although Magistrates' courts (subordinate courts) have jurisdiction over any complaint that seeks relief in monetary terms of up to MKW 2 million[15], any complaints consumers may have against their banks are also not, as a rule, disposed of by these courts. Anecdotally, this is due to various factors, including a generally perceived lack of objective evaluation of the facts and/or of professional application of the law, low salaries and inadequate working conditions. The General Division of the High Court is, therefore, where the few cases that have been brought by consumers against their banks have originated. The major drawbacks to these courts are their lack of expertise in respect of financial products and services and their inordinate delay in resolving cases. *Media* Secondly, while the media and CAMA are not prohibited from promoting banking consumer protection, they are given scant encouragement to do so by the Government. By the Media Law of 2011, power is granted to the Minister of Information to ban any publication that he deems contrary to the public interest, whether it originates in or outside of Malawi.[16] At least in some instances in the past, the Malawi press has published articles regarding consumer protection. One example is an article dated 23 July 2010 in the Blantyre Times stating that: "Government continues to ignore fully implementing the Consumer Protection Act seven years after its enactment in 2003. […] the Minister of Trade and Industry has not [yet] set up a Consumer Protection Council as required by Section 10 of the Act." Consumers International is assessing the capacity and gaps of CAMA[17] in general, and in line with the Open Society Initiative for Southern Africa ("OSISA") project, in particular. The lack of expertise, interest and funding prevents significant, if any, promotion of consumer protection measures generally, let alone those focused on banking products and services in particular. In February 2011, CAMA established its initial website[18] in order to help inform Malawian citizens of their rights and responsibilities as consumers, as well as to assist consumers in reporting any violations of their rights in these respects. While this initiative is to be welcomed, for the time being at least, it will suffer from the low degree of internet penetration in the country.[19]
Recommendation	As the ultimate bastion of justice, the Judiciary should be an effective final arbiter. For any consumer complaint about a banking product or service, the courts should be widely recognized as capable of rendering a final and binding decision in a professional, timely and cost effective manner. Building this capacity, however, will inevitably be a very long-term proposition. As indicated under Good Practice E. 2 below, the services of a Financial Services Ombudsman should be employed to dispose of consumer complaints that are not resolved internally within a financial institution. In the meantime, consideration should be given to providing specialized training to judges and staff working in courts, in order to improve their resources to deal with consumer complaints and disputes regarding financial products and services.

[15] See Courts Act, Section 39

[16] The local chapter of the Media Institute of Southern Africa has criticized the Government for enacting this legislation, which is widely seen as a move to target publications that are critical of the present administration.

[17] CAMA is a non-governmental membership organization established in 1994. Its purpose is to promote and protect consumer interests through policy advocating and lobbying, conducting public education and awareness programs and carrying out research on various issues having a direct or indirect effect on consumers.

[18] See http://www.cama.mw

[19] While the number of internet users has grown from an estimated 15,000 in December 2000 to 716,400 ten years later, internet penetration by year-end 2010 was still only 4.6% of Malawi's population. See: http://www.internetworldstats.com/stats1.htm

	The media and CAMA should play an active role in promoting financial consumer protection. Proper media coverage of consumer mistreatment by financial institutions is an effective tool in promoting consumer protection through "naming and shaming". However, it is important that journalists be educated to understand and transmit information on financial issues accurately and adequately. To promote the participation of consumer associations in financial services in general, and in banking services in particular, consideration should be given to providing (or channeling) funding mechanisms to associations that fulfill specific criteria.[20] It is also important to promote the participation of consumer organizations in working groups or consultative bodies, in order to ensure that consumers are properly represented during the formulation of financial services policies.
Good Practice A.5	***Licensing*** **All banking institutions that provide financial services to consumers should be subject to a licensing and regulatory regime to ensure their financial safety and soundness and effective delivery of financial services.**
Description	While all banking institutions that provide financial services to consumers are licensed, they are only just beginning to be subject to a regulatory regime to ensure their effective and proper delivery of services. Although all banking institutions that provide products and services to consumers are licensed by RBM, Malawi's banks have never experienced any, let alone thorough, regulation in respect of their treatment of consumers. It is only in relatively recent months that emphasis has begun to be placed on the role that RBM should play in terms of consumer protection in financial services (whether ideally or else as a practical matter, given the realities of significant human and financial resource constraints). Thus, what might be termed 'appropriate' regulation of banks, at least in these respects, will inevitably take some years to be developed.
Recommendation	This Good Practice needs to be adopted since it forms the basis and foundation for the enforcement of consumer protection in the banking system (see Basel Core Principle 3). Malawi's licensing authority should have the power to set criteria and reject applications for establishments that do not meet the standards set. Apart from its licensing, ongoing regulation and supervision of the activities of each bank, as well as its manner of delivering its services, need also to be regulated. In most countries as in Malawi, banking services are regarded as essential and, as such, appropriate regulatory and supervisory arrangements need to be in place.
SECTION B	**DISCLOSURE AND SALES PRACTICES**
Good Practice B.1	***Information on customers*** **a. When making a recommendation to a consumer, a bank should gather, file and record sufficient information from the consumer to enable the bank to render an appropriate product or service to that consumer.** **b. The extent of information the bank gathers regarding a consumer should:** **i. be commensurate with the nature and complexity of the product or service either being proposed to or sought by the consumer; and** **ii. enable the bank to provide a professional service to the consumer in accordance with that consumer's capacity.**
Description	The RBM Directive on Customer Due Diligence deals explicitly with Know Your Customer (KYC) principles and standards, as well as matters of compliance, RBM inspections, remedial measures and administrative sanctions. This Directive, however, does not require a bank to

[20] For example of criteria set for European consumer organizations to be supported financially by the EU, see Article 7 of Decision No. 20/2004/EC.

	gather any, let alone adequate, information regarding any customer/consumer for the purpose of offering the consumer only products or services that are appropriate in his or her circumstances. Also, without RBM guidance in these respects, policies and practices inevitably differ from bank to bank. Accurate and reliable customer identification is important but presents a special challenge in Malawi since national identity cards have not yet been issued. Some banks, however, use biometric measures to identify customers. Banking transactions conducted through mobile telephones do, though, create their own issues regarding reliable customer identification.
Recommendation	Pursuant to Section 34 of the FSA, the RBM should prepare and circulate a draft of a Directive for comment[21] that would require a bank to gather adequate information regarding any customer/consumer for the purpose of offering that consumer only products or services that would be appropriate in his or her circumstances. That same Directive should require a bank to gather such quantity and quality of information regarding a consumer as is commensurate with the nature and complexity of the product or service either being proposed to, or sought by, the consumer and which will enable the bank to provide a professional service to the consumer. This Good Practice is a basic requirement not only for the delivery of services but also for the purposes of complying with the Basel Core Principle 18[22] issued by the Bank for International Settlements (BIS), as well as with the standards issued by the Financial Action Task Force (FATF) on money laundering and terrorist financing.[23]
Good Practice B.2	***Affordability*** **a. When a bank makes a recommendation regarding a product or service to a consumer, the product or service it offers to that consumer should be in line with the need of the consumer.** **b. The consumer should be given a range of options to choose from to meet his or her requirements.** **c. Sufficient information on the product or service should be provided to the consumer to enable him or her to select the most suitable and affordable product or service.** **d. When offering a new credit product or service significantly increasing the amount of debt assumed by the consumer, the consumer's credit worthiness should be properly assessed.**
Description	There is no legal framework applicable to any aspect of this Good Practice and, without any credit reference bureau in Malawi, a bank's assessment of a consumer's credit worthiness is frequently highly problematic. Dealing largely with a relatively sophisticated and literate consumer client base, some banks, at least on occasion, deal with consumers who know what they need and are uninterested in learning about a range of options. That said, it is frequently exceedingly difficult, if not impossible, for any consumer to be provided sufficient information on any product or service so as to enable the consumer to select what is most suitable and affordable, whether within a bank or between various banks.

[21] Comments should, at the very least, be solicited from BAM, CAMA and concerned donors.

[22] Basel Core Principle 18: *Abuse of financial services*. Supervisors must be satisfied that banks have adequate policies and processes in place, including strict "know-your-customer" rules that promote high ethical and professional standards in the financial system and prevent the bank from being used, intentionally or unintentionally, for criminal activities.

[23] FATF is an inter-governmental body created for the purpose of combating money laundering and terrorism financing. FATF Standards comprise Forty Recommendations on Money Laundering and Nine Special Recommendations on Terrorist Financing. See http://www.fatf-gafi.org/document/28/0,3343,en_32250379_32236930_33658140_1_1_1_1,00.html and http://www.fatf-gafi.org/document/9/0,3343,en_32250379_32236920_34032073_1_1_1_1,00.html

	In Malawi, affordability is related to concerns over over-indebtedness, with many consumers relying on one loan to pay off another.[24]
Recommendation	Questions of affordability should be dealt with in a draft RBM Directive on Disclosure of Information to Customers of Financial Institutions and this draft should then be circulated for review and comment before being revised and coming into force. This Good Practice aims to avoid consumer over-indebtedness and to help consumers make appropriate decisions on their financial needs. It is not uncommon for consumer protection agencies to call on financial service providers to treat customers fairly, make sure that consumers can afford the credit they receive and, if not, ensure that they contact their lender or a free independent advice agency immediately.[25]
Good Practice B.3	***Cooling-off Period*** **a. Unless explicitly waived in advance by a consumer in writing, a bank should provide the consumer a cooling-off period of a reasonable number of days (at least 3-5 business days) immediately following the signing of any agreement between the bank and the consumer.** **b. On his or her written notice to the bank during the cooling-off period, the consumer should be permitted to cancel or treat the agreement as null and void without penalty to the consumer of any kind.**
Description	The CPA allows a consumer the right to retract a consumer contract "within a reasonable period but not less than seven (7) days from the signature or execution of a contract or receipt of the goods or services". This only applies, however, where the contract has been entered into at a place other than the ordinary business premises of the financial institution in question. In such circumstances, the consumer is entitled to the return of the consideration he or she has paid "subject to corresponding reasonable adjustments which shall be agreed upon by the parties".[26] It is unclear, however, what is meant to happen if the parties fail to agree. Otherwise, there is no legal provision that deals with cooling-off, as such. Invariably, the practice of banks is to charge various up-front costs to any consumer who seeks a loan. These always include a set-up or application fee. And, depending on the loan, these can also include appraisal and legal fees, as well as an initial premium on a policy that insures the collateral. There is never any cooling-off period as described in this Good Practice. Rather, if a consumer wishes to terminate a loan after he or she has received all or a portion of its principal sum, the consumer will be required, at the very least, to forfeit all up-front fees and to pay interest on the outstanding sum no matter how soon notice to terminate has been lodged with the bank. In addition, in many cases, there will also be a penalty applied for "changing one's mind". Furthermore, banks typically do not disclose the above to any consumer when he or she takes out a loan.
Recommendation	Unless explicitly waived in advance by a consumer in writing, a bank should provide the consumer a cooling-off period of a reasonable number of days immediately following the signing of any loan agreement during which time the consumer may, on written notice to the bank, treat the agreement as null and void and without penalty to the consumer of any kind. If this topic is not dealt with in a future voluntary Code of Conduct among Malawi's banks, it could be provided for in a future RBM Directive.

[24] In Peru, the regulator has issued Regulation 6941-2008 (Rules for the administration of the risk of over-indebtedness of retail debtors) to ensure that consumers do not use easy access to credit cards or other forms of credit to become over-indebted.
[25] See FSA's MoneyMadeClear website: http://www.moneymadeclear.fsa.gov.uk/campaigns/Mortgages.html
See also the EU Directive on Unfair Terms in Consumer Contracts 1993/13/EEC and EU Directive on Credit Agreements for Consumers, 2008/48/EC provide guidance regarding this Good Practice.
[26] See Subsections 30(1) and (3) of the CPA

	This important safeguard enables an individual to withdraw from an arrangement with impunity. Borrowers tend to rush into financial arrangements with their banks that provide seemingly attractive terms or returns without the benefit of shopping around. This is especially serious in Malawi where the terms of services and products are not readily available or cannot be compared. Thus, the cooling-off period provides relief similar to a "no-questions-asked" return policy for goods. However, for banking products and services that involve market risk, a consumer who cancels his or her contract during the cooling-off period should be required to compensate the bank for any processing fees.[27]
Good Practice B.4	***Bundling and Tying Clauses*** **a. As much as possible, banks should avoid bundling services and products and the use of tying clauses in contracts that restrict the choice of consumers.** **b. In particular, whenever a borrower is obliged by a bank to purchase any product, including an insurance policy, as a pre-condition for receiving a loan from the bank, the borrower should be free to choose the provider of the product and this information should be made known to the borrower.**
Description	Tying occurs when two or more products are sold together in a package and at least one of these products is not sold separately. Bundling occurs when two or more products are sold together in a package, although each of the products can also be purchased separately. All banks typically require insurance on loans to consumers that entail the bank taking title to one or more assets by way of collateral. Depending on the loan, one or more life insurance policies may also be required. Bundling or tying is not an issue for a bank that has no insurance company affiliate or an exclusive or preferential program of insurance cover from an otherwise unaffiliated insurance company, but, in cases where an insurance affiliate exists by law or contract, consumer choice may be effectively restricted. The RBM is considering a Directive on Interest Rate Pricing and Unfair Practices by Banks to ensure that, as a general rule, consumers are not required to accept insurance products as a condition for obtaining a loan. The exceptions would be in respect of real estate mortgages and the financing of moveable property. The same Directive will apparently also require banks to permit complete freedom to their consumers to name an insurer of their choice.
Recommendation	Prior to the entry into force of RBM's draft Directive on Interest Rate Pricing and Unfair Practices by Banks, the draft should be widely reviewed and commented upon by all relevant stakeholders.
Good Practice B.5	***Preservation of Rights*** **Except where permitted by applicable legislation, in any communication or agreement with a consumer, a bank should not exclude or restrict, or seek to exclude or restrict:** **i. any duty to act with skill, care and diligence toward the consumer in connection with the provision by the bank of any financial service or product; or** **ii. any liability arising from the bank's failure to exercise its duty to act with skill, care and diligence in the provision of any financial service or product to the consumer.**
Description	This Good Practice concerns the obligation to deal fairly and honestly with customers. This standard requires that consumers cannot be forced to accept contractual clauses that would reduce their rights. [28]

[27] For a description of cooling-off periods in several EU Member States, see the EC's Discussion Paper for the amendment of the Directive 87/102/EEC, available at http://ec.europa.eu/consumers/cons_int/fina_serv/cons_directive/cons_cred1a_en.pdf

[28] This is reflected in the Accountability Principle of the OECD Guidelines on the Protection of Privacy and Trans-border Flows of Personal Data's (Paragraph 14), and the Privacy Framework's Accountability Principle IX of the forum of 21 Pacific Rim countries known as the Asia-Pacific Economic Cooperation ("APEC"). Also, the EU Directive on Unfair Business-to-Consumer

	Section 8 (3) of the CPA deals in part with these matters by declaring that no contractual clause or stipulation has any effect where it excludes or seeks to exclude the responsibility of a supplier or trader (i.e. a bank) for the efficacy of the services rendered.[29] The duty of a professional to act with skill, care and diligence toward his customer or client in providing any product or service comes from the common law inherited from England and Wales during the period from 1907 to 1964.[30] Also, no agreement can exclude or restrict this duty at common law. Furthermore, at common law, there can be no exclusion or restriction on liability arising from the failure of a professional to act with skill, care and diligence in providing any product or service. Finally, there is no legislation in Malawi that excludes or restricts or purports to exclude or restrict either any such duty or any liability arising from a failure to exercise such duty.
Recommendation	These matters should be considered in a forthcoming draft RBM Directive that would make explicit the underlying common law principles.
Good Practice B.6	***Regulatory Status Disclosure*** **In all of its advertising, whether by print, television, radio or otherwise, a bank should disclose the fact that it is a regulated entity and the name and contact details of the regulator.**
Description	There is no legal requirement to do this. Nor is this the practice of any bank in Malawi.
Recommendation	This Good Practice is in line with responsible and fair advertisement practices. Consideration should be given to requiring each bank licensed by the RBM to disclose in any of its advertisements (whether by print, television, radio or otherwise) that it is a regulated entity, as well as the name and contact details of the RBM.
Good Practice B.7	***Terms and Conditions*** **a. Before a consumer opens a deposit, current (checking) or loan account at a bank, the bank should make available to the consumer a written copy of its general terms and conditions, as well as all terms and conditions that apply to the account to be opened. Collectively, these Terms and Conditions should include:** **i. disclosure of details of the bank's general charges;** **ii. a summary of the bank's complaints procedures;** **iii. a statement regarding the existence of the office of banking ombudsman or equivalent institution and basic information relating to its process and procedures;** **iv. information about any compensation scheme that the bank is a member of;** **v. an outline of the action and remedies which the bank may take in the event of a default by the consumer;** **vi. the principles-based code of conduct, if any, referred to in A.2 above;** **vii. information on the methods of computing interest rates paid by or charged to the consumer, any relevant non-interest charges or fees related to the product offered to the consumer;** **viii. any service charges to be paid by the consumer, restrictions, if any, on account transfers by the consumer, and the procedures for closing an account; and** **ix. clear rules on the reporting procedures that the consumer should follow in the case of unauthorized transactions in general, and stolen cards in particular, as well as the bank's liability in such cases.** **b. The Terms and Conditions should be written in plain language and in a font size and spacing that facilitates the reading of every word.**

Commercial Practices states that a commercial practice shall be deemed unfair if it is contrary to the requirements of professional diligence, and misleading if it omits material information that the average consumer needs in order to take a decision.

[29] As indicated elsewhere, however, although the CPA remains formally in effect, it has never been enforced.

[30] When the territory of Malawi was known as the British Protectorate of Nyasaland

Description	No guidance from the RBM has yet been provided in any of the above respects and no bank complies with this Good Practice. The RBM is, however, apparently proposing to deal at least in part with these matters in its forthcoming Directive on Interest Rate Pricing and Unfair Practices of Banks. Among other things, it apparently is the RBM's intention to require any bank to ensure that its credit agreement clauses, interest rates, charges and fees are fully explained to a consumer *before* funds are advanced to that consumer. Although the recent RBM Directive on Disclosure of Information by Banking Institutions requires banks to disclose such things as: • the base or Prime Lending Rate including the bank's maximum spread above that Rate; • deposit rates; and • fees/charges on all personal banking products/services with these being "itemized to allow for more transparency" These disclosures are required to be published *only* as at June 30 and December 31 of each year and in merely two newspapers "of wide circulation".[31] Also, while disclosures as at June 30 are required to be published within sixty days, those as at December 31 have to be published within six months. Itemized information on bank's charges and fees include not less than 21 items in connection with personal current accounts, 4 items regarding personal savings accounts, at least 3 items regarding personal electronic banking, 6 items in connection with personal foreign exchange transactions and at least 4 items in respect of personal loans.[32] Thus, while the RBM Directive on Disclosure of Information by Banking Institutions goes at least some way to inform the public of any bank's fees and charges in respect of personal banking, the consumer needs up-to-date information of bank fees, charges and rates. Dealing with the second point, although there is a provision in the CPA that requires at least standard form consumer contracts to be "in characters readable at single sight by any normal sighted person"[33], there is no specific requirement for a bank to ensure that *any* Terms and Conditions it might provide its actual and potential customers be written in plain language and in a font size and spacing that facilitates the reading of every word. A number of international guidelines provide the background for this Good Practice, including the EU Directive on Credit Agreements for Consumers 2008/48/EC, the EU Directive concerning Unfair Business-to-Consumer Commercial Practices in the Internal Market 2005/29/EC, the US Truth in Lending Act (TILA) and the US Truth in Savings Act. The purpose of TILA is to promote the informed use of consumer credit by requiring disclosures about its terms and by standardizing the manner in which costs associated with borrowing are calculated and disclosed. The Truth in Savings Act requires clear and uniform disclosure of the rate of interest (annual percentage yield) and fees that are associated with a savings account, so that the consumer is able to make a meaningful comparison between potential accounts. For example, a customer opening a certificate of deposit account should be provided with information about ladder rates (smaller interest rates with smaller deposits) and penalty fees for early withdrawal of a portion or all of the funds.
Recommendation	Before a consumer opens a deposit, current (checking) or loan account at a bank, the bank should be required to provide the consumer with a written copy of its general terms and conditions (in the vernacular), as well as all terms and conditions that apply to the account to

[31] From subsections 10(1) and (2) of Directive No D01-2010/DR
[32] See subsection 10(3) and Annexure 11 of this same Directive.
[33] See: subsection (1) (c) of Section 26 of the CPA. Again, though, the CPA has not been enforced yet.

	be opened. These terms and conditions should include each of the items referred above. For any consumer/customer who may be illiterate, alternative mechanisms of disclosure should likewise be required.
Good Practice B.8	***Key Facts Statement*** **a. A bank should have a Key Facts Statement for each of its accounts, types of loans or other products or services and provide these to its customers and potential customers.** **b. The Key Facts Statement should be written in plain language and summarize in a page or two the key terms and conditions of the specific banking product or service.** **c. Prior to a consumer opening any account at, or signing any loan agreement with, the bank, the consumer should have delivered a signed statement to the bank to the effect that he or she has duly received, read and understood the relevant Key Facts Statement from the bank.** **d. Key Facts Statements throughout the banking sector should be written in such a way as to allow consumers the possibility of easily comparing products that are being offered by a range of banks.**
Description	In Malawi there is no requirement for banking institutions to provide consumers with a document similar to a Key Facts Statement. That said, the kernel of the idea is contained in the CPA. By Section 6 of the CPA, any supplier or trader of goods or services (i.e. any financial institution) is required to provide consumers with true, sufficient, clear and timely information on goods and services that they offer.[34] And for a contravention of this obligation, the financial institution will be guilty of an offence and, upon conviction, liable to a fine up to MKW 500,000 or to imprisonment for up to five years or both.[35] So far at least, however, no financial institution has been held to the requirements of Section 6 of the CPA or has been found responsible for contravening these requirements. This is not surprising, however, since the required apparatus to apply and enforce the CPA has never been created. The Directive of the RBM being formulated in respect of the Disclosure of Information to Customers is apparently to deal with at least some of these issues.
Recommendation	Once the draft Directive on Disclosure of Information to Customers is prepared by the RBM, this draft should be distributed widely for review and comment by all stakeholders. While the provisions of Section 6 of the CPA are an obvious starting point for the RBM in this exercise, much more specific guidance will be needed to develop key facts statements. A key facts statement should provide consumers with simple and standard disclosure of key contractual information of a banking product or service, contributing to the consumers' better understanding of the product or service. Key facts statements should also allow consumers to compare offers provided by different banks before they purchase a banking product or service and provide a useful summary for later reference during the life of the banking product or service. For credit products, key facts statements would constitute an efficient way to inform consumers about their basic rights, the credit reporting systems and the existing possibilities for disputing information. There are several examples of key facts statements, such as the UK FSA's initial disclosure documents applicable to housing credit products, the EU's Standard European Consumer Credit Information (SECCI) form, the US Truth in Lending Act's "Schumer Box" for credit cards[36], Peru's "Hoja Resumen" (Summary Sheet) [37], South Africa's Pre-Agreement Statement & Quotation for Small Credit Agreements, Ghana's Pre-Agreement Truth in Lending Disclosure Statement.

[34] See item (h) of subsection 6(1)
[35] See Section 6.
[36] See http://www.fdic.gov/regulations/laws/rules/6500-1360.html#fdic6500appendixgtopart226new
[37] See Regulation No. 1765-2005, as amended in January 2010, available at http://www.sbs.gob.pe

	Of special concern is the need to provide basic information to consumers in a language widely used by various local populations. In Malawi, although Chichewa is spoken by a majority of the population, little written banking information is available other than in English. It may also be helpful to test consumer understanding of mandatory disclosure statements. In the US, the Federal Reserve Board has conducted extensive consumer testing of credit card disclosure information in order to develop an easily understood format.[38]
Good Practice B.9	***Advertising and Sales Materials*** **a. Banks should ensure that their advertising and sales materials and procedures do not mislead customers.** **b. All advertising and sales materials of banks should be easily readable and understandable by the general public.** **c. Banks should be legally responsible for all statements made in their advertising and sales materials (i.e. be subject to the penalties under the law for making any false or misleading statements).**
Description	The FSA is silent on the matter of advertising and sales materials provided to the public by any bank. Also, Malawi has no general Law on Advertising.[39] As indicated above, however, Section 43 of the CFTA deals with banks that provide misleading advertising. The CFTA requires that no person (i.e. no financial institution) shall, in relation to a consumer, advertise in a way which is misleading or deceptive.[40] In addition, Part VII of the CPA deals exclusively and extensively with the topic. The CPA obliges any supplier of financial services to "provide a consumer with true, adequate, clear and prompt information on the … goods and services offered so to the consumer can make a proper and informed choice".[41] Any financial institution that "puts out an advertisement that constitutes a false or misleading offer or promotion of … goods, activities or services [is] guilty of fraud".[42] False or misleading advertising for these purposes includes "any type of business information or communication using text, dialogue, sounds, images or descriptions which can directly or indirectly, expressly or by omission, lead a consumer to make a mistake, misunderstand or confuse [such matters as]: a) the benefits or repercussions of the uses [of the financial products or services]; b) the basic characteristis of the goods [i.e financial products] to be sold ... or the services to be rendered, such as the ... usefulness ... or any other standard deemed reasonable and indespensible or a normal dealing realting to such .... goods or services; c) the terms of the warranties and guarantees as offered; d) the price of the offered ... goods or services, the terms of payment and the cost of credit; or e) any other particular material to the transaction involving the technology, goods or services".[43] In addition, when any financial institution that advertises "goods or services in promotion, sale or special offer fails to comply with the advertisement, a consumer may: a) take necessary steps to compel the [financial institution] to comply with the obligation according to the general law of contract; .... or b) cancel the contract if there has been an advance payment by the consumer".[44]

[38] See details at -http://www.federalreserve.gov/research/staff/hogarthjeannem.htm
[39] Although there is a Commercial Advertising (Traditional Music) Control Act (see Laws of Malawi – Cap. 48:07), this does not qualify as a general law on the subject.
[40] See items (d), (g) and (k) of subsection 43(1)
[41] Section 43 of the CPA
[42] Subsection 44(2) of the CPA
[43] Subsection 44(3) of the CPA
[44] Subsection 46(3) of the CPA

	Finally, a fine of up to MKW 500,000 and/or a fixed period of up to five years imprisonment are provided for in the event a financial institution contravenes any of the above provisions.[45] However, neither Section 43 of the CFTA nor the CPA have ever been applied or enforced.
Recommendation	A main policy issue regarding disclosure and sales practices relates to misleading and comparative advertisement. In time, consideration should be given either to formulating a general law on advertising in Malawi that would cover all financial institutions or else a law on consumer protection in respect of financial products and services that would include specific provisions regarding advertisements. In the meantime, in the event that statutory amendments make it clear that Section 43 of the CFTA and all of the CPA no longer apply to financial institutions, it will fall to the RBM to prepare a Directive that deals with advertising by financial institutions, taking, as starting point, Section 43 of the CFTA and Part VII of the CPA.
Good Practice B.10	***Third-Party Guarantees*** **A bank should not advertise either an actual or future deposit or interest rate payable on a deposit as being guaranteed or partially guaranteed unless there is a legally enforceable agreement between the bank and a third party who or which has provided such a guarantee. In the event such an agreement exists, the advertisement should state:** **i. the extent of the guarantee;** **ii. the name and contact details of the party providing the guarantee; and** **iii. in the event the party providing the guarantee is in any way connected to the bank, the precise nature of that relationship.**
Description	No bank in Malawi apparently advertises (or provides a consumer) any guarantee or partial guarantee of an actual or future deposit or interest rate payable on a deposit. Thus, there has yet to be any experience against which to measure the applicability of this Good Practice. There is, though, a requirement in the CPA to the effect that no bank or other financial institution can use the term "guarantee" unless the true extent of the guarantee is clearly indicated, along with the "the conditions, manner, duration and place in which [the guarantee] can be enforced by the consumer".[46]
Recommendation	The word "guarantee" can be a persuasive element when it comes to "returns" on investment. There is a tendency, however, for the term to be used loosely. Furthermore, the actual terms of a guarantee can be difficult for the average customer to understand. Thus, advertisements should ensure that the fact of the third-party guarantee is clearly disclosed to the public so as to enable consumers to make an informed decision about the usefulness or relevance of the guarantee. For any future RBM Directive on this topic, care should be taken to consider this Good Practice, as well as Section 39 of the CPA.
Good Practice B.11	***Professional Competence*** **a. In order to avoid any misrepresentation of fact to a consumer, any bank staff member who deals directly with consumers, or who prepares bank advertisements (or other materials of the bank for external distribution), or who markets any service or product of the bank should be familiar with the legislative, regulatory and code of conduct guidance requirements relevant to his or her work, as well as with the details of any product or service of the bank which he or she sells or promotes.** **b. Regulators and associations of banks should collaborate to establish and administer minimum competency requirements for any bank staff member who:** **i. deals directly with consumers;**

[45] Section 48 of the CPA
[46] See Section 39 of the CPA

	ii. prepares any Key Facts Statement or any advertisement for the bank; or **iii. markets the bank's services and products.**
Description	Although banks recognize that it is in their best interest to employ competent staff who are able to communicate knowledgeably, whether generally by way of advertisement or individually in respect of any actual or potential customer/consumer regarding the products and services on offer by the bank, in no case is there an internally (let alone externally) applied and enforced regime so as to ensure any consumer that the 'facts' as stated to him or her have not been misrepresented. Nor can the consumer have any confidence that bank staff with whom he or she deals will be familiar with all relevant legislative and regulatory requirements, as well as with all of the details of any product or service which a bank staff member sells or promotes. It is remarkable, for instance, how no one in the banking community seems to have any idea of his or her prevailing obligations regarding consumer protection under the CFTA and CPA. Until these statutes are amended, however, to make them inapplicable in terms of consumer protection for all licensed financial institutions, they remain the law of the land.[47] In addition, the RBM and BAM have never collaborated with view to establishing and administering minimum competency requirements for any bank staff member who: (a) deals directly with consumers; (b) prepares any advertisement for the bank; or (c) markets the bank's services and products.
Recommendation	Each bank needs to consider how it can ensure that any member of its staff who deals directly with consumers, or who prepares bank advertisements (or other materials of the bank for external distribution) or who markets any service or product of the bank, is familiar with the legislative and regulatory requirements relevant to his or her work, as well as with the details of any product or service of the bank which he or she sells or promotes. Each bank needs then to take all appropriate measures so that the professional competence of its staff is assured. The RBM and BAM should collaborate in order to establish and administer minimum competency requirements for any bank staff member who: (a) deals directly with consumers; (b) prepares any advertisement for the bank; (c) markets any of the bank's services and products; or (d) in the future, will prepare any key facts statement for the bank. The assistance of BAM's Institute of Bankers in Malawi in these respects will be important.
SECTION C	**CUSTOMER ACCOUNT HANDLING AND MAINTENANCE**
Good Practice C.1	***Statements*** **a. Unless a bank receives a customer's prior signed authorization to the contrary, the bank should issue, and provide the customer free of charge, a monthly statement of every account the bank operates for the customer.** **b. Each such statement should:** **i. set out all transactions concerning the account during the period covered by the statement; and** **ii. provide details of the interest rate(s) applied to the account during the period covered by the statement.** **c. Each credit card statement should set out the minimum payment required and the total interest cost that will accrue, if the cardholder makes only the required minimum payment.** **d. Each mortgage or other loan account statement should clearly indicate the amount paid during the period covered by the statement, the total outstanding amount still owing, the allocation of payment to the principal and interest and, if applicable, the**

[47] In any possible action brought to enforce the provisions of these laws against a bank, the maxim "Ignorantia juris non excusat" (i.e. "Ignorance of the law is no defense") would presumably apply.

	up-to-date accrual of taxes paid. **e. A bank should notify a customer of long periods of inactivity of any account of the customer and provide a reasonable final notice in writing to the customer if the funds are to be treated as unclaimed money.** **f. When a customer signs up for paperless statements, such statements should be in an easy-to-read and readily understandable format.**
Description	The only regulation that covers some elements of this Good Practice is the RBM Directive on Disclosure of Information by Banking Institutions, which requires banks to provide "half yearly loan statements to all its borrowers indicating repayments to date, any other charges and balance outstanding."[48] Thus, there is no requirement for commercial banks to provide monthly statements of every account they operate for any individual, and typically, when statements are issued, a cost is charged to the customer. Also, there is no standard requirement regarding the content of such statement, whether in respect of a current, savings, loan or credit card account. In addition, no bank either notifies any individual customer of long periods of inactivity of any account of that customer or provides a reasonable final notice in writing to that customer before the bank treats the customer's funds as unclaimed money. Furthermore, there is no legal provision requiring paperless (i.e. electronic) statements to be in an easy-to-read and readily understandable format.
Recommendation	The provisions included in the RBM Directive on Disclosure of Information by Banking Institutions are a good start, but much more needs to be done. Banks should be obligated to provide monthly statements for all the accounts that they operate for individual customers. With access to the internet and telephone banking, some customers may opt to receive statements on a quarterly basis. The choice should be left to each individual customer. Also, when customers choose paperless statements, access to these statements, their format and details should be a fair substitute for paper statements. An RBM Directive should require banks to carry out all aspects of this Good Practice.
Good Practice C.2	***Notification of changes in interest rates and non-interest charges*** **a. A customer of a bank should be notified in writing by the bank of any change in:** **i. the interest rate to be paid or charged on any account of the customer as soon as possible; and** **ii. a non-interest charge on any account of the customer a reasonable period in advance of the effective date of the change.** **b. If the revised terms are not acceptable to the customer, he or she should have the right to exit the contract without penalty, provided such right is exercised within a reasonable period.** **c. The bank should inform the customer of the foregoing right whenever a notice of change under paragraph a. is made by the bank.**
Description	Whenever an interest rate to be paid or charged on any account changes or a non-interest charge on any account changes, the typical practice of banks is to place an advertisement in one or two newspapers and to apply the change with immediate effect. There is no requirement by law or regulation as to when or even whether a customer must be notified in writing by the bank of any change in the customer's applicable rate of interest. Nor is there any requirement by law or regulation that, to be effective, a change in any non-interest charge must be communicated to the customer at least a reasonable period in advance of the date of the proposed change. RBM's draft Directive on Interest Rate Pricing and Unfair Practices by Banks is apparently to

[48] See subsection 10 (5)

	provide rules in these respects. Although a customer of a bank typically has the right to exit his or her loan agreement at any time, this is never done without extracting a penalty, even if the revised terms (i.e. the new interest rate and/or other charges) are not acceptable to the customer.
Recommendation	Consideration should be given to having the RBM's draft Directive on Interest Rate Pricing and Unfair Practices by Banks deal with both aspects of this Good Practice. It would then include a provision to the effect that no penalty is permitted when a customer decides to exit his or her loan agreement within a reasonable period after receiving notice of a change in interest or other charges. It would also require all banks to inform their customers of this right as an integral part of the bank's notice of change. Banks in many countries provide at least 1 to 3 months of notice depending on the agreement. In most countries, banks indicate in their offer documents and loan agreements whether the interest rate is fixed or variable and whether it is linked to a daily reference rate that is widely published such as LIBOR. In such cases, the minimum notice that should be given in the event of a change in the interest rate should be agreed upfront. Interest rate increases that do not comply with the contractually stipulated notice are, therefore, invalid and will not be binding on the consumer. The Code of Conduct referred to in A.2 above could also include this requirement.
Good Practice C.3	***Customer Records*** **a. A bank should maintain up-to-date records in respect of each customer of the bank that contain the following:** **i. a copy of all documents required to identify the customer and provide the customer's profile;** **ii. the customer's address, telephone number and all other customer contact details;** **iii. any information or document in connection with the customer that has been prepared in compliance with any statute, regulation or code of conduct;** **iv. details of all products and services provided by the bank to the customer;** **v. a copy of correspondence from the customer to the bank and vice-versa and details of any other information provided to the customer in relation to any product or service offered or provided to the customer;** **vi. all documents and applications of the bank completed, signed and submitted to the bank by the customer;** **vii. a copy of all original documents submitted by the customer in support of an application by the customer for the provision of a product or service by the bank; and** **viii. any other relevant information concerning the customer.** **b. A law or regulation should provide the minimum permissible period for retaining all such records and, throughout this period, the customer should be provided ready access to all such records free of charge or for a reasonable fee.**
Description	Although banks typically maintain records for each of their customers, there is no law or regulation that requires a bank to comply with any of the requirements listed in paragraph a. of this Good Practice. In addition, there is no obligation for banks to conform to common practices in any of these respects. Also, no law or regulation provides the minimum permissible period for retaining all such records. And there is no requirement that, throughout any period, the customer must be provided ready, free access to all bank records that pertain to him or her. The Registrar does, however, have power to issue Directives on record keeping.[49]
Recommendation	A Directive of the Registrar should require all banks to perform in accordance with all aspects of this Good Practice. The list may seem prescriptive but its requirements should be regarded

[49] See Section 34 of the FSA

	as the minimum in order to ensure that sufficient information is kept for the purpose of providing customer protection.
Good Practice C.4	***Paper and Electronic Checks*** **a. The law and code of conduct should provide for clear rules on the issuance and clearing of paper checks that include, among other things, rules on:** **i. checks drawn on an account that has insufficient funds;** **ii. the consequences of issuing a check without sufficient funds;** **iii. the duration within which funds of a cleared check should be credited into the customer's account;** **iv. the procedures on countermanding or stopping payment on a check by a customer;** **v. charges by a bank on the issuance and clearance of checks;** **vi. liability of the parties in the case of check fraud; and** **vii. error resolution.** **b. A customer should be told of the consequences of issuing a paper check without sufficient funds at the time the customer opens a checking account.** **c. A bank should provide the customer with clear, easily accessible and understandable information regarding electronic checks, as well the cost of using them.** **d. In respect of electronic or credit card checks , a bank should inform each customer in particular:** **i. how the use of a credit card check differs from the use of a credit card;** **ii. of the interest rate that applies and whether this differs from the rate charged for credit card purchases;** **iii. when interest is charged and whether there is an interest free period, and if so, for how long;** **iv. whether additional fees or charges apply and, if so, on what basis and to what extent; and** **v. hether the protection afforded to the customer making a purchase using a credit card check differs from that afforded when using a credit card and, if so, the specific differences.** **e. Credit card checks should not be sent to a consumer without the consumer's prior written consent.** **f. There should be clear rules on procedures for dealing with authentication, error resolution and cases of fraud.**
Description	Although informal arrangements exist among banks on some of the matters referred to a. above, there is no law or Code of Conduct that provides clear rules on the issuance and clearing of paper checks. In addition, unless the customer asks the question when he or she opens a checking account, at least as an apparent general rule, no customer of a bank is told at that time of the consequences of issuing a paper check without sufficient funds. As for electronic and credit card checks, BAM has provided a facility to all banks known as the Electronic Cheque Clearing House[50] which facilitates the exchange of electronic files containing check data and images.
Recommendation	Consideration should be given to establishing clear rules on the issuance and clearing of checks either in the law or by way of RBM Directive or, failing which, by means of widely publicized voluntary Code of Conduct in these respects among all banks. Included in the Directive or the voluntary Code should be clear rules on consumer protection regarding the issuance and clearing of checks, including procedures for error resolution. It is also important that banking customers are told of their rights and liabilities in these respects.
Good Practice C.5	***Credit Cards*** **a. There should be legal rules on the issuance of credit cards and related customer**

[50] See the Rules Governing the Operations of the ECCH as produced by BAM and dated January 2008.

	disclosure requirements. **b. Banks, as credit card issuers, should ensure that personalized disclosure requirements are made in all credit card offers, including the fees and charges (including finance charges), credit limit, penalty interest rates and method of calculating the minimum monthly payment.** **c. Banks should not be permitted to impose charges or fees on pre-approved credit cards that have not been accepted by the customer.** **d. Consumers should be given personalized minimum payment warnings on each monthly statement and the total interest costs that will accrue if the cardholder makes only the requested minimum payment.** **e. Among other things, the legal rules should also:** **i. restrict or impose conditions on the issuance and marketing of credit cards to young adults (below age of 21) who have no independent means of income;** **ii. require reasonable notice of changes in fees and interest rates increase;** **iii. prevent the application of new higher penalty interest rates to the entire existing balance, including past purchases made at a lower interest rate;** **iv. limit fees that can be imposed, such as those charged when consumers exceed their credit limits;** **v. prohibit a practice called "double-cycle billing" by which card issuers charge interest over two billing cycles rather than one;** **vi. prevent credit card issuers from allocating monthly payments in ways that maximize interest charges to consumers; and** **vii. limit up-front fees charged on sub-prime credit cards issued to individuals with bad credit.** **f. There should be clear rules on error resolution, reporting of unauthorized transactions and of stolen cards, with the ensuing liability of the customer being made clear to the customer prior to his or her acceptance of the credit card.** **g. Banks and issuers should conduct consumer awareness programs on the misuse of credit cards, credit card over- indebtedness and prevention of fraud.**
Description	There is no law or RBM Directive that sets rules regarding the issuance of credit cards and related customer disclosure requirements. With impunity, therefore, banks can impose charges or fees on pre-approved credit cards that have not been accepted by the customer. As a general rule, those banks that issue credit cards do not ensure that personalized disclosure requirements are made in their credit card offers to consumers. Typically, therefore, a consumer is unclear as to: (a) what fees and charges (including finance charges) will accrue; (b) what his or her credit limit will be; (c) what penalty interest rate(s) will apply; (d) what will trigger any penalty; and (e) the basis for calculating the minimum monthly payment. In addition, no individual credit card holder receives personalized minimum payment warnings on each monthly statement and a clear indication of the total interest costs that will accrue if the cardholder makes only the requested minimum payment.
Recommendation	Careful consideration should be given to the formulation of a RBM Directive that deals comprehensively with each of the aspects of this Good Practice.
Good Practice C.6	***Internet Banking and Mobile Phone Banking*** **a. The provision of internet banking and mobile phone banking (m-banking) should be supported by a sound legal and regulatory framework.** **b. Regulators should ensure that banks or financial service providers providing internet and m-banking have in place a security program that ensures:** **i. data privacy, confidentiality and data integrity;** **ii. authentication, identification of counterparties and access control;** **iii. non-repudiation of transactions;** **iv. a business continuity plan; and** **v. the provision of sufficient notice when services are not available.** **c. Banks should also implement an oversight program to monitor third-party control**

	conditions and performance, especially when agents are used for carrying out m-banking. **d. A customer should be informed by the bank whether fees or charges apply for internet or m-banking and, if so, on what basis and how much.** **e. There should be clear rules on the procedures for error resolution and fraud.** **f. Authorities should encourage banks and service providers to undertake measures to increase consumer awareness regarding internet and m-banking transactions.**
Description	For a detailed description of what exists in these respects in Malawi, see Annex II "Mobile Banking in Malawi". While draft Guidelines on mobile banking have been prepared by a Sub-committee of the National Payments Council dealing with standard setting, these Guidelines focus only on matters pertaining to the ring-fencing of trust funds and not with issues of consumer protection *per se*. Although Malawi is quickly going electronic in terms of banking products and services, the law is considerably behind. One of numerous examples concerns the lack of legal provisions dealing with the recognition of electronic signatures.
Recommendation	The Guidelines referred to above should be expanded to cover such matters as fees, dispute settlements, etc., and the roles and responsibilities of agents of mobile phone companies. In addition, the Communications Act should be amended to provide a regime for electronic signatures. For more detailed recommendations, see Annex II "Mobile Banking in Malawi". In summary, consumer protection should be ensured through rules that: • limit systemic and other risks that could threaten the stability of financial markets or undermine confidence in the payment system; • encourage institutions to educate customers about their rights and responsibilities and how to protect their own privacy on the Internet and when using mobile phones; and • encourage the development of effective, low risk, low cost and convenient payment and financial services to customers and businesses through the Internet and by utilizing mobile phone banking.
Good Practice C.7	***Electronic Fund Transfers and Remittances*** **a. There should be clear rules on the rights, liabilities and responsibilities of the parties involved in any electronic fund transfer.** **b. Banks should provide information to consumers on prices and service features of electronic fund transfers and remittances in easily accessible and understandable forms. As far as possible, this information should include:** **i. the total price (e.g. fees for the sender and the receiver, foreign exchange rates and other costs);** **ii. the time it will take the funds to reach the receiver;** **iii. the locations of the access points for sender and receiver; and** **iv. the terms and conditions of electronic fund transfer services that apply to the customer.** **c. To ensure transparency, it should be made clear to the sender if the price or other aspects of the service vary according to different circumstances, and the bank should disclose this information without imposing any requirements on the consumer.** **d. A bank that sends or receives an electronic fund transfer or remittance should document all essential information regarding the transfer and make this available to the customer who sends or receives the transfer or remittance without charge and on demand.** **e. There should be clear, publicly available and easily applicable procedures in cases of errors and frauds in respect of electronic fund transfers and remittances.**

	f. A customer should be informed of the terms and conditions of the use of credit/debit cards outside the country, including the foreign transaction fees and foreign exchange rates that may be applicable.
Description	There is no legislation yet in place that deals with electronic payments and the rights, liabilities and responsibilities of the parties involved in any electronic fund transfer. Not surprisingly, therefore, banks do not provide information to consumers on prices and service features of electronic fund transfers and remittances in any easily accessible and understandable form. There is, however, a draft Payments System Bill that covers electronic payments for the first time. This has emanated from the Legal Sub-committee of the National Payments Council, a body which exists to coordinate projects in the payments system arena. For more information, see also Annex II "Mobile Banking in Malawi".
Recommendation	Malawi needs to adopt clear rules on the rights, liabilities and responsibilities of the parties involved in any electronic fund transfer. Also, all banks should be required by a RBM Directive to provide information to consumers on prices and service features of electronic fund transfers and remittances in easily accessible and understandable forms and, as far as possible, this information should include those matters referred to in i. through iv. of item b. of this Good Practice. In addition, if the price or other aspects of the service vary according to different circumstances, banks should be obliged to disclose this information without imposing any requirements on the consumer. Also, a bank that sends or receives an electronic fund transfer or remittance should document all essential information regarding the transfer and make this available on demand and without charge to the customer who sends or receives the transfer. Furthermore, there should be clear, publicly available and easily applicable procedures in cases of errors and frauds in respect of electronic fund transfers and remittances. And finally, a customer should be informed by his or her bank of the terms and conditions of the use of any credit/debit cards outside Malawi, including the foreign transaction fees and foreign exchange rates that may be applicable.
Good Practice C.8	***Debt Recovery*** **a. A bank, agent of a bank and any third party should be prohibited from employing any abusive debt collection practice against any customer of the bank, including the use of any false statement, any unfair practice or the giving of false credit information to others.** **b. The type of debt that can be collected on behalf of a bank, the person who can collect any such debt and the manner in which that debt can be collected should be indicated to the customer of the bank when the credit agreement giving rise to the debt is entered into between the bank and the customer.** **c. A debt collector should not contact any third party about a bank customer's debt without informing that party of the debt collector's right to do so; and the type of information that the debt collector is seeking.** **d. Where sale or transfer of debt without borrower consent is allowed by law, the borrower should be:** **i. notified of the sale or transfer within a reasonable number of days;** **ii. informed that the borrower remains obligated on the debt; and** **iii. provided with information as to where to make payment, as well as the**

	purchaser's or transferee's contact information.
Description	No law of Malawi deals with appropriate means of recovering debts and no Code of Conduct exists for debt collectors and debt collection agencies. Most debt collection activity is typically entrusted to a compliance department within a bank. If amicable settlement proves difficult or impossible, legal assistance is then typically brought to bear. In most instances, the bank's internal legal department is called upon at this stage but in at least some cases the hiring of outside counsel may be warranted. Only in rare instances does a bank employ one of the few debt collection agencies in Malawi. Since the practices of these agents are entirely unregulated, concerns naturally exist regarding reputational risks for the bank. If debt collection methods are employed which the bank, as principal, views as improper, the natural fear is that the bank will be stigmatized as operating unfairly. And it will be of little comfort to a bank to sue its debt collection agency for the possible breach of a provision in a collection contract between the agency and the bank.
Recommendation	Consideration should be given to drafting and enacting a Debt Collection statute that would respond appropriately to each aspect of this Good Practice, including: a) requiring any debt collection agency, agent or bureau to be registered or licensed; b) setting required standards to be accepted and applied by all debt collection agents; and c) providing supervisory powers to some appropriate governing body with a view to ensuring that all such standards are consistently applied. In a number of countries, weak safeguards against abusive debt collection: (i) strengthens the call for a more cumbersome recovery process; (ii) leads to moratoriums on collection; and (iii) earns the sympathy of courts. As a result, debt collection becomes a prolonged process that increases the cost of financing in the long run. Sound rules on debt collection are required to help ensure that consumers are not subject to abusive and illegal collection practices.
Good Practice C.9	***Foreclosure of mortgaged or charged property*** **a. In the event that a bank exercises its right to foreclose on a property that serves as collateral for a loan, the bank should inform the consumer in writing in advance of the procedures involved, and the process to be employed by the bank to foreclose on the property it holds as collateral and the consequences thereof to the consumer.** **b. At the same time, the bank should inform the consumer of the legal remedies and options available to him or her in respect of the foreclosure process.** **c. If applicable, the bank should draw the consumer's attention to the fact that the bank has a legal right to recover the balance of the debt due in the event the proceeds from the sale of the foreclosed property are not sufficient to fully discharge the outstanding amount.** **d. In the event the mortgage contract or charge agreement permits the bank to enforce the contract without court assistance, the bank should ensure that it employs professional and legal means to enforce the contract, including regarding the sale of the property.**
Description	The last paragraph of the deed of mortgage on any registered land in Malawi and issued by any debtor/consumer/mortgagor to his or her bank typically provides, in effect, that, by signing deed, the mortgagor agrees that the creditor/mortgagee shall be free to exercise all remedies available to it under Section 68 of the Registered Land Act.[51] The wording of this Section is, however, routinely not provided to the consumer/debtor and its implications are not revealed by banks to their customers. Section 68 provides that "if a default is made in payment of the principal sum or of any interest or other periodical payment of any part thereof … and continues for one month, the

[51] Laws of Malawi - Cap. 58:01.

	chargee (i.e. the creditor/bank) may serve on the chargor (i.e. the debtor/consumer) notice in writing to pay the money owing …".[52] Then, in the event the chargor does not comply, within three months of the date of service of the above notice, the chargee may sell the charged property.[53] By judicial precedent, this sale can be by private treaty rather than by public auction, no notice is required to be given of the sale to the debtor/consumer and no court order in respect of the sale is needed. The law of security on personal property is badly outdated and the efforts, therefore, to overhaul the prevailing legal framework are to be welcomed. The 2011 Personal Property Security Act, to be enacted by Parliament, has well thought-out provisions dealing with: a) enforceability of a security interest in personal property created or provided for by a transaction that secures the payment of money or the performance of an obligation; b) perfection of security interests by registration, possession or control; c) priority between security and other interests in the same personal property; and d) enforcement of security interests.
Recommendation	Many countries struggle to balance the rights of homeowners to keep their homes and the rights of banks to collect on defaulted loans. As a result, the pendulum swings between permitting out-of-court enforcement favoring banks and court foreclosures that favor borrowers. Whichever direction is chosen, it is important to have rules and procedures that ensure safeguards and due process. In Malawi, consideration should be given by the Ministry of Lands and the Ministry of Justice to the amendment of Section 68 of the Registered Land Act so as to require sales by auction only, with prior written notice to the debtor of any auction. Also, a RBM Directive should require every bank to have a debt re-scheduling department. In addition, the Personal Property Security Act 2011 should be enacted as soon as feasible.
Good Practice C.10	***Bankruptcy of Individuals***[54] **a. A bank should inform its individual customers in a timely manner and in writing on what basis the bank will seek to render a customer bankrupt, the steps it will take in this respect and the consequences of any individual's bankruptcy.** **b. Every individual customer should be given adequate notice and information by his or her bank to enable the customer to avoid bankruptcy.** **c. Either directly or through its association of banks, every bank should make counseling services available to customers who are bankrupt or likely to become bankrupt.** **d. The law should enable an individual to:** **i. declare his or her intention to present a debtor's petition for a declaration of bankruptcy;** **ii. propose a debt agreement;** **iii. propose a personal bankruptcy agreement; and** **iv. enter into voluntary bankruptcy.** **e. Any institution acting as the bankruptcy office or trustee responsible for the administration and regulation of the personal bankruptcy system should provide adequate information to consumers on their options to deal with their own unmanageable debt.**
Description	Bankruptcy carries serious implications for an individual Malawian and can have a significant negative impact on his or her social and economic standing. Being declared bankrupt also entails a prohibition on being named to official positions and participating in certain economic activities.

[52] From sub-section 68 (1)
[53] Sub-section 68 (2)
[54] In some countries, individual bankruptcy may be referred to as "insolvency".

	Most customers of banks in Malawi who default on their loans, however, have little knowledge of the likelihood of being declared bankrupt and the consequences to their lives of any such declaration. The process lacks transparency and a consumer may not even know that he or she has been declared bankrupt until his or her subsequent application for a credit has been turned down. Malawi's law of personal bankruptcy dates from the British colonial era.[55] Notwithstanding its vintage, this law does enable an individual to: a) declare his or her intention to present a petition for a declaration of bankruptcy; b) propose a personal bankruptcy agreement; and c) enter into voluntary bankruptcy. In addition, the Deeds of Arrangement Act (again from the British Colonial era)[56] enables an individual to propose a debt agreement. There is, however, no requirement for a bank to inform its individual customers in a timely manner and in writing on what basis the bank will seek to render a customer bankrupt, the steps it will take in this respect and the consequences of any individual's bankruptcy. In addition, no individual customer is provided any notice and information by his or her bank so as to avoid bankruptcy. Likewise, no counseling services exist for any consumer who is, or is likely to become, bankrupt, and no official responsible for administrating and regulating Malawi's personal bankruptcy system provides any, let alone adequate, information to consumers on their options to deal with their own unmanageable debt.
Recommendation	Given the age of both the Bankruptcy Act and the Deeds of Arrangement Act, it is perhaps time for a review of these statutes on the basis of developments in these fields over the last 80 years. In addition, attention should be given to all aspects of this Good Practice, including making counseling available to those who are, or are likely to become, bankrupt, so that consumers may be able to avoid bankruptcy or at least manage the process better.
SECTION D	**PRIVACY AND DATA PROTECTION**
Good Practice D.1	***Confidentiality and Security of Customers' Information*** **a. The banking transactions of any bank customer should be kept confidential by his or her bank.** **b. The law should require a bank to ensure that it protects the confidentiality and security of the personal data of its customers against any anticipated threats or hazards to the security or integrity of such information, as well as against unauthorized access.**
Description	Malawi has yet to enact a data protection law. Also, there is no Regulation or Directive of the Registrar that deals with this subject. Thus, although banks, at least as a general rule, do keep the financial transactions of their customers confidential, the practices in these respects are left to the discretion of each bank.
Recommendation	The confidentiality of identifiable personal information is protected under several international guidelines, such as the OECD Guidelines on the Protection of Privacy and Trans-border Flows of Personal Data or the APEC Privacy Framework.

[55] See Laws of Malawi, Cap. 11:01 of April 14, 1928.
[56] See Laws of Malawi, Cap. 11:02 of May 19, 1931.

	Consideration should be given to drafting and enacting a law that would require a bank to protect the confidentiality and security of the personal data of its customers against unauthorized access and any anticipated threats or hazards to the security or integrity of such information.
Good Practice D.2	***Sharing a Customer's Information*** **a. A bank should inform its customers in writing:** **i. of any third-party dealing for which the bank is obliged to share information regarding any account of the customer, such as any legal enquiry by a credit bureau; and** **ii. as to how it will use and share the customer's personal information.** **b. Without the customer's prior written consent, a bank should not sell or share account or personal information regarding a customer of the bank to or with any party not affiliated with the bank for the purpose of telemarketing or direct mail marketing.** **c. The law should allow a customer of a bank to stop or "opt out" of the sharing by the bank of certain information regarding the customer and, prior to any such sharing of information for the first time, every bank should be required to inform each of its customers in writing of his or her rights in this respect.** **d. The law should prohibit the disclosure by a third party of any banking-specific information regarding a customer of a bank.**
Description	There are no legal provisions dealing with any aspect of this Good Practice.
Recommendation	A separate law or at least a RBM Directive should address each of these issues.
Good Practice D.3	***Permitted Disclosures*** **The law should provide for:** **i. the specific rules and procedures concerning the release to any government authority of the records of any customer of a bank;** **ii. rules on what the government authority may and may not do with any such records;** **iii. the exceptions, if any, that apply to these rules and procedures; and** **iv. the penalties for the bank and any government authority for any breach of these rules and procedures.**
Description	There are, as yet, no legal requirements touching upon any of these matters.[57] The powers of the Registrar are especially broad when it comes to information on any consumer contained in any licensed credit bureau. By the terms of the recent Credit Reference Bureau Act, for the purpose of supervision, the Registrar can demand access to all information a credit bureau may have regarding any consumer's credit history.[58]
Recommendation	Banks should be required to inform each customer in plain and understandable language about what information can be disclosed before concluding any contract with the bank. This holds as well for all co-borrowers and personal guarantors. While the Registrar should have access to aggregated data on consumers, there should be a clear statutory prohibition on allowing the Registrar access to any individual file or files. A statute or at least a Directive should: • state specific rules and procedures concerning the release to any government authority, including the Registrar, of the records of any customer of a bank; • state what the government authority may and may not do with any such records;

[57] See, however, Section 21 of the Reserve Bank of Malawi (Amendment) Act, 2010 amending section 59 of the Reserve Bank of Malawi Act at least in respect of officers of the RBM.
[58] See Section 19 of the Credit Reference Bureau Act, 2010

	• state what exceptions, if any, apply to these rules and procedures; and • provide for penalties for the bank, credit bureau and any government authority for any breach of these rules and procedures.
Good Practice D.4	***Credit Reporting*** **a. Credit reporting should be subject to appropriate oversight, with sufficient enforcement authority.** **b. The credit reporting system should have accurate, timely and sufficient data. The system should also maintain rigorous standards of security and reliability.** **c. The overall legal and regulatory framework for the credit reporting system should be:** **i. clear, predictable, non-discriminatory, proportionate and supportive of consumer rights; and** **ii. supported by effective judicial or extrajudicial dispute resolution mechanisms.** **d. In facilitating cross-border transfer of credit data, the credit reporting system should provide appropriate levels of protection.** **e. Proportionate and supportive consumer rights should include the right of the consumer:** **i. to consent to information-sharing based upon the knowledge of the institution's information-sharing practices;** **ii. to access his or her credit report free of charge (at least once a year), subject to proper identification;** **iii. to know about adverse action in credit decisions or less-than-optimal conditions/prices due to credit report information;** **iv. to be informed about all inquiries within a period of time, such as six months;** **v. to correct factually incorrect information or to have it deleted and to mark (flag) information that is in dispute;** **vi. to reasonable retention periods of credit history, for instance two years for positive information and 5-7 years for negative information; and** **vii. to have information kept confidential and with sufficient security measures in place to prevent unauthorized access, misuse of data, or loss or destruction of data.** **f. The credit registries, regulators and associations of banks should undertake campaigns to inform and educate the public on the rights of consumers in the above respects, as well as the consequences of a negative personal credit history.**
Description	See Section "Good Practices: Credit Reporting System".
Recommendation	See Section "Good Practices: Credit Reporting System".
SECTION E	**DISPUTE RESOLUTION MECHANISMS**
Good Practice E.1	***Internal Complaints Procedure*** **a. Every bank should have in place a written complaints procedure and a designated contact point for the proper handling of any complaint from a customer, with a summary of this procedure forming part of the bank's Terms and Conditions referred to in B.7 above and an indication in the same Terms and Conditions of how a consumer can easily obtain the complete statement of the procedure.** **b. Within a short period of time following the date a bank receives a complaint, it should:** **i. acknowledge in writing to the customer/complainant the fact of its receipt of the complaint; and** **ii. provide the complainant with the name of one or more individuals appointed by the bank to deal with the complaint until either the complaint is resolved or cannot be processed further within the bank.**

	c. The bank should provide the complainant with a regular written update on the progress of the investigation of the complaint at reasonable intervals of time. **d. Within a few business days of its completion of the investigation of the complaint, the bank should inform the customer/complainant in writing of the outcome of the investigation and, where applicable, explain the terms of any offer or settlement being made to the customer/complainant.** **e. When a bank receives a verbal complaint, it should offer the customer/complainant the opportunity to have the complaint treated by the bank as a written complaint in accordance with the above. A bank should not require, however, that a complaint be in writing.** **f. A bank should maintain an up-to-date record of all complaints it has received and the action it has taken in dealing with them.** **g. The record should contain the details of the complainant, the nature of the complaint, a copy of the bank's response(s), a copy of all other relevant correspondence or records, the action taken to resolve the complaint and whether resolution was achieved and, if so, on what basis.** **h. The bank should make these records available for review by the banking supervisor or regulator when requested.**
Description	Banks are not required to have a written complaints procedure for the proper handling of a complaint from a customer and, thus, as general practice, no summary of it is supplied to any customer. Invariably, therefore, the consumer knows neither who within a bank is authorized to deal with consumer complaints or the procedures which will be followed. These realities place consumers at significant and unwarranted disadvantage. Also, the procedures that do exist typically do not require the consumer to be heard. No bank in Malawi has adopted any aspect of this Good Practice.
Recommendation	Since the FSA mandates the Registrar to promote complaint resolution schemes within financial institutions,[59] a RBM Directive should be issued in these respects for all commercial banks.[60] This directive should be guided by each aspect of this Good Practice and by section 93 of the FSA. The Directive should require the establishment of a dispute resolution unit within each bank, as well as the delivery to the RBM of all relevant information dealing with complaints. This information should be in a standardized format, as devised by the RBM. In this way, the bank in question, as well as the RBM, will be able to analyze problem areas and take corrective action.
Good Practice E.2	***Formal Dispute Settlement Mechanisms*** **a. A system should be in place that allows customers of a bank to seek affordable and efficient recourse to a third-party banking ombudsman or equivalent institution, in the event the complaint of one or more of customers is not resolved in accordance with the procedures outlined in E.1 above.** **b. The existence of the banking ombudsman or equivalent institution and basic information relating to the process and procedures should be made known in every bank's Terms and Conditions referred to in B.7 above.** **c. Upon the request of any customer of a bank, the bank should make available to the customer the details of the banking ombudsman or equivalent institution, and its applicable processes and procedures, including the binding nature of decisions and the mechanisms to ensure the enforcement of decisions.** **d. The banking ombudsman or equivalent institution should be appropriately**

[59] Section 93

[60] Although measures along these lines have apparently been drafted by the RBM regarding the micro-finance industry, they need, as well, to be prepared regarding all of Malawi's commercial banks.

	resourced and discharge its function impartially. **e. The decision of the banking ombudsman or equivalent institution should be binding upon the bank against which the complaint has been lodged.**
Description	In the event a customer's complaint is not resolved to his or her satisfaction internally within a bank, no affordable and efficient recourse mechanism exists to any third-party banking ombudsman or equivalent institution. Rather, on paper at least, formal avenues of redress exist solely within Malawi's judicial system. In the first place, under Part VI of the CFTA, any consumer who has suffered "loss or harm as a result of any agreement, arrangement, undertaking, act or omission which is prohibited under [the CFTA may] recover damages by way of civil proceedings in the High Court from the person (i.e. the financial institution) responsible …".[61] Since no mention is made here of a minimum sum which must be in dispute, this provision appears to override the requirement that would otherwise prevent the High Court from taking jurisdiction over any dispute having a value of less than MKW 1 million. Also by Section 3 of the CFTA, consumers are entitled to full, timely, adequate and prompt compensation for any damages suffered by them which are attributed to any supplier or trader (i.e. any bank). In addition, Part VIII of the CPA provides its own measures for consumer redress and the mechanisms aimed at ensuring that such redress proves possible. According to Subsection 49, the "defence, promotion or enforcement of rights under [the CPA] or any other written law" may be "exercised or conducted through individual or collective mediation, negotiation, arbitration or litigation". Also, collective action may be conducted where so-called "collective or diffuse interests or rights" are involved (any such interest is defined as "supra-individual rights or interests having an indivisible nature to which undetermined individuals are entitled"). In addition, registered consumer associations are entitled "to act in judicial or administrative tribunals in the collective enforcement or defence of the rights that [the CPA] or any other written law vests in a consumer and they may represent consumers in such tribunals". Finally, each decision rendered in favor of consumers in a collective action has general effect and applies to all consumers. Also by Part VIII of the CPA, each subordinate court[62] is to have jurisdiction over any claim of a consumer who resides within "its area". Such courts are to "be available and accessible to all consumers in order to provide simple, speedy, inexpensive and understandable justice" and they are also to "have the power to order alteration … rescission or reformulation of consumer contracts and transactions".[63] In addition, these courts are stated to exercise penal and remedial powers provided under the CPA and any other written law and may "give the following remedies to a consumer: a) cancellation, recission or revision of a contract or its clauses; b) damages and interests; or c) fine the guilty party".[64] For purposes of disposing of consumer claims, the funding of these subordinate courts is to be assured by allocations from Local Authorities.[65] However, just as no funding has been made available for the CPC, no funding from any source has been made available for any subordinate court. Part IX of the CPA also grants power to the Minister of Trade to make regulations "for the

[61] Section 52
[62] The term "subordinate court" is defined in Section 2 of the Courts Act, Cap 3:02 as "any court, subordinate to the High Court, established under this Act but does not include a Traditional Court established under the Traditional Courts Act or any Act replacing the same."
[63] See subsections 50(1) and 53(1)
[64] Subsections 52(1) and (2)
[65] Section 51

	better carrying into effect" of the CPA, as well as to set fees to be paid by any consumer or consumer association who or which makes a complaint.[66] In addition, the Chief Justice, in consultation with the Minister, is empowered to make regulations prescribing: a) the manner of making complaints to the subordinate courts; b) the monetary jurisdiction and ceilings for matters which may be tried in subordinate courts; c) the procedure of subordinate courts in matters of consumer protection; d) the forms for pleadings in matters of consumer protection; and e) the sessions of the subordinate courts in order to facilitate access as well as to ensure expeditious determination of matters.[67] However, just as no funding from any source has ever been provided for the purpose of constituting the CPC, there has been no funding for subordinate courts to function as they are meant to do regarding consumer complaints.[68] In addition, no regulations have ever been issued under the CPA, whether by the Minister of Trade or by the Chief Justice. Under the FSA, however, there is a requirement that if a complaint is not resolved by means of a bank's own internal dispute settlement scheme,[69] in order to ensure fairness of the process, the complaint must be determined by a person independent of the bank that is the subject of the complaint, with that determination being binding on the bank but not on its customer.[70] Even with all of the apparent statutory requirements, however, there is widespread agreement that an office of a neutral, highly-respected third party (called the Office of the Financial Services Ombudsman or other similar title) should be created for the sole purpose of resolving complaints that individual consumers have against their banks. The funding for the Office would, ideally, come, in part, from all banks on a sliding scale depending on size, and, in part, perhaps, from a modest charge required or to be volunteered by any consumer who seeks the assistance of the Office, with the balance, if any, coming from Government. Unlike in the case of the Administrative Ombudsman (as provided for in the Constitution), decisions of the Financial Services Ombudsman would need to be binding upon the financial institution, whether by statute or "compulsory" contract.
Recommendation	The absence of effective small claims courts in Malawi prevents an affordable means for the average customer to bring action against banks. Thus, an office of Ombudsman for Banking Services (if not for Financial Services, more generally) should be established in the near term to deal expeditiously, independently, professionally and inexpensively with consumer disputes that are not resolved internally by banks. The establishment and sustainability of such offices are now generally regarded as fundamental requirements for sound consumer protection. An Ombudsman can also identify complaints that are few in number but high in importance for consumer confidence in the financial system, thereby enabling RBM and other relevant authorities to take effective action to remedy the situation. There are a number of ways an Ombudsman's office might be established. For example: • through specific legislation; or • through the Registrar issuing a Directive requiring all banks to join an approved Ombudsman Scheme covering complaints made by consumers. The Scheme would have rules binding on all banks (and which the Registrar would need to approve). Regardless of the way in which the Scheme is established, it should be developed in close consultation with all relevant stakeholders, including relevant Ministries, the banks, BAM and consumer representatives, including those of CAMA.

[66] Subsections 56(1) and (2)
[67] Subsection 56(3)
[68] Under Part IX of the CPA
[69] Section 93
[70] Subsection 94 (1) item f.

	At a minimum, the rules of any Ombudsman Scheme would need to cover: • who could be a member; • the nature of disputes which could be dealt with by the Ombudsman and any applicable claims limits (bearing in mind that the service would be for consumers); • compensation caps; • the fees for membership and for dealing with disputes; • the fact that decisions are to be binding on the bank but not on the consumer; • confidentiality of complainant information; • the circumstances in which legal action could be launched while a matter is with the Ombudsman (for example, if a statutory period was about to expire); and • record keeping of information about caseloads, processing times, systemic issues, cases of serious misconduct (such as fraud). The Scheme would also need an overseeing body. Such a body would: • have its own terms of reference; • have an equal number of industry and consumer representatives and an independent Chair; • have functions such as appointing the Ombudsman for the service, monitoring the scheme, approving budgets and monitoring systemic complaint issues and serious misconduct issues such as fraud; • require an independent annual audit of the operation of the scheme; and • report systemic and serious misconduct issues to the Registrar as well as provide an annual report. In developing an Ombudsman Scheme, the Registrar might have regard to International Standards on Internal Dispute Resolution Schemes – such as those in ISO 10002 – 2006, as well as to the exemplary framework for, and operations of, the Ombudsman for Banking Services in South Africa.[71]
Good Practice E.3	***Publication of Information on Consumer Complaints*** **a. Statistics and data of customer complaints, including those related to a breach of any code of conduct of the banking industry should be periodically compiled and published by the ombudsman, financial supervisory authority or consumer protection agency.** **b. Regulatory agencies should publish statistics and data and analyses related to their activities in respect of consumer protection regarding banking products and services so as, among other things, to reduce the sources of systemic consumer complaints and disputes.** **c. Banking industry associations should also analyze the complaint statistics and data and propose measures to avoid the recurrence of systemic consumer complaints.**
Description	To date, no statistics and data of customer complaints industry have been or are being compiled and published by any government agency of other institution.
Recommendation	Statistics and data on customer complaints should be compiled, analyzed and published by the CFEP Unit in the RBM. Apart from providing useful quantitative information, such statistics on customer complaints would provide the tools needed for predictions and forecasting that form essential input for policy decision-making. However, the collection of statistics and data alone is not sufficient. Publication of the statistics and data is required to inform the Malawian public of common problems affecting consumers and to increase the knowledge and awareness of consumers. By analyzing statistics and data, the CFEP Unit and BAM would be able to identify recurring

[71] See: http://www.obssa.co.za/

	problems and areas of weakness in banking practices. They can then take steps to deal with the source of these problems. The analyses will also be critical for the identification of correlation between issues raised in complaints and systemic issues or weaknesses that may affect the soundness of the banking system itself.
SECTION F	**GUARANTEE SCHEMES and INSOLVENCY**
Good Practice F.1	***Depositor Protection*** **a. The law should ensure that the regulator or supervisor can take necessary measures to protect depositors when a bank is unable to meet its obligations including the return of deposits.** **b. If there is a law on deposit insurance, it should state clearly:** **i. the insurer;** **ii. the classes of those depositors who are insured;** **iii. the extent of insurance coverage;** **iv. the holder of all funds for payout purposes;** **v. the contributor(s) to this fund;** **vi. each event that will trigger a payout from this fund to any class of those insured; and** **vii. the mechanisms to ensure timely payout to depositors who are insured.** **c. On an on-going basis, the deposit insurer should directly or through insured banks or the association of insured commercial banks, if any, promote public awareness of the deposit insurance system, as well as how the system works, including its benefits and limitations.** **d. Public awareness should, among other things, educate the public on the financial instruments and institutions covered by deposit insurance, the coverage and limits of deposit insurance and the reimbursement process.** **e. The deposit insurer should work closely with member banks and other safety-net participants to ensure consistency in the information provided to consumers and to maximize public awareness on an ongoing basis.** **f. The deposit insurer should receive or conduct a regular evaluation of the effectiveness of its public awareness program or activities.**
Description	The Registrar can take swift action in the event it appears to him that a bank is "unlikely to meet the demands of its depositors or pay its obligations in the normal course of business".[72] There is, however, no law on deposit insurance. Also, within the Registrar's wide range of possible Directives[73], one could require some form and extent of insurance cover for customers' deposits with their banks.
Recommendation	Malawi's policymakers have choices regarding how depositors can be protected. Explicit, limited-coverage deposit insurance has become the preferred choice in many countries compared to reliance on implicit protection. A deposit insurance system should limit the scope for discretionary decisions, promote public confidence, help to contain the costs of resolving failed banks and provide for an orderly process for dealing with bank failures. Consideration should be given to establishing a deposit insurance system by statute, with this law specifying how the system is to be funded on a sustainable basis, as well as its obligations to depositors. In order to be credible, the deposit insurance system needs to be part of a well-constructed financial system safety net, properly designed and well implemented. The system needs to be supported by strong RBM prudential regulation and supervision, sound accounting and disclosure regimes, and effective law enforcement. The system should also be supported

[72] See Section 21 of the Banking Act, 2010
[73] By Section 34 of the FSA

	by a high level of public awareness about its existence, its benefits and its limitations.
Good Practice F.2	***Bank Insolvency*** **a. Depositors should enjoy higher priority than other unsecured creditors in the liquidation process of a bank.** **b. The law dealing with the insolvency of banks should provide for expeditious, cost effective and equitable provisions to enable the maximum timely refund of deposits to depositors.**
Description	In the liquidation process of a bank, the priorities for payments are as follows: a) the liquidators expenses; b) depositors *pari passu*; c) secured creditors; d) employees of the bank for all wages and salaries due, net of any liabilities to the bank; and then e) other creditors *pari passu*.[74] Under the Banking Act, 2010, the liquidator is obliged to begin paying depositors and creditors within 90 days after submission of a report on the assets and liabilities of the failing or failed bank. This report must be submitted to the Registrar within five months of the liquidator's appointment.[75] Thus, payment of depositors would normally start some 8 months after the liquidator's appointment. This length of delay seems excessive.
Recommendation	In time, consideration might usefully be given to taking steps to ensure that maximum timely refunds of deposits to depositors occur more expeditiously.
SECTION G	**CONSUMER EMPOWERMENT**
Good Practice G.1	***Broadly based Financial Capability Program*** **a. A broadly based program of financial education and information should be developed to increase the financial capability of the population.** **b. A range of organizations, including those of the government, state agencies and non-government organizations, should be involved in developing and implementing the financial capability program.** **c. The government should appoint an institution such as the central bank or a financial regulator to lead and coordinate the development and implementation of the national financial capability program.**
Description	The Malawi government set up a National Taskforce on Consumer Financial Education in 2010, with participation of several stakeholders from the financial industry, government Ministries, civil society, academia and the media. The Taskforce constituted a Technical Committee on Financial Literacy, assigned with the responsibility of developing a National Strategy for Consumer Financial Education, an implementation plan of the National Strategy, among other tasks. The RBM is the chair and champion of the Committee. It is hoped that the Committee and Taskforce will finalize developing the Strategy in 2011.
Recommendation	The most effective ways of improving any Malawian's financial capability vary according to factors such as his or her age, income level, educational attainment and particular culture. A range of approaches will undoubtedly be needed so as to reflect the diversity of people's needs and aptitudes. These approaches, however, should focus on attitudes, as well as on financial education, information and skills. For example, it is not sufficient that Malawians know how to save; they also need: (a) to understand the benefits that savings can bring to them and their families; (b) to recognize that it is worth deferring current expenditures; and (c) to be motivated to set aside money on a regular basis.

[74] Section 32 of the Banking Act, 2010
[75] Section 31 of the Banking Act, 2010

	It will also be important to cover basic issues such as budgeting, saving, planning ahead and choosing products, rather than merely to provide information about particular types of financial products and services. Those bodies in Malawi, such as the CFEP Unit in the RBM, BAM and CAMA that have an interest in improving people's financial capability should work together so that a range of initiatives is developed over time in order to help Malawians improve their capacities to manage their own personal finances. The CFEP Unit of the RBM should further lead and coordinate the development and implementation of the national financial capability program. And, in time, the CFEP Unit should provide drive and momentum in respect of this program; secure the active engagement of a broad range of other concerned organizations; and ensure that priorities are identified and that unnecessary duplication is avoided, so that the most cost-effective use is made of available resources.
Good Practice G.2	***Using a Range of Initiatives and Channels, including the Mass Media*** **a. A range of initiatives should be undertaken by the relevant ministry or institution to improve people's financial capability regarding banking products and services.** **b. The mass media should be encouraged by the relevant ministry or institution to provide financial education, information and guidance to the public regarding banking products and services.** **c. The government should provide appropriate incentives and encourage collaboration between governmental agencies, banking regulators, the banking industry and consumer associations in the provision of financial education, information and guidance regarding banking products and services.**
Description	No such initiatives have yet been undertaken, no such encouragement has been provided to the mass media and no such incentives provided by government.
Recommendation	A range of financial capability initiatives should, ideally, be developed, including: • financial education programs for schoolchildren; • programs aimed at young people, such as university and college students; • financial education presentations and other facilitated learning in workplaces and local communities, supported by "train the trainer" programs; • publications and websites; and • television, radio and dramatic productions. Financial education should be provided in Malawi's schools so that schoolchildren gain the understanding, skills and confidence to manage their money as they take on responsibility for managing their own financial affairs. Although there is unlikely to be room in the curriculum for financial education to be included as a separate subject, financial education could easily be incorporated into other subjects, such as mathematics, life skills and citizenship curriculum. Young Malawians are more likely to find financial education engaging where it is interactive (for example, by involving research and problem-solving) and where it relates to issues they, themselves, regard as relevant to their own lives in the reasonably foreseeable future.[76] So, for example, older students are more likely to react positively to issues regarding saving to buy a means of transportation or to help pay for their education, rather than to issues relating to pensions or mortgages. The media - particularly television and radio - can play an important role in providing financial education and information. The RBM and BAM should also support initiatives by providing

[76] See Shaun Mundy, *Financial Education in Schools: Analysis of Selected Current Programmes and Literature – Draft Recommendations for Good Practices*, published in proceedings of OECD-US Treasury International Conference on Financial Education, Washington DC, 7-8 May 2008, Vol. II.

	the media with information about different types of financial services and products, as well as current concerns. The Association of Business Journalists of Malawi can also play an important role by organizing workshops, conferences and training seminars for their members dealing with financial sector issues.
Good Practice G.3	***Unbiased Information for Consumers*** **a. Regulators and consumer associations should provide, via the internet and printed publications, independent information on the key features, benefits and risks –and where practicable the costs– of the main types of banking products and services.** **b. The relevant authority or institution should encourage efforts to enable consumers to better understand the products and services being offered to consumers by banking institutions, such as providing comparative price information and undertaking educational campaigns.** **c. The relevant authority or institution should adopt policies that encourage non-governmental organizations to provide consumer awareness programs to the public regarding banking products and services.**
Description	Under Part II of the CPA, all consumers are entitled to true, sufficient, clear and timely consumer education, including information on whatever financial goods and services are offered, as well as on prices, characteristics, quality and risks that may be encountered in the consumption of any financial goods and services.[77] These 'rights', however, are not backed up by the means to ensure that consumers receive any consumer education at all, let alone "true, sufficient, clear and timely" consumer education.
Recommendation	In order to boost the confidence of consumers and potential consumers regarding the suitability for them of their purchases of financial products and services, they should have access to reliable and objective information. In time, the CFEP Unit within the RBM should be well-placed to provide this. For example, the UK Financial Services Authority's consumer website Money Made Clear: (a) includes information on a range of products;[78] (b) provides a facility to download or to order leaflets (which can also be ordered by telephone);[79] and (c) includes impartial tables[80] which people can use to compare the costs and some other features of similar financial products from different companies. South Africa's financial regulators (National Credit Regulator and Financial Services Board) have also developed several materials with unbiased information on financial products and services for consumers.
Good Practice G.4	***Consulting Consumers and the Financial Services Industry*** **a. The relevant authority or institution should consult consumers, banking associations and banking institutions to help them develop financial capability programs that meet banking consumers' needs and expectations.** **b. The relevant authority or institution should also undertake consumer testing with a view to ensuring that proposed initiatives have their intended outcomes.**
Description	Given the fledgling status of the CFEP Unit in the RBM, it has not yet consulted consumers, banks, BAM and CAMA to help in the development of specific financial capability programs that meet banking consumers' needs and expectations. Still, a good first step has been the creation by the Government of the multi-stakeholder National Taskforce on Consumer Financial Education (NTCFE), chaired by the RBM, which includes representatives from the banking industry and consumer movement. Likewise, there has not yet been any consumer testing.
Recommendation	In developing financial capability programs, consultations will be helpful in order to take into account the perspectives of consumers and banks, through CAMA and BAM respectively. It is important that initial consultations developed within the NTCFE continue beyond the preparation of the National Strategy of Financial Literacy.

[77] See Section 4 of the CPA
[78] See http://www.moneymadeclear.fsa.gov.uk/
[79] See http://www.moneymadeclear.fsa.gov.uk/publications.
[80] See http://www.moneymadeclear.fsa.gov.uk/tools/compare_products.html.

	To ensure that consumers are actively involved in the policy development process, the government or private sector organizations or both should provide appropriate funding to non-governmental organizations for this purpose and support CAMA in its efforts to represent consumers in the policy-making process. So as to ensure that financial literacy initiatives are likely to have their intended impact, the proposed initiatives should be tested with end-users (i.e. a representative sample of the type of person any specific initiative is intended to reach). Focus groups and pilot studies should be considered for these purposes.
Good Practice G.5	***Measuring the Impact of Financial Capability Initiatives*** **a. The financial capability of consumers should be measured, amongst other things, by broadly-based household surveys and mystery shopping trips that are repeated from time to time.** **b. The effectiveness of key financial capability initiatives should be evaluated by the relevant authorities or institutions from time to time.**
Description	To date, no data has been obtained and no evaluation made regarding the financial capability of any segment of Malawi's population. Thus, there is, as yet, no 'base-line' for purposes of measuring the impact of financial capability initiatives of any sort.
Recommendation	In order to measure the impact of financial education and information, the financial capability of a sample of the population should be measured by means of large-scale market research that gets repeated from time to time. Initiatives will inevitably take time to have measurable impact on the financial capability of any population, so it is likely to be sufficient to repeat the survey every four to five years. In addition, key financial capability initiatives should be evaluated to assess their impact on those they are intended to reach. With this essential information, policymakers and funders will be able to decide which initiatives should be continued and perhaps scaled up and which should be modified or discontinued.
SECTION H	**COMPETITION AND CONSUMER PROTECTION**
Good Practice H.1	***Regulatory Policy and Competition Policy*** **Banking regulators and competition authorities should be required to consult with one another for the purpose of ensuring the establishment, application and enforcement of consistent policies regarding the regulation of financial services.**
Description	Although efforts are now underway within the RBM to formulate regulation on banking products and services, there is no detailed information on such regulatory procedures. As indicated in the description of Good Practices A. 1 and H. 2, the CFTC has been gravely hampered by its lack of resources ever since being established, on paper at least, in 2000. In the result, no consultations have taken place between the RBM and the CFTC regarding the establishment, application and enforcement of any, let alone consistent, policies regarding the regulation of banking products and services. Although the law does not expressly require the RBM and the CFTC to consult on any matters, let alone in these respects, the RBM is entitled to enter into such arrangements with any agency of Government having functions related to the financial system and the regulation or supervision of financial services.[81] The RBM and the CFTC can, therefore, agree on when and how consultations and the exchange of information between them will occur.

[81] FSA, Section 19

Recommendation	It could prove helpful for the work of the CFEP Unit within the RBM and for that of the CFTC (and ultimately for consumers) if the RBM and the CFTC would regularly consult one another for the purpose of ensuring the establishment, application and enforcement of consistent policies for the regulation of banking products and services. Consideration should be given to requiring such consultations.
Good Practice H.2	***Review of Competition*** **Given the significance of retail banking to the economy as a whole and to the welfare of consumers, competition authorities should:** **i. monitor competition in retail banking;** **ii. conduct and publish for general consumption periodic assessments of competition in retail banking (such as the range of interest rates across banks for specific products); and** **iii. make recommendations publically available on enhancing competition in retail banking.**
Description	From the entry into force of the CFTA in 2000, the operations of the CFTC have been severely hampered by its lack of resources. While the CFTC is supposed to carry out investigations of suspected anti-competitive behavior, the required staff members are still to be hired. As of mid-February 2011, the CFTC's full-time Secretariat consisted of only one employee. Also, four out of seven appointed, part-time, CFTC-member positions then remained to be filled. This has made meetings of the CFTC especially problematic since, with only 6 of the 10 required Commissioners positions having been filled, the required quorum of five for the conduct of any CFTC business is often difficult to obtain. It is not surprising, therefore, that the CFTC has never monitored competition in retail banking; nor has it been able to conduct and publish any assessment of competition in retail banking. In addition to its theoretically broad powers in terms of its own monitoring and investigating of actual or potential anti-competitive agreements or behavior, as well as in terms of the holding of hearings and the fixing of penalties, the CFTC is supposed to root out and deal harshly with any bank's "misleading" terms or advertisements or "unconscionable" conduct in respect of its actual or potential individual customers. With only one section of the CFTA that deals with these matters,[82] however, statutory concern for protecting individuals is only a minor footnote to what the CFTA otherwise requires of the CFTC in terms of ensuring that Malawi's markets remain competitive.
Recommendation	Since it has proven exceedingly difficult, if not impossible, for the CFTC to carry out its work in respect of anti-competitive behavior, thought should be given to removing *any* CFTC responsibility in respect of consumer protection. The responsibilities of the CFTC are more than enough in terms of devising, applying and enforcing well-conceived and articulated competition policies. To continue to burden the CFTC in addition in matters of consumer protection generally, and in respect of the acquisition and delivery of financial products and services in particular, seems unreasonable, especially in view of the fact that the RBM, as regulator, has evident interest, the mandate under the FSA and an already growing human resource capacity to take on this role. Since it would be wrong to have the consumer protection work of RBM compromised by Section 43 of the CFTA (especially since Section 43 has never been applied by the CFTC), consideration should be given to amending the CFTA to remove Section 43. As of mid-February 2011, a campaign had begun by means of newspaper advertisements, etc., with a view to the hiring of an Executive Director, a lawyer, an economist and an accountant

[82] Section 43 of the CFTA

	for the CFTC's Secretariat. It is intended that these positions be filled by qualified candidates in 2011.[83] In addition, names have apparently been forwarded to the Minister of Trade and from him to the office of the President for eventual Presidential appointment of four additional members of the CFTC so as to fill these long-outstanding vacancies. These recruitment efforts can only be encouraged.
Good Practice H.3	***Impact of Competition Policy*** **The competition authority and the regulator should evaluate the impact of competition policies on consumer welfare, especially regarding any limitations on customer choice and collusion regarding interest and other charges and fees.**
Description	For the reasons stated above, the CFTC has a particularly difficult time monitoring and enforcing compliance with the CFTA, let alone setting policies and monitoring and enforcing compliance with them. With the fledgling CFEP Unit in the RBM as the identified commercial banking business conduct regulator, it and the CFTC have yet to carry out any, let alone systematic, separate or joint evaluations of the impact of competition policies on the welfare of consumers in their dealings with banks.
Recommendation	In time, it will be important for the CFTC and the CFEP Unit to carry out competition policy impact evaluations on consumer welfare, with a focus on any possible limitations on customer choice, as well as collusion regarding interest and other charges and fees. The well-being of Malawi's consumers will obviously be enhanced to the extent that there is availability of choice, as well as fees and charges of banks that are reasonable and clearly stated.

[83] Initially it was expected that positions would be filled by June 2011, but the process is still underway as at August 2011.

CONSUMER PROTECTION IN THE NON-BANK CREDIT SECTOR

Overview

A number of government initiatives regarding financial access have focused, in their initial stages, on strengthening an emerging microfinance sector and increasing the total number of microfinance clients in Malawi. The main target of such programs has been, and continues to be, the rural adult population, as they represent over 84% of all adults in Malawi.[84] Nonetheless, it is broadly recognized that financial access remains limited even in urban settings. The government-driven financial inclusion efforts, as well as other initiatives run by international or local organizations, recognize the various challenges that the country faces to achieve greater levels of financial inclusion, ranging from serious deficiencies in the basic public infrastructure such as power, water supply and roads, perceived unawareness and lack of understanding of financial products and services, very low levels of income compared to the price of financial services, limited opportunities and skills to support sustainable income-generation activities among the poor, lack of identification documents, and physical distance between financial services providers and the majority of the unbanked population. Lack of confidence, cultural differences and intimidation form additional barriers for financial inclusion among the poor and raise consumer protection concerns.

The recent growth of the non-bank credit sector is the result, to a certain extent, of further promotion of financial inclusion initiatives and limited response from the banking sector to an increasing demand for financial services. Retail banking is a new and largely unexplored niche for commercial banks operating in Malawi, which have been focusing on high-worth individual customers in addition to lucrative corporate banking. Only as recently as 2010, a few banks started experimenting with products and services targeting the mass market, thereby making initial tentative efforts to enter the microfinance sector. The continuous lack of investment by banks in the mass market has sustained a large unmet demand for financial services, which is being partially tapped by non-bank microfinance providers focusing on the provision of small loans either to groups of borrowers or individual clients. The demand for financial services is estimated at between 1.5 and 5 times the current supply.[85] Although the microfinance sector has a fairly good presence in the rural areas compared to commercial banks, the demand for finance remains largely unmet throughout the country. The FSAP 2008 estimated that the microfinance sector serves approximately 5.3% of the adult population (or 313,254 adults), while the banking sector reaches out to 4.6% (or 275,558 adults).

Although young and less developed, the microfinance industry has been instrumental in bringing a limited range of formal financial services to Malawian households. The core business of the microfinance sector is the provision of microcredit, both group lending and individual loans, with focus on agriculture loans –although there seems to be broad agreement that providing agricultural loans continues to be a challenging business for most providers, due not only to the high costs of increasing physical presence in the countryside, but also to the difficulties in achieving good performance.[86] However, the variety and quality of the offerings varies substantially. In some cases, the loans are provided as in-kind inputs of fertilizer and seeds. Most commonly targeted clients are groups of women,

[84] Finscope Survey Malawi 2009

[85] Source: Burritt, K., "Expanding Access to Financial Services in Malawi", UN Capital Development Fund <http://www.uncdf.org/english/microfinance/uploads/technical/MalawiMFlr2.pdf>, March 2006.

[86] There seems to be a bias to non-agricultural lending methodology. Further experimentation and research might be necessary to identify adequate products and lending methodologies that work for agricultural development while allowing for good portfolio performance. See also Brune et al (2011), "Commitments to Savings: A Field Experiment in Rural Malawi".

in the case of group lending. Individual lending tends to focus on male borrowers. The microfinance-oriented banks are important providers of savings and transactional services linked to checking and savings accounts[87]. In Malawi, consumer finance companies providing payroll loans are also considered microfinance providers. Salaried workers have been common targets for payroll lenders.[88] Their loans can reach nominal interest rates of over 30% per month, excluding the costs of compulsory loan insurance of about 1-2% and loan processing fees of up to 3% of the value of the loan.

Various types of institutions offer microfinance services in Malawi. Microfinance providers assume a variety of legal forms and ownership structures including membership-based savings and credit cooperatives (SACCOs), limited liability companies, NGOs, government-administered trusts, government-owned and private commercial banks. Through its various programs and corporations, the government of Malawi is the largest single provider of microfinance services. The government also has stake in several commercial banks that conduct microfinance business, such as NBS and Indebank. It appears that a number of private commercial banks are planning to enter the microfinance sector or have started piloting new products for the mass market.

There are 58 SACCOs grouped in a membership-based organization, namely the Malawi Union of Savings and Credit Cooperatives (MUSCCO). A SACCO is a member-owned financial cooperative whose primary objective is to mobilize savings and afford members access to loans (productive and provident) on competitive terms as a way of enhancing their social-economic well being. The number of members affiliated to a SACCO varies widely, from under a hundred to a few thousand members. Established in 1980, MUSCCO is a cooperative of SACCOs, with more than 100,000 members in total. MUSCCO members mobilize MKW 2.4 billion in deposits (most held in shares, not savings accounts) and have, as a group, nearly MKW 3 billion in total assets. Many of MUSCCO affiliates work exclusively with share-based payroll loans by establishing agreements with a limited number of companies who in turn deduct the loan installments directly from the borrower's salary. The average loan size of a SACCO is MKW 20,824 and the average interest rate is 31.5% per year. Savings accounts held at the few SACCOs providing this facility pay an average of 7.3% per year. MUSCCO is considering establishing an insurance company to improve its current insurance scheme. It is estimated that other 30 to 40 small cooperatives operate in the country and are not members of MUSCCO.

As of September 2010, the largest specialized institutions offering microfinance products had a total outstanding loan portfolio of MKW 12 billion and 471,797 borrowers, out of which 57% are women. The 21 largest microfinance providers, including MUSCCO and microfinance banks, are members of the Malawi Microfinance Network (MAMN). Only 3 MAMN members, namely Opportunity International Bank of Malawi (OIBM), Malawi Savings Bank (MSB) and Malawi Rural Finance Company (MRFC), are allowed to accept deposits from the public. OIBM has around 70% of the total number of depositors in MAMN member institutions, followed by MRFC with 16% and MSB with 14%.

The non-bank microfinance sector as a whole has shown relatively poor performance. Even SACCOs, which lend against member share contributions (and some lend exclusively against payrolls), show a relatively high ratio of non-performing loans (a total average of 12.5 as of September 2010).[89]

According to the FSAP 2008, there is concern in the industry regarding the poor performance of some of the government's microfinance programs. Lax loan collection policies are affecting the

[87] Leasing is not included in this diagnostic, as in Malawi it is a business largely focused on corporate clients rather than on retail customers, and operated as divisions of commercial banks, rather than by independent leasing companies.
[88] Payroll lenders sign agreements with employers in order to deduct loan installments from the borrower's monthly salary, which is then transferred to the lender.
[89] The institution oriented to the microfinance segment with best performance indicators is OIBM, a commercial bank that started operations in 2003, reaches over 300,000 depositors and 50,000 borrowers, and has a non-performing loans ratio below 3%.

repayment culture among borrowers in the micro-finance sector as a whole. Particularly MRFC, the single dominant supplier of microcredit and savings facilities, has consistently shown poor performance, which has been forcing it to shift from agricultural loans to small and medium business clients. MRFC started with World Bank and IFAD support in 1994 and it is now a limited liability company owned by the government. About 47% of MRFC's loans issued by 2004 were later treated as losses according to a study by Chemonics/USAID 2004.[90] MRFC has a good presence in rural areas, although, like most microfinance providers, it still does not carry on business far from main roads and trade centers. It has a network of six service branches and 20 sub-branches usually operating in local government buildings[91].

The main challenges for the sustainable growth of the microfinance industry are high operating costs, the low level of institutional capacity of microfinance providers and an inadequate repayment culture. High operating costs are associated with the provision of small value, labor-intensive loans, as well as savings in areas which often lack reliable basic infrastructure such as electricity, roads and telecommunications. Such challenges have led the sector to concentrate its activities in urban and semi-urban centers, creating concerns within micro-finance institutions themselves, as well as the consumer association (CAMA) and the RBM, regarding multiple borrowing and over-indebtedness. These concerns are heightened by the lack of credit history information for microfinance borrowers and sparsely available credit information for other borrowers within the financial system. Another challenge is the low level of institutional capacity. Microfinance providers find it hard to identify and retain qualified personnel to support healthy growth. This has hampered financial performance, as well as the adoption of good business conduct standards. Last, the direct provision of loans by the government through MRFC and MSB is generally seen by the private sector as having a negative impact on the repayment culture, which could affect the long-term sustainability of the microfinance sector as a whole. State-owned financial institutions are also seen as having poor underwriting and collection standards and weak corporate governance, and being laxly supervised by the RBM.

However, the biggest challenge for the industry is its own underdevelopment, reflected in inadequate infrastructure, deficient management capacity, faulty information and management systems and procedures, and low standards of market conduct. The lack of basic infrastructure negatively impacts the ability of providers to keep client information safe and accurate by safeguarding personal files, transactional and account records. This raises particular concerns for SACCOs and MFIs with growing numbers of clients, assets and, most importantly, liabilities. For instance, SACCOs are required by its membership organization to have an office that provides safety to its members' funds, including a built-in safe, an organized filing system, and security services. However, most SACCOs are not capable of complying with such requirements, or at least are not pushed to do so. Even some relatively large SACCOs (with more than 1,000 members) are operating with low standards of physical security. Allied to the lack of automated systems for financial management and record keeping, such conditions represent an important risk to members, especially if paper-based records are destroyed, for example, in a fire or flood. Despite the commendable work being done by its industry association in promoting international best practices, the SACCO sector is in dire need of more effective management and information systems. Most SACCOs are operating exclusively with manual procedures and controls. While the association is negotiating the acquisition of management information systems for about 40 SACCOs, it remains unclear if and when such systems are going to be installed and made operational.

The lack of appropriate management and information systems is also reflected in market practices that end up hurting consumers. These include SACCOs charging flat ("straight line") interest rates on their loans for the sake of simplicity, or due to the lack of adequate information systems. Flat rates also have become the rule in MFIs, although many are capable of using the reducing balance method manually

[90] See "Microfinance Sector Assessment in the Republic of Malawi" <http://pdf.usaid.gov/pdf_docs/PNACX006.pdf>
[91] "Supply Side Study of Financial Inclusion in Malawi" by Oxford Policy Management and Kadale Consultants, May 2010 <http://www.housingfinance.org/uploads/Publicationsmanager/R_MalawiSupplySide.pdf>

or with the assistance of information systems. Some practitioners argue that flat rates are easier for customers to understand. However, provided there is standardized disclosure for the reducing balance method, along with simple and effective information given in person by providers, this information could be simple and understandable by customers with low levels of literacy, and could be used by the industry as a whole. Another typical market practice of SACCOs is to require members to increase their ownership shares in order to access loan facilities, rather than increasing their savings. Reportedly, this is largely due to lack of IT infrastructure. Even some large SACCOs' operations and procedures are manual, and the absence of management and operating systems make it difficult for them to operate savings and transactional accounts.

There is frequent discussion by the media, CAMA and in the political sphere about the interest rates charged by microfinance providers. According to Microfinance Transparency, the average rate in the microfinance sector, including SACCOs, MFIs and some commercial banks offering microcredit, is 45% for bigger loans (MKW 1 million) but most loans (below MKW 500,000) have interest rates ranging from 55% to 80%[92]. Compared to lending rates for consumer loans, and in particular payroll lending, microfinance providers, on average, are within an acceptable price range, considering they incur higher operational costs due to their labor intensive underwriting methodology. However, it is widely known that many microfinance providers do charge more than the average due to blatant operational inefficiencies. Given the few instances where a community is served by only one provider, pushing for greater and more meaningful price transparency, as well as some greater level of product standardization, would potentially show positive results. Most microfinance customers in Malawi can choose between different providers. Hence, rather than trying to limit interest rates or subsidizing below-market rates, working on transparency and standardization of offerings in this sector is likely to produce better results in raising awareness and empowering consumers while promoting price competition.

A common practice of microfinance institutions is to require weekly repayments from borrowers (mostly women), without a grace period, i.e. the borrower starts paying within one week from the date of disbursement. Many say this practice is leading to excessive and multiple borrowing whereby the client borrows from a second MFI to pay the first installment at the first MFI or simply uses the borrowed money to pay the first installment. The result is that the borrower is not able to generate capital, lacking enough time to invest in economic activity and see returns before the first payment. Reportedly, the lack of a grace period also leads to situations where members of a borrowers group take desperate measures to pressure a delinquent member to pay her part, such as holding her children from her for "ransom". Some argue that these practices reflect MFIs' inability to adapt practices to the needs of their clientele, and instead to continue to offer standardized products that may, in some cases, impoverish borrowers rather than contribute to their economic and social emancipation.

Another widespread practice in MFIs and SACCOs is to apply compulsory credit life insurance to all microfinance loans. Usually, the insurance has a standard premium of 1% to 2% of the value of the loan, and is provided in many cases by a single insurance company, Nico. A few MFIs and banks do, however, use other insurers to cover their microfinance loans. Customers are typically not allowed to choose the provider or the type of insurance and some reports indicate that customers are not always aware of what they are paying for. The resulting room for misconduct by microfinance providers and insurers is significant. For instance, some MFIs charge 1% as insurance premium to cover the outstanding loan in case of death of the borrower, and pay compensation to the family in the case of accidental death. Another MFI in the same area may require the same 1% premium for insurance with the same insurer, but compensates the family regardless if the death is accidental or natural, considering that for a poor family an accidental and a natural death have similar economic impact. It is unclear if loan officers provide explanations about the insurance component of the loan to their clients when loan applications are

[92] See http://www.mftransparency.org/data/countries/mw/data/

completed. Without a regulatory requirement to do so, it is difficult to ensure standardized conduct across the sector. In any case, compulsory insurance should be prohibited when the borrower has similar coverage either from another insurance policy bought directly from an insurer, or from insurance through a pension scheme that provides such coverage. If compulsory insurance continues to be permitted, the offers should at least be standardized by regulatory requirement across the industry.

Legal and Institutional Frameworks for Non-Bank Credit Institutions

The Registrar has a range of broad enforcement powers and remedial measures that can be applied over SACCOs and microfinance institutions. They include the power to revoke licenses and certificates, determine changes in management, require remedial actions, and impose fines, among other actions. For non-deposit taking MFIs, the Registrar may petition the High Court to sanction the winding-up of the entity, in which case the provisions of the law under which the institution is incorporated shall apply. In the case of prudentially regulated MFIs, the Financial Services Act (FSA) applies.

Although vested with broad supervisory powers by the FSA, there is concern with the RBM's capacity and resources to carry out effective supervision. A team of 10 people was recently appointed to be in charge of this area. The team is located at the Micro-Finance and Capital Markets Department of the RBM. The Microfinance Division is divided into 3 areas: a) SACCOs; b) deposit-taking microfinance institutions; c) non-depository microfinance institutions. The RBM plans to allocate 6 more people to the Microfinance Division by the end of 2011. There is much concern with the ability of this small team to take on supervision over nearly 100 entities comprising this sector. Moreover, this team will need specialized training in microfinance operations and institutions, not only related to different financial risks, but also with regard to the substantial differences between MFIs and SACCOS when compared to banks, particularly in credit policies, IT, management infrastructure and governance standards.

According to the FSA, the Registrar may delegate his supervisory and enforcement powers to a self-regulatory organization. There are two associations for the microfinance sector in Malawi, MUSCCO and MAMN. MUSCCO has already some experience in conducting audits and promoting standard practices on its members and is likely to assume an important supervisory role on behalf of the Registrar to enforce market conduct rules issued by the Registrar. In addition, as MUSCCO provides a range of financial services to its member SACCOs, it will be prudentially regulated by the RBM as well. On the other hand, MAMN is a young, less experienced and seriously understaffed organization that convenes non-deposit taking microfinance institutions and microcredit agencies. It is clear that the RBM will rely on these institutions at least for submitting periodic financial and statistical reports. According to RBM, draft Directives will require SACCOs and MFIs to affiliate with MUSCCO and MAMN, respectively. Both institutions lack adequate resources to conduct effective offsite and onsite supervision of their respective sectors, with particular challenges for MAMN, which is comprised of only 2 people.

In the absence of a statutory supervisor of financial cooperatives, MUSCCO assumed a regulatory, supervisory and development role, including the responsibility to safeguard stability of the cooperative system and provide liquidity facilities to member SACCOs. MUSCCO has oversight powers over SACCOs on the basis of a Memorandum of Understanding (MoU) signed between each affiliated SACCO and MUSCCO, following general principles set forth in MUSCCO's Bylaws. According to the Bylaws, MUSCCO's mission is to develop, promote and safeguard a safe and sound network of SACCOs in Malawi, capable of providing quality and affordable financial services to members. MUSCCO follows the guidelines from World Council of Credit Unions (WOCCU) to promote prudent and safe operations of SACCOs, and a certain level of standardization in the conduct of business,

particularly regarding financial reporting and monitoring, internal controls and governance structure[93]. However, membership in MUSCCO is voluntary, so only SACCOs that are MUSCCO members must abide by the Bylaws and their individual MoUs with MUSCCO

MUSCCO has an Inspection and Examination Department to conduct administrative and financial inspections in SACCOs and enforce compliance with the rules set in the Bylaws and the MoU. The inspections are conducted with or without notice of the SACCO and in the event a SACCO is in breach of any rule, MUSCCO may: (1) suspend or cancel the SACCO's affiliation; (2) impose fines or penalties; (3) amend the conditions of the SACCO's affiliation; (4) take all measures deemed necessary to protect SACCO members' funds; and (5) impose measures to reorganize and revitalize the SACCO. MUSCCO is empowered to recommend to the Registrar of Cooperatives to discontinue SACCO operations if unacceptable practices are identified, including: (1) mismanagement of funds by Directors and Management; (2) failure to produce financial reports on time; (3) failure to conduct Board meetings and Annual General Meetings; (4) restrict inspection and examination by MUSCCO or the supervisory committee; (5) inability to prepare books of accounts for audit; and (6) operating without business plans and budgets. In consultation with the Registrar of Cooperatives, MUSCCO may dissolve the Board Committee of a SACCO and recommend the suspension of the manager and other officers or employees from duty if evidence is uncovered showing gross violation of the applicable rules. MUSCCO may also recommend to the Registrar the liquidation of a SACCO that cannot meet minimum standards of operations prescribed in the CSA.

Three Acts currently govern the operations of microfinance providers. Until the 2010 financial sector legal reform, only banks (OIBM, MSB and MFRC as specialized microfinance banks) were subject to any type of supervision and regulation by the RBM. The microfinance sector is, however, now governed by three specialized Acts: the Financial Services Act (FSA) of 2010, the Microfinance Act (MFA) of 2010 and the Financial Cooperatives Act (FCA) of 2011.

The Financial Services Act of 2010

The FSA is the umbrella statute providing for the regulation and supervision of the entire financial services industry. The FSA creates the Registrar of Financial Services (Registrar), a function performed by the Governor of the RBM, with very broad powers to regulate and supervise financial services providers. The Registrar's powers, including enforcement powers, are extensively described in the FSA and generally apply to all financial sectors, from microfinance to insurance and pensions. In the case of the microfinance sector, the FSA's provisions apply in addition to the FCA and the MFA, which, as specialized financial sector laws, introduce specific responsibilities for the Registrar to exercise its oversight over the microfinance sector, and more detailed standards and obligations are created for institutions covered by these two statutes. The FSA also establishes, among other standards, broad principles for corporate governance and market conduct to guide the operations of financial institutions, including all microfinance services providers, such as deposit taking and non-depository microfinance providers, SACCOs, as well as commercial banks. Annex III provides a detailed analysis of the provisions of the FSA concerning consumer protection.

The Financial Cooperatives Act of 2011

[93] For example, each member SACCO is required to set up a supervisory committee similar to an internal auditor, send its staff to attend MUSCCO's training events and submit monthly financial and statistics reports to MUSCCO. Member SACCOs also need to submit their annual business plans and budgets to the Annual General Meetings and analyze their monthly financials using PEARLS ratios, a financial monitoring system developed by WOCCU (http://www.woccu.org/bestpractices/pearls)

The Financial Cooperatives Act (FCA) was issued in 2011 to strengthen the safety and soundness of the SACCO sector by subjecting it to official supervision and regulation by the Registrar of Financial Services. Before the FCA, financial cooperatives were only governed by the ***Cooperative Societies Act*** of 1998, which applies to all types of cooperatives operating in Malawi. The Cooperative Societies Act requires cooperatives to be registered by the Registrar of Cooperatives within the Ministry of Trade and Industry. However it neither sets prudential or business conduct standards nor establishes a supervisory structure for the sector. The FCA aimed at ensuring SACCOs are managed with integrity, prudence and professional skill. A SACCO must first seek registration with the Registrar of Cooperatives, and then a license from the Registrar of Financial Services. The latter must decide upon the request within 60 days from the date of receipt of a completed application. A license may be granted under certain conditions and the Registrar may, from time to time, add, vary or substitute such conditions when deemed appropriate. The Appeals Committee may reverse decisions of the Registrar under certain circumstances. A SACCO operating without a license (and using the word "SACCO") commits an offense, subject to a fine and imprisonment. The FCA requires the Registrar of Financial Services to create a SACCO Register listing licensed SACCOs. The SACCO Register –which has not been implemented by the time of this report– is to be published yearly in at least one electronic or print media.

The FCA allows for the establishment of primary (individual) and secondary (a cluster of at least 15 individual) SACCOs. There is no minimum number of members for individual SACCOs.[94] To obtain a license, a primary SACCO needs to be a member of a national association of financial cooperatives. A primary SACCO may offer credit facilities, deposit taking, leasing, bill payments, ATM services, debit cards and be an agent for an insurance company. Only transactional services such as money transfers and ATM facilities can be offered to non-members. In addition to the services allowed to primary SACCOs, a secondary SACCO may offer national payments, clearing and settlement services, insurance services (subject to specific authorization), liquidity management, auditing services to primary SACCOs, and securitization. No more than 5% of a SACCO's assets may be invested in non-financial activities.

The FCA not only sets minimum operating requirements, but also introduces internal controls and governance standards. For example, SACCOs are required to establish a Board of Directors, whose members cannot be SACCO employees (with the exception of the CEO), and can only serve as Directors for 3 years maximum per term and for 2 consecutive terms. SACCOs also have to formalize the duties of the management, establish a supervisory committee reporting to the Board, disclose loans to related parties, implement internal control systems, and prohibit a single member from holding more than 10% of the shares or deposits. SACCOs may access the liquidity window of the RBM under conditions still to be defined by the RBM. Except ownership and capital adequacy requirements, which must be observed within 5 years, existing SACCOs need to comply with the provisions of the FCA within 12 months of its commencement, i.e. by February of 2012.

The FCA also establishes a Deposit Guarantee Fund to provide protection for member deposits (but not shares) up to an amount approved by the Registrar and the Fund's Board of Trustees. [95] The Fund, which reports annually to the Minister of Trade and Industry, is to consist of contributions by SACCOs, income investment interest accruing to the Fund, borrowed funds, and funds received as donations or grants. The Board is to publish annually in the Official Gazette and in at least one daily newspaper of national circulation a list of all SACCOs the deposits of which are protected. The World Bank has been working with the RBM on the creation and management of the Fund.

[94] The Registrar may grant a license to a primary or secondary SACCO upon being satisfied that the proposed business shall be financial viable, regardless of the number of members. A previous draft of the FCA had a minimum number of members that was eliminated in the final version of the law.

[95] The Board of Trustees shall consist of the Registrar's appointee, the Registrar of Cooperatives (or appointee), the Secretary to the Treasury (or appointee), four members nominated by licensed SACCOs and approved by the Registrar, and the chief executive officer of a national association who shall be *ex officio* member and secretary to the Board of Trustees.

The RBM has been given broad powers to issue and enforce rules, require remedial actions and apply penalties under the FSA and the FCA. The FCA empowers the Registrar to issue Directives dealing with a variety of issues. The Registrar's Directives may vary for different categories of SACCOs and may be complemented by guidelines, bulletins or other regulatory statements. The Minister of Finance is also empowered to issue Regulations, on the recommendation of the Registrar. According to the RBM, there are several draft Directives and Regulations that are and will be presented to stakeholders for consultation. These include the power to determine a merger of SACCOs under specific circumstances, as well as to wind up a SACCO and appoint a liquidator.[96] Thus, the new FCA provides a much stronger basis for the Registrar to regulate and enforce rules that could significantly improve the level of protection of SACCO members, through better market discipline. It remains to be seen whether the RBM is able to build adequate human resources to supervise the SACCO sector effectively.

The Microfinance Act of 2010

The Microfinance Act (MFA) aims to provide a sound legal and regulatory framework to the nascent non-cooperative microfinance movement, which includes some banks and credit-only institutions of various legal forms. The MFA applies to all persons providing microfinance services as a whole or part of their business, except if explicitly exempted by the Registrar of Financial Services. The following are explicitly exempted from the application of the MFA:[97] (1) SACCOs; (2) small member-based schemes which are operating in a single locality, on a mutual benefit rather than on a for-profit basis, or based on a common bond and rotating savings and credit association or similar form and methodology; (3) persons whose microfinance operations do not surpass a threshold to be determined by the Registrar, in terms of maximum number of customers, maximum value of outstanding loan portfolio, or other criteria. The MFA identifies three main types of providers, as seen below.

Table 2: Types of Microfinance Service Providers according to the Microfinance Act

Type of microfinance provider	Definition
Deposit taking microfinance institutions	Licensed provider of microfinance services, prudentially regulated under the Financial Services Act
Non-deposit taking microfinance institutions	Licensed provider of microfinance services, not prudentially regulated if under certain thresholds
Other licensed financial institutions	Any other licensed financial institution that has been granted approval to offer microfinance services by the Registrar[98]

The MFA defines microfinance services as the provision of financial services to small or micro enterprises, low-income customers, financial underserved customers, or others as prescribed by the Registrar. Such financial services include: microcredit; deposit-taking; micro-insurance; micro-leasing; micro-pension; transfer and payments services, including the conversion into electronic payment media; or any other service that the Registrar may designate. *Microcredit* is defined as the provision of small loans where: (a) such loans are granted to a natural person individually, or in a group, whose income depends on his, her or the group's own business or economic activity; (b) security for such loans may include non-traditional instruments such as group guarantees or compulsory savings; (c) the borrower may be required to make frequent repayments in small amounts; and (d) such loans may take the form of micro-housing or micro-leasing products. *Micro-housing* is defined in the MFA as loans for renovation or

[96] SACCOs are subject to the Money Laundering Proceeds of Serious Crimes and Terrorist Financing Act 2006, described in more details in Banking Section.
[97] The exemption shall not prejudice the application of any other law that may apply to such exempted persons and their services and operations, by virtue of their not being licensed or registered under the MFA.
[98] The microfinance operations in licensed financial institutions shall be segregated from other activities.

expansion of an existing home, construction of a new home, land acquisition, and basic infrastructure. *Micro-insurance* offers protection against specific peril in exchange for regular premium payments proportionate to the likelihood and cost of the risk involved. *Micro-pension* provides modest savings to low-income or financially underserved customers in order to secure old age or future needs.

The MFA requires any institution that offers microfinance services to be registered or licensed as a microfinance service provider. Any licensee may apply to the Registrar for approval to offer products and services under the Banking Act, the FCA, and the Insurance Act. The registration, approval and licensing requirements established in the FSA apply, *mutatis mutandis*, to registration, approval and licensing under the MFA (see Annex II for a description of the FSA). The Registrar must decide an application within 60 days from the date of receipt of a complete application. The Registrar's decisions can be questioned through the Appeals Committee, although such committee has not been implemented yet. The Registrar is also required to implement the Microfinance Register, which must be available for the public in hard copy at the office of the Registrar, as well through print and electronic media. A licensed MFI cannot have more than 5% of its investible funds in non-financial activities (unless permitted by the Registrar). This rule aims to avoid blending financial and non-financial activities, such as business development and education to clients.

All deposit-taking MFIs are subject to prudential regulation and supervision under the FSA, and any other licensed MFI may also be deemed prudentially regulated at the determination of the Registrar. The Registrar will determine thresholds upon attainment of which a licensed non-deposit taking MFI shall apply for a license to be prudentially regulated. If such determination occurs, the MFI will be required to be incorporated as a company limited by shares as defined in the Companies Act, within a certain timeframe. Microcredit agencies must submit annual financial statements and any additional information required by the Registrar, within 4 months after the end of the financial year. A MFI has to provide periodic returns.

Although the detailed governance structure of microcredit agencies is to be defined in Directives to be issued by the Registrar, the Act establishes minimum governance and operating requirements. Every MFI must have a board of directors in accordance with the Companies Act. The management of a MFI must be comprised of, at a minimum, a chief executive officer and one other senior management officer such as a chief financial officer or head of operations. The FSA's fit and proper requirements apply to the CEO of an MFI. MFIs must implement internal controls and have an audit committee and a review committee reporting annually to the Board. Where provisions of the MFA are inconsistent with governance of any MFI, as provided in the law under which the entity was incorporated, the provisions of the MFA prevail.

All microfinance service providers must conduct business with integrity, prudence and professional skill, engage only in *bona fide* transactions, and comply with minimum standards of good practice to be prescribed by the Registrar. With regard to ownership, a person who has *de jure* or *de facto* control of a deposit taking MFI cannot acquire or maintain *de jure* or *de facto* control of any other deposit taking MFI. Provisions of the FSA on acquisition of beneficial interest in voting shares and voting trust or other agreements apply to deposit taking MFIs. All microfinance service providers are subject to the Money Laundering Proceeds of Serious Crimes and Terrorist Financing Act 2006.

The MFA provides for the use of mobile banking services, defined as "microfinance services where the licensed institution is wholly responsible for its lawful provision to the same extent as if offering the service directly". In this manner, a MFI may, upon approval by the Registrar, contract with an agent for the provision of mobile banking services on its behalf. The Registrar may examine the fitness of the agent, including its financial condition, record of experience, terms of the agency agreement, equipment or premises to be used, or any other relevant factor. It is important to note that the MFA prohibits the

appointment of an agent approved by the Registrar and operating according to the Registrar's approved terms as constituting an assignment, transfer or encumbrance of any certificate, license or approval. Thus, the responsibility for the services provided remains with the licensed institution.

Pending Directives and Regulations

The Draft Regulations on Deposit-Taking Microfinance Institutions deal with procedures, fees and criteria for licensing deposit-taking microfinance institutions, and sets standards of business conduct. The Draft Regulations include financial and fit and proper requirements, the obligation to prove the source of funds of any new entity, as well as the conditions under which the license or certificate may be revoked or suspended. The Registrar is also required to carry out pre-licensing inspections at the premises where the microfinance business will be conducted. Part IV of the Regulations deals with corporate governance, audit and internal control requirements, and sets various business conduct standards, including client identification, disclosure of terms and conditions, and lending policies.

The Draft Directive on Microcredit Agencies establishes the criteria for entities seeking to be registered as microcredit agencies, and aims to ensure that all agencies "adhere to high standards of market conduct and do not engage in reckless lending." According to this draft Directive, the Registrar is to monitor microcredit agencies with regard to market conduct in order to ensure fair lending practices. Importantly, the Registrar is explicitly not to carry out prudential regulation of this type of entity. The draft also details the procedures, fees and criteria for registration and situations that justify denial of registration. It sets criteria and procedures of deregistration, the reporting requirements and penalties for non-compliance, the obligation to report to and consult a credit bureau[99], and procedures for inspections by the Registrar. Part V of the draft Directive deals specifically with lending policies and complaints procedures, and Part VI deals with confidentiality. The draft also indicates thresholds on asset base, number of customers and annual turnover, above which an agency must apply for a license as a non-deposit taking microfinance institution.

The Draft Directive on Non-Deposit Taking Microfinance Institutions focuses on market conduct regulation and corporate governance. The draft establishes criteria for entities seeking a license to become a non-depository microfinance institution. Equally, the objective is to ensure that microfinance providers "adhere to high standards of market conduct and corporate governance, and do not engage in reckless lending". It details the procedures, fees and criteria for a license and situations that justify denial of the application. It sets criteria and procedures for revocation of a license, the reporting requirements and penalties for non-compliance, and the obligation to report to and consult a credit bureau, as well as requirements regarding the insolvency and winding-up of non-deposit taking microfinance institutions, among other provisions. All non-deposit taking MFIs are to be incorporated as companies limited by shares or guarantees and all are to be licensed and supervised by the Registrar.

MAMN's Code of Conduct

MAMN's Code of Conduct sets basic principles by which all member organizations must abide in their relationship with their customers and amongst themselves. MAMN not only functions as an industry association and an advocacy body, but also plays a modest role in promoting minimum business standards in the microfinance industry –an industry where many 'players' are donor-funded organizations with poor performance records. MAMN's Code of Conduct promotes a respectful, transparent and fair relationship with customers and encourages the adoption of best practices by MAMN members. MAMN can suspend a membership when a member MFI consistently fails to conform to the Code. However, the

[99] According to information provided by the RBM.

simplicity of the Code and its focus on recognizing different practices within the microfinance industry reflects the low level of agreement and standardization that exists in practice in this nascent industry.

Comparison with Good Practices for Non-Banking Credit Institutions

SECTION A	CONSUMER PROTECTION INSTITUTIONS
Good Practice A.1	***Consumer Protection Regime*** **The law should provide for clear rules on consumer protection in the area of non-bank credit institutions, and there should be adequate institutional arrangements to ensure the thorough, objective, timely and fair implementation and enforcement of all such rules, as well as of sanctions that effectively deter violations of these rules.** **a. There should be specific statutory provisions, which create an effective regime for the protection of consumers of non-bank credit institutions.** **b. There should be a government authority responsible for implementing, overseeing and enforcing consumer protection in the area of non-bank credit institutions.** **c. The supervisory authority for non-bank credit institutions should have a register which lists the names of non-bank credit institutions.** **d. The rules should provide for, or at least not prohibit, a role for the private sector, including voluntary consumer organizations and self-regulatory organizations, in respect of consumer protection in the area of non-bank credit institutions.**
Description	*The current regime provides for limited protection of microfinance customers, due to:* *a) poor business conduct standards prevalent in the industry, particularly with regard to product suitability and price disclosure and comparability;* *b) pending regulations necessary to implement new legal framework;* *c) unclear and insufficient legal and regulatory framework for complaint and redress mechanisms;* *d) inadequate structure, resources and capacity for market conduct supervision at the Registrar, specially to cover the size of the microfinance sector and the particular consumer protection issues in this market;* *e) scarce supervisory resources and capacity at the Registrar for microfinance regulation and supervision in general; and* *f) weak enforcement powers, inadequate resources and capacity at self-regulatory bodies which are expected to play a role in market conduct supervision.* The overarching laws dealing with consumer protection in the non-bank credit sector are the Consumer Protection Act (CPA) and the FSA.[100] **The CPA provides for broad consumer protection provisions regarding microfinance services based on the Act's definition of "service".** There is very little knowledge about the CPA in the financial sector and its provisions have been ignored in practice. It was also ignored in the 2010 legal reform of the financial sector and continued to be ignored in the process of drafting the Directives and regulations stemming from the new financial sector laws in early 2011. However, a court is still likely to find that the CPA will continue to apply, except to the extent of any clear inconsistency with the later legislation. Section 54 of the CPA seems to mean that the CPA applies in addition to the FSA, and the sector-specific laws applicable to nonbank providers. **Contrary to the CPA, the FSA explicitly covers microcredit providers and financial**

[100] A full description of the CFTA, and the issues with the proposed new regulatory structure, is in the Banking Sector: Good Practices A.1.

cooperatives, and includes some specific consumer protection provisions. The FSA states that the Registrar shall perform its supervisory functions with a view to achieving the highest standards of conduct of business by financial institutions, and the fairness, efficiency and orderliness of the financial sector. The FSA contains a number of consumer protection provisions, as detailed in Annex IV, including areas like self-dealing or related-party transactions; misleading and deceptive conduct; Registrar's powers to prohibit unfair business practices, to issue directives on consumer disclosure, to pursue administrative penalties, to require promotion and development of complaints resolution schemes; broad remedial powers given to the Court; to seek compensation for loss in case of a breach of a financial services law; customer due diligence obligations.

The FSA is complemented by the ***Financial Cooperatives Act*** of 2011 (FCA) and the ***Microfinance Act*** of 2010 (MFA), which bring microfinance institutions (MFIs) and SACCOs, respectively, under the supervisory and regulatory powers of the Registrar. Both Acts set forth basic market conduct principles for the industry, as well as important disclosure requirements, with the intent to create an adequate regime for protecting microfinance consumers. With the exception of the CPA, the current framework (MFA, FCA, FSA) was created as part of a coherent and broad financial sector regulatory reform passed in 2010, which incorporated some key consumer protection principles (with the notable exception of redress mechanisms, which have not received much attention by the new laws).

Subject to administrative penalty under the FSA, SACCOs are required by the FCA to disclose, at all times, in writing, to the borrower, the cost of borrowing, including the interest rate and the related fees. SACCOs must also post in every place of business:

1) a copy of its last audited financial statements;
2) information about member rights and responsibilities;
3) financial products and services offered; and
4) terms under which products and services are offered.

Under the MFA, all microfinance service providers must, at all times, disclose to the customer, in writing, the terms of any credit or savings products being offered. All (except microcredit agencies) must display in a conspicuous place on the premises of every branch where they conduct business a notice containing:

1) the provider's code of conduct;
2) information on customer rights and responsibilities;
3) financial statements;
4) microfinance products and services offered and the terms under which they are offered;
5) certificate, license, or approval, including company incorporation certificate.

Two draft RBM Directives covering MFIs would expand upon the general provisions of the MFA. The draft directives on Microcredit Agency and Non-Deposit Taking Microfinance Institutions, set, for instance, standards for lending policies at these institutions, requiring:

1) These policies to specify the maximum amounts that can be approved at every level of discretion, and the respective internal controls to be maintained.
2) Microlenders to limit monthly loan repayments to 50% of the borrower's take-home salary and observe the Registrar's directive on "Reckless Lending".
3) Microcredit Agencies to carry out fair lending practices, with the loan contract stating the nominal rate of interest as well as commissions and fees either on an annual or monthly basis.
4) Microcredit agencies to permit partial or total pre-payments by micro-borrowers, with penalties for pre-payments being described in the loan contract.

In this context, with some few exceptions, business conduct standards in the industry are staggering low. Most microfinance service providers have simply been operating without any level of prudential or market conduct regulation and supervision. Also, microfinance is a new industry that has new and unsophisticated customers who are unfamiliar with any formal

	financial services. In addition, there is an important participation of the government in direct provision of microcredit services to the same clientele, with poor performance. **According to the FSA, the supervision and monitoring of market conduct issues in the microfinance sector will be carried out by the Registrar**. Accordingly, the RBM has created the CFEP Unit to deal with consumer protection and financial literacy. However, this Unit is located under the Micro-Finance and Capital Markets Supervision Department. This not only reduces the importance of market conduct supervision, but also the independence of the examiners working in the Unit. Since they are part of Department that focuses primarily on prudential supervisory matters some conflict of interest between prudential and market conduct supervision is likely to arise. **While the legal framework also provides for an important oversight role to be played by self-regulatory bodies, they do not have enough capacity yet to assume this role effectively**. The FSA permits the Registrar to delegate regulatory and supervisory powers to self-regulatory organizations such as MUSCCO and MAMN. In the cooperatives segment, MUSCCO has been a standard setter and supervisor of SACCOs for many years under the Cooperative Societies Act and its Bylaws. SACCOs are required to abide by a number of business conduct standards based on a MoU signed with MUSCCO. MFIs face even bigger challenges than those of SACCOs, by reason of being heterogeneous and relatively new, with providers having not only different incentive structures leading to differing performance and business conduct standards, but also different legal set ups and funding structures. In addition, MAMN is a new institution with no experience of monitoring and supervising its members. Currently, it is focused simply on reaching agreement among its members on appropriate lending practices.
Recommendation	To effectively improve and monitor business practices of a nascent and growing market that has shown signs of low conduct standards, but that serves a significant number of unsophisticated, inexperienced, low-income consumers, the Registrar will need to assume a leading role in regulation and supervision of microfinance. The Registrar should: 1) Implement systems and procedures to enforce Directives covering microfinance providers and SACCOs, once they are finalized and adopted. The RBM should also require specific complaint and redress mechanisms to be implemented by the sector, record keeping of consumer complaints and implementation of improvements based on the analysis of complaint logs. 2) Design a clearer supervisory structure in the RBM for enforcing the new legal and regulatory framework for market conduct and consumer protection, and provide necessary financial and human resources for its implementation in the microfinance sector. Ideally, such responsibilities should be charged to an independent Department under the General Manager for Supervision of Financial Institutions. As pointed out in the Banking Section (Good Practice A.3), the RBM should employ its best efforts to obtain donor funding to assist with the necessary increase in capacity. Among other things, funding should be aimed at training the staff responsible for prudential supervision of MFIs and SACCOs, and for enforcing market conduct rules in these segments. 3) Design a clear supervisory structure in the RBM, under the Microfinance Division, for the purpose of implementing the new oversight function for the microfinance sector, and provide necessary financial and human resources for its implementation. Ideally, this Division would be separate from the Capital Markets Department, forming an independent Department. It will soon be recognized as unwieldy and unreasonable to allocate microfinance supervisory responsibilities to the same unit that oversees capital markets. This mixing of functions can be viewed as a sign of weakness of the microfinance supervision which undermines the powers of the Registrar over this market, the achievement of effective supervision, and the progressive strengthening of the microfinance sector. It is particularly important for a sector that is just

	being established under the supervision of the financial regulator to know that there is enough importance and relevance being afforded the sector. Otherwise, it will be difficult to ensure adequate levels of regulatory compliance and hence appropriate business conduct standards. 4) Define a clear structure and implementation plan for the important supporting role expected to be played by MUSCCO and MAMN in enforcing market conduct rules in SACCOs and microfinance providers. The RBM should conduct a careful evaluation of current oversight activities in these two institutions, as well as their skills pool, human resources, management and information systems. The scheme should define clear reporting channels, rights and responsibilities of each organization, and set remedial and sanction measures that create the right incentives for these organizations to conduct such auxiliary roles adequately. Despite having limited resources and little experience with MFIs and SACCOs, the RBM is the best placed institution to lead oversight of this industry, even if it relies in part on coordination and information-sharing with MUSCCO and MAMN. Rather than delegating any of regulatory powers to MUSCCO or MAMN (inevitably generating serious conflicts of interest), the Registrar should only delegate pre-defined functions that can be brought back under the RBM if deemed necessary. 5) Issue a directive on reckless lending, covering all credit providers in Malawi, in order to create a level playing field for them all and to provide consumers with a more coherent regulatory framework. This Directive can be specific for the microfinance sector, but should be aligned to similar rules issued for the banking sector. To increase the eventual effectiveness of such regulation, it would be beneficial at the outset to conduct a market study to understand better the current practices in microfinance and identify actual instances of reckless lending so that these and similar recklessness can be explicitly prohibited. **Deposit protection in SACCOs** An additional issue is that the Deposit Guarantee Fund, instituted on paper at least by the FCA, protects deposits held in SACCOs but not shares. SACCOs traditionally and typically, however, offer shares in substitution to savings, due to the lack of adequate information systems and management skills to handle transactional accounts. Once this Fund becomes a reality, it will be necessary to promote savings accounts in SACCOs and improve management and IT systems. Alternatively, given the prevailing market practice, the Fund should consider covering shares in SACCOs, since shares are considered "deposits" by clients. It is also advisable that the Registrar require SACCOs to publicize information about coverage by posting it where they conduct business. This would allow members to choose a covered SACCO or exercise pressure for SACCOs to offer savings services. SACCOs should also be required to inform potential members about this topic during the application for membership.
Good Practice A.2	***Code of Conduct for Non-Bank Credit Institutions*** **a. There should be a principles-based code of conduct for non-bank credit institutions that is devised in consultation with the non-bank credit industry and with relevant consumer associations, and that is monitored by a statutory agency or an effective self-regulatory agency.** **b. If a principles-based code of conduct exists, it should be publicized and disseminated to the general public.** **c. The principles-based code should be augmented by voluntary codes on matters specific to the industry (credit unions, credit cooperatives, other non-bank credit institutions).** **d. Every such voluntary code should likewise be publicized and disseminated.**
Description	*There are non-statutory Codes of Conduct for the microfinance industry, but implementation and enforcement are deficient. The RBM and clients cannot rely entirely on industry codes of conducts that might be particularly inefficient for this young and heterogeneous industry dealing with inexperienced or unsophisticated customers.* MUSCCO and MAMN have their own Codes of Conduct that are signed by their members,

	who in turn are expected to abide by them. The two Codes, however, differ substantially in depth and coverage. Allied to the Memorandum of Understanding signed with each of its SACCO members, MUSCCO's Code provides for much more formal obligations than exist under the MAMN Code. MUSCCO and its members are supposedly to follow certain business practices set in the Code and to live with a better base for enforcement of the principles by MUSCCO. MUSCCO in practice, however, lacks enough resources to conduct any enforcement activities in an effective manner. Also, MUSCCO's Code focuses on financial performance and internal controls, rather than on market conduct. MAMN's Code focuses on financial performance and reflects the initial stages of industry organization and coordination. It sets only four key basic principles which member organizations must uphold in their relationships with their customers and amongst themselves: public service, openness, respect and leadership. It also includes principles of professional ethics to be complied by microfinance institutions. These ethical principles include fair and objective advertising, full disclosure of consumers' rights regarding money deposited with MFIs, promotion of competition based on free market principles, requirement of agreement with customers on reference checking of their credit histories, and use of lending methodologies that neither hurt customers nor are detrimental to the public, government or other MFIs. The Code promotes a respectful, transparent and fair relationship with customers and encourages the adoption of "best practices", but neither describes acceptable practices nor practices that should be avoided. MAMN has little enforcement power and no resources to exercise what few powers it has. These Codes are not enforced by the RBM and there is no clear provision in the FSA, MFA or FCA providing for such arrangement. However, by allowing the Registrar to delegate some supervisory functions to self-regulatory organizations, the new legal framework allows this to happen. The delegated supervisory scheme that is planned for market conduct in the microfinance sector anticipates a pivotal role to be played by MUSCCO and MAMN in coordination with the Registrar in order to ensure that the relevant market conduct rules are observed by member institutions. Moreover, MUSCCO, as a cooperative of financial cooperatives which provides a range of financial services to its members, is, itself, a prudentially regulated financial institution, and that fact *per se* justifies MUSCCO having, disclosing and enforcing its Code of Conduct. Unfortunately, the shortcoming of such approach is that MUSCCO and MAMN both lack sufficient resources to permit any greater role in oversight being shifted to them by the Registrar. Under the MFA, in a conspicuous place on the premises of every branch where they conduct business, all regulated microfinance service providers must display a notice containing the Code of Conduct and information on customer rights and responsibilities. This requirement is not clear for SACCOs. The laws and draft regulations do not clearly require service providers in the microfinance sector to produce their own Codes of Conduct based on the industry's Code and set specific principles of business practices.
Recommendation	1) Clarify, through Directives, the power of the Registrar to enforce industry Codes of Conduct and apply sanctions in case of observed non-compliance. 2) Submit MUSCCO's and MAMN's Codes of Conduct to a thorough review in consultation with the Registrar, with the purpose of aligning them with all the market conduct provisions in the new legal and regulatory framework, particularly the FSA, MFA, FCA and related Directives. These new Codes should be submitted for the approval of the Registrar and should form the basis on which individual codes of conduct are established by each SACCO and microfinance provider. 3) Encourage MUSCCO and MAMN to:

	• publicize their codes through their members, in advertising materials, places where microfinance providers conduct their businesses (branches, offices and agents) and their websites, and to consumers when they are offered a microfinance product; • translate the Codes into the local languages where their members operate. 4) Require, through Registrar's Directives: • all SACCOs to display in a conspicuous place on the premises of every branch where they conduct business a notice containing the Code of Conduct and information on customer rights and responsibilities; • all supervised microfinance institutions and SACCOs to produce their own codes of conduct that are consistent with MUSCCO's and MAMN's Codes of Conduct, and publicize them through appropriate means, in the places their business are conducted. For the purpose of publication, such documents should be simple, concise and easily understandable by the clientele served by the institution; • that codes are made available in at least Chichewa, in addition to English; if necessary, codes should be available in other local languages where the business operates. 4) Publicize the industry's codes of conduct on the RBM's website. Since microfinance providers are allowed to use agents to deliver services on their behalf, it is important that disclosure and transparency rules clearly apply to agent locations, e.g. if some information is required to be posted in branches, it should also be required to be posted in agent locations.
Good Practice A.3	***Other Institutional Arrangements*** **a. Whether non-bank credit institutions are supervised by a financial supervisory agency, the allocation of resources between financial supervision and consumer protection should be adequate to enable their effective implementation.** **b. The judicial system should ensure that the ultimate resolution of any dispute regarding a consumer protection matter with a non-bank credit institution is affordable, timely and professionally delivered.** **c. The supervisory authority for non-bank credit institutions should encourage media and consumer associations to play an active role in promoting consumer protection regarding non-bank credit institutions.**
Description	*The above institutional arrangements for financial consumer protection are not adequate or effective, particularly with regard to microfinance consumers.* As pointed out in Good Practice A.1, the RBM has established the new Consumer Financial Education and Protection (CFEP) Unit, within the Micro-Finance and Capital Markets Supervision Department, to deal with market conduct regulation and supervision in all regulated sectors. Although this is a good first step in identifying the function of consumer protection supervision and regulation, more needs to be done. **This current structure undermines the market conduct function and may result in weak enforcement** as a result of conflicts of interest between prudential and market conduct examinations, and as a result of perceptions from regulated entities regarding the importance given by the RBM to this subject, particularly to newly regulated sectors such as microfinance providers and SACCOs. This is particularly important if one considers the RBM's plans to delegate market conduct supervision in the microfinance sector to MAMN and MUSCCO. **In general, the judicial system in Malawi is deficient, expensive and slow. Simply put, it does not work for microfinance clients.** There is little apparent trust in this branch of the government, and little reliance in the judicial system as a channel for solving problems between end consumers and financial institutions. This is a particular challenge in the microfinance sector where the poor are utterly unable to seek let obtain redress or enforcement of rules through the courts. Also, consumers in this segment are not familiar with, and are

	intimidated by, statutory institutions such as the RBM or others. Hence, the judicial system does not provide the necessary credibility to the enforcement of the rules on financial consumer protection in the microfinance sector. Reportedly it does give a certain level of credibility for enforcement of loan contracts for microfinance services providers, based on pressure from businesses and on some powerful legal provisions guaranteeing contract rights. This lack of reliance of retail financial consumers in the justice system is further reinforced by the fact that at least some existing laws affecting the financial sector, including the CPA, are not implemented and are ignored by government agencies and the private sector alike. **Non-profit organizations are not very active in financial consumer protection issues.** The Consumers Association of Malawi (CAMA) has, from time to time, raised awareness about market conduct in financial services. The focus has been on the lack of transparency and price levels in the lending business of banks and microfinance institutions. The Paralegal Advisory Service Institute (PASI), funded by the Danish Development Agency (DANIDA), offers free legal advice and assistance to poor Malawians before, during and following the adjudication by local judges of claims by microfinance providers regarding non-payments of debts. Much of PASI's attention is focused on helping the poor who end up in prison for failure to comply with court orders to pay debts owing to microfinance institutions, which then leads to contempt of court orders which, in turn, are breached. **The media has raised awareness regarding practices in the financial services, but not very often**. In the microfinance sector, the main concern has been the level of interest rates charged. Also, some reports of abusive collection practices within group lending have been brought to the attention of the public. In pricing, most concerns relate to the payroll lending which, despite lower levels of default risk, entail very high interest rates. Also, the reach of the local mainstream media is limited, particularly among the poor. Most Malawians do not have access to TV, let alone internet. The two most important newspapers have a daily circulation of only 8,000. In this context, it is unrealistic to expect newspapers to play an important role in raising awareness and knowledge about consumer protection issues for microfinance customers. The main communication channel for the lower-income segments is the radio, followed by mobile phones and some radio programs do transmit at least the main news from the most widely-read newspapers.
Recommendation	1) Design a clearer supervisory structure in the RBM for enforcing the new legal and regulatory framework for market conduct and consumer protection, and provide necessary financial and human resources for its implementation in the microfinance sector. Ideally, such responsibilities should be charged to an independent Department under the General Manager for the Supervision of Financial Institutions. This improved supervisory structure would give a clear sign by the RBM that this is an important matter, that there is a balance between consumer protection and prudential supervision goals and that poor market conduct standards will not be tolerated in the new legal and supervisory framework. 2) Institute an ombudsman (covering all financial sectors, as recommended in the other sectors analyzed in this Report) with procedures and outreach that work for microfinance consumers. Such an ombudsman will need to address the challenge of reaching out to rural villages where microfinance services are provided and offer communication channels and procedures that are easy, accessible and understandable by these populations, including rural Malawians who do not have reliable or any access to electricity and phones and newspapers and do not know how to read in Chichewa, English or any other language. In order to ensure the outreach and effectiveness of the ombudsman, it will be necessary to use local leaders as much as possible. 3) Carry out sustained awareness and education activities reaching potential and current microfinance clients. This is likely to require use of focus groups and community discussions, as well as radio programs. Tribal chiefs will have an important role to play in these respects.
Good Practice A.4	***Registration of Non-Bank Credit Institutions*** **All financial institutions that extend any type of credit to households should be registered**

	with a financial supervisory authority.
Description	The MFA and the FCA require the Registrar to establish and publicize a list of licensed and registered microfinance services providers and SACCOs. The Deposit Taking Microfinance Regulations specify the information to be contained in the register. The draft RBM Directives on Microcredit Agencies and on Non-deposit Taking Microfinance Institutions also establish that the public shall be sensitized of reports of illegal operators of microcredit agencies. Making this information available to the general public in means and formats that reach out to the poor and unsophisticated public is particularly important in microfinance, as there have been reports of illegal deposit taking activities and pyramid schemes which have resulted in loss of funds in places where villagers are offered a wide array of microfinance products and services with little standardization amongst different providers, and end up mixing *bona fide* providers with scammers. For this purpose, the Draft Directives for microfinance providers require that the "public be sensitized of reports of illegal operations of microcredit agencies".
Recommendation	Implement the register of microfinance providers and SACCOs, with the RBM making a list of licensed institutions available to the public, through channels and by means that reach out to communities likely to be served by microfinance providers. An RBM Directive should require licensed and registered microfinance institutions to display their status as such in premises where their businesses are conducted. It might also be helpful to provide a telephone number the public can call to confirm the status of any institution. MUSCCO and MAMN should play an active role in raising awareness about the need to check on a provider's status. Consumer associations should also be engaged in such awareness efforts.
SECTION B	**DISCLOSURE AND SALES PRACTICES**
Good Practice B.1	***Information on Customers*** **a. When making a recommendation to a consumer, a non-bank credit institution should gather, file and record sufficient information from the consumer to enable the institution to render an appropriate product or service to that consumer. The extent of information the non-bank credit institution gathers regarding a consumer should:** **i. be commensurate with the nature and complexity of the product or service either being proposed to or sought by the consumer; and** **ii. enable the institution to provide a professional service to the consumer in accordance with that consumer's capacity.**
Description	*There are no specific provisions in the law or regulations requiring providers to conduct such an assessment and keep records with information about the risk of the transaction, the nature and complexity of the product or service being sought by the consumer*. Customer due diligence during loan underwriting procedures in the microfinance sector varies considerably even within the same institution, as there are no standard KYC procedures set by regulations or a self-regulatory body. Stricter requirements for client identification and analysis of the suitability of the product being offered are more common for higher value transactions. In the low-end of the market, a thorough customer due diligence is usually conducted only for cash-flow based loans targeting micro-entrepreneurs. In these instances, a loan officer typically provides one-on-one assistance for the borrower to construct his cash-flow that will generate funds to repay the loan. This process is supposed to result in a personalized repayment schedule that fits future cash flow and the needs of the borrower's household. However, what seems to be a more common practice in Malawi, especially outside agriculture lending, is to offer guarantee-based loans, with the focus being on group guarantees or collateral, such as an item with personal or emotional value to the borrower. In this type of loan, the provider simply offers its standard offerings, including compulsory credit life insurance, with less strict customer due diligence procedures. This practice may result in the customer acquiring products and services that he or she does not necessarily want or need. For example, it is a widespread practice to include compulsory credit life insurance in all microfinance loans, but there is little evidence that institutions carry out an assessment of the

	need to impose this insurance. This is especially the case of employees who are already covered by life insurance provided by their pension program or by other life insurance. **There are no specific provisions in the laws or regulations requiring microfinance providers, including SACCOs, to carry out careful customer due diligence** with the purpose of providing the most suitable product or service that caters to the needs of the customer and reduces the risk of the transaction for both parties. The provisions in the draft Regulations and Directives applicable to microfinance providers do not go beyond requiring institutions to: • produce and keep individual client profiles with identification information, • report to and consult a credit reference bureau. The laws governing microfinance services providers and SACCOs (FSA, MFA, and FCA) subject all institutions to the Money Laundering, Proceeds of Serious Crimes and Terrorist Financing (AML) Act. The AML Act establishes minimum customer due diligence and know your customer requirements. The purpose, however, is to establish anti-money laundering controls, and is not related to product suitability, repayment capacity or other risk assessment of the transaction.
Recommendation	1) In the draft regulations and directives applicable to microfinance providers and SACCOs, include a requirement to conduct customer due diligence with the purpose of assessing the needs or the customer and offering the most suitable product or service. This is particularly important for the microfinance sector, where clients are not well equipped to assess the risks and characteristics of different product offerings. With regard to loans, providers should at least be required to: • assess a borrower's repayment capacity based on expected cash flows and such assessment should shape the repayment schedule, including any necessary grace period before the first installment; • assess the need of the borrower for acquiring a credit life insurance, and provide accessible and understandable information about their credit life insurance offer. 2) The forthcoming regulations should require all providers to consult the credit bureau or other sources of information about any outstanding debts and, of course, provide information to these same bureaus in order to construct a solid credit information database over time. The customer due diligence process should be recorded (not necessarily in paper-based records and not necessarily all steps of the process) and kept for a minimum period of time, and should have supporting documentation gathered to conduct such an assessment. The requirements on record keeping should be reasonable enough to avoid excessive burden for providers. 3) Conduct a thorough review of the current practices in the micro-lending sector with regard to product suitability, including the compulsory insurance that most (if not all) microfinance loans require, and take additional steps to prohibit abusive or unsound practices, including debt collection practices, that are deemed detrimental to microfinance consumers.
Good Practice B.2	***Affordability*** **a. When a non-bank credit institution makes a recommendation regarding a product or service to a consumer, the product or service it offers to that consumer should be in line with the need of the consumer.** **b. Sufficient information on the product or service should be provided to the consumer to enable him or her to select the most suitable and affordable product or service.** **c. When a non-bank credit institution offers a new credit product or service that significantly increases the amount of debt assumed by the consumer, the consumer's credit worthiness should be properly assessed.**
Description	*There is great concern with the affordability of microfinance products and services, particularly microfinance loans. The current regulation does not require from providers an assessment of affordability or suitability of the products being offered. However, there are*

	positive changes being introduced by the draft regulations applicable to microfinance providers that could enhance the regulatory framework governing this issue. As described in Good Practice B.1, a common practice in Malawi is to offer guarantee-based loans, with focus on group guarantees or collateral. This practice may result in the customer acquiring products and services that are not necessarily suitable for his needs, or even affordable, with implications for multiple borrowing and abusive collection practices. A common microfinance offering is, reportedly, a loan for up to 16 weeks targeting groups of women, with weekly repayments, and without a grace period, i.e. the group starts paying within one week from the date of disbursement. Many say this practice leads to multiple borrowing whereby the client borrows from a second MFI to pay the first installment at one MFI or uses the borrowed money itself to pay the first installment. This method does not fit every customer's repayment capacity and does not allow borrowers to generate capital from the economic activity they intended to fund. Reportedly, this practice has led to abuse in collection practices within the group such as holding a child from its mother until the payment is made. The lack of effective assessment of a borrower's repayment capacity based on expected cash flow may, in some instances, contribute to impoverishment of the borrower rather than contributing to her economic success. There are no specific or clear provisions requiring microfinance institutions to assess the affordability of their products and services, except provisions in draft Regulations and Directives for microfinance providers. These include requirements: • to report to and consult a credit bureau during the loan application process; (However, since credit bureaus are in their infancy and have little useful information for microfinance providers, they are not yet normally consulted.) • to limit monthly loan repayments to 50% of the borrower's take-home salary (based on a provision of the Labor Law); and • to comply with the forthcoming Registrar's Directive on reckless lending. The draft Directives also introduce a very positive requirement, which was dearly needed in the microfinance sector: the requirement to use the reducing balance method to calculate interest rates rather than flat interest rates -which unfortunately have become the rule in micro-lending. While some practitioners argue that flat rates are easier for customers to understand, there is no reason to impose this more onerous calculation method on poorer clients under the guise of simplicity. The MAMN Code of Conduct requires members to share information on defaulters only. In practice, this is done during the loan application process: loan officers call their colleagues in other institutions and banks to know if there is any negative record in the name of the potential borrower. Another important principle in MAMN's Code requires members to ensure that the costs of their inefficiencies are not transferred to their clients. Last, the Code requires members to develop a thorough understanding of the market through regular market research that is used to refine their products. Also, according to the MoU between SACCOs and MUSCCO, SACCOs are required to encourage thrift savings and member shares whereby such savings receive a market rate of interest and competitive rate of dividend. They also must provide loans to members at competitive interest rates and terms of repayment. As noted elsewhere in this Report, however, there is little evidence that the terms of the MoU and of MAMN's Code of Conduct are enforced in practice. Last, the interest rates charged by payroll lenders, which define themselves as microfinance lenders, are a common theme of heated public discussion by politicians, the consumer association and sometimes the RBM's top management. Interest rates can reach 40% per month on a loan with next to no credit risk since instalments are automatically deducted from the borrower's salary.
Recommendation	1) As recommended in the previous section, there is need to include a specific provision in the

	microfinance Regulations and Directives for providers to assess client affordability and repayment capacity, particularly for loan products, defining minimum items to be looked at in such assessment. 2) Require all types of microfinance services providers, including commercial banks and other licensed financial institutions authorized to carry out microfinance operations, to report credit history information to the credit bureaus that are being established (not only information on defaulters, but on all loans and potentially on other types of financial information, if allowed), and to consult the most appropriate bureau when assessing the borrower's repayment capacity. The Directives should specify the format and the periodicity of such reports. 3) Require MUSCCO and MAMN to insert in their Codes of Conduct a clear obligation on all providers to assess the affordability of their products and services in respect of any borrower or group of borrowers.
Good Practice B.3	***Cooling-off Period*** **a. Unless explicitly waived by the consumer in writing, a non-bank credit institution should provide the consumer a cooling-off period of a reasonable number of days immediately following the signing of an agreement between the institution and the consumer.** **b. On his or her written notice to the non-bank credit institution during the cooling- off period, the consumer should be permitted to cancel or treat the agreement as null and void without penalty to the consumer of any kind.**
Description	*It is not industry practice to offer a cooling-off period for any of the products commercialized in Malawi. In addition, there are no specific legal or regulatory requirements governing charges and procedures applicable to loan prepayment.* Only the CPA includes a cooling-off period of not less than 7 days from the signature or execution of a contract or receipt of goods or services. However, this provision only applies to contracts entered into at a place other than the ordinary business premises of the financial institution in question; and as indicated above, the CPA has never been applied or enforced. The draft Directives on non-deposit taking microfinance providers require that they permit borrowers to make partial or total prepayments on their microloans. The only specific requirement is that penalties for prepayments, if any, are to be described in the contract. No other standard is included in the draft regulations. There are no other provisions establishing acceptable practices or minimum consumers' rights with regard to prepayment of microfinance loans, or a cooling-off period for other products such as savings or insurance. Reportedly, prepayment is not a common practice amongst microfinance borrowers, but it is unclear if this is due to the lack of awareness about the possibility of prepaying a loan, resistance from lenders, or for some other reason(s). Some SACCOs do not charge a fee for prepayment within 30 days of disbursement, charging only the interest accrued in the period. Other providers give 4 days within which a prepayment fee is not charged, some do not charge any fee at any time, and many others do not have clear policies regarding prepayment. The only commonality in the industry is the non-disclosure of any prepayment fee in advance to the customer. Moreover, working with such tight timeframes between the disbursement of the loan and the first payment, it is difficult to contemplate a cooling-off period being implemented by MFIs.
Recommendation	1) In order to provide microfinance borrowers with a competitive and fair environment where switching costs are not prohibitive, including the costs related to burdensome and time-consuming administrative procedures being put in place by providers to discourage prepayment, Directives for the microfinance sector should set minimum standards for loan prepayment, procedures and fees such as (but not limited to): • limiting prepayment charges to a single prepayment fee (i.e. no hidden fee(s));

	• requiring the prepayment fee to be set at a reasonable level so as to cover only the administrative costs incurred by the provider; • including the fee and its main terms in all pertinent Key Facts Statements and every loan agreement; • prohibiting providers from submitting customers to burdensome administrative procedures that discourage them from prepaying their loans. 2) Conduct a thorough review of the current practices with regard to loan prepayment in the micro-lending sector and take additional steps to prohibit abusive and unsound practices that are deemed detrimental to microfinance consumers. This review should provide valuable information to the RBM's drafting process, as well as help to design effective supervision techniques.
Good Practice B.4	***Bundling and Tying Clauses*** **a. As much as possible, non-bank credit institutions should avoid the use of tying clauses in contracts that restrict the choice of consumers.** **b. In particular, whenever a borrower is required by a non-bank credit institution to purchase any product, including an insurance policy, as a pre-condition for receiving a loan, the borrower should be free to choose the provider of the product and this information should be made known to the borrower.** **c. Whenever a non-bank credit institution contracts with a merchant as a distribution channel for its credit contracts, no bundling, tying or other exclusionary dealings should be permitted.**
Description	*There are no legal or regulatory provisions for the microfinance sector dealing with bundling, tying or other exclusionary dealings.* Using third parties such as merchants for the delivery of microfinance services is not a common practice in Malawi. The most pervasive practice related to bundling in the microfinance sector is requiring a compulsory credit life insurance in all types of micro-loans. A microfinance client simply cannot access credit without accepting the coverage of credit life insurance, under terms and conditions pre-determined by the provider according to its agreement with an insurance company. The premiums vary from 0.5% to 3% of the value of the loan and are paid up front. The coverage varies widely across providers even when the insurer is the same. However, the one feature that does not vary is that customers are not allowed to choose the insurance provider or the type of coverage. Microfinance providers do not assess the risks that are intended to be covered, and do not take into consideration whether the client already has life insurance or any other type of insurance coverage. Also, microfinance clients are unable to compare different offerings, since there is no standardized manner in which microfinance providers disclose the total cost of their loans and the components of the cost, including interest rates, loan processing fees and compulsory insurance premiums. Typically, little information is provided to a client when his or her loan agreement is being signed. The insurance premium may be amalgamated with other charges, and the client not even made aware that he or she is acquiring insurance and for what purpose. Although it is not common to use merchants as distribution channels for microfinance products, the practice is allowed by the MFA (and the draft Directives). Therefore, the Registrar should prohibit exclusionary dealings for such cases, particularly if the use of merchants becomes a common practice as it has elsewhere (e.g. Brazil).
Recommendation	1) Issue Directives applicable to microfinance that: • prohibit tying or bundling practices that limit the customer's ability to choose an insurance provider or at least the type of coverage to be received from the insurance provider with which the microfinance provider has an agreement to provide the compulsory credit life insurance; • require micro-lenders and SACCOs to offer at least two options of insurers or two options of coverage from the same insurance, for every loan category;

	• require micro-lenders and SACCOs to disclose the insurance premium separately, and the general terms and conditions of coverage, in their loan agreements and key facts statements; • require providers to assess the need to cover any loan with insurance (in some few cases, the clients may have another insurance that covers debts such as loans); • require providers to inform the customer of the insurance and provide enough information so as to help customers understand not only that they are acquiring insurance, but also the purpose of such product. 2) In the forthcoming Directives dealing with mobile banking, prohibit merchants from linking the delivery of financial services, as agreed with a microfinance provider, to purchases of products and services in the merchant's establishment. 3) Given the relatively low level of sophistication of microfinance clients and the difficulty in assessing different insurance options, the self-regulatory bodies (MUSCCO and MAMN) and the RBM should consider establishing the terms of a few standardized compulsory credit life insurance products for the microfinance sector, at least in the event that compulsory insurance remains a requirement. This would facilitate comparison between different loan offerings, particularly if well-drafted Key Facts Statements become standard practice in the industry.
Good Practice B.5	***Key Facts Statement*** **a. Non-bank credit institutions should have a Key Facts Statement for each type of account, loan or other products or services.** **b. The Key Facts Statement should be written in plain language, summarizing in a page or two the key terms and conditions of the specific financial product or service, and allowing consumers the possibility of easily comparing products offered by different institutions.**
Description	*There are no legal or regulatory provisions requiring Key Facts Statements to be produced.* There are no common standards agreed within the industry for price disclosure and the provision of Key Facts Statements with any other important information. Comparability between different products in such a heterogeneous market, and even among the products offered by a single microfinance provider, is virtually impossible, raising the risk that leading to this vulnerable, unsophisticated clientele will all too frequently result in unwise financial decisions on the part of borrowers. There is only a very low level of compliance with the broad principles set out in the applicable legislation and regulation in this regard, and little evidence that in practice the providers make an effort to provide meaningful information to help clients make a financial decision. A draft Directive introduces the requirement for microfinance providers to use the reducing balance method to calculate interest rates, instead of using flat interest rates. However, there is need for developing standardized disclosures of the reducing balance method that are simple and understandable for customers with low levels of literacy and useable by the industry as a whole. There is no reason to impose a more onerous calculation method to poorer clients under the guise of simplicity.
Recommendation	The RBM should require all providers to furnish consumers with a simple, easy-to- understand and comparable Key Facts Statement that describes in a concise manner the total cost of each product being offered, in particular all loans, and the main terms and conditions of the product, including, for example, any requirement for compulsory credit life insurance. The Registrar should determine what information should be included in any Key Facts Statement, including formulas and key terminology, and in the format these need to take in order to ensure comparability in respect of price and other factors among different providers. For example, there should be explicit guidance on how to calculate and present the interest rate and monthly balances.

	A Key Facts Statement should also be required for other products offered by microfinance providers, including savings accounts offered by all deposit-taking microfinance institutions. Loan officers should be able to explain such information to potential clients, particularly illiterate customers. 2) The RBM should issue a Directive defining a standard format for the interest rate calculated using the reducing balance method, in a way that is easily understood by microfinance consumers. This format should be applied by the industry as a whole, to allow for comparability. In addition to an extensive consultation with the industry, these measures could benefit immensely from consumer testing of the formats created by the RBM to make sure that they are useful and understandable in practice. Consumer testing is a powerful step to achieving regulatory effectiveness. Such standard formats should also be published in the RBM's website, the media and other means in order to increase public awareness.
Good Practice B.5	***Advertising and Sales Materials*** **a. Non-bank credit institutions should ensure that their advertising and sales materials and procedures do not mislead customers.** **b. All advertising and sales materials should be easily readable and understandable by the general public.** **c. Non-bank credit institutions should be legally responsible for all statements made in advertising and sales materials.**
Description	*There are no provisions in the FSA, MFA or FCA regarding advertising and sales materials.* However, the CPA has many provisions in this regard: • An obligation to ensure that advertising conforms to rules of decency, sincerity and truth, dies not exploit superstition, ignorance or fear (section 44(1)); • A provision that an advertiser is guilty of fraud if they publish a false or misleading advertisement (which is very broadly defined to include leading a consumer to misunderstand, mistake or confuse the basic characteristics or price of the services to be provided) (section 44(2)); • A prohibition on abusive advertising (section 45); • An obligation to publish conditions and terms of any promotional offer, as well as the period for which the offer is open (if this is not done, it is assumed to be open for 30 days) (section 46); • A consumer can seek compensation for a breach of these provisions (section 47) and a breach exposes the person concerned to a penalty of MK 500,000 and to imprisonment for 5 years. In practice, however, there has been no compliance with such requirements, since the CPA has never been applied and the CPC has never been funded or established.
Recommendation	The RBM should issue a Directive applicable to all microfinance providers, including SACCOs, requiring that, at a minimum, their advertising and marketing materials: • not be misleading and deceptive or include false representations, in particular interest rates on loans should be effective rates; • be concise and clearly expressed, and in a minimum font size; • be in English and/or the relevant local language, whichever is most appropriate; • include essential information relevant to the product, to be determined by the Registrar; and • be the responsibility of the service provider.

	Such Directive should clearly define terms such as abusive and misleading advertising. There should also be clarification of any inconsistencies between the CPA and any Directives relating to this issue in the microfinance sector.
Good Practice B.6	***General Practices*** **Disclosure and sales practices should be included in the non-bank credit institutions' code of conduct and monitored by the supervisory authority.**
Description	*The industry Codes of Conduct have some principles that relate to disclosure and sales practices. However, industry practices are not favorable to the consumer and the lack of standardized disclosure standards does not promote competition, does not permit price shopping and may lead consumers to make unwise decisions. There are no legal or regulatory provisions setting common standards for price. The applicable laws and regulations only set high-level principles without setting specific standards. Individual institutions are not required to have their own Code of Conduct and this is not a common practice in Malawi.* As described in Good Practice A.1, the relevant consumer protection provisions in the FCA require disclosure, at all times, in writing, of the cost of borrowing, including the interest rate and the related fees. Microfinance providers and SACCOs must also post in every place of business: 1) a copy of its last audited financial statements; 2) information about member rights and responsibilities; 3) financial products and services offered; and 4) terms under which products and services are offered. The CPA requires a supplier to provide consumers with "*true, sufficient, clear and timely information on - ... services offered, to enable consumers to make proper, informed and reasonable choices*". Under the MFA, all microfinance service providers must, at all times, disclose in writing to the concerned customer the terms of any credit or savings products being offered. With the exception of microcredit agencies, in a conspicuous place within every branch where they conduct business, all microfinance service providers must display a notice containing: (a) the provider's code of conduct; (b) information on the customer's rights and responsibilities; (c) the provider's financial statements; (d) the microfinance products and services it offers and the terms under which they are being offered; and (e) the provider's certificate, license, or approval, including company incorporation certificate. The MFA also requires MFIs to disclose all credit facilities involving related parties (as defined in the FSA). The FCA requires SACCOs to disclose to their members at the annual general meeting any compensation, food and travel or meeting expense or reimbursement paid to a director. MUSCCO's and MAMN's Codes are not specific on the matter of disclosure and sales practices. Standardized, comparable, understandable, clear and concise information is the very minimum necessary for microfinance customers to help them avoid unwise financial decisions. Even with such information, microfinance borrowers are particularly vulnerable to pressure to take loans that do not fit their needs or their repayment capacity. Pressure can come from peers (to become part of a group of borrowers), from loan officers who need to reach a certain portfolio size to earn their commissions, or even from a community chief who is convinced by a

	provider that the product being offered is appropriate. Payroll borrowers are also subject to high-pressure sales by loan officers who are keen to have unsuspecting borrowers agree to pay particularly high rates of interest.
Recommendation	1) The RBM should issue Directives or Regulations applicable to all microfinance services providers, including SACCOs and payroll lenders, to: • Require all providers to display prominently the key price/cost information of the products they offer, in all branches and all other places they offer their products, including in the marketing materials they employ for each product being offered: - The Registrar should determine what information should be disclosed, including formulas and key terminology, and in what format to ensure price comparability among different providers; - Price disclosure should also be required for savings and other accounts, including fees and charges for transactions and maintenance of the account, minimum balance and remuneration; - For deposit services, the client must be informed about the existence or inexistence of deposit insurance or guarantee scheme; - The RBM should work towards a standardized price disclosure for savings products in the near future; • Require all providers to disclose their regulatory status; • Require all providers to publish all relevant information on their websites and any other means used to advertise their products. 2) As part of their potential role in market conduct supervision with the RBM, MUSCCO and MAMN should publicize prices and conditions of the main offerings in their respective segments, analyze business practices of MFIs and SACCOs, monitor compliance of disclosure requirements and standards, and assess prevailing market practices in advertisements, disclosure documents and sales practices. They should be required to report non-compliance to the RBM, for further enforcement action and engage in public awareness to help customers avoid risky situations and offerings. 3) There should be coherence in the disclosure requirements across the different sectors providing credit in Malawi, from banks to community-based SACCOs. However, it might be necessary to consider implementing customized price disclosure standards that specifically target microfinance clients given their low level of education, literacy and experience with financial services.
Good Practice B.5	***Disclosure of Financial Situation*** **a. The relevant supervisory authority should publish annual public reports on the development, health, strength and penetration of the non-bank credit institutions, either as a special report or as part of the disclosure and accountability requirements under the law governing them.** **b. Non-bank credit institutions should be required to disclose their financial information to enable the general public to form an opinion regarding the financial viability of the institution.**
Description	*The laws and regulations applicable to the microfinance sector require providers to disclose their financial situation to customers and provide the Registrar with powers to publish such information. Given the level of education and literacy among microfinance providers, such measure is unlikely to provide a higher level of protection. Still, such information is valuable to other stakeholders such as the civil society, investors, etc., and should be required from all providers of microfinance services.* The RBM does not publish frequent information on the development, health, strength and

	penetration of the microfinance sector, given that this sector was not subject to its regulatory and supervisory powers until the 2010 financial sector reform[101]. Also, there is little public information available about this sector. Under the FSA, all financial institutions should submit annual audited financial statements to the Registrar and publish such information in at least two local newspapers of wide circulation. In addition, they shall exhibit the statements in a conspicuous place in their premises. The FCA empowers the Registrar to publish any information about the financial situation of a SACCO, provided that it does not contain information about individual account holders. There is no similar provision in the MFA, but the Registrar is entitled to request any financial information, in addition to the financial statements, it deems necessary. The Draft Directives for Non-deposit taking microfinance providers include the standard format in which the financial statements should be submitted. Similar guidance for SACCOs is pending on future Directives or Regulations. Despite this enabling legal framework, due to weaknesses in their management and information systems, it is expected that many microfinance providers will not be able to comply with reporting requirements, at least in the first years of operation under the new regulatory and supervisory regime. MUSCCO and MAMN are likely to play an important role in helping the industry prepare for regulation and supervision by the RBM.
Recommendation	1) The RBM should issue a Directive or Regulation setting reporting and publication standards of financial statements for SACCOs and microfinance providers. 2) The RBM should also gather and publish (through printed and electronic media) statistics about the microfinance sector on an annual basis, and exercise pressure on the sector to increase capacity to produce reliable and meaningful information. Such statistics could include: number of borrowers, depositors, total deposits, total shares (in the case of SACCOs), total loan portfolio, average interest rates for different types of loans and savings accounts, geographic coverage, total assets and liabilities. 3) The RBM and financial industry associations should help SACCOs and MFIs improve their capacity to comply with reporting and account standards. The RBM, MAMN and MUSCCO should do their best to attract donor funding with a view to making a successful transition of the microfinance sector into the regulated sphere. They should also promote workshops and training for staff of SACCOs and MFIs.
SECTION C	**CUSTOMER ACCOUNT HANDLING AND MAINTENANCE**
Good Practice C.1	***Statements*** **a. Unless a non-bank credit institution receives a customer's prior signed authorization to the contrary, the non-bank credit institution should issue, and provide the customer with, a monthly statement regarding every account the non-bank credit institution operates for the customer.** **b. Each such statement should:** **i) set out all transactions concerning the account during the period covered by the statement; and** **ii) provide details of the interest rate(s) applied to the account during the period covered by the statement.** **c. Each credit card statement should set out the minimum payment required and the total interest cost that will accrue, if the cardholder makes only the required**

[101] A Microfinance Section was included as part of the Non-Bank Financial Sector Report 2009, prepared by the then-existent Supervision of Non-Bank Financial Institutions Department of the RBM.

	minimum payment. **d. Each mortgage or other loan account statement should clearly indicate the amount paid during the period covered by the statement, the total outstanding amount still owing, the allocation of payment to the principal and interest and, if applicable, the up-to-date accrual of taxes paid.** **e. A non-bank credit institution should notify a customer of long periods of inactivity of any account of the customer and provide a reasonable final notice in writing to the customer if the funds are to be transferred to the government.** **f. When a customer signs up for paperless statements, such statements should be in an easy-to-read and readily understandable format.**
Description	*There are no legal or regulatory requirements setting standards for account handling procedures and statements to be provided to the customer. It is not a practice in the microfinance sector to provide customers with such information, even in the SACCO sector, which in some cases offers savings accounts.* There are no provisions in the FSA, the FCA, the MFA or the Draft Directives for MFIs with regard to monthly statements for loans or other types of accounts, or which govern how this type of information is to be released to the client. Neither are there provisions or clauses in the Codes of Conduct of MUSCCO and MAMN covering this issue. It is not a practice in the microfinance sector to provide clients with any regular written statements regarding their financial position, their rights and obligations towards the service provider, if any, and a description and the prices of all of their transactions. This sector usually uses a passbook that is brought to the MFI or SACCO every time a loan installment is paid, or every time a deposit is made, so that the account balance is updated manually. SACCOs and the MRFC are the only non-bank microfinance providers that are authorized to accept voluntary savings from the public under the FSA and the FCA. There is not yet any MFI operating under the new legal framework that allows deposit-taking. It is expected, however, that some 5 or 6 MFIs will apply for a deposit-taking license when the new regulations for this sector are issued. The FCA defines a "dormant account" as one that has been kept inactive for 12 months. Once an account is dormant the Registrar may determine the treatment of its funds. However, the FCA does not set a requirement to inform the client or any other procedure to reinstate such funds to the customer or beneficiary. There is no example of paperless statements in the microfinance sector, although this is likely to become a more common practice as electronic banking reaches a larger number of microfinance customers, particularly mobile-phone based services (see Annex II). MFIs are not allowed to offer credit cards.
Recommendation	1) The RBM should issue Directives for all types of microfinance providers in order to: • Set sensible minimum standards regarding provision of account statements (not necessarily paper-based statements), including the minimum number of free statements in a certain period of time (e.g. once a month). - set standardized formats and language to be used across the industry for similar charging events and similar products or services; - prohibit statements from containing items that are illegible or difficult to understand, such as mysterious abbreviations; - require a free monthly account statement, in a reasonable format according to the channel used for the delivery of the service or product (e.g. if the statement is provided through a mobile phone, its format will need to be readable from the screen of the mobile phone). • Require the customer to be informed, when opening an account, how many statements

	are free and any cost for requesting additional statements (if, say, more than one per month). • Require the customer to be informed, when opening an account, of any coverage from a deposit insurance or any other guarantee scheme and the scope and size of such coverage. • Prohibit the charge of maintenance fees or other fees on dormant accounts that have reached a zero balance, i.e. no negative balance is permitted as a result of such charges, and no automatic overdraft is permitted to allow such charges. • Set requirements for providers to inform clients with a minimum notice, regarding the potential closing of a dormant account, and potential destination of the funds in case the client does not claim the funds within a pre-determined period of time.
Good Practice C.2	***Notification of Changes in Interest Rates and Non-Interest Charges*** **a. A customer of a non-bank credit institution should be notified in writing by the non-bank credit institution of any change in:** **i. the interest rate to be paid or charged on any account of the customer as soon as possible; and** **ii. a non-interest charge on any account of the customer a reasonable period in advance of the effective date of the change.** **b. If the revised terms are not acceptable to the customer, he or she should have the right to exit the contract without penalty, provided such right is exercised within a reasonable period.** **c. The non-bank credit institution should inform the customer of the foregoing right whenever a notice of change under paragraph a. is made by the institution.**
Description	*There are no such provisions in the law or the regulations covering microfinance services providers, including SACCOs. The industry Codes of Conducts do not deal with this issue either. It is not a practice in the microfinance sector (particularly in MFIs) to provide such an advance notice when prices are being changed, especially due to the short-term nature of microlending.* Microfinance loans are usually short-term, varying from 15 days to 6 months. Some institutions, and in particular SACCOs, provide loans from 1 month to 2 years. However, the general practice in the local industry is to use fixed interest rates during the life of the loan and it is not common for customers to exit their contracts. Also, there are no extra fees charged against micro-borrowers during the life of the loan. The fees may change without notice, but would only apply to the next loan the borrower takes. There is no guidance in the laws, regulations or Codes of Conduct within the microfinance industry covering this issue. With regard to notifying customers about changes in non-interest charges on savings or other types of accounts, few non-bank providers offer such products in the microfinance sector, and few of the SACCOs (in most SACCOs, deposits are towards shares, not savings). The regulation applicable to SACCOs does not address this issue.
Recommendation	1) Although there might be limited application in the microfinance sector at the moment as most providers are credit-only institutions, it is advisable that rules be issued for SACCOs and MFIs (particularly deposit-taking MFIs under the new rules authorizing the establishment of this type of provider), with regard to changes in charges and interest rates during the life of a loan or a savings product. A reasonable minimum notice period should be adopted and notice should be required to be provided using means that are practical, meaningful and implementable in the microfinance context (for instance, using the phone and other informal means of communication is more appropriate than written letters, as many clients will not have any formal physical address). Although such rules should be consistent with those applicable to banks in order to provide for a level playing field across sectors, there must be enough flexibility provided by the RBM in the way the rules are implemented in the microfinance sector in order to avoid imposing undue burdens on providers within this market. 2) All microfinance providers, including SACCOs and MFIs, should be required by Directives

	or Regulations to establish their own written policies on such matters and disclose these policies to their clients by posting them in the same place that their current charges and interest rates are disclosed. Most importantly, a;ll such providers must, in clear and succinct terms, explain this information to their clients before and after a service is sold. Such policies should not conflict with the principles stated in the Codes of Conduct of each relevant industry and the applicable regulations.
Good Practice C.3	***Customer Records*** **a. A non-bank credit institution should maintain up-to-date records, in respect of each customer of the non-bank credit institution, that contain the following:** **i. a copy of all documents required to identify the customer and provide the customer's profile;** **ii. the customer's address, telephone number and all other customer contact details;** **iii. any information or document in connection with the customer that has been prepared in compliance with any statute, regulation or code of conduct;** **iv. details of all products and services provided by the non-bank credit institution to the customer;** **v. all documents and applications of the non-bank credit institution completed, signed and submitted to the institution by the customer;** **vi. all documents submitted by the customer in support of an application for a financial product or service; and** **vii. any other relevant information concerning the customer.** **b. A law or regulation should provide the minimum permissible period for retaining all such records and, throughout this period, the customer should be provided ready free access to all such records.**
Description	*The current legal and regulatory framework provides for minimum standards with regard to record keeping, but pending regulations should be further refined to provide a higher level of detail in such requirements, compatible with microfinance activities and clients.* The FCA requires SACCOs to keep records, including client records, for a minimum period that the Registrar would prescribe in upcoming Directives. MUSCCO Bylaws require its members to keep records, for at least 3 years from the date of the termination of the loan agreement, reflecting details of all loans, shares and deposits, including the name, address and contact details of the individual members, and the date of each transaction. The Anti-Money Laundering Proceeds of Serious Crime and Terrorist Financing Act, 2006, which applies to MFIs and SACCOs, requires all covered institutions to keep clients' records for a minimum of 7 years from the date the account was closed of the business relationship ceased. Such records (hard or soft copy) must contain, for instance, identifying documentation data, account files and business correspondence, as well as all transactions including domestic and international transactions carried out by the institution, and correspondence relating to such transactions. In terms of data privacy and protection, the FCA and the MFA require SACCOs and MFIs to conduct their business in strict confidence. Except in certain circumstances described in both Acts, including remitting information to third parties such as members of a group guarantee scheme or a credit register, with the consent of the customer, an offence will be committed if a person discloses or publishes any information which comes into his possession in the course of the performance of his duties or responsibilities under the FCA and the MFA. For further details with regard to the legal framework for the functioning of credit bureaus, see Annex I on Credit Reporting. The Draft Directives on Microcredit Agencies and Non-deposit Taking MFIs confirm such an

	approach by requiring these institutions to maintain confidentiality when dealing with their customers and exempt such confidentiality for reports to and consultations from credit bureaus. According to the Directives, officers must take precaution to protect the confidentiality of customer information and transactions, unless any written law, a court order, the Registrar or other supervisory authority requires disclosure in the context of regulatory obligations. The Registrar is entitled to inspect the premises of the institution to check on safekeeping on clients' records and record-keeping procedures. The Draft Directives do not specify the minimum period to keep clients' records, but one would assume that with regard to the minimum information required by the AML Act, records must be kept for at least 7 years.
Recommendation	1) In the appropriate statute, the RBM should specify the minimum period for which microfinance providers should keep client's records and specify what information should be recorded and kept and in what form (electronic, paper-based). If the minimum period is less than 7 years, the extent of the application of the AML Act will need to be clarified. 2) The RBM should provide similar specifications for the SACCO segment and MUSCCO should adapt its Code of Conduct to reflect the new rules.
Good Practice C.4	***Debt Recovery*** **a. All non-bank credit institutions, agents of a non-bank credit institution and third parties should be prohibited from employ any abusive debt collection practice against any customer of the non-bank credit institution, including the use of any false statement, any unfair practice or the giving of false credit information to others.** **b. The type of debt that can be collected on behalf of a non-bank credit institution, the person who can collect any such debt and the manner in which that debt can be collected should be indicated to the customer of the non-bank credit institution when the credit agreement giving rise to the debt is entered into between the non-bank credit institution and the customer.** **c. A debt collector should contact any third party about a non-bank credit institution customer's debt without informing that party of:** **i. the debt collector's right to do so; and** **ii. the type of information that the debt collector is seeking.** **d. Where sale or transfer of debt without borrower consent is allowed by law, the borrower should be:** **i. notified of the sale or transfer within a reasonable number of days;** **ii. informed that the borrower remains obligated on the debt; and** **iii. provided with information as to where to make payment, as well as the purchaser's or transferee's contact information.**
Description	*There are no provisions in the FSA or the specific Acts or regulations governing the microfinance sector on debt collection practices. This diagnostic mission gathered very limited information on market practices in this regard.* Based on the Registrar's broad mandate, the Registrar could regulate on this matter, if necessary. Given the methodologies used in microfinance lending and the vulnerability of microfinance customers and their low level of sophistication, it is advisable to prohibit abusive collection practices and to define sanctions in case of non-compliance. Although the extent of abuses is debatable, there are reports of some abusive practices, such as holding a child of a delinquent borrower until the borrower pays her debt. The RBM may want to investigate these and any other abusive practices.
Recommendation	1) The RBM should issue a Directive defining and prohibiting abusive collection practices. 2) The RBM should conduct a market study to identify prevailing market practices, in order to inform the regulatory process. This can involve field visits and interviews with borrowers.

SECTION D	DISPUTE RESOLUTION MECHANISMS
Good Practice D.1	***Internal Complaints Procedure*** **Complaint resolution procedures should be included in the non-bank credit institutions' code of conduct and monitored by the supervisory authority.**
Description	*The laws or industry codes of conduct do not mandate internal complaints procedures for microfinance services providers or SACCOs. The draft Directives for microfinance service providers (which do not cover SACCOs) would require such procedures and mechanisms. This aspect is not normally checked by the RBM during its routine examinations of financial services providers.* The CPA makes no reference to internal complaints procedures. The FSA requires the Registrar to promote and encourage formation, by financial institutions, of free complaints resolution schemes to informally and quickly resolve complaints, with power to make binding decisions on financial institutions. The Registrar may give written direction to institutions or to self-regulatory organizations to implement such schemes, which shall encourage conciliation of complaints. However, complaints resolution schemes shall not be implemented or amended unless approved by the Registrar. The Draft Directives for Microfinance providers require all covered institutions to have in place complaints handling procedures to guide clients in the event of complaints but do not require institutions to disclose and publicize the existence of such procedures and educate the customer about their right to complain and solve problems with their institutions, and how to do so. Specifically, these draft Directives require MFIs to report to the Registrar all complaints received on a quarterly basis and to maintain a Complaints Register where the following details are recorded: a) date complaint is received; b) nature of complaint; c) steps taken to resolve the complaint; and d) date and resolution of the complaint. MAMN's Code of Conduct does not have any reference to complaints mechanisms. Regarding SACCOs, the only explicit reference to internal complaint resolution mechanisms are in the MUSCCO Bylaws, which require member SACCOs to keep a register and records of written complaints received from members and all correspondence relating to such complaints for a period of 3 years as form the date of termination of the loan agreement and submit to MUSCCO, at its request, copies of all written complaints received. The Code does not set minimum standards for the complaint filling mechanisms, channels and procedures, nor does it set minimum requirements and standards for handling complaints, such as maximum amount of days to resolve a complaint or minimum information to give to customers about the complaints procedure. In practice, the loan officer is the main point of contact between a microfinance client and the service provider, but he has little incentive to educate the customer about his rights to complain and the channels and mechanisms to do so. Few institutions establish policies and standard procedures for handling complaints, and even fewer, if any, keep records of complaints. The creation of such infrastructure has not been addressed by MUSCCO or MAMN. Awareness about the right to complain and consumer rights in general is very limited by the low levels of sophistication of microfinance clients, and their little experience with the formal financial sector.
Recommendation	1) To support healthy financial inclusion and increase levels of confidence amongst low-income customers in their dealings with microfinance providers, it is important to promote the use of, and strengthen, the complaint resolution mechanisms in this sector. In the microfinance

	sector, internal disputes mechanisms should definitely be prioritized and should work well to avoid recourse to formal channels that might be overly burdensome, expensive and complex. This should be a priority for the RBM in its regulatory and supervisory process. 2) The draft Directives for non-deposit taking microfinance providers is an important first step in this direction. To provide a clear sign to the regulated market regarding the goal of improving business practices in microfinance and create a level playing field across different providers, the Directives and Regulations governing microfinance institutions, microcredit agencies and SACCOs should create minimum similar rules for the compulsory establishment of internal complaint mechanisms that: - are free of charge; - are fast and simple and work for low-income customers; - encourage conciliation; - are operated according to written policies, procedures and standards that are commensurate with the institution's size and complexity and with the level of sophistication and income of customers. The Directives should require all microfinance providers and SACCOs to have systems and procedures in place to keep records of consumer complaints. Minimum standardized information such as date of complaint, client name, reason for complaint, measures taken and the reasoning for it, resolution date and description, name of the employee handling the complaint, etc., should be determined by the Registrar to allow for comparison across providers in the same sector. Ideally, in time, such records will be electronic. 3) In the foreseeable future, the Registrar should aim at receiving and using customer complaints reports as an important input to its supervisory functions. Such input can be valuable in identifying areas in which to concentrate scarce supervisory resources dedicated to market conduct oversight and may, in addition, help the prudential oversight team identify weaknesses in internal controls that may affect other risk areas of the institution in question. To be able to carry out this task, the RBM will need to put in place specific supervisory procedures to assess the effectiveness of complaint handling and resolution mechanisms and create standardized reporting to receive information on consumer complaints periodically. 4) MUSCCO and MAMN should aim to provide necessary technical assistance to their members in the implementation of complaints mechanisms, by crafting minimum standard procedures, as well as guidance in disclosing the existence and operation of such mechanisms to microfinance clients.
Good Practice D.2	***Formal Dispute Settlement Mechanisms*** **a. A system should be in place that allows consumers to seek affordable and efficient third-party recourse, such as an ombudsman, in the event the complaint with the non-bank credit institution is not resolved to the consumer's satisfaction in accordance with internal procedures.** **b. The role of an ombudsman or equivalent institution in dealing with consumer disputes should be in place and made known to the public.** **c. The ombudsman or equivalent institution should be impartial and act independently from the appointing authority, the industry and the parties to the dispute.** **d. The decisions of the ombudsman or equivalent institution should be binding upon non-bank credit institutions. The mechanisms to ensure the enforcement of these decisions should be established and publicized.**
Description	*There is no out-of-court external dispute resolution mechanism available for microfinance customers. The only formal dispute resolution mechanisms are within the Malawi Judicial system, which seems inadequate for this type of clientele and their small claims.* For a full description of the legal framework for formal dispute resolution in Malawi, see the

	Banking Section (Good Practices E), which details the provisions of the CPA in this regard, including the possibility of presenting collective actions against financial services providers. There are no small claims courts in Malawi or similar instance where low value claims can be resolved. The only formal resolution mechanism for microfinance clients is the Commercial Court or the Magistrates Courts. As pointed out in the Banking Section, there has been no funding for subordinate courts to function as they are meant to do regarding consumer complaints. In addition, no regulations have ever been issued under the CPA, whether by the Minister of Trade or by the Chief Justice. [102] The FSA empowers the Registrar to require all financial institutions, including microfinance services providers and SACCOs, to have a scheme under which an independent person must resolve a complaint if the financial institution cannot do so. Such a scheme must bind the financial institution but not the customer. This provision has not been implemented and it is not clear how it is to be implemented. It remains an open question, therefore, whether it means, in practice, the creation of an ombudsman for the microfinance sector. There appears to be general agreement within the microfinance industry and in other sectors of the financial system that creating and sustaining a neutral, specialized independent body, such as an ombudsman, would be a positive development. Its purpose would be to resolve disputes that do not get resolved internally between a financial institution and its customer, with power to issue decisions that bind financial institutions. There are, however, legitimate concerns regarding: • who would fund the implementation and operation of such a scheme; and • how would such an institution work for microfinance customers, given: - their lack of awareness about their rights to complain and to seek out any additional means of resolving their complaints, if efforts to do so prove unsuccessful with their microfinance institution; - the physical distances between microfinance clients and urban centers where such a scheme would be headquartered; - the lack or unreliability of communication channels to connect rural and urban areas; and - the potential fees, if any, to be charged by the ombudsman, and their possible liability for at least some of these. In accordance with the MoU in the SACCO system, MUSCCO can carry out an inquiry if at least 2/3rds of the members of a SACCO request it. It seems, however, that this prerogative has never been used, at least in respect of an unresolved complaint that one or more consumers may have with a SACCO. This is not surprising, though, since not only do few SACCO members know of the existence of the MoU, let alone what it contains, MUSCCO officials themselves are rightly concerned about the likely perception of bias towards any SACCO on the part of MUSCCO since MUSCCO is financed by SACCOs.
Recommendation	1) In the near term, the Malawian authorities (including the RBM and the Ministry of Trade) should consider establishing an independent Ombudsman for all financial services, including all types of microfinance services. This could be done by enacting a specific law or through Registrar's Directives requiring each institution to participate and be bound by any Ombudsman's decision with respect to it. 2) Regardless of the way in which the scheme is established, it should be developed in close consultation with all relevant stakeholders, including Ministries, the financial services industry (including the microfinance providers and SACCOs), and consumer representatives including the Consumers Association of Malawi. The priority of such service should be to deal expeditiously, independently, professionally and inexpensively with consumer disputes that

[102] In addition, draft legislation is being prepared to create a Mediation and Arbitration Centre to resolve small commercial disputes, although it is not clear whether this Centre is also envisaged as having jurisdiction over consumer disputes in respect of financial services.

	are not resolved internally by any financial services providers, including those operating in the microfinance sector. 3) The scheme would need an oversight body and have its own rules or terms of reference covering basic points such as membership, nature of disputes and compensation caps. 4) Within its newly created market conduct unit, the RBM could use reports from the Ombudsman to identify potential weaknesses in the supervised sectors and address them through its supervisory function. 5) Even if this service is well designed and implemented, it will only work effectively for microfinance if a national campaign is rolled out to make all consumers aware not only of their right to present a complaint about a financial services provider and to seek redress to the ombudsman if their complaint is not solved directly with the service provider, but also of the procedures to present a case to the ombudsman. Such awareness campaign would need to be designed in a way that: • makes consumers identify themselves with the ombudsman, overcoming the reported psychological or cultural barrier (e.g. intimidation) between low-income Malawians and official government institutions and financial institutions; • works for illiterate and semi-illiterate microfinance consumers, by using creative informative materials and techniques (e.g. printed comics, roadshows) and dissemination channels (e.g. radio programs, community discussions); and • takes into consideration available information on the current levels of financial literacy and capability in Malawi. 6) The ombudsman's services should be designed to incorporate two-way communications in which the ombudsman is capable of reaching the consumer (e.g. through radio programs, tribal chiefs, associations, group discussions, etc.) and consumers are capable of reaching the ombudsman (e.g. through suggestion boxes, mobile phones, etc.). The ombudsman should also be capable of dealing with poor microfinance customers in their mother tongue, and know how to resolve their most common problems without imposing undue burden (in terms of time and money) and without eliciting intimidation. 7) Lastly, in designing such an Ombudsman scheme, the Malawian authorities should consult with international experts and look into international standards (such as ISO) and other models in other countries. However, the international experience will need to be adapted to the reality of Malawi and, in particular, the reality of microfinance clients and products, if the scheme is to work for this segment.
SECTION F	**CONSUMER EMPOWERMENT**
Good Practice G.1	***Broadly based Financial Capability Program*** **a. A broadly based program of financial education and information should be developed to increase the financial capability of the population.** **b. A range of organizations - including government, state agencies and non-government organizations- should be involved in developing and implementing the financial capability program.** **c. The government should appoint an institution such as the central bank or a financial regulator to lead and coordinate the development and implementation of the national financial capability program.**
Description	The FinScope survey results showed that increased financial literacy and strong consumer protection in financial services are essential for promoting financial inclusion in Malawi. Accordingly, the Malawi National Strategy for Financial Inclusion 2010-2014, as developed by the Ministry of Finance's FIMA Project, includes an Action Plan at the Client level that

	focuses on financial literacy and consumer protection. The financial literacy dimension includes activities such as: conducting a baseline study on financial literacy, developing a strategy for financial literacy, establishing a national financial literacy network, providing training, and delivering financial education. Within the financial inclusion strategy, the Government of Malawi has taken the important step of setting up a multi-stakeholder National Taskforce on Consumer Financial Education (NTCFE), under RBM's leadership. The taskforce includes representatives of the financial industry (such as MAMN and MUSCCO), government, civil society, academia and the media council. The taskforce has developed a draft outline of a financial literacy action plan.
Recommendation	Led by the RBM, efforts should continue so as to develop and implement a national strategy on financial literacy with the participation of all stakeholders.
Good Practice G.2	***Using a Range of Initiatives and Channels, including the Mass Media*** **a. A range of initiatives should be undertaken by the relevant authority to improve the financial capability of the population, and especially from low-income communities.** **b. The mass media should be encouraged by the relevant authority to provide financial education, information and guidance to the public, including on non-bank credit institutions and the products and services they offer.** **c. The government should provide appropriate incentives and encourage collaboration between governmental agencies, the supervisory authority for non-bank credit institutions, the associations of non-bank credit institutions and consumer associations in the provision of financial education, information and guidance to consumers.**
Description	*Microfinance consumers are usually vulnerable and have limited access to information and little understanding of the information provided to them by financial institutions and other sources. Language, content, and channels are not adequate.* MUSCCO requires member SACCOs to educate customers on the management and control of money. Before microfinance loans are provided to solidarity groups (usually groups of women), many MFIs, particularly those working in rural areas with small farmers and micro-entrepreneurs, conduct financial education with potential clients. These institutions usually require customers to attend a 4-hour training program over a 4-week period. However, it is not clear how much of this training focuses on financial management skills rather than the workings of a microfinance group loan, including when and how to make loan payments to the MFI. Nonetheless, low-income financial consumers can become better informed if their tribal chieftains learn basic lessons of financial management and budgeting and then pass on their knowledge to those in their villages. Also, different delivery channels, including radio, roadshows and village-level role-playing, should be considered in the implementation of financial literacy initiatives. The main objective of such initiatives should be to foster a savings culture and avoid over-indebtedness. The effectiveness in achieving these objectives should be measured.
Recommendation	Several initiatives and delivery channels should be used in the implementation of financial education initiatives, especially in order to reach those who are poorest and most vulnerable. Communication and information initiatives targeting microfinance consumers, however, need to be different from those aimed at middle and high-income individuals. In the first instance, an evaluation of methodologies and channels that would likely work best for microfinance consumers should be undertaken. This should necessitate a nationwide financial capability survey and incorporate evaluations of the impact of different financial education initiatives.
Good Practice F.2	***Unbiased Information for Consumers*** **a. Consumers, especially the most vulnerable, should have access to sufficient resources to enable them to understand financial products and services available to them.** **b. Supervisory authorities and consumer associations should provide, via the internet**

	and printed publications, independent information on the key features, benefits and risks –and where practicable the costs- of the main types of financial products and services, including those offered by non-bank credit institutions. **c. The relevant authority should adopt policies that encourage non-governmental organizations to provide consumer awareness programs to the public regarding financial products and services, including those offered by non-bank credit institutions.**
Description	*Financial regulators have not been providing information, either via internet or in printed publications, that is meaningful or accessible by microfinance consumers or organizations representing them or promoting their rights.* The overall cost to consumers of credit or savings products in the microfinance sector can be difficult, if not impossible, to understand, in particular for those who are especially inexperienced and poor. In many cases, as well, the employees and agents of microfinance providers, themselves, lack full understanding of the products and services they offer, as well as the clientele they serve. Apart from low-levels of financial literacy, the overall cost of credit and savings products is typically far too complex and difficult to compare across different providers due to the lack of any required standardization in terms of what is disclosed and how it must be disclosed. Additionally, associated charges and fees, not to mention compulsory savings and insurance, typically apply to a microcredit product and are most often not included in the total price being disclosed. All too frequently, therefore, customers are not aware of - and are incapable of knowing - what they are going to be paying for what they are getting.
Recommendation	The RBM's initiative on consumer protection and financial literacy is a great opportunity to improve levels and quality of information available to microfinance consumers. However, it is important that the RBM first understands the financial capability needs of this market segment and the average profile of microfinance clients, in order to design effective educational and informational materials and initiatives. It is also necessary to evaluate which methodologies and channels will work best for these consumers.
Good Practice F.4	***Measuring the Impact of Financial Capability Initiatives*** **a. Policymakers, industry and advocates should understand the financial capability of various market segments, particularly those most vulnerable to abuse** **b. The financial capability of consumers should be measured through a broadly based household surveys that are repeated from time to time.** **c. The effectiveness of key financial capability initiatives should be evaluated by the relevant authority from time to time.**
Description	*Although no such initiatives have yet been carried out in Malawi, relevant work is in progress to conduct a baseline survey of the level of financial literacy throughout Malawi. This survey will identify differences in these respects between consumers of microfinance products and services and other consumers within the financial system, in order to assist in determining effective methodologies, channels and messages of a nuanced eventual national financial literacy effort in Malawi.* The implementation of a baseline household financial literacy survey has been identified as part of the Action Plan of the Malawi National Strategy for Financial Inclusion 2010-2014, developed by the Ministry of Finance's FIMA Project. The National Taskforce on Consumer Financial Education has also developed a draft outline of a financial literacy action plan, the first measure of which is a financial literacy study.
Recommendation	Current efforts should continue and be encouraged so that a detailed nationwide household survey of financial literacy is completed as soon as feasible, with its results then informing what is done and how it is done in order to improve the existing levels of literacy.

CONSUMER PROTECTION IN THE SECURITIES SECTOR

Overview

The securities sector in Malawi is comparatively small and there are very low numbers of retail investors. We were advised that currently around 10 -15% of trades are done for retail investors. This is not surprising given Malawi's status as one of the world's least developed countries; with an estimated GDP per capita in 2010 of US$900 (Malawi per capita GDP ranks as number 219 out of 229 countries).[103] However, the economy had an estimated real growth rate in 2010 of around 6.5% (30th highest among 216 countries), 7.6% in 2009 and 9.8 % in 2008.[104] On one view, the number of retail investors should increase, given the growth in the economy, the education campaign proposed by the Malawi Stock Exchange (MSE) and the push to develop a corporate bond market. However, the relatively poor performance of the stock exchange in 2010 is likely to discourage investors.

The Malawi stock market is in its infancy. There are only 15 companies listed on the MSE, which commenced trading in equities in November 1996. MSE had a market capitalization at the end of December 2010 of around MKW 1,278 billion (US$1.86 billion). However these figures are much less if non-Malawi shares in Old Mutual are excluded. Then the figures are around MKW 207 billion (approximately US$242 million), which represented a decline of 6.96% compared to 2009, as seen in Table 3. Old Mutual is dual listed in Malawi and on the London Stock Exchange. Old Mutual is Malawi's largest life assurance company and offers pension scheme and asset management services as well as life insurance products.[105] It is the only foreign company listed on the MSE. At present only equities are traded on the MSE, though there are moves afoot to try and develop a corporate bond market. The Government is reportedly very keen on this idea (presumably because of the prospect of being able to trade publicly in Government securities).

Table 3: Malawi Stock Exchange Market Capitalization and Index

Quarter Ending	Market Capitalization				MSE Index
	MKW million	MKW million *	US$ million	US$ million *	
2010	1,278,529.23	207,223.12	1,863.11	241.96	4,953.09
3rd Qtr. 2010	1,185,578.52	206,098.65	418.77	63.99	4,927.21
2nd Qtr. 2010	1,159,454.97	202,931.66	587.30	69.40	4,851.50
1st Qtr. 2010	1,165,031.38	208,508.07	612.65	68.05	5,154.95
2009	1,172,148.07	215,624.76	2,877.64	592.42	5,154.95
2008	1,839,275.76	251,447.07	13,081.65	1,788.39	6,091.15
% Δ 09-10	**9.08**	**-3.90**	**5.60**	**-6.96**	**-3.92**

* Excludes non-Malawi shares in Old Mutual

Source: Malawi Stock Exchange, *Annual Market Performance Review 2010*

The MSE would very much like to build the capacity to process transactions electronically. A factor indicating the small size of the MSE is that it only trades around 1 hour a day. To some extent this is due to the small number of listed companies and limited demand for their securities. A further consideration is the fact that the market operates on a manual basis. This severely restricts the number of trades that they can process in a day as well as their ability to monitor transaction volumes to look for unusual activity (which could, for example, indicate money laundering or insider trading). The MSE would very much like to operate on an electronic basis but cannot afford the cost (which is estimated at around US$1.3 million).

[103] CIA – The World Factbook.
[104] CIA – The World Factbook.
[105] http://www.oldmutualmalawi.com/about.html

The MSE is involved in a number of initiatives to enhance regional harmonization and efficiency. The MSE is a member of the African Securities Exchange Association (**ASEA**), which provides a forum for mutual communication, exchange of information, cooperation and technological assistance among its members, to facilitate the process of financial integration within the region for the effective mobilization of capital to accelerate economic development of Africa.[106] ASEA also assists in promoting the development of standards of training and professionalism amongst members and other market players, standards of listing, trading and settlement of securities, the products and services of Africa's capital markets as well as the establishment of a data bank and information system.

The MSE is also a member of the Committee of Stock Exchanges under the umbrella of the South African Development Community (SADC). The Committee aims to fast track the development of capital markets in the region by improving the liquidity of trade in equities, bonds, derivatives and other financial instruments. The Committee's strategy is to keep national markets autonomous and to find ways of using technology, skills-sharing, dual-listing and cross-border investment within the SADC to accelerate development of a regional capital market. The Committee is, in particular, working to: (i) harmonise and achieve best practice in the policy, legal and regulatory environment (such as in listing rules); (ii) promote broader participation by the population in equity markets through the privatisation and listing of state-owned enterprises and other empowerment mechanisms; and (iii) encourage the development of a regional capital market (whilst allowing national exchanges to retain their autonomy) through devices such as shared technological resources, dual listing and cross border trading, which could only be done if all the exchanges operate on an electronic basis.[107] MSE's membership of ASEA and SADC may thus also facilitate the development of the capital markets in Malawi.

Securities intermediaries in Malawi consist of dealers, brokerage firms and discount houses. There are around 70 dealers in Malawi (working, for example, in the Treasury departments of major banks). There are only four brokerage firms in Malawi plus the brokerage services offered by two discount houses. Reportedly, there are also a number of unregistered brokers.

Legal Framework for the Securities Sector

The securities industry in Malawi is primarily regulated through two Acts and related Directives and Regulations. They are the Financial Services Act of 2010 (FSA) and the Securities Act of 2010. Under the Securities Act, the "Securities (Establishment and Operation of Collective Investment Schemes) Directive" (CIU Directive) was gazetted in 2010. In addition, as of August 2011 new regulations for the conduct of securities business had been made, and were awaiting gazettal. These regulations will replace the Capital Market Development (Licensing and Activities of Brokers, Dealers and Investment Advisers) Regulations of 1997 (CMD Regulations). According to Section 70 of the Securities Act, the CMD Regulations are relevant until they are revoked (to the extent that they are not inconsistent with the Securities Act)

Consumer protection and fair trading legislation also applies. Also relevant in a consumer protection context are the Consumer Protection Act of 2003 (CPA) and the Competition and Fair Trading Act of 1998 (CFTA). Both Acts expressly apply to "services" which would seem to include services provided in the securities industry although there is not an express reference to such services in ether Act.

[106] http://www.africansea.org/asea/About.aspx
[107] http://www.sadc.int/index/browse/page/111

There are also two self-regulatory organizations operating under the framework of the FSA and the Securities Act, which are allowed to issue Directives for their members. According to Section 45 of the FSA, the Registrar has the authority to declare a body which has functions in relation to a class of financial institutions to be an SRO. The Registrar then needs to sign an agreement with the SRO in order to delegate powers under financial services laws (e.g. the power to issue Directives and to enforce financial services laws). The MSE regulates brokers and dealers through its Members' Rules. The Securities Act expressly provides for stock exchanges to provide such assistance to the Registrar as he "may reasonably require for the performance of his functions and duties", including giving returns and information (section 14). Also, the Financial Markets Dealers Association in Malawi (FIMDA) was appointed as a self –regulatory organisation under the Capital Markets Development Act, 1990 (Chapter 46:06) and retains that status under the Securities Act (See Good Practice A.1).

Securities Act

The Securities Act, which commenced on 1 October 2010, has the following objectives:
"…to provide for the regulation of capital and securities markets, and persons transacting business in or through capital and securities markets; to promote internal and external confidence in the integrity and proper functioning of the capital and securities markets; and to make provision for matters connected therewith or incidental thereto."

The Securities Act covers the following subjects (in summary):

- **Part I (Interpretation and Application)** contains general interpretation provisions, including the definition of "*securities*". The term is broadly defined to mean, (in summary) shares, stock, bonds, notes or funds issued by the government or a body corporate and related warrants, options, rights or interests and any instrument commonly known as securities or which is prescribed as such by the Registrar (Section 2 (1)). However, the term would not, for example, include the interests of a lender in property taken as collateral. Importantly, Section 3 makes it clear that the Securities Act applies **in addition to the FSA**. So anyone who carries on a securities business is bound by both Acts.
- **Part II** sets out the **powers of the Registrar** (without limiting his powers under the FSA) and gives details of the Directives that the Registrar may issue for the purposes of the Securities Act (Sections 4 and 5).
- **Part III** provides for the licencing of **stock exchanges** (Sections 6 to 10) as well as the Registrar's power to issue Directives relating to the trading of a particular security or trading in general, in order to protect investors, among other reasons (Section 11). All rules of a stock exchange are subject to approval by the Registrar who may seek public comment on them (Section 13). Importantly, stock exchanges must assist the Registrar in the performance of his functions and duties (Section 14), and are allowed to take disciplinary action against their members or associates (Section 15).
- **Licensing of various securities intermediaries** is covered in **Part IV.** The intermediaries required to be licensed include brokers, dealers, investment advisers, portfolio managers, securities market intermediaries and securities representatives (Sections 17 and 18). Part IV also relates to the issue, suspension, revocation and renewal of licences (Sections 19 to 22), records of beneficial ownership in securities (Sections 23 and 24) and the obligation to lodge a deposit with the Registrar on request (Section 26).
- **Part V (Registration of securities and public offers)** requires publicly traded securities to be registered and requires offers and sales of such securities to be accompanied by a prospectus registered under Section 168 of the Companies Act (Sections 27 to 29). There are also ongoing obligations to file information with the Registrar (Section 30) and keep the public informed of all matters affecting the value of registered securities (Section 31). Further, there are obligations to notify any acquisition of beneficial ownership of more than 5% of securities which are publicly traded

(Section 32) and regulation of solicitation of proxy votes (Section 33). Finally, it is made clear that the Securities Act prevails over the Companies Act (Section 34).

- **Part VI (Conduct of Securities Business)** requires licensed brokers and dealers to comply with stock exchange rules and Directives when effecting transactions on securities (Section 35). The Registrar is also given power to impose capital, liquid asset and reserve requirements on securities intermediaries, and to impose requirements on licensing of depositories, clearing and settlement of securities transactions, and record keeping by licensees (Sections 42 to 44). This Part also contains a number of investor protection provisions. Section 37 is especially important as it provides a statutory code of conduct regulating the conduct of securities businesses.
- **Part VII** contains broad prohibitions on various types of **Improper trading practices** likely to adversely affect investors.
- **Part VIII** provides for the establishment of a **Securities Stabilization Fund** to be used to compensate investors who suffer loss as a result of specified defaults in connection with dealing in securities (Sections 50(1) and 52). The Fund is funded by penalties recovered by the Registrar and any other amounts determined by the Registrar (Section 50(2)) and administered by a statutory Stabilization Fund Committee.
- **Part IX** provides for the Registrar to **licence collective investment schemes** and issue related Directives (Sections 57 to 62).
- **Part X (Powers of intervention)** sets up the Registrar's powers to undertake several measures, such as administrative penalties under the FSA, monetary penalties, and prohibition of disposal of assets (Sections 63 to 66).
- **Part XI** includes **Miscellaneous provisions**, such as the Registrar's powers to issue Directives as well as guidance notes, bulletins and other regulatory statements (Section 68). They may relate to matters such as conduct of business, the purchase and sale of securities by securities intermediaries, display of licences, record keeping and reports, advertising of securities, confidentiality, margin facilities and "*any other purpose which furthers the purposes of this Act and is in the public interest*" (Section 67). It is also made clear that the provisions of the FSA relating to penalties apply to offences under the Securities Act (section 69).

So far there are only 3 Directives that have been drafted under the Securities Act, but none of them relate specifically to consumer protection issues:

- "Securities Act (Portfolio Managers) Directive", 2011(NO.CM03-2011/PMD);
- "Securities Act (Securities Representatives) Directive, 2011(NO.CM05-2011/SRD); and
- "Securities Act (Clearing and Settlement) Directive", 2011(NO.CM07-2011/CSD).

CIU Directive

The CIU Directive includes the following parts (further details in the relevant Good Practices):

- **Part I (Preliminary)** contains general interpretation provisions and makes it clear that the CIU Directive applies to all CIUs licensed under the FSA (paragraph 2).
- **Part II (Statement of Policy)** sets out the objectives of the CIU Directive and the rationale for its issue. Relevantly, the objectives expressly include "*to protect the interests of investors and the public interest in general*" (paragraph 4 (b)) and the rationale includes the aim that "*this Directive will serve to ensure that collective investment schemes operate in a sound and efficient manner and in the interests of investors*".
- **Part III (Licensing)** sets out procedures for the operator of a CIU (section 6) and makes clear the Registrar's power to suspend or revoke a licence (section 7).
- **Part IV (Disclosure)** prohibits interests in CIUs being offered for sale unless there is a registered prospectus (section 8), which must comply with the Companies Act.

- **Part VI (Capital)** requires the operator of a CIU to at all times maintain at least MKW 15 million net capital and provides guidance as to the detail of this requirement (section 10).
- **Part VIII (Restrictions)** regulates the type and amount of consideration which may be taken when selling interests in CIUs (section 11), and certain matters relating to contracts with investment managers (section 12), and restricts transactions with affiliated persons (section 13).
- **Part IX (Open-end and Closed-End Collective Investment Schemes)** requires open-ended CIUs to publish daily details of the net asset value of their shares, and to purchase and redeem shares only at that value (section 14). Closed-end schemes can only sell listed shares (section 15).
- **Part IX (Unit Trusts)** contains extensive requirements on matters such as the operation and management of unit trusts, trust property, duties of trustees, record keeping and the required register of unit holders (section 16).
- **Part X (Miscellaneous Requirements)** contains various consumer protection provisions which are described in Good Practice A.1.

CMD Regulations

Provisions of the CMD Regulations which still seem to be in force and relate specifically to investor protection matters deal with the following topics (details are in the relevant Good Practices):

- Adherence to Just and Equitable Principles of Trade (Reg. 18);
- Suitability (Reg. 19);
- Best Execution; Interpositioning; Priority of Transactions (Reg. 20);
- Commissions, Concessions, Fees and Sales Charges (Reg. 21);
- Contract Notes (Reg. 21);
- Account Statements (Reg. 23);
- Securities of Collective Investment Schemes (Reg. 25);
- Short Sales (Reg. 26);
- Purchases or Carrying of Securities on Margin (Reg. 27);
- Agreements with Customers (Reg. 28)
- Contracts of Investment Advisers (Reg. 30)
- Disclosures to Customers (Reg. 31);
- Qualifications and training of employees and other associated persons (Reg. 32);
- Investigations and Disqualified Persons (Reg. 33);
- Supervisory Requirements employees and other associated persons (Reg. 34);
- Transactions by employees (Reg. 35);
- Actions Against Employees (Reg. 36);
- Reporting of Disciplinary Actions (Reg. 37);
- Manipulated and Deceptive Acts and Practices (Reg. 38);
- Prohibited Practices of Investment Advisers (Reg. 39);
- Trading on Nonpublic Information (Reg. 40);
- Acceptance of Gifts and Other Inducements (Reg. 41); and
- Disclosure of Material Interests (Reg. 42).

Consumer Protection Act

The CPA is a very pro-consumer, far reaching Act, but it has not been enforced and is not well known. The CPA expressly includes references to "*banking"* and "*insurance*" in the definition of "*services*" in Section 2. There is no specific reference to "*securities"* but given the breadth of the definition of "*services*", it would include services provided in connection with all financial products, including securities. A few stakeholders consulted by the Mission said that they had heard of the Act but

no one had any knowledge of its substantive provisions. This is likely to be because the Act has never been enforced, and the regulatory framework provided for by the Act (the Consumer Protection Council) has never been established. However a draft Bill is currently being prepared to give responsibility for the administration of the CPA to the permanent Competition and Fair Trading Commission (CFTC), when that body is finally fully established. Implementation of this proposal would not only require amendment to the CFTA, but also the CPA given that it regulates the Consumer Protection Council..

A fundamental issue with the CPA is the extent to which its provisions interact with the consumer protection provisions in the new financial services laws, including the FSA and the Securities Act. The general principle of interpretation is that a court is likely to find that the CPA will continue to apply, except to the extent of any clear inconsistency with the later legislation.

Further, the CPA has a "*for the avoidance of doubt*" provision to the effect that is to be regarded as ensuring and enhancing other laws that regulate or touch on consumer protection (Section 54). It would accordingly seem that the CPA applies in addition to the FSA and other financial sector laws. In the event of a clear inconsistency with consumer protection provisions in a financial services law, it is expected that such a law would prevail being later in time and given its specific focus. Interestingly, Section 61 of the FSA provides that the market practice provisions in Part VII (which include many consumer protection provisions) prevail over those in any other financial services law. The CPA is not such a law at present but would be if it were prescribed as such a law (according to the definition of "financial services law" in Section 2 of FSA). However, this approach would not of course deal with other inconsistencies between the CPA and consumer protection provisions in other parts of the financial services laws package. A full description of the CPA, and the issues with the proposed new regulatory structure, is included in Annex III.

Competition and Fair Trading Act

This is another Act with consumer protection provisions that could apply to the financial sector. However, there is still only an interim Competition and Consumer Commission, although there are moves afoot to appoint a permanent Commission and the required supporting staff. As a result there has been very little enforcement of this Act. A full description of the CFTA, and the issues with the proposed new regulatory structure, is included in Annex III.

MSE's Member Listing Rules

The MSE's Members Rules bind all members and deal with the following topics:

- The constitution of the MSE and its Board (Parts 1 and 2);
- The effect of the Rules (which is that they bind all members) (Section 1.3);
- Members, membership and non-member institutions (Parts 3 and 4);
- Authorized dealers (Part 5);
- Commissions, with specific rules around minimum commissions (Part 6);
- Trading activities and how they are to be conducted (Part 7);
- Listing requirements (Part 8);
- Permitted dealings (Part 9);
- Responsibilities to clients (Part 10);
- Defaulters and insolvency (Part 11); and
- The establishment of the Malawi Stock Exchange Fund (Part 12).

Although the Member Rules state that they cannot be enforced by any person other than members (Rule 1.2), the Securities Act requires intermediaries to comply with them. According to Section 14

of the Securities Act, the stock exchange is required to enforce compliance with the Rules and to take appropriate disciplinary action. Rule 2.26 also gives the MSE power to issue a reprimand or to suspend or cancel membership of the MSE for non-compliance with the Rules. Further, Section 35 of the Securities Act requires that all licensed dealers and brokers comply with the Rules in effecting any transaction in relation to a listed security (as well as any Directives and, of course other legislation). Accordingly, a breach of the MSE Rules would be a breach of the Act. The Securities Act also provides that, subject to certain exceptions, any dealing in listed securities must take place in accordance with the requirements of the rules of the relevant stock exchange (Section 41).

Comparison with Good Practices for the Securities Sector

SECTION A	**INVESTOR PROTECTION INSTITUTIONS**
Good Practice A.1	***Consumer Protection Regime*** **The law should provide for clear rules on investor protection in the area of securities markets products and services, and there should be adequate institutional arrangements for implementation and enforcement of investor protection rules.** **a. There should be specific legal provisions in the law, which create an effective regime for the protection of investors in securities.** **b. There should be a governmental agency responsible for data collection and analysis (including complaints, disputes and inquiries) and for the oversight and enforcement of investor protection laws and regulations.**
Description	There are adequate protections in the Securities Act, the CMD Regulations, the CIU Directive and in the MSE Members Rules. The Registrar has wide data-gathering powers but they do not specifically relate to complaints, disputes or inquiries. Further, there are doubts as to the Registrar's capacity to supervise consumer protection matters generally, including the investor protection regime under the Securities Act. Finally, the conflict with the CPA, the CFTA and the new financial services laws needs to be resolved. **Investor Protection Regime** *Financial Services Act* **The FSA contains several substantive investor protection provisions**, as detailed in Annex IV, including areas like self-dealing or related-party transactions; misleading and deceptive conduct; Registrar's powers to prohibit unfair business practices, to issue directives on consumer disclosure, to pursue administrative penalties, to require promotion and development of complaints resolution schemes; broad remedial powers given to the Court to make orders in favor of consumers; to seek compensation for loss in case of a breach of a financial services law; customer due diligence obligations. **Directives under the FSA.** The Registrar has the power to issue a variety of Directives under the FSA which could provide important consumer protection rules for the benefit of investors, which as at the time of writing had not been issued. In particular, Directives should be issued imposing obligations on financial institutions (including securities intermediaries) in relation to: • Standards of business conduct for financial institutions (Section 34 (2)(e)); • Record keeping (Section 34 (2)(k)); • Disclosure of information to customers of financial institutions (which would include investors) (Section 34 (2)(m)). There is a further power to issue Directives on "*disclosure of information to clients or other persons about financial services*" (Section 64);

	• Requirements on pricing and other charges (which would include, for example, commissions and advice charges to investors) (Section 34 (2)(cc)); and • Requirements aimed at preventing exploitation of consumers of financial services (which would include investors) (Section 34 (2)(dd)). *Securities Act* **The Securities Act contains a strong investor protective regime.** The Code of Conduct in Section 37 requires every licensed broker, dealer, investment adviser, portfolio manager and any securities market intermediary to comply with a long list of rules relating to the conduct of securities business. For further information, see Good Practice A.2. The Registrar can also issue Directives which further specify or define the above rules and impose additional rules of conduct (Section 37 (4)). Part VII "Improper Trading Practices" prohibits conduct relating to: • False trading and stock exchange and market manipulations (Section 45); • Use of false or misleading statements, promises and forecasts (Section 46); • Fraudulent and manipulative transactions (Section 47); • False or misleading statements in connection with the sale or purchase of securities (Section 48); and • Insider trading (Section 49). Other investor protection provisions in the Securities Act include: • The obligation to issue a contract note for securities transactions containing details to be specified in Directives issued by the Registrar (Section 38); • An obligation to comply with Directives issued by the Registrar in the public interest and for the protection of investors (Section 39); • The prohibition on short selling (Section 40); • The prohibition on trading in securities outside a stock exchange, subject to specified exceptions (including a gift approved by the Registrar and a court order) (Section 41); • A prohibition on investment advisers entering into certain profit sharing arrangements with clients (Section 44). It is an offence to engage in all the above mentioned conduct. The relevant provisions in the FSA apply to such offences (Section 69). *CMD Regulations* The CMD Regulations contain extensive investor protection regulations which include provisions dealing, in summary, with the following issues: • A licensee is required at all times "*to adhere to just and equitable principles of trade, and high standards of fair dealing and ethical conduct*" (Reg. 18), ensure products are suitable (reg. 19), execute transactions at the best price available (Reg. 20), ensure commissions and fees are not unreasonable or excessive (Reg. 21), provide a contract note containing detailed information (Reg. 22), maintain detailed account records for customers and send statements at least once every calendar quarter (Reg. 23) and ensure interests in CIUs are offered at the public offering price (Reg. 25); • A licensee is prohibited from using various practices including short selling (Reg. 26), providing clients with credit for transactions unless it is secured with government securities (Reg. 27) or entering into options transactions (Reg. 28); • A licensee is required to have a written agreement with its clients which contains extensive prescribed information (Reg. 29); • An investment adviser must not be remunerated on the basis of capital gains (Reg. 30), provide a disclosure document which contains detailed information about the service

	offered and the business of the adviser (Reg. 31) and comply with various rules relating to the publication of testimonials, recommendations and forecasts (Reg. 39); • A licensee has obligations in relation to officers, employees and various representatives including as to qualifications and training (Reg. 32), background checks (Reg. 33), supervision (Reg. 34) and the obligation to report to the Reserve Bank termination of employment and other disciplinary actions. (Regs. 36 and 37); • A broker, dealer and investment adviser is prohibited from engaging in a long list of misleading and deceptive practices and actions designed to manipulate a market (Reg. 38) and a licensee is prohibited from engaging in insider trading (Reg. 40) and accepting gifts or other inducements (Reg. 41); and • A licensee must disclose material interests in transactions (Reg. 42). *CIU Directive* The CIU Directive contains provisions dealing with the following consumer protection issues: • An operator of a CIU must seek the prior approval of the Registrar for all sales and advertising material (paragraph 16 (15); • All sales literature must be filed with the Registrar if it contains information that is in an offer document, trust deed, annual report or in any other document filed with the Registrar. The Registrar then has 10 days in which to prohibit its publication (paragraph 17 (5)); • Sales and service charges must be fully disclosed in the relevant prospectus and cannot be excessive, taking into account the nature of the objectives of the scheme and activities and the types of stakeholders to whom it offers its shares for sale (paragraph 17 (6)); • There is a prohibition on engaging in any fraudulent and related practices and courses of conduct, on making misstatements, on omitting material information and on engaging in fraudulent or deceitful conduct (paragraph 18 (1)); • There is a prohibition on promising or guaranteeing to investors any specific, excessive or extravagant rate of return or profit (paragraph 18 (3)); • The operator of a CIU must disclose the fact that it has received a license but cannot suggest that it constitutes an endorsement or recommendation from the Registrar (paragraph 18 (5)); • The Registrar's prior written approval must be obtained for amalgamations, takeovers, major changes in the nature of the CIU or its legal status or the liquidation of the CIU (paragraph 19); • All securities held by a CIU have to be placed with a bank or financial institution licensed under the Banking Act (paragraph 21 (1)); • The portfolio of securities of a CIU must be kept segregated and must not be the subject of any sort of assignment, pledge or disposition (paragraph (2)); and • There is an obligation to maintain insurance against unlawful acts of directors, officers, trustees and employees (paragraph 21 (3)). *Consumer Protection Act* **It is important to stress that there is very little knowledge of this Act (let alone compliance) in the financial services industry in Malawi, including the securities sector**. A few stakeholders consulted in the securities industry said that they had heard of the Act but no one knew its substantive provisions. This is a major concern given the extensive consumer protection provisions, and the regulatory structure, that is contained in the in the Act. Further, as mentioned above, the definition of "*services*" is very broadly defined and we consider that it would include services related to securities (Section 2). Investors would have the benefit of provisions in the CPA which apply to consumers generally, such as: consumer's rights to protection of their economic interests, consumer education and compensation of damages; interpretation of unfair or ambiguous contracts in

	favor of the consumer; standard form contracts; relief against unfair contracts; right of cancelation of a contract where the supplier does not comply with the contract (for example in relation to securities); among others detailed in Annex III. *Competition and Fair Trading Act* There are limited provisions in the Act relevant to consumer protection. Of most relevance is Section 43 which provides that a person must not: • Make a false warranty that services have performance and qualities or uses and benefits that they do not have (Section 43(1)(c)); • Engage in conduct which is likely to mislead as to matters such as price or quality (Section 43(1)(d)); • Engage in unconscionable conduct (Section 43(1)(g)); • Engage in pyramid selling (Section 43(1)(h)); or • Issue a misleading or deceptive advertisement (Section 43(1) (k)). **Institutional framework** **According to the FSA, the authority for the securities sector is the Registrar, who is the Governor of the Reserve Bank of Malawi (Sections 8 and 9)**. Relevantly, the objectives which apply to the Registrar include to exercise his supervisory functions with a view to achieving: • The highest standards of business conduct; and • The fairness, efficiency and orderliness of the financial system. The Registrar has wide ranging powers to issue Directives and directions under the FSA, requiring financial institutions and other persons to provide information (Sections 34 (2) (f)) and 35) and to appoint an examiner who can require the provision of information (Section 41(3)). However no such action has been taken in relation to the securities industry. Further, although the Registrar has wide data gathering powers, they do not specifically relate to complaints, disputes or inquiries and no Directives have been issued in this regard**.** However, it is understood that the Registrar is thinking of doing so. The Registrar is required by the FSA to establish departments to supervise the operations of banking, insurance, pension funds and securities markets organizations (Section 8(4)). At the time of writing the following supervision departments have been created for the financial sector: Banking, Pensions together with Insurance, and Microfinance together with Capital Markets. The FSA does not actually say that separate departments have to be created, although this seems to be implicit. Further, consumer protection supervision is currently located in the Microfinance and Capital Markets Department. Accordingly, there is not a cross-sector overview of consumer protection issues within the Reserve Bank, and there are only a few staff members located within the Department. A further concern is that this Department is located within the part of the Registrar that deals with prudential supervision, with the potential for conflict in responsibilities that this approach provides. **The Securities Act** also includes specific powers, duties and functions of the Registrar relating investor protection, such as: • to promote and encourage high standards of investor protection and integrity among persons licensed to operate in the securities market; • to promote the operation of a free, orderly, fair, secure, and properly informed securities market; • to take all reasonable steps to safeguard the interest of persons who invest in securities and to suppress illegal, dishonorable and improper practices in relation to dealings in

	securities, whether on a stock exchange or otherwise; • to take all reasonable steps to promote and maintain the integrity of various securities intermediaries and collective investment schemes and to encourage the provision by such persons of balanced and informed advice to their clients and to the public general. A few stakeholders raised concerns about the capacity of the Registrar to supervise the activities of brokers, given the highly specialized nature of their business. One stakeholder cited an example of fraudulent activity that had gone on in their firm for a number of years without the Registrar becoming aware of it, notwithstanding numerous on – site visits. **The CPA and the CFTA are meant to be administered by the CPC and the CFTC, respectively.** However the CPC has never been established, whereas the CFTC only has one junior staff member in its Secretariat and only three of its seven permanent Commissioners have been appointed. There is a proposal now to give CPC's functions to the soon-to-be-established permanent CFTC. Implementation of this proposal would require amendments to the CPA and the CFTA.
Recommendations	**The laws applying to consumer protection should be clarified**. There should be clarification of the interaction between the CPA, the CFTA and the consumer protection provisions in the FSA and the Securities Act as well as other sector specific financial services laws (see Good Practice A.1: Banking Sector for further detail of this recommendation). **The supervision structure for consumer protection should be clear and distinct**. The Registrar should provide a clear and distinct supervisory structure for consumer protection laws, regulations, Directives and other regulatory instruments, which should not be within a department of the Registrar dealing with prudential regulation. **There should be a requirement to provide volume and analytical data to the Registrar about consumer complaints, disputes and inquiries (including as to potential systemic issues).** Further, there should be a requirement to maintain a Complaints Register which should be available for inspection by the Registrar at any time. **The new regulations replacing the investor protection provisions of the CMD Regulations should be gazetted as soon as possible.** This will increase regulatory certainty. **There should be consideration as to whether the Registrar's technical capacity and resources to supervise the securities industry need to be enhanced.**
Good Practice A.2	***Code of Conduct for Securities Intermediaries and Collective Investment Undertakings.*** **a. Securities Intermediaries and CIUs should have a voluntary code of conduct.** **b. Securities Intermediaries and CIUs should publicize the code of conduct to the general public through appropriate means.** **c. Securities Intermediaries and CIUs should comply with the code and an appropriate mechanism should be in place to provide incentives to comply with the code.**
Description	**There is a statutory code of conduct under Section 37 of the Securities Act for securities intermediaries. However, there is no provision for this Code to be publicized. Further, as with other laws, it would be very difficult for an investor to get a copy of the Act. The only incentives to comply with the Code are the offence and penalty provisions of the Securities Act and the possibility of disciplinary action by the MSE. In addition, the MSE Members' Rules might be considered as a voluntary code.** *Securities Act* The Code of Conduct in Section 37 of the Securities Act requires every securities intermediary to comply with a long list of Rules relating to the conduct of securities business, such as: • Treat customers fairly and justly and to adhere to just and equitable principles in all

	trading activities (Section 37 (1)(a)); • Make extensive enquiries about a customer's background, financial conditions and investment objectives (Section 37 (1)(b)); • Charge only fair commissions, fees and mark-ups and mark-downs (Section 37 (1)(c)); • Disclose material interests (Section 37 (1)(d)); • Ensure that transactions are effected at the best price under all the circumstances (Section 37 (1)(e)); and • Have written procedures to ensure that transactions are dealt with in fair sequence and allocated equitably (Section 37 (1) (f)). Securities intermediaries are also prohibited from engaging in specified improper practices in connection with any securities transaction which is effected or recommended, including: • Engaging in fraudulent, deceptive or manipulative devices or schemes (Section 37 (1)(a)); • Recommendations of excessive or voluminous transactions (Section 37 (1)(b)); • Profit or loss sharing arrangements (Section 37 (1)(c)); • Price or market rigging arrangements (Section 37 (1)(d)); and • The acts prohibited by Part VII (Improper Trading Practices), which include: false trading and stock exchange and market manipulation; false or misleading statements, promises and forecasts; fraudulent and manipulative transactions; false or misleading statements in connection with the sale or purchase of securities; and insider trading. The incentive to comply with the Code is that it is an offence not to do so, and the relevant provisions of the FSA would apply. The FSA in turn provides that: • If a person suffers a loss because of a breach of a financial services law, then a Court can order compensation and the Registrar can initiate a representative action for this purpose (Section 74); • The Registrar has power to pursue an administrative penalty which can include: an order for compensation; corrective action; a fine of an amount which is set out in a Directive or determined by the Minister; a requirement for a compliance program; corrective advertising; a change in management or compliance with a direction to take action to ensure that the conduct in question does not occur again. Failure to comply with an administrative penalty is subject to a penalty of MKW 5 million (approximately US$33,156) and 4 years imprisonment (Section 75). Further, for a corporate body, there is potential for a court to increase such a penalty by a multiple of five (Section 113); and • The Court has broad powers to make remedial orders including to require the offending financial institution to compensate persons who suffer loss because of the breach and to remedy the effects of the contravention (Section 76). *MSE Members Rules* The MSE Members Rules bind all members, but cannot be enforced by any person other than members (Rule 1.2). Rule 2.26 gives the MSE power to issue a reprimand or to suspend or cancel membership of the MSE. Further, under the Securities Act, a stock exchange is required to enforce compliance with the Rules and to take appropriate disciplinary action (Section 14). Licensed brokers and dealers must also comply with stock exchange Rules and Directives when effecting transactions on listed securities (Section 35). Any breach of the relevant requirements in the MSE Rules would attract the offence and penalty Rules in the Securities Act (Section 69). The MSE's Members Rules contain various Rules dealing with investor protection: • A prohibition on participating in the creation of false markets (Rule 1.5); • Professional qualifications and liquidity and other business conduct requirements for member brokers (Rule 3.5); • A requirement to take out professional indemnity insurance at a level determined by the Registrar. Such a policy must cover negligent and dishonest acts and the handing of lost

	and stolen certificates (Rule 3.21); • Qualification and experience requirements for dealers (Rule 5.1); • Limits on dealers entering into transactions in their own name (Rule 5.9); • Commissions charged by brokers – they cannot be charged at a rate less than the prescribed threshold and, if a greater amount is charged, the broker must advise the client (Rule 6.01); • Obligation of brokers to provide a "Brokers' Note" in respect of each transaction (Rule 6.06); • Obligation to conduct business in accordance with just and equitable principles and a ban on fictitious sales (Rule 7.5); • Obligation to process orders on a "*on a First Received First Executed basis*" (Rule 7.6); • Obligations in relation to specified transactions by members (such as on their own account) (Rules 7.7 – 7.10); • Time periods for settlement procedures (Rule 7.19); and • An obligation to have cash cover for short selling transactions (Rule 7.20) (however such transactions are an offence under Section 40, except where the Registrar has provided an exemption); • Relations with clients including to conduct due diligence on the client and to "*observe and exercise high standards of commercial honour and just and equitable principles of trade, having due regard to the maintenance of fair and orderly markets and the protection of investors*" (Rule 10.1); • To conduct transactions on a cash basis (Rule 10.2); • Records of orders (Rule 10.2); • Declaration of a member's interest in a transaction (Rule 10.2); • Confirmation of "*bargains*" (essentially transactions executed by a broker for an investor) (Rule 10.2); • Defaulting clients (Rule 10.10); • A prohibition against making a practice of taking a position against a client (Rule 10.11); • A ban on misleading statements and forecasts (Rule 10.15) and on carrying on business under a false name (Rule 10.20); • The establishment of the Malawi Stock Exchange Fund, which is described in further detail in Good Practice F.1 (Part 12). Further, although there is no voluntary code of practice for CIUs, any operator would be subject to the consumer protection provisions in the CIU Regulations and the general provisions in the FSA, the CPA and the CFTA (see Good Practice A.1 for details).
Recommendations	**Publication of the code of conduct and other consumer protection provisions should be required**. Both securities intermediaries and CIUs should be required through a Directive to publicize the consumer protection provisions which apply to them amongst investors and to the public generally, including the code of conduct under the Securities Act and the MSE Member Rules. **The legal status of listing rules for a stock exchange needs to be clearer.** As noted above, there is an obligation on dealers and brokers to comply with stock exchange rules in effecting transactions (Section 35). However, it is not clear whether it is a breach of the Securities Act if there is a failure to comply with other aspects of the rules and whether the court has any power to enforce compliance.
Good Practice A.3	***Other Institutional Arrangements*** **a. The judicial system should provide an efficient and trusted venue for the enforcement of laws and regulations on investor protection.** **b. The media should play an active role in promoting investor protection.** **c. The private sector, including voluntary investor protection organizations, industry associations and, where permitted, self-regulatory organizations should play an active role in promoting investor protection.**

Description	**The only formal claims dispute resolution mechanisms in relation to the securities sector are through the Commercial Court or the General Registry (both of which are divisions of the High Court) or the Magistrates Courts. However it appears that consumers do not use these avenues for dispute resolution for the reasons given below. Neither the media nor the private sector has a particular focus on investor protection issues. The one exception is the MSE, which is planning a campaign on shareholder rights.** The Commercial Court, which is reportedly extremely efficient, would have jurisdiction to hear securities matters. However, its jurisdiction is limited to amounts over MKW 1 million (approximately US$6,700) and there are other concerns as to the accessibility of this court to consumers. The Magistrates Courts could hear securities related matters as well. However, we understand that there are capacity limitations in relation to understanding financial matters as well as significant delays. Further details of the issues with the judicial and general dispute resolution system in Malawi are described in Good Practice E.2. The media and the Consumer Association of Malawi both play a role in raising consumer protection issues. However, we are not aware of any focus on issues relevant to the securities sector. As mentioned above, the one exception is the MSE, which is planning a campaign for potential retail investors on the rights of shareholders. Regarding the role of the private sector, the MSE and the Financial Markets Dealers Association of Malawi (FIMDA) both have roles in the regulation of the securities market. However there is no industry association for brokers yet. As mentioned in Good Practice A.2, the MSE Members Rules bind all members, but cannot be enforced by any person other than members. Further, under the Securities Act, a stock exchange is required to enforce compliance with the Rules and to take appropriate disciplinary action, whereas dealers and brokers are required to comply with the Rules when entering into securities transactions. FIMDA performs certain disciplinary functions against dealers, pursuant to an arrangement with the Registrar. Under this arrangement, FIMDA has power to fine dealers and to retain any penalty imposed for the purposes of FIMDA. However this agreement is not in writing. We note in this regard that the Securities Act, unlike other financial services legislation, does not contain provisions for the delegation of powers to self-regulatory organizations (SROs). This is presumably because of the recognition of the role given to the MSE. This position is in contrast to the position under the former Capital Markets Development Act, which did provide for SROs (including the MSE).
Recommendations	*Judicial system and Financial Services Ombudsman* **There needs to be an assessment as to the need for capacity support for the judiciary.** It is recommended that there be a detailed assessment as to whether capacity building support is required for the judicial system in relation to all financial services, including in understanding securities products. This is particularly the case in relation to the General Registry of the High Court and the Magistrates Court. **A Financial Services Ombudsman is needed**. It is also strongly recommended that the recommendation concerning the Financial Services Ombudsman be accepted and the proposal implemented (see Good Practice E.2). *Media and investor associations* **A publicity campaign on investors' rights is needed**. There should be a general public awareness campaign in relation to investors' rights and the need to consider relevant risks of

	investments. This might be done in conjunction with the MSE. The Consumer Association of Malawi should also be encouraged to become involved in the campaign, with appropriate capacity building support. **The regulatory basis for the arrangements with FIMDA needs to be clearer**. If the Registrar wishes this arrangement to continue then there would seem to be a need for legislation to provide regulatory justification for the role that the FIMDA is performing. This could be achieved through including in the Securities Act provisions allowing for the delegation of powers to a SRO, although it is important that there is transparency about how and when these powers can be exercised. It may also be considered appropriate to make the MSE a SRO. **An industry association for brokers should be considered**. Consideration should also be given to assisting the broking industry to form an industry association which might be encouraged to have a particular focus on training of brokers, assisting the Registrar with technical training and investor education.
Good Practice A.4	***Licensing*** **a. All legal entities or physical persons that, for the purpose of investment or speculation, solicit funds from the public should be obliged to obtain a license from the supervisory agency.** **b. The securities supervisory agency should have broad powers to investigate fraudulent schemes.**
Description	**There is no requirement that persons raising funds from the public be licensed. However the general licensing requirements seem to be sufficient. The Registrar has very broad investigative powers, which would extend to investigating fraudulent schemes.** A person who carries on a business as a financial institution must be licensed (this would include all entities covered by the Securities Act – Section 21 of the FSA). An operator of a CIU must also be licensed (Section 57 of the Securities Act). There is not, however, a specific requirement for persons who solicit funds from the pubic to obtain a license from the Registrar (or indeed anyone else). However in such situations the securities must be registered and there must be a prospectus relating to the relevant securities or interests in a CIU which meets the requirements of Section 168 of the Companies Act[108]. Further, according to the Securities Act, the Registrar may suspend a security from "*effectiveness*" (presumably as a registered security) if there is a complaint that a registration statement or prospectus is false or misleading, contains a material untrue statement or does not comply in a material respect with the Securities Act or the Companies Act[109]. There are also ongoing obligations to file information with the Registrar and keep the public informed of all matters affecting the value of registered securities[110] . Section 168 of the Companies Act requires a prospectus to contain the matters set out in the Fifth Schedule: • A disclaimer to the effect that the Registrar has not checked any information in the prospectus and takes no responsibility for the prospectus, the financial soundness of the company or the value of the securities (Preamble); • Details of the company (including its authorised and paid up capital, its businesses, trading prospects, names of beneficial holders of 25% or more of any shares and any subsidiaries), the securities to be issued (including the minimum amount to be raised, how the proceeds are to be applied and the cost of any property to be purchased),

[108] Sections 27 and 28 of the Securities Act, Sections 167 to 169 of the Companies Act and Paragraph 8(1) of the CIU Directive.
[109] Section 27
[110] Sections 30 and 31, respectively.

	dividends paid in the previous ten financial years, shares and debentures issued, property acquired and material contracts and other transactions entered into in the previous two years, any stock exchange listing, directors and other officers, underwriters, accountants and details of any trustee for debenture holders (paragraphs 1 to 41, 43); • A statement to the effect that no expert has withdrawn their consent (paragraph 42); • Information as to when and where certain documents may be inspected including the most recent financial statements for the company and its subsidiaries, the memorandum and articles and any debenture trust deed (paragraph 44); and • A report from accountants qualified to be auditors for the last five financial years of the company (paragraph 46), in relation to any business or subsidiary acquired since the date of the last accounts or proposed to be acquired (paragraph 47). Any expert named in a prospectus must have provided written consent, and every director and proposed director must sign the prospectus before it is registered[111] . The above prospectus requirements are very detailed and generally seem adequate. Although it is unfortunate that there is not an overarching requirement to disclose anything that might be material to a potential investor. The Registrar also has very broad investigative powers, which would extend to investigating fraudulent schemes[112], especially as the Securities Act expressly prohibits such schemes[113]. Further, the MSE Member Rule 1.5 prohibits participating in the creation of false markets, and the MSE would be under an obligation to enforce compliance with this rule (as well as all other rules)[114]. Reportedly, there are many unlicensed brokers in Malawi.
Recommendation	**The prospectus requirements should be reviewed.** In particular, consideration should be given to including a requirement to the effect that a prospectus must contain information which an investor and their advisers might reasonably expect to be included, which is material to the rights and liabilities attached to the relevant securities and the assets and liabilities, and financial performance, of the relevant company.
SECTION B	**DISCLOSURE AND SALES PRACTICES**
Good Practice B.1	***General Practices*** **There should be disclosure principles that cover an investor's relationship with a person offering to buy or sell securities, buying or selling securities, or providing investment advice, in all three stages of such relationship: pre-sale, point of sale, and post-sale.** **a. The information available and provided to an investor should inform the investor of:** **i. the choice of accounts, products and services;** **ii. the characteristics of each type of account, product or service;** **iii. the risks and consequences of purchasing each type of account, product or service;** **iv. the risks and consequences of using leverage, often called margin, in purchasing or selling securities or other financial products; and** **v. the specific risks of investing in derivative products, such as options and futures.** **b. A securities intermediary, investment adviser or CIU should be legally responsible for all statements made in marketing and sales materials related to its products.** **c. A natural or legal person acting as the representative of a securities intermediary,**

[111] Sections 169 and 170 of the Companies Act
[112] Section 43 of the FSA
[113] Section 47 of the Securities Act
[114] Section 15 of the Securities Act

	investment adviser or CIU should disclose to an investor whether the person is licensed to act as such a representative and who licenses the person.
Description	**There is limited compliance with this Good Practice.** The relevant requirements are: • The Securities Act requirement relating to assessing the suitability of a transaction for a customer and to the need to ascertain whether the customer understands the risks of the transaction (Section 37 (1)(b)); • The CIU Directive requirement that the operator of a CIU disclose the fact that it has received a license but cannot suggest that it constitutes an endorsement or recommendation from the Registrar (Reg. 18 (5)); • The CMD Regulation requirement that a licensee (such as a broker, dealer or an investment adviser) include in their agreement with a customer details of the nature of the services that the licensee will provide (Reg. 29(1)(c)); • The provisions in the Securities relating to contract notes (see Good Practice C.2); • The rules relating to advertising in the CIU Directive, the CMD Regulations and the CPA (see Good Practice B.7)**;** and • Rule 10.15 of the MSE Members' Rules requires a member to display the fact that it is a member of the MSE on a notice outside their premises. In particular, there is no requirement to provide a statement of personal advice to an investor or to personally provide the investor with any warnings as to any limitations of the advice given and the risks involved in the investments which are recommended. This is notwithstanding that Reg. 31 requires an investment adviser to provide detailed information to a client, including "*a full description of investment advisory services and fees*" (Reg. 31(2)(a)).
Recommendations	**The Registrar should issue a Directive covering all areas in paragraph (a) and applying to interests in CIUs as well as interests in securities.** All documents should be in clear terms and in English and in the local language of the region in which the investor resides. **Further, there should be Directives issued covering areas in paragraphs (b) and (c).** **A written Statement of Advice should also be required.** In addition to the matters mentioned, there should be an obligation to provide a Statement of Advice covering any investment advice which is given (especially personal advice), including a standard form, clearly expressing the summary of the advice. Such a Statement should include the adviser's details, a statement of the advice, the basis on which the advice is made, details of any remuneration, fees or commissions received by the adviser in connection with the giving of the advice and appropriate warnings and limitations as to the effectiveness of the advice. It is also suggested that there be close consultation with the MSE in relation to these issues, as any new Directive is likely to require consequential amendments to the Members Rules.
Good Practice B.2	***Terms and Conditions*** **a. Before commencing a relationship with an investor, a securities intermediary or CIU should provide the investor with a copy of its general terms and conditions, and any terms and conditions that apply to the particular account.** **b. Insofar as possible, the terms and conditions should always be in a font size and spacing that facilitates easy reading.** **c. The terms and conditions should disclose:** **i. Details of the general charges;** **ii. The complaints procedure;** **iii. Information about any compensation scheme that the securities intermediary or CIU is a member of, and an outline of the action and remedies which the investor may take in the event of default by the securities intermediary or CIU;** **iv. The methods of computing interest rates paid or charged;** **v. Any relevant non-interest charges or fees related to the product;** **vi. Any service charges;**

	vii. Any restrictions on account transfers; and **viii. The procedures for closing an account.**
Description	**The CMD Regulations provide for some of this information to be included in the terms and conditions of a client agreement with securities intermediary, as well as other information (Reg. 29). However there is no requirement for the information to be in a font size and spacing that facilitates easy reading.** In particular, there is no requirement in the CMD Regulations to include information about: • the complaints procedure; • any compensation scheme, such as the MSE Fund under the MSE Rules or the Stabilization Fund provided for by the Securities Act. However, there is a requirement to provide "*a statement of the customer's rights to compensation if the licensee cannot meet any of its liabilities to the customer*" (reg. 29 (1)(j)); • the abovementioned information on interest rates; or • any restrictions on account transfers. Additional details required by the CMD Regulations to be included in terms and conditions include information about: • contact details of the customer; • particulars of commissions (as well as fees, advisory charges or other remuneration); • term of the agreement; • the terms on which any discretionary transaction can be effected by the licensee; • the suitability information required by reg. 19 (in summary, this is the information required to assess whether a recommendation is suitable); • any restrictions on the types of transactions that can be performed; • handling of client funds; • any clearing broker or dealer; • any loan that might be provided by the licensee; • any conflict of interest or material interest; • whether the licensee can act as a principal; and • "*any other terms and conditions necessary to fully spell out the rights and obligations of the licensee and the customer*" (Reg.29 (1) (r)).
Recommendations	**The new regulations under the Securities Act, which would replace the investor protection provisions of the CMD Regulations, should be gazetted as soon as possible, so as to increase regulatory certainty.** These regulations should require disclosure of all the information currently disclosed, as well as the additional matters referred to in this Good Practice and should apply to agreements relating to interests in CIUs as well as interests in securities. Further, all documents should be required to be in a font size and spacing that facilitates easy reading, in clear terms and in English and in the local language of the region in which the investor resides.
Good Practice B.3	***Professional Competence*** **Regulators should establish and administer minimum competency requirements for the sales staff of securities intermediaries and CIUs, and collaborate with industry associations where appropriate.**
Description	**This Good Practice is partially followed in Malawi through the CMD Regulations for securities intermediaries**. The CMD Regulations requires that all licensees ensure that their representatives: • have training and experience in investment and financial matters sufficient to enable him to deal fairly, competently and knowledgeably with customers; • are aware of the Capital Markets Development Act and regulations and any rules and regulations of any SRO; and • receive continuing education.

	However, these rules do not seem to apply to sales of interests in CIUs (because they are not interests in "securities" for the purposes of the CMD Regulations). Further, it is not clear that such requirements are enforced.
Recommendation	**There should be detailed education and experience competency requirements mandated pursuant to a Directive for staff of securities intermediaries and CIUs.** This Directive should be developed in consultation with the MSE and FIMDA (for dealers).
Good Practice B.4	***Know Your Customer (KYC)*** **Before providing a product or service to an investor, a securities intermediary or CIU should obtain record and retain sufficient information to enable it to form a professional view of the investor's background, financial condition, investment experience and attitude toward risk in order to enable it to provide a recommendation, product or service appropriate to that investor.**
Description	**This Good Practice is to a large extent followed by securities intermediaries but the position is not clear in relation to CIUs.** Section 37 (1)(b) of the Securities Act specifically requires a securities intermediary, before effecting a transaction for a customer, to make an assessment of the suitability of the transaction, having regard to inquiries of "*the knowledge in financial and investment matters, background, financial conditions and investment objectives of the customer*". There is also an obligation to assess whether the customer understands the risks of the transaction. However this provision does not apply to an operator of a CIU, or anyone who advises on the acquisition of interests in a CIU (given that an "investment adviser" is defined to mean, in summary, someone who advises on "securities" and an interest in a CIU do not come within that definition). There are, however, obligations on financial institutions to demand proof of identity of clients and customers (Section 100 of the FSA). The MSE Members' Rules also require that members use due diligence "*to learn the essential facts relative to every client and to every order or account accepted*" and "*to ensure that recommendations made for any account are appropriate for the client and in keeping with his investment objectives*" (rule 10.1).
Recommendations	**A Directive should be issued to make it clear that the above requirements also apply to CIUs.** This Directive should apply to both securities and CIUs and be developed in consultation with the MSE.
Good Practice B.5	***Suitability*** **A securities intermediary or CIU should ensure that, taking into account the facts disclosed by the investor and other relevant facts about that investor of which it is aware, any recommendation, product or service offered to the investor is suitable to that investor.**
Description	See Good Practice B.4.
Recommendation	See Good Practice B.4.
Good Practice B.6	***Sales Practices*** **a. Legislation and regulations should contain clear rules on improper sales practices in the solicitation, sale and purchase of securities. Thus, securities intermediaries, CIUs and their sales representatives should:** **i. Not use high-pressure sales tactics;** **ii. Not engage in misrepresentations and half truths as to products being sold;** **iii. Fully disclose the risks of investing in a financial product being sold;** **iv. Not discount or disparage warnings or cautionary statements in written sales literature;** **v. Not exclude or restrict, or seek to exclude or restrict, any legal liability or duty of care to an investor, except where permitted by applicable legislation.**

	b. Legislation and regulations should provide sanctions for improper sales practices.
Description	**There are various general regulatory provisions relevant to this Good Practice.** *FSA* The FSA prohibits misleading and deceptive conduct (which would include misleading or false representations about price, the need for a financial service or the particular qualities of a service) (Section 62). A person who breaches this provision is liable to an administrative penalty, which can include an order for compensation, corrective action, a fine of an amount which is set out in a Directive or determined by the Minister, a requirement for a compliance program, corrective advertising, a change in management, or compliance with a direction to take action to ensure that the conduct in question does not occur again (Section 75). *Securities Act* The Securities Act requires a securities intermediary to treat customers fairly and justly and to adhere to just and equitable principles in all trading activities (Section 37 (1) (a)). Further, an intermediary is prohibited from: • Engaging in fraudulent, deceptive or manipulative devices or schemes (Section 37); • Trying to induce someone to deal in securities by making or publishing any statements, promises or forecasts that are known to be misleading, false or deceptive or by being reckless or dishonest in that regard or by dishonest concealment of material facts (Section 46); • Engaging in fraudulent, deceptive or manipulative practices in connection with the purchase or sale of securities (Section 47); and • Making false and misleading statements in connection with the sale or purchase of securities (Section 48). It is an offence to fail to comply with the above provisions, which exposes the offender to the penalties provided for by the FSA. *CIU Directive* This Directive prohibits: • Engaging in any fraudulent and related practices and courses of conduct, making misstatements, omitting material information, and engaging in fraudulent or deceitful conduct (paragraph 18 (1)); and • Promising or guaranteeing to investors any specific, excessive or extravagant rate of return or profit (paragraph 18 (3)). *CMD Regulations* It is not entirely clear whether the relevant provisions of the CMD Regulations still apply, given the abovementioned provisions of the Securities Act. However, for completeness, it is noted that the CMD Regulations provide (in summary) that: • A licensee is required at all times "*to adhere to just and equitable principles of trade, and high standards of fair dealing and ethical conduct*" (Reg. 18); • Securities representatives and associated persons must not engage in *any* fraudulent, *deceptive or manipulative devices or contrivances; any schemes to defraud, or any acts, practices, or courses of conduct which act or would act as a fraud or artifice upon any person*; any activities which give the effect of false misleading volumes of trading, state of the market or price of any securities (reg. 38); • An investment provider is prohibited from using, sending, delivering or publishing any public communication which refers to a testimonial about the investment adviser or to their past performance (other than a list of all recommendations over a period of at least a

	year, together with a warning that past performance should not be considered an indicator of future performance); and from publishing devices such as graphs, charts and formulae without disclosing to customers the limitations in the use of such devices (Reg. 39 (1)(a),(b) and (c)); and • Investment advisers are prohibited from making untrue or false and misleading statements (Reg. 39(1) (d)). *CPA and CFTA* See also Good Practice B.7 for a description of the provisions relating to advertising (which are also relevant in this context).
Recommendation	**As mentioned in Good Practice B.1, there should be an obligation to provide a Statement of Advice.** This Statement should cover any investment advice which is given, including a standard form, clearly expressed summary of the advice and the other matters discussed in Good Practice B.1. There should also be a Directive which specifically prohibits: • Conduct of the type described in Good Practice B.6 (a) and (e); and • Conduct of the type currently provided for by Reg. 39 (1) (a) and (b) of the CMD Regulations. Under these provisions an investment provider is prohibited from using, sending, delivering or publishing any public communication which refers to a testimonial about the investment adviser or to their past performance (other than a list of all recommendations over a period of at least a year, together with a warning that past performance should not be considered an indicator of future performance).
Good Practice B.7	***Advertising and Sales Materials*** **a. All marketing and sales materials should be in plain language and understandable by the average investor.** **b. Securities intermediaries, CIUs and their sales representatives should ensure their advertising and sales materials and procedures do not mislead the customers.** **c. Securities intermediaries and CIUs should disclose in all advertising, including print, television and radio, the fact that they are regulated and by whom.**
Description	**There are no provisions in either the FSA or the Securities Act specifically relating to these matters, apart from the FSA's general prohibition on misleading and deceptive conduct (Section 62), the ability of the Registrar to issue an order for corrective advertising (Section 75(2)), and the general provisions of the Securities Act and the CMD Regulations described in Good Practice B.6. The Securities Act also provides that the Registrar may issue a Directive regulating or prohibiting the advertising of securities otherwise than by way of a prospectus (Section 67 (2) (n)). Further, the CIU Directive and the CPA have provisions relevant to this Good Practice.** The CIU Directive has strict provisions dealing with advertising: • An operator of a CIU must seek the prior approval of the Registrar for all sales and advertising material (paragraph 16 (15); and • All sales literature containing information that is in an offer document, trust deed, annual report and any other document filed with the Registrar must be filed with the Registrar who has 10 days in which to prohibit its publication (paragraph 17 (5)). The CPA has extensive provisions of general application dealing with advertising, such as: • An obligation to ensure that advertising conforms to rules of decency, sincerity and truth, does not exploit superstition, ignorance or fear (Section 44(1)); • A provision that an advertiser is guilty of fraud if they publish a false or misleading advertisement (which is very broadly defined to include leading a consumer to misunderstand, mistake or confuse the basic characteristics or price of the services to be provided) (Section 44(2));

	• A prohibition on abusive advertising (Section 45); • An obligation to publish conditions and terms of any promotional offer, as well as the period for which the offer is open (if this is not done, it is assumed to be open for 30 days) (Section 46); and • A consumer can seek compensation for a breach of these provisions (Section 47) and a breach exposes the person concerned to a penalty of MKW 500,000 (approximately US$3,311) and to imprisonment for 5 years. The difficulty with the CPA is that there is no enforcement of the Act and the industry does not make any attempt to comply with its provisions. The CFTA further provides that it is an offence to issue a misleading or deceptive advertisement (Section 43(1) (k)). However this Act, like the CPA, is not enforced (the current Commission has never considered a case under Section 43).
Recommendation	**A Directive should be issued covering this Good Practice.** The Directive should, at a minimum, require that advertising and marketing materials: • not be misleading or deceptive or include false representations (in particular there should be limits on the investment returns which can be displayed); • be clearly expressed, and in a minimum font size (say 10 point); • be in English where nationally available and in the relevant local language of the region in which it is available; • include essential information relevant to the product; and • be the responsibility of the service provider as well as of the publisher who is aware of any breach. **There should also be clarification of the inconsistencies between the abovementioned CPA and CFTA provisions and any new Directive relating to this issue.**
SECTION C	**CUSTOMER ACCOUNT HANDLING AND MAINTENANCE**
Good Practice C.1	***Segregation of Funds*** **Funds of investors should be segregated from the funds of all other market participants.**
Description	**Securities intermediaries are required to comply with any Directive issued by the Registrar relating to the "safekeeping of customer funds and securities" and "the separation of the funds and securities from those of the licensee and other customers" (Section 36(3) of the Securities Act). However no such Directive has been published.** In the interim, the CMD Regulations require (in summary) that customer funds and securities need to be segregated in a separate account with a financial institution are or with another broker or dealer under an agreement requiring their segregation. It is also clear that such funds and securities cannot be used for the licensee's own purposes and cannot be in any way charged by the licensee (Reg. 14).
Recommendation	**The Directive provided for by Section 36 (3) of the Securities Act should be developed as soon as possible, in consultation with the MSE.**
Good Practice C.2	***Contract Note*** **Investors should receive a detailed contract note from a securities intermediary or CIU confirming and containing the characteristics of each trade executed with them, or on their behalf. The contract note should disclose the commission received by the securities intermediary, CIU and their sales representatives (expressed as total expenses as a percentage of total assets purchased).**
Description	**The Registrar has power to issue a Directive for the purposes of this Good Practice but has not done so.**

	The Securities Act requires that a contract note be provided no later than the end of the next trading day after the contract was entered into (section 38(1)). The note must contain "*such information as the Registrar specifies*". Any contractual provision that purports to exclude this obligation is void (section 38 (2)). No such information has yet been specified by the Registrar although it would seem likely that the prescribed information would be similar to that required by Reg. 19 of the CMD Regulations. Reg. 19 requires disclosure of details of the broker, the customer, the date of settlement, the securities and their price or the securities given in exchange and the rate or amount of commission.
Recommendation	**The Registrar should specify the information to be included in a contract note as soon as possible.** This is because of the uncertainty as to whether Reg. 19 of the CMD Regulations still applies (because of the terms of Section 38). We suggest that information be modeled on that required by Reg. 19, except that we consider that the rate, as well as the amount, of commission should be included (i.e. they should not be alternatives).
Good Practice C.3	***Statements*** **An *investor* should receive periodic, streamlined statements for each account with a securities intermediary or CIU, providing the complete details of account activity in an easy-to-read format.** **a. Timely delivery of periodic securities and CIU statements pertaining to the accounts should be made.** **b. Investors should have a means to dispute the accuracy of the transactions recorded in the statement within a stipulated period.** **c. When an investor signs up for paperless statements, such statements should also be in an easy-to-read and readily understandable format.**
Description	**At best, there is only partial compliance with this Good Practice.** A licensee is required by the CMD Regulations to send statements at least once every calendar quarter (Reg. 23). The statement must describe any securities positions, money balances, or "account activity". Account activity includes any purchases, sales, interest credits or debits, charges or credits, dividend payments, transfer activity, securities receipts or deliveries, and/or journal entries relating to securities or funds in the possession or control of the licensee. However there is not a specific requirement that the investors have a means to dispute the accuracy of transactions or that statements be in an easy-to-read and readily understandable format.
Recommendation	**The Registrar should issue a Directive to require the provision of statements containing at least the Reg. 23 information.** This could be done under Section 67(2)(p) of the Securities Act, which makes it clear that the Registrar can issue Directives relating to information. Such statements should also be required to be in an easy-to-read and readily understandable format and in at least 10-point font. The statement should be in writing (or electronically if the latter is acceptable to the investor). Consideration should also be given to requiring the statement to be in English and the local language of the region where the investor resides.
Good Practice C.4	***Prompt Payment and Transfer of Funds*** **When an investor requests the payment of funds in his or her account, or the transfer of funds and assets to another securities intermediary or CIU, the payment or transfer should be made promptly.**
Description	**Malawi does not currently comply with this Good Practice**. However Section 36 (3) (d) of the Securities Act gives the Registrar power to issue a Directive relating to the "*prompt transmission of customer funds and securities*".
Recommendation	**The Registrar should issue a Directive to give effect to this Good Practice.**

Good Practice C.5	***Investor Records*** **a. A securities intermediary or CIU should maintain up-to-date investor records containing at least the following:** **i. A copy of all documents required for investor identification and profile;** **ii. The investor's contact details;** **iii. All contract notices and periodic statements provided to the investor;** **iv. Details of advice, products and services provided to the investor;** **v. Details of all information provided to the investor in relation to the advice, products and services provided to the investor;** **vi. All correspondence with the investor;** **vii. All documents or applications completed or signed by the investor;** **viii. Copies of all original documents submitted by the investor in support of an application for the provision of advice, products or services;** **ix. All other information concerning the investor which the securities intermediary or CIU is required to keep by law; and** **x. All other information which the securities intermediary or CIU obtains regarding the investor.** **b. Details of individual transactions should be retained for a reasonable number of years after the date of the transaction. All other records required under a. to j. above should be retained for a reasonable number of years from the date the relationship with the investor ends. Investor records should be complete and readily accessible.**
Description	**At best, there is only partial compliance with this Good Practice.** Section 36(3) (e) of the Securities Act gives the Registrar power to issue a Directive specifying the "*form and content of books, records and accounts reflecting or relating to the holding or maintenance of customer funds and securities*". No such Directive has been issued at this stage. In the interim the provisions of Reg. 17 in the CMD Regulations would seem to continue to apply. Reg. 17 contains very detailed record-keeping requirements for licensees, especially in relation to the ledgers and detailed transaction records that they are required to keep. This information must be kept for 6 years. However, very few of the requirements in Good Practice C.5 are met. The exceptions are the Reg. 17 obligations to keep details of the investor and of the transactions which are effected.
Recommendation	**A Directive should be issued under section 36(3) of the Securities Act to comply with Good Practice C.5.**
SECTION D	**PRIVACY AND DATA PROTECTION**
Good Practice D.1	***Confidentiality and Security of Customers' Information*** **Investors of a securities intermediary or CIU have a right to expect that their financial activities will have privacy from unwarranted private and governmental scrutiny. The law should require that securities intermediaries and CIUs take sufficient steps to protect the confidentiality and security of a customer's information against any anticipated threats or hazards to the security or integrity of such information, and against unauthorized access to, or use of, customer information.**
Description	**There are not any express provisions in the law requiring investor information to be kept confidential or, indeed, any data protection provisions of general application.** However the Registrar has power to issue Directives under Section 67 of the Securities Act relating to the "*maintenance of the confidentiality of clients or persons licensed under Part IV*" (i.e. the different types of securities intermediaries).
Recommendation	**Consideration should be given to developing a data protection law that would apply generally to all personal information.** This recommendation is made given:

	• the sensitivity of the personal information held and used in financial services; • the extensive information flows which can take place (such as between securities intermediaries, brokers, dealers, the company whose shares are sold or purchased and the investor themselves); • the increasing potential for information to be received and held electronically with a corresponding increase in the risk of unauthorized access and in the volume of information which can be easily transmitted; • the uncertainty which presently exists in at least some financial institutions as to the extent to which information can be used for purposes such as marketing or shared with corporate group members; and • importantly, privacy is treated as a fundamental human right deserving of protection in various international instruments to which many countries are signatories. Such a law might be based on the standards in the *OECD Guidelines on the Protection and Privacy and Transborder Flows of Personal Data*, 1980. These Guidelines have been used as the basis for the development of many data protection laws. In summary, the relevant principles in the OECD Guidelines are: • **Collection Principle**: information should be collected by lawful and fair means and "*where appropriate, with the knowledge or consent of the data subject*"; • **Data Quality Principle:** data collected should be relevant to the purposes for which it is to be used and should be kept "*accurate, complete and … up-to-date*". • **Purpose and Use Principle**: other than with consent, data should only be used for the purposes specified at the time of collection or as required by law. • **Security Principle**: data must be "*protected by reasonable security*" safeguards against events such as unauthorized destruction, use and disclosure. • **Openness Principle**: there should be a general policy of openness about practices in dealing with data. • **Access Principle**: individuals should have a reasonable right to access information relating to them. • **Transborder Data Flows Principle**: there should be restrictions on transborder data flows to a country which does not substantially comply with the OECD Guidelines.
Good Practice D.2	***Sharing Customer's Information*** **Securities intermediaries and CIUs should:** **a. Inform an investor of third-party dealings in which they should share information regarding the investor's account, such as legal enquiries by a credit bureau, unless the law provides otherwise;** **b. Explain how they use and share an investor's personal information;** **c. Allow an investor to stop or "opt out" of certain information sharing, such as selling or sharing account or personal information to outside companies that are not affiliated with them, for the purpose of telemarketing or direct mail marketing, and inform the investor of this option.**
Description	There are no provisions in the regulations for securities and CIUs dealing with these issues.
Recommendation	**The issues subject of this Good Practice should be considered in the development of new data protection laws proposed in Good Practice D.1.** However, these issues should be raised with the MSE as soon as possible so that, prior to the development of the new laws, the issues can be dealt with in the MSE Members' Rules. Further, a Directive should be issued under the new Credit Reference Bureau Act dealing with the disclosure of information to a credit bureau (see Annex I on Credit Reporting).
Good Practice D.3	***Permitted Disclosures*** **a. The law should state specific procedures and exceptions concerning the release of customer financial records to government authorities.** **b. The law should provide for penalties for breach of investor confidentiality.**

Description	There are no provisions in the regulations for securities and CIUs dealing with these issues.
Recommendation	**The issues subject of this Good Practice should be considered in the development of new data protection laws proposed in Good Practice D.1.** However, these issues should be raised with the MSE as soon as possible so that, prior to the development of the new laws, the issues can be dealt with in the MSE Members' Rules.
SECTION E	**DISPUTE RESOLUTION MECHANISMS**
Good Practice E.1	***Internal Dispute Settlement*** **a. An internal avenue for claim and dispute resolution practices within a securities intermediary or CIU should be required by the securities supervisory agency.** **b. Securities intermediaries and CIUs should provide designated employees available to investors for inquiries and complaints.** **c. Securities intermediaries and CIUs should inform their investors of the internal procedures on dispute resolution.** **d. The securities supervisory agency should provide oversight on whether securities intermediaries and CIUs comply with their internal procedures on investor protection rules.**
Description	**Currently there are not any mandated requirements for internal resolution of disputes in any financial services sector, including the securities sector (although there is a draft Directive which contemplates such requirements for the microfinance sector).** The only possibility is that such requirements might be prescribed under Section 93 of the FSA which: • requires the Registrar to promote and encourage informal dispute resolution schemes within financial institutions; and • gives the power to the Registrar to require a financial institution or an SRO to develop a complaint resolution scheme. Any such scheme must: • have as its objective quick and informal resolution of complaints; • be free to the complainant; • encourage conciliation; • have informal procedures, consistent with a resolution of the complaint; and • require an independent person to resolve a complaint if the financial institution cannot do so) which scheme must bind the financial institution but not the client. A rigorous internal dispute resolution process would, of course, minimize the need for resort to a formal dispute resolution scheme. The result would be a corresponding avoidance of the time and costs that resorting to such schemes involves and minimization of the risk of loss of customer good will.
Recommendation	**It is recommended that a Directive be issued under Section 93 of the FSA requiring all securities intermediaries and CIUs to have an internal complaint resolution scheme.** For example, the Directive might deal with topics such as the following: • Visibility of the process for consumers; • Staff training (however whether there is a need for staff dedicated solely to hearing customer complaints should depend on the size and complexity of the financial institution in question); • The time within which complaints must be considered; • Requirements for advice to the consumer as to progress in dealing with the compliant, the decision and the reasons for any adverse decision; • The staff resources to be provided for complaint resolution and the need to have such staff independent of the staff responsible for the conduct the subject of the complaint.

	Further, the required resources should vary depending on the size of the financial institution and the complexity of the products and services that are offered to consumers; • Record keeping as to matters such as: the number and type of complaints, the location from which they originated (such as the branch), whether or not they are resolved in favor of the consumer and how long the process took and records of any systemic issues. A formal Complaints Register should be required for this purpose; and • The need for involvement of senior management – for example, where there is a board of directors, they should sign off as to details of the scheme and the extent to which it complies with the Directive and they should receive regular reports as to systemic issues and resolve how they should be dealt with. Such a Directive might have regard to International Standards on Internal Dispute Resolution Schemes – such as those in ISO 10002 – 2006.
Good Practice E.2	***Formal Dispute Settlement Mechanisms*** **There should be an independent dispute resolution system for resolving disputes that investors have with their securities intermediaries and CIUs.** **a. A system should be in place to allow investors to seek third-party recourse, such as an ombudsman or arbitration court, in the event the complaint with their securities intermediary or CIU is not resolved to their satisfaction in accordance with internal procedure, and it should be made known to the public.** **b. The independent dispute resolution system should be impartial and independent from the appointing authority and the industry.** **c. The decisions of the independent dispute resolution system should be binding upon the securities intermediaries and CIUs. The mechanisms to ensure the enforcement of these decisions should be established and publicized.**
Description	**There is no compliance with Good Practice E.2 in Malawi.** The only formal dispute resolution mechanisms for financial consumers are through the Commercial Court or the General Registry (both of which are divisions of the High Court) or the Magistrates Courts. However it appears that consumers simply do not use these avenues for dispute resolution. The reasons include: **The Commercial Court** – high court costs (around 1.5% of the amount in dispute up to a maximum of MKW 1 million (around US$6,600)); limits on jurisdiction (the Commercial Court will not hear a matter if the amount in dispute is less than MKW 2 million (around US$13,200); complexity of procedures and pleading requirements (which in turn means that it is very difficult to pursue matters without a lawyer); legal costs and a perception that the Commercial Court may be biased in favor of large businesses (which is probably related to the fact that it was apparently established in 2007 for purposes related to "ease of doing business"). **The General Registry** – court costs are much lower (only MKW 100 or around US$0.66); matters of up to MKW 2 million (around US$132.46) may be heard; the procedures and pleading requirements are much simpler which in turn means that it is easier to pursue matters without a lawyer; and there is a perception that the Court is more "pro- consumer" (perhaps because the judges go out of their way to assist plaintiffs who are unrepresented). However, reportedly it can take up to 2-3 years to have a matter concluded in this Court and it is very rare for a consumer to bring a case in this court. **The Magistrates Courts** – reportedly a consumer would not bring a matter in this court, notwithstanding the low costs involved and the simplicity of the procedures and pleading requirements. This may be because of the perception that magistrates simply do not have the required expertise to hear matters related to financial products and services. A further concern may be our understanding that very poor consumers are often pursued in this court by MFIs for outstanding debts and are very likely to have judgment entered against them because of a failure to appear. If they then do not pay they are likely to be held to be in contempt of court and may be imprisoned. In the meantime the judgment debt will continue to accrue interest. If

	this is indeed the case then it is not surprising that consumers of any sorts of financial services are reluctant to approach the Magistrates Courts for any relief. We also note our understanding that the Constitution expressly forbids imprisonment of a person for failure to meet contractual obligations (see Section 45(2) (e) of the Constitution). **There is already an Ombudsman that deals with matters related to decisions of government officials.** The Ombudsman's office is established by virtue of the Constitution, with further details of his functions and powers provided for by the Ombudsman Act, 1996. The Ombudsman's functions relate to the mediation of disputes about decisions of Government officials, namely disputes "*concerning any alleged instance or matter of abuse of power or unfair treatment of any person by an official in the employ of any organ of Government, or manifest injustice or conduct by such official which would properly be regarded as oppressive or unfair in an open and democratic society"*[115]. The Constitution does contemplate that the Ombudsman's functions could be added to by any laws as well as the Constitution itself[116]. Further, the Ombudsman's functions in the Constitution are expressed in general terms "*The office of the Ombudsman may investigate any and all cases where it is alleged that a person has suffered injustice and it does not appear that there is any remedy reasonably available by way of proceedings in a court or by way of appeal from a court or where there is no other practicable remedy*."[117] It may accordingly be legally possible for the Ombudsman's office to expand its functions to handle complaints relating to financial services, as suggested by some stakeholders. However this option would not seem appropriate. It would send a very confusing message and image to the public if the Ombudsman were to have combined administrative and financial services dispute resolution functions and the ability to hear matters of concern to both consumers and to any person affected by a Government decision (which could include a corporation). It is also understood that the Ombudsman has very limited resources. **It is also not clear that the proposed Mediation and Arbitration Centre is an appropriate formal dispute resolution mechanism for consumers of financial services.** Reportedly there is draft legislation to establish this Centre, which will have 2 levels, with the second level being able to be used for hearing relatively small commercial disputes. However, it is not clear that the Centre would be appropriate for resolving consumer disputes on financial services. **The Registrar has power to require the development and implementation of a formal dispute resolution scheme.** As mentioned in Good Practice E.1, the FSA gives the Registrar power to require financial institutions to develop and implement a scheme under which an independent person must be used to resolve a complaint if the financial institution cannot do so. Such a scheme must bind the financial institution but not the client.
Recommendation	**Consideration should be given to establishing a third party Ombudsman to provide an independent dispute resolution service for all unresolved complaints involving financial institutions (including securities intermediaries) and their clients.** There are a number of ways this might be established. For example: • Through specific legislation; or • Through the Registrar issuing a Directive requiring relevant financial institutions to join an approved Ombudsman scheme covering complaints made by consumers, which would have rules binding on all its members (which the Registrar would need to approve). It may well be the case that such a Directive would not apply to some financial institutions, such as very small SACCOs.

[115] Section 5(1) of the Ombudsman Act
[116] Section 120 of the Constitution of Malawi
[117] Section 123 (1) of the Constitution of Malawi

	Regardless of the way in which the scheme is established, it should be developed in close consultation with all relevant stakeholders including relevant Ministries, the financial services industry (including very small institutions), all relevant industry associations and consumer representatives including CAMA. The rules of an Ombudsman service would need, at a minimum to cover: • Who could be a member; • The nature of disputes which could be dealt with by the Ombudsman and any applicable claims limits (bearing in mind that the service would be for consumers); • Compensation caps; • The fees for membership and for dealing with disputes (which should be paid by the financial institutions); • The fact that decisions were binding on the financial institution (but not the consumer); • Confidentiality of complainant information; • The circumstances in which legal action could be launched while a matter is with the Ombudsman (for example, if a statutory period was about to expire); and • Record keeping of information about caseloads, processing times, systemic issues, cases of serious misconduct (such as fraud). The scheme would probably also need an overseeing body. Such a body would: • Have its own terms of reference; • Have an equal number of industry and consumer representatives and an independent Chair); and • Have functions such as appointing the Ombudsman for the service, monitoring the scheme, approving budgets and monitoring systemic complaint issues and serious misconduct issues such as fraud; • Require an independent annual audit of the operation of the scheme; and • Report systemic and serious misconduct issues to the Registrar as well as provide an annual report. In developing an Ombudsman Scheme, the Registrar might have regard to International Standards on Complaints Handling Processes – such as those in ISO 10002: 2004.
SECTION F	**GUARANTEE SCHEMES AND INSOLVENCY**
Good Practice F.1	***Investor Protection*** **a. There should be clear provisions in the law to ensure that the regulatory authority can take prompt corrective action on a timely basis in the event of distress at a securities intermediary or CIU.** **b. The law on the investors guarantee fund, if there is one, should be clear on the funds and financial instruments that are covered under the law.** **c. There should be an effective mechanism in place for the pay-out of funds and transfer of financial instruments by the guarantee fund or insolvency trustee in a timely manner.** **d. The legal provisions on the insolvency of securities intermediaries and CIUs should provide for expeditious, cost-effective and equitable provisions to enable the timely payment of funds and transfer of financial instruments to investors by the insolvency trustee of a securities intermediary or CIU.**
Description	*Corrective Action* **The Registrar has wide powers to take corrective action**. This includes power to suspend for up to a year, or revoke, a license of a securities intermediary for a variety of reasons, which include failure to comply with the Securities Act or any other financial services law and being unable to meet financial, solvency and liquidity requirements or any other prescribed

	criteria.[118] The Registrar may also suspend or revoke a license of an operator of a CIU for reasons which include the CIU ceasing to be of good financial standing and acting in breach of the Securities Act or the FSA.[119] Further, under the CIU Regulations, the Registrar can impose administrative penalties, prohibit the declaration or payment of a dividend, prohibit the establishment of new branches, prohibit the payment of discretionary compensation and prohibit new branches or the expansion of existing activities. These powers can be exercised in relation to a licensed scheme and its Board or Directors or Executive Officer[120]. The Registrar also has wide ranging powers under the FSA to issue Directives and directions requiring financial institutions and other persons to provide information and to appoint an investigator with extensive powers to investigate a financial institution. [121] These powers would apply to securities intermediaries and to CIUs. *Investors Guarantee Funds* There is provision for two such funds: • **Securities Stabilization Fund.** The Securities Act (Part VIII) provides a fund to be used to compensate investors who suffer pecuniary loss as a result of specified defaults in connection with dealing in securities. The loss is required to be in relation to property (including money and securities) which was entrusted to or received by a licensee under the Act or its employee for or on behalf of the person (section 52). There is clear provision for claims and related costs to be paid from the Fund (section 53), subject to a limit to be prescribed by the Registrar (section 55). The Registrar may also issue Directives providing guidance on the administration, management and application of the Fund (section 54). • **The Malawi Stock Exchange Fund**. The MSE Members Rules (Part 12) provide for the establishment of a fund to compensate any person who suffers loss as a result of the dishonesty, insolvency, default, death or liquidation of a registered stockbroker or the dishonesty of an employee, associate or agent. The loss may be in relation to the practice of the stockbroker or any moneys, securities or other property entrusted to the registered stockbroker or his employee, associate or agent (Rule 12.5). The Board of Trustees may require all legal remedies to be exhausted before a grant is made (Rule 12.6). Grants can be made even if the stockbroker concerned was not in possession of a valid fund certificate at the time and even if, after the relevant event causing the loss, the stockbroker died or was liquidated or ceased to be a member of the Exchange or was suspended from practice (Rule 12.6). However the person concerned is under an obligation to give notice of the loss as required by the Rules (Rule 12.6(v)). *Payment of funds and transfer of instruments on insolvency* The FSA provides for the winding-up of prudentially regulated financial institutions, including securities exchanges, securities depositories, securities brokers and trustees of collective investment schemes (Section 2(1)). However no priority is given on liquidation to the payment of claims by an investor (in contrast, for example, to the payment of claims from a depositor or a policy holder – see Section 72(8)). The MSE Rules contain numerous provisions relating to the insolvency of a member (Part 11). However there are not any specific provisions dealing with payment of funds and transfer of instruments on insolvency other than a rule to the effect that the committee investigating the

[118] Section 23 of the FSA
[119] Section 59 of the FSA
[120] Regulation 26 of the CIU Regulations
[121] Sections 34 (2) (f)) and 35, and Sections 41 to 44

	claim "*deal with the Exchange estate in conformity with the Rules, and usage of the Exchange*" (Rule 11.3).
Recommendation	**A Directive covering Good Practices F.1 (c) and (d) should be issued, and** prepared in consultation with the MSE as well as other relevant stakeholders.
SECTION G	**CONSUMER EMPOWERMENT**
Good Practice G.1	***Broadly based Financial Capability Program*** **A broadly based program of financial education and information should be developed to increase the financial capability of the population.** **a. A range of organizations –including the government, state agencies and non-governmental organizations– should be involved in developing and implementing the financial capability program.** **b. The government should appoint a ministry (e.g. the Ministry of Finance), the central bank or a financial regulator to lead and coordinate the development and implementation of the national financial capability program.**
Description	**The Malawi National Strategy for Financial Inclusion 2010-2014, developed by the Ministry of Finance's FIMA Project, includes an Action Plan that focuses on financial literacy and consumer protection.** The financial literacy dimension includes activities such as: conducting a baseline study on financial literacy, developing a strategy for financial literacy, establishing a national financial literacy network, providing training, delivering financial education. The action plan for consumer protection includes activities such as: conducting a baseline study on consumer protection, enacting a consumer bill of rights, establishing a national consumer protection network, conducting a public awareness campaign. **Within the financial inclusion strategy, the Government of Malawi has taken the important step of setting up a multi-stakeholder National Taskforce on Consumer Financial Education (NTCFE), under the leadership of the Reserve Bank.** The Reserve Bank is chair and champion of the NTCFE, which was set up in June 2010. The taskforce also includes representatives of the financial industry (banks, insurance, microfinance associations and representatives of stockbrokers), government (Ministries of Education, Industry and Trade and Gender), civil society (associations representing consumers, small farmers, small businesses and disabled persons), academia (University of Malawi, Mzuzu University, Bunda College, College of Accountancy) and the media council. The taskforce has developed a draft outline of a financial literacy action plan. The first measure is the conduction of a financial literacy study. It is understood that the World Bank is to fund this survey and assist in its design.
Recommendation	**The above initiatives should be continued and there should also be activities with a particular focus on the securities industry.** For example, there should be a focus on educating consumers as to the nature of the capital markets, the features of equities and bonds, the nature of their rights as investors (and especially as shareholders), and the potential risks involved in investing in the capital markets.
Good Practice G.2	***Using a Range of Initiatives and Channels, including the Mass Media*** **a. A range of initiatives should be undertaken to improve people's financial capability.** **b. This should include encouraging the mass media to provide financial education, information and guidance.**
Description	There is only limited progress in implementing this initiative. The establishment of the National Taskforce on Consumer Financial Education is the main initiative in this regard.
Recommendation	Good Practice G.2 should be implemented. This would probably best be done through the National Taskforce on Consumer Financial Education.
Good Practice G.3	***Unbiased Information for Investors*** **a. Financial regulators should provide, via the internet and printed publications,**

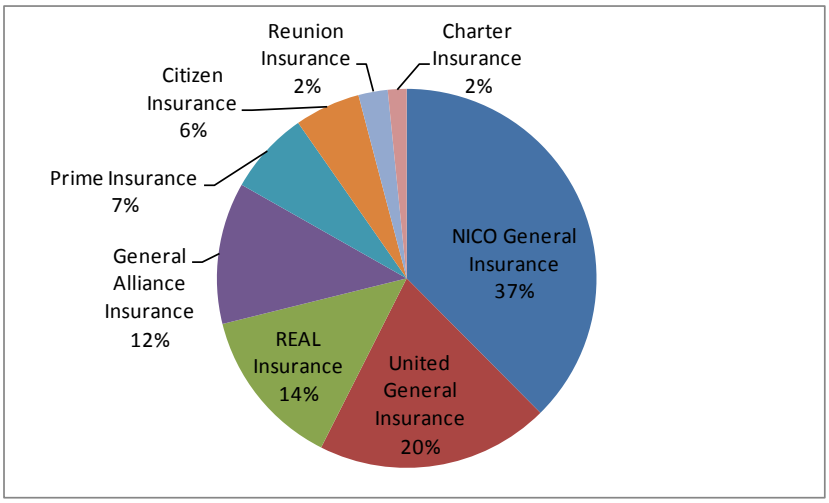
	independent information on the key features, benefits and risks –and where practicable the costs- of the main types of financial products and services. **b. Non-governmental organizations should be encouraged to provide investor awareness programs to the public regarding financial products and services.**
Description	The Reserve Bank of Malawi does not take either of these initiatives.
Recommendation	**This Good Practice should be implemented.** This might be done through the National Taskforce on Consumer Financial Education.
Good Practice G.4	***Measuring the Impact of Financial Capability Initiatives*** **a. The financial capability of consumers should be measured through a broad-based survey that is repeated from time to time.** **b. The effectiveness of key financial capability initiatives should be evaluated.**
Description	A financial capability survey of the type described is being proposed for the middle of 2011, with the support of the World Bank.
Recommendation	**The abovementioned survey is very important and should be undertaken.** Subsequent surveys could then measure the effectiveness of key financial capability, and consumer protection, initiatives.

CONSUMER PROTECTION IN THE INSURANCE SECTOR

Overview

The Malawi general insurance sector is composed of 9 licensed insurance companies competing for a small market. This is a highly competitive, concentrated market and new entrants are accordingly unlikely to appear in the near future. Nico General Insurance Company had close to a 35% market share of the general insurance market as at the end of 2009, as shown in Figure 5 below.

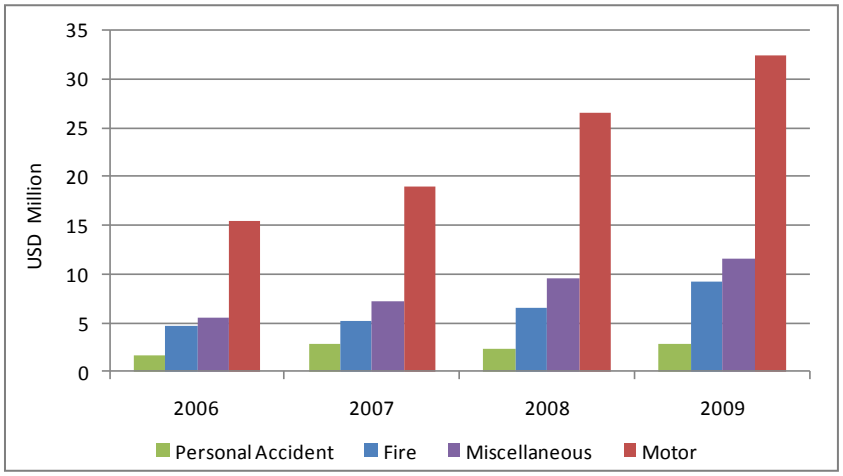
Figure 4: Market Shares for General Insurers based on Gross Premiums in 2009



Source: RBM, *Non-Bank Financial Sector Report 2009*

The general insurance market has continued growing over recent years, mostly driven by motor vehicle insurance. General insurance products offered in Malawi include home, motor vehicle, property, liability, accident, fire and marine. Gross premiums for the general insurance industry have grown at an average rate of 28 percent from 2005 to 2009. The growth rate in 2009 was 25%, led by the motor vehicle insurance segment. This segment increased 58% as shown in Figure 6.

Figure 5: Composition of General Insurance Gross Premiums written by Class in 2009

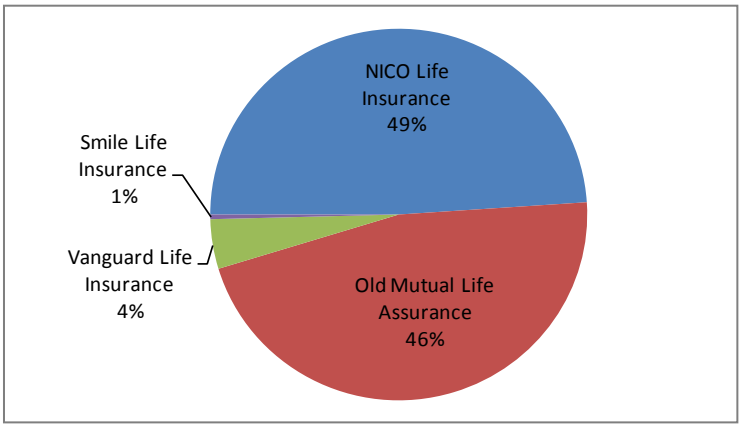


Source: RBM, *Non-Bank Financial Sector Report 2009*

There is very little micro insurance[122] in Malawi. Apparently there is very little interest among mainstream insurance companies in trying to design policies for the very poor given the risks involved and concerns about the ability to pay even very small premiums on a continuing basis. The main example is the pilot weather index-based insurance scheme run by Nico General and established with the support of the World Bank. This scheme operates on the basis that the insurance is required for groups of farmers who take out loans for crop-related purposes (including tobacco, maize and ground nuts and possibly cotton, tea and sugar in the future). Nico General also offers livestock insurance. There have also been industry discussions about the possibility of introducing a micro health insurance scheme, but no such project has been implemented at this stage.

The Malawi life insurance market is also small and tightly controlled. Total life insurance premiums decreased by 10 percent in 2009, from around $14 million to $12.7 million.[123] There are 4 licensed life insurance companies, with Old Mutual Life Assurance dominating the market, followed by Vanguard Life Insurance, a relatively new player in the market, as seen in Figure 7.

Figure 6: Market Shares for Life Insurers based on Gross Premiums in 2009



Source: RBM, *Non-Bank Financial Sector Report 2009*

The life insurance products being offered include single premium life insurance policies, endowment policies (which require savings over a specified period and pay a lump sum on expiry of the term or earlier death) and credit life (which provides life cover over the period of the loan and increasingly is being required by savings and credit cooperatives **(**SACCOs) as a substitute for collateral). It is also to be noted that life insurance companies such as Nico Life and Old Mutual Malawi are engaged in pension fund management. It is not known what percentage of their business comes into this category.

Two interesting life "insurance" products available through the Malawi Union of Savings and Credit Cooperatives (MUSCCO) are[124]:

- "**Life Savings**": benefits under this scheme are provided free to members of participating SACCOs). When the member dies their family receives an amount equivalent to the amount in the deceased member's share account plus any additional savings (although the benefit paid declines as a percentage of this amount after the age of 55). The participating SACCO has to pay a fee equivalent to approximately 0.8% of the amounts in the relevant members' share accounts.

[122] There are various definitions of "microinsurance". The essential elements seem to be low premiums and low coverage amounts, clients with low net worth, and active involvement of the relevant community in various elements of the insurance package (such as in the design and coverage of the policies, pooling of risk and the collection and payment of premiums).

[123] Source: RBM, Non-Bank Financial Sector Report 2009

[124] See http://www.muscco.org/index.php?option=com_content&view=article&id=206&Itemid=118

MUSCCO administers this scheme in house –there is no insurance company involved and this is not required under the terms of the new Financial Cooperatives Act. [125]

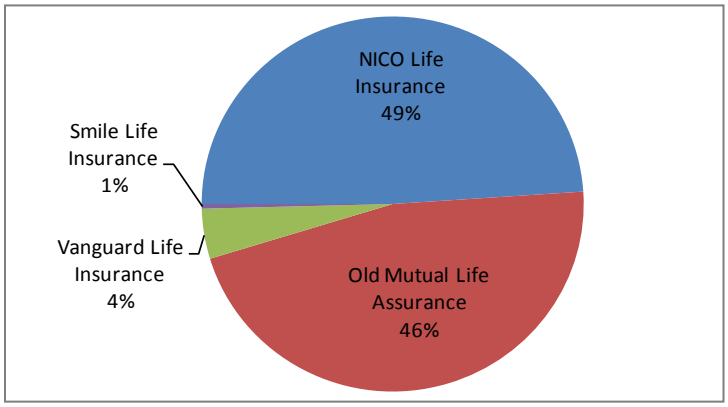
- **"Loan Protection":** this is life cover that members are required to take when they obtain a loan from a SACCO. The premium is 1% of the loan (in addition to the 1% loan processing fee). MUSCCO also administers this scheme – there is no life insurer involved.

MUSCCO is considering establishing an insurance company to offer the above products (and perhaps others), given the scale of the liabilities that are accruing under the current scheme.

The health insurance market is in its infancy, dominated by the Medical Aid Society of Malawi (MASM) and predominantly serves salaried employees. MASM is a nonprofit trust company established in 1983. They offer medical insurance to their members, of which about 90% are employed individuals. As of February 2011, they had about 110,000 members (the only other medical aid entity is Momentum Health, which provides group policies to employers, and only covers around 3,000 employees). MASM's cheapest health insurance package is MKW 800 ($5.29) per month, which we were told is too expensive for a significant proportion of low-income households. Apart from the cost, the challenges in serving the very poor are the availability of free Government health insurance (which is reputably poorly serviced and in limited supply), policies not being designed having regard to the needs of the very poor, the lack of access to good medical services (it is a requirement that the insured lives within close proximity to good medical services) and lack of understanding as to the nature of health insurance. However MASM is starting to sell health insurance products to tobacco farmers, with the premiums being collected from the proceeds of auctions.

Insurance brokers operate mostly in the general insurance market. 75% of general insurance premiums were paid through brokers in 2009, with the balance being policies directly written by the insurance companies. In the life insurance market only 15% of premiums were paid through brokers, since most life insurers use tied agents who are individually recruited and trained by the insurance companies. As seen in Figure 8, AON Malawi is the leading insurance broker in Malawi. AON has around 48% of the general insurance broking market and 99% of the life and pensions broking market.[126] An example of "bank assurance" i.e. insurance policies being written through banks, is the arrangement between Opportunity Bank of Malawi (OIBM Bank) and Nico General, under which Nico General insures OIBM Bank in relation to loans provided to small businesses, which enables them to purchase retail goods internationally for re-sale in Malawi.

Figure 7: Market Shares for Insurance Brokers based on Premiums in 2009



Source: RBM, *Non-Bank Financial Sector Report 2009*

[125] Section 20 of the Financial Cooperatives Act.

[126] Information provided in Mission's meetings with stakeholders.

The Finscope 2008 Malawi Survey reported that only 3% of Malawians had any sort of insurance. Further, over 50 % of respondents reported that they "*did not know that insurance products can protect you when you have a problem*". These results, and the above background information, suggest that there is a fundamental need for education as to the nature of insurance and its potential benefits (and costs).

Legal Framework for the Insurance Sector

The insurance industry in Malawi is expressly regulated through three Acts. They are the Financial Services Act (FSA) of 2010, the Insurance Act of 2010 and the Consumer Protection Act (CPA) of 2003.

Also relevant is the Competition and Fair Trading Act of 1998 (CFTA). This Act applies to "*services*" which would seem to include insurance although there is not an express reference to such services.

The Insurance Act

The Insurance Act has the following objective, which is relevant for consumer protection: *"…to make provision for the enhancement of the safety, soundness and prudent management of insurers and other persons involved in the insurance industry in Malawi, with the aim of protecting the interests of insurance policyholders and ensuring the highest standard of conduct of business of insurance companies, brokers and agents." (Section 3).*

The Insurance Act covers the following subjects (in summary):

- **Part I (Preliminary)** contains general interpretation provisions, including the definition of an "*insurer*" as a person carrying on an "*insurance business*" i.e. "*the business of undertaking liability, under a contract of insurance to indemnify a person in respect of any loss or damage, including a liability to pay damages or compensation contingent upon the happening of a specified event, and includes reinsurance business*" (Section 2). Section 4 also clarifies that the Insurance Act applies in addition to the FSA and that the licensing provisions in the FSA also apply to the Insurance Act.
- **Part II (Insurers)** categorizes insurance business into life and general insurance (Section 6) and contains the important requirement for insurers to be licensed (Section 7). It also relates to the issuance, suspension, revocation and renewal of licences and the time at which an insurer can commence to carry on business (Sections 8 to 13). The Registrar cannot appoint a person to be both a life insurer and a general insurer (Section 8(2)).
- **Part III (Provisions Governing the Carrying On of Insurance Business by Insurers)** requires insurers to keep a principal office and have a principal officer (Section 15), and contains obligations regarding reinsurance contracts (Sections 16 and 17) and the keeping of financial accounts (Sections 18 and 19). The accounts have to be audited by an external auditor if required by the shareholders and policy holders (Section 20). An actuary must be appointed if required by the Registrar (Section 21).
- **Part IV (Special Provisions governing the Carrying on of Life Insurance Business by Insurers)** makes it clear that life insurers can carry on other businesses and can co-mingle investments, but must maintain separate books of account (Section 24). They are also permitted to hold shares in its holding company, but these are deemed to be held on trust for the policy holders and are subject to any other limitations that the Registrar determines (Section 26). Part IV also contains the requirement for life insurers to have an actuary (Section 25).
- **Part V** contains specific requirements for the **licensing of insurance brokers** such as those related to qualifications and experience (Section 27), and maintenance of professional indemnity insurance (Section 28). Part V requires the Registrar to be notified of any termination of appointment (Section

29), confirms the Registrar's power to revoke a licence (Section 30) and requires broker's funds to be held in trust (Section 31).

- **Part VI** contains requirements for the **licensing of agents for brokers** (in terms of qualifications and experience) and an obligation to notify the Registrar of any termination of appointment (Sections 33-36), and confirms the Registrar's power to suspend or revoke a licence (Section 38).
- **Part VII** contains requirements for the **licensing of insurance agents** (in terms of qualifications and experience) and an obligation to notify the Registrar of any termination of appointment (Sections 39-42), and confirms the Registrar's power to suspend or revoke a licence (Section 44).
- **Part VIII (Collection of Premiums by Brokers or Agents)** sets out the requirements for the payment of premiums to insurers by brokers. In particular, a broker is required to pay the premiums to the insurer within 30 days of receipt (Section 46(1) (b)). However the Registrar may impose different or additional requirements (Section 46(3)), which is what is proposed under the draft Directive entitled "*Premium Payments to General Insurance Companies*".
- **Part IX** contains specific requirements for **licensing of loss assessors / adjustors and claims settling agents** and sets out detailed required qualifications and experience (Sections 47 and 48).
- **Part X** (**Investments, Loans and Ownership)** requires the Board of Directors of an insurer to establish and monitor investment and lending policies, standards and processes that a reasonable and prudent person would apply to avoid undue risk and obtain a reasonable return (Section 40). It sets limits on investments which can be made (Sections 50-52) and restrictions on acquiring more than a "*significant interest*" in an insurer without the approval of the Registrar (Section 55). It also gives the Registrar powers to order the disposal of investments and loans (Section 54), to issue Directives on prudential matters (Section 53) and to refuse to approve a transfer or amalgamation if it appears that 1/5th or more of policy holders would dissent (Section 56).
- **Part X1** requires that the **winding-up of insurance companies** take place in accordance with the provisions of the FSA and the Companies Act, and provides that the Registrar shall not approve a winding-up until all policyholder benefits are paid or transferred to an alternative insurer (Sections 57-58). There are also provisions dealing with the priority of claims on a winding-up and unclaimed moneys (Sections 59-61).
- **Part XII (Miscellaneous Provisions)** provides for the Registrar's approval to be obtained in relation to a wide variety of matters (Section 62) and includes provisions for a range of other matters, including in relation to claims settlement (Section 65), actions by policyholders (Section 67), deposit of approved securities (Section 68), signing of documents (Section 69), defaults by insurers (Section 70), printing of policies (Section 72), offences, penalties and regulations (Sections 76 to 78). The Registrar is also given powers to issue Directives on a range of matters, including "*generally for carrying out the purposes and provisions of this Act*" (Section 79).

There are 4 Directives drafted by the RBM for the purposes of the Insurance Act and awaiting gazettal:

- "*Suitability of Persons Associated with the Ownership and Management of insurance Companies and Insurance Brokers: Fit and Proper Requirements*" (NO. RI 07-10/FP) (draft, November 2010);
- "*Premium Payments to General Insurance Companies*" (NO. RI 10-10/PP) (draft, November 2010);
- "*Minimum Standards on Corporate Governance for Insurance Companies*" (NO. RI 06-10/CG) (draft, November 2010);
- "*Insurance (Minimum Capital and Solvency Requirements for General Insurers) Directive, 2010*" (draft, date unknown).

The Directive on premium payments by insurance intermediaries such as brokers, is especially controversial with the broking industry as it requires:

- Cash payments received by brokers to be banked in a trust account and paid to the relevant insurance company within 5 working days (Part III, sections 1(4) and 4 (1) (b)) (previously it was around 60 working days); and

- Premium cheques to be made out to the insurance company, rather than the broker who would accordingly lose the benefit of the float. Further any cheques made out to the intermediary by mistake must be returned to the policy holder (Part III, section 1 (3)).

Subsidiary legislation made under the previous Insurance Act of 1957 continues in force, unless in conflict with the new Insurance Act (Section 80 (2)). However, the Mission was not able to obtain copies of such regulations and understands that they are in any event likely to be replaced by Directives made under the FSA and the Insurance Act.

Consumer Protection Act

The CPA is a very pro-consumer, far reaching Act, which expressly includes "insurance" in its definition of "services" (Section 2), however it has not been enforced and is not well known. In general, only few stakeholders have heard of the Act but no one knows its substantive provisions. This is likely to be because the Act has never been enforced, and the regulatory framework provided for by the Act (the Consumer Protection Council) has never been established. However a draft Bill is currently being prepared to give responsibility for the administration of the CPA to the permanent Competition and Fair Trading Commission (CFTC), when that body is finally fully established. Implementation of this proposal would not only require amendments to the CPA and the CFTA, but also the CPA given that it regulates the Consumer Protection Council.

A fundamental issue with the CPA is the extent to which its provisions interact with the consumer protection provisions in the new financial services laws, including the FSA and the Insurance Act. The general principle of interpretation is that a court is likely to find that the CPA will continue to apply, except to the extent of any clear inconsistency with the later legislation.

Further, the CPA has a "for the avoidance of doubt" provision to the effect that is to be regarded as ensuring and enhancing other laws that regulate or touch on consumer protection (Section 54). It would accordingly seem that the CPA applies in addition to the FSA and the Insurance Act as well as other sector specific laws. In the event of a clear inconsistency with consumer protection provisions in a financial services law, it is expected that such a law would prevail being later in time and given its specific focus. Interestingly, Section 61 of the FSA provides that the market practice provisions in Part VII (which include many consumer protection provisions) prevail over those in any other financial services law. The CPA is not such a law at present but would be if it were prescribed as such a law (according to the definition of "financial services law" in Section 2 of FSA). However, this approach would not of course deal with other inconsistencies between the CPA and consumer protection provisions in other parts of the financial services laws package.

A full description of the CPA, and the issues with the proposed new regulatory structure, is in Annex III and in the Banking Section (Good Practice A.1).

Competition and Fair Trading Act

This is another Act with consumer protection provisions that could apply to the financial sector. However, there is still only an interim Competition and Consumer Commission, although there are moves afoot to appoint a permanent Commission and the required supporting staff. As a result there has been very little enforcement of this Act. A full description of the CFTA, and the issues with the proposed new regulatory structure, is in Annex III and in the Banking Section (Good Practice A.1).

Comparison with Good Practices for the Insurance Sector

SECTION A	CONSUMER PROTECTION INSTITUTIONS
Good Practice A.1	***Consumer Protection Regime*** **The law should provide for clear rules on consumer protection in the area of insurance and there should be adequate institutional arrangements for the implementation and enforcement of consumer protection rules.** **a. There should be specific provisions in the law, which create an effective regime for the protection of retail consumers of insurance.** **b. The rules should prioritize a role for the private sector, including voluntary consumer organizations and self-regulatory organizations.**
Description	**The new insurance law regime in Malawi currently only provides limited protection for policy holders, although there is potential for an appropriate regime to be put in place through Directives made by the Registrar and if the conflict with the CPA, the CFTA and the new laws is resolved. However there are doubts as to the Registrar's capacity to supervise consumer protection matters generally, including the regime applying to the insurance sector. At this stage no role has been provided for the private sector.** **Consumer protection regime** *Financial Services Act, 2010* **The FSA contains a number of consumer protection provisions**, as detailed in Annex IV, including areas like self-dealing or related-party transactions; misleading and deceptive conduct; Registrar's powers to prohibit unfair business practices, to issue directives on consumer disclosure, to pursue administrative penalties, to require promotion and development of complaints resolution schemes; broad remedial powers given to the Court to make orders in favor of consumers; to seek compensation for loss in case of a breach of a financial services law; customer due diligence obligations. **Directives under the FSA.** The Registrar has the power to issue a variety of Directives which could provide important consumer protection rules for the benefit of policyholders, which as at the time of writing had not been issued. Their absence constitutes a major gap in the consumer protection framework for policyholders. In particular, Directives should be issued imposing obligations on insurers regarding: • Standards of business conduct for financial institutions (section 34 (2)(e); • Record keeping (section 34 (2) (k); • Disclosure of information to customers of financial institutions (which would include policy holders) (section 34 (2) (m)); • Requirements on pricing and other charges (which would include premiums) (section 34 (2) (cc)); and • Requirements aimed at preventing exploitation of consumers of financial services (which would include premiums) (section 34 (2) (dd)). *Insurance Act, 2010* The Insurance Act contains a number of consumer protection provisions including those dealing with the following topics: • The powers of the Registrar to suspend or revoke licenses in the interests of the public or policy holders (for example, section 11); • Requirements for persons operating insurance companies and insurance agents and brokers to be "fit and proper persons" having regard to their experience and

qualifications (see section 8(3)(a) for example);

- The ability of the Registrar to issue Directives about trust accounts held by brokers (section 31);
- The ability of the Registrar to issue Directives in relation to the collection of premiums by brokers (section 46 (3). This power has already been exercised – see "Directives under the Insurance Act" below;
- The fact that an insurance company cannot be wound up until all policy holders are paid or transferred to another insurer (section 58);
- The issue of new products, which requires the Registrar's approval (section 62);
- The ability of the Registrar to issue a wide variety of Directives relating to prudential and corporate governance matters including in relation to: standards of sound business and financial practices (section 79(3)(q)), fair and equitable treatment of policy holders practices (section 79(3)(y)) and fair and timely payment of claims practices (section 79(3)(z)).

Directives under the Insurance Act. The only draft Directive prepared under the Insurance Act with a consumer protection focus is the "*Premium Payments to General Insurance Companies*" Directive.

Consumer Protection Act, 2003

There is very little knowledge of this Act (let alone compliance) in the financial services industry in Malawi, including the insurance sector. A few stakeholders consulted in the insurance industry said that they had heard of the Act but no one knew its substantive provisions. This is a major concern given the extensive consumer protection provisions and the regulatory structure that are contained in the Act. Further, since the CPA expressly includes "*insurance*" in its definition of "services" (section 2**),** there can be no doubt that the CPA applies in this sector.

The only provision that expressly refers to insurance (other than the definition of "services") is Section 28 which provides that:

- A consumer is entitled to insurance contracts, amongst others, "at affordable or lowest possible rates" (however this expression is not defined); and
- Contracts governing financial transactions such as general and health insurance (curiously there is no mention of life insurance) are to be interpreted, implemented and enforced in good faith, consistently with the contract and with laws governing or regulating financial transactions.

Policyholders would also have the benefit of the other provisions in the CPA which apply to consumers generally (a "consumer" includes anyone who purchases or offers to purchase "services" which includes insurance (Section 2)). Such provisions include, for example: consumer's rights to protection of their economic interests, consumer education and compensation of damages; standard form contracts; relief against unfair contracts; right of retraction (essentially a statutory cooling-off period which would allow a policyholder to withdraw from a contract of insurance within 7 days of signing the contract); right of cancelation of a contract where the supplier (e.g. insurer) does not comply with the contract (e.g. in relation to claims); obligation to display prices (e.g. premiums) in local currency; among others detailed in Annex III.

Competition and Fair Trading Act, 1998

There are limited provisions in the Act relevant to consumer protection. Of most relevance is section 43 which provides that a person must not:

- Make a false warranty that services have performance and qualities or uses and benefits that they do not have (section 43(1)(c));

- Engage in conduct which is likely to mislead as to matters such as price or quality (section 43(1)(d));
- Engage in unconscionable conduct (section 43(1)(g));
- Engage in pyramid selling (section 43(1)(h)); or
- Issue a misleading or deceptive advertisement (section 43(1) (k)).

Institutional framework

The Reserve Bank of Malawi

According to the FSA, the regulatory and supervisory authority for the insurance sector is the Registrar, who is the Governor of the Reserve Bank of Malawi (Sections 8 and 9). Relevantly, the objectives which apply to the Registrar include to exercise his supervisory functions with a view to achieving:

- The highest standards of business conduct; and
- The fairness, efficiency and orderliness of the financial system.

The Registrar has wide ranging powers to issue Directives and directions under the FSA, requiring financial institutions and other persons to provide information (Sections 34 (2) (f)), 35) and to appoint an examiner who can require the provision of information (Section 41(3)). However no such action has been taken in relation to the insurance sector. Further, although the Registrar has wide data gathering powers, they do not specifically relate to complaints, disputes or inquiries and no Directives have been issued in this regard**.** However, it is understood that the Registrar is thinking of doing so.

The Registrar is required by the FSA to establish departments to supervise the operations of banking, insurance, pension funds and securities markets organizations (Section 8(4)). At the time of writing the following supervision departments have been created for the financial sector: Banking, Pensions together with Insurance and Microfinance together with Capital Markets. The FSA does not actually say that **separate** departments have to be created, although this seems to be implicit.

Further, consumer protection supervision is currently located in the Microfinance and Capital Markets Department. Accordingly, there is not a cross-sector overview of consumer protection issues within the Reserve Bank, and there are only a few staff members located within the Department. A further concern is that this Department is located within the part of the Registrar that deals with prudential supervision, with the potential for conflict in responsibilities that this approach provides.

Consumer Protection Council and Competition and Fair Trading Commission

The CPA and the CFTA are meant to be administered by the Consumer Protection Council (CPC) and the Competition and Fair Trading Commission (CFTC), respectively. However the CPC has never been established, whereas the CFTC only has one junior staff member in its Secretariat and only three of its seven permanent Commissioners have been appointed. There is a proposal now to give CPC's functions to the soon-to-be-established permanent CFTC. Implementation of this proposal would require amendments to the CPA and the CFTA.

Private sector regime

The FSA provides for the delegation of the Registrar's regulatory and supervisory powers to an SRO. However, these powers are not being considered to be used in the insurance industry. In any event, the only industry body that currently exists is the Insurance Industry Association of Malawi, which only has general insurers as members. There is the embryonic Life and

	Pensions Insurance Association, but it has not as yet formulated its constitution. Further, neither of these Associations covers health insurance, such as the medical aid service offered by MASM. There is no provision in the regulatory framework for voluntary consumer organizations. The only such organization that we are aware of is the Consumers Association of Malawi (CAMA), which has very limited resources and does not have any particular focus on consumer protection issues for policy holders. **Summary of concerns** **There are a number of important consumer protection issues for consumers in the insurance sector which are currently not provided for in the new financial services law regime.** This is because the relevant law depends on Directives or directions from the Registrar which are not currently available. For example, at present there are not any laws requiring specific information about polices to be disclosed to policy holders, or dealing with complaints by policy holders[127]. **The CPA is not enforced, and the insurance industry does not comply with its provisions.** This is notwithstanding that the Act expressly applies to insurance services. Further, the Competition and Fair Trading Commission (which would take over responsibility for the CPA) is only operating on a very limited basis – it simply does not have the resources to consider cases within its jurisdiction and reportedly it has not considered any case under Section 43 of the CFTA. **It is not clear whether the Registrar, with all his new responsibilities, will have the resources necessary to regulate and supervise consumer protection issues in the entire insurance sector.** In general, the RBM is perceived as having appropriate resources and undertaking an adequate supervision of insurance companies. However, there are concerns in relation to its capacity to assume consumer protection responsibilities because: • The Registrar has already many new responsibilities to deal with (especially in relation to the microfinance, financial cooperatives and pensions sectors) and there may be resource constraints issues in the future; • The officers dealing with consumer protection issues are located in the Micro-Finance and Capital Markets Department and it is not apparent that this team has the required insurance expertise or resources; • The FSAP 2008 report noted that the RBM has limited capacity to supervise this sector, including limited staff and IT systems; if these issues still exist, then there must be a concern about whether it has the capacity to effectively regulate compliance with consumer protection laws. **It is not clear whether the medical aid industry is covered by the new regime.** Reportedly, this industry is not regulated under the new regime. However, this view would not appear to be correct given that the FSA expressly includes a "medical aid fund" in the definition of a "financial institution". Relevant entities would accordingly need to be registered or licensed under the FSA and otherwise comply with its terms. It is less clear whether such institutions are providing "insurance" under the Insurance Act, and accordingly need to comply with all the terms of that Act and any subordinate instruments. On the terms of the Insurance Act, it would seem to be the case that the medical aid service is in fact insurance. This is clearly an important issue given the consumer protection provisions provided for in the Insurance Act. **There is no specific requirement to provide volume and analytical data to the Registrar**

[127] For example, Section 65 of the Insurance Act requires payment of claims within 14 days of a claims discharge certificate being signed, but does not say anything about how long it should take to make a decision about a claim.

	about disputes with clients (including as to potential systemic issues).
Recommendations	**The laws applying to consumer protection should be clarified**. There should be clarification of the interaction between the CPA, the CFTA and the consumer protection provisions in the FSA and the Insurance Act as well as other financial sector laws (see Good Practice A.1 of the Banking Sector for further detail of this recommendation). **The supervisory structure for consumer protection should be clear and distinct**. The Registrar should provide a clear and distinct supervisory structure for consumer protection laws, regulations, Directives and other regulatory instruments, which should not be within a department dealing with prudential regulation. **There should be a requirement to provide volume and analytical data to the Registrar about consumer complaints, disputes and inquiries (including as to potential systemic issues).** Further, there should be a requirement to maintain a Complaints Register, which should be available for inspection by the Registrar at any time. **There should also be clarification as to whether the Insurance Act applies to medical aid services.**
Good Practice A.2	***Contracts*** **There should be a specialized insurance contracts section in the general insurance or contracts law, or ideally a separate Insurance Contracts Act. This should specify the information exchange and disclosure requirements specific to the insurance sector, the basic rights of the insurer and policyholder and allow for any asymmetries of negotiating power or access to information.**
Description	**There are no such specific legislative provisions or Directives under either the FSA or the Insurance Act dealing with insurance specific disclosure issues. Further, there is not yet a draft Directive being prepared by the Registrar on these issues. However all new insurance products are required to be approved by the Registrar (section 62(m) of the Insurance Act).** The CPA has provisions dealing with disclosure, which could apply to insurance policy holders, especially given that the Act expressly applies to insurance services. In particular, Section 35 (1) requires a supplier to provide consumers with "*true, sufficient, clear and timely information on - ... services offered, to enable consumers to make proper, informed and reasonable choices*". Further, Section 36 (1) requires provision of documents evidencing the supply of services. Section 49 then provides for the enforcement of such provisions by consumers as well as by registered consumer associations. The difficulty with the CPA, as mentioned above, is that there is no enforcement of the Act (it was not even taken into account in the recent financial sector laws package) and the industry does not make any attempt to comply with its provisions. Notwithstanding the CPA provisions, that there is no specific requirement that the terms of policies be disclosed to policy holders.
Recommendations	**As a matter of urgency, the Registrar should prepare a Directive which expressly sets out the disclosure requirements for policy holders in all insurance sectors.** Such a Directive should, for example, deal with the following matters: • Information to be provided as to premiums, fees, policy coverage, exclusions; • Provision of a copy of the policy document; • Obligation to provide up to date policy terms on request; and • Obligation to provide regular advice as to the balance and fund performance of investment based insurance policies.

	Such disclosures should be required to be provided in English and in the local language of the region where the policy holder resides. The information could be in writing, although there might also be provision for electronic communication where the relevant policy holder has the means of reading such communications. For example, information as to an endowment policy fund performance and balance might be provided by an SMS message. **Consideration should also be given to mandating minimum standards of coverage for general insurance policies** covering home contents and building, motor vehicles, sickness and accident, credit and travel. Such standards could apply to mandatory events covered, permissible exclusions and minimum indemnity amounts. Consideration should also be given as to appropriate standard cover for health insurance (medical aid) polices. **The Registrar might also consider issuing a Directive covering other issues relevant to policy holders**. For example: • The application of a duty of the utmost good faith to both the insurer and the insured; • Insurable interests (such as a provision to the effect that an insurable interest is not required at the time that a general insurance contract is entered into, although of course it would be required when a claim is made); • The insured's duty of disclosure and the circumstances in which it is considered to have been met or not met; • The circumstances in which an insurer can avoid a contract of insurance in whole or in part (for example, because of a misrepresentation, because of a pre-existing defect, illness or disability or because the relevant event being relied on to refuse the claim did not actually cause the loss); • Rights of a third party to recover (for example, where insured property is sold); and • Notification of expiry of contracts of general insurance. **Further, as mentioned above, there should be clarification of the interaction between the CPA and the consumer protection provisions in the FSA and the Insurance Act as well as other sector specific financial services laws.**
Good Practice A.3	***Codes of Conduct for Insurers*** **a. There should be a principles-based, statutory code of conduct for insurers that is devised in consultation with the insurance industry and with relevant consumer associations, and is monitored and enforced by a statutory agency.** **b. Insurers should publicize the statutory code of conduct to the general public through appropriate means.** **c. The statutory code should be limited to good business conduct principles. It should be augmented by voluntary codes on matters specific to insurance products or channels.**
Description	**There is no statutory code of conduct for any part of the insurance sector.** *General insurance* There is, however, a new voluntary "Code of Good Business Practice" for the **general insurance industry,** which has been developed by the Insurance Association of Malawi. The Code does not apply to the life insurance industry in Malawi. The Code commenced on February 1, 2011 and has the following objectives (in summary): • Promote high ethical standards; • Promote good relationships between insurers, intermediaries and consumers; • Promote customer satisfaction; and • Provide a dispute resolution mechanism for customers . The Code was developed by the Insurance Association of Malawi, having regard to regional

	Codes. However no other groups (such as the Consumer Association of Malawi) were consulted. At this stage it is not clear how the Code will be publicized to policy holders, although the Association is considering the issue. The Association also intends to provide a copy to the Registrar. The Code provides, in summary that: • General "good practice" obligations are imposed on insurers, including to "*Conduct business in good faith and with integrity, fairness, honesty and in a transparent manner*", to comply with all applicable legislation, to respect privacy of consumers, to promote the understanding of insurance and to ensure that employees are familiar with the Code; • Intermediaries must be trained and identify themselves; • Insureds must be advise of their duty to disclose and encouraged to read documents; • There are obligations to use plain language, to confirm oral disclosures in writing within 30 days and to provide extensive information to "*personal lines*" insureds and others on request; • There is a prohibition on unfair discrimination on many basis; • Terms and conditions must be easily understood and the consequences of non-disclosure and inaccuracies pointed out to the insured; • Insureds must be advised how to lodge claims, they must be settled "*without unnecessary delay*", and when claims are rejected the insured must be advised of the reasons and of the actions which can be taken; • Claims can only be rejected on specified grounds; and • Investigators, loss adjusters and assessors must be appropriately qualified and cannot be paid on a commission or incentive basis. The Code also provides for members to be disciplined for a failure to comply with the Code by its Ethics Committee. The Ethics Committee may impose any sanctions that it thinks fit, including requiring the insurer to take rectification steps and to submit to a compliance audit. The Ethics Committee may also recommend the expulsion of the member. Any decision of the Ethics Committee is subject to appeal in which case the Registrar of Insurance will act as arbitrator. It is not, however, clear that the Registrar has this power. *Life Insurance* The embryonic Life Insurance and Pensions Association is apparently considering the development of a Code of Conduct. However the first step is to finalize their constitution. *Health insurance (medical aid)* Given the tiny size of this industry, it is not clear that a Code of Conduct is appropriate at this stage. This is especially the case if there are adequate protective provisions for consumers in the law (see especially Good Practice A.2).
Recommendations	*General Insurance* **The Insurance Association of Malawi should be encouraged to take the following steps**: • To further publicize the Code through insurers, in advertising materials (including in newspapers and on the radio) and in information provided to consumers when they are issued with a policy. In particular, the ability to raise complaints about noncompliance with the Code through the Ethics Committee should be advised to consumers. • To require its members to make a copy of the Code available to consumers on request and to make it clear on websites and in branch offices that the Code is available (e.g. through posters in a branch). • To translate the Code into the main local languages. It should also be clarified whether the reference to the "*Registrar of Insurance*" in the Code of Good Business Practice is a reference to the Registrar of Financial Institutions (i.e. the

	Governor of the Reserve Bank). Further, and importantly, it should be confirmed that the Registrar has the power, and is willing, to undertake the role of mediator in disciplinary disputes. Consideration should also be given to making this Code mandatory pursuant to a Directive issued by the Registrar. *Life Insurance* **The Life Insurance and Pensions Association should be encouraged by the Registrar to formalize its Constitution as a matter of urgency and to develop a voluntary Code similar to that of the Insurance Association's Code.** The Code should be developed in consultation with CAMA as well as relevant insurers. Consideration should also be given to making this Code mandatory pursuant to a Directive issued by the Registrar.
Good Practice A.4	***Other Institutional Arrangements*** **a. There should be a balance between prudential supervision and consumer protection.** **b. The judicial system should provide credibility to the enforcement of the rules on financial consumer protection.** **c. The media and consumer associations should play an active role in promoting financial consumer protection.**
Description	Currently the regulation and supervision of the life and general insurance sectors seem to be almost totally weighted towards prudential regulation. So far as the judicial system is concerned, the Commercial Court does hear insurance matters. However its jurisdiction is limited to amounts over 1 million MKW (approximately US$6,700) and there are other concerns as to the accessibility of this court to consumers. The Magistrates Court could hear insurance related matters as well. However there seem to be capacity limitations in relation to understanding financial matters as well as significant delays. This is particularly likely in relation to insurance products, which can be very complex. Further details of the issues with the judicial and general dispute resolution system in Malawi are described in Good Practice E.2. The media and CAMA both play a role in raising consumer protection issues. However, there is not a particular focus on issues relevant to the insurance sector.
Recommendations	*Prudential supervision and consumer protection* **The above recommendations in relation to supervision of consumer protection should be implemented (see Good Practice A.1).** *Judicial system and Financial Services Ombudsman* **The capacity of the judiciary to deal with financial matters needs to be reviewed**. There needs to be a further, detailed assessment as to whether capacity building support is required for the judicial system in relation to all financial services, including all insurance products. This is particularly the case in relation to the General Registry of the High Court and the Magistrates Court. **It is also strongly recommended that the recommendation concerning the Financial Services Ombudsman be accepted** and the proposal implemented (see Good Practice E.2). *Media and consumer associations* **There should be a general public awareness campaign in relation to consumers' rights**

	under insurance laws and the protections provided to them. CAMA should also be encouraged to become involved in the development of the new regulatory regime and the media campaign, with appropriate capacity building support. If this is done then we would expect that the media and CAMA would take up any issues of concern.
Good Practice A.5	***Bundling and Tying Clauses*** **Whenever an insurer contracts with a merchant or credit grantor (including banks and leasing companies) as a distribution channel for its contracts, no bundling (including enforcing adhesion to what is legally a single contract), tying or other exclusionary dealings should take place without the consumer being advised and able to opt out**
Description	**SACCOs and other MFIs require life insurance to be taken out as a condition of providing finance.** With SACCOs, the insurance is the Loan Protection cover provided through MUSCCO for which a 1% premium is required to be paid. MUSCCO is not a regulated life insurer, although it is considering establishing such a fund (see Introduction). The insurer used by MFIs is generally the insurer with which they have an arrangement to provide such insurance. There is no choice of insurer given by either SACCOs or MFIs. **A number of banks also require mandatory life insurance** to be taken out when a secured or an unsecured loan is taken out. **Banks also require property insurance to be taken out for loans used to purchase motor vehicles and real estate.** The RBM currently requires there to be a choice of insurer in this case. However it is not clear that this requirement is mandated under the new financial services laws. The reasons given for allowing these arrangements were: • Mandatory life insurance is a substitute for lack of physical or reputational collateral – without such insurance loans would simply not be provided to individuals; • Unsophisticated customers of SACCOs and MFIs would not understand the differences between insurers, so there is no point in giving them any choice; and • Mandatory property insurance is necessary additional collateral covering property given as physical collateral (such as motor vehicles and real estate). A consideration to be taken into account in reviewing these arrangements is that **the Pensions Bill contains a provision to the effect that life insurance must be provided to employees** the subject of a mandatory pension scheme (clause 12). The minimum coverage is an amount equal to "*one times the annual pensionable emoluments of the employee*". The term "*pensionable emoluments"* is defined, in summary to mean, the annual salary with certain deductions (such as houses and motor vehicles) (section 3).
Recommendations	**Early and detailed consideration should be given as to whether mandatory life insurance should only be permitted in clearly defined circumstances, if at all**. In particular: • If the practice is to be allowed, it should only be permitted where the loan is given to an individual i.e. it should not be required for participants in a group loan; • There should be an obligation on the insurer to enquire whether the consumer already has life insurance (for example, as a result of the life cover provided through a pension scheme) and a prohibition on requiring cover which duplicates that already held; • Consideration should be given to prohibiting a requirement to take out life insurance to the extent that collateral is provided which duplicates the relevant life cover; and • Once credit bureaus get established in Malawi, it might be considered that there can be no justification for mandatory life insurance as the availability of credit reports should be a substitute. **All life insurance (mandatory or not) should be required to be provided by a regulated life insurer**. This would mean that MUSCCO would be required to provide its Loan

	Protection cover through such an entity (as they are planning to do). **Mandatory property insurance should be permissible in relation to secured property**, subject to a requirement that the policy be subject to renewal every 12 months so that the insured can consider if they want to use a different insurer. **There should be a choice of insurer in all cases where insurance is required.** **There needs to be adequate disclosure of key facts and all policy terms.** There should be a requirement that the policy holder be given the opportunity to read, or have read to them, a standard form, simplified disclosure of the key features of each policy, as well as the policy terms. A copy of these documents should be provided to them (regardless of whether they are illiterate). **If a loan is repaid early, then any insurance policy entered into for the purposes of the loan should be required to be terminated, with a refund of premiums for the unexpired period of the loan**.
SECTION B	**DISCLOSURE & SALES PRACTICES**
Good Practice B.1	***Sales Practices*** **a. Insurers should be held responsible for product-related information provided to consumers by their agents (i.e. those intermediaries acting for the insurer).** **b. Consumers should be made aware of whether the intermediary selling them an insurance contract (known as a policy) is acting for them or for the insurer (i.e. in the latter case they have an agency agreement with the insurer).** **c. If the intermediary is a broker (i.e. acting on behalf of the consumer) then the consumer should be advised at the time of initial contact with the intermediary if commission will be paid by the underwriting insurer. The consumer should have the right to require disclosure of the commission and other costs paid to an intermediary for long term savings contracts. The consumer should always be advised of the amount of commission paid on single premium investment contracts.** **d. An intermediary should not be allowed to identically fill broking and agency roles for a given general class of insurance (i.e. life and disability, health, general insurance, credit insurance).** **e. Sanctions, including meaningful fines and, in the case of intermediaries, loss of license, should apply for breach of any of the above provisions.**
Description	**There is only limited compliance with this Good Practice in Malawi.** The Insurance Act relevantly provides that insurers cannot, without permission from the Registrar, appoint an agent or a broker who does not hold a license (section 64). There is also a prohibition on a person holding themselves out as an agent (section 41). Both of these sections provide for significant penalties for breach. However there is nothing specific saying that an insurer is responsible for their agents. That said, this would seem to be the case under the general law. The Insurance Act also provides that a license cannot be granted to someone as an agent unless he has undertaken not to be an agent for another insurer (section 40 (1)(d)). **However, otherwise there is no provision for the abovementioned matters in the Insurance Act, nor in the FSA or the CPA.**
Recommendation	**All these matters should be dealt with in Directives issued by the Registrar.** There should also be clarification of the inconsistencies between the abovementioned CPA and CFTA provisions and any new Directives relating to this issue.
Good Practice B.2	***Advertising and Sales Materials*** **a. Insurers should make sure that their advertising and sales materials and procedures**

	do not mislead customers. Regulatory limits should be placed on investment returns used in life insurance value projections. **b. Insurers should be legally responsible for all statements made in marketing and sales materials they produce related to their products.** **c. All marketing and sales materials should be easy to read and easy to understand by the general public.**
Description	**There are no provisions in either the FSA or the Insurance Act relating to these matters, apart from the FSA's general prohibition on misleading and deceptive conduct (section 62) and the ability of the Registrar to issue an order for corrective advertising (section 75(2)).** However, the CPA has extensive provisions of general application dealing with advertising. They include: • An obligation to ensure that advertising conforms to rules of decency, sincerity and truth, does not exploit superstition, ignorance or fear (section 44(1)); • A provision that an advertiser is guilty of fraud if they publish a false or misleading advertisement (which is very broadly defined to include leading a consumer to misunderstand, mistake or confuse the basic characteristics or price of the services to be provided) (section 44(2)); • A prohibition on abusive advertising (section 45); • An obligation to publish conditions and terms of any promotional offer, as well as the period for which the offer is open (if this is not done, it is assumed to be open for 30 days) (section 46); and • A consumer can seek compensation for a breach of these provisions (section 47) and a breach exposes the person concerned to a penalty of MKW 500,000 and to imprisonment for 5 years. The difficulty with the CPA, as mentioned above, is that there is no enforcement of the Act and the industry does not make any attempt to comply with its provisions. The CFTA further provides that it is an offence to issue a misleading or deceptive advertisement (section 43(1)(k)). However this Act, like the CPA, is not enforced (the current Commission has never considered a case under section 43).
Recommendations	A Directive should be issued requiring, at a minimum, that advertising and marketing materials: • not be misleading and deceptive or include false representations; • be clearly expressed, and in a minimum font size (say 10 point); • be in English where nationally available and in the relevant local language of the region in which it is available; • include essential information relevant to the product; and • be the responsibility of the service provider as well as of the publisher who is aware of any breach. **There should also be clarification of the inconsistencies between the abovementioned CPA and CFTA provisions and any new Directive relating to this issue.**
Good Practice B.3	***Know Your Customer*** **The sales intermediary or officer should be required to obtain sufficient information about the consumer to ensure an appropriate product is offered. Formal "fact finds" should be specified for long-term savings and investment products and they should be retained and available for inspection for a reasonable number of years.**
Description	**There are no mandatory requirements for formal "fact finds" as to product suitability under the FSA or the Insurance Act.**

	The CPA relevantly provides that Section 35 (1) requires a supplier to provide consumers with "*true, sufficient, clear and timely information on … services offered, to enable consumers to make proper, informed and reasonable choices*". However there is not a specific requirement for a "*fact find*" as such.
Recommendation	**It is recommended that there be a requirement for a formal "fact find" as to product suitability in any case where personal advice is provided as to an appropriate insurance policy**. An insurer, its agent and any broker should be required to conduct an analysis of the insurance objectives and needs of any customer and to provide a copy of any advice given in writing (or electronically if the latter is acceptable to the consumer). **There should also be clarification of the inconsistencies between the abovementioned CPA provisions and any new Directives relating to this issue.**
Good Practice B.4	***Cooling-off Period*** **There should be a reasonable cooling-off period associated with any traditional investment or long-term life savings contract, after the policy information is delivered, to deal with possible high pressure selling and mis-selling.**
Description	There is no cooling-off period required for insurance products under either the FSA or the Insurance Act. The CPA provides in Section 30 that a consumer has to be given at least 7 days to withdraw after a contract is signed or executed at a place other than the ordinary business premises of the supplier. This would, for example, cover insurance policies which were signed in rural villages or in a door-to-door sale of a life insurance policy. However, as mentioned above, there is no compliance with, or enforcement of, the CPA.
Recommendation	**There should be a mandatory cooling-off period of at least 14 days for insurance products, other than for permitted mandatory insurance associated with a loan product.** However, the consumer who is required to take out a life policy should be required to read, or have read to them, a summary of the policy before they take out the loan. They should also receive all the mandated disclosure documents that apply to the policy. **The consumer should be clearly advised of their cooling-off rights** in this regard when they first take out the policy. **There should also be clarification of the inconsistencies between the abovementioned CPA provisions and any new Directives relating to this issue.**
Good Practice B.5	***Key Facts Statement*** **A Key Facts Statement should be attached to all sales and contractual documents, disclosing the key factors of the insurance product or service in large print.**
Description	*Key Facts Statement* There are no requirements of a Key Facts Statement under either the FSA or the Insurance Act. In practice, life insurance companies provide some type of Key Facts Statement for polices sold to individuals. However general insurance policies do not generally have attached any sort of Key Facts Statement. The CPA has provisions dealing with disclosure, which could apply to insurance policy holders, especially given that the Act expressly applies to insurance services. In particular, section 35 (1) requires a supplier to provide consumers with "*true, sufficient, clear and timely information on - … services offered, to enable consumers to make proper, informed and reasonable choices*". However there is not a specific requirement for a Key Facts Statement.

	Large Print The Insurance Act requires polices to be in clear uniform type and no less than 10 points (Section 72). The CPA also requires information to be "clear" (Section 35(1)).
Recommendations	**There needs to be adequate disclosure of key facts of policy terms.** In particular, there should be a requirement that the policy holder be given the opportunity to read, or have read to them, a standard form, simplified disclosure of the key features of each policy, as well as the policy terms. A copy of these documents should be provided to the policy holder (regardless of whether they are illiterate). The key facts should, for example, include a summary of key features and benefits, the premium payable and important limitations (such as any excess or contribution required) and other significant exclusions (such as that there is no cover on a motor vehicle policy if the insured is not driving). The above documents should be in English and in the local language of the region in which the policy holder resides.
Good Practice B.6	***Professional Competence*** **a. Sales personnel and intermediaries selling and advising on insurance contracts should have sufficient qualifications, depending on the complexities of the products they sell.** **b. Educational requirements for intermediaries selling long-term savings and investment insurance products should be specified, or at least approved, by the regulator or supervisor.**
Description	**The professional competence requirements for insurance intermediaries seem adequate.** The licensing requirements in the Insurance Act require all insurance brokers' agents and insurance agents to hold "*a reasonable educational and professional qualification*" and have at least 2 years of experience in the insurance industry with a satisfactory record of performance (sections 34(1)(b) and 39(1)(b)). A broker must have 5 years of such experience and hold a professional qualification recognized by the Insurance Institute of Malawi.
Recommendation	No recommendations.
Good Practice B.7	***Regulatory Status Disclosure*** **a. In all of its advertising, whether by print, television, radio or otherwise, an insurer should disclose: (a) that it is regulated and (b) the name and address of the regulator.** **b. All insurance intermediaries should be licensed and proof of licensing should be readily available to the general public, including through the internet.**
Description	**The identification requirements referred to above are not currently required.** However, there are licensing requirements in the Insurance Act for all brokers and agents of brokers and insurance agents (Parts V, VI and VII). The RBM maintains on its web site lists of insurers but not lists of brokers or agents. The Code of Good Business Practice for general insurers states that intermediaries should inform consumers of the "identity of the insurer for whom they are acting and the nature of the relationship between the insurer and the intermediary".
Recommendation	**The above provision in the Code of Good Business Practice should become the law for all intermediaries**. Further, the insurer should be required to disclose in all advertising that they are regulated and the name and address of the Registrar, and the Registrar should maintain a public list of all licensed intermediaries.
Good Practice B.8	***Disclosure of Financial Situation*** **a. The regulator or supervisor should publish annual public reports on the development, health, strength and penetration of the insurance sector either as a special report or as part of the disclosure and accountability requirements under the**

	law governing it. **b. Insurers should be required to disclose their financial information to enable the general public to form an opinion with regards to the financial viability of the institution.** **c. If credible claims paying ability ratings are not available, the regulator or supervisor should periodically publish sufficient information on each insurer for an informed commentator or intermediary to form a view of the insurer's relative financial strength.**
Description	**No such information is published by the Registrar to our knowledge, although the Insurance Association of Malawi gathers this information in relation to general insurers**. The regulatory gap in this regard is highlighted by the fact that there is a Directive awaiting gazettal, which requires banks to publish extensive financial information on their operations, as well as provide half yearly statements to customers. This is the Directive on Disclosure of Information by Banking Institutions No D01-2010. However, there is no such directive being drafted for the insurance industry as far as we know.
Recommendation	**A Directive in similar terms to the Directive on Disclosure of Information by Banking Institutions should be prepared for all parts of the insurance industry**. In particular, there should also be a requirement to publish claims payment statistics (including total amounts paid, average time to process claims, number of claims disputed, number of claims declined and details of reasons). Such disclosures should be in English and in the local language of the region in which the information is published.
SECTION C	**CUSTOMER ACCOUNT HANDLING AND MAINTENANCE**
Good Practice C.1	***Customer Account Handling*** **a. Customers should receive periodic statements of the value of their policy in the case of insurance savings and investment contracts. For traditional savings contracts, this should be provided at least yearly, however more frequent statements should be produced for investment-linked contracts.** **b. Customers should have a means to dispute the accuracy of the transactions recorded in the statement within a stipulated period.** **c. Insurers should be required to disclose the cash value of a traditional savings or investment contract upon demand and within a reasonable time. In addition, a table showing projected cash values should be provided at the time of delivery of the initial contract and at the time of any subsequent adjustments.** **d. Customers should be provided with renewal notices a reasonable number of days before the renewal date for non-life policies. If an insurer does not wish to renew a contract it should provide a reasonable notice period.** **e. Claims should not be deniable or adjustable if non-disclosure is discovered at the time of the claim but is immaterial to the proximate cause of the claim. In such cases, the claim may be adjusted for any premium shortfall or inability to recover reinsurance.** **f. Insurers should have the right to cancel a policy at any time (other than after a claim has occurred – see above) if material non-disclosure can be established.**
Description	**There are no provisions in either the FSA or the Insurance Act as to the above mentioned matters except that**: • An insurer is required to pay a claim within 14 days of signing a claims discharge certificate (however there is no requirement as to how quickly such a certificate must be signed) (section 65); and • Section 93 of the FSA requires the Registrar to promote and encourage informal dispute resolution schemes within financial institutions and gives the Registrar power to require a

	financial institution or an SRO to develop a complaint resolution scheme (see also Good Practice E.1). The voluntary (and very new) Code of Good Business Practice for general insurers also requires insurers and their intermediaries to: • Advise insureds on how to lodge claims; • Make claim forms and related documentation readily available; • Keep insureds updated on progress of their claims; • Settle claims without unnecessary delay; • Gives insureds advice of any rejection and reasons for the rejection; • Advise insureds of action that can be taken in relation to a dispute (including in relation to intermediaries) on a claim and relevant time limits. The Code of Good Business Practice also limits the circumstances in which claims can be refused, such as for: • Misrepresentation or material non-disclosure; • Fraud; • The loss is specifically excluded; • The loss is outside the cover provided; and • There has been a non-payment of premium.
Recommendation	**There should be a Directive issued which relating to the following matters**: • Statements to be provided for savings and investment type products at least annually and policy holders to be encouraged to raise any queries they have in relation to the statement; • Regular statements should be provided (at least annually) free of charge to policyholders of life products such as endowment policies as to the amount covered by the policy. • Cash values to be disclosed on request (if there are more than, say 2 requests in a year then a reasonable fee might be charged but otherwise the requests should be complied with free of charge); • Renewal advices to be provided at least one month before a policy expires; and • Compliance with claims processing principles similar to those in the abovementioned Code of Good Business Practice. **The proposed Directive should also set out the circumstances in which a claim might be denied and makes clear the extent to which non-disclosure can be relied on.** The Code of Good Business Practice is a good start in this regard, although it is not considered that that a claim should be denied simply because of: • Non-disclosure, except to the extent that it contributed to the event which caused the loss; • Non-payment of a premium (although if a premium has never been paid, the position might be different); • An act which was necessary to preserve property or for the safety of a person; or • An act which could not be avoided.
SECTION D	**PRIVACY AND DATA PROTECTION**
Good Practice D.1	***Confidentiality and Security of Customers' Information*** **Customers have a right to expect that their financial transactions are kept confidential. The law should require insurers to guarantee that they protect the confidentiality and security of personal data, against any anticipated threats or hazards to the security or integrity of such information, and against unauthorized access.**
Description	**There are not any express provisions in the law requiring customer information to be kept confidential or, indeed, any data protection provisions of general application.**

	However the Code of Good Business Practice for general insurers to "*Protect and respect privacy of insureds information obtained from various sources including but not limited to proposal forms, and to obtain the consent from insureds to allow for the sharing of appropriate information to fight fraud".*
Recommendation	Consideration should be given to developing a data protection law which would apply generally to all personal information. This recommendation is made given: • the sensitivity of the personal information held and used in financial services (as well as financial information there is the especially sensitive information on health is held by life and health insurers); • the extensive information flows which can take place (such as between intermediaries and agents and insurers, between members of a corporate group); • the increasing potential for information to be received and held electronically with a corresponding increase in the risk of unauthorized access and the volume of information which can be easily transmitted; • the uncertainty which presently exists in at least some financial institutions as to the extent to which information can be used for purposes such as marketing and shared with corporate group members; and • Importantly, privacy is treated as a fundamental human right deserving of protection in various international instruments to which many countries are signatories. Such a law might be based on the standards in the *OECD Guidelines on the Protection and Privacy and Transborder Flows of Personal Data*, 1980. These Guidelines have been used as the basis for the development of many data protection laws. In summary, the relevant principles in the OECD Guidelines are: • **Collection Principle**: information should be collected by lawful and fair means and "where appropriate, with the knowledge or consent of the data subject"; • **Data Quality Principle**: data collected should be relevant to the purposes for which it is to be used and should be kept " *accurate, complete and … up-to-date*". • **Purpose and Use Principle**: other than with consent, data should only be used for the purposes specified at the time of collection or as required by law. • **Security Principle**: data must be "*protected by reasonable security*" safeguards against events such as unauthorized destruction, use and disclosure. • **Openness Principle**: there should be a general policy of openness about practices in dealing with data. • **Access Principle**: individuals should have a reasonable right to access information relating to them. • **Transborder Data Flows Principle**: there should be restrictions on transborder data flows to a country which does not substantially comply with the OECD Guidelines.
SECTON E	**DISPUTE RESOLUTION MECHANISMS**
Good Practice E.1	***Internal Dispute Settlement*** **a. Insurers should provide an internal avenue for claim and dispute resolution to policyholders.** **b. Insurers should designate employees to handle retail policyholder complaints.** **c. Insurers should inform their customers of the internal procedures on dispute resolution.** **d. The regulator or supervisor should provide oversight on whether insurers comply with their internal procedures on consumer protection rules.**
Description	**Currently there are not any mandated requirements for internal resolution of disputes in any financial services sector, including the insurance sector (although we understand there is a draft Directive which contemplates such requirements for the microfinance sector).**

	The only possibility is that such requirements might be prescribed under section 93 of the FSA which: • Requires the Registrar to promote and encourage informal dispute resolution schemes within financial institutions; and • Gives the power to the Registrar to require a financial institution or an SRO to develop a complaint resolution scheme. Any such scheme must: • Have as its objective quick and informal resolution of complaints; • Be free to the complainant; • Encourage conciliation; • Have informal procedures, consistent with a resolution of the complaint; and • Require an independent person to resolve a complaint if the financial institution cannot do so) which scheme must bind the financial institution but not the client. The Code of Good Business Practice for general insurers relevantly provides that a general insurer must disclose to insureds and others on request the procedures for complaint resolution (including as to complaints about intermediaries or representatives). However the Code does not set out details of the procedures which must be followed for dispute resolution. A rigorous internal dispute resolution process would, of course, minimize the need for resort to a formal dispute resolution scheme. The result would be a corresponding avoidance of the time and costs that resorting to such schemes involves, and minimization of the risk of loss of customer good will.
Recommendation	It is recommended that a Directive be issued under section 93 of the FSA for all insurers to have an internal complaint resolution scheme. For example, the Directive might deal with topics such as the following: • Visibility of the process for consumers; • Staff training (however whether there is a need for staff dedicated solely to hearing customer complaints should depend on the size and complexity of the financial institution in question); • The time within which complaints must be considered; • Requirements for advice to the consumer as to progress in dealing with the compliant, the decision and the reasons for any adverse decision; • The staff resources to be provided for complaint resolution and the need to have such staff independent of the staff responsible for the conduct the subject of the complaint. Further, the required resources should vary depending on the size of the financial institution and the complexity of the products and services that are offered to consumers; • Record keeping as to matters such as: the number and type of complaints, the location from which they originated (such as the branch), whether or not they are resolved in favor of the consumer and how long the process took and records of any systemic issues. A formal Complaints Register should be required for this purpose; and • The need for involvement of senior management – for example, where there is a board of directors, they should sign off as to details of the scheme and the extent to which it complies with the Directive and they should receive regular reports as to systemic issues and resolve how they should be dealt with. Such a Directive might have regard to International Standards on Internal Dispute Resolution Schemes – such as those in ISO 10002 – 2006.
Good Practice E.2	***Formal Dispute Settlement Mechanisms*** **a. A system should be in place that allows consumers to seek affordable and efficient third-party recourse, which could be an ombudsman or tribunal, in the event the complaint with the insurer cannot be resolved to the consumer's satisfaction in accordance with internal procedures.**

	b. The role of an ombudsman or equivalent institution *vis-à-vis* consumer disputes should be made known to the public. **c. The ombudsman or equivalent institution should be impartial and act independently from the appointing authority and the industry.** **d. The decisions of the ombudsman or equivalent institution should be binding upon the insurers. The mechanisms to ensure the enforcement of these decisions should be established and publicized.**
Description	**There is very limited compliance with Good Practice E.2 in Malawi.** One of the Nico General insurance policies we reviewed provided for disputes to be referred to an "Arbitrator" to be appointed by agreement or, failing agreement, by two Arbitrators and, if they did not agree, by an Umpire (clause 10 of the "Conditions which Apply to the whole Policy" in the Motor Vehicle Policy provided to us). The equivalent clause in the Nico House owner's and Householder's Policy on the other hand made it clear that any arbitrator is to be appointed in accordance with any statutory requirements (there are none that we are aware of). The policies in question then provided that an arbitral award is a condition precedent to any court action. However there does not appear to be any formal external arbitration center in place in Malawi with clear rules and procedures and we accordingly do not consider that provisions such as these meet the requirements of this Good Practice. The only truly formal dispute resolution mechanisms for consumers of insurance services in Malawi are through the Commercial Court or the General Registry (both of which are divisions of the High Court) or the Magistrates Courts. However it appears that consumers simply do not use these avenues for dispute resolution. The reasons include: **The Commercial Court** – high court costs (around 1.5% of the amount in dispute up to a maximum of MKW 1 million (around US$ 6,600)), limits on jurisdiction (the Commercial Court will not hear a matter is the amount in dispute is less than MK 2million (around US$ 13,200), complexity of procedures and pleading requirements (which in turn means that it is very difficult to pursue matters without a lawyer), legal costs and a perception that the Commercial Court may be biased in favor of large businesses (which is probably related to the fact that it was apparently established in 2007 for purposes related to "ease of doing business"). **The General Registry** – court costs are much lower (only MK 100 or around US$0.66); matters of up to MKW 2 million (around US$132.46) may be heard, the procedures and pleading requirements are much simpler which in turn means that it is easier to pursue matters without a lawyer and there is a perception that the Court is more "pro- consumer" (perhaps because the judges go out of their way to assist plaintiffs who are unrepresented). However, it can take up to 2-3 years to have a matter concluded in this Court and it is very rare for a consumer to bring a case in this court. **The Magistrates Courts** – reportedly, a consumer would not bring a matter in this court, notwithstanding the low costs involved and the simplicity of the procedures and pleading requirements. This may be because of the perception that magistrates simply do not have the required expertise to hear matters related to financial products and services. A further concern may be our understanding that very poor consumers are often pursued in this court by MFIs for outstanding debts and are very likely to have judgment entered against them because of a failure to appear. If they then do not pay they are likely to be held to be in contempt of court and may be imprisoned. In the meantime the judgment debt will continue to accrue interest. If this is indeed the case then it is not surprising that consumers of any sorts of financial services are reluctant to approach the Magistrates Courts for any relief. We also note our understanding that the Constitution expressly forbids imprisonment of a person for failure to meet contractual obligations (see section 45(2)(e) of the Constitution).

	There is already an Ombudsman that deals with matters related to decisions of government officials. The Ombudsman's office is established by virtue of the Constitution, with further details of his functions and powers provided for by the Ombudsman Act, 1996. The Ombudsman's functions relate to the mediation of disputes about decisions of Government officials, namely disputes "*concerning any alleged instance or matter of abuse of power or unfair treatment of any person by an official in the employ of any organ of Government, or manifest injustice or conduct by such official which would properly be regarded as oppressive or unfair in an open and democratic society"* [128]. The Constitution does contemplate that the Ombudsman's functions could be added to by any laws as well as the Constitution itself[129]. Further, the Ombudsman's functions in the Constitution are expressed in general terms "*The office of the Ombudsman may investigate any and all cases where it is alleged that a person has suffered injustice and it does not appear that there is any remedy reasonably available by way of proceedings in a court or by way of appeal from a court or where there is no other practicable remedy*." [130] It may accordingly be that it would be legally possible for the Ombudsman's office to expand its functions to handle complaints relating to financial services, as suggested by some stakeholders. However, this option would not seem appropriate It would send a very confusing message and image to the public if the Ombudsman were to have combined administrative and financial services dispute resolution functions and the ability to hear matters of concern to both consumers and to any person affected by a Government decision (which could include a corporation). It is also understood that the Ombudsman has very limited resources. **It is also not clear that the proposed Mediation and Arbitration Centre is an appropriate formal dispute resolution mechanism for consumers of financial services.** There is draft legislation to establish this Centre, which will have 2 levels, with the second level being able to be used for hearing relatively small commercial disputes. However, it is not clear that the Centre would be appropriate for resolving consumer disputes on financial services. **The Registrar has power to require the development and implementation of a formal dispute resolution scheme.** As mentioned in Good Practice E.1, section 93 of the FSA gives the Registrar power to require financial institutions to develop and implement a scheme under which an independent person must be used to resolve a complaint if the financial institution cannot do so. Such a scheme must bind the financial institution but not the client.
Recommendation	Consideration should be given to establishing a third party Ombudsman to provide an independent dispute resolution service for all unresolved consumer complaints involving financial institutions (including insurers). There are a number of ways this might be established. For example: • Through specific legislation; or • Through the Registrar issuing a Directive requiring relevant financial institutions to join an approved Ombudsman scheme covering complaints made by consumers, which would have rules binding on all its members (which the Registrar would need to approve). It may well be the case that such a Directive would not apply to some financial institutions, such as very small SACCOs. Regardless of the way in which the scheme is established, it should be developed in close consultation with all relevant stakeholders including relevant Ministries, the financial services industry (including very small institutions), all relevant industry associations and, if course, consumer representatives including CAMA. The rules of an Ombudsman service would need, at a minimum to cover:

[128] Section 5(1) of the Ombudsman Act
[129] Section 120 of the Constitution of Malawi
[130] Section 123 (1) of the Constitution of Malawi

	• Who could be a member; • The nature of disputes which could be dealt with by the Ombudsman and any applicable claims limits (bearing in mind that the service would be for consumers); • Compensation caps; • The fees for membership and for dealing with disputes (which should be paid by the financial institutions); • The fact that decisions were binding on the financial institution (but not the consumer); • Confidentiality of complainant information; • The circumstances in which legal action could be launched while a matter is with the Ombudsman (for example, if a statutory period was about to expire); and • Record keeping of information about caseloads, processing times, systemic issues, cases of serious misconduct (such as fraud). The scheme would probably also need an overseeing body with its own terms of reference. Such a body would: • Have its own terms of reference; • Have an equal number of industry and consumer representatives and an independent Chair); and • Have functions such as appointing the Ombudsman for the service, monitoring the scheme, approving budgets and monitoring systemic complaint issues and serious misconduct issues such as fraud; • Require an independent annual audit of the operation of the scheme; and • Report systemic and serious misconduct issues to the Registrar as well as provide an annual report. In developing an Ombudsman Scheme, the Registrar might have regard to International Standards on Complaints Handling Processes – such as those in ISO 10002: 2004. Finally, it should also be clarified whether the reference to the "Registrar of Insurance" in the Code of Good Business Practice applying to insurers is a reference to the Registrar of Financial Institutions (i.e. the Governor of the Reserve Bank). Further, and importantly, it should be confirmed that the Registrar has the power, and is willing, to undertake the role of mediator in disciplinary disputes.
SECTION F	**GUARANTEE SCHEMES AND INSOLVENCY**
Good Practice F.1	***Guarantee Schemes and Insolvency*** **a. With the exception of schemes covering mandatory insurances, guarantee schemes are not to be encouraged for insurance because of the opaque nature of the industry and the scope for moral hazard. Strong governance and supervision are better alternatives.** **b. Nominal defendant arrangements should be in place for mandatory insurances such as motor third party liability insurance.** **c. Assets covering life insurance mathematical reserves and investment contract policy liabilities should be segregated or at the very least earmarked, and long-term policyholders should have preferential access to such assets in the event of a winding-up.**
Description	**There is no guarantee scheme relating to insurance products in Malawi and there is no nominal defendant (however the third party can take action against the insurer without having to first sue the owner or the driver).** The Insurance Act does not require the segregation of life insurance reserves or investment contract liabilities. However it does state that life insurance funds shall be "*absolutely the security of the owners of the life policies issued by the life insurer as though it belonged to a*

	life insurer carrying on no other business than life insurance business" (section 24 (3)). This provision clearly contemplates that life insurers might carry on other businesses. There is a further requirement, in summary, that such funds only be used for life insurance purposes (section 24 (5)). A somewhat problematic provision is section 24 (4), which allows co-mingling of life insurance funds with investments of other funds (section 24 (5)). There is also a requirement that premiums received by brokers must be held in trust and not charged in any way (section 31). The FSA provides for policy holders to have preferential access in a winding-up of an insurer (they rank second, after liquidation costs (section 72(8)). Somewhat confusingly, section 60 of the Insurance Act provides that, notwithstanding anything in the Companies Act or the Bankruptcy Act, assets of an insurer which has been wound-up are to be distributed after payment of secured and preferred claims in the following order (in summary): • unpaid losses under insurance contracts where the loss occurred before the date fixed by the Registrar for the winding up; • cash surrender value of life policies; • unpaid claims for losses occurring before the date fixed by the court for the winding-up; • claims for refunds of unearned premiums; and • other claims. However, it is not clear how section 60 of the Insurance Act fits in with the FSA priority provisions. We are not aware of any Directives which deal with any of the issues the subject of this Good Practice.
Recommendation	Life insurance reserves should be required to be held in trust and invested separately. The interaction between the priority provisions in section 60 of the Insurance Act and section 72(8) of the FSA should be clarified.
SECTION G	**CONSUMER EMPOWERMENT**
Good Practice G.1	***Unbiased Information for Consumers*** **a. Consumers, especially the most vulnerable, should have access to sufficient resources to enable them to understand the financial products and services available to them.** **b. Financial regulators should provide, via the internet and printed publications, independent information on the key features, benefits and risks –and where practicable the costs– of the main types of financial products and services.** **c. Non-governmental organizations should be encouraged to provide consumer awareness programs to the public regarding financial products and services.**
Description	These initiatives are not currently being undertaken. However these issues may be addressed through the financial inclusion strategy described in Good Practice G.2.
Recommendation	No recommendation.
Good Practice G.2	***Measuring the Impact of Financial Capability Initiatives*** **a. Policymakers, industry and advocates should understand the financial capability of various market segments, particularly those most vulnerable to abuse.** **b. The financial capability of consumers should be measured through a broad-based survey that is repeated from time to time.** **c. The effectiveness of key financial capability initiatives should be evaluated.**
Description	**There does not appear to be any sort off detailed understanding of the financial capability of the people of Malawi, beyond a general appreciation that it is very poor and**

	an appreciation of the results of the FinScope Malawi 2008 Survey. However, the Malawi National Strategy for Financial Inclusion 2010-2014 developed by the Ministry of Finance's FIMA Project includes an Action Plan that focuses on financial literacy and consumer protection. The financial literacy dimension includes activities such as: conducting a baseline study on financial literacy, developing a strategy for financial literacy, establishing a national financial literacy network, providing training, delivering financial education. The action plan for consumer protection includes activities such as: conducting a baseline study on consumer protection, enacting a consumer bill of rights, establishing a national consumer protection network, conducting a public awareness campaign. **Within the financial inclusion strategy, the Government of Malawi has taken the important step of setting up a multi-stakeholder National Taskforce on Consumer Financial Education (NTCFE), under the leadership of the Reserve Bank.** The Reserve Bank is chair and champion of the NTCFE, which was set up in June 2010. The taskforce includes also representatives of the financial industry (banks, insurance, microfinance associations and representatives of stockbrokers), government (Ministries of Education, Industry, Trade and Gender), civil society (associations representing consumers, small farmers, small businesses and disabled persons), academia (University of Malawi, Mzuzu University, Bunda College, College of Accountancy) and the media council. The taskforce has developed a draft outline of a financial literacy action plan, which first measure is the conduction of a financial literacy study. It is understood that the World Bank is to fund this survey and assist in its design.
Recommendation	No recommendation beyond that the above initiatives be continued and that there be a particular focus on educating consumers as to the nature of insurance policies and their rights in relation to matters such as the disclosure documents that they are entitled to, how to make claims and the availability of internal and external dispute resolution services.

ANNEX I: CONSUMER PROTECTION IN CREDIT REPORTING

There are currently no licensed credit information bureaus in Malawi. However, media reports indicate that two credit bureaus are interested in obtaining a license to operate in Malawi under the new Credit Reference Bureau Act, 2010 (CRB Act). These companies are CRB Data, a local company, and CRB Africa, a credit bureau with headquarters in Kenya and presence in 12 African countries through CRB Holdings Limited. Further, media reports indicate that the RBM is seeking a 20% stake in CRB Africa. This would create a clear conflict of interest with the RBM's role in licensing, and supervising, credit information bureaus, as well as the RBM's power to issue binding Directives and related regulatory statements under the CRB Act**.** Thus, the Registrar should not proceed with this proposal.

The Credit Reference Bureau Act

The CRB Act deals with the following subjects:

- **Preliminary (Part 1).** This Part makes clear that the CRB Act applies in addition to the FSA (section 3). It contains interpretation and application provisions, as well as relevant definitions, such as:
  - *"credit reference bureau" means a company that allows users to exchange information on their clients repayment history and current debt profiles and which compiles a database that collects, stores, consolidates and processes information related to credit history of persons";*
  - *"credit reference bureau business" means the business of compiling and processing credit information and disseminating credit information among users for their businesses;*
  - *"credit information" means the history of a person with regard to credit and financial obligations that a credit reference bureau may collect pursuant to this Act;"*
- **Licensing (Part II).** This Part provides for the licensing of credit reference bureaus, subject to operational requirements to be prescribed by the Registrar (sections 4 to 12). It is understood that these requirements have been finalized and are awaiting gazettal.
- **Operations of Credit Reference Bureau (Part III).** This Part deals with various operational matters including the information which can be collected by a bureau (sections 13 and 18 (1)), to whom the information may be provided (sections 14 and 18 (2)), data security (section 15), the operational matters for which the Registrar's prior approval is required (section 17), the requirement to maintain a database for 7 years (section 21), the right of a bureau to charge fees (section 22) and to take action against the providers of false information (section 25 (1)). Part III contains various consumer protection provisions, including provisions relating to accuracy of data (section 17), access rights (section 23), correction rights for illegal or inaccurate information (section 24) and the obligation of a bureau to have a claims and enquiries department (section 26). Part III also gives the Registrar broad powers in relation to bureaus, including to obtain unrestricted access to information managed by a bureau and to obtain information about complaints etc. in relation to a bureau (sections 19 and 27) and to take action against a credit bureau (section 28). These provisions are discussed below.
- **Winding Up (Part IV).** This Part makes it clear that the Registrar's approval is required for any winding up of a credit reference bureau (section 30)
- **Miscellaneous Provisions (Part V).** This Part deals with offences and penalties and powers to prescribe regulations and issue Directives, guidelines and instructions (sections 31 to 34).

The Act also contains various consumer protection provisions, including those dealing with:

- An obligation to take certain steps to ensure the accuracy of identification information about a person whose information is collected by a bureau (section 13);
- A prohibition on providing information to anyone other than a financial institution without consent (however a "financial institution" is very broadly defined in the FSA) (section 14);
- Obligations to ensure it provides "accurate, legitimate, truthful and current information" (section 15);

- Restrictions on access to information for direct marketing purposes (section 18);
- Access rights, subject to payment of a fee for documents (section 23);
- Rights of correction of illegal, inaccurate, erroneous, or outdated information which must be corrected by the credit reference bureau within 5 working days (sections 24 and 25);
- The obligation of a credit reference bureau to have a claims and enquiries department with sufficient staff (section 26).

Comparison with Good Practices for Credit Reporting Systems

SECTION A	**PRIVACY AND DATA PROTECTION**
Good Practice A.1	***Consumer Rights in Credit Reporting*** **Laws and regulations should require basic consumer rights. These rights may include:** **a. The right of the consumer to consent to information-sharing based upon the knowledge of the institution's information-sharing practices.** **b. The right to access the credit report of the individual, subject to proper identification of that individual and free of charge (at least once a year).** **c. The right to know about adverse action in credit decisions or less-than-optimal conditions/prices due to credit report information. In this process, consumers should be provided with the name and address of credit bureau.** **d. The right to be informed about all inquiries within a period, such as six months.** **e. The right to correct factually incorrect information or to have it deleted.** **f. The right to mark (flag) information that is in dispute.** **g. The right to decide if the consumer's credit information (for purposes not related to the granting of credit) can be shared with third parties.** **h. The right to have sensitive information especially protected (not included in the credit report), such as race, political and philosophical views, religion, medical information, sexual orientation or trade union membership.** **i. The right to reasonable retention periods such as those for positive information (for example, at least two years) and negative information (for example, 5-7 years.)** **j. The right to have information kept confidential and with sufficient security measures in place to prevent unauthorized access, misuse of data, or loss or destruction of data.**
Description	**The CRB Act provides inadequate protection for consumers both generally and for the purposes of Good Practice A.1.** Specific concerns relate to: • **Disclosures to consumers.** There is no requirement for the consumer to consent, or even be told, that their information will be disclosed to a credit bureau and shared with users and no provision for publication of the information sharing practices of a credit information bureau. • **Information which can be collected.** There are virtually no limits on the type of information which can be collected by a bureau or from whom it can be collected. Section 13(1) provides in this regard that a credit reference bureau "*shall collect information on the background and credit history of persons required by the Act*". However the Act does not actually require any information to be kept. Instead, it anticipates that credit information may be collected from financial institutions and any other institution as may be prescribed by the Minister with the approval of the Registrar (section 13 (3)). Further, the only specific restraints are a vague statement that the "*rights and liberties of the account holder shall not be violated*" (section 13 (3)) and a requirement that a bureau only request, collect or grant information "*related to its business*" (section 18(1)). However, the definition of what is a credit bureau's business is very broad: *credit reference bureau business" means the business of compiling and processing credit information and disseminating credit information among users for their businesses* (section 2(1)).

	• **Time period for holding information.** It appears that all information may be held for 7 years (section 21). However there is no distinction between positive and negative information and it is not clear from when the time limit starts. Further, there are no provisions requiring information to be deleted – for example, if a bureau is notified that a consumer's loan payment is no longer overdue then we would expect the information in question to be required to be deleted. • **Notice of adverse credit report.** There is no requirement that a consumer be notified if a credit application is refused on the basis of a credit report or to be told that they have can access the relevant credit information file and seek correction of the information. • **Dispute about accuracy of information**. There is an obligation to correct information which the bureau discovers is inaccurate or no longer valid (section 16(20)) and a provision which gives the account holder a right to seek correction of information which they believe to be illegal, inaccurate, erroneous, or outdated. The information must be corrected by the credit reference bureau within 5 working days. However, it is not clear what "illegal" or "outdated" means and, even more significantly, it is of significant concern that if the relevant information is shown to be incorrect then the bureau can charge a penalty or take legal action (section 24). • **Disclosure of information by credit information bureau.** There are insufficient limits on the circumstances in which a bureau can disclose information. Section 14 provides that a bureau can only provide "*credit information services to financial institutions regulated under the Financial Services Act*", other than with the consent of the account holder. The difficulties with this approach are that "*financial institutions*' are very broadly defined in the FSA and there are no limits on the nature of the information which can be disclosed or the purpose for which it may be disclosed. For example, can there be disclosure of outstanding debt information held in relation to a person, even if it is not strictly relevant to the financial institution concerned (say an insurer) because it will not be providing credit to the person? Another example: can information be disclosed to a related financial institution for cross selling purposes? In both cases the answer would appear to be "yes", although it is not clear that this is appropriate. • **Use of information by a credit bureau.** Section 15 (b) further provides that a credit reference bureau shall "*utilize the information collected exclusively for the purpose of meeting the objectives of the credit reference bureaux business in accordance with this Act*". The concerns with this approach are that the Act does not actually limit the purposes for which information can be used by a bureau. In summary, the information should only be able to be used for the permitted disclosures. • **Uses and disclosures by recipients of credit reports.** Section 18(2) provides that information cannot be disclosed for direct marketing purposes. However the Act does not make it an offence for the information to be used for such a purpose, or impose any other limits on the use or disclosure of information by the recipients. For example, there would be nothing to prevent credit sensitive information being used for employment related purposes. • **Fees.** An account holder may be charged a fee for a copy of a credit report (section 23). • **Access to information.** The Registrar has power to obtain unrestricted access to information managed by a bureau and the right to information held by a credit reference bureau where he needs that information to evaluate a complaint, accusation or inconsistency detected in the bureau (sections 19 and 27). It is not, however, clear why the Registrar should be able to access personalized information without consent. • **Positive or negative reporting system**? The Act is very unclear as to the type of report that can be provided by a bureau. In broad terms, a positive report could cover the entire credit history of the person concerned, including when they have repaid loans on time. In contrast, a negative system would only allow reports as to defaults to be provided. In our experience most countries allow positive credit reports to be given as they allow a more complete picture to be given of the person concerned and so can focus on the positive aspects of that history as well as negative aspects.

Recommendations	**A Directive should be issued to deal with each of the abovementioned concerns as well as the related gaps in Good Practice A.1.** In particular, it is considered that: • Information on a credit information file should be limited to identification information and credit specific information such as details of credit reports which have been provided, current credit facilities and repayment history. Further, it is considered there should be a prohibition on recording sensitive information such as that relating to political affiliations, religious beliefs, health and race. • There should be limits as to the nature of the information which can be disclosed by a credit information bureau. For example, it might be limited to credit reports provided in response to a specific application for credit or for the purposes of collection of a debt which is overdue. There should also be clarification on the important point as to whether both positive and negative reports can be provided. • There should be limits on the purposes for which recipients of credit reports can use and disclose the credit reports. It is recommended that the basic principle be that credit reports should only be used to assess an application for credit and to collect overdue payments, as specifically authorized by law or with the clear consent of the person concerned. • Section 24 (4) should be repealed and it should be made clear that there can be no charge for a request for a review of information on a credit file, where there has been no such request in the previous 12 months period. Further, there should be no charge for a request to review a file when the customer has been told that a credit request has been declined on the basis of information in that file. • The Registrar should not be able to access personalized information without consent. • Consideration might also be given as to whether all the protective provisions in the Act should apply to both individuals as well as corporate entities. In our experience this is an unusual approach. A further, important issue to be considered is whether there should be a **mandatory** requirement that a financial institution providing credit disclose details of the facility and the repayment history to a credit information bureau. If there is not any such requirement then it is likely that the Act will not be able to help achieve financial inclusion. However this is a complicated issue and needs further consideration, especially given the wide variety of financial institutions which provide credit in Malawi and the fees which are likely to be charged by a credit information bureau for use of its service. Such fees are likely to be passed on to consumers.
SECTION B	**CONSUMER EMPOWERMENT**
Good Practice B.1	***Unbiased Information for Consumers*** **Financial regulators should provide, via the internet and printed publications, independent information for consumers that seek to improve their knowledge for actively managing the credit report.**
Description	No such information is currently provided.
Recommendation	Such information should be provided as soon as the first credit bureau is licensed.
Good Practice B.2	***Awareness of Credit Reporting*** **To ensure that financial consumer protection and educational initiatives are appropriate, it is necessary to measure financial capability with large-scale surveys that are repeated periodically. These surveys should include questions on credit reporting and scoring.**
Description	A financial capability survey is to be developed in 2011, with the support of the World Bank.
Recommendation	The abovementioned survey is very important and should be undertaken. Consideration should be given to including questions as to the understanding of the implications of having personal information included in a credit bureau and of data protection rights. Subsequent surveys could then measure the effectiveness of financial capability (and consumer protection) initiatives.

ANNEX II: MOBILE BANKING IN MALAWI

Introduction

There is no internationally accepted definition of mobile banking, branchless banking, e-money or similar expressions. For the purposes of this Report, mobile banking means the provision of low-value basic financial services such as transfers, in-store and online purchases, electronic storage of value and domestic and international remittances to retail customers, whenever the delivery of such services is done through the use of mobile devices such as mobile phones and payment cards. These services are offered by banks and nonbank institutions, and are usually an alternative to traditional banking and payment services delivered in brick-and-mortar branches. They typically use retail outlets and other nonbank establishments as the main client interface.

Mobile banking services are becoming increasingly important in jurisdictions with low levels of financial access, as they usually target the great masses of unbanked or under-banked populations in middle and low-income countries. This is because electronic devices, along with third party agents acting as cash-in/out outlets (some define these as "cash merchants"[131]), dramatically reduce costs, enabling providers to serve hard-to-reach, low-income customers. The customers benefit from reduced transportation costs, less risk of carrying cash over long distances, greater convenience due to extended business hours offered by retail establishments in opposition to bank branch opening hours, and access to a wider variety of financial services.[132]

Notwithstanding the benefits of accessing financial services through mobile banking, it is important that retail customers are protected. Customers should remain protected as if the services were being delivered directly by financial institutions using traditional branches staffed with bank employees. Compliance with existing consumer protection and market conduct rules should remain a priority. In particular the main areas of concern in protecting mobile banking consumers are:[133]

- Protecting client funds held as electronically stored value when such funds are not considered bank deposits;
- Ensuring safety and reliability of services using information and communication technology as their main medium;
- Reducing opportunities for fraud and other harmful conduct by agents;
- Ensuring clear and effective disclosure;
- Protecting client's personal information which is stored digitally;
- Ensuring clients have knowledge of and access to effective redress and complaint procedures;
- Keeping providers liable for agent's regulatory compliance.

On the other hand, it is crucial that extensive laws and regulations aimed at protecting consumers do not render these low-value services economically unviable, which is the most attractive feature of mobile banking for low-income customers looking for convenience and accessibility. Consumer risks in mobile banking stem from the use of new information and communication technology that reaches out to a large number of inexperienced and unsophisticated customers, potentially in a short period of time. In Kenya, for instance, M-Pesa reached out to over 14 million clients in about 4 years of operation. From a regulatory and supervisory perspective, the key risks are related to the use of outsourcing –more specifically the use of nonbank agents such as merchants, with ramifications in the risk areas that are

[131] See, for instance, BIS Working Paper 347 "On harnessing the potential of financial inclusion", May 2011.
[132] See also the G20 Principles for Innovative Financial Inclusion.
[133] Dias, Denise, and Katharine McKee. 2010. "Protecting Branchless Banking Consumers: Policy Objectives and Regulatory Options." Focus Note 64. Washington, D.C.: CGAP.

already familiar to financial supervisors, mainly operational risk. For example, strategic risk may arise if the third-party agent conducts unauthorized activities on its own behalf that are inconsistent with the conduct standards of the regulated entity. Reputation risk appears if the agent delivers poor services to the customer in a way that could decrease confidence in the system. Compliance and legal risk may arise if the agent does not comply with data privacy rules; and operational risk, if technology failure and frauds become widespread events.

A proportional and realistic approach to dealing with risks and minimizing the exposure of retail customers to them should be the goal of regulators in markets where mobile banking is expected to play a major role in advancing financial inclusion. Policymakers and financial supervisors should pursue a regulatory and supervisory approach that focuses on protecting lower-income and inexperienced mobile banking consumers without jeopardizing access to services otherwise not available to them. Such an approach should also work well for higher-income clients, although customized rules may apply for higher-value transactions, such as stricter know-your-customer requirements to reduce the risk of money laundering.[134]

Key Findings and Recommendations

Mobile banking is an emerging business in Malawi, where banks are starting to enter despite facing several challenges. Key challenges include deficient retail infrastructure for service delivery and lack of identification documents from potential clients. Nonetheless, there are several initiatives by banks as they shift attention towards the approximately 1.5 million bankable adults who are not served by the formal financial system today.[135] These initiatives focus on the provision of basic transactional bank accounts with simplified opening procedures, and the use of agents and mobile phones to enable out-of-branch transactions such as peer-to-peer transfers. However, banks are not yet allowed by the RBM to collect deposits outside their branches, which limits the potential of the current offerings and creates inconvenience for clients (for instance, to deposit money in a mobile phone-based account, a client still needs to go to a bank branch).

Non-banking institutions are also entering the market and piloting mobile banking models mirrored in correspondent electronic value or e-money schemes operating elsewhere, particularly in Kenya. The focus of such programs is on the provision of payments and transfer services linked to an electronic account which is not a bank account. Ideally, the funds collected from clients by the nonbanks – and transformed into correspondent electronic value– are deposited in a trust account kept in a licensed bank by a trustee, for the benefit of the clients. As the pilots grow in size and outreach, issuing specific regulation on correspondent electronic value becomes an urgent matter, not only to provide a level-playing field between bank- and nonbank-based mobile banking that encourages healthy competition, but to set minimum operational and conduct standards that protect customers, particularly low-income consumers.

Although there appear to be no major consumer protection concerns with the provision of mobile banking at this stage in Malawi, it is recommended that regulations be issued to cover this fast growing area, in the near term. As highlighted in the FSAP 2008, a clear regulatory framework for the use of nonbank retail agents would be the first step to allow the expansion of financial services into the rural area on a sound basis. Such regulation would also ensure that basic business conduct standards are established from the outset for banks and nonbanks operating through agents and offering correspondent electronic value, with the intent to protect current and potential mobile banking consumers and maintain

[134] On this, see Chatain et al, 2011 "Protecting Mobile Money against Financial Crimes: Global Policy Challenges and Solutions", World Bank.
[135] FSAP 2008.

the levels of public confidence in financial services. A solid regulatory environment would also reduce the chances of unscrupulous providers successfully reaching out to unprotected consumers (e.g. pyramid schemes using prepaid cards were identified in many countries in Africa, Asia and Latin America).

Preferentially, such framework should be established in Directives or Regulations issued by the RBM or the Ministry of Finance, respectively. The RBM has issued "Guidelines for mobile payment systems" covering non-bank-based payments originated through mobile phones[136], but guidelines do not have the same enforcing powers as Directives or Regulations, and would not provide the RBM with authority to supervise nonbank entities that are not currently under its regulatory and supervisory scope. This issue will need to be further discussed within the RBM, jointly with the Ministry of Finance.

Ideally, the Payments Systems Bill should be passed to provide the RBM with unquestionable power to issue regulations and supervise payment services providers, including nonbank providers of electronic payment services. Based on a payments law, the RBM could issue regulations for retail payment providers, including providers of electronic payment services. A separate regulation on the use of agents by banks and nonbanks should also be in order. There is no major difference in regulating and supervising agency business undertaken by different types of institutions regulated or to be regulated by the RBM.

Regardless of its status and the underpinning legal base, the relevant regulation for bank- and nonbank-based mobile banking should, at the minimum:

1. Clarify the RBM's regulatory and supervisory authority over mobile banking services and providers, including nonbanks that are not currently supervised.
2. Clarify that the provider is legally liable for regulatory compliance by its agents, including compliance with existing or future consumer protection provisions.
3. Establish minimum clauses to be included in the service level agreements between agents and the provider.
4. Ensure effective disclosure in agent operations, including:
    a. Requiring price disclosure at agent premises;
    b. Prohibiting agents to charge fees other than those disclosed by the provider;
    c. Prohibiting agents to condition the delivery of the financial service to the purchase of products or services in its establishment;
    d. Requiring disclosure of the agent's regulatory status (an intermediary between the regulated service provider and the client).
5. Ensure liquidity and client ownership over funds collected against correspondent electronic value issued by banks (when they are not considered bank deposits) and nonbanks.[137]
6. Set minimum standards for speedy and easy fund redemption in schemes offering correspondent electronic value, including in case of termination of the contract.
7. Require providers to ensure reliability, availability, and safety of services.
8. Require providers to establish agent selection and training policies.
9. Ensure that existing rules for internal dispute resolution apply to and work properly for mobile banking delivery channels.
10. Require mobile banking transactions to produce an automatically generated receipt –either paper-based or electronic.
11. Require providers to educate customers on how to use electronic devices, including how to keep passwords safe.

[136] RBM's Mobile Payments Systems Guidelines, issued in March 2011, available at http://www.rbm.mw/documents/payment_systems/Mobile%20Payments%20Systems%20Guidelines.pdf

[137] On this, see Tarazi, Michael, and Paul Breloff. 2010. "Nonbank E-Money Issuers: Regulatory Approaches to Protecting Customer Funds." Focus Note 63. Washington, D.C.: CGAP, July.

ANNEX III: PRIVATE PENSION FUNDS IN MALAWI

Overview

The Financial Sector Assessment Report 2008 noted that there are around 150,000 employees in the formal sector in Malawi who are currently covered by around 450 private pension funds. These funds include contributions from both employers and employees. Around 90% of these funds are managed by two life insurers. The Government of Malawi runs a pay-as-you-go scheme for its employees. There is some debate about the number of employees covered (estimates are around 120,000 – 150,000).

It is expected that when the mandatory scheme provided for in the new Pensions Act comes into effect, the number of employees covered by pension schemes will increase to around 750,000. Also, the funds under management will increase from approximately MKW 60 billion (approximately $364 million) to approximately MKW 180 billion (approximately $10.9 billion). This would represent around 80% of the GDP for 2010.

Legal Framework

The first Act covering pension schemes was just approved in 2011. The pensions sector was unregulated in Malawi until February 2011, except for a requirement to register under the Taxation Act. The Pensions Act was enacted in March 2011 and became effective in June 2011. It is understood that at least the Government will need to commence contributions in the 2012 / 2013 fiscal year[138]. Given the very recent passage of the Act and the uncertainty as to the regulations and directives that might be made for the purposes of the Pension Act, a full template was not completed in relation to the pensions sector in Malawi. Instead, we highlight below the key features of the Pension Act and Key Issues identified.

In summary, the Pensions Act has four key objectives. These objectives are:

- To ensure that employers contribute to pension schemes for their employees
- To ensure that employees receive their retirement benefits and supplementary benefits when due;
- To promote the safety and soundness and prudent management of pension funds ; and
- To foster agglomeration of national savings (Section 4).

The Act establishes a mandatory, contributory National Pensions Scheme. All employers are required to ensure that any employee who has been employed for more than 12 months becomes a member of this scheme (Section 6). The National Pensions Scheme consists of a national pension fund, to be established pursuant to the Pensions Act, and private pension funds licensed under the Act (Section 6).

The Act establishes minimum contributions from employer and employee, but provides for some exemptions. The required minimum contributions will be 10% of the employee's "pensionable emoluments" from the employer and 5% from the employee (Section 12(1)). However these levels are subject to regulations which may be made by the Minister and there is express provision for regulations to be made allowing the employer to only contribute up to 7.5% from the commencement date of the Act until the latest 1st January before the expiry of 2 years from that date (Section 12(1)). Also, the employer and employee may agree to revise the levels upwards, and both employer and employee may voluntarily make additional contributions (Section 12). Further, the Minister is allowed to provide relief from both contribution requirements. This may be done by prescribing: (i) a salary threshold above which an employee's pensionable emoluments shall not be taken into account in determining contributions, and/ or

[138] Source: 2011/12 Output Based Budget Document, Budget Document No. 5 , page 8

(ii) a salary threshold below which there is no obligation to make contributions or to provide employees with the benefit of a life insurance policy (Section 10). However, employers must take into account two requirements to be granted the latter exemption: (i) if they have more than 5 employees, they shall provide contributions even when the salary is below the relevant salary threshold; and (ii) employers shall ensure that every employee who was a member of a existing pension scheme at the time the Act commenced, continues to be a member of the pension scheme, independently of the employee's salary.

Section 7 of the Pensions Act established the National Pension Fund Administrator, a body corporate responsible for acting as the administrator of the National Pension Scheme and setting up and managing the National Fund. The Registrar of Pensions may still license umbrella funds to administer individual pension funds, but the Pension Administrator must administer at least 20% of the funds in the National Pension Scheme. This percentage might be revised by an order of the Registrar. The Pension Administrator will have a Board of Trustees, responsible for its administrative and management policy. Trustees will be appointed by the President and are to include a representative from the "most representative" organizations of employers and employees, and either the secretary to the Treasury or the secretary responsible for Labour or for economic planning. Trustees must be "fit and proper" as defined by the Registrar and must possess specified qualifications (which do not necessarily have to be in the pensions sector). Notwithstanding these provisions, the Minister can designate any Government agency or private organization to perform the function of the Pension Administrator (Section 8).

The Act provides employees with the benefits of a separate pension account and a life insurance policy. Section 11 states that the trustees of a pension fund shall establish and maintain separate accounts in its books for each pension fund member, in accordance with the Registrar's Directives. According to Section 15, employers will be required to maintain a life insurance policy for each employee. The cover is required to be one time the "annual pensionable emoluments" of the employee, although this level may be amended by the Minister. Also, the Act states that a trustee of a restricted fund will need to comply with a member's request to move his or her assets to an unrestricted fund (Section 44).

All pension and umbrella funds will need to be registered and the trustees licensed under the FSA and the Pensions Act (Sections 16 – 19). Further, any investment manager, administrator, pension broker or custodian for the fund will need to be licensed under the FSA (Section 21), be a body corporate (Sections 30 and 33) and be appointed in writing (Section 32). There will also be provision for members of schemes to be represented within groups of trustees (Sections 26 and 29).

Each trustee is also subject to various statutory covenants. These covenants will, amongst other things, require a trustee to act honestly, with a specified degree of care, skill and diligence, to obtain skilled advice and to act in the best interests of members and beneficiaries, to keep moneys of the fund separate and to have a specified investment strategy (Section 36). Similar covenants apply to an operator of a fund (Section 37). A provision in a fund's rules will be void to the extent that it purports to exempt or indemnify a trustee or operator in respect of a liability incurred when failing to act honestly or to exercise the required degree of care and diligence (Section 41). Similar rules apply to a director (Section 42). However in other circumstances the fund's rules may provide for an indemnity out of fund assets.

The Act includes various rules related to the investment of fund assets, including:

- A provision exempting an investment manager from liability for negligence will be void (Section 49);
- A trustee must be able to require an investment manager to provide the trustee with certain information (Section 50);
- Pension fund assets must be invested at arms' length (Section 51);

- The part of a fund's assets acquired from an employer must not exceed 5% (subject to certain qualifications) (Section 52);
- Fund assets cannot be used to provide financial assistance to a member or a close relative of a member (Section 53);
- Fund assets cannot be acquired from members or their associates, except as authorised by a Directive (Section 55).

The Act requires pension funds to have an inquiries and complaints resolution scheme. The trustee of each fund is required to have such a scheme and to resolve inquiries and complaints within 60 days (Section 57). However there is no requirement for participation in an external dispute resolution scheme.

Members are required to be given information. Members must be given "fund information" before, or if that is not practicable, as soon as practicable afterwards, and then at times prescribed by the Registrar) (Section 58(1)). "*Fund information*" is defined to include information on matters such as the fund's investment strategy, performance and financial position, fees and charges, rights and entitlements of members and beneficiaries and obligations to pay contributions (or as prescribed in a Directive from the Registrar) (Section 3(1)). This information must be "*meaningful, accurate and complete and demonstrably written in a manner that enhances member understanding*" (Section 58(2)). The trustee of a pension fund must also comply with any reasonable request from a member for information about the fund or their entitlements (unless such a request has been made in the previous 6 months) (Section 60).

The Act requires prompt payment of due contributions and specifies circumstances where contributions can be paid out. Subject to certain qualifications, contributions which are due must be paid within 14 days after the end of the month in which the obligation accrued (Section 61 (1)). Contributions can only be paid out in specified circumstances, such as reaching the retirement age and death (Section 64). However, the Registrar can approve earlier pay outs if a person has left their employment and not been employed for more than 6 months and the amount paid out is limited to the member's contributions and investment returns (Section 65).

Key Recommendations

The RBM should set up an adequate organizational structure to deal with consumer protection issues in the pensions sector and enhance its technical capacity. It is not clear whether, the Registrar, with all his new responsibilities (including supervision of microfinance and financial cooperatives), will have the resources necessary to regulate and supervise consumer protection issues in the pensions sector. The officers dealing with consumer protection issues are located in the Microfinance and Capital Markets Department and it is not apparent that the relevant team has the required pension's expertise. This is a particularly acute issue with pensions, given that the Registrar has never supervised this sector and that the huge funds and numbers of people at risk. The Registrar should have a clear and distinct supervisory structure for consumer protection laws, regulations, Directives and other regulatory instruments, which is not within a department of the Registrar dealing with prudential regulation. Also, technical capacity building support should urgently be provided to the Registrar given the enactment of the Pensions Act.

The National Taskforce on Consumer Financial Education should include in its program a focus on educating the population as to the nature of pensions, their rights in relation to their funds and the availability of internal and external dispute resolution services. There is clearly a very low level of understanding of the concept of pensions in Malawi, given there are currently only around 120,000 people covered by the pension funds. There is an urgent need to increase understanding on entitlements under pension fund rules, and the related regulatory regime.

There should be a thorough public consultation process with all relevant stakeholders on the elaboration of Directives under the Pensions Act. There are a large number of Regulations and Directives which need to be made under the Pensions Act. Many of them relate to consumer protection issues, such as:

- the functions, powers and duties of the trustees of the Pension Administrator (Section 7(7));
- the requirement to maintain a separate fund for each member in the books of the trustee (Section 11);
- contributions, payment of benefits, commutation of pensions and annuities, transfer of entitlements, disclosures of information by trustees and others, the forms in which fees and charges must be expressed so as to enable clear comparisons, maximum fees and charges, the form and type of fees, and requirements relating to the role and mandate of a principal officer (Section 48);
- the information to be given to a member (Section 58(1)) and the definition of "fund information" (Section 3(1));
- applications for admission to a fund, who may be admitted as a member, and the documents to be given to applicants and their employers (Section 59);
- the crediting of amounts to a member's account (Section 62);
- debiting of certain amounts to a member's account (Section 63).

ANNEX IV: LEGAL AND INSTITUTIONAL FRAMEWORKS FOR CONSUMER PROTECTION IN FINANCIAL SERVICES

General Legal Framework for Consumer Protection in Financial Services

Three laws apply to any financial product or service: the Consumer Protection Act of 2003 (CPA)[139], the Competition and Fair Trading Act of 1998 (CFTA)[140], and the Financial Services Act of 2010 (FSA)[141] which applies to Malawi's entire financial sector.

The Consumer Protection Act

By its terms, the CPA is to "be regarded as complementary to the process of ensuring and enhancing laws regulating or touching on consumer protection."[142] The CPA defines "consumer" as including "a person who purchases … services otherwise than for resale… [or] receives … services for which consideration has been paid or promised or partly paid or promised …". The CPA also defines "service" as "service of any description which is made available to potential users and includes the provision of facilities in connection with … insurance [and] banking".[143]

In summary, financial consumers would have the benefit of provisions in the CPA such as:

- A consumer's right to: have their economic interests protected, consumer education, fair treatment, compensation for damages attributed to a supplier (Section 3);
- Interpretation of unfair or ambiguous contracts in favor of the consumer (Section 8);
- Standard form contracts (Section 26);
- Relief against unfair contracts (Section 27);
- Right of retraction, or essentially a cooling-off period which would allow a consumer to withdraw from a contract within 7 days of signing it (Section 29);
- Right of cancelation of a contract where the supplier does not comply with the contract (Section 33);
- An obligation to provide evidence of a transaction (Section 36);
- An obligation to display prices in local currency (Section 37);
- Provision of "true, adequate, clear and prompt" information sufficient to enable consumers to make an informed choice (Section 43); and
- Truthful and promotional advertising (Sections 44 and 46).

Specifically, under Part II, Section 3 of the CPA, all consumers in Malawi are entitled to:

a) protection of their economic interest[144] in the consumption of goods and services, be they of a financial nature or otherwise;
b) true, sufficient, clear and timely consumer education,[145] including information on goods and services offered, as well as on prices, characteristics, quality and risks that may be encountered in the consumption of the goods and services;

[139] See Laws of Malawi, Chapter 48:10. This Act came into force on its publication in the Official Gazette on October 21, 2004.
[140] Laws of Malawi, Chap. 48:01
[141] Act No. 26 of 2010, published July 30, 2010
[142] See Section 54. It is unclear what this section adds since there is no other law that deals exclusively with the subject of consumer protection.
[143] These definitions appear in Section 2 of the CPA.
[144] What is in the interest of one consumer can obviously differ significantly from the interest of any other consumer and it is not surprising, therefore, that "economic interest" is not defined in the CPA. Also, it is not clear who (or what institution) is responsible for delivering on this obligation, let alone how this can possibly be achieved.
[145] It is not clear who (or what institution) is responsible for performing this obligation.

c) fair and non-discriminatory treatment[146] by all suppliers or traders of goods and servicies (i.e. all financial institutions);
d) full, timely, adequate and prompt compensation[147] for damages they suffer which are attributed to any supplier or trader (i.e. any fianancial institution);
e) the freedom to associate and join or form consumer unions or associations; and
f) access to the "appropriate or competent authorities for the protection of their legitimate rights".[148]

Section 4 of the CPA specifies various "undertakings" of the Government with a view to protecting consumers of any services, including those of financial institutions. In the first place, the Government must ensure that consumers "draw maximum benefit from national, economic … and other resources"! Secondly, the Government must endeavor to establish "a system for indicating the quality and other elements of … goods and services and regulate against false advertising and exaggerated indications so that consumers 'may not make a mistake' in the selection of … goods and services, in purchasing or utilizing them"![149] Finally, and somewhat more reasonably, the Government is obliged to "endeavour to promote the circulation of information on … goods and services in order to assist the consumer [to] make a sound and informed choice on the … goods and services".[150]

Under Subsection 6 (1) of the CPA, any supplier or trader of goods or services (i.e. any financial institution) is, in turn, required:
a) to cooperate with the Government or Local Authorities in the execution of policies relating to consumer protection;
b) not to supply goods or services (e.g. financial products) which can cause harm[151] to a consumer
c) not to engage in any unfair trade practices[152]; and
d) to provide consumers with true, sufficient, clear and timely information[153] on goods and services that they offer.[154]

For a contravention of any of these obligations, the financial institution is guilty of an offence and, upon conviction, liable to a fine of MKW 500,000 and imprisonment for five years.[155]

Also (whether they know it or not), everyone in Malawi is legally obliged to "take the initiative to acquire the necessary knowledge of consumer life and endeavor to behave self-reliantly and rationally"![156]

By Part II of the CPA, if a consumer contract is "unfair or ambiguous", any "competent authority"[157] is obliged to construe the contract in favor, and for the benefit, of the consumer. Clauses or stipulations in consumer contracts have no effect in the event they purport to, or in fact:

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[146] What constitutes "fair and non-discriminatory treatment" is undefined.
[147] What differentiates "full" from "adequate" and "timely" from "prompt" is not clear. No term here is defined.
[148] There is no indication in f) as to those "authorities" that actually are "appropriate" or "competent" in these respects.
[149] It is not evident how *any* Government can possibly honor these obligations and thus ensure that all its citizens draw maximum benefit from any resources; and are prevented from making any mistake in selecting, purchasing or utilizing goods and services.
[150] No Government agency has, however, actually endeavored to do what is required, namely promote the circulation of relevant information to assist consumers in making sound and informed choices in respect of financial services.
[151] Since there is no definition of "harm", query, therefore, whether the word includes financial harm.
[152] There is no definition of what makes any such practice "unfair".
[153] There is no indication as to what ensures that information is "true sufficient, clear and timely".
[154] From items (d), (e), (f) and (h) of subsection 6(1)
[155] See Section 6. As is true of the general penalty provision in the CFTA, sub-section 6 (2) of the CPA does not permit any moderation of these penalties depending upon the circumstances; rather, a fine of Kw 500,000, as well as five years of imprisonment, must be imposed, regardless of the severity or impact of an offence.
[156] See Section 7. What constitutes "initiative" and "necessary knowledge," let alone "self-reliant and rational behavior" is not defined. Thus, it is not evident how any citizen could perform such nebulous "obligations".
[157] The term "competent authority" is defined in Section 2 of the CPA as "a body that has the power or jurisdiction, derived from any written law, over a particular issue or entity".

a) "exempt, exclude, reduce or limit the responsibility or liability of a supplier or trader [i.e. a financial institution] for a ... deficiency, inadequacy or efficacy (sic) of any nature of ... goods supplied or the services rendered;
b) imply a waiver of rights, freedoms or liabilities vested in the consumer pursuant to the [CPA] or any other written law ...;
c) place, shift or reverse the burden of proof against the consumer for a defect, deficiency, inadequacy efficacy (sic) which is not immediately apparent to the consumer;
d) authorize the supplier or trader [i.e. the financial institution] to unilaterally cancel, repudiate or rescind the contract ...; or
e) create contractual terms and conditions which are unfair, unconscionable, inequitable, oppressive or unreasonable to consumers or are actuated by bad faith".[158]

By Part VI of the CPA, standard form contracts must be clear and understandable to a consumer and may not refer to any texts which, not being within public or common knowledge, are not made available to the consumer prior to the execution of the contract.[159] They must also be in "the official language"[160] and be drafted "in characters readable at single sight by any normal sighted person".[161] In the event that the contract is "entered into locally", there must be a translation into the national local language and the contract must be must read "and explained to an illiterate, blind, mute and similarly disabled consumer in a language he understands".[162] Also, it is the responsibility of the CPC to "control and regulate … standard form agreements to ensure adequate consumer protection."[163]

In addition, "a competent authority" [164] is required to give relief to any consumer whose contract for any goods or services is "unfair or contains unfair provisions" or where the trader (i.e. the financial institution) has "taken or is likely to take unfair advantage of his rights under the contract".[165]

Finally, by Part IX of the CPA, any person who contravenes or fails to comply with any provision of the CPA or any regulations made thereunder is guilty of an offence and is liable to a fine of not less than MKW 500,000 and to imprisonment for five years.[166]

The Competition and Fair Trading Act

One of the stated objectives of the CFTA is to provide protection to consumers. Part I of this Act deals with preliminary issues, including the interpretation of various terms. "Consumer" includes "any person: (a) who purchases or otherwise offers to purchase goods[167] otherwise than for the purpose of resale …; [or] (b) to whom a service is rendered." "Person" includes "an individual, a company, a partnership and any group of persons acting in concert, whether incorporated or not". Thus, all financial institutions

[158] See Section 8 of the CPA
[159] See item (a) of subsection 26(1) of the CPA
[160] The Constitution of Malawi, however, does not stipulate any "official language". Rather, by Section 26 it provides that "every person shall have the right to use the language … of his or her choice".
[161] Ibid, item (b)
[162] Ibid, item (c)
[163] See subsection 26(2) of the CPA. There are 14 living languages in Malawi, besides English and Nyanjan (or Chewa). In alphabetical order these are: Afrikaans, Kachchi, Kokola, Lambya, Lomwe (Malawi), Ndali, Nyakyusa-Ngonde, Nyiha (Malawi), Nyika, SEna (Malawi), Tonga, Tumbuka, Yao, Zulu
[164] This term is defined in Section 2 of the CPA as "a body that has power or jurisdiction, derived from any written law, over a particular issue or entity".
[165] Section 27(1) of the CPA
[166] See Section 55. These dire consequences, thus, also befall any consumer who fails to "take the initiative to acquire the necessary knowledge of consumer life" or who does not "endeavour to behave self-reliantly and rationally" as required by Section 7 of the CPA. Clearly, many millions of Malawians should already be fined and imprisoned.
[167] Although the word "goods" is undefined in the CFTA, it undoubtedly includes all products of any financial institution, including, for example, any credit or debit card issued by a bank.

constitute "persons" for CFTA purposes.[168] Furthermore, "trade" includes "any … business, industry … or occupation relating to the supply or acquisition of goods or services". Thus, the provision or acquisition of any financial product or service constitutes a trade. [169]

Under Part V of the CFTA, consumers are given explicit protections. Among other things, in its relation to consumers, no person (i.e. no financial institution) is permitted:

a) to engage in conduct likely to mislead the public as to the nature, price, availability, characteristics, suitability for a given purpose, quantity or quality of any financial product or service;
b) to engage in unconscionable conduct in providing any (financial) goods or services; or
c) to advertise in a misleading or deceptive manner.[170]

What constitutes conduct or an advertisement that is "misleading" and at what point any conduct becomes "unconscionable" is left to the discretion of the CFTC but, if the CFTC determines that any person (i.e. any financial institution) has contravened any of these provisions, that person commits an offence and is "liable to a fine of MKW 500,000 or of an amount equivalent to the financial gain generated by the offence, if such is greater, and to imprisonment for five years".[171]

The Financial Services Act

The FSA is the most recent statute that applies to Malawi's entire financial sector.[172] It is an umbrella legislation that provides the supervisory structure for the entire financial services industry operating in Malawi. In summary, the FSA contains several substantive consumer protection provisions, such as:

- Prohibition on **self-dealing** i.e. related party transactions that are not done at normal or immaterial prices (Sections 32 and 33);
- **Misleading and deceptive conduct** (which would include false or misleading representations about price, the need for a financial service or the particular qualities of a service) (Section 61);
- The Registrar's power to **prohibit a particular practice**, pricing arrangement or fees and charges structure (by notice in the *Government Gazette*) if the Registrar considers that it is unfair, would restrict competition, results in exploitation of consumers or is otherwise undesirable (Section 63);
- The Registrar's express power to issue Directives relating to the **disclosure of information** to consumers (Section 64);
- The ability to seek **compensation for loss** caused by a breach of a financial services law and for the Registrar to institute a representative action in this regard (Section 74);
- The power of the Registrar to pursue an **administrative penalty** which can include an order for compensation, corrective action, fines set out in a Directive or determined by the Minister, a requirement for a compliance program, corrective advertising, change in management or compliance with a direction to take action to ensure that the conduct in question does not occur again. Failure to comply with an administrative penalty is subject to a penalty of MK 5 million (approximately US$33,112) and 4 years imprisonment (Section 75). Further, for a body corporate, there is potential for a court to increase such a penalty by a multiple of 5 (Section 113);
- The broad **remedial powers** given to the Court to make orders in favor of the consumer (Section 76);

[168] The word "person", therefore, includes a financial institution of any kind. RBM is also included by the terms of Section 54 which expressly makes the Act applicable to and binding upon the Government.
[169] Each of these definitions appears in subsection 2(1).
[170] See items (d), (g) and (k) of subsection 43(1)
[171] See subsection 43(2) and Section 51. By the Interpretation Act, the word "and" includes "or". Also, although such statutory language does not, on its face, permit any moderation of the fine or period of imprisonment, by Supreme Court judicial precedent, these formulations are always taken to mean that the one pronouncing sentence has complete discretion to fix any fine up to the limit of the amount stated and any period of imprisonment up to the limit of the time stated depending upon the severity or impact of the offence in question.
[172] Act No. 26 of 2010, published July 30, 2010.

- The ability to **appeal a decision** of the Registrar to the Financial Appeals Committee. It seems more likely that it would be a financial institution (rather than a consumer) which seeks to rely on this appeal process (Section 78);
- The Registrar's power to require the promotion and development of **complaints resolution schemes**, which should be free, informal, quick and binding on the institution (Section 93); and
- **Customer due diligence** obligations (Section 100).

Part I of the FSA deals with preliminary matters, including interpretation provisions, such as the definitions of a regulated financial institution and a financial services law (the latter includes a long list of specific laws, the Reserve Bank of Malawi Act, any law which declares itself as such a law, as well as prescribed laws and regulations and Registrar's Directives and Directions)[173]. Part I also sets out the principal object of the FSA as "to provide for the regulation and supervision of financial institutions in Malawi to foster: (…) (b) the highest standards of conduct of business by financial institutions; (c) the fairness, efficiency and orderliness of the financial sector".[174]

Part II provides that the Governor of the Reserve Bank of Malawi, as the so-called "Registrar of Financial Institutions", is the regulatory and supervisory authority for the financial services industry.[175] Part II sets out the Registrar's objectives and powers, including the power to impose levies and to delegate powers.

Part III requires a financial institution to be licensed or registered. Such a requirement can be imposed by the FSA or another Act (e.g. the Banking Act 2010, the Insurance Act 2010, the Pensions Act 2010, the Securities Act 2010 and the Financial Cooperatives Act 2010, the Credit Reference Bureau Act 2010)[176]. This Part also includes provisions relating to the process of applying for a license or registration, conditions on a license or registration and the ability of the Registrar to vary, suspend or revoke a license or registration[177].

Provisions dealing with corporate governance of prudentially regulated financial institutions are contained in Part IV, including requirements for a board of directors and for executive officers and managers (whose appointments are subject to approval of, and can be removed by, the Registrar), and restrictions on various types of conduct (such as self- dealing and related party transactions).

The supervision and regulation of financial institutions (not just prudentially regulated financial institutions) is the subject of Part V. It provides the Registrar with the power to issue Directives relating to the conduct of the affairs of financial institutions, including in relation to their "integrity, prudence and professional skill"[178] and requirements "aimed at protecting consumers of financial services from exploitation practices of financial institutions."[179] The Registrar also has wide powers to issue Directives to, and conduct investigations and examinations in relation to, a financial institution for a variety of reasons, which include circumstances where the Registrar thinks it is in the interests of clients to do so.[180] Part V also sets out the powers of the Registrar to delegate powers to self – regulatory organisations.[181]

The role of internal and external auditors of financial institutions and related matters are covered in Part VI. Part VII deals with the market practices of financial institutions and contains many important

[173] Sections 1 and 2
[174] Section 3 (b) and (c)
[175] Section 8
[176] Sections 21 and 22
[177] Sections 23 to 28
[178] Section 34 (1) (b)
[179] Section 34 (2) (dd)
[180] Sections 39 to 44
[181] Sections 45 to 52

consumer protection provisions that are applicable to financial institutions in addition to any other financial services law. These provisions relate to matters such as misleading and deceptive conduct as well as the Registrar's powers to determine that certain practices are prohibited and to issue directives relating to disclosure of information to clients and other persons.[182]

Provisions regarding amalgamations, transfers, statutory management and the winding-up of prudentially regulated financial institutions are covered in Part VIII. Part IX deals with the enforcement of financial services laws and, among other issues, provides for the Registrar to take enforceable undertakings, to bring a representative action for persons affected by a breach of a financial law to impose administrative penalties and to grant relief in relation to compliance with a financial services law. Part X provides for the review of decisions of the Registrar by way of a Financial Services Appeals Committee, and the promotion of, and requirements for, "complaint resolution schemes", among other procedures.

Part XII contains miscellaneous provisions, including the establishment of advisory bodies, the Registrar's power to withhold information from a financial institution and its obligation to keep information confidential subject to specified exceptions, as well as customer due diligence, offences and penalties, and the Minister's power to make regulations. Finally, Part XIII provides discretion to the Registrar to fix a transition period for the coming into effect of parts of the FSA.[183]

The FSA explicitly deals with the following financial institutions and individuals:

- banks covered by the Banking Act 2010;
- entities covered by the Securities Act 2010;[184]
- persons providing securities registration services;
- insurance industry institutions covered by the Insurance Act – insurers and their actuaries, reinsurers, brokers, agents of brokers, agents of insurers, loss assessors, claims agents;
- microcredit agencies and microfinance institutions covered by the Microfinance Act 2010;
- primary and secondary SACCOs covered by the Financial Cooperatives Act 2010;
- pension and umbrella funds and their investment managers and trustees, administrators and actuaries for pension funds, and pension brokers covered by the Pensions Act 2010;
- custodians (in summary, anyone who holds property of others for safekeeping as a business);
- friendly societies (in summary, associations without share capital that are designed to help others and that do not employ a membership officer);
- medical aid funds (in summary, scheme which provides insurance (or similar) cover for financial (or similar) assistance to cover prescribed medical expenses);
- foreign exchange dealers;
- remitters of funds to foreign countries;
- a holding company for any prudentially regulated institution;
- building societies under the Building Society Act;[185]
- a credit reference bureau, as defined in the Credit Reference Bureau Act, 2010;
- finance or leasing companies;
- an operator of any of the above institutions; and
- any one declared to be covered by a Directive of the Registrar, or by another financial services law.

[182] Sections 62 to 65
[183] Apparently, however, no specific transition period has been prescribed.
[184] Namely, dealers, brokers, representatives, investment advisers, the stock exchange, securities depositories, collective investment schemes and their trustees, investment companies, portfolio managers and securities market intermediaries.
[185] This statute has yet to be enacted.

Institutional Arrangements for Consumer Protection in Financial Services

Competition and Fair Trading Commission

As indicated above, Part II of the CFTA establishes the CFTC and provides for its composition and the tenure of office of, and allowances payable to, its members.

By statute, the CFTC consists of the following members nominated by the Minister of Trade and appointed by the President:

i) "two persons representing business interests;
ii) a lawyer;
iii) an economist;
iv) an accountant; and
v) two persons representing consumer interests", as well as
vi) the Secretary to the Treasury or his representative;
vii) the Secretary for Commerce and Industry or his representative; and
viii) the General Manager of the Malawi Bureau of Standards or his representative, with the last three of these individuals being *ex officio* members.[186]

The first seven of these individuals are to be chosen for their ability and experience in industry, commerce or administration or their professional qualifications or their suitability otherwise for appointment.[187]

Part II also spells out the functions and powers of the CFTC. Two of these are: (i) to provide persons engaged in business with information regarding their rights and duties under the CFTA; and (ii) to provide information for the guidance of consumers regarding their rights under the CFTA.[188] To date, however, neither of these responsibilities appears to have been carried out at all, let alone effectively. Among other things, the CFTC is empowered to summon and examine witnesses, call for and examine documents and administer oaths.[189] Five of the ten members constitute a quorum for any meeting of the CFTC and the CFTC is required to meet at least once every three months for transaction of business.[190]

Part III of the CFTA provides for the establishment of the CFTC's Secretariat and for the appointment and responsibilities of its Executive Director. Part IV deals with financial provisions and identifies the CFTC's sources of funds, including monies appropriated to it by Parliament. Part VI allows a person (i.e. a consumer or a financial institution) aggrieved by a finding of the CFTC to appeal to a Judge in Chambers within 15 days of the date of that finding.[191] And finally, power is granted to the Minister of Trade to make regulations to carry the CFTA "into effect".[192]

Notwithstanding the above, however, scant resources have been marshaled for any aspect of the CFTC's work or that of its Secretariat. The CFTC is without an Executive-Director, as well as any professional legal and economic professionals. Thus, a series of so-called "interim" arrangements is all that has proven possible in respect of any CFTC operations. Four of its seven members who are not *ex officio* remain to be appointed[193] and, therefore, ensuring a quorum for the transaction of the CFTC's business is always problematic. As of mid-February 2011, the interim Secretariat consisted of a single officer and the CFTC remained heavily constrained. No protection of consumers' interests generally, and in respect of financial

[186] See subsection 5(1)
[187] Subsection 5(5)
[188] See items (d) and (e) of subsection 8(2)
[189] See subsection 10(1)
[190] Subsections 13(4) and 13(2)
[191] See Section 48
[192] Section 53. A Regulation issued in 2006 under the CFTA is the only one that has appeared to date.
[193] These are: a member representing business interests; a lawyer; and two representatives of consumers' interests.

services in particular, has, therefore, resulted from the enactment of the CFTA in the eleven years since its entry into force. This, though, is perhaps just as well since all members of the CFTC have other full-time employment and none has any experience regarding the investigation or adjudication of consumer protection matters generally, let alone in respect of financial services in particular. It is hardly surprising, therefore, that the CFTC has done little, if anything, to provide persons engaged in business with information regarding their rights and duties under the CFTA and it has never provided information for the guidance of consumers regarding their rights under the CFTA.

Consumer Protection Council

While the Competiton and Fair Trading Commission has been a particularly weak institution since its establishment, this at least is more than can be said of the Consumer Protection Council. On paper, the CPA has established the CPC and provides for its membership and related matters, including the remuneration of CPC members, meetings of the CPC, and the CPC's procedure.

The CPC is to be made up of six members appointed by the Minister of Trade, as well as five *ex officio* members. The members consist of one representative from each of:

i) a consumer body in Malawi;
ii) an economic body in Malawi;
iii) the Malawi Confederation of Chambers of Commerce and Industry;
iv) the Law Society of Malawi;
v) a trade union in Malawi; and
vi) a women's organization.

The five *ex officio* members are to be the Secretaries of Industry, Justice and Local Government, the Director General of the Malawi Bureau of Standards and the Chief Executive of the Pharmacy, Medicines and Poisons Board or the representative of any one of these individuals he or she designates.[194] Although two out of the total of eleven individuals who are to constitute the CPC are likely to have training in the law, the CPA requires no qualifications for CPC membership. Also, with the quorum being seven members for the exercise of the CPC's powers, matters on which legal analysis is essential can be resolved entirely without legal input.

Part IV of the CPA then sets out the functions and powers of the CPC. Among other things, Part IV of the CPA indicates the CPC's functions as being:

i) "to identify price mechanisms in Malawi to determine whether prices are justifiable;
ii) to liaise and consult with relevant stakeholders in order to understand what is happening in the economy;
iii) to coordinate and network consumer activities and liaise with consumer associations or organizations, any competent authority and agencies within and outside Malawi to protect consumer interests;
iv) to carry out, promote or participate in consumer education programmes and activities;
v) to disseminate consumer information to the public;
vi) to provide advice to consumers on their rights and responsibilties ...;
vii) to monitor the operations of consumer organizations so that they operate in a transparent manner and effectively throughout the country;
viii) to create of facilitate the establishment of conflict resolution mechanisms on consumer issues;
ix) to investigate any complaint received regarding consumer protection, and where appropriate, refer the complaint to a competent authorty and ensure that action is taken by the competent authority to whom the complaint has been referred;

[194] Section 10 of the CPA

x) to advocate for the effective implementation of this Act and any other written law affecting consumers;
xi) to maintain a complaints register;
xii) to formulate and submit to the Minister, policy and legislative proposals in the interst of consumers...;
xiii) to carry out investigations or inspections on its own initiative or at the request of any person regarding matters relating to consumer issues; and
xiv) to undertake such activities as are necessary, to expedite or convenient for or in connection with the performance of its functions under this Act".[195]

Among other things, the CPC is empowered under Part IV:
i) "to request and advertiser to withdraw an advertisement which contravenes the provisions of this Act;
ii) to publish reports of the complaints the CPC has dealt with;
iii) to caution suppliers or traders who contravene the provisions of this Act;
iv) to publish ... such professional or other information as it deems necessasy or expedient for the promotion of the functions of the CPC; and
v) to do all such acts, matters and things as it deems necessary for fulfilling the functions of the CPC".[196]

Part V of the CPA deals with how the CPC is funded and the CPC's obligation to submit annual reports to the Minister of Trade who, in turn, is obliged to table these reports with the National Assembly. By Part V of the CPA, funds of the CPC are to include:
i) sums appropriated to it by Parliament;
ii) any fees payable under the CPA; and
iii) a portion of the fines paid to the subordinate courts in matters of consumer protection.[197]

The CPA, however, has been universally ignored by all relevant government agencies, including the RBM, as well as by all other financial institutions in Malawi. This has undoubtedly been due to the fact that no funding from any source has been provided for the purpose of constituting the CPC. Simply put, so-far at least, none of the provisions of the CPA has ever been applied or sought to be enforced by any agency of government or by any consumer or CAMA in respect of any financial product or service.

Local Authorities

Malawi has 40 Local Authorities, which consist of: 28 District Assemblies, 8 Town Assemblies, 1 Municipal Assembly and 3 City Assemblies. Each Local Authority is a body corporate. According to the CPA, Local Authorities are responsible for:

- planning and executing measures concerning consumer protection "according to the social and economic condition of the area under their jurisidiction"; and
- "implementing the provisions of [the CPA] and any other written laws on matters of consumer protection".[198]

Whether before or after the enactment of the CPA, however, there has never been any application of these requirements in, or by, any Local Authority in Malawi.

[195] From section 18 of the CPA
[196] From Section 19
[197] See subsection 22(1)
[198] By Section 5 of the CPA

The Reserve Bank of Malawi

As required by the Constitution of Malawi,[199] the **Reserve Bank of Malawi (RBM)** was established by an Act of Parliament in 1965,[200] the year following Malawi's independence. It is responsible for ensuring monetary stability, maintaining financial system stability and managing foreign exchange. From the outset, RBM set prudential regulations for all banks licensed under the Banking Act[201] and has supervised these banks with a view to ensuring that prudential regulations are followed. By the terms of the Financial Services Act of 2010, the Registrar of Financial Institutions is the regulatory and supervisory authority for the financial services industry. The Governor of the RBM holds this position (Section 8(2)).

The Registrar is financed through prescribed levies (which the Registrar can recommend to the Minister under section 13) and through money raised as fees, charges and fines and related interest (which can be prescribed through Registrar's Directives) section 14. The Registrar is responsible of licensing and registering financial institutions, and has the power to vary, suspend or revoke a license or registration (Sections 23-28)

In addition to the power to issue Directives under subsector-specific laws, the FSA has granted the Registrar with broad powers to issue Directives regarding not only prudential matters but also business conduct of financial institutions. Of specific relevance is the power to issue Directives that regulate or give guidance on:

- the conduct of the affairs of financial institutions and financial groups and the need for "integrity, 'prudence'[202] and professional skill";[203]
- standards of business conduct;[204]
- record keeping;[205]
- the disclosure of information to customers of financial institutions;[206]
- requirements on pricing and other charges, including maximum interest rate spreads and other charges;[207] and
- requirements aimed at preventing the "exploitation"[208] of consumers.[209]

The Registrar may also issue directions to a specific financial institution which it believes is conducting its affairs in an improper way or if the Registrar thinks that it is in the interests of the clients of the financial institution to do so.[210]

The Registrar may delegate any of his/her regulatory or supervisory functions, other than the power to delegate, to a director or officer of the RBM, an examiner, an officer, or a 'self-regulatory organization'[211].

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[199] See Section 185 (1) of the Constitution of Malawi where power is vested in the RBM, among other things, "to control … the institutions of finance".
[200] Laws of Malawi - Cap. 44:02 – Reserve Bank of Malawi Act, as amended
[201] See Laws of Malawi - Cap. 44:01, as amended. Although banking licenses are issued by the Minister of Finance, the RBM processes all applications to establish a bank in Malawi and makes a recommendation to the Minister.
[202] What constitutes "prudence" is not defined.
[203] Subsection 34 (1), item (b)
[204] Subsection 34 (2), item (e)
[205] Subsection 34 (2), item (k)
[206] Subsection 34 (2), item (m)
[207] Subsection 34 (2), item (cc)
[208] What constitutes "exploitation" is not defined.
[209] Subsection 34 (2), item (dd)
[210] Section 39 (1)
[211] See Section 20

The Registrar also has powers to consult and enter into arrangements with other government agencies on issues related to sharing of information, enforcement, consultations, examinations and investigations (Section 19).

As far as institutional arrangements are concerned the CFEP Unit within the RBM is beginning to take on responsibilities regarding business conduct appropriate to banks and other licensed financial institutions in their delivery of products and services to consumers.

The RBM's General Manager for the Supervision of Financial Institutions reports to the RBM's Governor and has responsibility for the operations of three Divisions, namely: (i) Bank Supervision; (ii) Micro-Finance and Capital Markets; and (iii) Pensions and Insurance. Each of these Divisions is, in turn, managed by a Director. The Director of Bank Supervision heads a long-standing team responsible for the prudential supervision of all licensed financial institutions. And the Director of Micro-Finance and Capital Markets, among other things, heads a very recently established and small Department that is to handle business conduct supervision throughout the financial system.

A recent Cabinet directive, however, has apparently proposed that efforts be undertaken to amend the CPA and CFTA so as to merge the work of the CPC with that of the CFTC, while otherwise leaving both statutes essentially as they are. This, however, would mean that the work of the CFTC in respect of banking products and services could contradict the work of RBM in these same respects. That possibility must, of course, be avoided.

Financial Industry Associations

The Bankers Association of Malawi (BAM) is a formal network of financial institutions in the formal banking sector, including commercial banks and discount houses. BAM currently has eleven members which are the leading financial providers in Malawi. The Association provides a common platform to financial service providers to discuss common issues and frame pertinent policies. BAM also acts as a representative of the financial providers to government agencies as well as consumer rights associations, both at national and international levels.

The Malawi Microfinance Network (MAMN) is an industry association that advocates for the interests of its members and offers training and other capacity building activities. MAMN comprises the 21 largest financial institutions providing microfinance in Malawi. Currently, only three members (Opportunity International Bank of Malawi (OIBM), Malawi Savings Bank (MSB), and Malawi Rural Finance Corporation (MRFC) are allowed to accept deposits from the public.

The Malawi Union of Savings and Credit Cooperatives (MUSCCO) was established in 1980 as a cooperative of savings and credit cooperatives (SACCOs). According to its Bylaws, its mission is to develop, promote and safeguard a safe and sound network of SACCOs in Malawi, capable of providing quality and affordable financial services to members in accordance with international cooperative principles disseminated by the World Council of Credit Unions (WOCCU). MUSCCO currently includes 60 SACCOs representing more than 88,000 members. It provides several services to its affiliates, such as technical assistance and training, financial services and in-house insurance facilities. It is estimated that another 30 to 40 small cooperatives operate in the country and are not members of MUSCCO.

There are two industry associations in the insurance sector: the **Insurance Industry Association of Malawi**, which only has general insurers as members, and the embryonic **Life and Pensions Insurance Association**, which has not formalized its constitution yet. Neither of these associations covers health insurance, such as the medical aid service offered by MASM.

The Financial Markets Dealers Association in Malawi (FIMDA) was appointed as a self –regulatory organisation under the Capital Markets Development Act, and as such it performs disciplinary functions against dealers, pursuant to an arrangement with the Registrar.

Consumer Organizations

The Consumers Association of Malawi (CAMA) is an independent non-government body which promotes consumer rights through campaigns and educational programs, while also providing consumer protection services for specific cases. As a member of Consumers International, CAMA represents and protects Malawian consumers at regional as well as international levels. Their vision is to use the "collective power for the good of consumer in Malawi".

List of Laws and Regulations

For more specific description of the sector-specific laws and regulations in this Annex, please refer to the relevant Section in Volume II covering Banking, Non-Bank Credit Institutions, Securities, Insurance or Credit Reporting Systems, respectively.

Cross-Sectoral Laws
- Consumer Protection Act, 2003
- Competition and Fair Trading Act, 1998
- Financial Services Act, 2010
- Reserve Bank of Malawi Act, 1965 as amended

Banking Sector
- Banking Act, 2010 as amended
- Directive on Customer Due Diligence for Banks and Financial Institutions (RBM Directive No. D01-2005/CDD), 2005
- Directive on Disclosure of Information by Banking Institutions of 2011 (RBM Directive No. D01-2010.DR), 21 January 2011

Non-Banking Credit Sector
- Microfinance Act, 2010
- Financial Cooperatives Act, 2011

Securities Sector
- Securities Act, 2010
- Securities (Establishment and Operation of Collective Investment Schemes) Directive, 2010
- Capital Market Development (Licensing and Activities of Brokers, Dealers and Investment Advisers) Regulations, 1997

Insurance Sector
- Insurance Act, 2010

Credit Reporting Systems
- Credit Reference Bureau Act, 2010

Private Pension Funds
- Pensions Act, 2011