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Financial Regulator  
PO Box No 9138  
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10<sup>th</sup> January 2011

**Re: Consultation Paper CP47 – Review of Consumer Protection Code**

Dear Sir/Madam

We welcome the opportunity to put forward our views on the consultation that you are undertaking in relation to the Review of the Consumer Protection Code, and attach our comments on specific aspects of the Consultation Paper for your consideration.

We would be delighted to meet with you in the event that clarification is required in relation to any aspect of our submission.

Yours faithfully

  
**David Ingram**  
**Chief Executive Officer**

## CONSUMER PROTECTION CODE – CP47

Chapter Number	Chapter Heading	Sub-Section Heading	Provision Number	Comment
Chapter 3	Common Rules	General Requirements	<p>2. A regulated entity must ensure that all instructions from or on behalf of a consumer are processed properly and promptly. Where an instruction cannot be acted on within two business days, the regulated entity must acknowledge in writing receipt of the instruction, outline the reason for the delay and confirm when it will be processed.</p>	<p>The revised provision requires that, in the event that a regulated entity cannot act on a written instruction from a customer within 2 business days of receipt, it must acknowledge in writing receipt of the instruction, outline the reason for the delay, and confirm when it will be processed.</p> <p>In certain cases we are concerned that this is going to result in correspondence with customers which will be of little value to them. It also imposes a time limit that is at odds with the turnaround times required of certain third parties to which some administrative functions may have been outsourced.</p> <p>We acknowledge that simple instructions, instructions regarding the transfer of funds, and instructions that if not acted on within 2 business days will result in detriment to the customer, should meet this standard and, arguably, there should be an absolute requirement for processing to be effected within 2 days. However, latitude should be given for other instructions (i.e. more complex instructions, instructions not involving the transfer of funds and instructions that will not result in customer detriment if not processed in 2 business days) so that, provided that they can be processed within 5 business days, there is no requirement to write to the customer as set out.</p>

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Chapter 3	Common Rules	Unsolicited Contact	31. An unsolicited personal visit or telephone call may be made only between 9.00 a.m. and 7.00 p.m. Monday to Friday (excluding bank holidays and public holidays) except where the purpose of the contact is to protect the consumer from fraud or other illegal activity.	<p>The revised provision means that an unsolicited call may only be made during the working week (i.e. Monday to Friday) and, essentially, during working/commuting hours (i.e. 9am to 7pm) when a customer in employment is least likely to be available. This is going to dramatically reduce the likelihood of making contact with the customer. In so far as this restriction applies to unsolicited contact in relation to customer arrears, this has the potential to restrict a lender's ability to work productively with a customer as required by the Code of Conduct on Mortgage Arrears ("CCMA"). In addition, given that it is proposed to limit the number of unsolicited contacts in any event as provided elsewhere in the Code, it also seems an unnecessary additional limitation.</p> <p>Furthermore, the provision is at variance with the time restrictions prescribed by the Consumer Credit Act, and, as the Code is not binding of all those providing personal credit or seeking payments from consumers (e.g. hire purchase/leasing companies; utility companies) it will mean that only some, rather than all, market participants will be subject to the revised time restrictions. This could result in consumers prioritising payment of unsecured debt, to their detriment.</p> <p>Finally, financial institutions have determined staff levels based on the contact hours that are currently permissible. The reduction in contact hours will impact negatively on employment arrangements and will reduce employment overall.</p>
Chapter 3	Common Rules	Product Producer Responsibilities	41. Where a product producer distributes its products through an intermediary and imposes target levels of business or pays	<p>Without knowledge of the arrangements that an intermediary has with every product producer (which an intermediary is very unlikely to furnish!) it is hard to</p>

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			<p>commission based on levels of business introduced, the product producer must be able to demonstrate that these arrangements:</p> <p>a) do not impair the intermediary's duty to act in the best interests of consumers; and</p> <p>b) do not give rise to a conflict of interest, either between the product producer and the intermediary or between either of them and the consumer.</p>	<p>envisage how a product producer can demonstrate that its particular arrangements with the intermediary does not create a conflict between an intermediary and a consumer. The intermediary's duty to act in the best interests of the consumer is absolute under the Code and should not have to be policed by product producers.</p>
Chapter 3	Common Rules	Product Producer Responsibilities	<p>42. A product producer must not terminate a letter of appointment with an intermediary solely based on the volume of new business introduced by the intermediary.</p>	<p>There is a substantial administrative burden, and compliance risk, attaching the continued appointment of an intermediary (e.g. checking PI cover/renewals, ensuring continued authorisation etc). In the event that little business has been referred by an intermediary then a product producer should be at liberty to terminate the appointment for productivity or compliance reasons even where these quite obviously emanate from low volume.</p> <p>The proposed provision would seem to suggest that the ability of a product producer to terminate a letter of appointment with an intermediary solely based on the volume of new business introduced by the intermediary will be used as a means of influencing an intermediary and, as such, may impair the intermediary's ability to act in the best interests of the consumer. However, intermediaries are also regulated entities and the requirement for them to act in the best interests of the consumer is absolute.</p>
Chapter 3	Provision of Information	Credit	<p>41. The regulated entity must notify the guarantor in writing: a) if the terms of the credit agreement change; b) when an account goes into arrears; and c) three months in advance of calling on a guarantee.</p>	<p>This provision now requires that a guarantor be informed 3 months in advance of calling on a guarantee. This will generally contradict the contractual position that was agreed with the guarantor at the outset, and the basis on which the guarantee was</p>

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Chapter 3	Provision of Information	Credit	42. A regulated entity must notify affected consumers in writing in advance of any change in the interest rate. This notification must include: a) the date from which the new rate will apply; b) details of the old and new rate; c) the revised repayment amount; and d) an invitation for the consumer to contact the lender if he/she anticipates difficulties meeting the higher repayments.	<p>provided (it would be usual for the guarantee to be capable of being called on immediately once the primary obligor defaults). In addition to leaving a window of opportunity for the guarantor to take action that may be to the detriment of the lender, we consider this proposed restriction to be gross interference with a lender's contractual rights.</p> <p>This provision now requires that the written notification of a rate change must include an invitation for the borrower to contact the lender if he/she anticipates difficulties meeting the higher repayments. Leaving aside the erroneous assumption that all rate changes will result in payment increases, this invitation introduces moral hazard and it could be assumed by the customer that the lender is expecting non-payment. A similar provision was initially proposed for the revised CCMA but was not included in the final publication, presumably for the reasons outlined above.</p>
Chapter 5	Knowing the Customer and Suitability	Knowing the Customer	1. Before offering, arranging or recommending a product or service, a regulated entity must gather and record sufficient information from the consumer to enable it to provide a recommendation or a product or service appropriate to that consumer. The level of information gathered should be appropriate to the nature and complexity of the product or service being sought by the consumer, but must be to a level that allows the regulated entity to provide a professional service and must include, where relevant, details of the consumers a) Needs and objectives (including, where relevant, the length of	<p>We do not have an issue with the use of a Standard Financial Statement for the purposes of establishing affordability, although we would consider this to be one aspect only of affordability assessment. We do have views about the form/content of this statement and would like to be included in whatever forum is convened to design the Standard Financial Statement for use by all market participants.</p>

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			<p>time for which the consumer wishes to hold a product, need for access to funds, need for emergency funds); b) Personal circumstances (including age, health, knowledge and experience of financial products, dependents, potential changes to his/her circumstances); c) Financial situation (including income, financial products and other assets, debts and financial commitments); and d) Attitude to risk (in particular, the importance of capital security to the consumer). In the case of a mortgage, a regulated entity must use a Standard Financial Statement to obtain financial data from the consumer.</p>	
Chapter 5	Knowing the Customer and Suitability	Knowing the Customer	<p>5. Before a mortgage can be drawn down a lender must have had sight of all original supporting documentation including bank statements, P60/certificate of earnings and other supporting documentation evidencing the consumer's identity and ability to repay. A declaration signed by the consumer, (or his representative), certifying their income and/or ability to repay is not sufficient evidence for these purposes.</p>	<p>This new provision requires that a mortgage lender must have sight of all original supporting documentation...evidencing the consumer's identity and ability to pay. Where a loan has been introduced by an intermediary there should not be a requirement for the lender to have sight of original supporting documentation evidencing the customer's <i>identity</i>. The borrower will not be present at the offices of the lender and may be reluctant (understandably) to be without his/her identification documents (passport/driving license in particular) for a period of time. In addition, under provision 6 the intermediary is obliged to submit a signed declaration to the lender confirming that it has had sight of the original documents in any event.</p>
Chapter 7	Transfer of Residential Mortgages		<p>1. A loan secured by the mortgage of residential property may not be transferred to a third party without the written consent of the borrower. When seeking consent from a</p>	<p>We understand that this chapter broadly mirrors the provisions of the Code of Practice on the Transfer of Mortgages (the "existing code") to which Credit Institutions are currently subject. However, there are</p>

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			<p>borrower, the lender must provide a statement containing sufficient information to enable the borrower to make an informed decision. This statement must include a clear explanation of the implications of a transfer and how the transfer might affect the borrower. Each borrower must be afforded three months to decide whether to give or to decline to give his/her consent. The lender must also provide the borrower with the following information: a) the name and address of the intended transferee, and of any holding company, if applicable; b) the nature of the relationship, if any, between the lender and the transferee; c) a description of the intended transferee and of its business, including details of how long it has been in operation, and of its experience in the management of mortgages; d) an explanation of the transferee's policy and procedures which will apply for the setting of the mortgage interest rate and for making repayments if the transfer takes place; and e) confirmation that in the absence of the borrower's specific consent the existing arrangements will continue to apply.</p>	<p>critical differences between the existing code and the Chapter 7 provisions which will make the future securitisation of both existing and future mortgage loans practically impossible for all market participants if the chapter remains as currently drafted. Specifically:</p> <p>(a) The requirement to provide the borrower with the name and address of the intended transferee etc means that the borrower consent built into existing mortgage documents is now inadequate. This means that fresh consents will be required from existing borrowers if existing un-securitised mortgage loans are to be securitised in the future. As there is no borrower incentive to give consent, the likelihood of specific consent being given is remote.</p> <p>(b) Again, the requirement to furnish the name and address of the intended transferee is going to make it impossible for the mortgage lender to build consents into any revised mortgage documents as the identity of the S.P. V. transferee is usually unknown until shortly before a securitisation transaction completes. This will mean that the securitisation of future mortgage loans will also be impaired.</p> <p>Given the importance of securitisation to the current (and future) funding of mortgage portfolios we think that the proposed amendments are fundamentally ill advised.</p> <p>In addition, as mentioned above, the existing code is currently applicable to Credit Institutions rather than to</p>

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				<p>all Regulated Entities. As such, were the existing code merely to replace Chapter 7 then, while the issues outlined immediately above would be dismissed, any Regulated Entity (such as Start Mortgages) not currently subject to the existing code would be immediately disadvantaged as, not having had any time to amend their processes to ensure that mortgage loans would meet the transfer requirements from the point of origination, they alone would face difficulties securitising loans. As such, an un-level playing field would be created.</p>
Chapter 9	Arrears Handling		<p>4. Where the arrears situation persists, an updated version of this information must be provided to the consumer on a monthly basis.</p>	<p>Our understanding of this provision is that an updated arrears status letter must be provided to customers whose accounts are in arrears but whose cases are not covered by the CCMA. The CCMA itself does not require a monthly letter but, instead, requires an equivalent letter to be furnished on a quarterly basis. We feel that both codes should impose the same requirement - otherwise additional systems development work will be required and there is a greater chance of future errors.</p>
Chapter 9	Arrears Handling		<p>6. In respect of a mortgage (other than a mortgage account that is subject to the Code of Conduct on Mortgage Arrears), where a third full or partial repayment is missed and remains outstanding and, where an approach to resolving the arrears situation has not been agreed, a regulated entity must advise the consumer, in writing, of the following: a) the potential for legal proceedings and loss of the property, together with an estimate of the costs to the consumer of such proceedings; and b) that</p>	<p>The wording here should be conformed to the wording of the equivalent provision under the CCMA. As such is should read as follows: "When a third full or partial mortgage payment <i>as per the original mortgage contract</i> is missed and remains outstanding and an <i>alternative repayment arrangement has not been put in place</i>, the lender must <i>notify</i> the borrower, in writing, of the following:  a) the potential for legal proceedings for repossession of the property, together with an estimate of the costs to the borrower of such proceedings;  b) <i>the importance of taking independent advice from</i></p>



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			<p>irrespective of how the property is repossessed and disposed of, the consumer will remain liable for the outstanding debt, including accrued interest, charges, legal, selling and other related costs, if this is the case.</p>	<p><i>his/her local Money Advice and Budgeting Service (MABS) or an appropriate alternative;</i> and  c) That irrespective of how the property is repossessed and disposed of, the borrower will remain liable for the outstanding debt, including any accrued interest, charges, legal, selling and other related costs, if this is the case. (<i>emphasis mine</i>)  Failure to have parallel provisions in the CCMA and this Code will lengthen the implementation time and will increase the chance of future error.</p>
Chapter 9	Arrears Handling		<p>16. Each calendar month, a regulated entity, and/or any third party acting on its behalf, may not initiate more than three unsolicited communications, by whatever means, to a consumer in respect of an arrears situation. The three unsolicited communications do not include any communications to the consumer which are required by this Code.</p>	<p>The wording here should be conformed to the wording of the equivalent provision under the CCMA. As such is should read as follows: "Each calendar month, a lender, and/or any third party acting on its behalf, may not initiate more than three unsolicited communications, by whatever means, to a borrower in respect of his/her arrears situation. The unsolicited communications do not include any communications to the borrower regarding his/her arrears situation, which are required by this Code or other regulatory requirements. (<i>emphasis mine</i>)"</p>
Chapter 11	Errors and Complaints	Errors	<p>3. A regulated entity must speedily, efficiently and fairly, correct an error that has resulted or may result in consumer detriment. All such errors must be fully resolved within six months of the date the error was first discovered, including: a) correcting any systems failures; b) making all reasonable efforts to effect a refund (with appropriate interest) to all consumers who have been affected by any error; and c) notifying all affected consumers, both current and former, in a timely manner, of</p>	<p>While it ought to be possible to notify and to effect a refund to all affected customers within a 6 month period, in some cases it may not be possible to effect a correction of system failures/ introduce new systems controls in the same timeframe. A 9 month timeframe would be more realistic in that regard.</p>

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Chapter 11	Errors and Complaints	Errors	<p>any error that has impacted or may impact negatively on the cost of the service, or the value of the product, provided.</p> <p>5. A regulated entity must inform the Central Bank, in writing, of any errors that have resulted or may result in consumer detriment that have not been resolved in accordance with provision 3 or are not likely to be resolved within one month.</p>	<p>We disagree with the 1 month reporting timeframe and the absence of a materiality test. Together these could result in big errors being unreported purely because they may be remedied quickly, and small errors that are of little consequence but that may take time to resolve being the subject of unnecessary reporting and oversight. We would suggest a three month resolution timeframe and also believe that only material errors (in monetary amount or number of incidences) should be required to be reported.</p>
Chapter 13	Definitions		<p>“vulnerable consumer” means a consumer that is vulnerable because of mental or physical infirmity, age, circumstances or credulity. These can include, but are not limited to, the following: · those with a low level of educational attainment; · those with a low income; · those with a high level of indebtedness; · those with a poor credit history; · those who do not have English as a first language; · those suffering from a long term illness or disability or episodic illness; · those whose mental capacity to make a decision is diminished; · those that are near, or over the statutory retirement age, are retired from their occupation or are retiring soon; · those who are recently bereaved; · those with a substantial sum to invest who have little or no investment experience.</p>	<p>Some of the “classifications” under this definition are subjective (e.g. low income/high indebtedness); others will be extremely difficult if not impossible for a regulated entity to establish (e.g. credulity). Others will require the regulated entity to ask questions of the consumer which may be considered to be offensive, particularly if the customer considers the matter to be of little relevance to their capacity make an informed decision about a product (e.g. educational attainment). In addition, as the regulated entity is required under provision 17 of Chapter 5 (Knowing the customer and suitability) to consider customer specific customer vulnerabilities in the statement of suitability furnished to the customer, this has the potential to lead to claims of discrimination by the customer if the determination of the regulated entity is not to their liking. It is also difficult to see how some of the determinants of vulnerability have any bearing at all on a customer’s</p>

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				<p>ability to make an informed choice in relation to a product (e.g. physical infirmity).            We are of the view that a vulnerable consumer should be defined as one who, for whatever reason, does not have the ability to understand the significance of the contract or commitment that he/she is entering into. Finally, given the asymmetry of information between the customer and the financial institution as regards vulnerability, the definition of a vulnerable consumer could have far-reaching consequences for financial institutions if (as was proposed by the Mortgage Arrears and Personal Debt Group in relation to the CCMA) the Consumer Protection Code were to be admissible in legal proceedings at some stage in the future.</p>