GOVERNMENT NOTICE NO. 21

FINANCIAL SERVICES ACT

(CAP.44:05)

FINANCIAL SERVICES (FIT AND PROPER REQUIRMENTS FOR SHAREHOLDERS, DIRECTORS AND SENIOR MANAGEMENT OFFICIALS OF BANKS AND BANK HOLDING COMPANIES) DIRECTIVE, 2018

ARRANGEMENT OF PARAGRAPHS

PART I—PRELIMINARY

1. Citation
2. Interpretation

PART II—OBJECTIVES

3. Setting standards for investors and managers of banks and bank holding companies

PART III—FIT AND PROPER TEST STANDARDS FOR SHAREHOLDERS

4. Approval of shareholders
5. Due diligence

PART IV—FIT AND PROPER TEST REQUIREMENTS FOR DIRECTORS AND SENIOR MANAGEMENT OFFICIALS

6. Approval of directors and senior management officials
7. Board responsibility
8. Restrictions on directors
9. Qualifications for accounting, finance and audit functions requirements
10. Qualifications for compliance officer
11. Verification of educational qualifications
12. Notification of exits of directors or executive officers

PARAGRAPH PART V—PRESCRIBED CRITERIA FOR FIT AND PROPER TEST

PART V—PRESCRIBED CRITERIA FOR FIT AND PROPER TEST

13. Eligibility
14. On-going assessment

PART VI—ENFORCEMENT

15. Monetary penalties
16. Administrative penalties
17. Revocation

Schedule

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

PART I—PRELIMINARY

Citation

1. This Directive may be cited as the Financial Services (Fit and Proper Requirements for Shareholders, Directors and Senior Management Officials of Banks and Bank Holding Companies) Directive, 2018.

Interpretation

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

"audit committee" means a permanent committee of the board of directors of a bank or bank holding company consisting of at least three (3) members, all or the majority of which, shall be non executive directors of the bank or bank holding company;

Cap. 44:05

"bank" has the meaning ascribed to that term in the Banking Act,;

"banking group" means a group of two or more companies one of which is a bank domiciled in Malawi where the holding company is either a bank or financial institution or a non-financial company;

"bank holding company" means a body corporate that owns or controls at least two financial institutions one of which is a bank, whether the financial institution is a subsidiary or significant minority investment(s) or interest(s) of the body corporate;

Cap: 44:01

"credit facility" has the meaning ascribed to that term in the Banking Act;

"home country supervisor" means the competent regulatory authority that supervises institutions engaged in banking business in the country where the head office of a foreign bank is located;

"managerial functions" means duties or assignments performed or undertaken by a senior management official;

"politically exposed person" has the meaning as ascribed to that term in the Financial Crimes Act;

Act No. 14 of 2017

"senior management official" includes—

(*a*) an executive officer;

(*b*) head of department or function;

(*c*) an official who reports either directly to the board of directors, to a committee of the board of directors or to an executive officer; or

(*d*) branch managers of a bank that the Registrar declares as senior management officials; or

(*e*) an officer the Registrar declares as a senior management official; and

"significant minority investment(s) or interest(s)" means any ownership interest of less than fifty percent of the voting rights or capital held by the reporting holding company in the relevant entity.

PART II—OBJECTIVES

Setting standards for investors and managers of banks and bank holding companies

3. The objectives of this Directive are to ensure that—

(*a*) only fit and proper shareholders are allowed to establish and invest in banks and bank holding companies in Malawi; and

(*b*) banks and bank holding companies are managed by competent personnel at board and senior management levels.

PART III—FIT AND PROPER TEST STANDARDS FOR SHAREHOLDERS

Approval of shareholders

4.—(1) A bank or bank holding company that is not a public company shall seek the approval of the Registrar in respect of—

(*a*) a new shareholder;

(*b*) a shareholder who may become a controlling party; or

(*c*) a change in shareholding structure.

(2) A bank or bank holding company that is a public company shall seek the approval of the Registrar in respect of—

(*a*) a new shareholder who may become a controlling party in the bank or bank holding company;

(*b*) an acquisition that increases the existing shareholding so that the shareholder may become a controlling party as a result of the acquisition; and

(*c*) a change in shareholding structure that results in one or more shareholders ceasing to become a controlling party.

(3) A shareholder referred to in this paragraph shall satisfy the fit and proper test requirements provided for in Part V of this Directive.

(4) The board of directors shall ensure that shareholders of the bank or bank holding company referred to in this paragraph provide the information prescribed in the Schedule to the Registrar and meet all the requirements of this Directive.

(5) In the course of carrying out his supervisory responsibilities, the Registrar may direct a proposed or existing shareholder to—

(*a*) submit additional information; or

(*b*) appear before the Registrar.

(6) The Registrar shall review the fitness and propriety of a shareholder or controlling party shareholder referred to in this paragraph on a continuous basis.

Due diligence

5. The Registrar shall conduct a due diligence of a prospective controlling party shareholder as part of the fit and proper test requirement.

PART IV—FIT AND PROPER TEST REQUIREMENTS FOR DIRECTORS AND SENIOR MANAGEMENT OFFICIALS

Approval of directors and senior management officials

6.—(1) A person shall not serve as a director or senior management official of a bank or bank holding company without prior approval of the Registrar.

(2) A bank or bank holding company shall submit to the Registrar a request for the approval in paragraph (1) in the format prescribed in the Schedule to this Directive.

(3) The number of foreign nationals appointed as senior management officials in a bank shall not exceed five, unless prior written approval of the Registrar has been granted to exceed the limit.

(4) The Registrar shall not grant the approval in subparagraph (3) unless the bank has demonstrated that it has not been able to identify the same skills for that position from the local market.

(5) The Registrar's approval to appoint a foreign national as a senior management official in terms of this Directive shall not preclude the bank from obtaining the necessary approvals from the Immigration Authority or complying with other applicable laws.

(6) A director or senior management official shall be considered to be fit and proper if he meets the Registrar's standards outlined in Part V of this Directive.

(7) The Registrar may require a person appointed as a director or senior management official of a bank to appear in person before him as part of the fitness and propriety test.

Board responsibility

7. The board of directors shall ensure that a bank or bank holding company has—

(*a*) an officer designated as second in command at a level of executive officer; and

(*b*) an independent risk management and compliance function headed by a senior management official.

Restrictions on directors

8.—(1) The Chairperson of the board of directors of a bank or a bank holding company shall be a non executive director.

(2) A director of a bank or bank holding company shall not serve as a director of another bank except where the other bank is a subsidiary of the banking group or the bank holding company.

(3) A director, executive officer or senior management official of a bank shall not serve on a board of a Credit Reference Bureau and vice versa.

(4) A director, executive officer or senior management official of a bank shall not own shares directly or indirectly in a Credit Reference Bureau and vice versa.

(5) A salaried employee of the Government shall not serve as a director of a bank or as an *ex-officio* except where the Government has direct shareholding interests in the bank.

(6) A salaried employee of the Government shall not serve as a chairperson of the Board of the bank.

(7) Except where specified by a relevant law or approved by the Registrar, directors referred to in subparagraph (5) shall not serve on the Board of any other bank.

(8) An individual who sits on the board of an institution that is a shareholder of a bank shall not serve as a director on the Board of any other bank.

(9) A person who served as Registrar shall not serve as a director or senior management official of a bank or bank holding company until the expiry of six (6) months cooling off period from the date of cessation as Registrar.

Qualifications for accounting, finance and audit functions requirements

9.—(1) A person shall not be appointed as head of the accounting or finance functions of a bank unless he is an accredited member of a professional body in Malawi.

(2) A head of the internal audit function of a bank shall be a registered member of an audit professional body in Malawi.

(3) The Registrar shall not approve a head of the accounting or finance functions of a bank, or a head of the internal audit function of a bank unless the bank provides written attestation from the respective professional body satisfying requirements of subparagraphs (1) and (2).

Qualifications for compliance officer

10.—(1) A compliance officer shall be a senior management official, who reports to a Board committee responsible for risk management.

(2) An internal auditor or chief executive of a bank shall not qualify as a compliance officer.

(3) A compliance officer shall have relevant qualifications and experience to enable him sufficiently discharge his responsibilities.

Verifications of educational qualifications

11. The Registrar shall verify the credentials and authenticity of academic and professional qualifications of a director, executive officer or senior management official.

Notification of exists of directors or executive officers

12. A bank shall notify the Registrar within ten (10) working days after the exit of its director or senior management official citing reasons behind the decision and the timeline regarding the director's or senior management official replacement.

PART V—PRESCRIBED CRITERIA FOR FIT AND PROPER TEST

Eligibility

13.—(1) The following persons shall not be eligible for appointment or shall not continue to serve as shareholders, directors, or senior management officials of a bank or bank holding company—

(*a*) a person who has been adjudged bankrupt or declared insolvent and has not been discharged from bankruptcy or insolvency;

(*b*) a person who has been convicted of an offence involving dishonesty or fraud, forgery, perjury, money laundering, or any other material breach of a financial service law;

(*c*) a person who has been removed as a director, senior management official, shareholder or trustee by the Registrar or a regulator of financial institutions in any country;

(*d*) a person who has been removed as a shareholder, director or senior management official by a court of competent jurisdiction or any other enforcement agency;

(*e*) a person who has been directed to disinvest or had his investment wound up or closed up by a supervisory authority;

(*f*) a person who has been disqualified or suspended from practicing any profession by a regulatory body;

(*g*) a person who is employed directly or indirectly by another bank, unless he relinquishes that position before the appointment;

(*h*) a director, officer or employee of the Reserve Bank of Malawi or the Financial Intelligence Authority;

(*i*) a politically exposed person;

(*j*) a child or a person under legal disability;

(*k*) a person who has been proven to be responsible for a loss suffered by a licensed institution in Malawi or elsewhere;

(*l*) a person who does not enjoy a good professional reputation and has a background that does not demonstrate integrity;

(*m*) a person whose education, technical knowledge and professional experience is not directly relevant to banking business;

(*n*) a person who has been a controlling party, shareholder, director, executive officer or senior management official of a bank or other financial institution that is or was subject to formal remedial measures for operating in an unlawful or unsound manner or for which a management advisor, conservator or liquidator has been appointed or that has had its licence revoked or which has been wound-up;

(*o*) a director whose attendance of board meetings is unsatisfactory or who misses three (3) consecutive board meetings without valid reasons;

(*p*) a person who has a non performing credit facility or whose related party has a non performing credit facility;

(*q*) in the case of senior management official, a person who is not resident in Malawi, unless specifically exempted in writing by the Registrar;

(*r*) a shareholder who lacks or has demonstrated lack of financial capacity;

(*s*) with respect to a financial institution in Malawi or elsewhere, a person who has—

(i) failed to take all reasonable steps to secure compliance by the financial institution with Malawi's financial services laws, Financial Crimes Act or home country banking laws; Act No. 14 of 2017

(ii) failed to take all reasonable steps to ensure the accuracy and completeness of information submitted to the Registrar or home country supervisory authority;

(iii) failed or delayed to supply information to the Registrar; or

(iv) obstructed or endeavored to obstruct, an inspection by an officer or other appointed person of the Registrar or any other financial regulator whether inside or outside Malawi;

(*t*) a person who has not disclosed with the bank all material interests in credits and other transactions;

(*u*) a person who directly or indirectly, alone or acting in concert with others has credit from the bank that exceed the limitations of the Directive on Financial Services (Transactions with Related Parties) Directive;

(*v*) a person who has supplied false or misleading information to the Registrar;

(*w*) a person who was dismissed from another bank or licensed institution; or

(*x*) any other person that may be prescribed as such by the Registrar based on the Registrar's assessment or other relevant information.

(2) On the commencement of this Directive, all banks and bank holding companies shall meet the requirements of this Directive.

(3) The Registrar may, upon application by a bank or bank holding company, allow a transition period to facilitate compliance with the requirements of this Directive.

14. A bank shall on a continuous basis, assess the fitness and probity of its directors and senior management officials as provided for under this Part. On-going assessment

PART VI—ENFORCEMENT

Monetary penalties

15.—(1) The Registrar shall impose the following monetary penalties for violations of this Directive—

(*a*) for banks, up to fifty million Kwacha (K50,000,000); and

(*b*) for natural persons who are members of the board of directors or senior management, up to ten million Kwacha (K10,000,000).

(2) With respect to banks, the Registrar shall—

(*a*) debit the penalty in subparagraph (1) (*a*) from the main account of the bank maintained at the Reserve Bank of Malawi; and

(*b*) notify the bank in writing prior to debiting the account.

(3) With respect to natural persons or where the bank does not maintain an account with the Reserve Bank of Malawi, the natural person or the bank shall pay the penalty through a bank certified cheque or electronic transfer payable to the Reserve Bank of Malawi within ten (10) working days after being notified by the Registrar.

Administrative penalties

Cap. 44:01

16. In addition to the monetary penalty imposed in paragraph 15 (1), the Registrar may impose directions, administrative penalties and enforcement action as provided for under the Act and the Banking Act.

Revocation of G. N. 5/2014

17. The Financial Services (Fit and Proper Requirements for Shareholders, Directors and Senior Management Officials of Banks) Directive, 2014 is hereby revoked.

SCHEDULE

APPLICATION FORM FOR APPROVAL AS A FIT AND PROPER PERSON

Form of Request

The following information should be presented in the order of request. Copies of documents should be appropriately labeled.

Information Requirements

The following information is required of all persons proposed to be shareholders, directors and senior management officials of banks or bank holding companies.

(1) If a person already serves as a senior management official of a bank or bank holding company and is now proposed to become a director or senior management official, the bank shall provide to the Registrar—

(*a*) a written confirmation by the person affirming that there have been no materialchanges to the information that had been submitted by the bank when the personfirst received the Registrar's approval to serve in that capacity; or

(*b*) all material changes to the information that had earlier been submitted by the bank in support of the application that the Registrar approved. The above provisions shall also apply to a person serving as a director and being proposed to become Chairman of the board of directors.

(2) Name and address of the bank or bank holding company.

(3) Name of contact person for the request; address and telephone number in Malawi.

(4) Country identification or passport number and data.

(5) Date and place of birth.

(6) Amount, type and percentage of shareholding, if any, in the bank.

(7) Proposed position with the bank or bank holding company: director, executive officer or senior management official. Specify title and provide a position description. If senior management official, then provide functional responsibilities.

(8) Education, technical knowledge and professional experience and employment history submitted in a detailed curriculum vitae. (Please attach copies of certificates duly certified).

(9)—(*a*) History of ownership of ten percent (10%) or more of the stock of a bank or financial institution; or

(*b*) History of holding a position as a director or senior management official in any bank or other financial institution located anywhere in the world.

(10) Where paragraph (9) of the Schedule applies, state whether during such time period, the bank or financial institution—

(*a*) was subject to formal remedial measures for operating in an unlawful or unsound manner;

(*b*) was threatened with insolvency or experienced illiquidity which resulted in request for additional capital, emergency liquidity assistance or some other form of financing or regulatory action;

(*c*) had appointed a management advisor, conservator, liquidator, or similar official;

(*d*) had its license revoked; or

(*e*) was wound-up.

(11) Membership in companies, partnerships, professional or trade associations and groupsof persons acting in concert, whether or not organized or registered as a formal business concern: Name, address, type of entity, and description of activities.

(12) A list of all "Related Parties" who will be so designated, pursuant to the FinancialServices (Transactions of Banks with Related Parties) Directive, if the person becomes a director or senior management official of the bank.

(13) A list of all credit facilities and other transactions with the bank, direct and indirect, alone or acting in concert with others, and where possible, a latest credit report from a licensed Credit Reference Bureau.

(14) Provide complete details of all of the following legal proceedings with which the proposed director, executive officer, or senior management official has been a party, including date, location and disposition.

Litigation. Is the person engaged or expecting to be imminently engaged in litigation, in Malawi or elsewhere, which may have a material impact on the person's financial condition?

Discipline. Has the person ever been censured, prosecuted, warned as to conduct, disciplined, disqualified or suspended from practicing a profession, removed from office, publicly criticized, or made subject to a court order at the instigation of any governmental body appointed under any enactment, by a professional organization, orthe substantial equivalent thereof in Malawi or elsewhere?

Conviction. Has the person ever been convicted of an offence, or been served a petition for an administrative order, or the substantial equivalent thereof, in Malawi or elsewhere?

Investigation. Is the person, or has the person ever been, subject to an investigation inMalawi or elsewhere by, or at the instigation of, any governmental department or agency, professional association, or other regulatory body?

Judgment. Has the person ever failed to satisfy within one (1) year a judgment of debt under a court order in Malawi or elsewhere?

Fraud. Has the person ever been adjudged by a court, in Malawi or elsewhere, to be civilly liable for actions which could have resulted in an indictment for a felony offence, as well as fraud, malfeasance, forgery, perjury, money laundering, or any other misconduct?

Bankruptcy. Has the person ever been adjudged bankrupt by a court in Malawi or elsewhere? Has a bankruptcy petition ever been served on the person? Has the person made any compromise arrangement or otherwise failed to satisfy creditors in full?

Receivership. Has a receiver or an administrator been appointed for any of the person's property, or has the substantial equivalent of any such receiver been appointed in any other jurisdiction? If so, provide details including whether the receiver or equivalent thereof is still acting under the appointment.

Winding-up. Has any body corporate, partnership, or unincorporated institution with which the person was associated as a controlling party shareholder, director, executive officer or senior management officer, in Malawi or elsewhere, been wound-up, made subject to an administration order, otherwise made any compromise or arrangement with its creditors, or ceased trading either while the person was associated with it or within one year after the person ceased to be associated with it or has anything analogous to any of these events occurred under the laws of any other jurisdiction?

(15) An official resolution of the board of directors authorizing the submission of the subject request to the Registrar.

For directors in addition to the information referred above:

(16) Proposed membership of committees of board of directors.

(17) A certified copy of the resolution taken by the general meeting of shareholders or directors of the bank on the appointment of the person to the board of directors which specifically states that the appointment is subject to the written approval of the Registrar and the person will not act in said capacity until the Registrar's written approval of the request has been issued.

For executive officers and senior management officials in addition to items 1-17 above:

(18) Copies of any employment contracts.

(19) A certified copy of the minutes of the meeting of the board of directors demonstrating that the board of directors has evaluated the proposed executive officer or senior management official according to the "fit and proper" standards prescribed in this directive and has determined that the person is "fit and proper" for the position as an executive officer or senior management officer of the bank.

Made this 3rd day of April, 2018.

D. KABAMBE, PhD
Registrar of Financial Institutions

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