GOVERNMENT NOTICE NO. 25

FINANCIAL SERVICES ACT

(CAP. 44:05)

FINANCIAL SERVICES (REGULATION OF COMMODITIES EXCHANGES) DIRECTIVE 2018

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

PART I—PRELIMINARY PROVISIONS

Interpretation

1. This Directive may be cited as the Financial Services (Regulation of Commodities Exchange) Directive, 2018.

Interpretation

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

Definitions used the Financial Services Act, shall have the same meaning in this Directive—

Cap.44:05

"Act" means the Financial Services Act;

"authorized user" means a person authorized by a commodity exchange to perform one or more services in terms of the commodity exchange's rules—

"commodity" means—

(*a*) agricultural, livestock, fishery, forestry, mining or energy goods, or any product that is manufactured or processed from any such goods; and

(*b*) an index, right or interest in any such commodity;

"commodity contract" includes a—

(*a*) spot commodity contract;

(*b*) commodity futures;

(*c*) commodity forward contractor; and

(*d*) commodity options on futures contracts;

"commodity exchange" for the purposes of this Directive shall mean and include any or all of the following—

(*a*) a trading platform;

(*b*) a clearing house; and

(*c*) a warehouse receipt system;

"commodity forward contract" means a contract the effect of which is that one party agrees to deliver a specified commodity, or a specified quantity of a specified commodity, to another party at a specified future time and at a specified price payable at the time of entering the contract in accordance with rules, but does not include a commodity futures contract;

"commodity futures contract" means a contract the effect of which is that—

(*a*) one party agrees to deliver to the other party a specified commodity, or a specified quantity of a specified commodity, at a specified future time and at a specified price payable at that future time, pursuant to the terms and conditions of the rules of the commodity exchange at which the contract is made; or

(*b*) the parties will discharge their obligations under the contract by settling the difference between the value a specified quantity of a specified commodity agreed at the time of the making of the contract and at

agreed at the time of the making of the contract and at a specified future time, such difference being in accordance with the rules of the commodity exchange at which the contract is made, provided that one of the parties is a commodity exchange;

"spot commodity contract" means a contract for the supply of a commodity which is traded on a commodity exchange for immediate settlement or delivery;

"trading platform" means an institution that matches buyers and sellers to transact in a commodity contracts in accordance with its rules.

"clearing house" in relation to a commodity exchange is a body corporate that constitutes, maintains and provides an infrastructure to clear transactions;

"warehouse receipt" means an official document issued by a designated warehouse operator as evidence that specified commodities of acceptable or agreed quality and quantity have been deposited; and

"warehouse receipt system" is a system of procedures that enables participants or players to deposit commodities in exchange for a warehouse receipt;

"rules" shall mean the business rules of a commodity exchange.

Objectives

3. The objectives of this Directive are to—

(*a*) license and regulate commodity exchanges;

(*b*) ensure that commodity exchanges comply with the provisions of the Act;

(*c*) protect the interests of investors and other participants in commodity exchanges;

(*d*) ensure the maintenance of professional standards in the management of commodity exchanges; and

(*e*) promote public confidence and interest in the commodity exchanges.

PART II—REGULATION OF COMMODITIES AND SUPERVISION EXCHANGES

Prohibition against operating commodity exchanges without a licence

4.—(1) A person shall not operate a commodity exchange without a licence.

(2) Any person who violates subparagraph (1) shall be liable to enforcement action in paragraph 15.

The Registar

5. The Registrar shall be the regulatory and supervising authority for all commodity exchanges.

Commoity Exchange Financial Institutions Cap. 46:06

6.—(1) It is hereby declared that a licensed commodity exchange is a financial institution and a securities market player for the purposes of the Act and the Securities Act.

(2) The Registrar shall not licence a commodity exchange unless it is a body corporate.

(3) An application for a commodity exchange licence shall—

(*a*) be made in the manner and contain the information prescribed by the Registrar;

(*b*) show that the applicant complies with the requirements listed in paragraph 8;

(*c*) be accompanied by—

(i) a copy of the founding documents of the applicant;

(ii) a copy of the proposed commodity exchange's rules;

(iii) such information in respect of the members of the controlling body of the applicant as may be prescribed by the Registrar; and

(iv) the application fee prescribed by the Registrar from time to time; and

(*d*) be supplemented by any additional information that the Registrar may reasonably require.

PART III—LICENSING OF COMMODITIES EXCHANGES

Application for a licence

7.—(1) An application for a licence to carry on business as a commodity exchange shall be in Form No. 1 set out in the Schedule to this Directive.

(2) Subject to subparagraph (3), an applicant for a commodity exchange licence under subparagraph (1) shall have—

(*a*) assets and resources to the satisfaction of the Registrar, which resources include financial, management and human resources with appropriate experience to perform its functions as set out in this directive;

(*b*) a business plan which is satisfactory to the Registrar;

(*c*) rules which are satisfactory to the Registrar;

(*d*) governance arrangements which are clear and transparent, promote the safety and efficiency of the commodity exchange and support the stability of the broader financial system, other relevant public interest considerations, and the objectives of relevant stakeholders;

(*e*) fit and proper systems and controls as required by the Registrar;

(*f*) made arrangements for the efficient and effective surveillance of all transactions effected through the commodity exchange and for the supervision of authorized users so as to identify possible market abuse and ensure compliance with the commodity exchange rules and this directive;

(*g*) made arrangements for the efficient and effective monitoring of compliance by authorized users with the rules established by the commodity exchange to the satisfaction of the Registrar;

(*h*) implemented arrangements to efficiently and effectively manage the material risks associated with the operation of the commodity exchange to the satisfaction of the Registrar;

(*i*) arrangements for efficient and effective security and back-up procedures to ensure the integrity of the records of transactions effected through the commodity exchange to the satisfaction of the Registrar; and

(*j*) implemented an effective and reliable infrastructure to facilitate transactions on the commodity exchange.

(3) The Registrar may—

(*a*) require an applicant to furnish such information, or require such information to be verified, as the Registrar may deem necessary to determine whether the applicant meets the requirements of subparagraph (2); and

(*b*) take into consideration any other information regarding the applicant, derived from whatever source, including any other supervisory authority.

Licensing of commodity exchange

8.—(1) The Registrar may, subject to any conditions which the Registrar may consider appropriate, grant a commodity exchange licence to perform the functions referred to in paragraph 10 if—

(*a*) the applicant complies with the relevant requirements of this Directive; and

(*b*) objectives of this Directive referred to in paragraph 4 will be furthered by the granting of the commodity exchange licence.

(2) A commodity exchange licence shall specify the terms and conditions of the licence, the categories of securities that may be transacted, the registered office of the commodity exchange in the Republic and places where the commodity exchange may be operated and stipulate that the commodity exchange may not be operated at any other place without the prior written approval of the Registrar.

(3) A commodity exchange may at any time apply to the Registrar for an amendment to the terms of the licence or the conditions subject to which the licence was granted.

(4) The granting of a commodity exchange licence shall by way of notice be published in the *Gazette*.

Requirements applicable to applications

9.—(1) A commodity exchange shall conduct its business in a fair and transparent manner with due regard to the rights and obligations of authorized users and their clients.

(2) A commodity exchange shall, to the satisfaction of the Registrar—

(*a*) establish and operate proper markets that are conducive to the economic good and objectives of this Directive and that do not cause or promote systemic instability;

(*b*) at all times ensure that its systems and controls are adequate and suitable for the performance of its functions and those of authorized users and appropriate to the size and nature of its respective operations;

(*c*) ensure (where applicable) that arrangements are made for—

(i) recording the activity and transactions effected on or through its facilities;

(ii) maintaining the activity and transactions records for at least seven (7) years; and

(iii) provide the Registrar with these records in a timely manner if required by the Registrar;

(*d*) supervise compliance with this Directive by its authorized users and report any non-compliance to the Registrar and assist the Registrar in enforcing this Directive;

(*e*) enforce its rules at all times;

(*f*) as soon as it becomes aware, inform the Registrar of any matter that may pose systemic risk to the financial markets; and

(*g*) do all other things that are necessary for, or incidental to the proper operation of the commodity exchange and that are not inconsistent with this Directive and the Act.

(3) The Registrar may assume responsibility for one or more of the regulatory or supervisory functions referred to in subparagraph (2) if the Registrar considers it necessary in order to achieve the objectives of this Directive and that are not inconsistent with the Act.

PART IV—GENERAL PROVISIONS APPLICABLE TO LICENSED COMMODITY EXCHANGES

Safeguarding and administering assets

10.—(1) A commodity exchange shall ensure that where its facilities provide for the safeguarding and administration of commodities or other assets which belong to users of those facilities, satisfactory arrangements are made for that purpose and clear terms of agreement exist between the users of the facility and the commodity exchange.

(2) A commodity exchange shall have compliance procedures in place to ensure rules are enforced as against authorized users, complaints regarding persons granted access to its facilities are investigated, appeal procedures are in place and where appropriate, disciplinary action resulting in financial and other types of penalties is available.

Complaint resolution scheme

11.—(1) A commodity exchange shall have in place procedures to address complaints by market users and authorized users so as to ensure that due process is upheld on an ongoing basis, to the satisfaction of the Registrar, which shall include—

(*a*) effective arrangements for the investigation and resolution of complaints made against the commodity exchange and authorized users; and

(*b*) establishing and maintaining a register of complaints made against the exchange and authorized users and resolutions reached.

(2) A commodity exchange shall keep records of the complaints for a minimum of seven years.

Reporting to Registrar

12. Within three month after the financial year end of a commodity exchange, that commodity exchange shall submit to the Registrar an annual report containing the details prescribed by the Registrar and audited financial statements that fairly present the financial affairs and status of the commodity exchange.

Attendance of meetings by and furnishing/ forwarding of documents to Registrar

13.—(1) The Registrar or a person appointed by the Registrar may attend any meeting of the controlling body of a commodity exchange or a committee of the controlling body, but shall not vote.

(2) A commodity exchange shall furnish the Registrar with all notices, minutes and documents which are furnished to members of the controlling body of the commodity exchange or a committee of the controlling body, as if the Registrar were a member of that body or committee.

Offences

14.—(1) A person who operates a commodity exchange without a licence shall—

(*a*) in the case of a natural person be liable to a penalty of K50,000,000.00 in addition to any monetary penalty imposed by reference to gains made;

(*b*) in the case of a body corporate it shall be liable to a penalty of K100,000,000.00; and

(*c*) the Registrar may impose a further monetary penalty imposed by reference to gains made.

(2) In addition to the penalties imposed above, the Registrar may impose directions and any other enforcement action as provided for under the Act.

Improper trading practices

15.—(1) A person shall not, directly or indirectly, create or cause to be created or do anything with the intention of creating—

(*a*) a false or misleading appearance of the volume of trading on any commodity exchange; or

(*b*) a false or misleading appearance of the market for or the price for any commodities.

(2) A person shall not directly or indirectly, by means of a fraudulent or fictitious transaction or device maintain, inflate, depress or cause fluctuations in the market price for any commodities.

(3) The Registrar may impose the following monetary penalties for violations of this paragraph—

(*a*) for legal persons up to K100,000,000.00; and

(*b*) for natural persons up to K50,000,000.00.

(4) In addition to the monetary penalties imposed in subparagraph (4) above the Registrar may impose any directions, restrictions or enforcement action as provided for the by the Act.

Fraudulent transactions

16.—(1) A person shall not directly or indirectly, in connection with any transaction with any other person involving the purchase or sale of any commodities—

(*a*) employ any device, scheme or artifice to defraud the counterparty;

(*b*) engage in any fraudulent, deceptive or manipulative device to defraud the counterparty; and

(*c*) engage in any act, practice or course of business which operates as a fraud or deception or is likely to operate as a fraud or deception on the counterparty.

(2) The Registrar may impose the following monetary penalties for violations of this paragraph—

(*a*) for legal persons up to K50,000,000.00;

(*b*) for natural persons up to K5,000,000.00; and

(*c*)include recovery of benefit.

(3) In addition to the monetary penalties imposed by subparagraph (2) above the Registrar may impose any directions, restrictions or enforcement action as provided for the by the Act.

Prohibition of self dealing

17.—(1) A commodity exchange shall not, directly or indirectly, enter into any transaction on its own markets except in extenuating circumstances and with prior approval of the Registrar.

(2) The Registrar may impose the following monetary penalties for violations of this paragraph—

(*a*) for legal persons up to K100,000,000.00;

(*b*) for natural persons up to K50,000,000.00; and

(*c*) include recovery of benefit.

(3) In addition to the monetary penalties imposed by subparagraph (4) above the Registrar may impose any directions, restrictions or enforcement action as provided for the by the Act.

Prohibition on execution of an order for purchase or sale

18.—(1) A person shall not—

(*a*) knowingly execute, or hold himself out as having executed, an order for the purchase or sale of a commodity contract on a commodity exchange without having effected a *bona fide* purchase or sale of the commodity contract in accordance with the business rules and practices of the commodity exchange; and

(*b*) gain control of the supply of a particular commodity which is traded on the commodity exchange with the aim of manipulating the price of the said commodity.

(2) The Registrar may impose the following monetary penalties for violations of this paragraph—

(*a*) for legal persons up to [K100,000,000.00]; and

(*b*) for natural persons up to [K50,000,000.00].

(3) In addition to the monetary penalties imposed by subparagraph (4) above the Registrar may impose any directions, restrictions or enforcement action as provided for the by the Act.

Transition

19. The Registrar, in addition to any other powers under the Act, may collect any penalty imposed under this Directive as a civil debt owed to the Registrar.

Commencement

20. This Directive shall come into force twelve (12) months from the date of its publication in the *Gazzette*.

SCHEDULE (para 8(1))

Form

APPLICATION FOR A COMMODITIES EXCHANGE LICENCE

This section requests information about the proposed Commodity Exchange. Please fill in all spaces required.

1. Name (Please state name of the proposed commodity exchange):.....

   :.....

2. Legal Form: (Indicate the legal form of the institution e.g private limited company, public company etc: .....

3. Incorporation (Date and Place):.....

4. Head Office and Registered Address: (Proposed Head Office in Malawi):

   :.....

5. Business Place: (Proposed Place of Business in Malawi and Branches)

   :.....

6. Category (ies) of Commodity Exchange Licence applied for (Circle as appropriate)

   (*a*) Trading platform; (*b*) Clearing house; and (*c*) Warehouse receipt system.

7. Details of Shareholders and Directors. State the names, addresses, occupation, educational and professional qualifications, employment history, business interests and company directorships of the Individuals that will be directors and shareholders of the proposed commodity exchange. The Registrar requires a minimum of five directors for a proposed financial institution.

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8. Details of Senior Management (Provide names, addresses, educational and professional qualifications, employment history, any business interests and company directorships; Details of any experience in commodity exchange business may be included) :

:.....

:.....

9. Give details of the Company Bankers and details of bank accounts.

:.....

10. Please include the following information—

(*a*) organisation chart showing the designations and levels of authority of staff; and

(*b*) a tree diagram showing a group structure if the applicant belongs to a group.

11. Has the applicant, a Director or Principal officer of the applicant—

(*a*) been convicted of any offence or are there any proceedings now pending which may lead to a conviction for any offence involving fraud or dishonesty? If yes provide details :.....

(*b*) has judgment involving findings of fraud or other dishonesty, misrepresentation, breach of contract, breach of fiduciary duty or professional negligence been given against it or are there any proceedings now pending that may lead to such judgment or finding? If yes provide details :.....

(*c*) contravened any written law designed for protecting members of the public against financial loss due to dishonesty, incompetence or malpractice by a person concerned in the provision of financial services or the management of companies or against financial loss due to the conduct of insolvents? If yes provide details :.....

:.....

(*d*) have insolvency proceedings been commenced? If yes provide details .....

.....

(*e*) been subject to disciplinary proceedings or action by any professional or regulatory body? If yes provide details .....

.....

12. Please attach the following documents—

(*a*) certified copy of Certificate of Incorporation;

(*b*) copy of the Memorandum and Articles of Association;

(*c*) most recent audited financial statements; and

(*d*) cheque for K10,000,000.00 being application fees.

We the undersigned do hereby certify that—

I. All the information given in response to and in support of the questions in this application is true and correct to the best of our information, knowledge and belief.

2. The application is made in good faith with the purpose and intent that the affairs of the company will at all times be honestly conducted with good and sound business principles and in full compliance with applicable laws and regulations.

3. To the best of our knowledge and belief there are no other facts or information relevant to this application of which the Registrar should be made aware of and we hereby pledge to promptly inform the Registrar of any material change to this application which may arise while it is being considered.

Dated this ..... day of .....20.....

Sinature: ....

Name: .....

Director

Made this 3rd day of April, 2018.

D. KABAMBE, PhD
Registrar of Financial Institutions

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