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Act

No. 26 of 2010

I assent

PROF. BINGU WA MUTHARIKA
PRESIDENT

29TH JULY, 2010

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An Act to make provision for the supervision and regulation of financial institutions and for matters connected therewith and incidental thereto

ENACTED by the Parliament of Malawi as follows—

PART I—PRELIMINARY

Short title and application

1. This Act may be cited as the Financial Services Act, 2010, and shall apply in addition to the provisions of other financial services laws.

Interpretation

2. (1) In this Act, unless the context otherwise requires—

"administrative penalty" means a penalty that the Registrar may impose on any person who contravenes this Act or any financial services law;

"Appeals Committee" means the Financial Services Appeals Committee established by section 78;

"associate"—

(*a*) in relation to a body corporate, means a controlling party, a subsidiary or a related body corporate of the body corporate; and

(*b*) in relation to an individual, means—

(i) a close relation of the individual; or

(ii) a partner, or a close relation of a partner, of the individual;

"bank" means a bank as defined in the Banking Act, 2010;

Act No. 10 of 2010

"close relation" means spouse, brother, sister, parent, child, child of the spouse and the spouse of any of these relations;

"controlling party", means a controlling party as described in section 5;

"Court" means the High Court of Malawi;

"complaint resolution scheme" means a scheme of the type mentioned in *Division 3* of Part X;

"compromise or arrangement" means—

(*a*) a compromise or arrangement in relation to a prudentially regulated financial institution, being a compromise or arrangement of a kind described in the Companies Act; and

Cap. 46.03

(*b*) any other arrangement, however described, for the amalgamation of a prudentially regulated financial institution with one or more other bodies corporate or the reconstruction of a prudentially regulated financial institution;

"credit reference bureau" means credit reference bureau as defined in the Credit Reference Bureau Act, 2010; Act No. 18 of 2010

"custodian" means a person who, by way of business, holds property of other persons for safe-keeping;

"director", in relation to a body corporate, means each of the following—

(*a*) a person who is appointed to a position of director or alternate director of the body corporate;

(*b*) a person who, although not appointed to a position of director or alternate director, acts as a director of the body corporate;

(*c*) a person in accordance with whose instructions or wishes the directors of the body corporate are accustomed to act, provided that this paragraph shall not apply merely because the directors act on advice given by the person in the proper performance of functions attaching to the person's professional capacity, or the person's business relationship with the directors or the body corporate;

"examiner" means a person appointed as an examiner under section 41;

"executive officer" means an officer or manager at the most senior level of management of a financial institution, whether or not he is also a director, who effectively manages that financial institution;

"financial crime" means any of the following—

(*a*) a criminal offence, whether or not arising under a financial services law, that involves fraud or dishonesty relating to a financial institution;

(*b*) financing or facilitating a criminal offence, whether or not it arises under a financial services law, relating to a financial institution;

(*c*) dealing with the proceeds of a criminal offence, whether or not it arises under a financial services law and whether or not it relates to a financial institution;

(*d*) an offence against the Money Laundering, Proceeds of Serious Crime and Terrorist Financing Act, 2006, being an offence relating to a financial institution; or Act No. 9 of 2006

(*e*) financing of terrorist activity in any place;

"financial group" means either of the following—

(*a*) a group consisting of a prudentially regulated financial institution and each body corporate of which that institution is a controlling party;

(*b*) a group consisting of two or more prudentially regulated financial institutions that have a common controlling party and the bodies corporate of which any of those institutions is a controlling party;

"financial institution" means each of the following—

(*a*) a bank;

Act No. 20of 2010

(*b*) each of the following as defined in the Securities Act, 2010—

(i) a securities dealer;

(ii) a securities broker;

(iii) a securities representative;

(iv) an investment adviser;

(v) a stock exchange;

(vi) a securities depository;

(vii) a collective investment scheme;

(viii) an investment company;

(ix) a portfolio manager;

(x) a securities market intermediary;

Act No. 20 of 2010

(*c*) a person who provides securities registration services for the purposes of the Securities Act, 2010;

Act No. 9 of 2010

(*d*) each of the following as defined in the Insurance Act, 2010—

(i) an insurer;

(ii) a reinsurer;

(iii) an insurance broker;

(iv) an agent for brokers;

(v) an insurance agent;

(vi) a loss assessor or adjustor;

(vii) a claims settling agent;

Act No. 21 of 2010

(*e*) each of the following as defined in the Microfinance Act, 2010—

(i) a microcredit agency;

(ii) a microfinance institution;

Act No. ... of 2010

(*f*) each of the following as defined in the Financial Cooperatives Act, 2010—

(i) a primary SACCO;

(ii) a secondary SACCO;

(*g*) each of the following as defined in the Pension Act, 2010— Act No. . . of 2010

(i) a pension fund;

(ii) an umbrella fund;

(iii) an administrator of a pension fund;

(iv) an investment manager for a pension fund or an umbrella fund;

(v) a pension broker;

(*h*) a trustee of a collective investment scheme as defined in the Securities Act, 2010, or of a pension fund or an umbrella fund as defined in the Pension Act, 2010; Act No. 20 of 2010

(*i*) an actuary for an insurer as defined in the Insurance Act, 2010, or for a pension fund as defined in the Pension Act, 2010; Act No. 9 of 2010 Act No. . . of 2010

(*j*) a custodian;

(*k*) a friendly society;

(*l*) a medical aid fund;

(*m*) a person who, by way of business, in Malawi—

(i) buys or borrows foreign currency from,

(ii) sells or lends foreign currency to, or

(iii) exchanges foreign currency with,

a person other than the Reserve Bank;

(*n*) a person who, by way of business, transfers funds to foreign countries, or carries out activities to the same, or to a similar, effect;

(*o*) a holding company;

(*p*) a credit reference bureau, as defined in the Credit Reference Bureau Act, 2010; Act No. 18 of 2010

(*q*) a building society as defined in the Building Societies Act; Cap. 32:01

(*r*) finance or leasing company;

(*s*) the operator of a financial institution as defined in paragraphs (*a*) to (*r*) of this definition; and

(*t*) a person, business or fund declared by Registrar's directives or by another financial services laws to be a financial institution;

"financial services" means services relating to financial matters;

"financial services law" means any of the following—

(*a*) this Act;

Act No. 10 of 2010 (*b*) the Banking Act, 2010;

Cap. 32:01 (*c*) the Building Societies Act;

Act No. 9 of 2010 (*d*) the Insurance Act, 2010;

Act No. ... of 2010 (*e*) the Pension Act, 2010;

Act No. 20 of 2010 (*f*) the Securities Act, 2010;

Act No. 21 of 2010 (*g*) the Microfinance Act, 2010;

Act No. ... of 2010 (*h*) the Financial Cooperatives Act, 2010;

Cap. 44:02 (*i*) the Reserve Bank of Malawi Act;

Act No. 18 of 2010 (*j*) the Credit Reference Bureau Act, 2010;

(*k*) a law that declares itself to be a financial services law for the purposes of this definition;

(*l*) a law prescribed for the purposes of this definition; and includes regulations, the Registrar's directives and directions;

"financial year" means a period of twelve months starting on 1 January;

"finance or leasing company" means a body corporate that provides loans, advances or leasing products, but does not include a bank;

"friendly society" means an association established with no share capital for the purpose of aiding members of the association and their dependants, being an association that does not employ a person with the main occupation of canvassing for members of, or collecting contributions or subscriptions for, the association;

"holding company" means a body corporate the principal function of which is to act as controlling party for one or more prudentially regulated financial institutions;

"investigator" means a person appointed as an investigator under section 42;

"Levies Account" means the account established as required by section 16;

"licence" means a licence under this Act or under another financial services law;

"licensed" means licensed under this Act or under another financial services law;

"licensee" means a person licensed under this Act or under another financial services law;

"manager", in relation to a financial institution, includes a person, whether or not an employee, who exercises managerial functions in relation to the financial institution;

"medical aid fund" means a scheme that provides insurance or similar cover for financial or other assistance to persons in connexion with prescribed medical services;

"microcredit" means the provision of small loans to small or micro enterprises or to low income customers or as prescribed by the Registrar, 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 microhousing or microleasing products designed for microfinance customers;

"operate", in relation to a financial institution, includes to—

(*a*) establish or administer the financial institution; and

(*b*) exercise managerial functions in relation to the financial institution;

"prudentially regulated financial institution" means each of the following—

(*a*) a bank;

(*b*) a licensed microfinance institution;

(*c*) each of the following as defined in the Securities Act, 2010— Act No. 20 of 2010

(i) a securities exchange;

(ii) a securities depository;

(iii) a securities broker;

(*d*) each of the following as defined in the Insurance Act, 2010— Act No. 9 of 2010

(i) an insurer;

(ii) a reinsurer;

(*e*) each of the following as defined in the Financial Cooperatives Act, 2010— Act No. 9 of 2010

(i) a primary SACCO; and

(ii) a secondary SACCO;

Act No. . . . of 2010

(*f*) each of the following as defined in the Pension Act, 2010—

(i) a pension fund; and

(ii) an umbrella fund;

Act No. 20 of 2010

(*g*) a trustee of a collective investment scheme as defined in the Securities Act, 2010, or of a pension fund or an umbrella fund as defined in the Pension Act, 2010;

Act No. . . . of 2010

(*h*) a custodian;

(*i*) a medical aid fund;

(*j*) a friendly society;

(*k*) a holding company;

Cap. 32:01

(*l*) a building society as defined in the Building Societies Act;

Act No. 18 of 2010

(*m*) a credit reference bureau as defined in the Credit Reference Bureau Act, 2010;

(*n*) a financial institution declared by Registrar's directives or by another financial services law to be a prudentially regulated financial institution; and

(*o*) the operator of a financial institution as defined in paragraphs (*a*) to (*m*) of this definition;

"records" of a financial institution, means documents and information used in the ordinary course of the business of the institution, whether in written form or kept on microfilm, magnetic tape or any other form of mechanical or electronic medium;

"Registrar's directive" means a directive issued under this Act or another financial services law;

"registered" means registered under this Act or under another financial services law;

Cap. 44:02

"Reserve Bank" means the Reserve Bank of Malawi established under the Reserve Bank of Malawi Act;

Act No. . . . of 2010

"savings and credit cooperative (SACCO)" means a cooperative, as defined in the Financial Cooperatives Act, 2010, whose principle object includes accepting deposits, advancing of loans, and providing other financial services to or for its members and is a licensee;

Act No. 20 of 2010

"securities" bears the same meaning as in the Securities Act, 2010;

"self-regulatory organization" means a body declared to be a self-regulatory organization under section 45;

"self-regulatory organization arrangements" means arrangements described in section 45;

"share", in relation to a body corporate, means a share in the capital or stock of the body corporate;

"statutory manager", for a prudentially regulated financial institution, means a person appointed as statutory manager for the institution under section 68s;

"supervisory expenditure" means expenditure in connexion with the supervisory functions of the Registrar;

"supervisory functions"—

(*a*) in relation to the Registrar, means the functions of the Registrar under or in connexion with this Act or another financial services law; and

(*b*) in relation to a self-regulatory organization, means the functions of the organization in respect of which arrangements described in section 45 are in force;

"supervisory levy" means a levy imposed by regulations made for the purposes of section 13.

(2) A reference in this Act or in another financial services law to operating or conducting a financial institution includes a reference to operating the institution by providing financial services to a person outside Malawi; but this subsection does not limit the provision of this Act or the other financial services law in which the expression is used.

Principal object of this Act

3. The principal object of this Act is to provide for the regulation and supervision of financial institutions in Malawi to foster—

(*a*) the safety and soundness of financial institutions;

(*b*) the highest standards of conduct of business by financial institutions;

(*c*) the fairness, efficiency and orderliness of the financial sector;

(*d*) the stability of the financial system; and

(*e*) the reduction and deterrence of financial crime in financial institutions.

Subsidiaries, holding companies and related bodies Cap. 46:03

4. For the purposes of a financial services law, the question whether a body corporate is a subsidiary, a holding company or a related body corporate of another body corporate shall be determined in accordance with the Companies Act as if both bodies corporate were companies for the purposes of that Act.

Controlling parties of financial institutions

5.—(1) For the purposes of a financial services law, a person is a controlling party of another person (the other person otherwise referred to as "the relevant person" in this section) if the first-mentioned person is in a position to control or exert significant influence over the business or financial operations of the relevant person, whether or not that control is exercised.

(2) Without limiting subsection (1), each of the following is also a controlling party of a person—

(*a*) if the relevant person is a body corporate—

(i) a director or member of the governing body of the body corporate;

(ii) a person that has the power to appoint a person to be a director or member of the governing body of the body corporate;

(iii) a person whose consent is needed for the appointment of a person to a director of the body corporate;

(iv) a person that holds at least ten per cent (10%) of the shares of the body corporate;

(v) a person that has the power to control at least ten per cent (10%) of the voting rights attached to shares or other securities of the body corporate;

(vi) a person that holds rights in relation to the body corporate that, if exercised, would result in the person's holding at least ten per cent (10%) of the shares of the body corporate or having the power to control at least ten per cent (10%) of the voting rights attached to shares or other securities of the body corporate;

(*b*) if the relevant person is a subsidiary of another person, each person that is a controlling party of the other body;

(*c*) if the relevant person is a prudentially regulated financial institution, a person declared by the Registrar under subsection (5) to be a controlling party of the institution,

provided that a Minister, the Registrar or the Reserve Bank, in that capacity, shall not be a controlling party of a relevant person in terms of this subsection.

(3) The provisions of subsection (2) are separate and independent, and none of those provisions affects the interpretation of any other provisions of this section.

(4) Registrar's directives may modify subsection (2) (*a*) (iv), (v) or (vi) by varying the percentage, either generally or in a class of cases specified in the directives.

(5) The Registrar may declare in writing that a specified person is or is not a controlling party of a prudentially regulated financial institution.

(6) The Registrar shall make a declaration under subsection (5) that a person is a controlling party of a prudentially regulated financial institution unless—

(*a*) the person has been given notice of the proposed declaration and a reasonable opportunity to make representations to the Registrar about the matter; and

(*b*) having regard to any such representations, the Registrar is satisfied that the person is in a position to control or exert significant influence over the business or financial operations of the institution.

References to obligations where financial institution is not a legal person

6. Where this Act or another financial services law imposes an obligation on or in respect of a financial institution that is not a legal person, such as a trust, the obligation shall be deemed to be imposed on or with respect to the person who operates the financial institution, such as, in the case of a trust, the trustee.

Financial services laws bind Government

7. Except to the extent specified in a financial services law, this Act and the other financial services laws bind the Republic and the Government.

PART II—THE RESERVE BANK AND THE REGISTRAR

Division 1—Registrar to Regulate and Supervise Financial Institutions

Registrar of Financial Institutions

8.—(1) There is hereby appointed a Registrar of Financial Institutions for the purposes of this Act and all financial services laws, who shall be the regulatory and supervisory authority for the financial services industry.

(2) The Governor of the Reserve Bank shall be the Registrar.

(3) The Registrar shall be supported by adequate structures and employees with appropriate skills to enable him perform the duties of the Registrar.

(4) Without limiting the Registrar's powers to create appropriate structures, the Registrar shall establish departments to supervise the operations of banking, insurance, pension benefit fund schemes, securities market entities, and any other area deemed necessary by the Registrar for the better carrying out of the requirements of this Act.

Additional function of Reserve Bank of Malawi Cap 44:02

9.—(1) In addition to the functions it has under the Reserve Bank of Malawi Act, the Reserve Bank has the function of supporting the Registrar in carrying out his functions under this Act and other financial services laws.

(2) In addition to the functions of the Registrar under this Act and the other financial services laws, the Registrar has the function of advising the Minister on matters related to financial institutions and financial services, whether of his own accord or at the request of the Minister.

Registrar's objectives

10. The Registrar shall perform his supervisory functions with a view to achieving—

(*a*) the safety and soundness of prudentially regulated financial institutions;

(*b*) the highest standards of conduct of business by financial institutions;

(*c*) the fairness, efficiency and orderliness of the financial sector;

(*d*) the stability of the financial system; and

(*e*) the reduction and deterrence of financial crime in financial institutions.

Registrar to report financially unsound financial institutions

11. If the Registrar believes that—

(*a*) a prudentially regulated financial institution is financially unsound; and

(*b*) the situation may impair the stability of the financial system or the safety and soundness of financial institutions generally,

the Registrar shall report the matter to the Minister and shall take such actions as the Registrar is authorized to take under any financial services law.

Division 2—Financial and accountability provisions

Funding for supervisory functions

12.—(1) The following funds may be applied to the Registrar's supervisory expenditure—

(*a*) supervisory levies imposed on financial institutions under section 13, and interest in respect of unpaid supervisory levies;

(*b*) money raised as fees, charges and fines, and interest from unpaid fees and charges, in respect of services rendered by the Registrar in performing his supervisory functions; and

(*c*) money otherwise paid in relation to the Registrar's supervisory functions.

(2) The funds referred to in subsection (1) (*a*) and (*c*) shall not be applied to any other purpose.

Supervisory levies to be prescribed

13.—(1) The Minister may, on recommendation of the Registrar, make regulations for, or with respect to, the imposition and collection of supervisory levies.

(2) The regulations shall set out the basis of calculation of supervisory levies for a financial year.

(3) Different bases of calculation, and different rates of supervisory levy, may be prescribed for different classes of financial institutions.

(4) The regulations may include provision for imposing interest on unpaid supervisory levy, and for imposing penalty levy for cases where a miss-statement or other non-compliance by a financial institution leads to an under-collection of supervisory levy.

Fees and charges to be prescribed

14.—(1) The Registrar may, through a Registrar's directive, impose fees and charges for licences and renewals of licences, and for other services provided by the Registrar in performing his supervisory functions.

(2) Different rates of fees and charges may be imposed for different classes of financial services, and different classes of licence or service.

Supervisory levies debt due to Registrar

15. An amount of a supervisory levy, penalty levy, fee or charge is a debt due to the Registrar and may be recovered by action in a court of competent jurisdiction.

Levies Account

16.—(1) The Registrar shall establish an account, to be called the Levies Account.

(2) The following shall be paid into the Levies Account—

(*a*) money paid to the Registrar as supervisory levies, penalty levies, fees or charges; and

(*b*) money paid to the Registrar in relation to the Registrar's supervisory functions.

Investment of Levies Account surplus

17. Money standing to the credit of the Levies Account but not immediately required may be invested as the Registrar may deem appropriate.

Registrar's annual report

18. The Registrar shall, within six months of the end of each calendar year submit an annual report to the Minister and a committee of Parliament responsible for financial matters, which shall include—

(*a*) details of the sources and application of supervisory funds for the year to which the report relates;

(*b*) an account of the performance of the Malawi financial sector over the year to which the report relates and of the way in which the Registrar has performed his supervisory functions in that year;

(*c*) an account of the Registrar's proposed supervisory activities and priorities for the year after the year to which the report relates; and

(*d*) details of any matter or circumstance that has arisen since the end of the year to which the report relates that has significantly affected, or may significantly affect, the performance by the Registrar of his supervisory functions in future financial years.

Division 3—Other Provisions

Arrangements with other agencies

19.—(1) In carrying out his supervisory functions, the Registrar shall consult, and may enter into arrangements with, other agencies of the Government that have functions related to the financial system, the regulation or supervision of financial services, taxation or social security.

(2) Without limiting what arrangements under subsection (1) may deal with, those arrangements may make provision with respect to—

(*a*) the exchange of information between the Registrar and the other agencies, with due regard for the need to protect appropriately personal information about individuals;

(*b*) consultation between the Registrar and the other agencies;

(*c*) enforcement of financial services laws and assistance with enforcement of other laws; and

(*d*) the conduct of examinations and investigations on a joint basis.

(3) The Registrar may enter into similar arrangements with organizations outside Malawi that have responsibilities under law for the regulation and supervision of financial institutions or similar institutions.

Delegation

20.—(1) The Registrar may delegate any of his supervisory functions, other than this power of delegation, to—

(*a*) a director or employee of the Reserve Bank;

(*b*) an examiner;

(*c*) an investigator; or

(*d*) a self-regulatory organization.

(2) A delegation under this section may be subject to conditions specified in the instrument of delegation.

(3) In performing or exercising a delegated function or power, the delegate shall comply with directions given by the person delegating the function or power.

(4) A delegation may be varied or revoked at will and does not prevent the Registrar from exercising the delegated power or performing the delegated function.

PART III—LICENSING AND REGISTRATION OF FINANCIAL INSTITUTIONS

Division 1—Licensing and Registration Requirements

Financial institutions to be licensed or registered

21.—(1) A person shall not operate, as a business, a financial institution unless—

(*a*) the financial institution is licensed or registered under this Act; and

(*b*) the financial institution is complying with the terms of the licence, including any conditions to which the licence is subject.

(2) Any person who contravenes subsection (1) commits an offence and shall, on conviction, be liable to a fine of ten million Kwacha (K10,000,000) and to imprisonment for four years.

(3) In the case of a continued contravention by a person convicted under subsection (1), that person shall be guilty of a further offence and shall be liable to a fine of fifty thousand Kwacha (K50,000) for every day on which the contravention continues.

(4) Subsection (1) shall not apply in relation to a financial institution if another financial services law requires the institution to be licensed or registered under that law.

(5) The Registrar may, by directives not inconsistent with this Act or another financial services law, impose requirements with respect to licensing or registration of financial institutions.

Division 2—Licensing and Registration Procedures

Application of the *Division*

22. This *Division* shall apply in relation to a financial institution if, by or under this Act or another financial services law, there is a requirement for the financial institution to be licensed or registered.

Licensing and registration applications and procedure

23.—(1) The Registrar may, on application—

(*a*) grant a financial institution a licence;

(*b*) register a financial institution; or

(*c*) grant a renewal of such a licence or registration.

(2) An application shall be—

(*a*) made by the financial institution concerned;

(*b*) made to the Registrar as prescribed;

(*c*) accompanied by such documents, statements and other information as are prescribed; and

(*d*) accompanied by the prescribed fee, if any.

(3) The Registrar may require an applicant to provide further information in connexion with the application, and the Registrar need not deal further with that application until the requirement is satisfied.

(4) The Registrar shall not grant an application for a licence or registration unless satisfied that—

(*a*) the documents submitted by the applicant are valid and the information is not questionable;

(*b*) the business to be carried out by the financial institution will be conducted with integrity, prudence and professional skill;

(*c*) the nature and scope of the proposed operations shall meet the needs and convenience of the community or sector to be served;

(*d*) the financial institution has and will maintain a sound financial position and not cause or promote instability in the financial system; and

(*e*) the financial institution otherwise meets and will continue to meet the requirements of the relevant financial services laws.

(5) A financial services law may prescribe additional criteria for granting licences or procedures for registration.

(6) The Registrar may grant an application for a licence or registration subject to conditions specified in the licence or certificate of registration.

(7) Any person who knowingly or recklessly furnishes any document which is false or misleading in a material particular in connexion with an application for a licence or registration commits an offence and shall, on conviction, be liable to a fine of ten million Kwacha (K10,000,000) and to imprisonment for four years.

Notification of a breach of licence or registration conditions

24. A licensed or registered financial institution shall, as soon as practicable after it becomes aware that a condition to which the licence or registration is subject has not been complied with, notify the Registrar of the matter, and give the Registrar such further information about the matter as the Registrar requires.

Issue and publication of licence

25.—(1) If the Registrar grants an application for a licence, he shall issue the licence to the applicant.

(2) If the Registrar grants an application for registration, he shall issue a certificate of registration to the applicant.

(3) The Registrar shall publish a notice of the grant of a licence or a registration in the *Gazette*.

(4) A licensed or registered financial institution shall publicly and prominently display a copy of its licence at all its places of business in Malawi.

(5) A licensed or registered financial institution that contravenes subsection (4) shall be liable to an administrative penalty.

Variation, suspension and revocation of licences and registrations on request

26.—(1) The Registrar may, on written request by a licensed or registered financial institution, or on his own initiative, by notice to the institution—

(*a*) vary the conditions of the licence or registration, including by imposing additional conditions;

(*b*) suspend the licence or registration for the period specified in the notice; or

(*c*) revoke the licence or registration.

(2) The Registrar shall cause notice of the suspension or revocation of a licence or registration under this section to be published in the *Gazette*, and may otherwise publish the notice, as he sees fit.

Variation, suspension and revocation of licences and registrations

27.—(1) This section applies if it appears to the Registrar that a licensed or registered financial institution—

(*a*) is not carrying on, or is likely not to carry on, the business in respect of which it is licensed or registered with integrity, prudence, professional skill or sound business principles;

(*b*) is in an unsound financial position or is likely to be in an unsound financial position;

(*c*) is causing or promoting instability in the financial system, or is likely to do so;

(*d*) is not complying or is likely not to comply with a financial services law;

(*e*) is or is likely to be involved in financial crime;

(*f*) has supplied false information in the application;

(*g*) has failed to commence financial services business under the licence within twelve months after the grant of the licence;

(*h*) has ceased to conduct financial services business in Malawi;

(*i*) has failed to comply with a condition to which the licence is subject;

(*j*) in the opinion of the Registrar, the financial institution is conducting business in a manner that is detrimental to consumers or the general public;

(*k*) in the opinion of the Registrar, the financial institution has engaged in serious deception of the Registrar or the general public in respect of its financial condition, ownership, management, operations or other facts material to its business; or

(*l*) has gone into liquidation, has wound-up or dissolved.

(2) If this section applies, the Registrar may, by notice to the financial institution—

(*a*) vary the licence or registration—

(i) by restricting the activities that can be carried on under the licence or registration; or

(ii) by imposing further conditions on the licence or registration;

(*b*) suspend the licence or registration for the period specified in the notice; or

(*c*) revoke the licence or registration.

(3) A financial services law may prescribe additional circumstances in which a licence or registration may be varied, suspended or revoked.

(4) The Registrar shall not vary, suspend or revoke a financial institution's licence or registration unless—

(*a*) the Registrar has given the institution written notice of the proposed action, setting out the reasons therefor and has given the institution twenty-one days within which to make representations to the Registrar on the matter; and

(*b*) the Registrar has taken into account any representations made by or for the institution within that period.

(5) The Registrar may suspend a financial institution's licence or registration without giving a notice under subsection (4) (*a*), but only if satisfied on reasonable grounds that it is necessary to do so to prevent or mitigate damage to the interests of financial institutions, clients of financial institutions or the financial system. In such a case the Registrar shall, as soon as practicable after the suspension—

(*a*) give the institution written notice of the suspension, setting out the reasons therefor and giving the institution twenty-one days within which to make representations to the Registrar on the matter;

(*b*) having considered any representations made by or for the institution, determine whether the suspension should be confirmed.

(6) The Registrar shall cause notice of the suspension or revocation of a licence under this section to be published in the *Gazette*, and may otherwise publish the notice, as he sees fit.

Exemptions from licensing and registration

28.—(1) The Registrar may, by notice published in the *Gazette*—

(*a*) exempt a person wholly or partly, as specified in the notice, from the application of this Part; or

(*b*) declare that this Part applies in relation to a person as modified in the declaration.

(2) An exemption or declaration may—

(*a*) apply generally or to a specified case or class of cases; and

(*b*) apply unconditionally or subject to specified conditions.

PART IV—CORPORATE GOVERNANCE

Board of directors

29.—(1) Without limiting the powers of the Registrar under this Act to issue directives relating to governance of prudentially regulated financial institutions, every prudentially regulated financial institution shall have a board of directors in accordance with the provisions of the Companies Act which shall be responsible for the management or supervision of the management of the business and affairs of the prudentially regulated financial institution.

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(2) The appointment of the directors shall be subject to the approval of the Registrar.

(3) The board of directors shall be headed by a Chairperson who shall be a non-executive director.

Appointment of executive officers and managers

30.—(1) The appointment of all executive officers and managers shall be subject to approval of the Registrar.

(2) All executive officers and managers of a prudentially regulated financial institution shall be resident in Malawi after their appointment.

Removal of executive officers or managers

31.—(1) The Registrar may disqualify and require a financial institution to remove from office a person holding the position of executive officer or manager of a prudentially regulated financial institution if the Registrar is of the opinion that on the basis of competence, business record or character, the person holding the position of executive officer and manager is unsuitable to discharge the duties and responsibilities associated with the position.

(2) The Registrar shall notify the prudentially regulated financial institution in writing, his intention to take the disqualification and removal action against the prudentially regulated financial

institution's executive officer or manager and give the prudentially regulated financial institution fifteen days to make representations, prior to the finalization of the Registrar's decision.

Prohibition of self-dealing

32. Without limiting the Registrar's power under this Act to issue directives, a prudentially regulated financial institution shall not, directly or indirectly, enter into any transaction with a related party except where the value of the transaction is normal or immaterial, based on the criteria established by the prudentially regulated financial institution and approved by the Registrar.

Related party

33.—(1) A person is a related party of a prudentially regulated financial institution if the person—

(*a*) directly or indirectly owns, controls any class of voting securities of a financial institution of any company that controls the financial institution;

(*b*) is a director or officer of the entity that controls the prudentially regulated financial institution;

(*c*) is a close relation of the person in (*a*) or (*b*) above;

(*d*) is an entity in which a director or officer of the prudentially regulated financial institution or person has control of; or

(*e*) is an entity in which a close relation of a person described in (*d*) has control.

(2) The Registrar may designate any person or any entity in which he has a significant investment, as a related party of the prudentially regulated financial institution where such person or entity has direct or indirect interest in or relationship with the prudentially regulated financial institution that might reasonably be expected to affect the exercise of the best judgement of the prudentially regulated financial institution in respect of a transaction.

PART V—SUPERVISION AND REGULATION OF FINANCIAL INSTITUTIONS

Division 1—Registrar's directives

Registrar's directives

34.—(1) The Registrar may issue directives with respect to either of the following—

(*a*) the conduct of the affairs of financial institutions, or of the affairs of financial groups, with a view to ensuring that the financial institutions and groups maintain a sound financial position and do not cause or promote instability in the financial system; or

(*b*) the conduct of the affairs of financial institutions and financial groups with integrity, prudence and professional skill.

(2) Without limiting the power of the Registrar to issue Registrar's directives, the Registrar's directives may make provision with respect to any of the following—

(*a*) fit and proper person requirements for controlling parties, directors, executive officers, managers, auditors and actuaries of financial institutions;

(*b*) the governance of financial institutions and financial groups;

(*c*) capital and liquidity requirements for financial institutions and financial groups;

(*d*) valuation requirements and methods for financial institutions and financial groups;

(*e*) standards of business conduct for financial institutions;

(*f*) requirements, including requirements to provide information, imposed on controlling parties of financial institutions;

(*g*) the use of financial instruments, including derivatives, by financial institutions and financial groups;

(*h*) the use of off balance sheet transactions by financial institutions and financial groups;

(*i*) insurance of financial institutions and, in the case of insurers, re-insurance arrangements;

(*j*) outsourcing by financial institutions;

(*k*) record keeping;

(*l*) preparation and scope of financial, audit and actuarial reports in relation to financial institutions and financial groups;

(*m*) disclosure of information to customers of financial institutions;

(*n*) provision of information about financial institutions and financial groups to the Registrar;

(*o*) the financial position of financial institutions and financial groups;

(*p*) the adequacy of resources, including human resources, technical resources, and financial resources, of, or available to, financial institutions and financial groups;

(*q*) funding and solvency of financial institutions and financial groups;

(*r*) winding-up of prudentially regulated financial institutions;

(*s*) actuarial standards and requirements for financial institutions and financial groups:

(*t*) how prudentially regulated financial institutions manage risks associated with their businesses:

(*u*) requirements or limitations of prudentially regulated financial institutions pertaining to their assets and liabilities:

(*v*) requirements relating to the manner in which audits and actuarial valuations of financial institutions are conducted:

(*w*) requirements relating to the interaction between the Registrar and auditors and actuaries of financial institutions:

(*x*) requirements relating to amalgamation and transfer of business of prudentially regulated financial institutions:

(*y*) requirements relating to the deterrence of financial crime by financial institutions:

(*z*) transactions between a prudentially regulated financial institution and a related party of a prudentially regulated financial institution, including specifying rules and maximum limits for exposure of the prudentially regulated financial institution to a related party:

(*aa*) requirements relating to handling of abandoned items by financial institutions:

(*bb*) requirements relating to the use of rating agencies by financial institutions:

(*cc*) requirements on pricing and other charges including specifying maximum interest spreads and charges by financial institutions; or

(*dd*) requirements aimed at protecting consumers of financial services from exploitation practices by financial institutions.

(3) A specification in this Act or another financial services law of a matter in respect of which the Registrar may issue directives shall not limit, by implication, the power of the Registrar to issue any other directives.

(4) The Registrar shall not issue a Registrar's directive unless—

(*a*) either—

(i) a draft of the directive has been published in a way that the Registrar considers will bring it to the attention of financial institutions to which it will apply;

(ii) those institutions have had at least twenty-one days after that publication to make representations about the matter to the Registrar; and

(iii) the Registrar had regard to those representations in deciding whether to issue the directive; or

(*b*) the Registrar considers on reasonable grounds that it is necessary to issue the directive urgently.

(5) Registrar's directives issued under subsection (4) (*b*) shall cease to have effect at the end of ninety days after they come into force, provided that this subsection shall not prevent the Registrar from acting under that paragraph again.

(6) Subsections (4) and (5) shall apply in respect of amendments to Registrar's directives.

(7) A Registrar's directive shall come into force—

(*a*) on the day on which it is published in the *Gazette*; or

(*b*) if the directive provides that it shall come into force on a later day, on that later day.

(8) Any person who refuses or fails to comply with Registrar's directives that are applicable to him, shall be liable to an administrative penalty.

Division 2 Information, Reports, etc.

Directions to licensed or registered institutions to provide information

35. The Registrar may at any time give a written direction to—

(*a*) a licensed or registered financial institution;

(*b*) a director or executive officer or manager of, or an auditor of or actuary for, or any other person participating in the business or operations of a licensed or registered financial institution, regardless of the position; or

(*c*) a related party of a licensed or registered financial institution, requiring it to give information to the Registrar or to publish such information as directed by the Registrar relevant to the performance of the Registrar's supervisory functions.

Requirements to provide information

36.—(1) The Registrar may issue Registrar's directives that impose requirements on any of the following—

(*a*) a financial institution;

(*b*) an associate of a financial institution;

(*c*) a person who is or has at any time been a director or manager or any other person who participates or participated in the business or operations of a financial institution;

(*d*) a person who is or has at any time been an auditor of, or actuary for, a financial institution;

(*e*) in the case of a pension fund or an insurer, an actuary or auditor for the fund or the insurer;

(*f*) a controlling party of a financial institution;

(*g*) a related party of a financial institution,

to make reports to the Registrar, and to give information or documents to the Registrar, in connexion with the Registrar's supervisory functions.

(2) Without limiting subsection (1), the directives may do any of the following—

(*a*) require the lodgement of periodic and other returns at such times and such forms as may be determined;

(*b*) require changes in management and control of financial institutions to be reported to the Registrar;

(*c*) require financial difficulties or suspected financial difficulties in financial institutions to be reported to the Registrar;

(*d*) require that contraventions or suspected contraventions of financial services laws in relation to financial institutions to be reported to the Registrar.

(3) Any person who refuses or fails to comply with directives made for the purposes of this section shall be liable to an administrative penalty.

(4) A person who reports to the Registrar—

(*a*) financial difficulties or suspected financial difficulties in a financial institution;

(*b*) a breach or suspected breach of a financial services law in relation to a financial institution;

(*c*) the involvement or the suspected involvement of a financial institution in financial crime,

whether or not the report is required by law, shall not be liable for damages or other sanction in relation to a loss caused by the report unless it is established that the report was made in bad faith.

(5) Any person who subjects another person (in this subsection called a "reporter") to any prejudice in his employment, or penalizes a reporter in any way, on the ground that the reporter made a report of a kind mentioned in subsection (4), even if the report was not required by law, commits an offence and shall, on conviction, be liable to a fine of five hundred thousand Kwacha (K500,000) and to two years imprisonment, and may be liable to the reporter for damages.

Audited statements

37.—(1) A prudentially regulated financial institution shall, within three months after the close of its financial year, submit to the Registrar a copy of its audited financial statements in a prescribed format together with the report of the external auditor appointed in accordance with section 56.

(2) Unless exempted by the Registrar, a copy of the balance sheet and profit and loss account submitted under subsection (1) shall, within four months after the close of its financial year be published in at least two local news papers of wide circulation.

(3) A prudentially regulated financial institution shall exhibit, in a conspicuous place in all its places of business, a copy of the audited financial statements together with the external auditors report.

Exchange of information

38.—(1) Where a financial, monetary or regulatory authority or any other authority requests the Registrar in writing to provide it with assistance in connexion with the exercise of its functions, the Registrar may disclose information, or provide documentation in its possession to the financial, monetary or regulatory authority or any other authority, as the case my be, in accordance with this section.

(2) The Registrar shall not disclose information or provide documentation to the financial, monetary or regulatory authority or any other authority, as the case may be, under subsection (1) unless it is satisfied that the information or documentation is reasonably required by the financial, monetary or regulatory authority or any other authority, as the case may be, for the purposes of fulfilling its functions.

(3) In deciding whether or not to disclose information or provide documentation to the financial, monetary or regulatory authority or any other authority, as the case may be, under subsection (1), the Registrar may take into account—

(*a*) if the authority is from a foreign country, whether reciprocal treatment would be given to the Registrar by the foreign authority;

(*b*) whether the request involves a breach of law;

(*c*) the seriousness of the case and its importance to persons in Malawi; and

(*d*) whether it is otherwise appropriate in the public interest to provide the assistance sought.

(4) For the purposes of subsection (3) (*a*), the Registrar may request the financial, monetary or regulatory authority or any other authority, as the case may be, making the request to give a written undertaking, in the form that the Registrar may require to provide corresponding assistance to the Registrar.

(5) Where the financial, monetary or regulatory authority or any other authority, as the case may be, fails to comply with a requirement made under subsection (4), the Registrar may refuse to provide assistance sought by the financial, monetary or regulatory authority or any other authority, as the case may be.

(6) The Registrar shall not exercise its powers under subsection (1) unless it is satisfied that the information or documentation provided to the financial, monetary or regulatory authority or any other authority, as the case may be, will be subject to safeguards.

Division 3 Directions

Directions to licensed or registered financial institutions

39.—(1) If it appears to the Registrar that—

(*a*) a licensed or registered financial institution—

(i) has contravened or is likely to contravene this Act or another financial services law;

(ii) is conducting its affairs in an improper or in a financially unsound way;

(iii) is causing or promoting instability in the financial system, or is likely to do so;

(iv) is or is likely to be involved in financial crime;

(v) has refused to submit to inspection and examination; or

(vi) has provided false information;

(*b*) a direction is necessary to protect the interests of clients of a licensed or registered financial institution,

the Registrar may give the financial institution a written direction as to take an action specified in the direction about the way in which the affairs of the institution are to be conducted, being an action the Registrar considers necessary or desirable to deal with the case in the interests of the institution, the clients of the financial institution or the financial system.

(2) Without limiting subsection (1), a direction may require a financial institution to do any of the following—

(*a*) to comply with the whole or a specified part of a financial services law;

(*b*) to cause a person, such as an auditor, chosen by the Registrar to audit the records of the institution, at the expense of the institution, and give a report to the Registrar;

(*c*) to ensure that a specified director or employee of the institution does not take part in the management or conduct of the business of the institution except as permitted by the Registrar;

(*d*) to appoint a specified person to a specified office, including the office of director, of the institution for a period specified in the direction;

(*e*) to remove an auditor or actuary of the institution from office;

(*f*) not to borrow a specified amount, or any amount;

(*g*) not to pay a dividend;

(*h*) not to pay or transfer an amount to a person, or create an obligation, contingent or otherwise, to do so;

(*i*) not to undertake a financial obligation, contingent or otherwise, on behalf of another person;

(*j*) initiate a cease and desist order, of either temporary or indefinite duration requiring the prudentially regulated financial institution and its management to—

(i) stop the improper or unacceptable practice;

(ii) put a limit to the business activity;

(iii) stop any declaration of dividends; or

(iv) correct or remedy the impact of any impermissible action;

(*k*) remove or suspend any person, including a director, from the management of or participation in the affairs of the prudentially regulated financial institution;

(*l*) impose penalties on the offending member of the management to be paid personally;

(*m*) require the prudentially regulated financial institution to reconstitute its board of directors within such period as shall be specified;

(*n*) withhold approvals on establishment of new branches;

(*o*) require the prudentially regulated financial institution to add such capital as may be specified; or

(*p*) impose any other sanctions as the Registrar may deem appropriate in the circumstances.

(3) A direction not to pay or transfer an amount does not prevent the payment or transfer of money under an order of a court or a process of execution.

(4) A direction may specify the time by which, or period during which, it is to be complied with.

(5) Prior to giving a direction under subsection (1), the Registrar shall give the financial institution concerned written notice of the proposed action—

(*a*) specifying the grounds for it and the facts supporting those grounds; and

(*b*) allowing for the financial institution and the person to ask for a hearing, to be held in private, on the matter within twenty-one days of the notice.

(6) The Registrar, may, upon representations made to it, modify or uphold any direction issued under this section and upon such modification or revocation impose such condition as are necessary.

(7) A financial institution that has been given a direction under this section shall comply with the direction despite anything in its memorandum or articles of association or regulations, and despite any contract or arrangement to which it is a party.

(8) The Registrar may revoke a direction at any time, by written notice to the financial institution concerned.

(9) Any person to whom a direction under subsection (1) has been given who fails or refuses to comply with the direction, shall be liable to an administrative fine.

Directions not ground for terminating contracts or accelerating debt, etc

40.—(1) A direction under section 39 shall not be a ground on which a person may terminate, repudiate or cancel a contract with the financial institution, accelerate a debt under such a contract, or close out a transaction with the institution, despite any provision to the contrary in any document.

(2) The Court may, on application by a party to a contract mentioned in subsection (1), make an order relating to the effect of the direction on the contract.

(3) Without limiting what an order under subsection (2) may do, the order may require the financial institution—

(*a*) to perform its obligations under the contract; or

(*b*) to compensate the applicant, as specified in the order,

provided however that the order may not require a person to take action that would contravene the direction.

Division 4—Examinations and Investigations

Examiners

41.—(1) The Registrar may, by instrument in writing, appoint a person to be an examiner.

(2) An examiner may at any time examine the affairs or any part of the affairs of a person who is, or at any time has been, a licensed or registered financial institution, to check whether the institution—

(*a*) is complying or has complied with the financial services laws and the conditions of its licence or registration; or

(*b*) satisfies or satisfied criteria or standards set out in, or made under, a financial services law; or

(*c*) is or has been involved in financial crime.

(3) For the purpose of such an examination—

(*a*) the examiner may, at any reasonable times, enter any premises used or apparently used by the financial institution for business purposes including business premises of an associate or any person who controls a financial institution to inspect and make copies, or take extracts from, any relevant records, documents or things in those premises; or

(*b*) require in writing, any associate or a person who controls the financial institution to provide the Registrar with information or documents as may be necessary, including financial statements and other financial records of the associate or person who controls the financial institution within a specified period.

(4) A licensed or registered financial institution, and its directors, executive officers, managers and employees, shall afford an examiner full and free access to the premises, records and documents of the institution as are relevant to the inspection, and shall permit the examiner to interview any officer, director, employee, agent, consultant, auditor, actuary or lawyer for the financial institution.

(5) Any person who, without reasonable excuse, contravenes subsection (4) commits an offence and shall be liable, in the case of—

(*a*) a licensed or registered financial institution, to an administrative penalty; or

(*b*) other entities, upon conviction, to five million Kwacha (K5,000,000) and to imprisonment for two years.

(6) Any controlling shareholder or director of a financial institution who—

(*a*) being a natural person fails, refuses, omits or neglects to provide information requested under subsection (3) and or (4) of this section or is party to a failure, refusal, omission, or neglect;

(*b*) being a company, fails, refuses, omits or neglects to provide information requested under subsection (3) and or (4) of this section or is party to a failure, refusal, omission, or neglect,

shall cease to be a fit and proper person and shall not remain a controlling shareholder or director in a financial institution.

Investigators

42.—(1) Where the Registrar has reasonable grounds to believe that—

(*a*) an offence under a financial services law has been or may have been committed;

(*b*) a financial institution is not complying with, or has not complied with, a financial services law; or

(*c*) a financial institution is or has been involved in financial crime,

the Registrar may, by instrument in writing, appoint a person to be an investigator in relation to the matter.

(2) In this section—

"relevant evidence", in relation to an investigation into a matter being carried out by an investigator, means anything that may afford evidence relevant to the matter;

"relevant person", in relation to an investigation into a matter being carried out by an investigator, means a person who the investigator has reasonable grounds to believe has relevant evidence in his possession or under his control.

(3) For the purpose of investigating the matter, the investigator may do any of the following—

(*a*) subject to subsection (7), enter any premises used or apparently used by the financial institution or a relevant person for business purposes, at any reasonable time, and search for any record, document or other thing that the investigator considers may be relevant to the investigation;

(*b*) inspect and make copies, or take extracts from, and where necessary in an appropriate case to take possession of, such records, documents or things;

(*c*) give a direction, orally or in writing, to any or all of the following—

(i) the financial institution;

(ii) a relevant person;

(iii) a director or employee of either the financial institution or a relevant person,

to produce the relevant evidence to the investigator as specified in the direction and to submit to an investigation or interrogation;

(*d*) give a direction, oral or written, to a relevant person to do any of the following—

(i) produce to the investigator, at a reasonable time and place specified in the direction, any relevant evidence;

(ii) give the investigator explanations or further information about the relevant evidence;

(iii) attend before the investigator at a reasonable time and place specified by the authorized person, and answer under oath questions relating to the matter.

(4) For the purposes of subsection (3), an investigator may administer an oath.

(5) A financial institution, and its directors, officers and employees, shall afford an investigator full and free access to the premises, records and documents of the institution as are relevant to an investigation under this section.

(6) Any person who, without reasonable excuse, contravenes subsection (5) shall be liable to an administrative penalty.

(7) An investigator shall not enter premises under subsection (3) (*a*) unless—

(*a*) with the consent of the person apparently in charge of the premises at the time of entry; or

(*b*) in accordance with a warrant; or

(*c*) in an emergency, under subsection (10).

(8) A warrant for the purposes of this section is a warrant issued by a magistrate on application by an investigator.

(9) A magistrate shall not issue a warrant under this section unless satisfied that there are reasonable grounds as mentioned in subsection (1).

(10) An investigator may enter premises and exercise powers under this section without the consent mentioned in subsection (7) (*a*) or a warrant only if he believes on reasonable grounds that it is necessary to do so to prevent loss or destruction of, or damage to, relevant evidence.

Powers and protections of investigators Cap 18.01

43. An investigator or an examiner acting under this *Division* shall have all the powers and protections of a Commissioner under the Commissions of Inquiry Act.

Identity cards

44.—(1) The Registrar shall give each examiner and investigator an identity card approved by the Registrar.

(2) An examiner or investigator, when exercising a power conferred by this Act, shall, on reasonable demand, produce his identity card for inspection, but failure to do so shall not make the exercise of the power invalid.

Division 5 Self-Regulatory Organizations

Declaration of Self-Regulatory Organizations

45.—(1) The Registrar may, by notice published in the *Gazette*, declare a person that has functions in relation to a class of financial institutions to be a self-regulatory organization for the purposes of this Act.

(2) The Registrar shall not make a declaration under subsection (1) unless the Registrar has entered into arrangements with the person or body for the performance by the person or body of regulatory or supervisory functions in relation to a class of financial institutions.

(3) The arrangements may, if the Registrar considers it appropriate, involve the delegation of the Registrar's powers under financial services laws to the self-regulatory organization.

(4) Without limiting what the arrangements may provide for, the arrangements shall provide for—

(*a*) the supervision by the Registrar of the performance of the self-regulatory organization's supervisory functions;

(*b*) the approval by the Registrar of any rules, and amendments of rules, of the self-regulatory organization for or with respect to the matters for which the self-regulatory organization has supervisory functions; and

(*c*) the variation or termination of the arrangements if the Registrar is not satisfied that the self-regulatory organization is performing, or is able to perform, its supervisory functions to the satisfaction of the Registrar.

Rules by Self-Regulatory Organizations

46.—(1) A self-regulatory organization may make rules, not inconsistent with the financial services laws, for or with respect to any matters for which the self-regulatory organization has supervisory functions.

(2) Rules made under subsection (1), and amendments of such rules, shall be of no effect unless approved by the Registrar.

Person affected to be heard

47. A self-regulatory organization shall not make a decision under its rules that adversely affects the rights of a person unless—

(*a*) it has given the person an opportunity to make representations to it about the matter; or

(*b*) it considers on reasonable grounds that delay in making the decision may prejudicially affect the protection of clients of financial institutions in relation to which arrangements mentioned in section 45 involving the self-regulatory organization are in force.

Self-Regulatory Organization to inform the Registrar of an appointment of director or executive

48. A self-regulatory organization shall notify the Registrar, as prescribed, as soon as practicable after a person is appointed a director or executive of the organization.

Declaration of Self-Regulatory Organization revocable by Registrar

49.—(1) The Registrar may revoke a declaration under section 45 at any time, but shall not do so unless—

(*a*) the self-regulatory organization consents; or

(*b*) the Registrar has notified the self-regulatory organization of his intention and the reasons for the Registrar's action, and given the organization at least fourteen days to make representations to the Registrar on the matter.

(2) The revocation of a declaration shall not affect a right of a person to apply to the Appeals Committee under section 83 for a review of a decision or action.

Amendment to Self-Regulatory Organization articles Cap 46.03

50. Notwithstanding any provision in the Companies Act, an amendment to the memorandum or articles of association, or other constituent documents, of a self-regulatory organization shall be of no effect unless approved by the Registrar.

Protection for Self-Regulatory Organizations

51. None of the following—

(*a*) a self-regulatory organization;

(*b*) a director, executive or employee of a self-regulatory organization;

(*c*) a member of a committee of a self-regulatory organization,

shall be liable for any loss sustained by or damage caused to any person as a result of anything done or omitted by them in the performance in good faith of their powers, functions and duties in connexion with the performance of its supervisory functions.

Annual reports by Self-Regulatory Organizations

52.—(1) Each self-regulatory organization shall lodge with the Registrar, within ninety days after the end of the financial year, an annual report which shall include—

(*a*) a report on its exercise of its supervisory functions during the financial year to which the report relates;

(*b*) a report on its corporate governance policy;

(*c*) audited financial statements prepared in accordance with accounting standards, and other requirements, specified in the prudential rules; and

(*d*) a report on any other matter specified in the prudential rules, or in a direction by the Registrar to the organization, for the purposes of this section.

(2) Financial statements to be included in an annual report under subsection (1) shall be audited in accordance with accounting standards, and other requirements, specified in the prudential rules, by an auditor approved by the Registrar.

(3) The Registrar shall not approve an auditor under subsection (2) unless it is satisfied that the auditor has adequate experience, expertise and resources to carry on the audit.

Division 6 Controlling Parties of Prudentially Regulated Financial Institutions

Limitation on shareholding

53.—(1) Shares issued by a prudentially regulated financial institution shall be only of such class as may be approved by the Registrar.

(2) Unless exempted under a financial services law or approved by the Registrar, no—

(*a*) individual, or

(*b*) an entity,

shall own or acquire more than forty-nine per cent (49%) of the shares of a prudentially regulated financial institution.

(3) Except as approved by the Registrar under such terms and conditions which the Registrar may determine, a trust shall not own more than ten per cent (10%) shares in a prudentially regulated financial institution.

(4) If, at the commencement of this Act, any individual or body corporate controlled by one individual holds more than forty-nine per cent (49%) of shares in a prudentially regulated financial institution, that individual or body corporate shall—

(*a*) within a period not exceeding five years, reduce their shareholding in the prudentially regulated financial institution or the body corporate; and

(*b*) within six months after commencement of this Act, present to the Registrar a credible plan of action regarding the reduction of the shareholding.

(5) If any person fails to submit a plan of action as required by subsection 4 (*b*), the Registrar shall limit, with immediate effect, the voting rights that may be exercised by that person by virtue of their shareholding to such percentage of voting rights as the Registrar may by notice determine until such a time as a credible plan is submitted.

Controlling parties to require Registrar's approval

54.—(1) If a person takes a step intending thereby to become a controlling party of a prudentially regulated financial institution, then, unless the Registrar has approved the person's becoming a controlling party of the institution in terms of fit and proper requirements for controlling parties as prescribed in the Registrar's directive, the person contravenes this provision and shall be liable to an administrative penalty.

(2) If—

(*a*) a person is a controlling party of a prudentially regulated financial institution by virtue of the degree of voting power a person has or controls in relation to the institution; and

(*b*) the person takes a step as a result of which the degree of voting power he controls varies by more than the percentage specified in Registrar's directives issued for the purposes of this subsection,

then, unless the Registrar has approved the variation, the person contravenes this provision and shall be liable to an administrative penalty.

(3) If—

(*a*) a person becomes or ceases to be a controlling party of a prudentially regulated financial institution; and

(*b*) at the end of fourteen days after the event, the change has not been reported to the Registrar in accordance with the Registrar's directives,

the person contravenes this provision and shall be liable to an administrative penalty.

(4) If—

(*a*) a person is a controlling party of a prudentially regulated financial institution by virtue of the degree of voting power in relation to the financial institution that he has or controls;

(*b*) the degree of voting power in relation to the financial institution that he has or controls varies by more than the amount prescribed by Registrar's directives issued for the purposes of this subsection; and

(*c*) at the end of fourteen days after the event, the variation has not been reported to the Registrar in accordance with the Registrar's directives,

the person, and the prudentially regulated financial institution, each contravenes this provision and shall be liable to an administrative penalty.

(5) A variation mentioned in subsection (2) or (4) may be either by way of increase or decrease in the percentage of voting power the person has or controls.

PART VI—AUDITORS

Internal Auditor

55. Without limiting the powers of the Registrar under this Act to issue directives, the management of every prudentially regulated financial institution shall, unless exempted by the Registrar, appoint an internal auditor suitably qualified and experienced in financial services.

Appointment of an external auditor

56.—(1) Without limiting the powers of the Registrar under this Act to issue directives, the shareholders of a prudentially regulated financial institution shall, unless exempted by the Registrar, at their first meeting, and at each succeeding annual meeting, appoint an external auditor to hold office until the close of the next annual meeting:

Provided that the appointment of the external auditor shall be subject to approval of the Registrar.

(2) The prudentially regulated financial institution shall take all necessary steps to ensure that its external auditor is appointed as the external auditor of each of its subsidiaries, with the exception of a subsidiary located in another country where another external auditor may be appointed.

Auditor to report to Registrar

57. The Registrar may require an external auditor to report to him on the extent of the external auditor's procedures in the examination of the annual financial statements of a prudentially regulated financial institution and may direct him to expand the scope of that examination.

Meetings with Registrar

58. The Registrar may, if he considers it necessary, arrange, from time to time, meetings with the external auditor of the prudentially regulated financial institution.

Duties of external auditors to the Registrar

59.—(1) An external auditor appointed under this Act shall inform the Registrar if there are reasonable grounds to believe that—

(*a*) a prudentially regulated financial institution is insolvent, or there is a significant risk that a prudentially regulated financial institution will become insolvent; or

(*b*) a prudentially regulated financial institution has contravened a—

(i) requirement in this Act or any other financial services law; or

(ii) requirement in any regulation, notice or directive issued under this Act or any other financial services law; or

(iii) condition imposed on its licence.

(2) An external auditor shall verify returns and other reports of a prudentially regulated financial institution which the Registrar may, from time to time, require to be verified.

Change of external auditors to be approved by Registrar

60.—(1) No prudentially regulated financial institution shall, before the expiry of the term of the current auditor, remove or change its external auditor except with the prior written approval of the Registrar.

(2) Any person who is an external auditor of a prudentially regulated financial institution shall give adequate written notice to the prudentially regulated financial institution and the Registrar of—

(*a*) his decision to resign from office and the reasons for the resignation;

(*b*) his decision not to seek to be re-appointed and the reasons for that decision.

(3) If an external auditor is removed or resigns from his position before the expiry of his term, the directors shall fill the position as soon as possible for the remainder of the term of the outgoing external auditor.

(4) If the directors fail to fill the vacancy of an external auditor caused by resignation or termination of the external auditor or by the Registrar's rejection of the external auditor nominated by the prudentially regulated financial institution, the Registrar may fill the vacancy for the appropriate term.

PART VII—REGULATING MARKET PRACTICES OF FINANCIAL INSTITUTIONS

Application of Part VII

61.—(1) This Part shall apply in addition to the other financial services laws.

(2) If a provision of this Part is inconsistent with a provision of another financial services law, the provision of this Part shall prevail to the extent of the inconsistency.

Misleading and deceptive conduct

62.—(1) A person shall not engage in conduct that is misleading or deceptive or is likely to mislead or deceive in relation to financial services, including financial services provided by another person.

(2) Without limiting subsection (1), a person shall not—

(*a*) falsely represent that a financial service is of a particular standard, quality, value or grade;

(*b*) falsely represent that a particular person has agreed to acquire or use a specified financial service;

(*c*) represent that a financial service has use, benefit, sponsorship, approval or performance characteristics that it does not have;

(*d*) represent that the person has, in relation to a financial service, a sponsorship, approval or affiliation it does not have;

(*e*) make a false or misleading representation with respect to the price of a financial service;

(*f*) make a false or misleading representation concerning the need for a specified financial service; or

(*g*) make a false or misleading representation concerning the existence, exclusion or effect of a condition, warranty, guarantee, right or remedy in relation to a financial service.

(3) Any person who contravenes subsections (1) and (2) shall be liable to an administrative penalty.

Prohibited practices

63.—(1) The Registrar may, by notice published in the *Gazette*, determine that a specified practice, pricing arrangement, pricing or fee or charges structure in relation to financial services and products is a prohibited practice if satisfied that the practice or pricing arrangement or structure—

(*a*) is unfair to consumers of financial services, or financial services of a particular kind;

(*b*) will tend to reduce competition in the financial service sector, or in a part of the financial service sector, contrary to the public interest;

(*c*) will result in exploitation of consumers; or

(*d*) is otherwise undesirable.

(2) Before making a determination under subsection (1), the Registrar shall consult any relevant advisory body established under section 95, unless the Registrar is satisfied that it is necessary to make the determination urgently to protect the financial system or the interests of clients and potential clients of financial institutions.

(3) Any financial institution that engages in a prohibited practice in relation to a financial service commits an offence and shall, on conviction, be liable to a fine of ten million Kwacha (K10,000,000) and to imprisonment for four years, and if the financial institution is not a natural person, then section 112 shall apply.

Disclosure by financial institutions

64. Without limiting the power of the Registrar to issue Registrar's directives, the Registrar's directives may impose requirements with respect to the disclosure of information to clients or other persons about financial services.

PART VIII—AMALGAMATIONS, TRANSFERS OF BUSINESS, STATUTORY MANAGEMENT AND WINDING-UP OF PRUDENTIALLY REGULATED FINANCIAL INSTITUTIONS

Division I—Compromises and Arrangements and Transfers of Business

Application of Part VIII

65. Without limiting the powers of the Registrar to issue directives, this Part shall apply to all prudentially regulated institutions.

Compromises and arrangements

66.—(1) Each prudentially regulated financial institution concerned in a proposed compromise or arrangement shall ensure that a copy of—

(*a*) all applications to the Court; and

(*b*) all documents to be given to members or creditors of the bodies corporate involved, either in relation to a meeting of members or creditors or otherwise,

are given to the Registrar before the application is made or the documents are sent to the members or creditors.

(2) The Registrar shall be entitled to be heard in any proceeding in the Court in relation to a compromise or arrangement.

(3) The Court shall not make an order under any Act or any order to a similar effect, in relation to a compromise or arrangement unless the Registrar has approved the compromise or arrangement in writing.

(4) Subsection (3) does not apply to an interlocutory or similar order.

(5) The Registrar's directive may make further provision about compromises and arrangements.

Transfer of business

67. (1) None of the business of a prudentially regulated financial institution, being business in respect of which it is licensed, may be transferred to another person or amalgamated with the business of another person except under a scheme for the transfer or amalgamation that has been approved by the Registrar.

(2) A purported transfer or amalgamation contrary to subsection (1) shall be void.

Division 2 Statutory Management

Appointment of statutory managers

68. (1) The Registrar may, on request by a prudentially regulated financial institution, place the prudentially regulated financial institution under statutory management on such terms and conditions as the Registrar may determine.

(2) The Registrar may place a prudentially regulated financial institution under statutory management if it appears to the Registrar that —

(*a*) the institution —

(i) is, not complying with a financial services law;

(ii) is, or is likely to be, in an unsound financial position; or

(iii) is, or may be, involved in financial crime;

(iv) is refusing to submit itself to inspection by the Registrar as is required under a financial services law;

(v) its licence has been suspended or revoked; or

(vi) is engaging itself in unsafe and unsound financial practices;

(*b*) the appointment will assist in protecting—

(i) the interests of the clients of the institution;

(ii) the stability, fairness, efficiency and orderliness of the financial system; or

(iii) the safety and soundness of financial institutions.

(3) If a prudentially regulated financial institution is placed under statutory management under this section, the Registrar or any other person appointed by the Registrar shall be the statutory manager of the prudentially regulated financial institution.

(4) An appointment of the statutory manager under subsection (3) shall take effect immediately, and the following shall apply—

(*a*) any lending to any director, officer, owner or any close relation of a director, officer or owner on preferential terms or without adequate security made within one hundred and eighty days prior to the statutory management shall be rescinded; and the director, officer, owner or close relation to the director,officer or owner shall immediately refund the moneys advanced and the interest accrued at the going market rate;

(*b*) any transfer of any asset of the financial institution made within one hundred and eighty days before the statutory management shall be annulled and any such assets shall be surrendered to the statutory manager; and

(*c*) any transfer of any asset of the financial institution made within one hundred and eighty days before the statutory management with intent to effect a preference or at less than the appraise book value shall be void.

(5) The Registrar shall as soon as possible after placing a prudentially regulated financial institution under statutory management appoint an auditor at the cost of the prudentially regulated financial institution to make an inventory of the assets and liabilities of the prudentially regulated financial institution and submit a report to the Registrar.

(6) The Registrar shall upon placing a prudentially regulated financial institution under statutory management immediately inform the general public.

Statutory managers

69.—(1) A person shall not be appointed or hold office as a statutory manager of a prudentially regulated financial institution unless the Registrar has approved the person as the statutory manager of the institution.

(2) The statutory manager of a prudentially regulated financial institution—

(*a*) shall have the management of the affairs of the institution to the exclusion of its directors and other managers;

(*b*) shall have power to repudiate a contract to which the institution is a party, but only if the statutory manager considers the contract detrimental to the interests of clients of the institution; and

(*c*) shall be entitled to receive such remuneration from the institution as the Registrar determines in consultation with the Board of the prudentially regulated financial institution.

(3) A repudiation of a contract under subsection (2) (*b*) shall not affect any rights of the parties that have accrued before the repudiation.

(4) The statutory manager of a prudentially regulated financial institution shall manage the affairs of the institution with the greatest economy possible compatible with efficiency and, as soon as practicable, shall report to the Registrar—

(*a*) what steps shall be taken to ensure that the institution—

(i) complies with the financial services laws;

(ii) will be financially sound; or

(iii) will not be involved in financial crime;

(*b*) if the statutory manager considers that it is not practicable to take steps as mentioned in paragraph (*a*)—

(i) whether steps shall be taken to transfer the business of the institution to another appropriate person and, if so, to whom and on what terms; and

(ii) whether the institution shall be wound-up.

(5) A Statutory Manager may for the purpose of exercising his duties under this Act require any person who has at any time been an officer or director of the prudentially regulated financial institution to provide the statutory manager with information relating to the business of the prudentially regulated financial institution.

(6) Any person who refuses, neglects or wilfully fails to provide any information requested under subsection (5) commits an offence and shall, on conviction, be liable to a fine of five million Kwacha (K5,000,000) and to imprisonment for two years.

(7) The statutory manager of a prudentially regulated financial institution shall comply with written directions from the Registrar in relation to his functions.

(8) The statutory manager of a prudentially regulated financial institution may apply to the Court at any time for directions.

(9) The Registrar may, at any time, remove a statutory manager from office, and appoint a replacement.

(10) The statutory manager of a prudentially regulated financial institution shall not be liable for a loss that the institution suffers unless it is established that the loss was caused by the statutory manager's fraud, dishonesty, negligence or wilful failure to comply with the law.

Legal proceedings against a prudentially regulated financial institution under statutory management

70. (1) A person shall not commence or continue with any legal proceeding in any court against a prudentially regulated financial institution while the prudentially regulated financial institution is under statutory management —

(*a*) except with leave of the Court, on grounds that he would be caused exceptional hardship if leave were not granted; or

(*b*) with the prior written consent of the Registrar.

(2) An application for leave under subsection (1) shall not be filed unless the Registrar receives twenty-one days notice of the intention to apply.

(3) The Registrar may apply to the Court to be joined as a party to the proceedings for leave.

(4) A party to a contract with a prudentially regulated financial institution shall not be relieved of his obligations on the ground that the prudentially regulated financial institution is under statutory management.

(2) All costs relating to statutory management of a prudentially regulated financial institution shall be payable by the prudentially regulated financial institution.

Priod of statutory management

71. (1) If a statutory manager is appointed to a prudentially regulated financial institution, the Registrar shall ensure that such a statutory manager remains appointed until the earlier of the times when —

(*a*) the Registrar is satisfied that the grounds for making the appointment no longer exist; or

(*b*) an application is made by or with the approval of the Registrar for the institution to be wound-up on the basis that it considers that the institution is insolvent and is unlikely to return to solvency within a reasonable time.

(2) Without limiting the powers of the Registrar in subsection (1), the Registrar may close the prudentially regulated financial institution where the period under which a prudentially regulated financial institution has been under statutory management has exceeded one hundred and twenty days.

Division 3 Winding-Up

Winding-up of prudentially regulated financial institutions

72.—(1) A resolution, demand or other step to wind-up a prudentially regulated financial institution shall be of no effect unless approved by the Registrar.

(2) An application to the Court for an order to wind-up a prudentially regulated financial institution, whether under the Companies Act or under another law, shall not be made except where it is made by the Registrar, or with the Registrar's approval.

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(3) The Registrar shall not give approval under subsection (2) unless the prudentially regulated financial institution's licence has been or is to be revoked and that the winding-up shall be on such terms and conditions as the Registrar may determine.

(4) The Registrar may apply to the Court for an order that a prudentially regulated financial institution be wound-up if the Registrar is satisfied that the institution is insolvent and will not be restored to solvency within a reasonable period.

(5) The order granted under subsections (2) and (4) shall be made public through print and electronic media in Malawi.

(6) Notwithstanding any provision in the Companies Act, where any proceeding for the winding-up of a prudentially regulated financial institution is commenced, the Registrar or any other person appointed or approved by the Registrar shall be the liquidator of the prudentially regulated financial institution. Cap. 46:03

(7) The remuneration of the liquidator appointed under this section, the cost and expenses of his establishment, and the costs and expenses of the liquidation shall be met out of the assets of the prudentially regulated financial institution under liquidation.

(8) Notwithstanding the provisions of the Companies Act, where a prudentially regulated financial institution is in liquidation, whether voluntary or involuntary, the ranking of claims shall be as follows— Cap. 46:03

(*a*) liquidator for all liquidation costs;

(*b*) depositors, policy holder claims and pension member benefits;

(*c*) secured creditors;

(*d*) employees for all wages, salaries and compensation due net of any liabilities to the financial institution;

(*e*) Government for all taxes, duty, rates and rent in respect of any period prior to the commencement of winding-up; and

(*f*) other creditors in *pari passu*.

PART IX—ENFORCEMENT OF FINANCIAL SERVICES LAWS

Enforceable undertakings

73. —(1) The Registrar may accept a written undertaking from a person in connexion with a matter in relation to which the Registrar has a supervisory function.

(2) The person may withdraw or vary the undertaking at any time, but only with the Registrar's consent.

(3) If the Registrar considers that the person has breached the undertaking, the Registrar may apply to the Court for an order under subsection (4).

(4) If the Court is satisfied that the person has breached the undertaking, the Court may make all or any of the following orders —

(*a*) an order directing the person to comply with the undertaking:

(*b*) an order directing the person to do a specified act, or refrain from doing a specified act, for one or more of the following purposes —

(i) to remedy the effects of the breach:

(ii) to compensate persons who have suffered loss because of the breach: or

(iii) to ensure that the person does not commit further breaches of the undertaking or of a financial services law: and

(*c*) any other order that the Court considers appropriate.

(5) The Registrar may publish a copy of the undertaking.

(6) The Registrar shall delete from the copies information that the person who gave the undertaking has asked not to be published, but only if the Registrar is satisfied that the information—

(*a*) is confidential information that has a commercial value that would be diminished if it were to be published:

(*b*) consists of personal details of an individual: or

(*c*) should not be disclosed because it would be against the public interest to do so.

(7) If information has been deleted from a copy of an undertaking under subsection (6), the copy shall include a note stating that some information has been deleted.

Compensation for loss from breach of financial services law

74.—(1) Any person who suffers loss as a consequence of a contravention of a financial services law by another person (in this section called a "claimant") may recover the amount of the loss by action in a court against any of—

(*a*) the other person: and

(*b*) any person who was knowingly involved in the contravention.

(2) The Registrar may institute an action of a kind mentioned in subsection (1) on behalf of one or more claimants if in its opinion it is proper to do so. Such an action is in this section called a "representative action".

(3) An action under subsection (1) or (2) may be commenced within twenty-one days after the day on which the cause of action that relates to the contravention occurred.

(4) In a representative action, the Court may make any appropriate order for the conduct of the action, including orders—

(*a*) for advertising the institution of the action;

(*b*) for the identification of claimants; and

(*c*) in respect of claimants who do not wish to pursue their claims through the action.

(5) If—

(*a*) the Registrar institutes a representative action in respect of a loss suffered by a claimant; and

(*b*) the claimant, either before or after the representative action is instituted but before it is determined, institutes an action under this section in respect of the same loss, the claimant shall not be entitled to recover in the representative action, and the Court may make any appropriate order for the conduct of the relevant actions.

(6) The Registrar shall have the conduct of a representative action to the exclusion of the claimants concerned, and may withdraw, abandon, settle or compromise the action, but a settlement or compromise of the action shall be subject to the approval of the Court.

(7) In a representative action, if the Court orders the payment of compensation, it may, in addition, if the Court thinks fit, order a defendant to pay—

(*a*) a penalty for punitive purposes not exceeding one and a half (1½) times the amount of the profit or gain that may have accrued to the defendant by the contravention; and

(*b*) interest on any amount ordered to be paid.

(8) In giving judgment in a representative action, or in approving a compromise or settlement in relation to a representative action, the Court shall make such orders for the publication of the judgment and any related matter in the *Gazette* and otherwise as the Court considers appropriate.

(9) A judgment in a representative action shall bind all claimants other than—

(*a*) those that the Court has by order excluded from the action, under subsection (4) (*c*) or otherwise; and

(*b*) claimants mentioned in subsection (5).

(10) Any amount recovered by the Registrar in a representative action shall be deposited into a specially designated account, and thereupon—

(*a*) the Registrar shall be entitled, as a first charge against the account, to reimbursement of all expenses reasonably incurred in bringing the representative action and in administering the distributions made under this subsection;

(*b*) the Registrar shall take reasonable steps to identify claimants and determine the amount of their losses in connexion with the contravention, including publishing the order of the Court; and

(*c*) the balance of the amount recovered, after making provision for expenses mentioned in paragraph (*a*), ("balance") shall be distributed among the claimants so that each claimant is paid the amount worked out using the formula:

$$\frac{\text{amount of the claimant's loss}}{\text{total amount of all claimants' losses}} \times \text{balance}$$

(11) A person knowingly involved in the contravention concerned is not entitled to a distribution under subsection (10).

(12) Distributions may be paid in stages.

(13) The surplus of the distributable balance not paid at the end of three years after the first payment under subsection (10) shall become funds of the Registrar.

Administrative penalties

75.—(1) If the Registrar is satisfied on reasonable grounds that a person has contravened a financial services law, the Registrar may impose administrative penalties on the person by doing one or more of the following—

(*a*) giving the person a written warning;

(*b*) directing the person to do a specified act, or refrain from doing a specified act, for one or more of the following purposes—

(i) to remedy the effects of the contravention;

(ii) to compensate persons who have suffered loss because of the contravention;

(iii) to ensure that the person does not commit further contraventions of financial services laws;

(*c*) requiring the person to pay a monetary penalty as may be determined in the Registrar's directives or as prescribed by the Minister.

(2) Without limiting subsection (1) (*b*), a direction may require the establishment of compliance programmes, corrective advertising or, in the case of a direction to a financial institution, changes in the management of the institution.

(3) A person on whom an administrative penalty has been imposed and who fails or refuses to comply with the administrative penalty commits an offence and shall, on conviction, be liable to a fine of five million Kwacha (K5,000,000) and to imprisonment for four years.

(4) In addition to subsection (3), where the administrative penalty imposed by the Registrar is a monetary penalty and the person on whom the monetary penalty has been imposed does not pay the monetary penalty for a period of more than twenty-one days from the date of first demand in writing by the Registrar, the amount in respect of the monetary penalty shall be recoverable by the Registrar as a civil debt.

Court Orders

76.—(1) Where a person is engaging, or proposes to engage, in conduct in contravention of a financial services law, the Court may, on application by the Registrar or a person authorized by the Registrar, make orders for the purposes of enforcing the financial services law.

(2) Without limiting subsection (1), an order may direct the person to do a specified act, or refrain from doing a specified act, for one or more of the following purposes—

(*a*) to remedy the effects of the contravention;

(*b*) to preserve the assets of a relevant financial institution;

(*c*) to compensate persons who have suffered loss because of the contravention; and

(*d*) to ensure that the person does not commit further contraventions of financial services laws.

(3) The Court may make an interim order pending the determination of an application, but so however that the Registrar shall be required, as a condition of the making of an interim order, to give an undertaking as to damages.

(4) The power of the Court under this section may be exercised—

(*a*) whether or not it appears to the Court that the person intends to engage again, or to continue to engage, in conduct of that kind; and

(*b*) whether or not the person has previously engaged in conduct of that kind.

(5) This section is in addition to any other power of the Court.

Exemptions

77.—(1) The Registrar may, by notice published in the *Gazette*—

(*a*) exempt a financial institution wholly or partly, as specified in the notice, from a financial services law; or

(*b*) declare that a financial services law applies in relation to a financial institution as modified in the declaration.

(2) An exemption or declaration may—

(*a*) apply generally or to a specified case or class of cases; or

(*b*) apply unconditionally or subject to specified conditions.

PART X—REVIEW OF DECISIONS

Division 1—Financial Services Appeals Committee

Financial Services Appeals Committee

78.—(1) There is hereby established a committee, to be called the Financial Services Appeals Committee.

(2) The Appeals Committee shall have the following functions—

(*a*) reviewing decisions made by the Registrar in accordance with the financial services laws;

(*b*) exercising and performing functions conferred on it by any other law.

(3) The appellant shall meet the costs and expenses of the Appeals Committee in the event that his appeal has not been successful, otherwise the Registrar shall meet the costs and expenses as supervisory expenditure.

Membership

79.—(1) The Appeals Committee shall consist of three (3) members, appointed by the Minister, one of whom shall be designated as Chairperson.

(2) A person shall not be appointed as a member of the Appeals Committee unless the Minister is satisfied that the person is a legal practitioner of at least ten years standing, or has at least ten years experience in the financial services industry.

(3) Subject to this Act, a member of the Appeals Committee shall hold office for three years and shall be eligible for re-appointment.

(4) A member of the Appeals Committee shall be entitled to be paid fees and allowances as the Minister determines.

(5) The Chairperson of the Appeals Committee may co-opt other persons to advise the Appeals Committee in respect of a particular matter, on terms approved by the Chairperson. Such a person shall not by reason only of being co-opted, be a member of the Appeals Committee.

Vacation of office

80.—(1) A member of the Appeals Committee may resign office by one month notice in writing to the Minister.

(2) A member of the Appeals Committee shall cease to hold office if he—

(*a*) is disqualified in Malawi from acting as a director or official of a body corporate under a law relating to corporations or to the provision of financial services;

(*b*) comes under a legal disability;

(*c*) is convicted in Malawi of an offence of a kind referred to in section 7 (*f*) of the Reserve Bank of Malawi Act; Cap. 44:02

(*d*) is removed from office in Malawi as mentioned in section 7 (*g*) of the Reserve Bank of Malawi Act; or Cap. 44:02

(*e*) is adjudged bankrupt by a competent court in Malawi or, in Malawi, makes an arrangement or composition with, or has suspended payment to, his creditors.

(3) The Minister may, by notice, terminate the appointment of a member of the Appeals Committee on the ground that—

(*a*) without reasonable excuse, the member fails to perform the duties of his office;

(*b*) the member, in the opinion of the Minister, is unfit to be a member because of misconduct or default in the discharge of his duties as a member;

(*c*) the member is unfit to discharge his duties as a member because of a mental or physical infirmity;

(*d*) the member has been disqualified, outside Malawi, from acting as a director or official of a body corporate under a law relating to corporations or to the provision of financial services;

(*e*) the member has been adjudged bankrupt by a competent court outside Malawi or, outside Malawi, makes an arrangement or composition with, or has suspended payment to, his creditors;

(*f*) the member has been convicted outside Malawi of an offence of a kind referred to in section 7 (*f*) of the Reserve Bank of Malawi Act; or Cap. 44:02

(*g*) the member has been removed from office outside Malawi as mentioned in section 7 (*g*) of the Reserve Bank of Malawi Act. Cap. 44:02

Disclosure of interest

81.—(1) A member of the Appeals Committee who has or acquires an interest, pecuniary or otherwise, that may conflict with the proper performance of the member's functions in relation to a particular matter to be considered by the Appeals Committee—

(*a*) shall disclose the interest to the Chairperson of the Appeals Committee, or where the member is the Chairperson, the disclosure shall be to the Minister; and

(*b*) shall not participate as a member in any proceeding of the Appeals Committee in relation to the matter without the approval of the Minister.

(2) The Minister shall not give approval under subsection (1) (*b*) unless satisfied on reasonable grounds that the interest shall not prevent the member from acting impartially in relation to the matter.

Appeal to the Appeals Committee

82. Any person aggrieved by a decision of the Registrar to withdraw, cancel, suspend or revoke a licence or registration, or to refuse a licence application, or to impose a direction or administrative penalty under this Act may appeal to the Appeals Committee within twenty-one days after being notified of the Registrar's decision.

Restriction on altering decisions under review

83. After an application is made to the Appeals Committee for a review of a decision, the decision may not be altered, set aside and a new decision made except—

(*a*) by the Appeals Committee; or

(*b*) with the consent of the parties to the proceeding and with the consent of the Appeals Committee.

Division 2 Conduct of Review Proceedings

Notice of, and parties to, review proceedings

84.—(1) The Chairperson of the Appeals Committee shall ensure that—

(*a*) the body whose decision is the subject of an application for review is properly notified of the application; and

(*b*) the Registrar is notified of all applications for review.

(2) The Registrar shall be entitled to be a party to the review proceeding for any decision.

(3) Parties to proceedings before the Appeals Committee may have legal representation.

Procedure

85.—(1) In a proceeding before the Appeals Committee—

(*a*) the procedure of the Appeals Committee shall be, subject to this Act, the regulations and any relevant financial services law, within the discretion of the Appeals Committee; and

(*b*) the proceeding shall be conducted with as little formality and technicality, and with as much expedition, as the requirements of the relevant financial services law and a proper consideration of the matters before the Appeals Committee permit; and

(*c*) the Appeals Committee shall not be bound by the rules of evidence but may inform itself on any matter as it thinks appropriate.

(2) The Chairperson of the Appeals Committee may give directions in relation to the proceeding, including directions—

(*a*) requiring a party to give further information;

(*b*) requiring the person who made the decision or the Registrar to give a statement of the grounds on which the application will be resisted at the hearing; and

(*c*) requiring a party to give a statement of matters or contentions it will rely on; and

(*d*) requiring the parties to hold a conference involving a member of the Appeals Committee.

(3) The Chairperson may vary or revoke a direction.

(4) At the hearing of a proceeding before the Appeals Committee, unless the parties otherwise agree, evidence shall not be given, and statements shall not be made, concerning anything done or said at a conference held under a direction under subsection (2) (*d*).

Hearings

86.—(1) Subject to this section, the Appeals Committee shall hold a hearing on an application for review of a decision unless the Chairperson of the Appeals Committee determines that the matter can be adequately determined in the absence of the parties and the parties agree.

(2) The Appeals Committee may hold a hearing or part of a hearing in private for any proper reason, and may give directions prohibiting or restricting the publication of evidence given in the hearing, whether orally or in writing.

(3) Any person who refuses or fails to comply with a direction under subsection (2) commits an offence and shall, on conviction, be liable to a fine of five million Kwacha (K5,000,000) and to imprisonment for two years, and if the person is not a natural person, then section 112 shall apply.

Rights of parties to review proceedings

87.—(1) Each party to a proceeding before the Appeals Committee shall be given a reasonable opportunity to present its case and, in particular, to inspect documents which the Appeals Committee proposes to consider in determining the matter.

(2) In considering an appeal, the Appeals Committee shall consider—

(*a*) the record considered by the Registrar;

(*b*) any written submissions the aggrieved person wishes to submit;

(*c*) any rebuttal materials the Registrar wishes to submit in response to submissions in paragraph (*b*) above; and

(*d*) the decision of the Registrar.

unless the Appeals Committee so determines in its sole and absolute discretion that there shall be no presentation of witnesses or other testimony.

Powers of the Appeals Committee

88.—(1) For the purposes of determining an application for review, the Appeals Committee shall have all the powers and authorities of the Registrar or the self-regulatory organization concerned and may—

(*a*) affirm the decision under review;

(*b*) vary the decision under review; or

(*c*) set aside the decision under review and—

(i) make a decision in substitution for the decision so set aside; or

(ii) remit the matter to the Registrar or the self-regulatory organization concerned for reconsideration in accordance with the decision of the Appeals Committee.

(2) A decision of the Appeals Committee shall be made by a majority of the votes of the members forming the Appeals Committee for the particular matter.

(3) For the purpose of reviewing a decision, the Appeals Committee may—

(*a*) take evidence on oath or affirmation;

(*b*) proceed in the absence of a party who has had reasonable notice of the proceeding; or

(*c*) adjourn the proceeding from time to time.

(4) The Chairperson may, for the purposes of a hearing, summon a person to appear before the Appeals Committee to do either or both—

(*a*) give evidence; or

(*b*) produce books, documents or things in the possession, custody or control of the person or persons named in the summons that are mentioned in the summons;

(5) The Chairperson may, for the purposes of a hearing—

(*a*) require a person appearing before the Appeals Committee to give evidence either to take an oath; and

(*b*) administer an oath.

Rights of legal practitioners, witnesses, etc

89.—(1) A legal practitioner or other person appearing before the Appeals Committee on behalf of a party shall have the same protection and immunity as a legal practitioner has in appearing for a party in proceedings in the Court.

(2) Subject to this Act, a person summoned to attend or appearing before the Appeals Committee as a witness shall have the same protection, and shall be, in addition to the penalties provided by this Act, subject to the same liabilities, as a witness in proceedings in the Court.

Summons

90.—(1) A person served with a summons to appear as a witness before the Appeals Committee shall not, without reasonable excuse—

(*a*) fail to attend as required by the summons; or

(*b*) fail to appear and report himself or herself from day to day unless excused, or released from further attendance, by a member.

(2) A person served with a summons under this Part to produce a book, document or thing shall not, without reasonable excuse, fail to comply with the summons.

(3) A person appearing as a witness before the Appeals Committee shall not, without reasonable excuse—

(*a*) when required by the Appeals Committee to take an oath or make an affirmation, refuse or fail to do so;

(*b*) refuse or fail to answer a question that he or she is required to answer before the Appeals Committee; or

(*c*) refuse or fail to produce a document that he or she was required to produce by a summons under this Part.

(4) A person appearing as a witness before the Appeals Committee shall not give evidence that, to his knowledge, is false or misleading.

(5) Any person who contravenes subsection (1), (2), (3) or (4) commits an offence and shall, on conviction, be liable to a fine of five million Kwacha (K5,000,000) and to imprisonment for two years, and if it is not a natural person, then section 112 shall apply.

Decisions of Appeals Committee

91.—(1) A decision of the Appeals Committee shall be in writing, and shall include the reasons for the decision, and a statement of its findings on material questions of fact and a reference to the evidence or other material on which those findings were based.

(2) The Appeals Committee shall cause a copy of its decision to be served on each party to the proceeding.

(3) Subject to subsection (4), a decision of the Appeals Committee shall come into operation when it is given.

(4) The Appeals Committee may specify in a decision that the decision is not to come into operation until a later date specified in the decision and, where a later date is so specified, the decision shall come into operation on that date.

(5) Unless the decision of the Registrar is not supported by reasonable evidence, the decision shall be affirmed.

Appeal from decisions of Appeals Committee

92.—(1) A party to a proceeding before the Appeals Committee may appeal to the Court, on a question of law, from any decision of the Appeals Committee in that proceeding.

(2) An appeal shall be instituted no later than twenty-one days after notice of the Appeals Committee's decision was served on the party.

(3) The Court may hear and determine such appeals, and may make such orders as it thinks fit to dispose of the appeal.

Division 3 Complaints Resolution Schemes

Registrar to promote complaint resolution scheme

93.—(1) The Registrar shall promote and encourage the development and implementation, by financial institutions, of appropriate schemes to assist in informally resolving complaints by clients of financial institutions in relation to financial services provided by financial institutions.

(2) The Registrar may give a written direction to financial institutions of a particular kind, or a self-regulatory organization, requiring them or it to develop and implement a complaint resolution scheme.

Requirements for complaint resolution schemes

94.—(1) A complaint resolution scheme shall be consistent with the following requirements:—

(*a*) the objective of the scheme shall be to facilitate the resolution of complaints by clients of the relevant financial institutions about the financial services covered by the scheme that are provided by those financial institutions in an informal and quick manner;

(*b*) any such client shall be entitled to make and pursue a complaint under the scheme without charge;

(*c*) the scheme shall encourage conciliation of complaints;

(*d*) all complaints under the scheme that are not resolved by conciliation shall be determined by a person who is independent of the financial institution the subject of the complaint;

(*e*) the procedures of the scheme in dealing with a complaint shall be as informal as is practicable, consistent with a fair resolution of the complaint;

(*f*) a determination under paragraph (*d*) shall bind the financial institution concerned but not the client.

(2) A complaints resolution scheme shall not be implemented unless the Registrar has approved the scheme.

(3) A complaints resolution scheme shall not be amended unless the Registrar has approved the amendment.

PART XI—MISCELLANEOUS

Advisory bodies

95. The Registrar may establish advisory bodies to advise him in relation to the performance of his supervisory functions.

Guidelines and bulletins

96. In addition to his other powers under this Act and the other financial services laws, the Registrar may issue guidelines, bulletins and other information as he may consider desirable in relation to the administration of financial services laws.

Holding out

97. Where the Registrar has information indicating that a person is conducting any class of a financial services business or holding himself out as a financial institution without being licensed as a financial institution, the Registrar shall investigate the matter and take appropriate action including informing the general public of the same and petitioning the Court without first informing the person concerned.

Indemnity

98.—(1) The Registrar and any other officer, employee of the Registrar or any other person acting on behalf of the Registrar shall not be liable for damages for any act or omission done in good faith under this Act or any financial services law, unless it is proved that the act or omission was done in bad faith.

(2) No action shall lie against a financial institution, or an officer, employee or agent of a financial institution in relation to provision of information by the financial institution to the Registrar or any person approved by the Registrar in compliance with a financial services law unless it is proved that the provision of information was done in bad faith.

Confidentiality

99.—(1) Except when in the performance of his duties or the exercise of his functions, or when required to do so by any court or under any law, neither any examiner or investigator appointed under sections 41 and 42, respectively, nor any director, manager, officer or employee or agent of the Registrar, shall not disclose any information relating to the business of any financial institution

which he has acquired in the performance of his duties or the exercise of his functions.

(2) Notwithstanding subsection (1), the Registrar may publish in whole or in part, in such form and at such time as he may deem fit, any information or data furnished or collected under this Act.

Customer Due Diligence

100.—(1) A financial institution in Malawi shall—

(*a*) demand proof of and record the identity of its clients or customers, whether usual or occasional, when establishing business relations or conducting transactions, and in particular, when performing large cash transactions; and

(*b*) together with its directors, officers and employees, report promptly to the Financial Intelligence Unit any suspected money laundering activity related to any client or customer of the financial institution.

(2) For purposes of this Act, "money laundering" shall cover all activities and procedures designed to alter the identity of illegally obtained money so that it appears to have originated from a legitimate source.

(4) Any director, manager, officer or employee of a financial institution who makes or permits to be made any transaction including the opening of an account—

(*a*) without taking all reasonable steps to establish the true identity of the person concerned in the transaction;

(*b*) when he doubts or has reason to doubt the authenticity of documents and the truth of written or oral statements material to the transaction; or

(*c*) when he knows or has reason to suspect that any of the funds involved in the transaction have been obtained by any party as the direct or indirect result of an activity that is illegal inside or outside Malawi,

commits an offence, and shall, on conviction, be liable to a fine of five million Kwacha (K5,000,000) and to imprisonment for two years.

Offences relating to failure to answer questions

101. Any person who, without reasonable excuse, fails to answer a question put to the person by the Registrar, an examiner or an investigator in connexion with the Bank's supervisory functions commits an offence and, on conviction, shall be liable to a fine of five million Kwacha (K5,000,0000) and to imprisonment for two years.

Offences relating to misleading answers and information

102. (1) A person shall not—

(*a*) make a statement to the Registrar, examiner or investigator;

(*b*) give information to the Registrar, examiner or investigator; or

(*c*) produce or give a document to the Registrar, examiner or investigator;

(*d*) authorize or permit another person to make a statement or give information or a document to the Registrar, examiner or investigator,

in connexion with the Registrar's supervisory functions or for any purpose connected with a financial services law if he knows or ought reasonably to know that the statement, information or document is misleading in a material respect, including by omission.

(2) Any person who contravenes subsection (1) commits an offence and shall, on conviction, be liable to a fine of five million Kwacha (K5,000,000) and to imprisonment for two years.

Offences relating to failure to comply with directions

103. Any person who, without reasonable excuse, fails to comply with a direction, order or requirement given to the person under a financial services law, shall be liable to administrative penalties.

Self-incrimination

104. (1) Any person who is required under a financial services law to answer a question or produce a document or thing shall not be excused from the requirement for reason only that compliance may incriminate him or expose him to a penalty.

(2) Notwithstanding subsection (1), if the person objects on that ground to complying, the answer, document or other thing given in compliance with the requirement shall not be admissible against him in a prosecution for an offence, except a prosecution for an offence of failing or refusing to comply with the requirement, or giving false or misleading information in purported compliance with the requirement.

Offences relating to holding out as licensed person

105. Any person who—

(*a*) not being licensed or registered as a financial institution, describes or holds himself out as so licensed or registered;

(*b*) not being licensed or registered as a financial institution of a particular kind, describes or holds himself out as being a financial institution of that kind;

(*c*) permits another person to do anything referred to in paragraph (*a*) or (*b*),

commits an offence and shall, on conviction, be liable to a fine of ten million Kwacha (K10,000,000) and to imprisonment for four years.

Destroying documents

106. Any person who destroys, falsifies, conceals or disposes of, or causes or permits the destruction, falsification, concealment or disposal of, a document or thing that the person knows or ought reasonably to know is relevant to the performance or exercise of the Registrar's functions or powers commits an offence, and shall, on conviction, be liable to a fine of ten million Kwacha (K10,000,0000) and to imprisonment for four years.

Obstruction

107.—(1) Any person who, without lawful excuse, obstructs or hinders—

(*a*) the Registrar;

(*b*) a member or employee of the Registrar; and

(*c*) an examiner or an investigator,

in the performance of the Registrar's supervisory functions commits an offence and shall, on conviction, be liable to a fine of ten million Kwacha (K10,000,000) and to imprisonment for four years.

(2) Any person who, without lawful excuse, obstructs or hinders a statutory manager in the performance of his functions under this Act commits an offence and shall, on conviction, be liable to a fine of ten million Kwacha (K10,000,000) and to imprisonment for four years.

Preventing compliance

108. Any person who knowingly hinders or prevents compliance with a direction, order or requirement given under a financial services law commits an offence and shall, on conviction, be liable to a fine of ten million Kwacha (K10,000,000) and to imprisonment for four years.

Extention of time

109. The Registrar may, on application, extend any time for compliance with, or a period prescribed by, a provision of a financial services law, and may do so before or after the time for compliance or the period prescribed has passed.

Certificate by Registrar

110. A statement in writing signed by the Registrar—

(*a*) that a specified person was or was not, at a specified time, licensed or registered; or

(*b*) that a specified person was or was not, at a specified time, an examiner or an investigator,

shall be admissible evidence of the facts and matters stated in the certificate and, unless the contrary is established, shall be conclusive as to those facts and matters.

Offences by bodies corporate relating to state of mind

111.—(1) Where it is necessary to establish, for the purposes of a financial services law, the state of mind of a body corporate in relation to particular conduct, it is sufficient to show that—

(*a*) the conduct was engaged in by a director, employee or agent of the body corporate within the scope of his actual or apparent authority; and

(*b*) the director, employee or agent had the state of mind.

(2) A reference in subsection (1) to the state of mind of a person includes a reference to—

(*a*) the knowledge, intention, opinion, belief or purpose of the person; and

(*b*) the person's reasons for the intention, opinion, belief or purpose.

(3) A reference in this section to engaging in conduct includes a reference to failing or refusing to engage in conduct.

Offences by bodies corporate relating to liability of directors

112. Where an offence against a provision of this Act or another financial services law is committed by a body corporate, each director, employee or an agent of the body corporate shall also be guilty of the offence and on conviction shall be liable to the same penalty unless it is established that the director took reasonable precautions and exercised due diligence to avoid the commission of the offence.

Penalties for offences by bodies corporate

113. Notwithstanding any other provisions of this Act, where a body corporate is convicted of an offence against a financial services law, the court may, if the court thinks fit, impose a pecuniary penalty not exceeding an amount equal to five times the amount of the maximum pecuniary penalty that could be imposed by the court on an individual convicted of the same offence.

Offences relating to acts done partly outside of Malawi

114. When an act that, if wholly done within Malawi, would be an offence against a financial services law, is done partly within and partly beyond Malawi, every person who within Malawi does any part of such act may be tried and punished under the financial services law in the same manner as if such act had been done wholly within Malawi.

Inconsistency with the Company's Act Cap. 46:03

115. Wherever the provisions of this Act are inconsistent with the provisions of the Companies Act, the provisions of this Act shall prevail to the extent of the inconsistency.

Regulations

116.—(1) The Minister may, in consultation with Registrar, make regulations for the purposes of this Act and the other financial

services laws respecting any matter for which the power to make regulations or Registrar's directives has not been conferred by another provision of this Act or a provision of a financial services law.

(2) Without limiting subsection (1), regulations made under subsection (1) may provide for anything that by this Act or another financial services law may or is to be prescribed and generally for the effective administration of this Act.

(3) For the avoidance of doubt, the power to make regulations in this Act or another financial services law does not extend to making regulations about a matter in respect of which Registrar's directives may be issued.

PART XII—TRANSITIONAL AND CONSEQUENTIAL PROVISIONS

Transition period

117.—(1) On commencement of this Act, all financial institutions shall meet the requirements of this Act.

(2) The Registrar may, upon application by any financial institution, or by his own initiative allow a transition period to facilitate compliance with this Act.

Passed in Parliament this second day of July, two thousand and ten.

M. M. KATOPOLA
Clerk of Parliament