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Act

No. 10 of 2010

I assent

DR. BINGU WA MUTHARIKA

PRESIDENT

8th January, 2010

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**An Act to provide for the regulation of the business of banking  
in Malawi, and to provide for matters incidental thereto and  
connected therewith**

ENACTED by the Parliament of Malawi as follows—

PART I—PRELIMINARY

1. This Act may be cited as the Banking Act, 2009.

Short title and  
commence-  
ment

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

Interpretation

“bank” means a person who conducts banking business in Malawi, including by accepting funds withdrawable by cheque or transferable by other means;

“banking business” means the business of receiving deposits or deposit substitutes from the public that are—

(a) payable, with or without interest, on demand, or after the expiration of a stated period; and

(b) transferrable by cheque or by other means.

“banking licence” means a licence granted by the Reserve Bank of Malawi and issued under the Financial Services Act to carry on banking business;

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2009

“capital” includes paid-up capital and unimpaired reserves;

“close relation” means spouse, brother, sister, parent, child, child of the spouse and the spouse of any of these and also includes a business partner and the close relations of the business partner;

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2009

“controlling party” has the meaning ascribed to that term in the Financial Services Act;

Cap. 46:03

“company” means any company incorporated or registered as such under the Companies Act;

“core capital” means paid-up share capital and disclosed reserves, with the latter being defined as the total of statutory reserves, retained profits from prior years, share premium, and sixty per cent (60%) of after tax profits in the current year to date (or in the case of loss, one hundred per cent (100%) of that loss), less unconsolidated investments in financial companies;

“credit facility” includes financing by means of loans, leases, advances, establishing a line of credit, factoring, hire purchase, accepting of trade and other bills, discounting of such bills and notes, the opening or confirming of documentary credit, the issue of other letters of standby, guarantee or surety, the undertaking to pay on account of another person, and such other similar undertakings as may be prescribed by the Registrar in the Registrar’s directives from time to time;

“deposit” means money entrusted to a bank and accepted by it for credit to a depositor’s account, which is payable, with or without interest, on demand or after the expiration of a stated period of time;

“deposit substitutes” means funds received from the public through the issue, endorsement or acceptance of debt instruments of any kind other than deposits, or through the issue of participations, certificate of assignment, repurchase agreements or similar instruments;

“executive officer” means an officer at the most senior levels of the management of a bank, whether or not the officer is a director, who effectively manages the affairs of the bank;

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2009

“group of related debtors” means a group of debtor companies or enterprises operating under common control of an individual or of a group of related individuals, or of a corporate body acting as a controlling party as defined in the Financial Services Act, 2009;

“insider” includes any of the following—

- (a) principal shareholders;
- (b) members of the board of directors or audit committee;
- (c) executive officer; and
- (d) senior management officials;

“liabilities to the public”, in relation to a bank means all claims against such bank payable on demand or at a determinable future date, whether or not the precise date of payment is fixed;

“non-performing loan” means a credit facility that is not paying principal or interest according to the terms of the borrower’s financing agreement;

“Registrar’s directive” means a directive issued under the Financial Services Act, 2009;

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2009

“related party” includes any of the following—

(a) a person who is related to an insider of a licensed institution by marriage or consanguinity to the second degree;

(b) a legal person in which an insider has a business interest, including as a partner, director, manager or guarantor;

(c) an individual person for whom an insider is a guarantor;

(d) a subsidiary of the licensed institution or of an insider;

(e) a company or undertaking in which at least a ten per cent (10%) interest is held by the licensed institution or by an insider;

(f) a parent company of the licensed institution or of an insider;

(g) a company that is under common control with the licensed institution or of an insider;

(h) a company that holds at least a ten per cent (10%) interest of another company in which the licensed institution or an insider holds at least a ten per cent (10%) interest;

(i) company that has common management or common directors with the licensed institution, an insider, or another related party of the licensed institution; and

(j) a political party that is controlled by an insider or related party or whose funds or services shall benefit an insider or related party;

“reserves”, in relation to a bank, means all funds which have been built up out of earnings, premiums on shares, profits from the realization of assets, and increase of the value of assets upon revaluation of such assets, and which have been set aside as a general or special reserve and are available for meeting the liabilities of the bank;

“significantly undercapitalized bank” means a bank which has the following characteristics—

(a) has capital ratios that are less than fifty per cent (50%) of the requirement prescribed in the Registrar’s directive on capital;

(b) holds core capital of less than fifty per cent (50%) of the requirement prescribed in the Registrar’s directive on capital; or

(c) holds total capital of less than fifty per cent (50%) of the requirement prescribed in the Registrar’s directive on capital.

“unsecured”, in relation to credit facilities, means credit facilities made without collateral, guarantee or other personal security, or if made against a collateral, guarantee or other personal security, such part of the credit facility which at any time exceeds the market value of the collateral or the amount recoverable from the guarantor or surety, as the case may be;

(2) For the purposes of this Act, a person shall be deemed to be accepting deposits of money if such person accepts from the general public deposits of money as a feature of his business, or if such person solicits such deposits, irrespective of the terms and conditions under which such deposits are accepted or solicited and whether or not certificates or other instruments are issued in respect of any such deposit:

Provided that the acceptance of insurance premiums by an insurer, shall not be deemed to constitute acceptance of deposits of money for the purposes of this Act.

(3) Words and expressions used in this Act have the meanings ascribed to them in the Financial Services Act, 2009.

Act No. . . . of  
2009  
Application of  
the Financial  
Services Act,  
2009

3. This Act shall apply in addition to the Financial Services Act, 2009.

Act No. . . . of  
2009  
Licensing  
of banks

#### PART II—LICENSING OF BANKS

4.—(1) A person shall not—

(a) conduct banking business in Malawi; or

(b) indicate to the public that he is conducting or is about to conduct banking business,

unless licensed as a bank under the Financial Services Act, 2009.

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(2) The Registrar shall not license a person as a bank unless the person is a body corporate.

(3) The Registrar may, by Registrar's directive, determine that other entities accepting funds from the public, including those that borrow from the public or other banks, and that employ such funds in whole or in part, by granting loans, advances and other credit facilities and by investing or by any other means at the risk of the person conducting such business, is engaged in banking business and shall require that entity to be licensed.

(4) A person who contravenes this section commits an offence and on conviction shall be liable to a fine of ten million Kwacha (K10,000,000) and to four (4) years imprisonment.

5.—(1) In considering an application for a banking licence, the matters that the Registrar shall take into account include—

Conditions for licensing of banks

(a) the validity and accuracy of the documents and information submitted therewith;

(b) the financial condition, resources, integrity and previous banking or non-banking business ventures of direct and indirect shareholders associates and affiliates of the proposed bank;

(c) the integrity, working experience and qualifications of the proposed directors and executive officers of the proposed bank and their competence to conduct the proposed business;

(d) the capacity of the applicant—

(i) to maintain an adequate capital at all times;

(ii) to comply with the provisions of this Act and of any other Act relevant to its business;

(e) the adequacy of the capital, and earning prospects resulting from the intended operation;

(f) the nature and scope of the proposed operation;

(g) the needs and convenience of the community or sector to be served;

(h) the structure of its organization;

(i) the interests of depositors and creditors of the applicant;

(j) the interest of the national economy and the public interest;

(k) the structure and shareholding of the proposed group of companies of which the proposed bank forms part or intends to form part;

(l) the sources and nature of capital to be used to finance the proposed bank;

(m) whether the applicant is or will be able to apply and maintain effective and proper internal control systems and sound principles of corporate governance; and

(n) other matters that may be deemed essential by the Registrar.

(2) The Registrar may interview the promoter, directors and proposed senior management personnel in the course of an appraisal and also inspect their books and records to satisfy himself about the representations made or information furnished by the applicant.

Limitation on  
shareholding

6.—(1) A person or group of persons who do not satisfy the criteria for the fit and proper test relating to controlling shareholders, as determined by the Registrar in the Registrar's directives shall not acquire more than ten per cent (10%) of the shares of a bank.

(2) A bank shall not transfer any shares referred to in subsection (1) without obtaining written approval from the Registrar.

(3) The Registrar of Companies shall not register any transfer of shares of a bank referred to in subsection (1) without receiving a notice of no objection from the Registrar.

(4) A person who is a controlling party of a bank shall not be a controlling party of another bank.

Licensing  
criteria

7.—(1) The Registrar shall not grant a licence unless he is satisfied that—

(a) the banking business to be conducted under the licence shall be effectively managed by at least two (2) persons as executive officers of the bank; and

(b) the bank has minimum start-up capital as stipulated in the Registrar's directive on capital.

(2) A bank shall not engage in any business other than the business designated in its licence.

Suspension or  
revocation of  
licence  
Act No. . . . of  
2009

8. Where a banking licence is suspended or revoked, the power of the Registrar to give written direction to the bank under the Financial Services Act, 2009, shall extend to—

(a) the disposal of its assets; and



(b) its entering into any transaction or a transaction of any kind specified in the directions.

9.—(1) The Registrar shall keep a register of banks, consisting of a separate part for each class of banking business. Register

(2) The Registrar shall publish in the *Gazette*—

(a) the entry of a bank, or the cancellation of any entry, in the register;

(b) a copy of the register as at 31st December of the preceding year.

### PART III—PRUDENTIAL SUPERVISION

#### *Division I—Obligations of Banks*

10.—(1) Every bank shall at all times maintain adequate capital for the conduct of its business. Capital funds and minimum capital ratios

(2) The Registrar may prescribe higher on-going capital requirements for a specific bank where the supervisory review process reveals existing risks in the bank warranting the increase.

11. Without limiting the power of the Registrar under the Financial Services Act, 2009, to issue Registrar's directives, the Registrar's directives may make provision with respect to any of the following— Directives related to accounting policies of bank Act No. . . . of 2009

- (a) valuation of assets and liabilities;
- (b) depreciation of assets;
- (c) impairment of assets;
- (d) provision for contingent losses and litigation;
- (e) provision for tax payable;
- (f) amortization of goodwill;
- (g) net positions on foreign currencies;
- (h) foreign currency loans;
- (i) recognition of income and expenses;
- (j) amortization of pre-incorporation expenses; or
- (k) such other items as may be prescribed by the Registrar.

12.—(1) A bank shall not declare, credit or pay any cash dividends or make any transfer from the surplus if to do so would result in a breach of its capital adequacy requirements under this Act or the Financial Services Act, 2009. Restriction of cash dividends Act No. . . . of 2009

Cap. 46:03 (2) Notwithstanding the provisions of the Companies Act, a bank shall not increase its paid-up share capital out of revaluation reserves.

Act No. . . . of 2009 (3) A bank shall not pay any cash dividend on its shares if the bank's capital requirements under section 10 or the Financial Services Act, 2009, are not met.

Submission of periodic returns to the Registrar  
Act No. . . . of 2009  
**13.—**(1) Every bank shall submit to the Registrar all information and data on its operations in Malawi including periodic returns and those of any company which is a subsidiary, affiliate, associate or holding company to the bank which the Registrar may require for proper discharge of its functions under this Act or the Financial Services Act, 2009.

(2) The format of the periodic returns required under subsection (1) and the periods within which they shall be submitted shall be determined by the Registrar in a Registrar's directive.

(3) Any bank which, without reasonable cause, fails to comply with subsections (1) and (2) of this section, or submits inaccurate returns, shall pay to the Registrar an administrative penalty per day of default as determined in the Registrar's directives.

(4) The Registrar shall, if he deems necessary for the safety and soundness of the bank, or for the safety of the depositors or to determine whether the provisions of this Act or the Financial Services Act are being duly complied with, require in writing any affiliates, associates, holding or subsidiary companies or any person who controls a bank to provide the Registrar or its appointed agent such information or documents as may be necessary including the financial statements and other financial records within the period specified in the notice.

Supervision of banks  
Act No. . . . of 2009  
**14.—**(1) The Registrar may periodically, or at his discretion, examine or cause to be examined the business of any bank in order to determine whether the bank is in a sound financial condition and complies with the requirements of this Act or the Financial Services Act, 2009, or any other Act relevant to its banking business.

(2) In addition to subsection (1), the Registrar may, on a consolidated basis, carry out an examination of any affiliates, associates, holding or subsidiary companies or any person who controls a bank, whether they are domiciled within or outside Malawi.

(3) A bank shall, periodically, as prescribed in the Registrar's directive or on request by the Registrar, provide any information or data requested by the Registrar for purposes of carrying out an examination in pursuance of subsection (2).

15.—(1) The Registrar may upon request made to him by any monetary, supervisory or other regulatory authority in the ordinary course of business, disclose any of the information provided under section 13 to that monetary, supervisory or regulatory authority within or outside Malawi; except that the Registrar shall, before disclosing any information under section 13, satisfy itself that the information is required for the proper discharge of the requesting monetary, supervisory or regulatory authority's duties.

Exchange of  
information

(2) The Registrar shall rely on foreign monetary, supervisory, or regulatory authorities on matters of cross-border supervision of banks.

16.—(1) Where a bank fails to nominate or obtain approval of an external auditor, as required under the Financial Services Act, 2009, within two months after the lapse of the term of its previous auditor, or fails to fill a vacancy for an external auditor, the Registrar may appoint a qualified firm of external auditors whose remuneration shall be paid by the bank.

Appointment  
of external  
auditor by  
the Registrar  
Act No. . . . of  
2009

(2) A person appointed as an external auditor under subsection (1) shall—

(a) for the purposes of the Companies Act be deemed to have been appointed as an external auditor at the immediately preceding annual general meeting of the bank;

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(b) be deemed to be an external auditor appointed by the bank and approved by the Registrar as required by the Financial Services Act, 2009.

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2009

(3) The Registrar may for sufficient cause withdraw its approval of the appointment of an external auditor previously granted, and upon the withdrawal, the external auditor concerned shall vacate office.

(4) For the purposes of subsection (3), sufficient cause shall relate to any of the following—

(a) failure to comply with the requirements of this Act;

(b) breach of duty as imposed by this Act;

(c) inability to perform in accordance with international accounting standards as prescribed by the Society of Accountants in Malawi; or

(d) any other reason that the Registrar may, in his discretion consider applicable.

17.—(1) In addition to the requirements under the Financial Services Act, 2009, the duties of an external auditor in relation to a bank shall include the following—

Additional  
duties of  
external  
auditors to  
a bank

(a) to warn the board of directors of a bank of—

(i) the bank's ability or inability to meet the capital requirements;

(ii) the bank's ability or inability to meet the reserve and liquidity requirements;

(iii) the bank's risk exposures;

(iv) any other matter which the external auditor becomes aware of in the performance of his or her functions as an auditor which may—

(aa) prejudice the ability of the bank to continue conducting business as a going concern;

(bb) be detrimental to the interest of the depositors; or

(cc) violate the principles of sound financial management or the maintenance of adequate internal controls and systems by the bank;

(b) to obtain sufficient, relevant and reliable evidence to satisfy themselves of the various matters necessary to form their opinion;

(c) to ascertain, evaluate and test internal controls before placing audit reliance on them;

(d) to exercise reasonable care and skill in accordance with the current professional standards and practices and to perform the audit in accordance with international auditing standards and such other regulations, directives, policies, guidelines as the Registrar may issue;

(e) to assess, and in writing comment on, the report of the board of directors before the report is tabled at the annual general meeting; and

(f) to report to the Registrar any of the following—

(i) facts or decisions that constitute a material breach of laws or regulations;

(ii) information that indicates failure to fulfil any of the requirements for a banking licence;

(iii) any indications that may affect the bank's ability as a going concern;

(iv) matters of serious conflict within decision making bodies;

(v) the intention of the auditor to resign or the removal of the auditor from office;

(vi) where after discussing the audit findings with a bank, the external auditors conclude that they will give a negative or adverse opinion as opposed to one qualified by exceptions; or

(vii) material adverse changes in current or potential risks of the bank's business;

(2) External auditors shall not be exonerated by disclaimer clauses in the statements they endorse if the statements contain material errors and gross misrepresentation.

(3) External auditors of banks shall be subject to an audit quality monitoring review as implemented by the Malawi Accountancy Board or its delegated authority.

(4) The Registrar may in his discretion require that audited financial statements of each bank be reviewed by the Malawi Accountants Board or his delegated authority and all the costs arising from such a review shall be met by the bank.

**18.**—(1) Every bank shall, before annual accounts are finalized, dividends paid, and the capital requirements in section 10 are met, satisfy the Registrar in respect of—

Requirements  
on bad debt  
provisions

(a) sufficiency of provisions for bad debts;

(b) existence and enforcement of a proper policy on non-accrual of interest on non-performing loans; and

(c) amortization of preliminary expenses, goodwill and similar expenses.

(2) The Registrar may, in a Registrar's directive, set out the requirements to be fulfilled by a bank in order to comply with subsection (1).

**19.**—(1) Every bank shall keep in Malawi such records, books of account and information as necessary to exhibit clearly and correctly the state of its business and to explain its transactions and financial position, and to enable the Registrar to determine whether it has complied with the provisions of this Act.

Records,  
books of  
account and  
information  
to be kept

(2) The records, books of account and information referred to in subsection (1) shall be preserved for a period of at least seven (7) years from the date of the last entry therein.

#### *Division II—Structural Matters and Limitations*

**20.** A company licensed under this Act to conduct banking business shall not—

Prohibited  
transactions

(a) purchase shares in its own business or make loans or advances against such shares as collateral;

(b) hold shares in a company that is a controlling party of the bank, irrespective of whether the shares are to be held for trading or equity investment.

Equity  
investments  
privately held  
by liquidated  
or divested  
investor

21.—(1) Where any shareholder of a privately held equity investment in a bank is liquidated or divests his interest, such investment shall with immediate effect—

(a) be offered to existing shareholders on a right-of-first-refusal basis, and at a consideration to be agreed among the parties;

(b) be offered to other external parties where for any reason the existing shareholders are not willing to take up the shares.

(2) Such equity shall be offered to existing shareholders in proportion to their shareholding.

(3) Such equity shall not, for any reason whatsoever, be warehoused.

(4) Approval shall be sought from the Registrar regarding persons wishing to take up such equity investment in a bank.

(5) If the Registrar is satisfied that existing shareholders have failed or may fail to take up their allocated shares, nominate or obtain approval for an external investor to take up such equity investment, the Registrar shall advertise for potential investors to take up such equity.

Restricted  
transactions

22. Except with the prior approval of the Registrar, a bank shall not—

(a) engage on its own account in wholesale or retail trade, including import and export trade, except in so far as may be necessary in the course of the satisfaction of debts due to it;

(b) purchase, acquire or hold immovable property other than for the purpose of conducting its business or providing housing or amenities for its staff;

(c) have investments in land, buildings and other immovable property which in aggregate exceeds the sum of its capital and reserves:

Provided that paragraph (b) and paragraph (c) shall not prevent a bank from enforcing a security by acquiring immovable property and reselling it within two (2) years; and

(d) own shares in the capital of any company, firm or enterprise the aggregate value of which is more than the percentage of the bank's core capital specified in Registrar's directives.

23. Without limiting the power of the Registrar under the Financial Services Act, 2009, to issue Registrar's directives, the Registrar's directives may make provision with respect to any of the following—

Matters that may be covered by the Registrar's directives  
Act No. . . . of 2009

(a) the solvency, liquidity and sound operating practices of banks, including any of the following—

(i) regulating the minimum liquidity requirements as a percentage or percentages of liabilities to the public;

(ii) regulating the minimum capital requirements as a percentage or percentages of a specified class or classes of assets and risk bearing commitments;

(iii) regulating the minimum and maximum ratios to be maintained between specified classes of assets and liabilities including on commitments to provide loans, advances and credit facilities;

(iv) specifying the composition of liquidity, capital, classes of assets and liabilities and risk bearing commitments, as well as the method of their computation;

(b) prohibiting or restricting—

(i) specified classes of loans, advances, credit facilities, investments and risk bearing commitments, including in excess of a specified limit;

(ii) uncovered positions in foreign currency, including in excess of a specified limit; or

(iii) other specified transactions that may affect the solvency or liquidity of a bank.

24.—(1) Without limiting the power of the Registrar under the Financial Services Act, 2009, a bank shall not grant or permit to be outstanding a loan or credit accommodation to any of its shareholders, directors, executive officers, employees or to any of their related party except on terms which are non-preferential in all respects including creditworthiness, term, interest rate and the value of the collateral.

Restrictions on loans to shareholders, directors, officers, employees and to their relations, etc.  
Act No. . . . of 2009

(2) For the purpose of subsection (1), "non-preferential" means upon terms no more favourable than those which would be offered under prevailing conditions to persons other than those referred to under subsection (1).

(3) A bank shall not grant or permit to be outstanding loans or credit accommodations to shareholders, directors, executive officers, employees or to any of their related party which exceed ten per cent of its core capital.

(4) Every loan or credit accommodation by a bank to any of its shareholders, directors, executive officers, employees or to any of their related party shall be secured at all times.

(5) Any loans, advances or credit facility granted by a bank to any of its shareholders, directors, executive officers, or to any of their related party shall—

(a) require a unanimous approval of the board of directors of the bank with the director, shareholder or executive officer or employee concerned not participating in the deliberations of the board with respect thereto; and

(b) be extended on non-preferential terms.

(6) A bank shall not grant a loan or credit accommodation to a director, shareholder, executive officer, or employee of the bank while another loan or credit accommodation to that person is non-performing.

(7) A director of a bank who at any time—

(a) defaults on a loan or credit accommodation granted to him by the bank; or

(b) has subsisting, a non-performing loan or credit accommodation obtained from the bank,

shall—

(i) immediately cease to be a “fit and proper” person for purposes of this Act;

(ii) cease to be a member of the board of directors of the bank; and

(iii) not be eligible for appointment to the board of directors of any bank in Malawi for a period of seven (7) years.

(8) Any person who grants a loan or credit accommodation which contravenes any of the provisions of this section commits an offence and shall be liable to administrative penalties under the Financial Services Act, 2009.

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2009

(9) Notwithstanding subsection (8), the Registrar may order for—

(a) repayment by the offending officer and director of any amount which exceeds the legal lending limits prescribed in subsection (3) above;

(b) the execution of proper security documentation where applicable;

(c) the regularization of any preferential terms or conditions of a loan as the case may be;



(d) the dismissal from the bank of the offending officer;

(e) barring the offending officer from any future employment at any bank for a specified or indefinite period.

(10) Where a loan extended to an insider becomes non-performing, the bank shall deduct the outstanding amount of the loan or sum granted or extended to the insider when computing the on-going capital requirements of the bank.

(11) Subject to the Registrar's directive on insider lending, this section shall not apply to loans that a bank may grant to its officers or employees as part of their terms and conditions of employment.

**25.** No bank shall without prior written permission of the Registrar—

Actions  
requiring  
prior  
approval

(a) grant or permit to be outstanding any loan, advance or credit facility in excess of twenty-five per cent (25%) of its core capital to any debtor or group of related debtors;

(b) change its articles of association;

(c) reduce its capital base by repayment of capital or distribution of its reserves;

(d) open and close branches and static or mobile agencies;

(e) open an establishment abroad;

(f) introduce a new product;

(g) participate in any other company to an extent of becoming a controlling party as defined in the Financial Services Act, 2009;

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2009

(h) go into restructuring;

(i) go into liquidation;

(j) arrange for transfer or sale or disposal of its shares or business;

(k) enter into a management agreement with any party; or

(l) amalgamate or merge with any other institution wherein the whole or a considerable part of the business or property of the bank will be transferred to that other institution.

### *Division III—Enforcement and Other Remedial Measures*

**26.—(1)** Whenever the Registrar determines that a bank or a person affiliated with the bank—

Enforcement  
action by  
the Registrar

(a) has violated any law, prudential rule, or Registrar's directive applicable to a bank;

(b) has engaged or is engaging in a practice that the Registrar believes is unsafe or unsound and threatens the interests of a bank, its depositors, or creditors or the public;

(c) has caused the bank to be in an unsafe or unsound condition that the Registrar believes threatens the interests of a bank, its depositors, or creditors or the public;

(d) is significantly under-capitalized; or

(e) is insolvent,

the Registrar may institute an enforcement action against the bank or such person affiliated with the bank as provided under this section, which enforcement action shall be effective immediately.

(2) The type of enforcement actions the Registrar may take shall include—

(a) an order to cease and desist which may require the bank or person affiliated with the bank to refrain from any violation or unsafe or unsound activity or practice or take such corrective action as shall be necessary to remedy effects of such violation or unsafe or unsound practice or activity, including making restitution or reimbursement for losses that may have resulted therefrom;

(b) an order requiring a person affiliated with the bank to cease such affiliation. In egregious cases, the Registrar may preclude such person from being or becoming a person affiliated with any bank in Malawi;

(c) an order requiring the payment of a monetary penalty as determined by the Registrar in the Registrar's directives;

(d) placing a bank under statutory management as stipulated in section 27; and

(e) closing the bank.

(3) For purposes of this section, "closing a bank" means physically barring any access to a bank.

(4) Prior to imposing an enforcement action as provided for in subsection 2 (a), (b) and (c) above, the Registrar shall provide written notice to the bank or person affiliated with the bank setting forth the proposed enforcement action and the basis thereof.

(5) Any bank or person affiliated with the bank wishing to contest the proposed enforcement action may request for a hearing on the matter as provided by the the Financial Services Act, 2009.

(6) Where a bank is significantly undercapitalized, the Registrar shall immediately—

(a) take any or all of the actions outlined in the Registrar's directive on capital;

(b) enter into an agreement with the board of directors of the bank requiring the bank to rectify its significant undercapitalization within ninety (90) days, and to restore capital adequacy within one hundred and eighty (180) days, or within such shorter periods as the Registrar shall order.

(7) If at any time—

(a) after the period specified in subsection (6) (b) the bank has failed to raise its capital to the levels necessary to rectify its significant undercapitalization; or

(b) before the end of the period specified in subsection (6) (b), the financial position of the institution continues to deteriorate,

the Registrar may place the bank under statutory management or revoke the licence and close the bank.

(8) This section shall not be construed so as to preclude the Registrar from closing any bank under any other provision of this Act.

27.—(1) In addition to the provisions of the Financial Services Act, 2009, the Registrar may place a bank under statutory management if it appears to the Registrar that the bank—

(a) is significantly undercapitalized;

(b) is unlikely to meet the demands of its depositors or pay its obligations in the normal course of business; or

(c) has incurred or is likely to incur losses that will deplete all or substantially all of its capital.

(2) Upon placing a bank under statutory management, the Registrar or his appointed agent, shall be the statutory manager and shall have exclusive powers to manage and control the affairs of the bank.

(3) The appointment of any person under this section shall not be construed so as to exclude the Registrar from performing any of the functions that a statutory manager may perform.

(4) No suit or other legal proceedings shall lie against any person appointed as a statutory manager by the Registrar for anything which is done or is intended to be done in good faith in the exercise of his duties as a statutory manager.

(5) The Registrar may at any time after placing a bank under statutory management, close the bank.

Provisions  
relating to  
statutory  
management  
or closure  
of banks  
Act No. . . . of  
2009

(6) Where the Registrar places the bank under statutory management or closes the bank, the following shall apply—

(a) any term whether statutory, contractual or otherwise on the expiration of which a claim of right of the bank would expire or be extinguished, shall be extended one hundred and eighty (180) days from the date of taking over;

(b) any attachment or lien existing one hundred and eighty (180) days prior to the take over of the bank by the Registrar shall be vacated;

(c) any transfer of any asset of the bank made one hundred and eighty (180) days before the takeover by the Registrar, with intent to effect a preference or at less than the appraised book value shall be void;

(d) any gratuitous transfer of any asset of the bank made within one hundred and eighty (180) days before the takeover by the Registrar shall be annulled and all such assets shall be surrendered to the Registrar; and

(e) any lending to any director, officer or any close relation of a director or officer on preferential terms or without adequate security made within one hundred and eighty (180) days prior to the take over by the Registrar of the bank shall be rescinded; and that director or officer or close relation to the director or officer shall immediately refund the moneys advanced and the interest accrued at the going rate in the bank.

(7) For the purposes of discharging his functions, the Registrar may declare a moratorium on the payment by the institution of its liabilities to depositors and other creditors.

(8) The declaration of a moratorium shall—

(a) be applied equally and without discrimination to all classes of depositors and creditors;

(b) limit the maximum rate of interest which shall accrue on deposits and other debts payable by the bank during the period of the moratorium to the minimum rate as may be prescribed by the Registrar by notice for the purposes of this section except that this paragraph shall not be construed so to impose an obligation on the institution to pay interest or interest at a higher rate to any depositor or creditor than would otherwise have been the case;

(c) suspend the running of time for the purposes of any law of limitation in respect of any claim by any depositor, or creditor of the bank; or

(d) cease to apply upon the termination of the statutory manager's appointment in which case the rights and obligations of the bank, its depositors and creditors shall, except to the extent provided in paragraphs (b) and (c), be the same as if there had been no declaration under this subsection.

(9) Where a bank is placed under statutory management—

(a) the board of directors shall stand suspended and the statutory manager appointed under section 26 (2) shall perform the functions of the members of the board of directors until such a time as the Registrar shall direct otherwise;

(b) no steps may be taken by any person to enforce any security over the property of the bank;

(c) no other proceedings and no execution or other legal process may be commenced or continued against the bank or its property.

28.—(1) The Registrar or his appointed agent, shall, within twelve (12) months from the date of taking over as statutory manager, consider and implement any or all of the following options either singly or in combination—

(a) arrange a merger with another bank;

(b) arrange for the purchase of assets and assumption of all or some of the liabilities by other banks;

(c) arrange to sell the bank;

(d) liquidate the assets of the bank; and

(e) any other option that the Registrar may decide.

(2) The Registrar or his appointed agent shall take the action described in subsection (1) which in the opinion of the Registrar—

(a) is most likely to result in marshalling the greatest amount of the bank's assets; or

(b) protects the interests of depositors including their interest in the unprotected deposit amounts; or

(c) ensures stability of the financial sector.

(3) In determining the amount of assets that is likely to be realized from the bank's assets, the statutory manager shall—

(a) evaluate the alternatives on a present value basis, using a realistic discount rate; or

(b) document the evaluation and the assumptions on which the evaluation is based, including any assumptions with regard to interest rates, asset recovery rates, inflation, asset holding and other costs

Registrar to  
determine  
action on  
bank placed  
under  
statutory  
management

## PART IV—WINDING-UP

Liquidation or  
winding-up  
of a bank

**29.**—(1) Notwithstanding the provisions of any other law, no proceedings for winding-up or liquidation of a bank shall be commenced except—

(a) where the proceedings are commenced by the Registrar or its appointed agent; or

(b) where the proceedings are commenced by a bank under subsection (4);

(2) Where proceedings for winding-up of a bank are commenced under subsection (1) (b) above, the Registrar or its appointed agent may permit the winding-up to proceed on such terms and conditions as the Registrar may determine.

(3) Notwithstanding any provisions in this Act, any bank that is insolvent and which the Registrar believes will not be restored to solvency within a reasonable period, shall have its license revoked and be subjected to the provision of subsection (1) (a) above.

(4) A bank shall with the prior approval of the Registrar, apply to the High Court for voluntary liquidation.

(5) Where the Registrar is satisfied that the assets of a bank which has applied for voluntary liquidation of its operations under subsection (4) are not sufficient to pay its depositors and other creditors in full, or that the completion of the liquidation of its operations is unduly delayed, the Registrar may, if it deems fit, place the bank under compulsory liquidation in line with subsection (1) (a).

(6) Subject to subsection (4) of this section, a bank under voluntary liquidation shall immediately cease all activities except those which are incidental to the orderly realization, conservation and preservation of its assets and the settlement of its obligations.

(7) In case of a liquidation under this section—

(a) the liability of the shareholders for uncalled subscriptions to the capital stock of the bank shall continue until the end of the liquidation process;

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(b) notwithstanding the provisions of the Companies Act, where a bank is in liquidation, whether voluntary or involuntary, the ranking of claims shall be in accordance with section 32 or as may be stipulated in the Registrar's directives.

Powers of  
a liquidator

**30.**—(1) The liquidator may, with the approval of the Registrar—

(a) bring or defend any action or other legal proceedings in the name and on behalf of the bank;

(b) carry on the business of the bank so far as may be necessary for the beneficial winding-up of the bank;

(c) retain advocates, notaries, accountants, appraisers and other professional advisers as may be approved by the Registrar;

(d) make any compromise or arrangement with creditors, or persons claiming to be creditors, or having or alleging themselves to have any claim, present or future, certain or contingent, ascertained or sounding only in damages against the bank or by which the company may be rendered liable;

(e) compromise all calls and liabilities to calls, debts and liabilities capable of resulting in debts, and all claims, present or future, certain or contingent, ascertained or sounding only in damages, subsisting or supposed to subsist between the bank and a contributory or alleged contributory or other debtor or person apprehending liability to the bank and all questions in any way relating to or affecting the assets or the liquidation of the bank on such terms as may be agreed, and take any security for the discharge of any such call, debt, liability or claim and give a complete discharge in respect of it.

(2) The liquidator may—

(a) sell the movable and immovable property of the bank by public auction or private contract, with power to transfer the whole of it to any person or company or to sell the same in parcels;

(b) do all acts and execute in the name and on behalf of the bank, all deeds, receipts and other documents, and for that purpose to use, when necessary, the seal;

(c) draw, accept, make and endorse any bill of exchange or promissory note in the name and on behalf of the bank with the same effect with respect to the liability of the bank as if the bill or note had been drawn, accepted, made or endorsed by or on behalf of the bank in the course of its business;

(d) raise on the security of the assets of the bank any money required;

(e) take out in his official name letters of administration to any deceased contributory, and do in his official name any other act necessary for obtaining payment of any money due from a contributory or his estate which cannot be conveniently done in the name of the company, and in all such cases the money due shall, for the purpose of enabling the liquidator to take out the letters of administration or recover the money, be deemed to be due to the liquidator; but nothing in this paragraph shall be deemed to affect the rights, duties and privileges of the Administrator General;

(f) appoint an agent to do any business which the liquidator is unable to do himself;

(g) enforce the individual liability of the shareholders and directors of the bank;

(h) eliminate the interests of shareholders;

(i) generally realise the assets of the insolvent bank;

(j) arrange, negotiate and conclude in the interests of the depositors of an insolvent bank an agreement to the benefit of the depositors and for the purposes of—

(i) releasing the liquidator from its obligations in respect of the depositors' claims for payment of their deposits out of the liquidation proceeds;

(ii) impose those obligations on any third party as shall be agreed;

(k) by notice in writing require any person who is or has been a director, executive officer, agent or auditor of the bank or any person who has custody of any funds or other assets of the institution being liquidated, to—

(i) give to the liquidator all reasonable assistance in connexion with the liquidation;

(ii) appear before the liquidator for examination concerning matters relevant to the liquidation; or

(iii) produce any books or documents that relate to the affairs of the institution being liquidated.

(3) The exercise by a liquidator of the powers conferred by this section shall be subject to the control of the Registrar; and any creditor may apply to the High Court for review with respect to any exercise or proposed exercise of any of those powers.

(4) No review under subsection (3) shall be allowed except where the action complained of is arbitrary and capricious.

(5) In exercise of its powers as a liquidator, the Registrar or its appointed agent shall carry out a forensic investigation to determine the causes of failure of the bank and report on among other things, significant related party transactions, violations of the law and the bank's governing policies and regulations, and unsound business and lending practices.

(6) A person who—

(a) refuses or fails to comply with a requirement of the liquidator which is applicable to him, to the extent to which he is able to comply with it;



(b) obstructs or hinders a liquidator in the exercise of the powers conferred under this Act; or

(c) furnishes information or makes a statement which he knows to be false or misleading in any material particular; or

(d) when appearing before a liquidator for examination in accordance with such requirement, makes a statement which he knows to be misleading in any material particular,

commits an offence and on conviction is liable to a fine of ten million Kwacha (K10,000,000) and to two (2) years imprisonment.

(7) Any person who, following the forensic investigation, is found to have contravened this Act and the bank's policies and regulations or significantly contributed to the failure of the institution shall cease to be a fit and proper person for the purposes of this Act.

(8) Notwithstanding anything to the contrary in any other law, a court shall not entertain any application for stay of proceedings in relation to the liquidation or winding-up of a bank under this Act.

(9) Subsection (8) does not apply to an application filed by the Registrar.

31.—(1) The liquidator shall within a period not exceeding five (5) months from the date of his appointment, submit to the Registrar a report detailing the assets of the bank in his or her custody or control and their value, and as far as can be established the liabilities to its depositors and other creditors.

Liquidator to report on custodial assets and liabilities

(2) Where a bank is under liquidation, every depositor of the bank shall be deemed to have filed his claim for the amount shown in the books of the bank as standing to his credit;

(3) The liquidator shall in the administration of the assets of the bank and in the distribution of those assets among its creditors, comply with the directions of the Registrar.

32.—(1) The liquidator shall, within ninety (90) days after submission of a report of the assets and liabilities of the bank commence the payment to depositors and creditors of the bank in the following priorities—

Preference of certain claims

(a) payment shall be made first to the liquidator for all expenses incurred in the process of liquidating the bank;

(b) second, to depositors in *pari passu*;

(c) third, to secured creditors;

(d) fourth, to employees for all wages and salaries due net of any liabilities to the bank; and

