



## **FINAL REPORT**

### **MALAWI: Strengthening the Legal Framework for NBFIs and providing preliminary advice on Pension Reform \***

24 October 2006

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### **Promontory Financial Group Australasia, LLP**

1. This Report is presented in compliance with the terms of reference for project No. FIRST.51.R416 as detailed in the contract between Promontory Financial Group Australasia and the FIRST Management Unit dated 13 January 2006.
2. This Report completes the project to draft bills to strengthen the legal framework for supervising non-bank financial institutions in Malawi and to prepare a policy paper on pension reform.
3. The Report is in several parts. The main document is a relatively brief overview of the project, its deliverables, and some thoughts on the way forward. The deliverables are contained in a series of attachments
4. The Report meets the Terms of Reference for the project.
5. We wish to thank the officials of the Reserve Bank of Malawi and of the Ministry of Finance, as well as the members of the Pension Reform Task Force who gave freely of their time and views.



Dr Jeffrey Carmichael  
Chief Executive  
Promontory Financial Group Australasia, LLP

15 November 2006



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## MAIN REPORT

# MALAWI: Strengthening the Legal Framework for NBFIs and providing preliminary advice on Pension Reform

## 1. Introduction

The Terms of Reference for this project include the following:

### Project Goal and Purpose

*“The goal of this project is to strengthen the financial sector in Malawi.*

*The purpose of this project is to strengthen the legal and regulatory framework in order to better define RBM’s regulatory obligations and develop a policy strategy for pension sector development.”*

### Key Deliverables

- *New pensions law regulating the current pensions schemes;*
- *Accepted and approved amendments to the RBM Act;*
- *Accepted and approved amendments to the Insurance, Securities Bills and Banking Act to ensure consistency with the RBM Act;*
- *Accepted and approved policy paper on the options for strengthening the pensions industry in Malawi;*
- *Roadmap for implementation of the preferred option(s) included in the policy paper.*

### Consultations

During the course of the project we met with the Minister of Finance, the Governors and senior management of the RBM, and senior representatives of the Ministries of Finance and Justice. We also met with the Pension Reform Task Force which has a wide representation from both the official sector and the finance industry.

We held six workshops over the course of the project to discuss the draft bills and the pension reforms, as well as several workshops with RBM staff to discuss the legal framework and its implications for financial sector supervision.

**Structure of the Report**

Section 2 provides a summary of issues pertaining to the draft set of Bills. Section 3 provides a summary of the key issues raised in the pension reform discussions. The final section offers a roadmap for implementing pension reforms as well as some general thoughts on the way forward. The attachments contain the key deliverables for the project, including the draft Bills and the policy paper on pension reform.

## 2. Strengthening the Legal Framework for Financial Sector Supervision in Malawi

### 2.1 Draft Financial Services Bill

The key legal reforms for strengthening the legal and supervisory framework for the financial sector in Malawi are contained in the draft Financial Services (FS) Bill.

Following discussions with the Reserve Bank of Malawi (RBM) and the Minister of Finance, it was agreed that the regulatory issues outlined in Stage 1 of this project would best be contained in a new bill, rather than included in what could otherwise become an overwhelming and possibly disjointed set of amendments to the Reserve Bank of Malawi Act (1989).

The central philosophy of the FS Bill is that all regulatory powers and responsibilities for the entire financial sector should be contained in a single Act. Thus the Bill establishes a single Registrar of Financial Services, and sets out the regulatory and supervisory objectives and powers for the Registrar. In this way, the Registrar will have a consistent set of powers across the whole of the financial sector and will be able to set consistent regulatory requirements for similar risks. In other words, this Bill facilitates a risk-based approach to financial sector supervision in a way that is practically impossible under separate institutional laws. Importantly, prudential and conduct standards will be issued under the FS ACT rather than under the individual industry Acts. These standards may be issued for a particular class of institutions (e.g. a capital adequacy standard for banks), or for groups of financial institutions (e.g. the Registrar may issue a standard on fit and proper person requirements for all prudentially-regulated institutions).

The Bill has been through an extensive exposure process with officials. The structure and content have been agreed by all stakeholders.

The main features of the FS Bill are the following:

#### **Institutional Arrangements**

- The Bill establishes the position of “Registrar” of Financial Institutions (s.8(1)). Further, it establishes that the Governor of the RBM will be the Registrar for the purposes of this and other financial services laws (s.8(2)) and that the RBM has the function of supporting the Registrar in carrying out his responsibilities (s.9(1)). Thus the Bill creates the RBM as a unified supervisory agency for the entire financial sector.
- The definitions section of the Bill lists the institutions to which the Act will apply and divides them into “financial institutions” (FIs) and “prudentially regulated financial institutions” (PFIs). The former group includes all institutions listed in the Bill, plus any additional institution(s) that the Registrar declares to be an FI. PFIs are a sub-set of the broader FI group and include banks and other deposit takers, insurance companies and other institutions offering insurance-like products, pension funds, trustees, securities exchanges and depositories. The Bill sets out a broad set of powers and requirements that apply to all FIs (Part III, Part IV Divisions 1 to 4, and Part VII) and a more intrusive set of powers and requirements that apply only to PFI (Part IV Division 6 and Part VI).
- The Bill establishes clear objectives for the Registrar, in line with international standards for a unified supervisor (s.10), including fostering: safety and soundness of financial institutions; the highest standards of conduct; fairness, efficiency of the financial sector;

systemic stability; and the reduction of financial crime. It qualifies these objectives by requiring the Registrar to take account of the impact of regulation and supervision on the ability of the community to access financial services, and the need to balance the effectiveness of supervision against its impact on the efficiency of the financial system.

- The Bill establishes an industry funding regime for financial supervision, with appropriate accountabilities, checks and balances, to ensure that the RBM does not abuse its powers in this respect (s.12 to s.20).

### **Regulatory and Supervisory Requirements and Powers**

- Under the Bill, all FIs are required to be either licensed or registered by the Registrar (s.23). The Bill gives the Registrar the power to impose conditions on, vary conditions on, suspend, vary or revoke, and exempt FIs from licences and registrations (s.23 to s.32). The Bill sets down several basic requirements for issuing a licence or registration.
- Part IV of the Bill gives the Registrar extensive supervisory powers including:
  - issuing directives (s.33). These may be for the purposes of establishing standards of market conduct or prudence. They may be issued with respect to a group of financial institutions, or a single institution. They may also be issued with respect to financial conglomerates. The Bill sets out a comprehensive list of matters on which the Registrar may issue directives (including requirements with respect to fit and proper persons, capital adequacy, governance, asset and liability valuations, controllership, use of particular instruments or transactions, and risk management systems) but is explicit that the section does not limit directives to the matters enumerated. The sectoral laws identify additional areas and matters, specific to each group of FIs, about which the Registrar may issue directives. The directives powers in total provide the RBM with the flexibility to establish an appropriate supervisory regime for each industry group while, at the same time, having the ability to issue standards that apply to all institutions or sub-sets of institutions where they face common risks;
  - setting information and reporting requirements (s.34 and s.35), which are to be issued as regulations by the Minister. S.34 provides an indemnity for individuals who will be required under the Act to report suspicions of contraventions of financial sector laws and/or involvement in financial sector crime; and
  - issuing directions (s.36). This section provides the Registrar with extensive powers to direct an FI to comply with the law, to undertake certain actions, or to cease undertaking certain actions, if it appears to the Registrar that the FI has contravened a financial services law, is conducting its affairs in an improper or financially unsound way, is promoting financial sector instability, or is likely to be involved in financial crime.
- Part IV, Division 4 of the Bill sets out the Registrar's powers of inspections and investigation (s.38 to s.41). The powers include emergency investigative powers for the Registrar to act in situations where it is judged necessary to do so to prevent loss or destruction of, or damage to, relevant evidence (s.39(10)).
- Part IV, Division 6 of the Bill sets out the need for the Registrar to approve controllers of PFIs, persons intending to become controllers of PFIs, and changes in the level of control by controllers of PFIs.

- Part V of the Bill addresses market conduct. S.53 prohibits false and misleading conduct in the financial services sector. Under s.54 the Registrar may determine that a specified practice is prohibited on the grounds that it is unfair to consumers, will reduce competition in the sector, is contrary to the public interest, or is otherwise an undesirable practice. Under s.55 the Minister may by regulation impose requirements with respect to information disclosure.

#### **Amalgamations, Transfers of Business, Statutory Management, and Winding up of PFIs**

- Part VI of the Bill sets out requirements for mergers, and management of troubled PFIs.
- Under s.59 the Registrar may appoint a statutory manager to a troubled PFI.
- Under s.62 an application to wind up a PFI can only be made with the Registrar's consent.
- These provisions not only provide a sound legal framework for intervening with troubled PFIs and winding them up if needed, they ensure that the Registrar has control of the process in order to protect the interests of the customers of the PFI.

#### **Enforcement Powers**

- Part VII spells out the Registrar's enforcement powers. These include:
  - the power to accept enforceable undertakings (s.63);
  - the power to undertake representative action against an FI or person involved with contravention of a financial services law on behalf of person or persons who suffer loss as a consequence of the contravention (s.64); and
  - the power to require a person or FI that has contravened a financial service law to comply with the law, to remedy the effects of the contravention, to compensate persons who have suffered a loss as a result of the contravention, to engage in a compliance programme, to change the management of the institution, and/or to impose a monetary penalty on the person or FI that contravened the law (s.65).
- These powers are subject to appropriate notice and appeals provisions.

#### **Other Considerations**

- The Bill makes provision for the Registrar to share information with other Government agencies (s.21) and overseas regulators in carrying out his duties under the Act. This power is subject to appropriate protections for individuals and should be read in conjunction with the revised secrecy provisions in the Amendments to the RBM Act (see below).
- The Bill facilitates the supervision of self-regulatory organisations (SROs) by the Registrar and the delegation of certain industry supervisory activities to SROs (s.42 to s.50). It is envisaged that supervision of small financial institutions such as SACCOs and microfinanciers may be implemented through such arrangements.
- Part VIII, Division 2 of the Bill establishes a Financial Services Appeals Committee to review, on appeal, decisions made by the Registrar or authorised SROs. The Committee will hear appeals on such matters across the entire financial services sector. S.86 of this Division requires the Registrar to promote and encourage the development by FIs of appropriate mechanisms for resolving complaints by clients of the industry.



- Part X of the Bills details transitional arrangements for FIs coming under the new Act.

## **2.2 Draft Retirement Funds Bill**

The second entirely new Bill drafted under this project is the Retirement Funds Bill. The objective of this Bill is to create a legal framework around the existing pension fund industry, which is currently subject to a very loose regulatory framework under the Taxation Act.

The Bill has been through an extensive exposure process with officials and industry representatives. While some issues remain contentious, the overall framework has been welcomed and agreed by all stakeholders.

The philosophy of the draft Bill is to create a legal framework to protect the interests of members of the existing pension fund industry in Malawi while, at the same time creating as little disruption to existing arrangements as practicable. In taking this approach we were conscious of the fact that existing schemes are voluntary. Consequently, an excessively onerous regime could have the unintended consequence of inducing employers to close existing schemes, to the detriment of employees.

### **2.2.1 Potentially Contentious Issues**

While the Bill attempts to preserve the status quo to a large extent, there are numerous areas in which the draft imposes conditions that currently do not exist, due to the absence of a legal framework for pension funds. These include:

- All retirement funds, persons involved in the operation of funds, and related professionals are required to be registered or licensed;
- All retirement funds are required to be established as trusts;
- All employer funds are required to use an independent custodian;
- Employers will be legally bound to remit scheme contributions to trustees within a defined period;
- Lending by funds to employers, and to employer related parties, will be restricted to 5 percent of fund assets;
- Lending to members will be prohibited; and
- Other than in specified circumstances, (including leaving the country, death and disablement, and circumstances related to severance allowances under the Employment Act) member entitlements are to be preserved until retirement.

Most of these impositions were agreed by the stakeholders without undue concern. The general view was that, in most cases, only a small number of funds would be adversely affected by the requirements (such as the requirement to have an independent custodian, to divest from related-party assets, or the need to reconstitute the fund as a trust). There were nonetheless two issues that caused considerable debate and concern in the Malawi context: namely, the prohibition on member lending; and the requirement that member benefits be preserved until retirement.

## Member Lending

It is common practice among a number of employer funds in Malawi to lend against member entitlements for housing during the period of employment. The case was put that many of these employees would not otherwise be able to access housing finance and would therefore not otherwise be able to purchase a house either during employment or after retirement, unless this practice is preserved.

The case against the practice rests on a number of principles:

- First, it is a basic foundation of pension funds that the assets of the fund should be quarantined from risk to the greatest extent possible, including risks incurred by the member during his/her working life. This philosophy inevitably leads to rules that prohibit encumbering fund assets by the trustees or pledging of fund entitlements by members. Member lending runs counter to the principle of not pledging entitlements as collateral.
- Second, if a loan is made to the member against the purchase of housing to be used by the member, either the asset is exposed to default by the member (e.g. foreclosure in the event of the loss of employment, natural disaster, etc), or the return on the fund is exposed (in the event that the fund writes the investment off, or suspends payments, rather than foreclose on the member).
- Third, pension fund assets are accumulated for the purpose of providing an income in retirement for the member. Since the member's entitlement is tied up in a physical asset, the implication is that the house would need to be sold in order to support the retirement annuity.
- Fourth, lending to members inevitably raises issues of equity among fund members since one member's loan is supported by other members' contributions. This is particularly sensitive if member loans are made at concessional rates.
- Fifth, lending to members requires fund trustees to develop the individual credit assessment skills that normally reside in banks and other specialist housing finance institutions.
- Finally, it is a basic foundation of pension fund management that the investments should be made at arm's length. The fact that members argue that they are unable to obtain loans from normal commercial sources is *prima facie* evidence that the loans to members are not being made on arm's length terms.

This is an emotive and difficult issue. While most industry and official sector stakeholders accepted the proposition that pension funds should be quarantined from member lending, they recognised that there would be some disruption and member resistance to changing the current practice. Nevertheless, it was agreed that the Bill should go ahead as drafted, but with suitable transition provisions to ensure that existing loans are not disrupted.

## Preservation of Benefits

The issue of preservation was, surprisingly, even more emotive. The current practice in Malawi is for individuals to access their entitlements in cash on leaving employment. There are widespread concerns in the official sector that individuals are being encouraged to leave employment early in order to access their lump sums. The penal tax that is levied on these lump sums has not deterred many employees from pursuing this route. There have even been cases where organized workers have accessed their pension entitlements early by arguing successfully that they have changed employer

where the corporate ownership of their employer has changed, despite no fundamental change in their working arrangements.

The practice has been complicated by a flaw in the drafting of the Employment Act which has enabled the courts to take a very wide interpretation of the circumstances under which severance payments are due. Rather than being confined to cases of genuine severance, the Act has been interpreted as applying to virtually all changes of employment, whether voluntary or involuntary. In response, employers have argued that allowing exiting workers to access both their pension entitlements in cash and their severance pay involves a degree of double dipping. While employers have waited patiently for over 6 years for some clarification to the Employment Act, there is a trend among employers to start closing pension funds on the grounds that they cannot afford to support both systems, especially given that the pension schemes are voluntary.

There is little question that the current situation is unsustainable. The problem has several elements. In a properly functioning system there should be no conflict between severance pay and pension entitlements, since they serve entirely different purposes. Severance pay is usually designed to assist workers who have been involuntarily laid off to manage the transition to a new job by providing them with short-term cash support during the job search period. Pension funds, on the other hand, are designed to provide income support in retirement and are not normally accessible in cash on leaving employment for reasons other than retirement. The problem in Malawi is that, in the absence of a legal framework for the pension industry, pension entitlements have been accessible on leaving employment and are therefore viewed in many respects as equivalent to severance pay. The problem has been compounded by the liberal interpretation of the conditions under which severance pay is payable, making severance pay in many respects comparable with the benefits under a provident fund.

An amendment to the Employment Act has been drafted by the Ministry of Labour and is expected to go to Cabinet soon. The essence of the amendment is the following:

- It clarifies the circumstances under which a severance allowance is payable: namely, where a contract of employment is terminated as a result of redundancy or retrenchment, death of the employee, mental or physical disability that prevents the employee from working, retirement of the employee, or economic difficulties, technical, structural or operational requirements of the employer, or unilaterally by the employer.
- The allowance is payable where an employee is not entitled to pension benefits or other termination benefits or, where the pension or termination benefit is less than the severance allowance, the amendment states that the employee is entitled to be paid the pension benefit plus the difference between the pension benefit and the applicable severance allowance.

In practice, this does little to resolve the problem, in that it still contemplates a very wide range of eligibility conditions for severance pay and, more importantly, assumes that pension benefits will continue to be accessible in cash on exit from employment, even when the individual has not yet attained retirement age.

Further, the amendment makes no distinction between pension entitlements that are due to employer contributions and those due to employee contributions. Under the wording of the amendment, an employee could effectively end up funding his/her severance from pension entitlements accumulated from his/her own pension contributions.

We recognise the realities of the current impasse. Given that pension contributions are voluntary, any attempt to force full preservation in the face of the Employment Act is likely to destroy the industry and damage the interests of members. At the same time, the terms of the Employment Act amendment do not adequately address the situation. As a compromise we have introduced the principle of

preservation to the draft Retirement Funds Bill, but also included a clause that enables an employer who is required to make a severance payment under the terms of the Employment Act to an employee whose employment has been terminated to be paid from the employee's pension fund an amount equal to the lesser of the accumulated value of the employer's contributions made with respect to the particular employee and the amount of severance pay payable. This compromise received the full endorsement of all stakeholders.

This clause conflicts with the treatment proposed in the draft amendment to the Employment Act in that it assumes that full severance pay is made, with the employer having the right to recoup part or all of its contributions under certain circumstances. In contrast, the amendment to the Employment Act assumes that the pension is paid in cash in full on termination and adjusts severance pay accordingly (implicitly for both the employer and employee contributions). Not only is the Employment Act approach unfair to employees (in terms of their own accumulated contributions), it pre-supposes that pension entitlements will never be preserved – a situation that we believe is in direct contradiction to the principles of pension schemes. We suggest that the proposed amendments to the Employment Act be revisited in light of the compromise suggested in the draft Retirement Funds Bill.

Some members of the Pension Fund Task Force argued (independent of the severance pay issue) that members should be able to access their accumulated entitlements on leaving employment prior to retirement. Their argument was that individuals should be able to access their own contributions while the employer's contributions should be preserved. We are less comfortable with this line of argument. In particular, in a situation where the employer's contributions are (at least partly) accessible on termination to cover the severance allowance, permitting the individual to access the remainder in cash is likely to result in very little being available for income support at the time of retirement. Indeed, this is the current situation and is partly what this draft Bill is attempting to correct.

While wishing to preserve benefits for retirement to the greatest extent possible, we recognise that there will be situations in which genuine hardship may result for a retrenched individual who might otherwise not live to retirement age. Consequently, we have included a set of conditions in the draft Bill under which early release of benefits may be granted.

### **2.2.2 Features of the Bill**

The main features of the draft Bill are the following:

#### **Coverage**

- Drawing on the existing definitions in the Taxation Act, the Bill defines several different types of retirement funds. These definitions draw distinctions between:
  - Retirement schemes (which are plans or arrangements for providing retirement benefits) and retirement funds (which are the legally constituted trusts to give effect to a scheme);
  - Pension funds (which provide retirement incomes) and provident funds (which provide lump sum benefits).
  - Restricted funds (which provide pension benefits to employees of a particular employer), and unrestricted pension funds (which take pension contributions from employers, individual employees, and/or self-employed persons);
  - Umbrella funds (unrestricted funds which act as a “fund of funds” for several pension funds); and
  - Defined benefit and accumulation (defined contribution) funds.

- The Civil Service Pension Scheme is explicitly exempted from the provisions of this Bill (s.3).

### **Regulatory Requirements**

- All retirement schemes are to be established as trusts (s.3).
- All retirement schemes are required to be registered under this Act as either a restricted pension fund, an unrestricted pension fund; a restricted provident fund, or an umbrella fund and it is an offense to operate a retirement scheme that is not registered (Part II Division 1).
- Investment managers, trustees, custodians, administrators, and actuaries of retirement funds are required to be licensed and it is an offense to act in one of these capacities without a licence (Part II Division 2). Individuals may not be licensed as investment managers, administrators, or custodians (s.19 to s.21).
- Unrestricted funds must have corporate trustees (s.14).
- Restricted funds may have individual or corporate trustees provide that, if the former, there will be at least 6 trustees (s.14(3)) and that there is equal representation of both employer and employees (s.15 - see also section below on fund rules). If the rules provide, a fund may appoint an independent trustee to assist the individual trustees.
- Investments of restricted funds must be held by a custodian (s.6).
- Part IV sets out issues that must be addressed by fund rules including listing of the responsibilities of trustees as set out in the Act (s.24 and s.25).
- Fund rules may provide that matters decided by trustees that have material cost implications for employers are subject to approval by the employer (s.34).
- Part V sets out some prudential requirements that the Registrar may establish by directive under the Financial Services Act (see above). These are primarily by way of guidance to the Registrar and neither limit nor extend the Registrar's powers under the FS ACT. They are specific to retirement funds and include setting rules with respect to:
  - The way in which contributions may be made to a fund;
  - When beneficiaries are entitled to benefits;
  - How benefits may be calculated and paid;
  - Commutation of pension benefits to a lump sum;
  - Actuarial standards;
  - Solvency requirements for defined benefits schemes;
  - Investment policies;
  - Outsourcing;
  - Fit and proper person requirements;

- Registration requirements; and
- Disclosure of information to fund members and the Registrar.

### **Investment Rules for Fund Assets**

- The Bill establishes a prudent person regime as the centerpiece of investment management (s.24).
- Under s.39 investments must be at arm's length.
- Under s.40 investments in employer assets are limited to 5 percent of total fund assets.
- Under s.41 a fund may not provide financial assistance to members.
- Under s.43 funds are prohibited from borrowing.
- Under s.44 fund assets may not be invested outside Malawi except in compliance with the Exchange Control Act.

### **Statutory Disclosures to Members**

- Part VI establishes information that must be disclosed to fund members. Under s.47 the Registrar may add to these requirements.

### **Contributions**

- S.49 makes it an offense for an employer to fail to make contributions to the trustees within 14 days after the end of the month in which the liability arises.
- Part VII also deals with the mechanics of record keeping by trustees.

### **Payment of Benefits**

- Pension fund benefits are to be preserved until retirement (s.53), unless the fund member is permanently disabled, has left Malawi, or has died. Provident fund benefits may be paid when a fund member leaves the employ of the employer (s.53(3)).
- S.54 provides for the Registrar to approve early release of benefits under situations of extreme hardship.
- S.57 permits the commutation of benefits to a lump sum under broadly the same conditions as are currently contained in the Taxation Act.
- S.61 enables an employer who is required to make a severance payment under the terms of the Employment Act to an employee whose employment has been terminated to be paid from the employee's pension fund an amount equal to the lesser of the accumulated value of the employer's contributions made with respect to the particular employee and the amount of severance pay payable.
- S.62 to s.64 provide basic protections of pension fund entitlements from bankruptcy of the member, trustees, and other fund operators. Under s.64 members may not charge or assign their pension entitlements.

### **Transitional Arrangements**

- The proposed transitional arrangements include recognitions that existing pension schemes that are not compliant with the provisions of the new law will be given a period of up to two years to become compliant. Non-compliant funds will be required to agree a compliance program with the Registrar.
- Some requirements, such as the 5 percent limit on related party investments will be subjected to a shorter transition period unless exempted by the Registrar.
- Similarly, existing loans to members will be grandfathered until they have been repaid.

## **2.3 The Reserve Bank of Malawi Amendment Bill**

The amendments to the RBM Act are intended to bring the Act up to international best practice in terms of independence, governance, transparency, and accountability and, as much as possible, into line with the agreed SADC Model Law for Central Banks. In addition, in order to bring the Act into line with the FS Bill, it is necessary to remove the existing (inadequate) provisions relating to financial sector supervision (Part IX of the Act), since these will be contained in the FS Act when it is passed into law.

While there was widespread agreement about the need to update the RBM Act, there were many issues over which there was active debate. The more important of these were:

- Operationalising the concept of central bank independence;
- Structure and role of the RBM Board; and
- The process for appointing and dismissing board members.

The following positions are the outcome of active consultation and debate, and reflect a broad consensus of stakeholders.

### **Independence**

The motivation for granting a degree of independence to a central bank such as the RBM is to enhance its effectiveness by ensuring that it is able to pursue and achieve its legislated monetary policy and supervisory objectives without inappropriate influence from Government or the industry.

Legal independence derives from legal provisions that require the regulator to act independently and provide legal support for regulators who exercise that independence. A legally independent regulator can form regulatory judgements and decisions without fear of retribution from individuals or groups within the industry or Government.

In practice, independence is determined by a wide range of factors including:

- the processes under which regulatory and monetary policies are formulated;
- the terms under which board members are appointed and dismissed;
- legal protections from interference;
- legal indemnities for regulatory and monetary policy staff who carry out their regulatory duties in good faith; and

- the way in which potential conflicts between the regulator and the Government are resolved.

The following is a summary how these aspects are addressed in the draft amendments.

The RBM is granted a high level of operational independence in pursuing its supervisory objectives under the FS Bill which enables the RBM to exercise its powers under the law (including the power to issue and revoke licenses, to issue directions, and to take enforcement actions) without first having to seek the approval of other departments, the Minister, or the Parliament.

Under the revised Part III of the RBM Act the RBM is given explicit independence to pursue its legislated objectives. Under the revised s.4A it will be an offense for any person to improperly seek to influence the Bank, or a director or employee of the Bank, in the performance of his or her functions.

S.4A(2), however, makes explicit provision for the Minister of Finance to over-rule the RBM on a matter of policy where the Minister determines that the policy being pursued by the Bank is not conducive to the achievement of the legislative objectives of the Bank and that it is in the national interest for the Minister to over-rule the Bank. The direction by the Minister must, however, be made in a transparent manner and therefore must be published in the *Gazette* within 7 days after the direction has been issued.

### **Structure and Role of the RBM Board**

Under the proposed amendments the role of the RBM Board will remain as a governance board, although the role of the Board will be made more explicit; namely, to:

*“oversee the operations, administration and management of the Bank and the exercise of the Bank’s and the Registrar’s powers and functions, with a view to ensuring that the Bank’s operations, administration and management are being conducted, and the Bank’s and the Registrar’s powers and functions are being exercised, in a proper, efficient and effective way”* s6(3).

The draft amendments contemplate the following changes to the board structure:

- There will be at least one but no more than three Deputy Governors;
- There will be at least 4 but no more than 7 non-executive directors;
- The non-executive directors will have a majority drawn from outside the official sector; and
- The Board will be required to establish the following sub-committees: an audit committee, a directors’ affairs and remuneration committee; and a regulation and supervision committee.

While there was some enthusiasm to set down the role of the Board and management in greater detail, including the way in which the Governor would account to the Board under the terms of s.6(3), and as set down in s.13(1), we believe it is better to leave the details of the relationship for the Board and Governors to work out. In practice, we expect that the Board would establish a set of performance criteria for the Bank’s operations and regular reporting requirements against which to assess performance. While the Board will not have formal power to sanction the Governors for underperformance, we expect that the normal degree of co-operation between the Board and the Executive would result in a productive and co-operative relationship.



## **Appointment and Dismissal of the Governors and RBM Board**

The appointment process will be modified to include the following:

- The Governor will be appointed for a term of 5 years by the President, subject to Parliamentary approval;
- The Deputy Governors will be appointed for a term of 5 years by the President;
- Other Board members will be appointed for a period of 3 years by the President;
- In appointing the Governor, the President will need to be satisfied that the candidate is a fit and proper person to hold the office of director and is qualified for the appointment by virtue of his or her knowledge of, or experience in, the fields of economics and finance;
- In appointing the Deputy Governors and other Board members the President will need to be satisfied that the candidates are fit and proper persons to hold office and that they are qualified for the appointment by virtue of their knowledge of, or experience in, one or more of the fields of economics, finance, financial markets, financial products or financial services, financial sector supervision and regulation, law, accounting or other relevant fields. The President will be required to ensure that the Board as a whole contains the requisite skills and experience coverage.
- The Bill sets out a set of explicit criteria that exclude a person from eligibility to be a member of the Board. These exclude the usual conflicts of interest, individuals with criminal records, disbarred professionals, bankrupts, and so on.
- The Bill also sets out a parallel set of criteria under which the President may terminate a director's appointment. These are designed to provide the Governors and Board members with appropriate protections against capricious dismissal.

## **Legal Protections for Staff**

The amendments to s.15A of the Bill provide legal protection to the Bank, the directors and employees of the Bank and an inspector or agent of the Bank appointed under the FS Act, while exercising the powers, functions and duties of the Bank or the Registrar. The indemnity is voided in the event that it is established that the individual acted in bad faith.

## **Accountability**

The amendments create a more rigorous accountability framework for the RBM. Under the amended s.52 the Bank is to prepare its accounts in accordance with international accounting standards. Under the revised s.52(4) the Governor will comply with any requests to appear before the Parliament or a Parliamentary Committee. Under s.52(5) the Governor is to make copies of its report available to financial institutions, and make arrangements for himself or a Deputy Governor to attend such conferences or meetings with financial institutions as in their view will enable financial institutions generally to consider the report and question them about the Reserve Bank's or the Registrar's intended activities in the financial year after the year to which the report relates.

## **Other Provisions**

- Proposed amendments to s.59 of the RBM Act strengthen the secrecy provisions of the Act.

- S.11A deals with procedures for disclosing and dealing with conflicts of interest on the Bank Board.
- The Bill includes a Code of Conduct. S.15B states that the code of conduct will apply to directors and employees of the Bank and that the Board should review the Code at least once a year.

#### **A Note on Section 28(j)**

In the course of drafting we were requested to draft a revision to s.28(j) of the RBM Act. This section gives the RBM the power to invest in any corporation set up with the approval of, or under the authority of, the Government for the purpose of facilitating economic development, provided that the total value of such holdings does not at any time exceed ten per cent of the aggregate amount of the capital and General Reserve Fund of the Bank. The thrust of the request was to increase the limit that the Bank may invest.

The position of the consultants on this matter is that it is generally inappropriate for a central bank to invest in development finance companies. These companies are usually vehicles of Government and, while they are capable of making sound investments, they are equally capable of losing money, as has been the past experience in Malawi. Not only does investment via the central bank obscure the source of funding, it creates a conflict for the Bank as the supervisor of financial institutions. Additionally, if the Bank is to take its investment role seriously, it would need to develop a venture capital capacity that is not normally found in central banks and which would not only absorb resources, but could also create a potential distraction from the main business of the Bank. Our preference would be to see the clause repealed.

Since the subject matter was outside the terms of reference for this project we declined to make any revisions to this clause.

## **2.4 Consequential Amending Bills**

The package of laws contains four Bills that amend existing Acts or Bills to bring them into alignment with the FS Bill. The main reason for these amendments is that the FS Bill contains all regulatory powers and responsibilities. The amendments to the Banking Act, the Insurance Bill, and the Securities Bill remove the regulatory components of those Acts and Bills, link them to the FS Bill and remove any inconsistencies in the definitions and provisions between those Acts and Bills and the FS Bill. The Taxation Amendment Bill removes the current regulatory responsibilities imposed on the Taxation Commissioner for pension funds. Importantly, the Taxation Act is amended to avoid double registration of funds by ensuring that registration of a pension fund by the Registrar under the FS Act satisfies the requirements of the Taxation Act for tax purposes.

### **3. Broader Pension Reform in Malawi**

#### **3.1 Introduction**

Pension reform has been one of the dominant factors in international financial markets over the past two or more decades. Increasingly, countries have recognized that, left to their own devices, individuals do not save sufficiently for their old age. The introduction of mandatory pension schemes has increased pension coverage significantly, with some 800 million workers (about 30% of the total workforce) covered by either a publicly-provided or publicly-mandated pension scheme as at the turn of the millennium.

Not only have these schemes improved the well-being of the aged, their impact on asset growth has been dramatic. Pension fund assets have tripled over the past decade and, in OECD countries, have now increased to almost 85% of GDP, while globally they have been estimated to be in excess of 50% of world GDP.

At present, there are approximately 600 private pension schemes in Malawi, with total assets of around K35 billion. A compulsory scheme with a contribution rate of 15% would more than double the stock of pension assets in two years and the sector would likely rival the banking sector for assets within a decade or so. A compulsory pension scheme thus offers the prospect of accelerating Malawi's economic development by breaking the cycle of low savings and low capital formation. However, since forced savings schemes require individuals to sacrifice current consumption in return for a promise of a better life in the distant future, they are only politically acceptable if the scheme is seen as credible. Several of Malawi's neighbours have introduced schemes that have yielded low or even negative real returns, which can result in the schemes being viewed as just another form of tax. International experience confirms that poorly designed schemes may offer little if anything in the way of net benefits and can come at a heavy price in terms of foregone consumption for the current working generation.

#### **3.2 A Possible Mandatory Pension Scheme for Malawi**

The Pension Reform Task Force discussed the many design options that would be available to Malawi if it were to proceed down this path. The Task Force agreed that a well-deigned scheme would offer Malawi a genuine prospect of not only improving the welfare of retirees, but also of providing an engine for growth and development, thereby helping many Malawians break out of the poverty trap. The Task Force agreed that if such a scheme were to be successful it would need to avoid the pitfalls of some of the less successful schemes in Africa and elsewhere in the world.

To avoid these pitfalls it was agreed that the scheme would need to:

- be simple in structure;
- leverage the skills that already exist in the private pension industry in Malawi;
- have minimal Government involvement in the operation of the scheme;
- enable existing pension schemes to continue to operate under the umbrella of the new scheme; and

- include the civil service scheme, for reasons of both credibility and to ensure that the considerable asset generating capacity of the public sector is available to the economy.

The Task Force agreed that the following general structure would address the many design challenges for Malawi:

1. The scheme should be defined contribution and compulsory for all formal sector employees. Extension to other sectors, including part-time workers, should be addressed after the scheme is established.
2. Contributions should be made by employers as an addition to salaries. The ultimate target contribution rate would need to be supported by a full actuarial study of the Malawi context but would probably be in the order of 15% of salaries. Such a target level would need to be phased in over a decade or so starting, for example, from a contribution rate of 5% and increasing by an additional 1% to 2% each year. It is expected that there would need to be some trade-offs between these contributions and general wage increases during the transition period.
3. Retirement benefits under the scheme should be primarily by way of pensions (either through a programmed withdrawal or purchase of a life annuity). Lump sum payments should be permitted in the event that accumulated contributions are insufficient to purchase a life annuity above the poverty line, or if they are sufficient to leave a surplus after purchasing an annuity at a minimally acceptable replacement rate (e.g. 60 percent) or higher.
4. Operation of the scheme should draw on the existing expertise of the private pension industry in Malawi. The Task Force considered two administrative structures, one centralised and one decentralised, that would be workable in the Malawi context. The preferred structure was the following:
  - The Registrar would licence a small number of unrestricted funds to accept mandatory contributions.
  - Licensing conditions, including evidence of financial strength, skills, risk management systems, and disclosure requirements, would be quite onerous and funds would be required to have a separate custodian.
  - Entitlements would be managed through individual accounts and employee would be free to select a fund and to change funds at most once per year.
  - Existing registered schemes would be permitted to continue to operate as restricted schemes provide they meet the minimum contribution rate set by the national mandate, meet prudential standards set by the Registrar, and offer members the right to switch their accumulated entitlements into one of the unrestricted schemes if they so desire.
  - This structure would leverage the existing skills in the current private pension market and would not require any costly new infrastructure.
5. While the foundation of the investment policy for the scheme should be the prudent person principle, this should be reinforced by maximum investment limits and prohibitions established for prudence. The Government should not direct the investments of the scheme.

6. The civil service pension scheme will be a particular challenge under a mandatory national scheme. While the public sector could remain outside the scheme, such a decision would diminish both the credibility of the national scheme and the volume of funds available for investment in the development of the country. At the same time, full funding of the existing civil service pension liability is beyond the Government's current budgetary capacity. The Task Force agreed with the following compromise, which is consistent with currently proposed reforms of the civil service scheme:
- A separate Civil Service Pension Scheme would be established as a restricted fund under the same terms as afforded existing private sector schemes.
  - The existing defined benefits structure of the civil service scheme should be retained, given that this has historically been a central factor in the Government's ability to attract and retain staff.
  - The Government would make contributions to the scheme in line with the mandated national minimum. The balance of any funding gap between accumulated assets and defined benefits would be funded from consolidated revenue.
  - Existing liabilities would remain as a contingent liability of the Government to be funded from consolidated revenue on a PAYG basis.
  - While the Government, through the civil service, would continue to administer the civil service scheme, management of the assets accumulated under the partial funding structure would be outsourced to one or more of the licensed asset managers for the national scheme.

### **3.3 An Appropriate Role for Government in a Mandatory Scheme**

While the international evidence suggests that direct involvement of Government in administration and/or investments is contrary to the interests of fund members, it does not necessarily follow that there is no role for the Government in a well-run and effective mandatory pension scheme. The balance that is needed between the flow of new investible savings and the need for productive investment opportunities suggests a facilitative role for Government. Under a public/private partnership approach, the Government could seek to facilitate the matching of savings with investment opportunities by creating a small full-time implementation team with a mandate to:

- identify roadblocks to productive investment that are a result of Government bureaucracy, or rules and regulations that inhibit commerce and investment;
- identify legislative weaknesses that limit investment opportunities by restricting ownership, property rights, etc.;
- identify areas of expertise or particular skill areas that may be inhibiting development of productive opportunities, and recommend ways in which the Government might attract those skills in the short term from abroad, as well as encouraging their development in the long term through the education system;
- target responsible foreign companies to help bridge the management and skill gaps in the short term; and
- identify areas of government infrastructure that may need to be upgraded to assist bringing productive opportunities online.

Importantly, pension reform on the scale discussed in this Report will require bi-partisan commitment from the Parliament and a whole-of-Government approach to ensure that the potential is not destroyed by inter-departmental rivalries and a lack of understanding of the overall strategy.

## **4. A Roadmap for Moving Forward**

### **4.1 Introduction**

The package of financial sector laws contained in this Report, if enacted, would provide Malawi with a modern legal framework for its financial sector. It would strengthen considerably the supervisory powers of the RBM and would provide a platform for prudent growth and innovation in the financial services industry. The potential synergies between these reforms and the broader pension reforms discussed in Section 3 above are significant. If the Government decides to proceed with pension reform, the financial markets will be required to absorb a significant increase in savings in coming years. While evidence suggests that growth and deepening of financial markets and pension asset growth tend to take place together, it is critical that the financial markets have the necessary legal and supervisory framework to enable this to happen.

### **4.2 The Package of Financial Sector Bills**

The package of financial sector bills needs finalization by the Ministry of Justice before it can go to the Cabinet for consideration. This should occur before the end of November. Provided the package receives strong support from the Minister and President there is no obvious reason why it could not be considered by Parliament during the first half of 2007. Passing laws through the Parliament at present is problematic and will require the support of at least some Opposition or Independent members of the House.

It is critical that the Parliament understands that the Bills form a cohesive package of reforms. Given the interlinkages between the FS Bill and the Amending Bills it would be potentially destructive for the financial sector to consider one Bill without, at the same time, considering the others in the package.

It has been suggested that it would be extremely helpful to offer a series of training sessions on the package for Parliamentarians in the first half of next year when the Bills are first presented. It would also be helpful for the supervisors at the RBM if a series of workshops could be held (in parallel with the sessions for Parliamentarians) to illustrate how to use the new laws to their full capacity in dealing with particular situations.

We therefore recommend that an additional to the budget be considered for the consultants to visit Malawi for socialization of the laws in the first half of 2007 after the Bills have been submitted to Parliament. Allowing for cost savings that have occurred during the project to date, and also for the contingency, the additional budget required is likely to be in the order of \$US20,000.

Once the Bills have been enacted, the RBM will need assistance in developing a suitable set of regulations and directives under the FS Act to support the move towards risk-based supervision. This should be done under FIRST's regional approach to regulations and in conjunction with FIRST's regional capacity building program aimed at strengthening off-site and on-site supervision and the implementation of a risk-based approach to supervision.

### **4.3 Pension Reform**

The path forward with pension reform is less certain. At this stage the Pension Reform Task Force has considered the various design issues and agreed on a general shape of a possible mandatory scheme

for Malawi. The Minister is aware of these discussions and has indicated his strong support for these reforms.

The path forward for pension reform will require the following:

- An agreed structure for the mandatory scheme to be proposed by the Pension Reform Task Force in a submission to the Minister.
- If the approach is supported by the Minister, the President and Cabinet, the Government should consider creating a full-time task force from the RBM and relevant Ministries to help manage the implementation process and to identify the opportunities for the Government to play a constructive role.
- An actuarial study would need to be commissioned to determine an appropriate target contribution rate for the mandatory scheme.
- The Government would need to agree an appropriate tax regime for the new scheme and to organize amending legislation.
- The severance allowance arrangements in the Employment Act would need to be revisited in light of the relationship between these and a mandatory pension scheme with preservation.
- The principles of the mandatory scheme would need to be socialized with workers and employers and estimates made of the impact of transition arrangements on wages, price inflation, and employment. An appropriate macroeconomic strategy would need to be devised to deal with the transition period.
- Legislation would be needed to establish the scheme and to integrate it into the Retirement Funds Act (assuming that it has been passed into law).

Realistically, the entire process from conceptualization to implementation could take somewhere between two and five years, depending on the ability of the Government to drive the passage of the legislative foundations through the Parliament.





## **Attachment 1**

### **Policy Paper on Pension Reform in Malawi**



*Strengthening Financial Sectors*

**FIRST Malawi Financial Sector Strengthening Project**

**Consultant Paper #3**

# **Policy Paper on National Pension Reform in Malawi**

24 October 2006

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## EXECUTIVE SUMMARY

### Policy Paper on National Pension Reform in Malawi

The introduction of a mandatory national pension scheme offers Malawi the prospect of improved security for its retirees, as well as an increase in savings, capital accumulation and economic growth. But, while the prospects are enticing, the process is not without its pitfalls. In a country in which pension contributions could impose severe hardship on the cash flow of employees or lead to short-term reductions in employment and welfare, the design of the scheme is critical if long-term benefits are not to be outweighed by short-term costs.

Drawing on international experience, this paper sets out the main design options open to Malawi in considering the introduction of a mandatory scheme. It does not recommend one particular structure over the others, although it offers some guidance on options that we believe are either particularly well-suited or unsuitable for Malawi, and outlines an overall structure that we believe could work for Malawi.

We have grouped what we regard as the eight critical design decisions into issues affecting the nature of the scheme, issues affecting its operation, and issues related to transition during the implementation of the scheme. A brief summary of the main options as we see them for Malawi is as follows.

#### A. Nature of the Scheme

1. The benefit structure of the scheme – involves three issues: how benefits should be calculated (defined benefit (DB) or defined contribution (DC)); how entitlements should be paid (as an income stream, a lump sum, or a combination of the two), and how the scheme should be taxed (on contributions, earnings, and/or pensions).

#### Design Options – Benefit Calculation

- Establish a mandatory DB scheme under which the Malawi Government takes responsibility for funding shortfalls should they emerge; or
- Establish a mandatory DC scheme under which retirees receive benefits commensurate with their accumulated contributions and fund earnings; or
- Establish a mandatory DC scheme with a guarantee arrangement to ensure that the retirement income of individual retirees does not fall below a target minimum replacement rate; or
- Establish a mandatory national scheme under which the basic structure is DC, but under which certain (qualifying) employers have the option to operate a DB scheme subject to appropriate conditions.

**Design Options – Benefit Payment**

- Require all of the assets in an individual’s pension fund to be converted to a pension annuity on retirement; or
- Permit retirees to commute all their pension entitlements to a lump sum on retirement; or
- Permit retirees to commute a portion of their pension entitlements to a lump sum payout on retirement, up to a maximum percentage of the value of the assets in the individual’s pension fund at the time of retirement; or
- Permit retirees to commute a portion of their pension entitlements to a lump sum payout on retirement, up to a maximum equal to any excess left after purchasing a specified minimum retirement annuity.

**Design Options – Taxation**

- Exempt contributions, exempt fund earnings, and tax retirement incomes on the same basis as earned income; or
  - Tax contributions, exempt fund earnings, and exempt retirement incomes; or
  - Exempt contributions, tax fund earnings, and tax retirement incomes.
2. Funding arrangements – this issue concerns whether the scheme should be funded or based on notional entitlements.

**Design Options - Funding**

- Establish a mandatory DC scheme based on the principle of full funding (at least over a period of time); or
  - Establish a mandatory notional DC scheme under which retirees are funded on a PAYG basis but with entitlements based on their accumulation of notional assets over the period of contribution.
3. The coverage of the scheme – coverage can be viewed from three perspectives: coverage of the workforce; replacement coverage of retirement incomes; and the extent to which the scheme covers social services.

**Design Options – Coverage of the Workforce**

- Establish a mandatory DC scheme limited to the formal and part-time sectors with no exemptions; or
- Establish a mandatory DC scheme limited to the formal sector with some exemptions (e.g. for part-time workers, small firms, etc); or
- Establish a mandatory notional DC scheme with coverage of every member of the labour force, whether employed formally or informally, or even temporarily unemployed.

**Design Options – Income replacement**

- Establish a mandatory DB scheme under which the Malawi Government takes responsibility for funding shortfalls should they emerge; or

- Establish a mandatory DC scheme under which retirees receive benefits commensurate with their accumulated contributions and fund earnings.

#### **Design Options – Coverage of Social Services**

- Extend the coverage of the mandatory scheme to include a wide range of social services; or
- Limit coverage of the scheme to pensions, and life and disability insurance.

### **B. Operation of the Scheme**

4. Administration – the key issue here is whether the scheme should be centrally administered or administered through a group of licensed administrators.

#### **Design Options - Administration**

- Create a centralised, government or semi-government agency to administer the national scheme; or
  - Create a centralised administrative structure but appoint one of the existing private sector fund administrators to operate it; or
  - Create a centralised administrative structure but select a private sector operator (or a small number of operators) by tender, based on an assessment of a range of considerations, including the proposed fees, evidence of staff skills and system resources; or
  - Allow any qualifying administrators to operate pension funds under the national scheme.
5. Asset management – again the key issue is whether asset management should be centralised or provided on a competitive basis and, if the latter, how much freedom members should be given to change funds, as well as how to ensure a competitive fee structure.

#### **Design Options – Asset Management**

- Create a state-owned investment agency with the monopoly right to manage all mandatory pension fund contributions; or
  - Auction the monopoly right to manage all mandatory pension fund contributions to a single private sector asset manager, subject to strict controls on fees and performance requirements; or
  - Either auction or select by defined criteria a small number of reputable private sector asset managers to manage all mandatory pension fund contributions subject possibly to either controls or incentive arrangements on fees, and restrictions on the frequency of switching funds; or
  - License any number of asset managers that meet prudential criteria set by the pension regulator, again subject possibly to either controls or incentive arrangements on fees, and restrictions on the frequency of switching funds.
6. Investment rules – this is a particularly contentious topic in many countries as governments have sought to balance the primary objective of the scheme to provide income replacement in retirement against the secondary objective of promoting economic growth and development.

**Design Options – Investment rules**

- Adopt the “prudent person” approach; or
- Adopt a set of “light” investment rules (including exclusions on leverage) that set large bands within which asset managers can operate without causing undue damage to local markets; or
- Adopt a set of “heavy” investment rules designed to limit risk taking.

**C. Transitional Arrangements**

7. Private sector transition issues – the main issues here are how to facilitate transition for existing private pension funds into the new scheme without unduly disadvantaging worker entitlements under those schemes, and whether or not to phase in the level of contributions over a period of time.

**Design Options – Treatment of existing private schemes**

- Require existing funds to be wound up, with assets transferred to the new scheme; or
- Require existing schemes to be frozen, with entitlements preserved on a pro rata basis with the risk to be born by employers; or
- Permit qualifying private schemes to operate under the new scheme as closed funds subject to:
  - Restrictions on membership of the schemes (scheme membership must not be open to the public);
  - The funds meeting not only the minimum requirements of the national scheme (in terms of contributions, asset allocation, etc) but also any regulatory requirements put on their licence by the industry supervisor; and
  - Freedom for both employers and employees to opt out of the private arrangement in favour of joining the centralised scheme.

**Design Options – Phasing in**

- Impose the full contribution rate from the introduction of the scheme; or
  - Phase the contribution rate from a low starting level to the target contribution rate over a decade or more.
8. Treatment of the existing civil service pension scheme – whether or not the civil service should be brought under the national scheme and, if so, how existing entitlements should be treated.

**Design Options – Civil Service Scheme**

- Retain the existing civil service PAYG pension scheme outside the national scheme; or
- Retain the existing scheme for existing civil servants but require all new employees to enter the national scheme; or



- Retain the existing scheme for staff over a certain age (or age range if some choice is to be permitted) while requiring all staff below that age (or age range) to enter the national scheme.

### **A Possible Structure for Malawi**

1. Mandatory defined contribution individual accounts for all formal sector employees.
2. Contributions made by employers as an addition to salaries with phasing in over at least a decade.
3. Retirement benefits by way of pensions with lump sums permitted where accumulation is either insufficient to purchase an annuity above the poverty line, or sufficient to leave a surplus after purchasing an annuity at a replacement rate of 60 percent or higher.
4. Operation to leverage existing expertise of the private pension industry in Malawi. Structure of operation:
  - The Registrar would licence a small number of unrestricted funds to accept mandatory contributions.
  - Licensing conditions, including evidence of financial strength, skills, risk management systems, and disclosure requirements, would be quite onerous and funds would be required to have a separate custodian.
  - Entitlements would be managed through individual accounts and employee would be free to select a fund and to change funds at most once per year.
  - Existing registered schemes would be permitted to continue to operate as restricted schemes provide they meet the minimum contribution rate set by the national mandate, meet prudential standards set by the Registrar, and offer members the right to switch their accumulated entitlements into one of the unrestricted schemes if they so desire.
5. Investment policy based on prudent person principle reinforced by maximum investment limits and prohibitions established for prudence.
6. Civil service pension scheme to participate as a restricted scheme with outsourced asset management. Structure to remain defined benefit and partially funded with Government to contribute at least the mandatory minimum rate.



## **FIRST Malawi Financial Sector Strengthening Project**

# **Policy Paper on National Pension Reform in Malawi**

## **1. Introduction**

Pension reform, including the introduction of mandatory schemes, has been a popular topic in international circles for the past decade or two. Many countries have gone down this path and are now reaping the benefits of increased welfare for retirees, increased savings and growth, and strengthened financial sectors. While the prospects are enticing, the process is not without its pitfalls. The mere introduction of a mandatory scheme is far from a guarantee of future prosperity. On the contrary, a badly managed scheme can deplete, rather than increase, the value of accumulated savings. Such a cost can be a very high price to pay, especially in emerging market countries where many citizens live at or below the poverty level, and in which pension contributions can impose severe hardship on the cash flow of employees or lead to short-term reductions in employment and welfare.

This paper sets out the main design options open to a country such as Malawi in considering the introduction of a mandatory scheme. It does not recommend one particular structure, although we offer thoughts and general guidance on options that we believe are more suitable for Malawi and, correspondingly, indicate where we think particular options are less suitable. Wherever possible we have drawn on international experience to illustrate how different options might be structured and what their impact might be. In this latter respect we drew heavily on work by the World Bank, including their excellent series of primers on pension reform.

The structure of the paper is as follows. Section 2 summarises international pension fund developments and trends in recent decades. Section 3 sets out the case for pension reform, both in terms of the underlying logic and the experience to support this logic. Section 4 provides an overview of what we regard as the eight critical design issues to be addressed in such a reform. We have grouped these into issues affecting the nature of the scheme, issues affecting its operation, and issues related to transition during the implementation of the scheme. The following eight sections address these issues in turn. Section 13 summarises relevant African experience, while the final section offers some guidance on the way forward, including our views on what could be a suitable scheme design for Malawi.

The one design issue that is not addressed in this paper is the regulatory framework for a national pension scheme. This topic, including our recommendation that the RBM have responsibility for supervising pension funds, and some guidance on how this should be done, is covered in other parts of this and earlier FIRST Initiative projects for Malawi.

## **2. Recent International Pension Fund Developments and Trends**

International convention classifies pension schemes in terms of “pillars”:

- First pillar schemes refer to national safety net schemes that provide income in retirement for individuals who, for whatever reason, are unable to provide themselves with a basic level of

subsistence. First pillar schemes are almost universally funded on a pay-as-you go (PAYG) basis from the Government's consolidated revenue fund.

- Second pillar schemes are mandatory schemes, under which members provide for their own retirement through forced savings during their working lives. The objectives of such schemes are, almost universally, to provide an adequate level of income replacement in retirement and to remove individuals, to the greatest extent possible, from the Government's budget under the first pillar scheme, if one is in place.
- Third pillar schemes refer to voluntary private pension schemes. These are typically occupational or employer-funded schemes offered as an inducement for worker loyalty. While these are sometimes run as alternatives to second pillar schemes, it is not uncommon for them to co-exist with second pillar schemes to provide a voluntary "top-up" option for individuals who wish to increase their levels of income replacement in retirement.

Recent decades have witnessed several clear trends in pension fund provision around the world:

- First, there has been a trend towards pension reform. This has included an increase in pension provision, especially among emerging market countries.
- Second, there has been an increase in the funding levels of public sector and even first pillar pension schemes.
- Third, there has been a shift away from defined benefit schemes in favour of defined contribution schemes.
- Fourth, there has been a shift towards privatising the management of centralised second pillar schemes.
- Finally, there has been a trend towards giving individuals greater choice and control over the management of their pension assets, either through self-managed funds or through individual choice of public offer pension funds. This trend has been encouraged by the growth of voluntary private pension assets and the advantages to individuals of consolidating their investments from different employers and different schemes.

In most OECD countries the dominant type of funded pension schemes are still occupational or employer-based plans, although fourteen OECD countries now have mandatory or semi-mandatory second pillar schemes. Second pillar schemes have been even more popular in emerging market countries where they have been seen not only as a source of retirement incomes but also as an engine of capital accumulation and growth.

As a result of these reforms pension funds are now a major component of the worldwide contractual savings industry<sup>1</sup>. In absolute terms, pension fund assets in the OECD area have almost tripled over the past decade from just under \$US6 trillion in 1994 to \$US15.6 trillion in 2004<sup>2</sup>. The compound

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<sup>1</sup> Despite the conceptual distinction between mutual funds, trustee companies and pension funds, according to the nature of the funds being invested, it is often difficult in practice to distinguish the different institutional groups. In many countries the same institutions offer both mutual funds and pension funds. In others, pension funds often act as the point of pooling, but then invest the pension contributions into a range of mutual funds.

<sup>2</sup> OECD Observer No. 254, March 2006.

annual growth rate of these funds has been in excess of 10% per annum. In relative terms, pension fund assets in OECD countries have increased to almost 85% of GDP and, globally, have been estimated to be in excess of 50% of world GDP<sup>3</sup>.

As well as pension fund assets, pension fund coverage has been increasing rapidly. It has been estimated that, as of the turn of the millennium, some 800 million workers (about 30% of the total workforce) were covered by either a publicly-provided or publicly-mandated pension scheme<sup>4</sup>. Coverage is largely related to per capita income, with higher per capita income countries generally providing a higher rate of coverage. Of this coverage, about half is in the form of public, unfunded, or partly-funded, defined benefits schemes. About another third consists of publicly-managed, funded, defined benefits schemes. The balance consists mostly of defined contribution schemes, managed either publicly or privately, and various combinations of defined benefits and defined contributions schemes.

### 3. The Case for Pension Reform

The case for introducing a mandatory second pillar scheme rests on two main arguments: individual savings myopia, and the impact that such schemes can have on economic growth and development.

#### 3.1 Savings Myopia

It is often argued that it is necessary to force individuals to provide for retirement. The need for coercion arises from the supposition that individuals suffer from a form of myopia when it comes to saving for retirement. To many workers, retirement is too far away in the future to concern them during their most productive earning years. In economic terms, their intertemporal rate of time preference is argued to be too high for them to make rational judgements about retirement savings.

While it is difficult to establish savings myopia empirically, what is clear is that mandatory schemes can have a significant impact on national savings rates, even in countries where there is a well-established tradition of private saving. For example, a recent study by the Australian central bank estimated that mandatory pension fund contributions increased household savings by about 2 percentage points above what it would have been in the absence of the scheme<sup>5</sup>. In Switzerland and Chile, where reforms have been in place long enough to assess the impact empirically, the national savings rate rose from 6 percent to 8.5 percent of GDP and from 16.7 percent to 26.6 percent of GDP respectively<sup>6</sup>.

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<sup>3</sup> See Iglesias, A., and R. Palacios, (2000), *Managing Public Pension Reserves: A Review of the International Experience*, World Bank Pension Reform Primer Working Paper series. Washington, D.C., World Bank.

<sup>4</sup> See Iglesias and Palacios, *ibid*.

<sup>5</sup> Connolly, E. and Kohler, M. (2004), *The Impact of Superannuation on Household Savings*, Research Discussion Paper 2004-01, Reserve Bank of Australia.

<sup>6</sup> These figures are reported in James, E (1997), *Pension Reform: Is there an Efficiency-Equity Trade-Off?*, Unpublished paper prepared for Conference on Inequality Reducing Growth in Latin America's Market Economies, World Bank, January.

### 3.2 The Impact on Capital Accumulation and Growth

The second main argument supporting the introduction of a mandatory second pillar pension scheme is that such a scheme will, by increasing domestic savings, also increase capital formation and economic growth.

While growth effects from any source are notoriously difficult to measure, the available evidence from studies of pension schemes nonetheless suggests that the growth effects are positive and possibly substantial. In simulation studies for Australia, Bateman and Piggott found that the introduction of the mandatory private pension scheme increased GDP by 1.5 percent<sup>7</sup>. In a similar study for Mexico, Ayala found that GDP increased by between 0.4 percent and 2.1 percent<sup>8</sup>.

Ultimately, the growth dividend from a mandatory pension scheme depends on the scale of the scheme, the availability of suitable (positive net present value) investment projects, and the skills with which the pension assets are managed. While there are examples of countries in which the growth dividend has been positive, there are also examples of countries that have experienced negative real returns on their pension fund investments, thereby squandering the growth dividend as well as diminishing the income replacement capacity of the retirement savings (see the box on public sector management of pension funds in Section 9).

To put this prospect into perspective for Malawi, as at 2005, Malawi had a local equity market capitalisation of K67 billion, while the total assets of financial institutions was around K150 billion. The value of pension assets under existing voluntary private sector pension schemes was around K35 billion. A mandatory contribution rate of 5% of wages would generate a flow addition to pensions of a little over K8 billion per annum, while a contribution rate of 20% would generate around K34 billion. Assuming that some of this would be offset by reduced voluntary savings elsewhere, a reasonable estimate of the addition to the pool of investible funds would be in the region of K4 billion initially, rising to around K20 billion (in inflation-adjusted terms) when the scheme reaches maturity. At this rate, depending on the target contribution rate and any phasing in of the contribution rate, total assets of the pension fund industry could rival those of the banking industry within a decade.

### 3.3 Other Benefits from Pension Reform

In addition to the impact on retirement incomes and economic growth, a mandatory pension scheme can contribute to economic welfare by improving resource allocation, and by adding depth and liquidity to financial markets.

Pension funds (and other contractual savings institutions) help nations to mobilise savings by providing a greater and more attractive range of investment opportunities. By adding divisibility to large-scale assets they enable investors to create better diversified portfolios. By pooling the resources of many small savers, they are able to offer each participant a better diversified portfolio and a more efficient use of risk management tools than would otherwise be possible.

The net effect of risk pooling should be to stimulate total savings as well as to provide a better matching of investor preferences with the range of investment possibilities. By extending the availability of different investments both geographically and across different income groups, pension

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<sup>7</sup> Bateman, H. and Piggott, J. (1997), *Mandatory Occupational Pension in Australia*, Annals of Public and Cooperative Economics.

<sup>8</sup> Ayala, U. (1996), *The Savings Impact of the Mexican Pension Reform*, World Bank Discussion Paper, World Bank, Washington D.C.

funds not only help to mobilise savings, but should also help to ensure their efficient allocation to the most productive uses.

By providing access to wholesale capital markets for small savers, pension funds increase the demand for capital market products such as debt and equities. Importantly, the inherent long-term focus of pension fund investments is consistent with the development of long-term capital markets, which might otherwise not be adequately supported by banks and other short-term focused investment vehicles.

In examining the relationship between contractual savings and capital market strength in OECD countries, Musalem found a strong positive correlation between contractual savings assets as a percentage of GDP and both market capitalisation and the value of stocks traded<sup>9</sup>. His findings lend support to the proposition that contractual savings, such as pension funds, help stimulate capital market liquidity and activity.

James supports the impact of pension growth on financial market deepening by noting that, in Chile: financial markets have become more liquid as pension funds have diversified their portfolios; the number of tradeable shares and their turnover have both increased; the variety of financial instruments traded has increased; and asset pricing has improved<sup>10</sup>. Holzmann estimates that the financial market deepening induced by Chile's pension reforms increased total factor productivity by 1 percent per annum (half of the total increase)<sup>11</sup>.

Vittas argues that pension funds go even further in contributing to growth and development<sup>12</sup>. He argues that pension funds are a positive force for innovation, for corporate governance and for privatisation. As pension funds grow in size and importance they create a demand for new instruments and for broader markets. Vittas cites the role that pension fund growth played in the development of securitisation and financial derivatives in the United States. He also attributes the emergence of block trading and the worldwide reform of stock broking commissions at least partly to pressure from pension funds. Their role in corporate governance arises from the size of their collective voice. Their role in privatisation also derives from their size and consequent capacity to absorb large-scale assets.

### 3.4 Lessons from International Experience

International experience provides ample encouragement for countries considering the introduction of a mandatory pension scheme. Not only does such a scheme hold out the prospect of financially secure retirement for participants, it also offers the prospect of capital accumulation, financial development and economic growth in countries where savings rates are chronically low.

These prospects, attractive as they might appear, are not without their risks. Accumulating investible assets through a mandatory pension scheme (or through other means) is a necessary but not a sufficient condition for improving economic performance. If savings are directed to political uses or

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<sup>9</sup> Musalem, A.R. (2000), *Contractual Savings and Financial Markets*, paper prepared for the Workshop on Non-Bank Financial Institutions: Development and Regulation, Washington, February.

<sup>10</sup> James (1997) *op. cit.*

<sup>11</sup> Holzmann, R. (1996), *On Economic Usefulness and Fiscal Requirements of Moving from Unfunded to Funded Pensions*, University of Saarland Working paper

<sup>12</sup> Vittas, Dimitri (1996), *Pension Funds and Capital Markets*, Public Policy for the Private Sector, Note no. 71, The World Bank, Washington D.C., February.

invested poorly, the result can be negative returns and a loss of wealth. Where pension contributions are provided at great cost in terms of foregone current consumption (as is the case in emerging market situations), such a waste of national resources can only be described as tragic. The lesson from these experiences is that pension fund design is critical if the scheme is to increase social welfare.

#### **4. Overview of the Critical Design Issues**

There are many options to be considered in designing a mandatory pension scheme. Different countries have followed different routes in seeking to achieve the same overall objective – namely, providing adequate income replacement for retirees.

In this paper we address what we consider to be the eight critical design issues<sup>13</sup>. We have further grouped these into three main categories:

##### **Category A: Nature of the Scheme**

1. The benefit structure of the scheme – this addresses issues such as whether the benefits should be linked to labour income or to pension contributions (and, if the latter, whether there should be some guarantee arrangements to ensure that entitlements are adequate), whether entitlements should be taken as an income stream, a lump sum, or a combination of the two, and how the scheme is to be taxed.
2. Funding arrangements - whether the scheme should be funded or based on notional entitlements.
3. The coverage of the scheme – in terms of the coverage of the workforce, the target replacement coverage of retirement income (and the corresponding implications for contribution rates), and the extent of coverage of services provided under the scheme.

##### **Category B: Operation of the Scheme**

4. Administration – whether the scheme should be centrally administered or administered through a group of licensed administrators and, if the latter, how the licensing arrangements should work.
5. Asset management – whether asset management should be centralised or provided on a competitive basis and, if the latter, how much freedom members should be given to change funds, as well as how to ensure a competitive fee structure.
6. Investment rules – this is a particularly contentious topic in many countries as governments have sought to balance the primary objective of the scheme to provide income replacement in retirement against the secondary objective of promoting economic growth and development.

##### **Category C: Transitional Arrangements for Implementing the Scheme**

7. Private sector transition issues – the main issues here are how to facilitate transition for existing private pension funds into the new scheme without unduly disadvantaging worker entitlements under those schemes, and whether or not to phase in the level of contributions over a period of time.

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<sup>13</sup> As noted in the Introduction, this paper does not address the regulatory framework for a national pension scheme since this is covered elsewhere.

8. Treatment of the existing civil service pension scheme – whether or not the civil service should be brought under the national scheme and, if so, how existing entitlements should be treated.

The following sections address these key design issues in turn.

## **Category A Issues: Nature of the Scheme**

### **5. Benefit Structure**

Retirement incomes schemes can be classified according to the basis on which benefits are calculated, the basis on which benefits are paid, and the basis on which the scheme is taxed.

#### **5.1 The Basis for Calculating Benefits**

Pension funds generally fall into one of two main categories, depending on the way in which retirement income benefits are calculated: defined benefit schemes (DB) and defined contribution schemes (DC). Under a DB scheme pension entitlements are linked to a combination of wages during employment and the term of service. In contrast, DC schemes link pension entitlements to the amount contributed and the return on the scheme's investments over the term of participation.

Under DC schemes, it is the workers who assume the performance risk of the fund as well as their own longevity risk. Under DB schemes, the performance risk of the fund and the longevity risk are assumed by the employer (or by an insurance company if the fund is offered as a life policy or a fixed annuity), while the workers assume the solvency risk of the employer (or insurance company) in the event that the fund proves to be unable to meet its pension obligations and the employer is unable to cover the solvency gap. DB schemes are more directly linked to replacement of earnings during retirement, while DC schemes are more like general investments in nature. Since the primary solvency risk of a DB scheme is assumed by the employer it is normal for pension laws to require the solvency of these funds to be assessed by an actuary from time to time and for there to be a requirement for the employer to maintain the fund's solvency.

Given the differing risk structures of the two types of schemes it is hardly surprising that workers generally favour DB schemes (provided the DB entitlements are credible), while employers generally favour DC schemes.

Notwithstanding the bias of workers towards DB schemes there has been a clear international trend towards DC, especially among mandatory schemes. In particular, there has been an increase in the number of countries introducing compulsory individual retirement account systems. Under these systems pensioners save towards their own retirement through centrally managed funds. The accounts track the individual's entitlements as a percentage of the aggregate pool of managed funds. Benefits in these schemes are limited by the amount that the individuals have contributed during their working careers, plus their accumulated earnings.

The defining characteristic of DC schemes is the linkage between contributions, fund earnings and benefits. Consequently, in the vast majority of cases, DC schemes are fully funded. There are nevertheless a small number of countries (such as Sweden, Italy, and Poland) that have set up national DC pension schemes based on notional accounts under a PAYG system (see the box on notional DC schemes in Section 6 below on funding arrangements).

Since the introduction of a mandatory contribution scheme imposes a burden on employers, many of which may not have previously offered pension benefits, many countries have favoured DC schemes on the grounds that they balance the cost of compulsion by shifting the burden of risk from the



employer to the employee. This balance, however, is not the only consideration that has generated the worldwide trend towards mandatory DC schemes. Other advantages include:

- DC schemes encourage more years of work. Under DC schemes, pension benefits are automatically lower for early retirees as they have spent fewer years contributing to their retirement accounts. Correspondingly, benefits for an early retiree also decrease as expected longevity increases with early retirement, all other considerations given. Thus DC schemes create an incentive for able workers to continue to work longer in order to accumulate pension assets to fund a more comfortable retirement. Under a DB scheme workers have little incentive to continue working past their salary peak and may choose to take early retirement, especially if the additional years worked are unlikely to result in substantially higher pension benefits (since benefits are linked to salary as well as to years of service).
- In countries where pension schemes are occupation-linked, DC plans are more portable as they are vested in the employee rather than in the firm. For example, in Japan, DC plans appeal to younger Japanese who are nervous about tying themselves to one company for life, especially in the wake of some well-publicised bankruptcies in which workers have lost much of their lump-sum entitlements.

The administrative and funding difficulties of managing DB entitlements for a mobile workforce under a funded mandatory scheme are such that no country of which we are aware has introduced such a structure as the sole foundation of its mandatory scheme. Where countries do allow DB plans as part of a mandatory scheme they typically do so as an option for employer-based or occupational-based schemes that qualify to continue under the mandatory arrangements. For example, in Australia, all employers are required to pay a minimum percentage of wages and salaries into an approved pension fund. Where an employer or industry operates a DB scheme that meets the minimum contribution requirements, and satisfies the regulatory requirements for approval, the DB scheme is allowed to continue as part of the mandatory scheme. Staff who leave the employ of a company offering a DB scheme may either have the value of their entitlements rolled into a new DC scheme or, if the employer is willing, to have their DB entitlements preserved in the fund until retirement.

Where DB has been the central foundation of mandatory schemes it has generally been on an unfunded basis. For example, in Egypt, the Government operates a national DB scheme in which current contributions are used to meet pension obligations of retirees. Retirement benefits, in turn, are based on notional DB entitlements accumulated over the employee's working life. These schemes are complex to administer and can experience serious funding problems as demographics change<sup>14</sup>.

While the two categories of scheme are usually considered to be mutually exclusive, it is possible to establish mechanisms under a DC scheme to share the risks between the two parties. For example, in most South American countries, the mandatory schemes are structured as DC schemes supplemented by various guarantee arrangements to ensure that the replacement rate of the scheme does not fall below an acceptable level.

Guarantees can take a variety of forms:

- Performance guarantees - In some countries (e.g. in South America – see the box on the Latin American experience in Section 11) the asset managers are required to guarantee a minimum return. This aspect is taken up in more detail in Section 9 on asset management.

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<sup>14</sup> The Egyptian scheme is currently under review to address emerging funding problems.

- Minimum pension guarantees - In other countries (e.g. in some transition economies in Eastern Europe) the guarantee is provided by the government. The guarantee is usually expressed as a minimum replacement rate of retirement income relative to pre-retirement earnings. These schemes can create a significant liability for the government if asset managers under-perform and if workers move in and out of employment regularly. To some extent, the need for a government guarantee of this type is obviated if the country has a sound first pillar scheme. For example, the proposed new scheme in Armenia will allow workers who accumulate insufficient funds in their pension accounts to transfer their pension entitlements under the mandatory scheme to the Government at retirement in return for a pension under the first pillar safety-net scheme. In other countries, such as Australia, retirees have access to the first pillar scheme on a means-tested basis, which phases first pillar entitlements out in favour of second pillar entitlements.

## 5.2 The Basis for Paying Benefits

In addition to the distinction between DB and DC schemes, pension arrangements are also categorised into pension funds and provident funds according to whether they provide retirement benefits in the form of a retirement annuity (pension funds) or a lump sum benefit (provident funds). This distinction is partly cosmetic in that provident funds can readily be used to support retirement incomes if the rules of the scheme mandate that the lump sum be converted on retirement into an income stream. At issue is whether the scheme legally permits retirees to commute part or all of their pension assets into a lump sum.

The potential downside of allowing lump sum payouts is that these are often spent quickly on consumption, thereby leaving the retiree with insufficient income on which to live during retirement. This is a particularly sensitive issue in Malawi where life expectancies after retirement may be short and in which retirees may consider a lump sum to be their right.

## 5.3 Taxation

Taxation arrangements can have a significant impact on the size of pension entitlements under any national pension scheme and should be considered as a major design aspect of the benefit structure of the scheme.

There are three points at which saving in a funded pension can be taxed:

- At the point at which employers or employees contribute;
- when investment income and/or capital gains accrue; and
- when benefits are paid out.

Since members can be either taxed or exempted at each of these points there are eight different tax configurations that can be constructed from the above. The table below illustrates some commonly found taxation regimes; where E indicates that cash flow is exempted, T indicates that it is taxed, and C indicates a tax credit.

<b>Tax Regimes for Pension Funds</b>			
	<b>Contributions</b>	<b>Returns</b>	<b>Benefits</b>
<b><i>Latin America</i></b>			
Argentina	E	E	T
Chile	E	E	T
Colombia	E	E	T
Costa Rica	E	E	-
Mexico	E	E	T
Peru	T	E	E
Uruguay	E	E	T
<b><i>Eastern Europe</i></b>			
Czech Republic	C	E	E
Hungary	E	E	T
Poland	E	E	T
<b><i>Asia</i></b>			
India	E	E	T
Indonesia	E	T	T
Korea	E	E	E
Philippines	T	T	E

In general, taxation regimes can be classified as essentially expenditure tax regimes (e.g. EET or TEE), or income tax regimes (e.g. TTE or ETT). Expenditure tax regimes offer a tax exemption on savings, while taxing the consumption eventually derived from the pension income stream. The defining feature of the expenditure tax model is that the earnings on the fund are tax exempt. Despite its unusual structure, the TEE model is essentially an expenditure tax model in which the tax is pre-paid at the time of contribution. The income tax model levies taxes on the earnings of the fund, thereby treating fund income the same way as other forms of income. The tax on income lowers the accumulation rate, thereby reducing the total volume of assets accumulated and the level of income replacement in retirement.

The fundamental difference between the expenditure tax model and the income tax model is that the former provides a higher reward for saving than does the latter. Consequently, for any given level of contributions, the expenditure tax models generate higher replacement rates of retirement income. The main distinction between the EET and TEE versions of the expenditure tax model is that, while they are broadly equivalent in terms of implied pension entitlements for retirees, given that pension assets are reduced by the amount of the tax under the pre-paid model, the total stock of assets accumulated under TEE is lower, which offers less of a growth dividend for the country.

In practice, as reflected in the table above, the expenditure tax approach is the most commonly used. Indeed, the World Bank generally encourages countries to use the expenditure tax model as the appropriate benchmark for taxing pension funds<sup>15</sup>. The Bank favours the expenditure tax model because it is neutral between current and future consumption, whereas the income tax approach has a natural bias against future consumption. Expenditure tax models are also easier to administer and avoid the difficult issue of whether or not to tax unrealised capital gains. They also avoid over-taxation of pension investments in periods of high inflation where real returns may be negative.

The choice between the pre-paid version of the expenditure tax model (TEE) and the conventional version (EET) is less straightforward. The pre-paid version creates less of a reduction in current tax revenues at the time the scheme is introduced. It thus puts less strain on Government deficits. At the same time, as noted above, it offers a lower growth dividend.

<sup>15</sup> See 'Taxation', World Bank Pension Reform Primer.

The current taxation regime for voluntary pensions in Malawi, basically ETT, is at the more onerous end of the international scale and is best characterised as a somewhat heavy-handed income tax approach. This burden arises from the feature that, not only are fund earnings taxed, but also many lump sum withdrawals from pension schemes are also taxed and at a penal rate. It would be helpful to review these taxing arrangements if a mandatory pension scheme is to be introduced to ensure that the burden on members is not unnecessarily heavy. Indeed it might be helpful to make participation attractive by offering tax concessions.

#### **5.4 Design Options**

##### ***Calculation of Benefits:***

- a) Establish a mandatory DB scheme under which the Malawi Government takes responsibility for funding shortfalls should they emerge (see Section 6 on funding arrangements); or
- b) Establish a mandatory DC scheme under which retirees receive benefits commensurate with their accumulated contributions and fund earnings; or
- c) Establish a mandatory DC scheme with a guarantee arrangement to ensure that the retirement income of individual retirees does not fall below a target minimum replacement rate; or
- d) Establish a mandatory national scheme under which the basic structure is DC, but under which certain (qualifying) employers (see Section 12 below) have the option to operate a DB scheme subject to suitable arrangement for firms that cease operations and for individuals who leave the employ of firms offering qualifying DB schemes.

##### ***Payment of Benefits:***

- a) Require all of the assets in an individual's pension fund to be converted to a pension annuity on retirement; or
- b) Permit retirees to commute all their pension entitlements to a lump sum on retirement; or
- c) Permit retirees to commute a portion of their pension entitlements to a lump sum payout on retirement, up to a maximum percentage of the value of the assets in the individual's pension fund at the time of retirement; or
- d) Permit retirees to commute a portion of their pension entitlements to a lump sum payout on retirement, up to a maximum equal to any excess left over after purchasing a specified minimum retirement annuity – the minimum could be set on the basis of a minimum subsistence income level, or a minimum replacement rate.

##### ***Taxation:***

- a) Exempt contributions, exempt fund earnings, and tax retirement incomes on the same basis as earned income (EET); or
- b) Tax contributions, exempt fund earnings, and exempt retirement incomes (TEE); or
- c) Exempt contributions, tax fund earnings, and tax retirement incomes (ETT).

## 5.5 Comments

While there is no reason why flexibility should not be a feature of a mandatory pension scheme, flexibility comes at a cost in terms of administrative complexity.

In our view, there is much to be said for using a simple DC scheme as the cornerstone of any pension reform in Malawi. DB schemes are potentially complex to administer, as are guarantees, which can also have perverse incentive effects. Allowing some employers to substitute existing DB arrangements for their mandatory contributions should be considered, at least as a transition arrangement (see Section 12 below). But, longer-term, the scheme will be simpler to administer and control if the pension model is simple.

In view of the short life expectancy after retirement in Malawi there is a case for considering at least a limited lump sum option under the mandatory scheme. The size of the lump sum would need to be balanced against the impact that it would have on income replacement, and on the rights of members' survivors.

With respect to taxation, there is much to be said for keeping the tax treatment of pensions as simple as possible. Some countries have ended up with endless volumes of tax law and a burgeoning advisory industry built around complex and frequently changing tax rules associated with pensions. There is also much to be said for taking an expenditure tax approach to pensions in preference to an income tax approach. Not only is this likely to result in greater asset accumulation, it also generates a higher replacement rate from any given contribution rate.

## 6. Funding Arrangements

One of the most fundamental issues to be decided in the introduction of a mandatory pension scheme is whether or not the scheme should be funded or unfunded.

First pillar schemes have traditionally been unfunded PAYG schemes in which tax revenue from consolidated revenue or taxes levied specifically for pension purposes are used to create inter-generational transfers from the working age population to the retired population. In contrast, third pillar private pension schemes are nearly always funded.

While unfunded national schemes do exist, they are not the most common form of national scheme. An unfunded (or notional) scheme is nevertheless an option and a summary of experience with these is presented in the box below.

### Notional Defined Contribution Schemes

Although PAYG pension systems have fallen out of favour over the past twenty years, countries contemplating the move from an unfunded, defined-benefit system to a fully-funded, defined-contribution system have been constrained by their ability to fund such a transition. Sweden's "notional" defined contribution (NDC) system, implemented in 2000, has provided an increasingly popular hybrid option, particularly in Europe where Latvia, Poland, and Italy have taken the NDC route.

While details differ from country to country, the key to an NDC scheme is that it continues to be operated on an unfunded PAYG basis, but ties benefits to contributions. While worker's contributions are nominally recorded and tracked in individual accounts, the actual funds are diverted to pay for benefits for current pensioners. When today's workers retire, their pension benefits are determined and limited by the notional capital and interest accumulated in their individual accounts, adjusted by certain factors related to cohort life-span (the "annuitisation" divisor), and wage or productivity growth. These benefits are, in turn, paid for by the payroll contributions of tomorrow's workers.

The NDC reforms thus insulate public pensions from the key drawbacks of a PAYG system. By adjusting pension annuities according to the projected life expectancy of the pensioner at retirement, the system remains financially solvent at the same level of pension contributions, because benefits decrease if life expectancies go up and/or the worker base shrinks. Workers also have a greater incentive to delay retirement to accumulate greater pension benefits, since NDC pensions more directly reflect contributions. For the government, taking the NDC option defers the heavy fiscal burden of financing the transition to a fully-funded system.

NDC systems are not without their imperfections. In reality, if the worker base continues to shrink even as life expectancy increases, pension payments will certainly fall. This runs the risk of workers retiring with insufficient funds, and could lead to political pressures for contribution rates to be raised. For example, even though Poland's expenditure on state pensions is projected to fall from 10.8% of GDP in 2000 to 8.3% in 2050, this is at the expense of the pension replacement ratio falling from 61% to a projected 49%.\* A second concern is that an NDC scheme, being essentially PAYG, does not give rise to accumulation of national savings; Sweden's pension fund assets were only 3.7% of GDP in 2004, while Poland's was 2.6%. In contrast, Australia, which has a fully-funded defined-contribution second pillar, had accumulated pension fund assets of 67.4% of GDP by 2004.\*\*

Significantly, perhaps as a reaction to these drawbacks, the Swedish and Polish systems both supplement their NDC pensions with mandatory, fully-funded individual retirement savings accounts. In both cases, while the employer's contribution and part of the employee's contribution are funneled into the NDC system, a small portion (2.5% of wages in Sweden's case and 7.3% for Poland) is diverted into individual accounts which are managed by private fund managers of the worker's choice and are returned as pension payments after retirement. This has set the stage for further privatisation of the pension system in the future. Indeed, Disney (1999) suggests that the higher returns to the private accounts will make them more attractive than the notional accounts, and may well lead to calls for a larger portion of pension contributions to be diverted to the fully-funded accounts instead.\*\*\*

\* The replacement ratio is based on a minimum of 37.5 years of contributions to the pension system, and is calculated as a percentage of the former income of an average worker. Cited in "European Pension Reform and Private Pensions: An Analysis of the EU's Six Largest Countries", Association of British Insurers, May 2004. Original source: "Pension Reform and Public Information in Poland", World Bank Pension Reform Primer, Agnieszka Chlon, August 2002.

\*\* Statistics taken from OECD's statistical database at <http://cs4hq.oecd.org/oecd/eng/TableViewer/Wdsview/disviewp.asp?ReportId=1879&bReportOnly=True>

\*\*\* "OECD Public Pension Programmes in Crisis: An Evaluation of the Reform Options", Richard Disney, August 1999. <http://siteresources.worldbank.org/SOCIALPROTECTION/Resources/SP-Discussion-papers/Pensions-DP/9921.pdf>

While an unfunded scheme is an option, it is worth noting that almost all the pension reforms over the past 20 years have included the development of a funded component, usually in conjunction with improvements to PAYG first pillar schemes. This was largely motivated by the recognition that population ageing was already straining existing PAYG systems and would be unsustainable in the long-run. Countries were also encouraged by Chile's successful transition to a fully-funded system in which pension benefits are paid out of savings and the returns on them. Since then, more than a dozen

Latin American countries and 11 Eastern European countries have elected to take this route as well (see box in Section 10 below on the Latin American experience).<sup>16</sup>

The advantages of a fully-funded scheme relative to an unfunded PAYG can be summarised as follows:<sup>17</sup>

- a. Fiscal sustainability - within the context of an ageing population and/or high unemployment, PAYG systems are highly likely to trend towards insolvency if they do not: (i) progressively reduce benefits to future generations of pensioners; or (ii) progressively increase payroll taxes/contribution rates to finance future pensioners at the current level of benefits. Both these steps entail political risks for the government of the day. In contrast, funded systems pay pensioners out of their own contributions and are therefore more resilient to adverse demographics.
- b. Inter-generational equity - having each generation pay for its own retirement under a fully-funded system is usually considered to be more equitable than transferring wealth from the working generation to the retired generation, particularly if retirement benefits change between generations.
- c. Increased national savings - a key advantage of fully-funded pension schemes (especially if these include mandatory retirement accounts) is that national savings will potentially increase while the system matures. Unfunded schemes do not increase national savings, do not generate a pool of investible resources, and do not therefore add to economic growth or welfare outside of their impact on security in retirement. Indeed, to the extent that the forced “implicit” savings under the scheme substitute for other planned savings, an unfunded scheme may actually decrease net savings and capital formation<sup>18</sup>.
- d. Funded pension systems encourage greater and longer labour market participation. High payroll taxes to finance a PAYG system, particularly if combined with adverse expectations about the sustainability of pension benefits, may lead more workers to opt out of pension contributions (whether legally or illegally), potentially creating an even greater strain on the PAYG system. Workers are more likely to participate in the funded pension system if they perceive that they are saving for themselves. Further, if retirement incomes are more closely tied to workers’ personal savings in pension accounts, there will be a stronger incentive for people to work longer to increase their pension benefits, which will help to offset the problem of population ageing.

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<sup>16</sup>

<http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:20289271~pagePK:34370~piPK:42768~theSitePK:4607,00.html>

<sup>17</sup>

Key sources are: “Hopeful Houdinis”, *The Economist*, 14 Feb 2002. [http://www.economist.com/research/backgrounders/displaystory.cfm?story\\_id=975661](http://www.economist.com/research/backgrounders/displaystory.cfm?story_id=975661), and “The Economic Implementation of Pension Reform and its Implementation”, Estelle James. Available at [http://www.estellejames.com-presentations-economic\\_impact.ppt](http://www.estellejames.com-presentations-economic_impact.ppt)

<sup>18</sup>

For example, the study by Connolly and Kohler, *op. cit.*, for Australia estimated that every dollar of forced saving under the mandatory scheme was offset by a 38 cent reduction in planned private savings. Since the Australia scheme is funded, the mandatory scheme caused actual savings to increase by 62 cents net for every dollar of contribution to the national scheme. By implication, had the scheme been unfunded, actual savings would have decreased net by 38 cents for every dollar of contribution to the national scheme.

- e. Funded pension systems promote capital market development. In countries currently without big private pension funds, establishing a funded scheme should promote a more efficient use of capital and encourage corporate management to concentrate on increasing shareholder value<sup>19</sup>.

Against these considerable advantages, funded systems do have some attendant drawbacks:

- a. Administration costs - the administrative costs of running a funded system are generally higher than those for PAYG systems (e.g. in Chile, employees contribute up to an additional 2.3% of payroll to their mandatory retirement accounts for servicing fees and insurance). Since charges directly affect the rate of return on pension investments, it is imperative to keep administrative costs low (see Sections 8 and 9 on administration and asset management).
- b. Adverse changes in the rate of return on capital - while funded systems provide a certain degree of insulation against the impact of population ageing, one school of thought is that this insulation is reduced by the possibility that the rate of return on capital could fall in response to population ageing. This is argued to occur if, as a result of aging, capital becomes more abundant and labour scarcer, with the result that the number of people seeking to liquidate financial assets will exceed the number of people seeking to acquire those assets, thereby reducing returns. This effect is potentially mitigated to some extent in emerging market economies, where there should be an abundance of investment opportunities offering high returns.
- c. Investment risk - funded systems generate benefits based on savings and returns on investment. They are therefore exposed to the vicissitudes of the market.

## 6.1 Design Options

- a) Establish a mandatory DC scheme based on the principle of full funding (at least over a period of time); or
- b) Establish a mandatory notional DC scheme under which retirees are funded on a PAYG basis but with entitlements based on their accumulation of notional assets over the period of contribution.

## 6.2 Comments

While notional schemes are theoretically viable, and involve low transition costs, they offer little to Malawi in terms of a growth dividend. In view of Malawi's already low national savings and underdeveloped capital markets there would be a serious risk that a notional scheme could actually lower the country's capital base and retard market development.

## 7. Coverage

There are three aspects of coverage that are relevant in designing a mandatory pension scheme:

- The extent of coverage of the workforce;

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<sup>19</sup> *The Economist* (14 Feb 02) quotes Dieter Bräuninger, an economist at Deutsche Bank, "It will bring broader and deeper markets, and promote more effective corporate governance." To Bräuninger, this is the main point of Germany's partial move away from PAYG to funding.



- The target replacement coverage of pre-retirement earnings by pension annuities; and
- The extent of social services covered by the scheme.

### 7.1 Coverage of the Workforce

As noted earlier in Section 2, approximately 30% of the world's workforce is currently covered by either a publicly-provided or publicly-mandated pension scheme. There is, however, a wide range within this average. Of countries that mandate participation, coverage ranges from less than 30% in most of East Asia to around 60% in the transition economies, and to around 80% in higher-income OECD countries. In Malawi the current coverage of the voluntary private pension schemes is likely to be much lower than this, although an exact estimate of the coverage ratio is not available.

A key limitation of contributory schemes, whether PAYG or fully-funded, is that coverage is usually restricted to the formal sector where contributions can be enforced and monitored. However, particularly in countries where the labour force is characterised by high unemployment, self-employment (for example in cottage industries or agriculture), and/or low wages, the percentage of the workforce in the formal sector could be as low as 5% to 10% (as is the case in South Africa and Kenya). This often leaves a significant portion of the elderly from the informal sectors with insufficient or even non-existent retirement savings. Women, who tend to have higher life expectancy and lower participation rate in the workforce, tend to be at greater risk.

It has been suggested that, at the margin, a shift from a defined-benefit pension system to a defined-contribution one will encourage greater worker participation by establishing a closer link between contributions and pension benefits. However, this effect is likely to be minor at best. In general, the evidence suggests that coverage is affected much more by non-pension related factors such as the cost of joining the formal sector. Formal production and employment often imply greater regulatory and tax burdens, which are strong incentives for small entrepreneurs and low-wage workers to remain in the informal economy. The costs of formality are usually sufficiently high that it pays small firms to devote energy and resources to evasion, thereby forfeiting the protections and benefits of the sector<sup>20</sup>.

Some countries have experimented with various design options to encourage labour force participation in national mandatory schemes or voluntary retirement savings schemes. For example, in Mexico, the government deposits a flat amount equivalent to about 2.2% of the average wage into the individual defined-contribution accounts, which could be a fairly substantial amount for low-income workers. South Africa is currently considering the establishment of a National Savings Fund to serve as a vehicle for the informal and low-wage sectors to voluntarily set aside money for retirement. The national fund would permit irregular contributions, invest the money on behalf of its contributors, and would provide tax-exempt benefits<sup>21</sup>.

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<sup>20</sup> For example, De Soto found for Peru that the cost of staying in the formal sector amounted to 348% of after-tax profits (see H. De Soto, (1989), *The Other Path*, Harper and Row, New York). Regulation and taxes add an average of 20% to labour costs in Latin America. In Thailand, the cost of staying in the informal sector has been estimated at around 13-22% of labour costs (World Bank Pension Reform Primer (2001), *Coverage: The Scope and Protection in Retirement Income Systems*).

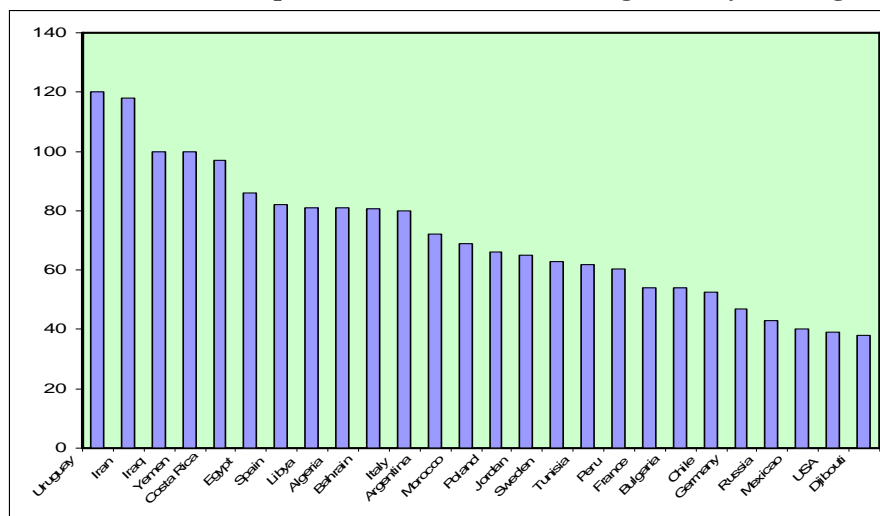
<sup>21</sup> National Treasury, Republic of South Africa (December 2004), *Retirement Fund Reform: A discussion paper*. Under the current design, the NSF would accept contributions from after-tax income and tax investment earnings although, in reality, the target workers would probably face an EET taxation regime as they are unlikely to earn enough to have to pay income tax in the first place.

A related consideration in both the contributory and non-contributory schemes is whether actions should be taken to ensure that certain sectors such as stay-at-home mothers or caregivers retire with sufficient income. In the UK and the Netherlands, where state pensions are provided to workers meeting a minimum number of years of contribution, additional pension years are provided for stay-at-home mothers. Under Sweden’s PAYG-NDC scheme, housewives, students, caregivers, and even military servicemen are provided with pension credits in their notional accounts. These types of add-ons are usually limited to higher-income countries.

**7.2 The Target Replacement Coverage**

One of the critical design issues for a mandatory national pension scheme is the target replacement rate for retirement pensions as a percentage of pre-retirement income. Internationally the average is around 60% (see Chart 1 below). The minimum acceptable replacement rate is usually regarded to be around 40%.

**Chart 1: Replacement Rates (% of Average Weekly Earnings)**



Of course there is a direct relationship between the target replacement rate and the contribution rate required by scheme participants; higher replacement requires higher contributions, all else equal.

The relationship between replacement and contribution rates varies from country to country according to longevity assumptions, length of working life, earnings rates, administration costs, and tax rates (see Section 5). We have made no attempt to assess this relationship in the Malawi context as that would require a full actuarial analysis. A very rough benchmark from international experience is that each additional 10% of replacement costs around 4% in contributions for a young individual just starting out in the scheme. As a rough guide for Malawi, we note that the actuarial study carried out on the Public Service Pension in 2004 suggested that 100% replacement for such an individual would cost around 21% in contributions.

A decision to allow retirees to commute part of their entitlements into a lump sum would automatically reduce the effective replacement rate by the proportion commuted. Thus the decision about replacement and the decision about lump sum options should be considered jointly.

### 7.3 Coverage of Social Services

In some countries the mandatory pension scheme is seen as a vehicle for providing other social services such as death and disability benefits, medical, educational and other social services, as well as retirement incomes.

To the extent that death and disability insurance benefits are linked to income maintenance both during working years and retirement there is a natural synergy between these and pension benefits. In most countries pension schemes also offer death and disability cover as part of the package.

Other social services are less obviously linked to income maintenance and are rarely incorporated within second pillar pension scheme. Indeed, it can be dangerous to mix fundamentally different programmes such as these, since social services are usually provided on a means-tested basis from the government's consolidated revenue, whereas second pillar pension entitlements are based on individual contributions.

### 7.4 Design Options

#### *Coverage of the Workforce:*

- a) Establish a mandatory DC scheme limited to the formal and part-time sectors with no exemptions (other than transitional exemptions – see Section 12); or
- b) Establish a mandatory DC scheme limited to the formal sector with some exemptions (e.g. for part-time workers, small firms, etc); or
- c) Establish a mandatory notional DC scheme with coverage of every member of the labour force, whether employed formally or informally, or temporarily unemployed.

#### *Replacement Coverage:*

- a) Establish a mandatory DB scheme under which the Malawi Government takes responsibility for funding shortfalls should they emerge (see Section 6 on funding arrangements); or
- b) Establish a mandatory DC scheme under which retirees receive benefits commensurate with their accumulated contributions and fund earnings.

#### *Coverage of Social Services:*

- a) Extend the coverage of the mandatory scheme to include a wide range of social services; or
- b) Limit coverage of the scheme to pensions, and life and disability insurance.

### 7.5 Comments

#### *Coverage of the Workforce*

If the scheme is to attract participation by members of the informal sector it must be seen as a credible savings vehicle with a clear mandate in favour of the members of the scheme. In this respect there is a case to start with a fairly narrow scheme and to extend its coverage over time. In the long run, the objective of any mandatory scheme should be to extend the coverage to as great a proportion of the workforce as possible. Consideration should be given to ways to include part-time workers, the self-employed and other members of the informal sector. While incentives may help in this respect, a national first pillar safety net is probably the only long-term option to capture the entire workforce.

### ***Replacement Coverage***

The target replacement rate requires careful thought and should not be made without consideration of the poverty level, lump sum options, and the capacity of industry to pay for the scheme (see also Section 12 below on transition arrangements). A decision on replacement rate should only be taken after a proper actuarial review.

### ***Coverage of Social Services***

In our view it is entirely reasonable to include provision for death and disability insurance cover within a mandatory national pension scheme. The inclusion of other social services is largely a matter of Government social policy. We simply note that it is not common practice, it would reduce the transparency of public provision of such services, and it could seriously compromise the integrity of the pension scheme itself.

## **Category B Issues: Operation of the Scheme**

### **8. Administration**

Administration of member entitlements and the logistics of pension fund operations is a core element of the operation of a national pension scheme. There are several steps in the administration process, including the collection of contributions, the distribution of investment mandates to asset managers, and record keeping of entitlements.

The collection of mandatory pension contributions usually involves the direct or indirect remittance of the funds from the employer to the pension fund manager. Regardless of the choice of collection system, it is critical that the collection process be transparent, maintain effective record-keeping, and provide timely transfers of funds from employers to fund managers.

Under the direct remittance model, the employer transmits the funds directly to the specialised provider of the employee's choice. The provider in this case is responsible for both asset management as well as record-keeping (i.e., individual transaction history and portfolio earnings). This system, employed by countries like Chile and Australia, helps avoid a long time lag between the point when the contributions are paid out and invested, but adds to business costs because employers must keep track of individual employee choices – and changes – of pension service provider.

Countries increasingly appear to be favouring the indirect remittance model, in which a centralised agency (usually but not always state-run) collects the contributions from the employers and subsequently redirects the funds to the employee-specified pension service provider. Centralised collection, especially if it is integrated with the collection of other payroll taxes, is associated with significant systemic cost savings for both the employer and the state: (a) employers may simply send payroll taxes and pension contributions for all their employees to one destination, regardless of changes in pension service provider; (b) integrated collection avoids the need for the creation of a separate pension contribution collection agency and reduces unnecessary duplication of payroll records; and (c) there are economies of scale to be reaped from centralised record-keeping. Sweden, the United Kingdom, and Argentina, for example, have chosen to centralise pension contribution collection within their taxation agency.

In a growing number of countries the whole administration process is centralised in a single agency – either a semi-public agency or a private sector agency selected for its skills in pension fund administration. At the other end of the spectrum, some countries have allowed pension fund administrators to compete openly for business. In Australia, for example, most occupational or

employer-based schemes either have their own administrative capacity or outsource it to professional administrators.

The case for centralisation rests with the economies of scale and overall coherence that result from having a single point for the collection of fund contributions, for monitoring late payments by employers, for distributing investible funds to asset managers, and for maintaining the records of the scheme in terms of entitlements.

The case against centralisation lies mainly in two arguments. First, a decentralised scheme is more difficult for a Government to tamper with if it wishes to direct the investments of the fund into social projects. Second, there are usually cost savings associated with competition (though these need to be weighed against the economies of scale available to a centralised administration). In particular, large administrations in positions of monopoly are notoriously bureaucratic and unresponsive to member needs. The letter in the box below from a member to the Indian Employee's Provident Fund (reproduced here from the World Bank Primer on the scope of pension fund coverage), is a good example of the worst of the problems that can arise from a state monopoly.

**A Plea for Service**

September 1984  
Dear Sir

Kindly let me know the balance lying in my above account after transfer of my funds from A/C No. ###.

I very much regret to inform you that since 1972 (when I left Assam i.e., my previous employer), I am trying to get my account position and statement of my funds without any effect from your side.

Initially, there was a confusion and your office had informed me that you had not received "K" form from your Calcutta office while the Regional Provident Fund Commissioner, West Bengal had informed that "K" Form was duly sent to you on 22.6.74 and 14.8.75 via their letter number TR/2099/WB/X/607 dated 19.11.75.

Under the circumstances, non-receipt of statement of account and non-confirmation of transfer of my fund from West Bengal to Assam by your office has put me in great trouble to withdraw my Provident Fund amount from your office. It is a pity that innumerable reminders from the side are evoking no response from you. In the absence of any communication from your side within 10 days on receipt of this letter shall constrain me to take legal action.

Would you kindly personally look into the matter and let me know why your office should take over 12 years to confirm such a simple matter.'

Note: This particular individual finally did receive his provident account balance – 16 years later.

Given the significant logistical advantages of centralisation, some countries have sought ways to contain both cost and bureaucratic inefficiency. The main ways to achieve these are to put limits on administrative costs and to tender the rights to operate the fund administration to the private sector on a periodic basis.

International experience with the cost of funds management is difficult to assess given that providers can levy administration and management fees in many different ways including, one-off and on-going fees, flat fees and proportional fees, and fees based on assets and/or fees based on contributions. Comparisons are further complicated by the fact that many fund operators do not separate administrative charges from management fees; more to the point, if a fund is able to charge for both administration and management it can use one to cross-subsidise the other.

The following are some examples from the World Bank's survey of administrative charges on pension funds<sup>22</sup>:

- In Australia, administrative fees are generally levied at a flat annual rate, averaging \$US34 for industry funds and \$US53 for retail funds. There is also a charge of 4.5% on contributions which can be interpreted as an administrative charge.
- Annual flat fees in the UK average around \$US30 (although around 40% of funds levy no fixed charge, while around 10% charge as much as \$US70), plus a charge of 6% on contributions.
- In Poland, administrative fees are levied only on contributions and typically range between 7% and 9%, although many funds reduce these to around 5% after a member has been with them for 2 years.
- Sweden has a complex formula for the (relatively new) funded component of their scheme. Fees appear to combine both administration and management services.
- Kazakhstan has set a ceiling on administration fees of 1% of contributions.
- Bolivia auctioned the rights to manage its national fund to two managers. Administrative fees cannot exceed 1% of contributions. The managers have a five-year duopoly. It appears likely that the administrative costs are cross-subsidised by the management fees.
- In countries where multiple providers offer administrative services on a competitive basis, the averages hide a wide range of charge levels between different providers (although the range on administrative charges is considerably less than that for management fees – see Section 9 below).

## 8.1 Design Options

- a) Create a centralised, government or semi-government agency to administer the national scheme; or
- b) Create a centralised administrative structure but appoint one of the existing private sector fund administrators to operate it; or
- c) Create a centralised administrative structure but select a private sector operator (or a small number of operators) by tender, based on an assessment of a range of considerations, including the proposed fees, evidence of staff skills and system resources; or
- d) Allow any qualifying administrators to operate pension funds under the national scheme.

## 8.2 Comments

In our view, the two key considerations in the Malawi context are the existence of skilled pension fund administrators in the private sector, and the economies of scale in administration. Together, these tend to militate against establishing a completely new government or semi-government administrator, and also against creating completely open competition. In a small country like Malawi a single administrator could be justified, provided a strong governance process (e.g. a tender and review

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<sup>22</sup> World Bank Pension Reform Primer, "Administrative Charges".

process) is put in place to ensure that costs are minimised while services are maximised, and that the Government (and future Governments) are committed to allowing the funds to be invested in the best interests of the fund members. On the other hand, a centralised scheme is more susceptible to tampering, either by the Government or by unscrupulous trustees. On balance, we favour a decentralised operational structure in that it is the simplest to implement and best aligns with the existing infrastructure in the private sector pension industry in Malawi.

## 9. Asset management

While asset management and fund administration are carried out by the same institution in most countries, they are nevertheless quite separable functions. Unlike administration, there is a much stronger case for competition in the provision of asset management services. Where asset management rights are granted to a monopoly there is little incentive for the manager to manage the fund assets efficiently in the interests of fund members.

Where asset management rights have been granted to a monopoly it has mostly been to a government or semi-public agency. The performance of these monopolies has been mixed at best and, in some cases, well below industry standards (see box below on Public Management). Perhaps the greatest drawback of establishing a monopoly to manage fund assets in an emerging economy context is that it is likely to make the local market unbalanced over time, with one dominant investor in many sectors. This can reduce market liquidity and inhibit the development of local markets.

In moving beyond monopoly, some countries select a fixed (small) number of asset managers to invest mandatory pension fund resources. The advantage of this approach is that the asset managers are inevitably large (if not initially, at least after the scheme reaches maturity). This ensures that they are financially strong and can benefit from the economies of scale that accrue in funds management. These benefits are often traded off against the inefficiencies that attach to limited competition (see, for example, the box in Section 10 on the Latin American experience).

At the other end of the spectrum, in more developed financial systems, where competition is encouraged, some countries have licensed all operators that meet the standards set for pension fund asset managers. Thus, in Australia for example, there are around 266 public offer funds (of a total of 311,000 funds) that compete for the business of pension fund contributors<sup>23</sup>. In the UK, over 100,000 funds are subject to the Pensions Regulator. These funds include corporate funds (a single employer), industry funds, and open funds.

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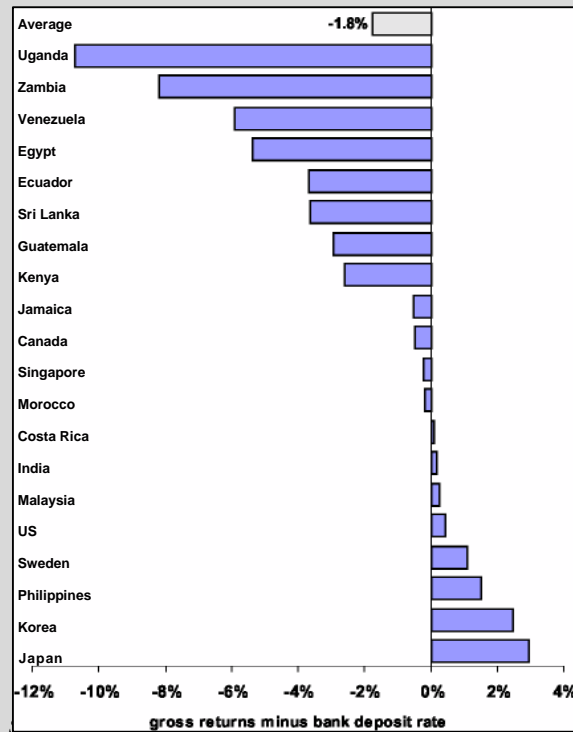
<sup>23</sup> *Annual Superannuation Bulletin*, Australian Prudential Regulation Authority, June 2005.

**Asset Management by the Public Sector**

A critical design issue for funded pensions is whether the pension fund assets, which can be substantial in mandatory systems, should be publicly managed or outsourced to private fund managers.

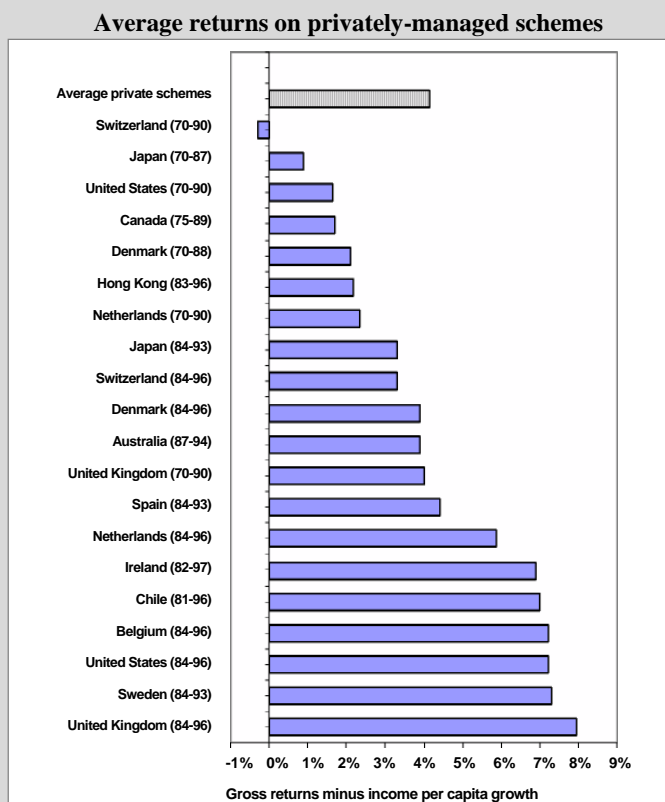
Since private fund managers are often restricted in their portfolios by government investment regulations, it is tempting to suggest that the assets might as well be centrally managed, which should lower the administrative costs charged to workers by reducing wasteful competition. In reality, however, the number of countries opting for public management of pension fund assets has fallen steadily, mainly because it invariably produces poorer returns than private management. This has been borne out by World Bank analysis of publicly-managed schemes which shows that returns in most cases are not even as high as could have been obtained by simply investing the funds into banks.

**Returns on publicly-managed pension funds minus bank deposit rates**





Private fund managers, on the other hand, have fared much better in terms of returns, as shown in the chart below (though note that in this chart fund returns are measure after deducting per capita growth in incomes):



This disparity in performance between publicly-managed and privately-managed funds may be explained by the fact that public investment policy tends to be driven by political motives, meaning that pension funds are typically invested in government bonds to provide a source for government borrowing, or diverted into national development projects. Pension fund assets in publicly-managed funds are usually insufficiently diversified outside of the country, thereby tying returns to the performance of the domestic economy. By prioritising public policy objectives over the maximisation of risk-adjusted returns, governments are rarely able to outperform private fund managers who tend to hold more diversified portfolios within the limitations of investment regulations.

A second reason why many countries opt for private management of pension funds is transparency, which is important in building confidence about the mandatory retirement accounts and encouraging labour force participation in the pension system. Unlike private fund managers, who are usually accountable for their performance, governments that have access to large pension assets may be tempted to use the funds to support the stock market, ailing state-run enterprises, or even firms with political influence. A case in point would be the recent pension scandal in Shanghai, China, where key politicians in the municipal government looted the city's pension funds of some \$400 million to help enrich illegal entrepreneurs and family members.

The Latin American countries have trodden a middle course. These countries have limited the number of open funds by statute (or decree) to a small number of major institutions (often between 2 and 12). This approach establishes an industry that is relatively easy to supervise and which is generally strong in terms of the safety of member funds. On the negative side, these structures tend to create an

uncompetitive environment. Studies have shown that these systems can, in some cases, yield low returns with high operating costs<sup>24</sup>.

The table below summarises some international experience with the number of providers.

<b>Number of Providers Available</b>	
<b>Country</b>	<b>Number of Providers</b>
Argentina	12
Chile	7
Colombia	6
Costa Rica	9
El Salvador	3
Hungary	22
Kazakhstan	16
Mexico	13
Peru	4
Poland	20
Singapore	41
Sweden	100+
Uruguay	4

*Source: World Bank Pension Primer, "Second Pillars: Provider and Product Selection for Funded Individual Accounts", June 2000.*

There are three important considerations in the Malawi context in assessing the appropriate number of asset managers:

- Management fees;
- Investment performance; and
- Supervision

### **9.1 Management Fees**

The World Bank study of administrative costs of pension funds mentioned in Section 8, also surveyed asset management costs. The variations across and within countries was much wider for asset management fees than was the case for administrative fees.

The World Bank's findings included the following:

- In Australia, management fees were generally between .4% and 1.9% on assets (the former is the average for industry funds while the latter is the average for retail funds);
- In the UK charges on assets range from .5% to 1.5%;
- In Poland the charge on assets is capped at .6%;
- In Sweden, fees are determined by a complex formula with an overall cap at .75% on assets (around half the fee charged in the Swedish mutual fund industry);

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<sup>24</sup> See, for example, the findings by Srinivas and Yermo reported in the box on Latin American experience in Section 10.

- In Kazakhstan the fee is capped at 10% of the fund's earnings – this cap is very low, with the result that most fund managers are currently making losses;
- In Bolivia the tender for the management duopoly resulted in a very low fee of just under .5% on assets, although this is partly offset by the scale economies that accrue to the duopoly members.

Fees are affected by a number of factors. Competition is, of course, a critical driver. In some countries government-imposed caps are a major factor, although many countries have avoided caps on the grounds that it is too big a responsibility for government if the caps are set inappropriately. In others, fund size is a key factor. In the Wallis Inquiry in Australia in the late 1990s, the high cost of funds management was found to be a negative feature of the Australian financial system at the time, due to the large number of small funds. The Wallis Committee found that the cost of funds management per member decreased by a factor of ten as the number of members increased from 10 to 1,000<sup>25</sup>.

Another key determinant of fees (especially over time) is whether they are levied on assets or contributions. While both increase exponentially over time as the scheme grows, the former tend to start low but grow more quickly, while the latter tend to be front-end loaded, but grow more slowly over time as contributions grow more slowly than fund assets. While countries may prefer one form of charge over the other for a variety of reasons, and may seek to impose one structure or the other on a mandatory scheme, what should be discouraged if at all possible is a wide array of complex fee structures that are difficult for members to assess.

## 9.2 Investment Performance

It is difficult to assess fees without also considering investment performance. In the UK, for example, funds with higher fees tend to outperform lower-fee funds, although it is not clear that the extra performance necessarily outweighs the differential in fees. What is interesting internationally is how few countries attempt to link fees and performance in a way that creates proper incentives.

Under a centralised system in which the number of asset managers is kept deliberately small, the scheme rules have the flexibility to control to some extent how fees will be calculated and distributed.

The proposed Armenian national scheme is one example of how incentives can be used to create a competitive structure from a small number of participants. Under the proposed scheme there will be a single central administrator and a small number of asset managers decided by tender. The intention is to create a fee pool, based on a fixed levy on contributions. The pool will be allocated on the basis of a base fee plus a performance linked component. Thus, asset managers will have two incentives to perform: the incentive based fee; and the potential to attract more members on the basis of their performance.

## 9.3 Performance Guarantees

As noted earlier in Section 5, some countries have required their asset managers to provide certain guarantees over their performance, in return for the privilege of being one of a select few asset managers for a centralised scheme. The guarantees, which can be funded *ex post* or by drawing on a guarantee fund set up for the purpose, are usually activated when the performance of a fund falls below a pre-established minimum. This minimum can be set either in terms of an absolute minimum (e.g. 1% real or nominal) or relative to an industry benchmark (e.g. the manager is required to make up any shortfall below a range based on the average performance of all asset managers in the scheme).

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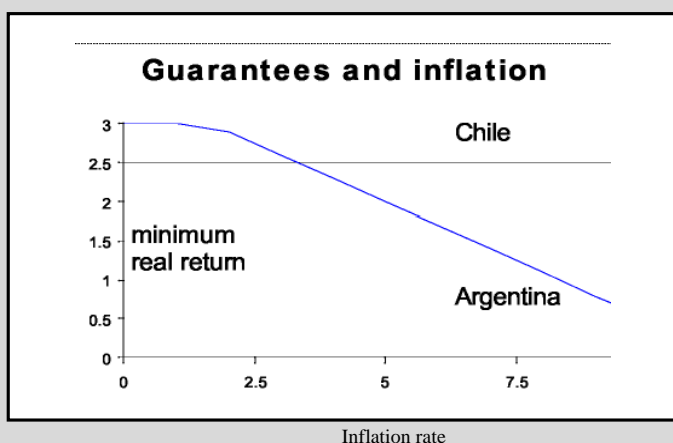
<sup>25</sup> *Financial System Inquiry, Final Report*, Australian Government Printer, September 1997.

The drawback of the former is that it can threaten the solvency of the asset managers in periods when asset values generally go through a sharp downturn (e.g. in the stock market crash of 1989). The latter tends to reduce competition and innovation by encouraging asset managers to “follow the herd” in order to minimise their own liability to the potential detriment of the interests of the fund members. International experience with guarantees is summarised in the box below.

#### Guarantees: Real Returns, Financing, and other Dangers\*

While governments may offer explicit guarantees of fund performance as a means of sharing investment risk with their pensioners, this does not necessarily protect the actual value of the pensions. Where guarantees are tied to nominal rates of return, they are vulnerable to inflation, meaning that pensioners could still see negative real rates of return. For example, although the members of Singapore’s Central Provident Fund are guaranteed at least 2.5% nominal returns on their pension funds, their real rates of return are negative when inflation rises above 2.5%.

The real value of guarantees tied to nominal rates will vary with inflation, as shown in the graph below. In Argentina, the pension guarantee is expressed in relative terms as the lesser of 70% of the average nominal return on all funds and the average nominal return minus 2%. In effect, Argentina’s minimum real return decreases as inflation increases. Uruguay and Chile, on the other hand, tie their pension guarantees to real rates of return, which remain constant as inflation changes.



Regardless of type and construct, however, all pension guarantees create a liability that depends on the difference between minimum and actual rates of return. This liability has to be financed either by the pension fund asset manager, the fund itself, a central guarantee fund, the government, or by a combination of these. In Latin America, pension funds must build up internal reserves by paying into a yield fluctuation reserve when they achieve returns that are a certain percentage (30% in Argentina and 50% in Chile) above the system average. They are generally also subject to mandatory reserve requirements, which may be an absolute amount or a percentage of assets set aside in an external account.

Some governments provide the guarantee by building up reserves in a central guarantee fund to tap when pension funds are themselves unable to make up the shortfall in returns. In Hungary and Poland, for example, pension funds must pay between 0.1 – 0.5% of contributions into the central guarantee fund. It is only when the private fund reserves and the central guarantee fund are depleted that the government steps in as the last resort.

The justification for requiring funds to build their own reserves and contribute to the central guarantee fund is to prevent a situation of ‘moral hazard’. The knowledge that returns will always be protected could tempt pension fund managers to seek high-risk, high-return assets, unless they are also partially liable for the investment protection.

Setting portfolio limits to avoid excessive investments in risky assets can also help to rein in overly aggressive pension fund managers (see Section 10 below).

\* World Bank Pension Reform Primer, "Guarantees".

#### 9.4 Regulatory Capacity

From a regulatory perspective, and therefore from the perspective of member safety, structures such as those in the UK and Australia, that encourage competition by allowing a large number of participants pose significant supervisory challenges to their regulators. Breaches of the rules are relatively common, and are often not discovered for some time due to the sheer number of funds to be monitored. While risk is arguably more concentrated in a system with a small number of participants, a small number of managers is inevitably safer for the members from a regulatory perspective (provided there are adequate protections against fraud and theft).

#### 9.5 Choice of Fund and Frequency of Change

Unless a single monopoly manager is appointed, the scheme design needs to consider the frequency with which members should be permitted to change funds. While the pressure of change helps to keep asset managers competitive, frequent change can be disruptive to markets and wasteful in terms of transactions costs.

There is general agreement that the benefits of greater choice can be more than offset by higher marketing costs. When pension fund managers have to compete to acquire clients, the higher marketing costs translate to higher administrative charges that reduce the rate of return that would otherwise be earned by the fund. For example, an administrative charge of 25% on contributions, which compares poorly with the charges on state-managed contributions, could reduce the net rate of return on pension assets by some 1.2 to 1.5% per year.<sup>26</sup>

Having too many choices can confuse the average consumer, who is likely to have limited financial knowledge. When Singapore's Central Provident Fund opted to give its members the choice of investing their own money with private fund managers, almost 75% of those who had exercised the choice to do so between 1993 and 2004 received mediocre returns and would have been better off leaving their funds to be invested by the Provident Fund.<sup>27</sup>

One of the worst examples of the cost of competition occurred when the UK liberalised its pension industry in the late 1980s to allow private fund managers to manage individual pensions. High-pressure sales tactics were used to persuade members (especially those close to retirement age) of well-run occupational schemes to switch into unsuitable personal pension schemes. The result was a major "mis-selling scandal" that cost the industry and government heavily in terms of compensation.<sup>28</sup>

Where freedom to choose and change funds is a feature of a pension scheme, the balance between competition and cost is usually struck by limiting the frequency with which members may change (for example, no more than once a year). If such a limit is not imposed and the matter is left to the market, funds will often put their own limiters on "churning" by imposing high exit fees for short-term investors.

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<sup>26</sup> L.H. Thompson, "Chapter 6 – Operation of Pension Systems: Public or Private?" in *Social Protection in Asia and the Pacific*, Asian Development Bank 2001.

<sup>27</sup> <http://stars.nhb.gov.sg/stars/public/viewHTML.jsp?pdfno=20050925997>

<sup>28</sup> Mamta Murthi, J. Michael Orszag, and Peter R. Orszag, *Administrative Costs under a Decentralised Approach to Individual Accounts: Lessons from the United Kingdom*, September 1999

## 9.6 Design Options

- a) Create a state-owned investment agency with the monopoly right to manage all mandatory pension fund contributions; or
- b) Auction the monopoly right to manage all mandatory pension fund contributions to a single private sector asset manager, subject to strict controls on fees and performance requirements; or
- c) Either auction or select by defined criteria a small number of reputable private sector asset managers to manage all mandatory pension fund contributions subject possibly to either controls or incentive arrangements on fees, and restrictions on the frequency of switching funds; or
- d) License any number of asset managers that meet prudential criteria set by the pension regulator, again subject possibly to either controls or incentive arrangements on fees, and restrictions on the frequency of switching funds.

## 9.7 Comments

Given that there are currently no asset management skills in the public sector in Malawi, while these skills already exist in the private sector, there is a compelling case to utilise the skills that already exist.

Further, the current small size and stage of development of the Malawi financial sector are such that there is a case to tread a middle ground in terms of the number of asset managers licensed to manage mandatory pension fund assets. Too few would be uncompetitive and would run counter to the interests of the fund members. Too many would limit the scale economies that accrue to funds management.

On balance, the soundest approach would appear to be to select a small number of asset managers initially (either by tender, by selection, or by setting very high prudential standards), with scope to add to this number over time if circumstances warrant.

Competition could then be generated by the way in which fees are structured to create the right incentives for performance.

## 10. Investment Rules

Investment limits on pension funds are common, and are imposed for a variety of reasons. Since the value of the fund depends critically on the fund's performance, some governments put investment restrictions in place to limit risk. In other cases, limits are put in place to direct investments either towards or away from particular areas or to restrict the way in which risk may be taken.

### 10.1 Portfolio Maxima and Minima

Portfolio investment limits usually involve setting quantitative restrictions on the share of particular types of assets that may be held by the fund. In some cases they are imposed as maximum percentages. In other cases they are imposed as minimum percentages. In others they are imposed as complex maxima and minima aimed at forcing managers to create diversified portfolios of investments.

Limits of this type are typically applied to:

- Investments in equities;

- Investments in property;
- Investments in debt; and
- Investments in foreign assets.

The motivation for imposing maximum investment limits on equities is usually linked to the perceived risk in equities. There is little debate that, over short periods of time, equities can have a much greater range of returns than fixed interest securities. What is often overlooked is that pension investments are generally long-term investments and, over virtually any 20-year time period in the past century or so, equities as an investment class have outperformed fixed interest securities in the developed capital markets of the world. The problem is that funds are usually managed as a pool for a wide range of members. Unless the manager offers separate pools for different age groups of participants, the natural long-term risk preferences of a 20-year-old are mixed in the same investment pool as the natural short-term risk aversion of a 60-year-old who is approaching retirement.

While limits on equities are common in emerging market countries where equity markets are thin, they are also found in countries with developed financial systems. For example, Denmark, Germany, Japan, and Switzerland all have a ceiling on the amount that can be invested in equities. The limit is typically 30 or 40 per cent of total assets.

The limit on property is often linked to its illiquidity as well as its potential price volatility. While this is a valid consideration, in countries where pension funds have had access to a wide range of unrestricted investments they have often become the backbone of the commercial property market.

The restriction on holdings of government securities is usually imposed as a minimum rather than as a maximum. While this is often justified on the grounds of prudence, the reality is that some governments see the national pension fund as a source of funding for their social and other programmes. A captive market for government debt can also help ease the transition to a funded public sector pension scheme (see Section 11 below).

The restriction on foreign investments is an interesting one. Logically, it should be possible to lower overall portfolio risk by investing abroad. However, to the extent that pension incomes will eventually be paid in domestic currency and spent largely on domestic goods and services, it is possible to make the case that the bulk of the investment portfolio should be in domestic-currency denominated securities. Empirical evidence does not necessarily support this proposition. More to the point, however, foreign investment restrictions, or even prohibitions, are often imposed for exchange control reasons rather than for prudential reasons. While a foreign investment ban may satisfy exchange controls and hold out the prospect of faster market development in the local securities markets, they do so to some extent at the expense of pension fund members (see the box on Latin American experience).

#### **The Latin American Experience\***

During the past decade or more, Latin America has been at the forefront of pension reform. Following the success of the Chilean experiment started in 1980, Argentina, Colombia, Peru, Uruguay and Mexico have all followed a similar pattern of reform. While there are some variations in detail, these reforms all share common elements: the schemes are all mandatory and managed by the private sector; the schemes are defined contribution in nature; the pension fund industries have been subject to very tight regulation over industry structure (limited licenses and one or two funds per provider), portfolio composition (investment restrictions and exclusions), and performance (a mixture of maximum and minimum rates of return, supported by guarantee funds).

The most restrictive regulations have been those governing portfolio composition. Using a sample of three countries – Chile, Peru and Uruguay - Srinivas and Yermo estimated the cost of these ‘draconian’ regulations

to have been substantial\*\*. They found that the structural restrictions created a false impression of investor choice. They found that, during the period in which these restrictions were in place, fund portfolios were largely identical and competition between funds was negligible. They found that pension portfolios significantly under-performed market benchmarks and noted that, unless fund performance improved, income replacement rates of retiring workers would be substantially below what they would have been in alternative investments\*\*\*. Their finding that Chile's investment performance improved markedly after the restrictions were relaxed supports their argument that draconian regulations have a high efficiency cost.

These findings, however, do not suggest that the staged approach of the Latin American countries was necessarily inappropriate. The justification for the initial 'heavy-handed' approach relies mainly on the combination of limited experience with funds management and underdeveloped domestic capital markets. As Srinivas and Yermo put it, "... *asset allocation limits are a way of isolating pension assets from agency and systemic risks in capital markets. As a consequence, self-regulation of the prudent person type may not be viable in countries where capital market infrastructure is underdeveloped and prudential controls are not in place*"<sup>+</sup>.

Initially, pension investments were limited to government and other high quality bonds. As these restrictions were relaxed to include corporate debt and equity they, in turn, stimulated the growth of those markets.

While the evidence is still preliminary, and each situation inevitably has its own unique characteristics, the following suggestions drawn from the Latin American experience may provide some helpful guidance in approaching key issues in the staging of reforms:

- a. Portfolio restrictions, including exemptions of some higher-risk asset classes, have a role to play in the early stages of the pension reform process.
- b. These restrictions should be relaxed progressively as capital markets grow and mature and as the regulatory system matures – a natural progression for relaxation in a completely underdeveloped financial system might be from government debt, to bank liabilities, to corporate debt, to equities.
- c. The absence of deep domestic capital markets should not inhibit pension reform - as the investment restrictions are relaxed, they will naturally stimulate growth of the asset classes affected.
- d. Liquidity requires careful management – pension funds that 'buy and hold' reduce liquidity, while funds that trade excessively for short-term performance can increase the cost of administering the fund.
- e. Foreign assets increase diversification, thereby lowering risk and/or increasing expected returns – especially where pension funds are very large relative to domestic markets. However, as put by Vittas, "*unrestricted foreign investment may institutionalise capital flight and prevent domestic markets from reaping the benefits of creating pension funds with long-term financial resources*"<sup>++</sup>. Foreign investment should therefore be introduced progressively into pension fund assets and should be accompanied by other reforms designed to strengthen the economy generally and to reduce its vulnerability to capital flight.
- f. In the longer-term, a soundly-regulated mandatory pension system in which financially well-educated individual investors have freedom of choice among a manageable range of competitive providers and products is likely to provide the greatest benefits to all involved.

\* From Carmichael, J and Pomerleano, M (2002) *The Development and Regulation of Non-Bank Financial Institutions*, TheWorld Bank, Washington DC.

\*\* Srinivas and Yermo, *op. Cit.*.

\*\*\* For example, they estimate that, in Chile, a balanced portfolio would have outperformed the pension fund industry, earning an average annual return of 17.4 percent over the 15 years to 1997, compared with 10.2 percent in the pension industry.

+ Srinivas and Yermo, *op. cit.*, p. 11.

++ Vittas, *op. cit.*, p. 3.

One problem that can arise from limits expressed as a share of the investment portfolio (whether as a maximum or a minimum), is that they can force perverse behaviour that can disrupt markets. For example, in a rising share market, equity limits may be breached as a result of revaluations, thereby



forcing pension funds to sell and dampening the market. Similarly, minimum holding requirements can lead to illiquidity in scarce securities as limits are approached.

The alternative to quantitative investment limits in many common law countries is what is known as the 'prudent person' rule. This rule, which is recognised in law, requires the fund manager to act with the care and diligence of a prudent person; in other words to take the same care with the investments that would be taken with their own funds under similar circumstances.

The prudent person concept is well established and is generally regarded as effective where it can be imposed under common law.

In general, the evidence suggests that restrictions can compromise fund performance. For example, the World Bank found that for a sample of countries, pension funds in countries with relatively liberal investment regimes, earned 9½ per cent per year between 1984 and 1996, whereas returns in countries that restricted asset allocations were around 6½ per cent per year over the same period<sup>29</sup>.

## 10.2 Other Investment Restrictions

There is another group of investment restrictions that are often imposed on pension fund investments. These include:

- A ban on leveraging of pension investments;
- A ban on the use of derivative products;
- A ban on lending to members; and
- Politically directed investments.

The bans on leverage, both direct leverage and indirect leverage through derivative products, are clearly aimed at limiting risk. At the same time, they can inadvertently restrict risk management by preventing fund managers from executing hedging transactions. On balance, however, these restrictions have probably prevented more problems than they have created.

The ban on lending to members is more sensitive. The case for the ban rests on a combination of equity between members (how to establish rules to decide which members can have access to credit from the fund) and the difficulty of extending credit to members on arm's length terms.

The case against politically directed investments is contained in the experience of state-managed funds relative to privately managed funds. When the government becomes actively involved in directing investments of the national pension scheme there is a great danger that the retirement incomes objective of the scheme will be overshadowed by social and other objectives of the Government. Under these circumstances confidence is likely to be lost and individuals can come to view their contributions as a tax rather than as investments.

## 10.3 An Appropriate Role for Government

While the evidence suggests that politically directed investments are antithetical to the interests of fund members, and that government or semi-government involvement in the administration and

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<sup>29</sup> See, 'Portfolio Limits', World Bank Pension Reform Primer.

management of funds is similarly unproductive, it does not necessarily follow that there is no role for government in a well-run and effective mandatory pension scheme.

We accept that, in an emerging market country such as Malawi, some portfolio limits will be inevitable. The presence of exchange controls suggests that foreign investment is likely to be restricted, though hopefully not restricted to zero.

In a situation where the flow of new funds coming into the scheme is being forced into local investments, it is imperative that a commensurate flow of sound new investment opportunities are also available. As noted in Section 3, the net flow of new funds into the Malawi market is likely to be somewhere between K4 billion and K20 billion per annum, depending on the final design of the scheme. These funds are likely to quickly exhaust existing investment opportunities unless new productive opportunities become available. Provided new investment opportunities come onstream, the Malawi capital market and economy are likely to grow in harmony. If not, pension fund investments may be forced into unproductive avenues with a resulting loss of real value. The limits may need to be calibrated carefully and recalibrated regularly to avoid destructive imbalances from emerging.

In such a situation the Government could play a positive role to facilitate the emergence of productive investment opportunities by:

- Revisiting its national development plan to identify industries that have potential;
- Identifying any upstream or downstream roadblocks to these opportunities that are a result of Government bureaucracy, or rules and regulations that inhibit commerce and investment;
- Identifying any legislative weaknesses that limit investment opportunities by restricting ownership, property rights and so on;
- Identifying areas of expertise or particular skill areas that may be inhibiting development of productive opportunities, and using government policy to attract those skills in the short term from abroad as well as encouraging their development in the long term through the education system<sup>30</sup>; and
- Identifying areas of government infrastructure that may be needed to assist bringing otherwise productive opportunities online.

In this way, a progressive government can “partner” with industry in the national development process by facilitating, rather than by engaging directly in the investment process.

#### **10.4 Design Options**

- a) The prudent person approach; or
- b) A set of “light” investment rules (including exclusions on leverage) that set large bands within which asset managers can operate without causing undue damage to local markets; or
- c) A set of “heavy” investment rules designed to limit risk taking.

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<sup>30</sup> Singapore, for example, responded to a recognized shortage of certain skills by softening their requirements for foreign residents wishing to work in Singapore and generally making it more attractive for them to come to the country.

## 10.5 Comments

While the prudent person regime has much to recommend it, the legal and financial maturity needed for its operation are arguably not yet in place in Malawi. Thus, there may be a case for considering an intermediate path, with a set of “light” investment rules during the early years of a national scheme. The interaction between portfolio limits and investment opportunities is something that can require careful management and suggests a key role for the Malawi Government to play.

## Category C Issues: Transition

### 11. Transition for the Private Sector

There are three largely private sector related issues that typically need to be addressed in thinking about transition arrangements to a mandatory pension scheme. These are:

- How to manage the switch for existing workers from a first pillar safety net scheme to the funded scheme;
- How best to treat existing private pension schemes; and
- How best to manage the introduction of mandatory contributions.

The first of these does not apply in Malawi, given that there is currently no first pillar scheme. The discussion therefore focuses on the latter two issues.

#### 11.1 Existing Private Schemes

It is estimated that there are currently around 600 employer-sponsored private pension schemes in Malawi. Most of these are believed to be defined benefit schemes, although information about existing schemes is incomplete. The challenge is how to bring these under a mandatory national scheme without disadvantaging the workers in the schemes.

Under a competitive national scheme, in which any number of pension fund providers are permitted to operate, transition is not usually an issue. Existing schemes can be authorised to continue to operate under the new scheme, provided they meet the minimum contribution rates and provided they meet the regulatory requirements. Normally, company-sponsored funds would be restricted to offering membership to company employees. Similarly, industry-based funds would be restricted to members of the particular industry. Existing funds offering pension investments to the self employed and general public would typically be required to meet more stringent prudential requirements in order to continue operating under the new national structure.

The issue is more complicated in the case where the national scheme involves centralised administration (through one or more administrators) and a selected group of asset managers. In this case there are three options:

- Require the existing funds to be terminated by transferring the assets of the existing funds to the centralised administrator with management of those assets then distributed to the selected asset managers according to the preference of the individual members; or
- Require the existing funds to be frozen, with member entitlements preserved as at the date of freezing; or

- Allow the existing funds to continue to operate as “closed funds” (a closed fund in this context is one that is licensed to accept mandatory contributions provided it only so only from its employees or a group with a common bond (such as an industry union affiliation)) as part of the new scheme but with an exemption from the requirement to operate through the centralised administration and investment structure.

None of these options is without some drawbacks, although the drawbacks of the first two options are arguably much more pronounced in the Malawi context.

Requiring termination and transfer to the new scheme is the simplest solution in that all funds are placed under the new scheme, with members of existing schemes simply transferring the value of their entitlements from the old scheme to the new. The main drawback is that some members may feel disadvantaged in that their existing defined benefits entitlements would be converted to defined contribution entitlements. Members may be further disadvantaged if employers reduce contributions in the likely event that the mandatory scheme has a lower contribution rate than under their existing DB schemes. Further, while such an approach does not rule out voluntary contributions by members, it virtually eliminates any incentive for employers to offer third pillar private pension schemes to top up the national scheme.

Preservation is fairer to employees but leaves the solvency of the existing schemes open to erosion over time, especially as employers are likely to feel less committed to schemes that are no longer operational. It is also administratively more complicated as it requires the assets of the preserved schemes to be managed and records to be maintained for both the new and old schemes. Again, it eliminates any incentive for employers to operate third pillar voluntary schemes to supplement the retirement benefits of their employees.

Finally, allowing existing funds to continue to operate as closed funds creates a complex combination of centralised and decentralised schemes. It also increases the regulatory burden since it increases, potentially significantly, the number of funds to be supervised<sup>31</sup>. The main advantage of this approach is that it better preserves the rights of existing members and leaves open the prospect of employers and industry groups operating third pillar schemes for their workers. The challenge under this approach is ensuring that workers are not disadvantaged by poor management of company-sponsored and industry funds.

This latter challenge is addressed partly by establishing a robust supervisory framework to ensure that authorised “closed funds” operate within the terms of the centralised scheme, even if technically they operate outside it. The interests of existing members can be further protected by ensuring that individuals, and employers, have the right to move between the centralised and closed funds. Thus, if this option is taken, it would be advisable to a) offer employers the option of terminating the existing scheme and transferring the assets into the national scheme and b) require closed funds to offer members the right to opt out of the company scheme in favour of transferring their benefits and contributions to the national scheme. With freedom to choose on the part of both the employer and employee it is likely that most existing schemes will be absorbed by the national scheme<sup>32</sup>. Private schemes that remain are likely to be those where employers offer significant advantages over the national scheme as an inducement to recruit and retain high-quality staff. In this case the cost of operating a separate scheme is justified by benefits to both the employer and employees.

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<sup>31</sup> However, it should be noted that, since these funds are already in existence, this burden will exist even if a mandatory second pillar scheme is not introduced.

<sup>32</sup> It is instructive that the number of funds has decreased by almost 50% since the introduction of member choice in Australia – and in a country where there is no centralised system.

## 11.2 Phasing in

In the longer term there is little practical difference between a scheme that levies the mandatory contributions on employers and one that levies them on employees. Like other non-cash benefits (such as housing subsidies, company vehicles and so on), pension contributions drive a wedge between the cash value of wages received by the employee and their cost to the employer. Over time, the level of wages can be expected to adjust to find a new equilibrium between the two. Indeed, in countries where pensions schemes have a long history it is usual for new employees to negotiate over the package of wages and benefits on the basis of the “total cost to the company”; with the employee then able to determine the composition of the package between wages, pension contributions and other non-wage benefits.

While markets have ways of sorting out the distribution of non-wage benefits between employer and employee, the resolution can take time. In the short term, if contributions are levied directly on employees (i.e. they are a deduction from existing wage levels), the impact will be to reduce take-home pay. For employees on the poverty line, or with significant cash commitments from salary (e.g. against a housing mortgage), the impact on immediate liquidity and welfare can be significant. On the other hand, if contributions are levied on employers (as an effective increase in wages) the short-term impact, until prices can adjust, is likely to be an increase in unemployment and a slowdown in economic activity. Clearly, the overall impact on either workers or employers is increased the larger is the size of the initial contribution.

To ease the impact of introducing mandatory pension contributions, countries have adopted combinations of: co-payments between employers and employees; and a staged introduction of contributions that build up to the target contribution rate over a period of years. The Australian experience with the latter approach is instructive in that the Government brokered a deal between industry and the major workers unions to substitute contributions to the national pension scheme for wage increases. This enabled the scheme to be phased in with minimal disruption to employment and worker welfare. The drawback of an overly long period of phasing in is that the scheme takes much longer to reach maturity in terms of providing adequately for retirement income replacement. It is perhaps ironic that larger initial contributions are easier to absorb in a period of moderate inflation than in a period of low inflation.

## 11.3 Design Options

### *Treatment of Existing Private Schemes:*

- a) Require existing funds to be wound up, with assets transferred to the new scheme; or
- b) Require existing schemes to be frozen, with entitlements preserved on a pro rata basis with the risk to be born by employers; or
- c) Permit qualifying private schemes to operate under the new scheme as closed funds subject to:
  - Restrictions on membership of the schemes (scheme membership must not be open to the public);
  - The funds meeting not only the minimum requirements of the national scheme (in terms of contributions, asset allocation, etc) but also any regulatory requirements put on their licence by the industry supervisor; and
  - Freedom for both employers and employees to opt out of the private arrangement in favour of joining the centralised scheme.

**Phasing in of Contributions:**

- a) Impose the full contribution rate from the introduction of the scheme; or
- b) Phase the contribution rate from a low starting level to the target contribution rate over a decade or more.

**11.4 Comments**

Choosing an appropriate implementation plan for a new mandatory pension scheme involves striking two balances: between administrative simplicity and the rights of members of existing schemes on the one hand, and between accelerating the long-term maturity of the scheme and disrupting labour markets in the short term on the other.

With respect to the former choice there is much to be said for the third option of allowing the market to decide which of the existing schemes might survive in the long term, provided they are forced to operate within the same limits imposed on the operators that form the new scheme. Indeed, in the Malawi context we believe that it would be both practically and politically disastrous to try to force the existing schemes into a centralised scheme through either closure or mandatory preservation.

With respect to the latter choice it is largely a matter of economic and political judgment as to how quickly the economy and labour markets can absorb the changes. It would be pointless implementing an attractive scheme for workers with a high target replacement rate, if the cost of that replacement target were to force industry into recession while a new equilibrium between wages and total employment cost is reached.

**12. The Civil Service Scheme**

One of the most difficult challenges facing any country in moving to a mandatory pension scheme is how to treat the existing civil service pension scheme. Prior to establishing a national scheme, most countries operate their civil service schemes as unfunded PAYG schemes; Malawi is no exception. Thus, a decision to transfer completely to a new funded scheme can present governments with a considerable fiscal strain if existing liabilities have to be funded at the same time that contributions are made to the new scheme.

**12.1 International Experience**

There are three main ways in which civil service pension benefits tend to be treated under national pension schemes:

- Civil servants are excluded from the national pension scheme and have a different pension programme altogether; or
- Civil servants are required to contribute only to the national pension scheme and a separate civil service pension scheme ceases to exist; or
- Civil servants' pension benefits are a combination of the national scheme pension benefits and the previous civil service pension scheme benefits.

While some countries have excluded their civil service scheme from the provisions of the national scheme, such a decision sends an unhelpful message to private sector entrants to the scheme about the

extent of commitment that the Government has to the new scheme<sup>33</sup>. By excluding itself from the scheme the Government can potentially undermine public confidence in the scheme. Exclusion is also unlikely to help attract workers and employers from the informal sector to the formal sector just to participate in the scheme.

The second option is attractive in that it integrates the civil service into the new scheme and is also administratively simple. An integrated pension scheme also reduces impediments to the labour mobility of civil servants, as their previously accumulated pension rights are vested and easily portable. The drawbacks of this approach are that it requires the Government to fund its pension obligations at the time of entry and that it may be resisted by civil servants if it involves moving from a DB scheme to a DC scheme, or if it involves some trade-off in the form of lower expected wage increases in order to help the Government to fund its contributions to the new scheme. This approach is more likely to be taken where large non-recurring revenues are available, such as arise from privatisation of government enterprises.

The third option is a compromise between the other two. Where a government recognises the value of participating in the new scheme but lack the funds needed to finance its existing liabilities, the third option provides some leeway, albeit at the expense of operating two schemes. The usual approach to this option is to divide entitlements into those from the old scheme and those accruing under the new scheme. While it is clear that new employees will all be members of the new scheme, and retired workers will all remain members of the old scheme, the division for existing workers can occur in any of several ways:

- One approach is to draw a line under the old scheme as at the day the new scheme is introduced. All existing civil servants have a pro rata share of their entitlement in the old scheme preserved for their retirement<sup>34</sup>. The Government continues to pay for these entitlements from consolidated revenue until they run off as existing workers eventually die. Commitments under the new scheme are fully funded from contributions made by the Government under the terms of the new scheme. Whether or not the Civil Service operates its own fund under the new mandatory scheme or simply transfers contributions to a centralised scheme depends on the structure of operation of the new scheme.
- A second approach is to choose an age, for example 40 years old, and to decree that all workers over the critical age will remain in the old scheme, while all workers under the critical age will transfer to the new scheme<sup>35</sup>. While this requires the Government to fund the transfer of “young” workers’ entitlements to the new scheme, the funding burden is potentially much lower than under a decision to transfer the entire old scheme. Similarly, the Government exchanges contribution obligations for existing “old” workers, in return for the obligation to fund their pensions at a later date.

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<sup>33</sup> For example, at the time of its introduction, the Australian Federal Government excluded its civil service scheme from the provisions of the mandatory national scheme due to its inability at the time to fund its liabilities. It has since begun funding its own scheme.

<sup>34</sup> For example, in a model in which workers are expected to retire after 30 years of work, one who has 12 years of service at the time of transfer will retain 12/30 of his/her entitlements under the old scheme until retirement, plus whatever entitlements accrue under the new scheme.

<sup>35</sup> It is normal under transitional arrangements to exempt retirees and those close to retirement (both public and private sector) from transferring to the new scheme, regardless of how the government decided to divide members between the old and new schemes.

- A variation on this second approach is to set upper and lower ages for remaining in the old scheme or transferring to the new respectively, while allowing those within the age band to make their own decision.
- At the far end of the spectrum, only new entrants to the civil service join the new national scheme, meaning that the transition could be stretched out for 50 years or more until the death of the youngest civil servant at the time of the reform. Assuming that civil service benefits are more favourable than the national scheme, this would be easier to finance on a cash flow basis in the short run, although it would not reduce overall pension liabilities as quickly<sup>36</sup>.

These hybrid approaches are attractive in that they involve participation in the new scheme but avoid, or at least reduce, the cost of fully funding existing liabilities. On the negative side, they require maintaining duplicate pension schemes, which is administratively costly as there are significant economies of scale to be reaped in the record-keeping, collection, and payout processes of pension schemes. For smaller countries in which the total membership in pension plans is often relatively low, avoiding the duplication of multiple schemes could result in significant cost savings to members.

At the other end of the spectrum, a fiscally-strong government could opt to transfer all civil servants (perhaps exclude those close to retirement age) to the national scheme immediately, with some credit for their previous years of coverage in the old scheme. This would reduce liabilities more quickly, but would necessitate more fiscal resources up front.

Ironically, while different funding options can have an impact on the pattern of cash flows through the Government's accounts, there is no substantive difference from a true balance sheet perspective. The reality is that the Government has the liability, whether it funds it or not. The question is simply one of whether or not the Government's accounts recognise the liability explicitly or implicitly.

One option therefore is to fund the existing liability (or part thereof) but in a way that does not have an immediate major fiscal impact. For example, the government could issue long-term government securities equivalent in value to the liability and transfer these to the new scheme along with all pension responsibilities. If the Government were concerned about the impact that such a significant increase in long-term government debt might have on the debt market, the bonds could be issued with features that limited their ability to be traded. For example, the Government could issue a series of long bonds with staggered maturity dates, but each of which might be non-tradeable before a certain period. In the case of Nigeria (see box below) the bonds are non-tradeable, linked to the individual staff member, and are only redeemable on retirement of the civil staff member.

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<sup>36</sup> This is particularly significant for civil service pension schemes that are currently funded on a PAYG basis because of the patterns of civil service hiring in the last three decades. Internationally, several civil service PAYG schemes have come under fiscal pressure because the expansion of civil service ranks in the 1980s was followed by downsizing in the 1990s.



<b>Integration of Civil Service Pension Scheme</b>			
<i>Country</i>	<i>Year</i>	<i>Systemic Reform</i>	<i>Transition</i>
Argentina	1994	Yes	New entrants with choice for others
Bolivia	1997	Yes	All workers
Cape Verde	2006	No	New entrants
Chile	1981	Yes	New entrants with choice for others
Dominican Republic	2003	Yes	New entrants with choice for others
El Salvador	1998	Yes	New entrants with choice for others
Ghana	1972	No	New entrants only
Hong Kong	2001	Yes	New entrants only
Jordan	1995	No	New entrants only
Peru	1994	Yes	New entrants with choice for others
Turkey	2006 (planned)	No	All; pro-rata benefits
United States	1984	No	Required only for new entrants
Zambia	2000	No	Required only for new entrants

Source: Robert Palacios and Edward Whitehouse; "Civil Service Pension Schemes Around the World", May 2006

Countries that have opted to integrate their civil service pension schemes with national schemes have paced their transitions differently, depending largely on the fiscal capacity of the individual governments to finance that transition. The table above summarises experience for a sample of countries. Interestingly, in most cases, countries have opted for imposing the new scheme only on new employees, which involves the lowest immediate fiscal drain, although many have offered existing employees the option to opt in to the new scheme.

A good example of how to resolve these (and other) design issues is the recent pension reform of the Nigerian Pension scheme (see the box below).

#### **Recent Nigerian Reforms\***

In the face of an unsustainable PAYG scheme, Nigeria recently embarked on a series of pension reforms. The key features of the new scheme are the following:

- a. The DC scheme will be mandatory, contributory, fully funded, and based on individual accounts.
- b. Coverage will include all public sector employees and private sector workers where the number of workers in the company totals 5 or more. Existing pensioners and workers with 3 or fewer years to retirement are exempt.
- c. The contribution rate will be 15% of basic salary, housing and transport allowances, with contributions split equally between employer and employee - except for the Military, where the employer will contribute 12.5% and the employees 2.5%. All employers are also required to maintain a life insurance policy in favour of each employee for a minimum of three times the annual total emolument of the employee.
- d. Entitlements may be withdrawn under one of the following options: (i) a programmed withdrawal (where the retirement sum is drawn down over a set number of years); or (ii) purchase of an annuity from an insurance company; or (iii) partial commutation to a lump sum provided, that the amount remaining in the fund is sufficient to purchase an annuity at a replacement rate of at least 50%.
- e. Collections will be decentralised, with employers to remit contributions directly to private-sector Custodians, who will hold the fund assets and execute transactions (pension fund custodians shall be required to issue a guarantee to the full sum and value of the pension fund assets that it holds).

f. Asset management advice and fund administration will be provided through licensed private sector pension fund administrators, who will instruct the custodians who will, in turn, execute the investment strategies and hold the investments on behalf of the fund members. The administrators are to maintain a Statutory Reserve Fund which shall be credited annually with 12.5% of net after-tax profit, or such percentage as stipulated by the Pension Commission (regulatory authority).

g. Existing PAYG civil service schemes will cease to exist. Civil servants who have an entitlement under one of the existing schemes will have the value of their entitlement transferred to their new account in the form of a Retirement Bond. The bond recognises the Government's liability but is only due and payable on the member's retirement. To help spread the cost of the retirement bonds, the Nigerian Government will create a sinking fund into which it will pay monthly an amount equal to 5% of total monthly wage bill payable to public sector employees.

h. Existing private pension schemes may continue to operate under the new scheme provided they meet certain prudential requirements, including: (i) they must demonstrate that they are fully-funded at all times with any shortfall to be made up within 90 days; (ii) assets of the company must be fully segregated from pension fund assets, with the latter held by a custodian; (iii) the company must have the requisite asset management skills; and (iv) the company must have been managing pension schemes effectively for at least 5 years prior to the commencement of the new scheme. Finally, employees of companies that continue to operate such a fund must be given the option of joining the new scheme. If they elect to transfer to the new scheme, their accrued retirement benefits are to be computed and transferred to a retirement savings account managed by a Pension Fund Administrator of the employee's choice.

\* See "Highlights of the Contributory Pension Scheme in Nigeria", National Pension Commission, February, 2006

## 12.2 Some Considerations in the Malawi Context

Recent estimates of the Malawi Government's liability under the existing civil service scheme are in the order of K88 billion, a figure that compares with Government debt on issue (Treasury Bonds and Treasury Bills) of around K70 billion in total, with total private pension fund assets of around K35 billion, and with total assets of financial institutions of around K150 billion. In short, funding this liability would be a significant challenge.

Further, the IMF estimated recently that, unless changes were made to the very attractive terms of the scheme, the budgetary commitment for existing civil service pensioners would be in the order of K5 billion in 2007, rising sharply in the following years. In fact, the Government has addressed these terms and has reduced entitlements by reducing the accrual rate for benefits. Under the new terms, the implied liability is probably closer to K60 billion. The Government has also taken the decision to begin funding the scheme from July 2007 by a combination of employer and employee contributions.

## 12.3 Design Options

- a) Retain the existing civil service PAYG pension scheme outside the national scheme; or
- b) Retain the existing scheme for all staff and integrate it into the new scheme gradually by funding contributions for all existing staff at the mandatory rate; or
- c) Retain the existing scheme for existing civil servants but require all new employees to enter the national scheme.

## 12.4 Comments

There are sound reasons for the eventual integration of Malawi's civil sector with a national pension scheme, if one is introduced. The fiscal cost of full funding is probably beyond the Government's capacity at this time, which suggests that one of the hybrid models is likely to be the best compromise between full participation and short-term fiscal drain. In the event that some funding is required to

transfer a part of the civil service to the new scheme it would be worthwhile to consider a creative issue of government bonds to facilitate the transfer.

### 13. A Brief Overview of African Experience

Malawi's African neighbours have had different experiences with their pension industries. The table below summarises the characteristics of several of these countries. The table indicates whether or not the country has introduced a mandatory scheme and, if so, what the mandatory contribution rate is. The table also shows the general nature of funds in the countries, the extent to which private pension schemes exist, and the overall pension penetration rate (as measured by pension fund assets as a percentage of GDP). In some cases it has been difficult to obtain information about the schemes while, in others, it has been difficult to obtain up-to-date statistics on penetration. Thus, the statistics in the table should be viewed as indicative only.

**African Experience with Pension Funds**

	Zambia	Tanzania	Uganda	South Africa	Botswana	Ghana	Nigeria	Kenya	Malawi	Swaziland	Namibia
Mandatory Scheme	Yes	Yes	Yes	No	No	Yes	Yes (new)	Yes	No	Yes	No
Date Introduced	1996	1998	1985			1991	2004	1965		1974	
Contrib. Rate	10%	20%	15%	0%	0%	17.5%	15%	10% Capped at USD6 p.m.	0%	10% Capped at USD12 p.m.	0%
Benefit structure	BD	Pension And gratuity	DC	DB and DC Civil service DB	Mostly DB Civil service DC	DB	DC	Lump Sum	DB and DC	Mostly DC	Mostly DB
Significant Voluntary Schemes	Yes	No	Yes	Yes	Yes	No	Yes	Yes	Yes	Yes	Yes
Pension Penetration*	4.5%	9.0%	4.1%	34%	40%	9.4%	4%	26%	4%	5%	84%

\* Various sources including OECD database <http://www.oecd.org/dataoecd/>; <http://www.bob.bw/files/attachments/statistical%20section.pdf>; <http://www.economist.com/countries/Nigeria/profile.cfm?folder=Profile-FactSheet>; <http://www.ppiaf.org/Gridlines/13financinginfrastructureinafrica.pdf>; <http://www.rfsol.com.na/PDFs/RR%20Ritter%20NAMFISA.pdf>.

Notwithstanding the approximate nature of some of the information in the table, several features stand out:

- Namibia, Botswana, and South Africa each have much higher penetration rates than the other countries and, in none of these three cases, is the penetration due to a national scheme. In all three cases, however, pension fund assets are dominated by a fully funded civil service scheme. For example, Namibia's Government Institutions Pension Fund (GIPF) manages some 67% of the total pension fund assets in the country. Historically, the GIPF was able to benefit from legacy funds, and was able to take advantage of the bull markets in the 1980s; when the scheme was converted to full-funding, all existing members were given actuarially fair benefits to transfer to the new scheme. In the case of South Africa, its various public sector pension schemes were amalgamated into the Government Employees' Pension Fund in 1996. The GEPF is fully-funded and has the

highest contribution rates among the countries listed here. The experience in South Africa also reflects its generally more mature financial sector.

- Despite having mandatory schemes, pension fund penetration in Zambia, Tanzania, Uganda, and Swaziland is still low. In Swaziland the reason for the low penetration rate is arguably due to the low contribution rate. In Zambia and Uganda, low penetration is arguably due more to poor scheme design and low rates of return (see table on the performance of publicly-managed schemes in Section 9). In Uganda, for example, pension funds are publicly managed by the National Social Security Fund, whose priorities are to invest in projects with social and economic impact and to seek investments that afford liquidity, security, and “acceptable yield” (in that order). Offshore investments were only introduced in 2001/2002 and, in 2002, only formed 4% of the investment portfolio; in contrast, Botswana pension funds are permitted to invest up to 70% offshore.
- In both Tanzania and Ghana, where contribution rates to the national scheme are high, private schemes are effectively non-existent. In Kenya and Swaziland, where contribution rates are low, private schemes still dominate. In Uganda, where the contribution rate is high, private schemes still exist, although this is due in large part to the low credibility of the national scheme as a source of adequate retirement incomes.

While this analysis is far from exhaustive, the African experience offers some important lessons:

- First, increasing the penetration of pension fund assets is a slow process without the participation of the civil service. The importance of the civil service in the formal sector of some of these countries suggests that even partial funding of the civil service scheme is key to extracting a growth dividend from a mandatory national pension scheme.
- Second, combining a high contribution rate with the requirement that all private sector employers contribute to the national scheme, regardless of whether or not they operate a voluntary private scheme, is likely to drive the voluntary schemes out of existence. If a high contribution rate is introduced in Malawi it will be important to give due consideration to including the existing private sector pension schemes within the mandatory framework as restricted funds, provided they meet the minimum contribution rate specified by the mandatory scheme.
- Third, a mandatory scheme is a necessary but not a sufficient condition for materially increasing pension fund penetration. For penetration to increase, the scheme must be credible and must offer positive rates of return. The African experience supports the international experience that positive returns are much more likely under private sector fund management than under public sector management.

## **14. The Way Forward**

### **14.1 Some General Principles**

Our grouping of the issues into three major categories was intended to indicate to some extent the sequential nature of the decisions that are needed before a mandatory system is implemented. Thus, we view the decisions under Category A (Nature of the Scheme) as the highest level issues. Of these, arguably the most critical is the combination of funding and benefits structure. The choices in this respect are illustrated in the matrix below.

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**The Benefit/Funding Matrix**


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	<b>Defined Contribution</b>	<b>Defined Benefit</b>
<b>Funded</b>	DCF	DBF
<b>Unfunded (Notional)</b>	DCU	DBU

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International experience confirms that each of the four models in the matrix has been implemented by at least one country. Thus all choices are logically possible. That is not always the case as we work down through the eight issues. In many cases, choices taken at a higher level will tend to constrain choices in others. Thus, for example, a decision to operate a notional scheme removes the need to consider issues to do with asset management and investment rules, and changes to some extent the focus of transitional issues. Similarly, a decision to pursue 100% coverage of the workforce virtually rules out a funded scheme (unless, in the Malawi context, it were introduced in combination with a first pillar safety net scheme - an option that was not addressed in this paper).

In deciding among the various options at each level we offer the following general guidance:

- Wherever possible, choices should be biased in favour of simplicity. Complexity usually generates confusion, reduces confidence in the scheme's ability to produce what it promises, and wastes resources by stimulating the establishment of a service industry devoted to "helping" employers and employees to understand the system and to exploit any inconsistencies.
- While the growth dividend of a national pension scheme is potentially significant, the central focus of design should remain firmly on providing adequate income replacement in retirement. Any benefits from growth should be a bonus rather than the driver of its design. At most, growth considerations should influence design decisions at the margin.
- Government involvement in the operation of the scheme should be minimal. Not only is there a compelling case to utilise the skills that already reside in the private sector of Malawi, the international evidence supports the proposition that government intervention in the operation of the scheme either through administration, asset management, or direction of investments, is almost universally counterproductive and can cost members significantly. The appropriate role for Government is as a facilitator to ensure that sound investment opportunities are not blocked by inappropriate regulations or lack of infrastructure, that skill shortages necessary to development of the commercial and financial sectors of the economy are, if appropriate, addressed by policy, and that the operation and performance of the scheme are open, transparent and accountable.

#### **14.2 A Possible Model for Malawi**

There are many options that can be chosen at each level of design. Many of these options are, in our opinion, inappropriate for Malawi. Importantly, any scheme designed for Malawi should seek to avoid the pitfalls of some of the less successful schemes in Africa and elsewhere in the world.

To avoid these pitfalls the scheme would need to:

- be simple in structure;
- leverage the skills that already exist in the private pension industry in Malawi;
- have minimal Government involvement the operation of the scheme;

- enable existing pension schemes to continue to operate under the umbrella of the new scheme; and
- include the civil service scheme, for reasons of both credibility and to ensure that the considerable asset generating capacity of the public sector is available to the economy.

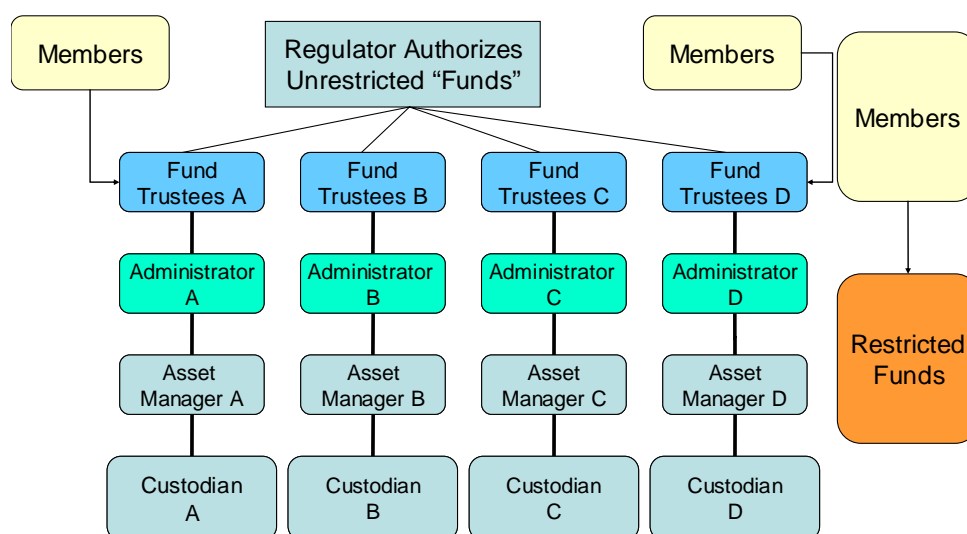
The following is a brief outline of a scheme structure that would, in our opinion, strike an appropriate balance between the risks and potential benefits of introducing a mandatory pension scheme:

1. The scheme should be defined contribution and compulsory for all formal sector employees. Extension to other sectors, including part-time workers, should be addressed after the scheme is established.
2. Contributions should be made by employers as an addition to salaries. The ultimate target contribution rate, driven by a target replacement rate – which we suggest should be in the order of 60 percent - would need to be supported by a full actuarial study of the Malawi context, but would probably be in the order of 15% of salaries. Such a target level would need to be phased in over a decade or more starting, for example, from a contribution rate of 5% and increasing by an additional 1% to 2% each year. It is expected that there would need to be some trade-offs between these contributions and general wage increases during the transition period.
3. Retirement benefits under the scheme should be primarily by way of pensions (either through a programmed withdrawal or purchase of a life annuity). Lump sum payments should be permitted in the event that accumulated contributions are insufficient to purchase a life annuity above the poverty line, or if they are sufficient to leave a surplus after purchasing an annuity at the target replacement rate (e.g. 60 percent) or higher.
4. Operation of the scheme should draw on the existing expertise in the private pension industry in Malawi. We believe that either a centralised or a decentralised administrative structure would be workable in the Malawi context. That said, we believe the decentralised would be simpler to administer and would be less prone to interference, and is therefore our preferred model. The operation of the scheme would work as follows:
  - The Registrar would licence a small number of unrestricted funds to accept mandatory contributions.
  - These unrestricted funds would be licensed under a strong set of prudential requirements including having a corporate trustee, an administrator acceptable to the Registrar, asset managers of proven substance and track record, and a separate custodian acceptable to the Registrar. The Registrar would licence the Trustees as the responsible entity for the operation of the fund. Licensing conditions would also include evidence of financial strength, skills, risk management systems, and disclosure requirements concerning performance, fees and charges. Any change in administrator, asset manager or custodian would require the approval of the Registrar.
  - The scheme should permit existing restricted DB and DC schemes to continue to operate as restricted schemes provide they meet the minimum contribution rate set by the national mandate, meet prudential standards set by the Registrar, and offer members the right to switch their accumulated entitlements into one of the unrestricted schemes if they so desire.

- Individual entitlements would be managed through individual accounts and employee would be free to select a fund and to change funds at most once per year.
- Existing registered schemes would be permitted to continue to operate as restricted schemes provide they meet the minimum contribution rate set by the national mandate, meet prudential standards set by the Registrar, and offer members the right to switch their accumulated entitlements into one of the unrestricted schemes if they so desire.
- This structure leverages the existing skills in the current private pension market and would not require any costly new infrastructure.

The structure of the scheme is illustrated graphically in the figure below.

#### Preferred Model: Decentralised Administration



5. While the foundation of the investment policy for the scheme should be the prudent person principle, this should be reinforced by maximum investment limits and prohibitions established for reasons of prudence. The Government should not direct investments of the scheme. The following set of investments limits is indicative only:
  - 30% traded equities
  - 60% debt instruments
  - 15% foreign investments<sup>37</sup>
  - 0% leverage
  - 20% property

<sup>37</sup> Note that any allowance for foreign investments would need to take due consideration of the exchange control regime in Malawi.

- 20% direct equity
  - 5% related parties
  - 0% derivatives
6. The civil service pension scheme will be a particular challenge under a mandatory national scheme. While the public sector could remain outside the scheme, such a decision would diminish both the credibility of the national scheme and the volume of funds available for investment in the development of the country. At the same time, full funding of the existing civil service pension liability is beyond the Government's current budgetary capacity. The following, which is consistent with the current direction of proposed reforms of the civil service scheme, is a practical compromise:
- A separate Civil Service Pension Scheme could be established as a restricted fund under the same terms as afforded existing private sector schemes.
  - The existing defined benefits structure of the civil service scheme should be retained, given that this has historically been a central factor in the Government's ability to attract and retain staff. In other words there would be no change in the benefits structure of the civil service scheme.
  - The Government would make contributions to the scheme in line with the mandated national minimum, possibly with additional contributions by staff if that is considered necessary to meet the relatively generous defined benefit nature of the scheme. The balance of any funding gap between accumulated assets and defined benefits would still be funded from consolidated revenue.
  - Existing liabilities would remain as a contingent liability of the Government to be funded from consolidated revenue on a PAYG basis.
  - While the Government, through the civil service, would continue to administer the civil service scheme, management of the assets accumulated under the partial funding structure would be outsourced to one or more of the licensed asset managers for the national scheme.

Under this model, the benefits for civil servants would remain largely unchanged, while the liabilities would be partially funded. Over time, as older workers phase out of the scheme it would become largely funded.

### **14.3 An Appropriate Role for Government under a National Pension Scheme**

While the international evidence suggests that direct involvement of Government in administration and/or investments is contrary to the interests of fund members, it does not necessarily follow that there is no role for the Government in a well-run and effective mandatory pension scheme. The balance that is needed between the flow of new investible savings and the need for productive investment opportunities suggests a facilitative role for Government. Under a public/private partnership approach, the Government could seek to facilitate the matching of savings with investment opportunities by creating a small full-time Implementation Team with a mandate to:

- identify roadblocks to productive investment that are a result of Government bureaucracy, or rules and regulations that inhibit commerce and investment;
- identify legislative weaknesses that limit investment opportunities by restricting ownership, property rights, etc.;



- identify areas of expertise or particular skill areas that may be inhibiting development of productive opportunities, and recommend ways in which the Government might attract those skills in the short term from abroad, as well as encouraging their development in the long term through the education system;
- target responsible foreign companies to help bridge the management and skill gaps in the short term; and
- identify areas of government infrastructure that may need to be upgraded to assist bringing productive opportunities online.

Importantly, pension reform on the scale discussed in this paper would require bi-partisan commitment from the Parliament and a whole-of-Government approach to ensure that the potential is not destroyed by inter-departmental rivalries and a lack of understanding of the overall strategy.



## **Attachment 2**

### **Draft Financial Services Bill**

## **FINANCIAL SERVICES BILL, 2007**

### **ARRANGEMENT OF CLAUSES**

CLAUSE

#### **PART I—PRELIMINARY**

1. Short title and commencement
2. Principal object of this Act
3. Interpretation
4. Subsidiaries, holding companies and related bodies corporate
5. Controlling parties of financial institutions
6. References to obligations etc where financial institution not a legal person
7. Financial services laws bind Government

#### **PART II—THE RESERVE BANK AND THE REGISTRAR**

##### *Division 1—Registrar to regulate and supervise financial institutions*

8. Registrar of Financial Institutions
9. Additional function of Reserve Bank of Malaŵi
10. Registrar's objectives
11. Registrar to report financially unsound financial institutions

##### *Division 2—Financial and accountability provisions*

12. Reserve Bank funding for supervisory functions

13. Annual estimates of supervisory expenditure
14. Supervisory levies to be prescribed
15. Fees and charges to be prescribed
16. Supervisory levies etc debts to Reserve Bank
18. Levies Account
19. Investment of Levies Account surplus
20. Reserve Bank annual report

*Division 3—Other provisions*

21. Arrangements with other agencies
22. Delegation

PART III—LICENSING AND REGISTRATION OF FINANCIAL INSTITUTIONS

*Division 1—Licensing and registration requirements*

23. Financial institutions to be licensed

*Division 2—Licensing and registration procedures etc*

24. Where Division applies
25. Licensing and registration—applications and procedure
26. Licensing, registration and renewal decisions reviewable decisions
27. Notification of breach of licence or registration conditions
28. Renewal of licences and registrations
29. Issue and publication of licence
30. Variation, suspension and revocation of licences and registrations on request
31. Variation, suspension and revocation of licences and registrations
32. Exemptions from licensing and registration requirements

PART IV—SUPERVISION AND REGULATION OF FINANCIAL INSTITUTIONS

*Division 1—Registrar's directives*

33. Registrar's directives

*Division 2—Information, reports etc*

34. Directions to licensed or registered institutions to provide information
35. Prescribed requirements to provide information

*Division 3—Directions*

36. Directions to licensed or registered financial institutions
37. Directions not ground for terminating contracts etc

*Division 4—Examinations and investigations*

- 38. Examiners
- 39. Investigators
- 40. Powers and protections of investigators
- 41. Identity cards

*Division 5—Self regulatory organisations*

- 42. Declaration of SROs
- 43. SRO's rules
- 48. Amendment to SRO articles
- 49. Protection for SROs etc
- 50. Annual reports by SROs

*Division 6—Controlling parties of prudentially regulated financial institutions*

- 51. Controlling parties to require Registrar's approval

## PART V—REGULATING MARKET PRACTICES OF FINANCIAL INSTITUTIONS

- 52. Application of Act
- 53. Misleading and deceptive conduct
- 54. Prohibited practices
- 55. Disclosure by financial institutions

PART VI—AMALGAMATIONS OF, TRANSFERS OF BUSINESS OF,  
STATUTORY MANAGEMENT OF AND WINDING UP OF PRUDENTIALLY  
REGULATED FINANCIAL INSTITUTIONS*Division 1—Compromises and arrangements and transfers of business*

- 56. Compromises and arrangements
- 57. Transfer of business
- 58. Act prevails over Companies Act

*Division 2—Statutory management*

- 59. Appointment of statutory managers
- 60. Statutory managers
- 61. Period of statutory management

*Division 3—Winding up*

- 62. Winding up of prudentially regulated financial institutions

## PART VI—ENFORCEMENT OF FINANCIAL SERVICES LAWS

- 63. Enforceable undertakings
- 64. Compensation for loss from breach of financial services laws
- 65. Administrative penalties
- 66. Injunctions
- 67. Exemptions

## PART VIII—NOTIFICATION OF AND REVIEWS OF DECISIONS

*Division 1—Notification of decisions of Registrar and self regulatory organisations, and appeal rights*

- 68. Notice of renewable decisions
- 69. Internal review of reviewable decisions
- 70. Review of reviewable decisions
- 71. Operation of decisions under appeal

*Division 2—Financial Services Appeal Committee*

- 72. Financial Services Appeals Committee
- 73. Membership
- 74. Termination of office
- 75. Disclosure of interests
- 76. Restriction on altering decisions under review

*Division 3—Conduct of review proceedings*

- 77. Notice of and parties to review proceedings
- 78. Procedure
- 79. Hearings
- 80. Rights of parties to review proceedings
- 81. Powers of Appeals Committee
- 82. Rights of legal practitioners, witnesses etc
- 83. Summons
- 84. Decisions of Appeals Committee
- 85. Appeal from decisions of Appeals Committee

*Division 4—Complaints resolution schemes*

- 86. Registrar to promote complaint resolution scheme
- 87. Requirements for complaint resolution schemes

## PART IX—MISCELLANEOUS

- 88. Advisory bodies
- 89. Guidelines etc
- 90. Offences—failure to answer questions etc
- 91. Offences—misleading answers and information
- 92. Offences—failure to comply with directions
- 93. Self-incrimination
- 94. Holding out as licensed etc
- 95. Destroying documents
- 96. Obstruction
- 97. Preventing compliance
- 98. Extension of time
- 99. Certificate by Registrar
- 100. Offences by bodies corporate—states of mind
- 101. Offences by bodies corporate—liability of directors

102. Offences by bodies corporate—penalties  
 103. Offences—acts done partly outside Malawi  
 104. Regulations

## PART X—TRANSITIONAL AND CONSEQUENTIAL PROVISIONS

105. Transition period

**A BILL**

*entitled*

**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

**1.** This Act may be cited as the Financial Services Act, 2007, and shall come into operation on such date as the Minister shall appoint by notice in the *Gazette*. Short title and commencement

**2.** The principal object of this Act is to provide for the regulation and supervision of financial institutions in Malawi to ensure— Principal object of this Act

- (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;

**3.—(1)** In this Act, unless the context otherwise requires— Interpretation

“Appeals Committee” means the Financial Services Appeals Committee established by section 63;

“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 spouse, child or relative of the individual; and

(ii) a partner, or a spouse, child or relative of a partner, of the individual;

“bank” means a bank as defined in the Banking Act;

“controlling party”, of a person, is defined in section 5;

“Court” means the High Court of Malaŵi;

“complaint resolution scheme” means a scheme of a kind mentioned in Division IV of Part VIII;

“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 section 198 or 200 of the Companies Act; and

(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 co-operative” means a co-operative society as defined in the *Co-operatives Act* the objects or which are or include the advancing of loans or giving other financial accommodation to members of the society;

“credit institution” means—

(a) a microlender;

(b) a credit co-operative;



(c) a friendly society;

(d) a finance or leasing company;

(e) any other person who, as a business, provides loans, advances, credit or other financial accommodation (however described), including by way of factoring, leasing, hire purchase, acceptance of trade and other bills, discounting of bills and notes, opening or confirming documentary credit, issuing other letters of standby, credit, guarantee or surety, and undertaking to pay on account of another person;

“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, but this paragraph does 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 subsection 36 (1);

“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;

(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;

(b) each of the following as defined in the Securities Act, 2007:

(i) a securities dealer;

(ii) a securities broker;

(iii) a securities representative;

(iv) an investment adviser;

(v) a securities exchange;

(vi) a securities depository;

(vii) a collective investment scheme;

(viii) an investment company;

(c) a person who provides securities registration services for the purposes of the Securities Act, 2007;

(d) each of the following as defined in the Insurance Act, 2007:

- (i) an insurer;
- (ii) a reinsurer;
- (iii) an insurance broker;
- (iv) an agent for brokers;
- (v) an insurance agent;
- (vi) a loss assessor/adjustor;
- (vii) a claims settling agent;

(e) each of the following as defined in the Retirement Funds Act, 2007:

- (i) a retirement fund;
- (ii) an umbrella fund;
- (iii) an administrator of a retirement fund;
- (iv) an investment manager for a retirement fund or an umbrella fund;

(f) a trustee of a collective investment scheme as defined in the Securities Act, 2007 or of a retirement fund or an umbrella fund as defined in the Retirement Funds Act, 2007;

(g) an actuary for an insurer as defined in the Insurance Act, 2007 or for a retirement fund as defined in the Retirement Funds Act, 2007;

(h) a custodian;

(i) a credit institution;

(j) a medical aid fund;

(k) a person who, by way of business, in Malaŵi—

- (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;

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

(m) a non-operating holding company;

(n) a person, business or fund declared by Registrar's directives or by another financial services laws to be a financial institution;

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

"financial services" means services relating to financial matters;

"financial services law" means any of the following—

(a) this Act;

(b) the Banking Act;

(c) the Insurance Act, 2007;

(d) the Retirement Funds Act, 2007;

(e) the Securities Act, 2007;

(f) the Reserve Bank of Malaŵi Act;

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

(h) a law prescribed for the purposes of this definition;

and includes the Registrar's directives;

"financial year" means a period of 12 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;

“investigator” means a person appointed as an investigator under section 37(1);

“Levies Account” means the account established as required by section 18;

“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 connection prescribed medical services;

“microlender” means a person who advances loans to persons, where the loans do not exceed the prescribed amount, but does not include a bank;

“non-operating 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;

“operate”, in relation to a financial institution, includes—

(a) establish or administer the financial institution; and

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

“prescribed” means prescribed by the Minister in regulations made under section 103;

“prudentially regulated financial institution” means each of the following—

(a) a bank;

(b) each of the following as defined in the Securities Act, 2007:

(i) a securities exchange;

(ii) a securities depository;

(c) each of the following as defined in the Insurance Act, 2007:

(i) an insurer;

(ii) a reinsurer;

(d) each of the following as defined in the Retirement Funds Act, 2007:

(i) a retirement fund;

(ii) an umbrella fund;

(e) a trustee of a collective investment scheme as defined in the Securities Act, 2007 or of a retirement fund or an umbrella fund as defined in the Retirement Funds Act, 2007;

(f) a custodian;

(g) a medical aid fund;

(h) a friendly society;

(i) a non-operating holding company;

(j) a financial institution declared by Registrar’s directives or by another financial services laws to be a prudentially regulated financial institution;

(k) the operator of a financial institution as defined in paragraphs (a) to (j) 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 section 32;

“registered” means registered under this Act or under another financial services law;

“Reserve Bank” means the Reserve Bank of Malawi;

“reviewable decision” means a decision declared by a provision of a financial services law or self regulatory arrangements to be a reviewable decision;

“securities” has the same meaning as in the Securities Act, 2007;

“self regulatory organisation” means a body declared to be a self regulatory organisation under subsection 40 (1);

“self regulatory organisation arrangements” means arrangements described in subsection 40 (2);

“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 under section 56 for the institution;

“supervisory expenditure” means expenditure of the Reserve Bank in connection with the supervisory functions of the Registrar;

“supervisory functions”—

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

(b) in relation to a self regulatory organisation—means the functions of the organisation in respect of which arrangements described in section 40 (2) are in force;

“supervisory levy” means a levy imposed by regulations made for the purposes of section 14.

(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 Malaŵi, but this subsection does not limit the provision of this Act or the other financial services law in which the expression is used.

**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.

Subsidiaries,  
holding  
companies and  
related bodies  
corporate

**5.**—(1) For the purposes of a financial services law, a person is a controlling party of another person (the other person is called in this section “the relevant person”) 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).

Controlling  
parties of  
financial  
institutions

(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 10% of the shares of the body corporate;

(v) a person that has the power to control at least 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 10% of the shares of the body corporate or having the power to control at least 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;

but a Minister, the Registrar or the Reserve Bank, in that capacity, is not a controlling party of a relevant person.

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

(4) Registrar's directives may modify subparagraph (1) (a) (iv), (v) or (vi) by substituting a lower percentage for 10%, 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 specified prudentially regulated financial institution.

(6) The Registrar shall not 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.

(7) A decision under subsection (5) to declare a person to be a controlling party of another person is declared to be a reviewable decision, and notice of the decision in accordance with section 68 shall be given to the person so declared.

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 (for example, a trust), the obligation is taken to be imposed on or with respect to the person who operates the financial institution (such as, for example, in the case of a trust, the trustee).

References to obligations etc where financial institution not a legal person

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.

Financial services laws bind Government

## PART II—THE RESERVE BANK AND THE REGISTRAR

### *Division 1—Registrar to regulate and supervise financial institutions*

8.—(1) There is a Registrar of Financial Institutions for the purposes of this Act and the other financial services laws.

Registrar of Financial Institutions

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

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 and the other financial services laws.

Additional function of Reserve Bank of Malawi

(2) In addition to the functions he has 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.

**10.**—(1) The Registrar shall perform his supervisory functions so as to foster—

Registrar's objectives

- (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.

(2) In pursuing this object, the Registrar shall take into account—

- (a) the impact of the costs of regulation and supervision on the ability of the community to gain access to financial services; and
- (b) the need to balance the effectiveness of regulation and supervision and the efficiency of the financial system.

**11.** If the Registrar believes that—

Registrar to report financially unsound financial institutions

- (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.

*Division 2—Financial and accountability provisions*

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

Reserve Bank funding for supervisory functions

- (a) supervisory levies imposed on financial institutions under section 14, and interest in respect of unpaid supervisory levies;
- (b) money raised as fees and charges, and interest from unpaid fees and charges, in respect of services

rendered by the Registrar Bank in performing his supervisory functions;

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

(2) The funds mentioned in subsection (1) may not be applied to any other purpose.

**13.**—(1) For each financial year, the Registrar shall prepare—

Annual estimates  
of supervisory  
expenditure

(a) annual estimates of expenditure for the financial year in relation to his supervisory functions; and

(b) a proposal for supervisory levies for the financial year.

(2) An annual estimate of expenditure for the Registrar's supervisory functions for a financial year shall include provision for a reserve of not more than **[10]**% of the total expenditure provided for in the estimate.

(3) A proposal for supervisory levies for a financial year (in this section called the "next financial year") shall be prepared having regard to the extent to which supervisory levy collected in previous financial years was less than, or exceeded, supervisory expenditure for those years.

(4) The Registrar shall, at least 3 months before the start of a financial year, publish draft annual estimates of expenditure for his supervisory functions, and a proposal for supervisory levies, for the financial year in a way that the Registrar considers will bring them to the attention of financial institutions generally, and call for submissions on the draft estimates.

(5) The Registrar shall, at least 2 months before the start of a financial year and having regard to any submissions received as mentioned in subsection (4), submit to the Minister for approval an annual estimate of expenditure for his supervisory functions, and a

recommendation for supervisory levies, for the financial year.

(6) The Reserve Bank shall not make expenditures for the Registrar's supervisory functions in relation to a financial year in excess of 105% of the total expenditures provided for in the annual estimates for the year approved by the Minister, unless the Minister approves the additional expenditure.

**14.**—(1) The Minister shall, for each financial year, on the recommendation of Registrar, make regulations for or with respect to the imposition and collection of supervisory levies. Supervisory levies to be prescribed

(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 mis-statement or other non-compliance by a financial institution leads to an under-collection of supervisory levy.

**15.**—(1) The Minister may by regulation impose fees and charges for licences and renewals of licences, and for other services provided by the Registrar in performing his supervisory functions. Fees and charges to be prescribed

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

**16.** An amount of a supervisory levy, penalty levy, fee or charge is a debt due to the Reserve Bank and may be recovered by action in a court of competent jurisdiction. Supervisory levies etc debts to Reserve Bank

**17.** The Registrar may, on application, waive payment of some or all of a supervisory levy, penalty levy, fee or charge.

**18.**—(1) The Reserve Bank shall establish an account, Levies Account to be called the Levies Account.

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

(a) money paid to the Reserve Bank as supervisory levies, penalty levies, fees or charges;

(b) money received by the Reserve Bank as interest or profits from the investment of money standing to the credit of the Levies Account;

(c) money paid to the Reserve Bank in relation to the Registrar's supervisory functions.

(3) Money standing to the credit of the Levies Account is to be applied only for the following purposes—

(a) making investments authorised under this Act;

(b) supervisory expenditure.

**19.** Money standing to the credit of the Levies Account but not immediately required may be invested in commercial bank deposits or in securities issued or guaranteed by the Government, as the Reserve Bank determines. Investment of Levies Account surplus

**20.** The Reserve Bank shall include in each annual report under the Reserve Bank of Malaŵi Act— Reserve Bank annual report

(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 Malaŵi 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;

(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*

**21.**—(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.

Arrangements  
with other  
agencies

(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 organisations outside Malaŵi that have responsibilities under law for the regulation and supervision of financial institutions or similar institutions.

22.—(1) The Registrar may delegate any of his <sup>Delegation</sup> 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 organisation.

(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*

23.—(1) A person shall not operate, as a business, a financial institution unless— <sup>Financial institutions to be licensed</sup>

- (a) the financial institution is licensed 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 on conviction is liable to [*insert penalty*].

(3) In the case of a continued contravention by a person convicted under subsection (1), that person commits a further offence for every day on which the



contravention continues and on conviction is liable to [*insert penalty*].

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

(5) The Minister may, by regulation 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 etc*

**24.** This Division applies 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. Where Division applies

**25.**—(1) The Registrar may, on application— Licensing and registration—  
applications and  
procedure

- (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 give it further information in connection with the application.

(4) The Registrar need not deal further with the application until the requirement is satisfied.

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

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

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

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

(6) A financial services law may prescribe additional criteria for granting licenses or for registration.

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

**26.**—(1) A decision of the Registrar under section 25—

(a) to refuse to grant an application for a licence for a financial institution or a renewal of a licence for a financial institution;

(b) to grant an application for a licence for a financial institution, or a renewal of a licence for a financial institution, subject to conditions;

is declared to be a reviewable decision, and notice of the decision in accordance with section 68 shall be given to the applicant.

(2) A decision of the Registrar under a financial services law—

(a) to refuse to grant an application for registration of a financial institution or a renewal of registration of a financial institution;

(b) to grant an application for registration of a financial institution, or a renewal of registration of a financial institution, subject to conditions;

is declared to be a reviewable decision, and notice of the decision in accordance with section 68 shall be given to the applicant.

Licensing,  
registration and  
renewal  
decisions  
reviewable  
decisions

**27.** 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.

Notification of breach of licence or registration conditions

**28.** A licence or registration under this Act or another financial services law expires, unless sooner revoked, at the time (if any) prescribed for the licence or registration but, subject to this Act and the other financial services laws, may be renewed.

Renewal of licences and registrations

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

Issue and publication of licence

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

(3) The Registrar shall publish 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 its principal place of business in Malaŵi.

(5) A licensed or registered financial institution that contravenes subsection (4) commits an offence and on conviction is liable to [*insert penalty*].

**30.**—(1) The Registrar may, on written request by a licensed or registered financial institution, by notice to the institution—

Variation, suspension and revocation of licences and registrations on request

(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 under this section to be published in the *Gazette*, and may otherwise publish the notice, as he sees fit.

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

Variation,  
suspension and  
revocation of  
licences and  
registrations

(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 and professional skill;

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

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

(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 stating that the institution has a specified period (at least 21 days) to make representations to the Registrar about 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 stating that the institution has a specified period (at least 21 days) to make representations to the Registrar about the matter;

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

(6) A decision under subsection (2) to vary, suspend or revoke the licence or registration of a financial institution is declared to be a reviewable decision, and notice of the decision in accordance with section 68 shall be given to the institution.

(7) 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.

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

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

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

Exemptions from  
licensing and  
registration  
requirements

(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.

(3) A notice under subsection (1) has effect according to its tenor.

PART IV—SUPERVISION AND REGULATION OF FINANCIAL  
INSTITUTIONS

*Division 1—Registrar's directives*

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

Registrar's  
directives

(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;

(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, Registrar's directives may make provision with respect to any of the following—

(a) fit and proper person requirements for controlling parties and managers 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) 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.

(3) A specification in this Act or another financial services law of a matter in respect of which the Registrar may issue Registrar's directives does not limit, by implication, the power of the Registrar to issue Registrar's 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 90 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 paragraph (4) (*b*) cease to have effect at the end of 90 days after they come into force, but this subsection does not prevent the Registrar from acting under that paragraph again.

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



- (7) A Registrar's directive comes into force—
- (a) on the day on which it is published in the *Gazette*; or
  - (b) if the directive provides that it comes 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 commits an offence and on conviction is liable to [*insert penalty*].

*Division 2—Information, reports etc*

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

- (a) a licensed or registered financial institution;
- or
- (b) a director or officer of, or an auditor of or actuary for, a licensed or registered financial institution,

requiring it to give information to the Registrar relevant to the performance of the Registrar's supervisory functions.

Directions to licensed or registered institutions to provide information

**35.**—(1) The Minister may make regulations 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 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 retirement fund or an insurer—  
an actuary or auditor for the fund or the insurer;
- (f) a controlling party of a financial institution;

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

Prescribed requirements to provide information

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

(a) require the lodgement of periodic and other returns;

(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 service laws in relation to financial institutions to be reported to the Registrar.

(3) Any person who refuses or fails to comply with regulations made for the purposes of this section commits an offence and on conviction is liable to [*insert 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 or her employment, or penalises 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 on conviction is liable to [*insert penalty*].

*Division 3—Directions*

- 36.**—(1) If it appears to the Registrar that—
- (a) a licensed or registered financial institution—
- (i) has contravened or is likely to contravene a 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; or
- (b) the direction is necessary to protect the interests of clients of a licensed or registered financial institution;

Directions to  
licensed or  
registered  
financial  
institutions

the Registrar may give the financial institution a written direction as to take action specified in the direction about the way in which the affairs of the institution are to be conducted, being 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 or persons 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.

(3) A direction may include a direction to remove a director or officer of the financial institution from office but only if the Registrar is satisfied that—

(a) either—

(i) the institution has contravened a financial services law or been involved in financial crime; and

(ii) the director or officer was knowingly concerned in the contravention or the financial crime; or

(b) the director or officer has contravened a financial services law or has been knowingly concerned in financial crime (whether or not related to the institution).

(4) 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.

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

(6) Before giving a direction under subsection (1), the Registrar shall give the financial institution concerned and, if the direction is or includes a direction mentioned in subsection (3), the director or officer concerned, written

notice of the proposed action, specifying the grounds for it and the facts supporting those grounds, and allowing 21 days after the notice is given for the financial institution and the person to ask for a hearing on the matter. If the person requests a hearing on the matter, the Registrar shall hold a hearing before giving the direction. The hearing shall be held in private.

(7) A financial institution that has been given a direction under this section has power to comply with it 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 commits an offence and on conviction is liable to [*insert penalty*].

(10) A decision to give a financial institution a written direction of a kind mentioned in paragraph (2) (c) is declared to be a reviewable decision, and notice of the decision in accordance with section 68 shall be given to the financial institution and to the director or employee concerned.

(11) A decision to give a financial institution a written direction of a kind mentioned in paragraph (2) (e) is declared to be a reviewable decision, and notice of the decision in accordance with section 68 shall be given to the financial institution and to the auditor or actuary concerned.

(12) A decision to give a financial institution a written direction of a kind mentioned in paragraph (2) (f), (g), (h), (i) or (j) is declared to be a reviewable decision, and notice of the decision in accordance with section 68 shall be given to the financial institution.

**37.**—(1) A direction under section 35 is not 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.

Directions not  
ground for  
terminating  
contracts etc

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

(3) Without limiting what the order 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;

but may not require a person to take action that would contravene the direction.

*Division 4—Examinations and investigations*

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

Examiners

(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 enter any premises used or apparently used by the financial institution for business purposes, at any reasonable time; and

(b) inspect and make copies, or take extracts from, any relevant records, documents or things in those premises.

(4) A licensed or registered financial institution, and its directors, officers 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.

(5) Any person who, without reasonable excuse, contravenes subsection (4) commits an offence and on conviction is liable to [*insert penalty*].

**39.**—(1) If the Registrar has reasonable grounds to believe that— Investigators

(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;

(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 authorised 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) commits an offence and on conviction is liable to *[insert penalty]*.

(7) An investigator shall not enter premises under paragraph (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 paragraph (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.

**40.** An investigator acting under this Division has all the powers and protections of a Commissioner under the Commissions of Inquiry Act.

Powers and protections of investigators

**41.**—(1) The Registrar shall give each inspector and investigator an identity card approved by the Registrar.

Identity cards

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

*Division 5—Self regulatory organisations*

**42.**—(1) The Registrar may, by notice in the *Gazette*,<sup>Declaration of SROs</sup> declare a person that has functions in relation to a class of financial institutions to be a self regulatory organisation 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 organisation.

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

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

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

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

**43.**—(1) A self regulatory organisation may make rules,<sup>SRO's rules</sup> not inconsistent with the financial services laws, for or with respect to any matters for which the self regulatory organisation has supervisory functions.

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

**44.** A self regulatory organisation 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 will prejudicially affect the protection of clients of financial institutions in relation to which arrangements mentioned in subsection 40 (2) involving the self regulatory organisation are in force.

**45.** Where a self regulatory organisation makes a decision in the performance of its supervisory or regulatory functions, being a decision that, under the self regulatory organisation arrangements, is a reviewable decision, the self regulatory organisation shall give notice of the decision as specified in those arrangements, in accordance with section 68.

**46.** A self regulatory organisation shall notify the Registrar, as prescribed, as soon as practicable after a person is appointed a director or executive of the organisation.

**47.**—(1) The Registrar may revoke a declaration under subsection 40 (1) at any time, but shall not do so unless—

(a) the self regulatory organisation consents; or

(b) the Registrar has notified the self regulatory organisation of its intention and the reasons for the Registrar's action, and given the organisation at least 14 days to make representations to the Registrar about the matter.

(2) The revocation of a declaration does not affect a right of a person to apply to the Appeals Committee under section 68 for a review of a decision or action.

(3) A decision under subsection (1) to revoke a declaration is declared to be a reviewable decision, and notice of the decision in accordance with section 68 shall be given to the self regulatory organisation concerned.

**48.** Despite anything in the Companies Act, an amendment to the memorandum or articles of association, or other constituent documents, of a self regulatory organisation is of no effect unless approved by the Registrar.

Amendment to  
SRO articles

**49.** None of the following—

Protection for  
SROs etc

(a) a self regulatory organisation;

(b) a director, executive or employee of a self regulatory organisation;

(c) a member of a committee of a self regulatory organisation;

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 connection with the performance of its supervisory functions.

**50.**—(1) Each self regulatory organisation shall lodge with the Registrar, within 90 days after the end of the financial year, an annual report which shall include—

Annual reports  
by SROs

(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 organisation, 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*

**51.**—(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, the person commits an offence and on conviction is liable to *[insert penalty]*.

Controlling parties to require Registrar's approval

(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 it 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 commits an offence and on conviction is liable to *[insert 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 14 days after the event, the change has not been reported to the Registrar in accordance with the regulations;

the person commits an offence and on conviction is liable to [*insert 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 it has or controls;

(b) the degree of voting power in relation to the financial institution that it 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 14 days after the event, the variation has not been reported to the Registrar in accordance with the regulations;

the person, and the prudentially regulated financial institution, each commit an offence and on conviction is liable to [*insert 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 V—REGULATING MARKET PRACTICES OF FINANCIAL INSTITUTIONS

**52.**—(1) This Part applies in addition to other laws.

Application of  
Act

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

53.—(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.

Misleading and  
deceptive  
conduct

(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 a 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 subsection (1) commits an offence and on conviction is liable to [*insert penalty*].

54.—(1) The Registrar may, by notice in the *Gazette*, determine that a specified practice in relation to financial services is a prohibited practice if satisfied that the practice—

Prohibited  
practices

(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; or

(c) is otherwise undesirable.

(2) Before making a determination under subsection (1), the Registrar shall consult any relevant advisory committee established under section 86, 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 on conviction is liable to [*insert penalty*].

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

Disclosure by  
financial  
institutions

PART VI—AMALGAMATIONS OF, TRANSFERS OF BUSINESS  
OF, STATUTORY MANAGEMENT OF AND WINDING UP OF  
PRUDENTIALY REGULATED FINANCIAL INSTITUTIONS

*Division 1—Compromises and arrangements and  
transfers of business*

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

Compromises  
and  
arrangements

(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 is 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 section 198 or 200 of the Companies 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 regulations may make further provision about compromises and arrangements.

**57.**—(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.

Transfer of  
business

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

**58.**—If there is an inconsistency between a provision of section 53 or 54 and the Companies Act, the provisions of section 53 or 54 prevail to the extent of the inconsistency.

Act prevails over  
Companies Act

#### *Division 2—Statutory management*

**59.**—(1) The Registrar may, on request by a prudentially regulated financial institution, appoint a person to be the statutory manager of the institution.

Appointment of  
statutory  
managers

(2) The Registrar may appoint a person to be the statutory manager of prudentially regulated financial institution 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; and
- (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) An appointment under subsection (1) or (2) takes effect immediately it is made.

(4) A decision under subsection (2) to appoint a person to be the statutory manager of prudentially regulated financial institution is declared to be a reviewable decision, and notice of the decision in accordance with section 68 shall be given to the financial institution concerned.

**60.**—(1) A person is not to 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.

Statutory  
managers

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

- (a) has the management of the affairs of the institution to the exclusion of its directors and other managers;
- (b) has 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) is entitled to receive such remuneration from the institution as the Court orders.

(3) A repudiation of a contract under paragraph (2) (b) does 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 should be taken to ensure that the institution—

- (i) complies with the financial services laws; or
- (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 should 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 should be wound up.

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

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

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

(8) The statutory manager of a prudentially regulated financial institution is not 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.

**61.** 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—

Period of statutory management

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

(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.

*Division 3—Winding up*

**62.**—(1) A resolution, demand or other step to wind up a prudentially regulated financial institution is of no effect unless the Registrar has approved.

Winding up of prudentially regulated financial institutions

(2) The Registrar may apply to the court for an order that a prudentially regulated financial institution be wound up if—

(a) a statutory manager has been appointed to the institution; and

(b) the Registrar is satisfied that the institution is insolvent and will not be restored to solvency within a reasonable period.

(3) An application to a court for the winding up of a prudentially regulated financial institution (whether under the Companies Act or under another law) is not to be made except by the Registrar or with its approval.

(4) The Registrar shall not give approval under subsection (3) unless—

(a) the prudentially regulated financial institution's licence has been or is to be revoked; and

(b) the Registrar is satisfied that adequate provision has been made to protect the interests of the clients of the institution.

## PART VI—ENFORCEMENT OF FINANCIAL SERVICES LAWS

**63.**—(1) The Registrar may accept a written undertaking from a person in connection with a matter in relation to which the Registrar has a supervisory function. Enforceable undertakings

(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; or

(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;

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

(5) The Registrar—

(a) shall make a copy of the undertaking available to any person who asks for it; and

(b) may publish a copy of the undertaking on its Internet site.

(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 information has been deleted.

**64.**—(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—

Compensation  
for loss from  
breach of  
financial services  
laws

- (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 [*insert period*] after the day on which the cause of action that relates to the contravention accrued.

(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 is not 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 has the conduct of a representative action to the exclusion of the claimants concerned, and may withdraw, abandon, settle or compromise the action, but an settlement or compromise of the action is 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 [*insert number*] 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 binds all claimants other than:

- (a) those that the Court has by order excluded from the action (under paragraph (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 is, as a first charge against the account, entitled 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 connection 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 [*insert number*] years after the first payment under subsection (10) becomes funds of the Reserve Bank.

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

- (a) giving the person a written warning;

Administrative  
penalties



(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 of not more than [*insert amount*] for each day during which the contravention continues.

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

(3) Before taking action under subsection (1), the Registrar shall give the person written notice of the proposed action, specifying the grounds for it and the facts supporting those grounds, and allowing 21 days after the notice is given for the person to ask for a hearing on the matter. If the person requests a hearing on the matter, the Registrar shall hold a hearing before taking the action. The hearing shall be held in private unless the person consents to the hearing's being held in public.

(4) A person to whom a notice under paragraph (1) (b) has been given who fails or refuses to comply with the direction commits an offence and on conviction is liable to [*insert penalty*].

(5) [*provision for recovery of penalties to be inserted*].

(6) The Registrar may, on application, waive payment of some or all of a monetary penalty imposed under paragraph (1) (c).

(7) A decision under subsection (1) to impose an administrative penalty on a person is declared to be a reviewable decision, and notice of the decision shall be given to the person in accordance with section 68.

**66.**—(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 authorised by the Registrar, make orders for the purposes of enforcing the financial services law. Injunctions

(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;
- (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 the Registrar is not to 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.

**67.**—(1) The Registrar may, by notice in the *Gazette*— Exemptions

(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.

(3) A notice under subsection (1) has effect according to its terms.

#### PART VIII—NOTIFICATION OF AND REVIEWS OF DECISIONS

##### *Division 1—Notification of decisions of Registrar and self regulatory organisations, and appeal rights*

**68.**—(1) Notice of a reviewable decision shall— Notice of renewable decisions

(a) set out the decision;

(b) set out the reasons for the decision;

(c) set out the Registrar's or the self regulatory organisation's findings on material questions of fact relevant to the decision;

(d) refer to the evidence or other material on which those findings were based; and

(e) if a financial services law provides that the person to whom the notice is given may apply for internal review, or may apply to the Appeals Committee for review, of the decision—state that right.

(2) A notice under subsection (1) shall be given no later than [*insert period*] after the decision concerned is made.

**69.**—(1) Where a person has been given notice of a reviewable decision under a financial services law (other than a decision under subsection (3)), the person may request the Registrar or the self regulatory organisation (as appropriate) to review the decision.

Internal review  
of reviewable  
decisions

(2) The request shall be made within 30 days after the person received the notice of the decision, or a longer period allowed by the Registrar or the self regulatory organisation (and the Registrar or the self regulatory organisation may do this after the 30 days has ended).

(3) On a request under subsection (1), the Registrar or the self regulatory organisation (as appropriate) shall, as soon as practicable, arrange for a person (not being the person who made the decision) to review the decision and make a fresh decision.

(4) The fresh decision under subsection (3) is declared to be a reviewable decision, and notice of the decision in accordance with section 68 shall be given to the person who made the request concerned.

(5) If the Registrar or the self regulatory organisation (as appropriate) has not notified the person who made the request under subsection (1) of a decision on the request within [*insert period*] after the request is made, the Registrar or the self regulatory organisation (as appropriate) is taken to have confirmed the decision to be reviewed.

**70.**—(1) Where a person has been given notice of a reviewable decision under section 69 (4), he may apply to the Appeals Committee for a review of the decision, but shall do so no later than [*insert period*] after the person received the notice of the decision.

Review of  
reviewable  
decisions

(2) Where, under section 69 (5), a decision of the Registrar or a self regulatory organisation is taken to be confirmed, a person who requested that the decision be reviewed under section 69 may apply to the Appeals

Committee for a review of the decision, but shall do so no later the period referred to in section 69 (5) ended.

(3) The Appeals Committee may, on application, extend either period, either before or after it has ended, and may do so on terms it thinks proper.

**71.** An application for a review of a decision does not affect the operation of the decision, but the Appeals Committee may, on application, suspend the operation of the decision as specified by, and on terms determined by, the Appeals Committee.

Operation of  
decisions under  
appeal

*Division 2—Financial Services Appeal Committee*

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

Financial  
Services Appeals  
Committee

(2) The Appeals Committee has the following functions—

(a) reviewing decisions made by the Registrar or an self regulatory organisation under a financial services law, in accordance with the financial services law;

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

(3) The costs and expenses of the Appeals Committee are to be met by the Reserve Bank, as supervisory expenditure.

**73.**—(1) The Appeals Committee consists of three members, appointed by the Attorney-General, one of whom shall be designated as Chairperson.

Membership

(2) A person is not be appointed as a member of the Appeals Committee unless the Attorney-General is satisfied that the person is legal practitioner of at least [10] years standing, or has at least [10] years experience in the financial services industry.

(3) Subject to this Act, a member of the Appeals Committee holds office for [*three*] years and is eligible for re-appointment.

(4) A member of the Appeals Committee is 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 is not a member of the Appeals Committee.

**74.**—(1) A member of the Appeals Committee may resign office by one months notice in writing to the Attorney-General.

Termination of  
office

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

(a) is disqualified in Malaŵi 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 Malaŵi of an offence of a kind referred to in section 7(f) of the Reserve Bank of Malaŵi Act;

(d) is removed from office in Malaŵi as mentioned in section 7(g) of the Reserve Bank of Malaŵi Act; or

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

(3) The Attorney-General 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 or her office;

(b) the member, in the opinion of the Attorney-General, is unfit to be a member because of misconduct or default in the discharge of his or her duties of a member; or

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

(d) the member has been disqualified, outside Malaŵi, 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 Malaŵi or, outside Malaŵi, makes an arrangement or composition with, or has suspended payment to, his creditors;

(f) the member has been convicted outside Malaŵi of an offence of a kind referred to in section 7(f) of the Registrar of Malaŵi Act; or

(g) the member has been removed from office outside Malaŵi as mentioned in section 7(g) of the Registrar of Malaŵi Act.

**75.**—(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—

Disclosure of interests

(a) shall disclose the interest to the Chairperson of the Appeals Committee (where the member is the Chairperson, the disclosure shall be to the Attorney-General); 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 Attorney-General.

(2) The Attorney-General shall not give approval under paragraph (1) (b) unless satisfied on reasonable grounds that the interest will not prevent the member from acting impartially in relation to the matter.

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

Restriction on altering decisions under review

(a) by the Appeals Committee; or

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

*Division 3—Conduct of review proceedings*

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

Notice of and parties to review proceedings

(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 is entitled to be a party to the review proceeding for any decision.

(3) Parties to proceedings before the Appeals Committee may be legally represented.

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

Procedure

(a) the procedure of the Appeals Committee is, 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 is not 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 Chairman 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 paragraph (2) (d).

**79.**—(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. Hearings

(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 on conviction is liable to *[insert penalty]*.

**80.**—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 Rights of parties  
to review  
proceedings

which the Appeals Committee proposes to consider in determining the matter.

**81.**—(1) For the purposes of determining an application for review, the Appeals Committee has all the powers and authorities of the Registrar or the self regulatory organisation concerned and may— Powers of Appeals Committee

- (a) affirm the decision under review; or
- (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 organisation concerned for reconsideration in accordance with the decision of the Appeals Committee.

(2) A decision of the Appeals Committee is 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; and
- (b) proceed in the absence of a party who has had reasonable notice of the proceeding; and
- (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.

**82.**—(1) A legal practitioner or other person appearing before the Appeals Committee on behalf of a party has the same protection and immunity as a legal practitioner has in appearing for a party in proceedings in the Court. Rights of legal practitioners, witnesses etc

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

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

- (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 by 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 or her knowledge, is false or misleading.

(5) Any person who contravenes subsection (1), (2), (3) or (4) commits an offence and on conviction is liable to [*insert penalty*].

**84.**—(1) A decision of the Appeals Committee shall be in writing, and 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.

Decisions of  
Appeals  
Committee

(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 comes 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 comes into operation on that date.

**85.**—(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.

Appeal from  
decisions of  
Appeals  
Committee

(2) An appeal shall be instituted no later than 28 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 4—Complaints resolution schemes*

**86.**—(1) The Registrar shall promote and encourage the development and implementation, by financial institutions,

Registrar to  
promote  
complaint  
resolution scheme

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 organisation, requiring them or it to develop and implement a complaint resolution scheme.

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

Requirements for  
complaint  
resolution  
schemes

(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 IX—MISCELLANEOUS

**88.** The Registrar may establish advisory bodies to advise him in relation to the performance of its supervisory functions. Advisory bodies

**89.** In addition to its other powers under this Act and the other financial services laws, the Registrar may issue guidelines, bulletins and other information as it may consider desirable in relation to the administration of financial services laws. Guidelines etc

**90.**—(1) Any person who, without reasonable excuse, fails to answer a question put to the person by the Registrar, an examiner or an investigator in connection with the Bank's supervisory functions commits an offence and on conviction is liable to [*insert penalty*]. Offences—failure to answer questions etc

(2) Any person who says anything in answering a question put to the person by an inspector or an investigator that the person knows or ought to know is false or misleading in a material particular (including by omission) commits an offence and on conviction is liable to [*insert penalty*].

**91.**—(1) A person shall not—

- (a) make a statement to the Registrar;
- (b) give information to the Registrar; or
- (c) produce or give a document that to the Registrar;
- (d) authorise or permit another person to make a statement or give information or a document to the Registrar;

in connection 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). Offences—misleading answers and information

(2) Any person who contravenes subsection (1) commits an offence and on conviction is liable to [*insert penalty*].

**92.** Any person who, without reasonable excuse, fails to comply with a direction, order or requirement given to the person under a financial services law commits an offence and on conviction is liable to [*insert penalty*].

Offences—failure to comply with directions

**93.**—(1) Any person who is required under a financial services law to answer a question or produce a document or thing is not excused from the requirement because compliance may tend to incriminate him or expose him to a penalty.

Self-incrimination

(2) However, if the person objects on that ground to complying, the answer, document or other thing given in compliance with the requirement is not 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).

**94.** Any person who does any of the following commits an offence and on conviction is liable to [*insert penalty*] —

Holding out as licensed etc

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

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

(c) permits another person to do anything mentioned in paragraph (a) or (b).

**95.** 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

Destroying documents

is relevant to the performance or exercise of the Registrar's functions or powers commits an offence and on conviction is liable to *[insert penalty]*.

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

- (a) the Registrar;
- (b) a member or employee of the Registrar; or
- (c) an examiner or an investigator;

in the performance of the Registrar's supervisory functions commits an offence and on conviction is liable to *[insert penalty]*.

(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 on conviction is liable to *[insert penalty]*.

**97.** Any person who knowingly hinders or prevents compliance with a direction, order or requirement given under a financial services law commits an offence and on conviction is liable to *[insert penalty]*.

**98.** 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.

**99.** 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;

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



**100.**—(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—

Offences by  
bodies  
corporate—states  
of mind

(a) the conduct was engaged in by a director, employee or agent of the body corporate within the scope of his or her 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.

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

Offences by  
bodies  
corporate—  
liability of  
directors

**102.** 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 by  
bodies  
corporate—  
penalties

**103.** When an act that, if wholly done within Malaŵi, would be an offence against a financial services law, is done partly within and partly beyond Malaŵi, every

Offences—acts  
done partly  
outside Malaŵi

person who within Malaŵi 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 Malaŵi.

**104.**—(1) The Minister may 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. Regulations

(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) To avoid 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 X—TRANSITIONAL AND CONSEQUENTIAL PROVISIONS

**105.** If—

Transition period

(a) a financial institution was lawfully carrying on an activity immediately before Part III commences;

(b) the financial institution was not, at that time, required to be licensed or registered under a financial services law other than this Act in relation to carrying on the activity; and

(c) the financial institution applies for a licence or registration within [**12 months**] after Part III commences;

Part III, and the other financial services laws, do not prevent the person from carrying on the activity until the application is finally determined.

OBJECTS AND REASONS

[name]

[Ministry]



## **Attachment 3**

### **Draft Retirement Funds Bill**

## **RETIREMENT FUNDS BILL, 2007**

### ARRANGEMENT OF SECTIONS

#### SECTIONS

##### PART I – PRELIMINARY

1. Short title and commencement
2. Interpretation
3. Principal object of this Act
4. Financial Services Act

##### PART II—REGISTRATION AND LICENSING

5. Retirement schemes and umbrella funds to be registered and trustees etc licensed
6. Registration criteria—restricted funds
7. Registration criteria—unrestricted funds
8. Registration criteria—umbrella funds
9. Notice of registration to Commissioner of Taxes
10. Investment managers, custodians and administrators to be licensed
11. Licensing and registration procedure
12. Licensing on a “class” basis

13. Trustees, operators and directors to consent to appointment
14. Composition of trustees
15. Equal representation rule
16. Additional independent trustees and additional independent directors
17. Advisory committees
18. Rules for appointments of member representatives

Division 2—Investment managers, administrators, custodians and actuaries  
of retirement funds and umbrella funds

19. Investment managers, custodians and administrators to be bodies corporate
20. Appointments of investment managers, custodians and administrators to be in writing
21. Individuals not to act as investment managers, custodians or administrators

PART IV—REQUIREMENTS FOR FUND RULES OF RETIREMENT FUNDS AND  
UMBRELLA FUNDS

22. Retirement fund rules to be enforceable
23. Retirement funds to be trusts
24. Retirement funds—statutory covenants
25. Umbrella funds—statutory covenants
26. Statutory covenants to be consistent with sections 24 and 25
27. Statutory covenants bind directors of trustee
28. Damages for breach of statutory covenants
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**A BILL**

entitled

**An Act to make provision for the supervision and regulation of retirement funds and umbrella funds, and for matters connected therewith and incidental thereto**

ENACTED by the Parliament of Malaŵi as follows—

PART I—PRELIMINARY

Short title and commencement

**1.** This Act may be cited as the Retirement Funds Act, 2007, and shall come into operation as follows—

(a) Part V (except for section 44) and Parts VII, IX and X shall come into operation as set out in section 9(11) of the General Interpretation Act; and

(b) section 44 and the other provisions of this Act shall come into operation on such date as the Minister shall appoint by notice in the Gazette, being a date not earlier than 2 years after the date on which the President assents to this Act.

Interpretation

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

“accumulation fund” means a retirement fund that is not a defined benefit fund;

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“advisory committee”, in relation to a retirement fund, means a board, committee or other body that—

(a) is established by or under the fund rules; and

(b) has the function of advising the trustee of the fund about issues relating to the fund that a fund member or a fund employer has raised;

“beneficiary”, in relation to a retirement fund, means an individual who is, in accordance with the fund rules, entitled to a benefit from the fund;

“child” includes a child born out of wedlock;

“corporate trustee” means a trustee that is a body corporate;

“defined benefit fund” means a retirement fund where, under the fund rules, a fund member’s benefits are calculated, wholly or in part, by reference to any or all of the following—

(a) the amount of the fund member’s remuneration at the date on which benefits are payable or a specified earlier date;

(b) the amount of the fund member’s remuneration averaged over a specified period before the date on which benefits are payable;

(c) an amount specified in the fund rules;

but does not include a provident fund;

“dependant” of a fund member, includes a spouse and a child of the fund member;

“employee contribution” means a contribution to a retirement fund made by the employee, including a contribution deducted by the employer from the employee’s remuneration where the employer is under an obligation to remit the amount concerned to the trustee of the fund;

“employer asset” means—

(a) an asset acquired from a fund employer or an associate of a fund employer;

(b) rights under a lease of fund assets to a fund employer or an associate of a fund employer; and

(c) a loan to, or rights acquired by the provision by the trustee of financial accommodation of any kind to, a fund employer or an associate of a fund employer;

but does not include assets that are securities issued by or guaranteed by the Government;

“employer asset percentage”, for a retirement fund, means the percentage calculated using the formula—

$$\frac{\text{total market value of fund's employer assets}}{\text{total market value of all fund assets}} \times 100;$$

“employer contribution” means a contribution to a retirement fund made by an employer in respect of an employee, excluding employee contributions;

“employer representative”, in relation to a group of trustees of a retirement fund or the board of directors of a corporate trustee of a retirement fund, means a member of the group, committee or board nominated by—

(a) the fund employers; or

(b) an organization representing the interests of fund employers;

“equal representation rule” means section 15 (1) or (2);

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“Financial Services Act” means the Financial Services Act, 2007;

“fund assets” of a retirement fund or an umbrella fund means property of any kind held by the trustee or operator of the fund in that capacity;

“fund employer”, in relation to a retirement fund, means a person who employs a fund member and who is liable, under the fund rules, to make employer contributions to the fund in respect of the member;

“fund information”, in relation to a retirement fund, means information about—

(a) the fund’s investment strategy;

(b) the fund’s investment performance and financial position;

(c) fees and charges payable by, or borne by, fund members or beneficiaries in relation to the fund; and

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(d) the rights and entitlements of fund members or beneficiaries under the fund rules and otherwise in relation to the fund;

“fund member”, in relation to a retirement fund, means a person who is, in accordance with the fund rules, a member of the fund;

“fund member account” means an account established under section 50;

“fund member information”, in relation to a fund member of a retirement fund, means information about the nature and extent of the member’s entitlements under the fund rules and otherwise in relation to the fund;

“fund member representative”, in relation to a group of trustees of a retirement fund, a policy committee of a retirement fund or the board of directors of a corporate trustee of a retirement fund, means a member of the group, committee or board nominated by the fund members;

“fund rules”, in relation to a retirement fund or an umbrella fund, means—

(a) the rules contained in a trust instrument, other document or legislation, or combination of them; and

(b) any unwritten rules;

governing the establishment or operation of the fund;

“independent director”, in relation to a corporate trustee of a retirement fund, means a director of the corporate trustee who is not—

(a) a fund member;

(b) a fund employer;

(c) an associate of a fund employer;

(d) an employee of a fund employer or of an associate of a fund employer;

(e) in any capacity, a representative of a trade union, or other organization, representing the interests of one or more fund members; or

(f) in any capacity, a representative of an organization representing the interests of one or more fund employers;

“independent trustee”, in relation to a fund, means a trustee of the fund who is not—

(a) a fund member;

(b) a fund employer;

(c) an associate of a fund employer;

(d) an employee of a fund employer or of an associate of a fund employer;

(e) in any capacity, a representative of a trade union, or other organization, representing the interests of one or more fund members; or

(f) in any capacity, a representative of an organization representing the interests of one or more fund employers;

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“investment management agreement” means an agreement between the trustee of a retirement fund or the operator of an umbrella fund and an investment manager for the investment of fund assets that, for the purposes of the agreement, are under the control of the investment manager;

“investment manager” means a person who, as a business, invests fund assets of retirement funds or umbrella funds by arrangement with the trustees or operators of the funds concerned;

“legal personal representative” means—

(a) in relation to a deceased person—the executor of the will or administrator of the estate of the person; and

(b) in relation to a person under a legal disability—the trustee or manager of the estate of the person appointed under law;

“loan” includes the provision of credit and any other form of financial accommodation, whether or not enforceable, or intended to be enforceable, by legal proceedings;

“nomination” means a nomination under section 59;

“operator”, in relation to an umbrella fund, means—

(a) if the umbrella fund is a trust—the trustee of the trust; or

(b) otherwise—a person who operates the umbrella fund;

“pension fund” means a retirement scheme that is an indefinitely continuing trust;

“provident fund” means a retirement scheme that is an indefinitely continuing trust the rules of which provide—

(a) that the sole purpose of the fund is to provide lump sums to either or both the following—

(i) employees on their leaving the service of an employer;

(ii) dependants of nominees of employees on the employees’ deaths;

(b) that an employee remunerated at an annual rate of more than the amount prescribed in the Registrar’s directives for the purposes of this definition is not eligible to be a fund member;

(c) for contributions to the fund to be made at specified times and rates; and

(d) that employer contributions to the fund in respect of an employee shall not exceed the percentage of the employee’s remuneration prescribed in Registrar’s directives for the purposes of this definition;

Act No. ... of 2007 “Registrar” means the Registrar of Financial Institutions under the Financial Services Act, 2007;

Act No. ... of 2007 “Registrar’s directive” means a directive issued under section 33 of the Financial Services Act, 2007;

“relative” of a person means [*to complete*];



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“restricted fund” means a retirement fund the fund rules of which restrict membership of the fund to officers and employees of a specified employer and its related bodies corporate;

“retire”, in relation to a fund member, means cease permanently (otherwise than because of death or disablement) to be engaged in any business, trade, profession, vocation, calling, occupation or employment;

“retirement age” means the age prescribed by the Minister in regulations for the purposes of this definition;

“retirement fund” means a restricted fund or an unrestricted fund;

“retirement scheme” means a scheme the primary purpose of which is the provision of retirement, provident or superannuation benefits to a member of the scheme on his retirement from any business, trade, profession, vocation, calling, occupation or employment in which the member was engaged, whether or not it also provides for benefits to be paid in other circumstances (for example, on the death or disablement of a person), but does not include—

(a) a contract of insurance;

(b) a scheme established by and operated in accordance with a written law the members of which are public officers; or

(b) a contract of employment merely because it provides for payments to be made on termination of the contract;

“scheme” means any plan, proposal, action, course of action, course of conduct, agreement, arrangement, understanding, promise or undertaking, whatever its legal form, whether express or implied and whether or not enforceable or intended to be enforceable;

“spouse”, in relation to a person (the “first person”), includes a person who, although not legally married to the first person, lives with the first person on a genuine domestic basis as the husband or wife of the first person;

“statutory covenant” means a covenant set out in or prescribed under section 24 (1) or 25 (1);

“totally and permanently disabled”, in relation to a fund member, means permanently incapable, through infirmity of mind or body, from engaging in his business, trade, profession, vocation, calling, occupation or employment or in any other business, trade, profession, vocation, calling, occupation or employment for which he may be trained or fitted;

“trustee”—

(a) in relation to a retirement fund or umbrella fund—means the trustee of the fund;

(b) in relation to an restricted fund where there is a group of individual trustees—means all of the trustees acting together;

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“umbrella fund” means a collective investment scheme as defined in the Securities Act, 2007 whose rules provide that only trustees of retirement funds or operators of umbrella funds may be members of the scheme;

“unrestricted fund” means a retirement fund whose rules do not restrict membership of the fund to officers and employees of a specified employer and its related bodies corporate.

(2) Other words and expressions used in this Act have the meanings they have in the Financial Services Act, 2007.

(3) Without limiting the ordinary meaning of “operate”, a person operates a retirement scheme or an umbrella fund if the person—

(a) establishes or administers the scheme or fund;

(b) induces or attempts to induce a person to be a member of the scheme or fund or to make payments by way of contribution to or investment in the scheme or fund; or

(c) accepts or makes payments in connection with the scheme or fund otherwise than as a member or beneficiary of the scheme or fund.

(4) A provision included in the fund rules of a retirement fund to avoid a breach of a rule of law against remoteness of vesting shall not prevent the fund from being treated as an indefinitely continuing fund for the purposes of the

definitions of “pension fund” and “provident fund” in subsection (1).

Principal object of this Act

**3.** The principal object of this Act is to make provision to enhance the safety, soundness and prudent management of retirement funds to ensure that they can provide post-retirement income support for fund members and beneficiaries.

Act applies in addition to the Financial Services Act Act No. ... of 2007

**4.** This Act applies in addition to the Financial Services Act, 2007.

PART II—REGISTRATION AND LICENSING

Retirement schemes and umbrella funds to be registered and trustees etc licensed

**5.**—(1) A person shall not operate a retirement scheme unless—

(a) the scheme is registered as a pension fund or provident fund; and

(b) the trustee of the fund is licensed as a trustee of the fund.

(2) A person shall not operate an umbrella fund unless—

(a) the fund is registered as an umbrella fund; and

(b) the operator of the fund is licensed as operator of the fund.

(3) Any person who contravenes subsection (1) or (2) shall be guilty of an offence and, on conviction, shall be liable—

(a) in the case of a natural person, to imprisonment for two (2) years and to a fine of two hundred thousand kwacha (K200,000); and

(b) in the case of a corporation, to a fine of one million kwacha (K1,000,000).

Registration criteria— 6.—(1) If an application is made in accordance with the restricted funds Act No. ... of 2007 Financial Services Act, 2007 for registration of a restricted

fund as a provident fund, the Registrar shall so register the fund if, and shall not so register the fund unless—

(a) the fund rules provide that the sole purpose of the fund is to provide lump sums to either or both the following—

(i) employees on their leaving the service of an employer;

(ii) dependants of nominees of employees on the employees' deaths;

(b) the fund rules provide for contributions to the fund to be made at specified times and rates;

(c) it appears to the Registrar that the fund complies with this Act and the other financial services laws;

(d) the trustee of the fund is licensed as required by this Act;

(e) the fund rules provide that each fund employer shall ensure that, for all employees of the employer who are eligible under the fund rules to be fund members, it is a condition of their employment that they be and remain a member of the fund or of some other registered retirement fund;

(f) the fund assets will be held by a custodian;

(g) subject to subsection (3), the fund rules provide that a trustee and, if the trustee is a corporate trustee, the directors of the trustee, are not to be paid any fee out of the fund assets for acting as trustee;

(h) if subsection (3) or (4) apply—any fee is, in the Registrar’s opinion, reasonable in the circumstances; and

(i) the Registrar has no reason to believe that the fund and the trustee will not comply with this Act, the other financial services laws (including the Registrar’s directives) if the fund is registered.

(2) If an application is made in accordance with the Act No. ... of 2007 Financial Services Act, 2007 for registration of a restricted fund as a pension fund, the Registrar shall so register the fund if, and shall not so register the fund unless—

(a) the fund rules provide that the fund shall be maintained solely to provide pensions or annuities for one or more of the following—

(i) fund members on their reaching retirement age;

(ii) fund members on their ceasing to be engaged in their business, trade, profession, vocation, calling, occupation or employment;

(iii) dependants of fund members on the fund members' deaths;

or for any of such purposes and the purpose of providing pensions or annuities for fund members on their ceasing to be engaged in their business, trade, profession, vocation, calling, occupation or employment because of ill-health;

(b) the fund rules provide for contributions to the fund to be made at specified times and rates;

(c) it appears to the Registrar that the fund complies with this Act and the other financial services laws;

(d) the trustee of the fund is licensed as required by this Act;

(e) the fund rules provide that each fund employer shall ensure that, for all employees of the employer who are eligible under the fund rules to be fund members, it is a condition of their employment that they be and remain a member of the fund or of some other registered retirement fund;

(f) the fund assets shall be held by a custodian;

(g) subject to subsection (32), the fund rules provide that a trustee and, if the trustee is a corporate trustee, the directors of the trustee, are not to be paid any fee out of the fund assets for acting as trustee;

(h) if subsection (3) or (4) apply—any fee is, in the Registrar’s opinion, reasonable in the circumstances; and

(i) the Registrar has no reason to believe that the fund and the trustee will not comply with this Act, the other financial services laws, including the Registrar’s directives, if the fund is registered.

(3) The fund rules may permit an independent trustee who is an individual or, in the case of a corporate trustee, an independent director of the corporate trustee, to be paid a fee out of the fund assets for acting as trustee or director.

(4) If the equal representation rule does not apply to the fund, the fund rules may permit the trustee to be paid a fee out of the fund assets for acting as trustee.

Registration  
criteria—  
unrestricted funds  
Act No. ... of  
2007

7. If an application is made in accordance with the Financial Services Act, 2007 for registration of a unrestricted fund as a pension fund, the Registrar shall not so register the fund unless satisfied that—

(a) the fund rules provide that the fund shall be maintained solely to provide pensions or annuities for one or more of the following—

(i) fund members on their reaching retirement age;

(ii) fund members on their ceasing to be engaged in their business, trade, profession, vocation, calling, occupation or employment;



(iii) dependants of fund members on the fund members' deaths;

or for any of such purposes and the purpose of providing pensions or annuities for fund members on their ceasing to be engaged in their business, trade, profession, vocation, calling, occupation or employment because of ill-health;

(b) the fund rules provide for contributions to the fund to be made at specified times and rates;

(c) the fund complies with this Act and the other financial services laws;

(d) the trustee of the fund is licensed as required by this Act;

(e) the fund assets will be held by a custodian; and

(f) any fee payable in accordance with the fund rules out of the fund assets to the trustee for acting as trustee is, in the Registrar's opinion, reasonable in the circumstances;

and the Registrar has no reason to believe that the fund and the trustee will not comply with this Act, the other financial services laws (including the Registrar's directives) if the fund is registered.

Registration  
criteria—umbrella  
funds  
Act No. ... of 2007

**8.** If an application is made in accordance with the Financial Services Act, 2007 for registration of a fund as an umbrella fund, the Registrar shall not register the fund unless—

(a) the fund complies with this Act and the other financial services laws;

(b) the operator of the fund is licensed as required by this Act; and

(c) the Registrar has no reason to believe that the fund and the operator will not comply with this Act, the other financial services laws (including the Registrar's directives) if the fund is registered.

Notice of registration to Commissioner of Taxes

**9.** As soon as practicable after a retirement fund or umbrella fund is registered, the trustee or operator of the fund shall give notice of the registration, as prescribed by the Minister by regulation, to the Commissioner of Taxes.

Investment managers, custodians and administrators to be licensed

**10.**—(1) A person shall not act as an investment manager for a retirement fund unless he is licensed as an investment manager for the fund.

(2) A person shall not act as an investment manager for an umbrella fund unless he is licensed as an investment manager for umbrella funds.

(3) A person shall not act as a custodian for a retirement fund or an umbrella fund unless he is licensed as a custodian for retirement funds and umbrella funds.

(4) A person shall not act as an administrator for a retirement fund unless he is licensed as an administrator for retirement funds.

(5) Any person who contravenes subsection (1), (2), (3) or (4) is guilty of an offence and on conviction, is liable to *[insert penalty]*.

Licensing and registration procedure Act No. of 2007

**11.** Division II of Part III of the Financial Services Act, 2007 makes provision for licensing and registration applications.

Licensing on a “class” basis

**12.**—(1) A person may be licensed as trustee in respect of retirement funds of a class specified in the licence.

(2) A person may be licensed as operator of umbrella funds of a class specified in the licence.

(3) An investment manager may be licensed in respect of retirement funds of a class specified in the licence.

PART III—REQUIREMENTS FOR TRUSTEES, INVESTMENT MANAGERS, ADMINISTRATORS, CUSTODIANS AND ACTUARIES OF RETIREMENT FUNDS AND UMBRELLA FUNDS

Division 1—Trustees of retirement funds and operators of umbrella funds

Trustees, operators and directors to consent to appointment

**13.** A person shall not be appointed as a trustee of a retirement fund, an operator of an umbrella fund or a director of a corporate trustee of a retirement fund unless he has consented in writing to the appointment.

Composition of trustees

**14.**—(1) An umbrella fund and an unrestricted fund shall have only a single trustee, which shall be a body corporate.

(2) If the trustee of a restricted fund is a body corporate, it shall be the only trustee of the fund.

(3) A restricted fund that has an individual as a trustee—

(a) shall have at least 6 individuals as trustees (called “a group of individual trustees”); and

(b) shall not have a body corporate as a trustee.

(4) If—

(a) a vacancy occurs in the membership of a group of individual trustees of a restricted fund;

(b) immediately before the vacancy occurred, the fund had at least six (6) individuals as trustees;

(c) the vacancy is filled within ninety (90) days after it occurred; and

(d) immediately after the vacancy is filled, the fund has at least six (6) individuals as trustees;

the fund shall be deemed to have had at least 6 individuals as trustees during the period of the vacancy.

Equal representation rule

**15.**—(1) If a restricted fund has a group of individual trustees, the group shall consist of equal numbers of employer representatives and member representatives.

(2) If a restricted fund has a corporate trustee that is not the trustee of another fund or trust, the board of directors of the corporate trustee shall consist of equal numbers of employer representatives and member representatives.

(3) For a fund where the equal representation rule applies, if—

(a) a vacancy occurs in the membership of a group of individual trustees or, if the trustee is a corporate trustee, on the board of directors of trustee;

(b) immediately before the vacancy occurred, the fund complied with the equal representation rule;

(c) the vacancy is filled within ninety (90) days after it occurred; and

(d) immediately after the vacancy is filled, the fund complies with the equal representation rule;

the fund shall be deemed to have complied with the equal representation rule during the period of the vacancy.

Additional  
independent trustees  
and additional  
independent directors

**16.** If the fund rules of a restricted fund provide that—

(a) an independent additional trustee may be appointed as a trustee, or an independent additional director may be appointed as a director, at the request of the employer representatives, or the member representatives, who are the members of the group or board; and

(b) the additional independent trustee or additional independent director may not exercise a casting vote in any proceedings of the group or board;

the appointment of such an additional independent trustee or additional independent director does not contravene the equal representation rule.

Advisory committees

**17.**—(1) This section applies in respect of—

(a) an unrestricted fund; and

(b) a restricted fund (other than a provident fund) that has a corporate trustee that is not the trustee of another fund or trust.

(2) The trustee shall make arrangements (whether through the fund rules or otherwise), in accordance with the Registrar’s directives, for the establishment and operation of one or more advisory committees for the fund.

Rules for appointments of member representatives

**18.**—(1) This section applies to a retirement fund to which the equal representation rule applies.

(2) The trustee shall establish rules (whether by inclusion in the fund rules or otherwise)—

(a) setting out a procedure for appointing the member representatives; and

(b) ensuring that member representatives so appointed can only be removed by the same procedure as that by which they were appointed, except in the event of—

- (i) mental or physical infirmity;
- (ii) retirement;
- (iii) termination of employment with a fund employer; or
- (iv) such other circumstances as are prescribed in Registrar's directives for the purposes of this section.

(3) The trustee shall publish those rules in a way that will make fund members aware of the procedure for appointment and removal of member representatives.

(4) Any person who contravenes subsection (2) or (3) is guilty of an offence and on conviction, shall be liable to [*insert penalty*].

Division 2—Investment managers, administrators, custodians and actuaries of retirement funds and umbrella funds

Investment managers, custodians and administrators to be bodies corporate

**19.**—(1) The Registrar shall not license an individual as an investment manager or a custodian for retirement funds or umbrella funds.

(2) The Registrar shall not license an individual as an administrator of retirement funds.

Appointments of investment managers, custodians and administrators to be in writing

(3) If the trustee of a retirement fund or the operator of an umbrella fund appoints a person other than a body corporate to be investment manager, administrator or custodian for the

fund, the trustee or operator, and the person appointed, are each guilty of an offence and shall be liable on conviction [*insert penalty*].

(3) An appointment referred to subsection (3) shall be void.

Appointments of investment managers, custodians and administrators to be in writing

**20.**—(1) If the trustee of a retirement fund, or the operator of an umbrella fund, appoints a person to be investment manager, administrator or custodian for the fund otherwise than in writing, the trustee or operator, and the person appointed, are each guilty of an offence and shall be liable on conviction [*insert penalty*].

(3) An appointment referred to subsection (1) shall be void.

Individuals not to act as investment managers, custodians or administrators

**21.**—(1) An individual shall not act as an investment manager or a custodian for retirement funds or umbrella funds.

(2) An individual shall not act as an administrator of retirement funds.

(3) Any person who contravenes subsection (1) or (2) shall be guilty of an offence and, on conviction, shall be liable to [*insert penalty*].



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PART IV—REQUIREMENTS FOR FUND RULES OF RETIREMENT  
FUNDS AND UMBRELLA FUNDS

Retirement fund rules to be enforceable      **22.** The fund rules of a retirement fund shall be legally enforceable as between the fund members and the trustee, and as between the trustee and each fund employer.

Retirement funds to be trusts      **23.** The fund rules of a retirement fund shall provide that—

(a) contributions to the fund, whether employer contributions or employee contributions, shall be paid to the trustee or as the trustee directs; and

(b) the fund assets shall be held by the trustee in trust for fund members, in accordance with this Act.

Retirement funds—statutory covenants      **24.—(1)** The fund rules of a retirement fund shall provide that the trustee of the fund covenants in favour of the fund members—

(a) to act honestly in all matters concerning the fund;

(b) to exercise, in relation to all matters affecting the fund, the same degree of care, skill and diligence as an ordinary prudent person would exercise in dealing with property of another for whom the person felt morally bound to provide;

(c) to ensure that the trustee’s duties and powers are performed and exercised in the best interests of the beneficiaries of the fund;

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(d) to formulate an investment strategy having regard to the whole of the circumstances of the fund including, but not limited to, the following—

(i) the risk involved in making, holding and realising, and the likely return from, the fund's investments having regard to its objectives and its expected cash flow requirements;

(ii) the composition of the fund's investments as a whole, including the extent to which the investments are diverse or involve risks from inadequate diversification;

(iii) the liquidity of the fund's investments having regard to its expected cash flow requirements;

(iv) the ability of the fund to discharge its existing and prospective liabilities;

(e) to give effect to the investment strategy formulated under paragraph (d);

(f) to keep the money and other assets of the fund separate from any money and assets—

(i) that are held by the trustee personally; or

(ii) that are money or assets of another person, including a fund employer or a related party of a fund employer;

(g) not to do anything that would prevent the trustee from, or hinder the trustee in, properly performing or exercising the trustee's functions and powers;

(h) if there are reserves of the fund—to formulate and to give effect to a strategy for their prudential management, consistent with the fund’s investment strategy and its capacity to discharge its liabilities as and when they fall due;

(i) such additional covenants as may be prescribed in Registrar’s directives for the purposes of this section.

(2) The covenant in subsection (1) (g) shall not prevent the trustee from engaging or authorizing persons to do acts or things on behalf of the trustee.

Umbrella  
funds—statutory  
covenants

**25.**—(1) The fund rules of an umbrella fund shall provide that the operator of the fund covenants in favour of the fund members—

(a) to act honestly in all matters concerning the fund;

(b) to exercise, in relation to all matters affecting the fund, the same degree of care, skill and diligence as an ordinary prudent person would exercise in dealing with property of another for whom the person felt morally bound to provide;

(c) to ensure that the operator’s duties and powers are performed and exercised in the best interests of the fund members;

(d) not to do anything that would prevent the operator from, or hinder the operator in, properly performing or exercising the operator’s functions and powers;

(e) such additional covenants as may be prescribed in Registrar's directives for the purposes of this section.

(2) The covenant in subsection (1) (d) shall not prevent the operator from engaging or authorizing persons to do acts or things on behalf of the trustee.

Statutory covenants to be consistent with sections 24 and 25

**26.**—(1) A covenant prescribed for the purposes of section 24 (1) (i) shall be capable of operating concurrently with all the covenants referred to in section 24 (1) and the other provisions of this Act.

(2) A covenant prescribed for the purposes of section 25 (1) (e) shall be capable of operating concurrently with all the covenants referred to in section 25 (1) and the other provisions of this Act.

Statutory covenants bind directors of trustee

**27.** If the trustee of a retirement fund is a body corporate, the statutory covenants also have effect as covenants by each of the directors of the trustee to exercise the degree of care and diligence that a reasonable person in the position of director of the trustee would exercise in the trustee's circumstances to ensure that the trustee performs the statutory covenants, and so operates as if the directors were parties to the fund rules.

Damages for breach of statutory covenants

**28.**—(1) A breach of a statutory covenant shall not be an offence and shall not result in the invalidity of a transaction, but a person who suffers loss or damage as a result of conduct of another person that is a breach of a statutory covenant may

recover the amount of the loss or damage by action against the other person and against any person involved in the breach.

(2) An action under subsection (1) may be commenced at any time within [*insert period*] after the day on which the cause of action arose.

(3) It shall be a defence to an action for loss or damage suffered by a person as a result of the making of an investment by or on behalf of a trustee of a retirement fund if it is established that the investment was made in accordance with an investment strategy formulated under the covenant set out in section 24 (1) (d).

(4) It shall be a defence to an action for loss or damage suffered by a person as a result of the management of reserves by a trustee of a retirement fund if it is established that the management of the reserves was in accordance with the covenant set out in subsection 24 (1) (h).

(5) Subsections (3) and (4) apply to an action for loss or damage, whether brought under subsection (1) or otherwise.

Fund rules—  
indemnities,  
liability and  
advice

**29.**—(1) A provision in the fund rules of a retirement fund or an umbrella fund shall be void to the extent that—

(a) it purports to preclude a licensed trustee of the retirement fund or the licensed operator of the umbrella fund from being indemnified out of the fund assets in

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respect of a liability incurred while acting as trustee or as operator; or

(b) subject to subsection (2), it limits the amount of such an indemnity.

(2) A provision in the fund rules of a retirement fund or an umbrella fund shall be void to the extent that it purports to:

(a) exempt a licensed trustee of the retirement fund, or the licensed operator of the umbrella fund, from a liability arising as a result of the trustee or operator—

(i) failing to act honestly in a matter concerning the fund; or

(ii) intentionally or recklessly failing to exercise, in relation to a matter affecting the fund, the degree of care and diligence that the trustee or operator was required to exercise; or

(b) indemnify such a trustee or operator in respect of such a liability.

(3) The fund rules of a retirement fund or an umbrella fund shall not prevent a licensed trustee of the retirement fund or the licensed operator of the umbrella fund from seeking advice from any person in respect of any matter relating to performance of his duties or the exercise of his powers as trustee or operator.

(4) A provision in the fund rules shall be void to the extent that it purports to preclude the trustee or operator from being

indemnified out of fund assets in respect of the cost of obtaining advice mentioned in subsection (3), or to limit the amount of such an indemnity.

Trustee directors  
may be  
indemnified

**30.**—(1) Subject to subsection (2), the fund rules of a retirement fund or an umbrella fund may provide for a director of the licensed trustee (being a corporate trustee), or of the licensed operator, of the fund to be indemnified out of the fund assets in respect of a liability incurred while acting as such a director, and the director may be so indemnified out of the fund assets accordingly.

(2) A provision of the fund rules of a retirement fund or an umbrella fund shall be void to the extent that it would have the effect of indemnifying a director of the licensed trustee, being a corporate trustee, or of the licensed operator, of the fund against a liability that arises because the director—

(a) fails to act honestly in a matter concerning the fund;  
or

(b) intentionally or recklessly fails to exercise, in relation to a matter affecting the fund, the degree of care and diligence that the director is required to exercise.

Retirement  
fund trustees  
not to be  
subject to  
direction

**31.**—(1) The fund rules of a retirement fund shall not permit a trustee to be subject, in the exercise of any of the trustee's powers in relation to the fund, to direction by any other person.

(2) Subsection (1) shall not apply to—

- Cap. 44:-02
- (a) a direction given by a court;
  - (b) a direction given by the Reserve Bank under the Reserve Bank of Malaŵi Act or by the Registrar under a financial services law;
  - (c) a nomination;
  - (d) in the case of a restricted fund—a direction given by a fund employer, or an associate of a fund employer, in circumstances prescribed in the Registrar’s directives for the purposes of this paragraph; or
  - (e) a direction given by the Appeals Committee.

(3) A provision of fund rules of a retirement fund shall be void to the extent of its inconsistency with subsection (1).

Retirement fund benefits to be portable

**32.**—(1) The fund rules of a pension fund that is a restricted fund shall provide that—

- (a) if a fund member—
  - (i) ceases employment with a fund employer; and
  - (ii) does not take up employment with another fund employer within the period specified in Registrar’s directives for the purposes of this paragraph;

the trustee shall, on application by the fund member, pay the amount of the member’s benefits in the fund to the trustee of another registered retirement fund (other than a provident fund); and



(b) if a person becomes a fund member—the trustee shall accept payments in respect of the fund member from the trustee of another registered retirement fund and shall credit to those amounts to the fund member’s account in the fund.

Act No. ... of 2007 (2) Without limiting the Registrar’s power under the Financial Services Act, 2007 to issue Registrar’s directives, Registrar’s directives may make provision with respect to the calculation and payment of members’ benefits for the purposes of this section.

Retirement funds—exercise of discretions **33.**—(1) Subject to this Act and the Registrar’s directives, the fund rules of a retirement fund shall not permit a discretion under those rules that is exercisable by a person other than a trustee to be exercised unless—

(a) those rules require the consent of the trustee to the exercise of that discretion; or

(b) the discretion is exercised in circumstances prescribed in, and in accordance with, Registrar’s directives for the purposes of this subsection.

(2) A provision of fund rules of a retirement fund shall be void to the extent of its inconsistency with subsection (1).

Restriction on requirement for fund employer approval etc **34.** The fund rules of a retirement fund shall not require a decision of the trustee under those rules to be made only with the consent or approval (however described) of a fund employer unless the decision—

(a) increases the benefits, or rates of benefits, payable under those rules;

(b) would have the effect of substantially increasing the costs to the employer of the administration of the fund; or

(c) is of a kind prescribed by Registrar's directives for the purposes of this section.

Restrictions on amendments to fund rules

**35.**—(1) The fund rules of a retirement fund shall not permit those rules to be amended unless—

(a) the trustee consents to the amendment;

(b) the amendment only confers on the trustee the power to consent to amendments of those rules; or

(c) the amendment is for the purposes prescribed in Registrar's directives for the purposes of this subsection.

(2) The fund rules of a retirement fund shall not permit the rules to be amended to make a person other than a licensed trustee eligible to be appointed as trustee.

(3) The fund rules of an umbrella fund shall not permit the rules to be amended to make a person other than a licensed operator eligible to be appointed as operator.

(4) A provision of fund rules of a retirement fund or an umbrella fund shall be void to the extent of any inconsistency with subsection (1), (2) or (3).

(5) If the fund rules of a retirement fund or an umbrella fund are amended, the trustee or operator of the fund shall give a copy of the amendment, as prescribed by Registrar's directives for the purposes of this subsection, to the Registrar.

(6) An amendment to the fund rules of a retirement fund shall not have effect until—

(a) the day the Registrar approves the amendment; or

(b) on a day specified in the amendment but after the approval of the Registrar.

(7) The Registrar shall not approve amendment to the fund rules of a retirement fund if—

(a) in the case of a restricted fund and subject to subsection (8), the fund rules as amended would provide that a trustee and, if the trustee is a corporate trustee, the directors of the trustee, are entitled to be paid a fee out of the fund assets for acting as trustee;

(b) in the case of an unrestricted fund—the fund rules as amended would provide that the trustee may be paid a fee payable out of the fund assets for acting as trustee that is not, in the Registrar's opinion, reasonable in the circumstances.

(8) Fund rules of a restricted fund may be amended to permit an independent trustee who is an individual or, in the case of a corporate trustee, an independent director of the

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corporate trustee, to be paid a fee out of the fund assets for acting as trustee or director.

(9) The Registrar shall be deemed to have approved an amendment to fund rules under subsection (6), at the end of fourteen (14) days after the copy of the amendment was given to the Registrar under subsection (5) unless, within the fourteen (14) days, the Registrar gives written notice to the trustee or operator—

(a) that approval is refused; or

(b) extending the period for dealing with the application.

(10) The Registrar may extend more than once the period for dealing with the application.

(11) A decision of the Registrar to refuse to approve an amendment to fund rules is declared to be a reviewable decision, and notice of the decision shall be given to the trustee or operator of the fund in accordance with section 68 of the Financial Services Act, 2007.

Act No. ... of 2007

(12) The trustee or operator of a retirement fund or umbrella fund shall give notice of any amendment to the fund rules, as prescribed by the Minister by regulation, to the Commissioner of Taxes within fourteen (14) days after the amendment comes into effect.

(13) Any person who contravenes subsection (12) shall be guilty of an offence and shall be liable on conviction [*insert penalty*].

PART V—PRUDENTIAL AND OTHER REQUIREMENTS FOR THE  
OPERATION OF RETIREMENT FUNDS AND UMBRELLA FUNDS

Matters that Registrar's  
directives may cover

Act No. ... of 2007

**36.** Without limiting the Registrar's power under the Financial Services Act, 2007 to issue Registrar's directives, Registrar's directives may make provision with respect to—

(a) contributions to retirement funds, including who may make contributions and the circumstances in which a retirement fund may accept contributions;

(b) payment of benefits from retirement funds, including—

(i) the way in which amounts of benefits are to be calculated; and

(ii) the form in which benefits may be paid;

(c) commutation of pensions and annuities from retirement funds;

(d) transferring entitlements to benefits from retirement funds to other retirement funds;

(e) the levels of assets that may be held by retirement funds;

(f) the application of fund assets no longer required to meet payments of benefits to beneficiaries in retirement

funds, including because the beneficiaries have ceased to be entitled to receive those benefits;

(g) the investment of fund assets of retirement funds and umbrella funds and the management of those investments;

(h) the number of individual trustees, and the composition of boards or committees of trustees, of restricted funds;

(i) fit and proper person requirements for trustees, investment managers, custodians and administrators;

(j) disclosure of information by trustees of a restricted fund to other trustees of the fund.

Investment management agreements not to exclude liability for negligence

**37.** A provision of an agreement between a trustee of a retirement fund or the operator of an umbrella fund and an investment manager that purports to exempt the investment manager from liability for negligence, or to limit that liability, shall be void.

Investment management agreements—provision of information

**38.—(1)** An investment management agreement shall include adequate provision to enable the trustee or operator to require the investment manager—

(a) to provide appropriate information as to the making of, and return on, the investments made with those assets; and

(b) to provide whatever information is necessary to enable the trustee or operator to assess the capability of the investment manager to select and manage the investments; whenever it is necessary or desirable to do so.

(2) If an investment management agreement entered into before the commencement of this section does not include provision required by subsection (1), the trustee or operator shall, as soon as practicable—

(a) ensure that the agreement is amended so that it contains such provision; or

(b) if the investment manager refuses to agree to such an amendment—terminate the agreement.

(3) The trustee or operator—

(a) may terminate an investment management agreement under subsection (2) (b) despite anything in the agreement; and

(b) shall not be under any liability to the investment manager because of such a termination.

Retirement fund assets to be invested at arm's length

**39.**—(1) A trustee of a retirement fund shall not invest fund assets unless—

(a) the trustee and the other party to the transaction are dealing with each other at arm's length in respect of the transaction; or

(b) the terms of the transaction are no more favourable to the other party than those that it is reasonable to expect would apply if the trustee were dealing with the other party at arm's length in similar circumstances.

(2) Subsection (1) applies to the investment manager of a retirement fund in the same way as it applies to the trustee of the fund.

(3) Any person who contravenes subsection (1) or (2) shall be guilty of an offence and shall be liable on conviction [*insert penalty*].

(4) A contravention of subsection (1) or (2) shall not affect the validity of a transaction.

(5) A reference in this section to a trustee and another party to a transaction dealing with each other at arm's length is a reference to the trustee and the other party dealing with each other on the basis that—

(a) each is pursuing its own commercial interests in relation to the transaction; and

(b) neither is preferring the other's interests in relation to the transactions to its own interests.

Restriction on  
employer  
assets

**40.**—(1) A trustee of a retirement fund shall not acquire an employer asset as an asset of the fund if—

(a) the fund's employer asset percentage is five per cent (5%) or more; or



(b) because of the acquisition of the asset, the fund's employer asset percentage would be more than five per cent (5%).

(2) If at any time (including the time of commencement of this section) the employer asset percentage of a retirement fund is more than five per cent (5%)—

(a) the trustee shall notify the Registrar as soon as practicable; and

(b) the trustee shall, within one (1) month after the notification, formulate a plan to dispose of employer assets of the fund so that the fund's employer asset percentage will be no more than five per cent (5%), and submit it to the Registrar.

(3) If the Registrar approves the plan, then, subject to any directions under subsection (7), the trustee shall implement the plan and report to the Registrar on the implementation of the plan every three (3) months until the fund's employer asset percentage is than five per cent (5%) or less.

(4) The Registrar shall be deemed to have approved a plan submitted to him under subsection (2) (b) at the end of fourteen (14) days after the plan was submitted to him unless, within the fourteen (14) days, the Registrar gives written notice to the trustee—

(a) that approval is refused; or

(b) extending the period for dealing with the plan.

The Registrar may extend more than once the period for dealing with the plan.

Act No. ... of 2007 (5) A decision of the Registrar to refuse to approve a plan under this section is declared to be a reviewable decision, and notice of the decision shall be given to the trustee of the fund in accordance with section 68 of the Financial Services Act, 2007.

(6) A person shall not take part in a scheme with the intention that the trustee of a retirement fund acquire (either directly or indirectly through one or more interposed companies, partnerships or trusts) an employer asset contrary to this section.

(7) The Registrar may give a written direction to a trustee of a retirement fund at any time in relation to disposal of employer assets.

(8) Any person who contravenes subsection (1), (2), (3) or (6) shall be guilty of an offence and shall be liable on conviction [*insert penalty*].

Financial  
assistance to  
fund members

**41.**—(1) A trustee or an investment manager of a retirement fund shall not lend money of the fund, or use fund assets to give any other financial assistance, to a fund member or a relative of a fund member.

(2) The trustee or an investment manager of an umbrella fund shall not lend money of the fund, or use fund assets to

give any other financial assistance, to a member of the fund or an associate of a member of the fund.

(3) Without limiting subsection (1) or (2), lending money or giving financial assistance to a person includes lending money or giving financial assistance to a company where the person owns more than fifty per cent (50%) of the voting shares in the company.

(4) Any person who contravenes subsection (1) or (2) is guilty of an offence and shall be liable on conviction [*insert penalty*].

(5) Subsections (1) and (2) shall not apply to a loan made before the commencement of this section that was not in breach of the fund rules of the fund concerned.

(6) For the avoidance of doubt, subsections (1) and (2) apply to an extension of the term of a loan made before the commencement of this section, and the provision of further loan funds under such a loan.

Retirement funds  
not to acquire  
assets from  
members or  
associates

**42.**—(1) The trustee or an investment manager of a retirement fund shall not knowingly acquire an asset from a fund member or an associate of a fund member except as authorized by Registrar's directives.

(2) A person shall not take part in a scheme with the intention that the trustee or an investment manager of a retirement fund acquire (either directly or indirectly through

one or more interposed companies, partnerships or trusts) an asset from a fund member or an associate of a fund member, except as authorized by Registrar's directives.

(3) Any person who contravenes subsection (1) or (2) is guilty of an offence and shall be liable on conviction [*insert penalty*].

(4) In this section—

“acquire an asset” does not include accept money by way of contribution;

“associate” of a fund member means—

(a) a spouse, child or relative of the fund member;  
and

(b) a partner, or a spouse, child or relative of a partner, of the fund member.

Retirement funds  
not to borrow

**43.**—(1) The trustee of a retirement fund shall not borrow money or maintain an existing borrowing of money except as authorized by Registrar's directives.

(2) Any person who contravenes subsection (1) is guilty of an offence and shall be liable on conviction [*insert penalty*].

Investments  
outside Malaŵi

**44.** Fund assets of a retirement fund or an umbrella fund shall not be invested outside Malaŵi except in compliance with the Exchange Control Act.

Cap XR:XR

Retirement  
funds—  
complaint  
resolution  
mechanisms

45.—(1) The trustee of a retirement fund shall take reasonable steps to ensure that, at all times, arrangements are in force under which—

(a) persons referred to in subsection (2) have the right to make an inquiry or a complaint as specified in that subsection; and

(b) such inquiries and complaints are properly considered and dealt with within ninety (90) days.

(2) For subsection (1) (a)—

(a) a beneficiary or former beneficiary of the fund may make an inquiry into, or complaint about, the operation or management of the fund in relation to him;

(b) the legal personal representative of a former beneficiary of the fund may make an inquiry into, or complaint about, the operation or management of the fund in relation to the former beneficiary; and

(c) without limiting paragraph (a) or (b), any person may make an inquiry into, or complaint about, a decision of a trustee of such a fund that relates to the payment of a death benefit if—

(i) he has or claims to have an interest in the death benefit; or

(ii) he claims to be entitled to death benefits through a person who has an interest in the death benefit.

PART VI—GIVING INFORMATION TO FUND MEMBERS AND  
BENEFICIARIES

Fund information and  
fund member  
information

**46.**—(1) The trustee of a retirement fund shall ensure that—

(a) a person who becomes a fund member is given fund information before, or, if that is not practicable, as soon as practicable after, he becomes a fund member; and

(b) each fund member is given fund information, and fund member information relating to the member, at times prescribed by Registrar’s directives for the purposes of this section.

(2) Information given under subsection (1) shall be meaningful, accurate and complete.

Unrestricted  
funds—information  
for prospective  
members,  
applications for  
membership

Act No. ... of 2007

**47.** Without limiting the Registrar’s power under the Financial Services Act, 2007 to issue Registrar’s directives, Registrar’s directives may make provision with respect to offering membership in, and admitting persons as fund members of, unrestricted funds, including provision with respect to—

(a) applications for membership;

(b) documents to be provided to applicants for membership and their employers; and

(c) the circumstances in which the trustee may admit a person to membership of a fund.

Trustees of retirement funds to give information to fund members

**48.**—(1) The trustee of a retirement fund shall comply with any reasonable request by a fund member—

(a) for information about the fund; or

(b) for information about his entitlements in the fund.

(2) The trustee of a retirement fund does not have to comply with a request under subsection (1) if he complied with such a request within six (6) months before the request was made.

#### PART VII—CONTRIBUTIONS AND INVESTMENT RETURNS

Employer to remit contributions promptly

**49.**—(1) If, under this Act or the fund rules of a retirement fund, a fund employer is under an obligation to make employer contributions in respect of a fund member, the employer shall pay to the trustee, or as the trustee directs, the amount of those contributions no later than fourteen (14) days after the end of the month in which the liability to make the contributions arose.

(2) An employer who contravenes subsection (1) is guilty of an offence and on conviction shall be liable to [*insert penalty*].

(3) If—

(a) an employer of an employee is authorized (whether by the employee, by law or otherwise) to deduct an amount from remuneration payable by the employer to the

employee and pay the amount of the deduction to a trustee of a retirement fund by way of employee contribution; and

(b) the employer makes such a deduction.

the employer shall pay to the trustee (or as the trustee directs) the amount of the deduction no later than fourteen (14) days after the end of the month in which deduction was or should have been made.

(4) An employer who contravenes subsection (3) is guilty of an offence and on conviction shall be liable to [*insert penalty—should be higher than the penalty for subclause (2)*].

(5) A fund employer who contravenes subsection (1) or (3) shall be liable to pay the trustee of the retirement fund interest, at the rate prescribed by the Minister by regulation, in respect of each month or part of a month during which any such amount (including interest) is outstanding, until the full amount (including interest) is paid.

(6) Amounts paid as interest under subsection (5) shall be treated for all purposes as employee contributions.

Member accounts

**50.** The trustee of a retirement fund shall establish and maintain a separate account in its books for each fund member, in accordance with the Registrar's directives.

Accumulation  
funds—what is to be  
credited and debited  
to fund member  
accounts

**51.**—(1) The trustee of an accumulation fund shall credit the following amounts to a fund member's account—



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(a) the amounts of the employer contributions and employee contributions paid to the trustee in respect of the fund member;

(b) investment returns, in accordance with the fund rules and Registrar's directives.

(2) The trustee of an accumulation fund who receives a contribution in respect of a fund member in a month shall allocate the contribution to the fund member's account—

(a) within fourteen (14) days after the end of the month;  
or

(b) if that is not reasonably practicable—as soon as practicable thereafter.

(3) The trustee of an accumulation fund shall debit a fund member's account, in accordance with the fund rules and Registrar's directives, with the following amounts—

(a) amounts of benefits paid from the fund in respect of the fund member;

(b) fees and charges;

(c) amounts owed by the fund member to the trustee in respect of the fund;

(d) the proportion of the fund's investment losses allocated to the account in accordance with Registrar's directives.

Defined benefit funds—  
Registrar's directives

**52.** The trustee of a defined benefit fund shall credit to a fund member's account such amounts as are prescribed by Registrar's directives.

PART VIII—PENSIONS AND OTHER BENEFITS

Division 1—Payment of benefits

Pension funds—  
conditions for  
payments of  
benefits

**53.**—(1) Subject to this Act, benefits in respect of a fund member of a pension fund shall be payable out of the fund only if, on application, the trustee is satisfied that—

(a) the fund member has reached retirement age and has retired;

(b) the fund member is totally and permanently disabled;

(c) the fund member is about to leave or has left Malaŵi;

(d) the fund member has died;

(e) the fund member has permanently left the service of the employer (whether because he resigned or because the employer terminated his employment (for any reason)) otherwise than in circumstances described in paragraphs (a) to (d); or

(f) the Registrar has given permission under section 54 (1).

(2) Subsection (1) (e) does not apply in respect of applications made after the end of three (3) years after the commencement of this Division.

(3) Subject to this Act, benefits in respect of a fund member of a provident fund shall be payable out of the fund only if, on application, the trustee is satisfied that—

(a) the fund member has reached retirement age;

(b) the fund member has permanently left the service of the employer;

(c) the fund member is totally and permanently disabled;

(d) the fund member is about to leave or has left Malaŵi;  
or

(e) the fund member has died.

(4) An application for the purposes of this section shall be made—

(a) by or with the authority of the fund member;

(b) in the case of a fund member who has died or is under a legal disability—by or with the authority of the fund member's legal personal representative;

(c) otherwise—in accordance with Registrar's directives.

Early payment of  
benefits on  
exceptional  
hardship grounds

**54.**—(1) The Registrar may, on application by a fund member of a retirement fund, permit the trustee of the fund to

pay benefits to the fund member out of the fund if the Registrar is satisfied that—

(a) the fund member is suffering exceptional hardship that would be materially alleviated if the benefits were paid; and

(b) it is in the public interest to permit the benefits to be paid despite the objects of this Act.

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

(3) A decision of the Registrar—

(a) to refuse to give permission for the purposes of this section; or

(b) to give such permission subject to conditions;

is declared to be a reviewable decision, and notice of the decision shall be given to the fund member, and the trustee of the fund, in accordance with section 68 of the Financial Services Act, 2007.

Retirement funds—  
immediate vesting  
of contributions

**55.** For the purpose of calculating and paying benefits in respect of members of retirement funds, employer contributions received by the trustee of the fund shall be taken into account without any period having to elapse or any other condition to be satisfied (for example, a condition that the employee have remained in service with a fund employer for a specified period).

Pension fund  
benefits to be paid  
as annuities

**56.**—(1) Except as provided by this Act or Registrar's directives—

(a) benefits payable in respect of a fund member of a pension fund shall be paid as a pension or annuity;

(b) a pension or annuity payable to a fund member of a pension fund shall be a pension or annuity for life; and

(c) a pension or annuity payable to a widow or widower of a fund member of a pension fund shall be a pension or an annuity for at least 20 years.

(2) The amount of a pension or annuity payable to a widow or child of a deceased fund member of a pension fund shall not exceed the pension or annuity that would have been payable to the fund member if he had not died.

(3) Payment of an annuity or pension to a fund member of a pension fund on the basis that the fund member has retired shall not begin unless the trustee is satisfied that the fund member has reached retirement age.

Commutation of  
annuities into  
lump sums

**57.**—(1) If the fund rules permit, a pension or annuity payable in respect of a fund member of a pension fund may, in accordance with the fund rules but subject to this section and the Registrar's directives, be commuted into a lump sum.

(2) The maximum that may be commuted shall be calculated as follows—

(a) calculate the amount of the lump sum that would be payable if all the pensions and annuities payable in respect of the fund member were commuted in accordance with the fund rules and the Registrar's directives;

(b) if the amount calculated under paragraph (a) does not exceed the amount prescribed for the purpose of this paragraph in Registrar's directives—all the pensions and annuities payable in respect of the fund member may be commuted;

(c) otherwise—up to one-third of the amount calculated under paragraph (a) may be commuted;

(d) if the pensions or annuities are payable on the basis that the fund member has left, or is about to leave, Malaŵi permanently—all the pensions and annuities payable in respect of the fund member may be commuted.

Payment of benefits on the ground that the fund member has permanently left the service of the employer or on leaving Malaŵi permanently

**58.**—(1) The amount of benefits payable in respect of a fund member on the ground set out in section 53 (1) (e) (that is, that the fund member has permanently left the service of the employer) shall not exceed the amount that, together with all other amounts of benefits paid in respect of the member out of the fund on that ground, equals—

(a) if the fund is an accumulation fund—the amount calculated under subsection (2); and

(b) if the fund is a defined benefit fund— the amount calculated under subsection (3)

(2) For subsection (1) (a), the amount is the lesser of—  
(a) the total amount of the employee contributions credited to the account; and

(b) the amount calculated using the formula—

$$\frac{\text{credit amount}}{3} \times \left( \frac{36 - \text{period}}{36} \right)$$

where—

“credit amount” means the amount standing to the credit of the fund member’s account at the date of the application;

“period” means the number of whole months elapsed between the date of commencement of this Division and the date of the application.

(3) For subsection (1) (b), the amount is the lesser of—  
(a) the total amount of the employee contributions credited to the account; and

(b) the amount calculated using the formula—

$$\frac{\text{current value}}{3} \times \left( \frac{36 - \text{period}}{36} \right)$$

where—

“current value” means the value, of the fund member’s benefits in the fund at the date of the application;

“period” has the meaning given to it in subsection (2).

(4) To avoid doubt, in subsections (1), (2), and (3), “employee contributions” includes investment returns credited to the fund member’s account to the extent attributable to the employee contributions.

(5) Benefits payable from a retirement fund in respect of a fund member on the basis that the fund member has left, or is about to leave, Malaŵi permanently shall be payable as follows—

(a) [*insert percentage*] per cent (*insert percentage*%) of the amount payable shall be payable on granting of the application; and

(b) the balance of the amount payable shall be payable at the end of 12 months after the payment made under paragraph (a), but only if the trustee is then satisfied that the fund member has left Malaŵi permanently.

Death benefit  
nominations

**59.**—(1) A fund member of a retirement fund may give the trustee a written nomination directing the trustee to pay the fund member’s benefits on his death to all of any of the following—

(a) his widow or widower;

(b) his child;

(c) his relative.

(2) A nomination shall set out the amount or proportion of the benefits to be paid to each of the persons specified.



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(3) A fund member may amend a nomination by written notice to the trustee, but shall not do so more than once in any period of twelve (12) months.

(4) A fund member may revoke a nomination by written notice to the trustee.

(5) A nomination shall be revoked by the later marriage of the fund member.

(6) A nomination and a revocation of a nomination shall be signed by the fund member, but if the fund member is unable to sign his name, his thumb impression may be affixed in the presence of—

(a) a trustee of the fund;

(b) if the trustee is a corporate trustee—a director or officer of the trustee; or

(c) a person prescribed by Registrar's directives for the purposes of this section.

(7) If the thumbprint of the fund member is so affixed, the nomination or revocation shall be deemed to be signed by the fund member.

(8) The trustee shall not accept a nomination or a revocation of a nomination if it appears to the trustee that the nomination or revocation was not made voluntarily.

Payment of death  
benefits

**60.**—(1) If a fund member's nomination to the trustee of a retirement fund is current at the death of the member, then, subject to this section, benefits payable out of the fund on the member's death shall be paid as directed in the nomination.

(2) The trustee shall not pay the death benefits in accordance with the nomination if it appears to the trustee that the nomination was not made voluntarily.

(3) The trustee shall not pay benefits to a relative of a fund member as directed by a nomination unless the trustee is satisfied that the relative was, at the time of the member's death, financially dependant on the member.

(4) If, in relation to all or a part of the benefits payable on the death of a fund member of a retirement fund—

(a) the fund member does not have a nomination current on his death; or

(b) under subsection 59 (8), the trustee has not accepted a nomination from the fund member;

then, subject to this Act but despite any other law to the contrary, those benefits, or that part of those benefits, shall be paid, in such proportions as the trustee determines, to a person or persons determined by the trustee of the fund, being a person or persons who, the trustee is satisfied, was or were financially dependent on the fund member at the time of his death.

(5) If a person to whom benefits are to be paid under this section (other than a surviving spouse of the fund member) is under 18, the amount of the benefit shall be held by the trustee in trust for the person, to be paid to him when he turns 18 and the following apply in this case—

(a) the amount shall not be part of the fund assets of the retirement fund, but may be invested and applied together with those fund assets;

(b) the trustee may at any time pay to the parent or guardian of the person any amount from the capital or income of the trust as the trustee thinks appropriate for the maintenance, education or welfare of the person;

(c) the trustee shall not be bound to see to the application of amounts paid under paragraph (b).

“Severance payments” and retirement fund benefits

**61.**—(1) This section shall apply if—

(a) an employee is a fund member of a retirement fund;

(b) the employee ceases to be employed by the employer;

(c) the employer is required by a written law other than this Act to pay an amount to the employee because of the cessation of employment; and

(d) the employer makes the payment.

(2) Despite any other provision of this Act or the fund rules to the contrary, the employer is entitled to be paid, out of the fund, an amount equal to the lesser of—

(a) the sum of the employer contributions made by the employer to the fund in respect of the employee, plus the amount equal to the investment return determined by the trustee as attributable to those contributions; and

(b) the amount mentioned in subsection (1) (c).

(3) Subsection (2) shall not have effect if the written law referred to in that subsection provides that the only case in which the amount mentioned in subsection (1) (c) is payable is the case where the employer terminates the employee's employment otherwise than for breach of the contract of employment by the employee.

(4) Notwithstanding subsection (3), subsection (2) shall apply where the retirement fund is a provident fund.

Division 2—Protection of benefits

Benefits not to be attached etc

**62.**—(1) Except as provided by this Act—

(a) amounts paid as contribution to a retirement fund in respect of a fund member;

(b) a fund member's entitlement to benefits in a retirement fund; and

(c) amounts paid out of a retirement fund by way of benefits in respect of a fund member;

shall not be liable to be attached, sequestrated or levied upon for or in respect of any debt or claim whatsoever.

(2) Except as provided by this Act, a fund member's entitlement to benefits in a retirement fund is not part of his estate.

Effect of bankruptcies

**63.**—(1) The bankruptcy of an employee, and an act of bankruptcy by an employee, shall not affect—

(a) any liability of his employer to pay employer contributions to a retirement fund; or

(b) any entitlement of the employee to benefits from a retirement fund.

(2) Subsection (1) shall apply notwithstanding any other law, and despite any provision in the employee's contract of employment or in any other agreement, arrangement or understanding (express or implied, formal or informal, written or not and whether or not enforceable).

Benefits cannot be pledged etc

**64.**—(1) A fund member's entitlement to benefits in a retirement fund shall not be capable of being assigned or transferred, or pledged or charged or otherwise being subject to a security interest (however described).

(2) The trustee of a retirement fund shall not recognize, or in any way encourage or sanction, a purported assignment or transfer of, or the granting of a pledge, charge or other security interest (however described) in respect of, a fund member's entitlement to benefits.

PART IX—MISCELLANEOUS

Significant  
adverse effects to  
be notified

**65.**—(1) If a trustee of a retirement fund or an umbrella fund becomes aware that an event has occurred that has a significant adverse effect on the financial position of the fund, the trustee shall, within three (3) days, give written notice to the Registrar setting out particulars of the event.

(2) If the retirement fund has a group of individual trustees and, within the three (3) days, one of them gives the notice as required by subsection (1), the notice shall be deemed to have been given by all of them.

(3) For the purposes of subsection (1), an event has a significant adverse effect on the financial position of a fund if, as a result of the event, at any time with the next twelve (12) months the trustee will not, or may not, be able to make payments to beneficiaries as and when the obligation to make the payments arises.

Payments to  
employers  
restricted

**66.**—(1) Except as provided by this section, the trustee of an employer pension fund shall not pay an amount, or permit an amount to be paid, out of the fund to a fund employer.

(2) Subsection (1) shall not apply where its application would result in the arbitrary deprivation of a person's property.

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(3) The trustee may pay a reasonable amount to a fund employer for services rendered in connection with the management or operation of the fund.

(4) The trustee may pay a reasonable amount to a fund employer if the following requirements are met—

(a) apart from this section, the fund rules require or permit the amount to be paid to the employer;

(b) the directors of the trustee (if the fund has a single corporate trustee) or the trustees (if the fund has a group of individual trustees), by resolution (the “first resolution”), declared their intention to pay the amount to the employer;

(c) at the time the first resolution is passed, the trustee complies with the equal representation rule;

(d) at, or within one (1) month before, the time the first resolution was passed, an actuary had given a written certificate to the trustee stating that, if the amount were paid, the fund would remain in a satisfactory financial position;

(e) the trustee gives notice in accordance with the fund rules to fund members—

(i) stating its intention to make the payment, and the reasons therefor;

(ii) stating that an actuary has given the certificate required by paragraph (d); and

(iii) setting out particulars of any amendment to the fund rules proposed to be made if the amount is to be paid to the employer;

(f) the trustee is reasonably satisfied that the notice has come to the attention of all the fund members other than fund members who, under Registrar's directives for the purposes of this paragraph, are lost members; and

(g) at the end of three (3) months after the notice is given, the directors of the trustee (if the fund has a single corporate trustee) or the trustees (if the fund has a group of individual trustees), by resolution (the "second resolution"), declare that—

(i) they are satisfied, having regard to the interests of the fund members and the employer, and any matters raised by fund members, that the payment of the amount and the making of the changes, if any, to the fund rules are reasonable; and

(ii) they authorize the payment of the amount, or a lesser amount, to the employer;

(h) at the time the second resolution is passed, the trustee complies with the equal representation rule;

(i) the payment is made within fourteen (14) days after the second resolution is passed;

(j) any other requirements prescribed in Registrar's directives for the purposes of this subsection.



(5) This section does not authorize a loan to, or an investment in, the employer.

(6) The Registrar may, on application by the trustee of a retirement fund, waive any or all of the requirements in subsection (4).

Victimization of trustees

**67.**—(1) A person shall not victimize a trustee of, or an officer or employee of a corporate trustee of, a restricted fund.

(2) Any person who contravenes subsection (1) is guilty of an offence and on conviction shall be liable [*insert penalty*].

(3) If a person (the “defendant”) victimizes a trustee of, or an officer or employee of a corporate trustee of, a restricted fund (each a “plaintiff”), the plaintiff may recover the amount of any loss or damage he suffers because of the victimization by action against the defendant.

(4) In this section—

“victimize” means subject, or threaten to subject, the trustee, officer or employee to a detriment on the ground that the trustee, officer or employee —

(a) has exercised, is exercising or is proposing to exercise a power he has as trustee, or as an officer or employee of the trustee, or has exercised, is exercising or is proposing to exercise such a power in a particular way; or

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(b) has performed, is performing or is proposing to perform a duty or function he has as trustee, or as an officer or employee of the trustee, or has performed, is performing or is proposing to perform such a duty or function in a particular way.

(5) For the purposes of this section—

(a) an employer subjects a trustee, or an officer or employee of a trustee, who is an employee of the employer to a detriment if he—

(i) dismisses the employee; or

(ii) injures the employee in his or her employment;  
or

(iii) alters the position of the employee to the employee's prejudice; but

(b) an employer shall not be deemed to subject an employee to a detriment merely because the employer—

(i) permanently ceases to be a fund employer of the fund; or

(ii) temporarily ceases to contribute to the fund in respect of a class of fund members in which the employee is included; or

(iii) reduces the level of employer contributions to the fund in respect of a class of fund members in which the employee is included.

(6) In proceedings under subsection (3)—

(a) it is not necessary for the plaintiff to prove the defendant's reason for the alleged action; and

(b) it is a defence if it is established that the action was not motivated (whether in whole or in part) by the alleged reason.

Rule against remoteness of vesting

**68.** The rule of law against remoteness of vesting shall not apply in relation to a retirement fund established after the commencement of this Act.

Protection for discharging obligations

**69.** A person shall not be liable in a civil action or civil proceeding in relation to an act done to discharge an obligation imposed by this Act, the regulations or Registrar's directives in relation to retirement funds or umbrella funds.

Regulations  
Act No. ... of 2007

**70.** The Minister's power to make regulations for the purposes of this Act is conferred by the Financial Services Act, 2007.

PART X—TRANSITIONAL

Transitional

**71.—(1)** The Registrar may, either on application or on his own initiative, declare by written instrument that a specified provision of this Act mentioned in section 1 (b) shall come into operation in relation to a specified person on a later date than the date provided for in that paragraph.

(2) A declaration under subsection (1) may apply generally or in a class of cases specified in the declaration, and may be subject to conditions specified in the declaration.

OBJECTS AND REASONS

[name]

*[Ministry]*



## **Attachment 4**

### **Draft Reserve Bank of Malawi Bill**

**RESERVE BANK OF MALAWI AMENDMENT BILL,  
2007**

**ARRANGEMENT OF CLAUSES**

CLAUSE

1. Short title and commencement
2. Amendment of long title
3. Reserve Bank of Malawi Act, amendment of s. 2
4. Amendment of s. 4
5. New s. 4A
6. Amendment of s. 6
7. New s. 6A, 6B, 6C
8. Amendment of s. 7
9. Repeal, substitution of s. 9
10. Amendment of s. 11
11. New s. 11A, 11B
12. Amendment of s. 12
13. Amendment of s. 13
14. Amendment of s. 14
15. New s. 15A, 15B
16. Repeal of Pt IX
17. Amendment of s. 54
18. Repeal, substitution of s. 59

- 19. Amendment of s. 60
- 20. New Schedule
- 21. Savings

## A BILL

*entitled*

**An Act to amend the Reserve Bank of Malawi Act to improve the governance of the Reserve Bank of Malawi and in consequence of the enactment of Financial Services Act, 2007, the Retirement Funds Act, 2007, the Securities Act, 2007 and the Insurance Act, 2007, and for matters connected therewith and incidental thereto**

ENACTED by the Parliament of Malawi as follows—

1. This Act may be cited as the Reserve Bank of Malawi Amendment Act, 2007 and shall come into operation on a date appointed by the Minister by notice in the *Gazette*. Short title and commencement

2. The long title to the Reserve Bank of Malawi Act (hereafter in this Part called the “Principal Act”) is amended by omitting the words “to provide for the supervision of banks and financial institutions;”. Amendment of long title

3. Section 2 of the Principal Act is amended— Amendment of s. 2

(a) by omitting the definition of “bank” and substituting the following definition—

“‘bank’ means a company licensed as a bank under the Banking Act;”;

(b) by inserting the following definitions after the definition of “Board”—

“‘Code of Conduct’ means the code set out in the Schedule, as amended under section 15B;

‘controlling party’ has the same meaning as in the Financial Services Act;”;

(c) by omitting the definition of “Deputy Governor” and substituting the following definition—

“Deputy Governor” means a Deputy Governor of the Bank appointed under section 12;”;

(d) by omitting the definition of “director” and substituting the following definition—

“director’, in relation to the Bank, means a member of the Board and includes the Governor and the Deputy Governors;”;

(e) by omitting the definition of “financial institution” and substituting the following definitions—

“financial institution’ means a person that is or is required to be licensed or registered under a financial services law;

‘financial services law’ means any of the following—

- (a) this Act;
  - (b) the Financial Services Act, 2007;
  - (c) the Banking Act;
  - (d) the Insurance Act;
  - (e) the Retirement Funds Act, 2007;
  - (f) the Securities Act;
  - (g) another law that is a financial services law for the purposes of the Financial Services Act;”;
- and

(f) by omitting the definition of “other financial institution”.

4. Section 4 (1) of the Principal Act is amended by omitting paragraph (h) and substituting the following paragraph—

Amendment of s.  
4

“(h) to support the regulation and supervision of banks and other financial institutions in accordance with financial services laws;”.



5. The Principal Act is amended by inserting after section 4 but in Part III the following new section—

New s. 4A

“4A.—(1) Except as provided by this Act, the Bank is independent and is not subject to direction by any person.

Bank is independent

“(2) Any person who improperly seeks to influence the Bank, or a director or employee of the Bank, in the performance of its or his functions commits an offence and shall, on conviction, be liable to [*insert penalty*].

“(3) If, after consultation with the Governor, the Minister is of the opinion that—

(a) a policy being pursued by the Bank is not adequate for, or conducive to, the achievement of the objects of the Bank as set out in Part III or in a financial services law; or

(b) it is in the national interest to do so; the Minister may, by written direction, determine the policy to be adopted by the Bank.

“(4) A direction shall not relate to an individual financial institution.

“(5) The direction shall state that the Government accepts responsibility for the policy determined in the direction.

“(6) The Bank shall give effect to the policy set out in a direction under this section while the direction remains in force.

“(7) A direction under this section shall be published in the *Gazette* within 7 days after it is given to the Bank.”.

6. Section 6 of the Principal Act is amended by omitting subsections (1) to (5) (inclusive) and substituting therefor the following subsections—

Amendment of s. 6

“6.—(1) There shall be a Board of Directors of the Bank.

Board of Directors

“(2) The Board shall consist of the Governor, at least one but not more than three Deputy Governors and at least four but more than seven other directors, who may include one (but not more than one at any time) of the Secretary to the Treasury, the Secretary for Economic Planning and Development and the Accountant General.

“(3) The Board is responsible for the administrative and management policy of the Bank, and shall oversee the operations, administration and management of the Bank and the exercise of the Bank’s powers and functions with a view to ensuring that the Bank’s operations, administration and management are being conducted in a proper, efficient and effective way.”

7. The Principal Act is amended by inserting after section 6 the following new sections—

New s. 6A, 6B,  
6C

“**6A.**—(1) The Governor and the Deputy Governors shall be appointed by the President, with the approval of the Parliament.

Appointments

“(2) The other directors shall be appointed by the President.

(3) The Governor and the Deputy Governors shall be appointed for a term of five years and shall be eligible for reappointment.

“(4) The other directors shall be appointed for a term of three years and shall be eligible for reappointment.

“**6B.**—(1) A person shall not be appointed to be the Governor unless the President is satisfied that the person is a fit and proper person to hold the office of Governor and qualified for the appointment by virtue of his or her knowledge of, or experience in, the fields of economics.

Qualifications  
for appointment

“(2) A person shall not be appointed to be a Deputy Governor or a director unless the President is satisfied that the person is a fit and proper person to hold the

office of director and qualified for the appointment by virtue of his or her knowledge of, or experience in, one or more of the following fields—

- (a) economics;
- (b) finance;
- (c) financial markets, financial products or financial services;
- (d) financial sector supervision and regulation;
- (e) law;
- (f) accounting;
- (g) other fields relevant to central banking.

“6C.—(1) With a view to ensuring continuity, appointments and reappointments to the Board shall, wherever practicable, be made in such a way that at least one half of the number of directors shall continue to serve on the Board. Continuity and experience

“(2) Appointments and reappointments to the Board shall be made with a view to ensuring that at all times the Board has an appropriate range of relevant skills and experience.”.

**8. Section 7 of the Principal Act is amended—** Amendment of s. 7

(a) by omitting “, or, if already a director, to remain a director”;

(b) by omitting paragraphs (b) and (c) and substituting the following paragraphs—

“(b) a financial institution, or a director, salaried official or employee of a financial institution;

(ba) a controlling party of a financial institution;

(bb) a person that provides or is engaged to provide (whether as a member of a firm or not) professional services to the Bank or a financial institution;

(c) a public officer (other than one mentioned in section 6 (2));

(ca) a person who is disqualified, whether in Malawi or elsewhere, from acting as a director or official of a body corporate under a law relating to corporations or to the provision of financial services;” and

(c) in paragraph (f), by deleting the words “involving an element of fraud” and substituting therefore the words “involving an element of dishonesty, fraud”.

9. Section 9 of the Principal Act is repealed and the following section substituted—

Repeal,  
substitution of s.  
9

“9.—(1) The appointment of a director immediately terminates if the director—

Termination of  
appointments

(a) becomes a member of the Parliament;

(b) becomes a financial institution, or a director, salaried official or employee of a financial institution;

(c) provides or is engaged to provide (whether as a member of a firm or not) professional services to the Bank or a financial institution;

(d) 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;

(e) becomes a public officer (other than one mentioned in section 6 (2));

(f) comes under legal disability;

(g) is adjudged bankrupt by a competent court in Malawi;

(h) in Malawi, makes an arrangement or composition with, or suspends payment to, his creditors;

(i) is convicted in Malawi of an offence of a kind referred to in section 7 (f); or

(j) is removed from office in Malawi as mentioned in section 7 (g).

“(2) The President may terminate a director’s appointment on the ground that the director—

(a) has ceased to be fit and proper to be a director;

(b) is suffering from a mental or physical condition such that he cannot properly carry out the duties of the office;

(c) has failed, without leave of the Board, to attend more than three consecutive meetings of the Board;

(d) is a controlling party of a financial institution;

(e) 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;

(f) has been adjudged bankrupt by a competent court outside Malawi;

(g) while outside Malawi, has made an arrangement or composition with, or has suspended payment to, his creditors;

(h) has been convicted outside Malawi of an offence of a kind referred to in section 7 (f); and

(i) has been removed from office outside Malawi as mentioned in section 7 (g); or

(j) has failed to comply with the Code of Conduct in a material particular.”.

**10.** Section 11 (1) of the Principal Act is amended by <sup>Amendment of s.</sup> omitting the words “and, in his absence the Deputy <sup>11</sup> Governor shall be chairman” and substituting therefor the words “and, in his absence, a Deputy Governor nominated by the Governor shall be chairman”.

**11.** The Principal Act is amended by inserting after section 11 the following new sections—

New s. 11A, 11B

“**11A.**—(1) Each director shall disclose in writing to each other director all interests that the director has that could conflict with the proper performance of the functions of his office, whether the interests were acquired before or after appointment.

Disclosure of interests

“(2) A disclosure under subsection (1) shall be given as soon as practicable after the director becomes aware of the interest.

“(3) The Bank shall record all disclosures under this section.

“(4) A director who has an interest that could conflict with the proper performance of the functions of his office in relation to a particular matter shall not perform functions in relation to the matter.

“(5) For subsections (1) and (4), it does not matter whether the interest is direct, indirect, pecuniary or non-pecuniary, nor when the interest was acquired.

“(6) For the purposes of this section, if—

(a) an associate of a director has an interest; and

(b) if the director had the interest, it could conflict with the proper performance of the functions of the director’s office;

the director is taken to have the interest, and this section applies accordingly.

“(8) The Bank must take reasonable steps to ensure that its employees, and other persons performing or exercising functions or powers of the Bank under financial services laws, make proper and adequate disclosure of their interests.

“(9) In this section—

“associate” of a person means—

(a) a spouse, child or relative of the person;

and

(b) a partner, or a spouse, child or relative of a partner, of the person.

“**11B.**—(1) The Board must ensure that there are at all times the following committees of the Board.

Audit etc  
Committees

(a) an Audit Committee;

(b) a Directors’ Affairs and Remuneration Committee;

(c) a Regulation and Supervision Committee.

“(2) A committee mentioned in subsection (1) shall consist of such directors as the Board appoints to the committee. The Board may, by resolution, remove a director from a committee.

“(3) Subject to any direction of the Board—

(a) a committee mentioned in subsection (1) may obtain assistance from employees of the Bank and other persons; and

(b) the procedure of a committee shall be as determined by the committee.

“(4) The functions of the committees are to be as prescribed, and such other functions as the Board confers on them.

“(5) The Board may establish other committees, and confer functions on them, as it thinks fit.”

**12.** Section 12 of the Principal Act is amended—

Amendment of s.  
12

(a) by omitting subsections (1) and (2); and

(b) by omitting subsections (3) and (4) and substituting therefor the following subsections—

“(3) The Governor and Deputy Governors shall be appointed on such terms and conditions as may be set out in the instrument of appointment, which terms and conditions shall not be altered to the disadvantage of the Governor or a Deputy Governor during the term for which they are appointed.

“(4) Neither the Governor nor a Deputy Governor shall occupy any other office or have any other employment, whether paid or otherwise:

Provided that the Minister may give his express approval to the Governor or a Deputy Governor holding a particular office or employment.”.

**13.** Sections 13 of the Principal Act is amended by omitting subsections (3) and (4) and substituting therefore the following subsections— Amendment of s.  
13

“(3) The Deputy Governors shall perform such duties as the Governor may direct and, in the event of the absence or a vacancy in the office of the Governor, a Deputy Governor designated by the Governor shall perform the duties of the Governor and shall have and may exercise the powers and perform the functions of the Governor.

“(4) In the event of the temporary absence of both the Governor and the Deputy Governors, the Governor shall designate in writing a senior official of the Bank to perform the duties of Governor.”.

**14.** Section 14 of the Principal Act is amended by— Amendment of s.  
14

(a) omitting from paragraph (3) (a) the word “shall” and substituting therefor the word “may”; and

(b) by omitting from paragraph (3) (b) the words “for the Governor and Deputy Governor” and substituting therefor the words “for the Governor, Deputy Governors and their dependants”.

**15.** The Principal Act is amended by inserting after section 15 the following new sections— New s. 15A, 15B

“**15A.**—(1) None of the following shall be liable for any loss sustained by or damage caused to any person as a result of anything done or omitted by it or him in Protection of  
officers etc



the exercise or purported exercise of its or his powers, functions and duties—

- (a) the Bank;
- (b) a director or employee of the Bank;
- (c) an examiner or investigator appointed by the Registrar under the Financial Services Act, 2007.

“(2) Subsection (1) does not apply if it is established that the act or omission was done in bad faith.

“**15B.**—(1) The Code of Conduct shall apply to the directors and employees of the Bank. Code of Conduct

“(2) The Board may review the Code of Conduct at any time, but shall do so at least once a year.

“(3) The Board may, after a review mentioned in subsection (2), amend the Code of Conduct.

“(4) The Code of Conduct shall be consistent with this Act (other than the Schedule) and other financial services laws, and shall make provision for at least the following matters—

- (a) use and disclosure of information by directors and employees of the Bank;
- (b) reducing or eliminating improper influence on the Bank and on directors and employees of the Bank in carrying out their functions under financial services laws;
- (c) trading in and ownership of securities or other financial instruments by directors and employees of the Bank;
- (d) conflicts of interest;
- (e) receiving, keeping, holding and reporting gifts of any description by directors and employees of the Bank.

“(5) A director or employee of the Bank shall not contravene the Code of Conduct.

“(6) Contravention of the Code of Conduct is not of itself an offence, but (without limiting any other law) an employee of the Bank who contravenes the Code of Conduct commits a breach of his or her contract of service with the Bank.”.

**16.** Part IX of the Principal Act is repealed.

Repeal of Pt IX

**17.** Section 54 (2) of the Principal Act is amended by omitting from the proviso to paragraph (a) “less than one million” and substituting “less than one million Kwacha,”.

Amendment of s. 54

**18.** Section 59 of the Principal Act is repealed and the following section substituted—

Repeal, substitution of s. 59

“**59.**—(1) In this section—

Secrecy

‘individual information’ means information relating to the affairs of the Bank or another person (including a financial institution);

‘officer’ means a person who is or has been—

(a) a director or employee of the Bank;

(b) a person engaged by the Bank to provide services to it; or

(c) an examiner or investigator appointed under the Financial Services Act, 2007;

‘protected information’ means each of the following—

(a) individual information;

(b) information that would have a commercial value if disclosed otherwise than in accordance with this Act or a financial services law.

“(2) An officer shall not disclose to any person (orally or in writing) any protected information that the officer has acquired in the performance of his duties or functions as an officer.

“(3) Subsection (2) does not prevent—

(a) disclosure of a summary or collection of information of a kind referred to in paragraph (b) of the definition of 'protected information' in subsection (1) that is prepared so that information relating to any particular person cannot be found out from it;

(b) disclosure of the name of a licensed financial institution;

(c) disclosure of the addresses at which licensed financial institutions carry on business;

(d) disclosure of any other information reasonably necessary to enable members of the public to contact financial institutions;

(e) disclosure of information to the Commissioner of Taxes.

“(4) It is a defence to a prosecution for an offence under subsection (2) that—

(a) the disclosure was for the purposes and in the course of the exercise of the officer's duties or the performance of the officer's functions under a financial services law;

(b) the disclosure was made to or with the consent of the person concerned;

(c) the disclosure was made in accordance with a lawful requirement of a court of competent jurisdiction;

(d) the disclosure was authorised by a financial services law;

(e) the disclosure was required by another law; or

(f) the disclosure was authorised by regulations made for the purposes of this section.

“(5) An officer who discloses information of a kind mentioned in subsection (2) may, at the time of the disclosure, impose conditions to be complied with in relation to the information.

“(6) In addition to any disciplinary action that may be taken, any person who contravenes the provisions of this section or fails to comply with a condition imposed under subsection (5) shall be guilty of an offence and shall, on conviction, be liable to [*insert penalty*].”.

19. Section 60 of the Principal Act is amended by omitting the word “bank” (first occurring) and substituting therefor the word “Bank”. Amendment of s.  
60

20. The Principal Act is amended by adding at the end thereof the following schedule— New Schedule

**[Code of Conduct to be inserted as Schedule]**

21. A person who, on the commencement of this Part, held office as the Governor, Deputy Governor or a director of the Reserve Bank of Malawi continues to hold that office, subject to the Principal Act as amended by this Act. Savings

OBJECTS AND REASONS

[name]  
[Ministry]



## **Attachment 5**

### **Draft Banking Amendment Bill**

## **BANKING AMENDMENT BILL, 2007**

### **ARRANGEMENT OF CLAUSES**

#### CLAUSE

1. Short title and commencement
2. Substitution of long title
3. Amendment of s. 2
4. New s. 2A
5. Repeal, substitution of s. 3
6. Repeal of s. 4, 5
7. Amendment of s. 6
8. Repeal of s. 7
9. Repeal, substitution of s. 8
10. Amendment of s. 9
11. Repeal, substitution of s. 10, 11, 12, 13
12. Repeal of Part III Division I
13. Amendment of s. 15
14. Amendment of s. 16
15. Repeal of s. 18, 19, 22
16. Amendment of s. 20
17. Amendment of s. 21
18. Repeal of s. 22
19. Amendment of s. 23

- 20. Amendment of s. 24
- 21. Repeal, substitution of s. 25, 26, 27, 28
- 22. Amendment of s. 29
- 29. Amendment of s. 30
- 24. Repeal of Pt. IV
- 25. Amendment of s. 34
- 26. Amendment of s. 36
- 27. Amendment of s. 37
- 28. Amendment of s. 38
- 29. Amendment of s. 41
- 30. Amendment of s. 46
- 31. Amendment of s. 44
- 32. Amendment of s. 45
- 33. Amendment of s. 46
- 34. Amendment of s. 47
- 35. Repeal of s. 50, 52, 53, 54
- 36. Repeal, substitution of s. 56, 57
- 37. Repeal of s. 58
- 38. Repeal of Schedule
- 39. Omitting references to financial institutions
- 40. Omitting references to Reserve Bank
- 41. Savings

## A BILL

*entitled*

**An Act to amend the Banking Act in consequence of the enactment of Financial Services Act, 2007, and for matters connected therewith and incidental thereto**

ENACTED by the Parliament of Malaŵi as follows—

**1.** This Act may be cited as the Banking Amendment Act, 2007 and shall come into operation on a date appointed by the Minister by notice in the *Gazette*. Short title and commencement

**2.** The long title to the Banking Act (hereafter in this Part called the “principal Act”) is omitted and the following title substituted— Substitution of long title

**“An Act to provide for the regulation and supervision of banking in Malaŵi and to provide**

**for matters incidental thereto or connected therewith”.**

**3.** Section 2 of the principal Act is amended— Amendment of s.  
2

(a) by omitting from subsection (1) the definitions of “bank” and “banking business” and substituting therefor the following definitions—

“‘bank’ means any person who conducts banking business in Malaŵi, including by accepting funds withdrawable by cheque or transferable by other means;

‘banking business’ means the business of receiving funds from the public repayable on demand;

‘banking licence’ means a licence under a financial services law to carry on banking business;”;

(b) by omitting from subsection (1) the definitions of “control” and “financial institution”;

(c) by inserting after the definition of “official receiver: the following definitions—

“‘Registrar’ means the Registrar of Financial Institutions under the Financial Services Act;

‘Registrar’s directive’ means a directive issued under section 33 of the Financial Services Act;”;

(d) by adding at the end thereof the following subsection—

“(3) Other words and expressions used in this Act have the meanings they have in the Financial Services Act.”.

**4.** The principal Act is mended by inserting after section 2, in Part I, the following section— New s. 2A

“**2A.** This Act applies in addition to the Financial Financial Services  
Act  
Services Act.”.



5. Section 3 of the principal Act is repealed and the following section substituted—
- Repeal,  
substitution of s.  
3
- “3.—(1) A person shall not—
- Banks to be  
licensed
- (a) conduct banking business in Malawi; or
- (b) indicate to the public that he is conducting or is about to conduct banking business;
- unless he is licensed as a bank.
- “(2) The Registrar shall not license a person as a bank unless the person is a body corporate.
- “(3) Any person who contravenes subsection (1) commits an offence and on conviction, is liable to [*insert penalty*].
- “(4) Division 2 of Part III of the Financial Services Act, 2007 makes provision for licensing and registration applications.”.
6. Sections 4 and 5 of the principal Act are repealed. Repeal of s. 4, 5
7. Section 6 of the principal Act is amended— Amendment of s.  
6
- (a) by omitting from subsection (1) the words “In considering an application for a licence the Reserve Bank shall conduct an investigation to ascertain—” and substituting therefor the words “In considering an application for a banking licence, the matters that the Registrar shall take into account include the following—”;
- (b) by omitting paragraph (1) (k); and
- (c) by omitting subsection (2).
8. Section 7 of the principal Act is repealed. Repeal of s. 7
9. Section 8 of the principal Act is repealed and the following section substituted therefor— Repeal,  
substitution of s.  
8
- “8. The Registrar shall not grant a banking licence unless— Licensing  
criteria
- (a) the Registrar is satisfied that the banking business to be conducted under the licence will be

effectively managed by at least two persons as executive officers of the bank; and

(b) the bank satisfies, and the Registrar is satisfied that the bank will continue to satisfy, the requirements as to capital prescribed in Registrar's directives for the purposes of this section;

but the Registrar may grant an exemption from paragraph (b) if, in the his opinion of the Reserve Bank, the exemption is required in the public interest, or in the interest of the national economy or because of the special circumstances of the case.”.

**10.** Section 9 of the principal Act is amended—

Amendment of s.  
9

(a) by omitting from subsection (1) the words “A licence granted under this Act” and substituting therefor the words “A banking licence”; and

(b) by omitting subsection (2) and substituting therefor the following subsection—

“(2) A body corporate licensed as a bank shall not engage in any business other than banking business.”.

**11.** Sections 10, 11, 12 and 13 of the principal Act are repealed and the following sections substituted therefor—

Repeal,  
substitution of s.  
10, 11, 12, 13

“**10.** Without limiting the power of the Registrar under the Financial Services Act to suspend or revoke a banking licence, the Registrar may suspend or revoke a banking licence on any of the following grounds—

Suspension and  
revocation of  
banking licences

(a) that the licensee supplied false information in the application;

(b) that the licensee failed to commence banking business under the licence within 12 months after the grant of the licence;

(c) that the licensee has ceased to conduct banking business in Malaŵi;

(d) that the licensee has failed to comply with a condition to which the banking licence is subject;

(e) that the licensee has failed to comply with a provision of a financial services law.

“11. Where a banking licence is suspended or revoked, the power of the Registrar under the Financial Services Act, 2007 to give written direction to the bank extends to giving directions with respect to—

Directions to bank where licence suspended or revoked

(a) the disposal of its assets; and

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

“11A.—(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.

12. Division I of Part III of the principal Act is repealed.

Repeal of Part III Division I

13. Section 15 of the principal Act is amended by omitting subsection (2).

Amendment of s. 15

14. Section 16 of the principal Act is amended—

Amendment of s. 16

(a) by omitting the words “For the purpose of ensuring that banks and financial institutions comply with the requirements of section 15, the Reserve Bank may issue directives as to—” and substituting the words “Without limiting the power of the Registrar under the Financial Services Act to issue Registrar’s directives, Registrar’s directives may make provision with respect to any of the following—”; and

(b) by omitting paragraph (g).

15. Sections 17, 18 and 19 and 22 of the principal Act are repealed and the following section substituted therefor—

Repeal of s. 18, 19, 22

“17. A licensed bank shall not pay any cash dividend on its shares without the prior written approval of the registrar if the bank’s capital requirements under section 15 are not met.”.

Restriction on dividend payments

16. Section 20 of the principal Act is amended by omitting subsection (4) and substituting therefor the following subsection—

Amendment of s. 20

“(4) Every bank shall give the auditor upon appointment permission in writing to provide the Registrar or the Reserve Bank on demand any information which may be reasonably required for the proper performance of his or its functions under this Act and other financial services laws.”.

17. Section 21 of the principal Act is amended by inserting after the words “and to enable the Reserve Bank” the words “or the Registrar”.

Amendment of s. 21

18. Section 22 of the principal Act is repealed.

Repeal of s. 22

19. Section 23 of the principal Act is amended by omitting paragraph (b) and substituting the following paragraph—

Amendment of s. 23

“(b) hold shares in a company that is a controlling party of the bank.”.

20. Section 24 of the principal Act is amended—

Amendment of s. 24

(a) by omitting the words “a company licensed under this Act to conduct banking business” and substituting therefor the words “a licensed bank”; and

(b) by omitting the proviso and substituting the following proviso—

“Provided that paragraph (b) does not prevent a bank from enforcing a security by acquiring immoveable property and reselling it as soon as practicable thereafter.”.

**21.** Sections 25, 26, 27 and 28 of the principal Act are repealed and the following section substituted—

Repeal,  
substitution of s.  
25, 26, 27, 28

“**25.**—(1) A licensed bank shall not do any of following unless Registrar’s directives expressly permit it to do so or the Registrar gives prior written approval—

Actions  
requiring  
Registrar’s  
approval

(a) appoint a person to be a director or executive officer of the bank;

(b) change its articles of association;

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

(d) open or close a branch or a static or mobile agency;

(e) open an establishment abroad;

(f) become a controlling party of a company;

(g) enter into any financial restructuring or liquidation of the bank;

(h) enter into any arrangement or agreement—

(i) for the sale or disposal of its shares or business; or

(ii) that will or may result in a change in the control or management of the bank.

“(2) A decision of the Registrar to refuse to give approval for the purposes of subsection (1) is declared to be a reviewable decision, and notice of the decision shall be given to the bank in accordance with section 68 of the Financial Services Act, 2007.

“**26.** Without limiting the power of the Registrar under the Financial Services Act to issue Registrar’s directives, Registrar’s directives may make provision with respect to any of the following—

Matters that may  
be covered by  
Registrar’s  
directives

(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; and such ratios may also include 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.”.

**22.** Section 29 of the principal Act is amended—

Amendment of s.

29

(a) by omitting from subsection (1) the words “The Reserve Bank may determine that” and substituting therefor the words “Without limiting the power of the Registrar under the Financial Services Act to issue Registrar’s directives, Registrar’s directives may require that”; and

(b) by omitting from subsection (1) the words “; and the Reserve Bank may monitor such loans, advances and credit, facilities and make representations it may deem appropriate”.

- 23.** Section 30 of the principal Act is amended—
- Amendment  
of s. 30
- (a) by omitting from subsection (1) the words “Without prejudice to the generality of the powers of the Reserve Bank to issue directives under section 26, no bank or financial institution shall without prior permission of the Reserve Bank” and substituting therefor the words “No bank shall, without prior permission of the Registrar—”;
- (b) by omitting paragraph (1) (c) and substituting therefor the following paragraph—
- “(c) own shares in the capital of any company, firm or enterprise the aggregate value of which is more than the percentage of its capital and reserve specified in Registrar’s directives for the purposes of this section.”; and
- (c) by omitting subsection (2).
- 24.** Part IV of the principal Act is repealed. Repeal of Pt. IV
- 25.** Section 34 of the principal Act is amended Amendment of s.  
34
- (a) by omitting all words after and including “, which may”; and
- (b) by adding at the end the following subsection—
- “(2) This section does not limit the operation of the Financial Services Act.”.
- 26.** Section 36 of the principal Act is amended— Amendment of s.  
36
- (a) by omitting paragraph (a) and substituting therefor the following paragraph—
- “(a) deposits and interest accrued thereon up to an amount not exceeding per depositor the amount specified in Registrar’s directives for the purposes of this section;”
- (b) by adding at the end the following subsection—
- “(2) This section applies despite the Financial Services Act.”.

- 27.** Section 37 of the principal Act is amended by omitting from subsection (2) “in the course of the winding-up of such institution” and substituting therefor the words “course of the winding-up of such bank”. Amendment of s.  
41
- 28.** Section 38 (1) of the principal Act is amended by omitting the words “the Reserve Bank Act” and substituting therefor the words “the Reserve Bank of Malaŵi Act”. Amendment of s.  
38
- 29.** Section 41 of the principal Act is repealed and the following section substituted therefor— Amendment of s.  
41
- 41.**—(1) A licensed bank shall, directly or indirectly, engage in regular and recurrent business of fiduciary nature unless its licence expressly permits it to do so. Licences may  
authorize  
fiduciary  
business
- “(2) A banking licence may specially authorize a bank to act as trustee, executor, administrator, registrar or custodian of stocks and bonds, guardian of estates, assignee, receiver, committee of estates for infants or for absent or incompetent individuals, or for lunatics or in any similar fiduciary capacity.”.
- 30.** Section 43 (1) of the principal Act is amended by omitting the words “Save with the consent of the Reserve Bank, which may impose such conditions as it thinks fit” and substituting therefor the words “Save with the consent of the Registrar, who may impose such conditions as he thinks fit”. Amendment of s.  
46
- 31.** Section 44 of the principal Act is amended by inserting the word “licensed” before the word “bank”. Amendment of s.  
44
- 32.** Section 45 of the principal Act is amended by omitting subsection (1) and substituting the following section therefor— Amendment of s.  
45
- “(1) Without limiting any other provision of Financial Services Act, 2007 or any provision of the memorandum of association, constitution, articles of association or other rules of conduct of the bank



concerned, no person shall be appointed or remain a director or executive officer of a licensed bank—

(a) if he has, under an written law in force in Malawi or elsewhere—

(i) been adjudged or otherwise declared insolvent or bankrupt and has not been discharged from insolvency or bankruptcy; or

(ii) made an assignment to or arrangement or composition with his creditors which has not been rescinded or set aside;

(b) if he is convicted of an offence involving dishonesty or fraud.”.

33. Section 46 of the principal Act is amended by omitting all words up to and including “of this Act” and substituting “A bank which contravenes section 3, 15, 17, 20, 21, 23, 24, 25 or 41 or a directive issued by the Reserve Bank under section 38”.

Amendment of s. 46

34. Section 47 of the principal Act is repealed and the following section substituted—

Amendment of s. 46

“47. Any executive officer of a bank who—

Liability of executive officers etc

(a) fails to take all reasonable steps to secure compliance by the bank with this Act, the other financial services laws, any Registrar’s directives or any directive issued by the Reserve Bank under this Act; or

(b) fails to take all reasonable steps to ensure the accuracy, completeness and correctness of any statement submitted under this Act or another financial services law; or

(c) fails to supply any information required under this Act or another financial services law;

shall be guilty of an offence on conviction [*insert penalty*].”.

35. Sections 50, 52, 53 and 54 of the principal Act are repealed.

Repeal of s. 50, 52, 53, 54

- 36.** Sections 56 and 57 of the principal Act are repealed and the following sections substituted therefor—
- Repeal,  
substitution of s.  
~~Regulations~~
- “**56.**—(1) The Minister’s power to make regulations for the purposes of this Act (other than Part VI) is conferred by the Financial Services Act, 2007.
- “(2) The Minister may, on the recommendation of the Reserve bank, make regulations for the better carrying out of the objectives of Part VI and for the better administration of that Part.
- “**57.**—(1) Any matter required to be prescribed under Part VI may be prescribed by directives issued by the Reserve Bank or by regulations under section 56.
- “(2) Any matter required to be prescribed under a provision of this Act other than Part VI may be prescribed by Registrar’s directives.”.
- 37.** Section 58 of the principal Act is repealed. Repeal of s. 58
- 38.** The Schedule to the principal Act is repealed. Repeal of  
Schedule
- 39.**—(1) The principal Act is amended by omitting the words “or financial institution” from each provision in which they occur. Omitting  
references to  
financial  
institutions
- (2) The principal Act is amended by omitting the words “or financial institutions” from each provision in which they occur.
- (3) The principal Act is amended by omitting the words “and financial institutions” from each provision in which they occur.
- (4) The principal Act is amended by omitting the words “or a financial institution” from each provision in which they occur.
- (5) The principal Act is amended by omitting the words “and financial institution” from each provision in which they occur.

(6) Section 51 of the principal Act is amended by omitting the words “, financial institution”.

40. The principal Act is amended by omitting the words “Reserve Bank” (wherever occurring) from each of the following provisions and substituting therefor the words “Registrar”: sections 4, 11, 17 (2), 20 (except section 20 (4)), 24 and 34 (1). Omitting  
references to  
Reserve Bank

41. Any person who, immediately before the commencement of this Part held a licence as defined in the principal Act authorising it to conduct banking business is taken to hold a banking licence, on the same terms and subject to the same conditions (if any) under the principal Act as amended by this Act. Savings

#### OBJECTS AND REASONS

[name]  
[Ministry]



## **Attachment 6**

### **Draft Taxation Amendment Bill**

**TAXATION AMENDMENT (RETIREMENT FUNDS)  
BILL, 2007**

**ARRANGEMENT OF CLAUSES**

CLAUSE

1. Short title
2. Taxation Act, amendment of s. 2
3. Taxation Act, repeal and substitution of s. 65 (Pension and provident funds)
4. Taxation Act, amendment of First Schedule
5. Taxation Act, repeal of Third Schedule
6. Application of amendments made by this Act

**A BILL**

*entitled*

**An Act to amend the Taxation Act in consequence of  
the enactment of Financial Services Act, 2007 and the**

**Retirement Funds Act, 2007, and for matters connected therewith and incidental thereto**

ENACTED by the Parliament of Malawi as follows—

**1.** This Act may be cited as the Taxation Amendment (Retirement Funds) Act, 2007 and shall come into operation on a date appointed by the Minister by notice in the *Gazette*.

**2.** Section 2 of the Taxation Act (hereafter in this Act called the “Principal Act”) is amended— Amendment of s.  
2

(a) by omitting paragraph (b) of the definition of “pension fund” and substituting the following paragraphs—

“(b) a retirement fund (other than a provident fund) registered under the Retirement Funds Act, 2007; or

“(c) an umbrella fund registered under the Retirement Funds Act, 2007;” and

(b) by omitting the definition of “provident fund” and substituting the following definition—

““provident fund” means a fund registered as a provident fund under the Retirement Funds Act, 2007;”.

**3.** Section 65 of the Principal Act is repealed and the following section substituted therefor— Repeal and  
substitution of s. 65

“**65.** A pension fund or a provident fund approved by the Commissioner under this section as in force at any time before the commencement of the Taxation Amendment (Retirement Funds) Act, 2007, or approved on or before 31 December 1963, is taken, for the purposes of this Act, to be a registered pension fund or a registered provident fund, as the case requires.”. Pension and  
provident funds

4. The First Schedule of the Principal Act is amended by omitting paragraph (b) (v) and substituting the following paragraph—

Amendment of First Schedule

“(v) registered pensions funds, registered provident funds, registered umbrella funds and other benefit funds as the Minister may approve;”.

5. The Third Schedule to the Principal Act is repealed.

Repeal of Third Schedule

6. The amendments made by this Act apply in respect of the year of income of a taxpayer next starting after the commencement of this art, and later years of income.

Application of amendments made by this Act

OBJECTS AND REASONS

[name]  
[Ministry]



## **Attachment 7**

### **Draft Amendments to Insurance Bill**



## **INSURANCE BILL, 2007**

### **ARRANGEMENT OF CLAUSES**

#### CLAUSE

#### PART I—PRELIMINARY

1. Short title and commencement
- 1A. Principal object of this Act
3. Interpretation
- 2A. Financial Services Act
- 2B. Licensing and registration procedure

#### PART IV—INSURERS

21. Insurers to be licensed
23. Reasons for rejecting an application for a licence
24. Commencement of business
25. Suspension and revocation of licences
26. Revocation of licence on ceasing to carry on business
28. Margin of solvency sufficient for the purposes of carrying on insurance business

PART V—PROVISIONS GOVERNING THE CARRYING OF INSURANCE  
BUSINESS BY LICENSED INSURERS OTHER THAN ASSOCIATIONS OF  
UNDERWRITERS

30. Application of Part V
31. Licensed insurers to maintain principal office and appoint principal officer
32. Reinsurance
34. Annual financial statements
35. Submission of annual accounts to the Registrar
36. Appointment of an auditor
37. Qualifications for an independent auditor
38. Termination of appointment of an auditor
39. Examination of statements by an auditor
40. Provision of information to an auditor
41. An auditor to receive notice of meetings on matters relating to his duties
42. Auditor to report to Registrar
43. Request for audit by shareholders
44. Audit for external reinsurer
45. Appointment of an actuary

PART VI—PROVISIONS GOVERNING ASSOCIATIONS OF UNDERWRITERS,  
WHICH ARE LICENSED INSURERS AND THE CARRYING ON OF INSURANCE  
BUSINESS BY THEIR MEMBERS

46. Audit of accounts of members of association of underwriters constituted outside Malawi
47. Certificates of auditors of members of association of underwriters as to underwriting assets
49. Agent for brokers to be licensed
50. Licensing for agents of brokers

PART VII—SPECIAL PROVISIONS GOVERNING THE CARRYING ON OF LIFE  
INSURANCE BUSINESS BY LICENSED INSURERS OTHER THAN  
ASSOCIATIONS OF UNDERWRITERS

52. Application of Part VII
53. Life insurers carrying on business other than life insurance business
54. Actuaries of life insurers
55. Re-insurance contracts of life insurers
56. Assets of insurer may include shares in holding company

PART VIII—SPECIAL PROVISIONS RELATING TO LIFE AND OTHER  
POLICIES

57. Interpretation of terms in Part VIII
58. Minor may insure his life
59. Life policies effected by married persons

60. Life policy on own life: protection afforded during life
61. Life policy on own life: protection afforded on death
62. Protection afforded in respect of life policy insuring to spouse or children
63. Protection afforded in respect of life policy insuring to wife
64. Appointments and revocation of appointments of beneficiaries
65. Selection for realization of life policies in respect of which protection is afforded
66. Partial realization and partial conversion of life policies
67. Provisions in case of life policy ceded or where trust policy cannot be kept up
68. Life policies ceded for premiums paid with intent to benefit someone at the expense of a creditor
69. Proof of age
70. Age incorrectly stated
71. Death of insured by his own act
72. Lost or destroyed life policies
73. Life policy may include disability benefits
74. Discrimination between life policies, etc. prohibited
75. Application of certain provisions of Part VIII to industrial policy
76. Application of certain provisions of Part VIII to sinking fund policy
77. Application of certain provisions of Part VIII to funeral policy, etc
78. Grace period, paid up policies and non forfeiture provisions: life, industrial and sinking fund policies
79. Grace period, paid up policies and non-forfeiture provisions: funeral policies
80. Grant of more favourable terms than those specified in sections 62 and 63 not precluded

#### PART IX—LICENSING OF INSURANCE BROKERS

81. Insurance brokers to be licensed
83. Termination of insurance broker's appointment
84. Revocation of licence at request of insurance broker, etc
86. Trust funds
87. Registrar's directives for insurance brokers

#### PART X—LICENSING OF INSURANCE AGENTS

88. Insurance agents, etc to be licensed
90. Licensing insurance agents, etc
91. Misrepresentation prohibited
92. Termination of agency
93. Agent for insurer
94. Suspension and revocation of insurance agents' licences for other reasons

## PART XI—COLLECTION OF PREMIUMS BY BROKERS OR AGENTS

- 96. Interpretation of terms in Part XI
- 97. Collection of premiums

PART XII—LICENSING OF LOSS ASSESSORS/ADJUSTORS, AND CLAIMS  
SETTLING AGENTS

- 98. Loss assessors/adjustors and claims settling agents to be licensed
- 100. Conditions for licensing loss assessors/adjustors and claims settling agents

## PART XIII—CORPORATE GOVERNANCE

- 101. Specific duties of directors
- 102. Duty of care
- 103. Directors' qualifications and number
- 104. Audit Committee
- 105. Conduct Review Committee
- 106. Appointment of chief executive officer
- 108. Conflict of interest
- 109. Self dealing
- 110. Prohibition of self dealing
- 111. Exception to prohibition
- 112. Registrar's directives regarding significant investments

## PART XV—INVESTMENTS AND LOANS

- 115. Investments and lending policies
- 116. Approval of investments
- 117. Acquiring ownership interest
- 119. Investment of assets

## PART XVI—OWNERSHIP

## PART XVII—WINDING-UP OF INSURANCE COMPANIES

- 125. Companies Act to apply
- 129. Rights of an insured person
- 130. Distribution of insurer's assets
- 131. Unclaimed money

## PART XX—MISCELLANEOUS PROVISIONS

- 141. Insurers to appoint licensed agents or brokers
- 142. Settlement of claims by insurers
- 143. Service of process against licensed insurers
- 144. Action by policy-owners against insurers
- 145. Deposit of approved securities
- 147. Documents to be signed and accompanied by copies
- 148. Sums insured, etc, to be stated in currency of Malawi
- 149. Default of an insurer, etc. not to invalidate policy

- 150. Certain policies to be printed in clearly legible letters, etc
- 151. Contravention of this Act, regulations and directives
- 152. Liability of officers involved in commission of offence
- 154. Persons acting on behalf of unlicensed insurers
- 155. Regulations
- 70. Regulations
- 156. References to insurance companies in other written laws
- 157. Inconsistency with the Companies Act
- 158. Compliance with the Act
- 159. Repeal and savings

## A BILL

*entitled*

**An Act to provide for the supervision and regulation of the insurance industry and for matters connected therewith or incidental thereto.**

ENACTED by the Parliament of Malawi as follows—

### PART I—PRELIMINARY

**1.** This Act may be cited as the Insurance Act, 2007 and shall come into operation on such date as the Minister shall appoint by notice published in the *Gazette*. Short title and commencement

**1A.** The principal object of this Act is to make provision to enhance the safety, soundness and prudent management of insurers and others involved in the insurance industry in Malaŵi. Principal object of this Act

**3.—(1)** In this Act, unless the context otherwise requires “agent for brokers” means a person acting as an agent for brokers who are authorized by an association of underwriters to place insurance business with members of the association; Interpretation

“approved securities” means securities issued by the Government and such other securities as the Registrar may approve;

“association of underwriters” means—

(a) underwriters at Lloyd’s; or

(b) an association of individual underwriters, organised in accordance with the system known as “Lloyd’s”, in which every underwriting member becomes liable for a specified part, limited or proportionate to the whole sum insured by a policy;

“chairperson”, in relation to an association of individual underwriters, includes the individual presiding over the board of directors or other governing body of the association;

“contingent obligation dependent on human life” means—

(a) an obligation to pay a particular person certain sums of money at specified intervals or a certain sum of money or to provide for a particular person a certain other benefit—

(i) on the occurrence of the death of a particular person or on the occurrence of the birth of a child to a particular person at any time or within a specified period; or

(ii) in the event of a particular person continuing to live throughout a specified period or specified periods; or

(b) an obligation assumed—

(i) until the occurrence of the death of a particular person; or

(ii) during a specified period or until the occurrence of the death of a particular person before the expiration of that period;

“existing insurer”, in relation to an applicant for licence as an insurer means an applicant who is, at the

date of his application for licence, carrying on insurance business inside or outside Malawi;

“external re-insurer” means a licensed reinsurer whose head office is not in Malawi;

“Financial Services Act” means the Financial Services Act, 2007;

“financial year”, in relation to a person, means each period at the end of which the balance of the accounts of the person is struck, and shall in the case of a licensed entity, end on 31 December of each year or alternatively such period as is approved by the Registrar of Insurance;

“funeral policy” means a policy whereby the insurer assumes, in return for a premium or the promise of a premium, an obligation to provide, on the death of any person, benefits, not exceeding in value a total of the sum stated in the policy, which consist principally of provision for the funeral of that person or the grant to another person of some other non-monetary benefit, whether or not the policy provides for—

(a) the payment, at the option of the insurer or any other person, of a sum of money instead of the provision of a funeral or the grant of a non-monetary benefit; and

(b) the payment of a sum of money in addition to the provision of a funeral or the grant of some non-monetary benefit;

“holding company” bears the same meaning assigned thereto in the Companies Act;

“industrial policy” means a policy whereby the insurer assumes, in return for a premium or the promise of a premium payable from time to time, at intervals not exceeding two months, a contingent obligation dependent on human life, not exceeding in amount a total of the sum stated in the policy, if the insurer has expressly or tacitly undertaken to send a person from time to time to the owner of the policy or

to his residence or place of work to collect the premiums;

“insurance agent” means a person who—

(a) initiates insurance business; or

(b) does any act in relation to the receiving of proposals for insurance, the issue of policies or the collection of premiums,

on behalf of a person carrying on insurance business who has appointed the person to act as the insurer’s agent;

“insurance broker” means a person who for any compensation, commission or other things of value, with respect to persons or property, deals directly with the public and—

(a) acts or aids in any manner in soliciting, negotiating or procuring the making of any contract of insurance or reinsurance whether or not the person has agreements with insurers allowing the person to bind coverage and countersign insurance documents on behalf of insurers;

(b) provides risk management services, including claims assistance where required; or

(c) provides consulting or advisory services with respect to insurance or reinsurance;

“insurance business”—

(a) means the business of assuming the obligation in any class of insurance business whatsoever, whether defined in this section or not, which is not declared to be exempt from this Act by an order made under section 2 (b); and

(b) includes re-insurance business;

“insurer” means a corporation incorporated under the Companies Act carrying on an insurance business, otherwise than as a broker, an agent for brokers or as an insurance agent, who is not a person or a member of a class of persons declared to be exempt from this Act



by order made under section 2 (b) and shall include a reinsurer, a friendly society and a medical aid scheme unless this Act contains a separate provision specifically applicable to the reinsurer, the friendly society and the medical scheme in which case that provision shall apply;

“licensed insurer” means an insurer licensed under Part IV of the Act;

“life insurance business” means the business of assuming the obligations of an insurer under life policies, funeral policies, industrial policies or sinking fund policies;

“life insurance fund” means the fund to which the receipts of an insurer in respect of his life insurance business are carried;

“life insurer” means a licensed insurer carrying life insurance business;

“life policy” means a policy whereby the insurer assumes, in return for the payment or the promise of the payment of a sum or sums of money or the promise of a periodical payment of a certain premium, a contingent obligation dependent on human life and includes any contract of insurance customarily regarded as a life insurance contract, but does not include a funeral policy, an industrial policy, a personal accident policy, a sinking fund policy or an insurance policy whereby the insurer assumes a contingent obligation dependent on human life in which the contingent obligation forms a subordinate part of the insurance effected by the policy;

“local insurer” means a registered insurer whose head office is in Malawi;

“local policy” means a policy issued in or outside Malawi upon an application made or presented to a broker, an agent for brokers or an insurance agent at any place in Malawi and includes a life policy issued outside Malawi and subsequently made payable in

Malawi at the request of the owner which the owner has agreed in writing shall be treated as a local policy for the purposes of this Act, but does not include a life policy made payable, after the date of its issue, outside Malawi at the request of the owner which the owner has agreed in writing shall not be treated as a local policy for the purposes of this Act;

“local reinsurer” means a licensed reinsurer whose head office is in Malawi;

“new insurer”, in relation to an applicant for licensing as an insurer, means an applicant who is not, at the date of his application for licence, carrying on insurance business inside or outside Malawi;

“owner”, in relation to a policy, means the person who is entitled to enforce any benefit provided for in the policy;

“person” includes a company, corporate body, association, natural person, partnership and scheme;

“policy” means an insurance contract under terms which a person in return for a premium, receive benefits from an insurer or allows an organisation to provide policy benefits to another person—

(a) upon the occurrence of a specified event, or in specified circumstances; or

(b) at a specified date; or

(c) during, or upon the expiry of, a specified period;

“policy benefits” means money, services or other benefits including annuities, services or other benefits, paid or payable under an insurance policy;

“premium” means the consideration to be given in return for an undertaking to provide policy benefits;

“prescribed” means prescribed by the Minister in regulations referred to in section 104 of the Financial Services Act;

“principal officer” means the principal officer of a licensed insurer appointed under section 31;

“Registrar” means the Registrar of Financial Institutions under of the Financial Services Act;

“Registrar’s directive” means a directive issued under section 33 of the Financial Services Act;

“reinsurer” means a person whose predominant business is to carry on reinsurance or retrocession business and includes both a local reinsurer and a external reinsurer;

“reinsurance business” means the business of undertaking liability to pay money to insurers or reinsurers in respect of contractual liabilities or insurance business incurred by insurers or reinsurers and includes a retrocession;

“retrocession” means the reinsurance of reinsurance business accepted by a reinsurer;

“share” bears the same meaning assigned thereto in the Companies Act;

“self-regulatory organization” means an association of members who operate regularly in the insurance industry formed with the aim of promoting orderly market conduct and established with the permission of the Registrar.

“sinking fund policy” means a contract whereby one party to the contract assumes the obligation to pay, after the expiration of a certain period or during a specified period, a certain sum or certain sums of money to a particular person in return for the payment or the promise of a payment, from time to time, of a certain sum of money by the other party to the contract;

“underwriting liabilities”, in relation to a member of an association of underwriters, means the liabilities of the insurance business of the member calculated in

accordance with formulae fixed by the committee of the association of underwriters and approved—

(a) in the case of an association of underwriters constituted in Malawi, by the Registrar; and

(b) in the case of an association of underwriters constituted in a country outside Malawi, by the appropriate authority in whom is vested the administration of the insurance law relating to associations of underwriters in that country.

(2) For the purposes of this Act, an association of underwriters shall be treated as an insurer.

(3) Other words and expressions used in this Act have the meanings they have in the Financial Services Act.

**2A.** This Act applies in addition to the Financial Services Act. Financial Services Act

**2B.** Division 2 of Part III of the Financial Services Act makes provision for licensing and registration applications. Licensing and registration procedure

#### PART IV—INSURERS

**21.**—(1) Subject to subsection (2), no person shall carry on insurance business in Malawi unless he is licensed as an insurer in the class of insurance business carried on by him or is a member of an association of underwriters licensed as an insurer in the class of insurance business carried on by him. Insurers to be licensed

(2) Nothing contained in subsection (1) shall apply to—

(d) the carrying on of business by—

(i) a person whose license as an insurer in a class of insurance business has been cancelled;

(ii) a member of an association of underwriters, the licence of which as an insurer in a class of insurance business has been cancelled, relating to policies in that class of insurance business which were issued by him before the date of the cancellation of his licence as an insurer in that class of insurance business or before the date of the cancellation of the licence of the association as an insurer in that class of insurance business as the case may be.

(2A) No person shall—

(a) without the approval of the Registrar, apply to his business or undertaking a name or description which includes the words “assure” or any derivative thereof, unless he is a licensed insurer in whatever class of insurance business; or

(b) perform any act which indicates that he carries on or is authorized to carry on any class of insurance business, unless he is an insurer licensed to carry on that class of insurance business.

(3) Any person who contravenes subsection (1) or (2) commits an offence and upon conviction shall be liable to a fine of five hundred thousand kwacha (K500,000) and to imprisonment for four years, or, if the offender is not a natural person to a fine of one million kwacha (K1,000,000).

**22.**—(1) If an application is made in accordance with the Financial Services Act for the licensing of a person as an insurer, the Registrar shall not grant the licence unless satisfied—

Registration  
criteria

(a) that the applicant for a licence as an insurer, other than as an external reinsurer, is a company incorporated under the Companies Act;

(c) that the applicant, if licensed, will not conduct any business other than that for which it has been licensed without the permission of the Registrar;

(d) that the applicant has entered into or undertakes to enter into a reinsurance agreement with a reinsurer acceptable to the Registrar;

(e) that the applicant is not disqualified under section 23 to be licensed as an insurer in the class of insurance business with respect to which the application is made;

(f) in the case of an applicant who is a new insurer, that the class of insurance business with respect to which the application is made will be carried on by the applicant or by the applicant's members in accordance with sound insurance principles

(g) in the case of an applicant who is an existing insurer and who applies for a licence as an insurer in a class of insurance business carried on by the applicant or the applicant's members outside Malawi, that—

(i) the class of insurance business with respect to which application is made will be carried on in Malawi and is being carried on outside Malawi by the applicant or the applicant's members in accordance with sound insurance principles; and

(ii) the other class or classes of insurance business carried on by the applicant or the applicant's members inside or outside Malawi are being and will be carried on by the applicant or the applicant's members in accordance with sound insurance principles; and

(h) in the case of an applicant who is an existing insurer and who applies for a licence as an insurer in a class of insurance business not carried on by the applicant or the applicant's members outside Malawi, and—

(i) the class of insurance business with respect to which the application is made will be carried on by the applicant or the applicant's members in accordance with sound insurance principles; and

(ii) the other class or classes of insurance business carried on by the applicant or the applicant's members inside or outside Malawi are being and will be carried on by the applicant or the applicant's members in accordance with sound insurance principles.

(2A) The Registrar shall not license an individual as an insurer unless he is a member of an association of underwriters.

(2B) The Registrar shall not licence a person to carry out both life insurance business and non-life insurance business.

(5) Without limiting the matters that the Registrar may take into account in determining an application for a licence under this Part, the Registrar shall pay particular attention to—

(a) the nature and sufficiency of financial resources of the applicant;

(b) the soundness and feasibility of the applicant's plans for the future conduct of the insurer's business;

(c) the business record and experience of the applicant;

(d) whether the persons who will operate the business are fit and proper persons, having regard to their qualifications, character, competence and experience in managing financial institutions; and

(e) whether the establishment of the business is contrary to the public interest in Malawi.

**23.**—(1) Without limiting the power of the Registrar to refuse to grant an application for a licence under this Part, the Registrar shall not grant an application for a licence under this Part if it appears to the Registrar that that—

Reasons for  
rejecting an  
application for a  
licence

(aa) it would be contrary to the public or policyholders' interests to do so;

(a) the name under which the applicant desires to be licensed is identical with the name of a licensed insurer or so nearly resembles the name of that licensed insurer as to be likely to be mistaken for it, unless that licensed insurer is being or is to be wound up or dissolved or, has ceased to carry on insurance business in Malawi, and consents to the licence of the applicant under the name in question; or an applicant other than an association of underwriters,

(b) (except in the case of an association of underwriters who is not a new insurer) the applicant's margin of solvency as defined in section 28 is not sufficient for the purposes of the class or, classes of insurance business as the case may be, for which application is made; or

(c) (in the case of an association of underwriters),—

(i) the regulations constituting the association of underwriters and governing the operations of the members do not provide, to the Registrar's satisfaction, for the matters referred to in sections 46, 47 and 48;

(ii) the committee of the association of underwriters does not hold, under a document creating a trust the terms of which have been approved by the committee, a deposit from each member of the association of underwriters of money or approved securities or both to the value of one million Kwacha (K1,000,000) as security in respect of each member's liabilities; and

(iii) if the association is constituted in a country outside Malawi—

(a) the association of underwriters was constituted less than five years before the date of the application for a licence; and

(b) the insurance law of the country in which the association was constituted does not provide



for the regulation of associations of underwriters;  
or

(d) if the applicant is a corporate body with share capital, the applicant does not comply with the requirements of Registrar's directives as to capital and reserves.

(2) For the purposes of subsection (1) (b) an applicant who carries on, outside Malawi, a class or classes of insurance business other than or those with respect to which application for a licence is made shall be treated as if he had applied for a licence as an insurer both in the class or classes of insurance business with respect to which his application for a licence is made and in the other class or classes of insurance business carried on by him outside Malawi.

**24.** No insurer shall commence his business until the Registrar has approved the commencement, which the Registrar shall not do unless satisfied that—

Commencement  
of business

(a) the meeting of shareholders has been duly held and other legal formalities regarding the organization of the business have been complied with;

(b) the insurer complies with the requirements of Registrar's directives as to capital and reserves;

(ba) the insurer has entered into a reinsurance agreement with a reinsurer, acceptable to the Registrar;

(c) the external reinsurer has on deposit an amount acceptable to the Registrar;

(e) the expenses of incorporation and organization to be borne by the company are reasonable; and

(f) all other provisions of this Act and other relevant financial services laws have been complied with.

**25.** Without limiting the power of the Registrar, under the Financial Services Act, to suspend or revoke a licence, the Registrar may suspend or revoke the licence of an insurer on the ground that—

Suspension and  
revocation of  
licences

(a) the insurer is disqualified under section 23 to be licensed as an insurer in the class of insurance business with respect to which he is licensed;

(b) a class or classes of insurance business with respect to which the insurer is licensed or any other class of insurance business carried on outside Malawi by the licensed insurer or, in the case of a licensed insurer who is an association of underwriters, by a member of the association, is not being carried on by the insurer or members of the association of underwriters, as the case may be in accordance with sound insurance principles;

(c) in the case of a licensed insurer or alternatively, in the case of a licensed insurer who is an association of underwriters, a member of the association of underwriters, who are external insurers, has or have, as the case may be, failed to comply with any insurance law of a country outside Malawi applying to him or them which relates to the maintenance of a life insurance fund or the holding in trust of insurance premiums;

(d) it is contrary to the interest of the public in Malawi for the licence to continue in force.

**26.** The Registrar shall cancel the licence of an insurer in a class of insurance business if he is satisfied that the insurer has ceased to carry on that class of insurance business in Malawi.

Revocation of licence on ceasing to carry on business

**28.**—(1) Without limiting the Registrar's power under the Financial Services Act to issue Registrar's directives, Registrar's directives may make provision with respect to—

Margin of solvency sufficient for the purposes of carrying on insurance business

(a) the maintenance by insurers of adequate capital and appropriate forms of liquidity;

(b) the maintenance by insurers of adequate value of assets corresponding to their liabilities;

(c) the maintenance by local reinsurers of adequate capital and adequate value of assets corresponding to their liabilities;

(d) the maintenance, by external reinsurers, of adequate value of assets corresponding to their liabilities;

(e) the margins of solvency required of an insurer for carrying on insurance business; and

(f) for those purposes—

(i) valuation of assets;

(ii) depreciation of assets;

(iii) determination of insurance liabilities

(iv) provision of bad and doubtful debts;

(v) provision of contingent losses and litigation;

(vi) provision of tax payable;

(vii) amortisation of goodwill; and

(viii) calculation of technical provision.

(2) Subject to any contrary provision in Registrar's directives, an insurer other than a reinsurer and an association of underwriters shall be treated as having a margin of solvency sufficient for the purposes of carrying on—

(a) any class of insurance business other than life insurance business if—

(i) it has a solvency ratio of no less than twenty per cent which shall be the percentage that the shareholders equity bears to the net premiums written for the preceding year after deduction of any premiums paid for reinsurance; and

(ii) the value of its assets in respect of the classes of insurance carried on by it exceeds the amount of its liabilities in respect of those classes of insurance by at least two million five hundred thousand Kwacha (K2,500,000);

(b) life insurance business, if his liabilities under unmaturing life, funeral, industrial and sinking fund policies do not exceed the amount of his insurance fund.

(3) Subject to any contrary provision in Registrar's directives, a reinsurer shall maintain at all times a value of assets exceeding the amount of his liabilities by at least ten million kwacha (K10,000,000).

(4) In calculating the liabilities of the insurer referred to in subsection (2), all contingent liabilities of the insurer shall be taken into account.

PART V—PROVISIONS GOVERNING THE CARRYING OF  
INSURANCE BUSINESS BY LICENSED INSURERS OTHER THAN  
ASSOCIATIONS OF UNDERWRITERS

**30.** This Part applies to licensed insurers who are not associations of underwriters.

Application of  
Part V

**31.**—(1) An insurer licensed under this Act shall establish a principal office in Malawi and shall appoint a principal officer in Malawi.

Licensed insurers  
to maintain  
principal office and  
appoint principal  
officer

(2) Where an insurer licensed under this Act has established a principal office and appointed a principal officer, the insurer shall notify the Registrar in writing where the office is situated and the name of the office.

(3) If an insurer licensed under this Act changes the place of his principal office in Malawi or closes the office or appoints a new principal officer, the insurer shall, within twenty one days (21) of such change, closure or new appointment, give notice thereof to the Registrar in writing.

(4) An insurer licensed under this Act shall inform the Registrar in writing of the name and address of every person authorised to enter into contracts on behalf of the insurer, whether as an employee, agent or otherwise in

Malawi and shall keep such information current by notifying the Registrar of any changes or additions or deletions with respect to the names and addresses of such persons.

**32.**—(1) An insurer may enter into an agreement to reinsure risks undertaken by it with a reinsurer of adequate standing, taking into account the considerations of safety and soundness when such an agreement is made in the ordinary course of business.

Reinsurance

(2) Without limiting the Registrar's power under the Financial Services Act to issue Registrar's directives, and without limiting the Registrar's power under that Act to give direction to an insurer, Registrar's directives, or a direction from the Registrar, may specify the extent to which an insurer may cause itself to be reinsured.

(3) Subject to subsection (4), no insurer, insurance broker, insurance agent or other person shall place insurance business other than treaty reinsurance business with an insurer not licensed in Malawi in respect of any risks arising in Malawi.

(4) The Registrar may, on application and subject to subsection (5) and on such conditions as the Registrar thinks fit, permit an insurer, insurance broker, insurance agent or other person to place insurance business other than reinsurance business with an insurer not licensed in Malawi in respect of specified risks or class of risks.

(5) The Registrar shall not give permission under subsection (4) if it appears to the Registrar that there is an insurer in Malawi who is able to provide such insurance cover efficiently and cost effectively (but need not for purpose of the application of that subsection have to be more efficient and cost effective than insurers not licensed in Malawi).

(6) A decision of the Registrar to refuse to give permission under subsection (4) is declared to be a

reviewable decision, and notice of the decision shall be given to the person who made the application in accordance with section 68 of the Financial Services Act.

**34.**—(1) The directors of a insurer shall place before the shareholders at every annual meeting— Annual financial statements

(a) comparative annual consolidated financial statements for the current year and the immediately preceding year, if any;

(b) the annual financial statements shall contain—

(i) a balance sheet as at the end of the financial year;

(ii) a statement of profit and loss for the financial year;

(iii) a statement of change of financial position for the financial year;

(iv) a statement of changes in shareholders' equity for the financial year;

(v) a list of subsidiaries of the insurer with their addresses and percentage ownership of shares of the subsidiary by the insurer;

(vi) the report of the auditor;

(vii) the report of the actuary; if applicable; and

(viii) a description of the roles of the auditor and the actuary in the preparation and audit of financial statements.

(2) The directors shall approve the annual financial statements and their approval shall be evidenced by the signatures of the chief executive officer and one other director.

**35.**—(1) Each licensed insurer shall ensure that a copy of its balance sheet and profit and loss account referred to in section 34 is published in at least two local news papers of general circulation, no later than one month after the meeting concerned. Publication of annual accounts

**36.**—(1) The shareholders of an insurer shall at their first meeting and at each succeeding annual meeting appoint an auditor, approved by the Registrar, to hold office until the close of the next annual meeting.

Appointment of  
an auditor

(2) An insurer shall take all necessary steps to ensure that its auditor is appointed the auditor of each of its subsidiaries, with the exception of a subsidiary located in another country, where another auditor may be appointed.

**37.**—(1) An accountant or a firm of accountants shall be qualified to be the auditor of an insurer if the proposed auditor in his individual capacity or as a member of a firm of accountants—

Qualifications  
for an  
independent  
auditor

(a) is eligible and entitled so to act under the Public Accountants and Auditors Act;

(b) has at least three years experience at a senior level in performing audits of financial institutions; and

(c) is independent of the insurer.

(2) A person shall not be considered independent of the insurer if he or any member of the firm of accountants to which he belongs—

(a) is a director, officer or employee of the insurer or its affiliate or is a business partner of the insurer or of any director, officer or employee of the insurer or any of its affiliates; or

(b) beneficially owns or controls a material interest in the shares of the insurer or any of its affiliates.

**38.**—(1) The shareholders of an insurer may, by resolutions, at a special meeting, terminate the appointment of an auditor and the directors shall fill the vacancy so created as soon as possible, for the remainder of the term of the outgoing auditor.

Termination of  
appointment of  
an auditor

(2) If an auditor resigns from his position, the directors, shall fill the position as soon as possible for the remainder of the term of the outgoing auditor.

(3) If the directors fail to fill the vacancy of an auditor caused by resignation or termination of the auditor or by the Registrar's non-approval of the auditor nominated by the insurer, the Registrar may fill the vacancy for the appropriate term.

(4) An auditor of an insurer who resigns or receives a notice or otherwise learns of a shareholders' or directors' meeting where the revocation of his appointment or the appointment of another auditor at the expiry of his term of office is to be considered, shall submit to the Chairperson of the Board and the Registrar his reasons for the resignation or why the auditor opposes the proposed action.

**39.**—(1) An the auditor of an insurer shall make such examination as he considers necessary to enable the auditor to report on the annual financial statement or on any other statements required under this Act, the examination shall be conducted in accordance with generally accepted auditing standards in Malawi.

Examination of  
statements by an  
auditor

(2) An auditor's report on the annual financial statements and any other statements required to be audited under this Act, shall state whether the examination was conducted in accordance with generally accepted auditing standards and shall further state whether, in the auditor's opinion, the annual financial statements—

(i) are prepared in accordance with generally accepted accounting standards adopted in Malawi;

(ii) present a true and fair view of the financial position of the insurer at the end of the financial year and the results of its operations and changes in its financial position for that financial year; and

(iii) have not been prepared on a basis consistent with that of the preceding year.

(3) An auditor may rely on the valuations made by the actuary of the insurer respecting the actuarial and other



policy liabilities of the insurer as at the end of the financial year.

(4) An auditor shall report in writing to the chief executive officer of an insurer any transactions or conditions that have come to the auditor's attention affecting the well-being of the insurer that, in the auditor's opinion, are not satisfactory or are beyond the powers of the insurer, and require rectification, and such reports shall also be simultaneously submitted to the Registrar and the actuary and the insurer shall be obliged to place the report at the forthcoming meeting of the Board of Directors and the report shall be recorded in the minutes of that meeting.

**40.** At the request of an auditor, the present and former directors, officers and employees of an insurer shall provide to the auditor—

Provision of information to an auditor

(a) access to the records, assets and securities held by the insurer or any company in which it has a substantial interest; and

(b) such information and explanations as, in the opinion of the auditor, are necessary in the performance of his duties.

**41.** An auditor of an insurer shall be entitled to receive notice of every meeting of the shareholders, audit committee or conduct review committee and to attend, at the expense of the insurer, and be heard at the meeting on matters relating to the duties of the auditor.

An auditor to receive notice of meetings on matters relating to his duties

**42.**—(1) The Registrar may require an auditor to report to him on the extent of the auditor's procedures in the examination of the annual financial statements of an insurer and may direct him to enlarge the scope of that examination.

Auditor to report to Registrar

(2) The Registrar may direct an auditor or appoint another auditor or a professional consultant, to conduct a special examination of the adequacy of procedures and

controls adopted by an insurer for the safety of its creditors, shareholders and policyholders and to assess the adequacy of assets and liabilities as stated in the books of the insurer.

(3) The expenses incurred in any examination or audit referred to in subsections (1) and (2) shall be borne by an insurer.

**43.** If required by the shareholders, an auditor shall audit a report on any financial statements presented to them by the Board of Directors and the auditor's report shall state whether, in his opinion, the financial statements present fairly the information contained therein.

Request for audit  
by shareholders

**44.** An external reinsurer shall have the financial statements of its reinsurance business in Malawi audited by the auditors of the head office of the external reinsurer, and the auditors shall express an opinion on the financial statements using the auditing and accounting standards applicable in the country of the head office.

Audit for  
external  
reinsurer

**45.**—(1) Where the Registrar is of the opinion that actuarial review of an insurer's business is warranted, or that such review is warranted for all companies undertaking a particular class of insurance business, the Registrar may require an insurer to appoint an actuary to value, in accordance with generally accepted actuarial practice, the insurer's liabilities either at a point in time or at regular intervals.

Appointment of  
an actuary

(2) An actuary appointed under this section shall comply with the provisions contained in section 54 of this Act, as if it applied to this section.

PART VI—PROVISIONS GOVERNING ASSOCIATIONS OF UNDERWRITERS, WHICH ARE LICENSED INSURERS AND THE CARRYING ON OF INSURANCE BUSINESS BY THEIR MEMBERS

**46.** An association of underwriters constituted in a country outside Malawi shall furnish evidence to the satisfaction of the Registrar that the accounts of each member of the association of underwriters are subject to an annual audit by an independent auditor.

Audit of accounts of members of association of underwriters constituted outside Malawi

**47.** The auditor of a member of an association of underwriters shall certify to the committee of the association of underwriters whether the underwriting assets held by the member at the close of each financial year were sufficient to cover the underwriting liabilities attached at that time to the member's underwriting accounts.

Certificates of auditors of members of association of

**49.** No person shall act in Malawi as an agent for brokers unless he is licensed as an agent for brokers under section 50.

Agent for brokers to be licensed

**50.**—(1) If an application is made in accordance with the Financial Services Act for the licensing of a person as an insurer, the Registrar shall not grant the licence if, in his opinion, it would not be in the public interest to do so.

Licensing for agents of brokers

PART VII—SPECIAL PROVISIONS GOVERNING THE CARRYING ON OF LIFE INSURANCE BUSINESS BY LICENSED INSURERS OTHER THAN ASSOCIATIONS OF UNDERWRITERS

**52.** This Part shall apply to life insurers who are not associations of underwriters.

Application of Part VII

**53.**—(1) A life insurer who carries on, in addition to his life insurance business, any other businesses, whether insurance business or otherwise, shall maintain separate books of accounts for all of his life insurance business.

Life insurers carrying on business other than life insurance business

(2) The receipts in respect of the life business of a life insurer shall be carried to and form part of the life insurance fund.

(3) The life insurance fund of a life insurer referred to in subsection (2) shall be as absolutely the security of the owners of the life, funeral, industrial and sinking fund policies issued by the life insurer as though it belonged to a life insurer carrying on no other business than life insurance business.

(4) Payments from the life insurance fund of a life insurer referred to in subsection (2) which would not be made if the business of the life insurer were only that of life insurance, and the life insurance fund shall not be applied directly or indirectly to any purposes other than those of life insurance.

(5) Nothing contained in this section shall preclude a life insurer referred to in subsection (1) from investing the life insurance fund in the same investments as any other funds.

**54.**—(1) A life insurer shall appoint an actuary for a specific duration and such an appointment shall be subject to approval by the Registrar. Actuaries of life insurers

(2) An individual shall be qualified to be the actuary of a life insurer if he is a member of an institute, society or association of actuaries acceptable to the Registrar.

(3) The Board of Directors may revoke the appointment of an actuary, in which case it shall notify the Registrar in writing forthwith.

(4) An actuary whose appointment is revoked or who resigns shall submit to the Board of Directors of an insurer and the Registrar a written statement of the circumstances and reasons why he resigned or why, in the actuary's opinion, his appointment was revoked.

(5) Where an actuary resigns or his appointment is revoked, or the Registrar withholds approval of his appointment, the Board of Directors shall appoint another actuary as soon as possible.

(6) The actuary shall value, in accordance with generally accepted actuarial practice, the actuarial and other policy liabilities as at the end of the financial year and the Registrar may require the actuary to carry out a valuation in a specific area, in which case the expenses incurred shall be paid by the insurer.

(7) At the request of the actuary, the present or former Directors, officer or employees shall provide him with access to the company's records as well as provide him with other information and explanations as are, in the opinion of the actuary, necessary to perform his duties.

(8) A life insurer shall make sure that an actuary so appointed shall within ninety (90) days from the end of the financial year of the insurer, make a report, in the prescribed form under the Registrar's directives, on the valuations made and in his report, the actuary shall state whether, in his opinion, the annual statements present fairly the results of his valuations.

(9) Where the Registrar is of the opinion that an actuary other than the actuary of the insurer should value the actuarial and other policy liabilities of the insurer or conduct a valuation in a specific area, he may appoint another actuary and the expenses incurred in this respect shall be payable by the insurer.

(10) The actuary shall report in writing to the chief executive office any matters that have come to his attention that, in his opinion, have material adverse effect on the financial condition of the insurer and require rectification and he shall forthwith provide a copy of his report to the Board of Directors and the Registrar.

(11) Where an insurer is a subsidiary of a foreign insurance company and the foreign insurance company furnishes to the appropriate authority in the country in which its head office is located any report or statement reflecting the results of an actuarial investigation of the whole or part of its insurance business, it shall furnish a copy of such report or statement to the Registrar.

**55.**—(1) No life insurer shall enter into a contract of reinsurance against any liability in respect of his life insurance business in Malawi otherwise than with a life insurer.

Re-insurance  
contracts of life  
insurers

(2) Subsection (1) shall not apply to a contract of reinsurance against any liability in respect of life insurance business in Malawi the parties to which and the terms of which have been approved by the Registrar.

**56.** If the assets which a life insurer holds in its life insurance fund in respect of its liabilities to policyholders include shares in its holding company—

Assets of insurer  
may include  
shares in holding  
company

(a) those shares shall be deemed, for the purpose of section 57(2) of the Companies Act, to be held by the insurer as trustee for the benefit of the owners of the policies to which the liabilities relate;

(b) those shares shall only be held subject to such limitations and conditions as the Registrar may determine; and

(c) the insurer shall not have the right to vote at meetings of the company in which it holds such shares or at meetings of any particular class of members of that company.

#### PART VIII—SPECIAL PROVISIONS RELATING TO LIFE AND OTHER POLICIES

**57.**—(1) In this Part, unless the context otherwise requires—

Interpretation of  
terms in Part  
VIII

“bankruptcy” shall be construed in accordance with any written law in force in Malawi relating to bankruptcy and as including an assignment to or arrangement or composition with creditors made under any written law in force in Malawi relating thereto; and “bankrupt” shall be construed accordingly;

“children” includes illegitimate children, step-children and children adopted under any written law whatsoever relating to the adoption of children;

“minor” means a person who, by reason of his youth, is under a legal disability;

“trustee”, in relation to an estate in insolvency or bankruptcy, includes an assignee, a trustee under a deed or arrangement or the person having the conduct of an order of composition, as the case may be.

(2) If the proceeds on realization of an asset, which was acquired with moneys paid by the insurer under a life policy and with other moneys, exceed in amount the moneys paid under the policy which were used for the purpose of acquiring the asset, a reference in this Part to the proceeds on realization of the asset shall be construed as a reference to the amount of the moneys paid under the policy which were used for the purpose of acquiring the asset, and a reference to the value of any such asset shall be construed accordingly.

**58.**—(1) A minor who has attained the age of eighteen years may, without the consent of his guardian, effect a life policy upon his own life and pay an premium due under the policy with money he has earned or with any other money at his disposal.

Minor may  
insure his life

(2) Subject to subsection (3), a minor who has effected a life policy upon his own life as provided in subsection (1) shall be as competent in all respects to be a policy-owner and to have and exercise all the powers and privileges or a policy-owner in relation to the policy as if he were of full age.

(3) A minor who has effect a life policy upon his own life shall not, without the consent of his guardian, pledge, cede or surrender the policy while he is still a minor.

(4) If any money becomes payable to a minor who has attained the age of eighteen years under a life policy effected by him on his own life, the insurer liable under the policy shall pay that money to the minor, who may, without the consent of his guardian, deal with the money as he thinks fit.

**59.**—(1) Notwithstanding anything to the contrary contained in any written law or in the common law, but subject to this Part—

Life policies  
effected by  
married persons

(a) a married woman may—

(i) effect and own life policy; and

(ii) hold and, by the way of gift or otherwise, acquire from a dispose of to any person, including her husband, any interest in a life policy; and

(iii) hold—

(A) any money paid by the insurer in respect of any interest held by her in a life policy or any assets acquired by her with those moneys;

(B) any moneys or assets acquired by her in respect of the disposal of any interest held by her in a life policy or any assets acquired by her with those moneys; and

(iv) dispose of to any person, including her husband, by way of gift or otherwise, any moneys or assets referred to in subparagraph (iii), in all respects as if she were a single woman of full age and capacity; and

(b) a married man may, by way of gift, acquire from or dispose of to his wife—

(i) any interest in a life policy;



(ii) any moneys paid by the insurer in respect of any interest in a life policy or any assets acquired with those moneys; and

(iii) any moneys or assets acquired in respect of the disposal of any interest in a life policy or any assets acquired with those moneys

in all respects as if he were a single man of full age and capacity.

(2) Subsection (1) (a) shall apply in relation to—

(a) a life policy effected by a married woman before her marriage;

(b) any interest in a life policy acquired by a married woman before her marriage;

(c) any moneys due or paid to a married woman before her marriage in respect of a life policy referred to in paragraph (a) or any interest in a life policy referred to in paragraph (b) or acquired by her before her marriage in respect of the disposal of any interest in a life policy; or

(d) any assets acquired by a married woman before her marriage with moneys referred to in paragraph (c), as if the policy, interest, moneys or assets was or were effected or paid to or acquired by her or became due during her marriage.

**60.**—(1) If a life policy effected by a person, whether married or not, on his or her own life inured for three years from the date of the payment of the first premium or longer—

Life policy on  
own life:  
protection  
afforded during  
life

(a) is attached in execution of a judgement or order of any court at the instance of a creditor of that person; or

(b) becomes part of that person's estate in bankruptcy, during the lifetime of that person, the proceeds on realization of the policy shall, to the extent specified in subsection (2), be protected against that

person's creditors and against any claim in connection with the attachment or the bankruptcy.

(2) The protection referred to in subsection (1) in respect of a life policy under that subsection—

(a) shall extend to so much of the proceeds on realization of the policy as does not exceed an amount of two hundred fifty thousand kwacha; and

(b) shall, subject to paragraph (a), extend, if the policy is pledged, to so much of the proceeds on realization of the policy as exceeds the amount of the liability, the payment of which the pledge secures, but no further.

(3) If moneys due or paid by the insurer under a life policy referred to in subsection (1) or assets acquired with those moneys or together with other moneys—

(a) are attached in execution of a judgement or order of any court at the instance of a creditor of a person by whom the policy was effected; or

(b) become part of the estate in bankruptcy of the person by whom the policy was effected, during the period of five years from the date the moneys due or paid under the policy first became due, the moneys due or paid under the policy or the proceeds on realization of the assets shall, to the extent specified in subsection (4), be protected against that person's creditors and against any claim in connection with the attachment or the bankruptcy.

(4) The protection referred to in subsection (3) in respect of moneys or assets of a person under that subsection—

(a) shall extend to those moneys or the proceeds on realization of those assets in so far as those moneys and proceeds, together with—

(i) all other moneys due or paid to that person under life policies referred to in subsection (1);

(ii) the value of all other existing assets of that person acquired with moneys paid under life policies referred to in subsection(1) or with the moneys and other moneys; and

(iii) the realizable value of all life policies referred to in subsection (1) of which that person is the owner,

(b) do not exceed two hundred fifty thousand Kwacha (K250,000); and

(c) shall, subject to paragraph (a), extend, in the case of an asset which is pledged or mortgaged, to so much of the proceeds on realization of the assets as exceeds the amount of the liability, the payment of which the pledge or mortgage secures, but no further; and

(d) shall not extend to any moneys due or paid under a life policy referred to in subsection (1) on surrender of the policy or to any assets acquired with those moneys or together with other moneys.

(5) For the purposes of this section—

(a) a life policy which an insurer issues in exchange for or in consideration of the surrender of another life policy under which the insurer was previously liable shall be regarded as having been effected on the date on which the surrendered policy was issued if the insurer received no payment other than the value of the surrendered policy as a consideration for the new policy;

(b) a life policy which an insurer issues under section 66 (3) shall be regarded as having been effected on the date on which the old life policy for which it was substituted was issued.

**61.**—(1) In this section unless the content otherwise requires—

“beneficiary” means—

Life policy on  
own life:  
protection  
afforded on  
death

(a) the surviving spouse of an owner, including a spouse of a union in accordance with the laws of Malawi, customary marriages in Malawi or in accordance with the tenets of various religions practised in Malawi;

(b) a child, including an illegitimate child, an adopted child, a step child, a grand child and an unborn child;

(c) a parent, including father, mother, grandfather, grandmother, paternal uncle, maternal uncle, paternal aunt and maternal aunt;

(d) a brother, including a half brother and a step brother;

(e) a sister, including a half sister and a step sister; or

(f) any other person appointed by an owner;

“owner” means an owner of a life policy, moneys or assets in respect of which protection is afforded by section 60.

(2) If—

(a) a beneficiary has, on the death of the owner, a claim—

(i) under a life policy; or

(ii) to moneys or assets

(b) in respect of which protection is afforded by section 60; and

(c) the life policy, moneys or assets referred to in paragraph (a)—

(i) are attached in execution of a judgement or order of any court at the instance of a creditor of the deceased owner; and

(ii) become part of the deceased owner’s estate in bankruptcy,

the beneficiary shall, in respect of his claim, enjoy the protection afforded by section 60.

**62.-(1) If—**

(a) before or during marriage a man effects or cedes for the benefit of his wife and children, including children to be born to him and his wife, or any of them;

(b) before or during marriage a woman effects or cedes for the benefit of her husband or her husband and children, including children to be born to her and her husband, or any of them; or

(c) a person effects or cedes for the benefits of his or her children, including children to be born to him or her;

a life policy on his or her life or on the life of his or her spouse, the policy or moneys due or paid thereunder by the insurer or any asset acquired with those moneys shall not, subject to this section and, in the case of a policy which is ceded, to the terms of the cession—

(i) be liable to be attached in execution of a judgement or order of any court at the instance of a creditor of the person by whom the policy was affected or ceded; or

(ii) form part of the estate in bankruptcy of the person by whom the policy was effected or ceded.

(2) A benefit conferred or purported to be conferred upon a spouse or child under a life policy referred to in subsection (1) or by virtue of the cession of a life policy referred to in that subsection shall, notwithstanding any agreement to the contrary between the insurer and the person by whom the policy was effected, but subject, in the case of a policy which is ceded, to the terms of the cession, be enforceable against the insurer liable under the policy at the suit of the spouse or child or the legal representative of the spouse or child, notwithstanding that the spouse or child has not accepted the benefit and is not a party to the contract of insurance.

(3) A life policy shall not be treated for the purposes of this section as having been effected for the benefit of the

Protection  
afforded in  
respect of life  
policy inuring  
to spouse or  
children

spouse and, additionally or alternatively, the children, including unborn children, or any of them, of the person by whom the policy was effected unless, at the time of its issue, the policy expressly so provides.

**63.**—(1) If, before or during marriage, a man effects or cedes for the benefit of his wife a life policy on his or her life and the policy—

Protection afforded in respect of life policy inuring to wife

(a) is attached in execution of a judgement or order of any court at the instance of her creditors; or

(b) becomes part of her estate in bankruptcy, the proceeds of realization of the policy shall, to the extent specified in section 60 (2), be protected against her creditors and against any claim in connection with the attachment or the bankruptcy.

(2) Section 60 (3), (4) and (5) and section 62 (2) and (3) shall, *mutatis mutandis*, apply to a life policy referred to in subsection (1) or money due or paid thereunder by the insurer or any assets acquired with those moneys or with those moneys and other moneys.

**64.**—(1) The owner may appoint any person or persons to be the beneficiary or beneficiaries to receive the benefits payable under the policy on the death of the life assured or the benefits payable under the policy on the maturity of the policy or on the death of the life insured.

Appointments and revocation of appointments of beneficiaries

(2) The appointment of the beneficiary or beneficiaries may be made at the time of proposing for the policy or at any time thereafter, but shall not be legally valid until it has been recorded in the policy or in an endorsement thereto:

Provided that the appointment may be recorded in the policy or in an endorsement thereto at any time before the benefits are paid.

(3) The owner shall be entitled to revoke or amend the appointment of the beneficiary or beneficiaries at any

time, but the revocation or amendment shall not be legally valid until it has been recorded in the policy or in an endorsement thereto:

Provided that the revocation or amendment may be recorded in the policy or in an endorsement thereto at any time before the benefits are paid.

(4) In cases where—

(a) one beneficiary is appointed, in the event of the death of the beneficiary before the benefits become payable and before the owner of the policy appoints another beneficiary or other beneficiaries in place of the deceased beneficiary, the appointment of the deceased beneficiary shall be deemed to have been revoked;

(b) more than one beneficiary is appointed, in the event of the death of one beneficiary before the benefits become payable and before the owner of the policy appoints another beneficiary, the owner of the policy shall be deemed to have appointed the surviving beneficiary or beneficiaries, as the case may be, to receive the share of the deceased beneficiary in addition to his original share or their original shares or, if all the beneficiaries die before the benefits become payable and before the owner of the policy before appoints another beneficiary or beneficiaries in their place, the owner of the policy shall be deemed to have revoked the beneficiary appointment.

(5) Subject to subsection (7), the benefits payable to the beneficiary or beneficiaries shall inure for their benefit and shall not form part of the estate of the owner of the policy.

(6) (a) Subject to subsection (7), it shall be lawful for an insurer to pay the benefits directly to the beneficiary or beneficiaries and it shall not be necessary for any grant of probate or letter or

administration or similar authority to be obtained for this purpose; and

(b) payment by the insurer of the benefits to the beneficiary or beneficiaries shall discharge the insurer's liability under the policy:

Provided that, if a beneficiary is a minor, the Administrator General shall hold the money upon trust for the minor beneficiary until the minor beneficiary attains the age of twenty-one (21) years and payment by the insurer to the Administrator General shall discharge the insurer's liability in respect of the benefits to which the minor beneficiary is entitled.

(7) In case where the benefits become payable in consequence of the death of the owner, before an insurer makes payment to the beneficiary, the insurer shall ascertain the amounts of the proceeds of all other life policies on the life of the owner which are owned by him and have become payable in consequence of his death and all other amounts making up the dutiable estate of owner and, if the dutiable estate is of such value as to be dutiable under the Estate Duty Act, the insurer shall pay the estate duty which is payable in respect of the benefits.

(8) The appointment of a beneficiary shall not affect the availability of the policy or the availability of the benefits payable under the policy for division amongst the creditors or the owner in the event of the owner's bankruptcy.

**65. If—**

(a) two or more life policies or assets in respect of which protection is afforded by sections 60, 61 or 63, being the property of one person, are attached in execution of a judgement or order of any court at the instance of a creditor; or

(b) the owner of two or more life policies or assets in respect of which protection is afforded by sections

Selection for realization of life policies in respect of which protection is afforded



60, 61, 63 is adjudged or otherwise declared insolvent or bankrupt, and a part only of the aggregate realizable value of the policies or assets is protected, the judgement creditor or, the trustee of the estate in insolvency or bankruptcy as the case may be, shall determine which policy or policies or other assets or other assets shall be realized, wholly or partly, in order or make available to him so much of the aggregate realizable value as is not protected.

**66.**—(1) A judgement creditor of the owner of a life policy or the trustee of his estate in insolvency or bankruptcy who is entitled to a part of the realizable value of the policy may, if he is in possession of the policy, deliver it to the insurer who is liable under the policy for the purpose of the payment to him of the sum to which he is entitled.

Partial realization and partial conversion of life policies

(2) If a judgement creditor or trustee referred to in subsection (1) is not in possession of the life policy to which that subsection relates, the owner or any other person in possession of the policy shall, at the request of the judgement creditor or trustee, deliver it to the insurer who is liable under the policy for the purposes of the payment to the judgement creditor or trustee of the sum to which he is entitled.

(3) On receipt of a life policy delivered to him under subsection (1) or (2), the insurer shall—

(a) at the request of the judgement creditor or trustee referred to in subsection (1), pay to him a sum equal to the part of the realization value of the policy to which he is entitled; and

(b) at the request of the owner of the policy, issue to him a new policy of the same class, but for a sum insured equal to the difference between—

(i) the full sum insured under the old policy, including any bonus which may have accrued in connection therewith; and

(ii) an amount which bears the same ratio to the full sum insured under the old policy, including any bonus, as the amount paid by the insurer to the judgement creditor or trustee referred to in subsection (1) bears to the full realizable value of the old policy.

(4) If an insurer makes the payment and issues a new Provisions in case of policy as provided in subsection (3), the old policy shall lapse.

**67.** If a person who—

(a) effects or cedes a life policy for the benefit of his spouse and, additionally or alternatively, children, including unborn children, or any of them; or

(b) holds a life policy in trust for any other person and is obliged to pay the premiums on the policy;

is or has been unable to pay the premiums, that person may, with the consent of each person who has an interest in the policy or, if any such person is a minor, with the consent of his guardian or the Registrar of the High Court, agree with the insurer liable under the policy to—

(i) exchange the policy for a paid-up life policy of the value equal to that of the original policy according to the insurer's current tariff, payable at the time and in the manner stipulated in the original policy to the person or persons entitled to the sum insured by the original policy;

(ii) borrow from the insurer upon security of the policy such sums as may be necessary to keep the policy in force or to revive it; or

(iii) apply any bonus which may have accrued in connection with the policy to a temporary or permanent reduction of premiums or to the payment of any premiums which have fallen due.

**68.**—(1) Nothing contained in this Part shall be construed as derogating from the power of a competent

Provisions in case of life policy ceded or where trust policy cannot be kept up

Life policies ceded for premiums paid with intent to benefit someone at the expense of a creditor

court to set aside, in terms of any written law in force in Malawi relating to bankruptcy, any cession of a life policy made with intent to benefit someone at the expense of a creditor.

(2) If a premium upon a life policy is paid with intent to benefit a person at the expense of a creditor of the person making the payment, a competent court may order the owner of the policy to pay a sum equal to the aggregate of all premiums so paid, with interest at the rate of six (6) percent per annum, on the amount of each premium so paid from the date of its payment, to the person to whose detriment the premium is or the premiums are paid or, if the person is adjudged or otherwise declared insolvent or bankrupt, to the trustee of his estate in bankruptcy:

Provided that an order for the payment of a sum of money is served upon the insurer concerned, the order shall have the effect of pledging the life policy to the person entitled to the payment as security for the payment and, until the payment is made, that person shall be entitled to possess the policy.

**69.** If—

Proof of age

(a) a claim is made for a benefit under a life policy which has insured for a period of three years from the date of the payment of the first premium;

(a) the age or date of birth of the insured is not admitted by the insurer liable under the policy; and

(b) the person claiming the benefit shows that, owing to circumstances beyond the control and through no default either of himself and of the person by whom the policy is effected, there was, at no time after the date of the payment of the first premium under the policy, either in existence or available any documentary evidence affording reasonable proof of the age or date of birth of the insured,

any written statement made in the proposal or application for the policy as to the age or date of birth of the insured shall be accepted for the purposes of the claim as the correct age or date of birth of the insured, unless the contrary is proved by records of a medical examination of the insured, made at the instance of the insurer, within the period of three years referred to on paragraph (a) or in any other manner.

**70.**—(1) If after the issue of a life policy it is proved that the policy is based upon an incorrect statement of the age of the person whose life is insured, the sum insured and other benefits under the policy shall, subject to subsection (2), be the same as those which the premiums payable under the policy would have secured had the policy been based upon a correct statement of the person's age. Age incorrectly stated

(2) If the Registrar is satisfied that the actuarial nature of life policies of any particular kind is such as to render the application of subsection (1) inequitable, he may direct an insurer to apply, in relation to policies of that kind, such other method of making adjustments in respect of incorrect statements of age as may appear to the Registrar to be equitable.

**71.**—(1) No life policy in which it is provided that the policy shall be void in the event of the insured, whether sane or insane, dying by his own act within a stipulated period shall be void for that reason if the insured dies by his own act after the expiration of that period. Death of insured by his own act

(2) A life policy in which no provision similar to that referred to in subsection (1) is contained shall not be void by reason of the insured, whether sane or insane, dying by his own act at any time after the issue of the policy.

**72.**—(1) If a local policy is lost or destroyed and the loss or destruction is proved and advertised in the prescribed manner, the insurer liable under the policy Lost or destroyed life policies

shall, at the request of the policy owner and on payment by the policy-owner to the insurer of the prescribed fee, issue to the policy-owner—

(a) a correct and certified copy of the policy upon which shall be inscribed any endorsement made by the insurer on the original policy after its issue; and

a correct and certified copy of any record in the possession of the insurer of any dealings with the policy after its issue.

(2) A certified copy of a life policy issued under subsection (1) shall for all purposes—

(a) take the place of the policy lost or destroyed; and

(b) be the sole evidence of the contract made by the policy.

**73.**—(1) If a licensed insurer by notice in writing—

Life policy may include disability benefits

(b) informs the Registrar that he has issued on or before the date of commencement of this Act, or that he intends to issue, local life policies which provides benefits—

(i) on the total or partial permanent disablement of the person whose life such a policy insures; or

(ii) on the death of the person whose life such a policy insures as a result of an accident or a particular disease; and

(b) requests the Registrar that the policies referred to in paragraph (a) shall be treated for the purposes of this Act as life policies only,

and any such policy issued by the insure on or before the date of commencement of this Act or after notification to the Registrar as provided in paragraph (a) shall, subject to subsection (2), be treated, for the purposes of this Act, as a life policy only.

(2) A policy referred to in subsection (1) (a) shall not be treated for the purposes of this Act as a life policy only

if the value of the benefits referred to in subparagraphs (i) and (ii) of the paragraph which it provides exceeds an amount equal to a waiver of claims to a premium under the policy in respect of the period of disability, together with—

(a) a monthly benefit, payable during the period of the disability of the person whose life the policy insurers, but not extending beyond the date of termination of the risk of the life insurance proper effected by the policy, amounting to one and one-quarter per centum of the sum payable under the policy on the death of the person;

(b) a lump sum equal to the sum payable under the policy on the death of the person whose life the policy insures; or

(c) in the case of a deferred annuity policy, a monthly benefit, payable during the period of the disability of the person whose life the policy insurers, but not extending beyond the date as from which the annuity will become payable, amounting to one-twelfth of the annuity.

(3) A local life policy which provides benefits such as those described in subsection (1)(a) which cannot, by reason of subsection (2), be treated for the purposes of this Act as a life policy only shall, for the purposes of this Act, be treated as both a life policy and a personal accident policy.

**74.**—(1) No insurer shall make or permit to be made any discrimination in respect of the rate of premiums charged or the rate of bonuses granted between life policies which are of the same kind and under which the persons whose lives are insured have an equal expectation of life.

Discrimination  
between life  
policies, etc.  
prohibited

(2) Nothing in subsection (1) shall apply to life policies which—

(a) are re-insurance contracts;

(b) are for large sums at preferential rates in accordance with the current tariff of the insurer concerned;

(c) insure at preferential rates the live of employees of one employer or a combination of employers or members of the families of such employees or the lives of a group of persons carrying on the same occupation; or

(d) are of a class prescribed in Registrar's directives for this section.

(3) No insurer or director, servant, or an agent of an insurer shall pay, allow, give, offer to pay, directly or indirectly—

(a) a rebate of the premium payable on a life policy;

(b) an advantage in the nature of a rebate of the premium payable on a life policy; or

(c) preferential treatment in connection with a bonus or other benefit under a life policy.

(4) No person shall knowingly receive as such, any rebate of premium, advantage or preferential treatment referred to in subsection (3) as an inducement to insure.

(5) No director, servant or agent of an insurer shall accept any proposal or application for a life policy in respect of which—

(a) a promissory note, bill of exchange or other negotiable instrument, not being a cheque payable on the date of issue; or

(b) an acknowledgement of debt not being a stop order,

in favour of the insurer or any person whatsoever is given for the first year's premium or any part thereof.

(6) A person who contravenes any provision of this section commits an offence and shall be liable to a fine of double the amount of the annual premium normally

payable on a life policy similar to the one in respect of which the offence is committed.

**75.** Sections 58 to 71 and 74 shall, *mutatis mutandis* apply to industries policies.

Application of certain provisions of Part VIII to industrial policies

**76.** Sections 72 and 74 shall, *mutatis mutandis*, apply to sinking fund policies.

Application of certain provisions of Part VIII to sinking fund policies

**77.**—(1) Sections 58 to 69 and 71 and 73 shall, *mutatis mutandis* apply to funeral policies.

Application of certain provisions of Part VIII to funeral policy, etc

(2) If after the issue of a funeral policy it is proved that the policy is based upon an incorrect statement of the age of the person whose life is insured, the benefits under the policy shall not be affected thereby, but the premiums payable under the policy from the date on which the person became insured shall be deemed to be those which would have been required had the age been correctly stated, and the insurer liable under the policy shall—

- (a) be entitled to recover from the policy-owner any resultant shortfall in the premiums actually paid; or;
- (b) refund to the policy-owner any resultant overpayment of premiums.

(3) A funeral policy issued on or after the date of commencement of this Act—

(a) shall provide that the policy-owner shall, at his option, be entitled to a sum of money instead of each funeral or other non-monetary benefit for which provision is made in the policy; and

(b) may provide that the insurer liable under the policy shall likewise have the option to pay the sum of money referred to in paragraph (a) instead of providing for each funeral or other non-monetary benefit for which provision is made in the policy.



(4) An option referred to in subsection (3) and the sum of money to which it relates shall be stated expressly and clearly in the funeral policy, and in every premium receipt book issued in connection therewith, in printed or typed letters no smaller than, and as legible as, the letters of the provisions of the policy.

(5) A licensed insurer who issues a funeral policy before the date of commencement of this Act shall, if the policy is still in force, within three months of that date declare to the Registrar the value in money of each funeral or other non-monetary benefit for which provision is made in the policy, and that value shall be stated in clear typed and in distinct terms in every premium receipt book issued thereafter in connection with the policy.

(6) If the Registrar is of the opinion that a sum of money stated in a funeral policy under subsection (4), or that the value declared by a licensed insurer under subsection (5) with reference to a particular funeral policy, does not approximate to the value of the funeral or other non-monetary benefit for which provision is made in the policy, he shall declare the amount of money which is, in his opinion, equal to the value of the funeral or other benefit provided for in the policy.

(7) In a funeral policy the amount declared by the Registrar under subsection (6), or if no amount is so declared, the sum of money stated in the policy under subsection (4), or the value declared under subsection (5), shall be deemed to be the sum insured.

**78.**—(1) If an annual premium under a local life, industrial or sinking fund policy has not been paid on its due date, an insurer liable under the policy shall, notwithstanding any agreement to the contrary between the parties to the policy, maintain the policy in force for the full sum insured without payment of a further premium for a period of one month as from the due date

Grace period,  
paid up policies  
and non  
forfeiture  
provisions: life,  
industrial and  
sinking fund  
policies

of the first unpaid annual premium and if such premium is paid within the month the insurer shall renew the policy.

(2) If the premiums under a local life or sinking fund policy are payable at monthly intervals, or at intervals of less than one month, subsection (1) shall have effect as if the references in the subsections to the words “one month” and “month” were references to the words “fifteen days.”

(3) If a claim under a local life, industrial or sinking fund policy arises during the grace period provided for under this section, an insurer liable under the policy shall be entitled to deduct the amount of the unpaid premium from the claim.

(4) If a premium under a local policy which is—

(a) a life policy under which at least three year’s premiums have been paid;

(b) an industrial policy under which at least five year’s premiums have been paid; or

(c) a sinking fund policy under which at least three years’ premiums have been paid,

has not been paid within the period specified in subsection (1), or, subsection (2) as the case may be, the insurer liable under the policy shall, in accordance with rules made by him and approved by the Registrar, either issue, in return and instead of the policy, a paid-up policy which shall be free from the obligation to pay any premiums thereunder or, unless the policy is a sinking fund policy, apply the non-forfeiture value of the policy in maintaining the policy in force for a period and by a method determined in accordance with the rules.

(5) The owner of the policy referred to in subsection (4) may, in writing, waive the rights conferred upon him by that subsection.

(6) The rules referred to in subsection (4) shall specify the basis on which the methods by which the amount of

the non-forfeiture value and the amount of the paid-up policy referred to in that subsection shall entitle the owner to any future bonuses thereon.

(7) Subsection (4) shall not apply in connection with any particular kind of life or industrial policy which an insurer issues or proposes to issue if the Registrar is satisfied that the actuarial nature of that kind of policy prevents the insurer from accumulating, in respect of policies of that kind, sufficient funds to enable him to grant any substantial benefit of a kind described in that subsection.

(8) If on or after the date of commencement of this Act a local life policy under which at least three years' premiums have been paid lapses or is dealt with as provided under subsection (4) and the owner of the policy informs the Registrar within thirty days of the date on which he is notified by the insurer liable under the policy that the policy has lapsed, or has been so dealt with or, if he is not so notified, within six months of the date on which the policy lapsed, or has been so dealt with that he received no written notice from the insurer a reasonable time beforehand to the effect that the policy was due to lapse or be so dealt with, the Registrar may, unless the insurer satisfies him that the notice was duly dispatched to the owner at his last known residence or postal address or place of work a reasonable time before the policy was due to lapse or be so dealt with, require the insurer to revive the policy on payment of the premium required within a period to be fixed by the Registrar.

(9) A policy shall be revived under subsection (8) without any alterations in its conditions with effect from the date of the payment of the premium required.

**79.**—(1) If a premium under a local funeral policy has not been paid on its due date, the insurer liable under the policy shall, notwithstanding any agreement to the

Grace period,  
paid up policies  
and non-  
forfeiture  
provisions:  
funeral policies

contrary between the parties to the policy, maintain the policy in force for the full value of the benefits—

(a) if the insurer is bound by an express or tacit undertaking to send a person from time to time to the owner of the policy at his residence or place of work to collect the premiums, for a period of one month as from the due date of the first unpaid premium; and

(b) if paragraph (a) does not apply, for a period expiring on a date specified for that purpose in a written notice which the insurer has served on the owner of the policy at least fourteen days before that date.

(2) If a premium referred to in subsection (1) is paid within the relevant period specified in paragraph (a) or (b) of the subsection, the insurer liable under the policy shall renew the policy, and if a claim under the policy arises during the period, the insurer shall be entitled to require the owner of the policy to pay the amount of the premium.

(3) If a premium under a local funeral policy issued on or after the date of commencement of this Act is not paid within the period specified in subsection (1), the policy shall, subject to this section, nevertheless remain in force for the appropriate period fixed under subsection (6) for the full sum insured without payment of further premiums.

(4) If an insurer's liability under a funeral policy is contingent upon the death of two or more persons and the policy provides for a benefit on the death of a person who is under the age of twenty-one years and who is not the owner of the policy or his wife or her husband, no benefit shall be claimable under that policy on that person's death if it occurs after he or she attained the age of twenty-one years.

(5) If an insurer's liability under a funeral policy is contingent upon the death of one person only, who was

under nine years of age when the policy was issued, the period specified in subsection (6) shall be computed as if the policy had been issued on the anniversary of the date of its issue when that person was between nine and ten years of age.

(6) A funeral policy referred to in subsection (3) shall remain in force for the appropriate period listed in the first column of the following table in accordance with the number of years for which premiums were paid under the policy specified opposite thereto in the second column of the table—

6 months	5 years or over and less than 7 years
9 months	7 years or over and less than 9 years
12 months	9 years or over and less than 11 years
18 months	11 years or over and less than 14 years
24 months	14 years or over and less than 17 years
36 months	17 years or over and less than 21 years
48 months	21 years or over and less than 25 years
60 months	25 years or over.

**80.** Nothing contained in section 78 or 79 shall preclude an insurer from granting to an owner of a policy of a kind referred to in section 78 or 79 more favourable terms than those specified for that kind of policy in section 78 or 79, as the case may be.

Grant of more favourable terms than those specified in sections 62 and 63 not precluded

#### PART IX—LICENSING OF INSURANCE BROKERS

**81.—(1) (a)** No person shall carry on the business of an insurance broker in Malawi unless that person is licensed as an insurance broker under this Act.

Insurance brokers to be licensed

(b) Any person who contravenes subsection (1)(a) commits an offence and upon conviction shall be liable

to a fine of five hundred thousand kwacha (K500,000) and to imprisonment for four years, or, if the offender is not a natural person, to a fine of one million kwacha (K1,000,000).

(3) If an application is made in accordance with the Financial Services Act for a licence as an insurance broker, the Registrar shall grant the licence if (and shall not so grant the licence unless) the applicant—

(a) holds professional insurance qualification as recognized by the Insurance Institute of Malawi and acceptable to the Registrar, or has a minimum of five years experience in a managerial position in the insurance industry and a satisfactory record in such employment;

(b) does not own shares of an insurer or does not have financial interest in an insurer of more than five percent or no insurer owns shares or has financial interest in the applicant of more than five percent;

(c) is not seeking to be licensed under a name identical or so nearly identical with the name of a person already licensed under this Act as to be likely to be mistaken for it;

(d) is otherwise a fit and proper person to be licensed as an insurance broker;

(f) has not entered into an agreement relating to the preferential offer of insurance business with any person carrying on insurance so as to impair his impartiality in placing insurance business,

(g) has secured appointment as a broker by not less than twenty five percent of licensed insurers.

(4) Notwithstanding anything contained in subsection (3), if the Registrar is of the opinion that it would not be in the public or policyholders' interests to approve an application for a licence as an insurance broker; the Registrar shall refuse to grant the licence.

**83.**—(1) When a broker's appointment by an insurer is terminated, the insurer shall forthwith notify the Registrar about the termination and thereupon inform the general public through a notice in at least two newspapers of wide circulation.

Termination of insurance broker's appointment

(2) An insurance broker whose appointment by an insurer is terminated shall immediately cease to sell insurance policies on behalf of the insurer.

(2A) and any violation thereof constitutes an offence and upon conviction shall be liable to a fine of five hundred thousand kwacha (K500,000) and to imprisonment for four years, or, if the offender is not a natural person, to a fine of one million kwacha (K1,000,000).

**84.** Despite section 30 of the Financial Services Act, the Registrar shall not revoke an insurance broker's licence at the request of the broker unless satisfied that all the liabilities of the broker in respect of his business are met or other provision is made for them by means acceptable to the Registrar.

Revocation of licence at request of insurance broker, etc

**86.** All funds received or receivable by an insurance broker in the course of business on behalf of insurers from members of the public shall be treated as trust funds and no insurance broker shall assign, pledge or in any way charge the trust funds.

Trust funds

**87.** Without limiting the Registrar's power under the Financial Services Act to issue Registrar's directives, Registrar's directives may make provision with respect to trust funds under section 86 and keeping trust accounts by insurance brokers.

Registrar's directives for insurance brokers

#### PART X—LICENSING OF INSURANCE AGENTS

**88.**—(1) Unless he is licensed under this Part, no person, whether or not he is licensed as an insurer or as an

Insurance agents, etc to be licensed

agent for brokers, shall carry on the business of an insurance agent.

(2) Any person who contravenes subsection (1) commits an offence and upon conviction shall be liable to a fine of five hundred thousand kwacha (K500,000) and to imprisonment for four years or, if the offender is not a natural person, to a fine of one million kwacha (K1,000,000).

**90.**—(1) If an application is made in accordance with the Financial Services Act for a licence as an insurance agent of a specified insurer, the Registrar shall grant the licence if (and shall not so grant the licence unless)—

Licensing  
insurance agents,  
etc

(a) the applicant holds a reasonable educational and professional qualification and has a minimum of two years experience in the insurance industry with satisfactory record of performance;

(b) the applicant is not seeking to be licensed under a name that so closely resembles the name of an existing insurance agent as to be likely to be mistaken for it;

(d) the applicant is otherwise a fit and proper person to be licensed as an insurance agent;

(e) the applicant has undertaken not to be an agent for more than one licensed insurer;

(f) the applicant has entered into an agreement with the insurer specifying the terms and conditions relating to the agency, including payment to the insurer of any premiums collected on his behalf; and

(g) the applicant will not conduct his business contrary to the interest of the public in Malawi; and

(h) the insurer has confirmed in writing to the Registrar that he has appointed the applicant as an agent.



(2) The licence shall specify to the name of the insurer and the classes of insurance covered on behalf of such insurer, in the licence.

**91.**—(1) No person shall make any representation to the public, by advertisement or otherwise, that he is an insurance agent of an insurer unless he—

Misrepresentation prohibited

(a) he is a licensed insurance agent; and

(b) has been appointed by the insurer to act as the insurer's agent, which appointment has not been revoked

(2) Any person who contravenes subsection (1) commits an offence and upon conviction shall be liable to a fine of five hundred thousand kwacha (K500,000) and imprisonment for four years, or, if the offender is not a natural person, to a fine of one million kwacha (K1,000,000).

**92.** When the appointment of an insurance agent is terminated, the insurer shall forthwith notify the agent and the Registrar of the termination and thereupon the insurance agent's licence shall be automatically suspended.

Termination of agency

**93.**—(1) An insurance agent shall, for all purposes connected with payment or receipts of premium for an insurance policy, be deemed to be the agent for the insurer until the agency is terminated.

Agent for insurer

(2) If such an agency is terminated, the insurer shall, within seven days, issue a notice to the general public in at least two newspapers of wide circulation and inform the Registrar of the cancellation.

**94.**—(1) Without limiting the power of the Registrar under the Financial Services Act to suspend or revoke a licence, the Registrar may suspend or revoke such a licence on the ground that the continuation in force of the

Suspension and revocation of insurance agents' licences for other reasons

agent's licence, would, in the opinion of the Registrar, be contrary to the public or policyholders' interest.

(3) Despite section 30 of Financial Services Act, the Registrar shall not revoke or suspend the licence of an insurance agent at the request of the insurance agent unless satisfied that that all liabilities of the agent are met or other appropriate arrangements are made.

PART XI—COLLECTION OF PREMIUMS BY BROKERS OR AGENTS

**96.** In this Part, unless the context otherwise requires—

Interpretation of terms in Part XI

“deposit premium” means a provisional premium which is agreed upon in the event of it being impossible at the inception or renewal date to determine the exact premiums and which represents a reasonable estimate of the premium;

“due date” in relation to premiums, means the date immediately following the expiry date of the mutually agreed credit period;

“prescribed credit period” means the period that starts—

(a) in the case of a new policy, at the inception date of the policy;

(b) in the case of an existing policy which has been renewed, at the renewal date of the policy; and

(c) in the case of a policy endorsement and a declaration under an open cover policy, on the first day of the month following the date upon which documentation is issued by the insurer to the policyholder concerned,

and ends as specified in the agreement with the insurer;

“premiums” includes a deposit premium.

**97.** An insurance broker and an insurance agent are responsible for the collection of premiums on behalf of an insurer and when he so collects the premiums he shall—

Collection of premiums

(a) close off his records of premium receipts within the prescribed credit period;

(b) pay the amount of such premiums to the insurer within that period and in any case not later than the due date;

(c) simultaneously furnish the insurer with a detailed payment bordereau in respect of payment under paragraph (b);

(d) before remitting any premiums under paragraph (c), set off any commission due to him by the insurer in respect of such premiums.

(2) Payment of premium by policyholder under his insurance to an agent or broker shall be deemed to be specific performance under the policy.

(3) Registrar's directives may, in the interest of policyholders, insurers or intermediaries, prescribe different or additional requirements for the receipt of, retention of, or dealing with moneys in respect of premiums and, to the extent of any inconsistency between the other provisions of this section and the provisions of Registrar's directives issued for this section, the provisions of Registrar's directives prevail.

PART XII—LICENSING OF LOSS ASSESSORS/ADJUSTORS,  
AND CLAIMS SETTLING AGENTS

**98.**—(1) No person shall, unless he is licensed under this Part, carry on the business of loss assessor/adjustor or claims settling agent.

Loss assessors /  
adjustors and  
claims settling  
agents to be  
licensed

(2) Any person who contravenes subsection (1) commits an offence and upon conviction shall be liable to a fine of twenty-five thousand kwacha (K25,000).

**100.** If an application is made in accordance with the Financial Services Act for a licence to carry on the business of loss assessor/adjustor or claims settling agent,

Conditions for  
licensing loss  
assessors/adjusto  
rs and claims  
settling agents

the Registrar shall grant the licence if (and shall not grant the licence unless) the applicant—

(a) holds reasonable educational and professional qualifications and has a minimum of five years of relevant experience with satisfactory record of performance;

(b) is not seeking to be licensed under a name that closely resembles the name of an existing loss assessor/adjustor or claims settling agent as to be likely to be mistaken for it;

(d) has not been declared insolvent or bankrupt under the laws of any country or made arrangement with or assignment to his creditors which has not been set aside;

(e) has not been convicted by any court of an offence involving dishonesty and does not otherwise have a criminal record; and

(f) is trading as an insurance agent; and a licensed insurer has confirmed in writing to the Registrar that he has appointed the applicant as a loss assessor/adjustor or claims settling agent.

#### PART XIII—CORPORATE GOVERNANCE

**101.**—(1) Every insurer that is a body corporate shall have directors in accordance with the provisions of the Company's Act.

Specific duties of directors

(3) The directors of an insurer shall be responsible for the management or supervision of the management of the business and affairs of the insurer and their duties shall include the establishment of—

(a) investment and lending policies and procedures of the insurer and their periodic review;

(b) procedures to identify and resolve conflicts of interest, including techniques for the identification of

potential conflict situations, and for restricting the use of confidential information;

(c) procedures to provide disclosure of information to customers;

(d) an audit committee;

(e) a conduct review committee; and

(f) such other committees as are necessary for the effective accomplishment of corporate objectives.

**102.** Every director or officer of an insurer in exercising his powers and discharging his responsibilities shall— Duty of care

(a) act honestly and in good faith with a view to best interests of the insurer;

(b) exercise due care, diligence and skills that a reasonably prudent person shall exercise in a comparable situation; and

(c) comply with this Act, , the other financial services laws, any other relevant written laws and the by-laws of the insurer.

**103.**—(1) An insurer shall have at least seven directors and at least one-half of the directors of an insurer that is a subsidiary of a foreign company and three-quarters of the directors of other insurers shall be persons who are ordinarily resident in Malawi, unless Registrar, on application, permits the insurer to have fewer directors. Directors' qualifications and number

(1A) A decision of the Registrar to refuse to give permission under subsection (1) is declared to be a reviewable decision, and notice of the decision shall be given to the person who made the application in accordance with section 68 of the Financial Services Act.(2) No more than one-third of directors of an insurer may be employees of the insurer or its subsidiary except that up to four employees may be directors if they do not constitute more than one half of the total directors.

(3) At least one-third of directors of an insurer shall have adequate background in the financial services industry, with no less than five years experience in the field at a senior management level.

(4) Directors may be elected for a term of no more than three years.

(5) Without limiting the Registrar's power under the Financial Services Act to issue Registrar's directives, the following persons shall be disqualified from being appointed directors of an insurer—

- (a) a person who is less than eighteen years of age;
- (b) a person who is of unsound mind and has been so declared by a court in Malawi;
- (c) a person who has been declared bankrupt;
- (d) a person who is an employee of the Government of Malawi or of a foreign Government;
- (e) a person who is an insurance agent or broker of the company.

(6) Where an insurer commits an offence under this Act, any officer or director of the insurer who directed, acquiesced or participated in the commission of the offence shall be a party to the offence.

**104.**—(1) The Audit Committee of an insurer established under section 101 shall consist of at least three directors and none of the members of the committee shall be employees of the insurer. Audit Committee

- (2) The Audit Committee shall—
- (a) review the annual financial statements of the insurer and report on the statements to the Directors;
  - (b) review the returns submitted to the Registrar;
  - (c) review such investments or transactions that could adversely affect the well-being of the insurer as

may be brought to their attention by the auditors or any officer of the insurer;

(d) ensure that appropriate internal control procedures are in place; and

(e) meet with the auditors to discuss the annual financial statements.

**105.**—(1) The Conduct Review Committee established under section 101 shall consist of three directors, non of whom shall be employees of the insurer or any of its subsidiaries.

Conduct Review  
Committee

(2) The Conduct Review Committee shall—

(a) review all proposed transactions with related parties of the insurer; and

(b) review the procedures and practices of the insurer to ensure that any transactions with related parties that may have material effect on the stability and solvency of the insurer are identified in a timely manner.

**106.**—(1) A chief executive officer of an insurer shall ordinarily be resident in Malawi after his appointment

Appointment of  
chief executive  
officer

(2) The appointment of a chief executive officer shall be subject to approval of the Registrar and at least thirty (30) days prior to the date of his appointment or such shorter time as the Registrar may allow, an insurer shall provide to the Registrar the name of the appointee together with such information about his background, business record and experience as the Registrar may require.

(2A) A decision of the Registrar to refuse to give approval for the purposes of subsection (2) is declared to be a reviewable decision, and notice of the decision shall be given to insurer and the proposed chief executive officer in accordance with section 68 of the Financial Services Act.

**108.**—(1) A director or an officer of an insurer who—

Conflict of  
interest

(a) is a party to a significant existing or proposed contract with the insurer;

(b) is a director or an officer of an entity that is a party to a significant existing or proposed contract with the insurer; or

(c) has a material interest in a person who is a party to a significant existing or proposed contract with the insurer

shall disclose in writing to the insurer the nature and extent of such interest.

(2) The disclosure required in subsection (1) shall be made in the case of—

(a) a director—

(i) at the first meeting of the directors after he becomes interested in a proposed contract and such contract is considered at the meeting; or

(ii) if he becomes interested after a contract is made or the contract is already in place and he later becomes a director, at the first meeting of the Board of directors after that occurrence; and

(b) an officer who is not a director—

(i) forthwith after he becomes aware that a proposed contract in which he has an interest has been or shall be considered at a meeting of the board of directors; or

(ii) if an officer becomes interested after a contract is made or the contract is already in place and he later becomes an officer, forthwith after the occurrence.

(4) A director referred to in subsection (1) shall not be present or vote in any resolution of the directors to approve the contract.

(5) Any director who knowingly contravenes the provision of this section, shall cease to be a director and



shall become ineligible to hold the position of a director of any financial institution in Malawi for a period of five years.

**109.**—(1) A person is a related party of an insurer if the person— Self dealing

(a) has a significant interest, directly or indirectly, in a class of shares of the insurer;

(b) is a director or officer of the entity that controls the insurer;

(c) is the spouse or a child under eighteen years of the person in (a) or (b) above;

(d) is an entity in which a director or officer of the insurer or person that controls the insurer has a significant investment; or

(e) is an entity in which the spouse or a child under eighteen years of age of a person described in (d) has a significant investment.

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

(3) A decision of the Registrar to refuse to designate a person under subsection (2) is declared to be a reviewable decision, and notice of the decision shall be given to the person in accordance with section 68 of the Financial Services Act.

**110.** Except for transactions where the value of the transaction is normal or immaterial, using criteria established by the Conduct Review Committee and approved by the Registrar, an insurer shall not, directly or indirectly, enter into any transaction with a related party

Prohibition of  
self dealing

**111.**—(1) An insurer may—

- (a) cause itself to be reinsured by a related party against any risk undertaken by the insurer;
- (b) borrow money from a related party;
- (c) acquire from or sell to a related party goods and services for use in the ordinary course of business; and
- (d) purchase from or sell assets to a related party where there is an active market for the assets and payment in full is made or received.

Exception to prohibition

(2) An insurer may in the normal course of business and subject to approval of the Registrar, acquire from or sell to a related party that is a financial institution any assets, other than real property.

**112.** Without limiting the Registrar's power under the Financial Services Act to issue Registrar's directives, Registrar's directives may make provision with respect to transactions between a licensed insurer and a related party of a licensed insurer, including specifying rules and maximum limits for exposure of the insurer to a related party who is a director or officer of the insurer.

Registrar's directives regarding significant investments

#### PART XV—INVESTMENTS AND LOANS

**115.** The board of directors of an insurer shall establish and monitor and an insurer shall implement investment and lending policies, standards and processes that a reasonable and prudent person would apply in respect of investments and loans to avoid undue risk of loss and obtain a reasonable return.

Investments and lending policies

**116.**—(1) Except as provided in the directives, an insurer shall not, without prior written approval of the Registrar, and subject to such terms and conditions as the Registrar may impose—

Approval of investments

- (a) acquire more than 10 per cent of the outstanding voting share capital of a body corporate or 10 per cent

of beneficial interest in an unincorporated entity, the aggregate value of all such shares and beneficial interest not to exceed 75 percent of the actuarial liabilities of the insurer; or

(b) purchase or otherwise acquire interest in real property or make an improvement to any real property if the aggregate value of all interests exceeds—

(i) in case of life insurer, 25 percent of its actuarial liabilities; and

(ii) in case of non-life insurer 10 per cent of its total assets.

(2) If the Registrar fails to respond to an insurer's request for approval of his investment within twenty one (21) days after the insurer provides all information required by the Registrar, the insurer may proceed with his investment without the Registrar's approval.

(3) A decision of the Registrar to refuse to give approval under subsection (1) is declared to be a reviewable decision, and notice of the decision shall be given to the insurer in accordance with section 68 of the Financial Services Act. **117.** Notwithstanding section 115, where an insurer has made a loan to an entity and a default has occurred, the insurer may acquire all or any of the ownership interest in the entity or its affiliates, providing that it undertakes to the Registrar do all things necessary to ensure that it divests itself of the ownership interest within two years.

Acquiring  
ownership  
interest

**119.** Subject to provisions of this Act, the articles of association of an insurer and any other reasonable constraints imposed on the insurer by other rules in respect of the manner in which it may invest its assets, the assets of the insurer shall be invested in Malawi with sufficient regard to the consideration of liquidity, return and security.

Investment of  
assets

## PART XVI—OWNERSHIP

**123.** Despite Part VI of the Financial Services Act, the Registrar shall not approve a transfer or amalgamation of the business of a licensed insurer if it appears to him that one fifth or more of the policyholders insured by any of the insurers involved dissent from the amalgamation or transfer.

Amalgamation  
and transfer of  
insurance  
business

## PART XVII—WINDING-UP OF INSURANCE COMPANIES

**125.** Subject to the provisions of this Part, the provisions of the Companies Act relating to winding-up of companies shall be applicable to insurance companies which are companies within the meaning of that Act:

Companies Act  
to apply

Provided that the provisions of the Companies Act, specifically applicable to creditors and members voluntary winding-up shall not apply to insurance companies.

**129.** For the purposes of any winding-up of a licensed insurer and notwithstanding anything to the contrary contained in sections 204 to 305 inclusive of the Companies Act or in the Bankruptcy Act, any entry in the books, account or records of an insurer respecting receipt of premiums, assumption or risk in insurance contracts, liability on insurance claims and life insurance fund, shall be *prima facie* evidence of the rights of the insured person.

Rights of an  
insured person

**130.** Notwithstanding the provisions of sections 260 and 287 of the Companies Act and section 35 of the Bankruptcy Act, in the winding-up of an insurer the assets of the insurer shall be distributed after payment of the secured and otherwise preferred claims in the following order—

Distribution of  
insurer's assets

(a) all claims for losses covered under insurance contracts that occurred before the date on which the Registrar gave approval to the winding up for the

purposes of section 62 (1) or (3) of the financial Services Act (whichever is earlier) but remain unpaid;

(b) cash surrender value of unexpired full life policies;

(c) other claims;

(d) all claims for losses covered under insurance contracts that occurred before the date fixed by the court for winding-up of the insurer but remain unpaid;

(e) all claims of insurance persons for refunds of unearned premiums; and

(f) other claims.

**131.** Any sums of money remaining unclaimed after the winding-up of an insurer shall be deposited in the Bankruptcy Estates Accounts at the prescribed bank or with the Accountant General as if they were unclaimed and undistributed funds and section 34 of the Bankruptcy Act shall apply accordingly.

Unclaimed  
money

#### PART XX—MISCELLANEOUS PROVISIONS

**141.** Unless permitted by the Registrar, a licensed insurer shall not appoint as an agent or a broker a person who is not licensed as such under this Act.

Insurers to  
appoint licensed  
agents or brokers

**142.**—(1) Every insurer shall in respect of claims arising out of policies of insurance issued by it, pay the claims no later than thirty days after admission of liability and establishment of the identity of the claimant:

Settlement of  
claims by  
insurers

Provided that if, for any reason, the insurer is unable to pay the claims within the period specified under this subsection, he shall apply to the Registrar for an extension of time.

(2) Where the Registrar is satisfied that undue delays are being or are likely to be experienced by claimants in the settlement of their claims, he shall after giving the

insurer reasonable opportunity of being heard direct the insurer to expedite the settlement.

**143.**—(1) Process in any legal proceedings against a licensed insurer who is not an association of underwriters may be served at the principal office of the insurer in Malawi or, in the absence of any such principal office, at the office of the Registrar

Service of  
process against  
licensed insurers

(2) Service of process upon the Registrar, in accordance with subsection (1) shall be deemed to be service upon the insurer.

**144.**—(1) The owner of a local policy shall, notwithstanding any contrary provision in the policy or in any agreement relating to the policy, be entitled to enforce his rights under the policy against the insurer liable under the policy in any competent court in Malawi.

Action by  
policy-owners  
against insurers

(2) Any question of law arising in any action under a local policy which is instituted by the owner against the insurer liable under the policy shall, subject to this Act, be decided in accordance with the law in Malawi.

(3) Notwithstanding subsection (1), a local policy may validly provide that the amount of any liability under the policy shall be determined in accordance with the Arbitration Act.

**145.**—(1) The Registrar shall, at the request of an insurer who has deposited approved securities with the Registrar under this Act, furnish the insurer once each year with a certificate specifying the approved securities deposited by the insurer and their face value.

Deposit of  
approved  
securities

(2) An insurer who has deposited approved securities with the Registrar under this Act shall be entitled to the income derived from the approved securities.

(3) An insurer may at any time substitute for an approved security deposited by him with the Registrar

under this Act any other approved security of like face value.

(4) If the licence of an insurer who has deposited approved securities with the Registrar under this Act is revoked, the Registrar may cause the approved securities deposited by the insurer to be realized to meet:

- (a) the liabilities of the insurance business of the insurer in Malawi; and
- (b) any penalty imposed on the insurer under a financial services law.

(5) When the Registrar is satisfied that the liabilities of the insurance business in Malawi of an insurer referred to in subsection (4) have been met, the Registrar shall return to the insurer such of the approved securities deposited by the insurer as have not been realized to meet those liabilities.

**147.**—(1) Subject to subsection (2), an insurer shall be regarded as having failed to comply with a provision of this Act requiring an insurer to furnish documents or copies of documents to the Registrar, unless—

Documents to be signed and accompanied by copies

(a) in the case of a document by the insurer which is not in a prescribed form—

(i) the document is signed—

(A) by the chairman and one other director of the insurer or, if the insurer has no chairman or director, by such other person or persons having control over the business of the insurer as the Registrar may specify;

(B) if the insurer is not an association of underwriters, by the principal officer of the insurer; and

(C) by such persons other than the persons referred to in paragraphs (a) and (b) as are required by a provision of this Act to sign or certify the document; and

- (ii) the document is accompanied by two copies; and
- (b) in the case of a document prepared by the insurer which is in a form prescribed—
  - (i) the document is signed by the persons specified in the form; and
  - (ii) the document is accompanied by two copies; and
- (c) in the case of an original document other than a document referred to in paragraph (a) or (b), the document is accompanied by two copies; and
- (d) in the case of a copy of a document, the copy is accompanied by two other copies, one of which is certified as correct by the insurer or by an officer of the insurer.

(2) The Registrar may, in such cases as he deems expedient, direct that a lesser number of copies of documents than that specified in subsection (1) (a), (b), (c) or (d) or that no copy of a document referred to in subsection (1) (a), (b) or (c) be furnished to him.

**148.** Unless the exchange control authorities have approved the transaction, insurers may not quote insurance contracts in foreign currency.

Sums insured, etc, to be stated in currency of Malawi

**149.** Subject to this Act, failure on the part of an insurer, insurance broker or agent to comply with any provision of this Act shall not invalidate any policy issued by the insurer.

Default of an insurer, etc. not to invalidate policy

**150.** No person shall issue—

(a) local life, funeral or industrial policy in a form, the printed provisions of which, whatever their nature, are not put in a clear type face in letters of a uniform size of not less than 10 points; or

Certain policies to be printed in clearly legible letters, etc

(b) a local policy of a class not specified in paragraph (a), the printed provisions of which,



whatever their nature, are not put in a clear type face in clearly legible letters.

**151.**—(1) Any person who, contravenes the provisions of this Act or the regulations made hereunder commits an offence.

Contravention of this Act, regulations and directives

(2). Every director, officer or employee of an insurer who wilfully gives or concurs in giving a creditor of the company a fraudulent, undue or unfair preference over other creditors, commits an offence.

(4) Every person who, fails to take all reasonable steps to ensure accuracy and completeness of returns or other reports submitted to the Registrar commits an offence.

**152.**—(1) Any person who is guilty of an offence under section 151 shall—

Penalties

(a) in case of a natural person, upon conviction be liable to a fine of five hundred thousand kwacha (K500,000) or to imprisonment for a term of twelve months or to both the fine and imprisonment;

(b) in case of an entity, upon conviction be liable to a fine of two million kwacha (K2,000,000).

(3) Where a person has been convicted of an offence under this Act, the court may, notwithstanding the fine that may be imposed under subsection (1), assess an additional amount where the court is satisfied that the convicted person or his spouse or other dependent has acquired monetary benefits, directly or indirectly, because of the commission of the offence, such additional fine may be up to the amount of the acquired benefits estimated by the court.

(4) In addition to any other remedies available under this Act any other written law—

(a) a court may, on convicting a person for an offence under section 151, in addition to any other penalty, if satisfied that the convicted person or his

spouse or other dependent has acquired monetary benefits, directly or indirectly, because of the commission of the offence, also impose a monetary penalty on the person in an amount not exceeding the amount of the monetary benefits so acquired; and

(b) the Registrar may, on imposing an administrative penalty under section 65 of the Financial Services Act, if satisfied that the convicted person or his spouse or other dependent has acquired monetary benefits, directly or indirectly, because of the commission of the offence, also impose a monetary penalty on the person in an amount not exceeding not exceeding the amount of the monetary benefits so acquired.

**154.**—(1) A person who causes another person to enter into or make an application to enter into a contract of insurance with a person who is not a licensed insurer shall, subject to subsection (3), be liable to a fine of five hundred thousand (K500,000) kwacha.

Persons acting  
on behalf of  
unlicensed  
insurers

(2) A person shall, save as provided in subsection (3), be guilty of an offence under subsection (1) notwithstanding that—

(a) the insurance is placed by an insurance broker; and

(b) the contract of insurance is without his knowledge or consent effected with a person who is not a licensed insurer or a member of an association of underwriters which is a licensed insurer or a person referred to in section 21(2)(b).

(3) A person who causes another person to enter into a contract of insurance such as is referred to in subsection (1) shall not be guilty of an offence under that subsection if—

(a) the insurance as a whole is placed by a broker who is authorized by an association of underwriters

which is a licensed insurer to place insurance business with members of the association;

(b) a substantial portion of the risk is placed with a licensed insurer or with members of the association of underwriters referred to in paragraph (a) or with a licensed insurer and with members of the association of underwriters referred to in that paragraph; and

(c) the portion of the risk insured which is not placed in accordance with paragraph (b) is placed with an insurer who does not solicit business, either directly or indirectly, in Malawi or advertise his business in any newspaper or other publication in Malawi.

**155.** The Minister's power to make regulations for the purposes of this Act is conferred by the Financial Services Act. **Regulations**

**156.** Any reference in any written law in force in Malawi relating to companies or to a company carrying on insurance business under any other written law or to an insurance company registered or licensed under any other written law shall be read and construed as a reference or if the context so requires, as including a reference to a company on insurance business under this Act. **References to insurance companies in other written laws**

**157.** Wherever the provisions of this Act are inconsistent with or in addition to the provisions of the Companies Act, the provisions of this Act shall apply. **Inconsistency with the Companies Act**

**158.**—(1) Upon coming into effect of this Act, all insurers, insurance agents, insurance brokers, agents for brokers, loss assessors/adjusters, claims settling agents shall meet the requirements of the Act, including those respecting incorporation, capital and margin of solvency. **Compliance with the Act**

(2) The Registrar may upon application by an insurer, insurance broker or insurance agent allow a transition period to facilitate compliance by him with the Act.

(3) Without limiting the Registrar's power under the Financial Services Act to issue Registrar's directives, Registrar's directives may make provision with respect to—

- (a) smooth transition of insurers, insurance brokers or insurance agents to the requirements of the Act;
- (b) the fair and equitable treatment of policyholders, including those of a mutual policy;
- (c) investments of insurers;
- (d) continuance of activities during the transition period and otherwise;
- (e) the ownership of shares issued by a mutual company, as applicable;
- (f) the conversion of a mutual society into a mutual company and the conversion of other unincorporated entities into corporate entities;
- (j) the regulatory capital and total assets of an insurer;
- (k) the standards of sound business and financial practices of insurers;
- (l) the value of assets of an insurer to be held in Malawi and the manner in which these assets are to be held;
- (m) the information on insurers required to be maintained in the office of the Registrar;
- (n) the transition period for insurers carrying on business in Malawi in meeting the requirements of this Act, including those in respect of incorporation;
- (o) the activities of external reinsurers and local reinsurers, including those in regard to corporate governance, auditors and actuaries.

**159.**—(1) The Insurance Act is repealed.

Repeal and savings

(2) Any subsidiary legislation made under the Act repealed by subsection (1), in force immediately before the commencement of this Act—

(a) shall remain in force unless in conflict with this Act, and shall be deemed to be subsidiary legislation made under this Act; or

(b) may be replaced, amended or repealed by subsidiary legislation made under this Act.

(3) Any agreement or similar arrangement made pursuant to the provisions of the Act repealed by subsection (1) shall continue in force until terminated in accordance with the terms and conditions thereof.

OBJECTS AND REASONS

R. KASAMBARA

**Attorney General**



## **Attachment 8**

### **Draft Amendments to Securities Bill**

## **SECURITIES BILL, 2002**

### **ARRANGEMENT OF CLAUSES**

CLAUSE

#### **PART I—PRELIMINARY**

1. Short title and commencement
- 1A. Principal object of this Act
2. Interpretation
- 2A. Financial Services Act
6. Rules, etc; relating to exchanges
- 6A. Licensing and registration procedure

#### **PART III—SECURITIES EXCHANGES**

7. Unlawful securities markets
8. Applications for securities exchange licences
10. Licensing of the Malawi Stock Exchange
11. Power of Commission to issue directions to securities exchange
13. Power of Commission to close securities exchange
14. Rules of securities exchange
16. Enforcement of rules of securities exchange
17. Use of certain titles

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MANAGERS AND REPRESENTATIVES

18. Brokers, dealers, investment advisers, portfolio managers to be licensed
19. Representatives to be licensed
20. Applications for licences
21. Refusal of licence
22. Term of licence
23. Revocation or suspension of licences
26. Register of licences
27. Records to be kept by licensees
28. Information to be supplied by licensees
30. Deposits by brokers, dealers investment advisers and portfolio managers

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32. Registration of publicly traded securities
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68. Purpose of the Compensation Fund
69. Disbursements from the Compensation Fund
70. Management of the Compensation Fund
71. Liability of the Compensation Fund to be limited
72. Recovery of Compensation Fund disbursements from defaulters

## PART X—COLLECTIVE INVESTMENT SCHEMES

73. Licensing and regulation of collective investment schemes
74. Restriction on promotions

## PART XII—MISCELLANEOUS

82. Limitation to the recovery of damages
85. Rules and directives
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87. Repeal and savings

SCHEDULE—REQUIREMENTS TO BE MET BY APPLICANTS FOR SECURITIES  
EXCHANGE LICENCE**A BILL***entitled*

**An Act to provide for the regulation of capital and securities markets, and persons transacting business in or through these markets; to promote internal and external confidence in the integrity and proper functioning of the capital and securities markets; and to provide for matters connected with or incidental to the foregoing**

ENACTED by the Parliament of Malaŵi as follows—

## PART I—PRELIMINARY

**1.** This Act may be cited as the Securities Act, 2002, and shall come into operation on such day as the Minister may appoint by notice published in the *Gazette*. Short title and commencement

**1A.** The principal object of this Act is to make provision to enhance the safety, soundness and prudent management of retirement funds to ensure that they can provide post-retirement income support for fund members and beneficiaries. Principal object of this Act

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

“associated person”, in relation to a broker, dealer, investment adviser or portfolio manager, means any person who is—

(a) an officer, director, general manager, managing partner, or branch manager of the broker, dealer, investment adviser or portfolio manager;

(b) any person controlling, controlled by or under common control with the broker, dealer, investment adviser or portfolio manager; or

(c) any representative or other employee of the broker, dealer, investment adviser or portfolio manager, other than an employee engaged solely in clerical or ministerial functions for such broker, dealer, investment adviser or portfolio manager;

“beneficial owner”, in relation to a security, means a person who, directly or indirectly, possesses or shares investment or voting power with respect to the security;

“broker” means any person engaged in the business of buying or selling securities for the account of others;

“collective investment scheme” means any arrangement with respect to money or other property of any description under which—

(a) provision is made for persons taking part in the arrangement to participate in or receive profits

or income arising from the acquisition, holding, management or disposal of the property or sums paid out of such profits or income;

(b) property which is subject of the arrangement is owned or held in trust by, or is managed by or on behalf of a body corporate; and

(c) the interests of persons participating in the arrangement are represented by shares or other securities of the body corporate or, in the case of a unit trust, by units;

“Compensation Fund” means the Securities Compensation Fund established under section 66;

“Compensation Fund Committee” means the Securities Compensation Fund Committee established under section 67;

“dealer” means any person engaged in the regular business of purchasing and selling securities for his own account, and licensed as such;

“exchange rules”, in relation to a securities exchange, means any rules made by a securities exchange that are binding on its members, or any of them;

“external licensee” means any broker, dealer or investment adviser licensed or required to be licensed under this Act which is organized under the laws of a jurisdiction outside Malaŵi ;

“external regulatory authority” means any securities, banking, financial institutions, insurance, pension or other financial regulatory authority, agency or body of a government other than Malaŵi, and includes any external self-regulatory authority;

“Financial Services Act” means the Financial Services Act, 2007;

“government securities” means securities issued or guaranteed by the Government of Malaŵi, and includes treasury bills issued under the [Finance and

Audit Act] or securities registered under or pursuant to that Act.

“government securities broker” means any broker in government securities;

“government securities dealer” means any dealer in government securities;

“investment adviser” means any person who, for reward, engages in the business of advising others on the purchase, sale or holding, or advisability of investing in, securities, but does not include—

(a) any broker or dealer who is licensed as such and is engaged in such business solely as an incident to the business of acting as a broker or dealer;

(b) any representative of a broker, dealer or investment adviser acting within the scope of his duty as such;

(c) any bank providing such services exclusively in a capacity as a trustee or other fiduciary;

(d) an advocate or accountant whose advice is incidental to his professional activities;

(e) the proprietor or publisher of a newspaper, news-magazine, or business or financial publication of general and regular paid circulation distributed only to subscribers thereto or to purchasers thereof, in relation to any advice with respect to investigations given therein, where—

(i) the proprietor or publisher receives no commission or other consideration for giving or publishing the advice; and

(ii) the giving or publication of that advice is incidental to the conduct of the business of a newspaper proprietor or publisher;

“investment company” means a company that is the owner of property which is the subject of a collective scheme;

“issuer” means a person who issues or proposes to issue a security;

“licence” means a licence issued under this Act;

“licensee” means any broker, dealer, investment adviser or representative licensed under this Act;

“listed security” means a security which has been admitted to listing by a securities exchange for the purposes of dealing in that security on the exchange;

“Malaŵi Stock Exchange” means the securities exchange operated by Malaŵi Stock Exchange Limited;

“open ended investment company” means an investment company whose collective investment scheme makes provision for—

(a) redemption or repurchase by, or out of funds provided by, the company, of shares, securities or units representing the interests of participants in the scheme; or

(b) the sale of shares, securities or units by the participants on a securities exchange at a price related to the value of the property which is the subject of the scheme;

“prescribed” means prescribed by the Minister in regulations referred to in section 104 of the Financial Services Act;

“portfolio manager” means any person engaged in the management of funds and investment portfolios on behalf of clients as a regular part of his business for remuneration;

“Registrar” means the Registrar of Financial Institutions under of the Financial Services Act;

“Registrar’s directive” means a directive issued under section 33 of the Financial Services Act;

“representative” means any person who is employed by a broker, dealer or investment adviser who –

(a) engages in the solicitation, purchase or sale of securities;

(b) provides advice or recommendations with respect to transactions in securities; or

(c) otherwise deals with members of the public with respect to the purchase or sale of securities;

“registered securities” means securities registered in accordance with Part V;

“registration statement” means the registration statement that complies with the requirements of the Registrar’s directives about registration statements;

“securities” means—

(a) shares, debentures, stocks or bonds issued by a government;

(b) shares, debentures, stocks, bonds or notes issued by a body corporate;

(c) any warrant, right or option in respect of any shares, debentures, stocks, bonds or notes referred to in paragraphs (a) and (b);

(d) any instrument, contract, profit-sharing agreement, fractional interest, right to subscribe, or instruments commonly known as security or which are prescribed by Registrar’s directives to be securities for the purposes of this Act;

“securities exchange” means an securities market established, maintained and operated by a company licensed to do so under this Act, and includes Malaŵi Stock Exchange;

“securities market” means a market or other place at which or a facility by means of which—

(a) offers to sell, purchase, or exchange securities are regularly made or accepted;

(b) offers or invitations, being offers or invitations that are intended, or may reasonably be expected, to result, whether directly or indirectly, in

the making or acceptance of offers to sell, purchase or exchange securities, are regularly made; or

(c) information is regularly provided concerning the prices at which, or the consideration for which, particular persons or particular classes of persons propose, or may reasonably be expected, to sell, purchase or exchange securities;

“share” means a share in the capital of a company, and includes a stock or any part of the stock of a company;

“underwriter” means any person who purchases a security with a view to a public distribution of that security, and includes the purchase of newly issued securities for the purpose of public resale on behalf of the issuer, or the guarantor to an issuer that the unsold portion of the issuer’s public issue or sale will be taken up;

“unit trust” means a collective investment scheme which is organized under a declaration of trust or similar instrument and issues redeemable securities not representing a fractional undivided interest in portfolio of securities.

(2) Other words and expressions used in this Act have the meanings they have in the Financial Services Act.

**2A.** This Act applies in addition to the Financial Services Act. Financial Services Act

**6.** Without limiting the Registrar’s power under the Financial Services Act to issue Registrar’s directives, Registrar’s directives may make provision with respect to— Rules, etc; relating to securities exchanges

(a) the conditions subject to, and the circumstances in, which, any securities exchange may permit, supervise and suspend dealings in securities;

(b) the qualifications for membership of securities exchanges and the maximum number of persons that

may be admitted to membership of any securities exchange;

(c) the types of business that may be carried on, and the services that may be provided by or at securities exchange;

(d) the requirements to be met before securities may be listed on securities exchange;

(e) the procedure for dealing with applications for the listing of securities at securities exchanges;

(f) the cancellation or suspension of the listing of any specified securities at any securities exchange, including if—

(i) the requirements of Registrar's directives are not complied with;

(ii) any undertaking given to the Registrar in connection with a listing agreement is not complied with; or

(iii) the Registrar considers that such action is necessary to maintain an orderly market.

**6A.** Division II of Part III of the Financial Services Act makes provision for licensing and registration applications.

Licensing and  
registration  
procedure

### PART III—SECURITIES EXCHANGES

**7.**—(1) No person shall establish, maintain or operate, assist in establishing, maintaining or operating or hold to himself out as maintaining or operating a securities market unless:

Unlawful  
securities markets

(a) the market is licensed as a securities exchange under this Act; and

(b) the person is licensed under this Act to operate the market.



(2) Any person who contravenes this section shall be guilty of an offence and shall be liable on conviction to a fine of K5,000,000 and to imprisonment for five years.

**8.-(1) —**

Applications for  
securities  
exchange licences

(2) The Registrar shall not license an individual as the operator of a securities exchange.

(3) If an application is made in accordance with the Financial Services Act for the licensing of a securities market, the Registrar shall not grant the licence unless satisfied that—

(a) the establishment of the securities exchange is necessary in the public interest having regard to the nature of the securities industry; and

(b) the market will be operated by a person that will at all times satisfy the requirements set out in the Schedule.

(4) If an application is made in accordance with the Financial Services Act for the licensing of a person as the operator of a securities market, the Registrar shall not grant the licence unless satisfied that—

(a) the establishment of the securities exchange is necessary in the public interest having regard to the nature of the securities industry; and

(b) the person that will at all times satisfy the requirements set out in the Schedule.

(5) This section does not limit the power of the Registrar to deal with an application for a licence.

**10.-(1) With effect from the date of commencement of this Part—**

Licensing of the  
Malaŵi Stock  
Exchange

(a) the Malaŵi Stock Exchange shall, subject to subsection (2) and (3), be deemed to be licensed under this Part; and

(b) Malaŵi Stock Exchange Limited shall be deemed to be licensed to operate the Malaŵi Stock Exchange.

(2) Malaŵi Stock Exchange Limited shall, not later than six months after the commencement of this Act or within such longer period as the Registrar may allow—

(a) adopt such rules, regulations and policies and take such other steps as are necessary to ensure that it satisfies the requirements set out in the Schedule; and

(b) notify the Registrar in writing of the steps so taken.

(3) If Malaŵi Stock Exchange Limited fails to take action in accordance with subsection (2) within the time specified by or under that subsection, the Registrar may revoke its licence.

(4) This section does not prevent the Registrar from varying the licence of the Malaŵi Stock Exchange, or Malaŵi Stock Exchange Limited, under this Act.

**11.**—(1) This section does not limit the Registrar's power under the Financial Services Act to issue Registrar's directives, or to give directions to any person.

Power of  
Commission to  
issue directions  
to securities  
exchange

(1A) The Registrar may give a direction under the Financial Services Act to the operator of a securities exchange if satisfied that it is in the interest of the investing public to give the direction, or that it is appropriate to give the direction for the protection of investors or for the proper regulation of the securities exchange.

(1B) A direction under subsection (1A) may include a direction with respect to—

(a) trading on or through the facilities of the exchange generally or with respect to trading of a particular security listed on the exchange;

(b) the manner in which the exchange carries on any aspect of its business, including the manner of reporting off-market purchases.

**13.**—(1) The Registrar may by direction, close a securities exchange for the transaction of dealings in securities, for such period as may be specified in the direction, if satisfied that the orderly transaction of business on the securities exchange is being or is likely to be prevented as a result of—

Power of  
Commission to  
close securities  
exchange

- (a) a natural disaster that has occurred in Malaŵi;
- (b) an economic or financial crisis, whether in Malaŵi or elsewhere or other like circumstance; or
- (c) failure by the exchange to meet the conditions set forth in the Schedule.

(3) A broker or dealer who deals in securities at or through a securities exchange while a direction is in force under this section commits an offence and, on conviction, is liable to [*insert penalty*].

(4) The Registrar may take such action specified in this Act as it considers necessary to ensure compliance with a direction under this section, and without limiting the generality of the foregoing, may cause the premises of the exchange affected by the direction to be locked and secured.

(5) A decision of the Registrar to give a direction under this section on the ground mentioned in subsection (1)(c) is declared to be a reviewable decision, and notice of the decision shall be given to the operator of the securities exchange in accordance with section 68 of the Financial Services Act.

**14.**—(1) Every operator of a securities exchange shall file with the Registrar, in any manner prescribed by the Registrar, copies of any proposed rule, or proposed change in an existing rule, of the securities exchange,

Rules of  
securities  
exchange

with a written statement explaining the proposed rule of rule of change, and the basis therefor.

(2) The Registrar may seek public comment on the proposed rule or rule change through publication in the or other means of general communication, if the Registrar determines that such public comment will aid the review and evaluation of the proposed rule or rule change.

(3) Any proposed rule or rule change filed pursuant to subsection (1) shall become effective upon expiration of sixty days after receipt thereof by the Registrar, unless the Registrar—

(a) extends the period of time for consideration of the proposed rule or rule change, for a further period not exceeding sixty days;

(b) by order, declares the proposed rule or rule change to be effective prior to the expiration of the sixty day period or extension thereof; or

(c) by order, disapproves the proposed rule or rule change.

(4) The Registrar may, upon its own motion, by notice published in the *Gazette*, add to, amend, delete or nullify any rules of a securities exchange as the Registrar determines is necessary and appropriate for the protection of investors, the proper administration of this Act, or the fair administration of the activities of the securities exchange.

(5) A decision of the Registrar:

(a) to disapprove a proposed rule or rule change; or

(b) to add to, amend, delete or nullify any rules of a securities exchange;

is declared to be a reviewable decision, and notice of the decision shall be given to the operator of the securities exchange in accordance with section 68 of the Financial Services Act.

**16.**-(1) The operator of a securities exchange shall, in relation to its members and their associated persons, enforce compliance with the requirements of this Act, the rules and regulations thereunder and the rules and regulations of the exchange, by bringing appropriate action against any such person who has engaged in acts or practices, or omissions thereof constituting contraventions of the Act, the rules and regulations thereunder, or the rules and regulations of the exchange.

Enforcement of  
rules of securities  
exchange

(2) If the operator of a securities exchange determines that a member or associated person of a member has contravened or failed to comply the requirements of this Act, the rules and regulations thereunder, or the rules and regulations of the exchange, the operator of the securities exchange may—

(a) reprimand the person who has committed such a contravention;

(b) limit, in a manner appropriate to the nature and gravity of the contravention, the activities of such person;

(c) suspend such person from membership of the securities exchange or, in the case of a representative, from being associated with a member of the securities exchange; or

(d) expel or bar such person from such membership or such association with a member.

(3) All actions taken under this section shall be instituted and conducted pursuant to rules adopted by the securities exchange which shall—

(a) afford the person charged with a contravention with the right to written notification of the charges and particulars; and

(b) afford the person charged with a contravention with right to present his views and defend himself.

(5) A decision of the operator of a securities exchange to take an action mentioned in subsection (1) is declared to be a reviewable decision, and notice of the decision shall be given to the person charged with the relevant contravention in accordance with section 68 of the Financial Services Act.

(5) Nothing in this section shall prevent or preclude the Registrar from pursuing an legal right or remedy, or taking any regulatory or remedial action permitted under this Act, with respect to the operator of a securities exchange, any member thereof or any person associated with such a member.

**17.** Any person other than the operator of a licensed securities exchange who takes or uses, or has attached to or exhibited at any place—

Use of certain titles

(a) the title “securities exchange” or “stock exchange”; or

(b) any title which so closely resembles either of those titles as to be likely to be deceptive, shall be guilty of an offence and shall be liable on conviction to a fine of K3,000,000 and to imprisonment for three years.

PART IV—BROKERS, DEALERS, INVESTMENT ADVISERS,  
PORTFOLIO MANAGERS AND REPRESENTATIVES

**18.** Any individual, or any company, other than the holder of a broker’s, and dealer’s, investment adviser’s or portfolio manager’s licence, that—

Brokers, dealers, investment advisers, portfolio managers to be licensed

(a) carries on business as a broker, dealer investment adviser or portfolio manager; or

(b) holds himself or itself out as carrying on business as a broker, dealer, investment adviser or portfolio manager,

shall be guilty of an offence and shall be liable on conviction to a fine of K5,000,000 and to imprisonment for five years.

**19.**—(1) A person who is not the holder of a <sup>Representatives to be licensed</sup> representative's licence and who is employed as or acts as a representative shall be guilty of an offence and shall be liable on conviction to a fine of K1,000,000 or to imprisonment for 12 months.

(2) A representative's licence may be conditioned on the licensee's being employed or acting only as the representative of a broker or dealer or only as the representative of an investment adviser.

**20.**—(1) —

(3) Unless specifically exempted by the Registrar as being consistent with the public interest and the protection of investors, every licensed broker or dealer shall, within sixty days or such longer period not exceeding an additional ninety days, as the Registrar may allow, of favourable action on an application reviewed under this section, become a member of a securities exchange.

(5) Any person who holds a licence issued under the Capital Market Development Act to act as a broker, <sup>Cap. 44:06</sup> dealer, investment adviser, portfolio manager or representative shall be deemed, on and as of the date of coming into force of this Act, to hold a similar licence under this Act:

Provided that such person shall thereafter within one year from the date of coming into force of this Act, or such longer period not exceeding six months as the Registrar may by order prescribe, to bring himself into compliance with the requirements of the Act.

(5A) This section does not prevent the Registrar from varying the licence of a person described in subsection (5), under this Act.

(6) Any person described in subsection (5) who fails to bring himself into compliance with this Act within the time prescribed in subsection (5) shall be in contravention of any requirements of this Act, or rules and regulations thereunder, with which such person is not in compliance, and shall be subject to those actions, remedies and penalties prescribed by this Act with respect to such contravention.

**21.**—(1) Without limiting the grounds on which the Registrar may, under the Financial Services Act, refuse to grant a licence under this Part, the Registrar may refuse to grant such a licence on the any of the following grounds—

Refusal of  
licence

(b) that the applicant is not a fit and proper person to be licensed under this Act, including because—

(i) in the case of an individual, the applicant has become incapable mentally or physically or performing the activities to which the licence relates;

(ii) it appears to the Registrar that the applicant is unwilling or unable to comply with this Act and the other financial services laws; or

(iii) it appears to the Registrar that the applicant is unable to meet the financial, solvency, liquidity or other requirements prescribed by the Registrar's directives; or

(g) the Registrar has reason to believe that the applicant will not perform the duties of the holder of the licence efficiently, honestly and fairly;

(i) in the case of an individual, the applicant is under twenty-one years of age.

(2) The Registrar shall not grant a representative's licence to a company.



**22.**—(1) Unless sooner revoked or suspended, a licence under this Part remains in force for the period specified in the licence. Term of licence

**23.**—(1) Where any person licensed under this Part— Revocation or suspension of licences  
 (a) being an individual, dies; or  
 (b) being a company, is dissolved,  
 the licence of that person is deemed to be revoked without further action by the Registrar.

(2) Without limiting the grounds on which the Registrar may, under the Financial Services Act, suspend or revoke a licence under this Part, the Registrar may suspend such a licence for up to one year, or revoke such a licence, if the licensee—

(e) is no longer a fit and proper person to hold a licence under this Part, including because he is or has been guilty of any misconduct in relation to the conduct of his business or the pursuit of the occupation with reference to which he is licensed;

(g) ceases to carry on business in Malaŵi; or

(h) being the holder of a representative's licence, the licence of the broker, dealer investment adviser or portfolio manager with whom he is associated is revoked or suspended.

(3) For purposes of subsection(2)(e)—

“misconduct” means—

(a) any contravention of, or failure to comply with, the requirements of this Act or a financial services law;

(b) any failure to observe the terms and conditions of a licence; or

(c) any act or omission relating to the business or occupation of a licensed person which is or is likely to be prejudicial to the interests of members of the investing public.

(6) Any agreement, transaction or arrangement relating to a transaction in securities entered into by a person whose licence has been suspended or revoked, after the suspension or revocation of the licence, is voidable at the election of the person with whom such agreement, transaction or arrangement was entered into.

(7) Except as provided under subsection (6), the suspension or revocation of a licence under this Part shall not affect any right, obligation, or liability arising under any agreement, transaction or arrangement described in subsection (6), or any agreement, transaction or arrangement entered into before the suspension or revocation of a licence under this Part.

(8) A person whose licence is revoked under this section may not reapply to be licensed under this Part in any capacity until the expiration of at least twelve months from the date of the revocation.

**26.**—(1) The Registrar shall cause to be kept, in such form as it deems appropriate, a register of persons holding licences under this Part.

Register of  
licences

(2) For each broker's, dealer's or investment adviser's licence, the register shall record—

(a) the name of the licensee;

(b) in the case of a licensed broker, dealer, investment adviser or portfolio manager, the name of each director, and of the secretary, of the company and the names and respective shareholdings of each shareholder;

(c) the date on which the licence was granted;

(d) in relation to each business to which the licence relates—

(i) the address of the principal place at which the business is conducted;

(ii) the address of the other places, if any, at which the business is conducted;

and

(iii) if the business is conducted under a name or style other than the name of the licensee, the name or style;

(e) particulars of any suspension or revocation of the licence;

(ea) particulars of any administrative or other penalties imposed on the licensee under a financial services law; and

(f) such other matters as the Registrar considers appropriate.

(3) For each representative's licence, the register shall record—

(a) the name and address of the business of the broker, dealer, investment adviser or portfolio manager in relation to whom the representative is licensed;

(b) particulars of any suspension or revocation of the licence; and

(ba) particulars of any administrative or other penalties imposed on the licensee under a financial services law; and

(c) such other matters as the Registrar considers appropriate.

(4) Where a person no longer holds a particular licence, the Registrar shall cause to be made an appropriate entry in the register.

(5) Any person may, upon payment of the prescribed fee, inspect and make copies of, or take extracts from, the register.

**27.**—(1) A person who is licensed under this Part shall maintain a record, in the form prescribed in Registrar's directives for the purposes of this section, of the securities of which he is the beneficial owner. Records to be kept by licensees

(2) Particulars required by the form prescribed under subsection (1) shall be entered in the record within seven days of the acquisition of the beneficial ownership by the licensee.

(3) Where there is a change in the beneficial ownership of securities by a person licensed under this Part, he shall enter in the record, within seven days after the date of the change, full particulars of the change, including the date of the change and the circumstances by reason of which that change has occurred; and for purposes of this subsection, where a person acquires or disposes of securities, there shall be deemed to be a change in the beneficial ownership of that person in the securities concerned.

(4) A person who fails to keep a record as required by this section shall be guilty of an offence and shall be liable on conviction to a fine of K1,000,000 and to imprisonment for 12 months.

**28.**—(1) Every application for a licence under this Part shall be accompanied by a notice to the Registrar, in the form prescribed in Registrar's directives for the purposes of this subsection, containing such particulars as are so prescribed, including the place at which the applicant will keep the required record of his beneficial ownership of securities.

Information to be  
supplied by  
licensees

(2) A person who ceases to carry on a business authorized by a licence under this Part shall, within fourteen days of his so ceasing to carry on business, give notice of the fact to the Registrar.

(3) Every person licensed under this Part shall forthwith, in writing, notify the Registrar of any change which, while his licence is in force, occurs—

(a) in the address in Malaŵi at which he carries on the business to which the licence relates; or

(b) in any information supplied or in connection with his application for his licence, being information specified in Registrar's directives for this subsection.

(4) If at any time while a company is licensed under this Part, any person becomes or ceases to be director or officer of the company, the company shall within seven days after the event notify the Registrar in writing of the name and address of that person.

(6) A person who neglects or fails to give any information as required by this section shall be guilty of an offence and shall be liable on conviction to a fine of K1,000,000 and to imprisonment for 12 months.

(7) If a company neglects or fails to give any information as required by subsection (6), then, in addition to that subsection, the director or officer concerned shall also be guilty of an offence and shall be liable on conviction to [*insert penalty*].

**30.**-(1) Every licensed broker, dealer investment adviser or portfolio manager shall deposit with the Registrar such amount as may be required by Registrar's directives.

Deposits by  
brokers, dealers  
investment  
advisers and  
portfolio  
managers

(1A) The licensed broker, dealer investment adviser or portfolio manager must comply with subsection (1) no later than [*insert period*] after the grant of his licence, or as otherwise required by the Registrar by written notice to the broker, dealer investment adviser or portfolio manager.

(2) Any licensed broker, dealer, investment adviser or portfolio manager that neglects or fails to comply with subsection (1), or is in arrears with respect to any deposit required under subsection (1), is liable to pay interest on the amount of the outstanding deposit, calculated at the rate specified in Registrar's directives for this section on the amount outstanding until the whole amount (including interest) is paid.

(3) Any deposit or interest payable under this section is a debt due to the Registrar and may be recovered at the suit of the Registrar in any court of competent jurisdiction.

PART V—REGISTRATION OF SECURITIES

**31.**—(1) No issuer or underwriter of a security shall, directly or indirectly— Securities to be registered

(a) sell, offer to sell or enter into a contract to sell that security to any person;

(b) deliver or cause to be delivered any prospectus with respect to that security to any person; or

(c) deliver or cause to be delivered that security to any person,  
unless the security is registered.

(2) No person shall sell, offer to sell or enter into a contract to sell any security described in subsection (1) unless such sale, offer or contract is preceded or accompanied by a prospectus containing the information required to be contained therein under section 168 of the Companies Act. Cap. 46:03

(3) Subsections (1) and (2) shall not apply to—

(a) any directly-negotiated private transaction by an issuer, underwriter or dealer with any person—

(i) who possesses, either through himself or an authorized representative, such knowledge and experience in financial and investment matters as to be able to assess the merits and risks of such security; and

(ii) to whom has been provided such information concerning the security and its issue as the person or his representative reasonably may have requested;

(b) any transaction by a person other than an issuer, underwriter or dealer;

(c) any transaction in any Government security;

(d) any transaction in a security which the Registrar has determined by order to be exempted from the requirements of this section, if the granting of such exemption is consistent with the purposes of this Act and the protection of investors.

(4) Any person who contravenes this section shall be guilty of an offence and shall be liable on conviction to a fine of K1,000,000 and to a term of imprisonment for 12 months.

**32.**—(1) No person shall buy or sell, offer to buy or sell, or enter into a contract to buy or sell that a publicly-traded security unless a registration statement with respect to is in effect.

Registration of  
publicly traded  
securities

(2) For the purposes of this section, a security shall be deemed as being publicly traded if such security is bought, sold or offered within Malaŵi, and—

(a) it is issued by a company having more than thirty shareholders at the end of most recent financial year;

(b) it is registered under section 31 of this Act;

(c) it is traded on a securities exchange in Malaŵi or elsewhere, or admitted to listing on such an exchange;  
or

(d) the Registrar, by notice in writing to the issuer thereof, has declared that, after ninety days, the security shall be treated as being publicly traded, and ninety days has elapsed since that notice was given.

(2A) A decision by the Registrar to make a declaration under subsection (2)(d) is declared to be a reviewable decision, and notice of the decision shall be given to the issuer of the security in accordance with section 68 of the Financial Services Act.

(3) Any person who contravenes this section shall be guilty of an offence and shall be liable on conviction to a fine of K5,000,000 and to imprisonment of five years.

**33.**—(1A) For the purposes of this Part, a security is registered if a registration statement in respect of the security is in effect. Registration statement and prospectus

(1) Registrar's directives specifying the form and content of registration statements shall require a registration statement to contain, at a minimum, the information about the relevant securities specified in section 168 of the Companies Act. Cap. 46:03

(2) A registration statement comes into effect [*inset period*] after a copy of the statement is filed with the Registrar in accordance with Registrar's directives for this section unless, within [*that period*], the Registrar gives written notice to the issuer of the security concerned, in the case of a security registered for the purposes of section 32, to any securities exchange where such security is traded or proposed to be traded—

(a) that the statement is not to come into effect; or

(b) extending the period for dealing with the matter.

The Registrar may extend the period more than once.

(4) The Registrar may declare that a registration statement for a security has ceased to be in effect if it appears to the Registrar, upon its own motion or upon petition by any person, that the registration—

(a) is false or misleading in any material respect; or

(b) contains any material untrue statement; or

(c) does not comply in any material respect with the provisions of this Act, another financial services law or section 168 of the Companies Act. Cap. 46:03

(5) A decision of the Registrar that a registration statement is not to come into effect, and a decision of the Registrar under subsection (4), are declared to be



reviewable decisions, and notice of the decisions shall be given to the issuer or proposed issuer of the security in accordance with section 68 of the Financial Services Act.

34.—(1) Any issuer of a security in respect of which a registration statement is in effect under section 32 of this Act shall—

Reports of  
issuers

(a) file with the Registrar annual, quarterly or current reports as may be required by the Registrar in such manner and containing such information as the Registrar may, by rule, notice or directive specify;

(b) simultaneously file with any securities exchange on which such securities are traded the reports specified in paragraph (a); and

(c) disseminate to shareholders, within ten business days after the filing with the Registrar thereof, the reports specified in paragraph (a).

(2) Any issuer of a security which is registered under section 32 may make written application to de-register that security on the ground that it no longer is or no longer should be deemed a publicly traded security and shall, as part of its application, state all facts supporting such application.

(3) The Registrar may by order de-register a security which is the subject of an application under subsection (2) if the Registrar finds that the facts stated in the application, or other facts known to the Registrar, support the application and that the de-registration of the security is otherwise in the public interest.

(4) A decision of the Registrar to refuse to de-register a security is declared to be a reviewable decision, and notice of the decision shall be given to the issuer of the security in accordance with section 68 of the Financial Services Act.

35.—(1) No broker or dealer which is a member of a securities exchange shall effect any transaction in any

Unlawful  
transactions by  
exchange

security which is listed for quotation or traded on such exchange, except in compliance with Registrar's directives and any rules of such exchange.

(2) Any broker or dealer which contravenes this section shall be guilty of an offence and liable upon conviction to a fine of K3,000,000 and to imprisonment for three years.

**36.** Any broker or dealer which effects a transaction in any security which is listed for quotation or traded on a securities exchange other than through that securities exchange, and which does not forthwith report that dealing to the securities exchange, shall be guilty of an offence and shall be liable on conviction to a fine of K1,000,000 and to imprisonment for 12 months.

Reporting of  
trades in listed  
securities

**37.**—(1) An issuer of any security registered under section 32 shall inform and keep the public informed of all matters which affect the value of the security immediately upon their becoming known to the directors of the issuer, by placing an advertisement in a newspaper of general circulation and by reporting to the Registrar and to any securities exchange on which the securities are listed.

Reporting of  
information by  
issuers

(2) Without limiting the Registrar's power under the Financial Services Act to issue Registrar's directives, Registrar's directives may prescribe further requirements to be met by the issuers of registered securities under subsection (1).

(3) An issuer of securities that neglects or fails to comply with subsection (1) shall be guilty of an offence and shall be liable on conviction to a fine of K1,000,000 and to imprisonment for 12 months.

**38.**—(1) Any person who acquires beneficial ownership of five per cent or more of any class of equity security which is publicly traded, or issued by an issuer which is the issuer of a publicly-traded security, shall report —

Acquisition of  
beneficial  
ownership of  
publicly traded  
securities

(a) the identity, residence, background and ownership of the acquiring person; and

(b) the amount, purpose and details of such acquisition,

to the Registrar and any securities exchange where such security, or the equity securities of such issuer, is or are publicly traded, within five business days after such acquisition.

(2) Without limiting the Registrar's power under the Financial Services Act to issue Registrar's directives, Registrar's directives may prescribe the form and content of reports filed under subsection (1).

(3) The Registrar may, by notice published in the *Gazette*, exempt from the application of this section any transaction or classes of transactions which the Registrar determines are of a nature or kind which are not effected for the purpose of controlling or influencing or changing the control of any issuer or are otherwise not inconsistent with the purposes of this Act and the protection of investors.

**39.**—(1) Any person who is the beneficial owner of more than five per cent of any class of publicly-traded securities traded security, or who is a director or officer of the issuer of such security, shall file, at the time such security becomes publicly-traded or within ten days after that person acquires beneficial ownership of such security, a statement with the Registrar, and any securities exchange of which such security is traded, specifying—

Acquisition by  
insiders of  
publicly traded  
securities

(a) name, address, citizenship, and position of the person making the statement; and

(b) the amount of all publicly-traded securities of which such person is the beneficial owner.

(2) Every person described in subsection (1) shall file with the Registrar, within fifteen days after the close of any calendar quarter, a statement of his ownership of any

security described in subsection (1) as well as any changes of his beneficial ownership of such security during the preceding calendar quarter.

(3) No person described in subsection (1) shall sell any security described in that subsection of which he is not the owner, or of which he cannot make timely delivery in accordance with usual business practices in the clearance and settlement of securities transactions in Malaŵi.

(2) Without limiting the Registrar's power under the Financial Services Act to issue Registrar's directives, Registrar's directives may prescribe the form and content of reports filed under this section.

(5) The Registrar may, by notice published in the , exempt from this section any transaction which the Registrar determines is not inconsistent with the purposes of this Act and the protection of investors.

**40.**—(1) (2) Without limiting the Registrar's power under the Financial Services Act to issue Registrar's directives, Registrar's directives may make provision with respect to—

Regulation of of  
proxy solicitation  
and tender offers

(a) the manner, form, and content of any solicitation by any issuer of any proxy, or consent or authorization in respect of any security which is publicly-traded or is issued by any collective investment scheme authorized under Part X; and

(b) the making of tender offers for, or requests or invitation for tenders of, any class of publicly-traded security, including requirements governing—

(i) the manner and timing of tender offers or requests for tenders; and

(ii) the form and content of any statements with respect to a tender offer or request for tenders, and similar matters.

(3) No person shall—

(a) make any untrue statement of a material fact or omit to state any material fact, necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or

(b) engage in any fraudulent, deceptive or manipulative acts or practices, in connection with any solicitation of any proxy or consent, or any tender offer, request or invitation for tender, with respect to a publicly-traded security issued by an collective investment scheme authorized or security issued by an collective investment scheme authorized under Part X

(4) Any person who contravenes subsection (3) shall be guilty of an offence and liable to a fine of K5,000,0000 and imprisonment for five years.

**41.**—(1) Unless otherwise specified in this Act, the requirements of Part IX of the Companies Act shall apply to the offer and sale of any security under this Act. Compliance with Companies Act

(2) Nothing in this Part shall relieve any issuer or other person from its obligation to comply with any requirement of the Companies Act, nor shall any issuer or other person be relieved of any liability or penalty provided for in the Companies Act, except where this Act specifically otherwise provides. Cap.46:01

(3) In the case of any conflict or inconsistency between this Act and the Companies Act, the requirements of this Act shall govern. Cap.46:01

#### PART VI—CONDUCT OF SECURITIES BUSINESS

**42.**—(1) Every broker, dealer, investment adviser and any other person licensed under this Act shall comply with the requirements of the Registrar's directives as to capital, liquid assets and reserves. Capital and financial responsibility

(2) Without limiting the Registrar's power under the Financial Services Act to issue Registrar's directives, Registrar's directives for subsection (1) may prescribe requirements which are absolute or which vary according to facts and circumstances, or different classes of licensed brokers, dealers and investment advisers taking into account—

(a) the character and extent of the business in which the licensee is engaged;

(b) whether the licensee holds or maintains custody of customer funds or securities;

(c) whether the licensee engages in the clearance and settlement of securities transactions;

(d) the types of assets, liabilities and financial resources of the licensee; and

(e) whether the licensee is an external licensee or conducts business outside of Malaŵi.

(3) Every licensed broker, dealer, investment adviser and any other person who holds or maintains custody of customer funds or securities shall comply with the requirements of the Registrar's directives as to—

(a) the safekeeping of customer funds and securities;

(b) the separation of the funds and securities from those of the licensee and other customers;

(c) the lending or pledging of customer funds and securities;

(d) the prompt transmission of customer funds and securities; and

(e) the form and content of books records and accounts reflecting or relating to the holding or maintenance of customer funds and securities.

(4) Every broker, dealer, investment adviser and any other person who at any time, knows, or in the exercise of reasonable efforts should know, that it is not in

compliance with Registrar's directives referred to in this section rules shall promptly notify the Registrar and its customers in writing of such non-compliance.

(5) The Registrar shall not issue Registrar's directives for this section imposing an obligation on a licensee which is discriminatory or acts as a burden on competition unless satisfied that the requirement is manifestly necessary to carry out the purposes of this Act.

**43.**—(1) Every broker, dealer, adviser portfolio manager and any other person licensed under this Act shall—

Code of  
investment  
conduct  
regarding  
securities  
business

(a) subject to the requirements of this Act, deal with its customers fairly and justly and adhere to just and equitable principles of trading in all its business activities;

(b) prior to effecting any transaction with or for, or recommending any transaction to, a customer, make inquiries of the knowledge in financial and investment matters, background, financial conditions and investment objectives of the customer to determine whether such transaction is suitable for that customer and whether the customer understands the risks of such transaction;

(c) charge a customer only such commissions, mark-ups, markdowns or fees as are fair and reasonable under the circumstances of the transaction;

(d) prior to affecting a transaction with, or recommending a transaction to, a customer, disclose to that customer any material interest which the licensee, or person associated with the licensee, has in such transaction, including any beneficial ownership or other interest in any security which is the subject of the transaction;

(e) take reasonable steps to ensure that all transactions effected for customers, whether by the licensee or a person acting at the direction of the licensee, are effected at the best price available for the

customer under all the circumstances of that transaction, including the size thereof, any the restriction by customer the fees charged in relation thereto, and other relevant factors; and

(f) in the case of brokers and dealers, establish and adhere to written procedures reasonably designed to ensure that customer transactions are effected in fair sequence and are equitably allocated, and without giving preference to itself or any customer over another customer.

(2) No broker, dealer or investment adviser licensed under this Act shall, in connection with any securities transaction effected or recommended by him—

(a) engage in any fraudulent, deceptive or manipulative devices or any scheme to defraud, or any acts, practices, or course of conduct which would act as a fraud or artifice upon any person;

(b) effect in a discretionary capacity or recommend transactions to any customer which are excessive in volume and number, given the financial situation or investment objectives of the customer;

(c) share or offer to share in the profit or loss of any customer in any securities transaction, or guarantee any profit or protection from loss of any transaction;

(d) effect or recommend any securities transaction which has the purpose or effect of creating a false or misleading appearance of the volume of trading in any security, or the market for a price of a security; or

(e) engage in any act or course of conduct prohibited under Part VII.

(3) Any person who contravenes subsection (2) shall be guilty of an offence and upon conviction be liable to a fine of K3,000,000 and imprisonment for a term of three years.



(4) Without limiting the Registrar's power under the Financial Services Act to issue Registrar's directives, Registrar's directives may specify rules of conduct with respect to the activities of persons licensed under this Act additional to subsection (2).

**44.**—(1) Every broker and dealer shall, in respect of every contract for the purchase, sale or exchange of securities entered into by him, whether as principal or agent, not later than the end of the next trading day after the contract was entered into, make out a contract note which contains such information as the Registrar may by rule or notice specify. Contract notes

(2) Any contract note which seeks to exclude or disclaim any obligation required under this Act shall be void and of no effect.

**46.**—(1) A person who sells securities which he does not hold at or through a securities exchange shall be guilty of an offence unless, at the time of sale he has or, where he is selling as agent, his principal has, or he reasonably believes that he has or, where he is selling as agent, that his principal has, a presently exercisable and unconditional right to vest the securities in the purchaser of them, and has on deposit in the manner prescribed in Registrar's directives one hundred percent collateral against the short sale, marked to market at the close of every trading day until the transaction is complete. Compliance with  
rules of the  
Commission

(2) For the purposes of subsection (1), "marked to market" means valued, for the purposes of the obligation of the seller, at the current market.

(3) A person who contravenes subsection (1) is guilty of an offence and shall be liable on conviction to a fine of K1,000,000 and to imprisonment for 12 months.

(4) The Registrar may, by order, exempt from the application of this section transactions or classes of transactions which he determines would not be

inconsistent with the maintenance of fair and orderly securities markets and the protection of investors.

47.—(1) A person must not operate a securities clearance and depository service, a securities registration service or a custodian service in respect of securities unless it is licensed to do so under this Act.

Depositories:  
clearance and  
settlement

(2) Without limiting the Registrar's power under the Financial Services Act to issue Registrar's directives, Registrar's directives may impose requirements governing the clearance and settlement of securities transactions, including requirements pertaining to—

- (a) financial and operational standards or persons engaged in clearance and settlement activities;
- (b) the maintenance and safeguarding of share certificates and other evidence of ownership;
- (c) books, records and internal controls relating to the clearance and settlement of securities;
- (d) the operation of book-entry systems in Government and other securities;
- (e) the reporting of lost and stolen securities;
- (f) the standardization of settlement periods in different types of securities.

48.—(1) Every licensed broker, dealer and investment adviser shall keep, or cause to be kept, such accounting and other records as sufficiently explain the transactions and financial position of all business of the licensee and enable true and fair profit and loss accounts and balance sheets to be prepared from time to time, and shall cause those records to be kept in such manner and form as to enable them to be conveniently and properly audited.

Accounts to be  
kept by licensees

(3) A person who contravenes this section shall be guilty of an offence and shall be liable on conviction to a fine of K1,000,000 and imprisonment for 12 months.

**49.**—(1) An investment adviser shall not enter into an investment advisory contract with any person in Malaŵi (in this section referred to as the “client”), or extend or renew any such contract, or in any way perform any such investment advisory contract entered into, extended or renewed after the commencement of the Act, if the contract—

Investment  
advisory contracts

(a) provides for remuneration to be paid by the client to the investment adviser on the basis of a share of capital gains of the funds or any part of the funds of the client;

(b) does not include a provision to the effect that an assignment of the contract by the investment adviser shall be made only with the consent of the client; or

(c) does not include a provision to the effect that the investment adviser—

(i) if he practices in partnership with one or more other investment advisers, will notify the client of any change in the partnership; and

(ii) if a company, will notify the client of any change in control of the company, prior to the change within a specified time which time shall not be less than thirty days.

(2) Subsection (1) (a) shall not—

(a) prohibit an investment advisory contract which provides for remuneration based on the total assets held in the client’s account averaged over a definite period or on definite dates, or taken on a definite date; or

(b) apply to an investment advisory contract with respect to participation in a licensed collective investment scheme, that provides for remuneration based on the asset value of the scheme or company under management averaged over a specified period and increasing or decreasing proportionately in

accordance with the performance of the scheme or company over a specified period in relation to either—

- (i) the investment record of an appropriate index securities; or
- (ii) such other measure of investment performance as the Registrar may approve in connection with licensing the collective investment scheme concerned or on the application of either part to a contract or intended contract.

(3) Any investment adviser who contravenes subsection (1) shall be guilty of an offence and shall be liable on conviction to a fine of K1,000,000 and to imprisonment for 12 months.

(4) Any contract entered into in contravention of this section shall, notwithstanding any provision of the contract or any prior action by the client, be voidable at the option of the client.

(5) For the purposes of this section, “investment advisory contract” means a contract or agreement whereby a person agrees to act as investment adviser or to manage any investment or trading account of a client.

#### PART VII—REQUIREMENTS APPLICABLE TO ALL PERSONS

**50.**—(1) No person shall, directly or indirectly, create or cause to be created, or do anything with the intention of creating— False trading and manipulations

- (a) a false or misleading appearance of the volume of trading in any securities on any securities exchange; or
- (b) a false or misleading appearance of the market for, or the price of, any securities.

(2) No person shall, directly or indirectly, by means of the purchase or sale of any securities that does not involve a change in the beneficial ownership of those securities,

or by any fictitious transaction or device, maintain, inflate, depress or cause fluctuations in the market price of any securities.

(3) A purchase or sale of securities by a person does not, for the purposes of subsection (2), involve a change in the beneficial ownership of such securities after the purchase or sale.

(4) Any person who contravenes this section shall be guilty of an offence and shall be liable on conviction to a fine of K5,000,000 and to imprisonment for five years.

**51.**—(1) No person shall, directly or indirectly, induce or attempt to induce another person to deal in securities— Use of deceptive statements, etc; as inducements

(a) by making or publishing any statement, promise or forecast that he knows to be misleading, false or deceptive;

(b) by any dishonest concealment of material facts; or

(c) by recklessly or dishonestly making or publishing any statement, promise or forecast that is false or misleading.

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

**52.**—(1) No person shall, directly or indirectly, in connection with any transaction with any other person involving the purchase, sale or exchange of securities— Fraudulent transactions

(a) employ any device, scheme or artifice to defraud that other person;

(b) engage in any fraudulent, deceptive or manipulative device to defraud that other person; or

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

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

**53.**—(1) No person shall, directly or indirectly, for the purpose of inducing the sale or purchase of the securities of any of any issuer, make with respect to those securities, or with respect to the operations or the past or future performance of the issuer —

False or misleading statements in connection with sale of securities

(a) any statement which is, at the time and in light of the circumstances in which it is made, false or misleading with respect to any material fact, and which he knows or has reasonable grounds to believe to be false or misleading; or

(b) any statement which is, by reason of the omission of a material fact, rendered false or misleading and which he knows or has reasonable grounds to believe is rendered false or misleading by reason of omission of that fact.

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

**54.**—(1) No person to whom this section applies shall, directly or indirectly, purchase or sell, or counsel or procure another person to purchase or sell, securities of an issuer concerning which he has knowledge that—

Insider trading

(a) is not publicly available; and

(b) would, if it were publicly available, materially affect the price of the security.

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

(3) This section applies to—

(a) any director, officer or employee of a relevant company;

(b) any person associated in a professional capacity with a relevant company;

(c) any person who knowingly obtains such information from any of the persons mentioned in paragraph (a) or (b).

(3A) In subsection (3)—

“relevant company” means—

(a) the issuer of the securities’

(b) a company controlled by the issuer of the securities;

(c) a company that controls the issuer of the securities; or

(d) a company under common control with the issuer of the securities.

(4) In addition to any other remedies available under this Act any other written law—

(a) a court may, on convicting a person for an offence against this section , in addition to any other penalty, impose a monetary penalty on the person in an amount not exceeding three times the amount of profit or gain obtained by that person with respect to such contravention; and

(b) the Registrar may, on imposing an administrative penalty under section 65 of the Financial Services Act, also impose a monetary penalty on the person in an amount not exceeding three times the amount of profit or gain obtained by that person with respect to such contravention.

#### PART VIII—REMEDIES

(3) The Court or the Registrar shall, before imposing a penalty under this section, satisfy itself or himself, so far as reasonably practicable, that the penalty would not

unfairly operate to the detriment of any person other than the person on whom the penalty is imposed.

**59.**—(1) Any person who—

Private rights of  
action

(a) offers or sells, or causes the offer or sale of, a security in contravention of the provisions of Part V; or

(b) offers, purchases or sells, or causes the offer, purchase or sale of, a security in contravention of the provisions of Part VII,

shall be liable to the person purchasing such security from, or selling such security to, such first person, and the injured person may bring suit in any court of competent jurisdiction to recover the consideration paid for such security, in the case of his purchase thereof, or the difference between the consideration received for such security and the consideration which the seller would reasonably have received were the contravention not have occurred, in the case of his sale thereof.

(2) Any person who is otherwise liable under subsection (1) shall not be held liable if—

(a) in the case of an action alleging a contravention based on the making of a material misstatement of fact, or the omission of a material fact in connection with the purchase or sale of a security, the person against whom the action is brought sustains the burden of proof that he did not know, or in the exercise of reasonable care could not have known, of such material misstatement or omission;

(b) in the case of an action alleging a contravention of Part V, the person against whom the action is brought is an underwriter or expert with respect to the security which is the subject of the action, and such underwriter or expert sustains the burden of proof that he had reasonable grounds to believe, and did believe, after reasonable investigation, taking into account his duties and responsibilities with respect to the offer and



sale of such security, that the security was offered and sold in compliance with Part V.

(3) No person shall be entitled to recover, under this section, damages which exceed the actual financial harm or loss suffered by such person by reason of contravention of Part V or VII, plus interest at the prevailing commercial bank lending rate calculated on such harm or loss.

(4) Nothing in this section limits or diminishes any civil liability of any person under any other written law.

**62.**—(1) The Registrar may, as regards any assets, whether in Malaŵi or elsewhere, if they are the assets of a person licensed under Part IV, by notice in writing—

Restrictions on assets

(a) prohibit a person so licensed from disposing of such assets or prohibit him from dealing with them in a manner specified in the notice; or

(b) require a person so licensed to deal with such assets in, and only in, a manner specified in the notice.

(2) A decision of the Registrar to give a notice under subsection (1) is declared to be a reviewable decision, and notice of the decision shall be given to the licensed person in accordance with section 68 of the Financial Services Act.

**63.**—(1) The Registrar may, by notice in writing, require a person licensed under Part IV to maintain in Malaŵi assets of such value as appears to the Registrar to be desirable with a view to ensuring that the licensed person will be able to meet his liabilities in respect of the business to which the licence relates.

Maintenance of notice assets in Malaŵi

(3) A decision of the Registrar to give a notice under subsection (1) is declared to be a reviewable decision, and notice of the decision shall be given to the licensed person in accordance with section 68 of the Financial Services Act.

**64.** If, in the case of a person which is a company licensed under Part IV, it appears to the Registrar that it is desirable for the protection of investors that the company should be wound up under the Companies Act, the Registrar may present a petition for it to be wound up under that Act on the ground that it is just and equitable that it should be wound up.

Winding up of a  
licensed  
Company

Cap. 46:03

**65.** If it appears to the Registrar that it is desirable for the protection of investors so to do, the Registrar may present a petition for a receiving order in accordance with Bankruptcy Act against a person which is a company licensed under Part IV if the person has committed an act of bankruptcy within the meaning of that Act, and that Act shall, with any necessary modifications, apply in relation to any such petition as it applies in relation to a petition presented by a creditor.

Receiving orders  
against a licensee

Cap. 11:01

#### PART IX—COMPENSATION FUND

**66.**—(1) There is hereby established a fund to be known as the Securities Compensation Fund (in the Act otherwise referred to as the “Compensation Fund”).

Establishment of  
Securities  
Compensation  
Fund

(2) The Compensation Fund shall consist of—

(a) all moneys paid to or deposited into it by any licensed broker, dealer, investment adviser, portfolio manager or any other person in accordance with section 30;

(b) all moneys recovered by, or on behalf of, the Registrar in the exercise of any right of action conferred by Part VII or Part VIII; and

(c) all other moneys otherwise accruing to the Compensation Fund.

**67.**—(1) There is hereby established a committee, to be known as the Securities Compensation Fund Committee (in this Act otherwise referred to as the “Compensation Fund Committee”), which shall be responsible for the

Establishment of  
Securities  
Compensation  
Fund Committee

administration of the Compensation Fund and for the settlement of claims against the Fund.

(2) The Committee shall consist of—

(a) a person nominated by the Banker's Association of Malaŵi, and appointed by the Minister;

(b) a person nominated by the Malaŵi Stock Exchange, and appointed by the Minister;

(c) a person nominated by the Malaŵi Law Society, and appointed by the Minister; and

(d) a person nominated by the Malaŵi Chamber of Commerce and Industry, and appointed by the Minister; and

(e) a person designated by the Registrar.

(3) Members of the Compensation Fund Committee shall elect one of their number to be the Chairman of the Committee.

(4) The Compensation Fund Committee may, subject to this Act, regulate its own procedure.

**68.**—(1) The Compensation Fund shall be held and applied, on such terms and conditions as the Registrar determines, for the purpose of compensating persons who suffer pecuniary loss occasioned by any default of a licensed investment broker, dealer, investment adviser or any other licensed person in the course of or in connection with any dealing in securities, being a loss in relation to any money, securities or other property which, in the course or in connection with the business of any such licensee, was entrusted to or received by the licensee or any employee for and on the person's behalf.

Purpose of the  
Compensation  
Fund

**69.**—Subject to this Part, there shall be paid out of the Compensation Fund as and when required and in such order as the Compensation Fund Committee considers proper—

Disbursements  
from the  
Compensation  
Fund

(a) the amount of all claims, including costs, allowed by the Compensation Fund Committee;

(b) all legal and other expenses incurred in investigating or defending claims under this Act or incurred in relation to the Compensation Fund or in the exercise by the Compensation Fund Committee of the rights, powers and authorities vested in it by this Act in relation to the Compensation Fund.

(c) all premiums payable in respect of contract of insurance or indemnity entered into by the Compensation Fund Committee.

(d) the expenses incurred or involved in the administration of the Compensation Fund; and

(e) all other moneys lawfully payable out of the Compensation Fund in accordance with the provisions of this Act.

**70.** Without limiting the Registrar's power under the Financial Services Act to issue Registrar's directives, Registrar's directives may make provision with respect to the administration, management and application of any Compensation Fund.

Management of the Compensation Fund

**71.** Payment from the Compensation Fund shall be limited, in respect of each licensee in default, to such amount as is calculated in accordance with Registrar's directives.

Liability of the Compensation Fund to be limited

**72.** The amount of a disbursement from the Compensation Fund in respect of a licensed person is a debt due to the Compensation Fund by the licensed person and is recoverable at the suit of the Registrar in any court of competent jurisdiction.

Recovery of Compensation Fund disbursements from defaulters

#### PART X—COLLECTIVE INVESTMENT SCHEMES

**73.**—(1) A person shall not operate a collective investment scheme unless—

Licensing and regulation of collective investment schemes

(a) the scheme is registered as a collective investment scheme; and

(b) the operator of the scheme is licensed as a operator of the scheme.

(1A) Without limiting the ordinary meaning of “operate”, a person operates a collective investment scheme if the person—

(a) establishes or administers the scheme;

(b) induces or attempts to induce a person to be a member of the scheme or to make payments by way of investment in the scheme; or

(c) accepts or makes payments in connection with the scheme otherwise than as a member of the scheme.

(1B) Any person who contravenes subsection (1) commits an offence and, on conviction, is liable to [*insert penalty*].

(1C) A person may be licensed as operator in respect of collective investment schemes of a class specified in the licence<sup>(3)</sup> Without limiting the Registrar’s power under the Financial Services Act to issue Registrar’s directives, Registrar’s directives may make provision with respect to—

(a) the criteria for and conditions of any licences for the purposes of this Part;

(b) the establishment and operation of collective investment schemes;

(c) the promotion, marketing and distribution of shares, securities or units representing the interests of participants in collective investment schemes;

(d) the management and administration of collective investment schemes;

(e) the provision by any body corporate or individual of trustee, or custodial and operation services, or any other services, for or in connection with collective investment schemes;

(f) any fee, remuneration or reward payable or obtainable for any services referred to in paragraph (e);

(g) books, accounts and records to be kept by collective investment schemes.

(4) Without limiting the Registrar's power under the Financial Services Act to issue Registrar's directives, Registrar's directives issued for subsection (1) may differ according to whether the scheme is in the form of a unit trust, or an open-ended investment company or another kind of investment company.

**74.**—(1) No person shall—

Restriction on promotions

(a) issue or cause to be issued any invitation or advertisement—

(i) inviting persons to become or offer to become participants in a collective investment scheme that is not registered under this Part; or

(ii) containing information calculated to lead directly or indirectly to persons' becoming or offering to become participants in a collective investment scheme that is not registered under this Part;

(b) advise or procure any person to become or offer to become a participant in a collective investment scheme that is not registered under this Part.

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

(3) In addition to the requirements of this Part, any collective investment scheme which is organized and approved under this Part shall be subject to the requirements of Parts II, V, VI, VII, VIII, IX and XI of this Act, and to any other requirements of law, including but not limited to the Companies Act.

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(4) In case of any conflict between the requirements of this Part and any other written law, the provisions of this Part shall prevail.

#### PART XII—MISCELLANEOUS

**82.** No person shall be entitled to recover damages under this Act which exceed the actual financial harm or loss suffered by such person by reason of a contravention of this Act, plus interest at the prevailing commercial bank lending rate calculated on such damage or loss.

Limitation to the recovery of damages

**85.—**

Rules and directives

(2) Without limiting the Registrar's power under the Financial Services Act to issue Registrar's directives, Registrar's directives may make provision with respect to—

(a) the conduct of business by licensed brokers, dealers, investment advisers and their representatives;

(b) matters incidental to the licensing of any person under this Act;

(c) the class of persons in relation to whom, and the manner and circumstances in which, licensed brokers, dealers and their representatives may purchase or sell securities;

(d) the types of securities which licensed brokers, dealers and their representatives may purchase or sell;

(e) the class of persons in relation to whom, and the manner and circumstances in which, licensed investment advisers or investment representatives may conduct their business

(f) the amount of deposit required to be made for the purposes of section 30 and the application of deposits under that section;

(g) the exhibition, by persons licensed under Part VI, of their licences at their places of business;

(h) the correction of any errors in any register or record kept under this Act;

(i) books, accounts, reports or records prepared or maintained for the purposes of this Act;

(j) the lodgement by persons licensed under this Act of annual financial statements;

(k) the lodgement of auditors reports and the information to be contained in such reports;

(l) the remuneration of any inspector appointed, and the costs of any inspection or audit carried out, for the purposes of this Act;

(m) the forms to be used for the purposes of this Act, and the manner in which applications are to be made for licences;

(o) the advertising of securities otherwise than by way of prospectus;

(p) maintenance of the confidentiality of clients or persons licensed under Part IV;

(q) information and the matters to be displayed on business stationery of persons licensed under this Act;

(r) transactions by licensee under this Act with related persons;

(s) the extension of margin facilities to clients of persons licensed under Part IV;

(u) insurance against negligence or default by persons licensed under Part IV;

(v) the issue of duplicate licences in case of loss or destruction;

**86.** In addition to his other powers, the Registrar may issue such guidelines, bulletins or other regulatory statements as the Registrar may consider necessary or desirable.

Guidance notes,  
etc;

**87.**—(1) The Capital Market Development Act is hereby repealed.

Repeal and  
savings



(2) Notwithstanding the repeal of the Capital Market Development Act—

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(a) any applications pending before the Malawi Stock Exchange under any provision of that Act shall continue to be pending and shall be processed as if such applications were made under this Act;

(b) any court exercising jurisdiction conferred by that Act, may continue to exercise its functions in relation to any matter pending or part-heard before it, and its decision shall be given effect to and shall be binding on parties to any appeal or other proceedings, as if that Act were still in force;

(c) any investigation or proceeding commenced under that Act and not concluded at the commencement of this Act may be continued by the Registrar; and

(d) any rules or regulations made, or directives issued, under that Act shall, unless inconsistent with this Act, continue in force until revoked, as if made or issued under this Act.

#### SCHEDULE (S.8(3)(B))

##### REQUIREMENTS TO BE MET BY APPLICANTS FOR SECURITIES EXCHANGE LICENCE

1. Trading in securities may be conducted only by brokers and dealers who are members of a securities exchange licensed under and meeting the standards prescribed in or under this Act.

2. A securities exchange may be registered by filing with the Registrar an application for registration in such form as may be prescribed, and submitting with such application, the operational rules of such organization or such other information and documentation as the Registrar may require.

3. A securities exchange shall not be registered unless the Registrar determines that it meets the requirements of Part III and that—

(a) it is so organized that it has the capability to carry out the purposes of this Act and to ensure compliance by its members and its employees with the provisions of this Act and with its own rules;

(b) its rules are designed to—

(i) promote development of the capital markets;

(ii) prevent fraudulent and manipulative acts and practices;

(iii) remove impediments to, and perfect the mechanism of, a free and open market; and

(iv) generally protect investors and the public interest;

(c) its rules are not designed to permit, and do not permit discrimination between customers, issuers of securities, brokers, dealers, market makers and underwriters;

(d) its rules provide that its members and persons associated with the members, shall, for contravening those rules, the provisions of this Act, or any rules or regulations made under this Act, be appropriately disciplined by expulsion, suspension, limitation of activities and functions, or by suspending or barring them from being associated with the organization or a member thereof, or by any other fitting sanctions;

(e) its rules provide a fair procedure for the discipline of its members and persons associated with it or with its members; and

(f) its rules do not impose any undue burden in furtherance of the purposes of this Act.

4. (1) A securities exchange shall take steps necessary to ensure compliance with the requirements of this Act,

with its own rules and with the requirements of any other relevant written law.

(2) A securities exchange shall adopt all measures necessary to provide a fair, orderly, transparent, and properly regulated and disciplined market for the benefits of the public and investors, and as a minimum, shall have—

(a) rules establishing the manner in which business is to be transacted by its members;

(b) rules designed to ensure that the capital market functions for the benefit of investors and not solely for the special benefit or advantage of its members;

(c) rules establishing the rights and obligations between members and their customers, including rules for members acting in a fiduciary capacity and for members acting as agents;

(d) rules establishing trading procedures and requirements and record-keeping to provide for an adequate audit trail;

(e) rules establishing priority, parity and precedence among orders designed to ensure proper treatment of all orders;

(f) rules designed to ensure that all buying and selling interest is brought together and exposed sufficiently to lead to efficient pricing, and that transactions by investors obtain the best execution;

(g) rules establishing whether and in what circumstances members may trade for their own account and requiring disclosure of this fact, with the objective of ensuring that the self-regulatory trading system operates as a public market for the benefit of investors;

(h) rules establishing the obligations of those acting as market-makers;

(i) rules establishing trading procedures for less actively traded securities;

(j) rules establishing that any transaction shall be a cash transaction, if determined appropriate by the securities exchange;

(k) rules establishing procedures to ensure efficient, prompt and orderly clearance, settlement and payment of transactions, including but not limited to—

(i) requirements that members must clear, settle and pay transactions among themselves independent of the obligations to or of their customers;

(ii) requirements, if determined appropriate by the securities exchange, that members must receive from customers securities and payments before executing transactions;

(iii) rules regulating transfer of ownership securities;

(l) rules designed to foster fair, honest, orderly and transparent markets, protect investors, promote high standards of commercial honour and fair principles of trade and conduct, and prevent manipulative, deceptive and fraudulent acts, practices and course of conduct by any person, and acts, practices and courses of conduct by any person determined by the securities exchange to be improper or contrary to the purposes of this Act;

(m) rules providing effective and fair procedures and standards under which members and their associated persons shall be appropriately disciplined, by expulsion, suspension, limitation of activities and functions, and other fitting sanctions in case of contravention of its own rules, any of the provisions of this Act or the rules and regulations made under this Act;

(n) rules providing for suspension or cancellation of trading;

(o) rules establishing the obligations of the issuers of publicly traded securities to provide disclosure of material information to investors, brokers, dealers, market makers, underwriters, investment advisers and

portfolio advisers and portfolio managers and the market in general; and

(p) rules establishing the duties of its members to obtain and disseminate information provided by issuers securities.

5.-(1) A securities exchange shall file with the Registrar, in accordance with such requirements as may be prescribed by or under the Act, copies of any proposed rules or any proposed change in the rules of the organisation.

(2) In the case of change in the rules, the submission to the Registrar shall be accompanied with a statement of the basis and purpose of each proposed change and an explanation of how the proposed change furthers the purposes and meets the requirements of this Act, all in sufficient detail to permit the Registrar to reach a finding on each proposed change.

(3) No proposed change of the rules of a securities exchange shall take effect unless approved by the Registrar.

6. For a secondary market transaction in securities a commission, fees and other charges may be payable in accordance with a minimum and maximum scale which shall be determined by the securities exchange and approved by the Registrar and which shall be appropriate to the stage of development of the capital market and the provision of adequate compensation to brokers or dealers, but so, however, that neither the securities exchange nor the Registrar shall have authority to fix a commission, fees or charges for underwriting or similar services or for public offering.

7. Officials and personnel of a securities exchange shall maintain secrecy regarding any information which they have obtained as a result of the performance of their functions or otherwise, and shall not use the knowledge of

such information for themselves personally or for others, whether in any way related or totally unrelated to the capital markets.

#### OBJECTS AND REASONS