

RESERVE BANK OF MALAWI



**GUIDELINES FOR PROCESSING
APPLICATIONS FOR BANK MERGERS
AND ACQUISITIONS**



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GUIDELINES FOR PROCESSING APPLICATIONS FOR BANK MERGERS AND ACQUISITIONS

1.0 INTRODUCTION

Section 25 (j) and (l) of the Banking Act, 2009, requires a bank to obtain prior written approval from the Registrar to arrange for the transfer, sale or disposal of its shares or business, as well as to amalgamate or merge with any other institution wherein the whole or a considerable part of the business or property of the bank will be transferred to that other institution. In addition, Section 25 (b), (d) and (k) of the Banking Act, 2009, also requires a bank to obtain the prior written consent of the Registrar to change its Articles of Association, open or close branches (or static or mobile agencies), or to enter into a management agreement with any party. Section 54 of the Financial Services Act requires the Registrar to approve any step or intention by a person to become a controlling party of a bank. Section 67 of the Financial Services Act, 2010 provides that none of the business of a licensed bank 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.

In order to effectively implement these provisions of the Banking Act, 2009, and the Financial Services Act 2010 and to fast track processing of any request from a bank for approval of a merger or acquisition, the following Guidelines have been formulated to guide banking institutions, their legal/technical advisors and other stakeholders regarding the information that the RBM shall require for it to process a merger or acquisition application.

2.0 DEFINITION OF TERMS

For purposes of these Guidelines, the following definitions shall apply:

2.1 Acquirer

Is the buyer i.e., legal entity which proposes to acquire all or a considerable part (i.e. 10.0 per cent or more) of the assets or shares of a bank licensed under the Financial Services Act, 2009.

2.2 Target Bank

Is the bank whose shares or assets are to be acquired through a merger, purchase and assumption agreement, or through any other legal agreement.

2.3 Successor Bank

Is the bank resulting from a merger or acquisition approved by the Registrar in accordance with Section 25 of the Banking Act, 2009 and Section 67 of the Financial Services Act, 2010.

2.4 Merger

Is the amalgamation or fusion of two separate banks into a single legal entity.¹ In a merger, the merging banks combine to form a new bank. The assets and liabilities of the merging institutions pass to the Successor Bank, unless otherwise provided by contract, and the merging institution(s) are simultaneously and legally dissolved. Shares for both institutions are surrendered and new shares are issued in their place. The new bank formed is a separate legal entity and the RBM shall issue a new banking licence upon approval.

Merging institutions before seeking the Registrar's approval should:

- a) First inquire with the Registrar of Companies for the name under which they intend to use in cases where there is a planned change of name to ensure that the proposed new name is available and appropriately reserved for their use. This inquiry is also necessary for the purposes of avoiding the tort of passing off. Under certain circumstances, such as where the proposed name would contain the word "Malawi" or other protected names, approval from the Office of President and Cabinet is necessary.
- b) Secondly, seek authorisation from the Competition and Fair Trading Commission where the merger or takeover is likely to result in substantial lessening of competition in any market.²

2.5 Acquisition (also referred to as a Takeover or Buyout)

Is the purchase of one bank by another for cash, exchange of shares or a combination of both. An acquisition takes place when an Acquirer takes over the controlling shareholder interests of another banking institution. At the end of the process, there exist two separate companies: the Acquirer and the Successor Bank. From a legal point of view, the Target Bank ceases to exist as the buyer swallows its business.³ In these Guidelines, acquisition includes purchase of 10.0 percent or more of the interests/shares of a bank.

2.6 Registrar

Means the Registrar of Financial Institutions as defined under Section 8 of the Financial Services Act, 2010.

3.0 FACTORS INFLUENCING MERGERS AND ACQUISITIONS

There are many factors that can influence merger or acquisition decisions by business entities. Among them are the following: desire to attain economies of scale, growth in market share, wish to enter a new more growth-oriented market, desire to invest excess capital, lack of management succession, inability to keep up with change e.g. technology,

¹ In practice however, actual mergers do not happen very often. Usually, one bank will buy another and as part of the deal's terms, simply allow the acquired bank to proclaim that the action is a merger even if it's technically an acquisition. For purposes of these guidelines however, separate assessment procedures have been made for mergers and acquisitions.

² Section 35 (1) of the Competition and Fair Trading Act Cap 48:09 of the Laws of Malawi

³ Where the acquired bank changes name, the RBM shall issue a new banking licence, but where it maintains the same name, only pertinent details such as shareholding structure, Board composition, executive management details, articles of association etc shall be amended. No new licence shall be issued.

regulatory concerns/pressures, and perceived opportunity to cash out at high price. The Examiner should ensure that the applicant clearly articulates the reason(s) for the proposal to merge or acquire a particular banking institution.

4.0 OPERATIONS OF BANKING INSTITUTIONS IN THE PROCESS OF MERGER/ACQUISITION

Banking institutions that are undergoing a merger or acquisition process shall continue to transact business under their old names and licences but should not embark on further branch expansion or new capital projects such as banking system or accounting software purchases until the Registrar's final approval is granted to effect the merger or acquisition and the merger or acquisition is consummated.

5.0 TIMELINES FOR PROCESSING MERGER AND ACQUISITION APPLICATIONS

The Banking Act, 2009, does not specify the timelines for processing applications for mergers or acquisitions. However, the Registrar believes that most applications should be processed within 90 days after the Examiner receives a complete merger or acquisition application. This time period may be extended for two additional periods of up to 45 days each if the complexity of the application or precedential issues raised by an applicant require additional processing time. The Registrar shall communicate the final decision to the applicant within five business days of the decision.

6.0 APPLICATION FORM AND PROCESSING FEE

Applications for mergers or acquisitions shall be accompanied by all the information stipulated in section 7.0 below. The Registrar may, at its own discretion, require any additional information or documents it deems necessary for its review. The application should be submitted together with a non-refundable processing fee in the form of a bank certified cheque in the amount of the Malawi Kwacha equivalent of USD5,000 payable to the Reserve Bank of Malawi. No application shall be processed without a processing fee except as specifically exempted by the Registrar.

7.0 DOCUMENTS REQUIRED FOR MERGERS AND ACQUISITION APPLICATIONS

There shall be two stages of approval for mergers and acquisitions: pre-merger/acquisition approval in concept and final approval.

7.1 Merger

7.1.1 Pre Merger Consent

Pre-merger consent represents the Registrar's preliminary consent to the banking institutions wishing to merge to the effect that it has no objection in concept to the proposed merger. This approval is solely to enable the merging institutions to proceed with negotiations and enter into agreements on key aspects of the transaction. However, no merger of banks may be consummated without the final approval of the Registrar as specified in Section 7.1.2.

All agreements, appointments, transactions and legal documents, entered into or drawn or executed with, by or in favour of any of the banks, financial institutions or other legal entities involved in a proposed merger which are in force immediately prior to the merger, shall remain in force and effect and shall be construed for all purposes as if they had been entered into, made, drawn or executed with, or in favour of, the resulting institution (i.e., the Successor Bank).

The following documents/information should be submitted at the pre-merger consent stage:

- a) A formal application by the merging banks addressed to the Registrar and signed by the Chairpersons and Managing Directors/Chief Executive Officers of each of the merging banks accompanied by the following:
- b) The proposed name of the Successor Bank.
- c) A statement of the nature and objectives of the merger.
- d) A copy of the proposed merger agreement and any related transaction documents.
- e) Current Memorandum and Articles of Association for each of the merging banks.
- f) Resolutions by each of the Boards of the merging banks authorising management to proceed with merger negotiations.
- g) List of new shareholders of the Successor bank; their physical addresses and their respective shareholding proportions.

7.1.2 Final Approval

This represents the Registrar's final approval for the merger transaction having reviewed all the information submitted by all participating individuals and institutions. The Registrar may, if deemed necessary, grant final approval of the merger with conditions.

The following information/documents should be submitted to obtain final approval:

- a) A formal application by the merging banks addressed to the Registrar and signed by the Chairpersons and Managing Directors/Chief Executive Officers of each of the merging banks accompanied by the following:
- b) Proposed Memorandum and Articles of Association of the Successor Bank.
- c) Certificate of Incorporation of the Successor Bank (if applicable).
- d) Certified Board Resolutions from each of the merging banks approving the merger.
- e) Certified Shareholders Resolutions of each of the merging banks approving the merger.
- f) List of principal shareholders (i.e shareholding of 10% and above) of the Successor Bank, showing their business and residential addresses (not just P.O. Boxes).

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- g) List of Directors, designation, curriculum vitae and interests they represent in the Successor Bank.
 - h) List of proposed Executive Officers and senior management officials, including designations and curriculum vitae for each person.
 - i) Proposed organisational structure showing functional units, reporting lines and grades of Successor Bank.
 - j) Detailed Business Plan for the Successor Bank for the next 3-5 years, including the Successor Bank's business development strategy, key products to be offered, future goals, etc.
 - k) Due diligence report on each of the merging banks.
 - l) Copies of Management Agreements in all areas (if applicable).
 - m) If one of the merging banks is a foreign bank, written confirmation from its primary supervisory authority indicating approval for, or no objection to, the merger.
 - n) Audited financial statements of each of the merging banks for the last three years.
 - o) Audited financial statements of each principal shareholder of the Successor bank for the last three years.

After final approval of a merger has been granted, the Registrar shall prepare a new banking licence for the Successor Bank. Banking licences of both merging institutions must be surrendered to the Registrar and will be deemed null and void.

7.2 Acquisition

7.2.1 Pre Acquisition Consent

Pre-acquisition consent represents the Registrar's preliminary consent to the acquirer to the effect that it has no objection in concept to the proposed acquisition. This approval is solely to enable the acquirer to proceed with negotiations and enter into agreements on key aspects of the transaction. However, no acquisition may be consummated without the final approval of the Registrar as specified in Section 7.2.2.

All agreements, appointments, transactions and legal documents, entered into or drawn or executed with, by or in favour of any of the banks, financial institutions or other legal entities involved in a proposed acquisition which are in force immediately prior to the acquisition, shall remain in force and effect and shall be construed for all purposes as if they had been entered into, made, drawn or executed with, or in favour of, the target bank.

The following information/documents should be submitted at the pre-acquisition stage:

- a) A formal application by the Acquirer addressed to the Registrar and signed by the Chairperson and Managing Director/Chief Executive Officer accompanied by the following.
- b) A Sales Agreement/Memorandum of Understanding (MoU) between the Target Bank (seller) and Acquirer (buyer) duly signed by both parties.
- c) Certified Board Resolutions of the Acquirer and Target Bank(s) approving the acquisition/take over.

7.2.2 Final Acquisition Approval

The following information/documents should be submitted at final approval stage:

- a) A formal application by the Acquirer addressed to the Registrar and signed by the Chairman and Managing Director/Chief Executive Officer of the Acquirer accompanied by the following:
- b) Audited annual financial statements of the Acquirer for the past three years.
- c) Certified Board and Shareholder Resolutions of the Acquirer and Target Bank(s) approving the acquisition/take over.
- d) Sale Agreement between shareholders of Acquirer and Target Bank(s).
- e) An independent valuation and due diligence report on the Target Bank(s).
- f) Memorandum and Articles of Association of the Acquirer and Successor Bank.
- g) Certificate of Incorporation of the Acquirer.
- h) List of principal shareholders of the Acquirer (i.e. shareholders owning 10% and above) including its related affiliates/subsidiaries and their business/residential addresses.
- i) Proposed organizational structure of the Successor Bank showing functional units and reporting relationships.
- j) List of proposed Directors, their curriculum vitae, designations and interests they will represent in the Successor Bank.
- k) List of proposed Executive Officers and other senior management officials of the Successor Bank, their titles and their curriculum vitae.
- l) Detailed Business Plan for the Successor Bank for the next 3-5 years including the Successor Bank's business development strategy, key products to be offered, future goals, etc.
- m) Copies of Management Agreements in all areas (if applicable).
- n) If one of the acquiring institutions is a foreign bank, written confirmation from its primary supervisory authority indicating approval or no objection to the acquisition.

If the Acquirer changes name, a new banking licence shall be issued. The previous banking licence must be surrendered to the Registrar within 10 (ten) working days.