

**NON-BANK FINANCIAL INSTITUTIONS REGULATORY
AUTHORITY**

(NBFIRA)

FIT AND PROPER PERSON RULES FOR CONTROLLERS

In terms of Section 4 (2) (d) of the NBFIRA Act, 2016

FIT AND PROPER PERSON RULES FOR CONTROLLERS

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IN EXERCISE of the powers conferred on the Non-Bank Financial Institutions Regulatory Authority by Section 4 (2) (d) of the Non-Bank Financial Institutions Regulatory Authority Act of 2016, the following Rules are hereby made: –

1. INTRODUCTION

- 1.1. The Financial Services Laws require persons intending to become controllers and/or key persons of prudentially regulated non-bank financial institutions to be fit and proper and to demonstrate the qualities and traits that will allow a controller, or director, to perform the duties and carry out the responsibilities of his or her position with the regulated entity. These traits include integrity demonstrated in personal behavior and personal conduct, soundness of judgment, financial soundness, sufficient degree of knowledge, experience and professional qualifications. These Rules have been promulgated in terms of Section 4 (2) (d) of the Non-Bank Financial Institutions Regulatory Authority Act which gives the Regulatory Authority power to make and publish rules imposing requirements with respect to conduct of the affairs of prudentially regulated non-bank financial institutions.
- 1.2. The purpose for these Rules is therefore to prescribe fit and proper person requirements for Controllers including designated Anti Money Laundering/Countering Financing of Terrorism (AML/CFT) Compliance Officers.

2. INTERPRETATION

- 2.1. In these Rules, unless the context leads to a contradictory result:
 - 2.1.1. **“the Act”** means the Non-Bank Financial Institutions Regulatory Authority Act, 2016 as amended from time to time;
 - 2.1.2. **“Board”** means the Board of a regulated institution;
 - 2.1.3. **“Controller”** has the meaning assigned to it under the Act;
 - 2.1.4. **“Director”** has the meaning assigned to it under the Act;
 - 2.1.5. **“Financial Crime”** has the meaning assigned to it under the Act;
 - 2.1.6. **“Fit and proper”** has the meaning assigned to it under the Act;
 - 2.1.7. **“Investigations”** has the same meaning as ascribed in the NBFIRA Act, Securities Act, Insurance Industry Act, International Insurance Act, Collective Investment Undertakings Act, Part IV of the Income Tax Act, Botswana Stock Exchange Act or Retirements Funds Act or any other law as may have been prescribed by the Minister;
 - 2.1.8. **“Key Person”** has the meaning assigned to it under the Act;
 - 2.1.9. **“Proposing Entity”** means any institution applying for the approval for a Controller;

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- 2.1.10. **“Regulated Institution”** means any institution licensed or exempted from licensing under the Act or any financial services law and or whose activities are regulated by the Regulatory Authority;
- 2.1.11. **“Regulated Activity”** means any activities regulated under the Act and/or any of the financial services law;
- 2.1.12. **“the Regulatory Authority”** means the Non-Bank Financial Institutions Regulatory Authority;
- 2.1.13. **“Suspension”** has the meaning as ascribed in the Employment Act;
- 2.1.14. **“Criminal Offences”**, has the same meaning as the meaning ascribed to Offence in the Penal Code of Botswana;
- 2.1.15. **“Money Laundering”** has the same meaning as ascribed in the Proceeds and Instruments of Crime Act; and
- 2.1.16. **“Financial Crime”** has the same meaning as ascribed in the NBFIRA Act.
- 2.2. The headings in these Rules are inserted for reference purposes only and shall in no way govern or affect the interpretation hereof.
- 2.3. If any provision in a definition is a substantive provision conferring rights or imposing obligations on any party, effect shall be given to it as if it were a substantive provision in the body of these Rules.
- 2.4. Unless the context indicates otherwise, an expression that denotes any gender includes the others; a natural person includes a created entity (corporate or unincorporated) and the singular includes the plural, and vice versa in each case.
- 2.5. References in these Rules to any statutory provisions include a reference to those provisions as amended or replaced from time to time and include any subordinate legislation made under them from time to time. Any reference to a particular section in a statutory provision is to that section as at the date of adoption of these Rules, and as amended or re-enacted from time to time and/or an equivalent measure in a statutory provision, provided that if as a result of such amendment or re-enactment, the specific requirements of a section referred to in these Rules are changed, the relevant provision of these Rules shall be read also as if it had been amended as necessary, without the necessity for an actual amendment.
- 2.6. When any number of days is prescribed in these Rules, same shall be reckoned exclusively of the first and inclusively of the last day unless the last day falls on a day which is not a business day, in which case the last day shall be the next succeeding day which is a business day.
- 2.7. Unless a contrary intention clearly appears -

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- 2.8. if figures are referred to in numerals and in words and if there is any conflict between the two, the words shall prevail;
- 2.9. the words "include", "including" and "in particular" shall be construed as being by way of example or emphasis only and shall not be construed as, nor shall they take effect as, limiting the generality of any preceding word/s;
- 2.10. any reference in these Rules to another agreement or document shall be construed as a reference to such other agreement or document as same may have been, or may from time to time be, amended, varied, novated or supplemented; and
- 2.11. the words "other" and "otherwise" shall not be construed with any preceding words if a wider construction is possible.

3. APPLICATION OF RULES

- 3.1. These Rules shall apply to "controllers" as defined in Section 2 of the Act including designated Anti Money Laundering/Countering Financing of Terrorism (AML/CFT) Compliance Officers. Each Regulated Institution shall on request by the Regulatory Authority, provide such details as may be required in respect of its organizational structure to enable the Regulatory Authority to make a declaration on whether or not a person is a controller as envisaged in Section 2 (2) of the Act.

4. APPLICATION FOR APPROVAL AS CONTROLLER

- 4.1. No person shall serve as a controller of a regulated institution without the prior written approval of the Regulatory Authority.
- 4.2. An application to the Regulatory Authority for approval as a controller of a prudentially regulated non-bank financial institution shall be made by a Proposing Entity and shall comprise of:
 - 4.2.1. cover letter including the following information:
 - 4.2.1.1. Names and full addresses of the Proposing Entity;
 - 4.2.1.2. Name of contact person, address and telephone number; and
 - 4.2.1.3. Names and full addresses of the proposed Controller.
 - 4.2.2. certified copies of Identity card if a citizen of Botswana; otherwise, a valid Passport;
 - 4.2.3. business and professional history included in a detailed Curriculum Vitae;
 - 4.2.4. information as to whether the person is, or has ever been, a significant shareholder, director or senior management official of any of the Regulated Institution in Botswana; or elsewhere.

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- 4.2.5. information on the person's involvement in companies, partnerships, associations, and groups of persons acting together with a common purpose whether or not organised as a formal business entity;
 - 4.2.6. a completed Personal questionnaire in the prescribed Form 1 in the Schedule;
 - 4.2.7. Security Vetting in the prescribed Form 2 in the Schedule; or as may be prescribed;
 - 4.2.8. Botswana Police Service Clearance; or country of residence;
 - 4.2.9. a Reference by any Bank licensed in terms of the Banking Act; or equivalent legislation for foreign referee banks
 - 4.2.10. two recent Passport sized photos;
 - 4.2.11. copies of educational and professional Certificates certified no more than three 3 months prior to the date of submission;
 - 4.2.12. Proof of Residence to be verified by a utility bill, letter from an employer or an affidavit.
- 4.3. The Regulatory Authority may request any other document or information it deems necessary to accompany the application for approval.
 - 4.4. Within 60 days of receipt of a complete application under this provision, the Regulatory Authority shall make a determination in respect of an application and give notice of its determination to the proposing entity. The assessment may take longer than envisaged depending on the circumstances of the application.
 - 4.5. Failure to provide the Regulatory Authority with all the required information within fourteen (14) days will result in the Regulatory Authority returning the application without consideration.
 - 4.6. Any applicant who was vetted in the past twelve (12) months shall be exempted from the assessment, provided that the applicant satisfies the prescribed minimum experience and qualification for the new position.

5. DETERMINATION OF FIT AND PROPER

5.1. Key Indicators

- 5.1.1. The Regulatory Authority shall conduct fit and proper assessment by considering the following indicators:
 - i. **Criminal indicators:** These cover record of **criminal convictions** such as dishonesty, misappropriation of assets, embezzlement of funds, money laundering, financing of terrorism and fraud, theft, forgery etc.

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- ii. **Financial indicators:** These provide information on financial misconduct of both the individual and the entity in which the applicant is/was a controller. Indicators shall include but not be limited to financial trouble as a result of inability to manage own affairs, judgement debt or award which remains outstanding or has not been satisfied within a reasonable period, bankruptcy or insolvency proceedings, or property attachment resulting from legal proceedings, bankruptcy or insolvency proceedings in or in respect of an entity applicant which the individual is/was a Key Person/controller.
- iii. **Supervisory indicators:** These relates to information gathered by the Regulator in the performance of their supervisory duties. Indicators could be the withholding of information from Regulators, a history of non - compliance, failure or refusal to cooperate with regulators, submission of incorrect information, market conduct transgressions and prior refusal of regulatory approval for key positions, suspension from operations, being subjected to regulatory investigations, being statutorily managed or subject to court proceedings by the Regulator.
- iv. **Other indicators:** These may provide other information relating to the suitability of the individual, which may include documentary evidence of non-compliance with internal policies, previous lawful dismissal of the person, disciplinary measures imposed by professional associations/bodies, evidence that the person is or has been disqualified from being a director in a company in line with the Companies Act of Botswana or non-disclosure of pertinent information.

5.2 The Regulatory Authority shall exercise judgment and discretion in assessing an application for approval and shall determine whether a proposed controller is fit and proper by taking into account all relevant matters including but not limited to:

5.2.1 good character which comprises an assessment of honesty, integrity, fairness and reputation;

5.2.2 competence and capability; and

5.2.3 Financial soundness.

5.3 An assessment using the indicators set out under paragraph 5.1 shall be subject to the relevant Regulated Institution's industry standards and circumstances, nature of the proposed responsibilities and influence of the proposed Controller in the affairs of the Proposing Entity.

5.4 In considering and assessing a proposed controller's individual qualities set out under paragraph 5.1 of this Rules, the Regulatory Authority shall also consider:

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- 5.4.1 the seriousness of, and surrounding circumstances resulting in, the relevant person not meeting the specific criteria;
 - 5.4.2 the relevance of the failure by the relevant person to meet the specific criteria to the duties that are, or are to be, performed and the responsibilities that are, or are to be, assumed by the relevant person; and
 - 5.4.3 the passage of time since the failure by the relevant person to meet the specific criteria.
- 5.5 Where the Regulatory Authority has reasonable grounds to believe that an individual is not fit and proper, it shall declare that person to be not fit and proper, therefore unable to be approved as a controller, and shall give reasons for its decision.
- 5.6 The Applicant has the right to request for a hearing pursuant to the laws of natural justice.

6 GOOD CHARACTER

- 6.1 The assessment by the Regulatory Authority on whether a person is of good character shall include, but shall not be limited to, the following:
- 6.1.1 whether the person has ever been subject of an investigation by any government, professional or other regulatory body;
 - 6.1.2 whether the person has ever been asked to resign by the employer due to gross misconduct and has in fact resigned;
 - 6.1.3 whether the person has in connection with the formation or management of any company, partnership or unincorporated institution been adjudged by a court civilly liable for any fraud misfeasance or other misconduct towards any company, partnership or unincorporated institution or towards any members thereof;
 - 6.1.4 whether the person has ever had a previous application to be a controller refused or revoked by any regulatory authority in Botswana or elsewhere;
 - 6.1.5 whether the person is disqualified from being a controller by any law applicable in Botswana;
 - 6.1.6 whether the person has ever been convicted for any criminal offence, including financial crimes and anti-money laundering such as fraud, theft, forgery, dishonesty, perjury, etc. whether in Botswana or elsewhere, excluding minor traffic offences;
 - 6.1.7 whether the person has ever previously been a Controller of a regulated institution, where the entity has had to be deregistered as a result of any failure on the part of the Controllers or where the Authority has appointed a curator;

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- 6.1.8 whether the person has any actual or potential conflicts of interest which might interfere in the exercise of his/her fiduciary duties towards the regulated institution;
- 6.1.9 whether the person is or has been the subject of any proceedings of a disciplinary or criminal nature, which have resulted in a conviction, censure or a fine;
- 6.1.10 whether the person has engaged in any business practices which are deceitful, oppressive or otherwise improper (whether unlawful or not), or which otherwise discredit his/her professional conduct;
- 6.1.11 whether the person, or any business in which he/she has a controlling interest or exercises significant influence, has been investigated, disciplined or suspended, by a regulatory body, a supervisory authority or professional body, a court or a tribunal, whether publicly or privately;
- 6.1.12 whether the person has been associated, in ownership, directorship or management capacity, with a company, partnership or other business association that has been refused registration, authorization, membership or a license to conduct trade, business or profession, or has had that registration, authorization, membership or license revoked, withdrawn or terminated;
- 6.1.13 whether, as a result of the removal of the license, registration or other authority, the person has been refused the right to carry on a trade, business or profession requiring a license;
- 6.1.14 whether the person has been the subject of any justified complaint relating to dishonesty, fraud or financial criminal activities inter alia money laundering, theft, malpractice;
- 6.1.15 whether the person has contravened any of the requirements and standards of a regulatory body, a professional body, a supervisory authority, government or its agencies, which are of the nature and/or significance that may have affected his/her suitability to be a controller;
- 6.1.16 whether the person has been a director, partner, or otherwise involved in the management, of a business that has gone into receivership, insolvency, or liquidation while the person was connected with that business or within one year after the connection;
- 6.1.17 whether the person has been dismissed, asked to resign or resigned from employment or from a position of trust, fiduciary appointment or similar position because of questions about his fitness and probity;
- 6.1.18 whether the person has at any time shown strong opposition or lack of willingness to maintaining effective internal control systems;
- 6.1.19 whether, in the past, the person has been unfair, untruthful and not forthcoming in his dealings with his customers, superiors, auditors and regulatory authorities; and

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6.1.20 whether the person demonstrates a readiness and willingness to comply with the requirements and standards of the regulatory system and other legal, regulatory or professional requirements and standards.

7 COMPETENCE AND CAPABILITY

7.1 An applicant for controller of a regulated entity must demonstrate his competence and ability to understand the technical requirements of the business, inherent risks and management processes required to conduct its operations effectively.

7.2 In the determination of competence and capability of a person, the following must be taken into consideration:

7.2.1 A minimum of five (5) years' experience in the financial services industry relevant to the position being applied for (such as working as an investment manager, pension fund administrator, banker, accountant, actuary, lawyer or trustee etc.). Three (3) years' relevant experience will be required for compliance officer's and internal auditor's roles;

7.2.2 A relevant Degree or a Diploma or Certificate or industry qualification offered by any institution of higher learning in Botswana or a similar foreign qualification commensurate with level of complexity of business operation;

7.2.3 Any examination administered/recognised by the Regulatory Authority;

7.2.4 Industry or professional qualification required by the Regulatory Authority;

7.2.5 The Accreditation status of the institute of learning;

7.2.6 Whether the person has ever been disciplined by a professional, trade or regulatory body or dismissed or requested to resign from any position or office for negligence, incompetence or mismanagement;

7.2.7 Where candidates are deficient in their capability, they may be allowed a period of up to two years within which to undergo training to remedy the deficiency. However, if the candidate is unable to fulfill the requirements under these Rules after two years of failing the assesment, he/she may be required by the Regulatory Authority to relinquish his/her key/controller position.

8 FINANCIAL SOUNDNESS

8.1 In determining a person's financial soundness, the Board must consider all relevant factors, including but not limited to:

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- 8.1.1 whether the person has been the subject of any adverse judgement or award that remains outstanding or was not satisfied within a reasonable period;
- 8.1.2 whether the person has filed for bankruptcy, been adjudged bankrupt, had assets sequestrated, or been involved in proceedings relating to any of these;
- 8.1.3 whether a person who has been a key person or controller in the company that:
- has been the subject of any adverse judgement or award, in Botswana or elsewhere, that remains outstanding or was not satisfied within a reasonable period; and
 - has, in Botswana or elsewhere, filed for bankruptcy, been adjudged bankrupt, had assets sequestrated, or been involved in proceedings relating to any of the foregoing.
- 8.2 The fact that a person may be of limited financial means will not, in itself, affect his ability to satisfy the financial soundness criteria.

9. THE AUTHORITY MAY APPLY THE PASSAGE OF TIME PRINCIPLE AS FOLLOWS:

- 9.1 Applicants with a record of convicted financial criminal offences will be considered only after seven (7) **years** following conviction, or where a custodial sentence has been served the passage of a minimum of seven (7) years since the end of the custodial sentence.
- 9.2 Applicants who have records of other criminal offences will be considered only after five (5) years following conviction, or where a custodial sentence has been served the passage of a minimum of five (5) years since the end of the custodial sentence.
- 9.3 Applicants who have been key persons in a regulated business which had been declared bankrupt, insolvent, refused licenses or had its license revoked will be considered after five (5) years following the date of pronouncement of decision.
- 9.4 Dismissal arising out of disciplinary actions, suspensions by a regulatory body, a supervisory authority, a professional body, a court, a tribunal, relating to financial crime will attract a five (5) years passage of time from the date of dismissal or the suspension.
- 9.5 Applicants found not to be fit and proper for any other incident other than in 9.1 to 9.4 above will be considered after a period, not exceeding five (5) years, to be determined by the Regulatory Authority,

10. CONTINUING REQUIREMENTS FOR CONTROLLERS

- 10.1 Controllers approved and declared in terms of these Rules shall continue to be fit and proper.
- 10.2 Non-bank financial institutions are obliged to notify Regulatory Authority forthwith of any events or circumstances that have occurred subsequent to their initial assessment of fit and proper person that might change the assessment or at least have a material bearing on it.
- 10.3 The Regulatory Authority may, at any time after it has approved and declared a person as a controller in terms of these Rules, investigate whether such a controller is still fit and proper in terms of these Rules.

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- 10.4 Where the Regulatory Authority considers on the basis of information it has, that a controller may no longer be fit and proper, it may:
- 10.4.1 privately reprimand the concerned controller; and/or
 - 10.4.2 give the concerned controller a period of two years within which to undergo prescribed training to remedy the deficiency and where the controller still fails to fulfill the requirements under these Rules, the Regulatory Authority shall either revoke or suspend for a period not exceeding 6 months, the approval and declaration granted as a controller; or
 - 10.4.3 where it deems necessary for the stability, orderliness, and safety of the non-bank financial institutions and sector , and/or for the deterrence of financial crime, either revoke or suspend for a period not exceeding 6 months, the approval and declaration granted as a controller.
- 10.5 The Regulatory Authority shall not take any action specified in paragraph 10.4 of these Rules, unless it has given the person concerned notice of the proposed action and a reasonable opportunity to make representations in writing about the matter, save where it is a new application for entry into the market.
- 10.6 An approval granted under the Act shall lapse as soon as a person ceases to become a controller of a Regulated Institution.

11. EFFECTIVE DATE

These Rules shall come into effect on **January 01, 2018** and shall remain effective and applicable unless amended or revoked.

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SCHEDULE

Form 1

PERSONAL QUESTIONNAIRE

[ATTACHED]

Form 2

SECURITY VETTING FORM

[ATTACHED]

NBFRRA