

FINANCIAL INSTITUTIONS AND MARKETS ACT, 2021**GENERAL****THE INDEPENDENCE OF DIRECTORS, MEMBERS OF A BOARD, TRUSTEES,
CUSTODIANS, AUDITORS, VALUATORS AND ANY OTHER PERSON REQUIRED TO
BE INDEPENDENT UNDER THE ACT****Standard No. GEN.S.10.8**

issued by NAMFISA under section 410(2)(e) of the Financial Institutions and Markets Act, 2021

Definitions

1. (1) In this Standard –
 - (a) “Act” means the Financial Institutions and Markets Act, 2021 (Act No. 2 of 2021), and it must be read with the regulations prescribed under the Act and the standards and other subordinate measures issued by NAMFISA under the Act;
 - (b) “conflict of interest” means a situation which a director, key person, auditor, valuator or any other service provider encounters, while rendering a financial service to a client, if that situation –
 - (i) impairs the objectivity of the director, key person, auditor, valuator or any other service provider in any aspect of rendering the financial service to the client; or
 - (ii) prevents the director, key person, auditor, valuator or any other service provider from rendering the financial service to the client in an unbiased and fair manner or from acting in the best interest of the client;
 - (c) “familiarity risk” means risk that may arise due to a long or close relationship with a client, which could make a financial institution or financial intermediary become too sympathetic to the client’s interests or too accepting of the client’s work or product; and
 - (d) “key person” means any person responsible for managing or overseeing, either alone or together with another responsible person, the activities of a financial institution or financial intermediary relating to the rendering of the financial services, and includes those individuals or other entities holding more than 20% of the financial institution or financial intermediary’s voting rights.
- (2) Words and phrases defined in the Act have the same meaning in this Standard, unless the context indicates otherwise, including without limitation, the following:
 - (a) as defined in section 1 of the Act:
 - (i) affiliate;
 - (ii) associate;
 - (iii) auditor;
 - (iv) board;
 - (v) client;
 - (vi) director;

- (vii) entity;
 - (viii) financial institution;
 - (ix) financial intermediary;
 - (x) financial service;
 - (xi) principal officer;
 - (xii) valuator; and
- (b) as defined in section 168 of the Act –
- (i) custodian; and
 - (ii) trustee.

Applicability

2. This Standard applies to any person who is required under the Act to be independent including, without limitation, directors, members of a board, principal officers, trustees, custodians, auditors and valutors.

General criteria

3. (1) Unless the person can show that there is no direct conflict of interest, the person will not be considered independent in respect of an election or appointment to a position with a financial institution or financial intermediary if the person –

- (a) is an associate of –
 - (i) the financial institution or financial intermediary; or
 - (ii) an entity that is an affiliate of the financial institution or financial intermediary; or
- (b) derives any benefit in the provision of a financial service to a client, other than through the contractual relationship with the financial institution or financial intermediary in terms of which the election or appointment to the position was made.

(2) In relation to a financial institution or financial intermediary, unless the person can show that there is no direct conflict of interest, the person will not be considered independent in respect of an election or appointment to a position with that financial institution or financial intermediary if the person is employed by, or has within the immediate preceding year been employed by –

- (a) the financial institution or financial intermediary; or
- (b) an associate or affiliate of that financial institution or financial intermediary.

Specific criteria

4. (1) In addition to the general criteria, unless the person can show that there is no direct conflict of interest, an auditor will not be considered independent, whether as an individual not associated with a firm of auditors or associated to a firm of auditors, if the auditor –

- (a) is a key person with respect to the financial institution or financial intermediary concerned, or is a key person of an associate or affiliate of that financial institution or financial intermediary; or

- (b) is associated with the valuator of that financial institution or financial intermediary or with the member of the firm of valuers designated pursuant to section 402(2)(b) and (4) of the Act.

(2) In addition to the general criteria, unless the person can show that there is no direct conflict of interest, a valuator will not be considered independent if the valuator –

- (a) is a key person with respect to the financial institution or financial intermediary concerned, or is a key person of an associate or affiliate of that financial institution or financial intermediary; or
- (b) is associated with the auditor of that financial institution or financial intermediary or with the member of the firm of auditors designated pursuant to section 401(2) of the Act.

Disclosure

5. Where it is contemplated that a person may be elected or appointed to a position with a financial institution or financial intermediary, that person must disclose to the financial institution or financial intermediary any matter which relates or may possibly relate to the independence of the person, both before the election or appointment and on an ongoing basis.

Familiarity risk

6. (1) Financial institutions and financial intermediaries must have a policy outlining how familiarity risk and threats to the independence of directors, members of a board, trustees, custodians, auditors, valuers and any other person required to be independent under the Act, will be managed.

(2) In managing conflict of interest, financial institutions and financial intermediaries must –

- (a) clearly define where actual or potential conflict of interest may arise;
- (b) define the roles and responsibilities of persons accountable for the management and oversight of the conflict of interest;
- (c) provide for corrective actions that must be taken for non-compliance with the arrangements;
- (d) provide for adequate processes and procedures for transactions with related parties; and
- (e) address and provide for any additional matters relating to conflict of interest arrangements that have been prescribed.