



## BANK OF SOUTH SUDAN (BSS)

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### **REGULATION NO. 12, 2012**

#### **FIT AND PROPER GUIDELINES**

In accordance with the provisions of section 12 of the Bank of South Sudan Act, 2011, and Section 57 of the Banking Act 2012 (the Banking Act), I hereby issue the following Regulation that prescribes the criteria on the basis of which the Bank of South Sudan (BSS) will determine whether a person is a fit and proper person to serve in designated capacities with respect to banks and bank holding companies operating in South Sudan, and in certain other capacities referenced in the Banking Act.

This Regulation shall be cited as Fit and Proper Guidelines, 2012, and shall come into effect as from the date of its signature.

#### **I. General Provisions and Definitions**

1. In accordance with the Banking Act, certain persons are required to be fit and proper to hold designated positions:

- (a) directors and managers of banks and bank holding companies;
- (b) significant participants in banks and bank holding companies;
- (c) directors and managers of enterprises that are significant participants in banks or bank holding companies;
- (d) employees of the internal audit function of banks; and
- (e) special administrators or receivers of banks.

2. In addition to the specific requirements referenced in section 1:

- (a) section 33(4) of the Banking Act gives the BSS the authority to approve or deny applications by banks to establish or acquire subsidiaries;
- (b) section 34(4) of the Banking Act gives the BSS the authority to prevent the establishment or acquisition of associated enterprises by banks on the same grounds as referenced in section 33(4), following notification to the BSS by the bank of its intention to carry out such establishment or acquisition;
- (c) section 36 of the Banking Act requires approval by the BSS before a bank establishes a branch in South Sudan;
- (d) section 105(3) of the Banking Act gives the BSS the authority to prevent the establishment or acquisition of subsidiaries and associated enterprises by bank holding companies following notification to the BSS by the bank holding company of such intention; and
- (e) section 106(1) of the Banking Act requires prior approval by the BSS for a bank holding company to establish or acquire a foreign subsidiary or associated enterprise, and gives the BSS the authority to deny such approval on the same grounds referenced in section 105(3).



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3. In each of the cases referenced in section 2, the BSS is authorised, or required, to prevent the intended action if in its judgment, it would be detrimental to bank or its depositors.
4. One of the factors that the BSS considers in making the determinations referenced in section 3 is the fitness and properness of the management of the enterprise or branch concerned. In the case of subsidiaries and associated enterprises of banks and bank holding companies, one of the factors that the BSS considers is the fitness and properness of other significant participants, if any, of the subsidiary or associated enterprise in question.
5. In accordance with the Banking Act:
- (a) a "fit and proper person" means a person who, in the judgment of the BSS, has an impeccable record for honesty, trustworthiness, fairness, integrity, competence, and soundness of judgment in personal and business activities, and, where appropriate, professional experience and qualifications suitable for the position to be held.
  - (b) a legal person is considered to be a fit and proper person if all members of its board of directors and senior management, or equivalent governing bodies, and significant participants have the qualities referenced in subsection (a).
  - (c) a person cannot be deemed a fit and proper person if:
    - (1) they have been convicted by an authorised court of an offense for which he was or could have been sentenced to imprisonment unless such conviction was motivated by his religious or political views or activities;
    - (2) they, or any enterprise of which they have been a member of the board of directors or senior management, or has had any significant policy-making authority, has been declared bankrupt or subject to receivership, conservatorship, forced liquidation or similar legal proceedings, unless, in the judgment of the Bank, such declaration or legal proceedings did not arise due to his negligence, unsound business practices, or improper conduct; or
    - (3) on grounds of personal misconduct or professional incompetence, has been disqualified or suspended by a competent authority from practicing a profession.
6. For purposes of this regulation, a "*person concerned*" mean a natural or legal person who/that is, or is under consideration to be, as applicable:
- (a) a person referenced in section 1;
  - (b) a manager of a branch of a bank;
  - (c) a responsible person or significant participant of a subsidiary or associated enterprise of a bank or bank holding company;
  - (d) a responsible person of an enterprise that is a significant participant of a bank or bank holding company.
7. For purposes of this regulation, a "*responsible person*" means a member of the board of directors or senior management, or a person performing similar functions, of an enterprise referenced in section 6.
8. For purposes of this regulation, an "*enterprise with which a person concerned is or has been involved*" means an enterprise in which the person concerned is or has been a responsible person or a significant participant.



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9. In determining whether a person concerned is a fit and proper person, the BSS must be able to determine that:

- (a) there are no adverse factors listed in sections 16 through 22 of this regulation that, in the opinion of the BSS, are incompatible with the person concerned holding the contemplated position; and
- (b) where appropriate, the person concerned has the necessary professional background and qualifications to hold the contemplated position.

10. Adverse factors may include either acts or omissions, of the person concerned or with respect to subordinates of the person concerned, where the person concerned was responsible for supervising the activities of the subordinate.

11. Either an act or an omission may constitute an adverse factor that indicates that the person's fitness and properness are in doubt.

12. The existence of a single adverse factor does not always, by itself, mean that the person concerned is not a fit and proper person, unless such a conclusion is required under section 5 of the Banking Act. Where there is room for the exercise of judgment, the BSS will make its own determination based on all of the facts and circumstances surrounding the adverse factor. However, the BSS will generally presume the existence of an adverse factor to mean that the person concerned is not sufficiently fit and proper to hold the contemplated position, unless it is shown otherwise.

13. The adverse factors to be considered when assessing fitness and properness are:

- (a) criminal adverse factors;
- (b) financial adverse factors;
- (c) supervisory adverse factors;
- (d) tax adverse factors;
- (e) other adverse factors.

The adverse factors listed are illustrative but not exhaustive.

14. Information about the adverse factors may be obtained from, *inter alia*:

- (a) any application or questionnaire completed by the bank or the person concerned in accordance with relevant provisions of the Banking Act or any regulation, circular or guideline of the BSS;
- (b) the tax authorities;
- (c) information provided by any public body, in South Sudan or elsewhere, charged with the supervision of the financial markets;
- (d) the Ministry of Justice, or equivalent authority in a foreign jurisdiction;
- (e) references, including present or previous employers or business associates of the person concerned.



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### II. Adverse Factors

#### A. Criminal Adverse Factors

15. Criminal adverse factors shall include:

- (a) criminal convictions listed in section 17; and
- (b) other factors referred to in section 18.

#### 1. Criminal Convictions

16. "*Convictions*" shall refer to convictions within South Sudan and also convictions elsewhere for offenses that are comparable to the referenced offenses.

17. The BSS may deem a person concerned to be unworthy to hold the contemplated position if the person has been convicted by a judicial decision of any of the following criminal offenses; or of an attempt to commit such an offense; or of the preparation, instigation or incitement of any such offense (including unsuccessful preparation, instigation or incitement); or of being a co-perpetrator and/or accessory to any such offense:

##### (a) Property or Economic Offenses

- (1) property and other crimes - common theft, robbery, embezzlement, currency offenses, counterfeiting and similar offences, fraud, forgery, prejudicial treatment of creditors or entitled persons, knowingly handling stolen money or other property and culpably handling stolen property;
- (2) money-laundering;
- (3) insider trading in securities;
- (4) economic offenses for which criminal penalties may be imposed, including in particular the prohibitory provisions of the financial supervisory legislation punishable as crimes under applicable law and provisions relating to reporting of unusual transactions or unauthorised providing of financial services;
- (5) breach of tax legislation for which criminal penalties may be imposed;
- (6) serious offences committed by a public servant;
- (7) crimes relating to endangerment to public order or destruction of public property;

##### (b) Violent Offenses

- (1) violent offences – offenses against life, bodily injury, threats of violence or crime, involuntary manslaughter or bodily harm, crimes against public decency, robbery, extortion;

##### (c) Offenses Suggesting Dishonesty

- (1) using a false name, academic title, or similar designation, falsely creating the impression of acting on the basis of official authority, support or recognition, carrying out brokerage activities on an unauthorised basis;



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(2) supplying false information, or infringement of the obligation to supply information;

(d) Drug-related Offenses

(1) intentionally smuggling, producing, selling, delivering, and/or being in possession of hard drugs;

(2) preparatory acts with regard to preparing, selling, delivering, and/or smuggling hard drugs, intentionally smuggling, selling, delivering, and/or being in possession of and producing soft drugs.

(e) Offenses Related to Weapons and Ammunition

(1) unlawful manufacturing or possession of certain weapons or ammunition;

(2) causing particular weapons to be imported or exported without consent;

(3) unlawful transporting of particular weapons or ammunition without a licence or permission;

(f) Road Traffic Offenses

(1) involuntary manslaughter or injury, hit-and-run, driving under the influence of alcohol or drugs;

(2) driving a motor vehicle after disqualification;

(3) refusal to co-operate in an investigation.

### **2. Other Facts or Circumstances**

18. The BSS may also consider other facts or circumstances, not necessarily resulting in a criminal conviction but which could reasonably indicate that the person concerned is or has been involved in one or more of the criminal offences referred to in section 17. Such a determination may be based on official reports drawn up by officials competent to investigate criminal offences in South Sudan or elsewhere, or comparable documents.

### **B. Financial Adverse factors**

19. Financial adverse factors include, but are not limited to:

(a) the person concerned, or any enterprise with which this person is or has been involved, has had major financial problems which have resulted in legal, recovery or collection proceedings, in South Sudan or elsewhere;

(b) a bankruptcy order, or similar legal determination in South Sudan or elsewhere, has been made or applied for regarding the person concerned or any enterprise with which this person is or has been involved;

(c) the person concerned is currently involved in one or more legal proceedings in South Sudan or elsewhere due to financial problems, or is expected to become involved in such proceedings;

(d) according to the opinion of the BSS, the financial liabilities of the person concerned are not reasonably related to the income and/or assets of that person;



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- (e) the person concerned has been required to pay unpaid debts on account of liability for the bankruptcy of any enterprise with which this person is or has been involved, pursuant to bankruptcy legislation of South Sudan or comparable legal provisions elsewhere;
- (f) other facts or circumstances that, in the opinion of the BSS, are comparable to those listed in subsections (a) through (e).

### **C. Supervisory Adverse Factors**

20. Supervisory adverse factors include, but are not limited to:

- (a) the person concerned has provided inaccurate and/or incomplete information to any financial supervisory authority (in South Sudan or elsewhere);
- (b) the person concerned, or any enterprise with which a person concerned is or has been involved:
  - (1) has been refused, or had revoked, any licence, authorisation, permit, or similar document, or exemption by any financial supervisory authority, in South Sudan or elsewhere;
  - (2) has been involved in any matter, in South Sudan or elsewhere that has led to any corrective measure, sanction, or penalty, or comparable action being taken with regard to the person concerned or such enterprise by any financial supervisory authority;
  - (3) has been refused registration, incorporation or the amendment of the articles of association in accordance with the applicable laws of South Sudan, or comparable legislation of a foreign country.
- (c) other facts or circumstances that, in the opinion of the BSS, are comparable to those listed in subsections (a) or (b).

### **D. Tax Adverse Factors**

21. Tax adverse factors include, but are not limited to, the imposition of civil or criminal penalties for one or more of the offenses enumerated below, as mentioned in the Taxation Act, 2009:

- (a) deliberate submission of an incorrect or incomplete tax return by the person concerned or any enterprise with which a person concerned is or has been involved, and in which the person concerned has or had responsibility for submitting such returns;
- (b) intentionally or through gross negligence, causing a tax assessment to be issued for an insufficient amount, or causing an insufficient tax to be levied, regarding the person concerned or any enterprise with which this person is or has been involved;
- (c) taxes due from the person concerned, or from any person on whose account the person concerned was responsible for submitting wage withholding taxes, have not been paid on time;
- (d) intentionally or through gross negligence causing the insufficient withholding of taxes, or causing taxes to not be paid on time, with regard to the person concerned or any



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enterprise with which a person concerned is or has been involved, and in which the person concerned had responsibility for making such payments; or

- (e) any other facts or circumstances that, in the opinion of the BSS, are comparable to those listed in subsections (a) through (d).

### **E. Other Adverse Factors**

22. Other adverse factors include, but are not limited to:

- (a) the person concerned is, or has been, subject to investigatory or disciplinary proceedings by any organisation responsible for regulating any profession, within or outside of South Sudan, including the legal, accounting, auditing or actuarial professions, and this procedure has led to measures being taken by such organisation with regard to the person concerned;
- (b) the person concerned is or has been subject to disciplinary action by an employer (including a warning, reprimand, suspension or dismissal) by his/her current or a former employer concerning the correct fulfilment of his/her duties or compliance with a code of conduct in connection with the fulfilment of this position; or
- (c) the person concerned, or any enterprise with which the person concerned is or has been involved, has been investigated by any public authority, in South Sudan or elsewhere, or has been involved in any legal proceedings that may suggest dishonesty, fraud, or improper business practices on the part of the person concerned or such entity.

### **III. Professional qualifications**

23. Some positions require a certain level of professional experience or qualifications. The BSS will apply the criteria of this section in determining whether such conditions are satisfied.

24. Every member of board of directors of a bank must have a suitable professional background via previous work in business, accounting, law, academia or supervision of financial institutions. At least one member of the board of directors must have expertise in banking, accounting, or financial management in order to facilitate that person's membership on the audit committee.

25. The chief executive officer of a bank must have a degree of higher education and at least twenty years' practical experience in the financial field in a management capacity.

26. Other members of the senior management of a bank, including managers of bank branches, must have a degree of higher education and professional qualifications and experience suitable for the position to be held. The latter requirement shall be presumed to have been fulfilled if a person has at least three years of experience in the banking field in positions comparable to that for which he is proposed, or six years of comparable experience in other financial institutions, or other comparable professional activities.

27. Responsible persons of a bank holding company must have a suitable professional background comparable to those applicable to banks, taking into consideration the nature of the business of the bank holding company.

28. Employees of the internal audit function of a bank must have professional qualifications suitable for their level of participation and responsibility in the internal audit function. The head of the internal audit function must have a suitable professional background in accounting or



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auditing. The latter requirement shall be presumed to have been fulfilled if a person has at least three years of experience in such fields.

29. Responsible persons of an enterprise that is a significant participant in a bank or bank holding company, but which is not itself a bank or bank holding company, do not need to have specific experience or educational background. They must, however, have a suitable business background, taking into consideration the nature of the business of the enterprise and the fact that it is a significant participant in a bank or bank holding company.

30. Responsible persons of subsidiaries and associated enterprises of banks and bank holding companies should have a suitable business background, taking into consideration the nature of the business of the enterprise and the fact that it is a subsidiary or associated enterprise of a bank or bank holding company.

31. Significant participants of subsidiaries and associated enterprises of banks and bank holding companies should have a suitable business background, taking into consideration the nature of the business of the enterprise and the fact that it is a subsidiary or associated enterprise of a bank or bank holding company.

32. In reviewing applications or notifications by banks and bank holding companies to establish or acquire subsidiaries or associated enterprises, the BSS will consider the extent to which the activities or condition of such enterprises may have a material impact on the bank or bank holding company concerned, when assessing the fitness and properness of other significant participants of such enterprises.

33. Special administrators and receivers of banks must meet the same criteria as referenced in section 25 for chief executive officers of banks.

### **IV. Responsibilities of Banks and Significant Participants in Banks**

34. Upon request of the BSS, each bank and bank holding company, and each enterprise having a significant participation in a bank or bank holding company, must notify the BSS of the following information for each of its responsible persons:

- (a) the person's full name;
- (b) the person's position and main responsibilities; and
- (c) data indicating whether the person is a fit and proper person in accordance with these Guidelines.

35. Each bank and bank holding company, and each significant participant in a bank or bank holding company, must:

- (a) take necessary steps to ensure that a person is not appointed to, or does not continue to hold, a position for which they are not qualified or is not fit and proper where such is required;
- (b) assess the fitness and properness of any proposed responsible person prior to appointing the person to such a position, and then re-assess such person's fitness and properness annually;
- (c) provide the BSS upon request with information regarding their responsible persons, and the bank's or company's assessment of the person's fitness and properness;





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- (d) ensure that the information provided to the BSS remains correct for all of its responsible persons; and
- (e) notify the BSS without delay if it determines that a responsible person, or any other person for whom a determination of fitness and properness is required under the Banking Act, or any regulation or circular of the BSS, is not a fit and proper person.

Made under my hand on

This 19<sup>th</sup> day of SEPT 2012

A large, stylized handwritten signature in blue ink is written over the date line. The signature appears to read 'Koriom'.

Kornelio Koriom Mayik

Governor  
Bank of South Sudan