



# GOVERNMENT GAZETTE

## OF THE

# REPUBLIC OF NAMIBIA

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### CONTENTS

*Page*

#### GENERAL NOTICE

No. 284	Bank of Namibia: Determinations under the Banking Institutions Act, 1998 (Act No. 2 of 1998), as amended: Imposition of Administrative Fines (BID – 25) .....	1
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## General Notice

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### BANK OF NAMIBIA

No. 284

2013

#### DETERMINATIONS UNDER THE BANKING INSTITUTIONS ACT, 1998 (ACT NO. 2 OF 1998), AS AMENDED: IMPOSITION OF ADMINISTRATIVE FINES (BID – 25)

In my capacity as Governor of the Bank of Namibia, and under the power vested in the Bank by virtue of section 71(3) of the Banking Institutions Act, 1998 (Act No. 2 of 1998) as amended, read in conjunction with 73A of the afore mentioned Act, I hereby issue this **Determination on the Imposition of Administrative Fines (BID-25)**, which Determination shall become effective from date of publication in the *Gazette*.

**I.W.SHIIMI**  
**GOVERNOR**

Windhoek, 27 June 2013

**Determination No. BID - 25**  
**IMPOSITION OF ADMINISTRATIVE FINES**

**Arrangement of Paragraphs**

**PART I**

**Preliminary**

**PARAGRAPHS**

1. Short Title
2. Authorization
3. Application
4. Definitions

**PART II**

**Statement of Policy**

5. Purpose
6. Scope
7. Responsibility

**PART III**

**Implementation and Specific Requirements**

8. Maximum daily fines
9. Grounds for imposing administrative fines
10. Assessment of administrative fines
11. Procedural rules
12. Right to appeal

**PART IV**

**Corrective Measures**

13. Remedial Measures

**PART V**

**Effective Date**

14. Effective Date

**PART VI**

**Appendices**

- A. Considerations in appraising administrative fines
- B. Categories of severity of contravention or non-compliance

**PART I: PRELIMINARY**

1. **Short Title** – Imposition of Administrative Fines
2. **Authorization** – Authority for the Bank to issue this Determination is provided in section 71(3) of the Act.
3. **Application** – This Determination applies to all banking institutions or controlling companies authorized by the Bank to conduct banking business or to exercise control over a banking institution in Namibia.

4. **Definitions** – Terms used in this Determination are as defined in the Act, as further defined below, or as reasonably implied by the contextual usage.
- 4.1 “**Act**” means the Banking Institutions Act, 1998 (Act No. 2 of 1998), as amended.
- 4.2 “**Administrative fines**” are fines imposed by the Bank without the intervention of a court, subject to right of appeal to the Appeal Board and then to the High Court, if applicable.
- 4.3 “**Appeal board**” refers to the board of appeal constituted in terms of section 73B of the Act.
- 4.4 “**closed day**” means a Sunday or a public holiday referred to in, or declared under, the Public Holidays Act, 1990 (Act No. 26 of 1990).
- 4.5 “**day**” means any calendar day excluding a closed day.
- 4.6 “**individual party**” means a natural person employed by a banking institution or controlling company
- 4.7 “**related party**” in relation to a person means the definition provide for in section 20 (6) of the Act

## PART II: STATEMENT OF POLICY

5. **Purpose** – This Determination sets the criteria for the application of administrative fines that the Bank will impose on banking institutions or controlling companies which have contravened the provisions of the sections of the Act listed under paragraph 6 below. It further sets out mechanisms for assessing the appropriate fines to be levied on each violation.
6. **Scope** – This Determination applies to contraventions or non-compliance by banking institutions or controlling companies of sections 26 (16), 38 (3), 49 (6), 53 (3) or 71 (4) and (5) of the Act under which the Bank is required to determine a fine.
7. **Responsibility** – The board of directors of each banking institution or controlling company must be responsible for establishing policies and procedures, which are adequate to ensure that banking institutions or controlling companies do not contravene the provisions of the Act and Determinations issued in terms of the Act.

## PART III: IMPLEMENTATION AND SPECIFIC REQUIREMENTS

### 8. **Maximum Daily Fines**

- 8.1 In terms of section 73A of the Act, the Bank may impose a daily administrative fine not exceeding N\$100, 000 for every day during which contravention or non-compliance continues.
- 8.2 The daily fines may be assessed either as from the date:
- (a) of the contravention or when the non-compliance occurred and so reported by the banking institution or controlling company to the Bank; or
  - (b) of contravention or non-compliance is detected for the first time by the Bank, including, during its on-site or off-site inspections or through the media or any other source,

up to and including the day the contravention or non-compliance has been resolved by the banking institution or controlling company.

- 8.3 A contravention or non-compliance will be regarded as being resolved upon:
- (a) the rectification of the contravention or non-compliance by the banking institution or controlling company; or
  - (b) a favourable outcome of a banking institution or controlling company's representation made to the Bank in terms of section 73A (2) & (3); or
  - (c) the resolution of the matter by the Appeal Board or the High Court.
- 8.4 Table 1 below sets out the maximum administrative fines and the corresponding sections of the Act which attract fines, in the event of a contravention thereof, in terms of section 73A.

**Table 1 - Maximum daily fines and corresponding sections of the Act.**

Topics/issues	Sections of the Act	Maximum daily fines as per section 73A
Prohibitions and restrictions	Section 26(16)	N\$100,000
Exposure to holding companies, subsidiaries and affiliates	Section 38(3)	N\$100,000
Furnishing of certain statements, notices, returns and information	Section 49(6)	N\$100,000
Production of records and furnishing of information	Section 53(3)	N\$100,000
Prudential Determinations	Section 71(4)	N\$100,000
Determinations on other matters	Section 71(5)	N\$100,000

## 9. Grounds for Imposing Administrative Fines

Appraisal of administrative fines should be made when one or more of the following criteria are present. More guidelines are provided under **Appendix 1** to this Determination.

- 9.1 A contravention or non-compliance causes substantial harm to customers or the banking institution or controlling company.
- 9.2 A contravention or non-compliance is willful, flagrant or shows bad faith on the part of a banking institution or controlling company, e.g. repeated or multiple violations.
- 9.3 A contravention or non-compliance directly or indirectly involves an individual party, associate or related party that received material or substantial benefit from the activity.
- 9.4 Previous supervisory actions (for example: Memorandum of Understandings, Commitment Letters or Cease-and-Desist Orders) have been ineffective in eliminating or deterring a contravention or non-compliance.

## 10. Assessment of Administrative Fines

- 10.1 In determining the appropriate administrative fine(s) for a contravention or non-compliance by a banking institution or controlling company, the Bank will consider a number of factors (column 1 of Table 2) namely:

- 10.1.1 **Intent** – whether or not a contravention has been an intentional act.
- 10.1.2 **Frequency and Severity** – the frequency or recurrence of and how severe a contravention or non-compliance is.
- 10.1.3 **Continuation after notification** – whether a contravention or non-compliance ceased or continued after notification.
- 10.1.4 **History of previous non-compliance** – has there been previous contravention(s) or non-compliance by the banking institution or controlling company?
- 10.1.5 **Cooperation with supervisor** – has the banking institution or controlling company been cooperative?
- 10.1.6 **History of previous supervisory or administrative actions** – has the banking institution or controlling company been previously cautioned for any contravention or non-compliance?
- 10.1.7 **Detriment to banking institution, controlling company or customers** - what is the impact on the banking institution, controlling company or customers?
- 10.1.8 **Gain or benefit to banking institution, controlling company or related parties** – the extent to which a banking institution, controlling company or related party benefited from a contravention or non-compliance.
- 10.2 These factors are used to categorize a contravention or non-compliance into three levels of severity as presented in the Table 2 below. The table sets out factors considered in order to determine the severity of contravention; the classification of factors i.e. low (less serious cases – column 2), medium (moderate cases – column 4) and high (serious or severe cases – column 6); and the related maximum daily fine assigned to each of the factor assessed. The total daily administrative fine for a contravention or non-compliance will be the summation of the daily fines calculated by the Bank, taking into account the maximum fine assigned to the applicable factors. In calculating or imposing the daily fine of each factor, the Bank will exercise its discretion taking into account the extent to which the factor was contravened and the prescribed maximum fines.

**Table 2 - Administrative Fines Matrix**

Factors	Severity of Contravention and Related Maximum Daily Fine Per Factors					
	Low		Moderate		High	
	Assessment	Max.daily fine per factor	Assessment	Max.daily fine per factor	Assessment	Max.daily fine per factor
1	2	3	4	5	6	7
Intent	No intentional act; technical in nature	<b>N\$2, 000</b>	Should have known	<b>N\$4, 000</b>	Clear intent or knowingly contravenes	<b>N\$6, 000</b>
Frequency and Severity	Isolated (single occurrence) but substantive	<b>N\$3, 000</b>	Number of occurrences which are substantial, but technical in nature	<b>N\$6, 000</b>	Numerous and repeated contravention	<b>N\$8, 000</b>

Continuation after notification	Ceased immediately upon notification	<b>N\$4, 000</b>	Ceased shortly after notification	<b>N\$8, 000</b>	Contravention continue after notification	<b>N\$10, 000</b>
History of previous non-compliance	Unrelated prior non-compliance	<b>N\$5, 000</b>	At least one repeated violation	<b>N\$10, 000</b>	Several/frequent repeated contravention	<b>N\$12, 000</b>
Co-operation with supervisor	Full cooperation	<b>N\$6, 000</b>	Acknowledged caution. Full response still to come.	<b>N\$12, 000</b>	No acknowledgement or negative response to caution	<b>N\$14, 000</b>
History of previous supervisory or administrative actions	Prior caution for similar contravention	<b>N\$7, 000</b>	Few cases of prior cautioning/reprimanding for similar contravention	<b>N\$14, 000</b>	Prior supervisory actions/resolution outstanding	<b>N\$16, 000</b>
Detriment to banking institution, controlling company or customers	Minimal impact; no unsafe practices or breach of fiduciary duty	-	Moderate impact on consumers or bank; no unsafe practice or breach of fiduciary duty	<b>N\$10, 000</b>	Substantial impact	<b>N\$18, 000</b>
Gain to banking institution, controlling company or related parties	No or minimum benefit to related party	-	Significant, but indirect benefit to related party	<b>N\$6, 000</b>	Significant, but direct benefit to related party	<b>N\$16 000</b>

**Appendix II** to the Determination provides more detailed information on the factors considered for determining the appropriate administrative fines and the categorization of the contravention or non-compliance according to levels of severity.

#### **11. Procedural rules**

The Bank must, when imposing administrative fines, follow the procedural rules provided under section 73A (2) and (3) of the Act.

#### **12. Right to appeal**

12.1 A banking institution or controlling company may, if dissatisfied with the decision made or fine imposed by the Bank, appeal to the Appeal Board as outlined in section 73A (4) of the Act.

12.2 A banking institution or controlling company may, if dissatisfied with the decision of the Appeal Board, further appeal to the High Court as outlined in section 73A (6) of the Act.

### **PART IV: CORRECTIVE MEASURES**

**13. Remedial measures** – If a banking institution or controlling company fails to comply with this Determination, the Bank may pursue any remedial measures as provided under the Act.

### **PART V: EFFECTIVE DATE**

**14. Effective date** – The effective date of this Determination shall become effective from date of publication in the *Gazette*.

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**Questions relating to this Determination should be addressed to:**

**The Director**

**Banking Supervision Department**

**Bank of Namibia**

**P.O. Box 2882**

**Windhoek**

**Namibia**

**Tel: 283 5040**

**Appendix I****A. Considerations in Appraising Administrative Fines**

The following factors should be used in determining an appropriate administrative fine to be imposed for contravention or non-compliance of the respective provisions of the Act, Determinations or Regulations.

1. Evidence that the contravention or pattern of contravention was intentional or committed with the disregard of the law or with a disregard of the consequences to the banking institution or controlling company;
2. The frequency or recurrence of the contravention or non-compliance and the length of time the contravention or non-compliance has been outstanding;
3. Continuation of the contravention or non-compliance after the banking institution or controlling company becomes aware of it, or its immediate termination and correction;
4. Failure to cooperate with the Bank in effecting early resolution of the problem;
5. Evidence of concealment of the contravention or non-compliance, or voluntary disclosure of the contravention or non-compliance;
6. Any threat of loss, actual loss, or other harm to the banking institution or controlling company, including harm to the public's confidence in the banking institution or controlling company, and the degree of the harm;
7. Evidence that participants or their associates received financial, or other gain, or benefits, or preferential treatment as a result of the violation or from the violation;
8. Evidence of any restitution (amends) by the participants in the contravention or non-compliance;
9. History of prior contraventions or non-compliance, particularly where they are similar to the contravention or non-compliance under consideration;
10. Previous caution of the banking institution or controlling company for similar contravention or non-compliance;
11. Presence or absence of a compliance program or its effectiveness;
12. Tendency to create unsafe or unsound banking practices or breaches of fiduciary duty;
13. The existence of commitments, or conditions imposed in writing intended to prevent the contravention or non-compliance; and
14. Any other factors that the Bank may deem necessary to consider for the purpose of determining an appropriate fine.



**Appendix II****B. Categories of Severity of Contravention or Non-Compliance**

1. **Low** – Comprises less serious cases of non-compliance for example:
  - 1.1 No evidence of intentional act but caused by technical factors such as system failures.
  - 1.2 Cases of contravention or non-compliance where the occurrences are isolated (single occurrence) but are substantive in nature.
  - 1.3 Contravention or non-compliance ceased immediately after notification.
  - 1.4 Contravention or non-compliance is unrelated to previous cases.
  - 1.5 The banking institution or controlling company is cooperative.
  - 1.6 An entity has been previously cautioned for similar contravention or non-compliance.
  - 1.7 Contravention or non-compliance will have minimum impact on consumers, banking institution or controlling company and no unsafe practices or breach of fiduciary duty.
  - 1.8 There has been no significant benefit, if any, to affiliated party or parties.
2. **Moderate** – Comprises of moderate cases of contravention or non-compliance for example:
  - 2.1 Where the banking institution or controlling company should have known that the action taken or failure to act could lead to a contravention or non-compliance.
  - 2.2 There have been a number of occurrences but which are technical in nature.
  - 2.3 Contravention or non-compliance ceased shortly after notification.
  - 2.4 There is at least one repeated contravention or non-compliance.
  - 2.5 Acknowledge caution and detailed response is to be provided in due course.
  - 2.6 There are few cases of prior cautioning for similar contravention or non-compliance.
  - 2.7 Contravention or non-compliance will have moderate impact on customers, banking institution or controlling company.
  - 2.8 There has been significant benefit to affiliated party (ies).
3. **High** – Comprises of more serious or severe cases of contravention or non-compliance for example:
  - 3.1 Evidence of a clear intent to or knowingly contravene or fail to comply.
  - 3.2 Frequent or numerous repeated contravention or non-compliance of substantive nature.
  - 3.3 Contravention or non-compliance continued for a period of time after notification and/or is still continuing.

- 3.4 History of several/frequent repeated contravention or non-compliance.
  - 3.5 No acknowledgement or negative response of caution by management.
  - 3.6 Prior board resolution or commitment letter issued.
  - 3.7 Substantial impact on customers, the banking institution or controlling company.
  - 3.8 There has been indirect/direct significant benefit to affiliated party.
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