



GOVERNMENT GAZETTE

OF THE

REPUBLIC OF NAMIBIA

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Government Notice

OFFICE OF THE PRIME MINISTER

No. 247

2010

PROMULGATION OF ACT OF PARLIAMENT

The following Act which has been passed by the Parliament and signed by the President in terms of the Namibian Constitution is hereby published in terms of Article 56 of that Constitution.

No. 14 of 2010: Banking Institutions Amendment Act, 2010.

Act No. 14, 2010

BANKING INSTITUTIONS AMENDMENT ACT, 2010**EXPLANATORY NOTE:**

_____ Words underlined with a solid line indicate insertions in existing provisions.

[] Words in bold type in square brackets indicate omissions from existing provisions.

ACT

To amend the Banking Institutions Act, 1998, so as to provide for certain definitions; to provide for consolidated supervision; to provide for the registration of controlling companies and cancellation thereof; to regulate investment by controlling companies and the restructuring within group of companies; to authorise foreign banking institutions to open branches in Namibia; to prohibit banking institutions from converting to branches of foreign banking institutions; to authorise the Bank to determine minimum capital funds in respect of banking institution or banking group; to oblige banking institutions and controlling companies to notify the Bank of nomination of any person for appointment as director or principal officer 30 days prior to such appointment; to prohibit and criminalise pyramid schemes; to subject the appointment of provisional liquidator, provisional judicial manager, liquidator or judicial manager by the Master of the High Court to the recommendation of the Bank; to oblige the Master of the High Court to appoint persons designated by the Bank to assist provisional liquidators, provisional judicial managers, liquidators or judicial managers; to empower the Minister to regulate unfair terms in transactions and contracts between banking institutions and their customers or the general public; to empower the Minister to regulate the ownership of a banking institution or a controlling company; to empower the Bank to determine administrative fines; to provide procedure for the imposition of fines and to decriminalise certain provisions; to provide for the appointment of an Appeal Board; and to provide for incidental matters.

(Signed by the President on 19 October 2010)

BE IT ENACTED by the Parliament of the Republic of Namibia as follows:

Amendment of section 1 of Act No. 2 of 1998

1. Section 1 of the Banking Institutions Act, 1998 (Act No. 2 of 1998) (hereinafter referred to as the principal Act) is amended -

(a) by the insertion after the definition of “banking business” of the following definition:

“banking group”, means a group consisting of two or more persons, whether natural or juristic persons, that are predominantly engaged in financial activities, and one or more of which is a banking institution and -

(a) each of which person is an associate of any one of the others;
or

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- (b) which persons are so interconnected that should one of them experience financial difficulties, another one or all of them would likely be adversely affected, irrespective of whether any of those persons is domiciled in the same country as any of the others;”;
- (b) by the substitution for the definition of “controlling company” of the following definition:
- “controlling company” means a [controlling company as defined in the Companies Act] company registered under section 12A as a controlling company in respect of a banking institution, and “holding company” has a corresponding meaning;”;
- (c) by the insertion after the definition of “controlling company” of the following definition:
- “core banking systems’ means all core systems that contain records and documents covering core functional areas of a banking institution, and include all IT systems and subsystems keeping and maintaining records and documents relating to the business, affairs, transactions, conditions, property, assets or liabilities of a banking institution;”;
- (d) by the insertion after the definition of “director” of the following definition:
- “executive officer” means any person, by whatever name described, who could exercise significant influence, and is in the direct employment of, or acting for, or by arrangement with the banking institution, and is principally responsible for the management and conduct of the risk management, compliance, accounting, auditing, secretarial, treasury and operation functions, and includes a chief executive officer, deputy chief executive officer, and any manager of a significant business unit;”;
- (e) by the insertion after the definition of “fellow subsidiary” of the following definition:
- “financial records”, includes banking and accounting records;”;
- (f) by the insertion after the definition of “officer” of the following definition:
- “person” means a natural or juristic person, and includes a partnership;”;
- (g) by the insertion after the definition of “managerial responsibility” of the following definition:
- “merger” means when one or more banking institutions or controlling company directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another banking institution or controlling company, in any means including -

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- (a) the purchase or lease of shares, an interest, or assets of that other banking institution or controlling company; or
- (b) the amalgamation or other combination with any other banking institution or controlling company;
- (h) by the substitution for the definition of “principal officer” of the following definition:
- “principal officer”, in relation to a banking institution or controlling company, means the executive chairperson, the managing director, the executive director, the chief executive officer or the manager, or any other person, by whatever title referred to, who is chiefly responsible for the management of the affairs of the banking institution or controlling company in Namibia, and whose name and title the banking institution or controlling company from time to time in writing advises to the Bank, and includes a person who, in terms of section 10, applies for an authorization to establish a banking institution;”;
- (i) by the deletion of paragraph (e) of the definition of “receiving funds from the public”; and
- (j) by the substitution for the definition of “substantial shareholder” of the following definition:
- “substantial shareholder” means any person or registered shareholder that, directly or indirectly, holds, controls or is entitled to exercise the voting rights in **[more]** not less than five per cent of any class of voting shares of a company, and for the purpose of determining whether a person is a substantial shareholder -
- (a) a person that controls a substantial shareholder **[shall be]** is deemed to be a substantial shareholder; and
- (b) any shares owned or controlled, or the voting rights of which are exercisable, by **[an individual’s]** a person’s close relative **[shall be]** is deemed to be owned or controlled by **[that individual]** such person; and”.

Amendment of section 2 of Act No. 2 of 1998

2. Section 2 of the principal Act is amended by the substitution for subsection (2) of the following subsection:

- “(2) This Act **[shall]** does not apply to –
- (a) the Bank, except insofar as it confers upon the Bank the power to perform the functions contained in this Act;
- (b) any international bank or international financial organisation, or any associated or affiliated bank or financial organisation of such international bank or international organisation, of which the Government of Namibia or the Bank is a member;

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- [(c) **any insurer registered under the Insurance Act, 1943 (Act No. 27 of 1943);]**
- (d) the Agricultural Bank of Namibia, established by the [**Agricultural Bank Act, 1944 (Act No. 13 of 1944)**] Agricultural Bank of Namibia Act, 2003 (Act No. 5 of 2003);
- [(e) **any pension fund registered under the Pension Funds Act, 1956 (Act No. 24 of 1956);**
- (f) **any friendly society registered under the Friendly Societies Act, 1956 (Act No. 25 of 1956);**
- (g) **any unit trust registered under the Unit Trusts Control Act, 1981 (Act No. 54 of 1981);**
- (h) **any scheme registered under the Participation Bonds Act, 1981 (Act No. 55 of 1981);]**
- (i) any building society registered under the Building Societies Act, 1986 (Act No. 2 of 1986);
- [(j) **the Development Fund of South West Africa/Namibia, established by the Development Fund of South West Africa/Namibia Act, 1987 (Act No. 29 of 1987);]**
- (k) the Post Office Savings Bank as defined in the Posts and Telecommunications Act, 1992 (Act No. 19 of 1992);
- (l) the Namibia Development Corporation, established by the Namibia Development Act, 1993 (Act No. 18 of 1993);
- (m) the National Housing Enterprise, established by the National Housing Enterprise Act, 1993 (Act No. 5 of 1993);
- [(n) **any medical scheme registered under the Medical Aid Funds Act, 1995 (Act No. 23 of 1995);]**
- (o) any cooperative society registered under the Co-operative Societies Act, 1996 (Act No. 23 of 1996); [or]
- (p) any other institution or body designated by the Minister, on the recommendation of the Bank, by notice in the *Gazette*[.]; or;
- (q) any non-banking financial institution governed by statute and regulated by the Namibia Financial Institutions Supervisory Authority established by the Namibia Financial Institutions Supervisory Authority Act, 2001 (Act No. 3 of 2001)."

Substitution of section 3 of Act No. 2 of 1998

3. The following section is substituted for section 3 of the principal Act:

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BANKING INSTITUTIONS AMENDMENT ACT, 2010**“Guidelines, circulars or notices by the Bank**

“(1) The Bank may from time to time, for the purpose of promoting sound and prudential banking practices, furnish banking institutions and controlling companies with guidelines, circulars or notices not inconsistent with this Act, relating to the application of this Act by banking institutions or controlling companies or to the conducting of [**banking**] business, as a banking institution or controlling company in general.

(2) The guidelines, circulars or notices contemplated in subsection (1) [**shall**] must be in writing and [**shall**] must be delivered by the Bank to the principal officer of a banking institution or controlling company.”.

Amendment of section 6 of Act No. 2 of 1998

4. Section 6 of the principal Act is amended –

(a) by the substitution for the introductory sentence of subsection (2) of the following introductory sentence:

“(2) The Bank may, if it has reason to believe that a person is conducting banking business in contravention of section 5 or section 55A, in writing authorise an officer of the Bank to –”;

(b) by the substitution for subparagraph (i) of paragraph (a) of subsection (2) of the following subparagraph:

“(i) enter any premises which the Bank or the officer has reason to believe is occupied or used by any person for the purpose of or in connection with the conducting of banking business in contravention of section 5 or section 55A.”; and

(c) by the substitution for paragraph (h) of subsection (2) of the following paragraph:

“(h) if any person has been convicted of an offence in terms of section 5 or section 55A, close down the business of such person; or”.

Amendment of section 7 of Act No. 2 of 1998

5. Section 7 of the principal Act is amended by the substitution for subsection (1) of the following subsection:

“(1) If the Bank is satisfied that a person has obtained any monies in contravention of section 5 or section 55A, the Bank [**shall**] must in writing direct the person to repay all the monies so obtained by him or her, including any interest or other amounts which may be owing by the person in respect of such monies -

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- (a) to the respective persons from whom such person has obtained the monies as verified;
- (b) in the manner and in accordance with the requirements imposed; and
- (c) within the period of time imposed,

[**imposed**] by the Bank and specified in the direction.”.

Substitution of section 9 of Act No. 2 of 1998

6. The principal Act is amended by the substitution for section 9 of the following section:

“[Banking institutions to be incorporated] Prerequisite for conducting banking business

9. (1) [No] A person [**shall be**] is not authorised to conduct banking business [**as a banking institution**] unless such person is -

- (a) incorporated as a public company under the Companies Act and has the minimum capital funds [**specified in or**] as determined under section 28; or
- (b) a branch of a foreign banking institution authorised under section 19A.

(2) [No] A company [**shall**] may not, without the written approval of the Bank, be incorporated under the Companies Act for the purpose of conducting banking business.

(3) An incorporated banking institution may not under this Act or any other law convert to a branch of a foreign banking institution contemplated in section 19A.”.

Amendment of section 11 of Act No. 2 of 1998

7. Section 11 of the principal Act is amended -

(a) by the substitution for paragraph (g) of subsection (1) of the following paragraph:

“(g) the structure and shareholding of the group of companies of which the applicant forms a part or intends to form a part may not hinder effective banking supervision or endanger the stability of the banking sector;”;

(b) by the insertion after paragraph (i) of subsection (1) of the following paragraph:

“(iA) whether the applicant complies or is able to comply with the laws relating to anti-money laundering and combating of financing of terrorism; and”;

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- (c) by the deletion of subsection (3);
- (d) by the substitution for subsection (4) of the following subsection:

“(4) After [**consultation with the Minister, in terms of subsection (3)**], having considered an application made in terms of section 10(1), the Bank [shall], with the concurrence of the Minister, and subject to the further provisions of this Act, may -

- (a) refuse the application; or
- (b) grant the application; or
- (c) grant the application subject to such conditions as the Bank may impose,

and [**shall**] must in writing inform the applicant of its decision.”.

Insertion of sections 12A, 12B, 12C, 12D, and 12E in Act No. 2 of 1998

8. The principal Act is amended by the insertion after section 12 of the following sections:

“Application for registration as controlling company

12A. (1) A company which -

- (a) desires to exercise control over any banking institution; or
- (b) is a controlling company in respect of any other public company which –
 - (i) has been authorized to conduct banking business; or
 - (ii) has applied in terms of section 10 for authorization to conduct banking business,

may, subject to this section, apply to the Bank to be registered as a controlling company.

- (2) An application contemplated in subsection (1) must –
 - (a) be made in writing in the form and manner determined by the Bank;
 - (b) be signed by the director(s) on behalf of the company to be registered or by the subscribers to its memorandum and articles of association; and
 - (c) be accompanied by the prescribed application fee.

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(3) For the purposes of this Act, a person is deemed to exercise control over a banking institution if, in the case where that person is a company, the banking institution is a subsidiary of that company, or, whether or not that person is a company, if that person alone or together with his or her associates –

- (a) holds shares in a banking institution of which the total nominal value represents more than 50 per cent of the nominal value of all the issued shares of the banking institutions, unless, due to limitations on the voting rights attached to the shares so held by the person alone or together with his or her associates, such person voting independently or such person and his or her associates voting as a group, is or are unable to decisively influence the outcome of the voting at a general meeting of the banking institution;
- (b) is entitled to exercise more than 50 per cent of the voting rights in respect of the issued shares of that banking institution; or
- (c) has the power to determine the appointment of the majority of the directors of that banking institution, including -
 - (i) the power to appoint or remove, without the concurrence of any other person, all or the majority of such directors; or
 - (ii) the power to prevent any person from being appointed as director without the consent of any other person,

and if a person is appointed as a director of the banking institution mainly because he or she is a director of the person who exercises control over a banking institution, such appointment, for the purposes of this subsection, is deemed to be an appointment by virtue of the power of a person exercising such control.

(4) Despite subsection (3), if on any other grounds a person is deemed to exercise control over a banking institution, the Bank may subject such person to the provisions of this Act relating to a controlling company.

(5) If the applicant referred to in subsection (1) is a financial institution as defined in section 1 of the Namibia Financial Institutions Supervisory Authority Act, 2001 (Act No. 3 of 2001), the applicant must establish a legal entity separate from the operations of the applicant to carry on its business as a controlling company.

(6) If a company contemplated in subsection (1) has a financial institution as defined in section 1 of the Namibia Financial Institutions Supervisory Authority Act, 2001 (Act No. 3 of 2001) as part of its group of companies, the Bank and the Namibia Financial Institutions Supervisory Authority must enter into an agreement on matters of concurrent jurisdiction to give effect to the relevant legislation in respect of the functions of the Bank and the Authority.

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Granting or refusal of application for registration as controlling company

12B. (1) Before considering an application for registration as a controlling company in terms of section 12A, the Bank must conduct such investigation, both in or outside Namibia relating to the applicant or to the application as it may consider necessary to ascertain -

- (a) that the registration of the applicant as a controlling company is not contrary to the public interest;
- (b) that in the case of an applicant applying for registration in the circumstances referred to in subsection (1)(a) of section 12A, the applicant is able to establish control, as contemplated in that section, over the banking institution concerned;
- (c) that no provision of the memorandum or articles of associations of the applicant is inconsistent with this Act or is undesirable in so far as it concerns banking institutions;
- (d) that every director or every principal officer, as far as can reasonably be ascertained, is a fit and proper person to hold the office as such director or principal officer, and that every such director or principal officer has sufficient knowledge and experience to manage the affairs of the applicant in its capacity of a controlling company;
- (e) that the applicant is in a financially sound condition;
- (f) that no interest which any person has in the applicant is inconsistent with this Act; and
- (g) that the application complies with the requirements of this Act.

(2) No applicant which has applied for registration as a controlling company in the circumstances referred to in section 12A(1)(b) may be registered as such controlling company, unless the company in respect of which it made such application is an authorized banking institution.

(3) After having considered an application made in terms of section 12A, the Bank may -

- (a) refuse the application;
- (b) grant the application; or
- (c) grant the application subject to such conditions as the Bank may impose,

and must, subject to further provision of this Act, in writing inform the applicant of its decision.

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(4) If the Bank under subsection (3) grants an application for registration of a controlling company, the Bank must, against payment of the non-refundable prescribed registration fee, register the applicant as a controlling company in respect of the banking institution concerned and issue to the applicant a certificate of registration as a controlling company.

(5) A certificate referred to in subsection (4) must –

- (a) be in the form;
- (b) contain the particulars; and
- (c) be issued and signed by a person,

determined by the Bank.

(6) A company which, on the date of commencement of this Amendment Act, is a controlling company in respect of a banking institution, is, with effect from that date, deemed to be a controlling company registered as such in terms of this section in respect of the banking institution concerned.

Cancellation by Bank of registration of controlling company

12C. (1) Subject to subsection (2), the Bank, by notice in writing addressed and delivered to a controlling company, may cancel the registration of a controlling company from the date specified in the notice -

- (a) if the controlling company –
 - (i) has failed to establish control over the banking institution in respect of which it is registered within a period of six months after the date of issue of the certificate of registration or any other date as the Bank may specify;
 - (ii) no longer exercises such control in terms of section 25 or under any other circumstances; or
 - (iii) has submitted a special resolution contemplated in section 200 of the Companies Act authorising such cancellation; or
- (b) if the authorization of a banking institution in respect of which a controlling company is registered, is cancelled, the registration of that controlling company in respect of that banking institution is deemed to have been cancelled simultaneously.

(2) No cancellation of any registration under subsection (1)(a)(i) and (ii) may be of force, unless the Bank has previously by notice in writing given the controlling company concerned an opportunity to show cause within a period specified in the notice, not being less than 30 days, why its registration should not be cancelled.

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BANKING INSTITUTIONS AMENDMENT ACT, 2010**Investment by controlling company**

12D. A controlling company investing –

- (a) in undertakings other than a banking institution, institutions which conduct business similar to the business of a banking institution in a country other than Namibia, controlling companies or companies of which the main object is the holding or development of property of which is used or intended to be used mainly for the purpose of conducting the business of the banking institutions; or
- (b) in fixed property which is not used or intended to be used mainly for the purpose of conducting the business of the banking institution,

must manage its transactions in such investments in such a way that the amount of such investments does not at any time exceed a percentage of the sum of the capital funds of the controlling company and any banking institution under its control, as the Bank may determine.

Restructuring within group of companies

12E. No restructuring of companies within a group, of which a banking institution or a controlling company or a subsidiary of banking institution is a member, may be effected without the prior written approval of the Bank.”.

Amendment of section 14 of Act No. 2 of 1998

9. Section 14 of the principal Act is amended by the addition of the following subsections:

“(3) A controlling company may not, without the prior written approval of the Bank -

- (a) establish or acquire a subsidiary; or
- (b) acquire any direct or indirect interest in any undertaking outside Namibia.

(4) A controlling company must, not less than 30 days prior to the opening, disposal or closing of a subsidiary or of any interest in any other undertaking, in writing inform the Bank of the intended opening, disposal or closing.”.

Amendment of section 15 of Act No. 2 of 1998

10. Section 15 of the principal Act is amended by the substitution for paragraph (d) of subsection (1) of the following paragraph:

- “(d) is found guilty of an offence under any provision of this Act, and if the Bank is of the opinion that the banking institution

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concerned is conducting its business in a manner detrimental to [(d) of subclause (1)] the interest of its customers or the public; or”.

Insertion of sections 19A and 19B in Act No. 2 of 1998

11. The principal Act is amended by the insertion after section 19 of the following sections:

“Branches of foreign banking institutions

19A. (1) An institution which has been incorporated in a country other than Namibia and which lawfully conducts in such other country a business similar to banking business (hereinafter referred to as the foreign institution) may, despite section 9, with the prior written authorization of the Bank and subject to conditions, if any, as the Bank may determine, conduct banking business by means of a branch in Namibia.

(2) To obtain the prior authorization of the Bank as contemplated in subsection (1), the foreign institution concerned must in the manner and form required by the Bank lodge a written application with the Bank which must be accompanied by -

- (a) a written statement containing information required by the Bank; and
- (b) the prescribed application fee which is not refundable.

(3) The Bank may require the foreign institution applying in terms of subsection (2) to furnish it with -

- (a) such information or documents, in addition to information and documents furnished by the foreign institution in terms of subsection (2); or
- (b) such further information with regard to the nature and extent of supervision exercised or to be exercised by the responsible supervisory authority of the foreign institution's country of domicile in respect of –
 - (i) the proposed branch in Namibia;
 - (ii) the foreign institution itself; or
 - (iii) any group of institutions of which the foreign institution may form a part,

as the Bank may consider necessary.

(4) After having considered an application in terms of subsection (2) the Bank, with the concurrence of the Minister, and subject to the further provisions of this Act, may –

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- (a) refuse the application; or
- (b) grant the application; or
- (c) grant the application subject to such conditions as the Bank may impose,

and in writing inform the applicant of its decision.

(5) The Bank may not grant an application in terms of subsection (4) unless the Bank is satisfied that all the requirements as determined by the Bank have been met.

(6) If the Bank grants an application referred to in subsection (4), the Bank must issue to the foreign institution concerned a certificate of authorization to conduct banking business by means of a branch in Namibia.

(7) Any foreign institution that conducts banking business by means of a branch in Namibia without having obtained the Bank's written authorization referred to in subsection (1) commits an offence and is liable to the penalties provided for under section (72)(2)(a).

Application of this Act to branches of foreign banking institutions

19B. (1) A foreign banking institution authorized to conduct banking business by means of a branch in Namibia is construed as a banking institution in terms of this Act, and for all purposes this Act applies to any such branch, but the Minister, by notice in the *Gazette*, on the recommendation of the Bank, may exempt such branch from the application of certain provisions of this Act.

(2) Unless expressly stated otherwise, any reference to a banking institution in any other law includes, in so far as it may be relevant, a reference to a branch in Namibia of a foreign banking institution.”

Substitution of section 25 of Act No. 2 of 1998

12. The principal Act is amended by the substitution for section 25 of the following section:

“Restriction of right to control banking institution

25. (1) Subject to subsection (3) and section 20, a person may not acquire, or directly or indirectly exercise, control over a banking institution, unless such person is -

- (a) a fit and proper person as contemplated in section 20(4);
- (b) incorporated as a company under the Companies Act; and
- (c) registered as a controlling company in terms of section 12B in respect of such banking institution.

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(2) The Bank, by notice in writing addressed to a person, may prohibit the person to acquire or to exercise control over a banking institution, or to continue to exercise such control within a period specified in the notice, if in the opinion of the Bank the person -

- (a) is not fit and proper having regard to the structure and business activities of the corporate group of which the person is a member;
- (b) has furnished the Bank in or in connection with its application for registration with information which is in a material respect untrue;
- (c) is conducting its business in a manner detrimental to the banking institution in respect of which it was registered as a controlling company; or
- (d) has contravened or failed to comply with a provision of or a requirement under this Act.

(3) The notice under subsection (2), in the case of a company registered as a controlling company, must -

- (a) compel such company to reduce, within a period determined by the Bank, the shareholding of that company in that banking institution to a shareholding with a total nominal value of not more than 20 per cent of the total nominal value of all the issued shares of that banking institutions;
- (b) limit, with immediate effect, the voting rights that may be exercised by such person by virtue of the shareholding of that person to not more than 20 per cent of the voting rights attached to all the issued shares of the banking institution concerned; and
- (c) limit, with immediate effect, the power to appoint or remove, without the concurrence of any other person, all or the majority of such directors.

(4) A person who fails to comply with a notice issued under subsection (2) commits an offence and is liable to the penalties provided for under section (72)(2)(a).

Amendment of section 26 of Act No. 2 of 1998

13. Section 26 of the principal Act is amended by the substitution for subsection (16) of the following subsection:

“(16) Any person who fails to comply with any provision of subsection (4) [**shall be guilty of an offence and on conviction be**] is liable to a fine [**not exceeding N\$2 000 or to imprisonment for a period not exceeding six months or both such and such imprisonment**] determined by the Bank.”

Act No. 14, 2010 BANKING INSTITUTIONS AMENDMENT ACT, 2010**Amendment of section 28 of Act No. 2 of 1998**

- 14.** Section 28 of the principal Act is amended -
- (a) by the substitution for paragraph (a) of subsection (1) of the following paragraph:
- “(a) an amount [~~of N\$10 000 000~~] determined by the Bank; or”;
- and
- (b) by the deletion of subsections (2) and (3).

Insertion of section 28A in Act No. 2 of 1998

15. The principal Act is amended by the insertion after section 28 of the following section:

“Minimum capital funds in respect of banking group

28A. (1) Despite section 28(1), but subject to subsection (2), a controlling company must manage its affairs in such a way that the sum of the capital funds of the banking group structured under such controlling company does not at any time amount to -

- (a) less than the sum of the amounts of the required capital funds determined, for the respective entities constituting such banking group, in accordance with the rules and regulations of the respective regulators responsible for the supervision of those entities;
- (b) plus such amount as may be determined by the Bank in respect of entities that are included in such banking group, but are not subject to the supervision of a regulator.

(2) In calculating the aggregate amount a banking group is required to maintain in terms of subsection (1), the sum of the banking group’s capital funds is calculated by deducting from it such amounts as may be determined.

(3) Despite paragraphs (a) and (b) of the definition of “banking group”, the Bank, after having regard to the structure and business activities of a banking group, and by notice in the *Gazette*, may include in or exclude from that definition any person or persons.”.

Amendment of section 30 of Act No. 2 of 1998

- 16.** Section 30 of the principal Act is amended -
- (a) by the substitution for paragraph (a) of subsection (1) of the following paragraph:
- “(a) bad [~~or~~], doubtful or substandard debts, and the depreciation of assets, to be calculated not less than quarterly;”;
- and

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(b) by the substitution for subsection (2) of the following subsection:

“(2) The minimum standards for provision for bad **[or]**, doubtful or substandard debts, the accounting treatment and suspension of interest of non-performing loans as contemplated in subsection (1) may be determined by the Bank.”.

Substitution of section 32 of Act No. 2 of 1998

17. The principal Act is amended by the substitution for section 32 of the following section:

“Restriction on dividends

32. (1) A banking institution, **[shall not, unless]** if its capital is adequate in terms of section 28, **[without the written approval of the Bank]**, may declare, pay or credit [any] dividend, or make any transfer from its profits [other than to a reserve account].

(2) In the event that dividends to be paid, declared, credited or any transfer to be made under subsection (1), exceed current audited profits, prior written approval of the Bank must be obtained.”.

Amendment of section 34 of Act No. 2 of 1998

18. Section 34 of the principal Act is amended by the substitution for subsection (3) of the following subsection:

“(3) For the purposes of this section, the Bank may determine the meaning of a “single borrower” or a “group of related persons” or of a ‘large exposure’.”.

Amendment of section 36 of Act No. 2 of 1998

19. Section 36 of the principal Act is amended -

(a) by the substitution for subsection (1) of the following subsection:

“(1) No banking institution **[shall, subject to subsection (4)]** may have any exposure to -

- (a) any director or officer with managerial responsibility in the banking institution;
- (b) any substantial shareholder in the banking institution;
- (c) any of the banking institution’s auditors;
- (d) any affiliate, associate or close relative of a person referred to in paragraph (a), (b), or (c), as the case may be **[, if such a person is a natural person];** or

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- (e) any body corporate or unincorporated of or in which a person referred to in paragraph (a), (b) or (c) as the case may be, is a director, a substantial shareholder or a guarantor, or otherwise has an interest,

except if such exposure [**is incurred with the prior approval of the board of directors of the banking institution and is fully secured**] complies with the requirements for exposures to connected persons as determined by the Bank."; and

- (b) by the deletion of subsections (2), (3) and (4).

Substitution of section 37 of Act No. 2 of 1998

20. The principal Act is amended by the substitution for section 37 of the following section:

“Terms of exposure to directors, officers and shareholders

37. The Bank must determine the criteria and conditions to be employed for establishing the acceptability or evaluation of collateral for the purpose of this Act.”.

Amendment of section 38 of Act No. 2 of 1998

21. Section 38 of the principal Act is amended -

- (a) by the substitution for subsection (1) of the following subsection:

“(1) [**Notwithstanding**] Despite section 226 of the Companies Act, but subject to subsection (2) of this section, a banking institution may, with [the written approval of the Bank,] the prior written notification to the Bank, stating the terms and conditions of a loan, grant a loan, advance or credit facility to its holding company, subsidiary or affiliate, provided that such notification is received by the Bank at least 5 days prior to granting such loan, advance or credit facility.”;

- (b) by the substitution for paragraph (c) of subsection (2) of the following paragraph:

“(c) has been approved by the majority of the entire board of directors or a committee of the board of directors.”;

- (c) by the substitution for subsection (3) of the following subsection:

“(3) Any banking institution which –

- (a) without the approval of the Bank in terms of subsection (1), grants a loan in terms of that subsection; or

- (b) grants a loan in contravention of subsection (2),

[shall be guilty of an offence] must pay a fine as determined by the Bank.”; and

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(d) by the addition of the following subsection:

“(4) Despite subsection (2), the Bank may object to the granting of a loan, advance or credit facility.”.

Substitution of section 41 of Act No. 2 of 1998

22. The principal Act is amended by the substitution for section 41 of the following section.

“Directors and principal officers and executive officers of banking institutions

41. (1) The number of directors of a banking institution [shall], subject to subsection (2), may not be less than five.

(2) Not more than one half of the total number of the directors contemplated in subsection (1) [shall] may be employed by the banking institution concerned, or by any of its subsidiaries or by its holding company, including any of the subsidiaries of the holding company, as the case may be.

[(3) Subsections (1) and (2) shall, subject to subsection (4), only from the day following the date of the first annual general meeting held by a banking institution which immediately prior to the commencement date of this Act was registered as a banking institution under the repealed Banks Act, 1965 (Act 23 of 1965), apply to such banking institution.]

(4) The Bank may, upon a written request by a banking institution, in writing exempt the banking institution from subsection (1) or (2) for such period, and subject to such conditions, as the Bank may impose and specify in such exemption.

(5) Subject to subsection (6), the Bank may determine -

(a) the conduct and the qualifications applicable to, or to be complied with by; and

(b) the manner of, and the criteria and procedures relating to, the election or appointment of a person as,

a director or the principal officer or executive officer of a banking institution or controlling company.

[(6) Subsection (5) shall not, during his or her current term of office, apply to a director or principal officer of a banking institution elected or appointed before, and in office at, the commencement date of this Act, but shall apply to such director or principal officer when he or she is re-elected or re-appointed to office after the commencement date of this Act.]

(7) The board of directors of a banking institution or controlling company [shall] -

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- (a) **[be]** is responsible for the good corporate governance and business performance of the banking institution or controlling company;
- (b) must ensure that the board is in full control of the affairs and business operations of the banking institution or controlling company;
- (c) must ensure, and report to the shareholders at the annual general meeting of the banking institution or controlling company, that the internal controls and systems of the banking institution or controlling company -
- (i) are designed to provide reasonable assurance as to the integrity and reliability of the financial statements of the banking institution or controlling company, and to adequately safeguard, verify and maintain accountability of its assets;
 - (ii) are based on established and written policies and procedures, and are implemented by trained and skilled officers with an appropriate segregation of duties; and
 - (iii) are continuously monitored, reviewed and updated by the board of directors to ensure that no material breakdown occurs in the functioning of such controls, procedures and systems;
- (d) immediately inform the Bank if they have reason to believe that -
- (i) the banking institution or controlling company may not be able to properly conduct its business as a going concern;
 - (ii) the banking institution or controlling company appears to be, or will in the near future be, unable to meet all, or any of, its obligations;
 - (iii) the banking institution or controlling company has suspended, or is about to suspend any payment of any kind; or
 - (iv) the banking institution does not, or may not be able to, meet its capital requirements determined by or under section 28; and
- (e) constitute from among its members an audit committee as contemplated in section 42.
- (8) A director **[shall]**, in relation to the banking institution or to the controlling company of which he or she is a director, must act honestly and in good faith in the best interest and for the benefit of the banking institution and

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its depositors, or of the controlling company, as the case may be, and [**shall**] must in the performance of his or her functions as a director comply with this Act.

(9) The principal officer of a banking institution or controlling company or -

(a) any other officer of the banking institution or controlling company acting on his or her behalf, [**shall, notwithstanding**] must, despite any action taken by the board of directors, immediately inform the Bank if he or she has reason to believe that any of the events contemplated in subsection (7)(d) may, or is likely to, occur;

(b) a principal officer or manager of a branch of a banking institution, [**shall**] may not -

(i) engage in any commercial business activities other than -

(aa) for or on behalf; and

(bb) in his or her capacity as an officer,

of the banking institution; or

(ii) be an agent of any other person engaged in any business contemplated in subparagraph (i),

unless the position held by such person is that of a director of a company which is in liquidation, whether provisionally or final, or is being wound-up or is under judicial management, or if the Bank, on the recommendation of the board of directors of the banking institution, has exempted the principal officer or the manager from this paragraph [(b)].

(10) No director of a banking institution or a member of a committee of the board of directors established for the purpose of granting credit to customers, and no principal officer or a manager of a division or a branch, [**shall**] may take part in the discussion or consideration of, or the taking of a decision relating to, any matter -

(a) in which -

(i) he or she or any of his or her close relatives;

(ii) any company in which he or she or any of his or her close relatives is a substantial shareholder; or

(iii) any other organisation in which he or she or any of his or her close relatives is a partner or member,

has any personal or economic interest; or

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- (b) which is, subject to subsection (11), of particular economic interest to a municipality, company, association or any other public or private institution towards which he or she has, in his or her capacity as mayor, board member, manager or representative, a duty to protect the economic interests of such municipality, company, association or institution.

(11) Paragraph (b) of subsection (10) [**shall**] does not apply in respect of the election of officers or the consideration of remuneration relating to positions of trust.

(12) Before a matter contemplated in subsection (10) is considered by the decision-making body concerned, any person who is not entitled to take part in the consideration of, or the taking of a decision relating to, the matter [**shall**] must -

- (a) inform the decision-making body accordingly; and
- (b) recuse himself or herself from the meeting.

(13) The proceedings contemplated in subsection (12) [**shall**] must be recorded in the minutes of the meeting of the decision-making body concerned.

(14) Every banking institution or controlling company must give the Bank a written notice of the nomination of any person for appointment as a director or principal officer or executive officer by furnishing the Bank with information in the manner and form determined by the Bank, but the notice must reach the Bank at least 30 days prior to the proposed date of appointment;

(15) The Bank may object to the proposed nomination for appointment referred to in subsection (14) on grounds that such director or principal officer or executive officer is not fit and proper to hold such position as determined by the Bank, and must within 20 days of receipt of the notice referred to in subsection (14) deliver a written notice stating the grounds of its objection to the appointing banking institution or controlling company;

(16) If the Bank objects to the proposed appointment as envisaged in subsection (15), the banking institution or controlling company, may not appoint the nominee and any purported appointment has no legal effect.

(17) If the banking institution or controlling company disputes the Bank's objection, the Bank must give such person reasonable opportunity to make representation to the Bank.

(18) After considering the banking institution's or controlling company's representation made under subsection (17), if any, the Bank may -

- (a) accede to the nomination of the director or principal officer or executive officer, with or without conditions; or
- (b) uphold its objection,

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and must in writing inform the banking institution or controlling company of its decision.”.

Amendment of section 42 of Act No. 2 of 1998

23. Section 42 of the principal Act is amended by the substitution for subsection (2) of the following subsection:

“(2) The audit committee referred to in subsection (1) [**shall**] consists of so many members, but not less than [**two**] three, as the banking institution may decide on, who [**shall all be**] are all directors without any executive responsibility in the banking institution.”.

Amendment of section 43 of Act No. 2 of 1998

24. Section 43 of the principal Act is amended by the substitution for subsection (2) of the following subsection:

“(2) [**Within a period of 30 days after the appointment of an auditor in terms of subsection (1), the**] A banking institution or controlling company [**shall**] must, 10 days prior to the annual meeting, submit details regarding the auditor it intends to appoint in terms of subsection (1) in the form and manner required by [**as**] the Bank [**may require**], and apply to the Bank for the Bank’s approval of the appointment.”.

Substitution of section 46 of Act No. 2 of 1998

25. The principal Act is amended by the substitution for section 46 of the following section:

“Financial and other [banking] records

46. (1) A banking institution [**shall**] must, in the official language of Namibia, keep core banking systems that contain records and documentation covering core functional areas and such accounting and other [**banking**] records as are necessary to reflect the true and fair state of its affairs and to explain its transactions and financial position in such a manner so as to enable the Bank to ascertain whether the banking institution is complying with this Act.

(2) The core banking systems, [**and**] accounting and other [**banking**] records contemplated in subsection (1) [**shall**] must be kept in Namibia and [**shall**] must, subject to subsection (4), comply with the requirements -

- (a) of section 284 of the Companies Act; and
- (b) determined by the Bank,

and [**shall**] must be kept and maintained by the banking institution for a period of not less than five years after the date of the last entry in such records.

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(3) [No] A person [shall] may not, with the intent to deceive, in any book, record, report, statement or other document relating to the business, affairs, transactions, conditions, property, assets, liabilities or accounts of a banking institution or controlling company -

- (a) make a false entry, knowing such entry to be false, or cause such an entry to be made; or
- (b) omit an entry, or cause such an entry to be omitted; or
- (c) alter, abstract, conceal, remove or destroy an entry, or cause an entry to be altered, abstracted, concealed, removed or destroyed.

(3) For the purposes of this section, “other [banking] records” [shall], include any book, record, report, statement or other document relating to the business, affairs, transactions, conditions, property, assets or liabilities of a banking institution or controlling company.”.

Substitution of section 47 of Act No. 2 of 1998

26. The principal Act is amended by the substitution for section 47 of the following section:

“Financial statements

47. (1) The Companies Act [shall], subject to the further provisions of this section, [apply] applies to the financial statements of a banking institution or a controlling company.

- (3) [Notwithstanding] Despite subsection (1) -
 - (a) the Bank may determine -
 - (i) that all or any of the exemptions contained in paragraph 70 of Part V of Schedule 4 to the Companies Act [shall] may not, subject to such determination, apply to a banking institution or a controlling company;
 - (ii) additional requirements not in conflict with this Act relating to the financial statements contemplated in subsection (1); and
 - (b) a banking institution or a controlling company [shall] must –
 - (i) in its annual financial statements disclose the name of a shareholder who holds 20 per cent or more of the total voting rights in the banking institution or a controlling company;
 - (ii) [subject to subsection (3), within a period of three months after the end of its financial year, submit a copy of its audited annual financial statements to

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the Bank; and] despite anything to the contrary in any other law, submit to the Bank, within three months after the end of its financial year, but at least 30 days before its annual general meeting, its audited financial statements; and

- (iii) subject to subsection [3 or] (4) within a period of one month from the date of acceptance of the financial statements at an annual general meeting of the banking institution or controlling company, publish the financial statements in a newspaper as may be approved, and in the form specified, by the Bank.

(3) **[Notwithstanding]** Despite anything to the contrary in the Companies Act, or any other law, [subparagraph (iii) of subsection (2)(b),] a banking institution or controlling company must, within six months after the end of its financial year, hold its annual general meeting [which holds its annual general meeting within a period of three months after the end of its financial year, shall, subject to subsection (4), publish the financial statements in terms of that subparagraph within a period of three months after the acceptance of the financial statements at the annual general meeting so held].

(4) The Bank may, at the written request of a banking institution or controlling company and subject to such conditions as the Bank may impose, in writing extend any period of time specified in subsection (2)(b)(ii), (2)(b)(iii) or (3), as the case may be.

(5) If the Bank is satisfied that the financial statements of a banking institution or controlling company do not comply with this Act or with any additional requirement determined by the Bank **[as determined]** in accordance with subsection (2)(a)(ii), or contain information that may be misleading in any way, or are not published in the form specified by the Bank, the Bank may by notice in writing require the banking institution or controlling company -

- (a) to amend or correct the financial statements to comply with this Act or with the additional requirements;
- (b) to correct the misleading information;
- (c) to re-publish the amended or corrected financial statements;
or
- (d) to submit to the Bank -
- (i) such further or additional documents or information;
or
- (ii) such explanation or amplification relating to any document or information,

to the satisfaction of the Bank or as the Bank may consider necessary.”.

Act No. 14, 2010 BANKING INSTITUTIONS AMENDMENT ACT, 2010**Amendment of section 49 of Act No. 2 of 1998**

27. Section 49 of the principal Act is amended by the addition of the following subsection:

“(6) A banking institution or controlling company which fails to furnish the Bank with information required in terms of this section, within the specified period of time, or knowingly and repeatedly furnishes the Bank with incorrect or incomplete information is liable to a fine determined by the Bank.”.

Substitution of section 52 of Act No. 2 of 1998

28. Section 52 of the principal Act is amended by the substitution for section 52 of the following section:

“Examination by Bank

52. (1) The Bank may, in order to determine whether a banking institution or controlling company is in a sound financial condition and whether the provisions of this Act or any other legal requirements pertaining to the [banking] business being conducted have been, and are being, complied with by the banking institution or controlling company, and without prior notice, at any reasonable time, through or by means of -

- (a) its own officers; or
- (b) any person appointed by the Bank on account of his or her special knowledge or expertise, including a legal practitioner registered to practice as such under the Legal Practitioners Act, 1995 (Act 15 of 1995); or
- (c) the auditor of a banking institution or any other auditor appointed by the Bank,

conduct an examination of the affairs of a banking institution or controlling company.

(2) Section 6 [**shall *mutatis mutandis* apply**] applies with necessary changes to an examination under this section.

(3) In the conducting of an examination in terms of subsection (1), the Bank, or the person appointed by the Bank under that subsection, [**shall,**] in addition to the powers, duties and functions he or she or it has in terms of this Act, [**have**] has the powers [upon a registrar by section 4 of the Inspection of Financial Institutions Act, 1984 (Act 38 of 1984), to conduct an inspection of the affairs of a financial institution in terms of section 3 of that Act] and duties in all respects corresponding to the powers and duties conferred or imposed by the law regulating financial institutions and markets upon the Authority or inspector contemplated in that law.”.

(4) The person, legal practitioner or auditor referred to in subsection (1) [**shall**], upon the completion of his or her examination in terms

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of that **[paragraph]** subsection, must submit a report to the Bank relating to the examination so conducted, in the form and manner as the Bank may require.

(5) The Bank may, if an examination contemplated in subsection (1) reveals that the banking institution or controlling company concerned is not conducting its affairs in terms of this Act or is contravening any other law, recover from the banking institution or controlling company the costs incurred by the Bank relating to the examination, including the fees and expenses of a person appointed by the Bank under subsection (1).

(6) If not less than one-fifth of the total number of the depositors of a banking institution representing not less than one-fifth of the total value of the deposits made with the banking institution in terms of subsection (1), the Bank **[shall]**, subject to subsection (7), must conduct an examination **[mutatis mutandis]** with necessary changes in terms of this section.

(7) The Bank **[shall]** must only conduct an examination contemplated in subsection (6) if the depositors referred to in that subsection, together with their request as contemplated in that subsection, provide the Bank with proof, to the satisfaction of the Bank, that such an examination may be justified.

(8) After the completion of an examination under this section, the Bank may furnish the board of directors of the banking institution or the controlling company concerned with a report relating to the examination, which report **[shall]** must contain the findings of the Bank in respect of the conducting of business by the banking institution or the controlling company.

(9) In the report furnished to the board of directors of the banking institution in or the controlling company terms of subsection (8), the Bank may direct such board of directors to, within the period of time specified in the report, rectify the deficiencies mentioned in the report.

(10) For the purpose of this section and of section 53, a banking institution **[shall]**, include an affiliate of the banking institution.

(11) The examination report prepared and furnished to the board of directors of a banking institution or a controlling company in terms of subsection (8) remains the property of the Bank and no disclosure of any portion thereof is permitted, except where such disclosure or exchange takes place between directors, officers or employees of that banking institution or the controlling company and is necessary to facilitate the day to day efficient functioning of that banking institution.

Amendment of section 53 of Act No. 2 of 1998

29. Section 53 of the principal Act is amended by the substitution for subsection (3) of the following subsection:

“(3) Any **[offer of a]** banking institution, its affiliate or associate who fails to allow any person referred to in subsection (2) access to or possession of, or refuses or fails to produce to such person any document or other item referred to in, or to give information in accordance with, that subsection, or to provide

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to the person suitable facilities for the purposes of conducting an examination under that subsection, is liable to a fine determined by the Bank.”.

Amendment of section 54 of Act No. 2 of 1998

30. Section 54 of the principal Act is amended -

(a) by the substitution for the heading of section 54 of the following heading:

“Approval of special resolutions, amalgamation and transfer of assets and liabilities”; and

(b) by the addition of the following subsection:

“(5) If the Bank in writing approves an application referred to in subsection (1)(a) or (b) in terms of subsection 3(b) or (c) -

(a) the notice of the passing of a special resolution by the shareholders of the banking institution or controlling company together with a certified copy of the Bank’s approval in terms of subsection 3(b) or (c) -

(i) containing full particulars of the merger, consolidation, transfer or other disposition; and

(ii) duly certified by two directors and the secretary of each party to the merger, consolidation, transfer or other disposition,

must be sent by each of the parties to the Registrar of Companies, who must register the merger, consolidation, transfer or other disposal, with the Bank and the Registrar of Deeds;

(b) upon registration of the special resolution by the Registrar of Companies –

(i) all the assets and liabilities of the banking institution or controlling company involved in the merger or consolidation become the assets and liabilities of the merged or consolidated banking institution or controlling company;

(ii) all rights and obligations that vested in the respective banking institutions or controlling company prior to the merger or consolidation are, from the date of registration by the Registrar of Companies, vested in the merged or consolidated banking institution or controlling company; and

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- (iii) in the case of a transfer or other disposal of property in terms of subsection (1)(b), such property is vested in the transferee;
- (c) upon receipt of a certified copy of the special resolution registered by the Registrar of Companies, the Registrar of Deeds must endorse the transfer of rights and obligations from the banking institutions or controlling company who have merged or become consolidated to the merged or consolidated banking institution or controlling company on every deed, bond, instrument or document registered in the Deeds Registry; and
- (d) despite section 16 of the Deeds Registries Act, 1937 (Act 47 of 1937) and the date on which the transfer of such rights and obligations have been endorsed by the Registrar of Deeds, all such rights and obligations are transferred to the merged or a consolidated banking institution or controlling company on the date of registration of the special resolution by the Registrar of Companies.”.

Amendment of section 55 of Act No. 2 of 1998

31. Section 55 of the principal Act is amended by the deletion of subparagraph (iii) of paragraph (b) of subsection (2).

Insertion of section 55A of Act No. 2 of 1998

32. The principal Act is amended by the insertion after section 55 of the following section:

“Pyramid Schemes

55A. (1) A person or banking institution may not conduct, permit or become involved in the conducting of, or the acceptance or obtaining of money, directly or indirectly, from members of the public, as a regular feature of a business practice, with the prospect of any of such members (hereinafter referred to as the “participating members”) receiving payments or other money-related benefits, directly or indirectly –

- (a) on or after the introduction of other members of the public to the business practice (hereinafter referred to as the “new participating members”), from which new participating members, in their turn, money is accepted or obtained, directly or indirectly, as a regular feature of the business practice, whether or not-
 - (i) the introduction of the new participating members is limited to their introduction by participating members or extends to the introduction of the new participating members by other persons; or

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- (ii) new participating members are required to acquire movable or immovable property, rights or services;
 - (b) on or after the promotion, transfer or change of status of the participating members or new participating members within the business practice; or
 - (c) from funds accepted or obtained from participating members or new participating members in terms of the business practice,
- or the soliciting of, or advertising for, directly or indirectly, money or persons for introduction into or participation in a business practice in terms of the business practice referred to in this section, but does not include any activity of -
- (i) the public sector, governmental or other institution; or
 - (ii) any person or category of persons, designated by the Minister, on the recommendation of the Bank, by notice in the *Gazette*, if such activity is performed in accordance with the conditions that the Minister may specify in the notice.
- (2) A person who contravenes subsection (1) commits an offence and is liable to a fine prescribed by section 72(2)(a).”.

Amendment of section 56 of Act No. 2 of 1998

- 33.** Section 56 of the principal Act is amended –
- (a) by the substitution for subparagraph (iii) of paragraph (a) of subsection (2) of the following subparagraph:
 - “(iii) subject to the Labour Act, [1992 (Act 6 of 1992)] 2007 (Act No. 7 of 2007), but [notwithstanding] despite any provision to the contrary –”;
 - (b) by the substitution for subsection (4) of the following subsection:
 - “(4) [An] A director or an officer removed from office under subsection (2) [shall] ceases to hold the office from which he or she is so removed with effect from the date specified in the order made under that subsection, and [shall] after the date so specified -
 - (a) may not hold any office or participate in the affairs of - [in the banking institution or in its affiliate or associate; and]
 - (i) the banking institution from which he or she was removed;
 - (ii) any other banking institution; or
 - (iii) the controlling company; and

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- (b) is not [be] entitled to the payment of any remuneration from the banking institution or [from its affiliate or associate.] any other banking institution or the controlling company,

provided that the Bank may, upon written application by such director or officer rescind or modify the removal order subject to any conditions as the Bank may impose.”; and

- (c) by the deletion of subsection (9).

Amendment of section 58 of Act No. 2 of 1998

34. Section 58 of the principal Act is amended by the addition of the following subsection:

“(5) Despite anything to the contrary in the Companies Act or any other law, the Master of the High Court –

- (a) may not appoint a person as provisional liquidator, provisional judicial manager, liquidator or judicial manager of a banking institution, other than a person recommended by the Bank under paragraph (b);
- (b) 30 days before appointing a person for any position referred to in paragraph (a), must submit the particulars and qualifications, and experience, if any, of such person and other relevant information to the Bank for its recommendation; and
- (c) the Master of the High Court must appoint a person designated by the Bank, who, in the opinion of the Bank, has wide experience of, and is knowledgeable about the latest developments in, the banking industry, to assist a provisional liquidator, provisional judicial manager, liquidator or judicial manager referred to in paragraph (a) in the performance of his or her functions in respect of the banking institution concerned.”.

Substitution of section 59 of Act No. 2 of 1998

35. The principal Act is amended by the substitution for section 59 of the following section:

“Proof and repayment of claims

59. (1) Despite the provisions of any other law, in the event of winding-up of a banking institution, all assets of the banking institution must be made available to meet all deposit liabilities of the banking institution in the order of priority as determined by the Bank.

(2) For the purpose of winding-up of a banking institution, and **[notwithstanding]** despite any provision to the contrary in the Insolvency Act, 1936 (Act 24 of 1936), or in the Companies Act, or any other law, an entry in

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the books, accounts or records of the banking institution relating to a depositor of the banking institution, **[shall be]** is prima facie proof of a claim of the depositor.”.

Amendment of section 64 of Act No. 2 of 1998

36. Section 64 of the principal Act is amended by the insertion after paragraph (i) of subsection (10) of the following paragraph:

“(j) if the exchange of individual customers’ information takes place within a banking institution between directors, officers or employees of that banking institution and which is necessary to facilitate the day-to-day banking business.”.

Substitution of section 71 of Act No. 2 of 1998

37. The principal Act is amended by the substitution for section 71 of the following section:

“Regulations and determinations

71. (1) The Minister may, on the recommendation of the Bank, make regulations relating to -

- (a) any matter which is required or permitted by this Act to be prescribed;
- (b) the requirements relating to the ownership, or the citizenship and place of residence of the members of a board of directors or officer, of a banking institution or a controlling company;
- (c) the manner in which the payment of any monies in terms of this Act **[shall be]** is made to the Bank; **[and]**
- (cA) unfair terms in transactions or contracts between banking institutions and their customers or the general public; and
- (d) all other matters which the Minister considers necessary or expedient to prescribe in order to achieve the objects and purposes of this Act.

(2) A regulation made under subsection (1) may in respect of any contravention thereof or failure to comply therewith prescribe a penalty not exceeding a fine of N\$100 000 or imprisonment for a period not exceeding two and a half years or both such fine and such imprisonment.

(3) The Bank may by notice in the *Gazette* make determinations not inconsistent with this Act relating to -

- (a) any matter which is required or permitted by this Act to be determined by the Bank; and

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(b) all other matters which the Bank considers necessary or expedient to determine for the conducting of **[banking]** business, as a banking institution or controlling company, in a prudent manner and consistent with the best standards and practices of corporate governance and sound financial management.

(4) Any **[person or]** banking institution or controlling company, as the case may be, **[shall,]** on contravention of, or failure to comply with, any determination made under paragraph (a) of subsection (3) -

(a) as provided for in section 28(5)(b) or (c), 28A, 30(2), 41(5) or 43(6) in respect of **[any person, including]** a banking institution or controlling company; or

(b) as provided for in section 21(7), 28(1)**[(b)]**, 30(1)(d), 31(1), 33(1), 34(1) or (2), 46(2)(b) or 47(2)(a) in respect of any banking institution or controlling company;

[be guilty of an offence and on conviction be liable to the penalties provided for in section 72(1)(a)] is liable to a fine determined by the Bank.

(5) A banking institution or controlling company that contravenes or fails to comply with a determination made under paragraph (b) of subsection (3) [may in respect of any contravention thereof or failure to comply therewith determine a penalty not exceeding a fine of N\$50 000 or imprisonment for a period not exceeding one and a half years or both such fine and such imprisonment] is liable to a fine determined by the Bank and imposed in accordance with section 73A.”.

Amendment of section 72 of Act No. 2 of 1998

38. Section 72 of the principal Act is amended by the substitution for paragraph (a) of subsection (1) of the following paragraph:

“(a) contravenes or fails to comply with any provision of section 5, 19A(1), **[25(2),]** 46(3), 55A or 64(7); or”.

Amendment of section 73 of Act No. 2 of 1998

39. Section 73 of the principal Act is amended -

(a) by the substitution for paragraph (a) of subsection (1) of the following paragraph:

“(a) any provision of section 8(2), 12(2), 12D and 12E, 14, 16(1), 19(1) or (4), 20(1)(a), (2)(a) or (5), 21(1), (4), (6) or (7), 27(2), **[28(1),]** 30(1)(a), (b) or (c), 31(2) or (3), 32, 35, 36(1), 37(1), **[38(1) or (2),]** 39(1) or (2), 40(1) or (2), 41(1) or (2), 42(2) or (4), 43(1) or (2), 45(4), 46(1) or (2)(a), 47(2)(b) or (3), 48, **[49(2), (3) or (4),]** 53(1) **[or (3)]**, 54(1), 55(1), 61(1), 62(1) or 63; or”; and

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(b) by the substitution for paragraph (d) of subsection (1) of the following paragraph:

“(d) any condition or requirement laid down under section 8(3), [28(2)] or (4), 36(2), 47(5), 49[(1) or] (5) or 50.”.

Insertion of sections 73A and 73B in Act No. 2 of 1998

40. The principal Act is amended by the insertion after section 73 of the following sections:

“Imposition of administrative fines by Bank

73A. (1) If the Bank on reasonable grounds believes that a banking institution or controlling company contravenes or fails to comply with section, 26(16), 38(3), 49(6), 53(3), or 71(4), under which the Bank is required to determine a fine, the Bank may impose a fine not exceeding N\$100 000 for every day during which contravention or non-compliance with the section continues.

(2) Before imposing a fine, the Bank must in writing -

- (a) inform the banking institution or controlling company of its intention to impose a fine;
- (b) specify the particulars of the alleged contravention or noncompliance;
- (c) provide reasons for the imposition of the intended fine;
- (d) specify the amount of the fine intended to be imposed; and
- (e) invite the banking institution or controlling company to make written representations within 14 days of receipt of the invitation and to show cause why the fine should not be imposed.

(3) If the Bank after consideration of the representations made, decides to impose a fine, the Bank must by written notice inform the banking institution or controlling company that it must, within 30 days of receipt of the notice, pay the fine.

(4) A banking institution or controlling company may appeal to the Appeal Board against the decision made or fine imposed by the Bank by lodging a notice of appeal with the Minister within 14 days of receipt of the notice referred to in subsection (3).

(5) After consideration of an appeal, the Appeal Board may confirm, amend or set aside the decision made or fine imposed by the Bank.

(6) If a banking institution or controlling company is dissatisfied with the decision of the Appeal Board, it may appeal to the High Court within 14 days after the decision was made.

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(7) A contravention of or failure to comply with any section referred to in subsection (1) is not a criminal offence.

Appeal Board

73B (1) Upon receipt of the notice of appeal by a banking institution or controlling company against the decision of the Bank made under section 73A, the Minister must constitute an Appeal Board to decide the appeal.

(2) The Appeal Board consists of a judge of the High Court, who is the chairperson, designated by the Judge President and other two members appointed by the Minister.

(3) The qualifications, terms and conditions and other requirements for appointment as members of the Appeal Board are as prescribed.”.

Insertion of certain expressions in Act No. 2 of 1998

41. The principal Act is amended by the insertion after the expression “banking institution” or “banking institutions” wherever it appears in section 3, 13, 20, 21, 22, 24, 26, 27(2), 43, 44, 45, 49, 51, 54, 65, 66, 72, or 73, respectively, of the following expression, respectively:

“or controlling company’ or ‘or controlling companies”.

Short title

42. This Act is called the Banking Institutions Amendment Act, 2010.
