

## **BANKING INSTITUTIONS BILL, 2013**

To consolidate and amend the laws relating to banking institutions, microfinance banking institutions and controlling companies; to provide for the authorisation of a person to conduct business as a banking institution, microfinance banking institution or controlling company; to provide for the control, supervision and regulation of banking institutions, microfinance banking institutions and controlling companies; to protect the interests of persons making deposits with banking institutions and microfinance banking institutions; to provide for consolidated supervision; to authorise foreign banking institutions to open branches in Namibia; to prohibit and criminalise illegal financial schemes; to empower the Minister to regulate the ownership of a banking institution or a controlling company; and to provide for incidental matters.

(Signed by the President on .....2013)

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## **SCHEDULE**

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

### **PART I PRELIMINARY PROVISIONS**

#### **1. Definitions**

(1) In this Act, unless the context otherwise indicates -

“affiliate”, in relation to a person, means any company, association, syndicate, partnership or other body of persons, corporate or unincorporated, in which -

- (a) 20 per cent or more of any class of voting shares or other voting participation is directly or indirectly owned or controlled by the person, or is held by the person with power to vote; or
- (b) the election of the majority of directors is in any manner controlled by the person;

“associate”, in relation to a person, but subject to subsection (2), includes -

- (a) the holding company of such person;
- (b) a subsidiary company or a fellow subsidiary of such person;
- (c) a subsidiary company of any of the companies referred to in paragraphs (a) or (b) or in this paragraph;
- (d) a substantial shareholder of such person or a substantial shareholder of such person’s holding company;
- (e) a business partner of -
  - (i) such person;
  - (ii) such person’s substantial shareholder;
  - (iii) a substantial shareholder of such person’s holding company; or
  - (iv) any of the companies referred to in paragraphs (a), (b) or (c);
- (f) any person who is an officer of -

- (i) such person;
- (ii) any of the companies referred to in paragraphs (a), (b) or (c); or
- (iii) any shareholder or business partner referred to in paragraph (d) or (e);

"auditor" means an auditor referred to in the Public Accountants and Auditors Act, 1951 (Act 51 of 1951);

"authorised" means authorised under this Act to conduct banking business or microfinance banking business;

"Bank" means the Bank of Namibia referred to in section 4 of the Bank of Namibia Act, 1997;

"banking business" means the business that consists of –

- (a) **[the regular receiving of funds from the public]** accepting sums of money in the form of deposits or other funds, whether or not such deposits or funds involve the issue of securities or other obligations howsoever described, withdrawable or repayable on demand or after a fixed period or after notice; and
- (b) **[the using of funds referred to in paragraph (a), either in whole, in part or together with other funds, for the account and at the risk of the person conducting business]** the use of such deposits or funds, either in whole or in part on the own account and at the risk of the person carrying on such business for–
  - (i) loans, advances, or investments;
  - (ii) any other purpose or activity authorised by law or by **[customary ]** traditional banking practice in terms of this Act;
  - (iii) such activities that the Minister, **[in consultation with]** on recommendation of the Bank has, by notice in the Gazette [determined] designated to be an authorised manner of using funds for the purpose of conducting banking business; and

(c) includes such services as are incidental and necessary to banking

but does not include:

- (ab) any activity of the public sector, governmental or other institution, or of any person or category of persons, designated by the Minister, on the recommendation of the Bank, by notice in the Gazette, and if such activity is performed in accordance with the conditions that the Minister may specify in the notice.

- (ac) the acceptance of money against securities or other obligations, if such money is not used for the purpose of granting advances, loans or credit to the public,

“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, as defined in section 1(1) of the principal Act, of any one of the others; or
- (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;

“banking institution” means a public company authorised under this Act to conduct banking business, or deemed to be so authorised;

“business practice” includes any agreement, arrangement or understanding, whether or not enforceable under any law, entered into between two or more persons, or any scheme, practice or method of trading, including any method or manner of marketing or distribution;

“bridge bank” means an temporary institution established by the Bank, to administer the assets and liabilities of a failing banking institution, microfinance banking institution or controlling company as stipulated under section 65 (1)(b)(ii)

“capital funds” has the meaning determined by the Bank under section 35;

“claim”, with regard to a person, means the obligation of any other person to pay or to deliver to such person, any value in accordance with an agreement or the law establishing such claim;

“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);

“close relative”, in relation to a person, means -

- (a) the spouse of such person, or any other person who has a relationship with such person as a spouse in a union in terms of the customary law;
- (b) such person’s child, step-child, adopted child, brother, sister, step-brother, step-sister, parent or step-parent; or

- (c) the spouse, or any person who has a relationship as a spouse in both **[a union in terms of the]** civil and customary [law] marriages, of any of the persons mentioned in paragraph (b)

“Companies Act” means the Companies Act, 2004 (Act No. 28 of 2004);

“Company” means a company registered under the Companies Act or a close corporation registered under the Close Corporation Act 26 of 1988 (as amended);

“controlling company” means a company approved under section 13 as a controlling company in respect of a banking institution, and “holding company” has a corresponding meaning”;

“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;”

“credit bureau” means an entity established by law specialised in the collection and sale of credit performance information of individuals and businesses

“day” means a calendar day, excluding a closed day;

“debt instrument” includes debentures as defined in section 1(1) of the Companies Act, or any other security or document issued by a company, evidencing or acknowledging the liability of a person or the company to repay an amount of money specified in the security or other document, subject to the conditions whereto the security or document is issued;

“deposit”, when used as a noun, means an amount of money paid by one person to any other person, or by a customer to a banking institution or microfinance banking institution, subject to an agreement in terms of which the full amount of money, or any part thereof, will, conditionally or unconditionally, and with or without interest or a premium, be repaid to such person or to the customer on demand or at a specified or unspecified date, or after a predetermined period of time, or after a predetermined period of notice of withdrawal, or subject to an agreement entered into by the parties concerned, notwithstanding that such payment is limited to a fixed amount or that a transferable or non-transferable certificate or other instrument providing for the repayment of the amount is issued in respect of such amount, but a deposit shall not include an amount of money -

- (a) paid as an advance or as a part payment in terms of a contract for the sale, letting, hiring or other provision of movable or immovable property or for services;



- (b) paid as security for the performance of a contract or as security in respect of any loss which may result from the non-performance of a contract;
- (c) paid as security for the delivery or return of any movable or immovable property;
- (d) paid by a holding company to its subsidiary, or by a subsidiary to its holding company, or by one subsidiary to a fellow subsidiary; or
- (e) paid by a person who, at the time of such payment -
  - (i) is a close relative of the person to whom such money is paid;
  - (ii) is a director or an officer concerned in the management of the person to whom such money is paid; or
  - (iii) is a close relative of a director or of an officer referred to in subparagraph (ii),

and “depositor” will **[shall]** have a corresponding meaning;

“determination” means a determination made by the Bank under this Act and published by notice in the Gazette, and “determine” has a corresponding meaning;

“director” means a director as defined in section 1(1) of the Companies Act;

“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, microfinance banking institution or its controlling company, and is principally responsible for the management and conduct of the credit provisions, risk management, compliance, accounting, auditing, secretarial, treasury and operation functions, and includes a chief executive officer and deputy chief executive officer**[,and any manager of a significant business unit]**

“exposure” means any form of exposure, including -

- (a) loans, advances and irrevocable commitments to lend;
- (b) leasing;
- (c) guarantees;
- (d) any other form of finance; or
- (e) any other exposure contemplated for the purpose of capital requirements under section 35;

“failing banking institution, microfinance banking institution or controlling company” means a banking institution, microfinance banking institution or controlling company that

- (i) fails or is unlikely to comply with the order issued or to be issued in terms of section 64 (2) and the conditions contemplated under section 64 (1) continue or deteriorate; or
- (ii) is insolvent; or
- (iii) is likely to become insolvent and the provisions of section 64 are deemed inadequate to resolve the situation; or
- (iv) is significantly undercapitalized. For the purposes of this section “significantly undercapitalized” means that the equity and/or total risk weighted capital adequacy ratios are less than the minimum levels as determined by the Bank,

as envisaged by section 65 (1).

“fellow subsidiary” means, in relation to a company which is a subsidiary of a holding company, any other company which is a subsidiary of such holding company;

“financial records” includes banking and accounting records;

“foreign banking institution” means a person authorised or registered to conduct banking business under the laws of any state, country, colony or territory other than Namibia, and which conducts banking business in such other state, country, **[colony]** or territory;

“foreign national” means –

- (a) a person who is not a citizen or permanent resident of Namibia;
- (b) a company incorporated under the laws of any country other than Namibia; or
- (c) a company incorporated in Namibia in which the majority of the issued share capital is beneficially owned by foreign nationals within the meaning of this definition;

“High Court” means the High Court of Namibia constituted by Article 80(1) of the Namibian Constitution and referred to in the High Court of Namibia Act, 1990 (Act 16 of 1990);

“holding company” means a holding company as defined in section 1(6) of the Companies Act;

“incorporated”, in relation to a banking institution, microfinance banking institution or controlling company, means registered as a public company under the Companies Act;

“insolvent”, means the inability by the banking institution, microfinance banking institution or controlling company to meet the set requirements as determined by the Bank.

“listed banking institution” means a banking institution that issued shares through an initial public offering and whose shares are traded on a stock exchange;

“managerial responsibility” means the responsibility for the control or administration of the business or affairs of a banking institution, microfinance banking institution or controlling company, or any part of such business or affairs;

“merger” means when one or more banking institutions, microfinance 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, microfinance banking institution or controlling company, in any means including -

- a) the purchase or lease of shares, an interest, or assets of that other banking institution, microfinance banking institution or controlling company; or
- b) the amalgamation or other combination with any other banking institution, microfinance banking institution or controlling company;

“microfinance banking business” means the business that primarily consists of –

- (a) accepting sums of money in the form of deposits or other funds withdrawable or repayable on demand or after a fixed period or after notice; and
- (b) the use of such deposits or funds, either in whole, in part or together with other funds, on the account and at the risk of the person carrying on such business for–
  - (i) microloans and advances;
  - (ii) such other activities that the Minister, on recommendation of the Bank, has by notice in the Gazette designated to be an authorised manner of using funds for the purpose of conducting micro-finance banking business.

- (c) any other activity that the Minister, on recommendation of the Bank, may by notice in the Gazette, designate to be an authorised business activity for microfinance banking institutions;

but does not include:

- (ab) any activity of the public sector, governmental or other institution, or of any person or category of persons, designated by the Minister, on the recommendation of the Bank, by notice in the Gazette, and if such activity is performed in accordance with the conditions that the Minister may specify in the notice.

“microfinance banking institution” means a public company authorised under this Act to primarily conduct or microfinance banking institution, or deemed to be so authorised.”

“microloan” means a loan of not greater than an amount as may be set by the Bank by notice in the Government Gazette from time to time

“Minister” means the Minister of Finance;

“Ministry” means the Ministry of Finance;

“officer”, in relation to a company, means any director having executive responsibilities in the company, or any manager, secretary or other employee of the company, but does not include a juristic person holding any such position;

“person” means a natural or juristic person and includes a partnership;

“public” refers to any natural or juristic person, whether or not such person is a depositor with a banking institution or microfinance banking institution but excludes its controlling company, or the associate or affiliates of such banking institution or microfinance banking institution.

“prescribe” means prescribe by regulation;

“principal officer”, in relation to a banking institution, microfinance 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, microfinance 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 authorisation to establish a banking institution or microfinance banking institution;

“proxy” means a written appointment given by a director, executive officer, any substantial shareholder and auditor of a banking institution, microfinance banking institution or controlling company to another person allowing the proxy holder to attend a specific meeting on behalf of the director, executive officer, substantial holder and auditor including the power to exercise of their voting rights at that meeting.

**[“receiving funds from the public”, for the purpose of ascertaining if a person is conducting banking business, means that a person –**

**(a) accepts deposits or similar funds from the public, including from employees, members, shareholders or partners of the person, as a regular feature of his or her business;**

**(b) solicits or advertises for deposits or similar funds;**

**(c) obtains, as a regular feature of his or her business, money through the sale of an asset to a person other than to a banking institution or a statutory body or other institution referred to in section (2) (2), subject to an agreement in terms of which the seller undertakes to repurchase from the buyer at a future date the asset sold, or any other asset;**

**(d) conducts any other activity which the Bank, by notice in the Gazette, has declared to be the acceptance of deposits from the public.”]**

“regulations” mean the regulations made under this Act;

“representative office”, in respect of a foreign banking institution, means an office of the foreign banking institution in Namibia;

“risk weighting” means attaching a weight of one, or a fraction of one, to each class of assets or other exposures of a banking institution, microfinance banking institution or controlling company in accordance with the determinations by the Bank for the purpose of calculating the minimum capital requirements under section 35;

“security” means a financing or investment instrument issued by a company or government that denotes an ownership interest and provides evidence of a debt, a right to share in the earnings of the issuer, or a right in the distribution of a property, and it includes bonds, dentures, notes, etc.

“subsidiary” means a subsidiary company as defined in section 1(3) of the Companies Act, and includes a subsidiary company of a subsidiary;

“substantial shareholder” means any person or registered shareholder that, directly or indirectly, holds, controls or is entitled to exercise the voting rights in not less than **[five]** ten 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 is deemed to be a substantial shareholder; and
- (b) any shares owned or controlled, or the voting rights of which are exercisable, by a person's close relative is deemed to be owned or controlled by such person ;

"this Act" includes the regulations and the determinations.

(2) For the purposes of -

- (a) paragraph (e) of the definition of "associate" in subsection (1), a business partner means a business partner who is able, by virtue of his or her own shareholding, to contribute to or to affect the influence which the person, substantial shareholder or company referred to in that paragraph is, in his or her or its capacity as a shareholder; and
- (b) paragraph (f) of the definition of "associate" in subsection (1), an officer means an officer who is able to contribute to or to affect the influence which the person, company, shareholder or business partner referred to in that paragraph is, by virtue of his or her or its shareholding,

able or in a position to exercise.

- (3) Any application or notice made or given, or any other communication, in terms of or pursuant to this Act, shall -
  - (a) be in the official language of Namibia; and
  - (b) unless otherwise provided for in this Act, be in writing.

## **2. Application of Act**

- (1) This Act, in so far as it provides for a limitation on the fundamental freedoms contemplated in Article 21 of the Namibian Constitution by authorising restrictions relating to the conducting of business, is, unless otherwise provided, enacted upon the authority conferred by that Article.
- (2) This Act 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

- (c) the Agricultural Bank of Namibia, established by the Agricultural Bank of Namibia Act, 2003 (Act 5 of 2003);
  - (d) any building society registered under the Building Societies Act, 1986 (Act 2 of 1986);
  - (e) the Namibia Development Corporation, established by the Namibia Development Corporation Act, 1993 (Act 18 of 1993);
  - (f) the National Housing Enterprise, established by the National Housing Enterprise Act, 1993 (Act 5 of 1993);
  - (g) any co-operative **[society]** registered under the Co-operative **[Societies]** Act, 1996 (Act 23 of 1996); or
  - (h) any other institution or body designated by the Minister, on the recommendation of the Bank, by notice in the Gazette; or
  - (i) any non-bank 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), as amended;
  - (j) the Development Bank of Namibia, established by the Development Bank of Namibia Act 2002 (Act 8 of 2002).
- (3) The Minister may, on the recommendation of the Bank, by notice in the Gazette, remove any institution or body **[from]** under subsection (2), and the Minister, in consultation with the Bank, may–
- (a) despite the provisions of the establishing Act of that institution or body, apply any provisions of this Act or prescribe differentiated prudential requirements to such institution or body as the Minister may deem fit;
  - (b) withdraw or amend any such notice
- (4) A person, other than a person who solicits or advertises for deposits, will not be deemed to be accepting deposits if he or she does not, at any time, hold deposits –
- (a) for or on behalf of more than 20 persons; or
  - (b) amounting in aggregate to more than N\$ 500 000, excluding interest payable on the deposits.
- (5) The Minister may, on the recommendation of the Bank, by notice in the Gazette amend –

- (a) the number of persons specified in paragraph (a); or
- (b) the amount specified in paragraph (b), of subsection (4).

## **PART II ADMINISTRATION OF ACT**

### **3. 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, or microfinance 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 microfinance banking institutions or controlling companies or to the conducting of business, as a banking institution, or microfinance banking institution or controlling company in general.
- (2) The guidelines, circulars or notices contemplated in subsection (1) must be in writing and must be delivered by the Bank to the principal officer of a banking institution, or microfinance banking institutions or controlling company.

### **4. Limitation of liability**

- (1) No liability shall attach to -
  - (a) the Government of Namibia;
  - (b) the Minister;
  - (c) the Bank;
  - (d) the Governor or Deputy Governor, or any member of the Board or officer or employee of the Bank; or
  - (e) any person acting on behalf of the Government or of the Bank,

either in his or her personal or official capacity, for any loss sustained or damage caused by any person as a result of anything done or omitted by any such person in good faith and not attributable to wrongful intent or to negligence, in the performance of any function or duty under this Act.

- (2) For the purposes of this section -
  - (a) “Governor” means the Governor of the Bank; and
  - (b) “Deputy Governor” means the Deputy Governor of the Bank,

as defined in the Bank of Namibia Act, 1997.



**PART III**  
**AUTHORISATION TO ESTABLISH A BANKING INSTITUTION OR MICROFINANCE**  
**BANKING INSTITUTION**

**5. Prohibition on conducting of banking business or microfinance banking business by unauthorised persons**

- (1) No person must -
- (a) conduct banking business or microfinance banking business;
  - (b) receive, accept or take a deposit;
  - (c) by any means, including advertising or soliciting, procure or attempt to procure a deposit;
  - (d) pretend to be a banking institution or microfinance banking institution; or
  - (e) subject to subsection (2), use the expression or derivative “bank”, “banking institution”, “microfinance banking institution”, “MFBI” or any expression, name, title or symbol indicating or calculated to create the impression that the person is conducting, or is authorised to conduct, business as a banking institution or microfinance banking institution as the case may be.

unless such person is under this Act authorised to so conduct business as a banking institution or microfinance banking institution.

- (2) Paragraph (e) of subsection (1) will not apply if the expression “bank”, “microfinance banking business” or any equivalent or derivative of the expression, is -
- (a) included in the name or title of a staff association or similar organisation of a banking institution or microfinance banking institutions;
  - (b) included in the name or title of an association of banking institutions or microfinance banking institutions; or
  - (c) used for any other purpose approved by the Bank in writing.
- (3) Any person that contravenes subsection (1) commits an offence and is liable to the penalties provided for under section 90 (2) (a).

**6. Investigations**

- (1) This section, in so far as it provides for a limitation on the fundamental rights contemplated in Sub article (1) of Article 13 of the Namibian Constitution by

authorising interference with the privacy of any person's home, correspondence or communication, is enacted upon the authority conferred by Sub article (2) of that Article.

- (2) The Bank may, if it has reason to believe that a person is conducting banking business or microfinance banking institution in contravention of section 5 **[or section 55A]**, in writing authorise an officer of the Bank to -
- (a) with the necessary changes and in accordance with Chapter 2 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), at any time and without prior notice -
- (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 or microfinance banking business in contravention of section 5; and
  - (ii) search for any book, record, statement, document or other item used, or which is believed to be used, in connection with the banking business or microfinance banking business referred to in subparagraph (i); or
  - (iii) seize or make a copy of any book, record, statement, document or other item referred to in subparagraph (ii), or seize any money found on the premises,
- as if the officer were a police official referred to in that Act and the book, record, statement, document or other item were used in the commission of a crime;
- (b) question any person who is present on the premises referred to in paragraph (a)(i), or the auditors, directors, members or partners of any person conducting business on the premises, in connection with the conducting of the business on the premises;
- (c) direct that the premises referred to in paragraph (a)(i), or any part of, or anything on, the premises, be left undisturbed for as long as it is necessary to search the premises for any book, record, statement, document or item referred to in paragraph (a)(ii);
- (d) by notice in writing addressed and delivered to any person who has control over or custody of any book, record, statement, document or other item referred to in paragraph (a) (i), require the person to produce the book, record, statement, document or other item to the officer of the Bank addressing the notice, at the place, on the date and at the time specified in the notice;
- (e) examine any book, record, statement, document or other item referred to in paragraph (a)(i), and may require from any person referred to in

paragraph (b) an explanation regarding any entry in the book, record, statement, document or other item;

- (f) by notice in writing delivered to a banking institution or microfinance banking institutions, instruct such banking institution or microfinance banking institutions to summarily freeze any banking account or accounts of any person referred to in this subsection with such banking institution or microfinance banking institutions, and to retain all moneys in any such banking account or accounts, pending the further instructions of the Bank;
  - (g) by notice in writing delivered to any person referred to in this section, direct that the business of such person be summarily suspended, pending the investigation by the Bank under this section;
  - (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
  - (i) require a member of the Namibian Police Force, or may request any other person, to assist him or her in the exercising, performance or execution of his or her powers, duties or functions under this section.
- (3) If the officer of the Bank referred to in subsection (2) exercises, performs or executes a power, duty or function under this section in the presence of any person affected by the exercising, performance or execution of the power, duty or function, the officer shall at the request of the person so affected, exhibit to the person the written authorisation referred to in that subsection.
- (4) No person shall -
- (a) hinder or obstruct an officer of the Bank authorised under subsection (2) in the exercising, performance or execution of his or her powers, duties or functions;
  - (b) refuse or fail to comply with any request made by an officer referred to in paragraph (a) in the exercising, performance or execution of such officer's powers, duties or functions;
  - (c) subject to Article 12(1)(f) of the Namibian Constitution, refuse or fail to answer any question which an officer referred to in paragraph (a) lawfully directs at such person in the exercising, performance or execution of such officer's powers, duties or functions.
  - (d) wilfully furnish false or misleading information to an officer referred to in paragraph (a); or
  - (e) falsely give himself or herself out as an officer referred to in paragraph (a).
- (5) For the purposes of this section, "premises" shall include any building or structure, or part of such building or structure, whether above or below the surface of the land or water, or any vehicle, vessel or aircraft.

- (6) A person who contravenes subsection (4) commits an offence and is liable to the penalties provided for under section 90 (1) (b).

## **7. Repayment of monies by unauthorised persons**

- (1) If the Bank is satisfied that a person has obtained any monies in contravention of section 5 **[or section 55A]**, the Bank 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 -
- (a) to the respective persons from whom he or she 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,
- by the Bank and specified in the direction.
- (2) Any person referred to in subsection (1) who refuses or fails to comply with a direction under that subsection, will, for the purposes of section **[345]** 350 of the Companies Act, be deemed to be unable to pay its debts, or for the purposes of section 8 of the Insolvency Act, 1936 (Act 24 of 1936), be deemed to have committed an act of insolvency, as the case may be, and the Bank may apply to the High Court for the winding-up, or for the sequestration of the estate, of such person, as the case may be.
- (3) Subsections (1) and (2) will be in addition to, and not derogate from, any criminal liability in terms of this Act or of any other law, of a person referred to in those subsections.
- (4) Section 69 will mutatis mutandis apply to monies referred to in subsection (1), or to any other property which a person referred to in that subsection may have in his or her possession as a lessor of a safe deposit box, as a trustee, a fiduciary or in any other capacity on behalf of any other person.

## **8. Name of banking institution or microfinance banking institution**

- (1) No authorisation to conduct banking business or microfinance banking business must be issued to any person under a name which, in the opinion of the Bank, may mislead the public as to the identity of the banking institution or microfinance banking institution concerned, or as to the nature of its activities.
- (2) No banking institution or microfinance banking institution may, without the written approval of the Bank, use, refer to itself by, or conduct banking business or microfinance banking business under, a name other than the name under which it was authorised to conduct banking business or microfinance banking business as contemplated in subsection (1).

- (3) Upon a written application by a banking institution or microfinance banking institution, the Bank may, subject to such conditions as it may impose, change the name under which the banking institution or microfinance banking institution was authorised to conduct banking business or microfinance banking business to the name applied for by the banking institution or microfinance banking institution, or may refuse the application.
- (4) If the Bank is satisfied that the authorised name of a banking institution or microfinance banking institution or the name under which the banking institution or microfinance banking institution conducts business, as the case may be, may mislead the public as to the identity or nature of the business of the banking institution or microfinance banking institution, the Bank may, subject to subsection (5), by written notice addressed and delivered to the banking institution or microfinance banking institution -
  - (a) change the authorised name of the banking institution or microfinance banking institution; or
  - (b) instruct the banking institution or microfinance banking institution to change the name under which it is conducting business to a name approved by the Bank.
- (5) The Bank shall not change the name of a banking institution or microfinance banking institution under subsection (4), unless -
  - (a) the Bank has given the banking institution or microfinance banking institution 30 days written notice of its intention to change the name of the banking institution or microfinance banking institution, furnishing reasons for the intended change of name; and
  - (b) has afforded the banking institution or microfinance banking institution the opportunity to, within the 30 day period of time contemplated in paragraph (a), make written representations to the Bank relating to the intended change of name.
- (6) If the Bank under subsection (3) or (4), as the case may be, changes the name under which a banking institution or microfinance banking institution was authorised, the Bank must under section 11 issue an amended certificate of authorisation in the name of the banking institution or microfinance banking institution, specifying the changed name of the banking institution or microfinance banking institution

## **9. Prerequisite for conducting banking business or microfinance banking institution**

- (1) A person is not authorised to conduct banking business or microfinance banking institution unless such person is -

- (a) incorporated as a public company under the Companies Act and has the minimum capital funds as determined under section 35 of this Act; or
  - (b) a branch of a foreign banking institution, incorporated as a public company under similar provisions of the Companies Act in its jurisdiction and registered as an external company under the Companies Act, authorised in terms of 24 of this Act and which has the minimum capital funds as determined by the Bank.
- (2) A company may not, without the prior written approval of the Bank, be incorporated as a public company or register as an external company under the Companies Act for the purpose of conducting banking business or microfinance 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 24.
  - (4) A person who contravenes subsection (1) and (2) commits an offence and is liable to a fine prescribed by section 90 (1) (b).

#### **10. Application for authorisation to establish a banking institution or microfinance banking institution**

- (1) Any person who intends to conduct banking business or microfinance banking institution may, subject to the further provisions of this section, apply to the Bank for the granting of an authorisation to so conduct banking business or microfinance banking business.
- (2) An application contemplated in subsection (1) must **[shall]** -
  - (a) be made in the form and manner required by the Bank in writing;
  - (b) be signed on behalf of the applicant by its principal officer, or if the applicant is a company to be registered, by its trustees or by the subscribers to its memorandum and articles of association; and
  - (c) be accompanied by the prescribed application fee.
- (3) On receipt of an application contemplated in subsection (1), the Bank may, before considering the application, in writing require the applicant to furnish to the Bank-
  - (a) a report in writing by a public accountant as defined in section 1 of the Public Accountants' and Auditors' Act, 1951 (Act No. 51 of 1951), or by another person approved by the Bank, on such aspects relating to the application as the Bank may deem necessary; or
  - (b) such further information, books, records, statements or other documents as the Bank may request.

- (4) An applicant may withdraw the application by written notice to the Bank at any time before it is granted or refused.
- (5) Where an applicant has failed to submit the necessary information or document(s) in support of an application as required by subsection (3) and within such time period as the Bank may further provide for the submission of the outstanding information, the Bank may;
  - (a) close such application; and
  - (b) should the applicant intend to continue with the application after it has been closed, a new application must be submitted.

#### **11. Granting or refusal of application for authorisation and certificate to conduct banking business or microfinance banking business**

- (1) Before considering an application for an authorisation lodged with the Bank in terms of section 10, the Bank shall conduct such investigations, both in or outside Namibia, relating to the applicant or to the application as it may deem necessary in order to ascertain -
  - (a) the validity and authenticity of the information submitted by the applicant to the Bank in terms of section 10;
  - (b) the financial status and history of the applicant, including its assets and liabilities, and its policies and strategies relating to the future development of its banking business or microfinance banking business;
  - (c) whether the applicant has an adequate capital structure, ascertained in the manner, and in accordance with the criteria, determined by the Bank under section 35;
  - (d) the integrity of the applicant and its competence to conduct, or experience in conducting, banking business or microfinance banking business;
  - (e) the ability of the applicant to comply with the provisions of this Act;
  - (f) whether the directors and officers of the applicant are fit and proper persons for the purpose of conducting banking business or microfinance banking business, according to the criteria as the Bank may determine;
  - (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;
  - (h) whether the granting of the application for authorisation will be in the economic interest of Namibia;

- (i) whether the applicant is or will be able to apply or maintain adequate, effective and proper internal control systems when conducting the banking business or microfinance banking business in terms of the authorisation;
  - (j) whether the applicant complies or is able to comply with the laws relating to anti-money laundering and combating of financing of terrorism; and
  - (k) any other matter which the Bank may regard as relevant to the applicant or to the application.
- (2) No application for authorisation to conduct banking business or microfinance banking business must be considered by the Bank unless the Bank is satisfied that -
  - (a) the applicant complies with, or is able to comply with, all the relevant provisions of this Act; and
  - (b) the banking business or microfinance banking business to which the application relates would be to the economic advantage of Namibia.
- (3) After having considered an application made in terms of section 10(1), the Bank, **[with the concurrence of]** in consultation with 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 must in writing inform the applicant of its decision and where the application is refused provide reasons for the refusal of the application.
- (4) For the purpose of this section, “in consultation with the Minister”, means presenting the assessment results, including the decision taken by the Bank, of an application for authorization to conduct banking business or microfinance banking institution for the Minister’s input before the final decision is communicated to the applicant or applicants.
- (5)
  - (a) If the Bank under subsection (3)(b) or (c) grants the application for authorisation to conduct banking business or microfinance banking business, the Bank must provide such person with provisional authorisation valid for not more than six months, to enable the applicant to ready itself to start conducting banking business.
  - (b) On application by the person granted provisional authorisation, the Bank may extend the provisional authorisation for a period as it may deem fit.



- (c) No person who has been granted a provisional authorisation must commence with the conducting of banking business unless the Bank is satisfied that the applicant is ready to start conducting banking business.
- (d) An applicant to whom the Bank has granted a provisional authorisation under subsection (5)(a), may within the six months period or extended period, notify the Bank of its readiness upon which the Bank must conduct a pre-opening examination to ascertain the extent of such readiness.
- (6) The application fee paid by or on behalf of the applicant in terms of section 10 (2) (c) shall, irrespective of whether the application is granted or refused, not be refunded.
- (7) If the Bank under subsection (3) grants an application for authorisation to conduct banking business or microfinance banking business and has confirmed the readiness of the applicant under (5)(d), the Bank must, against payment of the prescribed authorisation fee by or on behalf of the person who applied for the authorisation, issue, in the name of such person, a certificate of authorisation to conduct banking business or microfinance banking business.
- (8) A certificate contemplated in subsection (6) must -
  - (a) be in the form;
  - (b) contain the particulars; and
  - (c) be issued and signed by a person,
 decided on by the Bank.

## **12. Duration and conditions of authorisation**

- (1) An authorisation issued under section 11 **[shall]** will, subject to 20 or 69, as the case may be, be valid for an indefinite period of time.
- (2) A banking institution or microfinance banking institution must -
  - (a) if it intends to effect any change in, or in any of the circumstances relating to, any of the particulars furnished by the banking institution or microfinance banking institution when it in terms of section 10 applied to the Bank for the granting of an authorisation under section 11, give the Bank at least 30 days written notice of such intended change; or
  - (b) if any change occurs in any of the circumstances referred to in paragraph (a), immediately in writing inform the Bank of such change which has so occurred,
 together with full particulars of such change or intended change, as the case may be.

- (3) The Bank may, on receipt of a notice contemplated in paragraph (a) or (b) of subsection (2), as the case may be, or if a banking institution or microfinance banking institution effects a change, or a change occurs, as the case may be, in the circumstances contemplated in that subsection, and the banking institution or microfinance banking institution fails to inform the Bank of such change as required by that subsection, and if in the opinion of the Bank, the change or the intended change in the circumstances of the banking institution or microfinance banking institution contemplated in that subsection is of such a nature or extent that the Bank considers it necessary to amend any of the conditions subject to which the authorisation was granted, the Bank must –
- (a) in writing notify the banking institution or microfinance banking institution of the Bank's intention to so amend such conditions; and
  - (b) together with the notice contemplated in paragraph (a) -
    - (i) furnish the banking institution or microfinance banking institution with full particulars of the intended amendments to the conditions; and
    - (ii) request the banking institution or microfinance banking institution to, in writing and within the period of time specified in the notice, make written representations to the Bank relating to such intended amendments.

### **13. Application for registration as controlling company**

- (1) A company which -
- (a) desires to exercise control over any banking institution or microfinance 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 microfinance banking business; or
    - ii) has applied in terms of section 10 for authorization to conduct banking business or microfinance banking business,

may, subject to this section, apply to the Bank to be approved 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.
- (3) For the purposes of this Act, a person is deemed to exercise control over a banking institution or microfinance banking institution if, in the case where that person is a company, the banking institution or microfinance 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 the banking institution or microfinance 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 or microfinance 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 or microfinance 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 microfinance banking institution; or
  - (c) has the power to determine the appointment of the majority of the directors of that banking institution or microfinance 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 or microfinance banking institution mainly because he or she is a director of the person who exercises control over a banking institution or microfinance 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 or microfinance 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 section 1 of the Namibia Financial 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 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.

- (7) A company that fails to apply to the Bank in terms of subsection (1) commits an offence and is liable to a fine as determined by the Bank in terms of section 90 (1) (b).

#### **14. Granting or refusal of application for registration as controlling company**

- (1) Before considering an application for registration as a controlling company in terms of section 13, 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 13 (1) (a), the applicant is able to establish control, as contemplated in that section , over the banking institution or microfinance 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 or microfinance banking institutions;
  - (d) that every director, every principal officer or executive officer, as far as can reasonably be ascertained, is a fit and proper person to hold the office of such director, principal officer or executive officer, and that every such director, principal officer or executive 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 13(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 or microfinance banking institution.

- (3) After having considered an application made in terms of section 13, 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 and where the application is refused provide reasons for the refusal of the application..
- (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, approved the applicant as a controlling company in respect of the banking institution or microfinance 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 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 or microfinance banking institution concerned.

## **15. Cancellation by the Bank of registration of controlling company**

- (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 or microfinance 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 31 or under any other circumstances; or
  - (iii) has submitted a special resolution contemplated in section 208 of the Companies Act authorising such cancellation; or
- (b) if the authorization of a banking institution or microfinance 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 or microfinance 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.

## **16. Investment by controlling company**

A controlling company investing –

- (a) in undertakings other than a banking institution or microfinance banking institution, institutions which conduct business similar to the business of a banking institution or microfinance 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 microfinance 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 or microfinance 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 or microfinance banking institution under its control, as the Bank may determine.

## **17. Restructuring within group of companies**

- (1) No restructuring of companies within a group, of which a banking institution, microfinance banking institution or a controlling company or a subsidiary of banking institution or microfinance banking institution is a member, may be effected without the prior written approval of the Bank;

- (2) If any change occurs in any of the circumstances referred to in subsection (1), immediately in writing inform the Bank of such change which has so occurred together with full particulars of such change or intended change, as the case may be.

## **18. Annual fees**

- (1) An authorised banking institution or microfinance banking institution must, subject to subsection (2), in respect of the authorisation to conduct business as a banking institution or microfinance banking institution, and before 31 January of each year, pay to the Bank the prescribed annual fees in respect of such year.
- (2) The Bank may, upon receipt of a written request made by a banking institution or microfinance banking institution before the date for payment of the annual fees specified in subsection (1), and on good cause shown in writing grant an extension of time to such banking institution or microfinance banking institution for the payment of such fees for such period of time and subject to such conditions as the Bank may impose.
- (3) If a banking institution or microfinance banking institution fails to pay the prescribed annual fees before or on the date specified in subsection (1), or within the extended period of time, if any, granted by the Bank under subsection (2) -
- (a) the authorisation referred to in subsection (1) shall terminate on that date or on the last day of the extended period of time, as the case may be; and
  - (b) the unpaid annual fee and any penalty payable in terms of subsection (4)-
    - (i) shall be a debt due to the Bank by the banking institution or microfinance banking institution; and
    - (ii) may be recovered by the Bank from the banking institution or microfinance banking institution by means of action instituted in any court having jurisdiction.
- (4) If the annual fees payable in terms of subsection (1) are not paid on or before the date specified in that subsection, such late payment of the annual fees shall, subject to subsection (2), be subject to the payment of a penalty at the prescribed rate.

## **19. Subsidiaries, branch offices, representative offices and other interests of a banking institution, microfinance banking institution or controlling company**

- (1) A banking institution or microfinance banking institution must not, without the prior written approval of the Bank -
- (a) establish or acquire a subsidiary;
  - (b) open a branch outside Namibia;

- (c) acquire any direct or indirect interest in any undertaking outside Namibia; or
  - (d) establish a representative office outside Namibia.
- (2) A banking institution or microfinance banking institution must not less than 30 days prior to -
  - (a) the opening of a branch in Namibia by the banking institution or microfinance banking institution;
  - (b) the disposal of a subsidiary, or of any interest in any other undertaking; or
  - (c) the closing of a representative office or of a branch office,

in writing inform the Bank of the intended opening, disposal or closing, as the case may be.
- (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.

## **20. Cancellation of authorisation**

- (1) The Bank may, after consultation with the Minister and subject to subsection (2), by notice in writing addressed and delivered to a banking institution or microfinance banking institution, cancel, from a date specified in the notice, the authorisation to conduct banking business or microfinance banking business granted to the banking institution or microfinance banking institution under section 11, if the banking institution or microfinance banking institution -
  - (a) fails to commence with the conducting of banking business or microfinance banking business within a period of six months -
    - (i) after the date for commencement of the conducting of banking business or microfinance banking business specified by the Bank upon the granting of the authorisation; or
    - (ii) if no date for commencement contemplated in subparagraph (i) is specified by the Bank, after the date of issue of the certificate of authorisation under section 12;



- (b) fails to comply with any condition imposed by the Bank under section 11(3)(c);
  - (c) ceases to conduct the business for which it is authorised;
  - (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 or microfinance banking institution concerned is conducting its business in a manner detrimental to the interest of its customers or the general public ; or
  - (e) in the circumstances contemplated in section 47(6), and if the Bank is of the opinion that the banking institution or microfinance banking institution concerned is conducting its business in a manner detrimental to the interests of its customers or the general public.
- (2) The Bank must, before cancelling the authorisation of a banking institution or microfinance banking institution under subsection (1), but subject to subsection (5), in writing give the banking institution or microfinance banking institution not less than 30 days written notice of its intention to so cancel the authorisation.
- (3) A notice to a banking institution or microfinance banking institution contemplated in subsection (2) must -
- (a) state that the Bank intends to cancel the authorisation of a banking institution or microfinance banking institution;
  - (b) specify the reason or reasons for the intended cancellation; and
  - (c) invite the banking institution or microfinance banking institution to, within the period of time specified in the notice, in writing make representations to the Bank to show cause why the authorisation must not be cancelled.
- (4) The Bank may, at the expiration of the 30 day period contemplated in subsection (2) and after considering the representations, if any, made by the banking institution or microfinance banking institution concerned after consultation with the Minister -
- (a) cancel the authorisation under subsection (1); or
  - (b) without cancelling the authorisation, amend the conditions subject to which the authorisation was granted; or
  - (c) decide not to cancel the authorisation or to amend the conditions referred to in paragraph (b),

and must immediately in writing inform the banking institution or microfinance banking institution of its decision.

- (5) Despite subsection (2), the Bank may, after consultation with the Minister, in circumstances contemplated in subsection (1) and without prior notice, direct a banking institution or microfinance banking institution by means of a notice delivered in accordance with section 33 (3)(d), to summarily suspend all, or any part of, the banking business or microfinance banking business for such period and subject to such conditions as the Bank may specify in such notice.
- (6) A banking institution or microfinance banking institution to which a notice under subsection (5) has been delivered may, within a period of 14 days after receipt of the notice, in writing submit to the Bank representation relating to the notice and to the suspension of its banking business or microfinance banking business, or part thereof, under that subsection.
- (7) On receipt of representations by a banking institution or microfinance banking institution under subsection (6), the Bank may confirm or rescind the suspension made by it under subsection (5), or may vary the conditions subject to which the banking business or microfinance banking business of the banking institution or microfinance banking institution was so suspended.

## **21. Repayment of deposits upon cancellation of authorisation**

- (1) If the authorisation to conduct banking business or microfinance banking business granted to a banking institution or microfinance banking institution ceases or has been cancelled, the Bank may give notice to the banking institution or microfinance banking institution -
  - (a) to repay all monies due by it to its depositors, including any interest on, or any other amounts owing by it in respect of, such monies; and
  - (b) to change its name and to amend its memorandum and articles of association, in accordance with the directions and within the period of time specified by the Bank in the notice.
- (2) Different directions or periods of time may, in respect of different kinds of deposits, be specified by the Bank under subsection (1) (a).
- (3) Despite subsection (2), the Bank may, in specifying the directions or periods of time contemplated in that subsection, not give any preference to any depositor which such depositor does not enjoy in terms of any other law.
- (4) A banking institution or microfinance banking institution which in accordance with a notice under subsection (1) repays a deposit before the due date agreed upon for the repayment of the deposit, must not be bound to pay any interest or any other amounts which would have been payable in respect of the deposit for the period calculated from the date of the actual repayment up to the due date.
- (5) A banking institution or microfinance banking institution which fails to comply with a notice under subsection (1) must for the purposes of sections 349 and 350 of the Companies Act be deemed not to be able to pay its debts.

## **[Cancellation of authorisation upon winding-up**

**17. When the affairs of a banking institution or microfinance banking institution have been completely wound up in terms of section 425 of the Companies Act -**

**(a) the Master of the High Court must transmit to the Bank a copy of the certificate contemplated in subsection (3) of that section of the Companies Act; and**

**(b) an authorisation granted to the banking institution or microfinance banking institution must, from the date of the dissolution of the company concerned contemplated in subsection (3) of that section of the Companies Act, be deemed to be cancelled.]**

## **Publication of information relating to banking institutions or microfinance banking institutions**

### **22. Publication of information relating to banking institutions**

The Bank, by notice in the Gazette in the prescribed form and manner -

**(a) must inform -**

**(i) the authorisation of a person to conduct business as a banking institution or microfinance banking institution;**

**(ii) any change of name of a banking institution or microfinance banking institution; or**

**(iii) the cancellation of an authorisation; or**

**(b) may inform the suspension of the authorisation, of the business or of any part of the business of a banking institution or microfinance banking institution,**

under any provision of this Act.

### **23. Representative office of foreign banking institution**

**(1) No foreign banking institution must establish a representative office in Namibia without the prior written approval of the Bank.**

**(2) A foreign banking institution must, in the form and manner required by the Bank, apply for an approval contemplated in subsection (1) and must, together with the application, furnish such particulars or documents relating to the application as the Bank may specify and inform the applicant.**

- (3) An application in terms of subsection (2) must be accompanied by the prescribed application fee.
- (4) The representative office in Namibia of a foreign banking institution must -
  - (a) not less than 20 days prior to the foreign banking institution -
    - (i) changing its name;
    - (ii) substituting its chief representative officer;
    - (iii) changing the address or location of its representative office in Namibia; or
    - (iv) closing down the representative office,in writing inform the Bank of such intended change, substitution or closing, as the case may be;
  - (b) not conduct banking business in Namibia; and
  - (c) only be engaged in such activities in Namibia as the Bank may approve and in writing inform the foreign banking institution.

#### **24. Branches of foreign banking institutions**

- (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 the 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 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, **[the concurrence of]** in consultation with 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 in writing, subject to further provisions of this Act, inform the applicant of its decision and where the application is refused provide reasons for the refusal of the application.

- (5) For the purpose of this section, "in consultation with the Minister", means presenting the assessment results, including the decision taken by the Bank, of an application for authorization to conduct business as a foreign banking institution for the Minister's input before the final decision is communicated to the applicant or applicants.

- (6)
  - (a) If the Bank under subsection (4) (c) grants the application for authorisation to conduct banking business by means of a branch in Namibia subject to conditions, the Bank must provide such, person with provisional authorisation valid for not more than six months, to enable the applicant to ready itself to start conducting banking business by means of a branch in Namibia.
  - (b) On application by the person granted provisional authorisation, the Bank may extend the provisional authorisation for a period as it may deem fit.
  - (c) No person who has been granted a provisional authorisation must commence with the conducting of the business of a branch, unless the Bank is satisfied that the applicant is ready to start conducting such business.
  - (d) An applicant to whom the Bank has granted a provisional authorisation under subsection (5)(a), may within the six months period or extended period, notify the Bank of its readiness upon which the Bank must conduct a pre-opening examination to ascertain the extent of such readiness.

- (7) The Bank may not grant an application referred to in subsection (4), unless the Bank is satisfied that all the requirements as determined by the Bank have been met.
- (8) If the Bank grants an application referred to in subsection (4) and has confirmed the readiness of the applicant under (6)(d) the Bank must, against payment of the prescribed authorisation fee by or on behalf of the person who applied for the authorisation, issue to the foreign institution concerned a certificate of authorization to conduct banking business by means of a branch in Namibia.
- (9) 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 90 (2)(a).

#### **25. Application of other provisions of the Act to branches of foreign banking institutions**

- (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.

### **PART IV**

#### **SHAREHOLDING IN BANKING INSTITUTIONS, MICROFINANCE BANKING INSTITUTIONS AND CONTROLLING COMPANIES**

#### **26. Restriction on shareholding and changes in shareholding in a banking institution, microfinance banking institutions and controlling company**

- (1) Despite the Companies Act, but subject to the prior written approval of the Bank
  - (a) no banking institution, microfinance banking institution or controlling company must allot or issue, or register the transfer of, any of its shares to a person; or

- (b) no person must acquire any shares in a banking institution, microfinance banking institution or controlling company,

to the extent to which the nominal value of the shares so allotted, issued, transferred or acquired, together with the nominal value of any other shares in the banking institution, microfinance banking institution, or controlling company already registered in the name of such person or in the name of any related party of such person, equals or exceeds in total 20 per cent of the total nominal value of all issued vote-bearing shares in the banking institution, microfinance banking institution or controlling company.

- (2) Without prior written notification to the Bank -

- (a) no banking institution, microfinance banking institution or controlling company must allot or issue, or register the transfer of, any of its shares to a person; or

- (b) no person must acquire any shares in a banking institution, microfinance banking institution or controlling company,

to the extent to which the nominal value of such shares so allotted, issued, transferred or acquired, together with the nominal value of any other shares in the banking institution, microfinance banking institution or controlling company already registered in the name of such person or any related party of such person, equals or exceeds, subject to subsection (1), **[five]** ten per cent of the total nominal value of all issued vote-bearing shares in the banking institution, microfinance banking institution or controlling company.

- (3) Despite the provisions of the Companies Act, persons purchasing shares through nominees are obliged, through their nominees or otherwise, to notify, or apply to the Bank for approval, in line with subsection (1) and (2).

- (4) Any transfer, registration or acquisition of shares of a listed banking institution, microfinance banking institution and controlling company is exempted from subsections (1) and (2), provided that a person acquiring listed shares through a domestic stock exchange, within 5 working days after such acquisition of shares:

- (a) notify the Bank if such person acquired shares equal to or more than ten per cent of the nominal value; or

- (b) obtains approval of the Bank if such person acquired shares equal to or more than twenty per cent of the nominal value

in a banking institution or microfinance banking institution.

- (5) Despite subsections (1) and (2), no single shareholder or group of related shareholders may without the prior written approval of the Bank, acquire more than 50 per cent of vote bearing shares in a banking institution.

(6) On receipt of an application or notification in terms of this section, the Bank may:

- (a) refuse the application;
- (b) approve the application;
- (c) approve the application subject to such conditions as the Bank may specify; or
- (d) object to the acquisition or transfer of shares in respect of section 26 (1) and section 26 (4)(a);

and must in writing inform the applicant of its decision and where the application is refused provide reasons for the refusal of the application.

- (7) If the Bank under paragraph (c) of subsection (6) approves the application subject to conditions, the Bank must in writing furnish the applicant with particulars of the conditions so imposed.
- (8) If the Bank under paragraph (d) of subsection (6) objects to the acquisition or transfer of shares, the Bank must in writing furnish the applicant with preliminary order in terms of section 33.
- (9) If the nominal value of shares in a banking institution, microfinance banking institution or controlling company issued or to be registered in the name of a person, together with the nominal value of the shares already held by the person, amount to the lesser of N\$ 100 000 or one per cent of the value of all the shares issued in the banking institution, microfinance banking institution or controlling company, the banking institution, microfinance banking institution or controlling company may, unless it has knowledge to the contrary, accept that the person is not a related party of any other shareholder in the banking institution, microfinance banking institution or controlling company.
- (10) No person who is not a fit and proper person in accordance with the criteria for fitness and properness relating to substantial shareholders as determined by the Bank must become a substantial shareholder of a banking institution, microfinance banking institution or controlling company.
- (11) No banking institution, microfinance banking institution or controlling company must allot or issue, or register a transfer of, shares to a person -
  - (a) who is; or
  - (b) who will, as a result of the allotment, issue or registration, become,



a substantial shareholder of the banking institution, microfinance banking institution or controlling company, if such person is prohibited in terms of subsection (10) to be, or to become, a substantial shareholder of a banking institution, microfinance banking institution or controlling company.

- (12) For the purposes of this section, a “related party” in respect of a person means -
- (a) an associate or close relative of the person; or
  - (b) any other person who has entered into an agreement with the person relating to -
    - (i) the acquisition, holding or disposal; or
    - (ii) the exercising of voting rights in respect,of shares in a banking institution, microfinance banking institution, controlling company or in any trust controlled or administered by the person.
- (13) The Minister may, on the recommendation of the Bank, by notice in the Gazette amend the substantial shareholder threshold specified under this section.

## **27. Shareholder’s register and registration of shares**

- (1) Subject to subsection (3), a banking institution, microfinance banking institution or a controlling company must, in such form and manner as the Bank may approve, maintain a register of the current beneficial holders of all vote-bearing shares in the banking institution, microfinance banking institution or the controlling company.
- (2) The transfer of a share referred to in subsection (1), will not be valid until such time as the transfer has been recorded in the register contemplated in that subsection.
- (3) If the Bank is satisfied that the register kept by a banking institution, microfinance banking institution or a controlling company in terms of section 99 of the Companies Act clearly reflects the particulars of the current beneficial holders, and a record of any change in the holders, of all the shares referred to in subsection (1) of this section, the Bank may, at the request of the banking institution, microfinance banking institution or the controlling company, in writing exempt the banking institution, microfinance banking institution or controlling company from the requirement to maintain the register contemplated in that subsection.
- (4) Despite the provisions of the Companies Act, a banking institution, microfinance banking institution or a controlling company must not, without the prior written approval of the Bank -
- (a) allot or issue any of its shares to, or register any of its shares in the name of, any person other than the intended beneficial shareholder;

- (b) transfer any share in the name of any person other than the beneficial shareholder; or
  - (c) allow any of its shares registered in the name of a person other than the beneficial shareholder before the commencement date of this Act, to remain so registered.
- (5) Subsection (4) will, subject to subsection (6), not affect the allotment or issue, or the registration of a transfer, of shares in a banking institution, microfinance banking institution or a controlling company -
- (a) in the name of a trustee of a unit trust scheme as defined in the Unit Trust Control Act, 1981 (Act 54 of 1981), or of a nominated company of the trustee approved by the Registrar of Unit Trust Companies referred to in that Act;
  - (b) in the name of an executor, administrator, trustee, curator, guardian or liquidator, as the case may be, in the circumstances referred to in section 111 (3) of the Companies Act; or
  - (c) for a period of not more than six months in the name of a stock broker, or in the name of a company established by him or her for any purpose contemplated in section 12(3) of the Stock Exchanges Control Act, 1985 (Act 1 of 1985), or in the name of an employee of the company,
- if the banking institution, microfinance banking institution or the controlling company is satisfied that the shares are allotted, issued or registered in such a manner in order to facilitate delivery of the shares to the purchaser thereof.
- (6) With respect to the shares that are allotted, issued or registered under subsection (5), the banking institution, microfinance banking institution or the controlling company, must obtain information on -
- (a) the identity of the person on whose behalf that shares is held or the beneficial shareholders; and
  - (b) the number and class of shares held for each such person with a beneficial interest.
- (7) The banking institution, microfinance banking institution or a controlling company referred to in subsection (5) must in writing furnish the Bank with full particulars of the transaction, including the details of the beneficial shareholders, relating to the allotment, issue or registration of the shares contemplated in that subsection.
- (8) The voting rights attached to the shares registered in terms of subsection (5) must, unless otherwise determined by the Bank, not be more than 25 per cent of the aggregate of the voting rights attached to all the issued shares of the banking institution, microfinance banking institution or the controlling company concerned.

## **28. Furnishing of information by shareholders**

- (1) At the written request of a banking institution, microfinance banking institution or controlling company addressed to a person who has notified the banking institution, microfinance banking institution or controlling company that he or she or it intends to acquire shares in the banking institution or microfinance banking institution, such person must, subject to subsection (2), furnish the banking institution or microfinance banking institution with the information or particulars specified in such request and which the banking institution or microfinance banking institution considers necessary to enable it to comply with sections 26 or 27, as the case may be.
- (2) The information or particulars contemplated in subsection (1) must be furnished to the banking institution, microfinance banking institution or controlling company in such form as the banking institution, microfinance banking institution or controlling company may specify in the request contemplated in that subsection.

## **29. Absence of wrongful intent**

If a banking institution, microfinance banking institution or a controlling company, or any director, officer, employee or agent of the banking institution, microfinance banking institution or controlling company, on the strength of information or particulars reasonably obtained by him or her, in good faith and without wrongful intent, acts, or fails to act, in contravention of section 26(1), (2), (3), (4) or (5) or 27(1), (2), (4), (6) or (7), such act or failure to act shall not constitute an offence.

## **30. Effects of registration of shares contrary to Act**

- (1) No person must -
  - (a) either personally or by proxy granted to any other person, cast a vote attached to; or
  - (b) receive a dividend payable in respect of,  
  
any share in a banking institution, or microfinance banking institution or a controlling company allotted or issued to him or her, or registered in his or her name, in contravention of any provision of this Act.
- (2) A vote cast in contravention of paragraph (a) of subsection (1) will, for the purposes of this Act, be null and void.
- (3) A dividend referred to in paragraph (b) of subsection (1) shall accrue to the banking institution, microfinance banking institution or the controlling company concerned, as the case may be.

### **31. Restriction of right to control banking institution or microfinance banking institution**

- (1) Subject to subsection (3) and section 26, a person may not acquire or, directly or indirectly exercise control over a banking institution or microfinance banking institution, unless such person is -
  - (a) a fit and proper person as contemplated in section 26(4);
  - (b) incorporated as a company under the Companies Act; and
  - (c) registered as a controlling company” in terms of section 14 in respect of such banking institution or microfinance banking institution.
- (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 microfinance 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 or microfinance 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 or microfinance banking institution to a shareholding with a total nominal value of not more than 20 (twenty) per cent of the total nominal value of all the issued shares of that banking institutions or microfinance 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 (twenty) per cent of the voting rights attached to all the issued shares of the banking institution or microfinance 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) Any 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 90 (2)(a).

### **32. Restriction on foreign shareholder in banking institutions and microfinance banking institutions**

- (1) (a) Despite any other legislation to the contrary,
  - (i) no banking institution or microfinance banking institution must allot, issue, or register the transfer of, any of its shares to any foreign nationals; or
  - (ii) no foreign nationals must acquire any shares in a banking institution or microfinance banking institution,

to the extent to which the nominal value of the shares so allotted, issued, transferred or acquired, together with the nominal value of any other shares in the banking institution or microfinance banking institution already registered in the names of foreign nationals or in the name of any related party of such foreign nationals, exceeds in total 55 per cent of the total nominal value of all issued vote-bearing shares in the banking institution or microfinance banking institution.
- (b) Despite the provisions of subsection (1), no foreign nationals must acquire more than 50 per cent of the vote bearing shares in a banking institution or microfinance banking institution without the prior written approval of the Bank.
- (2) (a) The Bank, in consultation with the Minister may, on application in writing by a banking institution, microfinance banking institution or foreign nationals referred to under subsection (1), permit such banking institution, microfinance banking institution or foreign nationals to allot, issue, transfer

or acquire shares as the case may be, in excess of 55 per cent, if it is in the interest of financial stability.

(b) In pursuant of subsection (2)(a), the Bank may not approve an application to allot, issue, transfer or acquire shares in excess of 75 per cent of the total nominal value of all issued vote-bearing shares in the banking institution or microfinance banking institution unless the Bank is satisfied that there are no suitable local persons.

(c) In the event that there are no suitable local persons as envisaged by paragraph (b), the banking institution or microfinance banking institution must within a period of 8 years ensure that the limits as set under subsection (1) are met.

(3) On receipt of an application in terms of this section, the Bank may;

(a) refuse the application;

(b) approve the application; or

(c) approve the application subject to such conditions as the Bank may specify;

and must in writing inform the applicant of its decision and where the application is refused provide reasons for the refusal of the application

(4) If the Bank under paragraph (c) of subsection (3) approves the application subject to conditions, the Bank must in writing furnish the applicant with particulars of the conditions so imposed.

(5) The Bank, by notice in writing, addressed to the banking institution, microfinance banking institution or foreign national, may prohibit such banking institution or microfinance banking institution to allot, issue or transfer shares or such foreign national to acquire shares in the banking institution or microfinance banking institution should such allotment, issuance, transfer or acquisition of shares contravene subsection (1).

- (6) The notice under subsection (3), must compel such banking institution, microfinance banking institution or foreign national to reduce, within a period specified by the Bank, the shareholding in that banking institution or microfinance banking institution to a shareholding as stipulated under subsection (1);
- (7) Any banking institution, microfinance banking institution or foreign national who fails to comply with a notice issued under subsection (3) commits an offence and is liable to the penalties provided for under section 90 (2)(a);
- (8) For the purposes of this section, a “related party” will carry the same meaning as stated under section 26(6) of this Act.
- (9) These sections will have no retrospective effect.

### **33.Prohibitions and restrictions**

- (1) The Bank may, if it is satisfied that a banking institution, microfinance banking institution, controlling company or any other person has contravened, or has failed to comply with, any of the provisions of section 26, 27, 28 or 31, as the case may be, in writing make a preliminary order imposing one or more of the restrictions specified in subsection (2) on the person or on the banking institution, microfinance banking institution or controlling company, as the case may be, as the Bank may consider appropriate.
- (2) A preliminary order by the Bank contemplated in subsection (1) may, in respect of any of the shares forming the subject of, or related to, the contravention or failure referred to in that subsection, prohibit -
  - (a) the transfer of, or the due performance in terms of any agreement to transfer, the shares; or
  - (b) in the case of unissued shares, the transfer of, or the right to be issued with, the unissued shares;
  - (c) the exercise of any voting rights in respect of the shares;
  - (d) the issue of any further shares in pursuance to any offer made to the holder of the shares; or

- (e) except in the case of liquidation, the payment of any amount whatsoever due by the banking institution, microfinance banking institution or controlling company in respect of the shares.
- (3) A preliminary order made by the Bank under subsection (1) must -
- (a) be in the form required, and signed by a person appointed, by the Bank;
  - (b) be addressed to the banking institution, microfinance banking institution, controlling company or person concerned;
  - (c) specify, and contain full particulars of, the order made by the Bank; and
  - (d) during normal hours of business be delivered by a person appointed in writing by the Bank for such purpose, upon the principal officer of the banking institution, microfinance banking institution, controlling company or upon the other person contemplated in subsection (1), as the case may be, to whom the preliminary order is directed, or, in the case of a banking institution microfinance banking institution or controlling company, if the principal officer is not available, upon any person over the age of 16 years employed by the banking institution, microfinance banking institution or controlling company.
- (4) The person to whom the preliminary order is delivered in terms of subsection (3) (d), must -
- (a) in writing acknowledge receipt of the order, specifying -
    - (i) the full names and designation of the person who received the order; and
    - (ii) the date and time of such receipt; and
  - (b) sign the acknowledgment of receipt contemplated in paragraph (a).
- (5) The Bank may, at its discretion and in addition to the delivery of the preliminary order in terms of subsection (3)(d) upon the banking institution, microfinance banking institution or controlling company or upon the other person concerned, publish the preliminary order in one or more newspapers in the manner and form as the Bank may specify.
- (6) A preliminary order delivered upon a banking institution, microfinance banking institution, controlling company or other person in terms of subsection (3) (d) must, from the date of such delivery, be binding upon the banking institution, microfinance banking institution, controlling company or the other person, as the case may be, to whom the order is directed and to whom it is delivered in terms of that subsection.
- (7) A person holding shares in a banking institution, microfinance banking institution or controlling company and to whom a preliminary order has been



delivered in terms of subsection (3) (d) **[shall]** must, within seven days after the date of such service, or within such longer period of time as the Bank may allow, surrender the share certificates concerned to the Bank, together with such other documents relating to the shares as the Bank may specify in the order.

- (8) Any person to whom a preliminary order has been delivered in terms of subsection (3) (d), or any other person prejudiced by the order, may within a period of 14 days after the date of service of the order, or after the date upon which he or she became aware of the order, as the case may be, make written representations to the Bank applying for -
  - (a) the cancellation of the order on the grounds that the person had not contravened, or had not failed to comply with, any provision of this Act as specified in the order; or
  - (b) an amendment of the order on the grounds specified in the application.
- (9) The Bank may, after considering the representations made to it in terms of subsection (8) -
  - (a) confirm the preliminary order;
  - (b) cancel the preliminary order; or
  - (c) confirm the preliminary order subject to such amendments as the Bank may consider appropriate.
- (10) If the Bank confirms a preliminary order under subsection (9), it may dispose of the shares surrendered to it in terms of subsection (7), in such manner as it may consider appropriate, to a person qualified to hold such shares in terms of this Act.
- (11) The proceeds of a sale of shares under subsection (10) must, subject to subsection (12), be paid by the Bank to the person entitled to the proceeds.
- (12) If the Bank is for any reason unable to pay the proceeds referred to in subsection (11) to the person entitled thereto under that subsection, section 69(1) must with the necessary changes apply to the proceeds.
- (13) The Bank may in writing give such instructions or directions to the directors or officers of a banking institution, microfinance banking institution or controlling company contemplated in subsection (1) as the Bank may consider necessary to give effect to an order made by the Bank under this section.
- (14) Any transaction, including any agreement or arrangement, in relation to any shares or security, or to any interest in any shares or security, which is in contravention of -
  - (a) any order made under this section; or

(b) any instruction or direction given under subsection (13),

by the Bank, must be null and void.

- (15) The Bank may, irrespective of whether a person contemplated in subsection (1) has been prosecuted in respect of the contravention of, or failure to comply with, a provision of this Act referred to in that subsection, make a preliminary order or take such other steps as the Bank may consider appropriate.
- (16) Any person who fails to comply with any provision of subsection (4) is liable to a fine determined by the Bank.

## **PART V PRUDENTIAL REQUIREMENTS AND LIMITATIONS**

### **34. Recovery Plans**

- (1) A banking institution, microfinance banking institution or controlling company must annually, prepare and maintain recovery plans, on an individual and/or consolidated basis, containing the arrangements and measures to address a possible severe financial stress such institution may face, at such times and in such manner as may be determined by the Bank.
- (2) The Bank may require banking institutions, microfinance banking institutions or controlling companies to, submit for review such recovery plans as referred to under subsection (1).
- (3) Without prejudice to subsection (1), the Bank may request the banking institution, microfinance banking institution or controlling company submitting the recovery plan to:
- (a) provide additional information or records deemed necessary in order to evaluate the recovery plan filed;
  - (b) supplement the recovery plan with a plan to negotiate with all or some of the banking institution's, microfinance banking institution's or controlling company's creditors in order to restructure its loan capital, debt and accounts payable in general;
  - (c) propose the amendment of the recovery plan in order to make it more effective; or

- (d) apply the above plans or parts thereof in keeping with a specific timetable

### **35. Standards of corporate behaviour**

- (1) A banking institution, microfinance banking institution, or its holding company in respect of its activities conducted in Namibia or its subsidiaries must, in accordance with guidelines, circulars or notices issued by the Bank under section 3 and to the satisfaction of the Bank, at all times conduct its business in a prudent manner and consistent with the best standards and practices of corporate governance and sound financial management.
- (2) Unless otherwise prescribed or determined, a banking institution, microfinance banking institution or controlling company must comply with the standards of corporate governance generally practiced, or required to be so practiced, by companies listed on any stock exchange established in Namibia under the Stock Exchanges Control Act, 1985 (Act 1 of 1985).

### **36. Minimum capital funds**

- (1) The minimum capital funds, unimpaired by losses, of a banking institution or microfinance banking institution must, subject to subsection (2), (4) or (5), as the case may be, at any time not be less than the greater of -
- (a) an amount determined by the Bank ; or
  - (b) an amount which represents a percentage of the risk weighted assets and other exposures of a banking institution or microfinance banking institution as the Bank may determine.
- (2) Despite any provision of this section, the Bank may, if it is of the opinion that there is a risk of the existing capital funds of a banking institution or microfinance banking institution being impaired, require the banking institution or microfinance banking institution to, in addition to the capital funds required by or under subsection (1), acquire such further capital funds as the Bank may specify.
- (3) The Bank may -
- (a) on application in writing and on good cause shown, in writing permit a banking institution or microfinance banking institution to, for such limited period of time as the Bank may specify, have capital funds which are lower than the capital funds determined by or under subsection (1), and which limited period of time and the amount of the lower capital funds shall be specified in the permission;
  - (b) determine that the capital requirements of a banking institution or microfinance banking institution contemplated in subsection (1), must, on a consolidated basis, apply to, and the capital be reflected in the

consolidated accounts of, the banking institution, microfinance banking institution, its holding company or the affiliate or associate of the banking institution, microfinance banking institution or its holding company; or

- (c) for the purposes of this section, determine the percentage and risk weighting of assets or other exposures.

### **37. Minimum capital funds in respect of a banking group**

- (1) Despite section 35(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.

### **38. Composition of capital funds**

The Bank may, for the purposes of section 35, determine the composition and proportions of the different classes of capital constituting capital funds contemplated in, and other requirements and criteria of approval relating to, the last mentioned section.

### **39. Provision to be made for certain matters**

- (1) A banking institution or microfinance banking institution must, in order to ascertain whether the banking institution or microfinance banking institution is complying with section 35, or before any dividend is declared, take into account and in its calculations make provision for -
  - (a) bad, doubtful or substandard debts, and the depreciation of assets, to be calculated not less than quarterly; and

- (b) operating losses, including depreciation and bad debts not yet written off;
  - (c) any amount representing expenses relating to the organisation or extension of business or goodwill, or other intangible assets, to be calculated not less than quarterly; or
  - (d) such other item or items as the Bank may determine.
- (2) The minimum standards for provision for bad, 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.
- (3) If a capital requirement is to be applied on a consolidated basis in terms of section 35(5) (b), subsection (1) of this section must apply to all persons within the group constituting the consolidation.

#### **40. Minimum liquid assets**

- (1) The Bank may determine the minimum, or minimum average, liquid assets which a banking institution or microfinance banking institution must hold at any time, or over the period of time as specified in the determination.
- (2) If a banking institution or microfinance banking institution fails to comply with a determination under subsection (1), it must immediately in writing report such failure to the Bank and shall in such report state the reasons for such failure.
- (3) During any period of time which a banking institution or microfinance banking institution fails, or is unable, to comply with a determination under subsection (1), it must not grant any loan or credit to any person without the prior written approval of the Bank.

#### **41. Restriction on dividends**

- (1) A banking institution or microfinance banking institution, if its capital is adequate in terms of section 35, may declare, pay or credit dividend, or make any transfer from its profits.
- (2) In the event that dividends to be paid, declared, credited or any transfer to be made in terms of subsection (1), exceed current audited profits, prior written approval of the Bank must be obtained.

#### **42. Minimum local assets**

- (1) a banking institution or microfinance banking institution **[shall]** must maintain the minimum local assets as determined by or under this section.
- (2) The minimum local assets contemplated in subsection (1) **[shall]** will be determined by the Bank.

- (3) For the purposes of this section, “local assets” means any asset consisting of exposures with persons permanently resident in Namibia and other assets situated in Namibia.

#### **43. Large exposures and concentrations of credit**

- (1) A banking institution or microfinance banking institution **[shall]** must not, without the prior written approval of the Bank, undertake exposure to a single person, to a group of related persons, or to any industry in or outside Namibia which exceeds such percentage of its capital funds as the Bank may determine.
- (2) The total amount of large exposures of a banking institution or microfinance banking institution must not exceed such percentage of its capital funds as the Bank may determine.
- (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”.

#### **44. Lending against own shares or debt instruments**

No banking institution or microfinance banking institution **[shall]** must, directly or indirectly, lend money or issue guarantees against the security of -

- (a) the shares; or
- (b) such debt instruments which may qualify as capital,

of the banking institution, microfinance banking institution, of its holding company or of any of its subsidiaries.

#### **45. Exposure to directors, to executive officers **[with managerial responsibilities]** or to shareholders to be secured**

- (1) No banking institution or microfinance banking business may have any exposure to -
- (a) any director or executive officer **[with managerial responsibility]** in the banking institution, microfinance banking business or controlling company;
  - (b) any substantial shareholder in the banking institution or microfinance banking business;
  - (c) **[any of the banking institution`s auditors]** any of the banking institution`s, microfinance banking institution`s or controlling company`s auditors. For the purposes of this section, auditors will only include the leading /engagement partner and/or manager in charge;

- (d) any affiliate, associate, or close relative of a person referred to in paragraph (a), (b) or (c), as the case may be; or
- (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, or
- (f) any proxy of a director or substantial shareholder referred to in paragraph (a) or (b) as the case may be

except if such exposure complies with the requirements for exposures to connected persons as determined by the Bank.

#### **46. Terms of exposure to directors, officers and shareholders**

The Bank **[shall]** must determine the criteria and conditions to be employed for establishing the acceptability or evaluation of collateral for the purpose of this Act.

#### **47. Exposure to holding companies, subsidiaries and affiliates**

- (1) Despite section 234 of the Companies Act, but subject to subsection (2) of this section, a banking institution or microfinance banking institution **[shall]** may, with 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;
- (2) A banking institution or microfinance banking institution **[shall]** must not grant a loan, advance or credit facility under subsection (1) unless such loan, advance or credit facility -
  - (a) is fully secured;
  - (b) is subject to the criteria or conditions for the granting of, or the terms and conditions relating to the payment of interest on, or the repayment of, the loan, advance or credit facility which is not more favourable than the criteria or conditions ordinarily applicable to any member of the public; and
  - (c) has been approved by the majority of the entire board of directors or a committee of the board of directors.
- (3) Any banking institution or microfinance banking institution which -
  - (a) without the **[approval]** prior written notification 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),

must pay a fine as determined by the Bank.

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

#### **48. Restriction on commercial activities**

- (1) A banking institution must only conduct financial business or transactions which are usually or ordinarily conducted by banking institutions in terms of this Act or of any other law.
- (2) A microfinance banking institution must only, subject to subsection (7), conduct financial business or transactions as may be determined by the Bank.
- (3) A banking institution or microfinance banking institution must not, subject to subsection (7), conduct, or have any direct interest in, any activities relating to merchandise, trade, industry, insurance, mining, agriculture, fisheries or commerce unless such activities -
- (a) are permitted in terms of subsection (1) or (2), as applicable; or
  - (b) may, in exceptional circumstances, be necessary in the course of -
    - (i) the banking business of the banking institution or the microfinance banking business of the microfinance banking institution, or in the course of the satisfaction of debts which may be incurred as a result of such banking business or microfinance banking business; or
    - (ii) any trusteeship or the administration of the estate of a deceased person.
- (4) The Minister may, on the recommendation of the Bank, by notice in the Gazette define the activities of a banking institution or microfinance banking institution contemplated in subsection (3).
- (5) If a banking institution or microfinance banking institution fails to comply with this section, or conducts activities which are in contravention of this section, the Bank may by means of a written notice delivered to such banking institution or microfinance banking institution, in far as is applicable, in accordance with section 33 (3)(d) instruct such banking institution or microfinance banking institution to, within the period of time specified in the instruction, comply with this section or to discontinue the activities so conducted in contravention of this section, as the case may be.



- (6) If a banking institution or microfinance banking institution fails to comply with an instruction under subsection (5), the Bank may, under 20, cancel the authorisation to conduct banking business or microfinance banking business granted to the banking institution or microfinance banking institution.
- (7) The Bank may, upon a written application made by a banking institution or microfinance banking institution and delivered to the Bank, and subject to such conditions as the Bank may impose, exempt the banking institution or microfinance banking institution from the restrictions in subsection (3), or from such provisions of that subsection as the Bank may specify in the exemption.

#### **49. Limitation on investment in property**

- (1) No banking institution or microfinance banking institution must, subject to the restrictions in this section, directly or indirectly, purchase, acquire or take on lease any immovable property, except as may be necessary for the purposes of conducting its banking business or microfinance banking business, for housing its staff, or for such other purposes or in such other circumstances as the Bank may determine.
- (2) The total amount of the investments made, or disbursed in respect of the purchases, acquisitions or leases by a banking institution or microfinance banking institution under subsection (1), must unless otherwise approved by the Bank upon a written application and on good cause shown by the banking institution or microfinance banking institution concerned, not exceed the amount of the capital funds of the banking institution or microfinance banking institution.
- (3) A banking institution or microfinance banking institution may, against any immovable property, secure a debt owing to itself by, or an advance made or to be made by itself to, any person, whether or not the ownership in respect of the property vests in or the property is registered in the name of, the person or any other person.
- (4) In the event of a default in the repayment of a debt or an advance referred to in subsection (3), or if the property referred to in that subsection is for any reason sold in execution or in any other manner, the banking institution or microfinance banking institution concerned may, subject to subsection (5), acquire such property.
- (5) The acquisition of property by a banking institution or microfinance banking institution under subsection (4) must for a period of five years from the date of the acquisition, not be deemed property acquired under subsection (1).

### **PART VI DIRECTORS, PRINCIPAL OFFICERS AND AUDITORS**

#### **50. Directors and principal officers and executive officers of banking institutions or microfinance banking institution**

- (1) The number of directors of a banking institution microfinance banking institution or controlling company, 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) may be employed by the banking institution or microfinance 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) The Bank may, upon a written request by a banking institution or microfinance banking institution, in writing exempt the banking institution or microfinance 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.
- (4) **[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, microfinance banking institution or controlling company.
- (5) The board of directors of a banking institution microfinance banking institution and controlling company -
  - a) is responsible for the good corporate governance and business performance of the banking institution, microfinance 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, microfinance 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, microfinance 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, microfinance 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, microfinance banking institution or controlling company may not be able to properly conduct its business as a going concern;
    - (ii) the banking institution, microfinance 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, microfinance banking institution or controlling company has suspended, or is about to suspend any payment of any kind; or
    - (iv) the banking institution or microfinance banking institution does not, or may not be able to, meet its capital requirements determined by or under section 35; and
  - (e) constitute from among its members an audit committee as contemplated in section 50.
- (6) A director, in relation to the banking institution, microfinance 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, microfinance banking institution and its depositors, or of the controlling company, as the case may be, and must in the performance of his or her functions as a director comply with this Act.
- (7) (a) The principal officer of a banking institution, microfinance banking institution or controlling company or any other officer of the banking institution, microfinance banking institution or controlling company acting on his or her behalf, 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 (5) (d) may, or is likely to, occur;
- (b) A principal officer or manager of a branch of a banking institution or microfinance banking institution 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 microfinance 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 or microfinance banking institution, has exempted the principal officer or the manager from this paragraph.

- (8) No director of a banking institution or microfinance banking institution including a member of a committee of the board of directors established for the purpose of granting credit to customers; or principal officer or a manager of a division or a branch, 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

- (b) which is, subject to subsection (7), 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.

- (9) Paragraph (b) of subsection (8) does not apply in respect of the election of officers or the consideration of remuneration relating to positions of trust.

- (10) Before a matter contemplated in subsection (8) 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 must -

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

- (11) The proceedings contemplated in subsection (10) shall be recorded in the minutes of the meeting of the decision-making body concerned.
- (12) No banking institution, microfinance banking institution or controlling company shall appointment a person as a director, principal officer or executive officer unless—
- (a) it is satisfied that the person is fit and proper in accordance with criteria determined by the Bank, to hold such position; and
  - (b) it has notified the Bank in a manner determined by the Bank;
- (13) Every banking institution, microfinance 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;
- (14) The Bank may object to the proposed nomination for appointment referred to in subsection (13) 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 (twenty) days of receipt of the notice referred to in subsection (13) deliver a written notice stating the grounds of its objection to the appointing banking institution, or microfinance banking institution or controlling company;
- (15) If the Bank objects to the proposed appointment as envisaged in subsection (14), the banking institution, microfinance banking institution or controlling company, may not appoint the nominee and any purported appointment has no legal effect.
- (16) If the banking institution, or microfinance banking institution or controlling company disputes the Bank's objection, the Bank must give such person reasonable opportunity to make representation to the Bank.
- (17) After considering the banking institution's, or microfinance banking institution's or controlling company's representation made under subsection (16), if any, the Bank may –
- (a) accede to the nomination of the director or principal officer, as the case may be; or
  - (b) uphold its objection,
- and must in writing inform the banking institution, microfinance banking institution or controlling company of its decision.

- (18) Any banking institution, microfinance banking institution or controlling company that fails to comply with the provisions of this section is liable to a fine determined by the Bank.

## **51. Audit committee**

- (1) The audit committee established by the board of directors of a banking institution, or microfinance banking institution in terms of section 39 (5)(e) may, subject to this section or to the determinations issued by the Bank, have such powers, duties and functions as the board of directors may specify and inform the audit committee in writing.
- (2) The audit committee referred to in subsection (1) consists of so many members, but not less than three, as the banking institution or microfinance banking institution may decide on, who are all directors without any executive responsibility in the banking institution or microfinance banking institution.
- (3) The board of directors of the banking institution or microfinance banking institution concerned must, from amongst the members of the audit committee concerned, designate a chairperson for the audit committee, which chairperson will, subject to subsection (5), have the powers, duties and functions as decided on by the banking institution or microfinance banking institution.
- (4) The audit committee must meet not less than four times during any financial year of the banking institution or microfinance banking institution concerned, which meetings must be attended by -
- (a) the members of the audit committee;
  - (b) the officer responsible for the internal audit function of the banking institution or microfinance banking institution;
  - (c) the auditor of the banking institution or microfinance banking institution appointed in terms of section 51;
  - (d) any other auditor of the banking institution or microfinance banking institution; and
  - (e) the officer responsible for the financial or treasury functions of the banking institution or microfinance banking institution.
- (5) The powers, duties and functions of the audit committee are to -
- (a) ascertain the nature, scope or extent of the audit of the banking institution or microfinance banking institution to be undertaken by the auditor appointed in terms of section 51;
  - (b) review the internal audit programme of the banking institution or microfinance banking institution, to ensure co-ordination between the internal audit programme and the audit undertaken by the

auditor appointed in terms of section 51, and to ensure that sufficiently trained and skilled officers of appropriate standing, to the satisfaction of the audit committee, in the banking institution or microfinance banking institution undertake and implement the internal audit programme of the banking institution or microfinance banking institution;

- (c) review and update the internal controls and systems of the banking institution or microfinance banking institution;
  - (d) consider, discuss and make recommendations to the board of directors relating to any issue or reservation raised by the auditor appointed in terms of section 51, or any finding made during internal investigations arising from the internal audit programme of the banking institution or microfinance banking institution ;
  - (e) review the financial statements of, or to make recommendations to, the banking institution or microfinance banking institution relating to the financial statements; and
  - (f) perform such other duties and functions as the board of directors of the banking institution or microfinance banking institution may specify.
- (6) The company secretary must be the secretary of the audit committee and must have such duties and perform such functions as the board of directors of the banking institution or microfinance banking institution may specify.

## **52. Appointment of auditor**

- (1) Despite Chapter 10 of the Companies Act, a banking institution, microfinance banking institution or controlling company must annually appoint an auditor for the banking institution, microfinance banking institution or controlling company.
- (2) A banking institution, microfinance banking institution or controlling company 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 the Bank, and apply to the Bank for the Bank's approval of the appointment.
- (3) On receipt of an application in terms of subsection (2), the Bank may -
  - (a) refuse to approve the appointment;
  - (b) approve the appointment; or
  - (c) approve the appointment subject to such conditions as the Bank may impose and specify.

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

- (4) If the Bank under paragraph (c) of subsection (3) approves the appointment subject to conditions, the Bank must in writing furnish the banking institution, microfinance banking institution or controlling company concerned with particulars of the conditions so imposed.
- (5) No person must hold office as an auditor of a banking institution, or microfinance banking institution or controlling company unless his or her appointment as such has been approved by the Bank under subsection (3).
- (6) The Bank may determine criteria or procedures relating to the appointment of, the conduct by, the duties of, and the requirements or qualifications in respect of, an auditor.
- (7) If -
- (a) a banking institution, microfinance banking institution or controlling company fails to appoint an auditor in terms of subsection (1);
  - (b) the Bank under subsection (3) refuses to approve the appointment of an auditor appointed by a banking institution, microfinance banking institution or controlling company; or
  - (c) an auditor appointed by a banking institution, microfinance banking institution or controlling company in terms of subsection (1) is disqualified in terms of section 52 to act as an auditor,
- the Bank may, for or on behalf of the banking institution, microfinance banking institution or controlling company, appoint an auditor.
- (8) An auditor appointed by the Bank for or on behalf of a banking institution, or microfinance banking institution or a controlling company under subsection (7) must be deemed to be an auditor appointed by the banking institution, microfinance banking institution or controlling company in terms of subsection (1) and approved by the Bank under subsection (3).
- (9) The Bank may, at any time, withdraw an approval granted under subsection (3) or an appointment made under subsection (7), if the auditor concerned -
- (a) fails to comply with -
    - (i) the conditions, if any, imposed by the Bank under paragraph (c) of subsection (3); or
    - (ii) the criteria determined by the Bank as contemplated in subsection (6); or
  - (b) becomes disqualified in terms of section 52 to act as an auditor.



### **53. Disqualification for appointment as auditor**

No person must qualify to be appointed or to act as an auditor of a banking institution, microfinance banking institution or a controlling company, if -

- (a) any of the grounds for disqualification stipulated by section 283 of the Companies Act applies to the person;
- (b) the appointment of the auditor by a banking institution, microfinance banking institution or a controlling company was not approved by the Bank, or an approval granted by the Bank has been withdrawn under section 51(9);
- (c) the auditor, either directly or indirectly, has a material interest in the banking institution, microfinance banking institution or in its affiliate or associate;
- (d) any other circumstances exist which, in the opinion of the Bank, may impair the independence or impartiality of the auditor; or
- (e) the criteria, or any of the criteria determined by the Bank as contemplated in section 51(6) are not complied with.

### **54. Duties and functions of auditor**

- (1) An auditor appointed by a banking institution, microfinance banking institution or a controlling company in terms of section 51 must in writing inform the board of directors of the banking institution, microfinance banking institution or the controlling company and the Bank of -
  - (a) the banking institution or microfinance banking institution's ability or inability to meet with the requirements of section 35 or 39;
  - (b) any other matter which the auditor becomes aware of in the performance of his or her duties or functions as an auditor and which, in his or her opinion, may -
    - (i) prejudice the ability of the banking institution, microfinance banking institution or the controlling company to continue conducting business as a going concern;
    - (ii) be detrimental to the interest of the customers of the banking institution, microfinance banking institution or the controlling company concerned or the general public; or
    - (iii) violate the principles of sound financial management or the maintenance of adequate internal controls and systems by, the banking institution, microfinance banking institution or the controlling company.

- (2) The duties of an auditor appointed in terms of section 51 include the duties of an auditor -
  - (a) in terms of the Companies Act;
  - (b) in terms of this Act or any other law; and
  - (c) determined by the Bank as contemplated in subsection (6) of that section.
- (3) The auditor must assess, and in writing comment on, the report of the board of directors made in terms of section 49 (5)(c) before the report is tabled at the annual general meeting.
- (4) A copy of the comments made by an auditor in terms of subsection (3), signed by the auditor and by the chairperson of the board of directors, must be transmitted by the banking institution, microfinance banking institution or the controlling company concerned to the Bank not more than 20 days after the receipt by the board of the auditor's comments.
- (5) If an auditor, acting in good faith and not negligently or with wrongful intent, furnishes any information to any person in terms of subsection (1), (2) or (4), or makes any comments in terms of subsection (3), such actions by the auditor will not -
  - (a) constitute a contravention of any provision of any law or a breach of a code of professional conduct which the auditor may be subject to; or
  - (b) cause the auditor to incur any liability to any person as a consequence of the furnishing of the information or the making of the comments.

## **PART VII SUPERVISION BY BANK**

### **55. Financial and other records**

- (1) A banking institution or microfinance banking institution 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 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 or microfinance banking institution is complying with this Act.
- (2) The core banking systems, accounting and other records contemplated in subsection (1) must be kept in Namibia and must, subject to subsection (4), comply with the requirements-

(a) of section 292 of the Companies Act; and

(b) determined by the Bank,

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

- (3) A person 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, microfinance banking institution or a 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.
- (4) For the purposes of this section, "other records", include any book, record, report, statement or other document relating to the business, affairs, transactions, conditions, property, assets or liabilities of a banking institution, microfinance banking institution or controlling company.

## **56. Financial statements**

- (1) The Companies Act, subject to the further provisions of this section, applies to the financial statements of a banking institution, microfinance banking institution or a controlling company.
- (2) Despite subsection (1) -
- (a) the Bank may determine additional requirements not in conflict with this Act relating to the financial statements contemplated in subsection (1); and
  - (b) a banking institution, microfinance banking institution or a controlling company 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, microfinance banking institution or a controlling company;
    - (ii) 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 (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, microfinance 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) Despite anything to the contrary in the Companies Act, or any other law, a banking institution, microfinance banking institution or controlling company must, within six months after the end of its financial year, hold its annual general meeting.
- (4) The Bank may, at the written request of a banking institution, microfinance 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, microfinance banking institution or controlling company do not comply with this Act or with any additional requirement determined by the Bank 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, microfinance 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.

## **57. Disclosure of paid-up share capital**

If a banking institution or microfinance banking institution or controlling company publishes a statement or issues a document in which the amount of its authorised share capital is disclosed, the amount of its paid-up share capital must also be disclosed in such statement or document.

## 58. Furnishing of certain statements, notices, returns and information

- (1) A banking institution, microfinance banking institution or a controlling company must, at such times and in such manner as the Bank may in writing require and notify the banking institution, microfinance banking institution or a controlling company with the necessary changes in accordance with section 33 (3)(d), submit to the Bank a statement containing full particulars of all the assets and liabilities of the banking institution, microfinance banking institution or the controlling company, including information relating to all the assets and liabilities of the banking institution, microfinance banking institution or controlling company outside Namibia.
- (2) In addition to the particulars to be furnished to the Bank by a banking institution, microfinance banking institution or controlling company as specified and contemplated in subsection (1), the Bank may at any time by means of a notice delivered to the banking institution, microfinance banking institution or controlling company demand from any banking institution, microfinance banking institution, controlling company or from its principal officer to furnish the Bank with such information relating to the banking business or microfinance banking business of the banking institution or microfinance banking institution or any of its transactions, and within such period of time, as the Bank may specify in the demand.”.
- (3) If a banking institution, microfinance banking institution or a controlling company-
  - (a) forwards to its shareholders a notice of a meeting or of the declaration of a dividend, or a report on its activities during a financial year, or part of a financial year;
  - (b) in terms of section 178 (2) **[170(2)]** of the Companies Act, gives notice to the Registrar of Companies of any change in the situation of its registered office or of its postal address;
  - (c) in terms of section 224 (2) **[216(2)]** of the Companies Act, lodges with the Registrar of Companies a return regarding its directors; or
  - (d) in terms of section 306 (5) **[302(4)]** of the Companies Act, forwards to the Registrar of Companies a copy of its annual financial statements,

the banking institution, microfinance banking institution or the controlling company must simultaneously with the forwarding or lodging of the notice, report, return or statements, as the case may be, furnish the Bank with a copy of the notice, report, return or statements, as the case may be, so forwarded or lodged.
- (4) A banking institution, microfinance banking institution or a controlling company must -

- (a) within a period of one month after a general meeting of shareholders, forward to the Bank a copy of the minutes of the meeting kept in terms of section 212 [204] of the Companies Act; or
  - (b) at the written request of the Bank, within the period of time and in the form stated in the request, furnish the Bank with particulars to enable the Bank to ascertain whether the banking institution, microfinance banking institution or controlling company is complying with section 35 or section 36 as the case may be.
- (5) The Bank may require the auditors of a banking institution, microfinance banking institution or a controlling company appointed in terms of section 51 to certify as correct and accurate any information submitted by the banking institution, microfinance banking institution or the controlling company to the Bank in terms of this section.
- (6) A banking institution, microfinance 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 shall pay a penalty as determined by the Bank.

#### **59. Reporting of certain transactions by banking institutions or microfinance banking institution**

The Bank may require a banking institution or microfinance banking institution to report to the Bank, or to any other person or authority the Bank may specify, any money transaction which it becomes aware of and which indicates or arises a suspicion that the person conducting, or any person involved in, the transaction may be engaged in an illegal activity.

#### **60. Extension of time**

If a banking institution, microfinance banking institution or controlling company has to furnish any information or document to the Bank in terms of this Act within a specified period of time, the Bank may, at the written request of the banking institution, microfinance banking institution or controlling company, in writing extend the period of time specified for the furnishing of the information or document, as the case may be.

#### **61. Examination by Bank**

- (1) The Bank may, in order to determine whether a banking institution, microfinance 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 business being conducted have been, and are being, complied with by the banking institution, microfinance 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 practise as such under the Legal Practitioners Act, 1995 (Act 15 of 1995); or
- (c) the auditor of a banking institution, microfinance banking institution, controlling company or any other auditor appointed by the Bank,

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

- (2) Section 6 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, in addition to the powers, duties and functions he or she or it has in terms of this Act, has the powers 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) , upon the completion of his or her examination in terms of that 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, microfinance 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, microfinance 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 or microfinance banking institution representing not less than one-fifth of the total value of the deposits made with the banking institution or microfinance banking institution, in writing request the Bank to conduct an examination in terms of subsection (1), the Bank, subject to subsection (7), conduct an examination with necessary changes in terms of this section.
- (7) The Bank 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, microfinance banking institution or the controlling company concerned with a report relating to the examination,

which report must contain the findings of the Bank in respect of the conducting of business by the banking institution, microfinance banking institution or the controlling company.

- (9) In the report furnished to the board of directors of the banking institution, microfinance banking institution or the controlling company in 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 purposes of this section and of section 61, a banking institution, includes an affiliate or associate of the banking institution or microfinance banking institution.
- (11) The examination report prepared and furnished to the board of directors of a banking institution, microfinance 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, microfinance banking institution and the controlling company and is necessary to facilitate the day to day efficient functioning of that banking institution or microfinance banking institution.

## **62. Production of records and furnishing of information**

- (1) For the purpose of an examination by the Bank under section 60, the banking institution microfinance banking institution or controlling company concerned must produce or furnish to the person conducting the examination -
  - (a) all cash or other liquid assets, books, minutes, vouchers, records, accounts, deeds, securities or other documents in the possession or custody of the banking institution or microfinance banking institution and relating to the business of the banking institution or microfinance banking institution; and
  - (b) all information concerning the business of the banking institution, microfinance banking institution or controlling company as may be required by such person,

at such time and place as may not unduly disrupt the conduct of the normal business of the banking institution, microfinance banking institution or controlling company.

- (2) Any person authorised by the Bank in writing to conduct an examination under section 60, may, for the purposes of such examination, take possession of any document or other item referred to in subsection (1) of, and to which such person has access under, this section.
- (3) Any banking institution or microfinance 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 to the person suitable facilities for the purposes of conducting an examination under that subsection is liable to a fine determined by the Bank.

### **63. Approval of special resolutions, amalgamation and transfer of assets and liabilities”**

- (1) A banking institution, microfinance banking institution or a controlling company **[shall]** must not, without the prior written approval of the Bank -
  - (a) enter into a merger or consolidation;
  - (b) transfer, or otherwise dispose of, the whole or part of its property, whether situated in or outside Namibia, other than in the ordinary course of business;
  - (c) effect a reduction of its paid-up share capital;
  - (d) change the name of the banking institution, microfinance banking institution or controlling company; or
  - (e) take any other action which requires a special resolution of the shareholders of the banking institution, microfinance banking institution or controlling company.
  - (f) transfer, sell or dispose of, any of its shares amongst the shareholders or through an intermediary resulting in a substantial shareholding in the banking institution, microfinance banking institution or controlling company.
- (2) A banking institution, microfinance banking institution or controlling company which requires the approval of the Bank in terms of subsection (1) [shall] must in writing apply to the Bank for the granting of the required approval and **[shall]** **must**, to the satisfaction of the Bank, in the application furnish the Bank with full particulars relating to the proposed transaction or action.
- (3) After considering an application made in terms of subsection (2) and, in so far as it may be relevant, after consultation with the Competition Commission, 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 **[shall]** must in writing inform the banking institution, microfinance banking institution or controlling company of its decision under this subsection and where the application is refused provide reasons for the refusal of the application.

- (4) If the Bank, under paragraph (a) of subsection (3) refuses an application made in terms of subsection (2), or under paragraph (c) of that subsection grants an application subject to conditions, the Bank **[shall]** must in writing furnish the banking institution, microfinance banking institution or controlling company with reasons for the refusal of the application or for the imposition of the conditions, as the case may be.
- (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, microfinance 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,

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

**[shall]** must be sent by each of the parties to the Registrar of Companies, who **[shall]** 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, microfinance banking institution or controlling company involved in the merger or consolidation become the assets and liabilities of the merged or consolidated banking institution, microfinance banking institution or controlling company;

(ii) all rights and obligations that vested in the respective banking institutions microfinance banking institution 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, microfinance banking institution or controlling company; and

(iii) in the case of a transfer or other disposal of property in terms of subsection (1)(b), such property shall vest in the transferee;

- (c) upon receipt of a certified copy of the special resolution registered by the Registrar of Companies, the Registrar of Deeds **[shall]** must endorse the transfer of rights and obligations from the banking institutions, or microfinance banking institutions or controlling company who have merged or become consolidated to the merged or consolidated banking institution, microfinance 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, microfinance banking institution or controlling company on the date of registration of the special resolution by the Registrar of Companies”.

#### **64. Undesirable practices**

- (1) A banking institution, microfinance banking institution **[shall]** must not conduct, permit or become involved in the conducting of, an undesirable practice.
- (2) For the purpose of this section, “undesirable practice” in respect of a banking institution or microfinance banking institution, subject to subsection (3), means -
  - (a) the holding of shares in a company of which the banking institution or microfinance banking institution is a subsidiary;
  - (b) the holding of assets of the banking institution or microfinance banking institution in the name of any other person, excluding any asset -
    - (i) which is bona fide hypothecated to secure an actual or potential liability;
    - (ii) in respect of which the Bank has, upon a written application made by the banking institution or microfinance banking institution concerned, in writing approved that the asset may be held in the name of the other person; or
  - (c) The payment of dividends on shares out of profits before pre-incorporation expenditure had been accounted for;
  - (d) The entering into a repurchase agreement in respect of a fictitious asset or an asset created by means of a simulated transaction;
  - (e) The entering into a repurchase agreement without -

- (i) the agreement being substantiated by a written document signed by the other party to the agreement; and
    - (ii) the details of the agreement being recorded in the accounts of the banking institution as well as the accounts, if any, kept by the banking institution in the name of the other party; and
  - (f) Any other practice which the Minister may, on the recommendation of the Bank, by notice in the Gazette declare an undesirable practice in respect of all banking institutions or microfinance banking institutions, or in respect of the banking institution or microfinance banking institution, specified in the notice.
- (3) Despite subsection (2), the Bank may in writing notify a banking institution or microfinance banking institution that a practice employed by the banking institution or microfinance banking institution and specified in the notice, constitutes an undesirable practice, irrespective of whether the practice so specified in the notice is an undesirable practice in terms of that subsection.

### **[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**
  - (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).]

**65. Powers of the Bank regarding banking institutions microfinance banking institution or controlling company**

(1) If the Bank is satisfied –

(a) that a banking institution, microfinance banking institution or an affiliate or associate of the banking institution or microfinance banking institution –

(i) **[is insolvent, or]** is likely to become insolvent;

(ii) is conducting its business –

(aa) in contravention of any provision of this Act or of any other law pertaining to banking business or microfinance banking business; or

(bb) in a manner detrimental to its customers; or

(iii) is unable to meet all or any of its obligations, or is likely to become unable to so meet its obligations; or

(iv) is about to suspend any, or part of any, payment; or

(b) that any of the officers or substantial shareholders of the banking institution, microfinance banking institution or controlling company are no longer fit and proper persons to satisfactorily fill their positions in, or in relation to, the banking institution, microfinance banking institution or controlling company.

the Bank may, in addition to any other action that it may take under any specific section of this Act or under any other law, take any of the actions contemplated in subsection (2).

(2) The Bank may, in any of the circumstances contemplated in subsection (1), by means of an order in writing addressed and delivered to the banking institution, microfinance banking institution or controlling company **[affiliate or associate]** concerned, and in the manner and within the period of time, or before a stipulated date, specified in the order –

(a) require the banking institution, microfinance banking institution or controlling company, **[affiliate or associate]** as the case may be, to –

(i) take the action or steps, or discontinue any action, as the case may be, relating to the banking institution, microfinance banking institution or

controlling company, [affiliate or associate] or to the officers or substantial shareholders;

- (ii) discontinue the extension of credit for such period of time;
- (iii) execute its recovery plan in order to address a situation of severe financial distress such institution may be facing.
- (iv) subject to the Labour Act, 2007 (Act No. 7 of 2007), but despite any provision to the contrary –

- (aa) in any contract of employment entered into between the banking institution, microfinance banking institution, or controlling company its affiliates or associate, and any director or officer; or

- (bb) in the memorandum and articles of association of the banking institution, microfinance banking institution or controlling company, its affiliates or associate,

remove from office a director or an officer;

- (v) appoint a person(s) –

- (aa) as a director(s) of the banking institution microfinance banking institution or controlling company; or

- (bb) to advise the banking institution, microfinance banking institution or controlling company in relation to the proper conduct of its business, and to specify that the person so appointed **[shall]** must be paid a remuneration by the banking institution, microfinance banking institution or controlling company .

such person shall comply with any direction given by the Bank in terms of this Act or any other law.

**[(b) if the Bank is satisfied that the banking institution is conducting its business in a manner detrimental to the interest of its customers or the general public, without prejudice to the powers of the Bank under paragraph (a), and in addition to any action taken by the Bank under that paragraph, assume control of the entire property, business and affairs of the banking institution, or any part thereof, and conduct the entire business and affairs of the banking institution, or the part so assumed control of, for and on behalf of the banking institution, or appoint a person to so conduct the business and affairs of the banking institution in the name of the Bank].**

- (3) The Bank may, in any of the circumstances contemplated in subsection (1), appoint a person in terms of section 60 for a period as the Bank may deem fit, to

assess the financial soundness of the banking institution, microfinance banking institution or controlling company and such person shall have the additional powers to attend any meetings of the banking institution, microfinance banking institution or controlling company as he may deem fit.

- (4) A banking institution, microfinance banking institution or controlling company **[its affiliate or associate]**, as the case may be, **[shall]** will be bound by, immediately comply with, and give effect to, **[an]** the order under subsection (2).
- (5) A director or an officer removed from office under subsection (2) 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 after the date so specified –
  - (a) may not hold any office or participate in the affairs of –
    - (i) the banking institution or microfinance banking institution or controlling company from which he or she was removed;
    - (ii) any other banking institution or microfinance banking institution or controlling company;
  - (b) is not entitled to the payment of any remuneration, [other than that] except the remuneration that he or she was entitled to up until and including the date upon which he or she was removed from the banking institution, microfinance banking institution or controlling company.

Provided that, after a period of five years, 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]**

- (6) No order **[shall]** must be made under subsection (2) unless the banking institution, microfinance banking institution or controlling company has been given a reasonable opportunity to make representations to the Bank relating to the proposed order.
- (7) The costs and expenses incurred by the Bank, or the remuneration payable to any person appointed by the Bank under this section **[(2)]**, **[shall]** must, **[notwithstanding]** despite any provision to the contrary in the Insolvency Act, 1936 (Act No. 24 of 1936) or in any other law contained, be payable as a preferential claim out of the funds of the banking institution, microfinance banking institution or controlling company.
- [(7) If the Bank assumes control of a banking institution pursuant to an order made under subsection (2), the banking institution, its directors and officers shall submit the property, business and affairs of the banking institution so assumed to the control of the Bank, and shall provide or make available to the Bank or to the person appointed under that subsection, as the case may be, all the facilities required to properly conduct the business and affairs of the banking institution.**

(8) In the circumstances contemplated in subsection (7), the Bank or the appointed person, as the case may be, shall –

(a) remain in control of the property, business and affairs of the banking institution for or on behalf of the banking institution; and

(b) execute all the powers of the banking institution or of its directors under the memorandum and articles of association of the banking institution, until such time as the order made under subsection (2) is cancelled by the Bank.]

(8) No order made under subsection (2) shall confer upon, or vest in, the Bank or any person appointed by the Bank, any title to, or any beneficial interest in, any property of the banking institution, microfinance banking institution or controlling company.

**66. [Additional powers of Bank to apply for capital reduction or to acquire shares in a banking institution] Resolution powers of the Bank regarding failing banking institutions, microfinance banking institutions or controlling companies**

(1)(a) [If the Bank assumes control of a banking institution in terms of an order made under subsection (2) of section 56, and if the share capital of the banking institution has been lost or is not represented by available assets, the Bank or the person appointed by the Bank under paragraph (a) (iv) of that subsection, as the case may be, may apply to the High Court for an order reducing the share capital of the banking institution so as to reflect the actual available assets of the banking institution, and the High Court may, notwithstanding any provision to the contrary in any other law, grant such an application and issue such an order]. If the banking institution, microfinance banking institution or controlling company,

(i) is insolvent; or

(ii) is likely to become insolvent and the provisions of section 64 are deemed inadequate to resolve the situation; or

(iii) is significantly undercapitalized. For the purposes of this section “significantly undercapitalized” means that the equity and/or total risk weighted capital adequacy ratios are less than the minimum levels as determined by the Bank,

the Bank may, despite any provision to the contrary in any other law or in the memorandum and articles of association of the banking institution, microfinance banking institution or controlling company but with the concurrence of the Minister, exercise the options under subsection (1)(b) in respect of such banking institution, microfinance banking institution or controlling company.



- (b) Pursuant to subsection (1)(a) the Bank may exercise any of the following options in order to resolve a failing banking institution, microfinance banking institution or controlling company:
  - (i) sell all or part of the business of the banking institution, microfinance banking institution or controlling company, to a private sector purchaser; or arrange a merger with or take over by another banking institution or microfinance banking institution:
  - (ii) transfer all or part of the business of the banking institution, microfinance banking institution or controlling company to a bridge bank,;
  - (iii) liquidate the banking institution, microfinance banking institution or controlling company that is unsolvable, in terms of the provisions of section 66.
  - (iv) Take any other action it deems fit to resolve the banking institution, microfinance banking institution or controlling company.
- (2) In exercising the options stipulated under subsection 1(b), the Bank has the following powers;
  - (a) If the share capital of the banking institution, microfinance banking institution or controlling company has been eroded or is not represented by available assets, the Bank may:
    - (i) Direct the reduction of the share capital of the banking institution, microfinance banking institution so as to reflect the actual available assets of the banking institution, microfinance banking institution,
    - (ii) upon the reduction of share capital under paragraph (i) direct the issuance of new shares to an amount specified by the Bank in order to satisfy the capital requirements of the banking institution, or microfinance banking institution as determined under section 35.
  - (b) Authorise a bridge bank, to take over and continue operating the critical functions and viable operations of a failing banking institution, microfinance banking institution or controlling company pursuant to the provision of (1)(b)(ii). These will include powers to:
    - (i) Enter into legally enforceable agreements by which the Bank transfers, and the bridge bank receives, selected assets and liabilities of the failing banking institution, microfinance banking institution or controlling company.

- (ii) Establish the terms and conditions under which the bridge bank will operate as a going concern, including
  - (aa) the manner under which the bridge bank obtains capital or operational financing and other liquidity support;
  - (ab) the prudential and other regulatory requirements that apply to the operations of the bridge bank;
  - (ac) the selection of management and the manner by which the corporate governance of the bridge bank may be conducted; and
  - (ad) the performance by the bridge bank of such other temporary functions as the Bank may from time to time stipulate.
- (c) Reverse, if necessary, asset and liability transfers of a failing banking institution, microfinance banking institution or controlling company from the bridge bank
- (d) Arrange the sale of the bridge bank, or the sale of some of its assets and liabilities to a purchasing institution, so as to best effect the objectives of resolution.
- (e) Override the rights of the shareholders of the banking institution, microfinance banking institution or controlling company under resolution, including requirements for approval by shareholders of particular transactions, in order to permit a merger, acquisition, sale of substantial business operations, recapitalisation or other measures to restructure and dispose of the banking institution's or microfinance banking institution's business or its liabilities and assets.
- (f) Establish a separate asset management vehicle and transfer non-performing loans or difficult-to-value assets of the institution referred to under subsection (1) (b) (i) or (ii) to the vehicle for management and liquidation.
- (g) Recover monies from executive officers, principal officer or directors removed from the banking institution, including variable remuneration, where such monies were obtained illegally or fraudulently.
- (h) Write down, in a manner that respects the hierarchy of claims in liquidation as stipulated under section 68, equity or other instruments of ownership of the banking institution, microfinance banking institution or

controlling company, unsecured and uninsured creditor claims to the extent necessary to absorb the losses.

- (i) Convert all or parts of unsecured and uninsured creditor claims into equity or other instruments of ownership of the banking institution, microfinance banking institution or controlling company under resolution (or any successor in resolution or the parent company within the same jurisdiction), claims in a manner that respects the hierarchy of claims in liquidation.
  - (j) Upon entry into resolution, convert or write-down any contingent convertible or contractual bail-in instruments whose terms had not been triggered prior to entry into resolution and treat the resulting instruments in line with subsection (h) or (j).
  - (k) Temporarily suspend the rights to invoke the breach clause where such breach arises by reason only of entry into resolution or in connection with the exercise of any resolution powers. Provided that the stay should:
    - (i) Not exceed five days or until such further time period that the institutions established in terms of subsection (1)(b) are in place;
    - (ii) be subject to adequate safeguards that protect the integrity of financial contract and provide certainty to counterparties; and
    - (iii) not affect the right to exercise the breach clause by a counterparty against the banking institution, microfinance banking institution or controlling company being resolved in the case of any event of default not related to entry into resolution or the exercise of the relevant resolution power occurring before, during or after the period of the stay.
- (3) A banking institution, microfinance banking institution or controlling company referred to in subsection (1) (b) (ii) must comply with all statutory or regulatory requirements applicable to all banking institution, microfinance banking institution or controlling company.
- (4) The Bank may determine the specific conditions, criteria, manner and form in which the Bank will exercise the options and the powers contained under this section.

## **67. Winding-up or judicial management**

- (1) Notwithstanding section 351, 354 or 433 of the Companies Act, no person **[shall]** must apply for the winding-up or judicial management, or commence with a voluntary winding-up, as the case may be, of a banking institution or microfinance banking institution, unless such person has given the Bank 14 days written notice of his or her or its intention to so apply for the winding-up or judicial management, or to commence with the voluntary winding-up, as the case may be, of the banking institution or microfinance banking institution.
- (2) Upon receipt of a notice contemplated in subsection (1), the Bank may -
  - (a) if an application for judicial management of the banking institution or microfinance banking institution is to be made, take such action under section 64 or 65 as the Bank may consider appropriate; or
  - (b) if a voluntary winding-up is to be commenced with, [notwithstanding] despite the provisions of the Companies Act, allow the voluntary winding-up to be proceeded with, subject to the terms and conditions which the Bank may impose.
- (3) The Bank may, if an application for the winding-up of a banking institution or microfinance banking institution is brought to the High Court -
  - (a) appear before the Court at the hearing of the application; or
  - (b) make representations to the Court relating to the application.
- (4) The Bank may, despite section 351 of the Companies Act, or despite having taken action under section 64 or 65 of this Act, make an application to the High Court for the winding-up of any banking institution or microfinance banking institution.
- (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 or microfinance 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.

## **68. Proof and repayment of claims**

- (1) Despite the provisions of any other law, in the event of winding –up of a banking institution, microfinance banking institution or controlling company, all assets of the banking institution, microfinance banking institution or controlling company must be made available to meet all deposit liabilities of the banking institution, microfinance banking institution or controlling company in the following order of priority [as determined by the Bank]:
  - (a) the liquidator for all expenses incurred in the process of liquidating the banking institution, microfinance banking institution or controlling company;
  - (b) monies owed to the Bank;
  - (c) rates and taxes due, whether payable to the Government or to a local authority or;
  - (d) secured creditors;
  - (e) depositors as set out under subsection (2);
  - (f) employees for all wages and services due net of any liabilities to the banking institution, microfinance banking institution or controlling company;
  - (g) other general creditors to rank equally or without preference;
  - (h) subordinated debt holders; and
  - (i) equity / shareholder's claim.
- (2) Deposit liabilities under subsection (1)(e) shall be paid in following order of priority:
  - (a) deposit liabilities incurred by the banking institution or microfinance banking institution with customers other than other banking institution or microfinance banking institution, juristic persons or institutional customers; and Government
  - (b) deposit liabilities incurred by the banking institution or microfinance banking institution with other banking institutions or microfinance banking institutions juristic persons or institutional customer and Government;
- (3) In the event of winding-up, domestic assets of banking institution or microfinance banking institution must not be used to meet any deficiency which occurs in the foreign assets of banking institution or microfinance banking institution;

- (4) For the purpose of winding-up of a banking institution, microfinance banking institution or controlling company despite any provision to the contrary in the Insolvency Act 1936 (Act No. 24 of 1936, or in the Companies Act, or any other law, an entry in the books, accounts or records of the banking institution, microfinance banking institution or controlling company relating to a depositor of the banking institution or microfinance banking institution, is prima facie proof of a claim of the depositor.
- (5) Provisions of the Companies Act, Insolvency Act or any other act relating to the ranking of claims must not apply to the liquidation of a banking institution, microfinance banking institution or controlling company.
- (6) Where any assets remain after the payment of the liquidator of all claims against the banking institution, microfinance banking institution or controlling company, the remaining assets must be distributed among the shareholders and creditors in accordance with their respective rights and interests.
- (7) Where the liquidator has made payments to all depositors and creditors, the liquidator must cause audited financial statements to be submitted to the Bank.
- (8) The remuneration of the liquidator appointed under this Act, the cost and expenses of his establishment and all the costs and expenses of the liquidation must be met out of the assets of the banking institution, microfinance banking institution or controlling company.

## **69. Cancellation of authorisation upon winding-up**

When the affairs of a banking institution or microfinance banking institution have been completely wound up in terms of section 425 of the Companies Act -

- (a) the Master of the High Court must transmit to the Bank a copy of the certificate contemplated in subsection (3) of that section of the Companies Act; and
- (b) an authorisation granted to the banking institution or microfinance banking institution must, from the date of the dissolution of the company concerned contemplated in subsection (3) of that section of the Companies Act, be deemed to be cancelled.

## **70. Unclaimed monies or property after winding-up**

- (1) Sections 416 and 417 of the Companies Act relating to unpaid dividends must with the necessary changes apply to the funds of a banking institution or microfinance banking institution wound-up under that Act.

- (2) The Minister, on the recommendation of the Bank, may prescribe the procedures to be followed relating to the disposal of property held by a banking institution or microfinance banking institution in its capacity as a lessor of a safe deposit box, as a trustee, a fiduciary or in any other capacity on behalf of any person, and which property had not been claimed by, or been returned to, the rightful owner thereof.

## **PART VIIA**

### **ILLEGAL FINANCIAL SCHEMES**

#### **71. Definitions for this Part**

- (1) In this Part –

“Consideration”- means anything of value given and accepted, whether or not in exchange for goods, products or services, including –

- (a) Any money or other goods, products or services, facilities or benefits and whether or not electronically so given or accepted; or
- (b) Any other thing, undertaking, promise or assurance; whether it is transferred, directly or indirectly, or involves only the participant and other participants or other persons in addition to the participants, but it does not include-
  - (i) The purchase of any goods, products or services at cost price or otherwise provided for marketing sales, or not for resale;
  - (ii) The purchase of any goods, products or services in exchange for which the seller of those goods, products or services offers to repurchase the participant’s goods, products or services under reasonable commercial terms;
  - (iii) The participant’s time and effort in pursuit of any sales or recruiting activities.

“illegal financial scheme” means a scheme referred to in section 73;

“participant”, in relation to an illegal financial scheme, means a person participates, whether upon application or invitation, to such scheme for consideration;

“participate”, in relation to an illegal financial scheme, means –

- (a) to establish or promote the scheme, whether alone or together with another person or persons; or
- (b) to take part in the scheme in any capacity, whether as employee or agent of a person referred to in paragraph (a) or who otherwise takes part, enter or join in the scheme as a participant.

“participation payment” means a payment made or advanced to another participant or promoters of the business, directly or indirectly, in order to belong to the business practice or in order to become a member or take part in the activities of such business practice including receiving of a consideration; and

“recruitment payment” means a payment derived entirely or primarily from the introduction to the scheme of other persons and recruitment into the scheme as participants, rather than from the sale of products or services;

## **72. Participation in illegal financial scheme prohibited**

- (1) No person must,
  - (a) Promote or knowingly participate in a illegal financial scheme; or
  - (b) Cause or attempt to cause, any other person to participate in an illegal financial scheme.
- (2) A person who contravenes subsection (1) commits an offence and is liable to a fine prescribed by section 90 (2) (a).

## **73. Meaning of illegal financial scheme**

- (1) Any scheme is an illegal financial scheme if-
  - (a) Participants in the scheme receive consideration for the introduction and recruitment to the scheme of other persons as participants; and
  - (b) Such consideration is derived entirely or primarily from the introduction to the scheme of other persons and recruitment into the scheme as participants, rather than from the sale of products or services; and
  - (c) As a result of the participation, any participant or any other person suffers or is likely to suffer, directly or indirectly, any financial loss, damages or harm by participating in the scheme.
- (2) The Minister may, on the recommendation of the Bank, by notice in the Gazette declare any other activities to constitute illegal financial schemes.

## **74. Marketing schemes as illegal financial schemes**



- (1) In determining whether a scheme that involves the marketing of goods or services, or both, is an illegal financial scheme regard must be given as to whether participation under in the scheme is entirely or substantially induced by the prospect held out to new participants of entitlement to recruitment payments.
- (2) The participation in the scheme is considered to be entirely or substantially induced by the prospect held out to new participants of entitlement to recruitment payments if:
  - (a) the participation payments do not bear a reasonable relationship to the value of the products or services that participants are entitled to be supplied with under the scheme, as assessed, if appropriate, by reference to the price of comparable or similar products or services available elsewhere;
  - (b) the emphasis in the promotion of the scheme is given more to the participants' entitlement to consideration as a result of the recruitment of new participants than to the entitlement of participants to the supply of products or services .
- (3) Subsection (1) does not limit the matters which may considered in determining whether participation payments are entirely or substantially induced by the prospect held out to new participants of entitlement to recruitment payments.

## **75. Bank may issue a public warning notice**

- (1) The Bank may, in such manner as the Bank considers appropriate, issue to the public a notice containing a warning about the conduct of a person if the Bank –
  - (a) has reasonable grounds to believe that the conduct may constitute a contravention of section 72; and
  - (b) is satisfied that any person has suffered, or is likely to suffer, detriment as a result of such conduct.
- (2) No notice shall be made under subsection (1) unless the person has been given a reasonable opportunity to make representations to the Bank relating to the scheme in question.

## **76. High Court order**

- (1) On application by the Bank or any person, the High Court may grant any order the court considers appropriate, if it is satisfied that a person has engaged, or is proposing to engage, in conduct that constitutes or would constitute –

- (a) a contravention of section 72;
- (b) attempting to contravene that section;
- (c) aiding, abetting, counselling or procuring a person to contravene that section; or
- (d) conspiring with others to contravene that section.

## **77. Repayment of monies obtained in contravention of section 72**

- (1) If the Bank is satisfied that a person has obtained any monies in contravention of section 72, the Bank may 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 -
  - (a) to the respective persons from whom he or she 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 by the Bank and specified in the direction.
- (2) Any person referred to in subsection (1) who refuses or fails to comply with a direction under that subsection, shall, for the purposes of section 345 of the Companies Act, be deemed to be unable to pay the debts, or for the purposes of section 8 of the Insolvency Act, 1936 (Act 24 No. of 1936), be deemed to have committed an act of insolvency, as the case may be, and the Bank may apply to the High Court for the winding-up, or for the sequestration of the estate, of such person, as the case may be.
- (3) Subsections (1) and (2) will be in addition to, and not derogate from, any criminal liability in terms of this Act or of any other law, of a person referred to in those subsections.
- (4) Section 70 (1) will, with the necessary changes, apply to monies referred to in subsection (1).

## **78. Power of entry and inspection**

- (1) This section, in so far as it provides for a limitation on the fundamental rights contemplated in Sub article (1) of Article 13 of the Namibian Constitution by authorising interference with the privacy of any person's home, correspondence or communication, is enacted upon the authority conferred by Sub article (2) of that Article.
- (2) The Bank may, if it has reason to believe that a person has been engaged, or is engaging, or is proposing to engage, in conduct in contravention of section 72, in writing authorise an officer of the Bank, at any time and without prior notice, but subject to subsection (5), to –
  - (a) enter any premises which the Bank or the officer has reason to believe is occupied or used by that person for the purpose of or in connection with such conduct in contravention of section 71;
  - (b) search for any book, record, statement, document or other item used, or which is believed to be used, in connection with such conduct; or
  - (c) seize or make a copy of any book, record, statement, document or other item referred to in paragraph (b), or seize any money found on the premises.
- (3) An officer of the Bank authorised under subsection (2), has, in addition to the powers referred to in that subsection, the powers, duties or functions referred to in paragraphs (b), (c), (d), (e), (f), (g), and (i) of subsection (2) of section 6, with any necessary changes, in relation to the exercise of the powers for the purposes of this section.
- (4) An officer of the Bank who seeks to exercise any power or perform any function under this section in relation to any person must produce his or her written authorisation by the Bank for inspection when so requested by that person.
- (5) In exercising the powers conferred by subsection (2) an authorised officer of the Bank must not enter any premises or part of premises being used as a private home, except if the entry and search of the premises are authorised by a warrant issued by a judge of the High Court of Namibia or a magistrate who has jurisdiction in the area in which the premises in question are situated.
- (6) A warrant for entry and search of premises or part of premises being used as a private home may be issued in accordance with subsection (5) if it appears to

the judge or magistrate from information on oath that there are reasonable grounds for believing that –

- (a) section 72 has been or is being contravened in that home; or
  - (b) a book, record or any other document or other article required for inspection is in that home.
- (7) The search of the home of a person must be conducted in accordance with section 21(3) (a) and (4) and section 29 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977).
- (8) A person in charge or control of premises entered by an authorised officer under subsection (2) must provide such reasonable facilities and assistance as the officer may require for performing a function under this section, including providing access to any computer on the premises and rendering assistance to the officer to search any data contained in such computer and, on request of the officer, provide any data contained in that computer in printed form to the officer.
- (9) (1) A person must not, without just cause –
  - (a) refuse to permit an authorised officer of the Bank to enter premises or to conduct an examination or inquiry in terms of this section;
  - (b) fail or refuse to produce any book, record, statement or other document which the officer requires to be produced to him or her for inspection;
  - (c) fail or refuse to explain any entry in a book, record, statement or other document which the officer requires him or her to explain;
  - (d) subject to Article 12(1)(f) of the Namibian Constitution, refuse or fail to answer any question which the officer lawfully directs at such person in the exercising, performance or execution of the officer's powers, duties or functions under this section.
  - (e) fail or refuse to provide the officer with reasonable facilities and assistance required by the officer in terms of subsection (8);
  - (f) hinder, obstruct or interfere with the authorised officer in the exercise of his or her powers under this section;

- (g) knowingly furnish false or misleading information to the authorised officer; or
  - (h) remove or tamper with any book, record, statement or other document seized by the authorised officer under subsection (2).
  - (i) hinder or obstruct an officer of the Bank authorised under subsection (2) in the exercising, performance or execution of his or her powers, duties or functions under this section;
- (2) A person who contravenes paragraph (1) commits an offence and is liable to a fine prescribed by section 90 (1) (b).

## PART VIII GENERAL PROVISIONS

### **79. Agreements restricting competition**

- (1) An agreement relating to the restricting of competition entered into by a banking institution or microfinance banking institution with another banking institution, microfinance banking institution or its affiliate or associate must, unless the parties to such agreement are of the same corporate group, be submitted by the parties to the Bank for its approval.
- (2) An agreement referred to in subsection (1) will, unless it is approved by the Bank under that subsection, be *void ab initio*.

### **80. Prohibition to accept deposits by insolvent banking institutions or microfinance banking institutions**

- (1) If a banking institution or controlling company is or becomes insolvent it must not accept any monies as a deposit from any person, unless with the prior written approval of the Bank.
- (2) An approval by the Bank contemplated in subsection (1) must specify the amount of, and the person from whom, a deposit may be taken by the banking institution.
- (3) No director of, and no officer with managerial responsibilities in, a banking institution or controlling company must, if he or she is aware that the banking institution or microfinance banking institution is insolvent, receive, authorise, permit or allow the banking institution or microfinance banking institution to accept deposits.

### **81. Insurance against loss due to negligence or dishonesty**

A banking institution or microfinance banking institution -

- (a) must, subject to paragraph (b), contract an insurance policy with an insurer as defined in the Long-Term Insurance Act, 1998 (Act No. 5 of 1998) and approved by the Bank, to insure itself to such an amount as the Bank in writing may approve, against any loss which the banking institution or microfinance banking institution or any of its customers may suffer as a result of the negligence, dishonesty or fraud of any of the officers of the banking institution or microfinance banking institution; or
- (b) may, if the insurance contemplated in paragraph (a) -
  - (i) is not available; or
  - (ii) is available, but at a premium which is, in the opinion of the Bank, too high in relation to the cover provided,

with the written approval of the Bank and in lieu of the insurance, maintain a special reserve account exclusively for the purpose of compensating any person in respect of any loss suffered by the person as a result of the negligence, dishonesty or fraud referred to in paragraph (a) and which is, in the opinion of the Bank, sufficient for such purpose.

## **82. Confidentiality and secrecy**

- (1) No person employed or duly authorised by the Bank to examine the affairs of a banking institution, microfinance banking institution or controlling company must, subject to subsection (2) or except for the purpose of the performance or exercise of his or her duties or functions, or when lawfully required to do so by a court having jurisdiction or under any law, disclose any information acquired in the performance or exercise of such duties or functions.
- (2) If the Bank seeks advice from a qualified person on a matter of law, of accountancy or of valuation of property, or on any other matter requiring the exercise of professional skills, as the case may be, in order to enable the Bank to perform any of its functions under this Act, the Bank may, despite subsection (1), but subject to subsection (3), disclose to the qualified person such information as the Bank may deem necessary to ensure that the qualified person is properly informed with respect to the matters on which his or her advice is sought.
- (3) The qualified person referred to in subsection (2) must be subject to the same duty of secrecy as a person employed by the Bank under subsection (1).
- (4) Despite the further provisions of this Act or of the Bank of Namibia Act, 1997, the Bank may, for the purpose of the prudential supervision of financial institutions, but subject to the confidentiality of the information transmitted, furnish information acquired by the Bank to an authority in Namibia or in a foreign state, country, colony or territory with supervisory responsibilities in respect of financial

institutions in Namibia or in the foreign state, country, **[colony]** or territory concerned, as the case may be.

- (5) Subsection (1) will apply to information received from an authority referred to in subsection (4).
- (6) Any person may, despite subsection (1), against payment of a fee determined by the Bank, inspect or obtain a copy of -
  - (a) a certificate of authorisation; or
  - (b) the memorandum and articles of association,  
of a banking institution or microfinance banking institution.
- (7) A director or officer of a banking institution or microfinance banking institution, during his or her tenure of office or employment, as the case may be, or after such tenure of office or employment, or any other person who for any reason has by any means access to any record, book, register, correspondence or other document, information or material relating to the affairs or the account of any customer of the banking institution or microfinance banking institution, must not, subject to subsection (10), provide, produce, divulge, reveal, publish or in any manner disclose to any other person, or make a record for any person, of any information or document whatsoever relating to the affairs or account of such customer.
- (8) Subsection (7) will not apply to any record, book, register, correspondence or other document, information or material referred to in that subsection and which has lawfully been made available to the public from any source other than the banking institution or microfinance banking institution concerned, or to any information which is in the form of a summary or collection of information set out in such a manner that does not enable information relating to any particular banking institution or microfinance banking institution, or to any particular customer of a banking institution or microfinance banking institution, to be ascertained or identified from such summary or collection.
- (9) A person who has any record, book, register, correspondence or other document or material referred to in subsection (7) in his or her possession, and which to his or her knowledge has been disclosed in contravention of that subsection, shall not in any manner whatsoever disclose such record, book, register, correspondence or other document or material to any other person.
- (10) Subsection (7) will not apply to the disclosure of any record, book, register, correspondence or other material referred to in that subsection -
  - (a) which the customer concerned, or his or her authorised representative, has in writing given permission to be disclosed;

- (b) if the estate of the customer has been sequestrated, whether provisionally or final, or, if the customer is a body corporate, the body corporate has been, or is in the process of being, wound-up;
  - (c) if information is required by a party to a bona fide commercial transaction to which transaction the customer is a party, for the purpose of, subject to subsection (11), assessing the creditworthiness of the customer relating to such transaction;
  - (d) for the purpose of instituting, or in the course of, any criminal proceedings;
  - (e) for the purpose of instituting, or in the course of any proceedings -
    - (i) between a banking institution or microfinance banking institution and its customer, or his or her guarantor relating to the customer's transaction with the banking institution or microfinance banking institution; or
    - (ii) between the banking institution or microfinance banking institution and two or more parties making opposing or adverse claims to money in a customer's account, if the banking institution seeks relief by way of interpleader proceedings;
  - (f) if a writ of attachment or of execution attaching monies in an account of a customer of a banking institution or microfinance banking institution is served on the banking institution or microfinance banking institution;
  - (g) if the disclosure is required or authorised by any other provision of this Act or by any other law;
  - (h) if the disclosure may, subject to subsection (12), in terms of any law be made to a police officer investigating an offence specified in such law; or
  - (i) if the disclosure is authorised by the Bank in writing.
  - (j) if the exchange of individual customers' information takes place within a banking institution, microfinance banking institution or controlling company between directors, officers or employees of that banking institution, microfinance banking institution or controlling company and which is necessary to facilitate the day-to-day banking business or microfinance banking business.
- (11) The information furnished in terms of paragraph (c) of subsection (10) should be of a general nature and must not enable the details of the customer's affairs or account to be ascertained from the information so furnished.
- (12) A disclosure contemplated in paragraph (h) of subsection (10) must be limited to the affairs or account of the customer suspected of such offence.



- (13) In civil proceedings referred to in paragraph (b) or (e) of subsection (10), the court may, if it appears that any record, book, register, correspondence or other document, information or material referred to in subsection (7) will be disclosed, voluntarily or on application by any of the parties to the proceedings, conduct the proceedings in camera.
- (14) Subsection (7) will apply to any record, book, register, correspondence or other document, information or material disclosed in terms of subsection (13).
- (15) For the purposes of this section, 'financial institution' means a statutory body or other institution referred to in section 2(2), and includes a banking institution or microfinance banking institution.
- (16) Except as otherwise required by an Act of Parliament, nothing in this Act must prevent a banking institution or microfinance banking institution from releasing information in a prescribed manner to a credit bureau.

### **83. Publication of information**

- (1) The Bank may, subject to subsection (2) -
  - (a) publish in whole or in part, in such form and at such time as it may deem appropriate; or
  - (b) for the purpose of tabling in the National Assembly, provide,
   
any information or data furnished or collected under this Act.
- (2) The information or data referred to in subsection (1) must not, unless with the written consent of a banking institution, microfinance banking institution, controlling company or of a customer of a banking institution, microfinance banking institution or controlling company, as the case may be, disclose particulars relating to the affairs of the banking institution, microfinance banking institution or controlling company or of the customer of a banking institution or microfinance banking institution, as the case may be.

### **84. International supervisory co-operation**

- (1) A person who, under the laws of a foreign state, country, colony or territory, exercises supervisory authority in respect of banking institutions, microfinance banking institution or controlling company conducting business in such foreign state, country, colony or territory, may, with the written approval of the Bank granted under subsection (3), examine the books, accounts or transactions of -
  - (a) a banking institution, or microfinance banking institution in Namibia which is a subsidiary; or
  - (b) a representative office in Namibia,

of the banking institution, or microfinance banking institution or controlling company so conducting business in such foreign state, country, colony or territory, or cause such books, accounts or transactions to be examined.

- (2) The person referred to in subsection (1) must in writing apply to the Bank for its approval as contemplated in that subsection.
- (3) The Bank may, on receipt of an application in terms of subsection (2) -
  - (a) refuse the authority;
  - (b) grant the authority; or
  - (c) grant the authority subject to such conditions as the Bank may impose.
- (4) The Bank must in writing inform the applicant of its decision under subsection (3) and of the conditions, if any, imposed under that subsection.
- (5) Section 61(1) must, subject to the conditions contemplated in subsection (3), with necessary changes apply to an examination by a person in terms of subsection (1).
- (6) If so imposed by the Bank under subsection (3), the person conducting an examination in terms of subsection (1) must, within a period of 30 days after the completion of the examination, furnish the Bank with a report on the examination so conducted.
- (7) The Bank may enter into an agreement with a person referred to in subsection (1) -
  - (a) to regulate -
    - (i) the establishment -
      - (aa) in the foreign state, country, colony or territory concerned of representative offices or of subsidiaries of banking institutions, or microfinance banking institutions conducting business in Namibia; or
      - (bb) in Namibia of representative offices or of subsidiaries of foreign banking institutions, or microfinance banking institutions or controlling companies conducting business in Namibia; and
    - (ii) the supervisory powers, duties and functions of the Bank and of such person relating to the representative offices or of the subsidiaries established in Namibia and in the foreign state, country, colony or territory respectively, as contemplated in subparagraph (i);

- (b) to provide for -
    - (i) the furnishing of information relating to representative offices or subsidiaries;
    - (ii) the co-operation and exchange of information relating to examinations by the Bank or by such person; and
    - (iii) the confidentiality relating to information referred to in subparagraphs (i) and (ii); and
  - (c) any other matter which the parties may consider of importance relating to the conducting of business by banking institutions, or microfinance banking institutions.
- (8) For the purposes of this section, the 'supervisory authority' of a person referred to in subsection (1) means supervisory authority corresponding to the supervisory authority of the Bank in respect of banking institutions, or microfinance banking institutions conducting business in Namibia.

## **85.Minors as depositors**

Despite anything to the contrary in any law contained, a minor person of 16 years and older, and who has not been declared mentally ill under the Mental Health Act, 1973 (Act 18 of 1973), may open an account and be a depositor with a banking institution or microfinance banking institution and may, without the assistance of his or her parent or guardian, as the case may be, execute all necessary documents, give all necessary receipts or acquaintances and may cede, pledge, borrow against, and generally deal with, his or her deposit as he or she may consider appropriate, and shall enjoy all the privileges and be liable to all the obligations and conditions applicable to depositors.

## **86.Exemption of certain transactions from stamp duties and transfer duties**

- (1) No stamp duty imposed by the Stamp Duties Act, 1993 (Act 15 of 1993) will be payable in respect of the transfer of shares in a banking institution, microfinance banking institution or any of its subsidiary companies, sold or disposed of in any manner by the banking institution or microfinance banking institution to its controlling company, if such sale or disposal has been approved by the Bank.
- (2) No transfer duty must be imposed in terms of the Transfer Duty Act, 1993, (Act 14 of 1993) will be payable in respect of the transfer of shares in a banking institution, microfinance banking institution or controlling company in pursuant of section 65.

## **87.Application of other laws to banking institutions or microfinance banking institution**

- (1) A company registered as a banking institution, microfinance banking institution or as a controlling company will continue to be a company in terms of the Companies Act, and that Act will, subject to subsection (2), continue to apply to any such company to the extent to which that Act is not inconsistent with this Act.
- (2) Despite subsection (1) -
  - (a) the provisions of the Companies Act relating to the conversion of public companies into other forms of companies will not apply to a company referred to in that subsection; and
  - (b) the Minister may, on the recommendation of the Bank, by notice in the Gazette provide that a provision of the Companies Act specified in the notice -
    - (i) must not apply to a company authorised to conduct business as a banking institution, microfinance banking institution or to a controlling company of the banking institution or microfinance banking institution;
    - (ii) must only apply to a company referred to in subparagraph (i) subject to the conditions and qualifications specified in the notice; or
    - (iii) must in respect of a company referred to in subparagraph (i), if such provision, in respect of a company, confers a power, duty or function on the Registrar of Companies, be deemed to confer on the Bank the power, duty or function specified in the notice.
- (3) The Minister must table a copy of a notice under subsection (2) in the National Assembly within a period of 14 days after the publication thereof, if the National Assembly is then in ordinary session, or, if the National Assembly is not then in ordinary session, within a period of 14 days after the commencement of its next ensuing ordinary session.
- (4) If the National Assembly, by resolution passed during the session in which the notice referred to in subsection (3) was tabled, rejects the notice, the notice will cease to be in force as from the date it was so rejected.
- (5) An authorisation granted under this Act will not exempt a banking institution or microfinance banking institution from the obligation, if any, to obtain a licence, a permit or an authorisation, or to comply with any requirement, as the case may be, under any other law to conduct banking business or microfinance banking business.
- (6) If the Bank is satisfied that a banking institution, microfinance banking institution is conducting its business in contravention of any provision of any other law relating to banking business or microfinance banking business, the Bank may impose a fine as prescribed by section 92.

## **88. External bureaux**

- (1) An external bureau established or utilised by one or more banking institutions or microfinance banking institutions for the purposes of accounting or payment by the banking institutions, microfinance banking institution or their affiliate or associate must, irrespective of the ownership of the external bureau, for the purpose of supervision by the Bank, be deemed to be a part of the accounting or payment system of the banking institutions or microfinance banking institutions which established, or which utilise or utilised the external bureau.
- (2) For the purposes of this section, “external bureau” means an office, an establishment or an agency in Namibia owned or retained by one or more banking institutions, microfinance banking institution or their affiliates or associates, for the purpose of accounting, payment or other banking services.

## **89. Regulations and determinations**

- (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, microfinance banking institution or a controlling company;
  - (c) the manner in which the payment of any monies in terms of this Act is made to the Bank; and
  - (d) unfair terms in transactions or contracts between banking institutions or microfinance banking institution and their customers or the general public;
  - (e) different and specifically tailored regulatory requirements applying to deposit taking specialised institutions or entities governed by any other legislation; and
  - (f) 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
  - (b) all other matters which the Bank considers necessary or expedient to determine for the conducting of business, as a banking institution, microfinance 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 banking institution, microfinance banking institution or controlling company, as the case may be, on contravention of, or failure to comply with, any determination made under paragraph (a) of subsection (3) -
  - (a) as provided for in section 35(5)(b) or (c), 36, 38(2), 49 (5) or 51(6) in respect of a banking institution, microfinance banking institution or controlling company; or
  - (b) as provided for in section 27(7), 35(1), 38(1) (d), 39(1), 41 (1), 42 (1) or (2), 54 (2) (b) or 55(2) (a) in respect of any banking institution, microfinance banking institution or controlling company;

is liable to a fine determined by the Bank.
- (5) A banking institution, microfinance banking institution or controlling company that contravenes or fails to comply with a determination made under paragraph (b) of subsection (3) is liable to a fine determined by the Bank and imposed in accordance with section 91.

## 90. Offences and penalties

- (1) Any person who -
  - (a) contravenes or fails to comply with any provision of section 5, 24 (1), 54 (3), **[55A]** 72 or 81 (7); or
  - (b) contravenes or fails to comply with any provision of section 6(4), 26(1)(b), (2)(b), (4), (5) or (10), 32(1)(a)(ii) or (b) 30(1), 33(7), 49(7), (8), (9), (10), (12) or (13), 51(5), 53(1)(2) or (3), 54 (3), 64 (4), (7) or (9), 66 (1), 77 (9), 79 (3), 81 (1), (3), (7) or (9), or 83(2); or

- (c) contravenes or fails to comply with any order, direction or instruction made or issued under section 6(2)(g), 7(1), 33 (1) or (13), 64(3) or 83(6) in respect of any person, including a banking institution or microfinance banking institution; or
- (d) when furnishing information to the Bank, to a banking institution, microfinance banking institution, a controlling company or to any other person in terms of section 6(4)(d), 10, 28, 57 (1), (2), (3) or (4), wilfully and with the intent to deceive or to mislead, furnishes false, untrue or misleading information, or furnishes a forged document,

will be guilty of an offence.

(2) Any person convicted of an offence -

- (a) under paragraph (a) of subsection (1), will be liable to a fine not exceeding N\$ 1 000 000 or to imprisonment for a period not exceeding ten years or to both such fine and such imprisonment; or
- (b) under paragraph (b), (c) or (d) of subsection (1), will be liable to a fine not exceeding N\$ 500 000 or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment.

**91. Offences by banking institutions, officers or agents**

(1) A banking institution, microfinance banking institution or controlling company which contravenes or fails to comply with -

- (a) any provision of section 8(2), 12(2), 16 and 17, 19, 21(1), 23(1) or (4), 26(1)(a), (2)(a) or (11), 27(1), (4), (6) or (7), 32 (1)(a)(i), 34(2), , 36, 38(1)(a), (b) or (c), 39(2) or (3), 40, 43, 44(1), 45(1), , 47(1) or (2), 48 (1) or (2), 49(1) or (2), 50(2) or (4), 51(1) or (2), 53 (4), 54(1) or (2)(a), 55 (2)(b) or (3), 56, , 60(1) , 62(1), 63 (1), 78(1), 79(1) or 80; or;
- (b) any notice, demand, instruction or request made or issued under any section referred to in paragraph (a); or
- (c) any order, direction or instruction made or issued under section 6(2) (f), 8(4) (b), 20 (5), 47 (4) or 60 (9); or
- (d) any condition or requirement laid down under section 8(3), 35 (4), 44 (2), 55 (5), 57 (5) or 58,

will be guilty of an offence.

(2) A banking institution, microfinance banking institution or controlling company convicted of an offence under subsection (1) will be subject to the penalties prescribed by section 90 (2)(a).

- (3) If a banking institution, microfinance banking institution or controlling company is convicted of an offence under subsection (1), any person who at the time of the commission of the offence was an officer, a director or a substantial shareholder of the banking institution, microfinance banking institution or controlling company, or was purporting to act in any such capacity, or was in any manner or to any extent responsible for the management of any of the affairs of the banking institution, microfinance banking institution or controlling company, or was assisting in the management, as the case may be, must, if it is proven that the offence was committed at the instructions of, or with the consent or connivance of, such person, be guilty of the same offence, and be subject to the same penalty, which the banking institution, microfinance banking institution or controlling company is guilty of and is subject to.
- (4) If an officer, employee or agent of a banking institution, microfinance banking institution or controlling company is convicted of an offence under section 90, any person who at the time of the commission of the offence was in a position of authority in relation to the officer, employee or agent, or who was a director or a substantial shareholder of the banking institution, microfinance banking institution or controlling company, as the case may be, or was purporting to act in any such capacity, and if it is proven that the offence was committed by the officer, employee or agent in the course of his or her employment and at the instructions of, or with the consent or connivance of the person in authority, or the director or substantial shareholder, as the case may be, the person in authority or the director or shareholder [shall] must be guilty of the same offence, and [shall] must be subject to the same penalty, which the officer, employee or agent is guilty of or is subject to.

## **92. Imposition of administrative fines by Bank**

- (1) If the Bank on reasonable grounds believes that a banking institution, microfinance banking institution or controlling company contravenes or fails to comply with section, 33(16), 46 (3), 57 (6), 61 (3), 87 (6), 88(4) or 88(5), 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, microfinance banking institution or controlling company of its intention to impose a fine;
  - (b) Specify the particulars of the alleged contravention or non-compliance;
  - (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, microfinance banking institution or controlling company to make written representations within 14 days of receipt 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, microfinance banking institution or controlling company that it must, within 30 days of receipt of the notice, pay the fine.
- (4) A banking institution, microfinance 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, microfinance 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.
- (7) A contravention of or failure to comply with any section referred to in subsection (1) is not a criminal offence.

### **93. Appeal Board**

- (1) Upon receipt of the notice of appeal by a banking institution, microfinance banking institution or controlling company against the decision of the Bank made under section 91, 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.

### **94. Repeal of laws and savings**

- (1) Subject to subsection (2), the laws specified in the Schedule are hereby repealed to the extent set out in the third column of the Schedule.
- (2) Any regulation made or in force, or any banking institution, or controlling company registered as such for the purpose of conducting banking business, under any provision of any law repealed by subsection (1) must be deemed to

have been made or to be in force, or to have been authorised to conduct banking business, under the corresponding provision of this Act.

**95. Short title and commencement**

This Act shall be called the Banking Institutions Act, 2013, and shall come into operation on a date to be determined by the Minister by notice in the Gazette.

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**96. SCHEDULE****LAWS REPEALED**

<b>No and year of law</b>	<b>Short title</b>	<b>Extent of repeal</b>
Act No. 2 of 1998	Banking Institutions Act	The whole
Act No. 14 of 2010	Banking Institutions Amendment Act	The whole
Act No. 23 of 1965	Banks Act, 1965	The whole
Act No. 80 of 1969	Financial Institutions Amendment Act, 1969	section 2
Act No. 23 of 1970	Financial Institutions Amendment Act, 1970	section 6
Act No. 91 of 1972	Financial Institutions Amendment Act, 1972	sections 12(a) (ii), 12(a) (iii) and 13
Act No. 67 of 1973	Financial Institutions Amendment Act, 1973	section 4
Act No. 101 of 1976	Financial Institutions Amendment Act, 1976	sections 37(a), (b), (d) and (f), 40, 42, 43, 47, 48, 49, 50, 51, 52 and 53
Act No. 94 of 1977	Financial Institutions Amendment Act, 1977	sections 20 and 21
Act No. 80 of 1978	Financial Institutions Amendment Act, 1978	sections 18(b), (c) and (d), 19, 20(1) (c) and 21(c)
Act No. 103 of 1979	Financial Institutions Amendment Act, 1979	section 27(c)
Act No. 99 of 1980	Financial Institutions Amendment Act, 1980	section 45
Act No. 36 of 1981	Financial Institutions Amendment Act, 1981	sections 25(a) and (b)
Act No. 38 of 1984	Inspection of Financial Institutions Act, 1984	section 11(1)
Act No. 46 of 1984	Corporation for Public Deposits Act, 1984	section 20
Act No. 86 of 1984	Financial Institutions Amendment Act, 1984	sections 24, 25, 29, 30, 31(a), (b) and (c), 32(c) and 33
Act No. 106 of 1985	Financial Institutions Amendment Act, 1985	sections 10(a), (b), (c), (j), (k), (o) and (p), 12(b), (c), (d), (e) and (g), 14(a), 15, 16, 17(a) and (c), 18(a), (c) and (d), 19(a), (b) and (c), 21(b) and (c), 22(b) and (c), 24, 25(a), 26, 29, 30, 31, 32, 33, 34 and 35
Act No. 6 of 1987	Financial Institutions	sections 3, 4, 5, 6 and 7

	Amendment Act, 1987	
Act No. 96 of 1988	South African Reserve Bank, Banking Institutions, Mutual, Building Societies and Building Societies Amendment Act, 1988	sections 2(a), 4(b) and (c), 6(a), 7(a), 8, 9, 10(a) and (b), 11, 12(a), (b) and (c), 13, 14, 15 and 16
Act No. 13 of 1989	Banking Institutions, Mutual Building Societies and Building Societies Amendment Act, 1989	sections 1, 3, 4 and 5
Act No. 22 of 1991	Banking Institutions Amendment Act, 1991	the whole
Act No. 1 of 1996	Married Persons Equality Act, 1996	section 26