EXPLANATORY MEMORANDUM: BANKING INSTITUTIONS BILL, 2023

31 JANUARY 2023

Content

1. PURPOSE

The purpose of this explanatory memorandum is as follows:

- To explain the rationale for the proposed amendments to the Banking Institutions Act, 1998 (Act No. 2 of 1998) and the Banking Institutions Amendment Act, 2010 (Act No. 14 of 2010);

- To consolidate the proposed amendments into a single legislation; and

- Lastly, the memorandum will also serve as institutional memory for future reference.

It is important to note that with the consolidation of banking laws as stated above, the intention is to ultimately repeal the previous versions of the Banking Institutions Act by introducing the Banking Institutions Bill of 2022. Therefore, the reader should take note that the explanatory memorandum will maintain the provisions of the Banking Institutions Act, 1998 (Act No. 2 of 1998) as amended by the Banking Institutions Amendment Act, 2010 (Act No. 14 of 2010). This explanatory memorandum should be read in conjunction with the table highlighting the changes in the relevant sections for ease of reference.

2. BACKGROUND

One of the key responsibilities of the Bank, as a regulator of banking institutions, is to ensure that the applicable legal framework for the regulation and supervision of banking institutions in Namibia remains effective and relevant. To this end, the legal framework is constantly benchmarked against applicable international best supervisory standards and practices as well as developments in both local and international financial markets, at least on annual basis. During the 2011 review of the banking legislation, the Bank identified sections that required to be amended to ensure that the legal framework is brought in line with international developments in the regulatory sphere and to ensure that it remains effective and relevant. In short, the issues identified include:

- Certain definitions in the Act needed to be streamlined to provide more clarity and to ensure proper application thereof in the context of the financial economic crisis experienced since 2008;

- The need to introduce a framework for microfinance banking institutions or second tier type of banking institution in an effort to enhance access to financial services and eliminate the wider populous from banking and financial services;

- The newly enacted provisions, relating to illegal financial schemes (also known as pyramid schemes) in the 2010 Amendment Act, proved to be challenging and problematic to implement practically;

- The recommendations following the crisis simulation exercises carried in 2011 and 2016 to test the resilience of the advice tools, pointed out significant weaknesses in the regulatory toolbox and intervention measures, including the liquidity and bank resolution provisions of the Act;

- The Bank of Namibia's role as a banking supervisor is set out in a series of approaches underpinning its various functions such as recovery and resolution options, as well as our approach towards resolving failing banking institutions or controlling companies under our purview. In this regard, the Bank seeks to reduce the risk and impact of a failure, through rigorous banking supervision coupled with robust recovery and resolution planning. The Global Financial Crisis underscored the need for effective frameworks to resolve systemically important banking institutions and banking groups. To this end, the Financial Stability Board formulated the Key Attributes of Effective Resolution Regimes for Financial Institutions, which sets out the core elements necessary for an effective resolution regime, and which principles has been used to strengthen the resolution regime for banking institutions in Namibia in line with those Key Attributes and internationally accepted practice recommendations;

- The lessons learned from exposure to single economies and non-diversification of ownership prompted the Bank to relook at the optimal level of local vs. foreign shareholding in banking institutions;

- The Companies Act, 2004 (Act No. 28 of 2004) came into effect on 1 November 2010 and repealed the Companies Act, 1973 (Act No. 61 of 1973). Therefore, the reference in the Banking Institutions Act to sections of the repealed Companies Act 1973 should be changed to read the Companies Act of 2004, which is an amendment to the 1973 Companies Act;

- Financial Sector Assessment Program (FSAP) revealed that the Bank did not have adequate powers to resolve failing banking institutions. staff statutory protection as provided in the Banking Institutions act, FSAP proposed that the resolution powers of the Bank should be improved; and

- Ultimately, as matter of principle, the single legislation will, upon promulgation, result in the repeal of the Banking Institutions Act of 1998 and Banking Institutions Amendment Act of 2010 to ensure that there is a single law governing matters relating to banking institutions, microfinance banking institutions and their controlling companies.

The above-mentioned background is the basis for the current proposed amendments to the Act.

3. PROPOSED AMENDMENTS

3.1 Objectives

The objectives of the Bill are –

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 or microfinance banking institution; to provide for the

registration of controlling companies in respect of authorised banking institutions or microfinance banking institutions; 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 the resolution of failing institutions and winding-up, judicial management and cancellation of authorisations; to provide for consolidated supervision of banking institutions, microfinance banking institutions and controlling companies; to authorise foreign banking institutions to open branches in Namibia; to provide for regulation of the ownership of banking institutions, microfinance banking institutions and controlling companies; to prohibit and criminalise illegal financial schemes; to establish an Appeal Board to hear and determine appeals against certain decisions of the Bank; and to provide for incidental matters.

3.2 Definitions (section 1 of Bill; section 1 of Act)

The definition of authorised dealer

Issue: In view of the fact that the Currencies and Exchanges Act 9 of 1933 and the Exchange Control Regulations dates back many years and the licensing requirements have become obsolete, the Bank considered it important to include new licensing provisions and rules for entities dealing in foreign exchange in the country. Consequently, the definition of authorised dealers had to be included in the Banking Institutions Bill to be read in conjunction with the licensing requirements provision under section 12 of the Bill.

Amendments to be included in the new Bill:

by the insertion for the definition of “authorized dealer” with the following definition:

“authorised dealer” in respect of any transaction in respect of gold, means a person authorized by the Bank to deal in gold, and in respect of any transaction in respect of foreign exchange, a person authorised by the Bank to deal in foreign exchange.

The definition of banking business

Issue: The formulation of the current definition of banking business poses interpretational and practical implementation challenges. This is because the definition comprised of two parts, the first referring to the “regular receiving of funds” from the public and the second referring to “banking business. **“Regular receiving of funds from the public”** is defined under a separate definition, a few pages after the definition of “banking business. This causes fragmentation, as the reader constantly has to cross reference between these two definitions to get a complete understanding of what banking business entails.

Further, for an activity to be regarded as banking business it has to occur or be carried out “regularly” or conducted frequently or more than once. However, the term “regularly” has not been defined to indicate how often or frequent activity is allowed to be carried out, before such activity could be considered a regular

occurrence, hence this created interpretational problems within the definition of "banking business".

The same definition included activities that fall within the definition of banking business, but if such activities are conducted once-off they may fall outside the application of the law. This however was not the intention of the lawmakers and as such, there is need to ensure that all activities relating to banking business should be reserved for licensed banking institutions, unless specifically stated otherwise.

After close analysis it appears that the word **"customary"**, under paragraph (b) (ii) is not commonly and widely used and can be misinterpreted. It is therefore proposed to delete and replace the word "**customary"** with a more commonly used words such as **"traditional".**

Under the definition of receiving of funds, certain activities stipulated under (ab) and (ac) were erroneously deleted in the 2010 Amendment Act, although it was meant to remain part of the definition of banking business. Therefore, to ensure that subsection (ab) and (ac) form part of the definition of banking business, they are reintroduced under the definition of banking business.

Furthermore, under the now deleted definition of "receiving of funds from the public" the exclusion (ac) stated that banking business excludes *"the acceptance of money against debentures or other similar debt instruments, if such money is not used for the purpose of granting advances, loans or credit to the public, excluding customary credit in respect of the sale of goods or the provision of services by the issuer of these instruments"; (emphasis added).*

However, during the recent financial crisis many of the excluded activities fell under term shadow banking; most particularly because the part of definition stating "*excluding customary credit in respect of the sale of goods or the provision of services by the issuer of these instruments" would have excluded such activities and consequently would have allowed activities such as shadow banking.*

The recent financial crisis demonstrated in many ways how shadow banking is interrelated with the regular banking system and can have severe negative impact on financial system stability. It was also noted that financial transactions outside the banking sector can be complex and may evolve over time depending on factors such as financial innovation and regulatory changes. A flexible forward-looking perspective is crucial to capture mutations in credit intermediation that can pose risks to the financial system.

Therefore, to ensure that shadow banking activities do not become part of banking system, it is proposed that the section of the exclusion stating that *"excluding customary credit in respect of the sale of goods or the provision of services by the issuer of these instruments"* should be deleted from the exclusion, meaning that such activities will amount to banking business as defined and if such person is not authorized, such business activity will be illegal.

Proposal: The proposal is to rephrase the first part of the definition of banking business to address the ambiguity brought about by the term "regular" and to remove the elements that causes fragmentation of the definition. In addition, it is proposed to delete and replace the word customary, to ensure that previously excluded activities, which could be deemed shadow banking activities under the definition of banking business is also deleted.

Amendments to be included in the Bill:

(a) by the insertion for the definition of "banking business" with the following definition:

"banking business" means the business that consists of –

[the regular receiving of funds from the public] accepting money in the form of deposits or other funds from the public, whether or not such deposits or funds involve the issue of securities or other obligations howsoever described, irrespective whether raised through a private or public placement, 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) any other activity designated as an authorised use of money for banking business by the Minister [in consultation with] on recommendation of the Bank has, by notice in the Gazette [determined] by notice issued under subsection 3(1); and

(c) such other services as are incidental and necessary to banking but does not include:

(i) 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.

(ii) the acceptance of money against securities or other obligations, if such money is -

(aa) not used for the purpose of granting advances, loans or credit to the public; or
(bb) if such money is used for investments for the purpose of expanding the business infrastructures of the issuer of such securities or in equity of other entities.

Definition of beneficial owner

Issue: Insertion of a definition for "beneficial owner"

The International Monetary Fund (IMF) carried out a scoping mission to Namibia during November 28–December 6, 2022. The objective of the mission was, among others, to provide legislative drafting support to address technical compliance deficiencies identified in Namibia's Mutual Evaluation Report adopted in September 2022.

One of the identified deficiencies was the absence of a legal definition of "beneficial ownership" in the legislation. A definition of beneficial ownership is necessary particularly when assessing the application for a banking license to ensure that the natural persons who are beneficial shareholders of applicants are subject to fit and proper assessment to determine their fitness to hold shares in a banking institution. In order to address the identified shortcoming, the Bank proposes that a definition of "beneficial shareholder" be inserted in the Bill and the words "beneficial shareholder" be inserted in the relevant provisions in sections 28, 29 and 34 of the Banking Institutions Bill. With this intervention, the Bank would ensure that Namibia meets the Anti-Money Laundering/Combating the Financing of Terrorism requirements and avoid a possible grey listing by the IMF.

Proposal: Incorporate the definition of "beneficial owner" in section 1 and insert the words "beneficial owner" provisions in sections 28, 29 and 34 of the Bill.

Amendments to be included in the new Bill:

The insertion of the following paragraph after the definition of banking institution:

"Beneficial owner" means a natural person who ultimately owns or controls a banking institution or controlling company of a banking institution and/or the natural person on whose behalf a ownership or control is held in a banking institution or controlling company.

The insertion of "beneficial owner" in the relevant provisions of sections 28, 29 and 34.

Definition of bridge bank

Issue: Insertion of a definition for “bridge bank”

The resolution framework introduces under section 70 the establishment of a “bridge bank” as one of the resolution options.

Establish a temporary bridge institution to take over and continue operating certain critical functions and viable operations of a failed banking institution.

Resolution authorities or the Bank of Namibia should have the power to establish one or more bridge banking institutions to take over and continue operating certain critical functions and viable operations of a failed banking institution, including:

(i) the power to enter into legally enforceable agreements by which the authority transfers, and the bridge banking institution receives, assets and liabilities of the failed firm as selected by the authority;

(ii) the power to establish the terms and conditions under which the bridge banking institution has the capacity to operate as a going concern, including the manner under which the bridge banking institution obtains capital or operational financing and other liquidity support; the prudential and other regulatory requirements that apply to the operations of the bridge banking institution; the selection of management and the manner by which the corporate governance of the bridge banking institution may be conducted; and the performance by the bridge banking institution of such other temporary functions as the authority may from time to time prescribe;

(iii) the power to reverse, if necessary, asset and liability transfers to a bridge banking institution subject to appropriate safeguards, such as time restrictions; and

(iv) the power to arrange the sale or wind-down of the bridge banking institution, or the sale of some or all of its assets and liabilities to a purchasing institution, so as best to effect the objectives of the resolution authority or the Bank of Namibia.

Proposal: Define bridge bank to provide clarity within section 70. Amendment by the insertion of the definition of “bridge bank” as follows:

Amendments to be included in the new Bill:

The insertion of the following paragraph after the definition of business practice:

"bridge bank" means a 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 70 (3)(b).

Definition of close relatives

Issue: Expansion of the definition of "close relatives"

In the current Act, the definition of close relative, in relation to a person, refers to 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. This definition excludes spouses in a union solemnized in terms of the civil law.

Close relatives are subjected to restricted loan exposure except if such exposure complies with the requirements for exposures to connected persons as determined by the Bank. For the purpose of the Act, spouses both in unions solemnized in terms of civil and customary laws are regarded as connected persons and are therefore subjected to restrictions imposed by the Act in terms of exposure to credit facilities and obligations to repay the loans.

Proposal: To effectively capture and distinguish between these different types of marriages, reference has been made to both civil and customary marriages by excluding the reference to customary law.

Amendments to be included in the Bill:

Repeal and replace paragraph (c) of the definition of "close relative" with the following definition:

(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)

For purposes of subsection (b) the definition applies only to brothers, sisters, step-sisters and step brothers that are reasonably known to the executive officers, board members or substantial shareholders, as the case may be.

Definition of credit bureaus

Issue: The insertion of a definition of "credit bureaus"

The Namibia Financial Sector Strategy (NFSS), a 10-year development strategy for the financial sector, acknowledges the important role that credit bureaus can play in ensuring access to finance for both individuals and SMEs. The NFSS recognises credit bureaus as a platform for information sharing among credit providers on the credit records of borrowers that could lead to determining the creditworthiness of borrowers, thereby achieving the dual objective of improving access to finance and avoiding over-indebtedness.

There are two credit bureaus operating in Namibia, namely *TransUnion* and *Compuscan* registered in terms of the Credit Bureau Regulations, 2014.

Proposal: It was therefore proposed that all credit bureaus in Namibia must be regulated. However, the challenges were that the Act did not have a definition for credit bureaus and that banking institutions are not compelled to submit credit data or borrower information to credit bureaus. Consequently, it is proposed to insert a definition of credit bureau in the Bill

Amendments to be included in the Bill:

Amend the Bill by the insertion of the definition of "credit bureau" to read as follows:

"credit bureau" means an entity specialised in the collection and sale of credit performance information for individuals and businesses, and registered as a credit bureau in terms of the of the applicable law;

Definition of "company"

Issue: Amendment of the definition of "company" in the Act

Currently the definition of a company does not include the entities incorporated in terms of the Close Corporation Act. This is despite the fact that there is a possibility that in the case of illegal deposit-taking, illegal banking business and illegal financial schemes, the juristic person involved may actually be a close corporation.
Therefore, to ensure that the common forms of juristic persons are encompassed under the law, it is important to expand the current definition to include close corporations.

Proposal: Amend the definition of "company" to include Close Corporations.

Amendments to be included in the new Bill:

The amendment of the definition of "company" to read as follows:

"Company" means a company registered under the Companies Act or a close corporation registered under the Close Corporation Act, 1988 (Act No.26 of 1988), as amended, or a trust registered under the Unit Trust Control Act, 1981 (Act No. 54 of 1981).

Definition of core banking systems

Issue: The current definition of core banking systems appears to be too broad especially in the context of the legal requirement to localise core banking systems in terms of the Determination on Localisation of Core Banking Systems (BID-19).

Proposal: Amend the definition of core banking systems as follow: “core banking systems means all IT systems and applications that process and record the execution of the core functions of a banking institution in an end-to-end manner, or any application in the absence of which core banking functions cannot be executed from initiation to completion”.

Definition of “suspend”

Issue: Include definition of “suspend” in the Act

In light of challenges experienced in the practical application of section 56 of the Banking Institutions Act, 1998 (Act No. 2 of 1998) as amended, the implications of assumption of control, especially with respect to role of a director of a banking institution requires more explicit clarification.

While the provision empowers the Bank to assume control of the banking institution and appoint persons to manage the affairs of the banking institution, the role of directors of the banking institution during the assumption is not clear. Legally speaking, directors of companies are vested with certain powers which must be temporarily or permanently stayed during the assumption of control.

Proposal: In order to provide certainty, it is proposed that the definition of “suspend” be introduced in the Banking Institutions Bill.

Amendment to be included in the new Bill:

By the insertion for the definition of “suspend” in section 1 of the Bill, with the following definition:

“suspend” with respect to a director or officer of a banking institution or microfinance banking institution means deprive by the Bank of powers and authority vested in a director or officer by virtue of any Act and/or the Memorandum and Articles of Association, for a period as may be specified by the Bank;

Definition of “executive officers”

Issue: **Amendment of the definition of executive officer.**

With the introduction of consolidated supervision under the Banking Institutions Amendment Act of 2010, the application of the Act was extended to the banking group as a whole and more particularly to the bank controlling companies. However, despite the amendments of 2010 the definition of executive officer did not explicitly include the controlling company`s executive officers. Executive officers of controlling companies as well as microfinance banking institutions, like those of banking institutions, are expected to be "fit and proper" persons to run the affairs of the controlling companies, thereby ensuring amongst others that on a consolidated basis banking institutions are effectively and properly managed.

Proposal: Amend definition of "executive officer" to include executive officers of controlling company and microfinance banking institutions.

Amendments to be included in the Bill:

by inserting the words "or controlling company" after the words "banking institution" in the definition of "executive officer" as follows:

"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 of the credit provisions, risk management, compliance, accounting, auditing, secretarial, treasury and operation functions, and includes a chief executive officer, deputy chief executive officer and any manager of a significant business unit;

Definition of "failing banking institution"

Issue: In view of the introduction of the resolution process for failing banking institutions or banking institutions in distress, where such banking institutions have to be resolved, especially where the banking institutions are no longer viable or likely to be no longer viable, and has no reasonable prospect of becoming so, the Bank proposes the introduction of a definition to explain what is meant with a failing banking institution in the context of bank resolution schemes.

The resolution regime should provide for timely and early entry into resolution, and importantly, should be initiated before a banking institution is balance-sheet insolvent and before all equity has been fully wiped out. There should be clear standards or suitable indicators of non-viability to help guide decisions on whether firms meet the conditions for entry into resolution. These include insolvency or likelihood thereof, failure to comply with minimum prudential requirements and unsound corporate governance practices.

With the introduction of the resolution framework, there is thus a need to introduce the definition of what consists of a failing banking institution, microfinance banking institution or controlling company.

Proposal: Introduce a definition of failing banking institution, microfinance banking institution or controlling company.

Amendments to be included in the new Bill:

"failing banking institution, microfinance banking institution or controlling company" means a banking institution, microfinance banking institution or controlling company that experiences or continues to experience, or becomes subject to, any of the conditions or circumstances specified in section 69(1).

Definition of "Foreign National"

Issue: The Bank considers a blend of local and foreign-owned banks as an important principle of economic development and financial stability. Currently, the ownership of banking institutions in Namibia is dominated by foreign nationals. As such the Bank is proposing amendments to the Banking Institutions Act by restricting the extent to which foreign investors can acquire or hold ownership stakes in banking institutions. These restrictions could minimize the severity of the potential impact to the Namibian financial system and economy in case of any crises experienced in the country that our banking industry is exposed to, a position that will foster stability of the banking system in the long run. However, to ensure greater certainty in the consistent application of ownership matters relating to banks, which is fundamental in safeguarding financial stability in the domestic banking system, it is critical to have the issue of foreign nationality clearly spelled out in the Act.

The terms "foreign national" come from the introduction of the provisions relating to ownership under section 33 which regulates shareholding by foreign nationals. As such, there is need to define the term to clarify who qualifies to be a foreign national for the purpose of those sections.

Proposal: It is proposed to insert a definition of foreign national in line with the definition under the Namibia Investment Promotion Act, 2016 (Act No. 9 of 2016).

Amendments to be included in the new Bill:

By the insertion of "foreign national" in section 34 as follows:

"foreign national" means –

(a) a natural person who is not a Namibian; or

(b) a company incorporated, registered or constituted in accordance with the laws of -

(i) Namibia; or

(ii) any country other than Namibia,

that is not directly or indirectly owned or controlled by a Namibian;

(c) a close corporation that is registered in accordance with the laws of -

(i) Namibia; or

(ii) in any country other than Namibia,

that is not directly or indirectly owned or controlled by a Namibian;

(d) a trust registered in Namibia, or in any country other than Namibia, that is not directly or indirectly owned or controlled by a Namibian.

Definition of "listed banking institution"

Issue: Introduction of definition of "listed banking institution"

Currently the law does not include a definition of a listed banking institution. The term" listed banking institution" was introduced in section 28. Although it may appear rather obvious what the term may mean, it is important to explicitly define it accordingly.

Proposals: Insert the definition of "listed banking institution" in the Act after the definition of insolvent.

Amendment to be included in the new Bill:

"listed banking institution" means a banking institution that issued shares through an exchange as defined in this Act or an exchange, by whatever name it is called, registered or licensed in terms of the laws of a State other than Namibia, and whose shares are traded on that exchange.

Insert microfinance banking institution related definition with the establishment of a regulatory framework for such banking institutions in Namibia.

Issue: In line with its strategic objective of promoting financial inclusion, the Bank adopted a strategic goal to create a special regulatory framework for the establishment of microfinance banking institutions in Namibia. This undertaking includes the development of a regulatory framework for microfinance banking institutions (MFBIs), which will place such institutions under the regulatory

ambit of the Bank. This framework specifies the appropriate prudential standards and supervisory requirements the MFBIs will be subjected to, taking into account their unique characteristics and the risks inherent in their business models versus mainstream banks.

In order to create a window for establishment of the microfinance banking institutions and to bring them within the regulatory ambit of the Bank, it is necessary to introduce the below definitions that specifically relate to the unique operations of microfinance banking institutions.

In ensuring that the Bank appropriately addresses the concerns regarding access to finance, it is imperative that clear distinction should be drawn between micro-lending business (under NAMFISA) and microfinance banking business, except for the deposit-taking elements. It was found that in order to accommodate such a distinction, a new definition as subcategory of banking business will have to be introduced, to prevent regulatory arbitrage and to prevent new entrants into this space that do not have the desired social objectives in mind. The clear line of distinction will provide for a trade-off between maintaining the focus on the excluded portion of society, while allowing for flexibility and avoiding concern of enforceability.

Defining the scope of microfinance banking business will provide for its distinction from conventional banking business and will set the parameters within which such institutions must primarily operate.

Proposals: It is proposed to insert appropriate definitions related to microfinance banking institutions in the Act to clarify the concepts that are unique to microfinance banking business.

Amendment to be included in the Bill:

Amendment by the insertion of “microfinance banking business” definition after the definition “managerial responsibility” to read as follows:

“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.

(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; or if such money is used for investments for the purpose of expanding the business infrastructures of the issuer of such securities or in equity of other entities.

(a) Microloan - The regulatory framework for microfinance banking institutions in Namibia requires microfinance banking institutions to be registered with the Bank. This effectively means that institutions that engage in microloan banking business will fall under the regulatory purview of the Bank. In the absence of a national definition of microloan, there is a need to provide a definition of microloan to ensure consistency and avoid potential misinterpretation of the concept. The insertion of this definition intends to carve out the loan size and clarify what constitutes a microloan for purposes of microfinance banking business.

Amendment by insertion of "microloan" definition as follows:

"microloan" means a loan not greater than an amount as may be determined by the Bank by notice in the Government Gazette from time to time;

(c) Microfinance banking institution

Similarly, to banking institutions, there is need to stipulate what exactly constitutes a microfinance banking institution, thus the definition of microfinance banking institution has been inserted as follows;

"microfinance banking institution" means a public company authorised under this Act to primarily conduct or microfinance banking business or deemed to be so authorised."

Insert a definition for "public"

Issue: The word "public" was not defined in the current Act, and consequently the word is subjected to various interpretations. Different meanings may be attached to the provisions of the Act, especially where the word "public" is used. The different interpretation posed practical challenges with industry

players because consensus could not be reached on the meaning of the word "public".

Throughout the Act, the term public is used, however no definition has been provided to give a clear indication of who falls within or outside the category of public in terms of the Act.

Proposal: The proposal therefore is to define public so as to provide clarity within the context of banking business.

Amendment to be included in new Bill:

By the insertion of the definition of "public" after the definition of "prescribed" to read as follows:

"public" in the context of banking business, 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, statutory bodies and other institutions referred to in section 2 (2) of the Act.

Definition of receiving of funds from the public

Issue: "Receiving of funds from the public" is defined under a separate definition, a few pages after the definition of "banking business. This causes fragmentation, as the reader constantly has to cross reference between these two definitions to get a complete understanding of what banking business entails.

Further, for an activity to be regarded as banking business it has to occur or be carried out "regularly" or conducted frequently or more than once. However, the term "regularly" has not been defined to indicate how often or frequent activity is allowed to be carried out, before such activity could be considered a regular occurrence, hence this created interpretational problems within the definition of "banking business".

The same definition included activities that fall within the definition of banking business, but if such activities are conducted once-off they may fall outside the application of the law. This however was not the intention of the lawmakers and as such there is need to ensure that all activities relating to banking business should be reserved for licensed banking institutions, unless specifically stated otherwise. In view of the proposed amendment to the (rephrased) definition of banking business, there will be no need for the definition of 'receiving of funds from the public". In other words, it will become redundant.

Proposal: It is proposed to delete this definition in its entirety.

Amendments to be included in new Bill:

By deleting the definition of "receiving funds from the public", which follows the definition of "prescribed" in the Act.

> **["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."]**

Insert definitions for the words "originating institution", "securitisation", "synthetic securitisation", "traditional securitisation" and "special purpose entity"

Issue: Although some banking institutions intends to engage in securitisation transactions to ease their liquidity challenges and diversify their source of funding, currently there is no securitisation framework in Namibia. Securitisation is considered as a banking business because it involves "receiving of funds from the public" and therefore any institution intending to take part in securitisation as a special purpose entity has to be duly authorised by the Bank. However, the Minister may designate securitisation transactions as not falling under the definition of "receiving funds" from the public.
The designation of securitisation, through the Notice published in the Gazette, would provide the securitisation legal framework and pave the way for banking institutions and special purpose entity" to participate in securitisation transactions.

The Bill makes references to securitisation transactions, origination institutions and special purpose entities. Therefore, in order to provide an understanding of the securitisation transactions, the Bill provides the definitions of technical terms relating to the securitisation process.

Proposal: Insert the definitions for the words "securitisation" and "special purpose entity" in section 71.

<u>Definitions to be included in the Bill:</u>

securitisation" means the process by which assets, originally owned by a banking institution or non-bank institution, are pooled and sold to a special-purpose entity that issues marketable or tradable securities over the pooled assets; and

"special-purpose entity" means an institution incorporated, created or used solely for the purpose of implementation and operation of securitisation scheme or as approved by the Bank and whose legal status makes its obligations secure even if the parent company becomes insolvent.

Insert a definition for the word "security"

Issue: The proposed amendment to the definition of "banking business" introduces a new term "securities", a term which is not defined elsewhere in the Act. It is necessary that the term "security" be defined to avoid it being subjected to different interpretations.

Proposal: Insert the definition for "securities" to provide better clarity in the usage of this word in the context of the Amendment Act.

Amendment to be included in the new Bill:

(a) by the insertion of "security" definition as follows:

"securities", for purposes of the definition of banking business, means a financing or investment instrument issued by a juristic person 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, debentures, credit linked notes and other similar instruments.

Insert a definition of the phrase "significant business unit"

Issue: Banking institutions are challenged with interpretation of the phrase "significant business unit" in the definition of "executive officer"**.**

Proposal: The proposal is therefore to insert the definition of "significant business unit" in the Bill.

Amendment to be included in the Bill:

"significant business unit" means a functional and strategic division of a banking institution, microfinance banking institution or controlling company that work towards the achievement of the strategic objectives of the institution.

Insert a definition of the phrase "substantial shareholder"

Issue: In order to safeguard the interests of depositors, it is crucial that banks are soundly and prudently managed. Accordingly, as deposit-taking institutions, banks should be owned, managed and operated by persons who maintain high ethical standards, whose conduct and business dealings support a conclusion of overall integrity and probity, and who are competent and qualified to conduct such business. In the current law, no person who is not a fit and proper person, in accordance with the criteria for the "fitness and probity" testing relating to substantial shareholders as determined by the Bank may become a substantial shareholder of a banking institution. The threshold for any shareholder to be regarded as a substantial is (5) five percent of total voting shares. It was however found that this threshold is below the international best practices threshold for significant ownership of shareholding. Most countries worldwide set substantial threshold at (10) ten percent.

Proposal: The proposal is therefore to amend the definition of "substantial shareholder" by increasing the threshold to (10) ten percent and to include the word banking institution in the same paragraph to replace the word company.

Amendment:

"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]** **banking institution or microfinance banking institution**, 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.

Insert definition of "financial distress"

Issue: As one of the lessons learnt from the financial crisis, banking institutions are now required to prepare and implement Recovery and Resolution demonstrating how the institution would be resolved in a rapid and orderly manner in the event such institution's material financial distress or failure. In order to provide certainty and avoid different interpretations, it is necessary to provide a definition of "financial distress" in the Bill.

Proposal: To insert a definition of "financial distress" in the Bill as follows: "financial distress" means a condition where a company cannot meet, or has difficulty paying off, its financial obligations to its creditors, typically due to high fixed costs, illiquid assets or revenues sensitive to economic downturns".

Insert definition of "deposit guarantee scheme"

Issue: Section 69 of the Bill provides the order of priority that should be followed when assets of a failing banking institution, microfinance banking institution or controlling company are made available to meet its liabilities. One of the categories provided is payment to preferential creditors including deposit liabilities which are covered by the deposit guarantee scheme. In order to provide certainty and avoid different interpretations, it is necessary to provide a definition of "deposit guarantee scheme" in the Bill.

Proposal: To insert a definition of "deposit guarantee scheme" in the Bill as follows:

"deposit guarantee scheme" means a scheme established by law to protect depositors of banking institutions or microfinance banking institutions by paying out compensation in the event of deposits held by a banking institution or microfinance banking institution becoming unavailable.

3.3 Amendment of section 2 of the Act (section 2 of the Bill)

Issue: (i) Removal or addition of any institution or body from section 2

Currently, the removal of an institution or a body from section 2 implies that such institution or a body will become subject to or have to comply with the provisions of the Act, should such entity be conducting business that resembles that of banks as stipulated by this Act. However, this is not explicitly stated in the Act and may be open to different interpretations. Therefore, taking into account that the institutions or bodies under section 2 may warrant different regulation and supervision, there is need to permit the Minister to prescribe regulations relating to such entities or subject them to specific provisions of the law. Further, the current Act does not make provision for the Minister to add institutions to section 2 to make the Act not applicable to such institutions. Therefore, there is a need to empower the Minister to add institutions to section 2(2) if the Minister, upon the recommendation of the Bank, is of the opinion that the Act should not be applicable to a certain institution.

(ii) Adding the Development Bank of Namibia to the list of exempted institutions

With the 2010 Amendment Act, the reference to the Development Fund of South West Africa/Namibia Act, 1997 (Act No. 28 of 1987), was deleted. However, the current Development Bank as established by the Development

Act of Namibia Act 2002 (Act No.8 of 2002) was not included. Despite the fact that the Development Bank of Namibia Act explicitly states that such entity is excluded from the realm of the Banking Institutions Act, there is a need to ensure that our law explicitly excludes Development Bank of Namibia as intended by the law. Development Bank of Namibia Act has a provision, which allow Development Bank of Namibia to be subjected to Banking Institutions Act, cross reference this section in Act

(iii) Prohibition of exempted non-banking financial institutions from engaging in banking business

Currently, the Act exempt non-banking financial institutions regulated by the Namibia Financial Institutions Supervisory Authority from the application of the Banking Institutions Act, 1998. The Act does not provide circumstances under which these institutions are exempted. This state of affairs results in some nonbanking financial institutions exploiting this loophole in the Act by engaging in banking business under the pretext that the Banking Institutions Act, 1998 does not apply to them since they are exempted by section 2 of the Act.
However, it could not have been the intention of the legislature that unauthorised non-banking financial institution engage in banking business without appropriate authorisation by the Bank.

Proposal: Therefore, the Banking Institutions Act needs to be amended under the existing provisions to allow for the Minister, where appropriate, to also explicitly subject any institution or body that has been removed from the exemptions clauses of section 2, to be subjected to specific provisions of the law and prescribed requirements by way of regulation, by the Bank of Namibia. The provisions of section 2 must also be amended to include the institution, Development Bank of Namibia to the exempted institutions. Further, the Act should be amended to empower the Minister, by Notice in the Gazette, to add institutions to section 2(2) if the Minister, upon the recommendation of the Bank, is of the opinion that the Act should not be applicable to a certain institution.

Further, there is a need to provide circumstances under with non-banking institutions are exempted from the application of the Act in order to make sure that only authorised institutions can engage in banking business.

Amendments to be included in the Bill:

Section 2 is amended as follows:

(a) by the substitution for paragraph (2)(g) of the following paragraph:

"(g) any co-operative **[society]** registered under the Co-operatives **[Societies]** Act, 1996 (Act No. 23 of 1996); or"

(b) by revising subsection 2(2)(j) as follows:

"(j) any non-bank financial institution whose business activities are governed by law and regulated by NAMFISA, except that the exemption is limited to the extent that the business activities of that non-bank financial institution are regulated by NAMFISA"

(c) by the introduction of the following section after subsection (2)(i)

(j) the Development Bank of Namibia, established by the Development Bank of Namibia Act, 2002 (Act No. 8 of 2002).

(d) by the introduction of new subsection (3)

"(3) A non-banking financial institution exempted from the application of this Act in terms of subsection (2)(i) may not engage in banking business without written authorisation by the Bank".

(e) by the substitution for subsection (3) of the following subsection:

"(4) The Minister may, on the recommendation of the Bank, -

(a) by notice in the Gazette, remove any institution or body **[from]** from or add any institution or body to, the institutions or bodies exempted from the application of this Act under subsection (2),

(b) despite the provisions of the establishing Act of an institution or a body referred to in subsection (2), apply any provisions of this Act to that institution or body, or prescribe differentiated prudential requirements for such institution or body, as the Minister may consider appropriate in the circumstances; or

(c) withdraw or amend a notice issued under paragraph (a) by notice in the Gazette.

(f) by the introduction of new subsection (7)

"(7) Where there is a conflict between the provisions of this section and any provision of any law establishing a non-banking financial institution relating to a matter regulated under or governed by this Act, the provisions of this section prevail to the extent of the conflict.

3.4 Addition of a new section 5: delegation of powers and assignment of functions

Issue: Currently, the Act does not explicitly make provision for the delegation of powers from the Board to the Governor or Deputy-Governor. In most instances, the Act provides that the Bank may execute a certain function. For instance, in terms of section 8 (of the Bill), the Bank must in writing direct a person who obtained money from the public in contravention of section 6 to repay all monies so obtained by him within a period as the Bank may specify.

In this instance it is implied that such directive should be made by the Board of the Bank. Because it is practically impossible for the Board to give a resolution every time the Bank performs administrative function, it is imperative that there is clear delegation of powers by the Board to the Governor and Deputy-Governors to execute administrative functions on behalf of the Bank.

Proposal: It is proposed that a new section 5 be introduced in the Bill empowering the Board, in writing, to delegate any of the powers conferred on the Bank under this Act to the Governor or Deputy-Governor as follows:

5. (1) The Board of the Bank may, as contemplated in section 79(2) of the Bank of Namibia Act, in writing delegate a power or assign a function conferred or imposed on the Board by or under this Act to the Governor, a Deputy Governor or a staff member of the Bank.

(2) The Governor of the Bank may, as contemplated in section 79(3) of the Bank of Namibia Act, in writing and on such conditions as the Governor may determine, delegate a power or assign a function conferred or imposed on the Governor in terms of subsection (1) or in terms of this Act to a Deputy Governor or staff member of the Bank.

3.5 Amendment of section 4 of the Act

Issue: Financial Sector Assessment Program (FSAP) of the World Bank revealed that the staff statutory protection as provided in the Banking Institutions act, 1998 as amended does not provide adequate protection to the staff of the Bank in the event of legal proceedings instituted against them in the course of their duties. FSAP proposed that such protection should be improved.

Proposal: It is proposed that section 4 of the Act be amended to enhance statutory protection as follows:

(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 in the performance of any function or duty under this Act.

(2) The costs and fees incurred by any person under subsection (1) paragraphs (b), (d) and (e) must be borne by the Bank.

3.6 Amendments of section 5 of the Act (section 6 of bill)

Issue: Criminalise non-compliance with subsection (1).

The current provisions are silent on offences and penalty in respect of noncompliance with this section. The imposition of penalties will serve as deterrence for non-compliance and create an appropriate compliance driven culture within the banking industry.

In view of the above, the penalty for non-compliance has been introduced taking into account the practices in other jurisdictions and aligning with the risk based supervisory framework adopted by the Bank of Namibia. Non-compliance with the Bank of Namibia's regulatory framework is viewed in serious light. The seriousness of non-compliance is determined based on factors such as threat to the financial system, duration and frequency of occurrences and past records of non-compliance incidents.

The payment of a penalty does not by itself absolve the concerned banking institutions from remedying the compliance failure. Banking institutions are expected are expected to address compliance failure within a reasonable period of time.

Proposal: Criminalise and penalise any contravention with the provisions of subsection (1) by inserting subsection (3) as follows: "Any person who contravenes or fails to comply with subsection (1) commits an offence and is liable to the penalties specified in section 92(2)(a)".

3.7 Amendment of section 6 of the Act (section 7 of the Bill)

Issue: Subsection 6(2) is referring to section 55A, however, a new proposed section has been brought into the Act, which replaces the old section 55A dealing with pyramid schemes or illegal financial schemes, the Bank found that the reference to section 55A has become redundant and is therefore no longer needed.

Further, the current provision is silent on offences and penalty in respect of non-compliance with this section therefore as suggestion has been made to add subsection (6) to provide penalties for non-compliance with subsection (4).

Proposal: Therefore, the proposal is to remove any reference to section 55A from section 6(2). Further, a proposal is made to revise the entire section 7 as follows:

7. (1) For the purposes of this section, "premises" includes 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.

(2) 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 on the authority conferred by Sub-Article (2) of that Article.

(3) If the Board of the Bank has reason to believe that a person is conducting banking business or microfinance banking business in contravention of section 6, the Bank may request an authorised officer, which may exercise any of the powers conferred by subsection (4) or (5).

(4) An authorised officer may, subject to subsection (7), at any time and without prior notice -

(a) enter any premises which the Bank or authorised 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 6;

(b) 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 paragraph (a); 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,

as if the authorised officer were, subject to necessary changes, a police official referred to in Chapter 2 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977) and the book, record, statement, document or other item were used in the commission of a crime.

(5) An authorised officer may -

(a) 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 subsection (4)(a), require that person to produce the book, record, statement, document or other item to the authorised officer issuing or delivering the notice at the place, on the date and at the time specified in the notice;

(b) examine any book, record, statement, document or other item referred to in subsection (4)(a), and may require from any person referred to in paragraph (a) an explanation regarding any entry in the book, record, statement, document or other item;

(c) by notice in writing delivered to any banking institution, microfinance banking institution or controlling company, instruct such banking institution, microfinance banking institution or controlling company to -

(i) summarily freeze any banking account or accounts of any person referred to in this section with such banking institution or microfinance banking institution or a banking institution or microfinance banking institution controlled by such company; and

(ii) retain all moneys in any banking account or accounts, pending the further instructions from the Bank;

(d) 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;

(e) if any person has been convicted of an offence in terms of section 6, by notice in writing delivered to that person direct the person to close down his or her or its business;

(g) require a member (s) of the Namibian Police Force to assist the authorised officer in the exercise of powers or performance or execution of duties or functions under this section; or

(h) request any other person who –

(i) is not below the age of 16 years and not above 60 years of age; and

(ii) the authorised officer reasonably believes is able to assist the authorised officer in the exercise of powers or performance or execution of duties or functions under this section,

to assist the authorised officer in the exercise of powers or performance or execution of duties or functions under this section.

(6) In the exercise of powers or performance or execution of duties or functions conferred by subsection (4) or (5), the authorised officer may not enter any premises or part of premises being used as a private home, except where –

(a) the owner or occupier of those premises consents to the entry and search of the premises;

(b) 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; or

(c) the authorised officer on reasonable grounds believes that -

(i) a warrant of entry and search would be issued to him or her if he or she applied for it; and

(ii) the delay in obtaining the warrant would defeat the object of the investigation.

(7) 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 (6) if it appears to the judge or magistrate from information on oath or affirmation that there are reasonable grounds for believing that -

(a) section 6 has been or is being contravened in those premises; or

(b) a book, record or any other document or other article required for inspection is in those premises.

(8) A warrant must -

(a) identify the premises that may be entered and searched; and

(b) authorise the person named in the warrant to enter and search the premises and exercise any of the powers conferred by subsection (4) or (5).

(9) A warrant continues in force for a period of 30 days from the date it is issued but lapses if -

(a) the purpose for which it was granted is fulfilled; or

(b) it is cancelled by the judge or magistrate by whom it was issued or by any other judge of the High Court or any other magistrate.

(10) A warrant may be executed on any day between 07:00 and 18:00 unless a different time that is reasonable in the circumstances is authorised and specified in the warrant by the judge or magistrate granting the warrant.

(11) On first entering any premises under a warrant the staff member authorised by the warrant must -

(a) provide to the owner or occupier of the premises proof of -

(i) his or her authority to enter the premises by handing a copy of the warrant to that person; and

(ii) his or her identity; or

(b) if none of the persons mentioned in paragraph (a) is present, affix a copy of the warrant to the premises in a prominent and visible place.

(12) A person in charge or control of premises entered by an authorised officer under subsection (4) or (5) must provide such reasonable facilities and assistance as the authorised officer may require for performing a function under this section, including providing access to any computer on the premises and rendering assistance to the authorised officer to search for any data contained

in such computer and, on request of the authorised officer, provide any data contained in that computer in printed form to the authorised officer.

(13) An authorised officer who exercises or seeks to exercise any power or performs or seeks to perform any function under this section in relation to any person must produce his or her written authorisation by the Bank for inspection when requested to do so by that person.

(14) A person -

(a) not being an authorised officer, who by words, conduct or demeanor falsely represents himself or herself to be an authorised officer, unless that person is an authorised officer ;

(b) who hinders or obstructs an authorised officer in the exercise, performance or execution of his or her powers, duties or functions under this Act;

(c) who, without lawful or reasonable excuse, refuses to permit an authorised officer to enter premises or to conduct an examination or inquiry in terms of this section;

(d) who, without lawful or reasonable excuse, fails or refuses to produce any book, record, statement or other document which an authorised officer requires to be produced to him or her for inspection under subsection (5)(a);

(e) who, without lawful or reasonable excuse, fails or refuses to explain any entry in a book, record, statement or other document which an authorised officer requires him or her to explain;

(f) who removes or tampers with any book, record, statement or other document seized by the authorised officer under subsection (4)(a);

(g) who, without lawful or reasonable excuse, fails or refuses to comply with a direction issued by an authorised officer under subsection (5)(d) or (e);

(h) who, without lawful or reasonable excuse, fails or refuses to provide authorised officer with reasonable facilities and assistance required by an authorized officer in terms of subsection (12);

(i) who, without a lawful or reasonable excuse, refuses or fails to comply with any request made by an authorized officer as contemplated in subsection (5)(h) in the exercise, performance or execution of such officer's powers, duties or functions;

(j) who, subject to Article 12(1)(f) of the Namibian Constitution, refuses or fails to answer any question which an authorized officer lawfully directs at such person in the exercise, performance or execution of such officer's powers, duties or functions; or

(k) intentionally or recklessly furnishes false or misleading information to an authorized officer,

commits an offence and is liable to the penalties specified in section 92(2)(b).

(15) A banking institution, microfinance banking institution or controlling company that or any other person who contravenes or fails to comply with an instruction issued by the Bank under subsection (5)(c) commits an offence and is liable to the penalties referred to in section 93(2).

3.8 Amendment of section 7 of the Act (section 8 of Bill)

Issue: Section 55A will be repealed by the new proposed section and hence reference thereto will become irrelevant.

Proposal: Therefore, the proposal is to remove the reference to section 55A, by amending the Act as follows:

Amendments to be included in the Bill:

"Repayment of monies by unauthorised persons"

Section 8 is amended as follows:

(a) section 7 of the principal Act is amended by the substitution for subsection (1) for the following subsection:

"(1) if the Bank is satisfied that a person has obtained any monies in contravention of section 6 [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, within a period as the Bank may specify in the directives.

(5) A directive issued to a person to repay monies in terms of subsection (1) does not exonerate such person from criminal liability.

(6) A person who contravenes or fails to comply with a directive issued by the Bank under subsection (1) commits an offence and is liable to the penalties specified in section 92(2)(a).

3.9 Amendments of section 8 of the Act (section 9 of Bill)

Issue: The current provisions of the Banking Institutions Act authorise the Bank to change the authorised name of any banking institution which is deemed to be misleading to the public as to the identity or nature of the business.

Proposal: Therefore, the proposal is to delete the current paragraph (a) of subsection (4) and subsection (5), to remove the possibility of the Bank of Namibia changing the name of a banking institution, after it has been duly authorised to use such a name, but to direct the banking institution to change the name itself.

Amendments to be included in new Bill:

The Act is amended as follows:

(a) by the deletion of paragraph (a) of subsection (4).

[(a) Change the authorised name of the banking institution; or]

(b) by the deletion of subsection (5).

[(5) The Bank shall not change the name of banking institution under subsection (4), unless –

(a) the Bank has given the banking institution 30 days' written notice of its intention to change the name of the banking institution, furnishing reasons for the intended change of name; and

(b) has afforded the banking institution the opportunity, within 30-day period of time contemplated in paragraph (a), make written representations to the Bank relating to the intended change of name.]

(6) Any banking institution or microfinance banking institution that or any other person who –

(a) contravenes or fails to comply with subsection (2); or

(b) refuses or fails to comply with a directive issued by the Bank under subsection (4),

commits an offence and is liable to the penalties referred to in section 93(2).

3.10 Amendment of section 9 of the Act (section 10 of the Bill)

Issue: Incorporation of branches of foreign banking institution as external company under the Companies Act.

Foreign banking institutions, applying for approval to establish a branch in Namibia, are not expected to be incorporated as a public company under the Companies Act, but rather be registered as an external company. The Act does not explicitly make reference to an external company in relation to branches of foreign banks and it is not clear whether such foreign banking institutions should register as

external companies or should be public companies. The current provisions therefore may cause confusion as to what type of company or business entity a branch of foreign banking institutions must be.

Further, there is a need to criminalise non-compliance with subsections (1) and (2). The current provisions are silent on offences and penalty in respect of non-compliance with this section.

Proposal: Therefore, the proposal is to explicitly state that a foreign banking institution wishing to conduct banking business through a branch, must be registered as an external company as provided for in the Companies Act, which read as proposed under the amendments below.

Criminalise and penalise any contravention with the provisions of subsection (1) and (2) by inserting 10(4).

Amendments to be included in the new Bill:

The Act is amended by the substitution for subsections (1) and (2) of section 10 of the following section:

"Prerequisite for conducting banking business or microfinance banking business

(1) The Bank may not authorise a person to conduct banking business or microfinance banking institution unless that person is -

(a) incorporated as a public company under the Companies Act and has the minimum capital funds as determined under section 39; or

(b) a branch of a foreign banking institution that;

(i) is incorporated as a public or private company under similar provisions of the Companies Act in its country of origin;

(ii) is registered as an external company under the Companies Act, authorised to conduct banking business or microfinance banking institution in terms of section 26; and

(iii) 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.

3.11 Amendments to Section 10 of the Act (section 11 of the Bill)

Issue: Currently, the law is silent on whether or not an application can be withdrawn at any given time by the applicant. Likewise, the Act also does not empower the Bank to cancel applications of poor quality. It can however be implied that such applications, in the absence of any provision to the contrary in the law, can be revoked by the applicant or can be cancelled by the Bank of Namibia, if the preliminary findings are that such applications do not meet the minimum set criteria to be licensed or authorised as banking institutions or fail to submit the necessary information timely.

Proposal: Therefore, to create certainty and clarity in the law, it is proposed that provisions be introduced under section 11 to allow bank license applicants, out of their own accord to withdraw applications. At the same time, to enable the Bank of Namibia, where applicants fail to submit qualitative information or quantitative information in support of their application timely, cancel such applications.

Amendments to be included in the new Bill:

The Act is amended by the insertion of subsections (4) and (5) after subsection (3):

"(4) An applicant may withdraw the application by written notice to the Bank at any time before authorisation to conduct banking business is granted or refused.

(5) The Board of the Bank may, delegate the powers to the Governor to cancel any application where –

(a) 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; or

(b) an application contains material deficiencies in its proposed business plan, financial projections, proposed capital and shareholding structures,

(6) Where an application has been cancelled under subsections (4) or (5), it will not be processed for further consideration and the applicant must be notified accordingly.

(7) Should the applicant intend to continue with the application after it has been cancelled under subsections (4) or (5), a new application must be submitted provided that a period of twelve months has lapsed from the date of such refusal.

(8) Any person who when making an application under subsection (1) intentionally or recklessly furnishes false or misleading information to the Bank commits an offence and is liable to the penalties specified in section 92(2)(a).

3.12 Amendment of section 11 of the Act, 1998 (section 12 of the Bill)

Issue: A recent Financial Sector Assessment Program of the World Bank revealed that the Bank of Namibia's independence, as the regulator of banking institutions, is limited by a requirement for the Ministry of Finance's input to supervisory decisions. This is particularly the case where it is required that the Bank may only grant or refuse banking license application in "consultation with the Minister". This requirement can be construed as limiting the independence of the Bank. In terms of the Basel Core Principles, the licensing and authorization of banking institutions is inherently the responsibility of the Central Bank. Notwithstanding this, the total independence of the central bank may have certain political consequences. Therefore, it is proposed that the Bank should solely be responsible for licensing of banks, but the consultation process with the Minister, who may provide advice to the Bank on matters relating to license application, should remain.

As part of licensing procedures, the Bank will have to develop a practice whereby prior to the issuance of the license and as part of the assessment process, the applicant is given a "provisional license" valid for a period of 6 months. During such period, the applicant is expected to commence with the preparations to start conducting banking business, which includes the recruitment of staff in the key positions, acquiring the operating system(s) and securing a building. The purpose of issuing such provisional license is to enable the Bank to satisfy itself that the applicant is indeed ready to commence with conducting of banking business. However, the Bank does not have explicit powers in terms of the Act to issue a provisional license.

Therefore, to ensure that the Bank is empowered to issue a provisional license, a provision is introduced accordingly.

Proposal: Remove from the Act the wordings "with the concurrence of" but leave the text "in consultation with the Minister".

<u>Amendments to be included in the new Bill:</u>

"Granting or refusal of application for authorisation and certificate to conduct banking business"

Section 11 of the principal Act is amended:

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

"(2) No application for authorisation to conduct banking business <u>or microfinance banking business</u> must be considered by the Bank, unless the Bank is satisfied that -

(a) <u>Business plan is viable;</u>

(b) Proposed capital structure is adequate to –

(i) mitigate the risks from the proposed business model;

(ii) support the growth in the balance sheet and expansion of the business, and

(iii) cover the formation expenditures and other operational expenses.

(c) substantial shareholders possess adequate financial means to provide required support to the proposed banking institution or microfinance banking institution;;

(d) proposed banking institution or microfinance banking institution has transparent shareholding group structures which allow for the -

(i) better understanding and assessment of the ultimate owners of the proposed banking institution or microfinance banking institution; and

(ii) conduct of effective consolidated supervision of the group;

(e) substantial shareholders have submitted a commitment letter in support of the application on the following aspects:

(i) meeting the banking institution's or microfinance banking institution's liquidity or funding requirements;

(ii) injecting more capital in the banking institution or microfinance banking institution, if it becomes necessary;

(iii) providing management and technical expertise to the banking institution or microfinance banking institution;

(iv) establishing, monitoring and assessing internal control systems, including the risk management function at the banking institution or microfinance banking institution;

(v) training the banking institution's or microfinance banking institution's employees to have the knowledge and skills to perform their responsibilities; and

(vi) providing the banking institution or microfinance banking institution with other non-financial resources or support if a weakness is identified that cannot be corrected by the banking institution or microfinance banking institution on its own;

(f) applicant complies with, or is able to comply with, all the relevant provisions of this Act; and

(g) the banking business or microfinance banking business to which the application relates will be to the economic advantage of Namibia.

By the substitution of subsection (3) (previously subsection (4) and revising subsequent subsections as follow:

(3) After having considered an application made in terms of section 11(1), and the matters referred to in subsection (1) and (2), the Bank must consult with the Minister who may provide his or her advice with respect to the application.

(4) On receipt of the Minister's advice, if any, given under subsection (3), the Bank must give due consideration to that advise, and the Bank 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 and imposition of the conditions.

(5) If the Bank under subsection (4)(b) or (c) grants the application for authorisation to conduct banking business or microfinance banking business, the Bank must provide such person with a provisional authorisation valid for not more than six months to enable the applicant to prepare itself to start conducting banking business or microfinance banking business.

(6) On application by the person granted provisional authorisation under subsection (5), the Bank may extend the provisional authorisation for a period as it considers appropriate in the circumstances.

(7) A person to whom a provisional authorisation has been granted may not commence with the conducting of banking business or microfinance banking business unless the Bank has issued a certificate of authorisation to conduct the banking business or microfinance banking business concerned.

(8) The Bank may cancel a provisional authorisation if a person to whom a provisional authorisation has been granted commences with the conducting of banking business or microfinance banking business without being issued with a certificate of authorisation.

(9) The application fee paid by or on behalf of the applicant in terms of section 11 (2) (c) is not refundable, irrespective of whether the application is granted or refused.

(10) If the Bank has refused an application in terms of subsection (4)(a), the applicant may lodge another application, after a period of 12 months has lapsed from date of the refusal.

3.13 Amendment of sections 12, 12A, 12B, 12C, 12D, 12E, 13, 14, 15, 16, and 18 of the Act, 1998 (Act No. 2 of 1998), as amended – See paragraph 3.50 of this Explanatory memo

3.14 Amendment of section 12 of the Act (section 14 of Bill)

Issue: Inconsistent approval and notification procedures.

It was noted that the current acts contain sections that require notification to be made by banking institutions to the Bank and some other require application to be made for the Bank's approval. In this regard, under the provisions of section 12, a banking institution if it intends to effect any change, or in any of the circumstances relating to any of the particulars furnished by the banking institution when it applied to be authorised or to be licensed as a banking institution, to give the Bank 30 days' notification of such intended change. It was noted that, under these circumstances and the actions purported to be taken by banking institutions, it could have far reaching implications and therefore important for such decisions not to be a mere notification to the Bank, but to be subjected to a written approval process.

The current provisions are also silent on offences and penalty in respect of non-compliance with section 12.

Proposal: Therefore, it is proposed that the proposed provisions be inserted to address the inconsistencies in terms of notification and approval procedures observed in section 12.

Further, criminalise and penalise any contravention with the provisions of section 12 by inserting subsection (7).

Amendments to be included in the new Bill:

"**Duration and conditions of authorisation"**

Section 12 of the principal Act is amended:

(a) By the deletion of subsection (2) and (3).
(b) (b) By the insertion of a new subsections as follows:

"(2) If a banking institution or microfinance banking institution –

(a) intends to effect any change with respect to any of the particulars of an operational or strategic nature furnished when the banking institution or microfinance banking institution applied to the Bank for the granting of an authorisation in terms of section 11; or

(b) becomes aware that any change has occurred in relation to the matters and under the circumstances contemplated in paragraph (a),

the banking institution or microfinance banking institution must at least 30 days prior to the change, in a case where paragraph (a) applies, or within 30 of becoming aware of the change, in a case where paragraph (b) applies, in writing apply for approval of the change to the Bank.

(3) An application made under subsection (2) must be -

(a) made in the form and manner determined by the Bank; and

(b) accompanied by full particulars of the -

(i) intended changes or the changes which have so occurred; and

(ii) the impact that the changes may have on the banking institution or microfinance banking institution.

(4) After having considered an application made under subsection (2), 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, in writing, inform the applicant of the decision of the Bank, and where the application is refused or conditions imposed, provide the applicant with reasons for the refusal of the application and imposition of conditions.

(5) If –

(a) a banking institution or microfinance banking institution effects a change; or

(a) a change occurs,

in the circumstances contemplated in subsection (2), and the banking institution or microfinance banking institution fails to apply for approval of the change by the Bank as required by that subsection the Bank may, despite any criminal liability which the banking institution or microfinance banking institution may incur, take action under subsection (6).

(6) If Bank is of the opinion that the change or the intended change in the particulars of the banking institution or microfinance banking institution contemplated in subsection (5) 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 intention of the Bank to so amend such conditions; and

(b) together with the notice referred to 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 specified in the notice, make written representations to the Bank relating to such intended amendments.

(7) Any banking institution or microfinance banking institution that or any other person who contravenes or fails to comply with subsection (2) commits an offence and is liable to the penalties referred to in section 93(2).

3.15 Deletion and relocation of section 17 (section 71 of the Bill)

Issue: With reference to the cancellation of authorisation upon winding up, the Bank noted that section 17 needs to be relocated to the chapter dealing with the winding-up of banking institutions and microfinance banking institutions. The section is now section 70.

However, looking at the chapter under which the section is currently placed, it was the opinion of the Bank that it will be better suited under the section relating to the winding-up as opposed to the section relating to general cancellation of authorisation.

Proposal: It is therefore, proposed that section 17 as is should be deleted and relocated closer to sections dealing with winding-up and judicial management of banking institutions and microfinance banking institutions.

Amendment to be included in the new Bill:

Deletion of section 17 and reintroducing it as section 70.

3.16 Amendment of section 19A of the Act (section 26 of the Bill)

Issue:

(1) In terms of section 19A, after having considered an application in terms of the requisite section, the Bank cannot take any of the actions as stated therein, unless the Minister concurs with the decision. Taking into account that licensing and authorization in terms of the Basel Core Principles should inherently be the responsibility of the Central Bank to ensure the necessary checks and balances. Therefore, it is proposed that the initial version of the principle law should be reinserted, with the exception of introducing the appropriate sequencing to the process, which states that the Bank will consult with the Minister before the decision has been taken. This will allow the autonomy of the Bank as regulator to remain and to ensure compliance with good regulatory practice. Likewise, this provision of allowing for concurrence may also put an

additional responsibility on the Ministry to also do an independent assessment of bank branch license applications before agreeing or not agreeing with the recommendations of the Bank of Namibia regarding the outcome of such applications.

(2) Provisional certificate to organise or prepare itself to conduct banking business by means of a branch in Namibia.

In this regard, the Bank of Namibia has developed a practice whereby prior to the issuance of any bank license and as part of the assessment process, the applicant is given a "provisional license" valid for a period of 6 months. During such period, the applicant is expected to start with the preparations before commencement to conduct banking business, which includes the recruitment of the key positions, acquiring the operating systems and securing the building. The purpose of such activity is to enable the Bank to satisfy itself that the applicant is indeed ready to commence with the conducting of banking business. However, the Bank does not have explicit powers in terms of the Act to issue such provisional license.

Proposal: Therefore, the proposal is to amend section 19A to empower the Bank to issue provisional licenses, to conduct pre-opening evaluations or inspections to assess the readiness of applicants and to cancel a provisional authorisation if a person to whom a provisional authorisation has been granted commences with the conducting of banking business as a branch of foreign banking institution without being issued with a certificate of authorisation.

Amendments to be included in the new Bill:

(a) Amendment of section 19A as follows:

26. (1) In this section a "foreign institution" means 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.

(2) A foreign institution may, despite section 10, with the prior written authorisation of the Bank and subject to conditions, if any, as the Bank may determine, conduct banking business by means of a branch in Namibia.

(3) A foreign institution that intends to conduct banking business by means of a branch in Namibia must apply to the Bank for the granting of an authorisation to conduct the banking business.

(4) An application made under subsection (3) must be –

(a) made in the form and manner determined by the Bank; and

(b) accompanied by -

(i) a written statement containing the information required by the Bank; and

(ii) the prescribed application fee which is not refundable.

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

(a) such information or documents, in addition to information and documents furnished by the foreign institution in terms of subsection (3); 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.

(6) After having considered an application made under subsection (2) the Bank must consult the Minister for his or her advice with respect to the application, after which 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, in writing, notify the Minister before informing the applicant of its decision, and where the application is refused, provide the applicant with the reasons for the refusal of the application and the imposition of conditions.

(7) If the Bank under subsection (5)(c) grants the application for authorisation to conduct banking business by means of a branch in Namibia subject to conditions, the Bank must provide the foreign institution with a provisional authorisation valid for not more than six months, to enable the foreign institution to prepare itself to start conducting banking business by means of a branch in Namibia.

(8) On application by the foreign institution to whom provisional authorisation has been granted, the Bank may extend the provisional authorisation for a period as the Bank considers appropriate in the circumstances.

(9) A foreign institution to whom a provisional authorisation has been granted may not commence with the conducting of banking business unless the Bank has issued a certificate of authorisation to conduct the banking business concerned.

(10) The Bank may cancel a provisional authorisation if a person to whom a provisional authorisation has been granted commences with the conducting of banking business as a branch of foreign banking institution without being issued with a certificate of authorisation.

(110) An applicant to whom the Bank has granted a provisional authorisation under subsection (6) may within the six months' period or any extended period, notify the Bank of its readiness to commence banking business after which the Bank must conduct a pre-opening examination to ascertain the extent of readiness.

(121) The Bank may not grant an application referred to in subsection (3), unless the Bank is satisfied that all the requirements as determined by the Bank have been met.

(132) If the Bank –

(a) under subsection (4) grants an application for authorisation to conduct banking business by means of branch in Namibia; and

(b) after a pre-opening examination contemplated in subsection (9), has confirmed the readiness of the applicant to commence banking business,

the Bank must, against payment of the prescribed authorisation fee by or on behalf of the foreign institution that applied for the authorisation, issue, in the name of the foreign institution, a certificate of authorisation to conduct banking business by means of a branch in Namibia.

(143) The provisions of section 13(3) and (4) apply, with necessary changes, to a foreign institution that has been issued with certificate of authorisation to conduct banking business by means of a branch in Namibia under this section.

(154) Where the Bank has refused an application in terms of subsection (5)(a), the applicant may not lodge another application until a period of 12 months has lapsed from date of the refusal.

(165) A foreign institution that or any other person who –

(a) conducts banking business by means of a branch in Namibia without having obtained the Bank's written authorisation referred to in subsection (1); or

(b) contravenes or fails to comply with subsection (9),

commits an offence and is liable to the penalties referred to in section 93(2).

3.17 Amendment of section 20 of the Act (section 28 of the Bill)

Issue: During consultation with the Namibia Stock Exchange and Industry players it was brought to the attention of the Bank of Namibia that, unlike

the strategic shareholders, some shareholders purchase bank shares for speculative purposes on the stock exchanges and cannot commit themselves beyond the initial investment. As such, this category of shareholders cannot be relied on to bail out banking institutions in the event that it experiences financial difficulties.

In view of the challenges experienced with notifying the Bank or seeking the approval of the Bank prior to the transfer, registration or acquisition of shares in terms of section 20(1) and (2), it is proposed that the transfer, registration or acquisition of shares bought through the domestic stock exchange are exempted from section 20(1) and (2). However, all banking institutions transferring, allotting or registering shares or persons acquiring shares equal to or more than 10% must inform the Bank within 5 days of such transfer, registration or acquisition of shares for approval.

Further, the Act in the past did not place a restriction on the concentration of shareholding in a single shareholder. Therefore, a single person who has been approved as substantial shareholder in terms of section 20 or approved as controlling shareholder in terms of section 25 may acquire up to 100 per cent without seeking further approval from the Bank or without providing any notification in that respect.

This may result in concentration risk in terms of shareholding in that particular banking institution, which in the event such shareholder experiences financial problems could have serious implications on the banking institution concerned. In order to mitigate this risk, the Bank is proposing that, should a single shareholder wish to hold 50 per cent or more in a banking institution, such person should seek the prior written approval of the Bank.

Proposal:

In this regard, it is proposed that those shareholders who intend to hold their shares for speculative purposes should be exempted from the notification and/or approval process, as the case may be as required by section 20. Therefore, the law should be amended such that all banking institutions transferring, allotting or registering shares or persons acquiring shares equal to or more than 10% must inform the Bank within 5 days of such transfer, registration or acquisition of shares for approval.

Further, it is proposed to prohibit any single shareholder from acquiring 50 per cent or more without the prior written approval of the Bank.

Amendments to be included in the Bill:

Restriction on shareholding in banking institutions, microfinance banking institutions and controlling companies

Section 20 is amended as follows;

"28. (1) Despite the Companies Act -

(a) a banking institution, microfinance banking institution or controlling company may not, without the prior written approval of the Bank, allot or issue, or register the transfer of, any of its shares to any person; or

(b) a person may not, without the prior written approval of the Bank, hold any shares in a banking institution, microfinance banking institution or controlling company,

to the extent that the nominal value of the shares held by that person or by a related party of that person exceeds the value specified in subsection (2).

(2) The nominal value of –

(a) the shares allotted, issued, transferred or acquired under subsection (1); and

(b) any other shares in the banking institution, microfinance banking institution or controlling company already registered in the name of the person referred to in subsection (1) or in the name of any related party of that person,

may not be equal to or exceed 10 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, a person referred to in subsection (1), who purchases shares through a nominee must, on his or her or its own apply to the Bank for approval of the transaction.

(4) A transfer, registration or acquisition of shares of a listed banking institution, microfinance banking institution or controlling company is exempted from subsections (1), provided that the –

(a) banking institution or microfinance banking institution or controlling company transferring, allotting or registering the shares; or

(b) person acquiring listed shares through an exchange which, 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, are equal to or exceed 10 per cent of the issued vote bearing shares,

does, within five working days after such transfer, registration or acquisition of shares, inform the Bank of the transfer, registration or acquisition.

(5) Despite subsection (1) or (4), a single shareholder or group of related shareholders may not, without the prior written approval of the Bank, hold more than 50 per cent of vote bearing shares in a banking institution, microfinance banking institution or controlling company.

(6) On receipt of an application for approval contemplated subsection (1) or (5), the Bank may -

(a) refuse the application;

(b) approve the application; or

(c) approve the application subject to such conditions as the Bank may impose,

and must in writing inform the applicant of the decision, and where the application is refused, provide the applicant with the reasons for the refusal of the application and the imposition of conditions.

(7) If the Bank under subsection (6)(a) refuses as application for approval of the acquisition or transfer of shares, the Bank must in writing –

(a) furnish the applicant with preliminary order in terms of section 35; and

(b) authorise the reversal/unwinding of the transaction within a specified period of time.

(8) A banking institution, microfinance banking institution or controlling company may not allow a person who is not a fit and proper person in accordance with the criteria for fitness and probity relating to substantial shareholders as determined by the Bank to become a substantial shareholder of the banking institution, microfinance banking institution or controlling company.

(9) A banking institution, microfinance banking institution or controlling company may not 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 (8) to be, or to become, a substantial shareholder of a banking institution, microfinance banking institution or controlling company.

(10) The Minister may, on the recommendation of the Bank, by notice in the Gazette amend any shareholder threshold or requirement specified under this section.

(11) Any -

(a) banking institution, microfinance banking institution or controlling company that or any other person who contravenes or fails to comply with subsection (1)(a), (4)(a), (8) or (9) commits an offence and is liable to the penalties referred to in section 93(2).

(b) person who contravenes or fails to comply with subsection (1)(b),(3), (4)(b) or (5) commits an offence and is liable to the penalties specified in section 92(2)(b).

3.18 Amendments of section 21 of the Act (section 29 of Bill)

Issue: Currently, the law does not explicitly put an obligation on banks to obtain the full particulars of transactions relating to the allotment, issue or registration of shares as envisaged by subsection (5) which includes transactions with respect to trustees of unit trust, executors, liquidators and stock brokers. The law places an obligation on banks to furnish the Bank with full details of the transaction, therefore, to enhance this requirement the explicit provision that requires the banks to obtain such information is introduced.

Proposal: Therefore, it is proposed that the law introduces a provision that explicitly requires banks to obtain the particulars relating to such transactions. Particularly, with respect to the identity of the beneficial owners and the number and classes of shares they own.

Amendments to be included in the new Bill:

Section 21 is amended by the insertion and the revision of the following subsection after subsection (4):

(5) Subsection (4) does not affect the allotment or issue, or the registration of a transfer, of shares in a banking institution, microfinance banking institution or controlling company -

(a) in the name of a trustee or custodian of collective investment scheme as defined in section 168 of the Financial Institutions and Markets Act, or of a nominee company of that trustee or custodian approved by NJAMFISA under the provisions of that Act;

(b) in the name of an executor or administrator or a 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 an authorised user or authorised representative, as defined in section 78 of the Financial Institutions and Markets Act of an exchange or an employee of an authorised user,

if the banking institution, microfinance banking institution or 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 of the shares.

(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 those shares are held or the beneficiary of the shares; 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 controlling company referred to in subsection (5) must in writing furnish the Bank with full particulars of the

transaction, including the details of the beneficiary of the shares, 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), unless otherwise determined by the Bank, may 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 controlling company concerned.

(9) A banking institution, microfinance banking institution or controlling company that or any other person who contravenes or fails to comply with subsection (1), (4), (6) or (7) commits an offence and is liable to the penalties referred to in section 93(2).

3.19 Amendments to sections 20, 21, 22, 23 and 24 and 25 of the Act– See paragraph 3.53 of this Explanatory memo.

3.20 Restriction on foreign shareholder (section 34 of Bill)

Issue: Currently, Namibia does not have any restrictions on foreign shareholding in respect of banking institutions. A desirable blend of local and foreign-owned banking institutions is an important principle of economic development and financial stability.

As such the Bank is proposing amendments to the Act to ensure greater certainty in the consistent application of ownership matters relating to banking institutions, which is fundamental in safeguarding financial stability in the banking system.

Proposal: It is proposed that a new section 34 should be inserted into the Amendment Act. The aim of this section is to impose the necessary restrictions in respect of foreign shareholding in banking institutions. Section 34 (2) prohibits a banking institution from allotting, issuing or registering the transfer of any of its shares to foreign nationals in excess of 75% of the total nominal value of shares of such banking institution. It further prohibits foreign nationals from acquiring any shares in a banking institution in excess of the prescribed limit. The aim of this provision is to ensure that foreign ownership in banking institutions is restricted to 75% of the total nominal value of shares of a banking institution in order to achieve the desired blend in ownership between local and foreign nationals.

However, the Bank may, in consultation with the Minister, approve on application by a foreign national, for such person to hold more than the 75% if it meets the requirements as stipulated. Further, notwithstanding the limit of 75%, it is required for the banking institution to apply to the Bank when a shareholder attains 50% shareholding. This is to ensure that Bank is made aware of shareholders who hold more than 50% in that particular institution.

Secondly, this section empowers the Bank to issue a notice prohibiting any banking institution from allotting, issuing or transferring shares to foreign

nationals or foreign nationals acquiring share, should such transfer result in the total shares of such banking institution to exceed the prescribed limit of 75%. Furthermore, the Bank is empowered to compel the banking institution or foreign national, by way of a written notice issued in terms of subsection (2), to reduce the foreign shareholding and bring it within the prescribed limit. Failure to comply with the notice issued under subsection (2) amounts to an offence in terms of subsection (4).

The new section 34 of the Bill reads as follows:

34. (1) For the purposes of this section -

"foreign national" means -

(a) a natural person who is not a Namibian; or

(b) a company incorporated, registered or constituted in accordance with the laws of -

(i) Namibia; or

(ii) any country other than Namibia,

that is not directly or indirectly owned or controlled by a Namibian;

(c) a close corporation that is registered in accordance with the laws of -

(i) Namibia; or

(ii) in any country other than Namibia,

that is not directly or indirectly owned or controlled by a Namibian;

(d) a trust registered in Namibia, or in any country other than Namibia, that is not directly or indirectly owned or controlled by a Namibian; and

"Namibian" means -

(a) a natural person who is a citizen of Namibia;

(b) a natural person who is a permanent resident of Namibia and is in possession of a permanent residence permit issued to him or her in terms of the Immigration Control Act, 1993 (Act No. 7 of 1993);

(c) a company incorporated, registered or constituted in accordance with the laws of Namibia or any country other than Namibia -

(i) of which the majority of the issued share capital is directly or indirectly owned by a person referred to in paragraph (a) or (b); or

(ii) which is directly or indirectly controlled by a person referred to in paragraph (a) or (b);

(d) a close corporation that is registered in accordance with the laws of Namibia or in any country other than Namibia -

(i) of which the majority of the members' interests are directly or indirectly owned by a person referred to in paragraph (a) or (b); or

(ii) which is directly or indirectly controlled by a person referred to in paragraph (a) or (b); or

(d) a trust registered in Namibia or in any country other than Namibia -

(i) of which the majority of the interests in the trust are directly or indirectly owned by a person referred to in paragraph (a) or (b); or

(ii) which is directly or indirectly controlled by a person referred to in paragraph (a) or (b).

(2) Despite anything to the contrary in this Act or in any other law, but subject to subsections (8) and (12) -

(a) a banking institution, microfinance banking institution or controlling company may not allot, issue, or register the transfer of, any of its shares to any foreign national; or

(b) a foreign national may not acquire shares in a banking institution, microfinance banking institution or controlling company,

to the extent that the nominal value of the vote bearing shares held by that foreign national or by a related party of that foreign national exceeds the value specified in subsection (3).

(3) The nominal value of –

(a) the shares allotted, issued, transferred or acquired under subsection (2); and

(b) any other shares in the banking institution, microfinance banking institution or controlling company already registered in the name of the foreign national referred to in subsection (2) or in the name of any related party of that foreign national,

may not exceed 75 per cent of the total nominal value of all issued vote-bearing shares in the banking institution, microfinance banking institution or controlling company.

(4) Despite the provisions of subsection (2), a single foreign national or a group of related foreign nationals may not, without the prior written approval of the Bank, acquire more than 50 percent of the nominal value of the vote bearing shares in a banking institution, microfinance banking institution or controlling company.

(5) In case there is no suitable Namibian to hold a minimum of 25 percent shareholding or shareholding interest in the banking institution, microfinance banking or controlling company at the time when an authorisation is granted to -

(a) conduct banking business or microfinance banking business; or

(b) be a controlling company,

the banking institution, microfinance banking or controlling company must ensure that the shareholding requirements of subsection (2) are complied with within the period specified by the Bank when granting the authorisation and subject to such conditions and prudential requirements as the Bank may further determine.

(6) A banking institution, microfinance banking or controlling company to which the provisions of this section applies must, at such intervals of time as determined by the Bank, provide written reports to the Bank on the status and progress made with regard to its compliance with the minimum local shareholding requirements throughout the period referred to in subsection (5).

(7) A banking institution, microfinance banking institution or controlling company must, pursuant to subsection (5), submit to the Bank, simultaneously with the application for authorisation to conduct banking business or microfinance banking business or to exercise control over a banking institution or microfinance banking institution, a programme to comply with the provisions of that subsection -

(a) making a share offer in accordance with the programme approved by the Bank;.

(b) ensuring that the share buying offer referred to in paragraph (a) is offered to fit and proper Namibians, through -

(i) private offers to Namibian private, corporate and institutional investors; or

(ii) public offers on an exchange.

(8) If the Minister considers it to be in the economic interest of Namibia, the Minister, on the recommendation of the Bank and on such conditions and requirements as may be prescribed, may permit a foreign national to acquire more than 75 per cent of the nominal value of the issued vote bearing shares in a banking institution, microfinance banking institution or controlling company.

(9) Where a controlling company is registered in terms of this Act, the provisions of section 33 apply to that controlling company and not to the banking institution or microfinance banking institution, in respect of which that controlling company is so registered.

(10) When a banking institution, microfinance banking institution or controlling company intends to list on an exchange, the initial total shares allotted to a foreign national, its associates or related parties, may not exceed 75 percent of the nominal value of the vote-bearing shares of that banking institution, microfinance banking institution or controlling company.

(11) The provisions of subsection (2) will no longer be a requirement after the banking institution, microfinance banking institution or controlling company has been listed on an exchange: provided that -

(a) the requirements of subsection (10) have been met;

(b) in addition to the provisions of section 27, a foreign national, its associates or related parties with a combined pre-listing allotted shareholding in excess of five percent of the nominal value of the vote bearing shares of that banking institution, microfinance banking institution or controlling company may not be allowed to increase their shareholding without the written approval of the Bank; and

(c) in addition to the provisions of section 28, a foreign national, its associates or related parties may not be allowed to acquire shares in excess of five percent of the nominal value of the vote bearing shares of that banking institution, microfinance banking institution or controlling company in total, after the banking institution, microfinance banking institution or controlling company was listed on an exchange , without the written approval of the Bank.

(12) Any -

(a) banking institution, microfinance banking institution or controlling company that or any other person who contravenes or fails to comply with subsection (2)(a) or to comply with the requirements of subsection (6) commits an offence and is liable to the penalties referred to in section 93(2); or

(b) person who contravenes or fails to comply with subsection (2)(b) or (4) commits an offence and is liable to the penalties specified in section 92(2)(b).

(13) The provisions of this section do not apply with respect to a banking institution, microfinance banking institution or controlling company that, before the commencement of this section, was authorised to conduct banking business under the law repealed by section 103.

3.21 Amendments to section 26, 27, 28, 30, 31, 32, 33, 34 and 35 of the Banking Institutions Act, 1998 (Act No. 2 of 1998), as amended – See paragraph 3.53 of this Explanatory memo.

3.22 Introduction of Recovery Plans (section 37 of the Bill)

Issue: Introduction of recovery and resolution plans for banking institutions, microfinance banking institutions and controlling companies.

Currently, the law does not require banking institutions to maintain recovery and resolution plans that identify the options to restore financial strength and viability when the firm comes under severe stress.

Following the financial crisis, regulatory authorities have been developing systems and controls to avert a financial crisis and further reduce the need for bank bailouts. New regulatory standards are being put in place to make all financial institutions more robust and reduce the risk of failure in the future. A key component of this new regulatory standard is the requirement for the regulated institutions to prepare and implement Recovery and Resolution plans i.e. “living wills”. It is required that these plans demonstrate how the institution would be resolved in a rapid and orderly manner in the event such institution’s material financial distress or failure. This requirement enables both the firm and the regulators to understand and address the parts of the business that could create systemic consequences in times of distress. In order to provide certainty to the Bank and the banking institutions, and avoid different interpretation, it is necessary to provide a definition of “financial distress” in the Bill.

Proposal: Therefore, in line with the international best standards the following proposal is to amend the law by inserting the new provisions and define “financial distress” in the definition in the Bill.

Amendment:

(1) A banking institution, microfinance banking institution and controlling company must annually, prepare and maintain a recovery plan, on an individual and on a consolidated basis, containing the arrangements and measures to address a possible severe financial distress situation such institution or company may face, at such times, and in such manner and form as may be determined by the Bank.

(2) A banking institution, microfinance banking institution or controlling company must review their recovery plans prepared and maintained in terms of subsection (1), at such times as may be determined by the Bank.

(3) The recovery plan must be designed in such a way to identify possible recovery measures and the necessary steps and time needed to implement such measures and assess the associated risks.

(4) The Bank may determine that only certain category of banking institution, microfinance banking institution or controlling company must submit for review such recovery plan as referred to under subsection (1).

(5) The range of possible recovery measures should include:

(a) actions to strengthen the capital adequacy requirements such as recapitalisation after extraordinary losses, capital conservation measures such as suspension of dividends and payments of variable remuneration;

(b) the possibilities of sales of subsidiaries;

(c) the possibilities of voluntary restructuring of liabilities through debt-to-equity conversion;

(d) measures to secure sufficient funding while ensuring sufficient diversification of funding sources and adequate availability of collateral in terms of volume, location and quality; and

(e) measures to be taken to transfer liquidity and assets within the banking group.

(6) The Bank may require banking institution, microfinance banking institution and controlling company to submit a recovery plan for review pursuant to subsection (4), to:

(a) provide additional information or records the Bank considers necessary in order to evaluate the adequacy of the submitted recovery plan;

(b) supplement the recovery plan with a plan indicating how 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 should circumstances dictate such actions;

(c) amend 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.

3.23 Amendment of section 28 of the Act (section 39 of the Bill)

Issue: Section 28(2) (a) of the Act empowers the Bank to require a banking institution to acquire further capital should there be a risk of the existing capital funds being impaired.

There are no explicit provisions which empower the Bank to require shareholders of a banking institution to inject additional capital once it falls below prudential requirements stipulated in section 28(1) of the Act, or when a banking institution is at risk of failing to meet the minimum requirements. The lack of explicit provisions to this effect poses a practical challenge since the Bank does not have powers to request shareholders to inject additional capital directly. There is need to ensure that the Bank has the express authority to require shareholders of a banking institution to inject capital to enable the institution meets prudential requirements, should the Bank be of the opinion that the circumstances render it necessary.

Proposal: To give effect to section 28(2)(a) of the Banking Institutions Act (Section 37), it is recommended that a provision be included in the Act which empowers the Bank to request shareholders to inject additional capital in a banking institution, as the Bank may specify, if it is the opinion of the Bank that the banking institutions' capital funds have fallen below prudential requirements prescribed by section 28(1) or there is a risk that it may be impaired to the extent that it falls below minimum prudential requirements. Further, a provision should be added to penalise any person or banking institution that fails to comply with this section.

Amend section 28(2)(a) of the Banking Institutions Act (Section 37) as follows:

(2) Despite any provision contained in this section, the Bank, based on the assessment made, if it concludes that-

(a) there is a risk of the existing capital funds of a banking institution or microfinance banking institution being inadequate, may require the shareholders of the banking institution or microfinance banking institution to inject additional capital funds within a period as the Bank may specify.

(b) a banking institution or microfinance banking institution is a systemically important institution, may subject such banking institution or microfinance banking institution to a more advanced capital framework as may be determined by the Bank.

(3) Any banking institution, microfinance banking institution or controlling company that or any other person who contravenes or fails to comply with subsection (1) or to comply with a requirement or condition imposed by the Bank under subsection (2) commits an offence and is liable to the penalties referred to in section 93(2).

3.24 Amendment of Section 32 of the Act (section 44 of the Bill)

Issue: Although, the current provisions of the Act allow for consideration by Bank in the event where the proposed dividends exceed the current audited profits of banking institutions to seek prior approval. The current provisions do not explicitly allow that banking institutions obtain the consent, in the event where proposed dividends may impact the minimum prudential capital limits.

Proposal: Introduce a provision in Section 32, after sub-section (1) to provide that prior written approval must be sought from the Bank in the event that payment of dividends is to be made under circumstances alluded to above.

Amend section 32 to read as follows:

"44. (1) A banking institution or microfinance banking institution may not declare, pay or credit dividends or make any transfer from its profits unless its –

(a) capital funds are adequate as contemplated in section 39; or

(b) minimum liquidity requirements are above the required limits as determined by the Bank and contemplated in section 43.

(2) If the dividends to be paid, declared, credited or any transfer to be made in terms of subsection (1) -

(a) exceed current audited profits; or

(b) may result in an impact on capital adequacy requirements, usage or draw down on conservation buffers as determined by the Bank or minimum liquidity requirements,

prior written approval of the Bank must be obtained.

(3) Any banking institution or microfinance banking institution that or any other person who contravenes or fails to comply with subsection (1) or (2) commits an offence and is liable to the penalties referred to in section 93(2)".

3.25 Amendment of section 36 of the Act (section 48 of the Bill)

Issue: The current list of connected persons under section 36 (1) is considered to be too wide as it includes persons that should not necessarily fall under that category. On the other hand, the list does not include or encompass the "proxies" of the connected persons.

The definition of "connected persons" is too wide as it includes persons who will not necessarily have the influence and control required to achieve the objectives of the determination. It, therefore, make the compliance and enforceability thereof challenging.

Currently, proxies of a director, officer with managerial responsibility, any substantial shareholder and auditors of banking institutions are not categorized as connected parties. Proxies are equally providing services to the banking institutions and should be treated as standing in the stead of their masters and should be equally treated as such.

Proposal: It is therefore, proposed that the definition of "connected persons" should be narrowed to ensure effective enforcement due to the nature of the work and the relationship they have with the above persons, proxies sitting on panel of the banking institutions should fall under this category.

Amendment:

Amendment of section 36

"Exposure to directors, to executive officers [with managerial responsibilities] or to shareholders to be secured"

Section 36 is amended as follows:

"48. (1) A banking institution or microfinance banking business may not have any exposure to any -

(a) director or executive officer in the banking institution, microfinance banking business or controlling company;

(b) substantial shareholder in the banking institution or microfinance banking institution or controlling company;

(c) external auditor of the banking institution, microfinance banking institution or controlling company, who in the case of a firm or partnership of auditors is for purposes of this paragraph is limited to the leading or engagement partner or the manager in charge of the audit;

(d) affiliate, associate or close relative of a person referred to in paragraph (a), (b) or (c); or

(e) body corporate or unincorporated of, or in which, a person referred to in paragraph (a), (b) or (c) is a director, a substantial shareholder or a guarantor or otherwise has an economic or a financial interest, or

(f) proxy of a director or substantial shareholder referred to in paragraph (a) or (b),

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

(2) Any banking institution or microfinance banking institution that or any other person who contravenes or fails to comply with subsection (1) commits an offence and is liable to the penalties referred to in section 93(2)".

3.26 Amendments of section 28A of the Act (section 40 of the Bill)

Issue: Align the wording of capital requirements for the banking group with the Basel Committee Risk Weightings. The wording of capital requirement for the banking group, currently contained under subsection (1), does not refer to a percentage of risk weighted assets and other exposures

Proposal: Amend subsection (1) to explicitly relate the capital requirements of the banking group to a percentage risk-weighting.

Amendment:

"Minimum capital funds in respect of a banking group

Section 28A of Act is amended as follows:

By the substitution of subsections (1) for the following subsection:

(1) Despite section 39(1), but subject to subsection (2), a controlling company must manage its affairs in such a way that the -

(a) sum of the capital funds of the banking group structured under that controlling company does not at any time amount to less than an amount which represents a determined percentage of the sum of amounts relating to the different categories of assets and other risk exposures and calculated in such a manner as may be determined by the Bank; and

(b) capital funds of any entity regulated in terms of any law of Namibia included in the banking group and structured under that controlling company do not at any time amount to less than the required amount of capital funds determined in respect of the relevant regulated entity included in such banking group in accordance with the rules and regulations of the relevant regulator responsible for the supervision of the relevant entity.

3.27 Amendment of section 38 of the Act 14 of 2010 (section 50 of the Bill)

Issue: Banking institutions are allowed, with the written approval of the Bank to grant loans, advances or credit facilities to its holding company, subsidiary or affiliate. However, such approvals in the current legislation are subject to the fulfilment of conditions as stipulated in section 38. These provisions in the Act posed some challenges in that requirements for all exposures to holding company, subsidiary or affiliate to be fully secured are very restrictive. Despite that, the Bank also had the obligation to approve and get involved in the credit decisions of banks relating to the granting of such loans and advances.

Proposal: Therefore, the purpose for the proposed amendments is to empower the Bank to determine by way of subordinate legislation to introduce a threshold above which loans and advances to related parties (i.e. holding companies, subsidiaries or affiliates) must be fully secured. Further, the proposed amendments will remove the obligation on the Bank to approve loans and advances to related parties (i.e. holding companies, subsidiaries or affiliates) and get involved in the management decisions of banks. Furthermore, the criteria for granting loans to related parties (i.e. holding companies, subsidiaries or affiliates) must be specified in the Act for the banks to comply with.

Amendment:

"Exposure of holding companies, subsidiaries and affiliates

By the amendment of subsection (1) and substitution of subsections (2), (3) and (4) for the following subsections:

(1) Despite section 234 of the Companies Act, but subject to subsection (2) and (3) of this section, a banking institution or microfinance banking institution may grant a loan, advance or credit facility to its holding company, subsidiary or affiliate.

(2) A banking institution or microfinance banking institution may not grant a loan, advance or credit facility under subsection (1) unless such loan, advance or credit facility -

(a) 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

(b) has been approved by the majority of the entire board of directors;

(3) Despite subsection (2) a banking institution or microfinance banking institution must not grant a loan, advance or credit facility in excess of a percentage of its capital funds as the Bank may determine unless all amounts in excess of the percentage so determined are fully secured at all times.

(4) Any banking institution or microfinance banking institution that or any other person who grants a loan or an advance or a credit facility in contravention of this section commits an offence and is liable to the penalties referred to in section 93(2).

By the insertion of the term microfinance banking institution under the introductory paragraphs of subsection 2 and subsection 3.

3.28 Amendment of section 39 of the Act (section 51 of the Bill)

Issue: Due to the limited nature of activities that microfinance banking institutions normally are allowed to engage, in comparison to banking institutions, there is need to narrow down their permissible activities. As such subsection is introduced to empower the Bank to determine the permissible activities for microfinance banking institutions.

Proposal: It is therefore proposed that a new insertion should be made in section 49(2) to empower the Bank to determine the permissible activities of microfinance banking institution, similar to that of commercial banking institutions.

Amendment:

Section 39 is amended by the insertion of subsection (2) after subsection (1) and inserting a penalty clause as subsection (8).

"(2) A microfinance banking institution must only, subject to subsection (7), conduct financial business or transactions as may be determined by the Bank.

(8) Any banking institution or microfinance banking institution that or any other person who contravenes or fails to comply with subsection (1), (2) or (3) or a written instruction issued by the Bank under subsection (5), commits an offence and is liable to the penalties referred to in section 93(2).

3.29 Section 40 of the Act (section 52 of the Bill) – See paragraph 3.50 of this Explanatory Memo

3.30 Amendment of section 41 of the Act (section 53 of the Bill)

Issue: Currently, the banks and controlling companies are required to notify the Bank of any intended appointments by submitting specific information for the Bank to determine whether such nominee is "fit and proper" in terms of the Determination to hold such office. However, there is no obligation on the banks and controlling companies to ensure that such nominated persons are indeed "fit and proper" persons prior to that submission.

In terms of section 41 (7), the Board is responsible for good corporate governance and business performance of the institution; and remains in full control of the affairs and business operations of the banking institution.

Therefore, to enable them to meet this requirement it is their responsibility to ensure that the right persons, who are “fit and proper” to hold such positions, are employed in key positions.

The Bank has on numerous occasions received nominations that have not been completed as required by the Bank or that failed to meet the set standards. The Bank had to request on numerous occasions for further information to assist the Bank, in arriving at the appropriate decision. This may be an indication that the institutions have not satisfied themselves, based on the information submitted to the Bank, that the nominated persons have been subjected to the requirements as per the determinations. Therefore, it is important to note that in as much the Bank needs to satisfy itself that the nominated candidates are “fit and proper”, the banking institution in question must equally ensure that only “fit and proper” persons are submitted to the Bank.

With reference to the above, the Amendment Act of 2010 deleted subsection (6) however; the newly inserted subsection (5) in the Amendment Act that cross-referenced to this aspect was however not aligned accordingly.

Further, the current Act does not outline the functions, duties and obligations of directors, principal officers and other officers of a banking institutions or controlling companies.

During supervisory engagements with banking institutions, the Bank has realised that some principal officers of the banking institutions are forced to report to credit officers of parent companies or other officers by whatever tittle they are called and are denied the opportunity of engaging the heads of the parent entity directly and hence undermining their authority or facing the risk of strategic misalignment. This is tantamount to reducing the subsidiary to the equivalence of branch operations in Namibia, a situation which may not augur well, since these subsidiaries are of systemic importance and deserve to be treated as such.

Proposal: Therefore, it is proposed to delete the wording “subject to subsection (6)” under subsection (5) in order to align it with the wording in the amended Act and introduce the subsection requiring banking institutions to satisfy themselves beforehand by conducting their own “fitness and probity” test on individuals, prior to submitting the nominations to the Bank and provide the Bank with proof thereof.

It is further proposed that the functions, duties and obligations of directors, principal officers and other officers be clearly outlined and a requirement for the principal officers of subsidiaries of foreign banking institutions to report to heads of parent companies be introduced in the Act.

Amendment:

"Directors and Principal Officers of banking institution"

(a) **Section 41 is amended as follows:**

"53. (1) A banking institution, microfinance banking institution or controlling company may not, subject to subsection (2), have less than five directors.

(2) Not more than two of the total number of the directors contemplated in subsection (1) may be employed by the banking institution, microfinance banking institution or controlling company concerned, any of its subsidiaries or its holding company, including any of the subsidiaries of the holding company.

(3) The Bank, on a written request by a banking institution or microfinance banking institution, may 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) A banking institution, microfinance banking institution or controlling company may not appoint a person as a director, principal officer or an executive officer unless the banking institution, microfinance banking institution or controlling company -

(a) is satisfied that the person is fit and proper in accordance with criteria determined by the Bank to hold such position; and

(b) has notified the Bank in a manner determined by the Bank, that the banking institution, microfinance banking institution or controlling company is satisfied that the person to be appointed meets the requirements of paragraph (a).

(5) 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 an executive officer by furnishing the Bank with information in the form and manner determined by the Bank, and the notice must reach the Bank at least 30 days prior to the proposed date of appointment.

(6) The Bank –

(a) may object to the proposed nomination for appointment referred to in subsection (6) 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

(b) must within 20 days of receipt of the notice referred to in subsection (5) deliver a written notice stating the grounds of its objection as contemplated in paragraph (a) to the nominating banking institution, microfinance banking institution or controlling company.

(7) If the Bank objects to the proposed appointment pursuant to subsection (6), the banking institution, microfinance banking institution or controlling company may not appoint the nominee and any purported appointment contrary to the objection has no legal effect.

(8) If the banking institution, microfinance banking institution or controlling company disputes the Bank's objection, the Bank must give such banking institution, microfinance banking institution or controlling company a reasonable opportunity to make representations to the Bank.

(9) After considering the representations of the banking institution, microfinance banking institution or controlling company made under subsection (8), if any, the Bank may -

(a) accede to the nomination of the director, principal officer or executive director; or

(b) maintain its objection to the appointment,

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

(10) 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, principal officer or executive officer of a banking institution, microfinance banking institution or controlling company.

(11) Any banking institution, microfinance banking institution or controlling company that or any other person who fails to comply with subsection (1), (2), (4), (5) or (7) commits an offence and is liable to the penalties referred to in section 93(2).

(b) **by introducing a new section clarifying the functions, duties and obligations of directors, principal officers and other officers of a banking institutions or controlling companies as follows:**

"54. (1) The board of directors of a banking institution, microfinance banking institution or 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 be independent and must act without improper or undue influence and without fear, favour, prejudice or direction from any person in the exercise and performance of its powers and functions unless such direction is sanctioned by law promulgated in the Republic of Namibia.

(c) must exercise oversight over the management of the banking institution, microfinance banking institution or controlling company;

(d) must ensure and report to the shareholders at the annual general meeting of the banking institution, microfinance banking institution or controlling company, that the internal controls and systems of the banking institution, microfinance banking institution or controlling company are -

(i) 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) based on established and written policies and procedures and are implemented by trained and skilled officers with an appropriate segregation of duties; and

(iii) 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;

(e) must immediately inform the Bank if they have reason to believe that the banking institution, microfinance banking institution or controlling company -

(i) may not be able to properly conduct its business as a going concern;

(ii) appears to be, or will in the near future be, unable to meet all, or any of, its obligations;

(iii) has suspended or is about to suspend any payment of any kind; or

(iv) does not, or may not be able to, meet its capital requirements determined by or under section 39; and

(f) must constitute from among its members an audit committee as contemplated in section 55.

(2) A director, principal officer or other officer of a banking institution, microfinance banking institution or controlling company must, in relation to the banking institution, microfinance banking institution or controlling company of which he or she is a director, principal officer or an other officer, act honestly and in good faith in the best interest and for the benefit of the banking institution or microfinance banking institution and its depositors or of the controlling company, and must in the performance of his or her functions as a director, principal officer or an other officer comply with this Act.

(3) 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 behalf of the principal officer or other officer must, despite any action taken by the board of directors, immediately inform the Bank if

the principal officer or other officer has reason to believe that any of the events contemplated in subsection (1)(d) may, or is likely to, occur.

(4) A principal officer or manager of a branch of a banking institution or microfinance banking institution may not -

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

(i) for or on behalf; and

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

of the banking institution or microfinance banking institution; or

(b) be an agent of any other person engaged in any business contemplated in paragraph (a),

unless –

(i) the position held by such person is that of a director of a company which is -

(aa) in liquidation, whether provisionally or final; or

(bb) being wound-up or is under judicial management; or

(ii) 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 the requirements of this subsection.

(5) The principal officer of a banking institution or microfinance banking institution which is a subsidiary of a foreign banking institution or microfinance banking institution must have direct access to or report directly to the –

(a) board of directors of the foreign banking institution, microfinance banking institution or controlling company of which it is a subsidiary; and

(b) principal officer of the banking institution, microfinance banking institution or controlling company referred to in paragraph (a),

on matters of strategic nature and importance.

(6) Any executive officer, by whatever name described, who is in the direct employment of a banking institution, microfinance banking institution or controlling company in Namibia and who exercises significant influence within such banking institution, microfinance banking institution or controlling company must administratively and functionally report to the principal officer of such a banking institution or microfinance banking institution or controlling company in Namibia.

(7) A decision pertaining to the affairs of a banking institution, microfinance banking institution or controlling company may only be taken by a person or officer who has been duly vetted and approved by Bank.

(8) A –

(a) director of a banking institution, microfinance banking institution or controlling company including a member of a committee of the board of directors established for the purpose of granting credit to customers; or

(b) principal officer or a manager of a division or a branch of a banking institution or microfinance banking institution,

may not take part in the discussion or consideration of, or the taking of a decision relating to, any matter -

(i) in which -

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

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

(cc) 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;

(ii) which is, subject to subsection (9), of particular economic interest to a local authority council as defined in section 1 of the Local Authorities Act, 1992(Act No, 23 of 1992), regional council as defined in section 1 of the Regional Councils Act, 1992(Act No, 22 of 1992), a corporate body, any other juristic person, any unincorporated organisation or association or any other public or private institution, towards which he or she has, in his or her capacity as a member of the council, board member, manager or representative, a duty to protect the economic interests of such council, body, person, organisation or association or institution.

(9) 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) must be recorded in the minutes of the meeting of the decision-making body concerned.

(12) Any person who contravenes or fails to comply with subsection (1)(c) or (d), (3), (4), (8) or (10) commits an offence and -

(a) is liable to the penalties specified in section 92(2)(a); and

(b) in the case of a director, principal or other officer of a banking institution, microfinance banking institution or controlling company, is liable to the penalties referred to in section 93(2).

(13) If a director, principal or other officer of a banking institution, microfinance banking institution or controlling company contravenes or fails to comply with any provision of this section, the banking institution, microfinance banking institution or controlling company on whose behalf he or she acts is liable to the administrative penalties specified in section 94".

3.31 Amendments to sections 42, 43, 44, 46, 47, 48 49 50, 51 52 and 53 of the Banking Institutions Act, 1998 (Act No. 2 of 1998), as amended – See paragraph 3.50 of this Explanatory Memo

3.32 Amendment of section 43 of the Act (section 56 of the Bill)

Issue: Currently the Act does not require that the external auditors of banking institution or microfinance banking institution or controlling company must be rotated. As a result, external auditors are appointed for long periods consecutively. This situation has a risk of compromising the independence of the auditors. In addition, the auditors become so used to the operations and risks of the institution concerned as such that they become complacent and hence impair ability to dig deeper and discover new risks. In this regard, the Basel Committee on Banking Supervision is recommending that supervisors should policies requiring banks to rotate their external auditors.

Proposal: Therefore, it is proposed to introduce a new subsection (6) to require banking institutions to rotate their external auditors.

Amendment:

"Appointment of Auditor"

(a) Section 43 is amended by the introduction of a new subsections (6) – (10) after subsection (5):

"(6) A banking institution, microfinance banking institution or controlling company may not appoint a person as an auditor of a banking institution, microfinance banking institution or controlling company for a period exceeding such continuous consecutive periods as may be determined by the Bank.

(7) 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.

(8) 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 57 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.

(9) An auditor appointed by the Bank for or on behalf of a banking institution, microfinance banking institution or controlling company under subsection (8) is 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).

(10) The Bank may at any time withdraw an approval granted under subsection (3) or an appointment made under subsection (8), if the auditor concerned -

(a) fails to comply with -

(i) the conditions, if any, imposed by the Bank under of subsection (3)(c); or

(ii) the criteria determined by the Bank as contemplated in subsection (7); or

(b) becomes disqualified in terms of section 57 to act as an auditor.

(11) Any banking institution, microfinance banking institution or controlling company that or any other person who fails to comply with subsection (2), (5) or (6) commits an offence and is liable to the penalties referred to in section 93(2)".

3.33 Amendment of Sections 45 of the Act (section 58 of the Bill)

Issue: Generally, a third party, such as a regulator, who wishes to obtain information regarding an audit client should obtain the information directly from the banking institution. Circumstances may however arise, where the information which is sought by the Bank cannot be obtained from the banking institution and therefore, must be provided directly by the independent auditors. The Act in its current format, does not explicitly empower the Bank to require the Independent Auditor of a banking institution to provide working papers or other records.

In certain instances, such as those that precede or give rise to triggering the powers of the Bank by virtue of section 56 of the Act (Section 65), the Bank should be able to require an auditor to grant access to inspect audit working papers which support an opinion on financial statements or other financial or non-financial information, without the permission of the banking institution.

Proposal: It is proposed that a provision empowering the Bank to require an auditor to grant access to inspect audit working papers which support an opinion on financial statements or other financial or non-financial information, without the permission of the banking institution, be introduced.

Amendment of Section 45 of the Act (Section 58)

Duties and functions of auditor

"(6) Despite anything to the contrary in any other law, the Bank may require the auditor to provide access to the Bank or to any other person the Bank may specify, to inspect –

(a) audit working papers, financial statements, other financial records or non-financial records; or

(b) any other information the Bank considers necessary and appropriate,

relating to the banking institution, microfinance banking institution or controlling company, if in the opinion of the Bank –

(i) any money transaction indicates or raises a suspicion that an officer of the banking institution, microfinance banking institution or controlling company or any person involved in a transaction may be engaged in an illegal activity; or

(ii) the records in the possession of the auditor will assist the Bank in achieving the objectives set out in this Act.

(7) If an auditor has furnished to the Bank any information, financial statements or other financial or non-financial records relating to the banking institution, microfinance banking institution or controlling company in terms of (6), such actions -

(a) do not 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) may not cause the auditor to incur any criminal or civil liability to any person as a consequence of the furnishing of the information.

(8) Any –

(a) banking institution, microfinance banking institution or controlling company that fails to comply with subsection (4), (5) commits an offence and is liable to the penalties referred to in section 93(2); or

(b) person who fails to comply with subsection (1) or fails or refuses to provide access to the Bank or any other person as required under subsection (6) commits an offence and is liable to the penalties specified in section 92(2)(a)".

3.34 Amendment of section 46 of the Act (Section 59 of the Bill)

Financial and other records

Issue: Section 46(2) of the current Act provides that the core banking systems of a banking institutions must be kept in Namibia and must comply with the requirements determined by the Bank. The requirements relating to localisation of core banking systems in the Act makes it difficult for the Bank to changes such requirements depending on the prevailing circumstances.

Proposal: **It is proposed that the current section subsection (2) be deleted, and subsection be amended to provide that the core banking systems will be kept and maintained as determined by the Bank.**

Amendment of section 46(3)

"(3) The banking institution or microfinance banking institution must keep and maintain the core banking systems, accounting and other records referred to in subsection (1), and comply with requirements -

(a) of section 292 of the Companies Act;

(b) as determined by the Bank; and

(c) for a period of not less than five years after the date of the last entry in such records".

3.35 Amendment of Section 53 of the Act (Section 66)

Issue: Section 53 of the current Act provides that a banking institution, its affiliates or associate that fails to allow any person authorised to conduct an examination of a banking institution is liable to a fine determined by the Bank. However, the section does not stipulate the intention or negligence in relation to denial of access to records or furnishing of information. This stipulation is particularly necessary because it is often difficult to prove intention, as opposed to negligence, in relation to an offence.

Proposal: It is proposed that section 53 of the Act be amended to explicitly refer to intention or negligence regarding failure to allow access to records during examination of a banking institution.

Amendment of section 53 (3) of the Banking Institutions Act, as amended

"(3) Any banking institution, microfinance banking institution or controlling, its affiliate or associate that or any other person who, without lawful excuse, refuses or fails to -

(a) allow access to, or possession of, accurate information or any document or other item;

(b) produce or neglects to produce accurate information or any document or other item;

(c) give information in accordance with subsection (2); or

(d) provide suitable facilities for the purposes of conducting an examination under subsection (2),

to any person referred to in subsection (2) commits an offence and is liable to the penalties referred to in section 93(2).

3.36 Amendment of Section 54 of the Act (section 67 of the Bill)

Issue: With respect to the transfer of shares, the general rule is that shares are freely transferable in the manner provided by the Companies Act and the articles of association, and the board of directors have no discretion to refuse to register a bona fide transfer (section 97 of the Companies Act, 2004). However, the Companies Act does not prescribe the manner in which a decision to transfer or dispose of the shares may be made, that is, either by means of a special resolution or by a general or ordinary resolution. As such, it can be concluded that transfer or disposal may be effected by means other than a decision by special resolution, which may circumvent the provisions of section 54. In other words, banking institutions may, without informing the Bank or seeking any approval from the Bank, transfer its shares to another person.

Proposal: To ensure that no banking institution, microfinance banking institution or controlling company may transfer any of its shares without obtaining the prior written approval of the Bank, it is proposed to introduce subsection 54(1)(f) to explicitly prohibit such activity.

Amendment of section 54 of the Act

By the substitution of subsection (3) and adding subsections (6) – (9):

"(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 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 and the imposition of conditions."

(6) On registration of the special resolution by the Registrar of Companies pursuant to subsection (5) -

(a) 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;

(b) all rights and obligations that vested in the respective banking institution, 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

(c) in the case of a transfer or other disposal of property or assets in terms of subsection (1)(b) or (c), such property or assets are vested in the transferee.

(7) On receipt of a certified copy of the special resolution registered by the Registrar of Companies, and if applicable, the Registrar of Deeds must endorse the transfer of rights and obligations from the banking institutions, microfinance banking institutions or controlling companies that 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.

(8) Despite section 11 of the Deeds Registries Act, 2015 (Act No. 14 of 2015) 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 of the merging or consolidating banking institution,

microfinance banking institution or controlling company are transferred to the merged or consolidated banking institution, microfinance banking institution or controlling company on the date of registration of the special resolution by the Registrar of Companies.

(9) Any banking institution, microfinance banking institution or controlling company that or any other person who contravenes or fails to comply with subsection (1) commits an offence and is liable to the penalties referred to in section 93(2).

(10) Any person aggrieved by the decision made by the Bank in terms of this section may appeal to the Appeal Board within 30 days of being informed of the Bank's decision.

3.37 Amendment of section 55A (section 68 of the Bill) - See paragraph 3.53 of this Explanatory Memo

Issue: Several weaknesses have been identified in section 55A (1), which could result in practical challenges to both the Bank and the general public in respect of the application and interpretation of the said section.

The interpretation of section 55A (1) read in conjunction with other relevant provisions of the Act proved that the practical application of the provision is cumbersome and problematic, which brings the enforceability of section 55A into question. The section lacked clarity on what the crime is and what it intends to outlaw and therefore it may fail to meet the requirement of the principle of legality that a crime must be defined as illegal before it is committed. The implications of this shortcoming could be that this section could possibly be declared null and void on the basis of its ambiguity if it were to be tested in a court of law.

Proposal: It is proposed that section 55A should be repealed in whole and another Chapter dealing with pyramid/illegal financial schemes should then be introduced.

3.38 Amendment of section 56 of the Act (section 69 of the Bill)

3.38.1. Amendment of Section 56 (2)(a) of the Banking Institutions Act

Issue: The Act currently does not empower the Bank to remove or suspend an officer and/or remove or suspend a director through an order. The Act only allows the Bank to require a banking institution to remove an officer or suspend a director. The authority to remove or suspend may however become necessary, in certain instances, where either officers or directors are no longer fit and proper to hold office and the governance structures in the banking institution are ineffective. In such cases, it would be unreasonable and ineffective to require a director to remove him/herself.

The findings from the crisis simulation exercise report highlighted that section 56 is inadequate to achieve its intended purpose. Currently, section 56 of the Act empowers the Bank to deal with insolvent cases and banking institutions that show signs of failure before they reach the critical stage of insolvency all

together. Given recent developments in the banking system, it is deemed necessary to retain this provision for certain exceptional circumstances. The practical implementation thereof has been tested and although it may have been challenging, inadequacies may be addressed with minor amendments and clarifications of the provision. The existing regulatory tools has proven very useful in resolving certain types of problem banks and should remain at the disposal of the Bank.

The current provisions of section 56(6) prescribe that the banking institution entitled to reasonable opportunity to make representations relating to the proposed order by the Bank. However, given the personal interest a director and/or officer may have in an order for his/her removal or suspension in terms of sections 56(a), adherence with the audi alteram partem principle (right to be heard) should be explicitly provided for.

Proposal: Insert a provision which will empower the Bank to suspend or remove executive officers and/or suspend or remove directors of banking institutions directly through an order, in circumstances where it is deemed necessary. The provision which empowers the Bank to make an order to require a banking institution should be retained. An order to remove should only be effected as a last resort.

It is further proposed to amend section 56(6) to include reasonable opportunity for officers or directors who may have an interest to may representations related to an order by the Bank.

Therefore, it is proposed that the provision be amended to read as follows:

Amendment to be included in the new Bill:

The current section 56 is amended as follows:

"69. (1) If the Bank is satisfied -

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

(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;

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

(v) does not meet minimum prudential requirements related to capital and liquidity, or is not likely to meet minimum prudential requirements related to capital and liquidity, at the levels and for a period determined by the Bank; or

(vi) in the opinion of the Bank, does not comply with the best standards and practices of corporate governance and sound financial management;

(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 perform their duties or functions related to their position in 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 provision of this Act or under any other law, take any of the actions contemplated in subsection (2) or (3).

(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 concerned, and in the manner and within the period of time, or before a date, specified in the order -

(a) direct the banking institution, microfinance banking institution or controlling company 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, or to the officers or substantial shareholders;

(ii) discontinue the extension of credit for such period of time;

(iii) execute its recovery plan contemplated in section 37 in order to address a situation of severe financial distress such banking institution, microfinance banking institution or controlling company may be facing.

(iv) despite any provision to the contrary in -

(aa) the Companies Act, 2004;

(bb) the Labour Act, 2007 (Act No. 7 of 2007);

(cc) any contract of employment entered into between the banking institution, microfinance banking institution or controlling company, its affiliate or associate, and any director or officer; or

(dd) the memorandum and articles of association of the banking institution, microfinance banking institution or controlling company, its affiliate or associate,

remove or suspend an officer or a director of the banking institution, microfinance banking institution or controlling company, its affiliate or associate;

(b) appoint a person or persons -

(ii) as a director or directors or officer or officers of the banking institution, microfinance banking institution or controlling company to manage or provide oversight over the business and affairs or any part of the banking institution, microfinance banking institution or controlling company; or

(ii) 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 or persons so appointed must comply with any direction given by the Bank under this Act and be paid a remuneration by the banking institution, microfinance banking institution or controlling company.

(3) If the Bank considers it necessary in the interests of the banking institution, microfinance banking institution, controlling company, the customers of the banking institution or microfinance banking institution, or the public, and where the circumstances render the provisions of subsection (2)(a)(iv) ineffective, the Bank may, despite any provision to the contrary in -

(a) the Companies Act, 2004;

(b) the Labour Act, 2007 (Act No. 7 of 2007); or

(c) any contract of employment entered into between the banking institution, microfinance banking institution or controlling company or its affiliate or associate, and any director or officer; or

(d) the memorandum and articles of association of the banking institution, microfinance banking institution or controlling company, its affiliate or associate.

by written order and within the period of time, or before a date, specified in an order, remove or suspend from office an officer or a director of the banking institution, microfinance banking institution or controlling company, its affiliate or associate.

(4) If the Bank is satisfied that the banking institution, microfinance banking institution or controlling company 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 subsection (2) or (3), and in addition to any action taken by the Bank under those subsections the Bank may by written order -

(a) assume control of the entire property, business and affairs of the banking institution, microfinance banking institution or controlling company or any part the property, business and affairs and conduct the entire business and affairs of the banking institution, microfinance banking institution or controlling company or the part so assumed control of, for and on behalf of the banking institution, microfinance banking institution or controlling company; or

(b) appoint a person or persons to so conduct the business and affairs of the banking institution, microfinance banking institution or controlling company in the name of the Bank.

(5) The Bank may, in any of the circumstances contemplated in subsection (1), (2), (3) or (4), in terms of section 65 appoint a person or persons, who is or are suitably qualified and with sufficient experience, for a period as the Bank may consider fit, to assess the financial soundness of the banking institution, microfinance banking institution or controlling company and such person or persons has the additional powers to attend any meetings of the banking institution, microfinance banking institution or controlling company as the Bank may consider necessary.

(6) A banking institution, microfinance banking institution or controlling company is bound by, and must immediately comply with, and give effect to, the order made under subsection (2), (3) or (4).

(7) A director or an officer removed or suspended from office under subsection (2) or (3) ceases to hold the office from which he or she is so removed or suspended 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, microfinance banking institution or controlling company from which he or she was removed or suspended;

(ii) any other banking institution, microfinance banking institution or controlling company;

(b) is not entitled to the payment of any remuneration from the banking institution, microfinance banking institution or controlling company, except the remuneration that he or she was entitled to up until and including the date upon which he or she was removed or suspended from the banking institution, microfinance banking institution or controlling company,

but the Bank may, upon written application by such director or officer rescind or modify the removal or suspension order subject to any conditions as the Bank may impose.

(8) The Bank may not make an order under subsection (2), (3) or (4) unless the banking institution, microfinance banking institution, controlling company, or in the event that the order concerns the suspension or removal of an officer or a director, the officer or director concerned has been given a reasonable opportunity to make representations to the Bank relating to the proposed order.

(9) The costs and expenses incurred by the Bank are, or the remuneration payable to any person appointed by the Bank under subsection (2)(a)(v) is, payable by the banking institution, microfinance banking institution or controlling company.

(10) If the Bank assumes control of a banking institution, microfinance banking institution or controlling company pursuant to an order made under subsection (4), the banking institution, microfinance banking institution or controlling company, its directors and officers must –

(a) submit the property, business and affairs of the banking institution, microfinance banking institution or controlling company so assumed to the control of the Bank; and

(b) provide or make available to the Bank or to the person or persons appointed under that subsection all the facilities required to properly conduct the business and affairs of the banking institution, microfinance banking institution or controlling company.

(11) In the circumstances contemplated in subsection (10), the Bank or the appointed person or persons must -

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

(b) execute all the powers of the banking institution, microfinance banking institution or controlling company or of its directors under the memorandum and articles of association of the banking institution, microfinance banking institution or controlling company, until such time as the order made under subsection (2), (3) or (4) is cancelled by the Bank.

(12) An order made under subsection (2), (3) or (4) does not confer upon, or vest in, the Bank or any person or persons appointed by the Bank, any title to, or any beneficial interest in, any property of the banking institution, microfinance banking institution or controlling company.

(13) Any –

(a) banking institution, microfinance banking institution or controlling company that or any other person who contravenes fails to comply with subsection (6) or (10) commits an offence and is liable to the penalties referred to in section 93(2).; or

(b) person who contravenes or fails to comply with subsection (7) commits an offence and is liable to the penalties referred to in section 93(2).

3.39 Amendment of section 57 of the Act (section 70 of Bill)

Issue: There is inadequate statutory bank resolution powers as was uncovered during the 2011 and 2016 crisis simulation exercises conducted by the Bank, NAMFISA and the Ministry of Finance.

Currently, Namibia does not have a clear or effective statutory regime specifically tailored to deal with failing institutions regulated by the Banking Institutions Act. The current provisions are inadequate to effectively resolve problem bank situations. Ineffective resolution framework could lead to a prolonged resolution process which is associated with high costs to tax payers.

During the resolution process, a banking institution may face a potential bank run or its assets may be in danger of being looted. There is no provision in the current legislation that empowers management of the banking institution to suspend business operations of the banking institution. Similarly, the Bank does not have powers to order the banking institution to suspend business operation in order to protect its assets.

Furthermore, in the event of a resolution of a banking institution, funds may be required to capitalize a bridge bank, to contribute to funding the deficiency of assets relative to liabilities transferred as part of resolution by means of an asset/liability transfer, or to recapitalize a bank taken into temporary public ownership.

Proposal: In order to remedy the current situation, the Bank opted to amend the Act in order to give the Bank "stabilisation powers' to transfer shares, property, rights and liabilities of a banking institution deemed to be failing but which is potentially worth rescuing, in whole or in part, as a going concern. To achieve the public objectives of resolution, the Bank has powers that affect the contractual rights of counterparties and investors in the failed banking institution. Similarly, the Act is amended to empower the Bank to suspend the business operation of the banking institution during resolution process in order to protect it against bank run or to protect its assets against looting. The options which the Bank can exercise as part of a resolution process are explained below.

(a) Private sector purchaser

The Bank sells all or part of the business of the failing banking institution or microfinance banking institution to a private sector purchaser either by a transfer of the shares issued by the banking institution or microfinance banking institution, or by transfer of its assets rights and liabilities.

(b) Bridge bank

The Bank transfers all or part of the banking institution`s or microfinance banking institution's business to a bridge banking institution, which may only be done through a transfer of a banking institution`s property, rights and liabilities.

Furthermore, with the introduction of consolidated supervision, the Bank extended its supervisory and regulatory powers to the controlling companies which may exercise control over other non-bank institutions in a group. Therefore, the proposed amendments intend to further extend the resolution powers to the controlling companies in so far as may be necessary. The rationale is that in the event that a banking group is failing the entire financial group can be resolved at once with the expectation that there will be contagion among entities in the group. In addition, in order to provide for the resolvability of banking institutions, controlling companies and microfinance banking institutions, the Bank must limit the extent to which other institutions hold liabilities eligible for a bail-in tool, save for liabilities that are held at entities that are part of the same banking group.

There should be differentiation among creditors in order to avoid *pari passu* treatment of creditors when taking resolution measures in exceptional circumstances, especially where it is necessary to achieve the continuity of critical functions and core business lines in the banking institution under resolution.

Amendment:

Therefore, section 57 is amended by deleting and substituting it with the following section 70 in the new Bill, which reads as follows:

70. (1) If the Bank is satisfied that a banking institution, microfinance banking institution or controlling company has become a failing institution, 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, exercise the resolution options under subsection (3) in respect of such banking institution, microfinance banking institution or controlling company.

(2) The Bank may, with the concurrence of NAMFISA, exercise the resolution options listed under subsection (3) in respect of non-banking institutions within groups of which a banking institution, microfinance banking institution or controlling companies is an associate or forms part.

(3) Pursuant to subsection (1) or (2) the Bank may exercise any of the following options in order to resolve a failing institution:

(a) sale or transfer of the business or part of the business of the banking institution, microfinance banking institution or controlling company to any suitable purchaser in terms of subsection (4);

(b) transfer of the business or part of the business of the banking institution, microfinance banking institution or controlling company to a bridge bank in terms of subsection (7);

(c) consent to the liquidation of the banking institution, microfinance banking institution or controlling company pursuant to subsection (10), if the banking institution, microfinance banking institution or controlling company is unsolvable; or

(d) take any other action it considers fit to resolve the failing institution.

(4) The Bank may sell all or part of the business of the banking institution, microfinance banking institution or controlling company, to a suitable purchaser.

(5) In order to undertake a purchase in terms of subsection (4), the Bank must have due regard to the following public interest considerations -

(a) the stability of the financial system of Namibia;

(b) the maintenance of public confidence in the stability of the financial system of Namibia; or

(c) the protection of depositors.

(6) The Bank may determine the manner in which a purchase arrangement will be established, including its operations.

(7) The Bank may transfer all or part of the business of banking institution, microfinance banking institution or controlling company to a bridge bank established by the Bank after consultation with the Minister.

(8) The Bank may issue guidelines in a particular case of a bridge bank or generally to all bridge banks relating to the manner in which the critical functions and viable operations of a bridge bank are established and the manner in which such bridge bank is capitalised and disposed of.

(9) In exercising the options stipulated under subsection (3), (4) or (7) 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 or controlling company so as to reflect the actual available assets of the banking institution, microfinance banking institution or controlling company; and

(ii) on the reduction of share capital under subparagraph (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, microfinance banking institution or controlling company as specified in section 39;

(b) 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 business, liabilities and assets of the banking institution, microfinance banking institution or controlling company;

(c) appoint, remove or suspend, or vary or terminate the contract of service of, executive officers and directors of the banking institution, microfinance banking institution or controlling company under resolution, except that appointments made for purposes of this section must be on the terms and conditions agreed with the Bank;

(d) establish a separate asset management entity and transfer non-performing loans or difficult-to-value assets of the banking institution, microfinance banking institution or

controlling company referred to in subsection (3) or (4) to such entity for management and liquidation;

(e) recover money from any executive officer, principal officer or director of a banking institution, microfinance banking institution or controlling company, removed from the banking institution, microfinance banking institution or controlling company, including variable remuneration, where such money was removed illegally or fraudulently;

(f) write down, in a manner that respects the hierarchy of claims in liquidation as stipulated under section 71, equity or other instruments of ownership of the banking institution, microfinance banking institution or controlling company of, unsecured and uninsured creditor claims to the extent necessary to absorb the losses;

(g) convert all or parts of unsecured and uninsured creditor claims into equity or other instruments of ownership of -

(i) the banking institution, microfinance banking institution or controlling company under resolution; or

(ii) any successor in resolution or the parent company within the same jurisdiction,

claims in a manner that respects the hierarchy of claims in liquidation as stipulated in section 72;

(h) on entry into resolution, convert or write-down any contingent convertible or contractual bail-in instruments whose terms had not been triggered before the commencement of the resolution process and treat the resulting instruments in line with paragraph (g) or (j);

(i) temporarily suspend any right that resulted from any breach clause where such breach arises by reason only of the commencement of resolution process or in connection with the exercise of any resolution powers, provided that such suspension -

(ii) does not exceed five days or until such further time period that the institutions established in terms of subsection (3)(b) are in place;

(iii) is subject to adequate safeguards that protect the integrity of financial contract and provide certainty to counterparties; and

(i) does 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 the commencement of resolution process or the exercise of the relevant resolution power occurring before, during or after the period of the stay.

(10) In exercising the powers referred to in subsection (3)(c), the Bank may, subsequent to exercising its powers under filing an application in the High Court in terms of subsection (9)(a), direct a banking institution, microfinance banking institution or controlling company to

summarily suspend all, or any part of the banking business, of the banking institution, microfinance banking institution or controlling company for such period and subject to such conditions as the Bank may specify if –

(a) the capital adequacy ratio and liquid asset requirements fall below the level and period as determined by the Bank; or

(b) there is evidence of fraud or theft committed against a banking institution, microfinance banking institution or controlling company.

(11) In exceptional circumstances, where bail-in tools are applied, the Bank may determine the manner and form in which such tools are to be applied.

(12) Despite subsection (9), the Bank, if satisfied that a failing institution is unresolvable, must direct the Namibia Deposit Guarantee Authority established by section 2 of the Deposit Guarantee Act, 2018(Act No. 16 of 2018), to make payments to guaranteed depositors before winding-up.

(13) Despite any provision to the contrary in the Insolvency Act and the Companies Act, the Bank, if it is satisfied that a failing institution is unresolvable under subsection (3) or (4) or under any action taken under this section, the Bank may in writing and subject to the provisions of section 71 consent to the winding-up or liquidation of such banking institution, microfinance banking institution or controlling company.

(14) A bridge bank must comply with all legal or regulatory requirements applicable to all banking institutions, microfinance banking institutions or controlling companies, and subject to necessary changes required by the context, the provisions of this Act apply to bridge bank as if it were a banking institution or microfinance banking institution, or, where applicable, a controlling company.

(15) Any person aggrieved by the decision made by the Bank in terms of subsection (11) may appeal to the Appeal Board within 30 days of being informed of such decision.

3.40 Amendment to section 58 (section 71 of the Bill)

Issue: The envisaged securitisation legal framework would pave the way for banking institutions and special purpose entity" to participate in securitisation transactions. It is the intention of the Bank to have the securitised assets excluded from the liquidation process if the transferring or originating banking institution is liquidated.

Further, the objectives which guide a bank liquidator should be provided in the law. A failed banking institution may be placed into insolvency if the public interest test for use of resolution powers is not met and where the banking institution or controlling company holds protected deposits or client assets. Thus, the insolvency procedures should be designed to allow for rapid pay-out of deposits protected under the Deposit Guarantee Scheme or to the transfer the Deposit Guarantee Scheme – protected deposits to a viable firm.

The commencement of a liquidation order is currently not explicit and should be provided for.

Proposal: It is proposed that explicit provisions be inserted in the Bill excluding securitised assets from the liquidation process, the objectives of the liquidator and the commencement of a liquidation order.

Amendment of section 58

The section is amended by inserting subsection (5) and rearranging subsections 6 and 7 as follows:

(5) The Bank may request the Master of the High Court to submit the names, qualifications and experience of liquidators to the Bank for its recommendation for appointment by the Master and may not recommend a person for appointment unless such person is qualified and has the necessary experience to act as a liquidator or judicial manager of a banking institution, microfinance banking institution or controlling company.

(6) Despite anything to the contrary in the Companies Act or any other law, the Master of the High Court -

(a) must only appoint a person recommended by the Bank under subsection (5) as a provisional liquidator, provisional judicial manager, liquidator or judicial manager of a banking institution, microfinance banking institution or controlling company; and

(b) may in addition to an appointment under paragraph (a), appoint a person recommended by the Bank who, in the opinion of the Bank, has wide experience in liquidation proceeding and is knowledgeable about the latest developments in the banking or microfinance 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, microfinance banking institution or controlling company concerned.

(7) Despite anything to the contrary in any other law, in the event that an originating banking institution, microfinance banking institution or controlling company is wound-up, the winding-up of such banking institution, microfinance banking institution or controlling company will not have an impact on a special purpose entity to which assets, through securitisation, have become securitised assets have been sold and such winding-up will have no effect on -

(a) the securitised assets acquired, or risks assumed by the special purpose entity, or

(b) other assets of the special purpose entity, including payments due by the underlying debtors, cash-flows or other proceeds owing to the special purpose entity in connection with the securitised assets.

(8) For the purposes of subsection (7) –

"securitisation" means the process by which assets, originally owned by a banking institution or non-bank institution, are pooled and sold to a special-purpose entity that issues marketable or tradable securities over the pooled assets; and

"special-purpose entity" means an institution incorporated, created or used solely for the purpose of implementation and operation of securitisation scheme or as approved by the Bank and whose legal status makes its obligations secure even if the parent company becomes insolvent.

(9) Any person who contravenes or fails to comply with subsection (1), commits an offence and is liable to the penalties specified in section 92(2)(b).

(10) Any person aggrieved by the decision made by the Bank in terms of subsection (4) may appeal to the Appeal Board within 30 days of being informed of such decision.

3.41 Amendment of section 59 of Act (section 72 of the Bill)

Issue: In 2010, this section was amended to provide for depositor preference over other general creditors, in favour of small depositors. The wording of the section is unclear whether the intent is to give depositors preference over other general creditors.

Proposal: In order to remedy the situation, the current section is amended in order to set out the priority of claims for all classes of creditors and provisions are included to limit the extent to which institutions who hold liabilities are eligible for bail-in. The recommendation is that depositors protected by a deposit guarantee scheme are 'super-preferred'. This means that in insolvency the depositor has a higher position in the insolvency creditor hierarchy to recover from the insolvency ahead of other creditors and is likely therefore to recover more of its costs than under the normal insolvency proceedings. This will reduce the risk that the failure of one bank weakens other firms and reduce the overall costs to the industry. Deposits from individuals and small and medium-sized enterprises that exceed the insured amount are also preferred to other senior unsecured liabilities but rank behind the 'super preferred' protected deposits.

Amendment of section 59 of the Act:

The section is amended as by the substitution for section 59 as following:

(1) Despite the provisions of the Insolvency Act, the Companies Act or 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 must be made available to meet all liabilities of the banking institution, microfinance banking institution or controlling company in the following order of priority:

(a) the cost and administrative expenses of the liquidator and Master of the High Court incurred in the process of liquidating the banking institution, microfinance banking institution or controlling company;

(b) remuneration of employees in accordance with the Labour Act, 2007 (Act No. 7 of 2007), including -

(i) deductions made but not paid over yet in respect of income tax for the benefit of the Receiver of Revenue, medical and pension or retirement fund contributions.; and

(ii) any portion to be contributed by the banking institution, microfinance banking institution or controlling company towards the payments referred to in subparagraph (i) as determined in the employee's contract of service;

(c) covered deposit liabilities of member institutions of the Namibia Deposit Guarantee Scheme in terms of sections 23 and Part 7, of the Deposit Guarantee Act, 2018 (Act No. 16 of 2018);

(d) secured creditors;

(e) preferential creditors, including any other class of liability or deposit as determined by the Bank;

(f) all deposit liabilities not covered in paragraph (c);

(g) other ordinary creditors;

(h) unsecured subordinated creditors such as holders of subordinated debt instruments issued by the banking institution;

(i) holders of preference shares; and

(j) holders of ordinary shares.

(2) Any surpluses that may arise after applying subsection (1) must be distributed in accordance with the Insolvency Act.

(3) The liquidator must provide a copy of the final distribution and liquidation account as prescribed in the Insolvency Act, to the Bank within 30 days after payment of claims.

3.42 Amendments to sections 60 of the Act – See paragraph 3.53 of this Explanatory Memo

3.43 Illegal financial schemes – Part VIII (Newly inserted chapter into the Bill sections 75 - 81)

Issue: Section 55A was introduced under the Banking Institutions Act of 2010. However, the interpretation of section 55A (1) read in conjunction with other relevant provisions of the Banking Institutions Act of 1998 (as amended) proved that the practical application of the provision to be cumbersome and problematic, which brought the enforceability of the section into question. It appeared that the section lacked clarity on what the crime is and what it intends to outlaw and therefore it may fail to meet the constitutional requirement that a crime must be clear and concise without having to be referred to a court of law for interpretation. The implications of this shortcoming could be that, this section could possibly be declared null and void on the basis of its ambiguity if it were to be tested in a court of law.

Proposal: Therefore, to address the identified shortcomings, the following proposals were made;

Introduction of wording "illegal financial schemes"

Previously, the Act used the wording "pyramid schemes". However, it was realised that the wording pyramid scheme could pose a potential restriction in the provisions, since it will only relate to typical pyramid schemes, as it is commonly known. A typical pyramid scheme as the name suggests is structured like a pyramid scheme, with the initial recruiter at the apex. Typically, the hallmark of a pyramid scheme is that no actual product is offered and instead, people pay a one-time fee to sign up to be part of the scheme or may purchase materials instructing them on how to sign up others. In order to make any money, the person must then sign-up other people of which part of the revenue from new recruits must be given to those who signed one up for the program. These people in turn give part of their money to those who signed them up. Money flows upward towards the top of pyramid and to the founders of the pyramid scheme. The problem is that the scheme cannot go on forever because there is a finite number of people who can join the scheme and ultimately collapses.

Therefore, to ensure that all other schemes of a similar nature are captured by the law and outlawed, the use of the word "illegal schemes" was introduced.

Introduction of the definition of illegal schemes

Under the current Act, no explicit definition for "illegal schemes" is catered for under the definition section and section 55A merely describes the activities that may constitute pyramid schemes. It, therefore, became necessary to include an appropriate definition in the amendments to cater for illegal schemes. As a result, the proposed current amendments are proposing for the inclusion of a definition under section 71 of the Amendment Act for "illegal schemes" to aid in the ease of interpretation of the new provisions.

Criminalization of illegal schemes

It has been noted that the current section failed to concisely and clearly outlaw the participation in pyramid schemes, due to the fact that the opening paragraph of section 55A appears to

have key words missing and as such failed to articulate the crime that it was intended in the law.

Therefore, the proposed section 77 will now explicitly prohibit the participation in illegal schemes and accordingly state the crime that the section intends to outlaw.

Outlining the elements of a crime

The current wording and language used in section 55A (1) describes the activities that may be construed as pyramid schemes, which makes it very difficult to understand what the section intends to outlaw. It was therefore considered that, one must have an in-depth background on the subject to be able to extract the meaning of the section.

In this regard, it was proposed to introduce changes under the provisions of section 76, to simplify the section and outline the elements of the crime in simple, easy to understand language and to make the section more reader friendly even for novice persons.

Involvement of the Courts

In view of the technical nature of the subject matter, section 74 is included to guide the Courts in the interpretation of the provisions. It further makes it clear that the guidance provided by the section will not be all inclusive and the Courts may at their discretion use the relevant aids and resources at their disposal to arrive at the appropriate interpretation and application of the law.

Furthermore, although the High Court has inherent jurisdiction in respect of certain offences, section 77 also provides certainty by laying out the procedures of how to bring such matters before the courts and empower the Bank or any other person to make such application.

Powers of the Bank

In view of the continuous public statements in the media, section 76 was introduced with the primary objective of providing the Bank with enabling powers to issue public warnings, at its discretion. The section also goes further in outlining the criteria the Bank may take into account in assessing whether or not to make a public pronouncement on suspected illegal schemes.

The amendments further include section 79 that stipulates the powers of the Bank in respect of conducting investigations and the section is very similar to the provisions of section 6 in the current Act in respect of illegal banking business.

Powers of the Minister to declare certain activities as illegal financial schemes

The Minister may, on the recommendation of the Bank, make regulations relating to activities that can be regarded as illegal financial schemes under section 106(1).

Amendments to the Act to include the Chapter dealing with Illegal Financial Schemes

Definitions for this Part

“75. (1) In this Part -

“business practice”, for the purposes of the definition of “participation payment”, 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 of any services or products;

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

(a) any money or 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 the -

(i) purchase of any goods, products or services -

(aa) at cost price;

(bb) provided for marketing sales; or

(cc) not for resale;

(ii) 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) participant’s time and effort in pursuit of any sales or recruiting activities;

“illegal financial scheme” means a scheme referred to in section 76;

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

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

(a) establish or promote the scheme, whether alone or together with another person or other persons; or

(b) take part in the scheme in any capacity, whether as employee or agent of a person -

(i) referred to in paragraph (a); or

(ii) who otherwise takes part, enters or joins in the scheme as a participant;

“participation payment” means a payment of money 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 any form of consideration; and

“recruitment payment’ means a payment of money or other consideration 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 goods, products or services.

Meaning of illegal financial scheme

76. (1) A 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;

(b) the consideration referred to in paragraph (a) 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 goods, products or services; and

(c) as a result of the participation in the scheme, 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.

Participation in illegal financial scheme prohibited

77. A person who, intentionally, knowingly or without having taken reasonable steps to ascertain the lawfulness or otherwise of any activity -

(a) promotes, or participates in, an illegal financial scheme; or

(b) causes or attempts to cause, any other person to participate in an illegal financial scheme,

commits an offence and is liable to the penalties provided for in section 92(2)(a).

Marketing schemes as illegal financial schemes

78. (1) In determining whether a scheme that involves the marketing of goods, products or services is an illegal financial scheme regard must be given as to whether participation 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 goods, 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; or

(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 the goods, products or services.

(3) Subsection (1) does not limit the matters which may be considered in determining whether participation payments are entirely or substantially induced by the prospect held out to new participants of entitlement to recruitment payments.

Bank may issue public warning notice

79. (1) The Bank may, in such manner as the Bank considers appropriate, issue to the public a notice in the Gazette, in a newspapers circulating widely in Namibia or in any other appropriate electronic platform 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 77; and

(b) is satisfied that any person has suffered or is likely to suffer, directly or indirectly, any financial loss, damages or harm as a result of such conduct.

(2) The Bank may not issue a notice may under subsection (1) unless the person in relation to whom the notice is issued has been given a reasonable opportunity to make representations to the Bank relating to the scheme in question.

Repayment of money obtained in contravention of this Part

80. (1) If the Bank is satisfied that a person has obtained any money in contravention of section 77, 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 that person in respect of such money -

(a) to the respective persons from whom he or she has obtained the money 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 directive.

(2) Any person referred to in subsection (1) who refuses or fails to comply with a directive issued under that subsection must, for the purposes of -

(a) section 345 of the Companies Act, be deemed to be unable to pay the debts; or

(b) section 8 of the Insolvency Act, be deemed to have committed an act of insolvency,

and the Bank may apply to the High Court for the winding-up or for the sequestration of the estate, of such person.

(3) Subsections (1) and (2) are in addition to, and may not be construed as a derogation from any criminal liability in terms of this Act or of any other law, of a person referred to in those subsections.

(4) Section 74 applies with the necessary changes to the money referred to in subsection (1).

Power of entry and investigation

81. (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) If the Board of the Bank has reason to believe that a person has been engaged, or is engaging, or is proposing to engage, in conduct in contravention of section 77, the Bank may request an authorised officer to exercise the powers conferred by subsection (3) or (4).

(3) An authorised officer may, subject to subsection (6), at any time and without prior notice -

(a) enter any premises which the Bank or the authorised 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 77;

(b) search for any book, record, statement, document or other item used, or which is believed to be used, in connection with the conduct referred to in paragraph (a); 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,

as if the authorised officer were, subject to necessary changes, a police official referred to in Chapter 2 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977) and the book, record, statement, document or other item were used in the commission of a crime.

(4) An authorised officer has, in addition to the powers referred to in this section, but with any necessary changes, the powers conferred on an authorised officer by section 7, in relation to the exercise of the powers for the purposes of this section.

(5) In exercising the powers conferred by subsection (3) or (4) the authorised officer may not enter any premises or part of premises being used as a private home except –

(a) the owner or occupier of those premises consents to the entry and search of the premises;

(b) 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; or

(c) the authorised officer on reasonable grounds believes -

(i) that a warrant of entry and search would be issued to him or her if he or she applied for it; and

(ii) that the delay in obtaining the warrant would defeat the object of the investigation.

(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 77 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 provisions of section 7(7) to (15), inclusive, apply with necessary changes in relation to a warrant issued under subsection (6), entry into the premises pursuant to a warrant, granting of access to the premises by persons in charge or control of premises, production of authorisations, obstruction of authorised officers under this section and other incidental matter performed or required to be performed under this section.

3.44 Amendment of section 64 of the Act (section 85 of the Bill)

Issue: Rapid growth and fierce competition in the microfinance banking industry has been considered a contributing factor to fueling over indebtedness and high default rates. However, having a credit bureau that is collecting both negative and positive information and to help lenders determine the level of their borrowers' indebtedness to other lenders has been identified as an important tool to avoid this kind of crisis. It is believed that, credit reference bureaus allow both banking institutions and microfinance banking institutions to get the information needed to assess and price risks and ultimately make good credit decisions.

Currently, the law is silent on whether the provision of information to a credit bureau contravenes the provisions of section 64.

Proposal: Thus, in view of the important role that credit bureau plays in the banking industry, section 64 is amended to ensure that the providing of information to credit bureaus does not contravene the confidentiality and secrecy provisions in terms of the Act.

Amendments to be included in the new Bill:

The principal Act is amended as follows:

(a) By the substitution for subsection 10 (k) with the following:

"If the exchange of individual customers' information takes place within a banking institution or microfinance banking institution between directors, officers or employees of that banking institution or microfinance banking institution and which is necessary to facilitate the day-to-day banking business or microfinance banking business."

(b) by the addition of the following subsection:

"(11)(d) if the information is disclosed, with or without the permission of the customer, in the prescribed manner by the banking institution, microfinance banking institution or controlling company to a credit bureau".

3.45 Amendments to section 68 of the Act (Section 89 in the Bill)

Issue: The introduction of the resolution framework brings about the possibility of that the Bank may need to transfer shares in a failing banking to another person to ensure the objectives of the framework are met. Accordingly, taking into account that this is not a day-to-day transaction, the proposal is that such transaction should then be exempted from transfer duty.

Proposal: Insert a provision that exempts transaction by the Bank in pursuant of the resolution framework from the payment of transfer duty thereon.

Amendment to be included in the Bill:

"(2) Transfer duty in terms of the Transfer Duty Act, 1993 (Act 14 of 1993) is not payable in respect of the transfer of any immovable property or any right or interest in immovable property of a banking institution, microfinance banking institution or controlling company, if the transfer is occasioned by the exercise of the resolution powers of the Bank pursuant to section 67".

3.46 Insertion of a provision relating to application for approvals or authorizations not provided in the Act (section 91 of the Bill)

Issue: The current Act does not have a provision relating to application for approvals or authorizations that are not provided for in the Act.

Proposal: It is proposed that a new section 91 be introduced in the Bill to provide for guidance how applications for approvals or authorizations not provided in the

Act should be made and the process to be followed by the Bank in assessing such applications.

New section 91

91. (1) Where an approval or authorisation is required to be obtained from the Bank and the process for obtaining such approval or authorisation is not specifically provided for in this Act, the person seeking such approval or authorisation must apply for such approval or authorisation to the Bank.

(2) An application made under subsection (1) must be -

(a) made in the form and manner determined by the Bank;

(b) signed by the applicant or on behalf of the applicant by a person duly authorised by the applicant; and

(c) if applicable, accompanied by the prescribed application fee.

(3) Before deciding on an application made under subsection (1) the Bank may request the applicant to furnish the Bank with such further information as the Bank may consider necessary to determine the application.

(4) After considering an application made under subsection (1), and any further information provided under subsection (3), if any, the Bank may -

(a) refuse to grant the approval or authorisation;

(a) grant the approval or authorisation;

(c) grant the approval or authorisation subject to such conditions as the Bank may impose.

(5) The Bank must in writing inform the applicant of –

(a) the decision of the Bank under subsection (4);

(b) the conditions, if any, imposed under subsection (4)(c) and the reasons for imposition of conditions; and

(c) the reasons for the refusal of the application, if the application is refused.

3.47 Insertion of a new provision on appeal board

Issue: The Act make provision for the Minister to constitute the Appeal Board to hear an appeal lodged by a banking institution against a decision made or fine imposed by the Bank. However, the Act does not provide in detail how the Appeal Board should be constituted and the procedure to be followed by the Board.

Proposal: Insert the new sections (95-105) relating to the establishment of the Appeal Board and how the Appeal Board should perform its functions.

Appeal Board

95. (1) There is established an Appeal Board to hear and determine appeals against decisions of the Bank made under this Act.

(2) The Appeal Board consists of five members appointed by the Minister as follows:

(a) one legal practitioner registered to practise as such under the Legal Practitioners Act, 1995 (Act No. 15 of 1995) who has at least 10 years experience in the legal profession who is the chairperson; and

(b) four other persons who, in the opinion of the Minister, have suitable knowledge and experience in banking or microfinance banking business, financial services, economics or law.

(3) The Minister may prescribe regulations relating to qualifications, terms and conditions for appointment as members of the Appeal Board and the establishment, composition and procedures of panels to which an appeal may be assigned.

(4) When the Appeal Board considers it necessary that it be assisted by a person or persons who has or have expert knowledge of a particular matter, the Appeal Board may appoint a person or persons to provide the Appeal Board with expert knowledge, but such person or persons does or do not have the right to participate in any decision of the Appeal Board.

(5) Any reference in this Act to the Appeal Board must be construed as including a reference, where appropriate, to a panel established under subsection (3) to which an appeal is or was assigned.

(6) All expenditure incurred by the Appeal Board, including remuneration payable to Appeal Board members must be defrayed out of, or paid out from, public funds as determined by the Minister, and within 90 days before the end of the financial year of the Bank, the Appeal Board must prepare and submit to the Minister a proposed budget for the following year.

Disqualification for appointment as member

96. A person does not qualify for appointment as a member of the Appeal Board, if that person -

(a) is an unrehabilitated insolvent;

(b) is not a Namibian citizen or is not lawfully admitted to Namibia for permanent residence;

(c) is actively engaged in the business of a banking institution, microfinance banking institution or controlling company, unless that person ceases to engage in that business before the date of the proposed appointment;

(d) is an office-bearer of any political party, unless that person ceases to be such an officer-bearer before the date of the proposed appointment;

(e) is a member of Parliament, or of a regional or local authority or council, unless that person ceases to be such a member before the date of the proposed appointment;

(f) has, during the period of 10 years immediately preceding the date of commencement of this Act, or at any time after that date, been convicted, whether in Namibia or elsewhere, of theft, fraud, forgery or perjury, an offence under any law on corruption or any other offence involving dishonesty;

(g) has under any law been declared to be of unsound mind or under legal disability;

(h) has been removed from an office of trust;

(i) has been sanctioned by any national or international statutory regulatory body for the contravention of a law relating to the regulation and supervision of banking institutions, microfinance banking institutions or controlling companies; or

(j) is a member of the board of the Bank or is a staff member of the Bank, unless that person ceases to be such a member before the date of the proposed appointment.

Term of office

97. A member of the Appeal Board holds office for a period of three years and, at the expiration of that period, is eligible for re-appointment.

Vacation of office

98. (1) A member of the Appeal Board vacates office, if the member -

(a) becomes subject to a disqualification referred to in section 96;

(b) resigns from office by written notice to the Minister; or

(c) is removed from office by the Minister under subsection (2).

(2) The Minister may, on good cause shown, by notice in writing, remove a member of the Appeal Board from office on the grounds of misconduct, incapacity, incompetence or loss of confidence after having given the member concerned a reasonable opportunity to be heard.

(3) The Minister may suspend a member of the Appeal Board from office without complying with subsection (2), if the Minister is satisfied that the member is guilty of dishonesty, gross misconduct or other serious unbecoming or inappropriate conduct such that it is necessary to act expeditiously in order to protect the integrity of the Appeal Board or the financial system in Namibia, but the Minister must give notice to the member as soon as practicable thereafter and consider any representations made by the member on the matter.

(4) If a member of the Appeal Board dies or the office of a member becomes vacant as a result of the happening of an event referred to in subsection (1), the Minister may, with due regard to section 96, appoint a person to fill the vacancy for the unexpired portion of the term of office of the member concerned.

(5) If, because of death, illness, resignation or of any other reason, a member of the Appeal Board is unable to complete a hearing, the chairperson of the Appeal Board –

(a) may direct that the hearing of that matter proceed before the remaining members of the Appeal Board; or

(b) must, if the number of the members hearing the appeal is less than three, terminate the proceedings before the Appeal Board, whereupon the Minister must forthwith appoint a person to fill the vacancy on the Appeal Board pursuant to subsection (4).

(6) If the proceedings before the Appeal Board are terminated in terms of subsection (5)(b), the chairperson must, as soon as the Minister has appointed a person to fill the vacancy pursuant to subsection (3), ensure that the Appeal Board conducts a new hearing of the appeal.

Remuneration

99. (1) A member of the Appeal Board who is not in full-time employment of the State is entitled to be paid out of the funds referred to in section 95(6), such remuneration and allowances specific services rendered to the Appeal Board in that capacity, as the Minister may determine in respect of the chairperson and other members.

(2) The remuneration and allowances referred to in subsection (1) are payable on the basis of the actual work done and time spent on a particular case brought before the Appeal Board, and not on the basis of a fixed fee paid on a regular basis.

Administration

100. The Minister must make arrangements for the performance of the administrative and clerical work of the Appeal Board, including the designation or appointment of a secretary and other support staff, the cost of which forms part of the budget referred to in section 95(6).

Right of appeal

101. (1) The Appeal Board has primary jurisdiction to hear and determine any appeal brought to it under this Act or any other applicable law.

(2) Any banking institution, microfinance banking institution or controlling company that or any other person who is aggrieved by -

(a) a decision of the Bank made under section 12, 14, 15, 16, 18, 19, 26, 28, 36, 91 or 94; or

(b) any other decision of the Bank made pursuant to the Bank's supervisory or regulatory functions or powers under any other provision of this Act, other than a decision to institute an investigation or inspection under section 7 or 81,

may appeal against that decision to the Appeal Board.

(3) An appeal must be lodged with the Appeal Board within the period, in the manner and on payment of such fees as may be prescribed by the Minister in rules pursuant to subsection (8).

(4) The Appeal Board must hear an appeal on a date, at a time and place determined by the chairperson of the Appeal Board, and the chairperson must notify the appellant and the respondent in writing.

(5) The Minister, after consultation with the Appeal Board, may make rules relating to -

(a) the period within which an appeal to the Appeal Board against a decision of a respondent must be taken;

(b) the manner in which such appeal must be made;

(c) the conduct of proceedings before the Appeal Board and the procedures to be followed by the Appeal Board, including matters relating to condonation for non-compliance and the admissibility of evidence;

(d) witnesses, including payment of expenses and costs incurred by witnesses, offences by or relating to witnesses and other matters relating to witnesses;

(e) sittings of the Appeal Board;

(f) the integrity of the Appeal Board and measures that are necessary or expedient to prevent the Appeal Board or a member of the Appeal Board from being insulted, disparaged or belittled or to prevent the proceedings or findings of the Appeal Board from being prejudiced, influenced or anticipated;

(d) the fees that may be payable by the appellant; and

(e) any other matter which the Minister considers necessary to ensure effective and expeditious resolution of matters before the Appeal Board.

(9) Rules made under subsection (8) may create offences for contraventions of the rules and penalties for such contraventions which may not exceed a fine of N$20 000 or imprisonment for periods not exceeding two years or both such fine and such imprisonment.

Summoning of witnesses and giving of evidence

102. (1) For the purposes of hearing of an appeal pursuant to section, the Appeal Board may -

(a) summon any person to appear before it at a date, time and place specified in the summons, to be questioned or to produce any document;

(b) retain for examination any document so produced; and

(c) administer an oath to or accept an affirmation from any person called as a witness at an appeal.

(2) A person summoned to provide oral evidence pursuant to subsection (1) is entitled to legal representation at the expense of that person.

(3) The law relating to privilege, as applicable to a witness summoned to give evidence or to produce a book, document or thing before a court of law, applies, subject to necessary changes required by context, in relation to a person summoned to give evidence pursuant to subsection (1).

(4) A person giving oral evidence under this sectionpage229 may be required to answer any question put to that person at the hearing, despite that the answer might incriminate that person.

(5) An incriminating answer directly obtained, or incriminating evidence directly derived from a hearing under this section is not admissible as evidence in criminal proceedings in a court against the person giving the evidence, except in criminal proceedings where the person is charged with an offence relating to –

(a) an oath or affirmation;

(b) giving false evidence;

(c) making a false statement; or

(d) deliberate failure to answer questions fully or satisfactorily.

(6) Where any person giving evidence in terms of the provisions of this section is obliged to answer questions which may incriminate him or her or, where he or she is to be tried on a criminal charge, the evidence may prejudice him or her at the trial, the Appeal Board may order that such part of the hearing be held in camera and that no information regarding such questions and answers may be published in any manner whatsoever.

(7) Any person who contravenes or fails to comply with any provision of an order contemplated in subsection (6) commits an offence and is liable on conviction to the penalty mentioned in subsection (5) of section 154 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977).

(8) Any person who has been duly summoned under subsection (1)(a) and who, without sufficient cause –

(a) fails to appear at the date, time and place specified in the summons;

(b) fails to remain in attendance until excused by the Appeal Board from further attendance;

(c) refuses to take the oath or to make an affirmation as referred to in subsection (1)(c);

(d) fails to answer fully and satisfactorily any question lawfully put to the person; or

(e) fails to furnish information or to produce a document specified in the summons,

commits an offence and is liable on conviction to a fine of N$80 000 or to imprisonment for a period not exceeding two years or to both such fine and imprisonment.

Decision of Appeal Board

103. (1) The decision of the majority of the members of the Appeal Board is the decision of the Appeal Board, and where a panel contemplated in section 95(3) has been appointed to hear an appeal, the Appeal Board must take the recommendation of that panel into account in making its decision.

(2) A decision of the Appeal Board must be in writing and a copy must be furnished to every party to the appeal within 30 days of the decision being finalised.

(3) At the conclusion of the hearing of an appeal the Appeal Board must consider the evidence submitted and representations made by the parties and may in writing –

(a) confirm the decision of the Bank, with or without amendments, and order that the decision of the Appeal Board be given effect to;

(b) remit the matter back to the Bank for reconsideration of its decision in accordance with such directions, if any, as the Appeal Board may determine; or

(c) set aside or vary the decision of the Bank,

and must in all cases give reasons for its decision.

(4) The Appeal Board may make such order as to costs of the appeal, in an amount not to exceed that prescribed by regulation, as it may consider suitable and fair, including an order regarding the prescribed fees that have been paid by the appellant.

(5) An order of the Appeal Board has legal force and effect and may be enforced as if it were issued in civil proceedings in a court.

(6) The chairperson of the Appeal Board must make the decision of the Appeal Board public, by publication in the Gazette.

(7) If any party to an appeal is not satisfied with the decision of the Appeal Board, it may appeal to the High Court within 30 days after the decision was made.

(8) An appeal under subsection (7) must be lodged and prosecuted in accordance with rules of the High Court that are applicable to an appeal from a decision of a magistrates' court in a civil matter.

Decision not suspended

104. An appeal lodged with the Appeal Board pursuant to this Part does not suspend a decision of the Bank referred to in section 101(1), unless the Appeal Board upon application directs otherwise.

Rights not limited

105. This Act must not be construed so as to limit the right of any interested person to appeal against or have a decision of the Appeal Board reviewed by a court, subject to the obligation of such person first to have exhausted all available remedies under this Act.

3.48 Amendment of section 71 of the Act (section 106 of the Bill)

Issue: Having regard for customer complaints that have come to the attention of the Bank, there is need for the Bank to ensure that the fees and charges payable by consumers for services rendered by banking institutions are determined in the public interest with an objective to promote competition, efficiency and cost-effectiveness in service delivery.

Proposal: Therefore, it is proposed to insert a section empowering the Minister to issue regulations on matters relating to fees and charges.

Amendment:

Section 71 of the principal Act is amended by the insertion of subsection 1 (e) after subsection 1(cA)–

"(e) fees and charges imposed by a banking institution or microfinance banking institution on customers;"

Issue: The deposit taking specialized financial institutions, e.g. Nampost Savings Bank, Agribank, National Housing Enterprise, Development Bank of Namibia and the likes, can equally cause instability in the financial system. In this regard, 2005 FSAP recommendations suggested that these entities must be subjected to prudential supervision by the Bank in order to promote a sound credit and financial system and better risk management policies and practices

by deposit taking institutions. This has necessitated the amendment to section 71 in order to provide for appropriate legal and regulatory framework for these institutions.

Proposal: Therefore, it is proposed to insert a section empowering the Minister to issue a Regulation on matters relating to specialised institutions, deposit-taking institutions**.**

Amendment:

Section 71 of the principal Act is amended by the insertion of subsection 1 (f) after subsection 1(cA)–

"(f) different and specifically tailored regulatory requirements applying to deposit taking institutions or entities governed by any other legislation"

Issue: The activities of Illegal financial schemes are becoming complex, and their characteristics change over time. The promoters of illegal financial schemes are constantly changing their business models such that some of the schemes may in future not fall within the definition of illegal financial schemes.

Proposal: It is proposed that the Act empowers the Minister to declare certain business practices as illegal financial schemes.

Amendment:

Insert a new provision after section 106(1)(g) as follows:

"(g) business practices that can be regarded as illegal financial schemes".

Issue: Since the financial crisis, bank regulators have focused on identifying systemic risks and develop appropriate responses or tools in an attempt to strengthen the resilience of the financial system. An effective macro prudential regime must employ effective tools that increase the resilience of the financial system to shocks that originate not only from external sources, but also from within the financial system. On the advent of macro prudential concerns around the world, the Bank requires empowering tools to strengthen financial system thereby safeguarding financial stability. This has necessitated the amendment to section 71 in order to provide for appropriate legal and regulatory framework for banking institutions.

Proposal: Therefore, it is proposed to insert a section 71 (3) (c) empowering the Bank to issue a Determination on matters relating to macro-prudential concern that may impact on financial stability**.**

Amendment:

Section 71 of the Principal Act is amended by the insertion of subsection 3 (c) –

macro-prudential measures and tools in the context of financial stability relating to credit of banking institutions or any other macro-prudential standards expedient to ensure the stability in the banking sector.

3.49 Amendment of section 72 of the Act (section 90 of Bill)

Issue: The Banking Institutions Amendment Act, 2010 inserted section 55A to criminalise Pyramid Schemes which is vague and ambiguous. A new proposal has been made to include a totally new section, namely section 73, which will replace section 55A.

Proposal: Delete section 55A and insert section 73.

Amendment:

Section 72 of the principal Act is amended –

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

"(a) contravenes or fails to comply with any provision of section 6, 56 (3), 73 or 83 (7); or";

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

"(b) contravenes or fails to comply with any provision of section 7(4), 10(1) or (2), 14(1), 27(1)(b), (2)(b), (4), (5) or (10), 31(1), 33(1)(a)(ii) or (b), 34(7), 51(7), (8), (10), (12) or (13), 53(5), 55(1) or (3), 56 (3), 66 (5) or (8), 68 (1), 79 (9), 82 (3), 83 (1), (3), (7) or (9), or 84(2); or".

3.50 Amendments of section 73A (section 94 of the Bill)

Issue: Section 73A of the Act empowers the Bank to impose administrative fines on banking institutions for non-compliance with certain provisions of the law. However, the powers of the Bank need to be expanded to include non-compliance issues that are currently not covered under the Act.

Proposal: Therefore, it is proposed to expand sections where the Bank can impose an administrative fine for non-compliance with the Act. This can provide an avenue for certain non-compliance issues to be handled administratively as opposed through court processes.

Amendment:

Section 73A of the Act is amended by the substitution of subsection (1) and addition of subsection (3) with the following:

"(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 18(1), 33(16), 48(2)(b), 48 (3), 59 (6), 63 (3) 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) <u>If the Bank after consideration of the representations made, decides to impose a fine, or suspend part or the whole of the fine for a period of time, 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, to pay the fine.</u>

3.51 Amendment of section 73B of the Act (section 106 of the Bill)

Appeal Board

Issue: The provisions of section 73B do not, either in the Act or for prescription by regulation, cater for aspects critical to operation/functioning of the Appeal Board, e.g. procedures for lodging appeal, appeal proceedings, administration of the Appeal Board (secretariat), etc. This shortcoming will render deficiency in functioning of the Appeal Board.

Proposal: Substitute section 73B of the Act with section 95 - 105 of the Bill.

3.52 Amendments cutting across various sections

3.52.1 **Issue:** Insertion of the expression “microfinance banking Institution” or “or microfinance banking institutions”.

The Bank adopted a strategic goal to create a special regulatory framework to permit the establishment of MFBIs in Namibia in promoting financial inclusion of the currently unbanked in our society. Therefore, in order to bring these envisaged institutions under the regulatory ambit of the Bank, there is need to incorporate them under the Act. Taking into account that the majority of the sections in the Act remain relevant to the MFBI, the amendments would only incorporate principle provisions that will distinguish between the MFBIs and mainstream banks.

Proposal: It is then proposed that the expressions “microfinance banking institution” or “or microfinance banking institutions” should be inserted in the sections of the Act as stipulated below.

Amendment:

The principal Act is amended by the insertion after the expression “banking institution” or “banking institutions” wherever it appears in section 1 under the definitions of “authorised”, “controlling company”, “core banking systems”, “deposit”, “executive officer”, “incorporated”, “insolvent”, “managerial responsibility”, “principal officer”, “risk-weighting” and section 3, 5 (excluding subsection (1)(e) and subsection (2)), 6, 9 (excluding subsection 4), 10, 11, 12, 12A (excluding subsection (1)), 12B (excluding subsection (6)), 12C, 12D, 12E, 13, 14,15 (excluding subsections (1), (5), (6) and (7)), 16 (excluding subsection (1)),17, 18, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 38, 39, 40 (excluding subsection (1)), 41, 42, 43, 44, 45, 46, 47, 48, 49 (excluding subsection (2)), 50, 51, 52, 53, 54, 55 (excluding

subsection 2 (d) and (e)), 56 (excluding subsection (1)), 57, 58, 59, 60, 61, 62, 63, 64 (excluding subsections (10) (j) and (16)), 65, 66, 67, 68, 69 (excluding subsection (5)), 70, 71, 72, 73, 73(A), and 73(B) respectively, of the following expression, respectively:

“or microfinance banking institution” or “or microfinance banking institutions”.

3.52.2 Issue: Insertion of the expression “microfinance banking business”

With the introduction of the tier II banks, this warrants the introduction of what constitutes the requisite business unique to microfinance business. Therefore, to bring the business of microfinance banking institutions in line with the provisions of the Act, it is important to introduce in the specific section of the Act.

Proposal: Insert the term “microfinance banking business” after “banking business” wherever it appears under the following sections;

Section 6;
Section 9;
Section 10;
Section 11;
Section 15;
Section 39;
Section 40; and
Section 69.

3.52.3 Issue: Reference to Companies Act 61 of 1973

With the repeal of the 1973 Companies Act was the promulgation of Companies Act of 2004. However, the Act still makes reference to repealed provisions, as such there is need to updated and replace the relevant section as contained in the Companies Act of 2004.

Proposal: Replace sections of the 1973 Companies Act with the corresponding section under the Companies Act of 2004. Therefore, the Act is amended by the deletion of sections of the Companies Act of 1973 and replacing them with the corresponding sections under the Companies Act of 2004 under the following section of the Act;

Banking Institutions Act, amended	**Companies Act of 1973**	**Companies Act of 2004 as**
Section 7	345	350
Section 16	344 and 345	349 and 350
Section 17	419	425

Section 21	93 and 103 (3)	99 and 110 (3)
Section 38	226	234
Section 43	Chapter X	Chapter 10
Section 44	275	283
Section 46	284	292
Section 47	Paragraph 70 of Part V of Schedule 4	Has been removed
Section 49	170 (2), 204, 216 (2), and 302 (4)	178 (2), 212, 224 (2), and 306 (5)
Section 58 and 59	346, 349, 427	351,354, and 433
Section 60	410 and 411	416 and 417

3.52.4 Issue: Use of the term “shall”

Currently, the Act uses the term “shall” to impose a duty or to exercise discretion; the interpretation is mostly left to the reader. However, in recent years’ legal drafters are moving towards the use of plain language and in particular refraining from utilising the word “shall”. This is due the interpretational challenges that may arise due to the use of “shall”.

The *Oxford English Dictionary* currently defines “shall” as expressing the future tense, expressing a strong assertion or intention, expressing an instruction, command, or obligation, or if used in questions indicating offers or suggestions. Further, “shall” is a verbal auxiliary capable of performing two separate functions which should not be confused. “Shall” may be temporal and denote future time; or imperative mood. The temporal use is not necessary in legislation in view of the convention that a law is not to be regarded as always speaking. Therefore, although it may be known that acts or circumstances may occur long after the law is passed, the present tense will in most instances nevertheless be correct. Therefore, it is harder to use correctly, and it is old (outdated).

It is preferable to use “must” instead of “shall” to impose a duty. This is more in line with ordinary speech and avoids confusion that the use of “shall” may introduce. The declaratory use of “shall” in the contexts below that are neither temporal not obligatory, should be avoided. In the below contexts a duty is intended, “must” is preferable to “shall” as it is more direct. Therefore, to ensure certainty it is proposed that the term “shall” be replaced with specify terms like

- “Must” meaning- is required to.
- “Must not” is required not to; is disallowed.
- “May” has discretion to; is permitted to.
- “May not” is not permitted to; is disallowed from.
- “Is entitled to” has a right to.
- “Should” ought to.
- “Will” to express a future contingency.

Proposal: Thus, it is proposed that the term “shall” be deleted and replaced with “must”, “must not”, “will”, “may”, or ‘may not” as the case maybe under the following sections;

Section 5 (1),
Section 5 (2),
Section 7 (2),
Section 8 (1),
Section 10 (2),
Section 11 (2),
Section 17 (1) (a) and (b),
Section 49 (3) and (4),
Section 56 (2) (bb), (3), (5) and (6), and Section 60 (1).

3.52.5 Issue: Use of the term *“mutatis mutandis”*

Currently, the Act uses the term *“mutatis mutandis”* to mean “with the necessary changes”. To avoid archaic language, it is proposed that the plain English meaning should be adopted.

Proposal: Thus, it is proposed that the term “mutatis mutandis” be deleted and replaced with “with the necessary changes “under the following sections;

Section 6 (2) (a);

Sections 39 (4); and

Section 60 (1);

3.52.6 Issue: Use of the term “notwithstanding”

Currently, the Act uses the term “notwithstanding”. However, during the 2010 amendment process “notwithstanding” was replaced with “despite”, employing the much simpler and plain English.

Proposal: Thus, it is proposed that the term “notwithstanding” be deleted and replaced with “despite” under the following sections;

Section 15 (5);

Sections 43 (1); and

Section 58 (1), (2) (b) and (4).