

## **BILL**

**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 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.**

*(Introduced by the Minister of Finance)*

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**BE IT ENACTED** as passed by the Parliament, and assented to by the President, of the Republic of Namibia as follows:

**PART 1**  
**PRELIMINARY PROVISIONS**

**Definitions and interpretation**

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

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

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

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

- (a) the holding company of that person;
- (b) a subsidiary company or a fellow subsidiary of that person;
- (c) a subsidiary company of any of the companies referred to in paragraph (a) or (b);
- (d) a substantial shareholder of that person or a substantial shareholder of that person’s holding company;
- (e) a business partner of -
  - (i) that person;
  - (ii) that person’s substantial shareholder;
  - (iii) a substantial shareholder of that person’s holding company; or
  - (iv) any of the companies referred to in paragraph (a), (b) or (c);

(f) any person who is an officer of -

(i) that person;

(ii) any of the companies referred to in paragraph (a), (b) or (c); or

(iii) any shareholder or business partner referred to in paragraph (d) or (e);

“auditor” means a person registered as an accountant and auditor under section 23 of the Public Accountants and Auditors Act, 1951 (Act No. 51 of 1951), and who has been admitted as a member of the Institute of Chartered Accountants of Namibia as provided for in section 29 of that Act;

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

“authorised officer” means a staff member of the Bank authorised by the Bank in writing to exercise the powers conferred on such officer by sections 7 and 81;

“Bank” means the Bank of Namibia referred to in section 2 of the Bank of Namibia Act;

“Bank of Namibia Act” means the Bank of Namibia Act, 2020 (Act No. 1 of 2020);

“banking business” means the business that consists of -

(a) accepting sums of money in the form of deposits from the public, whether or not such deposits or sums of money involve the issue of securities or other obligations howsoever described, irrespective of whether such sums of money are raised through a private or public placement, withdrawable or repayable on demand or after a fixed period or after notice;



- (b) the use of the sums of money referred to in paragraph (a), either in whole or in part, together or with any other sums of money, for the 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 banking practice in terms of this Act; or
  - (iii) any other activity designated as an authorised use of money for banking business by the Minister by a notice issued under subsection (3)(a); and
- (c) such other services as are incidental and necessary to banking business, but does not include -
  - (i) any activity of any public sector or private sector institution or of any person or category of persons, designated as excluded from this definition by the Minister by a notice issued under subsection (3)(b); and
  - (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) used for investments for the purpose of expanding the business infrastructures of the issuer of such securities or in equity of other entities;

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

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

Commented [FZ1]: What is intended here?

Commented [NR2R1]: It was supposed to mean investments of money raised from the public that is invested in equities, meaning that such investors or depositors receive equity stake or interest.

- (b) which persons are so interconnected that should one of them experience financial difficulties, another one or all of them would likely be adversely affected, irrespective of whether any of those persons is domiciled in the same country as any of the others;

“banking institution” means a public company authorised under this Act to conduct banking business;

“beneficial owner” means a beneficial owner as defined in the Financial Intelligence Act, 2012 (Act No. 13 of 2012) or any amendments thereto;

“branch” means a business unit of a banking institution or microfinance banking institution that meets the following requirements -

- (a) business is conducted from its own premises;
- (b) has its own management or is under the control of a shared management; and
- (c) provides a full spectrum of customary banking business or microfinance banking business facilities and services;

“branch of a foreign banking institution” means a branch of a foreign banking institution authorised to conduct banking business under section 26;

“bridge bank” means a temporary institution established by the Bank pursuant to section 70(7) to administer the assets and liabilities of a failing banking institution, microfinance banking institution or controlling company;

“capital funds” has the meaning determined by the Bank under section 39;

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

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

- (a) the spouse of that person, or any other person who has a relationship with that person as a spouse in a union in terms of customary law;
- (b) that person's child, step-child, adopted child, brother, sister, step-brother, step-sister, parent or step-parent, except that this provision applies only in relation to a brother, sister, step-sister or step brother who is reasonably known to the executive officers, board members or substantial shareholders, as the case may be; or
- (c) the spouse, or any person who has a relationship as a spouse in a union in terms of customary law, of any of the persons mentioned in paragraph (b);

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

“company” means a company registered as a public company under the Companies Act;

“controlling company” means a company approved under section 18 as a controlling company in respect of a banking institution or microfinance banking institution;

“conservation buffer” means capital set aside to promote the conservation of capital and to build-up adequate funds above the minimum capital during normal times which can be drawn down as losses are incurred during a period of financial distress;

“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;

“credit bureau” means an entity specialised in the collection and sale of credit performance information of individuals and businesses; and registered and licensed as such under the regulations made under the Bank of Namibia Act;

“day” means any day other than a Sunday or a public holiday referred to in, or declared under, the Public Holidays Act, 1990 (Act No. 26 of 1990);

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

“deposit” means an amount of money paid by one person to another person, or by a customer to a banking institution or microfinance banking institution, subject to an agreement in terms of which the full amount of money, or any part thereof, will, conditionally or unconditionally, and with or without interest or a premium, be repaid to such person or to the customer on demand -

- (a) at a specified or an unspecified date;
- (b) after a predetermined period of time;
- (c) after a predetermined period of notice of withdrawal; or
- (d) subject to an agreement entered into by the parties concerned,

even if the payment is limited to a fixed amount or a transferable or non-transferable certificate or other instrument providing for the repayment of the amount is issued in respect of such amount, but a deposit does not include an amount of money -

- (i) paid as an advance or as a part payment in terms of a contract for the sale, letting, hiring or other provision of movable or immovable property or for services;
- (ii) paid as security for the performance of a contract or as security in respect of any loss which may result from the non-performance of a contract;
- (iii) paid as security for the delivery or return of any movable or immovable property;
- (iv) paid by a holding company to its subsidiary or by a subsidiary to its holding company or by one subsidiary to a fellow subsidiary; or

- (v) paid by a person who, at the time of the payment -
  - (aa) is a close relative of the person to whom the money is paid;
  - (bb) is a director or an officer concerned in the management of the person to whom the money is paid; or
  - (cc) is a close relative of a director or of an officer referred to in subsubparagraph (bb);

“Deputy Governor” means a Deputy Governor of the Bank referred to in section 1 of the Bank of Namibia Act;

“determination” means a determination made by the Bank under section 102(3);

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

“exchange” means an exchange as defined in section 78 of the Financial Institutions and Markets Act and that is registered as such in terms of Chapter 3 of that Act and includes a foreign exchange as defined in that section;

“executive officer” means a person, by whatever name described, who –

- (a) could exercise significant influence over a banking institution, microfinance banking institution or controlling company;
- (b) is in the direct employment of, or acting for, or by arrangement with, a banking institution, microfinance banking institution or controlling company; or
- (c) is principally responsible for the management and conduct of the credit provisions, risk management, compliance, accounting, auditing, secretarial, treasury and operation functions of a banking institution, microfinance banking institution or controlling company,

and includes a chief executive officer, deputy chief executive officer and any manager of a significant business unit;

“exposure” means any form of exposure, including -

- (a) loans, advances, investments and irrevocable commitments to lend;
- (b) leasing;
- (c) guarantees;
- (d) any other form of finance; or
- (e) any other exposure contemplated for the purpose of capital requirements under sections 39 and 40;

“failing institution” 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);

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

“Financial Institutions and Markets Act” means the Financial Institutions and Markets Act, 2021 (Act No. of 2021);

“financial records” includes banking and accounting records;

“financial distress” means a condition where a banking institution, microfinance banking institution or controlling 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;

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

“Governor” means Governor of the Bank referred to in section 1 of the Bank of Namibia Act;

“High Court” means the High Court of Namibia constituted by Article 80(1) of the Namibian Constitution;

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

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

“Insolvency Act” means the Insolvency Act, 1936 (Act No. 24 of 1936);

“insolvent”, in relation to a banking institution, microfinance banking institution or controlling company, means a banking institution, microfinance banking institution or controlling company -

- (a) of which the liabilities exceed its assets; or
- (b) which has committed an act of insolvency in terms of the Insolvency Act;

“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;

“merger” means an occurrence where one or more banking institutions, microfinance banking institutions or controlling companies directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another banking institution, microfinance banking institution or controlling company, by any means including -

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

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

- (a) accepting sums of money in the form of deposits withdrawable or repayable on demand or after a fixed period or after notice; and
- (b) the use of the sums of money or referred to in paragraph (a), either in whole, in part or together with any other sums of money, for the account and at the risk of the person carrying on that business for -
  - (i) microloans, advances or investments; and
  - (ii) any other activity designated as an authorised use of money for microfinance banking business by the Minister by a notice issued under subsection (3)(c);
- (c) any other activity that the Minister designates as an authorised business activity for microfinance banking institutions by a notice issued under subsection (3)(d), but does not include -
  - (i) any activity of any public sector or private sector institution, or of any person or category of persons, designated as excluded from this definition by the Minister by a notice issued under subsection (3)(e);
  - (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) used for investments for the purpose of expanding the business infrastructure of the issuer of such securities or in equity of other entities;

“microfinance banking institution” means a public company authorised under this Act to primarily conduct microfinance banking business;

“microloan” means a loan of not greater than an amount as may be determined by the Bank by a notice issued under subsection (3);

“Minister” means the Minister responsible for finance;

“Ministry” means the Ministry responsible for the administering of finance matters;

“NAMFISA” means the Namibia Financial Institutions Supervisory Authority referred to in section 2 of the Namibia Financial Institutions Supervisory Authority Act, 2021 (Act No. of 2021);

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

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

“public” , 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);

“prescribe” means prescribe by regulation made under this Act;

“principal officer”, in relation to a banking institution, microfinance banking institution or controlling company, includes –

- (a) the executive chairperson, managing director, executive director, chief executive officer or manager, or any other person, by whatever title referred to, who is mainly responsible for the management of the affairs of the banking institution, microfinance banking institution or controlling company in Namibia, and whose name and title the banking institution, microfinance banking institution or controlling company must submit to the Bank for approval pursuant to section 53; and
- (b) a person who, in terms of section 11, applies for an authorisation to establish a banking institution or microfinance banking institution;

“regulations” mean the regulations made under this Act;

“related party,” in relation to a person or shareholder contemplated in section 28 or 34, but subject to subsection (4), means -

- (a) an associate or close relative of that person or shareholder; or
- (b) any other person who has entered into an agreement with that person or shareholder relating to -
  - (i) the acquisition, holding or disposal; or
  - (ii) the exercising of voting rights in respect,

of shares in a banking institution, microfinance banking institution, controlling company or in any trust controlled or administered by that person or shareholder;

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

“risk weighting” means attaching a weight to each class of assets or other exposures of a banking institution, microfinance banking institution or controlling company in accordance with the

determinations by the Bank for the purpose of calculating the minimum capital requirements under sections 39 and 40;

“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 includes –

- (a) a share;
- (b) stock;
- (c) a bond;
- (d) a debenture;
- (e) a note;
- (f) a derivative instrument and an option, warrant, certificate or other instrument acknowledging, conferring or creating a right to subscribe to, acquire, dispose of, or convert a security; and
- (g) an investment scheme, plan, programme or contract designed to entice a client or potential client to invest, use or commit money or other property with the expectation of future payment of interest, dividends, capital appreciation or other return or monetary benefit;

“significant business unit”, for the purposes of the definition of executive officer, means a functional and strategic division of a banking institution, microfinance banking institution or controlling company that works towards the achievement of the strategic objectives of the institution;

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

“substantial shareholder” means any person or registered shareholder that, directly or indirectly, holds, controls or is entitled to exercise the voting rights in not less than 10 per cent of any class of voting shares of a banking institution, microfinance banking institution or controlling company, and for the purpose of determining whether a person is a substantial shareholder -

- (a) a person that controls a substantial shareholder is deemed to be a substantial shareholder;  
and
- (b) any shares owned or controlled, or the voting rights of which are exercisable, by a person's close relative is deemed to be owned or controlled by such person;

“this Act” includes the regulations and the determinations.

(2) For the purposes of -

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

(3) For the purposes of -

- (a) paragraph (b)(iii) of the definition of “banking business” the Minister, on recommendation of the Bank, may by notice in the *Gazette* designate any activity as an authorised manner of using funds for the purpose of conducting banking business;
- (b) paragraph (c)(i) of the definition of “banking business” the Minister, on recommendation of the Bank, may by notice in the *Gazette* designate any activity of the public or private sector, or of any person or category of persons as an

excluded from that definition, if that activity is performed in accordance with the conditions that the Minister may specify in the notice;

- (c) paragraph (b)(ii) of the definition of “microfinance banking business” the Minister, on recommendation of the Bank, may by notice in the *Gazette* designate any activity as an authorised manner of using funds for the purpose of conducting microfinance banking business;
  - (d) paragraph (c) of the definition of “microfinance banking business” the Minister, on recommendation of the Bank, may by notice in the *Gazette* designate any activity as an authorised business activity for microfinance banking business;
  - (e) paragraph (c)(i) of the definition of “microfinance banking business” the Minister, on recommendation of the Bank, may by notice in the *Gazette* designate any activity of the public or private sector, or of any person or category of persons as excluded from that definition, if that activity is performed in accordance with the conditions that the Minister may specify in the notice; and
  - (f) the definition of “microloan” the Bank may, by notice in the *Gazette* determine the maximum amount of money which can be granted as a microloan by a microfinance banking institution.
- (4) For purposes of the definition of “related party”, if –
- (a) the nominal value of shares in a banking institution, microfinance banking institution or controlling company issued or to be registered in the name of any person; and
  - (b) the nominal value of the shares already held by the person referred to in paragraph (a),

amount to the lesser of N\$ 100 000 or one per cent of the value of all the shares issued in the banking institution, microfinance banking institution or controlling company, the banking institution, microfinance banking institution or controlling company may, unless it has knowledge

to the contrary, accept that the person is not a related party of any other shareholder in the banking institution, microfinance banking institution or controlling company.

(4) Any application or notice made or given, or any other communication, in terms of or pursuant to this Act must -

- (a) be in the official language of Namibia; and
- (b) unless otherwise provided for in this Act, be in writing.

#### **Limitation of rights and non-application of Act**

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

- (2) This Act does not apply to -
- (a) the Bank, except insofar as it confers upon the Bank the power to perform the functions contained in this Act;
  - (b) any international bank or international financial organisation, or any associated or affiliated bank or financial organisation of such international bank or international organisation, of which the Government of Namibia or the Bank is a member;
  - (c) any building society registered under the Building Societies Act, 1986 (Act No. 2 of 1986);
  - (d) the Post Office Savings Bank as defined in the Posts and Telecommunications Act, 1992 (Act No. 19 of 1992);

- (e) the National Housing Enterprise, established by the National Housing Enterprise Act, 1993 (Act No. 5 of 1993);
- (f) the Namibia Industrial Development Agency, established by the Namibia Industrial Development Agency Act, 2016 (Act No.16 of 2016);
- (g) a co-operative registered under the Co-operatives Act, 1996 (Act No. 23 of 1996);
- (h) the Development Bank of Namibia, established by the Development Bank of Namibia Act, 2002 (Act No. 8 of 2002);
- (i) the Agricultural Bank of Namibia, established by the Agricultural Bank of Namibia Act, 2003 (Act No. 5 of 2003);
- (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; and
- (k) any other institution or body exempted by the Minister by notice under subsection (4).

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

- (4) The Minister, on the recommendation of the Bank may -
  - (a) by notice in the *Gazette*, remove any institution or body 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

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

(5) A person, other than a person who solicits or advertises for deposits, is not considered to be accepting deposits if he or she, at any time, hold deposits -

(a) for or on behalf of not more than 20 persons; or

(b) amounting in aggregate to not more than N\$ 500 000, excluding interest payable on the deposits.

(6) The Minister, on the recommendation of the Bank, may by notice in the *Gazette* amend -

(a) the number of persons specified in paragraph (a); or

(b) the amount specified in paragraph (b),

of subsection (5).

(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.

## **PART 2**

### **ADMINISTRATION OF ACT**

#### **Guidelines, circulars or notices by Bank**



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

(2) The guidelines, circulars or notices contemplated in subsection (1) must be in writing and the Bank must deliver those guidelines, circulars or notices to the principal officer of a banking institution, microfinance banking institution or controlling company concerned.

**Limitation of liability**

**4.** (1) No liability attaches -

(a) to the Government of Namibia or the Bank;

(b) to -

(i) the Minister;

(ii) the Governor or a Deputy-Governor, any member of the Board or staff member of the Bank; or

(iii) 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 by or damage caused to any person as a result of anything done or omitted by any person in good faith in the performance of any function or duty under this Act.

(2) The costs and fees incurred by the Bank or by any person referred to in subsection (1)(b)(ii) or (iii) must be borne by the Bank.

### **Delegation of powers and assignment of functions**

**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.

## **PART 3**

### **AUTHORISATION TO ESTABLISH BANKING INSTITUTION OR MICROFINANCE BANKING INSTITUTION**

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

- 6.** (1) A person may not -
- (a) conduct banking business or microfinance banking business;
  - (b) receive, accept or take a deposit;
  - (c) by any means, including advertising or soliciting, procure or attempt to procure a deposit;
  - (d) represent himself or herself or itself to be a banking institution or microfinance banking institution; or
  - (e) subject to subsection (2), use the expression or derivative “bank”, “banking institution”, “microfinance banking institution” or any expression, name, title or

symbol indicating or calculated to create the impression that the person is conducting, or is authorised to conduct, business as a banking institution or microfinance banking institution,

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

(2) Subsection (1) does not apply if the expression “bank”, “microfinance banking business” or any equivalent or derivative of the expression, is -

- (a) included in the name or title of a staff association or similar organisation of a banking institution or microfinance banking institution;
- (b) included in the name or title of an association of banking institutions or microfinance banking institutions; or
- (c) used for any other purpose approved by the Bank in writing.

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

### **Investigations**

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 demeanour 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 authorised 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 authorised 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 authorised 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 authorised 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).

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

**8.** (1) If the Bank is satisfied that a person has obtained any money in contravention of section 6, the Bank must in writing direct the person to repay all the money so obtained by him or her, including any interest or other amounts which may be owing by the person in respect of that 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 direction under that subsection, must, for the purposes of –

- (a) section 350 of the Companies Act, be considered to be unable to pay its debts; or
- (b) section 8 of the Insolvency Act, be considered 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 do not derogate from, any criminal liability in terms of this Act or of any other law, of a person referred to in those subsections.

(4) Section 74, with necessary changes, applies to -

- (a) money referred to in subsection (1); or
- (b) any other property which a person referred to in subsection (1) may have in his or her possession as a lessor of a safe deposit box, a trustee, a fiduciary or in any other capacity on behalf of any other person.

(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).

**Name of banking institution or microfinance banking institution**

9. (1) The Bank may not issue an authorisation to conduct banking business or microfinance banking business to any person under a name which, in the opinion of the Bank, may mislead the public as to the -

- (a) identity; or
- (b) nature of the activities,

of the banking institution or microfinance banking institution concerned.

(2) A banking institution or microfinance banking institution may not, without the written approval of the Bank –

- (a) use or refer to itself by; or
- (b) conduct banking business or microfinance banking business under,

a name other than the name under which it was authorised to conduct banking business or microfinance banking business as contemplated in subsection (1).

(3) On written application by a banking institution or microfinance banking institution for the change of name of the banking institution or microfinance banking institution, the Bank may -

- (a) subject to such conditions as the Bank may impose, approve the change of the name under which the banking institution or microfinance banking institution was authorised to conduct banking business or microfinance banking business to the name applied for by the banking institution or microfinance banking institution; or
- (b) refuse the application.

- (4) If the Bank is satisfied that the –

- (a) authorised name of a banking institution or microfinance banking institution; or
- (b) name under which a banking institution or microfinance banking institution conducts business,

may mislead the public as to the identity or nature of the business of the banking institution or microfinance banking institution, the Bank may by written notice addressed and delivered to the banking institution or microfinance banking institution, direct the banking institution or microfinance banking institution to change the name under which it is conducting business to a name approved by the Bank.

(5) If the Bank, under subsection (3) approves, or under (4) directs, the change of the name under which a banking institution or microfinance banking institution was authorised, the Bank must under section 13 issue an amended certificate of authorisation in the name of the banking institution or microfinance banking institution, specifying the changed name of the banking institution or microfinance banking institution.

(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).

#### **Prerequisite for conducting banking or microfinance banking business**

**10.** (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) An incorporated banking institution or microfinance banking institution authorised to conduct banking business or microfinance banking business under this Act may not, under this Act or any other law, convert to a branch of a foreign banking institution contemplated in section 26, unless the banking institution or microfinance banking institution has obtained the approval of the Bank to so convert.

- (4) Any –
  - (a) person who contravenes or fails to comply with subsection (2) commits an offence and is liable to the penalties specified in section 92(2)(a);.or
  - (b) banking institution or microfinance banking institution that or any other person who contravenes or fails to comply with subsection (3) commits an offence and is liable to the penalties referred to in section 93(2).

#### **Application for authorisation to conduct banking or microfinance banking business**

**11.** (1) Any person who intends to conduct banking business or microfinance banking business must apply to the Bank for the granting of an authorisation to conduct the banking business or microfinance banking business.

(2) An application made under subsection (1) must be -

- (a) made in the form and manner determined by the Bank;
- (b) signed on behalf of the applicant by its principal officer or if the applicant is a company to be registered, by its trustees or by the subscribers to its memorandum and articles of association; and
- (c) accompanied by the prescribed application fee.

(3) On receipt of an application contemplated in subsection (1), the Bank may, before considering the application, in writing require the applicant to furnish to the Bank with -

- (a) a report in writing by an auditor or by another person approved by the Bank, on such aspects relating to the application as the Bank may consider necessary; or
- (b) such further information, books, records, statements or other documents as the Bank may request.

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

(5) The Bank may cancel any application where -

- (a) an applicant has failed to submit the necessary information, books, records, statements or other documents in support of the application as required under subsection (3), within such time period as the Bank may specify for the submission of the outstanding information; or

- (b) the application contains material deficiencies in its proposed business plan, financial projections, proposed capital and shareholding structures such that the Bank considers that the applicant or the application does not or will not be able to meet the requirements of this Act.

(6) Where an application has been withdrawn under subsection (3) or cancelled under subsection (5), the Bank may not process the application for further consideration and the Bank must in writing notify the applicant accordingly.

(7) If the applicant intends to continue with the application after it has been withdrawn or cancelled under this section, the applicant must submit a fresh application, provided that a period of not less than 12 months has lapsed from the date of the withdrawal or cancellation of the initial application.

(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).

#### **Grant or refusal of application and provisional authorisation**

**12.** (1) Before considering an application for an authorisation lodged with the Bank under section 11, the Bank must conduct such investigations, both within or outside Namibia, relating to the applicant or to the application as it may consider necessary in order to ascertain -

- (a) the validity and authenticity of the information submitted by the applicant to the Bank in terms of section 11;
- (b) the financial status and history of the applicant, including its assets and liabilities, and its policies and strategies relating to the future development of its banking business or microfinance banking business;

- (c) whether the applicant has an adequate capital structure, ascertained in the manner and in accordance with the criteria, determined by the Bank under section 39 ;
- (d) the integrity of the applicant and its competence to conduct, or experience in conducting, banking business or microfinance banking business;
- (e) the ability of the applicant to comply with the provisions of this Act;
- (f) whether the directors and officers of the applicant are fit and proper persons for the purpose of conducting banking business or microfinance banking business, according to the criteria as the Bank may determine;
- (g) whether the structure and shareholding of the group of companies of which the applicant forms a part or intends to form a part will not hinder effective banking supervision or endanger the stability of the banking sector;
- (h) whether the granting of an authorisation to conduct banking business or microfinance banking business will not be in conflict with national economic objectives and development priorities of Namibia;
- (i) whether the applicant is or will be able to apply or maintain adequate, effective and proper internal control systems when conducting the banking business or microfinance banking business in terms of the authorisation;
- (j) whether the applicant complies or is able to comply with the laws relating to anti-money laundering and combating of financing of terrorism;
- (k) whether the applicant complies with the provisions of this Act and in particular the provisions of section 33 pertaining to ownership and shareholding requirements; and
- (l) any other matter which the Bank may regard as relevant to the application or prescribed in terms of this Act.



(2) The Bank may not consider an application for authorisation to conduct banking business or microfinance banking business unless the Bank is satisfied that the -

- (a) business plan is viable;
- (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 banking institution;
- (d) proposed banking institution or microfinance banking 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 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.

(3) After having considered an application made under section 11(1) and the matters referred to in subsections (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 advise, if any, given under subsection (3), the Bank must give due consideration to that advise, and 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 are imposed, provide the applicant with reasons for the refusal of the application and the imposition of 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.

**Authorisation to conduct banking business or microfinance banking business and certificate of authorisation**

**13.** (1) An applicant to whom the Bank has granted a provisional authorisation under section 12(5) may, within the six months' period or extended period, notify the Bank of its readiness to commence banking business or microfinance banking business after which the Bank must conduct a pre-opening examination to ascertain the extent of such readiness.

(2) If the Bank –

- (a) under section 12(4) has granted an application for authorisation to conduct banking business or microfinance banking business; and
- (b) after a pre-opening examination contemplated in subsection (1), has confirmed the readiness of the applicant to commence banking business or microfinance banking business,

the Bank must, against payment of the prescribed authorisation fee by or on behalf of the person who applied for the authorisation, issue, in the name of such person, a certificate of authorisation to conduct banking business or microfinance banking business.

(3) A certificate contemplated in subsection (2) must -

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

determined by the Bank.

(4) The –

- (a) granting of authorisation to conduct banking business or microfinance banking business under section 12(4); and
- (b) issuance of a certificate under subsection (3),

constitutes a licence to conduct business as an authorised dealer in foreign exchange, provided that the applicant complies with the licensing requirements prescribed under the Currency and Exchanges Act, 1933 (Act No. 9 of 1933).

#### **Duration and conditions of authorisation**

**14.** (1) A certificate of authorisation issued under section 13(2) is, subject to section 15 or section 73, valid for an indefinite period of time.

(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 of time 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).

#### **Cancellation of authorisation**

**15.** (1) After consultation with the Minister and subject to subsection (2), the Bank may, by notice in writing addressed and delivered to a banking institution or microfinance banking institution, cancel, from a date specified in the notice, the authorisation to conduct banking business or microfinance banking business granted to the banking institution or microfinance banking institution under section 13, if the banking institution or microfinance banking institution

-

- (a) fails to commence with the conducting of banking business or microfinance banking business within a period of six months -
  - (i) after the date specified by the Bank in the certificate of authorisation to conduct banking business or microfinance banking business issued under section 13(2); or
  - (ii) if no date for commencement contemplated in subparagraph (i) is specified by the Bank, after the date of issue of the certificate of authorisation under section 13(2);

- (b) fails to comply with any condition imposed by the Bank under section 12(4)(c);
- (c) ceases to conduct the business for which it is authorised;
- (d) is found guilty of an offence under any provision of this Act, and the Bank is of the opinion that the banking institution or microfinance banking institution concerned is conducting its business in a manner detrimental to the interest of its customers or the general public; or
- (e) fails to comply with an instruction as contemplated in section 51(6), and the Bank is of the opinion that the banking institution or microfinance banking institution concerned is conducting its business in a manner detrimental to the interests of its customers or the general public.

(2) Before cancelling the authorisation of a banking institution or microfinance banking institution under subsection (1) the Bank, subject to subsection (5), must in writing give the banking institution or microfinance banking institution not less than 30 days written notice of its intention to so cancel the authorisation.

(3) A notice to a banking institution or microfinance banking institution referred to in subsection (2) must -

- (a) state that the Bank intends to cancel the authorisation of the banking institution or microfinance banking institution;
- (b) specify the reason or reasons for the intended cancellation; and
- (c) invite the banking institution or microfinance banking institution to, within the period of time specified in the notice, in writing make representations to the Bank to show cause why the authorisation must not be cancelled.



(4) At the expiration of the 30-day period referred to in subsection (2), the Bank, after considering the representations, if any, made by the banking institution or microfinance banking institution concerned and after consultation with the Minister, may -

- (a) cancel the authorisation under subsection (1);
- (b) without cancelling the authorisation, amend the conditions subject to which the authorisation was granted; or
- (c) decide not to cancel the authorisation or to amend the conditions as contemplated in paragraph (b),

and must within three working days in writing inform the banking institution or microfinance banking institution of the decision and the reasons for the decision of the Bank.

(5) Despite subsection (2), the Bank, after consultation with the Minister, in circumstances contemplated in subsection (1) and without prior notice, may direct a banking institution or microfinance banking institution by means of a notice delivered in accordance with section 35(4)(a), to summarily suspend all, or any part, of the banking business or microfinance banking business of the institution for such period and subject to such conditions as the Bank may specify in such notice.

(6) A banking institution or microfinance banking institution to which a notice under subsection (5) has been delivered may, within a period of 14 days after receipt of the notice, in writing submit to the Bank representations relating to the notice and to the suspension of its banking business or microfinance banking business, or part the of the business, under that subsection.

(7) On receipt of representations by a banking institution or microfinance banking institution under subsection (6), the Bank may –

- (a) confirm or rescind the suspension made by it under subsection (5); or

- (b) vary the conditions subject to which the banking business or microfinance banking business of the banking institution or microfinance banking institution was so suspended.

(8) Any banking institution or microfinance banking institution that or any other person who refuses or fails to comply with a directive issued under subsection (5) commits an offence and is liable to the penalties referred to in section 93(2).

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

**16.** (1) If the authorisation to conduct banking business or microfinance banking business granted to a banking institution or microfinance banking institution has been cancelled or becomes invalid for any reason, the Bank must by written notice direct the banking institution or microfinance banking institution to -

- (a) repay all moneys due by it to its depositors, including any interest on, or any other amounts owing by it in respect of, such monies; and
- (b) change its name and to amend its memorandum and articles of association, in accordance with the directions and within the period of time specified by the Bank in the notice.

(2) The Bank may, under subsection (1)(a), specify different directives or periods of time, in respect of different kinds of deposits.

(3) Despite subsection (2), the Bank, in specifying the directives or periods of time contemplated in that subsection, may not give any preference to any depositor which such depositor does not enjoy in terms of any other law.

(4) A banking institution or microfinance banking institution which in accordance with a notice under subsection (1) repays a deposit before the due date agreed upon for the repayment of the deposit, is not liable to pay any interest or any other amounts which would have been

payable in respect of the deposit for the period calculated from the date of the actual repayment up to the due date.

(5) A banking institution or microfinance banking institution which fails to comply with a directive issued under subsection (1) must for the purposes of section 350 of the Companies Act be considered as being unable to pay its debts.

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

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

**17.** (1) A public company that -

- (a) desires to exercise control over any banking institution or microfinance banking institution; or
- (b) is a controlling company in respect of any other public company which -
  - (i) has been authorised to conduct banking business or microfinance banking business; or
  - (ii) has applied in terms of section 11 for authorisation to conduct banking business or microfinance banking business,

must apply to the Bank to be registered as a controlling company.

(2) An application made under subsection (1) must be -

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

- (b) signed by the directors on behalf of the company to be registered or by the subscribers to its memorandum and articles of association; and
- (c) accompanied by the prescribed application fee.

(3) For the purposes of this section a person is deemed to exercise control over a banking institution or microfinance banking institution if –

- (a) in the case where that person is a company, the banking institution or microfinance banking institution is a subsidiary of that company; or
- (b) that person, whether or not that person is a company, alone or together with his or her or its associates -
  - (i) holds shares in the banking institution or microfinance banking institution of which the total nominal value represents more than 50 per cent of the nominal value of all the issued shares of the banking institutions or microfinance banking institutions, unless, due to limitations on the voting rights attached to the shares so held by the person alone or together with his or her or its associates that person -
    - (aa) voting independently; or
    - (bb) voting as a group together with his or her or its associates,
 is or are unable to decisively influence the outcome of the voting at a general meeting of the banking institution or microfinance banking institution;
  - (ii) is entitled to exercise more than 50 per cent of the voting rights in respect of the issued shares of that banking institution or microfinance banking institution; or

- (iii) has the power to determine the appointment of the majority of the directors of that banking institution or microfinance banking institution, including -
  - (aa) the power to appoint or remove, without the concurrence of any other person, all or the majority of such directors; or
  - (bb) the power, alone and without the consent of any other person, to prevent any person from being appointed as director.

(4) If a person is appointed as a director of a banking institution or microfinance banking institution mainly because he or she is a director of the person who exercises control over a banking institution or microfinance banking institution, that appointment, for the purposes of subsection (3), is deemed to be an appointment by virtue of the power of a person exercising that control.

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

(6) If the applicant referred to in subsection (1) is a financial institution as defined in section 1 of the Financial Institutions and Markets Act the applicant must establish a legal entity separate from the operations of the applicant to carry on its business as a controlling company.

(7) If a company contemplated in subsection (1) has a financial institution as defined in section 1 of the Financial Institutions and Markets Act as part of its group of companies, the Bank and NAMFISA must enter into an agreement on matters of concurrent jurisdiction to give effect to the relevant legislation in respect of the functions of the Bank and NAMFISA.

(8) A person who exercises control or continues to exercise control over a banking institution or microfinance banking institution without having obtained approval to exercise such control as contemplated in subsection (1) commits an offence and is liable to the penalties specified in section 92(2)(a).

**Grant or refusal of application for registration as controlling company**

**18.** (1) Before considering an application for registration as a controlling company made under section 17, the Bank must conduct such investigation, both within or outside Namibia relating to the applicant or to the application as it may consider necessary to ascertain -

- (a) that the registration of the applicant as a controlling company is not contrary to the public interest;
- (b) that in the case of an applicant applying for registration in the circumstances referred to in section 17(1)(a), the applicant is able to establish control, as contemplated in that section, over the banking institution or microfinance banking institution concerned;
- (c) that no provision of the memorandum or articles of associations of the applicant is inconsistent with this Act or is undesirable in so far as it concerns banking institutions or microfinance banking institutions;
- (d) that every director, principal officer or executive officer of the applicant, as far as can reasonably be ascertained -
  - (i) is a fit and proper person to hold the office of such director, principal officer or executive officer; and
  - (ii) has sufficient knowledge and experience to manage the affairs of the applicant in its capacity of a controlling company;
- (e) that the applicant is in a financially sound condition;
- (f) that no interest which any person has in the applicant is inconsistent with this Act; and
- (g) that the application complies with the requirements of this Act.

(2) The Bank may not register as a controlling company an applicant that has applied for registration as such in the circumstances referred to in section 17(1)(b), unless the company in respect of which it made such application is an authorised banking institution or microfinance banking institution.

(3) After having considered an application made under section 17, 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, before informing the applicant of its decision, in writing, notify the Minister of the decision, and where the application is refused, provide the applicant with reasons for the refusal of the application.

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

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

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

determined by the Bank.

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

#### **Cancellation of registration as controlling company**

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

- (a) has failed to establish control over the banking institution or microfinance banking institution in respect of which it is registered within a period of six months after the date of issue of the certificate of registration or any other date as the Bank may specify;
- (b) no longer exercises such control in terms of section 33 or under any other circumstances; or
- (c) has submitted a special resolution contemplated in section 208 of the Companies Act authorising such cancellation.

(2) If the authorisation of a banking institution or microfinance banking institution in respect of which a controlling company is registered, is cancelled, the registration of that controlling company in respect of that banking institution or microfinance banking institution is deemed to have been cancelled simultaneously.

(3) The Bank may not cancel the registration of a controlling company under subsection (1)(a) or (b), unless the Bank has previously by notice in writing given the controlling company concerned an opportunity to make representations within a period specified in the notice, not being less than 30 days, on why its registration must not be cancelled.



(4) Any person aggrieved by the decision made by the Bank under subsection (1) may appeal to the Appeal Board within 30 days of receiving the Bank's decision.

#### **Investments by controlling company**

**20.** (1) The value of investments of a controlling company -

(a) in entities other than -

- (i) banking institutions or microfinance banking institutions;
- (ii) institutions which conduct business similar to the business of a banking institution or microfinance banking institution in a country other than Namibia; or
- (iii) controlling companies or companies of which the main object is the holding or development of property of which is used or intended to be used mainly for the purpose of conducting the business of the banking institutions or microfinance banking institutions; or

(b) in fixed property which is not used or intended to be used mainly for the purpose of conducting the business of the banking institution or microfinance banking institution that it exercises control over,

may not at any time exceed a percentage of the sum of the capital funds of the controlling company or any banking institution or microfinance banking institution under its control, as determined by the Bank.

(2) A 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).

#### **Restructuring within group of companies**

**21.** (1) The restructuring of companies within a group, of which a banking institution, microfinance banking institution or controlling company or a subsidiary of banking institution or microfinance banking institution is a member, may not be effected without the prior written approval of the Bank.

(2) If any restructuring occurs as contemplated in subsection (1), the banking institution, microfinance banking institution or controlling company concerned must immediately in writing inform the Bank of such restructuring which has so occurred together with full particulars of the restructuring or intended restructuring.

(3) Any person who fails to comply with subsection (1) is liable to a fine determined by the Bank.

(4) A banking institution, microfinance banking institution or controlling company 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).

#### **Annual fees**

**22.** (1) An authorised banking institution or microfinance banking institution must, subject to subsection (2), in respect of the authorisation to conduct business as a banking institution or microfinance banking institution, and before 31 January of each year, pay to the Bank the prescribed annual fees in respect of that year.

(2) On receipt of a written request made by a banking institution or microfinance banking institution before the date for payment of the annual fees specified in subsection (1), and on good cause shown in writing, the Bank may grant an extension of time to that banking institution or microfinance banking institution for the payment of the fees for such period of time and subject to such conditions as the Bank may impose.

(3) If a banking institution or microfinance banking institution fails to pay the prescribed annual fees before or on the date specified in subsection (1) or within the extended period of time granted by the Bank under subsection (2) -

- (a) the authorisation referred to in subsection (1) terminates on that date or on the last day of the extended period of time; and
- (b) the unpaid annual fee and any penalty payable in terms of subsection (4) -
  - (i) becomes a debt due to the Bank by the banking institution or microfinance banking institution; and
  - (ii) may be recovered by the Bank from the banking institution or microfinance banking institution by means of action instituted in any court having jurisdiction.

(4) If a banking institution or microfinance banking institution fails to pay the annual fees payable in terms of subsection (1) on or before the date specified in that subsection, that banking institution or microfinance banking institution is, subject to subsection (2), liable for payment of a penalty at the prescribed rate, for such late payment of the annual fees.

**Subsidiaries, branch offices, representative offices and other interests of banking institutions, microfinance banking institutions or controlling companies**

**23.** (1) A banking institution or microfinance banking institution may not, without the prior written approval of the Bank -

- (a) establish or acquire a subsidiary;
- (b) open a branch outside Namibia;
- (c) acquire any direct or indirect interest in any undertaking outside Namibia; or
- (d) establish a representative office outside Namibia.

(2) A banking institution or microfinance banking institution must, not less than 30 days prior to the -

- (a) opening of a branch in Namibia by the banking institution or microfinance banking institution;
- (b) disposal of a subsidiary or of any interest in any other undertaking; or
- (c) closing of a representative office or of a branch office,

in writing inform the Bank of the intended opening, disposal or closing.

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

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

(4) A controlling company must, not less than 30 days prior to –

- (a) the opening a subsidiary;
- (b) the disposal or closing of a subsidiary; or
- (c) the disposal of any interest in any other undertaking,

in writing inform the Bank of the intended opening, disposal or closing.

(5) A banking institution, microfinance banking institution or controlling company that or any other person who contravenes or fails to comply with subsection (1), (2), (3) or (4) commits an offence and is liable to the penalties referred to in section 93(2).

**Publication of information relating to banking institutions and microfinance banking institutions**

**24.** The Bank, by notice in the *Gazette* and any other means that the Bank considers appropriate –

- (a) must make known to the public –
  - (i) the authorisation of a person to conduct business as a banking institution or microfinance banking institution;
  - (ii) any change of name of a banking institution or microfinance banking institution;
  - (iii) the cancellation of an authorisation; or
- (b) may make known to the public the suspension of the authorisation, of the business or of any part of the business of a banking institution or microfinance banking institution,

under any provision of this Act.

**Representative offices of foreign banking institutions**

**25.** (1) A foreign banking institution may not establish a representative office in Namibia unless the foreign banking institution has obtained the prior written approval of the Bank.

(2) A foreign banking institution that intends to establish a representative office in Namibia must apply to the Bank for the approval contemplated in subsection (1).

- (3) An application made under subsection (2) must be –
  - (a) made in the form and manner determined by the Bank; and

- (b) accompanied by -
  - (i) such particulars or documents relating to the application as the Bank may specify and inform the applicant; and
  - (ii) the prescribed application fee.

(4) The representative office in Namibia of a foreign banking institution -

- (a) must, not less than 20 days prior to the foreign banking institution -
  - (i) changing its name;
  - (ii) substituting its chief representative officer;
  - (iii) changing the address or location of its representative office in Namibia; or
  - (iv) closing down the representative office,

in writing inform the Bank of such intended change, substitution or closing;
- (b) may not conduct banking business in Namibia; and
- (c) may only be engaged in such activities in Namibia as the Bank may approve and in writing inform the foreign banking institution.

(5) A foreign banking institution that or any other person who contravenes or fails to comply with subsection (1) or (4) commits an offence and is liable to the penalties referred to in section 93(2).

**Branches of foreign banking institutions**

**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.

(11) 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.

(12) 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.

(13) 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.

(14) 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.

(15) 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.

(16) 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).

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

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

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

### **PART 4**

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

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

**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 or by a beneficial owner 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 or a beneficial owner 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 or beneficial owners 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 an 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/ of the transaction within a specified period of time.

(8) A banking institution, microfinance banking institution or controlling company may not allow a person or a beneficial owner 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).

#### **Shareholder's register and registration of shares**

**29.** (1) A banking institution, microfinance banking institution or controlling company must, in such form and manner as the Bank may approve, but subject to subsection (3), maintain a register of the current beneficial holders of all vote-bearing shares in the banking institution, microfinance banking institution or controlling company.

(2) The transfer of a share referred to in subsection (1), is not be valid until such time as the transfer has been recorded in the register contemplated in that subsection.

(3) If the Bank is satisfied that the register kept by a banking institution, microfinance banking institution or controlling company in terms of section 99 of the Companies Act or a register or record kept in any central securities depository clearly as defined in section 78 of the Financial Institutions and Markets Act reflects –

- (a) the particulars of the current beneficial holders; and
- (b) a record of any change in the holders, of all the shares referred to in subsection (1),

the Bank may, at the request of the banking institution, microfinance banking institution or controlling company, in writing exempt the banking institution, microfinance banking institution or controlling company from the requirement to maintain the register contemplated in that subsection.

(4) Despite the provisions of the Companies Act to the contrary, a banking institution, microfinance banking institution or controlling company may not, without the prior written approval of the Bank -

- (a) allot or issue any of its shares to, or register any of its shares in the name of, any person other than the intended beneficial shareholder;
- (b) transfer any share in the name of any person other than the beneficial owner; or
- (c) allow any of its shares registered in the name of a person other than the beneficial owner before the commencement date of this Act, to remain so registered.

(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).

(10) A banking institution, microfinance banking institution or controlling company that contravenes or fails to comply with subsection (1), (6), (4) or (7) is liable to the administrative penalties specified in section 94.

#### **Furnishing of information by shareholders**

**30.** (1) A person who has notified a banking institution, microfinance banking institution or controlling company that he or she or it intends to hold shares in the banking institution or microfinance banking institution must, at the written request of the banking institution, microfinance banking institution or controlling company addressed to that person, but subject to subsection (2), furnish the banking institution or microfinance banking institution with the information or particulars specified in such request and which the banking institution, microfinance banking institution or controlling company considers necessary to enable it to comply with section 28 or 29.

(2) The person referred to in subsection (1) must furnish the information or particulars contemplated in subsection (1) to the banking institution, microfinance banking institution or controlling company in such form as the banking institution, microfinance banking institution or controlling company may specify in the request contemplated in that subsection.



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

#### **Absence of wrongful intent**

**31.** If a banking institution, microfinance banking institution or controlling company, or any director, officer, employee or agent of the banking institution, microfinance banking institution or controlling company, on the strength of information or particulars reasonably obtained by it or him or her, in good faith and without wrongful intent, acts, or fails to act, as result of which the banking institution, microfinance banking institution or controlling company commits the offences specified in section 28(11) or 29(9), that act or failure to act does not constitute the commission of any of those offences.

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

**32.** (1) A person may not -

(a) either personally or by proxy granted to any other person, cast a vote attached to;  
or

(b) receive a dividend payable in respect of,

any share in a banking institution or microfinance banking institution or controlling company allotted or issued to him or her, or registered in his or her name, in contravention of any provision of this Act.

(2) A vote cast in contravention of subsection (1)(a) is void.

(3) A dividend referred to in subsection (1)(b) does not accrue to the person referred to in that subsection, but accrues to the banking institution, microfinance banking institution or the controlling company concerned.

(4) A 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).

**Restriction on right to control banking institution or microfinance banking institution**

**33.** (1) A person may not acquire, or directly or indirectly exercise control over, a banking institution or microfinance banking institution unless that person is -

- (a) a fit and proper person as contemplated in section 28(8);
- (b) incorporated as a company under the Companies Act; and
- (c) registered as a controlling company in terms of section 18 in respect of such banking institution or microfinance banking institution.

(2) Subsection (1) does not apply –

- (a) to a person who holds shares whose nominal value is less than that specified in section 28(2); or
- (b) holds shares that have been acquired in the circumstances referred to in section 28(4).

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

- (a) is not fit and proper having regard to the structure and business activities of the corporate group of which the person is a member;
- (b) has furnished the Bank in, or in connection with, its application for registration with information which is in a material respect untrue;

(c) is conducting its business in a manner detrimental to the banking institution or microfinance banking institution in respect of which it was registered as a controlling company; or

(d) has contravened or failed to comply with a provision of or a requirement under this Act.

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

(a) compel that company to reduce, within a period determined by the Bank, the shareholding of that company in that banking institution or microfinance banking institution to a shareholding with a total nominal value of not more than 20 percent of the total nominal value of all the issued shares of the banking institution or microfinance banking institution concerned;

(b) limit, with immediate effect, the voting rights that may be exercised by that person by virtue of the shareholding of that person to not more than 20 percent of the voting rights attached to all the issued shares of the banking institution or microfinance banking institution concerned; or

(c) limit, with immediate effect, the power to appoint or remove, without the concurrence of any other person, all or the majority of the directors of the banking institution or microfinance banking institution concerned.

(5) Any person who contravenes or fails to comply with subsection (1) or a notice issued under subsection (3) commits an offence and is liable to the penalties specified in section 92(2)(a).

**Restriction on foreign shareholder in banking institutions and microfinance banking institutions**

**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
- (e) 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 or a beneficial owner 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 or beneficial owner of 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, related parties or beneficial owner, 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, related parties or beneficial owner, 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, related parties or beneficial owners 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.

#### **Preliminary orders prohibiting certain things**

**35.** (1) If the Bank is satisfied that a banking institution, microfinance banking institution, controlling company or any other person has contravened or has failed to comply with, any of the provisions of section 28, 29, 30, 33 or 34, the Bank may in writing issue a preliminary order imposing one or more of the restrictions specified in subsection (2) on the –

- (a) banking institution, microfinance banking institution or controlling company; or
- (b) person,

as the Bank may consider appropriate.

(2) A preliminary order issued by the Bank under subsection (1) may, in respect of any of the shares forming the subject of, or related to, the contravention or failure referred to in that subsection, prohibit -

- (a) the transfer of, or the due performance in terms of any agreement to transfer, the shares;
- (b) in the case of unissued shares, the transfer of, or the right to be issued with, the unissued shares;
- (c) the exercise of any voting rights in respect of the shares;
- (d) the issue of any further shares in pursuance to any offer made to the holder of the shares; or

- (e) except in the case of liquidation, the payment of any amount of money due by the banking institution, microfinance banking institution or controlling company in respect of the shares.
- (3) A preliminary order issued by the Bank under subsection (1) must -
  - (a) be in the form required, and signed by a person appointed, by the Bank;
  - (b) be addressed to the banking institution, microfinance banking institution, controlling company or person concerned; and
  - (c) specify and contain full particulars of the order issued by the Bank.
- (4) A person appointed in writing by the Bank for that purpose must, during normal hours of business, deliver the preliminary order issued by the Bank under subsection (1) -
  - (a) in the case of a banking institution, microfinance banking institution or controlling company -
    - (i) on the principal officer of that banking institution, microfinance banking institution or controlling company; or
    - (ii) if the principal officer referred to in subparagraph (i) is not available, on any person over the age of 16 years employed by that banking institution, microfinance banking institution or controlling company; or
  - (b) in the case of the other person referred to in subsection (1)(b) -
    - (i) on that other person; or
    - (ii) if that person is not available, on any person over the age of 16 years employed by that other person.

(5) The person on whom a preliminary order is delivered in terms of subsection (4) must -

(a) in writing acknowledge receipt of the order, specifying -

(i) his or her full names and designation; and

(ii) the date and time of such receipt; and

(b) sign the acknowledgment of receipt contemplated in paragraph (a).

(6) The Bank, at its discretion and in addition to the delivery of the preliminary order in terms of subsection (4) on the –

(a) banking institution, microfinance banking institution or controlling company; or

(b) other person referred to subsection (1)(b),

may publish, in the manner and form as the Bank may specify, the preliminary order in one or more newspapers circulating widely in Namibia.

(7) Any person who contravenes or fails to comply with a prohibition imposed in a preliminary order issued under subsection (2) commits an offence and –

(a) is liable to the penalties specified in section 92(2)(b);, or

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

#### **Effect of, compliance with, and enforcement of, preliminary order**

**36.** (1) A preliminary order delivered on a banking institution, microfinance banking institution, controlling company or other person in terms of section 35(4) is, from the date

of such delivery, binding on the banking institution, microfinance banking institution, controlling company or the other person, to whom the order is directed and to whom it is delivered in terms of that subsection.

(2) A person holding shares in a banking institution, microfinance banking institution or controlling company and to whom a preliminary order has been delivered in terms of section 35(4) must, within -

- (a) seven days after the date of such service; or
- (b) such longer period of time as the Bank may allow,

surrender the share certificates concerned to the Bank, together with such other documents relating to the shares as the Bank may specify in the order.

(3) Any person to whom a preliminary order has been delivered in terms of section 35(4) or any other person prejudiced by the order, may within a period of 14 days after the date -

- (a) of service of the order; or
- (b) on which he or she became aware of the order,

make an application to the Bank, supported by written representations, for -

- (i) the cancellation of the order on the grounds that the person has not contravened, or has not failed to comply with, any provision of this Act as specified in the order; or
- (ii) an amendment of the order on the grounds specified in the application.

(4) The Bank, after considering the application and representations made to it in terms of subsection (3), may -

- (a) confirm the preliminary order;
- (b) cancel the preliminary order; or
- (c) confirm the preliminary order subject to such conditions or amendments as the Bank may consider appropriate.

(5) If the Bank confirms a preliminary order under subsection (4), the Bank may dispose of the shares surrendered to it in terms of subsection (2), in such manner as it may consider appropriate, to a person qualified to hold such shares as determined by the Bank in terms of this Act.

(6) The Bank must, subject to subsection (7), pay over the proceeds of a sale of shares under subsection (5) to the person entitled to the proceeds.

(7) If the Bank is for any reason unable to pay the proceeds referred to in subsection (6) to the person entitled to them under that subsection, section 74(1) does, with the necessary changes, apply to the proceeds.

- (8) The Bank may in writing give such instructions or directions to the –
  - (a) directors or officers of a banking institution, microfinance banking institution or controlling company; or
  - (b) other person,

referred to in section 35(1) as the Bank may consider necessary to give effect to an order made by the Bank under this section.

(9) Any transaction, including any agreement or arrangement, in relation to any shares or security, or to any interest in any shares or security, which is in contravention of -

- (a) any order made under section 35; or

- (b) any instruction or direction given by the Bank under subsection (8),

is void.

(10) The Bank may, irrespective of whether a person contemplated in section 35(1) has been prosecuted or not in respect of the contravention of, or failure to comply with, a provision of this Act referred to in that subsection, make a preliminary order or take such other steps as the Bank may consider appropriate.

- (11) Any person who –

- (a) contravenes or fails to comply with subsection (2) commits an offence and is liable to the penalties specified in section 92(2)(b); or
- (b) fails to comply with any instruction or direction given under subsection (8) commits an offence and is liable to the penalties referred to in section 93(2) and, additionally, the banking institution, microfinance banking institution or controlling company on whose behalf the director or officer acted is liable to the administrative penalties specified in section 94.

## **PART 5**

### **RECOVERY PLANS AND PRUDENTIAL REQUIREMENTS AND LIMITATIONS**

#### **Recovery plans**

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

(2) A banking institution, microfinance banking institution or controlling company must review its recovery plan 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 that identifies 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 categories of banking institutions, microfinance banking institutions or controlling companies are required to submit for review by the Bank the recovery plans referred to in subsection (1).

(5) The range of possible recovery measures include -

- (a) actions to strengthen the capital adequacy requirements such as, recapitalisation after extraordinary losses and capital conservation measures that include suspension of dividends and payments of variable remuneration;
- (b) the possibility of sale of subsidiaries;
- (c) the possibility 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 request the banking institution, microfinance banking institution or controlling company submitting 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 creditors of the banking institution, microfinance banking institution or controlling company in order to restructure its loan capital, debt or accounts payable in general if circumstances dictate such actions;
- (c) amend the recovery plan in order to make it more effective; or
- (d) apply the recovery plans or parts thereof in keeping with a specific timetable.

#### **Standards of corporate behaviour**

**38.** (1) A banking institution or microfinance banking institution or the holding company of the banking institution or microfinance banking institution must –

- (a) in respect of its activities conducted in Namibia or its subsidiaries;
- (b) in accordance with guidelines, circulars or notices issued by the Bank under section 3; and
- (c) to the satisfaction of the Bank,

at all times conduct its business in a prudent manner and consistent with the best standards and practices of corporate governance and sound financial management.

(2) Unless otherwise prescribed or determined by the Bank, a banking institution, microfinance banking institution or controlling company must comply with the standards of corporate governance generally practiced, or required to be so practiced, by -

- (a) issuers of securities, as defined in section 78 of the Financial Institutions and Markets Act, companies listed on; or



- (b) authorised users, as defined in in section 78 of the Financial Institutions and Markets Act, of,

any exchange established in Namibia and registered under the Financial Institutions and Markets Act.

(3) Any banking institution, microfinance banking institution or controlling company 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); or

(4) A banking institution or microfinance banking institution that contravenes or fails to comply with subsection (2) is liable to an administrative penalty provided is section 94.

#### **Minimum capital funds**

**39.** (1) The minimum capital funds, unimpaired by losses, of a banking institution or microfinance banking institution may not, subject to subsection (2), (4) or (5), at any time be less than the greater of an amount -

- (a) determined by the Bank; or
- (b) an amount which represents a percentage of the risk weighted assets and other exposures of a banking institution or microfinance banking institution as the Bank may determine.

(2) Despite any provision to the contrary 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 banking institution or

microfinance banking institution to acquire additional capital funds within a period as the Bank may specify; or

- (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 requirements as may be determined by the Bank.

- (3) The Bank -

- (a) on application in writing and on good cause shown, may in writing permit a banking institution or microfinance banking institution to, for such limited period of time as the Bank may specify, have capital funds which are lower than the capital funds determined by or under subsection (1), and which limited period of time and the amount of the lower capital funds must be specified in the permission;

- (b) may determine that the capital -

- (i) requirements of a banking institution or microfinance banking institution contemplated in subsection (1), must, on a consolidated basis apply to; and

- (ii) of the banking institution or microfinance banking institution be reflected in the consolidated accounts of,

the banking institution, microfinance banking institution, and its holding company or an affiliate or associate of the banking institution, microfinance banking institution and its holding company; or

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

- (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); or

#### **Minimum capital funds in respect of banking group**

**40.** (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.

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

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

#### **Composition of capital funds**

**41.** For the purposes of section 39, the Bank may determine the composition and proportions of the different classes of capital constituting capital funds in that section and other requirements and criteria of approval of such capital funds.

**Provision to be made for certain matters**

**42.** (1) A banking institution or microfinance banking institution must, in order to ascertain whether the banking institution or microfinance banking institution is complying with section 39 or before any dividend is declared, take into account and in its calculations make provision for -

- (a) bad, doubtful or substandard debts and the depreciation of assets, to be calculated not less than quarterly on an annual basis;
- (b) operating losses, including depreciation and bad debts not yet written off;
- (c) any amount representing expenses relating to the organisation or extension of business or goodwill, or other intangible assets, to be calculated not less than quarterly on an annual basis; and
- (d) such other item or items as the Bank may determine.

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

(3) If a capital requirement is to be applied on a consolidated basis in terms of section 39(3)(b), subsection (1) applies to all persons within the banking group constituting the consolidation.

(4) 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).

### **Minimum liquid assets**

**43.** (1) The Bank may determine the minimum, or minimum average, liquid assets which a banking institution or microfinance banking institution must hold at any time or over the period of time as specified in the determination.

(2) If a banking institution or microfinance banking institution fails to comply with a determination under subsection (1) it must immediately in writing report such failure to the Bank and must in such report state the reasons for such failure.

(3) During any period of time which a banking institution or microfinance banking institution fails, or is unable, to comply with a determination under subsection (1), it may not grant any loan or credit to any person without the prior written approval of the Bank.

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

### **Restrictions on dividends**

**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).

#### **Minimum local assets**

**45.** (1) The Bank must determine the minimum local assets that must be maintained by a banking institution or microfinance banking institution for purposes of this section.

(2) A banking institution or microfinance banking institution must maintain the minimum local assets as determined by the Bank under subsection (1).

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

(4) 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).

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

**46.** (1) A banking institution or microfinance banking institution may not, without the prior written approval of the Bank, undertake exposure to a single person, a group of related

parties or to any industry in or outside Namibia which exceeds such percentage of its capital funds as the Bank may determine.

(2) The total amount of large exposures of a banking institution or microfinance banking institution may not exceed such percentage of its capital funds as the Bank may determine.

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

(4) 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).

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

**47.** (1) A banking institution or microfinance banking institution may not, directly or indirectly, lend money or issue guarantees against the security of -

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

of the banking institution or microfinance banking institution, of the holding company of the banking institution or microfinance banking institution or of any subsidiary of the banking institution or microfinance banking institution.

(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).

#### **Exposure to directors, executive officers or shareholders**

**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).

**Terms of exposure to directors, executive officers and shareholders**



**49.** The Bank must determine the criteria and conditions to be employed for establishing the acceptability or evaluation of collateral for the purpose of borrowing from a banking institution, microfinance banking institution or controlling company by directors, executive officers and shareholders of the banking institution, microfinance banking institution or controlling company concerned.

**Exposure to holding companies, subsidiaries and affiliates**

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

(2) A banking institution or microfinance banking institution may not grant a loan, an advance or a 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 may not grant a loan, an advance or a 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, 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).

**Restriction on commercial activities**

**51.** (1) A banking institution may only conduct financial business or transactions which are usually or ordinarily conducted by banking institutions in terms of this Act or of any other law.

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

(3) A banking institution or microfinance banking institution may not, subject to subsection (7), conduct or have any direct interest in any non-banking activities unless such activities -

- (a) are permitted in terms of subsection (1) or (2); or
- (b) may, in exceptional circumstances, be necessary in the course of -
  - (i) the banking business of the banking institution or the microfinance banking business of the microfinance banking institution;
  - (ii) satisfaction of debts which may be incurred as a result of the banking business or microfinance banking business referred to in subparagraph (i); or
  - (iii) any trusteeship or the administration of the estate of a deceased person.

(4) The Minister, on the recommendation of the Bank, may by notice in the *Gazette* define the activities of a banking institution or microfinance banking institution contemplated in subsection (3).

(5) If a banking institution or microfinance banking institution –

- (a) fails to comply with this section; or
- (b) conducts activities which are in contravention of this section,

the Bank may, by means of a written notice delivered to such banking institution or microfinance banking institution in accordance with section 35(4), instruct such banking institution or microfinance banking institution to, within the period of time specified in the instruction, comply with this section or to discontinue the activities so conducted in contravention of this section.

(6) If a banking institution or microfinance banking institution fails to comply with an instruction under subsection (5), the Bank may, under section 15, cancel the authorisation to conduct banking business or microfinance banking business granted to the banking institution or microfinance banking institution.

(7) The Bank, upon a written application made by a banking institution or microfinance banking institution and delivered to the Bank, and subject to such conditions as the Bank may impose, may exempt the banking institution or microfinance banking institution from –

- (a) the restrictions in subsection (3); or
- (b) such provisions of subsection (3) as the Bank may specify in the exemption.

(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).

#### **Limitations on investment in property**

**52.** (1) A banking institution or microfinance banking institution may not directly or indirectly, purchase, acquire or take on lease any immovable property, except -

- (a) subject to subsection (2), as may be necessary for –

- (i) the purposes of conducting its banking business or microfinance banking business;
- (ii) housing its staff; or
- (iii) such other purposes or in such other circumstances as the Bank may determine; or

(b) as otherwise provided for in this section.

(2) The total amount of the investments made or disbursed in respect of the purchases, acquisitions or leases by a banking institution or microfinance banking institution under subsection (1), may not, unless otherwise approved by the Bank upon a written application and on good cause shown by the banking institution or microfinance banking institution concerned, exceed a percentage of the capital funds of the banking institution or microfinance banking institution as determined by the Bank.

(3) A banking institution or microfinance banking institution may, against any immovable property, secure -

- (a) a debt owing to itself by; or
- (b) an advance made or to be made by itself to,

any person, whether or not the ownership in respect of the property vests in or the property is registered in the name of the person or any other person.

(4) If -

- (a) there is a default in the repayment of a debt or an advance referred to in subsection (3); or

- (b) the property referred to in subsection (3) is for any reason sold in execution or in any other manner,

the banking institution or microfinance banking institution concerned may, subject to subsection (5), and to the extent that is reasonably necessary to ensure the repayment of the debt or advance due to it, acquire such property.

(5) The acquisition of property by a banking institution or microfinance banking institution under subsection (4) must, for a period not longer than five years from the date of the acquisition, deemed to be property acquired as contemplated subsection (1)(a).

(6) 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).

## **PART 6**

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

#### **Directors, principal officers and executive officers of banking institutions and microfinance banking institutions**

**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).

#### **Functions, duties and obligations of directors, principal officers and other officers**

**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 sunbsidiary; 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 including credit extension..

(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.

#### **Audit committee**

**55.** (1) The audit committee established by the board of directors of a banking institution, or microfinance banking institution in terms of section 54(1)(e) has, subject to this section or to a determination issued by the Bank, such powers, duties and functions as the board of directors may specify and inform the audit committee in writing.

(2) The audit committee referred to in subsection (1) consists of so many members, but not less than three, as the banking institution or microfinance banking institution may decide on, who must all be directors without any executive responsibility in the banking institution or microfinance banking institution.

(3) The board of directors of the banking institution or microfinance banking institution concerned must, from among the members of the audit committee concerned, designate a chairperson for the audit committee, which chairperson must, subject to subsection (5), have the powers, duties and functions as decided on by the banking institution or microfinance banking institution.

(4) The audit committee must meet not less than four times during any financial year of the banking institution or microfinance banking institution concerned, which meetings must be attended by -

- (a) the members of the audit committee;
- (b) the officer responsible for the internal audit function of the banking institution or microfinance banking institution;
- (c) the auditor of the banking institution or microfinance banking institution appointed in terms of section 56;
- (d) any other auditor of the banking institution or microfinance banking institution; and
- (e) the officer responsible for the financial or treasury functions of the banking institution or microfinance banking institution.

(5) The powers, duties and functions of the audit committee are to -

- (a) ascertain the nature, scope or extent of the audit of the banking institution or microfinance banking institution to be undertaken by the auditor appointed in terms of section 56;
- (b) review the internal audit programme of the banking institution or microfinance banking institution to ensure -
  - (i) co-ordination between the internal audit programme and the audit undertaken by the auditor appointed in terms of section 56, and
  - (ii) that sufficiently trained and skilled officers of appropriate standing, to the satisfaction of the audit committee, in the banking institution or microfinance banking institution undertake and implement the internal

audit programme of the banking institution or microfinance banking institution;

- (c) review and update the internal controls and systems of the banking institution or microfinance banking institution;
- (d) consider, discuss and make recommendations to the board of directors relating to -
  - (i) any issue or reservation raised by the auditor appointed in terms of section 56; or
  - (ii) any finding made during internal investigations arising from the internal audit programme of the banking institution or microfinance banking institution;
- (e) review the financial statements of, and to make recommendations to, the banking institution or microfinance banking institution relating to the financial statements; and
- (f) perform such other duties and functions as the board of directors of the banking institution or microfinance banking institution may specify.

(6) The company secretary of the banking institution or microfinance banking institution must be the secretary of the audit committee and must have such duties and perform such functions as the board of directors of the banking institution or microfinance banking institution may specify.

#### **Appointment of auditor**

**56.** (1) Despite Chapter 10 of the Companies Act, a banking institution, microfinance banking institution or controlling company must annually appoint an auditor for the banking institution, microfinance banking institution or controlling company.

(2) A banking institution, microfinance banking institution or controlling company must, 10 days prior to its annual meeting and in the form and manner required by the Bank, submit to the Bank details regarding the auditor it intends to appoint in terms of subsection (1), and apply to the Bank for the Bank's approval of the appointment.

(3) On receipt of an application in terms of subsection (2) the Bank may -

- (a) refuse to approve the appointment;
- (b) approve the appointment; or
- (c) approve the appointment subject to such conditions as the Bank may impose and specify,

and must in writing inform the banking institution, microfinance banking institution or controlling company of Bank's decision, and where the application is refused, provide the applicant with, the reasons for the refusal of the application and the imposition of conditions.

(4) If the Bank under subsection (3)(c) approves the appointment subject to conditions, the Bank must in writing furnish the banking institution, microfinance banking institution or controlling company concerned with particulars of the conditions.

(5) 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 unless the appointment has been approved by the Bank under subsection (3).

(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 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).

#### **Disqualifications for appointment as auditor**

**57.** A person does not qualify to be appointed or to act as an auditor of a banking institution, microfinance banking institution or controlling company, if -

- (a) any of the grounds for disqualification stipulated by section 283 of the Companies Act apply to that person;
- (b) the appointment of the auditor by the banking institution, microfinance banking institution or controlling company was not approved by the Bank or an approval granted by the Bank has been withdrawn under section 56(10);
- (c) the auditor, either directly or indirectly, has a material interest in the banking institution, microfinance banking institution or controlling company or in its affiliate or associate;
- (d) any other circumstances exist which, in the opinion of the Bank, may impair the independence or impartiality of the auditor; or
- (e) the criteria or any of the criteria determined by the Bank as contemplated in section 56(7) are not complied with.

#### **Duties and functions of auditor**

**58.** (1) An auditor appointed by a banking institution, microfinance banking institution or controlling company in terms of section 56 must in writing inform the board of

directors of the banking institution, microfinance banking institution or controlling company, and the Bank of -

- (a) the banking institution or microfinance banking institution's ability or inability to meet with the requirements of section 39 or 43;
- (b) any other matter which the auditor becomes aware of in the performance of his or her duties or functions as an auditor and which in his or her opinion may -
  - (i) prejudice the ability of the banking institution, microfinance banking institution or controlling company to continue conducting business as a going concern;
  - (ii) be detrimental to the interests of the customers of the banking institution, microfinance banking institution or the controlling company concerned or the general public; or
  - (iii) violate the principles of sound financial management or the maintenance of adequate internal controls and systems by the banking institution, microfinance banking institution or controlling company.

(2) The duties of an auditor appointed in terms of section 56 include the duties of an auditor -

- (a) in terms of the Companies Act;
- (b) in terms of this Act or any other applicable law; and
- (c) determined by the Bank as contemplated in subsection (7) of that section.

(3) The auditor must assess and in writing comment on the report of the board of directors made in terms of section 54(1)(c) before the report is tabled at the annual general meeting.

(4) The banking institution, microfinance banking institution or controlling company must transmit a copy of the comments made by an auditor in terms of subsection (3), signed by the auditor and by the chairperson of the board of directors, to the Bank not more than 20 days after the receipt by the board of the auditor's comments.

(5) If an auditor, acting in good faith and without being negligent or without wrongful intent, furnishes any information to any person in terms of subsection (1), (2) or (4) or makes any comments in terms of subsection (3), such actions by the auditor -

- (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 liability to any person as a consequence of the furnishing of the information or the making of the comments.

(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).

## **PART 7**

### **SUPERVISION BY BANK**

#### **Financial and other banking records**

**59.** (1) A banking institution or microfinance banking institution must, in the official language of Namibia, keep core banking systems that –

- (a) contain records and documentation covering core functional areas and such accounting and other records as are necessary to reflect the true and fair state of the affairs of the banking institution or microfinance banking institution; and
- (b) explain the transactions and financial position of the banking institution or microfinance banking institution,

in such a manner so as to enable the Bank to ascertain whether the banking institution or microfinance banking institution is complying with this Act.

(2) The core banking systems, accounting and other records referred to in subsection (1) must, subject to subsection (4), comply with the requirements -

- (a) of section 292 of the Companies Act; and
- (b) as determined by the Bank.

(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) -

- (a) in Namibia; and
- (b) for a period of not less than five years after the date of the last entry in such records.

(4) A person may not, with the intent to deceive or negligently, in any records of a banking institution, microfinance banking institution or controlling company -

- (a) make a false entry, knowing such entry to be false or cause such an entry to be made;
- (b) omit an entry or cause such an entry to be omitted; or

- (c) alter, abstract, conceal, remove or destroy an entry or cause an entry to be altered, abstracted, concealed, removed or destroyed.

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

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

(7) A banking institution or microfinance banking institution that contravenes or fails to comply with subsection (1), (2) or (3) is liable to the administrative penalties provided for in section 94.

#### **Financial statements**

**60.** (1) The Companies Act, subject to the further provisions of this section, applies to the financial statements of a banking institution, microfinance banking institution or controlling company.

(2) Despite subsection (1) -

(a) the Bank may determine additional requirements not in conflict with this Act relating to the financial statements contemplated in subsection (1); and

(b) a banking institution, microfinance banking institution or controlling company must -

(i) in its annual financial statements disclose the name of a shareholder who holds 10 per cent or more of the total voting rights in the banking institution, microfinance banking institution or controlling company;

- (ii) despite anything to the contrary in any other law, submit to the Bank within three months after the end of its financial year, but at least 30 days before its annual general meeting, its audited financial statements; and
- (iii) subject to subsection (4), within a period of 30 days from the date of acceptance of the financial statements at an annual general meeting of the banking institution, microfinance banking institution or controlling company, publish the financial statements in a newspaper as approved, and in the form and manner specified, by the Bank.

(3) Despite anything to the contrary in the Companies Act or in any other law, a banking institution, microfinance banking institution or controlling company must, within six months after the end of its financial year, hold its annual general meeting.

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

(5) If the Bank is satisfied that the financial statements of a banking institution, microfinance banking institution or controlling company –

- (a) do not comply with this Act or with any additional requirement determined by the Bank in accordance with subsection (2)(a);
- (b) contain information that may be misleading in any way; or
- (c) are not published in the form specified by the Bank,

the Bank may by notice in writing require the banking institution, microfinance banking institution or controlling company to -

- (i) amend or correct the financial statements to comply with this Act or with the additional requirements;



- (ii) correct the misleading information;
- (iii) re-publish the amended or corrected financial statements; or
- (iv) submit to the Bank -
  - (aa) such further or additional documents or information; or
  - (bb) such explanation or amplification relating to any document or information,

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

(6) Any banking institution, microfinance banking institution or controlling company that or any other person who contravenes or fails to comply with subsection (2)(b) or (3) or fails or refuses to comply with the requirements of a notice issued by the Bank under subsection (5) commits an offence and is liable to the penalties referred to in section 93(2).

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

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

(2) 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).

#### **Furnishing of certain statements, notices, returns and information**

**62.** (1) A banking institution, microfinance banking institution or controlling company must, at such times and in such manner as the Bank may in writing require and notify the banking institution, microfinance banking institution or controlling company with the necessary changes in accordance with section 35(4), submit to the Bank a statement containing full particulars of all the assets and liabilities of the banking institution, microfinance banking institution or controlling company, including information relating to all the assets and liabilities of the banking institution, microfinance banking institution or controlling company outside Namibia.

(2) In addition to the particulars to be furnished to the Bank by a banking institution, microfinance banking institution or controlling company as specified and contemplated in subsection (1), the Bank may at any time by means of a notice delivered to the banking institution, microfinance banking institution or controlling company, direct the banking institution, microfinance banking institution, controlling company or its principal officer to furnish the Bank with such information relating to the banking business or microfinance banking business of the banking institution or microfinance banking institution or any of its transactions, and within such period of time, as the Bank may specify in the directive.

- (3) If a banking institution, microfinance banking institution or controlling company -
- (a) forwards to its shareholders, a notice of a meeting or of the declaration of a dividend or a report on its activities during a financial year or part of a financial year;
  - (b) in terms of section 178(3) of the Companies Act, gives notice to the Registrar of Companies of any change in the situation of its registered office or postal address;
  - (c) in terms of section 224(2) of the Companies Act, lodges with the Registrar of Companies a return regarding its directors; or
  - (d) in terms of section 306(5) of the Companies Act, forwards to the Registrar of Companies a copy of its annual financial statements,

the banking institution, microfinance banking institution or controlling company must simultaneously with the forwarding or lodging of the notice, report, return or statements, furnish the Bank with a copy of the notice, report, return or statements, so forwarded or lodged.

(4) A banking institution, microfinance banking institution or controlling company must -

- (a) within a period of 30 days after a general meeting of shareholders, forward to the Bank a copy of the minutes of the meeting kept in terms of section 212 of the Companies Act; or
- (b) at the written request of the Bank, within the period of time and in the form stated in the request, furnish the Bank with particulars to enable the Bank to ascertain whether the banking institution, microfinance banking institution or controlling company is complying with section 39 or 40.

(5) The Bank may require the auditors of a banking institution, microfinance banking institution or controlling company appointed in terms of section 56 to certify as correct and accurate any information submitted by the banking institution, microfinance banking institution or controlling company to the Bank in terms of this section.

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

- (a) contravenes or fails to comply with subsection (1), (3) or (4)(a);
- (b) fails to furnish the Bank with information required to do so in terms of subsection (2) or (4)(b), within the specified period of time; or
- (c) knowingly and repeatedly furnishes the Bank with incorrect or incomplete information under this section,

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

**Reporting of certain transactions by banking institutions and microfinance banking institutions**

**63.** (1) For the purposes of subsection (2) an “illegal activity” includes “money laundering” or “a money laundering activity” as defined in section 1 of the Financial Intelligence Act, 2012 (Act No. 13 of 2012) and an “unlawful activity” as defined in section 1 of the Prevention of Organised Crime Act, 2004 (Act No. 29 of 2004).

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

(3) Any banking institution, microfinance banking institution or controlling company that or any other person who fails or refuses to comply with a directive of the Bank issued under subsection (2) commits an offence and is liable to the penalties referred to in section 93(2).

**Extension of time**

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

**Examination by Bank**

**65.** (1) The Bank may, in order to determine whether –

- (a) a banking institution, microfinance banking institution or controlling company is in a sound financial condition; or

- (b) the provisions of this Act or any other legal requirements pertaining to the business being conducted have been, and are being, complied with by the banking institution, microfinance banking institution or controlling company,

without prior notice, at any reasonable time, through or by means of -

- (i) its own officers;
- (ii) any person appointed by the Bank on account of his or her special knowledge or expertise, including a legal practitioner registered to practise as such under the Legal Practitioners Act, 1995 (Act No. 15 of 1995); or
- (iii) the auditor of a banking institution, microfinance banking institution, controlling company or any other auditor appointed by the Bank,

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

(2) The provisions of section 7 apply with necessary changes to an examination under this section.

(3) In the conducting of an examination in terms of subsection (1), the Bank, or the person appointed by the Bank under that subsection, in addition to the powers, duties and functions he or she or it has in terms of this Act, has the powers and duties in all respects corresponding to the powers and duties conferred or imposed by the Financial Institutions and Markets Act upon the Authority or an inspector contemplated in that law.

(4) The person, legal practitioner or auditor referred to in subsection (1) must, on the completion of his or her examination in terms of that subsection, submit a report to the Bank relating to the examination so conducted, in the form and manner as the Bank may require.

(5) The Bank may, if an examination contemplated in subsection (1) reveals that the banking institution, microfinance banking institution or controlling company concerned is –

- (a) not conducting its affairs in terms of this Act; or
- (b) contravening any other law,

recover from the banking institution, microfinance banking institution or controlling company the costs incurred by the Bank relating to the examination, including the fees and expenses of the person appointed by the Bank under subsection (1).

(6) If one fifth or more of the total number of the depositors of a banking institution or microfinance banking institution representing not less than one fifth of the total value of the deposits made with the banking institution or microfinance banking institution, in writing request the Bank to conduct an examination in terms of subsection (1), the Bank, subject to subsection (7), must conduct an examination with necessary changes in terms of this section.

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

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

(9) In the report furnished to the board of directors of the banking institution, microfinance banking institution or controlling company in terms of subsection (8), the Bank must direct such board of directors to, within the period of time specified in the report, rectify the deficiencies mentioned in the report and every member of the board of directors or other officer of the banking institution, microfinance banking institution or controlling company must comply with such a directive of the Bank.

(10) The examination report prepared and furnished to the board of directors of a banking institution, microfinance banking institution or controlling company in terms of subsection (8) –

- (a) remains the property of the Bank; and
- (b) may not be disclosed to any person, except where such disclosure or exchange, in whole or in part -
  - (i) takes place between directors, officers or employees of that banking institution, microfinance banking institution or the controlling company; or
  - (ii) is necessary to facilitate the day to day efficient functioning of that banking institution or microfinance banking institution.

(11) For the purposes of this section and of section 66, a banking institution includes an affiliate or associate of the banking institution or microfinance banking institution.

(12) Any person who fails or refuses to comply with a directive of the Bank issued under subsection (9) commits an offence and is liable to the penalties referred to in section 93(2).

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

**66.** (1) For the purpose of an examination by the Bank under section 65, the banking institution, microfinance banking institution or controlling company concerned must produce or furnish to the person conducting the examination -

- (a) all cash or other liquid assets, books, minutes, vouchers, records, accounts, deeds, securities or other documents in the possession or custody of the banking institution or microfinance banking institution and relating to the business of the banking institution or microfinance banking institution; and

- (b) all information concerning the business of the banking institution or microfinance banking institution as may be required or considered necessary or appropriate by such person,

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

(2) Any person authorised by the Bank in writing to conduct an examination under section 65, may for the purposes of such examination take possession of any document or other item referred to in subsection (1) and to which such person has access under this section.

(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 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).

#### **Approval of special resolutions, amalgamations and transfer of assets and liabilities**

**67.** (1) A banking institution, microfinance banking institution or controlling company may not, without the prior written approval of the Bank -

- (a) enter into a merger or consolidation;



- (b) transfer, or otherwise dispose of, the whole or part of its property or assets, whether situated in or outside Namibia, other than in the ordinary course of business;
- (c) transfer, sell or dispose of, any of its shares among the shareholders or through an intermediary resulting in the person to whom the shares are transferred becoming a substantial shareholder of the banking institution, microfinance banking institution or controlling company;
- (d) effect a reduction of its paid-up share capital;
- (f) change the name of the banking institution, microfinance banking institution or controlling company; or
- (g) take any other action which requires a board resolution by directors or special resolution of the shareholders of the banking institution, microfinance banking institution or controlling company.

(2) A banking institution, microfinance banking institution or controlling company which requires the approval of the Bank in terms of subsection (1) must –

- (a) in writing apply to the Bank for the granting of the required approval; and
- (b) to the satisfaction of the Bank, and in accordance with criteria determined by the Bank in the application referred to in paragraph (a), furnish the Bank with full particulars relating to the proposed transaction or action.

(3) After considering an application made in terms of subsection (2) and in so far as it may be relevant, after consultation with the Namibian Competition Commission established by section 4 of the Competition Act, 2003(Act No. 2 of 2003), 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, and where the application is refused, provide the applicant with the reasons for the refusal of the application and the imposition of conditions.

- (4) If the Bank under -
  - (a) subsection (3)(a), refuses an application; or
  - (b) subsection (3)(c), grants an application subject to conditions,

the Bank must in writing furnish the banking institution, microfinance banking institution or controlling company with reasons for the refusal of the application and for the imposition of the conditions.

(5) If the Bank in writing approves an application pursuant to subsection (3)(b) or (c) each of the parties to the merger, consolidation, transfer or other disposition must submit -

- (a) the notice of the passing of a special resolution by the shareholders of the banking institution, microfinance banking institution or controlling company -
  - (i) containing full particulars of the merger, consolidation, transfer or other disposition; and
  - (ii) duly certified by two directors and the secretary of each party to the merger, consolidation, transfer or other disposition; and
- (b) a certified copy of the Bank's approval granted in terms of subsection (3)(b) or (c),

to the Registrar of Companies, who must pursuant to section 208 of the Companies Act register the special resolution authorising the merger, consolidation, transfer or other disposal, and forward a certified copy of the special resolution to the Bank and, if applicable, to the Registrar of Deeds.

(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).

(9) 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.

### **Undesirable practices**

**68.** (1) For the purpose of this section and subject to subsection (2), "undesirable practice", in relation to a banking institution, microfinance banking institution or controlling company, means -

- (a) the holding of shares in a company of which the banking institution, microfinance banking institution or controlling company is a subsidiary;
- (b) the holding of assets of the banking institution, microfinance banking institution or controlling company in the name of any other person, excluding any asset -
  - (i) which is *bona fide* hypothecated to secure an actual or potential liability; and
  - (ii) in respect of which the Bank has, upon a written application made by the banking institution, microfinance banking institution concerned, in writing approved that the asset may be held in the name of the other person;
- (c) the payment of dividends on shares out of profits before pre-incorporation expenditure had been accounted for;

- (d) the entering into a repurchase agreement in respect of a fictitious asset or an asset created by means of a simulated transaction;
- (e) the entering into a repurchase agreement without -
  - (i) the agreement being substantiated by a written document signed by the other party to the agreement; and
  - (ii) the details of the agreement being recorded in the accounts of the banking institution, microfinance banking institution or controlling company as well as the accounts, if any, kept by the banking institution, microfinance banking institution or controlling company in the name of the other party; and
- (f) any other practice which the Minister may, on the recommendation of the Bank, by notice in the *Gazette* declare to be an undesirable practice in respect of all banking institutions, microfinance banking institutions or controlling companies or in respect of the banking institution, microfinance banking institution or controlling company, specified in the notice.

(2) Despite subsection (1), the Bank may in writing notify a banking institution, microfinance banking institution or controlling company that a practice employed by the banking institution, microfinance banking institution or controlling company and specified in the notice, constitutes an undesirable practice, irrespective of whether the practice so specified in the notice is an undesirable practice in terms of that subsection.

- (3) A banking institution, microfinance banking institution or controlling company –
  - (a) may not conduct, permit or become involved in the conducting of, an undesirable practice; and

- (b) must on receipt of notice issued under subsection (2), desist from or discontinue the practice in question and rectify any deficiencies that may have been caused by that practice.

(4) Any banking institution, microfinance banking institution or controlling company that or any other person who contravenes or fails to comply with subsection (3)(a) or fails or refuses to comply with a notice as contemplated in subsection (3)(b) commits an offence and is liable to the penalties referred to in section 93(2).

**Powers of Bank regarding banking institutions, microfinance banking institutions and controlling companies**

**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).

**Resolution powers of Bank regarding failing banking institutions, microfinance banking institutions and controlling companies**

**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 -

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

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

(iii) 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 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.

#### **Winding-up and judicial management**

**71.** (1) Despite section 351, 354 or 433 of the Companies Act, a person may not apply for the winding-up or judicial management, or commence with a voluntary winding-up of a banking institution, microfinance banking institution or controlling company, unless such person has given the Bank 14 days written notice of his or her or its intention to so apply for the winding-up or judicial management or to commence with the voluntary winding-up of the banking institution, microfinance banking institution or controlling company.

(2) On receipt of a notice contemplated in subsection (1), the Bank may -

- (a) if an application for judicial management of the banking institution, microfinance banking institution or controlling company is to be made, take such action under section 69 or 71 as the Bank may consider appropriate; or
- (b) if a voluntary winding-up is to be commenced with, despite the provisions of the Companies Act, allow the voluntary winding-up to proceed subject to the terms and conditions which the Bank may impose.

(3) If an application for the winding-up of a banking institution, microfinance banking institution or controlling company is brought before the High Court, the Bank is entitled to -

- (a) make written representations to the court relating to the application; or
- (b) appear before the court at the hearing of the application and make oral representations,

as is if it were any other party to proceedings before that court.

(4) The Bank may, despite -

- (a) section 351 of the Companies Act; or
- (b) having taken action under section 69 or 70,

apply to the High Court for the winding-up or liquidation of any banking institution, microfinance banking institution or controlling company.

(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.

### **Proof and repayment of claims**

**72.** (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.

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

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

- (a) the Master of the High Court must transmit to the Bank, a copy of the certificate contemplated in subsection (1) of that section of the Companies Act; and
- (b) an authorisation granted to the banking institution or microfinance banking institution is, from the date of the dissolution of such company, deemed to be cancelled.

#### **Unclaimed money or property after winding-up**

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

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

### **PART 8**

#### **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.

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## **PART 9**

### **MISCELLANEOUS MATTERS**

#### **Agreements restricting competition**

**82.** (1) The parties to an agreement relating to the restricting of competition entered into by a banking institution or microfinance banking institution with another banking institution, microfinance banking institution or its affiliate or associate must, unless the parties to such agreement are of the same corporate group, submit the agreement to the Bank for its approval.

(2) An agreement referred to in subsection (1) is, unless it is approved by the Bank under that subsection, void.

#### **Prohibition on acceptance of deposits by insolvent banking institutions and microfinance banking institutions**

**83.** (1) A banking institution or microfinance banking institution that is, or becomes, insolvent may not accept any money as a deposit from any person, unless the banking institution or microfinance banking institutions has obtained the prior written approval of the Bank to accept the deposit.

(2) An approval by the Bank contemplated in subsection (1) must specify the amount of, and the person from whom, the deposit may be taken by the banking institution or microfinance banking institution.

(3) A director of, and an officer with managerial responsibilities in, a banking institution, microfinance banking institution or controlling company may not, if he or she is aware

that the banking institution or microfinance banking institution is insolvent, receive, authorise, permit or allow the banking institution or microfinance banking institution to accept deposits.

(4) Any banking institution, microfinance banking institution or controlling company that or any other person who contravenes or fails to comply with subsection (1) or (3) commits an offence and is liable to the penalties referred to in section 93(2), and additionally, the banking institution, microfinance banking institution or controlling company is liable to the administrative penalties provided for in section 94.

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

**84.** A banking institution or microfinance banking institution -

- (a) must, subject to paragraph (b), take out a policy for insurance with an insurer registered as such to provide insurance under the Financial Institutions and Markets Act and approved by the Bank, to insure itself to such an amount as the Bank may on application made to it, in writing approve, against any loss which the banking institution or microfinance banking institution or any of its customers may suffer as a result of the negligence, dishonesty or fraud of any of the officers of the banking institution or microfinance banking institution; or
- (b) may, if the insurance contemplated in paragraph (a) -
  - (i) is not available; or
  - (ii) is available, but at a premium which is, in the opinion of the Bank, too high in relation to the cover provided,

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

**Confidentiality and secrecy**

**85.** (1) For the purposes of this section, “financial institution” means a statutory body or other institution referred to in section 2(2), and includes a banking institution or microfinance banking institution.

(2) A person employed or duly authorised by the Bank to examine the affairs of a banking institution, microfinance banking institution or controlling company may not, except -

- (a) where subsection (3) applies;
- (b) for the purpose of the performance of his or her duties or functions or the exercise of his or her powers under this Act; or
- (c) when lawfully required to do so by a court having jurisdiction under the Act or under any other law,

disclose any information acquired in the performance of his or her duties or functions or exercise of his or her powers under this Act.

(3) If the Bank seeks advice from a qualified person -

- (a) on a matter of law, accountancy or valuation of property; or
- (b) on any matter requiring the exercise of professional skills,

in order to enable the Bank to perform any of its functions under this Act, the Bank may, despite subsection (2), but subject to subsection (4), disclose to the qualified person such information as the Bank may consider necessary to ensure that the qualified person is properly informed with respect to the matters on which his or her advice is sought.

(4) The qualified person referred to in subsection (3) is subject to the same duty of secrecy as a person employed by the Bank under subsection (2).

(5) Despite anything to the contrary in any provision of this Act or of the Bank of Namibia Act, the Bank may, for the purpose of the prudential supervision of financial institutions, but subject to the confidentiality of the information transmitted, furnish information acquired by the Bank to an authority in Namibia or in a foreign state, country, colony or territory with supervisory responsibilities in respect of financial institutions in Namibia or in the foreign state, country, colony or territory concerned.

(6) Subsection (2) applies to information received from an authority referred to in subsection (5).

(7) Despite subsection (2), any person may, against payment of a fee determined by the Bank, inspect or obtain a copy of -

- (a) a certificate of authorisation of a banking institution or microfinance banking institution;
- (b) a certificate of registration of a controlling company; or
- (c) the memorandum and articles of association of a banking institution, microfinance banking institution or controlling company.

(8) Any –

- (a) director or officer of a banking institution, microfinance banking institution or controlling company, during his or her tenure of office or employment or after such tenure of office or employment; or
- (b) person who for any reason has by any means access to any record, book, register, correspondence or other document, information or material relating to the affairs or the account of any customer of the banking institution, microfinance banking institution or controlling company,



may not, subject to subsections (9) and (11), provide, produce, divulge, reveal, publish or in any manner disclose to any other person, or make a record for any person, of any information or document whatsoever relating to the affairs or account of such customer.

(9) Subsection (8) does not apply to any –

(a) record, book, register, correspondence or other document, information or material referred to in that subsection which has lawfully been made available to the public from any source other than the banking institution, microfinance banking institution or controlling company concerned; or

(b) information which is in the form of a summary or collection of information set out in such a manner that does not enable information relating to any particular –

(i) banking institution, microfinance banking institution or controlling company; or

(ii) customer of a banking institution or microfinance banking institution,

to be ascertained or identified from that summary or collection.

(10) A person who has any record, book, register, correspondence or other document or material referred to in subsection (8) in his or her possession, and which to his or her knowledge has been disclosed in contravention of that subsection, may not in any manner whatsoever disclose such record, book, register, correspondence or other document or material to any other person.

(11) Subsection (8) does not apply to the disclosure of any record, book, register, correspondence or other material referred to in that subsection –

(a) which the customer concerned, or his or her authorised representative, has in writing given permission to be disclosed;

- (b) if the estate of the customer has been sequestrated, whether provisionally or final, or, if the customer is a body corporate, the body corporate has been, or is in the process of being, wound-up;
- (c) if information is required by a party to a *bona fide* commercial transaction to which transaction the customer is a party, for the purpose of, subject to subsection (12), assessing the creditworthiness of the customer relating to such transaction;
- (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;
- (e) for the purpose of instituting, or in the course of, any criminal proceedings;
- (f) for the purpose of instituting or in the course of any proceedings -
  - (i) between a banking institution or microfinance banking institution and its customer, or his or her or its guarantor relating to the customer's transactions with the banking institution or microfinance banking institution; or
  - (ii) between the banking institution or microfinance banking institution and two or more parties making opposing or adverse claims to money in a customer's account, if the banking institution or microfinance banking institution seeks relief by way of interpleader proceedings;
- (g) if a writ of attachment or of execution attaching money in an account of a customer of a banking institution or microfinance banking institution is served on the banking institution or microfinance banking institution;
- (h) if the disclosure is required or authorised by an order of a competent court any other provision of this Act or by any other law;

- (i) if the disclosure may, subject to subsection (13), in terms of any law be made to a police officer investigating an offence specified in such law;
- (j) if the disclosure is authorised by the Bank in writing; or
- (k) 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.

(12) The information furnished in terms of subsection (11)(c) must be of a general nature and must not enable the details of the customer's affairs or account to be ascertained from the information so furnished.

(13) A disclosure contemplated in subsection (11)(i) must be limited to the affairs or account of the customer suspected of such offence.

(14) In civil proceedings referred to in subsection (11)(b) or (f), the court may, if it appears that any record, book, register, correspondence or other document, information or material referred to in subsection (8) may be disclosed, of its own accord or on application by any of the parties to the proceedings, conduct the proceedings *in camera*.

(15) Subsection (8) applies to any record, book, register, correspondence or other document, information or material disclosed in terms of subsection (14).

(16) Any person who contravenes or fails to comply with subsection (2), (4), (8) or (10) commits an offence and –

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

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

### **Publication of information**

**86.** (1) The Bank may, subject to subsection (2) -

- (a) publish in whole or in part, in such form and at such time as it may consider appropriate; or
- (b) for the purpose of tabling in the National Assembly, provide to the Minister,

any information or data furnished or collected under this Act.

(2) The information or data referred to in subsection (1) may not, unless with the written consent of -

- (a) a banking institution, microfinance banking institution or controlling company; or
- (b) a customer of a banking institution or microfinance banking institution,

disclose particulars relating to the affairs of the banking institution, microfinance banking institution or controlling company or of the customer of a banking institution or microfinance banking institution.

### **International supervisory co-operation**

**87.** (1) A person who, or an entity which, under the laws of a foreign state, country, colony or territory, exercises supervisory authority in respect of banking institutions, microfinance banking institutions or controlling companies conducting business in such foreign state, country, colony or territory may, with the written approval of the Bank granted under subsection (3), examine or cause to be examined the books, accounts or transactions of -

- (a) a banking institution, microfinance banking institution or controlling company in Namibia which is a subsidiary; or
- (b) a representative office in Namibia,

of the banking institution, microfinance banking institution or controlling company so conducting business in such foreign state, country, colony or territory.

(2) The person or entity referred to in subsection (1) must in writing apply to the Bank for its approval as contemplated in that subsection.

(3) The Bank may, on receipt of an application in terms of subsection (2) -

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

(4) The Bank must in writing inform the applicant of the decision of the Bank under subsection (3) and of the conditions, if any, imposed under that subsection.

(5) The provisions of section 65, subject to the conditions contemplated in subsection (3), apply with necessary changes to an examination by a person or an entity in terms of subsection (1).

(6) If so imposed by the Bank under subsection (3), the person or entity conducting an examination in terms of subsection (1) must, within a period of 30 days after the completion of the examination, furnish the Bank with a report on the examination so conducted.

(7) The Bank may enter into an agreement with a person or an entity referred to in subsection (1) -

(a) to regulate -

(i) the establishment -

(aa) in the foreign state, country, colony or territory concerned of representative offices, or of subsidiaries, of banking institutions, microfinance banking institutions or controlling companies conducting business in Namibia; or

(bb) in Namibia of representative offices, or of subsidiaries, of foreign banking institutions, microfinance banking institutions or controlling companies conducting business in Namibia; and

(ii) the supervisory powers, duties and functions of the Bank and of such person or entity relating to the representative offices or of the subsidiaries established in Namibia and in the foreign state, country, colony or territory respectively, as contemplated in subparagraph (i);

(b) to provide for -

(i) the furnishing of information relating to representative offices or subsidiaries;

(ii) the co-operation and exchange of information relating to examinations by the Bank or by such person or entity; and

(iii) the confidentiality relating to information referred to in subparagraphs (i) and (ii); and

(c) any other matter which the parties may consider of importance relating to the conducting of business by banking institutions, microfinance banking institutions or controlling companies.

(8) For the purposes of this section, the “supervisory authority” of a person or an entity referred to in subsection (1) means supervisory authority corresponding to the supervisory authority of the Bank in respect of banking institutions, microfinance banking institutions or controlling companies conducting business in Namibia.

#### **Minors as depositors**

**88.** Despite anything to the contrary in this Act or in any law, a minor person aged 16 years and older, and who has not been declared mentally ill under the Mental Health Act, 1973 (Act No. 18 of 1973) –

- (a) may open an account and be a depositor with a banking institution or microfinance banking institution;
- (b) may, without the assistance of his or her parent or guardian, execute all necessary documents and give all necessary receipts or acquittances to open and maintain the account referred to in paragraph (a);
- (c) may cede, pledge, borrow against, and generally deal with, his or her deposit in a banking institution or microfinance banking institution as he or she may consider appropriate, and
- (d) is -
  - (i) entitled to enjoy all the privileges; and
  - (ii) is liable to all the obligations and conditions applicable to depositors,  
  
of banking institutions or microfinance banking institutions.

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

**89.** (1) Stamp duty imposed by the Stamp Duties Act, 1993 (Act 15 of 1993) is not payable in respect of the transfer of shares in a banking institution, microfinance banking institution or any of its subsidiary companies, sold or disposed of in any manner by the banking institution or microfinance banking institution to its controlling company, if such sale or disposal has been approved by the Bank.

(2) 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.

#### **Application of other laws to banking institutions and microfinance banking institutions**

**90.** (1) A company registered as a banking institution, microfinance banking institution or controlling company continues to be a company in terms of the Companies Act, and that Act, subject to subsection (2), continues to apply to any such company to the extent to which that Act is not inconsistent with this Act.

(2) Despite subsection (1) -

- (a) the provisions of the Companies Act relating to the conversion of public companies into other forms of companies do not apply to a company referred to in that subsection; and
- (b) the Minister may, on the recommendation of the Bank, by notice in the *Gazette* declare that a provision of the Companies Act specified in the notice -
  - (i) may not apply to a company authorised to conduct business as a banking institution, microfinance banking institution or to a controlling company of a banking institution or microfinance banking institution;
  - (ii) must only apply to a company referred to in subparagraph (i) subject to the conditions and qualifications specified in the notice; or



- (iii) must in respect of a company referred to in subparagraph (i), if such provision, in respect of a company, confers a power, duty or function on the Registrar of Companies, be deemed to confer on the Bank the power, duty or function specified in the notice.

(3) The Minister must table a copy of a notice under subsection (2) in the National Assembly within a period of 14 days after the publication thereof, if the National Assembly is then in ordinary session, or, if the National Assembly is not then in ordinary session, within a period of 14 days after the commencement of its next ensuing ordinary session.

(4) If the National Assembly, by resolution passed during the session in which the notice referred to in subsection (3) was tabled, rejects the notice, the notice will cease to be in force as from the date it was so rejected.

(5) An authorisation to conduct banking or microfinance banking business granted under this Act does not exempt a banking institution or microfinance banking institution from the obligation, if any, to –

- (a) obtain a licence, a permit or an authorisation; or
- (b) comply with any requirement,

under any other law to conduct banking business or microfinance banking business.

#### **Application for approvals or authorisations not provided for in Act**

**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.

#### **Penalties for general offences**

**92.** (1) Any person who -

- (a) commits the offence referred to in section 6(1), 8(4), 10(4)(a), 11(8), 17(8), 32(4), 33(5), 34(12)(b), 35(7)(a), 54(12), 58(8)(b), 65(12), 69(13)(b), 71(9), 77 or 85(16);  
or
- (b) commits the offence referred in section 7(14), 28(11)(b), 30(3), 35(7)(a), 36(11)(a) or 59(6),

is liable to the respective penalties stipulated in subsection (2).

- (2) Any person convicted of an offence referred to in -
  - (a) subsection (1)(a), is liable to a fine not exceeding N\$1 000 000 or to imprisonment for a period not exceeding 10 years or to both such fine and such imprisonment; or
  - (b) subsection (1)(b) liable to a fine not exceeding N\$500 000 or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment.

**Penalties for offences by banking institutions, microfinance banking institutions or controlling companies, officers or agents**

**93.** (1) A banking institution, microfinance banking institution or controlling company which commits the offence referred to in section 7(15), 9(6), 10(4)(b), 14(7), 15(8), 16(6), 20(2), 21(4), 23(5), 25(5), 26(15), 28(11)(a), 29(9), 34(12)(a), 35(7)(b), 36(11)(b), 38(3), 42(4), 43(4), 44(3), 45(4), 46(4), 47(2), 48(2), 50(4), 51(8), 52(6), 53(11), 56(11), 58(8)(a), 61(2), 62(6), 63(3), 66(3), 68(4), 69(13)(a) or 83(4) is liable to the penalties specified in section 92(2)(a).

(2) If a banking institution, microfinance banking institution or controlling company is convicted of an offence under this Act, any person who at the time of the commission of the offence was -

- (a) an officer, a director or a substantial shareholder of the banking institution, microfinance banking institution or controlling company;

- (b) purporting to act in the capacity of any of the persons referred to in paragraph (a);
- (c) in any manner or to any extent responsible for the management of any of the affairs of the banking institution, microfinance banking institution or controlling company;  
or
- (d) assisting in the management of any of the affairs of the banking institution, microfinance banking institution or controlling company,

is, if it is proved that the offence was committed at the instructions of, or with the consent or connivance of, such person, guilty of the same offence and is liable to the same penalty, which the banking institution, microfinance banking institution or controlling company is guilty of and is liable to.

(3) If an officer, employee or agent of a banking institution, microfinance banking institution or controlling company is convicted of an offence under this Act, any person who at the time of the commission of the offence was -

- (a) in a position of authority in relation to the officer, employee or agent;
- (b) a director or a substantial shareholder of the banking institution, microfinance banking institution or controlling company; or
- (c) purporting to act in the capacity of any of the persons referred to in paragraph (b),

and if it is proved that the offence was committed –

- (i) by the officer, employee or agent in the course of his or her employment; and
- (ii) at the instructions of, or with the consent or connivance of the person in authority, or the director or substantial shareholder,

the person in authority or the director or shareholder is guilty of the same offence, and is liable to the same penalty, which the officer, employee or agent is guilty of or is liable to.

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

**94.** (1) If the Bank is satisfied after an inquiry under this section that that a banking institution, microfinance banking institution or controlling company contravenes or fails to comply with any of the provisions listed in section 93(1) the Bank may impose an administrative fine not exceeding N\$100 000 for every day during which contravention or non-compliance with the section continues.

(2) If the Bank on reasonable grounds believes that a banking institution, microfinance banking institution or controlling company contravenes or fails to comply with section the Bank must, in writing -

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

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

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

(5) The Bank may impose an administrative penalty under this Act irrespective of any criminal liability or penalty to which the banking institution, microfinance banking institution or controlling company may be subjected to, but where the banking institution, microfinance banking institution or controlling company has been sentenced to a fine following a conviction for an offence, the Bank must take the fine imposed into account when assessing an administrative payable under this section.

## **PART 10**

### **APPEAL BOARD**

#### **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 section 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.

## **PART 11**

### **GENERAL PROVISIONS**

#### **Regulations and determinations**

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

- (a) any matter which is required or permitted by this Act to be prescribed;
- (b) the requirements relating to the citizenship and place of residence of the members of a board of directors, or executive officer of a banking institution, microfinance banking institution or controlling company;
- (c) the manner in which the payment of any monies in terms of this Act is made to the Bank;
- (d) unfair terms in transactions or contracts between banking institutions or microfinance banking institution and their customers or the general public;
- (e) fees and charges imposed by a banking institution or microfinance banking institution on consumers;
- (f) specific regulatory requirements applying to deposit taking institutions or entities referred to in section 2(2) which requirements may differ from those applicable to banking institutions and microfinance banking institutions regulated by or under this Act;
- (g) activities that are regarded as illegal financial schemes; and
- (h) all other matters which the Minister considers necessary or expedient to prescribe in order to achieve the objects and purposes of this Act;

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

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

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



- (b) all other matters which the Bank considers necessary or expedient to determine for the conducting of business, as a banking institution, microfinance banking institution or controlling company, in a prudent manner and consistent with the best standards and practices of corporate governance and sound financial management; and
- (c) macro-prudential measures, tools and standards in the context of financial stability to ensure the stability in the banking sector and financial stability in general.
- (4) If a banking institution, microfinance banking institution or controlling company contravenes, or fails to comply with, any determination made under subsection (3)(a) -
  - (a) in relation to any the matter provided for in section 39(3)(b) or (c), 40, 42(2), 53 (4) or 55(6); or
  - (b) in relation to any the matter provided for in section 28(8), 37(1), 40(1) (d), 41(1), 43 (1), 44 (1) or (2), 56 (2) (b) or 57(2) (a),

the banking institution, microfinance banking institution or controlling company is liable to an administrative fine provided for is section 94. .

(5) A banking institution, microfinance banking institution or controlling company that contravenes or fails to comply with a determination made under subsection (3)(b) or (c) is liable to an administrative fine determined by the Bank and imposed in accordance with section 94.

#### **Repeal of laws and savings**

**107.** (1) For purposes of this section “repealed law” means the any of the laws repealed by subsection (2).

(2) Subject to subsections (3) and (4), the Banking Institutions Act, 1998 ( Act No. 2 of 1998) and the Banking Institutions Amendment Act, 2010 (Act No. 14 of 2010) are repealed.

(3) Any determination, regulation, guideline, circular or notice made or in force, or any banking institution or controlling company registered as such for the purpose of conducting banking business, or any action taken by the Bank under any provision of a repealed law -

- (a) is deemed to have been made or to be in force, or to have been authorised to conduct banking business, under the corresponding provision of this Act; and
- (b) remains in force until it has been repealed or amended under any appropriate provision of this Act.

(4) Any –

- (b) application made or process initiated under any provision of a repealed law and which is pending before the Bank;
- (b) legal proceedings commenced pursuant to the provisions of any provision of a repealed law; and
- (c) matter that is pending before an Appeal Board established under the law repealed by subsection (1),

must continue as if the provision of the repealed law has not been repealed and be finalised under the relevant provision of that repealed law.

#### **Short title and commencement**

**108.** This Act is called the Banking Institutions Act, 2020 and comes into operation on a date to be determined by the Minister by notice in the *Gazette*.

(2) Different dates may be determined under subsection (1) in respect of different

provisions of this Act.

(3) Any reference in this Act to the commencement of this Act must be construed as a reference to the date determined under subsection (1) or (2).