

Namibia

## Banking Institutions Act, 1998

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Republic of Namibia  
**Annotated Statutes**

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## **Banking Institutions Act, 1998**

### **Act 2 of 1998**

Published in [Government Gazette no. 1808](#) on 9 March 1998

**Assented to on 20 February 1998**

**Commenced on 1 April 1998 by [Government Notice 63 of 1998](#)**

*[Up to date as at 14 July 2020]*

*[Amended by [Banking Institutions Amendment Act, 2010 \(Act 14 of 2010\)](#) on 5 November 2010]*

*[Amended by [Removal of Post Office Savings Bank from Section 2\(2\) of Banking Institutions Act \(Government Notice 34 of 2011\)](#) on 1 April 2011]*

*[Amended by [Namibia Deposit Guarantee Act, 2018 \(Act 16 of 2018\)](#) on 20 May 2019]*

ACT

**To consolidate and amend the laws relating to banking institutions; to provide for the authorisation of a person to conduct business as a banking institution, and for the control, supervision and regulation of banking institutions; to protect the interests of persons making deposits with banking institutions; to provide for the winding-up or judicial management of banking institutions and for the cancellation of authorisations; and to provide for matters incidental thereto.**

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

### **Part I – PRELIMINARY PROVISIONS**

#### **1. Definitions**

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

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

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

- (b) the election of the majority of directors is in any manner controlled by the person;
- “associate”**, in relation to a person, but subject to subsection (2), includes -
- (a) the holding company of such person;
  - (b) a subsidiary company or a fellow subsidiary of such person;
  - (c) a subsidiary company of any of the companies referred to in paragraphs (a) or (b) or in this paragraph;
  - (d) a substantial shareholder of such person or a substantial shareholder of such person’s holding company;
  - (e) a business partner of -
    - (i) such person;
    - (ii) such person’s substantial shareholder;
    - (iii) a substantial shareholder of such person’s holding company; or
    - (iv) any of the companies referred to in paragraphs (a), (b) or (c);
  - (f) any person who is an officer of -
    - (i) such person;
    - (ii) any of the companies referred to in paragraphs (a), (b) or (c); or
    - (iii) any shareholder or business partner referred to in paragraph (d) or (e);

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

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

**“Bank”** means the Bank of Namibia referred to in section 4 of the Bank of Namibia Act, 1997;

*[The Bank of Namibia Act is Act 15 of 1997.]*

**“banking business”** means the business that consists of -

- (a) the regular receiving of funds from the public; and
- (b) the using of funds referred to in paragraph (a), either in whole, in part or together with other funds, for the account and at the risk of the person conducting the business -
  - (i) for loans or investments;
  - (ii) for any other purpose or activity authorised by law or by customary banking practice in terms of this Act; or
  - (iii) for such activities that the Minister, in consultation with the Bank has, by notice in the Gazette, determined to be an authorised manner of using funds for the purpose of conducting banking business;

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

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

*[definition of “banking group” inserted by Act 14 of 2010]*

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

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

“**capital funds**” has the meaning determined by the Bank under section 28;

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

“**closed day**” means a Sunday or a public holiday referred to in, or declared under, the Public Holidays Act, 1990 (Act 26 of 1990);

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

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

“**Companies Act**” means the Companies Act, 1973 (Act 61 of 1973);

*[The Companies Act 61 of 1973 has been replaced by the Companies Act 28 of 2004.]*

“**company**” means a company registered under the Companies Act;

“**controlling company**” means a company registered under section 12A as a controlling company in respect of banking institution, and “holding company” has a corresponding meaning;

*[definition of “controlling company” amended by Act 14 of 2010]*

“**core banking systems**” means all core systems that contain records and documents covering core functional areas of a banking institution, and include all IT systems and subsystems keeping and maintaining records and documents relating to the business, affairs, transactions, conditions, property, assets or liabilities of a banking institution;

*[definition of “core banking systems” inserted by Act 14 of 2010]*

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

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

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

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

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

and “depositor” shall have a corresponding meaning;

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

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

“**executive officer**” means any person, by whatever name described, who could exercise significant influence, and is in the direct employment of, or acting for, or by arrangement with the banking institution, and is principally responsible for the management and conduct of the risk management, compliance, accounting, auditing, secretarial, treasury and operation functions, and includes a chief executive officer, deputy chief executive officer, and any manager of a significant business unit;

*[definition of “executive officer” inserted by Act 14 of 2010]*

“**exposure**” means any form of exposure, including -

- (a) loans, advances and irrevocable commitments to lend;
- (b) leasing;
- (c) guarantees;
- (d) any other form of finance; or
- (e) any other exposure contemplated for the purpose of capital requirements under section 28;

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

“**financial records**”, includes banking and accounting records;

*[The definition of “financial records” is inserted by Act 14 of 2010. The comma after “financial records” is superfluous.]*

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

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

“**holding company**” means a holding company as defined in section 1(4) of the Companies Act;

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

“**insolvent**”, in relation to a banking institution, includes a banking institution -

- (a) of which the liabilities exceed its assets; or
- (b) which has committed an act of insolvency in terms of the Insolvency Act, 1936 (Act 24 of 1936);

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

“**merger**” means when one or more banking institutions or controlling company directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another banking institution or controlling company, in any means including -

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

*[definition of “merger” inserted by Act 14 of 2010]*

“**Minister**” means the Minister of Finance;

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

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

*[definition of “person” inserted by Act 14 of 2010]*

“**prescribe**” means prescribe by regulation;

“**principal officer**”, in relation to a banking institution or controlling company, means the executive chairperson, the managing director, the executive director, the chief executive officer or the manager, or any other person, by whatever title referred to, who is chiefly responsible for the management of the affairs of the banking institution or controlling company in Namibia, and whose name and title the banking institution or controlling company from time to time in writing advises to the Bank, and includes a person who, in terms of section 10, applies for an authorisation to establish a banking institution;

*[definition of “principal officer” amended by Act 14 of 2010]*

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

- (a) accepts deposits or similar funds from the public, including from employees, members, shareholders or partners of the person, as a regular feature of his or her business;
- (b) solicits or advertises for deposits or similar funds;
- (c) obtains, as a regular feature of his or her business, money through the sale of an asset to a person other than to a banking institution or a statutory body or other institution referred to in section 2(2), subject to an agreement in terms of which the seller undertakes to repurchase from the buyer at a future date the asset sold, or any other asset;
- (d) conducts any other activity which the Bank, by notice in the Gazette, has declared to be the acceptance of deposits from the public; or

*[See General Notice 100/2009 (GG 4284), effective from 1 July 2009.]*

- (e) ...

*[paragraph (e) of definition of “receiving funds from the public” deleted by Act 14 of 2010]*

or the soliciting of, or advertising for, whether directly or indirectly, money or persons for the purpose of introducing into or participating in a business practice referred to in this section,



*[Based on the sentence structure and the indentation used in the Government Gazette, the words above do not appear to be part of paragraph (e) which has been deleted. This is also indicated by the use of the words “this section” rather than “this paragraph” in the phrase in question - although it would be clearer if the phrase referred to “this definition”. It should be noted that other interpretations of the amendment are possible given the complexity of the sentence structure.]*

but does not include -

- (ab) any activity of the public sector, governmental or other institution, or of any person or category of persons, designated by the Minister, on the recommendation of the Bank, by notice in the Gazette, and if such activity is performed in accordance with the conditions that the Minister may specify in the notice; or
- (ac) the acceptance of money against debentures or other similar debt instruments, if such money is not used for the purpose of granting advances, loans or credit to the public, excluding customary credit in respect of the sale of goods or the provision of services by the issuer of these instruments;

“**regulations**” mean the regulations made under this Act;

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

“**risk weighting**” means attaching a weight of one, or a fraction of one, to each class of assets or other exposures of a banking institution in accordance with the determinations by the Bank for the purpose of calculating the minimum capital requirements under section 28;

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

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

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

*[definition of “substantial shareholder” amended by Act 14 of 2010; the word “is” in paragraph (b) should be “are” to be grammatically correct]*

“**this Act**” includes the regulations and the determinations.

(2) For the purposes of -

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

able or in a position to exercise.

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

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

## 2. Application of Act

- (1) This Act, in so far as it provides for a limitation on the fundamental freedoms contemplated in Article 21 of the Namibian Constitution by authorising restrictions relating to the conducting of business, is, unless otherwise provided, enacted upon the authority conferred by that Article.
- (2) This Act does not apply to -
  - (a) the Bank, except insofar as it confers upon the Bank the power to perform the functions contained in this Act;
  - (b) any international bank or international financial organisation, or any associated or affiliated bank or financial organisation of such international bank or international organisation, of which the Government of Namibia or the Bank is a member;
  - (c) ...  
*[paragraph (c) deleted by Act 14 of 2010]*
  - (d) the Agricultural Bank of Namibia established by the Agricultural Bank of Namibia Act, 2003 (Act No. 5 of 2003);  
*[paragraph (d) amended by Act 14 of 2010]*
  - (e) ...  
*[paragraph (e) deleted by Act 14 of 2010]*
  - (f) ...  
*[paragraph (f) deleted by Act 14 of 2010]*
  - (g) ...  
*[paragraph (g) deleted by Act 14 of 2010]*
  - (h) ...  
*[paragraph (h) deleted by Act 14 of 2010]*
  - (i) any building society registered under the Building Societies Act, 1986 (Act 2 of 1986);
  - (j) ...  
*[paragraph (j) deleted by Act 14 of 2010]*
  - (k) ...  
*[[Paragraph (k) is effectively deleted by Government Notice 34/2011. Paragraph (k) originally read as follows: "the Post Office Savings Bank as defined in the Posts and Telecommunications Act, 1992 (Act 19 of 1992)". In Government Notice 34/2011, the Minister states: "I remove the Post Office Savings Bank as defined in the Posts and Telecommunications Act, 1992 (Act No. 19 of 1992) from subsection (2)." This would appear to have the effect of deleting paragraph (k) even though there is no explicit reference to paragraph (k).]*
  - (l) the Namibia Development Corporation, established by the Namibia Development Corporation Act, 1993 (Act 18 of 1993);  
*[The Namibia Development Corporation Act 18 of 1993 is repealed by section 22 of the Development Bank of Namibia Act 8 of 2002 (GG 2826), but that section has not yet been brought into force.]*
  - (m) the National Housing Enterprise, established by the National Housing Enterprise Act, 1993 (Act 5 of 1993);
  - (n) ...

*[paragraph (n) deleted by Act 14 of 2010]*

- (o) any co-operative society registered under the Co-operative Societies Act, 1996 (Act 23 of 1996);
- (p) any other institution or body designated by the Minister, on the recommendation of the Bank, by notice in the Gazette; or
- (q) any non-banking financial institution governed by statute and regulated by the Namibia Financial Institutions Supervisory Authority established by the Namibia Financial Institutions Supervisory Authority Act, 2001 (Act No. 3 of 2001).

*[paragraph (q) inserted by Act 14 of 2010]*

*[subsection (2) amended by Act 14 of 2010]*

- (3) The Minister may, on the recommendation of the Bank, by notice in the Gazette, remove any institution or body from subsection (2).
- (4) A person, other than a person who solicits or advertises for deposits, shall not be deemed to be accepting deposits if he or she does not, at any time, hold deposits -
  - (a) for or on behalf of more than 20 persons; or
  - (b) amounting in aggregate to more than N\$500 000, excluding interest payable on the deposits.
- (5) The Minister may, on the recommendation of the Bank, by notice in the Gazette amend -
  - (a) the number of persons specified in paragraph (a); or
  - (b) the amount specified in paragraph (b),
 of subsection (4).

## **Part II – ADMINISTRATION OF ACT**

### **3. Guidelines, circulars or notices by the Bank**

- (1) The Bank may from time to time, for the purpose of promoting sound and prudential banking practices, furnish banking institutions and controlling companies with guidelines, circulars or notices not inconsistent with this Act, relating to the application of this Act by banking institutions or controlling companies or to the conducting of business, as a banking institution or controlling company in general.
- (2) The guidelines, circulars or notices contemplated in subsection (1) must be in writing and must be delivered by the Bank to the principal officer of a banking institution or controlling company.

*[Section 3 is amended by Act 14 of 2010, including by the insertion after the expressions “banking institution” or “banking institutions” of the expressions “or controlling company” or “or controlling companies”, respectively. Note that there is some overlap between sections 3 and 41 of the amending Act in this regard.]*

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

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

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

- (2) For the purposes of this section -
- (a) "Governor" means the Governor of the Bank; and
  - (b) "Deputy Governor" means the Deputy Governor of the Bank,
- as defined in the Bank of Namibia Act, 1997.

### **Part III – AUTHORISATION TO ESTABLISH A BANKING INSTITUTION**

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

- (1) No person shall -
- (a) conduct banking business;
  - (b) receive, accept or take a deposit;
  - (c) by any means, including advertising or soliciting, procure or attempt to procure a deposit;
  - (d) pretend to be a banking institution; or
  - (e) subject to subsection (2), use the expression "bank" or "banking institution", or any other 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,
- unless such person is under this Act authorised to so conduct business as a banking institution.
- (2) Paragraph (e) of subsection (1) shall not apply if the expression "bank" 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;
  - (b) included in the name or title of an association of banking institutions; or
  - (c) used for any other purpose approved by the Bank in writing.

#### **6. Investigations**

- (1) This section, in so far as it provides for a limitation on the fundamental rights contemplated in Subarticle (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 Subarticle (2) of that Article.
- (2) The Bank may, if it has reason to believe that a person is conducting banking business in contravention of section 5 or section 55A, in writing authorise an officer of the Bank to -
- (a) *mutatis mutandis* in accordance with Chapter 2 of the Criminal Procedure Act, 1977 (Act 51 of 1977), at any time and without prior notice -
    - (i) enter any premises which the Bank or the officer has reason to believe is occupied or used by any person for the purpose of or in connection with the conducting of banking business in contravention of section 5 or section 55A;
    - (ii) search for any book, record, statement, document or other item used, or which is believed to be used, in connection with the banking business referred to in subparagraph (i); or
    - (iii) seize or make a copy of any book, record, statement, document or other item referred to in subparagraph (ii), or seize any money found on the premises,

- as if the officer were a police official referred to in that Act and the book, record, statement, document or other item were used in the commission of a crime;
- (b) question any person who is present on the premises referred to in paragraph (a)(i), or the auditors, directors, members or partners of any person conducting business on the premises, in connection with the conducting of the business on the premises;
  - (c) direct that the premises referred to in paragraph (a)(i), or any part of, or anything on, the premises, be left undisturbed for as long as it is necessary to search the premises for any book, record, statement, document or item referred to in paragraph (a)(ii);
  - (d) by notice in writing addressed and delivered to any person who has control over or custody of any book, record, statement, document or other item referred to in paragraph (a)(i), require the person to produce the book, record, statement, document or other item to the officer of the Bank addressing the notice, at the place, on the date and at the time specified in the notice;
  - (e) examine any book, record, statement, document or other item referred to in paragraph (a)(i), and may require from any person referred to in paragraph (b) an explanation regarding any entry in the book, record, statement, document or other item;
  - (f) by notice in writing delivered to a banking institution, instruct such banking institution to summarily freeze any banking account or accounts of any person referred to in this subsection with such banking institution, and to retain all moneys in any such banking account or accounts, pending the further instructions of the Bank;
  - (g) by notice in writing delivered to any person referred to in this section, direct that the business of such person be summarily suspended, pending the investigation by the Bank under this section;
  - (h) if any person has been convicted of an offence in terms of section 5 or section 55A, close down the business of such person; or
  - (i) require a member of the Namibian Police Force, or may request any other person, to assist him or her in the exercising, performance or execution of his or her powers, duties or functions under this section.

*[subsection (2) amended by Act 14 of 2010]*

- (3) If the officer of the Bank referred to in subsection (2) exercises, performs or executes a power, duty or function under this section in the presence of any person affected by the exercising, performance or execution of the power, duty or function, the officer shall at the request of the person so affected, exhibit to the person the written authorisation referred to in that subsection.
- (4) No person shall -
  - (a) hinder or obstruct an officer of the Bank authorised under subsection (2) in the exercising, performance or execution of his or her powers, duties or functions;
  - (b) refuse or fail to comply with any request made by an officer referred to in paragraph (a) in the exercising, performance or execution of such officer's powers, duties or functions;
  - (c) subject to Article 12(1)(f) of the Namibian Constitution, refuse or fail to answer any question which an officer referred to in paragraph (a) lawfully directs at such person in the exercising, performance or execution of such officer's powers, duties or functions.
  - (d) wilfully furnish false or misleading information to an officer referred to in paragraph (a); or
  - (e) falsely give himself or herself out as an officer referred to in paragraph (a).
- (5) For the purposes of this section, "premises" shall include any building or structure, or part of such building or structure, whether above or below the surface of the land or water, or any vehicle, vessel or aircraft.

## 7. Repayment of monies by unauthorised persons

- (1) If the Bank is satisfied that a person has obtained any monies in contravention of section 5 or section 55A, the Bank must in writing direct the person to repay all the monies so obtained by him or her, including any interest or other amounts which may be owing by the person in respect of such monies -
  - (a) to the respective persons from whom he or she has obtained the monies as verified;
  - (b) in the manner and in accordance with the requirements imposed; and
  - (c) within the period of time imposed,by the Bank and specified in the direction.

*[subsection (1) amended by Act 14 of 2010]*

- (2) Any person referred to in subsection (1) who refuses or fails to comply with a direction under that subsection, shall, for the purposes of section 345 of the Companies Act, be deemed to be unable to pay its debts, or for the purposes of section 8 of the Insolvency Act, 1936 (Act 24 of 1936), be deemed to have committed an act of insolvency, as the case may be, and the Bank may apply to the High Court for the winding-up, or for the sequestration of the estate, of such person, as the case may be.
- (3) Subsections (1) and (2) shall be in addition to, and not derogate from, any criminal liability in terms of this Act or of any other law, of a person referred to in those subsections.
- (4) Section 60 shall mutatis mutandis apply to monies referred to in subsection (1), or to any other property which a person referred to in that subsection may have in his or her possession as a lessor of a safe deposit box, as a trustee, a fiduciary or in any other capacity on behalf of any other person.

## 8. Name of banking institution

- (1) No authorisation to conduct banking business shall be issued to any person under a name which, in the opinion of the Bank, may mislead the public as to the identity of the banking institution concerned, or as to the nature of its activities.
- (2) No banking institution shall, without the written approval of the Bank, use, refer to itself by, or conduct banking business under, a name other than the name under which it was authorised to conduct banking business as contemplated in subsection (1).
- (3) Upon a written application by a banking institution, the Bank may, subject to such conditions as it may impose, change the name under which the banking institution was authorised to conduct banking business to the name applied for by the banking institution, or may refuse the application.
- (4) If the Bank is satisfied that the authorised name of a banking institution or the name under which the banking institution conducts business, as the case may be, may mislead the public as to the identity or nature of the business of the banking institution, the Bank may, subject to subsection (5), by written notice addressed and delivered to the banking institution -
  - (a) change the authorised name of the banking institution; or
  - (b) instruct the banking institution to change the name under which it is conducting business to a name approved by the Bank.
- (5) The Bank shall not change the name of a banking institution under subsection (4), unless -
  - (a) the Bank has given the banking institution 30 days written notice of its intention to change the name of the banking institution, furnishing reasons for the intended change of name; and
  - (b) has afforded the banking institution the opportunity to, within the 30 day period of time contemplated in paragraph (a), make written representations to the Bank relating to the intended change of name.
- (6) If the Bank under subsection (3) or (4), as the case may be, changes the name under which a banking

institution was authorised, the Bank shall under section 11 issue an amended certificate of authorisation in the name of the banking institution, specifying the changed name of the banking institution.

## 9. Prerequisite for conducting banking business

- (1) A person is not authorised to conduct banking business unless such person is -
  - (a) incorporated as a public company under the Companies Act and has the minimum capital funds as determined under section 28; or
  - (b) a branch of a foreign banking institution authorised under section 19A.
- (2) A company may not, without the written approval of the Bank, be incorporated under the Companies Act for the purpose of conducting banking business.
- (3) An incorporated banking institution may not under this Act or any other law convert to a branch of a foreign banking institution contemplated in section 19A.

*[section 9 amended by Act 14 of 2010]*

## 10. Application for authorisation to establish a banking institution

- (1) Any person who intends to conduct banking business may, subject to the further provisions of this section, apply to the Bank for the granting of an authorisation to so conduct banking business.
- (2) An application contemplated in subsection (1) shall -
  - (a) be made in the form and manner required by the Bank in writing;
  - (b) be signed on behalf of the applicant by its principal officer, or if the applicant is a company to be registered, by its trustees or by the subscribers to its memorandum and articles of association; and
  - (c) be accompanied by the prescribed application fee.
- (3) On receipt of an application contemplated in subsection (1), the Bank may, before considering the application, in writing require the applicant to furnish to the Bank -
  - (a) a report in writing by a public accountant as defined in section 1 of the Public Accountants' and Auditors' Act, 1951 (Act 51 of 1951), or by another person approved by the Bank, on such aspects relating to the application as the Bank may deem necessary; or
  - (b) such further information, books, records, statements or other documents as the Bank may request.

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

- (1) Before considering an application for an authorisation lodged with the Bank in terms of section 10, the Bank shall conduct such investigations, both in or outside Namibia, relating to the applicant or to the application as it may deem necessary in order to ascertain -
  - (a) the validity and authenticity of the information submitted by the applicant to the Bank in terms of section 10;
  - (b) the financial status and history of the applicant, including its assets and liabilities, and its policies and strategies relating to the future development of its banking business;
  - (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 28;
  - (d) the integrity of the applicant and its competence to conduct, or experience in conducting, 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, according to the criteria as the Bank may determine;
  - (g) the structure and shareholding of the group of companies of which the applicant forms a part or intends to form a part may not hinder effective banking supervision or endanger the stability of the banking sector;  
*[paragraph (g) amended by Act 14 of 2010]*
  - (h) whether the granting of the application for authorisation will be in the economic interest of Namibia;
  - (i) whether the applicant is or will be able to apply or maintain adequate, effective and proper internal control systems when conducting the banking business in terms of the authorisation; and
  - (iA) whether the applicant complies or is able to comply with the laws relating to anti-money laundering and combating of financing of terrorism; and  
*[paragraph (iA) inserted by Act 14 of 2010]*
  - (j) any other matter which the Bank may regard as relevant to the applicant or to the application.
- (2) No application for authorisation to conduct banking business shall be considered by the Bank unless the Bank is satisfied that -
- (a) the applicant complies with, or is able to comply with, all the relevant provisions of this Act; and
  - (b) the banking business to which the application relates would be to the economic advantage of Namibia.
- (3) ...  
*[subsection (3) deleted by Act 14 of 2010]*
- (4) After, having considered an application made in terms of section 10(1), the Bank, with the concurrence of the Minister, and subject to the further provisions of this Act, may -  
*[The comma following the word "After", which results from the amendments made by Act 14 of 2010, is superfluous.]*
- (a) refuse the application; or
  - (b) grant the application; or
  - (c) grant the application subject to such conditions as the Bank may impose,
- and must in writing inform the applicant of its decision.  
*[subsection (4) amended by Act 14 of 2010]*
- (4A) Notwithstanding anything to the contrary in this Act or in any law, it shall be a condition for the grant of an application under subsection (4)(b) or (c) that the banking institution concerned shall become and remain a member of the Scheme established under section 22 of the Deposit Guarantee Act, 2018 (Act No. 16 of 2018).  
*[subsection (4A) inserted by section 58 of Act 16 of 2018]*
- (5) The application fee paid by or on behalf of the applicant in terms of section 10(2)(c) shall, irrespective of whether the application is granted or refused, not be refunded.
- (6) If the Bank under subsection (4) grants an application for authorisation to conduct banking business, the Bank shall, 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.



- (7) A certificate contemplated in subsection (6) shall -
- (a) be in the form;
  - (b) contain the particulars; and
  - (c) be issued and signed by a person, decided on by the Bank.

## 12. Duration and conditions of authorisation

- (1) An authorisation issued under section 11 shall, subject to section 15 or 17, as the case may be, be valid for an indefinite period of time.
- (2) A banking institution shall -
- (a) if it intends to effect any change in, or in any of the circumstances relating to, any of the particulars furnished by the banking institution when it in terms of section 10 applied to the Bank for the granting of an authorisation under section 11, give the Bank at least 30 days written notice of such intended change; or
  - (b) if any change occurs in any of the circumstances referred to in paragraph (a), immediately in writing inform the Bank of such change which has so occurred,
- together with full particulars of such change or intended change, as the case may be.
- (3) The Bank may, on receipt of a notice contemplated in paragraph (a) or (b) of subsection (2), as the case may be, or if a banking institution effects a change, or a change occurs, as the case may be, in the circumstances contemplated in that subsection, and the banking institution fails to inform the Bank of such change as required by that subsection, and if in the opinion of the Bank, the change or the intended change in the circumstances of the banking institution contemplated in that subsection is of such a nature or extent that the Bank considers it necessary to amend any of the conditions subject to which the authorisation was granted, the Bank shall -
- (a) in writing notify the banking institution of the Bank's intention to so amend such conditions; and
  - (b) together with the notice contemplated in paragraph (a) -
    - (i) furnish the banking institution with full particulars of the intended amendments to the conditions; and
    - (ii) request the 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.

## 12A. Application for registration as controlling company

- (1) A company which -
- (a) desires to exercise control over any banking institution; or
  - (b) is a controlling company in respect of any other public company which -
    - (i) has been authorized to conduct banking business; or
    - (ii) has applied in terms of section 10 for authorization to conduct banking business,
- may, subject to this section, apply to the Bank to be registered as a controlling company.
- (2) An application contemplated in subsection (1) must -
- (a) be made in writing in the form and manner determined by the Bank;
  - (b) be signed by the director(s) on behalf of the company to be registered or by the subscribers to its

memorandum and articles of association; and

- (c) be accompanied by the prescribed application fee.
- (3) For the purposes of this Act, a person is deemed to exercise control over a banking institution if, in the case where that person is a company, the banking institution is a subsidiary of that company, or, whether or not that person is a company, if that person alone or together with his or her associates -
- (a) holds shares in a banking institution of which the total nominal value represents more than 50 per cent of the nominal value of all the issued shares of the banking institutions, unless, due to limitations on the voting rights attached to the share so held by the person alone or together with his or her associates, such person voting independently or such person and his or her associates voting as a group, is or are unable to decisively influence the outcome of the voting at a general meeting of the banking institution;
  - (b) is entitled to exercise more than 50 per cent of the voting rights in respect of the issued shares of that banking institution; or
  - (c) has the power to determine the appointment of the majority of the directors of that banking institution, including -
    - (i) the power to appoint or remove, without the concurrence of any other person, all or the majority of such directors; or
    - (ii) the power to prevent any person from being appointed as director without the consent of any other person,

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

- (4) Despite subsection (3), if on any other grounds a person is deemed to exercise control over a banking institution, the Bank may subject such person to the provisions of this Act relating to controlling company.
- (5) If the applicant referred to in subsection (1) is a financial institution as defined in section 1 of the Namibia Financial Institutions Supervisory Authority Act, 2001 (Act No. 3 of 2001), the applicant must establish a legal entity separate from the operations of the applicant to carry on its business as a controlling company.
- (6) If a company contemplated in subsection (1) has a financial institution as defined in section 1 of the Namibia Financial Institutions Supervisory Authority Act, 2001 (Act No. 3 of 2001) as part of its group of companies, the Bank and the Namibia Financial Institutions Supervisory Authority must enter into an agreement on matters of concurrent jurisdiction to give effect to the relevant legislation in respect of the functions of the Bank and the Authority.

*[section 12A inserted by Act 14 of 2010]*

## **12B. Granting or refusal of application for registration as controlling company**

- (1) Before considering an application for registration as a controlling company in terms of section 12A, the Bank must conduct such investigation, both in or outside Namibia relating to the applicant or to the application as it may consider necessary to ascertain -
  - (a) that the registration of the applicant as a controlling company is not contrary to the public interest;
  - (b) that in the case of an applicant applying for registration in the circumstances referred to in subsection (1)(a) of section 12A, the applicant is able to establish control, as contemplated in that section, over the banking institution concerned;
  - (c) that no provision of the memorandum or articles of associations of the applicant is inconsistent with this Act or is undesirable in so far as it concerns banking institutions;

- (d) that every director or every principal officer, as far as can reasonably be ascertained, is a fit and proper person to hold the office as such director or principal officer, and that every such director or principal officer has sufficient knowledge and experience to manage the affairs of the applicant in its capacity of a controlling company;
  - (e) that the applicant is in a financially sound condition;
  - (f) that no interest which any person has in the applicant is inconsistent with this Act; and
  - (g) that the application complies with the requirements of this Act.
- (2) No applicant which has applied for registration as a controlling company in the circumstances referred to in section 12(A)(1)(b) may be registered as such controlling company, unless the company in respect of which it made such application is an authorized banking institution.
- (3) After having considered an application made in terms of section 12A, the Bank may -
- (a) refuse the application;
  - (b) grant the application; or
  - (c) grant the application subject to such conditions as the Bank may impose,
- and must, subject to further provisions of this Act, in writing inform the applicant of its decision.
- (4) If the Bank under subsection (3) grants an application for registration of a controlling company, the Bank must, against payment of the non-refundable prescribed registration fee, register the applicant as a controlling company in respect of the banking institution concerned and issue to the applicant a certificate of registration as a controlling company.
- (5) A certificate referred to in subsection (4) must -
- (a) be in the form;
  - (b) contain the particulars; and
  - (c) be issued and signed by a person,
- determined by the Bank.
- (6) A company which, on the date of commencement of this Amendment Act, is a controlling company in respect of a banking institution, is, with effect from that date, deemed to be a controlling company registered as such in terms of this section in respect of the banking institution concerned.

*[section 12B inserted by Act 14 of 2010, which is the "Amendment Act" referred to in subsection (6)]*

## **12C. Cancellation by Bank of registration of controlling company**

- (1) Subject to subsection (2), the Bank, by notice in writing addressed and delivered to a controlling company, may cancel registration of controlling company from the date specified in the notice -
- (a) if the controlling company -
    - (i) has failed to establish control over the banking institution in respect of which it is registered within a period of six months after the date of issue of the certificate of registration or any other date as the Bank may specify;
    - (ii) no longer exercises such control in terms of section 25 or under any other circumstances; or
    - (iii) has submitted a special resolution contemplated in section 200 of the Companies Act authorising such cancellation; or
  - (b) if the authorization of a banking institution in respect of which a controlling company is registered, is cancelled, the registration of that controlling company in respect of that banking institution is deemed to have been cancelled simultaneously.

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

*[section 12C inserted by Act 14 of 2010]*

### **12D. Investment by controlling company**

A controlling company investing -

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

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

*[section 12D inserted by Act 14 of 2010]*

### **12E. Restructuring within group of companies**

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

*[section 12E inserted by Act 14 of 2000]*

## **13. Annual fees**

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

*[section 13 amended by Act 14 of 2010 by the insertion after the expression “banking institution” of the expression “or controlling company”]*

#### **14. Subsidiaries, branch offices, representative offices and other interests of a banking institution**

- (1) A banking institution shall 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 shall not less than 30 days prior to -
- (a) the opening of a branch in Namibia by the banking institution;
  - (b) the disposal of a subsidiary, or of any interest in any other undertaking; or
  - (c) the closing of a representative office or of a branch office,
- in writing inform the Bank of the intended opening, disposal or closing, as the case may be.
- (3) A controlling company may not, without the prior written approval of the Bank -
- (a) establish or acquire a subsidiary; or
  - (b) acquire any direct or indirect interest in any undertaking outside Namibia.
- [subsection (3) inserted by Act 14 of 2010]*
- (4) A controlling company must, not less than 30 days prior to the opening, disposal or closing of a subsidiary or any interest in any other undertaking in writing inform the Bank of the intended opening, disposal or closing.
- [subsection (4) inserted by Act 14 of 2010]*

#### **15. Cancellation of authorisation**

- (1) The Bank may, after consultation with the Minister and subject to subsection (2), by notice in writing addressed and delivered to a banking institution, cancel, from a date specified in the notice, the authorisation to conduct banking business granted to the banking institution under section 11, if the banking institution -
- (a) fails to commence with the conducting of banking business within a period of six months -
    - (i) after the date for commencement of the conducting of banking business specified by the Bank upon the granting of the authorisation; or
    - (ii) if no date for commencement contemplated in subparagraph (i) is specified by the Bank, after the date of issue of the certificate of authorisation under section 12;
  - (b) fails to comply with any condition imposed by the Bank under section 11(4)(c) or (4A) or section 19(4A);
- [paragraph (b) substituted by section 59 of Act 16 of 2018]*
- (c) ceases to conduct the business for which it is authorised;
  - (d) is found guilty of an offence under any provision of this Act, and if the Bank is of the opinion that the banking institution concerned is conducting its business in a manner detrimental to the

interest of its customers or the public; or

*[paragraph (d) amended by Act 14 of 2010]*

- (e) in the circumstances contemplated in section 39(5), and if the Bank is of the opinion that the banking institution concerned is conducting its business in a manner detrimental to the interests of its customers or the general public.
- (2) The Bank shall, before cancelling the authorisation of a banking institution under subsection (1), but subject to subsection (5), in writing give the banking institution not less than 30 days written notice of its intention to so cancel the authorisation.
- (3) A notice to a banking institution contemplated in subsection (2) shall -
- (a) state that the Bank intends to cancel the authorisation of a banking institution;
  - (b) specify the reason or reasons for the intended cancellation; and
  - (c) invite the 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 shall not be cancelled.
- (4) The Bank may, at the expiration of the 30 day period contemplated in subsection (2) and after considering the representations, if any, made by the banking institution concerned after consultation with the Minister -
- (a) cancel the authorisation under subsection (1); or
  - (b) without cancelling the authorisation, amend the conditions subject to which the authorisation was granted; or
  - (c) decide not to cancel the authorisation or to amend the conditions referred to in paragraph (b), and shall immediately in writing inform the banking institution of its decision.
- (5) Notwithstanding subsection (2), the Bank may, after consultation with the Minister, in circumstances contemplated in subsection (1) and without prior notice, direct a banking institution by means of a notice delivered in accordance with section 26(3)(d), to summarily suspend all, or any part of, the banking business of the banking institution for such period and subject to such conditions as the Bank may specify in such notice.
- (6) A 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 part thereof, under that subsection.
- (7) On receipt of representations by a banking institution under subsection (6), the Bank may confirm or rescind the suspension made by it under subsection (5), or may vary the conditions subject to which the banking business of the banking institution was so suspended.

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

- (1) If the authorisation to conduct banking business granted to a banking institution ceases or has been cancelled, the Bank may give notice to the banking institution -
- (a) to repay all monies due by it to its depositors, including any interest on, or any other amounts owing by it in respect of, such monies; and
  - (b) to change its name and to amend its memorandum and articles of association, in accordance with the directions and within the period of time specified by the Bank in the notice.
- (2) Different directions or periods of time may, in respect of different kinds of deposits, be specified by the Bank under subsection (1)(a).
- (3) Notwithstanding subsection (2), the Bank shall, in specifying the directions or periods of time

contemplated in that subsection, not give any preference to any depositor which such depositor does not enjoy in terms of any other law.

- (4) A banking institution which in accordance with a notice under subsection (1) repays a deposit before the due date agreed upon for the repayment of the deposit, shall not be bound to pay any interest or any other amounts which would have been payable in respect of the deposit for the period calculated from the date of the actual repayment up to the due date.
- (5) A banking institution which fails to comply with a notice under subsection (1) shall for the purposes of sections 344 and 345 of the Companies Act be deemed not to be able to pay its debts.

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

When the affairs of a banking institution have been completely wound up in terms of section 419 of the Companies Act -

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

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

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

- (a) shall inform -
  - (i) the authorisation of a person to conduct business as a banking institution;
  - (ii) any change of name of a banking institution; or
  - (iii) the cancellation of an authorisation; or
- (b) may inform the suspension of the authorisation, of the business or of any part of the business of a banking institution,

under any provision of this Act.

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

- (1) No foreign banking institution shall establish a representative office in Namibia without the prior written approval of the Bank.
- (2) A foreign banking institution shall, in the form and manner required by the Bank, apply for an approval contemplated in subsection (1) and shall, together with the application, furnish such particulars or documents relating to the application as the Bank may specify and inform the applicant.
- (3) An application in terms of subsection (2) shall be accompanied by the prescribed application fee.
- (4) The representative office in Namibia of a foreign banking institution shall -
  - (a) not less than 20 days prior to the foreign banking institution -
    - (i) changing its name;
    - (ii) substituting its chief representative officer;
    - (iii) changing the address or location of its representative office in Namibia; or
    - (iv) closing down the representative office,

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

### **19A. Branches of foreign banking institutions**

- (1) An institution which has been incorporated in a country other than Namibia and which lawfully conducts in such other country a business similar to banking business (hereinafter referred to as the foreign institution) may, despite section 9, with the prior written authorization of the Bank and subject to conditions, if any, as the Bank may determine, conduct banking business by means of a branch in Namibia.
- (2) To obtain the prior authorization of the Bank as contemplated in subsection (1), the foreign institution concerned must in the manner and form required by the Bank lodge a written application with the Bank which must be accompanied by -
  - (a) a written statement containing information required by the Bank; and
  - (b) the prescribed application fee which is not refundable.
- (3) The Bank may require the foreign institution applying in terms of subsection (2) to furnish it with -
  - (a) such information or documents, in addition to information and documents furnished by the foreign institution in terms of subsection (2); or
  - (b) such further information with regard to the nature and extent of supervision exercised or to be exercised by the responsible supervisory authority of the foreign institution's country of domicile in respect of -
    - (i) the proposed branch in Namibia;
    - (ii) the foreign institution itself; or
    - (iii) any group of institutions of which the foreign institution may form a part,as the Bank may consider necessary.
- (4) After having considered an application in terms of subsection (2) the Bank, with the concurrence of Minister, and subject to the further provisions of this Act, may -
  - (a) refuse the application; or
  - (b) grant the application; or
  - (c) grant the application subject to such conditions as the Bank may impose,and in writing inform the applicant of its decision.
- (4A) Notwithstanding anything to the contrary in this Act or in any law, it shall be a condition for the grant of an application under subsection (4)(b) or (c) that the branch of the foreign institution concerned shall become and remain a member of the Scheme established under section 22 of the Deposit Guarantee Act, 2018 (Act No. 16 of 2018).  
*[subsection (4A) inserted by section 60 of Act 16 of 2018]*
- (5) The Bank may not grant an application in terms of subsection (4) unless the Bank is satisfied that all the requirements as determined by the Bank have been met.
- (6) If the Bank grants an application referred to in subsection (4), the Bank must issue to the foreign institution concerned a certificate of authorization to conduct banking business by means of a branch in Namibia.
- (7) Any foreign institution that conducts banking business by means of a branch in Namibia without having



obtained the Bank's written authorization referred to in subsection (1) commits an offence and is liable to the penalties provided for under section (72)(2)(a).

*[section 19A inserted by Act 14 of 2010]*

## **19B. Application of this Act to branches of foreign banking institutions**

- (1) A foreign banking institution authorized to conduct banking business by means of a branch in Namibia is construed as a banking institution in terms of this Act, and for all purposes this Act applies to any such branch, but the Minister, by notice in the Gazette, on the recommendation of the Bank, may exempt such branch from the application of certain provisions of this Act.
- (2) Unless expressly stated otherwise, any reference to a banking institution in any other law includes, in so far as it may be relevant, a reference to a branch in Namibia of a foreign banking institution.

*[section 19B inserted by Act 14 of 2010]*

## **Part IV – SHAREHOLDING IN BANKING INSTITUTIONS**

### **20. Restriction on shareholding and changes in shareholding**

- (1) Notwithstanding the Companies Act, but subject to the prior written approval of the Bank -
  - (a) no banking institution or controlling company shall allot or issue, or register the transfer of, any of its shares to a person; or
  - (b) no person shall acquire any shares in a banking institution or controlling company,  
to the extent to which the nominal value of the shares so allotted, issued, transferred or acquired, together with the nominal value of any other shares in the banking institution or controlling company already registered in the name of such person or in the name of any related party of such person, equals or exceeds in total 20 per cent of the total nominal value of all issued vote-bearing shares in the banking institution or controlling company.
- (2) Without prior written notification to the Bank -
  - (a) no banking institution or controlling company shall allot or issue, or register the transfer of, any of its shares to a person; or
  - (b) no person shall acquire any shares in a banking institution or controlling company,  
to the extent to which the nominal value of such shares so allotted, issued, transferred or acquired, together with the nominal value of any other shares in the banking institution or controlling company already registered in the name of such person or any related party of such person, equals or exceeds, subject to subsection (1), five per cent of the total nominal value of all issued vote-bearing shares in the banking institution or controlling company.
- (3) If the nominal value of shares in a banking institution or controlling company issued or to be registered in the name of a person, together with the nominal value of the shares already held by the person, amount to the lesser of N\$100 000 or one per cent of the value of all the shares issued in the banking institution or controlling company, the 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 or controlling company.
- (4) No person who is not a fit and proper person in accordance with the criteria for fitness and properness relating to substantial shareholders as determined by the Bank, shall become a substantial shareholder of a banking institution or controlling company.
- (5) No banking institution or controlling company shall allot or issue, or register a transfer of, shares to a person -

- (a) who is; or
  - (b) who shall, as a result of the allotment, issue or registration, become, a substantial shareholder of the banking institution or controlling company, if such person is prohibited in terms of subsection (4) to be, or to become, a substantial shareholder of a banking institution or controlling company.
- (6) For the purposes of this section, a “related party” in respect of a person means -
- (a) an associate or close relative of the person; or
  - (b) any other person who has entered into an agreement with the person relating to -
    - (i) the acquisition, holding or disposal; or
    - (ii) the exercising of voting rights in respect, of shares in a banking institution or controlling company or in any trust controlled or administered by the person.

*[section 20 amended by Act 14 of 2010 by the insertion after the expression “banking institution” of the expression “or controlling company”]*

## 21. Shareholder’s register and registration of shares

- (1) Subject to subsection (3), a banking institution or controlling company shall, in such form and manner as the Bank may approve, maintain a register of the current beneficial holders of all vote-bearing shares in the banking institution or controlling company.
- (2) The transfer of a share referred to in subsection (1), shall 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 or controlling company in terms of section 93 of the Companies Act clearly reflects the particulars of the current beneficial holders, and a record of any change in the holders, of all the shares referred to in subsection (1) of this section, the Bank may, at the request of the banking institution or controlling company, in writing exempt the banking institution or controlling company from the requirement to maintain the register contemplated in that subsection.
- (4) Notwithstanding the provisions of the Companies Act, a banking institution or controlling company shall not, without the prior written approval of the Bank -
  - (a) allot or issue any of its shares to, or register any of its shares in the name of, any person other than the intended beneficial shareholder;
  - (b) transfer any share in the name of any person other than the beneficial shareholder; or
  - (c) allow any of its shares registered in the name of a person other than the beneficial shareholder before the commencement date of this Act, to remain so registered.
- (5) Subsection (4) shall, subject to subsection (6), not affect the allotment or issue, or the registration of a transfer, of shares in a banking institution or controlling company -
  - (a) in the name of a trustee of a unit trust scheme as defined in the Unit Trust Control Act, 1981 (Act 54 of 1981), or of a nominated company of the trustee approved by the Registrar of Unit Trust Companies referred to in that Act;
 

*[Act 54 of 1981 is actually the Unit Trusts Control Act (with “Trusts” in plural).]*
  - (b) in the name of an executor, administrator, trustee, curator, guardian or liquidator, as the case may be, in the circumstances referred to in section 103(3) of the Companies Act; or
  - (c) for a period of not more than six months in the name of a stock broker, or in the name of a

company established by him or her for any purpose contemplated in section 12(3) of the Stock Exchanges Control Act, 1985 (Act 1 of 1985), or in the name of an employee of the company,

if the banking institution 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 thereof.

- (6) The banking institution or controlling company referred to in subsection (5) shall in writing furnish the Bank with full particulars of the transaction relating to the allotment, issue or registration of the shares contemplated in that subsection.
- (7) The voting rights attached to the shares registered in terms of subsection (5) shall, unless otherwise determined by the Bank, not be more than 25 per cent of the aggregate of the voting rights attached to all the issued shares of the banking institution or controlling company concerned.

*[section 21 amended by Act 14 of 2010 by the insertion after the expression "banking institution" of the expression "or controlling company"]*

## 22. Furnishing of information by shareholders

- (1) At the written request of a banking institution or controlling company addressed to a person who has notified the banking institution or controlling company that he or she or it intends to acquire shares in the banking institution, such person shall, subject to subsection (2), furnish the banking institution or controlling company with the information or particulars specified in such request and which the banking institution or controlling company considers necessary to enable it to comply with sections 20 or 21, as the case may be.
- (2) The information or particulars contemplated in subsection (1) shall be furnished to the banking institution or controlling company in such form as the banking institution may specify in the request contemplated in that subsection.

*[section 22 amended by Act 14 of 2010 by the insertion after the expression "banking institution" of the expression "or controlling company"]*

## 23. Absence of wrongful intent

If a banking institution or a controlling company, or any director, officer, employee or agent of the banking institution or controlling company, on the strength of information or particulars reasonably obtained by him or her, in good faith and without wrongful intent, acts, or fails to act, in contravention of section 20(1), (2), (3), (4) or (5) or 21(1), (2), (4), (6) or (7), such act or failure to act shall not constitute an offence.

## 24. Effects of registration of shares contrary to Act

- (1) No person shall -
  - (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 controlling company allotted or issued to him or her, or registered in his or her name, in contravention of any provision of this Act.
- (2) A vote cast in contravention of paragraph (a) of subsection (1) shall, for the purposes of this Act, be null and void.
- (3) A dividend referred to in paragraph (b) of subsection (1) shall accrue to the banking institution or controlling company or the controlling company concerned, as the case may be.

*[Section 24 is amended by Act 14 of 2010 by the insertion after the expression "banking institution" of the expression "or controlling company". However the words "or the controlling company" already appeared after "banking institution" in subsection (3), thus producing a duplication of wording as shown above.]*

## 25. Restriction of right to control banking institution

- (1) Subject to subsection (3) and section 20, a person may not acquire, or directly or indirectly exercise, control over a banking institution, unless such person is -
  - (a) a fit and proper person as contemplated in section 20(4);
  - (b) incorporated as a company under the Companies Act; and
  - (c) registered as a controlling company in terms of section 12B in respect of such banking institution.
- (2) The Bank, by notice in writing addressed to a person, may prohibit the person to acquire or to exercise control over a banking institution, or to continue to exercise such control within a period specified in the notice, if in the opinion of the Bank the person -
  - (a) is not fit and proper having regard to the structure and business activities of the corporate group of which the person is a member;
  - (b) has furnished the Bank in or in connection with its application for registration with information which is in a material respect untrue;
  - (c) is conducting its business in a manner detrimental to the banking institution in respect of which it was registered as a controlling company; or
  - (d) has contravened or failed to comply with a provision of or a requirement under this Act.
- (3) The notice under subsection (2), in the case of a company registered as a controlling company, must -
  - (a) compel such company to reduce, within a period determined by the Bank, the shareholding of that company in that banking institution to a shareholding with a total nominal value of not more than 20 per cent of the total nominal value of all the issued shares of that banking institutions;
  - (b) limit, with immediate effect, the voting rights that may be exercised by such person by virtue of the shareholding of that person to not more than 20 per cent of the voting rights attached to all the issued share of the banking institution concerned; and
  - (c) limit, with immediate effect, the power to appoint remove, without the concurrence of any other person, all or the majority of such directors.
- (4) A person who fails to comply with a notice issued under subsection (2) commits an offence and is liable to the penalties provided for under section (72)(2)(a).

*[section 25 substituted by Act 14 of 2010]*

## 26. Prohibitions and restrictions

- (1) The Bank may, if it is satisfied that a banking institution or controlling company or any other person has contravened, or has failed to comply with, any of the provisions of section 20, 21, 22 or 25, as the case may be, in writing make a preliminary order imposing one or more of the restrictions specified in subsection (2) on the person or on the banking institution or controlling company, as the case may be, as the Bank may consider appropriate.
- (2) A preliminary order by the Bank contemplated in subsection (1) may, in respect of any of the shares forming the subject of, or related to, the contravention or failure referred to in that subsection, prohibit -
  - (a) the transfer of, or the due performance in terms of any agreement to transfer, the shares; or
  - (b) in the case of unissued shares, the transfer of, or the right to be issued with, the unissued shares;
  - (c) the exercise of any voting rights in respect of the shares;
  - (d) the issue of any further shares in pursuance to any offer made to the holder of the shares; or
  - (e) except in the case of liquidation, the payment of any amount whatsoever due by the banking

institution in respect of the shares.

- (3) A preliminary order made by the Bank under subsection (1) shall -
  - (a) be in the form required, and signed by a person appointed, by the Bank;
  - (b) be addressed to the banking institution or controlling company or person concerned;
  - (c) specify, and contain full particulars of, the order made by the Bank; and
  - (d) during normal hours of business be delivered by a person appointed in writing by the Bank for such purpose, upon the principal officer of the banking institution or controlling company or upon the other person contemplated in subsection (1), as the case may be, to whom the preliminary order is directed, or, in the case of a banking institution or controlling company, if the principal officer is not available, upon any person over the age of 16 years employed by the banking institution or controlling company.
- (4) The person to whom the preliminary order is delivered in terms of subsection (3)(d), shall -
  - (a) in writing acknowledge receipt of the order, specifying -
    - (i) the full names and designation of the person who received the order; and
    - (ii) the date and time of such receipt; and
  - (b) sign the acknowledgment of receipt contemplated in paragraph (a).
- (5) The Bank may, at its discretion and in addition to the delivery of the preliminary order in terms of subsection (3)(d) upon the banking institution or controlling company or upon the other person concerned, publish the preliminary order in one or more newspapers in the manner and form as the Bank may specify.
- (6) A preliminary order delivered upon a banking institution or controlling company or other person in terms of subsection (3)(d) shall, from the date of such delivery, be binding upon the banking institution or controlling company or the other person, as the case may be, to whom the order is directed and to whom it is delivered in terms of that subsection.
- (7) A person holding shares in a banking institution or controlling company and to whom a preliminary order has been delivered in terms of subsection (3)(d) shall, within seven days after the date of such service, or within such longer period of time as the Bank may allow, surrender the share certificates concerned to the Bank, together with such other documents relating to the shares as the Bank may specify in the order.
- (8) Any person to whom a preliminary order has been delivered in terms of subsection (3)(d), or any other person prejudiced by the order, may within a period of 14 days after the date of service of the order, or after the date upon which he or she became aware of the order, as the case may be, make written representations to the Bank applying for -
  - (a) the cancellation of the order on the grounds that the person had not contravened, or had not failed to comply with, any provision of this Act as specified in the order; or
  - (b) an amendment of the order on the grounds specified in the application.
- (9) The Bank may, after considering the representations made to it in terms of subsection (8) -
  - (a) confirm the preliminary order;
  - (b) cancel the preliminary order; or
  - (c) confirm the preliminary order subject to such amendments as the Bank may consider appropriate.
- (10) If the Bank confirms a preliminary order under subsection (9), it may dispose of the shares surrendered to it in terms of subsection (7), in such manner as it may consider appropriate, to a person qualified to hold such shares in terms of this Act.
- (11) The proceeds of a sale of shares under subsection (10) shall, subject to subsection (12), be paid by the Bank

to the person entitled to the proceeds.

- (12) If the Bank is for any reason unable to pay the proceeds referred to in subsection (11) to the person entitled thereto under that subsection, section 60(1) shall mutatis mutandis apply to the proceeds.
- (13) The Bank may in writing give such instructions or directions to the directors or officers of a banking institution or controlling company contemplated in subsection (1) as the Bank may consider necessary to give effect to an order made by the Bank under this section.
- (14) Any transaction, including any agreement or arrangement, in relation to any shares or security, or to any interest in any shares or security, which is in contravention of -
- (a) any order made under this section; or
  - (b) any instruction or direction given under subsection (13),
- by the Bank, shall be null and void.
- (15) The Bank may, irrespective of whether a person contemplated in subsection (1) has been prosecuted in respect of the contravention of, or failure to comply with, a provision of this Act referred to in that subsection, make a preliminary order or take such other steps as the Bank may consider appropriate.
- (16) Any person who fails to comply with any provision of subsection (4) is liable to a fine determined by the Bank.

*[subsection (16) amended by Act 14 of 2010]*

*[section 26 amended by Act 14 of 2010 by the insertion after the expression "banking institution" of the expression "or controlling company"]*

## **Part V – PRUDENTIAL REQUIREMENTS AND LIMITATIONS**

### **27. Standards of corporate behaviour**

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

*[subsection (2) amended by Act 14 of 2010 by the insertion after the expression "banking institution" of the expression "or controlling company"]*

### **28. Minimum capital funds**

- (1) The minimum capital funds, unimpaired by losses, of a banking institution shall, subject to subsection (2), (4) or (5), as the case may be, at any time not be less than the greater of -
- (a) an amount determined by the Bank; or
- [paragraph (a) amended by Act 14 of 2010]*
- (b) an amount which represents a percentage of the risk weighted assets and other exposures of a banking institution as the Bank may determine.
- (2) ...

*[subsection (2) deleted by Act 14 of 2010]*

(3) ...

*[subsection (3) deleted by Act 14 of 2010]*

- (4) Notwithstanding any provision of this section, the Bank may, if it is of the opinion that there is a risk of the existing capital funds of a banking institution being impaired, require the banking institution to, in addition to the capital funds required by or under subsection (1), acquire such further capital funds as the Bank may specify.
- (5) The Bank may -
- (a) on application in writing and on good cause shown, in writing permit a banking institution to, for such limited period of time as the Bank may specify, have capital funds which are lower than the capital funds determined by or under subsection (1), and which limited period of time and the amount of the lower capital funds shall be specified in the permission;
  - (b) determine that the capital requirements of a banking institution contemplated in subsection (1), shall, on a consolidated basis, apply to, and the capital be reflected in the consolidated accounts of, the banking institution, its holding company or the affiliate or associate of the banking institution or its holding company; or
  - (c) for the purposes of this section, determine the percentage and risk weighting of assets or other exposures.

## **28A. Minimum capital funds in respect of banking group**

- (1) Despite section 28(1), but subject to subsection (2), a controlling company must manage its affairs in such a way that the sum of the capital funds of the banking group structured under such controlling company does not at any time amount to -
- (a) less than the sum of the amounts of the required capital funds determined, for the respective entities constituting such banking group, in accordance with the rules and regulations of the respective regulators responsible for the supervision of those entities;
  - (b) plus such amount as may be determined by the Bank in respect of entities that are not subject to the supervision of a regulator.
- (2) In calculating the aggregate amount a banking group is required to maintain in terms of subsection (1), the sum of the banking group's capital funds is calculated by deducting from it such amounts as may be determined.
- (3) Despite paragraphs (a) and (b) of the definition of "banking group", the Bank, after having regard to the structure and business activities of a banking group, and by notice in the Gazette, may include in or exclude from that definition any person or persons.

*[section 28A inserted by Act 14 of 2010]*

## **29. Composition of capital funds**

The Bank may, for the purposes of section 28, determine the composition and proportions of the different classes of capital constituting capital funds contemplated in, and other requirements and criteria of approval relating to, the last mentioned section.

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

- (1) A banking institution shall, in order to ascertain whether the banking institution is complying with section 28, 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;

*[paragraph (a) amended by Act 14 of 2010]*

- (b) operating losses, including depreciation and bad debts not yet written off;
  - (c) any amount representing expenses relating to the organisation or extension of business or goodwill, or other intangible assets, to be calculated not less than quarterly; or
  - (d) such other item or items as the Bank may determine.
- (2) The minimum standards for provision for bad, doubtful or substandard debts, the accounting treatment and suspension of interest of non-performing loans as contemplated in subsection (1) may be determined by the Bank.

*[subsection (2) amended by Act 14 of 2010]*

- (3) If a capital requirement is to be applied on a consolidated basis in terms of section 28(5)(b), subsection (1) of this section shall apply to all persons within the group constituting the consolidation.

### **31. Minimum liquid assets**

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

### **32. Restriction on dividends**

- (1) A banking institution, if its capital is adequate in terms of section 28, may declare, pay or credit dividend, or make any transfer from its profits.

*[The word "dividend" should be "dividends" to be grammatically correct.]*

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

*[section 32 amended by Act 14 of 2010]*

### **33. Minimum local assets**

- (1) A banking institution shall maintain the minimum local assets as determined by or under this section.
- (2) The minimum local assets contemplated in subsection (1) shall be determined by the Bank.
- (3) For the purposes of this section, "local assets" means any asset consisting of exposures with persons permanently resident in Namibia and other assets situated in Namibia.

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

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

*[subsection (3) amended by Act 14 of 2010]*

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

No banking institution shall, 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, of its holding company or of any of its subsidiaries.

### **36. Exposure to directors, to officers with managerial responsibilities or to shareholders to be secured**

- (1) No banking institution may have any exposure to -

- (a) any director or officer with managerial responsibility in the banking institution;
- (b) any substantial shareholder in the banking institution;
- (c) any of the banking institution’s auditors;
- (d) any affiliate, associate or close relative of a person referred to in paragraph (a), (b) or (c), as the case may be; or
- (e) any body corporate or unincorporated of or in which a person referred to in paragraph (a), (b) or (c), as the case may be, is a director, a substantial shareholder or a guarantor, or otherwise has an interest,

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

*[subsection (1) amended by Act 14 of 2010]*

- (2) ...

*[subsection (2) deleted by Act 14 of 2010]*

- (3) ...

*[subsection (3) deleted by Act 14 of 2010]*

- (4) ...

*[subsection (4) deleted by Act 14 of 2010]*

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

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

*[section 37 substituted by Act 14 of 2010]*

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

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

*[subsection (1) amended by Act 14 of 2010]*

- (2) A banking institution shall not grant a loan, advance or credit facility under subsection (1) unless such loan, advance or credit facility -
- (a) is fully secured;
  - (b) is subject to the criteria or conditions for the granting of, or the terms and conditions relating to the payment of interest on, or the repayment of, the loan, advance or credit facility which is not more favourable than the criteria or conditions ordinarily applicable to any member of the public; and
  - (c) has been approved by the majority of the entire board of directors or a committee of the board of directors.

*[paragraph (c) amended by Act 14 of 2010]*

- (3) Any banking institution which -
- (a) without the approval of the Bank in terms of subsection (1), grants a loan in terms of that subsection; or
  - (b) grants a loan in contravention of subsection (2),
- must pay a fine as determined by the Bank.

*[subsection (3) amended by Act 14 of 2010]*

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

*[subsection (4) inserted by Act 14 of 2010]*

### **39. Restriction on commercial activities**

- (1) A banking institution shall 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 banking institution shall not, subject to subsection (6), conduct, or have any direct interest in, any activities relating to merchandise, trade, industry, insurance, mining, agriculture, fisheries or commerce unless such activities -
- (a) are permitted in terms of subsection (1); or
  - (b) may, in exceptional circumstances, be necessary in the course of -
    - (i) the banking business of the banking institution, or in the course of the satisfaction of debts which may be incurred as a result of such banking business; or
    - (ii) any trusteeship or the administration of the estate of a deceased person.
- (3) The Minister may, on the recommendation of the Bank, by notice in the Gazette define the activities of a banking institution contemplated in subsection (2).
- (4) If a banking institution fails to comply with this section, or conducts activities which are in contravention of this section, the Bank may by means of a written notice delivered to such banking institution *mutatis mutandis* in accordance with section 26(3)(d) instruct such banking institution to, within the period of time specified in the instruction, comply with this section or to discontinue the activities so conducted in contravention of this section, as the case may be.
- (5) If a banking institution fails to comply with an instruction under subsection (4), the Bank may, under section 15, cancel the authorisation to conduct banking business granted to the banking institution.
- (6) The Bank may, upon a written application made by a banking institution and delivered to the Bank, and subject to such conditions as the Bank may impose, exempt the banking institution from the restrictions

in subsection (2), or from such provisions of that subsection as the Bank may specify in the exemption.

#### 40. Limitation on investment in property

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

### Part VI – DIRECTORS, PRINCIPAL OFFICERS AND AUDITORS

#### 41. Directors and principal officers and executive officers of banking institutions

- (1) The number of directors of a banking institution, subject to subsection (2), may not be less than five.  
*[subsection (1) amended by Act 14 of 2010]*
- (2) Not more than one half of the total number of the directors contemplated in subsection (1) may be employed by the banking institution concerned, or by any of its subsidiaries or by its holding company, including any of the subsidiaries of the holding company, as the case may be.  
*[subsection (2) amended by Act 14 of 2010]*
- (3) ...  
*[subsection (3) deleted by Act 14 of 2010]*
- (4) The Bank may, upon a written request by a banking institution, in writing exempt the banking institution from subsection (1) or (2) for such period, and subject to such conditions, as the Bank may impose and specify in such exemption.
- (5) Subject to subsection (6), the Bank may determine -
  - (a) the conduct and the qualifications applicable to, or to be complied with by; and
  - (b) the manner of, and the criteria and procedures relating to, the election or appointment of a person as,  
a director or the principal officer or executive officer of a banking institution or controlling company.  
*[subsection (5) amended by Act 14 of 2010]*
- (6) ...  
*[subsection (6) deleted by Act 14 of 2010]*
- (7) The board of directors of a banking institution or controlling company -

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

*[subsection (7) amended by Act 14 of 2010]*

- (8) A director, in relation to the banking institution or to the controlling company of which he or she is a director, must act honestly and in good faith in the best interest and for the benefit of the banking institution and its depositors, or of the controlling company, as the case may be, and must in the performance of his or her functions as a director comply with this Act.

*[subsection (8) amended by Act 14 of 2010]*

- (9) The principal officer of a banking institution or controlling company or -
  - (a) any other officer of the banking institution or controlling company acting on his or her behalf, must, despite any action taken by the board of directors, immediately inform the Bank if he or she has reason to believe that any of the events contemplated in subsection (7)(d) may, or is likely to, occur;
  - (b) a principal officer or manager of a branch of a banking institution, may not -
    - (i) engage in any commercial business activities other than -
      - (aa) for or on behalf; and
      - (bb) in his or her capacity as an officer, of the banking institution; or
    - (ii) be an agent of any other person engaged in any business contemplated in subparagraph (i), unless the position held by such person is that of a director of a company which is in liquidation, whether

provisionally or final, or is being wound-up or is under judicial management, or if the Bank, on the recommendation of the board of directors of the banking institution, has exempted the principal officer or the manager from this paragraph.

*[subsection (9) amended by Act 14 of 2010]*

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

(a) in which -

- (i) he or she or any of his or her close relatives;
- (ii) any company in which he or she or any of his or her close relatives is a substantial shareholder; or
- (iii) any other organisation in which he or she or any of his or her close relatives is a partner or member,

has any personal or economic interest; or

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

*[subsection (10) amended by Act 14 of 2010]*

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

*[subsection (11) amended by Act 14 of 2010]*

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

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

*[subsection (12) amended by Act 14 of 2010]*

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

*[subsection (13) amended by Act 14 of 2010]*

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

*[subsection (14) inserted by Act 14 of 2010]*

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

*[subsection (15) inserted by Act 14 of 2010]*

(16) If the Bank objects to the proposed appointment as envisaged in subsection (15), the banking institution

or controlling company, may not appoint the nominee and any purported appointment has no legal effect.

*[subsection (16) inserted by Act 14 of 2010]*

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

*[subsection (17) inserted by Act 14 of 2010]*

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

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

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

*[subsection (18) inserted by Act 14 of 2010]*

## 42. Audit committee

- (1) The audit committee established by the board of directors of a banking institution in terms of section 41(7)(e) shall, subject to this section or to the determinations issued by the Bank, have such powers, duties and functions as the board of directors may specify and inform the audit committee in writing.

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

*[subsection (2) amended by Act 14 of 2010]*

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

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

- (a) the members of the audit committee;
- (b) the officer responsible for the internal audit function of the banking institution;
- (c) the auditor of the banking institution appointed in terms of section 43;
- (d) any other auditor of the banking institution; and
- (e) the officer responsible for the financial or treasury functions of the 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 to be undertaken by the auditor appointed in terms of section 43;
- (b) review the internal audit programme of the banking institution, to ensure co-ordination between the internal audit programme and the audit undertaken by the auditor appointed in terms of section 43, and to ensure that sufficient trained and skilled officers of appropriate standing, to the satisfaction of the audit committee, in the banking institution undertake and implement the internal audit programme of the banking institution;
- (c) review and update the internal controls and systems of the banking institution;
- (d) consider, discuss and make recommendations to the board of directors relating to any issue or reservation raised by the auditor appointed in terms of section 43, or any finding made during

- internal investigations arising from the internal audit programme of the banking institution;
- (e) review the financial statements of, or to make recommendations to, the banking institution relating to the financial statements; and
  - (f) perform such other duties and functions as the board of directors of the banking institution may specify.
- (6) The company secretary shall be the secretary of the audit committee and shall have such duties and perform such functions as the board of directors of the banking institution may specify.

### 43. Appointment of auditor

- (1) Notwithstanding Chapter X of the Companies Act, a banking institution or controlling company shall annually appoint an auditor for the banking institution or controlling company.
- (2) A banking institution or controlling company must, 10 days prior to the annual meeting, submit details regarding the auditor it intends to appoint in terms of subsection (1) in the form and manner required by the Bank, and apply to the Bank for the Bank's approval of the appointment.  
*[subsection (2) amended by Act 14 of 2010]*
- (3) On receipt of an application in terms of subsection (2), the Bank shall -
  - (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 shall in writing inform the banking institution or controlling company of its decision.
- (4) If the Bank under paragraph (c) of subsection (3) approves the appointment subject to conditions, the Bank shall in writing furnish the banking institution or controlling company concerned with particulars of the conditions so imposed.
- (5) No person shall hold office as an auditor of a banking institution or controlling company unless his or her appointment as such has been approved by the Bank under subsection (3).
- (6) The Bank may determine criteria or procedures relating to the appointment of, the conduct by, the duties of, and the requirements or qualifications in respect of, an auditor.
- (7) If -
  - (a) a banking institution 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 or controlling company; or
  - (c) an auditor appointed by a banking institution or controlling company in terms of subsection (1) is disqualified in terms of section 44 to act as an auditor,the Bank may, for or on behalf of the banking institution or controlling company, appoint an auditor.
- (8) An auditor appointed by the Bank for or on behalf of a banking institution or controlling company under subsection (7) shall be deemed to be an auditor appointed by the banking institution or controlling company in terms of subsection (1) and approved by the Bank under subsection (3).
- (9) The Bank may, at any time, withdraw an approval granted under subsection (3) or an appointment made under subsection (7), if the auditor concerned -
  - (a) fails to comply with -
    - (i) the conditions, if any, imposed by the Bank under paragraph (c) of subsection (3); or

- (ii) the criteria determined by the Bank as contemplated in subsection (6); or
- (b) becomes disqualified in terms of section 44 to act as an auditor.

*[section 43 amended by Act 14 of 2010 by the insertion after the expression "banking institution" of the expression "or controlling company"]*

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

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

- (a) any of the grounds for disqualification stipulated by section 275 of the Companies Act applies to the person;
- (b) the appointment of the auditor by a banking institution or controlling company was not approved by the Bank, or an approval granted by the Bank has been withdrawn under section 43(9);
- (c) the auditor, either directly or indirectly, has a material interest in the 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 43(6) are not complied with.

*[section 44 amended by Act 14 of 2010 by the insertion after the expression "banking institution" of the expression "or controlling company"]*

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

- (1) An auditor appointed by a banking institution or controlling company in terms of section 43 shall in writing inform the board of directors of the banking institution or controlling company and the Bank of -
  - (a) the banking institution's or controlling company's ability or inability to meet with the requirements of section 28 or 31;
  - (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 or controlling company to continue conducting business as a going concern;
    - (ii) be detrimental to the interest of the customers of the banking institution or 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 or controlling company.
- (2) The duties of an auditor appointed in terms of section 43 shall include the duties of an auditor -
  - (a) in terms of the Companies Act;
  - (b) in terms of this Act or any other law; and
  - (c) determined by the Bank as contemplated in subsection (6) of that section.
- (3) The auditor shall assess, and in writing comment on, the report of the board of directors made in terms of section 41(7)(c) before the report is tabled at the annual general meeting.
- (4) A copy of the comments made by an auditor in terms of subsection (3), signed by the auditor and by the chairperson of the board of directors, shall be transmitted by the banking institution or controlling



company concerned to the Bank not more than 20 days after the receipt by the board of the auditor's comments.

- (5) If an auditor, acting in good faith and not negligently or with wrongful intent, furnishes any information to any person in terms of subsection (1), (2) or (4), or makes any comments in terms of subsection (3), such actions by the auditor shall not -
- (a) constitute a contravention of any provision of any law or a breach of a code of professional conduct which the auditor may be subject to; or
  - (b) cause the auditor to incur any liability to any person as a consequence of the furnishing of the information or the making of the comments.

*[section 45 amended by Act 14 of 2010 by the insertion after the expression "banking institution" of the expression "or controlling company"]*

## Part VII – SUPERVISION BY BANK

### 46. Financial and other records

- (1) A banking institution must, in the official language of Namibia, keep core banking systems that contain records and documentation covering core functional areas and such accounting and other records as are necessary to reflect the true and fair state of its affairs and to explain its transactions and financial position in such a manner so as to enable the Bank to ascertain whether the banking institution is complying with this Act.
- (2) The core banking systems, accounting and other records contemplated in subsection (1) must be kept in Namibia and must, subject to subsection (4), comply with the requirements -
- (a) of section 284 of the Companies Act; and
  - (b) determined by the Bank,
- and must be kept and maintained by the banking institution for a period of not less than five years after the date of the last entry in such records.
- (3) A person may not, with the intent to deceive, in any book, record, report, statement or other document relating to the business, affairs, transactions, conditions, property, assets, liabilities or accounts of a banking institution or controlling company -
- (a) make a false entry, knowing such entry to be false, or cause such an entry to be made; or
  - (b) omit an entry, or cause such an entry to be omitted; or
  - (c) alter, abstract, conceal, remove or destroy an entry, or cause an entry to be altered, abstracted, concealed, removed or destroyed.

- (3) For the purposes of this section, "other 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 or controlling company.

*[Section 46 is amended by Act 14 of 2010. The comma after "other records" is superfluous. The final subsection should be (4) instead of (3); there are two subsections numbered "(3)" in the substitution made by the amending Act.]*

### 47. Financial statements

- (1) The Companies Act, subject to the further provisions of this section, applies to the financial statements of a banking institution or a controlling company.
- (2) Despite subsection (1) -

- (a) the Bank may determine -
  - (i) that all or any of the exemptions contained in paragraph 70 of Part V of Schedule 4 to the Companies Act may not, subject to such determination, apply to a banking institution or a controlling company;
  - (ii) additional requirements not in conflict with this Act relating to the financial statements contemplated in subsection (1); and
- (b) a banking institution or a controlling company must -
  - (i) in its annual financial statements disclose the name of a shareholder who holds 20 per cent or more of the total voting rights in the banking institution or a controlling company;
  - (ii) despite anything to the contrary in any other law, submit to the Bank, within three months after the end of its financial year, but at least 30 days before its annual general meeting, its audited financial statements; and
  - (iii) subject to subsection (4), within a period of one month from the date of acceptance of the financial statements at an annual general meeting of the banking institution or controlling company, publish the financial statements in a newspaper as may be approved, and in the form specified, by the Bank.
- (3) Despite anything to the contrary in the Companies Act, or any other law, a banking institution 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 or controlling company and subject to such conditions as the Bank may impose, in writing extend any period of time specified in subsection (2)(b)(ii), (2)(b)(iii) or (3), as the case may be.
- (5) If the Bank is satisfied that the financial statements of a banking institution or controlling company do not comply with this Act or with any additional requirement determined by the Bank in accordance with subsection (2)(a)(ii), or contain information that may be misleading in any way, or are not published in the form specified by the Bank, the Bank may by notice in writing require the banking institution or controlling company -
  - (a) to amend or correct the financial statements to comply with this Act or with the additional requirements;
  - (b) to correct the misleading information;
  - (c) to re-publish the amended or corrected financial statements; or
  - (d) to submit to the Bank -
    - (i) such further or additional documents or information; or
    - (ii) such explanation or amplification relating to any document or information,to the satisfaction of the Bank or as the Bank may consider necessary.

*[section 47 amended by Act 14 of 2010]*

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

If a banking institution 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 shall also be disclosed in such statement or document.

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

- (1) A banking institution or controlling company shall, at such times and in such manner as the Bank may in

writing require and notify the banking institution or controlling company mutatis mutandis in accordance with section 26(3)(d), submit to the Bank a statement containing full particulars of all the assets and liabilities of the banking institution or controlling company, including information relating to all the assets and liabilities of the banking institution or controlling company outside Namibia.

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

(3) If a 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 170(2) of the Companies Act, gives notice to the Registrar of Companies of any change in the situation of its registered office or of its postal address;
- (c) in terms of section 216(2) of the Companies Act, lodges with the Registrar of Companies a return regarding its directors; or
- (d) in terms of section 302(4) of the Companies Act, forwards to the Registrar of Companies a copy of its annual financial statements,

the banking institution or controlling company shall simultaneously with the forwarding or lodging of the notice, report, return or statements, as the case may be, furnish the Bank with a copy of the notice, report, return, or statements, as the case may be, so forwarded or lodged.

(4) A banking institution or controlling company shall -

- (a) within a period of one month after a general meeting of shareholders, forward to the Bank a copy of the minutes of the meeting kept in terms of section 204 of the Companies Act; or
- (b) at the written request of the Bank, within the period of time and in the form stated in the request, furnish the Bank with particulars to enable the Bank to ascertain whether the banking institution or controlling company is complying with section 28.

(5) The Bank may require the auditors of a banking institution or controlling company appointed in terms of section 43 to certify as correct and accurate any information submitted by the banking institution or controlling company to the Bank in terms of this section.

*[section 49 amended by Act 14 of 2010 by the insertion after the expression "banking institution" of the expression "or controlling company"]*

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

*[subsection (6) inserted by Act 14 of 2010]*

## 50. Reporting of certain transactions by banking institutions

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

*[The word "arises" is incorrect in this sentence. The intended wording may have been "raises" or "arouses" or "gives rise to".]*

## 51. Extension of time

If a 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 or controlling company, in writing extend the period of time specified for the furnishing of the information or document, as the case may be.

*[section 51 amended by Act 14 of 2010 by the insertion after the expression "banking institution" of the expression "or controlling company"]*

## 52. Examination by Bank

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

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

*[subsection (1) amended by Act 14 of 2010]*

(2) Section 6 applies with necessary changes to an examination under this section.

*[subsection (2) amended by Act 14 of 2010]*

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

*[subsection (3) amended by Act 14 of 2010]*

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

*[subsection (4) amended by Act 14 of 2010]*

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

*[subsection (5) amended by Act 14 of 2010]*

(6) If not less than one-fifth of the total number of the depositors of a banking institution representing not less than one-fifth of the total value of the deposits made with the banking institution, in 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.

*[subsection (6) amended by Act 14 of 2010]*

(7) The Bank must only conduct an examination contemplated in subsection (6) if the depositors referred to

in that subsection, together with their request as contemplated in that subsection, provide the Bank with proof, to the satisfaction of the Bank, that such an examination may be justified.

*[subsection (7) amended by Act 14 of 2010]*

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

*[subsection (8) amended by Act 14 of 2010]*

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

*[Subsection (9) is amended by Act 14 of 2010. The wording of the amended subsection is reproduced above as it appears in the Government Gazette, but it should probably read as follows: "In the report furnished to the board of directors of the banking institution or the controlling company in terms of subsection (8), the Bank may direct such board of directors to, within the period of time specified in the report, rectify the deficiencies mentioned in the report."]*

- (10) For the purposes of this section and of section 53, a banking institution, includes an affiliate or associate of the banking institution.

*[Subsection (10) is amended by Act 14 of 2010. The comma after "banking institution" is superfluous.]*

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

*[subsection (11) inserted by Act 14 of 2010]*

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

- (1) For the purpose of an examination by the Bank under section 52, the banking institution concerned shall 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 and relating to the business of the banking institution; and
  - (b) all information concerning the business of the banking institution as may be required by such person,

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

- (2) Any person authorised by the Bank in writing to conduct an examination under section 52, may, for the purposes of such examination, take possession of any document or other item referred to in subsection (1) of, and to which such person has access under, this section.
- (3) Any banking institution, its affiliate or associate who fails to allow any person referred to in subsection (2) access to or possession of, or refuses or fails to produce to such person any document or other item referred to in, or to give information in accordance with, that subsection, or to provide to the person suitable facilities for the purposes of conducting an examination under that subsection, is liable to a fine determined by the Bank.

*[subsection (3) amended by Act 14 of 2010]*

## 54. Approval of special resolutions, amalgamation and transfer of assets and liabilities

*[heading of section 54 amended by Act 14 of 2010]*

- (1) A banking institution or controlling company shall not, without the prior written approval of the Bank -
- (a) enter into a merger or consolidation;
  - (b) transfer, or otherwise dispose of, the whole or part of its property, whether situated in or outside Namibia, other than in the ordinary course of business;
  - (c) effect a reduction of its paid-up share capital;
  - (d) change the name of the banking institution or controlling company; or
  - (e) take any other action which requires a special resolution of the shareholders of the banking institution or controlling company.
- (2) A banking institution or controlling company which requires the approval of the Bank in terms of subsection (1) shall in writing apply to the Bank for the granting of the required approval and shall, to the satisfaction of the Bank, in the application furnish the Bank with full particulars relating to the proposed transaction or action.
- (3) After considering an application made in terms of subsection (2), the Bank shall -
- (a) refuse the application;
  - (b) grant the application; or
  - (c) grant the application subject to such conditions as the Bank may impose,
- and shall in writing inform the banking institution or controlling company of its decision under this subsection.
- (4) If the Bank, under paragraph (a) of subsection (3) refuses an application made in terms of subsection (2), or under paragraph (c) of that subsection grants an application subject to conditions, the Bank shall in writing furnish the banking institution or controlling company with reasons for the refusal of the application or for the imposition of the conditions, as the case may be.

*[section 54 amended by Act 14 of 2010 by the insertion after the expression "banking institution" of the expression "or controlling company"]*

- (5) If the Bank in writing approves an application referred to in subsection (1)(a) or (b) in terms of subsection 3(b) or (c) -
- (a) the notice of the passing of a special resolution by the shareholders of the banking institution or controlling company together with a certified copy of the Bank's approval in terms of subsection 3(b) or (c) -
    - (i) containing full particulars of the merger, consolidation, transfer or other disposition; and
    - (ii) duly certified by two directors and the secretary of each party to the merger, consolidation, transfer or other disposition,

must be sent by each of the parties to the Registrar of Companies, who must register the merger, consolidation, transfer or other disposal, with the Bank and the Registrar of Deeds;
  - (b) upon registration of the special resolution by the Registrar of Companies -
    - (i) all the assets and liabilities of the banking institution or controlling company involved in the merger or consolidation become the assets and liabilities of the merged or consolidated banking institution or controlling company;
    - (ii) all rights and obligations that vested in the respective banking institutions or controlling company prior to the merger or consolidation are, from the date of registration by the

Registrar of Companies, vested in the merged or consolidated banking institution or controlling company; and

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

*[subsection (5) inserted by Act 14 of 2010]*

## 55. Undesirable practices

- (1) A banking institution shall not conduct, permit or become involved in the conducting of, an undesirable practice.
  - (2) For the purpose of this section, “undesirable practice” in respect of a banking institution, subject to subsection (3), means -
    - (a) the holding of shares in a company of which the banking institution is a subsidiary;
    - (b) the holding of assets of the banking institution in the name of any other person, excluding any asset -
      - (i) which is bona fide hypothecated to secure an actual or potential liability;
      - (ii) in respect of which the Bank has, upon a written application made by the banking institution concerned, in writing approved that the asset may be held in the name of the other person; or
      - (iii) ...
- [subparagraph (iii) deleted by Act 14 of 2010]*
- (c) the payment of dividends on shares out of profits before pre-incorporation expenditure had been accounted for;
  - (d) the entering into a repurchase agreement in respect of a fictitious asset or an asset created by means of a simulated transaction;
  - (e) the entering into a repurchase agreement without -
    - (i) the agreement being substantiated by a written document signed by the other party to the agreement; and
    - (ii) the details of the agreement being recorded in the accounts of the banking institution as well as the accounts, if any, kept by the banking institution in the name of the other party; and
  - (f) any other practice which the Minister may, on the recommendation of the Bank, by notice in the Gazette declare an undesirable practice in respect of all banking institutions, or in respect of the banking institution or banking institutions specified in the notice.
- (3) Notwithstanding subsection (2), the Bank may in writing notify a banking institution that a practice employed by the banking institution and specified in the notice, constitutes an undesirable practice in

respect of the banking institution, irrespective of whether the practice so specified in the notice is an undesirable practice in terms of that subsection.

### 55A. Pyramid Schemes

- (1) A person or banking institution may not conduct, permit or become involved in the conducting of, or the acceptance or obtaining of money, directly or indirectly, from members of the public, as a regular feature of a business practice, with the prospect of any such members (hereinafter referred to as the "participating members") receiving payments or other money-related benefits, directly or indirectly -
- (a) on or after the introduction of other members of the public to the business practice (hereinafter referred to as the "new participating members"), from which new participating members, in their turn, money is accepted or obtained, directly or indirectly, as a regular feature of the business practice, whether or not -
    - (i) the introduction of the new participating members is limited to their introduction by participating members or extends to the introduction of the new participating members by other person; or
    - (ii) new participating members are required to acquire movable or immovable property, rights or services;
  - (b) on or after the promotion, transfer or change of status of the participating members or new participating members within the business practice; or
  - (c) from funds accepted or obtained from participating members or new participating members in terms of the business practice,
- or the soliciting of, or advertising for, directly or indirectly, money or persons for introduction into or participation in a business practice in terms of the business practice referred to in this section, but does not include any activity of -
- (i) the public sector, governmental or other institution; or
  - (ii) any person or category of persons, designated by the Minister, on the recommendation of the Bank, by notice in the Gazette, if such activity is performed in accordance with the conditions that the Minister may specify in the notice.
- (2) A person who contravenes subsection (1) commits an offence and is liable to a fine prescribed by section 72(2)(a).

*[section 55A inserted by Act 14 of 2010]*

### 56. Powers of the Bank regarding banking institutions

- (1) If the Bank is satisfied -
- (a) that a banking institution, or an affiliate or associate of the banking institution -
    - (i) is insolvent, or is likely to become insolvent;
    - (ii) is conducting its business -
      - (aa) in contravention of any provision of this Act or of any other law pertaining to banking business; or
      - (bb) in a manner detrimental to its customers or the general public; or
    - (iii) is unable to meet all or any of its obligations, or is likely to become unable to so meet its obligations; or
    - (iv) is about to suspend any, or part of any, payment; or



- (b) that any of the officers or substantial shareholders of the banking institution are no longer fit and proper persons to satisfactorily fill their positions in, or in relation to, the banking institution, the Bank may, in addition to any other action that it may take under this Act or under any other law, take any of the actions contemplated in subsection (2).
- (2) The Bank may, in any of the circumstances contemplated in subsection (1), by means of an order in writing addressed and delivered to the banking institution concerned, and in the manner and within the period of time, or before a date, specified in the order -
- (a) require the banking institution, affiliate or associate, as the case may be, to -
- (i) take the action or steps, or to discontinue any action, as the case may be, relating to the banking institution, to affiliate or associate, or to the officers or substantial shareholders;
  - (ii) discontinue the extension of credit for such period of time;
  - (iii) subject to the Labour Act, 2007 (Act No. 7 of 2007), but despite any provision to the contrary -
    - (aa) in any contract of employment entered into between the banking institution, its affiliate or associate, and any director or officer; or
    - (bb) in the memorandum and articles of association of the banking institution, its affiliate or associate,
 

remove from office a director or officer;

*[Subparagraph (iii) is amended by Act 14 of 2010. The Labour Act is Act 11 of 2007, not Act 7 of 2004.]*
  - (iv) appoint a person -
    - (aa) as a director of the banking institution; or
    - (bb) to advise the banking institution in relation to the proper conduct of its business, and to specify that the person so appointed shall be paid by the banking institution the remuneration; or
- (b) if the Bank is satisfied that the banking institution is conducting its business in a manner detrimental to the interest of its customers or the general public, without prejudice to the powers of the Bank under paragraph (a), and in addition to any action taken by the Bank under that paragraph, assume control of the entire property, business and affairs of the banking institution, or any part thereof, and conduct the entire business and affairs of the banking institution, or the part so assumed control of, for and on behalf of the banking institution, or appoint a person to so conduct the business and affairs of the banking institution in the name of the Bank.
- (3) A banking institution, its affiliate or associate, as the case may be, shall be bound by, immediately comply with, and give effect to, an order under subsection (2).
- (4) A director or an officer removed from office under subsection (2) ceases to hold the office from which he or she is so removed with effect from the date specified in the order made under that subsection, and after the date so specified -
- (a) may not hold any officer participate in the affairs of -
- (i) the banking institution from which he or she was removed;
  - (ii) any other banking institution; or
  - (iii) the controlling company; and
- (b) is not entitled to the payment of any remuneration from the banking institution or any other banking institution or the controlling company,

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

*[subsection (4) amended by Act 14 of 2010]*

- (5) No order shall be made under subsection (2) unless the banking institution has been given a reasonable opportunity to make representations to the Bank relating to the proposed order.
- (6) The costs and expenses incurred by the Bank, or the remuneration payable to any person appointed by the Bank under section (2), shall, notwithstanding any provision to the contrary in the Insolvency Act, 1936 (Act 24 of 1936) or in any other law contained, be payable as a preferential claim out of the funds of the banking institution.
- (7) If the Bank assumes control of a banking institution pursuant to an order made under subsection (2), the banking institution, its directors and officers shall submit the property, business and affairs of the banking institution so assumed to the control of the Bank, and shall provide or make available to the Bank or to the person appointed under that subsection, as the case may be, all the facilities required to properly conduct the business and affairs of the banking institution.
- (8) In the circumstances contemplated in subsection (7), the Bank or the appointed person, as the case may be, shall -
  - (a) remain in control of the property, business and affairs of the banking institution for or on behalf of the banking institution; and
  - (b) execute all the powers of the banking institution or of its directors under the memorandum and articles of association of the banking institution,

until such time as the order made under subsection (2) is cancelled by the Bank.

- (9) ...

*[subsection (9) deleted by Act 14 of 2010]*

- (10) No order made under subsection (2) shall confer upon, or vest in, the Bank or any person appointed by the Bank, any title to, or any beneficial interest in, any property of the banking institution to which the order relates.

## **57. Additional powers of Bank to apply for capital reduction or to acquire shares in a banking institution**

- (1) If the Bank assumes control of a banking institution in terms of an order made under subsection (2) of section 56, and if the share capital of the banking institution has been lost or is not represented by available assets, the Bank or the person appointed by the Bank under paragraph (a)(iv) of that subsection, as the case may be, may apply to the High Court for an order reducing the share capital of the banking institution so as to reflect the actual available assets of the banking institution, and the High Court may, notwithstanding any provision to the contrary in any other law, grant such an application and issue such an order.
- (2) If the High Court issues an order under subsection (1), the share capital of the banking institution shall be reduced in accordance with the order so issued, and, notwithstanding any provision to the contrary in any other law or in the memorandum and articles of association of the banking institution, the Bank or the person referred to in that subsection, may issue new shares to an amount specified by the Bank in order to satisfy the capital requirements of the banking institution as determined under section 28.
- (3) Notwithstanding any provision to the contrary contained in the Bank of Namibia Act, 1997, or in any other law, but subject to subsection (4), the Bank may, with the concurrence of the Minister, subscribe to and acquire any shares in a banking institution issued under subsection (2).
- (4) If a banking institution referred to in subsection (3) at any time becomes able to satisfy the capital requirements relating to the banking institution as determined under section 28, the Bank shall dispose of

the shares in the banking institution acquired by the Bank under that subsection within such period of time as the Minister, in consultation with the Bank, may in writing determine.

## 58. Winding-up or judicial management

- (1) Notwithstanding section 346, 349 or 427 of the Companies Act, no person shall apply for the winding-up or judicial management, or commence with a voluntary winding-up, as the case may be, of a banking institution, unless such person has given the Bank 14 days written notice of his or her or its intention to so apply for the winding-up or judicial management, or to commence with the voluntary winding-up, as the case may be, of the banking institution.
- (2) Upon receipt of a notice contemplated in subsection (1), the Bank may -
  - (a) if an application for judicial management of the banking institution is to be made, take such action under section 56 or 57 as the Bank may consider appropriate; or
  - (b) if a voluntary winding-up is to be commenced with, notwithstanding the provisions of the Companies Act, allow the voluntary winding-up to be proceeded with, subject to the terms and conditions which the Bank may impose.
- (3) The Bank may, if an application for the winding-up of a banking institution is brought to the High Court -
  - (a) appear before the Court at the hearing of the application; or
  - (b) make representations to the Court relating to the application.
- (4) The Bank may, notwithstanding section 346 of the Companies Act, or notwithstanding having taken action under section 56 or 57 of this Act, make an application to the High Court for the winding-up of any banking institution.
- (5) Despite anything to the contrary in the Companies Act or any other law, the Master of the High Court -
  - (a) may not appoint a person as provisional liquidator, provisional judicial manager, liquidator or judicial manager of a banking institution, other than a person recommended by the Bank under paragraph (b);
  - (b) 30 days before appointing a person for any position referred to in paragraph (a), must submit the particulars and qualifications, and experience, if any, of such person and other relevant information to the Bank for its recommendation; and
  - (c) the Master of the High Court must appoint a person designated by the Bank, who, in the opinion of the Bank, has wide experience of, and is knowledgeable about the latest developments in, the banking industry, to assist a provisional liquidator, provisional judicial manager, liquidator or judicial manager referred to in paragraph (a) in the performance of his or her functions in respect of the banking institution concerned.

*[subsection (5) inserted by Act 14 of 2010]*

## 59. Proof and repayment of claims

- (1) Despite the provisions of any other law, in the event of winding-up of a banking institution, all assets of the banking institution must be made available to meet all deposit liabilities of the banking institution in the order of a priority as determined by the Bank.
- (2) For the purpose of winding-up of a banking institution, and despite any provision to the contrary in the Insolvency Act, 1936 (Act 24 of 1936), or in the Companies Act, or any other law an entry in the books, accounts or records of the banking institution relating to a depositor of the banking institution, is prima facie proof of a claim of the depositor.

*[section 59 amended by Act 14 of 2010]*

## 60. Unclaimed monies or property after winding-up

- (1) Sections 410 and 411 of the Companies Act relating to unpaid dividends shall mutatis mutandis apply to the funds of a banking institution wound-up under that Act.
- (2) The Minister, on the recommendation of the Bank, may prescribe the procedures to be followed relating to the disposal of property held by a banking institution in its capacity as a lessor of a safe deposit box, as a trustee, a fiduciary or in any other capacity on behalf of any person, and which property had not been claimed by, or been returned to, the rightful owner thereof.

## Part VIII – GENERAL PROVISIONS

### 61. Agreements restricting competition

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

### 62. Prohibition to accept deposits by insolvent banking institutions

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

### 63. Insurance against loss due to negligence or dishonesty

A banking institution -

- (a) shall, subject to paragraph (b), contract an insurance policy with an insurer as defined in the Insurance Act, 1943 (Act 27 of 1943) and approved by the Bank, to insure itself to such an amount as the Bank in writing may approve, against any loss which the banking institution or 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

*[The Insurance Act 27 of 1943 has been replaced by the Short-term Insurance Act 4 of 1998 and the Long-term Insurance Act 5 of 1998.]*

- (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.

### 64. Confidentiality and secrecy

- (1) No person employed or duly authorised by the Bank to examine the affairs of a banking institution shall,

- subject to subsection (2) or except for the purpose of the performance or exercise of his or her duties or functions, or when lawfully required to do so by a court having jurisdiction or under any law, disclose any information acquired in the performance or exercise of such duties or functions.
- (2) If the Bank seeks advice from a qualified person on a matter of law, of accountancy or of valuation of property, or on any other matter requiring the exercise of professional skills, as the case may be, in order to enable the Bank to perform any of its functions under this Act, the Bank may, notwithstanding subsection (1), but subject to subsection (3), disclose to the qualified person such information as the Bank may deem necessary to ensure that the qualified person is properly informed with respect to the matters on which his or her advice is sought.
  - (3) The qualified person referred to in subsection (2) shall be subject to the same duty of secrecy as a person employed by the Bank under subsection (1).
  - (4) Notwithstanding the further provisions of this Act or of the Bank of Namibia Act, 1997, the Bank may, for the purpose of the prudential supervision of financial institutions, but subject to the confidentiality of the information transmitted, furnish information acquired by the Bank to an authority in Namibia or in a foreign state, country, colony or territory with supervisory responsibilities in respect of financial institutions in Namibia or in the foreign state, country, colony or territory concerned, as the case may be.
  - (5) Subsection (1) shall apply to information received from an authority referred to in subsection (4).
  - (6) Any person may, notwithstanding subsection (1), against payment of a fee determined by the Bank, inspect or obtain a copy of -
    - (a) a certificate of authorisation; or
    - (b) the memorandum and articles of association,of a banking institution.
  - (7) A director or officer of a banking institution, during his or her tenure of office or employment, as the case may be, or after such tenure of office or employment, or any other person who for any reason has by any means access to any record, book, register, correspondence or other document, information or material relating to the affairs or the account of any customer of the banking institution, shall not, subject to subsection (10), provide, produce, divulge, reveal, publish or in any manner disclose to any other person, or make a record for any person, of any information or document whatsoever relating to the affairs or account of such customer.
  - (8) Subsection (7) shall not apply to any record, book, register, correspondence or other document, information or material referred to in that subsection and which has lawfully been made available to the public from any source other than the banking institution concerned, or to any information which is in the form of a summary or collection of information set out in such a manner that does not enable information relating to any particular banking institution, or to any particular customer of a banking institution, to be ascertained or identified from such summary or collection.
  - (9) A person who has any record, book, register, correspondence or other document or material referred to in subsection (7) in his or her possession, and which to his or her knowledge has been disclosed in contravention of that subsection, shall not in any manner whatsoever disclose such record, book, register, correspondence or other document or material to any other person.
  - (10) Subsection (7) shall not apply to the disclosure of any record, book, register, correspondence or other material referred to in that subsection -
    - (a) which the customer concerned, or his or her authorised representative, has in writing given permission to be disclosed;
    - (b) if the estate of the customer has been sequestrated, whether provisionally or final, or, if the customer is a body corporate, the body corporate has been, or is in the process of being, wound-up;
    - (c) if information is required by a party to a bona fide commercial transaction to which transaction the customer is a party, for the purpose of, subject to subsection (11), assessing the creditworthiness of

- the customer relating to such transaction;
- (d) for the purpose of instituting, or in the course of, any criminal proceedings;
  - (e) for the purpose of instituting, or in the course of any proceedings -
    - (i) between a banking institution and its customer, or his or her guarantor relating to the customer's transaction with the banking institution; or
    - (ii) between the banking institution and two or more parties making opposing or adverse claims to money in a customer's account, if the banking institution seeks relief by way of interpleader proceedings;
  - (f) if a writ of attachment or of execution attaching monies in an account of a customer of a banking institution is served on the banking institution;
  - (g) if the disclosure is required or authorised by any other provision of this Act or by any other law;
  - (h) if the disclosure may, subject to subsection (12), in terms of any law be made to a police officer investigating an offence specified in such law; or
  - (i) if the disclosure is authorised by the Bank in writing.
  - (j) if the exchange of individual customers' information takes place within a banking institution between directors, officers or employees of that banking institution and which is necessary to facilitate the day-to-day banking business.

*[paragraph (j) inserted by Act 14 of 2010]*

- (11) The information furnished in terms of paragraph (c) of subsection (10) shall be of a general nature and shall not enable the details of the customer's affairs or account to be ascertained from the information so furnished.
- (12) A disclosure contemplated in paragraph (h) of subsection (10) shall be limited to the affairs or account of the customer suspected of such offence.
- (13) In civil proceedings referred to in paragraph (b) or (e) of subsection (10), the court may, if it appears that any record, book, register, correspondence or other document, information or material referred to in subsection (7) will be disclosed, ex mero motu or on application by any of the parties to the proceedings, conduct the proceedings in camera.
- (14) Subsection (7) shall apply to any record, book, register, correspondence or other document, information or material disclosed in terms of subsection (13).
- (15) For the purposes of this section, "financial institution" means a statutory body or other institution referred to in section 2(2), and includes a banking institution.

## **65. Publication of information**

- (1) The Bank may, subject to subsection (2) -
  - (a) publish in whole or in part, in such form and at such time as it may deem appropriate; or
  - (b) for the purpose of tabling in the National Assembly, provide,
 

any information or data furnished or collected under this Act.
- (2) The information or data referred to in subsection (1) shall not, unless with the written consent of a banking institution or controlling company or of a customer of a banking institution or controlling company, as the case may be, disclose particulars relating to the affairs of the banking institution or of the customer of a banking institution or controlling company, as the case may be.

*[section 65 amended by Act 14 of 2010 by the insertion after the expression "banking institution" of the expression "or controlling company"]*

## 66. International supervisory co-operation

- (1) A person who, under the laws of a foreign state, country, colony or territory, exercises supervisory authority in respect of banking institutions 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 the books, accounts or transactions of -
  - (a) a banking institution or controlling company in Namibia which is a subsidiary; or
  - (b) a representative office in Namibia,of the banking institution or controlling company so conducting business in such foreign state, country, colony or territory, or cause such books, accounts or transactions to be examined.
- (2) The person referred to in subsection (1) shall in writing apply to the Bank for its approval as contemplated in that subsection.
- (3) The Bank may, on receipt of an application in terms of subsection (2) -
  - (a) refuse the authority;
  - (b) grant the authority; or
  - (c) grant the authority subject to such conditions as the Bank may impose

*[There is no full stop at the end of this subsection in the Government Gazette.]*
- (4) The Bank shall in writing inform the applicant of its decision under subsection (3) and of the conditions, if any, imposed under that subsection.
- (5) Section 53(1) shall, subject to the conditions contemplated in subsection (3), mutatis mutandis apply to an examination by a person in terms of subsection (1).
- (6) If so imposed by the Bank under subsection (3), the person conducting an examination in terms of subsection (1) shall, within a period of 30 days after the completion of the examination, furnish the Bank with a report on the examination so conducted.
- (7) The Bank may enter into an agreement with a person referred to in subsection (1) -
  - (a) to regulate -
    - (i) the establishment -
      - (aa) in the foreign state, country, colony or territory concerned of representative offices or of subsidiaries of banking institutions or controlling companies conducting business in Namibia; or
      - (bb) in Namibia of representative offices or of subsidiaries of foreign banking institutions or controlling companies conducting business in Namibia; and
    - (ii) the supervisory powers, duties and functions of the Bank and of such person relating to the representative offices or of the subsidiaries established in Namibia and in the foreign state, country, colony or territory respectively, as contemplated in subparagraph (i);
  - (b) to provide for -
    - (i) the furnishing of information relating to representative offices or subsidiaries;
    - (ii) the co-operation and exchange of information relating to examinations by the Bank or by such person; and
    - (iii) the confidentiality relating to information referred to in subparagraphs (i) and (ii); and
  - (c) any other matter which the parties may consider of importance relating to the conducting of business by banking institutions or controlling companies.

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

*[section 66 amended by Act 14 of 2010 by the insertion after the expressions “banking institution” and “banking institutions” of the expressions “or controlling company” and “or controlling companies”, respectively]*

## 67. Minors as depositors

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

## 68. Exemption of certain transactions from stamp duties

No stamp duty imposed by the Stamp Duties Act, 1993 (Act 15 of 1993) shall be payable in respect of the transfer of shares in a banking institution or any of its subsidiary companies, sold or disposed of in any manner by the banking institution to its controlling company, if such sale or disposal has been approved by the Bank.

## 69. Application of other laws to banking institutions

- (1) A company registered as a banking institution or as a controlling company shall continue to be a company in terms of the Companies Act, and that Act shall, subject to subsection (2), continue to apply to any such company to the extent to which that Act is not inconsistent with this Act.
- (2) Notwithstanding subsection (1) -
- (a) the provisions of the Companies Act relating to the conversion of public companies into other forms of companies shall not apply to a company referred to in that subsection; and
  - (b) the Minister may, on the recommendation of the Bank, by notice in the Gazette provide that a provision of the Companies Act specified in the notice -
    - (i) shall not apply to a company authorised to conduct business as a banking institution, or to a controlling company of the banking institution;
    - (ii) shall only apply to a company referred to in subparagraph (i) subject to the conditions and qualifications specified in the notice; or
    - (iii) shall 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 shall 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 shall cease to be in force as from the date it was so rejected.
- (5) An authorisation granted under this Act shall not exempt a banking institution from the obligation, if any, to obtain a licence, a permit or an authorisation, or to comply with any requirement, as the case may be, under any other law to conduct banking business.



## 70. External bureaux

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

## 71. Regulations and determinations

- (1) The Minister may, on the recommendation of the Bank, make regulations relating to -
  - (a) any matter which is required or permitted by this Act to be prescribed;
  - (b) the requirements relating to the ownership, or the citizenship and place of residence of the members of a board of directors or officer, of a banking institutions or a controlling company;
  - (c) the manner in which the payment of any monies in terms of this Act is made to the Bank;
  - (cA) unfair terms in transactions or contracts between banking institutions and their customers or the general public; and
  - (d) all other matters which the Minister considers necessary or expedient to prescribe in order to achieve the objects and purposes of this Act.
- (2) A regulation made under subsection (1) may in respect of any contravention thereof or failure to comply therewith prescribe a penalty not exceeding a fine of N\$100 000 or imprisonment for a period not exceeding two and a half years or both such fine and such imprisonment.
- (3) The Bank may by notice in the Gazette make determinations not inconsistent with this Act relating to -
  - (a) any matter which is required or permitted by this Act to be determined by the Bank; and
  - (b) all other matters which the Bank considers necessary or expedient to determine for the conducting of business, as a banking institution or controlling company, in a prudent manner and consistent with the best standards and practices of corporate governance and sound financial management.
- (4) Any banking institution or controlling company, as the case may be, on contravention of, or failure to comply with, any determination made under paragraph (a) of subsection (3) -
  - (a) as provided for in section 28(5)(b) or (c), 30(2), 41(5) or 43(6) in respect of a banking institution or controlling company; or
  - (b) as provided for in section 21(7), 28(1)(b), 30(1)(d), 31(1), 33(1), 34(1) or (2), 46(2)(b) or 47(2)(a) in respect of any banking institution or controlling company,is liable to a fine determined by the Bank.
- (5) A banking institution or controlling company that contravenes or fails to comply with a determination made under paragraph (b) of subsection (3) is liable to a fine determined by the Bank and imposed in accordance with section 73A.

*[section 71 amended by Act 14 of 2010]*

## 72. Offences and penalties

- (1) Any person who -
  - (a) contravenes or fails to comply with any provision of section 5, 19A(1), 46(3), 55(A) or 64(7); or

*[paragraph (a) amended by Act 14 of 2010]*

- (b) contravenes or fails to comply with any provision of section 6(4), 20(1)(b), (2)(b) or (4), 24(1), 26(7), 41(7), (8), (9), (10), (12) or (13), 43(5), 45(1) (2) or (3), 46(3), 56(4), (7) or (9), 58(1), 62(3), 64(1), (3), (7) or (9), or 66(2); or

*[A comma is missing after “(1)” in the phrase “45(1) (2) or (3)”.]*

- (c) contravenes or fails to comply with any order, direction or instruction made or issued under section 6(2)(g), 7(1), 26(1) or (13), 56(3) or 66(6) in respect of any person, including a banking institution or controlling company; or
- (d) when furnishing information to the Bank, to a banking institution or controlling company or to any other person in terms of section 6(4)(d), 10, 22, 49(1), (2), (3) or (4), wilfully and with the intent to deceive or to mislead, furnishes false, untrue or misleading information, or furnishes a forged document,

shall be guilty of an offence.

- (2) Any person convicted of an offence -

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

*[section 72 amended by Act 14 of 2010 by the insertion after the expression “banking institution” of the expression “or controlling company”]*

### **73. Offences by banking institutions, officers or agents**

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

- (a) any provision of section 8(2), 12(2), 12D and 12E, 14, 16(1), 19(1) or (4), 20(1)(a), (2)(a) or (5), 21(1), (4), (6) or (7), 27(2), 30(1)(a), (b) or (c), 31(2) or (3), 32, 35, 36(1), 37(1), 39(1) or (2), 40(1) or (2), 41(1) or (2), 42(2) or (4), 43(1) or (2), 45(4), 46(1) or (2)(a), 47(2)(b) or (3), 48, 53(1), 54(1), 55(1), 61(1), 62(1) or 63; or
- (b) any notice, demand, instruction or request made or issued under any section referred to in paragraph (a); or
- (c) any order, direction or instruction made or issued under section 6(2)(f), 8(4)(b), 15(5), 39(4) or 52(9); or
- (d) any condition or requirement laid down under section 8(3), or (4), 36(2), 47(5), 49(5) or 50,

shall be guilty of an offence.

*[subsection (1) amended by Act 14 of 2010]*

- (2) A banking institution or controlling company convicted of an offence under subsection (1) shall be subject to the penalties prescribed by section 72(2)(a).
- (3) If a banking institution or controlling company is convicted of an offence under subsection (1), any person who at the time of the commission of the offence was an officer, a director or a substantial shareholder of the banking institution or controlling company, or was purporting to act in any such capacity, or was in any manner or to any extent responsible for the management of any of the affairs of the banking institution or controlling company, or was assisting in the management, as the case may be, shall, if it is proven that the offence was committed at the instructions of, or with the consent or connivance of, such person, be guilty of the same offence, and be subject to the same penalty, which the banking institution or controlling company is guilty of and is subject to.

- (4) If an officer, employee or agent of a banking institution or controlling company is convicted of an offence under section 72, any person who at the time of the commission of the offence was in a position of authority in relation to the officer, employee or agent, or who was a director or a substantial shareholder of the banking institution or controlling company, as the case may be, or was purporting to act in any such capacity, and if it is proven that the offence was committed by the officer, employee or agent in the course of his or her employment and at the instructions of, or with the consent or connivance of the person in authority, or the director or substantial shareholder, as the case may be, the person in authority or the director or shareholder shall be guilty of the same offence, and shall be subject to the same penalty, which the officer, employee or agent is guilty of or is subject to.

*[section 73 amended by Act 14 of 2010 by the insertion after the expression "banking institution" of the expression "or controlling company"]*

### **73A. Imposition of administrative fines by Bank**

- (1) If the Bank on reasonable grounds believes that a banking institution or controlling company contravenes or fails to comply with section, 26(16), 38(3), 49(6), 53(3), or 71(4), under which the Bank is required to determine a fine, the Bank may impose a fine not exceeding N\$ 100 000 for every day during which contravention or non-compliance with the section continues.
- (2) Before imposing a fine, the Bank must in writing -
- (a) inform the banking institution or controlling company of its intention to impose a fine;
  - (b) specify the particulars of the alleged contravention or noncompliance;
  - (c) provide reasons for the imposition of the intended fine;
  - (d) specify the amount of the fine intended to be imposed; and
  - (e) invite the banking institution or controlling company to make written representations within 14 days of receipt of the invitation and to show cause why the fine should not be imposed.
- (3) If the Bank after consideration of the representations made, decides to impose a fine, the Bank must by written notice inform the banking institution or controlling company that it must, within 30 days of receipt of the notice, pay the fine.
- (4) A banking institution or controlling company may appeal to the Appeal Board against the decision made or fine imposed by the Bank by lodging a notice of appeal with the Minister within 14 days of receipt of the notice referred to in subsection (3).
- (5) After consideration of an appeal, the Appeal Board may confirm, amend or set aside the decision made or fine imposed by the Bank.
- (6) If a banking institution or controlling company is dissatisfied with the decision of the Appeal Board, it may appeal to the High Court within 14 days after the decision was made.
- (7) A contravention of or failure to comply with any section referred to in subsection (1) is not a criminal offence.

*[section 73A inserted by Act 14 of 2010]*

### **73B. Appeal Board**

- (1) Upon receipt of the notice of appeal by a banking institution or controlling company against the decision of the Bank made under section 73A, the Minister must constitute an Appeal Board to decide the appeal.
- (2) The Appeal Board consists of a judge of the High Court, who is the chairperson, designated by the Judge President and other two members appointed by the Minister.
- (3) The qualifications, terms and conditions and other requirements for appointment as members of the Appeal Board are as prescribed.

*[section 73B inserted by Act 14 of 2010]*

#### 74. Repeal of laws and savings

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

#### 75. Short title and commencement

This Act shall be called the Banking Institutions Act, 1998, and shall come into operation on a date to be determined by the Minister by notice in the Gazette.

### Schedule

#### LAWS REPEALED - SECTION 74

No. and year of law	Short title	Extent of repeal
Act No. 23 of 1965	Banks Act, 1965	The whole
Act No. 80 of 1969	Financial Institutions Amendment Act, 1969	section 2
Act No. 23 of 1970	Financial Institutions Amendment Act, 1970	section 6
Act No. 91 of 1972	Financial Institutions Amendment Act, 1972	sections 12(a)(ii), 12(a)(iii) and 13
Act No. 67 of 1973	Financial Institutions Amendment Act, 1973	section 4

Act No. 101 of 1976	Financial Institutions Amendment Act, 1976	sections 37(a), (b), (d) and (f), 40, 42, 43, 47, 48, 49, 50, 51, 52 and 53
Act No. 94 of 1977	Financial Institutions Amendment Act, 1977	sections 20 and 21
Act No. 80 of 1978	Financial Institutions Amendment Act, 1978	sections 18(b), (c) and (d), 19, 20(1)(c) and 21(c)
Act No. 103 of 1979	Financial Institutions Amendment Act, 1979	section 27(c)
Act No. 99 of 1980	Financial Institutions Amendment Act, 1980	section 45
Act No. 36 of 1981	Financial Institutions Amendment Act, 1981	sections 25(a) and (b)
Act No. 38 of 1984	Inspection of Financial Institutions Act, 1984	section 11(1)
Act No. 46 of 1984	Corporation for Public Deposits Act, 1984	section 20
Act No. 86 of 1984	Financial Institutions Amendment Act, 1984	sections 24, 25, 29, 30, 31(a), (b) and (c), 32(c) and 33
Act No. 106 of 1985	Financial Institutions Amendment Act, 1985	sections 10(a), (b), (c), (j), (k), (o) and (p), 12(b), (c), (d), (e) and (g), 14(a), 15, 16, 17(a) and (c), 18(a), (c) and (d), 19(a), (b) and (c), 21(b) and (c), 22(b) and (c), 24, 25(a), 26, 29, 30, 31, 32, 33, 34 and 35

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