



GOVERNMENT GAZETTE

OF THE

REPUBLIC OF NAMIBIA

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No. 1808

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Government Notice

OFFICE OF THE PRIME MINISTER

No. 41

1998

PROMULGATION OF ACT OF PARLIAMENT

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

No. 2 of 1998: Banking Institutions Act, 1998.

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BANKING INSTITUTIONS ACT, 1998**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.

(Signed by the President on 20 February 1998)

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SCHEDULE

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

**PART I
PRELIMINARY PROVISIONS**

Definitions

1. (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;

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“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;

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

“banking business” means the business that consists of -

- (a) the regular receiving of funds from the public; 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 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);

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

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

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

“controlling company” means a controlling company as defined in the Companies Act;

“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

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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;

“exposure” means any form of exposure, including -

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- (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;

“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);

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“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;

“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;

“prescribe” means prescribe by regulation;

“principal officer”, in relation to a banking institution, 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 in Namibia, and whose name and title the banking institution 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;

“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

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Gazette, has declared to be the acceptance of deposits from the public; or

- (e) accepts or obtains money, whether directly or indirectly, from members of the public, as a regular feature of a business practice, with the prospect of any of such members (in this section referred to as the "participating members"), receiving any payment or any other money-related benefits, directly or indirectly -
 - (i) on or after the introduction of other members of the public to the business practice (in this section referred to as the "new participating members"), and 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 -
 - (aa) the introduction of the new participating members is limited to their introduction by participating members or extends to the introduction of the new participating members by other persons; or
 - (bb) new participating members are required to acquire movable or immovable property, rights or services;
 - (ii) on or after the promotion, transfer or change of status of the participating members or new participating members within the business practice; or
 - (iii) 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, whether directly or indirectly, money or persons for the purpose of introducing into or participating in a business practice referred to in this section,

but does not include -

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- (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 more than five per cent of any class of voting shares of a company, and for the purpose of determining whether a person is a substantial shareholder -

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

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“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.

Application of Act

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

- (2) This Act shall not apply to -
 - (a) the Bank, except insofar as it confers upon the Bank the power to perform the functions contained in this Act;

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- (b) any international bank or international financial organisation, or any associated or affiliated bank or financial organisation of such international bank or international organisation, of which the Government of Namibia or the Bank is a member;
- (c) any insurer registered under the Insurance Act, 1943 (Act 27 of 1943);
- (d) the Agricultural Bank of Namibia, established by the Agricultural Bank Act, 1944 (Act 13 of 1944);
- (e) any pension fund registered under the Pension Funds Act, 1956 (Act 24 of 1956);
- (f) any friendly society registered under the Friendly Societies Act, 1956 (Act 25 of 1956);
- (g) any unit trust registered under the Unit Trusts Control Act, 1981 (Act 54 of 1981);
- (h) any scheme registered under the Participation Bonds Act, 1981 (Act 55 of 1981);
- (i) any building society registered under the Building Societies Act, 1986 (Act 2 of 1986);
- (j) the Development Fund of South West Africa / Namibia, established by the Development Fund of South West Africa / Namibia Act, 1987 (Act 29 of 1987);
- (k) the Post Office Savings Bank as defined in the Posts and Telecommunications Act, 1992 (Act 19 of 1992);
- (l) the Namibia Development Corporation, established by the Namibia Development Corporation Act, 1993 (Act 18 of 1993);
- (m) the National Housing Enterprise, established by the National Housing Enterprise Act, 1993 (Act 5 of 1993);

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- (n) any medical scheme registered under the Medical Aid Funds Act, 1995 (Act 23 of 1995);
 - (o) any co-operative society registered under the Co-operative Societies Act, 1996 (Act 23 of 1996); or
 - (p) any other institution or body designated by the Minister, on the recommendation of the Bank, by notice in the *Gazette*.
- (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

Guidelines or notices by the Bank

3. (1) The Bank may from time to time, for the purpose of promoting sound and prudential banking practices, furnish banking institutions

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with guidelines or notices not inconsistent with this Act, relating to the application of this Act by banking institutions or to the conducting of banking business in general.

(2) The guidelines or notices contemplated in subsection (1) shall be in writing and shall be delivered by the Bank to the principal officer of a banking institution.

Limitation of liability.

4. (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.

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BANKING INSTITUTIONS ACT, 1998**PART III****AUTHORISATION TO ESTABLISH A BANKING INSTITUTION****Prohibition on conducting of banking business by unauthorised persons**

5. (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.

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BANKING INSTITUTIONS ACT, 1998**Investigations**

6. (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, 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;

(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;

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- (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, close down the business of such person; or
 - (i) require a member of the Namibian Police Force, or may request any other person, to assist him or her in the exercising, performance or execution of his or her powers, duties or functions under this section.
- (3) If the officer of the Bank referred to in subsection (2) exercises,

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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.

Repayment of monies by unauthorised persons

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

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- (a) to the respective persons from whom he or she has obtained the monies;
- (b) in the manner and in accordance with the requirements; and
- (c) within the period of time,

imposed by the Bank and specified in the direction.

(2) Any person referred to in subsection (1) who refuses or fails to comply with a direction under that subsection, shall, for the purposes of section 345 of the Companies Act, be deemed to be unable to pay 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.

Name of banking institution

8. (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).

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(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.

Banking institutions to be incorporated

9. (1) No person shall be authorised to conduct business as a banking institution unless such person is incorporated as a public company under the Companies Act and has the minimum capital funds specified in or determined under section 28.

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(2) No company shall, without the written approval of the Bank, be incorporated under the Companies Act for the purpose of conducting banking business.

Application for authorisation to establish a banking institution

10. (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.

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

11. (1) Before considering an application for an authorisation lodged with the Bank in terms of section 10, the Bank shall conduct such

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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;
- (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
- (j) any other matter which the Bank may regard as relevant to the applicant or to the application.

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(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) After having considered an application made in terms of subsection (1) of section 10, the Bank shall, before taking any decision relating to the application, consult with the Minister.

(4) After consultation with the Minister in terms of subsection (3), the Bank shall, subject to the further provisions of this Act -

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

and shall in writing inform the applicant of its decision.

(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 -

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

decided on by the Bank.

Duration and conditions of authorisation

12. (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 -

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- (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.

Annual fees

13. (1) An authorised banking institution shall, subject to subsection (2), in respect of the authorisation to conduct business as a banking institution, and before 31 January of each year, pay to the Bank the prescribed annual fees in respect of such year.

(2) The Bank may, upon receipt of a written request made by a banking institution 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 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 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) -

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- (i) shall be a debt due to the Bank by the banking institution; and
- (ii) may be recovered by the Bank from the banking institution by means of action instituted in any court having jurisdiction.

(4) If the annual fees payable in terms of subsection (1) are not paid on or before the date specified in that subsection, such late payment of the annual fees shall, subject to subsection (2), be subject to the payment of a penalty at the prescribed rate.

Subsidiaries, branch offices, representative offices and other interests of a banking institution

14. (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.

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BANKING INSTITUTIONS ACT, 1998**Cancellation of authorisation**

15. (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);
- (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 (d) of subclause (1); or
- (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.

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(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.

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(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.

Repayment of deposits upon cancellation of authorisation

16. (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.

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BANKING INSTITUTIONS ACT, 1998**Cancellation of authorisation upon winding-up**

17. 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.

Publication of information relating to banking institutions

18. 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.

Representative office of foreign banking institution

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

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(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.

PART IV**SHAREHOLDING IN BANKING INSTITUTIONS****Restriction on shareholding and changes in shareholding**

20. (1) Notwithstanding the Companies Act, but subject to the prior

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written approval of the Bank -

- (a) no banking institution 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,

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 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.

- (2) Without prior written notification to the Bank -
 - (a) no banking institution 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,

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 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.

(3) If the nominal value of shares in a banking institution 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, the banking institution 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.

(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.

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(5) No banking institution 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, if such person is prohibited in terms of subsection (4) to be, or to become, a substantial shareholder of a banking institution.

(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 in any trust controlled or administered by the person.

Shareholder’s register and registration of shares

21. (1) Subject to subsection (3), a banking institution 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.

(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

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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, in writing exempt the banking institution from the requirement to maintain the register contemplated in that subsection.

(4) Notwithstanding the provisions of the Companies Act, a banking institution 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 -

- (a) in the name of a trustee of a unit trust scheme as defined in the Unit Trust Control Act, 1981 (Act 54 of 1981), or of a nominated company of the trustee approved by the Registrar of Unit Trust Companies referred to in that Act;
- (b) in the name of an executor, administrator, trustee, curator, guardian or liquidator, as the case may be, in the circumstances referred to in section 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,

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if the banking institution 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 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 concerned.

Furnishing of information by shareholders

22. (1) At the written request of a banking institution addressed to a person who has notified the banking institution 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 with the information or particulars specified in such request and which the banking institution 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 in such form as the banking institution may specify in the request contemplated in that subsection.

Absence of wrongful intent

23. 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.

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BANKING INSTITUTIONS ACT, 1998**Effects of registration of shares contrary to Act**

24. (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 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 the controlling company concerned, as the case may be.

Restriction of right to control banking institution

25. (1) No person shall acquire, or subject to subsection (3), directly or indirectly exercise control over, a banking institution, unless the Bank is satisfied that such person is a fit and proper person as contemplated in section 20(4).

(2) The Bank may by notice in writing addressed to a person, prohibit the person to acquire or, subject to subsection (3), to exercise control over a banking institution, if the person is, in the opinion of the Bank and having regard to the structure and business activities of the corporate group of which the person is a member, not a fit and proper person in terms of this Act to acquire or to control a banking institution.

(3) Any person who fails to comply with a notice under subsection (2) within the period of time or before the date specified in such notice, shall be guilty of an offence.

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(4) The provisions of subsections (1) and (2) relating to the exercising of control over a banking institution, shall, subject to the further provisions of this Act, not apply in respect of a person's control over a banking institution if -

- (a) the person was exercising control over the banking institution concerned; and
- (b) the banking institution was registered as a bank under any law repealed by this Act,

immediately prior to the commencement of this Act.

Prohibitions and restrictions

26. (1) The Bank may, if it is satisfied that a banking institution 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, 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.

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- (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 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 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, if the principal officer is not available, upon any person over the age of 16 years employed by the banking institution.
- (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 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 other person in terms of subsection (3)(d) shall, from the date of such delivery, be

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binding upon the banking institution 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 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.

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(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 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) shall be guilty of an offence and on conviction be liable to a fine not exceeding N\$2000 or to imprisonment for a period not exceeding six months or to both such fine and such imprisonment.

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BANKING INSTITUTIONS ACT, 1998**PART V
PRUDENTIAL REQUIREMENTS AND LIMITATIONS****Standards of corporate behaviour**

27. (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 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).

Minimum capital funds

28. (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 of N\$ 10 000 000; or
- (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) A banking institution which is immediately prior to the commencement date of this Act registered as a banking institution under any law repealed by this Act and which on that date does not comply with the requirements determined by or under subsection (1), shall, within the period of time and subject to the conditions imposed by the Bank, comply with the requirements so imposed.

(3) A banking institution referred to in subsection (2) which does not comply with the requirements contemplated in that subsection immediately prior

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to the commencement date of this Act, but which, within the period of time specified by the Bank for compliance as contemplated in that subsection, complies with the requirements so contemplated, shall not be guilty of an offence.

(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.

Composition of capital funds

29. 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.

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BANKING INSTITUTIONS ACT, 1998**Provision to be made for certain matters**

30. (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 or doubtful debts, and the depreciation of assets, to be calculated not less than quarterly;
- (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 or doubtful debts, the accounting treatment and suspension of interest of non-performing loans as contemplated in subsection (1) may be determined by the Bank.

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

Minimum liquid assets

31. (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

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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.

Restriction on dividends

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

Minimum local assets

33. (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.

Large exposures and concentrations of credit

34. (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 group of related persons" or of "a large exposure".

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BANKING INSTITUTIONS ACT, 1998**Lending against own shares or debt instruments**

35. 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.

Exposure to directors, to officers with managerial responsibilities or to shareholders to be secured

36. (1) No banking institution shall, subject to subsection (4), have any exposure to -

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

except if such exposure is incurred with the prior approval of the board of directors of the banking institution and is fully secured.

(2) A banking institution shall, in the form and manner required by the Bank -

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- (a) within one month after incurring an exposure under subsection (1), whether or not such exposure is -
 - (i) incurred with the prior approval of the board of directors; or
 - (ii) is fully secured,in writing submit to the Bank full particulars of such exposure or security; and
- (b) before 31 January of each year, in writing submit to the Bank particulars of all exposures existing on the first day of that month, irrespective of whether -
 - (i) such exposures were incurred before or after the commencement date of this Act; or
 - (ii) the particulars of any of the exposures were submitted to the Bank in terms of paragraph (a).

(3) The Bank shall determine the criteria and conditions to be employed for establishing the acceptability or valuation of collateral for the purpose of security exposures under this section.

(4) This section shall, from a date to be determined, apply to a banking institution conducting banking business under any provision of any law repealed by this Act, immediately before the commencement date of this Act.

Terms of exposure to directors, officers and shareholders

37. (1) No banking institution shall, subject to subsection (2), directly or indirectly grant, or permit to be outstanding, to any -

- (a) of its directors or officers, with or without managerial responsibility; or
- (b) shareholder or other person referred to in section 36(1),

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any loan, advance or credit facility.

(2) Subsection (1) shall not apply to a loan, advance or credit facility granted to a person referred to in that subsection if the loan, advance or credit facility was granted -

- (a) subject to the same criteria and conditions applied for granting a loan, advance or credit facility to a member of the public; or
- (b) to an officer in the employment of the banking institution in terms of the agreement of service entered into between the banking institution and the officer.

Exposure to holding companies, subsidiaries and affiliates

38. (1) Notwithstanding section 226 of the Companies Act, but subject to subsection (2) of this section, a banking institution may, with the written approval of the Bank, grant a loan, advance or credit facility to its holding company, subsidiary or affiliate.

(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 board of directors or a committee of the board of directors.
- (3) Any banking institution which -
- (a) without the approval of the Bank in terms of subsection (1), grants

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a loan in terms of that subsection; or

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

shall be guilty of an offence.

Restriction on commercial activities

39. (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.

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(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.

Limitation on investment in property

40. (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).

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BANKING INSTITUTIONS ACT, 1998**PART V I****DIRECTORS, PRINCIPAL OFFICERS AND AUDITORS****Directors and principal officers of banking institutions**

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

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

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

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

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

- (a) the conduct and the qualifications applicable to, or to be complied with by; and
- (b) the manner of, and the criteria and procedures relating to, the election or appointment of a person as,

a director or the principal officer of a banking institution.

(6) Subsection (5) shall not, during his or her current term of office, apply to a director or principal officer of a banking institution elected or appointed before, and in office at, the commencement date of this Act, but shall apply to

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such director or principal officer when he or she is re-elected or re-appointed to office after the commencement date of this Act.

- (7) The board of directors of a banking institution shall -
 - (a) be responsible for the good corporate governance and business performance of the banking institution;
 - (b) ensure that the board is in full control of the affairs and business operations of the banking institution;
 - (c) ensure, and report to the shareholders at the annual general meeting of the banking institution, that the internal controls and systems of the banking institution -
 - (i) are designed to provide reasonable assurance as to the integrity and reliability of the financial statements of the banking institution, 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 may not be able to properly conduct its business as a going concern;
 - (ii) the banking institution appears to be, or will in the near future be, unable to meet all, or any of, its obligations;

