

# **THE BANKS ACT, 1990**

(Act No. 94 of 1990)

(As amended)

(Including all amendments up to and including, the Banks Amendment Act, 2007 (Act No. 20 of 2007.  
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# **THE BANKS ACT, 1990**

**To provide for the regulation and supervision of the business of public companies taking deposits from the public; and to provide for matters connected therewith.**

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BE IT ENACTED by the State President and the Parliament of the Republic of South Africa, as follows :-

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#### 1. Definitions

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

**“agency”**, in relation to a bank, means a right granted to a person by that bank to receive on its behalf from its clients any deposits, money due to it or applications for loans or advances, or to make payments to such clients on its behalf;

**“allocated capital and reserve funds”** means such amount of qualifying capital and reserve funds as may be approved and assigned by the board of directors of a bank as capital and reserve funds designated to provide for the risks pertaining to the particular nature of such bank’s business as contemplated in sections 70(2), 70(2A) or 70(2B), as the case may be;

**"bank"** means a public company registered as a bank in terms of this Act;

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

- (a) each of which persons is an associate, as defined in section 37(7), 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;

**“branch”** means an institution that is not a public company as contemplated in section 11(1), but by means of which a foreign institution conducts the business of a bank in the Republic under an authorization referred to in section 18A;

**“branch of a bank”** means an institution by means of which a bank conducts the business of a bank outside the Republic;”

**"board of review"** means the board of review established by section 9(2);

**”chief executive officer”-**

- (a) in relation to a bank, means a person who, either alone or jointly with one or more other persons, is responsible under the direct authority of the board of directors of the bank for the conduct of the business of the bank;
- (b) in relation to a branch, means a person who, either alone or jointly, with one or more other persons, is responsible for the conduct of the business of the branch;

**"chief representative officer"** means the person in charge of a representative office;

**"close relative"**, in relation to any person, means -

- (a) a spouse;

- (b) a child, stepchild, parent or stepparent;
- (c) the spouse of any of the persons mentioned in paragraph (b);

**"Companies Act"** means the Companies Act, 1973 (Act No. 61 of 1973);

**"company"** means a company under the Companies Act;

**"consolidating supervisor"** means-

- (a) in relation to a foreign supervisor, the supervisor that is responsible for the regulation and supervision, on a consolidated basis, of a foreign institution that is incorporated in that foreign jurisdiction and which conducts the business similar to the business of a bank or controlling company; or
- (b) the Registrar, in terms of his or her functions and responsibilities to regulate and supervise a bank, controlling company or banking group on a consolidated basis;

**"controlling company"** means a public company registered in terms of this Act as a controlling company in respect of a bank;

**"co-operative"** means a co-operative incorporated in terms of the Co-operatives Act, 1981 (Act No. 91 of 1981), and includes a co-operative society or co-operative company deemed in terms of section 2 of that Act to be incorporated in terms of the said Act;

**"corporate governance"**, in relation to the management of a bank or a controlling company, includes all structures, processes, policies, systems and procedures whereby the bank or controlling company is governed;

**"deposit"**, when used as a noun, means an amount of money paid by one person to another person subject to an agreement in terms of which -

- (a) an equal amount or any part thereof will be conditionally or unconditionally repaid, either by the person to whom the money has been so paid or by any other person, with or without a premium, on demand or at specified or unspecified dates or in circumstances agreed to by or on behalf of the person making the payment and the person receiving it; and
- (b) no interest will be payable on the amount so paid or interest will be payable thereon at specified intervals or otherwise,

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 such amount *mutatis mutandis* as contemplated in paragraph (a) or for the payment of interest on such amount *mutatis mutandis* as contemplated in paragraph (b) is issued in respect of such amount, but does not include an amount of money -

- (i) paid as an advance, or as part payment, in terms of a contract for the sale, letting and hiring or other provision of movable or immovable property or of services, and which is repayable only in the event of -
  - (aa) that property or those services not in fact being sold, let and hired or otherwise provided;
  - (bb) the fulfilment of a resolutive condition forming part of that contract; or
  - (cc) the non-fulfilment of a suspensive condition forming part of that

contract;

- (ii) paid as security for the performance of a contract or as security in respect of any loss which may result from the non-performance of a contract;
- (iii) without derogating from the provisions of paragraph (ii), paid as security for the delivery up or return of any movable or immovable property, whether in a particular state of repair or otherwise;
- (iv) paid by a holding company to its subsidiary, or by a subsidiary to its holding company, or by one subsidiary to another subsidiary of the same holding company;
- (v) paid by a person who, at the time of such payment -
  - (aa) is a close relative of the person to whom such money is paid;
  - (bb) is a director or executive officer of the person to whom such money is paid; or
  - (cc) is a close relative of a director or executive officer of the person to whom such money is paid;
- (vi) paid by any person to a registered long-term insurer as defined in section 1 of the Long-term Insurance Act, 1998 (Act No. 52 of 1998), as a premium in respect of any kind of policy defined or referred in the Long-term Insurance Act and under which policy that long-term insurer assumes, in return for such premium, such obligation as is described in the Long-term Insurance Act;
- (vii) paid to a fund registered or provisionally registered under section 4 of the Pension Funds Act, 1956 (Act No. 24 of 1956), as a contribution, contemplated in section 13A of that Act, by or on behalf of a member of that fund;
- (viii) paid to a benefit fund, as defined in section 1 of the Income Tax Act, 1962 (Act No. 58 of 1962), as a contribution or a subscription by or on behalf of a member of that fund; or
- (ix) paid by any person to a registered short-term insurer as defined in section 1 of the Short-term Insurance Act, 1998 (Act No. 53 of 1998), as a premium in respect of any kind of policy defined or referred in the Short-term Insurance Act and under which policy that short-term insurer assumes, in return for such premium, such obligation as is described in the Short-term Insurance Act;

and "deposit" when used as a verb, or any derivative thereof, has a corresponding meaning;

**"director"**, includes an executive director and a non-executive director, unless expressly stated otherwise;";

**"division"**, in relation to a bank, means a business unit or section of that bank that conducts its business-

- (a) under a name that includes the word "bank" or any derivative thereof, or the words "deposit-taking institution" or "building society", or any derivative thereof; and
- (b) under the instruction and within the governance structures of the bank concerned.



**"domestic shareholder"**, in relation to a bank or controlling company, means a shareholder of the bank or controlling company -

- (a) who is resident in the Republic;
- (b) which is a company controlled, *mutatis mutandis* as contemplated in paragraph (a), (b) or (c) of the definition of "controlling company" in section 1 of the Companies Act, by a person or persons who is or are resident in the Republic or, in the case of a juristic person or persons, was or were formed, established or incorporated by or under a law of the Republic;
- (c) which is a juristic person other than a company and was formed, established or incorporated by or under a law of the Republic, excluding a pension fund registered in terms of the Pension Funds Act, 1956 (Act No. 24 of 1956), where the head office of the association which carried on the business of that fund, is outside the Republic; or
- (d) that is a person belonging to a category of persons recognized by the Registrar as domestic shareholders for the purposes of this Act;

**"eligible institution"** means an external credit assessment institution or an export credit agency that meets the minimum requirements as prescribed and which institution or agency has been approved in writing by the Registrar;

**"employee in charge of a risk management function"**, in relation to a bank, means that employee of the bank who is ultimately responsible for the management of one or more of the following types of risk to which the bank is exposed, namely –

- (a) solvency risk;
- (b) liquidity risk;
- (c) credit risk;
- (d) currency risk;
- (e) market risk (position risk);
- (f) interest rate risk;
- (g) counterparty risk;
- (h) technological risk;
- (i) operational risk;
- (j) compliance risk; or
- (k) any other risk regarded as material by that bank;";

**"executive officer"**, in relation to any institution -

- (a) that is not a bank, includes any manager, the compliance officer, the secretary of the company and any director who is also an employee of such an institution;
- (b) that is a bank, includes any employee who is a director or who is in charge of a risk management function of the bank, the compliance officer, the secretary of the company or any manager of the bank who is responsible, or reports, directly to the chief executive officer of the bank;

**"external credit assessment"** means an assessment or a rating issued by an eligible institution, which assessment or rating-

- (a) relates to the ongoing ability of a person or a country to repay amounts due and payable by the said person or the said country, including any principal amount and related interest; and

(b) meets such requirements as may be prescribed;

**"fellow subsidiary"**, in relation to a company, means any other company which is a subsidiary of the holding company of which the first-mentioned company is a subsidiary;

**"financial statements"** means annual financial statements referred to in sections 286 and 288 of the Companies Act;

**"foreign shareholder"**, in relation to a bank or controlling company, means a shareholder of such bank or controlling company that is not a domestic shareholder;

**"general public"** does not include a bank;

**"group of banks"** means a group consisting of two or more banks which have the same holding company, and such holding company;

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

**"host supervisor"** means-

- (a) in respect of a foreign supervisor, the supervisor that is responsible for the regulation and supervision of any branch, subsidiary, joint venture or related entity of a bank or controlling company, incorporated or operating within its jurisdiction; or
- (b) the Registrar, in terms of his or her functions and responsibilities to regulate or supervise a foreign institution that is incorporated and conducts business similar to the business of a bank in a foreign country and which has been authorised and registered to conduct the business of a bank within the Republic;

**"hybrid-debt instrument"** means a financial instrument that combines certain features of equity financial instruments and debt financial instruments;

**"Land Bank"** means the Land and Agricultural Bank of South Africa'

**"liquid assets"** means -

- (a) Reserve Bank notes, subsidiary coin, (excluding such notes or coin to the extent to which it is taken into account in the calculation of the minimum reserve balance a bank is required to maintain in an account with the South African Reserve Bank in terms of section 10 of the South African Reserve Bank Act, 1989 (Act No. 90 of 1989)), gold coin and bullion;
- (b) any credit balance in a clearing account with the Reserve Bank;
- (c) deleted;
- (d) treasury bills of the Republic;
- (e) deleted;
- (f) securities issued by virtue of section 66 of the Public Finance Management Act, 1999 (Act No. 1 of 1999) , to fund the National Government;

- (g) bills issued by the Land Bank for purposes of extending short-term financing -
  - (i) to an agricultural co-operative or a special farmers' co-operative formed and incorporated under the Co-operatives Act, 1981 (Act No. 91 of 1981), or deemed thereunder to be so formed and incorporated, for the purchase of agricultural products from farmers and of agricultural implements, equipment and other means of production for resale to farmers for the production of agricultural products; or
  - (ii) to a control board established under the Marketing Act, 1968 (Act No. 59 of 1968), for the purchase of agricultural products;
- (h) deleted;
- (i) deleted;
- (j) securities of the Reserve Bank with a maturity of not more than three years to the last redemption date thereof;

**"Minister"** means the Minister of Finance;

**"mutual bank"** means a mutual bank as defined in section 1(1) of the Mutual Banks Act, 1993 (Act No. 124 of 1993);

**"person"** includes any partnership;

**"prescribed"** means prescribed by regulation;

**"primary share capital"** means-

- (a) capital obtained through the issue of-
  - (i) ordinary shares;
  - (ii) non-redeemable non-cumulative preference shares; or
  - (iii) prescribed categories of preferred securities; or
- (b) such percentage of minority interests arising from the consolidation of accounts as may be prescribed,

but excluding such ordinary shares, non-redeemable non-cumulative preference shares or prescribed categories of preferred securities issued in pursuance of the capitalisation of reserves resulting from a revaluation of assets;

**"primary unimpaired reserve funds"** means -

- (a) funds obtained from-
  - (i) actual earnings or by way of recoveries;
  - (ii) premiums on the issue of ordinary or non-redeemable non-cumulative preference shares; or
  - (iii) a surplus on the realization of capital assets; or
- (b) such percentage of-
  - (i) a reserve arising from compliance with financial reporting standards as may be

prescribed; or

- (ii) minority interests arising from the consolidation of accounts as may be prescribed,

and which have been set aside as a general or special reserve, are disclosed as such a reserve in the financial statements of the bank or the controlling company concerned and are available for the purpose of meeting liabilities of or losses suffered by the bank or the controlling company, as the case may be, but does not include any fund required to be maintained in terms of any other law, unless so prescribed;

**"public"** includes a juristic person;

**"qualifying capital and reserve funds"** means the net sum of capital and reserve funds required to be held by a bank, calculated and determined in accordance with the provisions of sections 70(2), 70(2A) or 70(2B), as the case may be, having regard to the nature of such bank's business;

**"Registrar"** means the Registrar of Banks designated under section 4;

**"Registrar of Companies"** means the Registrar of Companies appointed under section 7 of the Companies Act;

**"regulation"** means a regulation made under section 90;

**"Regulations relating to Banks"** means the Regulations relating to Banks as amended or re-enacted from time to time under section 90;

**"Regulations relating to branches"** means the Regulations titled "Conditions for the conducting of the business of a bank by a foreign institution by means of a branch in the Republic" as published by Government Notice No. R. 1414 of 28 December 2000, and amended from time to time;

**"representative office"**, in relation to -

- (a) a foreign institution referred to in section 34(1), means premises situated within the Republic and from which the business referred to in the said section 34(1) and conducted by such foreign institution in the other country referred to in that section, is promoted or assisted in any way; or
- (b) the establishment by a bank of a representative office outside the Republic as contemplated in section 52(1)(e), means premises situated outside the Republic and from which the business conducted by such bank within the Republic in terms of this Act is promoted or assisted in any way;

**"Republic"**, for the purposes of the definition of "domestic shareholder", includes any state the territory of which formerly formed part of the Republic;

**"Reserve Bank"** means the South African Reserve Bank;

**"secondary capital"** means-

- (a) a prescribed percentage of capital obtained through the issue, with the prior written

approval of the Registrar and in accordance with conditions approved by the Registrar in writing and on such further conditions, if any, as may be prescribed, of-

- (i) cumulative preference shares;
  - (ii) ordinary shares, or preference shares other than cumulative preference shares, issued in pursuance of the capitalisation of reserves resulting from a revaluation of assets; or
  - (iii) prescribed categories of debt instruments; or
- (b) capital obtained through the issue of instruments constituting primary share capital where the relevant proceeds of such instruments, or any portion thereof, are excluded from qualifying primary share capital as a result of a prescribed limit;

**“secondary unimpaired reserve funds”** means-

- (a) such funds, obtained from actual earnings or by way of recoveries, as may be prescribed and which have been set aside, but which are not disclosed as a general or special reserve in the financial statements or consolidated financial statements of the bank or the controlling company, concerned;
- (b) a prescribed percentage of the amount of any surplus resulting from a revaluation of assets and determined as prescribed;
- (c) a prescribed amount of general provisions or a reserve held against unidentified and unforeseen losses;
- (d) funds obtained by way of premiums on the issue of cumulative preference shares or debt instruments issued in accordance with the prescribed conditions, whether or not such funds are disclosed as a general or special reserve in the financial statements or consolidated financial statements of the bank or the controlling company concerned;
- (e) such percentage of a reserve arising from compliance with financial reporting standards as may be prescribed;
- (f) such percentage of minority interests arising from the consolidation of accounts as may be prescribed, or
- (h) funds constituting primary unimpaired reserve funds where such funds, or any portion thereof, are excluded from qualifying primary reserve funds as a result of a prescribed limit,

but does not include any fund required to be maintained in terms of any other law, unless so prescribed;

**“securitisation scheme”** means a synthetic securitisation scheme or a traditional securitisation scheme as defined in Government Notice No. R. 681 and published in *Government Gazette* No. 26415 on 4 June 2004, as amended or substituted from time to time;

**"subsidiary"** means a subsidiary as defined in section 1(3) of the Companies Act;

**“tertiary capital”** means capital obtained by means of unsecured subordinated debt, subject to such conditions as may be prescribed;

**"the business of a bank"** means -

- (a) the acceptance of deposits from the general public (including persons in the employ of the person so accepting deposits) as a regular feature of the business in question;
- (b) the soliciting of or advertising for deposits;
- (c) the utilization of money, or of the interest or other income earned on money, accepted by way of deposit as contemplated in paragraph (a) -
  - (i) for the granting by any person, acting as lender in such person's own name or through the medium of a trust or a nominee, of loans to other persons;
  - (ii) for investment by any person, acting as investor in such person's own name or through the medium of a trust or a nominee; or
  - (iii) for the financing, wholly or to any material extent, by any person of any other business activity conducted by such person in his or her own name or through the medium of a trust or a nominee;
- (d) the obtaining, as a regular feature of the business in question of money through the sale of an asset, to any person other than a bank, subject to an agreement in terms of which the seller undertakes to purchase from the buyer at a future date the asset so sold or any other asset; or
- (e) any other activity which the Registrar has, after consultation with the Governor of the Reserve Bank, by notice in the *Gazette* declared to be the business of a bank,

but does not include -

- (aa) the acceptance of a deposit by a person who does not purport to accept deposits on a regular basis and who has not advertised for or solicited such deposit : Provided that -
  - (i) the person accepting deposits as contemplated in this paragraph shall not at any time hold deposits from more than twenty persons or deposits amounting in the aggregate to more than R500 000; and
  - (ii) a person and any person controlled directly or indirectly by the first-mentioned person (whether such control is through shareholding or otherwise) or managed by such first-mentioned person, and a subsidiary of such last-mentioned person, who accepts deposits as contemplated in this paragraph shall for the purposes of subparagraph (i) of this proviso be deemed to be one person;
- (bb) the borrowing of money from its members by a co-operative subject to such conditions as may be prescribed;
- (cc) any activity of a public sector, governmental or other institution, or of any person or category of persons, designated by the Registrar, with the approval of the Minister, by notice in the *Gazette*, provided such activity is performed in accordance with such conditions as the Registrar may with the approval of the Minister determine in the relevant notice;
- (dd) any activity contemplated in paragraph (a), (b) or (c) -

- (i) performed by any institution registered or established in terms of, by or under any other Act of Parliament and designated by the Minister by notice in the *Gazette*; or
- (ii) performed in terms of any scheme authorized and controlled by, and conducted in accordance with the provisions of, any other Act of Parliament and so designated by the Minister,

provided such activity is performed in accordance with such conditions as the Minister may determine in the relevant notice;

- (ee) deleted;
- (ff) the effecting, subject to the provision of any other Act of Parliament and to such conditions, if any, as the Registrar may from time to time determine by notice in the *Gazette*, of a money lending transaction directly between a lender and a bank as borrower through the intermediation of a third party who does not act as a principal to the transaction (hereinafter in this paragraph referred to as the agent), provided the funds to be lent in terms of the money lending transaction are entrusted by the lender to the agent subject to a written contract of agency in which, in addition to any other terms thereof, at least the following matters shall be recorded :
  - (i) Confirmation that the agent acts as the agent of the lender; and
  - (ii) that the lender assumes, except in so far as there may in law be a right of recovery against the agent, all risks connected with the administration of the entrusted funds by the agent, as well as the responsibility to ensure that the agent executes the instructions as recorded in the written contract of agency; or
- (gg) the activities, set forth in subparagraphs (A) and (B) hereunder, of a person (hereinafter in this paragraph referred to as the mandatary) that -
  - (i) is a natural or juristic person registered in terms of, or a juristic person established by or under, any other Act of Parliament and the main business activities of whom or of which are regulated or controlled in terms, by or under such other Act of Parliament; and
  - (ii) has been designated by the Registrar by notice in the *Gazette*,

which mandatary, for purposes of effecting a money lending transaction with a bank -

- (A) accepts money from the mandator in terms of a prescribed contract of mandate; and
- (B) in the execution of the mandate, and subject to such conditions as the Registrar may determine in the notice referred to in subparagraph (ii) above, deposits such money into an account maintained by the mandatary with a bank, irrespective as to whether or not such money is so deposited together with money so accepted by the mandatary from other mandators;

"**this Act**" includes the regulations;

"**undesirable practice**" means any act prohibited, or any failure to perform any act enjoined, by section 78(1), and, in relation to a particular bank or banks specified in a notice referred to in section 78(2)(b) or all banks, includes any act which in terms of a notice is referred to in section 78(2) constitutes an undesirable practice for such particular bank, such specified banks, or all banks, as the case may be;

"**wholly owned subsidiary**" means a wholly owned subsidiary as defined in section 1 of the Companies Act.

- (1A) (a) In order to determine, for the purposes of this Act, whether a particular person is a fit and proper person to hold the office of a director or an executive officer of a bank or a controlling company, the Registrar shall have regard to the following qualities, in so far as they are reasonably determinable, of the person concerned:
- (i) The general probity of that person;
  - (ii) the competence and soundness of judgement of that person for the fulfilment of the responsibilities of the office in question; and
  - (iii) the diligence with which the person concerned is likely to fulfil those responsibilities.
- (b) For the purpose of and without prejudice to the generality of the provisions of paragraph (a), the Registrar may have regard to the previous conduct and activities of the person concerned in business or financial matters and, in particular, to any evidence that such person -
- (i) was convicted of the offence of fraud or any other offence of which dishonesty, or the commission of violence, was an element;
  - (ii) had contravened the provisions of any law appearing to the Registrar to be designed for protecting members of the public against financial loss due to the dishonesty or incompetence of, or malpractices by, persons engaged in -
    - (aa) the provision of banking, insurance, investment or other financial services; or
    - (bb) the management of juristic persons,
 or against financial loss due to activities relating to insolvency;
  - (iii) was a director who had been indicated, as contemplated in section 421(2) of the Companies Act, as the effective cause of a particular company having been unable to pay its debts;
  - (iv) had taken part in any business practices that, in the opinion of the Registrar, were deceitful, prejudicial or otherwise improper (whether unlawful or not) or which otherwise brought discredit on that person's methods of conducting business; or
  - (v) had taken part in or been associated with any such other business practices as would, or had otherwise conducted himself or herself in such a way as to, cast doubt on his or her competence and soundness of judgement.



- (c) The Registrar shall be entitled, at any time, to request any person to complete a questionnaire that is designed to enable, and such person shall provide the Registrar with such information as may be necessary to enable, the Registrar to form an opinion, as contemplated in this subsection, regarding the qualities of that person.
  - (d) Any person who refuses or fails to comply with a request addressed to that person by the Registrar under paragraph (c) shall be guilty of an offence.
- (2)
- (a) The Minister may, on the recommendation of the Registrar and after consultation with the Governor of the Reserve Bank, by regulation amend the definition of "deposit" or "the business of a bank" for the purposes of the application of any of or all the provisions of this Act.
  - (b) Every regulation made under paragraph (a) shall be of force and effect unless and until, during the session in which the relevant list has been laid upon the Tables in Parliament in accordance with the provisions of section 17 of the Interpretation Act, 1957 (Act No. 33 of 1957), every House of Parliament has by resolution disapproved of the regulation, in which event the regulation shall lapse as from a date to be specified in the resolution, but such lapsing of the regulation shall not affect the validity of anything done under such regulation before the date specified in the resolution, and nothing contained in this paragraph shall affect the power of the Minister to make a new regulation as to the subject matter of the regulation which has so lapsed.

## **2. Exclusions from application of Act**

Except where expressly stated otherwise, the provisions of this Act, in so far as they impose requirements with which any institution must comply -

- (a) before it may carry on the business of a bank; or;
- (b) in the lawful carrying on of the business of a bank,

shall not apply to -

- (i) the Reserve Bank;
- (ii) the Land Bank;
- (iii) the Development Bank of Southern Africa;
- (iv) the Corporation for Public Deposits established by section 2 of the Corporation for Public Deposits Act, 1984 (Act No. 46 of 1984);
- (v) the Public Investment Commissioners referred to in section 2 of the Public Investment Commissioners Act, 1984 (Act No. 45 of 1984);
- (vi) any mutual bank; or
- (vii) any other institution or body designated by the Minister by notice in the *Gazette*.

## **CHAPTER II**

### **ADMINISTRATION OF ACT**

### 3. Office for Banks

For the registration as banks of public companies desiring to conduct the business of a bank and for the other purposes of this Act there shall, as part of the Reserve Bank, be an office in Pretoria called the Office for Banks, and at the head of such office shall be a person to be styled the Registrar of Banks.

### 4. Registrar and Deputy Registrar of Banks

(1) The Reserve Bank shall, subject to the approval of the Minister, designate an officer or employee in its service as Registrar of Banks, who shall perform, under the control of the said Bank and in accordance with the directions issued by the Bank from time to time, the functions assigned to the Registrar by or under this Act.

(2) The Reserve Bank may, subject to the approval of the Minister, designate so many officers or employees in its service as it may deem necessary, but not exceeding four, as Deputy Registrars of Banks, who shall subject to the control and directions of the Registrar, be competent to perform any function which the Registrar is permitted or required to perform.

(3) The Registrar may from time to time enter into a written cooperation arrangement, such as a memorandum of understanding, with a host supervisor, with a consolidating supervisor or any other person or institution as the Registrar may deem fit, which cooperation arrangement may include-

- (a) a provision that the Registrar may accept the methods and approval processes used by a foreign institution or a bank at group level: Provided that-
  - (i) such methods and approval processes comply with such conditions as may be prescribed; or
  - (ii) the Registrar may impose additional conditions or requirements;
- (b) a provision that the Registrar may conduct an on-site examination or an inspection of a bank or controlling company that is conducting business by means of a branch, a subsidiary company, joint venture or related entity within the jurisdiction of the relevant host supervisor or consolidating supervisor, as the case may be;
- (c) a provision that such a host supervisor or consolidating supervisor, as the case may be, may conduct an on-site examination or an inspection of a branch, a subsidiary company, joint venture or related entity of a bank or a controlling company;
- (d) a provision that the Registrar may share information relating to the financial condition and performance of branches, subsidiaries, joint ventures or related entities of a bank or controlling company with the relevant host supervisor;
- (e) a provision that the Registrar-
  - (i) be informed by the relevant host supervisor of adverse assessments of qualitative aspects of the foreign operations of a bank or controlling company; or
  - (ii) may provide information to the relevant host supervisor regarding significant problems that are being experienced within a bank, controlling company or banking group;

- (f) such other matters as the Registrar may deem to be relevant from time to time.
- (4) The Registrar shall implement and maintain a supervisory review process, which process may include any one or any combination of-
- (a) an on-site examination, inspection or review of a bank or controlling company and its respective branches, subsidiaries, joint ventures or related entities, within or outside the Republic;
  - (b) an off-site review of a bank or controlling company and its respective branches, subsidiaries, joint ventures or related entities, within or outside the Republic;
  - (c) a discussion with an executive officer, chief executive officer or employee in charge of a risk management function of a bank or controlling company, including a discussion with an executive officer responsible for compliance or internal audit of a bank or controlling company;
  - (d) a discussion with a member of the board of directors or a member of a board-appointed committee of a bank or controlling company;
  - (e) a review of the work done by an external auditor of a bank or controlling company;
  - (f) a review of reports submitted in terms of this Act by a bank, controlling company or banking group;
- (5) In order to ensure the appropriate usage by a bank, a controlling company or a branch, of an external credit assessment issued by an eligible institution, the Registrar-
- (a) shall assign such external credit ratings to such risk weights as may be prescribed from time to time; and
  - (b) shall publicly disclose which external credit assessment or rating issued by an eligible external credit assessment institution relates to which prescribed risk weight.
- (6) The Registrar may implement such international regulatory or supervisory standards and practices as he or she deems appropriate after consultation with banks.
- (7) Notwithstanding the provisions of section 33 of the South African Reserve Bank Act, the Registrar-
- (a) may from time to time publicly disclose the following information:
    - (i) Criteria relating to the review of the internal capital assessments of banks;
    - (ii) factors relating to the setting of capital adequacy ratios by the Registrar that are in excess of the minimum capital adequacy ratio as prescribed;
  - (b) shall from time to time publicly disclose the following information:
    - (i) The process and criteria for recognising eligible institutions,
    - (ii) international regulatory or supervisory practices and standards implemented in terms of the provisions of sub-section (6).

## **5. Delegation of powers and assignment of functions by Registrar**

- (1) The Registrar may with the approval of the Reserve Bank -
- (a) delegate to any officer or employee of the Reserve Bank any power conferred upon the Registrar by or under this Act; or
  - (b) authorize any such officer or employee to perform any duty assigned to the Registrar by or under this Act.
- (2) Any delegation under subsection (1)(a) shall not prevent the exercise of the relevant power by the Registrar personally.

## **6. Powers of inspection of, and guidelines by, Registrar**

(1) In addition to the powers and duties conferred or imposed upon him or her by this Act, the Registrar shall, for the purposes of the performance of his or her functions under this Act, have powers and duties in all respects corresponding to the powers and duties conferred or imposed by the Inspection of Financial Institutions Act, 1998 (Act No. 80 of 1998), upon a registrar contemplated in the last-mentioned Act.

(2) Any reference in this Act to an inspection or investigation made under this section shall be construed as a reference to an inspection made in accordance with the provisions of the Inspection of Financial Institutions Act, 1998.

(3) Neither the provisions of this section nor any other provision of this Act shall be construed as prohibiting the Registrar from holding discussions, from time to time, with the chief executive officer of any bank, or with any executive officer or employee designated by such chief executive officer, of -

- (a) that bank;
- (b) any subsidiary or controlling company of that bank, or any other subsidiary of such controlling company;
- (c) any juristic person which would have been a subsidiary of that bank or of its controlling company had such juristic person been a company;
- (d) any juristic person of which the board of directors or, in the case where such juristic person is not a company, of which the governing body is accustomed to act in accordance with the directions or instructions of that bank or its controlling company; or
- (e) any trust controlled directly or indirectly by that bank or its controlling company,

with a view to achieving effective supervision by the Registrar, on an individual or a consolidated basis, of that group or the group of banks of which that bank is a member.

(4) The Registrar may from time to time by means of a circular furnish banks, controlling companies, eligible institutions or auditors of banks or controlling companies with guidelines regarding the application and interpretation of the provisions of this Act.

(5) The Registrar may from time to time by means of a guidance note furnish banks, controlling companies, eligible institutions and auditors of banks or controlling companies with information in respect of market practices or market- or industry developments within or outside the Republic.

- (6) (a) The Registrar may from time to time, in writing, after consultation with the relevant bank, controlling company, eligible institution or auditor of a bank or controlling company, issue a directive to such a bank, controlling company, eligible institution or auditor of a bank or controlling company, either individually or collectively, regarding the application of the Act;
- (b) The directive contemplated in paragraph (a) may include the issuing of a non-financial sanction or a directive requiring a bank, a controlling company, an eligible institution or an auditor of a bank or controlling company, either individually or collectively, within the period specified in the directive, to-
- (i) cease or refrain from engaging in any act, omission or course of conduct or perform such acts necessary to remedy the situation;
- (ii) perform such acts necessary to comply with the directive or to effect the change required to give effect to the directive; or
- (iii) provide the Registrar with such information and documents, relating to the matter as specified in the directive.
- (c) The Registrar may after consultation with the relevant bank, controlling company, eligible institution or auditor of a bank or controlling company, subject to the directive, cancel in writing a previously issued directive;
- (d) No directive issued by the Registrar shall have retroactive effect;
- (e) Any bank, controlling company, eligible institution or auditor of a bank or controlling company that neglects, refuses or fails to comply with a directive issued under this subsection shall be guilty of an offence.

## **7. Furnishing of information by banks and controlling companies**

- (1) The Registrar may by notice in writing -
- (a) direct a bank or a controlling company or a subsidiary of a bank or controlling company to furnish the Registrar, at such time or times or at such intervals or in respect of such period or periods as may be specified in the notice, with such information as may be specified in the notice and as the Registrar may reasonably require for the performance of his or her functions under this Act; or
- (b) direct such bank, controlling company or subsidiary to furnish the Registrar with a report by a public accountant as defined in section 1 of the Auditing Professions Act, 2005 (Act No. 26 of 2005), or by any other person with appropriate professional skill, on any matter, or any aspect of any matter, about which the Registrar has directed or may direct under paragraph (a) the bank, controlling company or subsidiary to furnish information.
- (1A) A report required by the Registrar under paragraph (b) shall be drawn up at the reasonable expense of the bank, controlling company or subsidiary in question.
- (2) The public accountant or other person appointed by a bank, controlling company or subsidiary to make a report required under subsection (1)(b), shall be a person designated or approved by the Registrar, and the Registrar may require the relevant report to be in such form as

may be specified in the notice referred to in subsection (1).

(3) No due diligence audit of the financial condition of any bank shall be conducted without the Registrar first having been notified in writing of the intention to do so.

(4) The person at whose request a due diligence audit of the financial condition of a bank has been conducted shall furnish the Registrar with a copy of the audit report.

(5) No person shall without the written consent of the Registrar disclose to any other person, except to the bank whose financial condition was the subject of the due diligence audit, any information contained in a report referred to in subsection 4.

#### **8. Power of Registrar to extend certain periods**

(1) Any person who is required to submit to the Registrar or to furnish the Registrar with any return, statement, report or other document or information within a period determined by or under this Act, may before or after the expiry of that period apply to the Registrar in writing for an extension of that period.

(2) The Registrar may, after consideration of an application referred to in subsection (1) -

- (a) grant the application and extend by such period as he or she may determine the period within which the return, statement, report or other document or information had to be submitted or furnished; or
- (b) refuse the application,

and shall in writing notify the person who lodged the application of the Registrar's decision.

#### **9. Review of decisions of Registrar**

(1) Any person aggrieved by a decision taken by the Registrar under a provision of this Act may within the prescribed period and in the prescribed manner and upon payment of the prescribed fees apply for a review of that decision by the board of review established by subsection (2).

(2) For the purposes of this Act there is hereby established a board of review which shall consist of three members, appointed by the Minister and of whom -

- (a) one shall be appointed on account of his or her knowledge of law and shall be the chairperson;
- (b) one shall be a person who in the opinion of the Minister has wide experience of, and is knowledgeable about the latest developments in, the banking industry; and
- (c) one shall be a person registered as an accountant and auditor under the Auditing Professions Act, 2005 (Act No. 26 of 2005), and who in the opinion of the Minister has wide experience of, and is knowledgeable about the latest developments in, the accountants' and auditors' profession.

(2A) In any review under subsection (1), the board of review is, subject to the provisions of subsection (8), confined to establishing whether or not, in the taking of the relevant decision, the Registrar exercised his or her discretion properly and in good faith.

(3) deleted

(4) If before or during any review under subsection (1) it transpires that any member of the board of review has any direct or indirect personal interest in the outcome of that review, such member shall recuse himself or herself and such member shall be replaced by a person temporarily appointed, subject to the provisions of subsection (2), by the Minister for the purposes of the review.

(4A) If before or during any review under subsection (1), it transpires that any member of the board of review will, due to illness, absence from the Republic or for any other *bona fide* reason be unable to participate or continue to participate in that review, such member shall be replaced by a person temporarily appointed, subject to the provisions of subsection (2), by the Minister for the purposes of the review.

(5) A member of the board of review shall hold office for a period of three years and shall on the expiration of such member's term of office be eligible for reappointment .

(6) Any casual vacancy that occurs on the board of review shall be filled by the appointment by the Minister, subject to the provisions of subsection (2), of another member, and any person so appointed shall hold office for the unexpired portion of the period of office of the predecessor of such member.

(7) A review under subsection (1) shall take place on the date and at the place and time fixed by the board of review, which shall give notice in writing to the applicant as well as the Registrar thereof.

(8) The board of review may for the purposes of a review under subsection (1)-

- (a) summon any person who, in its opinion, may be able to give material information for the purposes of the review or who it believes has in his or her possession or custody or under his or her control any document which has any bearing upon the decision under review, to appear before it at a time and place specified in the summons, to be interrogated or to produce that document, and retain for examination any document so produced;
- (b) administer an oath to or accept an affirmation from any person called as a witness at the review; and
- (c) call any person present at the review proceedings as a witness and interrogate such person and require such person to produce any document in his or her possession or custody or under his or her control, and such a person shall be entitled to legal representation at his or her own expense.

(9) Subject to the provisions of subsection (2A), the procedure at the review shall be determined by the chairperson of the board of review.

(10) The board of review may after the review confirm, set aside or vary the relevant decision of the Registrar.

(11) The decision of a majority of the members of the board of review shall be the decision of that board.

(12) The decision of the board of review shall be in writing, and a copy thereof shall be furnished to the applicant as well as to the Registrar.

(13) If the board of review sets aside any decision by the Registrar, the prescribed fees paid by the applicant in respect of the review in question shall be refunded to the applicant, and if the board of review varies any such decision, it may in its discretion direct that the whole or any part of such fees be refunded to the applicant.

(14) A member of the board of review shall in respect of his or her services as such a member be paid such remuneration, including reimbursement for transport, travelling and subsistence expenses incurred by him or her in the performance of his or her functions as such a member, as the Minister may from time to time determine.

#### **10. Annual report by Registrar**

(1) The Registrar shall annually submit to the Minister a report on his or her activities in terms of this Act during the year under review.

(2) The Minister shall lay a copy of the report referred to in subsection (1) upon the Tables in Parliament within 14 days after receipt of such report, if Parliament is then in ordinary session, or, if Parliament is not then in ordinary session, within 14 days after the commencement of its next ensuing ordinary session.

### **CHAPTER III**

#### **AUTHORIZATION TO ESTABLISH, AND REGISTRATION AND CANCELLATION**



## OF REGISTRATION OF, BANKS

### 11. Registration a prerequisite for conducting business of bank

- (1) Subject to the provisions of section 18A, no person shall conduct the business of a bank unless such person is a public company and is registered as a bank in terms of this Act.
- (2) Any person who contravenes a provision of subsection (1) shall be guilty of an offence.

### 12. Application for authorization to establish bank

- (1) Any person who wishes to conduct the business of a bank may apply to the Registrar for authorization to establish such a bank.
- (2) An application under subsection (1) -
  - (a) shall be made in the manner and on the form prescribed by the Regulations relating to Banks; and
  - (b) shall be accompanied by a statement containing the information prescribed by the Regulations relating to Banks.
- (3) The Registrar may require an applicant contemplated in subsection (1) to furnish him or her with -
  - (a) such information or documents, in addition to information and documents furnished by the applicant in terms of subsection (2); or
  - (b) a report by a public accountant as defined in section 1 of the Auditing Professions Act, 2005 (Act No. 26 of 2005), or by any other knowledgeable person approved by the Registrar, on such aspects relating to the application in question,

as the Registrar may deem necessary.

### 13. Granting or refusal of application for authorization

- (1) Subject to the provisions of subsection (2), the Registrar may, after considering all information, documents and reports furnished to him or her for the purposes of an application under section 12, grant or refuse the relevant application or grant the application subject to such conditions as he or she may determine.
- (2) The Registrar shall not grant an application made under section 12 unless he or she is satisfied -
  - (a) that the establishment of the proposed bank will be in the public interest;
  - (b) that the business the applicant proposes to conduct, is that of a bank;
  - (c) that the applicant will conduct the proposed business of a bank in the capacity of a public company incorporated and registered under the Companies Act;
  - (d) that the applicant will be able to establish itself successfully as a bank;
  - (e) that the applicant will have the financial means to comply, in the capacity of a bank,

with the requirements of this Act;

- (f) that the business of the proposed bank will be conducted in a prudent manner;
  - (fA) that every person who is to be a director or an executive officer of the proposed bank is, as far as can reasonably be ascertained, a fit and proper person to hold the office of such director or executive officer;
  - (g) that every person who is to be an executive officer of the proposed bank has sufficient experience of the management of the kind of business it is intended to conduct; and
  - (h) that the composition of the board of directors of the proposed bank will be appropriate having regard to the nature and scale of the business it is intended to conduct.
- (3) When the Registrar grants or refuses an application made under section 12, he or she shall give written notice of that fact to the applicant concerned.

(4) Deleted.

#### **14. Revocation of authorization**

- (1) The Registrar may at any time prior to the registration, in terms of section 17, of a bank, revoke the authorization granted for the establishment of such a bank if the Registrar is satisfied that-
- (a) false or misleading information was furnished in the application for such authorization; or
  - (b) success has not been achieved within a period of 12 months as from the date of the granting of the said authorization, with the formation in accordance with the proposals contained in the application for the said authorization, of the proposed bank.
- (2) When the Registrar revokes an authorization in terms of subsection (1), he or she shall give written notice of that fact to the person to whom the authorization was granted.

#### **15. Formation of certain companies prohibited except with approval of Registrar**

- (1) No public company shall without the written approval of the Registrar be formed in terms of the Companies Act to conduct the business of a bank in accordance with the provisions of this Act.
- (2) The Registrar shall grant the approval referred to in subsection (1) only if he or she is of the opinion that the company concerned will probably, having regard to the provisions of section 17, be eligible for registration as a bank in terms of this Act.
- (3) Notwithstanding anything to the contrary contained in the Companies Act, the Registrar of Companies shall not register in terms of that Act the memorandum of association and articles of association of a public company formed for the purpose of conducting the business of a bank, unless the application for such registration is accompanied by the approval referred to in subsection (1).

#### **16. Application for registration as bank**

- (1) An applicant to whom the Registrar has under section 13 granted authorization for the establishment of a bank (hereinafter in this Chapter referred to as the institution) may at any time during the period of 12 months commencing on the date of the granting of the said authorization

apply to the Registrar for the registration of the institution as a bank, provided such authorization has not been revoked in terms of section 14(1).

- (2) An application under subsection (1) shall -
- (a) be made in the manner and on the form prescribed by the Regulations relating to Banks; and
  - (b) be accompanied by -
    - (i) two copies each of the institution's memorandum of association and articles of association;
    - (ii) a written statement in which is set out -
      - (aa) the full and the abbreviated name of the institution as well as the literal translations thereof;
      - (bb) the address of the institution's head office as well as its postal address;
      - (cc) full particulars of the business the applicant proposes to conduct and of the manner in which it proposes to conduct such business; and
      - (dd) the full names and the addresses of the chairperson, the other directors and the executive officers of the institution; and
    - (iii) a list of shareholders in the institution, as at the date of the application, drawn up in accordance with the requirements with which a return referred to in section 59 has to comply.

(3) The Registrar may require an applicant contemplated in subsection (1) to furnish him or her with such information or documents, in addition to information and documents furnished by the applicant in terms of subsection (2), as the Registrar may deem necessary.

(4) The application and every document lodged in terms of subsection (2) or (3) shall be signed by the chairperson or the chief executive officer of the institution.

## **17. Granting and refusal of application for registration**

(1) Subject to the provisions of subsection (2), the Registrar shall, after considering all information and documents furnished to him or her in terms of section 16 for the purposes of an application under that section, grant such application if he or she is satisfied -

- (a) that the business the applicant proposes to conduct is that of a bank;
- (b) that the applicant does not propose to adopt undesirable methods of conducting business; and
- (c) that the memorandum of association and articles of association of the institution are consistent with this Act and are not undesirable for any reason.

(2) Notwithstanding the provisions of subsection (1), the Registrar may refuse an application for the registration of an institution as a bank if he or she is of the opinion -

- (a) that any of the requirements specified in section 13(2) is no longer complied with by or in respect of the institution concerned;
  - (b) that the institution concerned, when registered as a bank, will probably not be able to comply with a provision of this Act, or is likely to pursue a practice contrary to a provision of this Act;
  - (c) that an interest which any person has in the institution concerned is inconsistent with a provision of this Act;
  - (d) that the interests of potential depositors with the institution concerned will be detrimentally affected by the manner in which the institution proposes to conduct its business, or for any other reason;
  - (e) that the name of the institution concerned -
    - (i) is identical with a name under which an existing bank or a mutual bank has already been registered;
    - (ii) so closely resembles the name of an existing bank or mutual bank that the one is likely to be mistaken for the other;
    - (iii) is identical with, or closely resembles, the name under which any bank or any other institution which was registered under any law repealed by this Act, or any mutual bank, was previously registered and that reasonable ground for objection against the use of the name by the institution concerned exists; or
    - (iv) is likely to mislead the public; or
  - (f) that the application does not comply with a requirement of this Act.
- (3) When the Registrar in terms of this section grants or refuses an application for registration, he or she shall give written notice of that fact to the applicant concerned.
- (4) If the Registrar in terms of this section grants an application for registration he or she shall, subject to the provisions of section 18, and on payment by the applicant of the prescribed registration fee, register the institution concerned as a bank and issue to the institution, on the prescribed form, a certificate of registration as a bank.
- (5) An institution which is for the first time registered as a bank shall not commence doing the business of a bank until it has furnished proof to the Registrar that it complies with the provisions of section 70.
- (6) An institution which contravenes the provisions of subsection (5) shall be guilty of an offence.

## **18. Conditions of registration**

- (1) The registration under section 17 of an institution as a bank shall be subject to the prescribed conditions and to such further conditions, if any, as the Registrar may determine.
- (2) In addition to any other condition which the Registrar may impose under subsection (1), he or

she may impose a condition requiring the institution concerned to take within a specified period such steps in terms of the Companies Act as may be necessary to alter its memorandum of association or articles of association in accordance with the requirements of the Registrar.

#### **18A. Branches of foreign institutions**

(1) An institution which has been established in a country other than the Republic and which lawfully conducts in such other country a business similar to the business of a bank (hereinafter in this section referred to as the foreign institution) may, notwithstanding the provisions of section 11(1), with the prior written authorization of the Registrar and subject to the prescribed conditions and to such further conditions, if any, as the Registrar may determine, conduct the business of a bank by means of a branch in the Republic.

(2) To obtain the prior authorization of the Registrar as contemplated in subsection (1), the foreign institution concerned shall in the manner and on the form prescribed by the Regulations relating to branches lodge with the Registrar a written application which shall be accompanied by -

- (a) a written statement containing the prescribed information; and
- (b) the prescribed fee.

(3) The Registrar may require the foreign institution applying in terms of subsection (2) to furnish him or her 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 the Republic;
  - (ii) the foreign institution itself; or
  - (iii) any group of institutions of which the foreign institution may form a part,

as the Registrar may deem necessary.

(4) When the Registrar grants or refuses an application in terms of subsection (2) for authorization to conduct the business of a bank by means of a branch in the Republic, he or she shall give written notice of that fact to the applicant concerned.

(5) The Registrar shall not grant an application in terms of subsection (2) unless he or she is satisfied that proper supervision as contemplated in subsection (3)(b) is or will be exercised by the responsible supervisory authority of the foreign institution's country of domicile.

(6) If the Registrar grants an application referred to in subsection (4) he or she shall on the prescribed form issue to the foreign institution concerned a certificate of authorization to conduct the business of a bank by means of a branch in the Republic.

(7) Any foreign institution that conducts the business of a bank by means of a branch in the Republic without having obtained the Registrar's written authorization referred to in subsection (1)

shall be guilty of an offence.

(8) Any reference to a bank in this Act or in any other Act of Parliament shall, in so far as it may be relevant, include a reference to a branch, unless expressly stated otherwise.

**18B. Cancellation or suspension of authorization by Registrar and notice by Registrar of intention to cancel or suspend authorization**

(1) The Registrar may, subject to the provisions of subsections (2) and (3), in the case of a foreign institution that, under an authorization referred to in section 18A, conducts the business of a bank by means of a branch in the Republic, with the consent of the Minister and by notice in writing to the foreign institution concerned cancel, or suspend on such conditions as the Registrar may deem fit, such authorization if the foreign institution concerned has failed to comply with a prescribed condition or a further condition, contemplated in section 18(A)(1), to which its authorization is subject.

(2) The Registrar shall, before cancelling or suspending under subsection (1) the authorization of a foreign institution referred to in subsection (1), in a written notice addressed to the foreign institution concerned -

- (a) inform the foreign institution of his or her intention to cancel or suspend, as the case may be, such authorization;
- (b) furnish the foreign institution with the reasons for the intended cancellation or suspension; and
- (c) call upon the foreign institution to show cause within a period specified in the notice, which shall not be less than 30 days as from the date of the notice, why its authorization should not be so cancelled or suspended.

(3) After considering any representations received within the specified period from the foreign institution concerned by virtue of the provisions of subsection (2)(c), the Registrar may in his or her discretion-

- (a) proceed with the cancellation or suspension in terms of subsection (1) of the authorization; or
- (b) refrain from taking any further steps in terms of subsection (1),

and the Registrar shall in writing inform the foreign institution concerned of his or her decision in terms of this subsection.

**19. Application for final registration as bank**

Repealed.

**20. Granting or refusal of application for final registration**

Repealed.

**21. Untrue information in connection with applications**

Any person who in or in connection with -

- (a) an application for authorization to establish a bank; or

- (b) an application for registration as a bank,

furnishes the Registrar with any information which to the knowledge of such person is untrue or misleading in any material respect, shall be guilty of an offence.

## **22. Use of name of bank**

(1) Subject to the provisions of subsection (2), an institution which is registered as a bank or a foreign institution which is authorized under section 18A to conduct the business of a bank by means of a branch in the Republic or an institution which is registered as a representative office of a foreign institution under section 34 shall not-

- (a) in the case of such bank use, or refer to itself by, a name other than the name under which it is so registered, or
- (b) in the case of such foreign institution, in respect of the branch concerned use, or refer to the branch by, a name other than the name under which the conduct of the business of a bank in the Republic was so authorised,

or any literal translation or abbreviation of such name which has been approved by the Registrar: Provided that the Registrar may, if he or she deems it desirable, authorise the use of a name by which such bank or foreign institution is otherwise generally known.

(2A) A bank may, with the prior written consent of the Registrar, in conjunction with its registered name, and subject to such conditions as the Registrar may determine, use or refer to a name of a division, brand or product of that bank, which name includes the word "bank" or any derivative thereof.

(2) An institution which is registered as a bank may, with the consent of the Registrar, in conjunction with its registered name of the name of which the use was authorised by the Registrar under the proviso to subsection (1) use, or refer to itself by, the name of another bank with which it has amalgamated or all the assets and liabilities of which have, as contemplated in section 54(1), been transferred to it or, in the case of a change of name, the name by which it was previously known.

(3) An institution which contravenes the provisions of subsection (1) shall be guilty of an offence.

(4) Any person who, in connection with any business conducted by such person-

- (a) uses any name, description or symbol indicating, or calculated to lead persons to infer, that such person is a bank registered as such under this Act; or
- (b) in any other manner purports to be a bank registered as such under this Act,

while such a person is not so registered as a bank, shall be guilty of an offence.

(5) No person shall use in respect of any business a name or description which includes the word "bank", or any derivative thereof, or the words "deposit-taking institution" or "building society", or any derivative thereof, unless -

- (a) the business in question is a bank or a foreign institution which is authorized under section 18A to conduct the business of a bank by means of a branch in the Republic or an institution that is registered as a representative office of a foreign institution under section 34; or
- (b) the business in question is registered as a controlling company in respect of a bank

under this Act and the name or description in question is so used for the purpose of indicating the connection between the two companies concerned; or

- (c) such name or description is composed of words which include the word "bank" as part of a place-name or a personal name,

and the Registrar has in writing authorized such person so to use such name or description.

(6) Notwithstanding the prohibition contained in subsection (5), a company -

- (a) of which the formation has been approved by the Registrar in terms of section 15, may be formed under a name which includes the word "bank" or the words "deposit-taking institution" or "building society", or a derivative thereof; or
- (b) whose application for registration as a bank has been granted by the Registrar under section 17 and which has not been formed in accordance with paragraph (a) of this subsection under a name which already includes the word "bank" or the words "deposit-taking institution" or "building society", or a derivative thereof, may before its registration take the necessary steps in accordance with the Companies Act to include such word, words or derivative in its name.

(7) The Registrar may in writing direct a company referred to in subsection (6) whose name includes the word "bank" or the words "deposit-taking institution" or "building society", or any derivative thereof, to remove such word, words or derivative from its name -

- (a) in the case of a company referred to in paragraph (a) of that subsection, if it fails to apply in terms of section 16(1) for registration as a bank within the period of 12 months referred to in that section, or if its application for such registration is refused under section 17; and
- (b) in the case of a company referred to in paragraph (b) of that subsection, if it fails to comply, within a reasonable time after its application for registration has been granted under section 17, with the conditions subject to which it was registered.

(8) Any person who contravenes any provision of subsection (5) or refuses or fails to comply with a direction under subsection (7) shall be guilty of an offence.

(9) The provisions of subsection (5) shall not be construed as prohibiting the use in respect of any company, society, firm, business or undertaking of any name, style or description which immediately prior to the commencement of this Act was lawfully so used in terms of the provisions of any law repealed by this Act.

### **23. Cancellation or suspension of registration by Registrar**

(1) The Registrar may subject to the provisions of section 24, in the case of a bank registered as such, with the consent of the Minister and by notice in writing to the institution concerned cancel, or suspend on such conditions as the Registrar may deem fit, such registration if the institution has not conducted any business as a bank during the period of six months commencing on the date on which the institution was registered as a bank.

(2) The Registrar may, subject to the provisions of section 24, in the case of a bank registered as such, with the consent of the Minister and by notice in writing to the institution concerned cancel, or suspend on such conditions as the Registrar may deem fit, such registration if -

- (a) it has, in the opinion of the Registrar, been obtained on the strength of untrue or misleading information furnished by any person and such person has, on account of



having so furnished such information, been convicted of an offence in terms of section 21;

- (b) in the case of a bank of which the main place of business is situated in a country other than the Republic, the authorization in terms of which the institution concerned is authorized to conduct business in such other country similar to the business of a bank, is revoked by the competent authority in such other country; or
- (c) the institution concerned has failed to comply -
  - (i) with a prescribed condition or a further condition, contemplated in section 18(1), to which its registration is subject; or
  - (ii) with a condition imposed by the Registrar under section 18(2).

(3) The Registrar may, subject to the provisions of section 24, in the case of a bank registered as such, with the consent of the Minister and by notice in writing to the institution concerned cancel such registration if the institution has ceased to conduct the business of a bank or is no longer in operation.

#### **24. Notice by Registrar of intention to cancel or suspend registration**

(1) The Registrar shall, before cancelling or suspending under section 23 the registration of a bank, in a written notice addressed to the chairperson or chief executive officer of the institution concerned -

- (a) inform the institution of his or her intention to cancel or suspend, as the case may be, such registration;
- (b) furnish the institution with the reasons for the intended cancellation or suspension; and
- (c) call upon the institution to show cause within a period specified in the notice, which shall not be less than 30 days as from the date of the notice, why its registration should not be so cancelled or suspended.

(2) After considering any representations received within the specified period from the institution concerned by virtue of the provisions of subsection (1)(c), the Registrar may in his or her discretion -

- (a) proceed with the cancellation or suspension in terms of section 23, of the registration; or
- (b) refrain from taking any further steps in terms of section 23,

and the Registrar shall in writing inform the chairperson or chief executive officer of the institution concerned of his or her decision in terms of this subsection.

#### **25. Cancellation or suspension of registration by court**

(1) The Registrar may by way of application on notice of motion apply to a competent court for an order cancelling or suspending the registration of a bank if in the opinion of the Registrar there exist grounds, other than the grounds referred to in section 23, justifying such cancellation or suspension.

(2) A competent court for the purposes of subsection (1) shall be any division of the High Court of

South Africa within the area of jurisdiction of which the registered office, referred to in section 170 of the Companies Act, of the bank concerned is situated.

(3) The court entertaining an application made under subsection (1) shall enquire into and consider the matter and shall grant or refuse the application, and may make such order as to costs as it may deem fit.

(4) In addition to any other grounds which the court may consider sufficient to justify the granting of an order under subsection (1) cancelling or suspending the registration of a bank, such an order may also be granted if the institution concerned -

- (a) has, or any of its directors or executive officers has, been convicted of any offence in terms of this Act;
- (b) does not carry on satisfactorily the business of a bank;
- (c) has failed to comply with a requirement of this Act which is applicable to it in its capacity as a registered bank;
- (d) continues to employ an undesirable practice; or
- (e) has in a material respect misrepresented the facilities which it offers to the general public,

or if, on any other ground advanced by the Registrar in the relevant application, the court is of the opinion that it is not in the public interest to allow the institution concerned to continue its activities as a bank.

## **26. Restriction by Registrar of activities of bank**

(1) The Registrar may, in lieu of an application under section 25(1), by written notice to a registered bank in respect of which, in the opinion of the Registrar, any of the circumstances mentioned in paragraphs (a) to (e), inclusive, of section 25(4) is present, restrict the activities of the institution concerned as a bank in such respects and on such conditions as the Registrar may specify in the notice.

(2) The provisions of section 24 shall *mutatis mutandis* apply in respect of the restriction of the activities of a bank by the Registrar under subsection (1).

## **27. Cancellation of registration at request of bank**

The Registrar shall cancel the registration of a bank upon submission to him or her by the institution concerned of a special resolution contemplated in section 200 of the Companies Act authorizing such cancellation.

## **28. Cancellation of registration upon winding-up**

When the affairs of a bank have been completely wound up as contemplated in section 419 (1) of the Companies Act, the responsible Master of the High Court shall transmit to the Registrar a copy of the certificate referred to in that section, and the Registrar shall upon receipt of such copy cancel the registration of the bank concerned.

## **29. Withdrawal of suspension or restriction**

- (1) The Registrar may on the written application of a bank of which -
- (a) the registration was suspended under section 23; or
  - (b) the activities were restricted under section 26,

by written notice to the institution concerned withdraw such suspension or restriction, as the case may be, provided the Registrar is satisfied that the institution has complied with all requirements for such withdrawal imposed by the Registrar in the conditions of suspension or restriction.

- (2) Application for an order discharging an order under section 25 whereby the registration of a bank has been suspended by the court, may be made to the competent court referred to in section 25(2).

**30. Publication of information relating to banks, controlling companies, eligible institutions and representative offices of foreign institutions and the keeping of records by the Registrar**

- (1) The Registrar shall publish a notice in the *Gazette* and shall keep a record of every –
- (a)
    - (i) registration of an institution as a bank or a controlling company;
    - (ii) authorisation granted to conduct the business of a bank by means of a branch; or
    - (iii) consent granted for the establishment of a representative office by a foreign institution;
  - (b)
    - (i) cancellation or suspension of the registration of a bank, or controlling company;
    - (ii) withdrawal of the authorisation to conduct the business of a bank by means of a branch; or
    - (iii) withdrawal of consent to conduct the business of a representative office by a foreign institution or the closure of such a representative office;
  - (c) restriction of the activities of a bank, controlling company or branch;
  - (d) change of the name of a bank, controlling company, branch or representative office of a foreign institution;
  - (e) permission granted in respect of a compromise, amalgamation or arrangement referred to in Chapter XII of the Companies Act that involves a bank as one of the principal parties to the relevant transaction;
  - (f) permission granted to an arrangement for the transfer of more than 25 per cent of the assets, liabilities or assets and liabilities of a bank to another person; or
  - (g) approval granted in respect of an eligible institution;

which is effected or which takes place in terms of this Act.

- (2) The Registrar shall keep a record of every-

- (a) approval granted to a bank or a controlling company to establish or acquire a subsidiary within or outside the Republic;
- (b) approval granted to a bank to establish or acquire a branch of a bank;
- (c) approval granted to a bank or a controlling company to acquire an interest in any undertaking having its registered office or principal place of business outside the Republic;
- (d) approval granted to a bank or a controlling company to create or acquire a trust outside the Republic of which the bank is a major beneficiary;
- (e) approval granted to a bank or controlling company to establish or acquire any financial or other business undertaking under its direct or indirect control; or
- (f) approval granted to a bank to establish or acquire a representative office outside the Republic,

which is affected or which takes place in terms of this Act.

### **31. Date on which registration lapses**

An institution registered as a bank shall cease to be registered as such -

- (a) deleted.
- (b) in the case of a registration cancelled by the Registrar under section 23, upon expiry of 30 days after the date of the notice referred to in subsection (1), (2) or (3) of that section or, if an application for the review of such a decision to cancel was lodged with the board of review in terms of section 9 before the expiry of the said 30 days and the board of review has confirmed such cancellation, upon the date on which the institution concerned is notified of such confirmation;
- (c) in the case of a registration in respect of which the court has granted an order under section 25 cancelling the registration, upon the date on which that order comes into force; or
- (d) in the case of a registration cancelled by the Registrar in terms of section 27 or 28, upon such date as may be determined by the Registrar.

### **32. Repayment of deposits upon lapse of registration**

(1) Whenever an institution which is registered as a bank ceases to be registered as such, the Registrar may in writing order that institution -

- (a) to repay, in accordance with such directions and within such period as may be specified in the order, all money due by it to members of the public in respect of deposits accepted by it while registered as a bank, including any interest or any other amounts owing by it in respect of such money; and
- (b) to change its name and its memorandum of association and articles of association within the period and in the manner required by the Registrar.

(2) Different directions and periods may under subsection (1) be determined in respect of different kinds of deposits : Provided that in determining such directions and periods no preference shall be given to any such member of the public which such member does not in law enjoy.

(3) An institution which by virtue of the provisions of subsection (1) repays a deposit before the due date agreed for the repayment thereof, shall not be bound to pay any interest or any other amounts which would have been payable in respect of such deposit for the period from the date of such repayment up to such due date.

(4) Any institution which fails to comply with an order under subsection (1) shall -

(a) be guilty of an offence; and

(b) for the purposes of sections 344 and 345 of the Companies Act be deemed not to be able to pay its debts.

### **33. Reregistration in terms of this Act**

(1) Every institution which on the date immediately preceding the date of commencement of the Deposit-taking Institutions Amendment Act, 1993 (hereinafter in this section referred to as the Amendment Act), is a deposit-taking institution that has been provisionally or finally registered as such under the provisions of this Act as those provisions existed prior to the amendment thereof by the Amendment Act shall, in accordance with and subject to the provisions of subsection (2) and (3)–

(a) in the case of an institution that has so been provisionally registered as a deposit-taking institution, be provisionally registered as a bank, and

(b) in the case of an institution that has so been finally registered as a deposit-taking institution, be finally registered as a bank,

by the Registrar in terms of the provisions of this Act as so amended, as soon as is practicable after the said date of commencement.

(2) The Registrar shall when complying with the provisions of subsection (1) issue to the institution in question a certificate of provisional or final registration as a bank, as the case may be.

(3) The reregistration of an institution in terms of this section shall in the case of a provisional registration be for the unexpired portion of the period of the institution's former provisional registration as a deposit-taking institution.

(4) Upon the reregistration of an institution in terms of this section its previous registration as a deposit-taking institution shall be deemed to have lapsed and any certificate or registration issued in respect thereof shall be deemed to have been cancelled.

(5) No fees shall be payable in respect of a reregistration in terms of this section.

### **33A. Reregistration after commencement of Banks Amendment Act, 1994**

(1) Every institution which on the date immediately preceding the date of commencement of the Banks Amendment Act, 1994 (hereinafter in this section referred to as the Amendment Act), is a bank that has been provisionally or finally registered as such under the provisions of this Act as those provisions existed prior to the amendment thereof by the Amendment Act shall, in accordance with and subject to the provisions of subsections (2) and (3), be reregistered as a bank by the Registrar in terms of the provisions of this Act as so amended, as soon as is practicable after the said date of

commencement.

(2) The Registrar shall, when complying with the provisions of subsection (1), issue to the institution in question a certificate of registration as a bank.

(3) The reregistration of an institution in terms of this section shall be subject *mutatis mutandis* to the provisions of section 18.

(4) Upon the reregistration of an institution in terms of this section its previous provisional or final registration as a bank, as the case may be, shall be deemed to have lapsed and any certificate of registration issued in respect thereof shall be deemed to have been cancelled.

(5) No fees shall be payable in respect of a reregistration in terms of this section.

#### **34. Representative offices of foreign institutions**

(1) An institution which has been established in a country other than the Republic and which lawfully conducts in such other country a business similar to the business of a bank (hereinafter in this section referred to as a foreign institution), may not establish a representative office in the Republic without having previously obtained the written consent of the Registrar.

(2) The consent referred to in subsection (1) shall be obtained by way of a written application to the Registrar in which is specified -

- (a) the name of the foreign institution;
- (b) the country in which it is established;
- (c) the name of its proposed chief representative officer in the Republic; and
- (d) the address of its proposed representative office in the Republic,

and the application shall be accompanied by the prescribed fee and a certificate of the competent authority in the other country in question to the effect that the foreign institution concerned is by or under the laws of that other country authorized to conduct a business in such country similar to the business of a bank.

(2A) A foreign institution applying in terms of subsection (2) may be required by the Registrar to furnish him or her with such information and documents as he or she may deem necessary, over and above any information and documents which have been furnished by such foreign institution by virtue of that subsection.

(2B) After having considered all information and documents furnished to the Registrar for the purpose of an application in terms of subsection (2), the Registrar may grant the application either unconditionally or subject to such conditions as he or she may determine, if the Registrar is satisfied that -

- (a) the foreign institution making that application lawfully conducts a business similar to the business of a bank in a country other than the Republic;
- (b) the competent authority responsible in that other country for the supervision of that foreign institution -
  - (i) has duly authorized the proposed establishment of a representative office in the Republic by that foreign institution;

- (ii) accepts, is committed to and complies with the proposals, guidelines and pronouncements of the Basle Committee on Banking Supervision;
  - (iii) is not legally precluded from fulfilling its obligations in terms of subparagraph (ii); and
  - (iv) will on a continuous basis furnish the Registrar with all material information regarding the financial soundness of that foreign institution; and
- (c) the establishment of a representative office in the Republic by that foreign institution will not be detrimental to the public interest.

(2C) Upon granting an application for consent to the establishment of a representative office in the Republic, the Registrar, against payment of the prescribed fee by the foreign institution, shall issue to the foreign institution, on the prescribed form, a certificate of authorization for the establishment of a representative office in the Republic.

(3) After the establishment of a representative office in terms of this section the foreign institution concerned shall in writing notify the Registrar -

- (a) of any change of the name of the institution;
- (b) of any substitution of its chief representative officer in the Republic;
- (c) of any change of the address of the representative office; or
- (d) of the closing down of the representative office,

as soon as it occurs.

(4) A representative office contemplated in this section may not conduct the business of a bank in the Republic.

(5) Representative offices established in accordance with the provisions of this section shall furnish the Registrar, at such time or times or at such intervals or in respect of such period or periods and in such form as may be prescribed, with such prescribed information as he may require reasonably for purposes of the performance of his functions under this Act.

### **35. Annual licence**

A bank, a branch by means of which a foreign institution is under section 18A authorized to conduct the business of a bank in the Republic and a representative office established in terms of section 34 shall obtain from the Registrar a business licence pertaining to its particular business in respect of each year ending on the thirty-first day of December against payment of the prescribed licence fees.

## **CHAPTER IV**

### **SHAREHOLDING IN, AND REGISTRATION OF CONTROLLING COMPANIES IN RESPECT OF, BANKS**

### **36. Restriction on shareholding in banks and controlling companies**

Repealed.

**37. Permission for acquisition of shares in bank or controlling company**

- (1) Subject to the provisions of subsection (6), no person shall acquire in a bank or controlling company -
- (a) shares of which the total nominal value or voting rights in respect of the issued shares of such bank or controlling company that are exercisable by such person ; or
  - (b) shares of which the total nominal value together with the total nominal value of such shares already held by such person or the voting rights in respect of the issued shares of such bank or controlling company that is exercisable by such person together with the voting rights attached to the shares of such bank or controlling company that are already held and exercisable by such person; or
  - (c) shares of which the total nominal value together with the total nominal value of such shares already held by such person and by the associate or associates of such person or the voting rights in respect of the issued shares of such bank or controlling company that are exercisable by such person together with the voting rights attached to the shares of such bank or controlling company that are already held and exercisable by such person and by the associate or associates of such person,

amount to more than 15 per cent of the total nominal value or the total voting rights in respect of all the issued shares of the bank or controlling company, without first having obtained permission in accordance with the provisions of subsection (2) for such acquisition.

- (2) (a) If, subject to the provisions of paragraph (c) -
- (i) any person has for a period of 12 months or such shorter period as the Registrar may deem fit held so many shares in, or the voting rights in respect of the issued shares of a bank or controlling company as such person may in accordance with the provisions of subsection (1) hold therein, such person may, if the Registrar has granted permission in writing thereto, acquire more than 15 per cent, but not exceeding 24 per cent, of those shares or the voting rights in respect of the issued shares as contemplated in the said subsection;
  - (ii) the said person has for a period of 12 months or such shorter period as the Registrar may deem fit held 24 per cent of those shares, or the voting rights in respect of the issued shares as so contemplated such person may, if the Registrar has granted permission in writing thereto, acquire more than 24 per cent, but not exceeding 49 per cent, of those shares or the voting rights in respect of the issued shares as contemplated in the said subsection (1);
  - (iii) the said person has for a period of 12 months or such shorter period as the Minister may deem fit held 49 per cent of those shares, or the voting rights in respect of the issued shares as contemplated in the said subsection (1) such person may, if the Minister has, through the Registrar, granted permission thereto in writing, acquire more than 49 per cent, but not exceeding 74 per cent, of those shares or the voting rights in respect of the issued shares as contemplated in the said subsection; and
  - (iv) the said person has for a period of 12 months or such shorter period as the Minister may deem fit held 74 per cent of those shares, or the voting rights in respect of the issued shares as contemplated in the said subsection (1) such person may, if the Minister has, through the Registrar, granted permission



thereto in writing, acquire more than 74 per cent of those shares or the voting rights in respect of the issued shares as contemplated in the said subsection.

- (b) In considering granting permission in terms of paragraph (a) the Registrar or the Minister, as the case may be, may consult with the Competition Commission established in terms of the provisions of the Competition Act, 1998 (Act No. 89 of 1998).
- (c) Notwithstanding the provisions of paragraph (a), the Registrar or the Minister, as the case may be, may, if in a particular case the Registrar or the Minister, as the case may be, deems it fit to do so, grant permission for the acquisition of shares or the voting rights in respect of the issued shares as contemplated in subparagraph (i), (ii), (iii) or (iv) of paragraph (a) without the applicant for such permission having held shares or the voting rights in respect of the issued shares for the period of 12 months or any shorter period as required in any of the said subparagraphs.

(3) If any person at the commencement of the Banks Amendment Act, 2007, already holds more than 15 per cent of the voting rights in respect of the issued shares in a bank or controlling company as contemplated in subsection (1), such person may not acquire more of the voting rights in respect of the issued shares as contemplated in the said subsection before such person has obtained the appropriate permission in terms of subsection (2).

(4) Permission in terms of subsection (2) for the acquisition of shares or the voting rights in respect of the issued shares in a bank or controlling company shall not be granted unless the Registrar or the Minister, as the case may be, is satisfied that the proposed acquisition of shares or the voting rights in respect of the issued shares -

- (a) will not be contrary to the public interest; and
- (b) will not be contrary to the interests of the bank concerned or its depositors or of the controlling company concerned, as the case may be.

(5) If, in the case of a shareholding contemplated in -

- (a) subsection (2)(a)(i) and (ii), the Registrar; or
- (b) subsection (2)(a)(iii) and (iv), the Minister,

is of the opinion that the retention of such shareholding or voting rights in respect of the issued shares in a bank or controlling company by a particular shareholder will be to the detriment of the bank or controlling company concerned, the Registrar or the Minister, as the case may be, may by way of application on notice of motion apply to the division of the High Court in whose area of jurisdiction the head office of the bank or controlling company is situated, for an order -

- (i) compelling such shareholder to reduce, within a period determined by the court, the shareholding or voting rights in respect of the issued shares of that person in that bank or controlling company to a shareholding or voting rights in respect of the issued shares, as contemplated in subsection (1), with a total nominal value of not more than 15 per cent of the total nominal value of all the issued shares or voting rights in respect of the issued shares of that bank or controlling company; and
- (ii) limiting, with immediate effect, the voting rights that may be exercised by such shareholder by virtue of the shareholding of that person to 15 per cent of the voting rights attached to all the issued shares of the bank or controlling

company concerned.

(6) The provisions of subsection (1) shall not apply to the acquisition of shares or voting rights in respect of the issued shares in a bank by a controlling company registered as such in respect of that bank.

(7) For the purposes of this section "associate" -

(a) in relation to a natural person, means -

- (i) a close relative of that person; or
- (ii) any person who has entered into an agreement or arrangement with the first-mentioned person, relating to the acquisition, holding or disposal of, or the exercising of voting rights in respect of, shares in the bank or controlling company in question;

(b) in relation to a juristic person -

- (i) which is a company, means any subsidiary or holding company of that company, any other subsidiary of that holding company and any other company of which that holding company is a subsidiary;
- (ii) which is a close corporation registered under the Close Corporations Act, 1984 (Act No. 69 of 1984), means any member thereof as defined in section 1 of that Act;
- (iii) which is not a company or a close corporation as contemplated in this paragraph, means another juristic person which would have been a subsidiary of the first-mentioned juristic person -
  - (aa) had such first-mentioned juristic person been a company; or
  - (bb) in the case where that other juristic person, too, is not a company, had both the first-mentioned juristic person and that other juristic person been a company;
- (iv) means any person in accordance with whose directions or instructions the board of directors of or, in the case where such juristic person is not a company, the governing body of such juristic person is accustomed to act; and

(c) in relation to any person -

- (i) means any juristic person of which the board of directors or, in the case where such juristic person is not a company, of which the governing body is accustomed to act in accordance with the directions or instructions of the person first-mentioned in this paragraph; and
- (ii) includes any trust controlled or administered by that person.

### **38. Registration of shares in name of nominees**

(1) Notwithstanding the provisions of the Companies Act, no bank or controlling company shall without the written approval of the Registrar -

- (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 of its shares in the name of a person other than the beneficial shareholder; or
  - (c) after the commencement of this Act allow any of its shares to remain registered in the name of a person other than the beneficial shareholder.
- (2) Subsection (1) shall not affect the allotment or issue, or the registration of the transfer, of shares in a bank or controlling company -
- (a) in the name of a trustee of a unit trust scheme as defined in section 1 of the Unit Trusts Control Act, 1981 (Act No. 54 of 1981), or of a nominated company of the trustee approved by the Registrar of Unit Trust Companies;
  - (b) in the name of any executor, administrator, trustee, curator, guardian or liquidator in the circumstances mentioned in section 103(3) of the Companies Act;
  - (c) for a period of not more than six months, in the name of a stock-broker or of a company established by such stock-broker for a purpose mentioned in section 12(3) of the Stock Exchanges Control Act, 1985 (Act No. 1 of 1985), or of a company controlled by the bank or of an employee of the bank, if it is necessary that the shares be so allotted, issued or registered in order to facilitate delivery to the purchaser or to protect the rights of the beneficiary in respect of those shares or where the beneficiary is not known;
  - (d) in the name of a person in other special circumstances determined by the Minister by notice in the *Gazette*; or
  - (e) in the name of a central securities depository as defined in section 1 of the Safe Deposit of Securities Act, 1992.

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

Any person desiring shares in a bank or controlling company to be allotted or issued to such person or to be registered in the name of such person, or in whose name such shares are registered, and any person acting on behalf of such a person, shall at the written request of the bank or controlling company furnish it with -

- (a) deleted.
- (b) such information as may be required by the bank or controlling company for the purposes of complying with the provisions of section 38.

### **40. Absence of wrongful intent**

If a bank or controlling company or any director, officer, employee or agent of a bank or controlling company in good faith and on the strength of information reasonably obtained acts or fails to act and thereby unknowingly contravenes the provisions of section 38, such act or failure to act shall not constitute an offence.

### **41. 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 on,

any share in a bank or controlling company allotted or issued to such person or registered in the name of such person in contravention of a provision of this Act.

(2) The validity of any resolution adopted by a bank or controlling company shall not be affected by a vote being cast in contravention of subsection (1)(a), if that resolution was adopted by the requisite majority of votes which were validly cast.

(3) A dividend referred to in subsection (1)(b) shall accrue to the bank or controlling company concerned.

#### **42. Restriction of right to control bank**

(1) Subject to the provisions of section 37, no person other than a bank or an institution which has been approved by the Registrar and which conducts business to the similar business of a bank in a country other than the Republic may exercise control over a bank, unless such person is a public company and is registered as a controlling company in respect of such bank.

(2) For the purposes of this Act a person shall be deemed to exercise control over a bank if, in the case where that person is a company, the bank is a subsidiary of that company, or, whether or not that person is a company, if that person alone or together with his or her associates -

- (a) holds shares in the bank of which the total nominal value represents more than 50 per cent of the nominal value of all the issued shares of the bank, unless, due to limitations on the voting rights attached to the shares so held by the person alone or together with his or her associates, as the case may be, 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 bank;
- (b) is entitled to exercise more than 50 per cent of the voting rights in respect of the issued shares of that bank; or
- (c) is entitled or has the power to determine the appointment of the majority of the directors of that bank, 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 a director without his or her consent,

and if a person's appointment as a director of the bank follows necessarily from his or her appointment as a director of the person first-mentioned in this subsection, the first-mentioned appointment shall for the purposes of this subsection be deemed to be an appointment by virtue of a power of a person so first-mentioned.

(3) For the purposes of this section "associate" means an associate as defined in section 37(7).

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

- (1) Subject to the provisions of section 42, a public company—
- (a) that intends to exercise control over any bank; or
  - (b) which is a controlling company, as defined in section 1 of the Companies Act, in respect of any other public company which has applied in terms of section 16 for registration as a bank,

shall apply to the Registrar on the prescribed form for registration as a controlling company in respect of that bank or proposed bank, as the case may be.

(2) An application referred to in subsection (1) shall be accompanied by such information and documents as may be prescribed.

(3) A public company applying in terms of subsection (1) for registration as a controlling company shall submit such additional particulars in connection with its application as the Registrar may require.

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

(1) Subject to the provisions of subsection (2), the Registrar may, after considering all information, documents and particulars furnished in terms of section 43 for the purposes of an application under that section, grant or refuse the relevant application or grant the application subject to such conditions as he or she may impose.

(2) The Registrar shall not grant an application made under section 43 unless he or she is satisfied -

- (a) that the registration of the applicant as a controlling company will not be contrary to the public interest;
- (b) that, in the case of an applicant applying for registration in the circumstances referred to in section 43(1)(a), the applicant will be able to establish control, as contemplated in section 42(2), over the bank concerned;
- (c) that no provision of the memorandum of association or articles of association of the applicant is inconsistent with a provision of this Act or is undesirable in so far as it concerns banks;
- (d) that every director or executive officer of the applicant is, as far as can reasonably be ascertained, a fit and proper person to hold the office of such director or executive officer, and that every such executive officer has sufficient knowledge and experience to manage the affairs of the applicant in its capacity of a controlling company;
- (e) that the applicant is in a financially sound condition;
- (f) that no interest which any person has in the applicant is inconsistent with a provision of this Act; and
- (g) that the application complies with the requirements of this Act.

(3) When the Registrar in terms of this section grants or refuses an application for registration as a controlling company, he or she shall give written notice of that fact to the applicant concerned.

(4) (a) If the Registrar in terms of this section grants an application he or she shall, upon

compliance by the applicant with the conditions subject to which the application was granted and on payment of the prescribed registration fee, register the applicant concerned as a controlling company in respect of the bank concerned and on the prescribed form issue to the applicant a certificate of registration as a controlling company in respect of the bank concerned.

- (b) No applicant which has applied for registration as a controlling company in the circumstances referred to in section 43(1)(b) shall be registered as such a controlling company unless the company in respect of which it made such application is registered as a bank.

(5) In addition to any other condition which the Registrar may impose under subsection (1), he or she may impose a condition requiring an applicant which applied for registration as a controlling company in the circumstances referred to in section 43(1)(a) -

- (a) to furnish within a specified period proof to the satisfaction of the Registrar that it will immediately after its registration as a controlling company establish control over the bank in respect of which it desires to be registered; or
- (b) to make an offer, within a specified period and on a basis and on conditions regarded by the Registrar as reasonable and fair, to persons holding shares in the said bank to take up shares in the applicant or to exchange shares held by them in the said bank for shares in the applicant.

(6) (a) Whenever the Registrar has imposed a condition referred to in subsection (5)(b), he or she may, after consultation with the applicant concerned, designate a person to investigate, independently of the applicant, and to advise the Registrar on, the reasonableness and fairness of the basis and conditions on which the applicant intends to make the share offer in compliance with the condition.

- (b) The costs of an investigation in terms of paragraph (a) shall be paid by the applicant concerned.

(7) A public company which on the date immediately preceding the date of commencement of the Deposit-taking Institutions Amendment Act, 1993 (hereinafter in this subsection referred to as the Amendment Act), is, in terms of the provisions of this Act as those provisions existed prior to the amendment thereof by the Amendment Act, registered as a controlling company in respect of a deposit-taking institution, shall, with effect from the date of the reregistration of the deposit-taking institution concerned as a bank in terms of section 33, be deemed to be a controlling company registered as such in terms of this section in respect of the bank as so reregistered.

#### **45. Cancellation by Registrar of registration of controlling company**

(1) If a controlling company has failed to establish control over the bank in respect of which it is registered, or no longer exercises such control, the Registrar may by notice in writing to such controlling company cancel its registration in respect of that bank.

(2) No cancellation of any registration under subsection (1) shall be of force unless the Registrar 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.

#### **46. Cancellation by court of registration of controlling company**

(1) The Registrar may by way of application on notice of motion apply to a competent court for an order cancelling the registration of a controlling company if in the opinion of the Registrar there exists

grounds, other than the grounds referred to in section 45, justifying such cancellation.

(2) The provisions of subsection (2) and (3) of section 25 shall *mutatis mutandis* apply to an application under subsection (1).

(3) In addition to any other grounds which the court may consider sufficient to justify the granting of an order under subsection (1) cancelling the registration of a controlling company, such an order may also be granted if the controlling company concerned -

- (a) has furnished the Registrar in or in connection with its application for registration with information which is in a material respect untrue; or
- (b) has contravened or failed to comply with a provision of or a requirement under this Act,

or if, on any other ground advanced by the Registrar in the relevant application, the court is of the opinion that it is not in the public interest to allow the controlling company concerned to continue its activities as a controlling company.

#### **47. Cancellation of registration at request of controlling company**

The Registrar shall cancel the registration of a controlling company upon submission to him or her by the controlling company of a special resolution contemplated in section 200 of the Companies Act authorizing such cancellation.

#### **48. Lapse of registration of controlling company upon cancellation of registration of bank**

(1) If the registration of a bank in respect of which a controlling company is registered, is cancelled, the registration of that controlling company in respect of that bank shall be deemed to have been cancelled simultaneously.

(2) The cancellation of the registration of a controlling company by virtue of the provisions of subsection (1) shall be with effect from the date on which the bank concerned in terms of section 31 ceased to be registered as such.

#### **49. Date on which registration of controlling company lapses**

A controlling company shall cease to be registered as such -

- (a) in the case of a registration cancelled by the Registrar under section 45, upon expiry of 30 days after the date of the notice referred to in subsection (1) of that section or, if an application for the review of such a decision to cancel was lodged with the board of review in terms of section 9 before the expiry of the said 30 days and the board of review has confirmed such cancellation, upon the date on which the controlling company concerned is notified of such confirmation;
- (b) in the case of a registration in respect of which the court has granted an order under section 46 cancelling the registration, upon the date on which that order comes into force; or
- (c) in the case of a registration cancelled by the Registrar in terms of section 47, upon such date as may be determined by the Registrar.

#### **50. Investments and loans and advances by controlling companies**

- (1) A controlling company investing money -
- (a) in undertakings other than banks, institutions which conduct business similar to the business of a bank in a country other than the Republic, controlling companies or companies of which the main object is the holding or development of property which is used or intended to be used mainly for the purpose of conducting the business of a bank; or
  - (b) in fixed property which is not used or intended to be used mainly for the purpose of conducting the business of a bank,

shall manage its transactions in such investments in such a way that the amount of such investments does not at any time exceed a prescribed percentage of a prescribed amount of the share capital and reserve funds of the controlling company calculated on a consolidated basis as prescribed.

- (2) A controlling company providing loans and advances -
- (a) to undertakings other than banks, institutions which conduct business similar to the business of a bank in a country other than the Republic, controlling companies or companies of which the main object is the holding or development of property which is used or intended to be used mainly for the purpose of conducting the business of a bank; or
  - (b) in relation to fixed property which is not used or intended to be used mainly for the purpose of conducting the business of a bank,

shall manage its transactions in relation to such loans and advances in such a way that the amount of such loans and advances does not at any time exceed a prescribed percentage of a prescribed amount of the share capital and reserve funds of the controlling company and calculated on a consolidated basis as prescribed.

## CHAPTER V

### FUNCTIONING OF BANKS AND CONTROLLING COMPANIES WITH REFERENCE TO COMPANIES ACT

#### **51. Application of Companies Act to banks and controlling companies**

- (1) A company registered as a bank or as a controlling company shall continue to be a company in terms of the Companies Act, and the provisions of that Act shall, subject to the provisions of



subsection (2), continue to apply to any such company to the extent to which they are not inconsistent with any provision of this Act: Provided that -

- (a) the provisions of the Companies Act governing the conversion of public companies into other forms of companies shall not apply to any such company; and
- (b) in the application, by virtue of the provisions of this subsection, of the provisions of section 171 (1) of the Companies Act in respect of a company referred to in this subsection, the reference in the said section 171 (1) -
  - (i) to "director", shall be deemed to be a reference only to a director whose name appears in the relevant company's register of directors and officers contemplated in section 215 of the Companies Act; and
  - (ii) to "business letter", shall be deemed not to include a reference to any printed form of advice.

(2) The Minister may with the concurrence of the Minister of Trade and Industry by notice in the *Gazette* declare that a provision of the Companies Act specified in such notice -

- (a) shall not apply to any company registered as a bank or as a controlling company;
- (b) shall only apply to any such company subject to such adjustments and qualifications as may be specified in the notice; or
- (c) the administration of which vests in the Registrar of Companies, shall in respect of companies registered as banks or as controlling companies vest in the Registrar.

(3) deleted

**52. Subsidiaries, branch offices, other interests and representative offices of banks and controlling companies**

(1) A bank shall not without the prior written approval of the Registrar and in accordance with such conditions as the Registrar may determine -

- (a) establish or acquire a subsidiary in the manner prescribed within or outside the Republic or enter into an agreement having the effect that any company becomes its subsidiary within or outside the Republic;
- (aA) invest in a joint venture within or outside the Republic if the investment, or the investment together with one or more investments already made by the bank in that joint venture, results in the bank being exposed to an amount representing more than five per cent of its capital and reserves: Provided that for as long as the bank is exposed to the aforementioned extent, such approval must be obtained whenever it seeks to make a further investment in that joint venture;
- (b) open or acquire a branch office outside the Republic;
- (c) acquire an interest in any undertaking having its registered office or principal place of business outside the Republic;
- (d) outside the Republic -
  - (i) create or acquire a trust of which the bank is a major beneficiary;

- (ii) establish or acquire any financial or other business undertaking under its direct or indirect control; or
- (e) establish or acquire a representative office outside the Republic; or
- (f) create or acquire a division within or outside the Republic by means of an arrangement or agreement with any person having the effect that such a person conducts his or her business through or by means of such a division.

(1A) Notwithstanding the provisions of subsection (1), the Registrar may, by means of a circular as contemplated in section 6(4), determine such circumstances and conditions in terms whereof an application as contemplated in subsection (1) is not required.

(2) To obtain the prior approval of the Registrar as contemplated in subsection (1), there shall be lodged with the Registrar a written application in which full particulars of the proposed action are furnished, including, in the case of a proposed establishment of a representative office outside the Republic as contemplated in paragraph (e) of the said subsection -

- (a) The country in which the representative office is to be established;
- (b) the name of the proposed chief representative officer, in that country, of the bank; and
- (c) the address of the proposed representative office in that country.

(3) The Registrar may require an applicant contemplated in subsection (2) to furnish him or her with such information, in addition to particulars furnished by the applicant in terms of that subsection, as the Registrar may deem necessary.

(4) After the establishment in terms of this section of a representative office outside the Republic, the bank concerned shall in writing notify the Registrar of -

- (a) any substitution of its chief representative officer in the country concerned;
- (b) any change of the address of the representative office in question; or
- (c) the closing down of the representative office,

as soon as it occurs.

(5) The provisions of subsection (1)(a), (c) and (d), and of subsection (2) and (3) in so far as they are relevant, shall *mutatis mutandis* apply in respect of any controlling company.

(6) For the purposes of this section and section 53 "joint venture" means a contractual arrangement between two or more persons, one or more of whom is a bank or a controlling company, in terms whereof the parties undertake an economic activity that is subject to their joint control.

### **53. Disclosure by banks and controlling companies of interest in subsidiaries, trusts and other undertakings**

A bank or a controlling company shall on such a form and at such intervals as may be prescribed

furnish the Registrar with such particulars as may be prescribed relating to its shareholding or other interests in -

- (a) its subsidiaries contemplated in section 52(1)(a);
- (aA) any joint venture contemplated in section 52(1)(aA);
- (b) an undertaking contemplated in section 52(1)(c); or
- (c) any trust or financial or other business undertaking contemplated in section 52(1)(d).

**54. Compromises, amalgamations, arrangements and affected transactions**

- (1) The Minister must consent, in writing and conveyed through the Registrar, to-
  - (a) a compromise, amalgamation or arrangement referred to in Chapter XII of the Companies Act and which involves a bank as one of the principal parties to the relevant transaction; and
  - (b) an arrangement for the transfer of more than 25 per cent of the assets, liabilities or assets and liabilities of a bank to another person:

Provided that the 25 per cent referred to in paragraph (b) shall be calculated by aggregating the amount of the transferred assets, liabilities or assets and liabilities together with any previous transfer of assets, liabilities or assets and liabilities within the same financial year of the bank concerned. Provided further that the Minister's consent is granted beforehand.

(1A) Subsection (1)(b) shall not be applicable to the transfer of assets effected in accordance with a duly approved securitisation scheme.

- (1B) (a) No arrangement for the transfer of 25 per cent or less of the assets, liabilities or assets and liabilities of a bank to another person, shall have legal force unless the consent of the Registrar to the transaction in question has been obtained beforehand.
- (b) In the event that only assets are being transferred and the amount of the transferred assets, together with any previous transfer of assets within the same financial year, aggregates to an amount that is less than 10 per cent of the total on-balance-sheet assets of the transferring bank, consent in terms of paragraph (a) is not required: Provided that the transferring bank notifies the Registrar of such a transfer in writing beforehand.

(1C) Subsection (1B) shall not be applicable to the transfer of assets effected in accordance with a duly approved securitisation scheme.

- (2) The Minister shall not grant his or her consent referred to in subsection (1) unless -
  - (a) he or she is satisfied that the transaction in question will not be detrimental to the public interest;
  - (b) in the case of an amalgamation referred to in subsection (1), the amalgamation is an amalgamation of banks only; or
  - (c) in the case of a transfer of assets, liabilities or assets and liabilities referred to in

subsection (1) such transfer is effected to another bank or to a person approved by the Registrar for the purpose of the said transfer.

(2A) The Registrar shall not grant his or her consent referred to in subsection (1A) unless he or she is satisfied -

- (a) that the transaction in question will not be detrimental to the public interest;
- (b) that the transaction in question will not be contrary to the interests of the bank concerned or its depositors or of the controlling company concerned, as the case may be; or
- (c) in the case of a transfer of assets, liabilities or assets and liabilities referred to in subsection (1B)(a), such transfer is effected to another bank or to a person approved by the Registrar for the purpose of the said transfer.

(3) Upon the coming into effect of a transaction effecting the amalgamation of one bank with another bank as contemplated in subsection (2)(b), or effecting the transfer of such part of the assets, liabilities or assets and liabilities as approved in terms of subsection (1) or (1B) of one bank to another bank or person as contemplated in subsections (2)(c) or (2A)(c)-

- (a) all the assets and liabilities of the amalgamating banks or, in the case of such transfer of assets, liabilities or assets and liabilities as approved in terms of subsections (1) or (1B), respectively, those assets, liabilities or assets and liabilities of the transferor bank that are transferred in terms of the transaction, shall vest in and become binding upon the amalgamated bank or, as the case may be, the bank or person taking transfer of such assets, liabilities or assets and liabilities;
- (b) the amalgamated bank or, in the case of such transfer of all the assets and liabilities or, in the case of such transfer of part of the assets, liabilities or assets and liabilities as approved in terms of subsections (1) or (1B), respectively, the bank or person taking transfer of such assets, liabilities or assets and liabilities, shall have the same rights and be subject to the same obligations as those which the amalgamating banks or, as the case may be, the transferor bank may have had or to which they or it may have been subject immediately before the amalgamation or transfer;
- (c) all agreements, appointments, transactions and documents entered into, made, drawn up or executed with, by or in favour of any of the amalgamating banks or, as the case may be, the transferor bank, and in force immediately prior to the amalgamation or transfer, but excluding such agreements, appointments, transactions and documents that, by virtue of the terms and conditions of the amalgamation or transfer, are not to be retained in force, shall remain of full force and effect and shall be construed for all purposes as if they had been entered into, made, drawn up or executed with, by or in favour of the amalgamated bank or, as the case may be, the bank or person taking transfer of the assets, liabilities or assets and liabilities in question; and
- (d) any bond, pledge, guarantee or instrument to secure future advances, facilities or services by any of the amalgamating banks or, as the case may be, by the transferor bank, which was in force immediately prior to the amalgamation or transfer, shall remain of full force and effect and shall be construed as a bond, pledge, guarantee or instrument given to or in favour of the amalgamated bank or, as the case may be, the bank or person taking transfer of such assets, liabilities or assets and liabilities, as security for future advances, facilities or services by that bank or person except where, in the case of such transfer, any obligation to provide such advances, facilities or services is not included in the transfer.

(4) Any compromise, amalgamation or arrangement or any arrangement for the transfer of assets, liabilities or assets and liabilities, referred to in subsections (1) or (1B) excluding a transfer other than a transfer referred to in subsections (2)(c) or (2A)(c) shall be subject -

- (a) to confirmation at a general meeting of shareholders of each of the banks concerned; or
- (b) in the case of a transaction effecting the transfer of assets, liabilities or assets and liabilities of one bank to another bank or a person as contemplated in subsections (2)(c) or (2A)(c) to confirmation at a general meeting of shareholders of the transferor bank and the bank or person taking transfer of such assets, liabilities or assets and liabilities,

and the notice convening such a meeting shall contain or have attached to it the terms and conditions of the relevant agreement or arrangement.

(5) Notice of the passing of the resolution confirming, as contemplated in subsection (4), any compromise, amalgamation or arrangement, or any arrangement for the transfer of assets, liabilities or assets and liabilities referred to in subsections (1) or (1B), respectively, together with a copy of such resolution and the terms and conditions of the relevant agreement or arrangement, duly certified by the chairperson of the meeting at which such resolution was passed and by the secretary of the bank or person concerned, shall be sent to the Registrar by each of the banks involved or, in the case of a transaction effecting the transfer of assets, liabilities or assets and liabilities of one bank to another bank or a person as contemplated in subsection (2)(c) or 2(A)(c), respectively, by the relevant transferor bank and the bank or person taking transfer of such assets, liabilities or assets and liabilities, and after having received such notices from all the parties to the relevant agreement or arrangement, the Registrar shall register those notices.

(6) Upon the registration by the Registrar of the notices referred to in subsection (5) -

- (a) of any amalgamation of two or more banks, the registration of the individual banks which were parties to the amalgamation shall be deemed to be cancelled and the Registrar shall withdraw those registrations and, on payment by the bank created by the amalgamation of the prescribed registration fee, register such bank subject *mutatis mutandis* to the provisions of section 18, as a bank; or
- (b) of any arrangement for the transfer of all the assets and liabilities of a bank, the registration of such bank shall be deemed to be cancelled and shall be withdrawn by the Registrar.

(7) Upon registration of a bank by the Registrar in terms of subsection (6), he or she shall issue a certificate of registration to the bank concerned.

(8) The Registrar of Companies, every Master of the High Court and every officer or person in charge of a deeds registry or any other office, if, in the office of such Registrar, Master, officer or person or any register under the control of such Registrar, Master, officer or person there-

- (a) is registered any title to property belonging to, or any bond or other right in favour of, or any appointment of or by; or
- (aA) is registered any share, stock, debenture or other marketable security in favour of; or

(b) has been issued any licence to or in favour of,

any bank which has amalgamated with any other bank, or any bank which has transferred all or part of its assets, liabilities or assets and liabilities referred to in subsections (1) or (1B) to any other bank or person shall, if satisfied -

- (i) that the Minister has consented in terms of subsection (1) to the amalgamation of transfer or that the Registrar has consented in terms of subsection (1B) to the transfer; and
- (ii) that such amalgamation or transfer has been duly effected,

and upon production to such Registrar, Master, officer or person of any relevant deed, bond, share, stock, debenture, certificate, letter of appointment, licence or other document, make such endorsements thereon and effect such alterations in the registers of such Registrar, Master, officer or person as may be necessary to record the transfer of the relevant property, bond or other right, share, stock, debenture, marketable security, letter of appointment or licence and of any rights thereunder to the amalgamated bank or, as the case may be, to the bank or person that has taken transfer of the said assets, liabilities or assets and liabilities in question.

(8A) No transfer duty, stamp duty, registration fees, licence duty or other charges shall be payable in respect of -

- (a) a transfer contemplated in subsection (8) taking place in the execution of a transaction entered into at the instance of the Registrar in the interest of the effective supervision of banks or the maintenance of a stable banking sector; or
- (b) any endorsement or alteration made to record such transfer,

upon submission to the Registrar of Companies, or the Master, officer or person referred to in subsection (8), as the case may be, of a written confirmation by the Registrar of Banks that the Minister, on the recommendation of the last-mentioned Registrar and after consultation with the Commissioner for Inland Revenue, has consented to the waiver of such duties, fees or charges.

(9) The provisions of this section shall not affect the rights of any creditor of a bank which has amalgamated with or transferred all or part of its assets, liabilities or assets and liabilities referred to in subsections (1) and (1B) to any other bank or person or taken over all or part of the assets, liabilities or assets and liabilities in question of any other bank, except to the extent provided in this section.

(10) The conditions and any tax benefit which immediately prior to the date of a transfer, referred to in this section, of assets, liabilities or assets and liabilities were applicable in respect of an investment, referred to in section 10(1)(i)(xii), (xiiA) or (xiii), 10(1)(v), (vA) or (w) or 19(5A) of the Income Tax Act, 1962 (Act No. 58 of 1962), with the transferor bank shall, notwithstanding such a transfer of assets, liabilities or assets and liabilities but subject to the provisions of the said Act, remain applicable to the investment until the expiration of a period of ten years as from the date on which it was initially made or until it is redeemed, whichever occurs first.

(11) Notwithstanding anything to the contrary contained in -

- (a) Chapter XVA of the Companies Act;
- (b) the Securities Regulation code on Take-overs and Mergers published by *Government Notice R 29* dated 18 January 1991, and any amendment thereof; or

- (c) the Rules under section 440C(4)(a), (b), (c) and (f) of the Companies Act, published by the said *Government Notice R 29*, and any amendment thereof,

neither the Securities Regulation Panel established by section 440B of the Companies Act nor its executive committee or its executive director shall furnish any clearance, decision or ruling in respect of a matter submitted to it or such executive director in terms of the provisions of the above-mentioned Code or Rules, and which matter relates to an affected transaction, as defined in section 440A(1) of the Companies Act, involving -

- (i) deleted.
- (ii) an acquisition of shares in a bank or controlling company for which permission under section 37(2)(a) (i), (ii), (iii) or (iv) is a prerequisite,

unless the person submitting the matter in question has furnished the said Panel, executive committee or executive director with written proof that such exemption or permission, as the case may be, has in fact been obtained.

#### **55. Reconstruction within group of companies**

No reconstruction of companies within a group -

- (a) in respect of which annual financial statements are required to be made out in terms of section 288(1) of the Companies Act; and
- (b) of which a bank or a controlling company or subsidiary of a bank is a member,

shall be effected without the prior written approval of the Registrar.

#### **56. Alteration of memorandum of association or articles of association, and change of name**

(1) No -

- (a) alteration, in terms of section 55, 56 or 62 of the Companies Act, of the memorandum of association or articles of association of a company registered as a bank; or
- (b) change, in terms of section 44 of the Companies Act, of the name of any such company,

shall have legal force for the purposes of this Act or any other law unless such alteration or change has been approved in writing by the Registrar prior to the registration thereof by the Registrar of Companies.

(2) Any application for the Registrar's approval in terms of subsection (1) shall be lodged with the Registrar before the proposed special resolution authorizing the alteration or change in question is laid before a general meeting of the company, and such application shall be accompanied by -

- (a) two copies of the proposed special resolution; and
- (b) an explanation of the reasons for the resolution.

(3) The Registrar shall not grant any application referred to in subsection (2) if he or she is of the

opinion -

- (a) that the proposed alteration is inconsistent with any provision of this Act or is undesirable in so far as it concerns the activities of banks; or
- (b) that the proposed new name is unacceptable on any of the grounds mentioned in subparagraphs (i), (ii), (iii) and (iv) of section 17(2)(e).

(4) A bank shall within 21 days of the registration by the Registrar of Companies of an alteration of its memorandum of association or articles of association or a change of its name, furnish the Registrar with a certified copy of the special resolution which sets out the alteration or change of name, as the case may be.

(5) Upon receipt, by virtue of the provisions of subsection (4), of a copy of a special resolution, and payment by the bank concerned of the prescribed fee, the Registrar shall -

- (a) in the case of a special resolution relating to an alteration of a memorandum of association or articles of association, register the alteration in question and issue to the bank concerned a certificate to the effect that the said alteration has been registered by the Registrar with effect from a date specified in the certificate; or
- (b) in the case of a special resolution relating to a change of name, change the name of the bank concerned in the register of banks, and issue to the bank concerned a certificate of such change of name.

(6) An alteration referred to in subsection (5)(a) shall not take effect until it has been registered in terms of that subsection.

(7) The provisions of subsections (1), (2) and (3) shall not apply with respect to any alteration of a bank's memorandum of association or articles of association in accordance with a direction by the Registrar under this Act.

(8) The provisions of subsection (1)(a), and of subsections (2), (3), (4), (5) and (6) in so far as they are relevant, shall *mutatis mutandis* apply in respect of any controlling company.

**57. Alteration of memorandum of association or articles of association in accordance with direction of Registrar**

(1) The Registrar may at any time in writing direct a bank to effect such alteration, not contrary to a provision of this Act, to its memorandum of association or articles of association as the Registrar may deem desirable in order to remove anomalies or undesirable divergences in the activities of different banks.

(2) An alteration directed by the Registrar under subsection (1) shall on or before the day of the first annual general meeting, referred to in section 179 of the Companies Act, following upon the date of such direction, be submitted for consideration to the shareholders of the bank concerned.

(3) If a bank refuses or fails to alter its memorandum of association or articles of association in accordance with a direction of the Registrar under subsection (1), the Registrar may submit a copy of that direction to the Registrar of Companies, who shall thereupon deal with the proposed alteration contained therein in accordance with the Companies Act as if it were contained in a special resolution adopted by the bank concerned and submitted to the Registrar of Companies by that bank in accordance with that Act.

**58. Information regarding directors and officers**



Every bank and every controlling company shall within 30 days of its registration as such, furnish the Registrar with a copy of its register of directors and officers referred to in section 215 of the Companies Act.

**59. Returns regarding shareholders**

- (1) Every bank and every controlling company shall within 90 days of its registration as such, and annually thereafter within 30 days of 31 December of each year, furnish the Registrar with a return regarding its shareholders as at the date of the said registration or as on 31 December, as the case may be.
- (2) A return referred to in subsection (1) shall contain such information as prescribed.

**60. Directors and officers of a bank or controlling company**

(1) Each director, chief executive officer and executive officer of a bank owes a fiduciary duty and a duty of care and skill to the bank of which such person is a director, chief executive officer or executive officer.

(1A) Each director, chief executive officer and executive officer of a bank owes a duty towards the bank to -

- (a) act *bona fide* for the benefit of the bank;
- (b) avoid any conflict between the bank's interests and the interests of such a director, chief executive officer or executive officer, as the case may be;
- (c) possess and maintain the knowledge and skill that may reasonably be expected of a person holding a similar appointment and carrying out similar functions as are carried out by the director, chief executive officer or executive officer of that bank; and
- (d) exercise such care in the carrying out of his or her functions in relation to that bank as may reasonably be expected of a diligent person who holds the same appointment under similar circumstances, and who possesses both the knowledge and skill mentioned in paragraph (c) and any such additional knowledge and skill as the director, chief executive officer or executive officer in question may have.

(1B) (a) The Registrar may institute action in terms of section 424 of the Companies Act against any director, chief executive officer or executive officer of a bank who was knowingly a party to the carrying on of the business of the bank in the manner envisaged in that section.

- (b) Notwithstanding anything to the contrary in any law, any amount recovered as a result of proceedings instituted by the Registrar as envisaged in paragraph (a), shall be utilised -
  - (i) first to reimburse all expenses reasonably incurred by the Registrar in bringing such proceedings;
  - (ii) thereafter against to set off against any amount paid to depositors by the Registrar, a deposit insurance scheme, or any governmental body, as part or full compensation for the losses suffered by depositors as a result of the bank being unable to repay their deposits; and

(iii) thereafter for the *pro rata* repayment of the losses of depositors.

(2) Without derogating from the provisions of subsections (1) and (1A), a director, chief executive officer or executive officer of a bank shall in the performance of his or her functions in respect of that bank, observe such guidelines and comply with such requirements as may be prescribed under section 90(1)(b).

(3) Notwithstanding anything to the contrary in any law or the common law or in any agreement contained, not more than 49 per cent, rounded off to the next lower integral number, of the directors of -

- (a) a bank shall be employees of that bank or of any of its subsidiaries, or of such bank's controlling company or of any of such controlling company's subsidiaries;
- (b) a controlling company shall be employees of that company or of any bank in respect of which that company is registered as a controlling company:

Provided that in respect of any matter put to the vote at a meeting of the board of directors of a bank or of a controlling company, as the case may be, such directors who are employees of that bank or that controlling company, as the case may be, shall together not have a vote in excess of 49 per cent of the total vote cast by all the directors present and voting at that meeting.

(4) No person who on the date of commencement of this Act is a director of a bank or controlling company shall on the expiration of his term of office be eligible for reappointment as such a director unless or until he qualifies for such appointment in terms of the provisions of subsection (3).

(5) (a) Every bank shall give the Registrar written notice of the nomination of any person for appointment as a chief executive officer, director or executive officer by furnishing the Registrar with the prescribed information in respect of the nominee.

(b) The notice shall reach the Registrar at least 30 days prior to the proposed date of appointment.

(c) The Registrar may object to the proposed appointment by means of a written notice, stating the grounds for the objection, given to the chairperson of the board of directors of the bank and to the nominee, within 20 working days of receipt of the notice referred to in paragraph (b).

(d) If the Registrar objects to the proposed appointment as envisaged in paragraph (c), the bank shall not appoint the nominee and any purported appointment shall have no legal effect: Provided that the bank or nominee may dispute the Registrar's objection, in which case the provisions of subsection (6) (d) to (k), inclusive, shall apply *mutatis mutandis*.

(e) For the purposes of this subsection the term "every bank" shall mean the chief executive officer of such bank, or in the case where it concerns the appointment of the chief executive officer, such member of the board of directors of such bank as may be designated by the board of directors of such bank.

(6) (a) Without derogating from any law, the Registrar may object to the appointment or continued employment of a chief executive officer, director or executive officer of a bank if the Registrar reasonably believes that the, chief executive officer, director or executive officer concerned is not, or is no longer a fit and proper person to hold that appointment, or if it is not in the public interest that such chief executive officer, director or executive officer holds or continues to hold such appointment.

- (b) If the Registrar wishes to terminate the appointment or the continued employment of a chief executive officer, director or executive officer of a bank, the Registrar shall notify the following affected parties in writing of his or her intention and of the grounds for the proposed termination:
- (i) The chief executive officer, director or executive officer concerned;
  - (ii) The chairperson of the board of directors of that bank (except if the chairperson of the board is the person whose appointment the Registrar wishes to terminate, in which case each director of the bank concerned shall be notified); and
  - (iii) The chief executive officer of that bank, (except if the chief executive officer is the person whose appointment the Registrar wishes to terminate, in which case the deputy chief executive officer shall be notified).
- (c) The written notice referred to in paragraph (b) shall notify such parties that they are entitled to submit written representations to the Registrar in response to that notice.
- (d) Any notified party shall be entitled, but not obliged, to make written representations to the Registrar's written notice within 14 working days of receipt of the Registrar's notice, or within such longer period as the Registrar may, upon written application by the affected party concerned, allow.
- (e) The Registrar shall, within 14 working days of receipt of a written representation referred to in paragraph (d) -
- (i) consider the representation;
  - (ii) decide whether or not the appointment of the chief executive officer, director or executive officer concerned should be terminated for the reasons contemplated in paragraph (a); and
  - (iii) give notice to the affected parties of his or her decision in writing.
- (f) If, after having considered any written representation in respect of the chief executive officer, director or executive officer concerned, the Registrar remains of the view that such officer's appointment should be terminated, or if no such written representation is submitted to the Registrar within the period allowed under paragraph (d), the Registrar shall refer the matter to the Arbitration Foundation of South Africa or its successor-in-law; or any other body designated by the Registrar by means of a notice in the *Gazette* (referred to below as the "Arbitrator") for arbitration.
- (g) The Registrar shall make the request for arbitration referred to in paragraph (f) -
- (i) in writing; and
  - (ii) within three working days after the expiry of the 14 day period referred to in paragraph (e) or, if the affected parties do not submit any written representations to the Registrar within the period allowed under paragraph (d), within three working days after the expiry of that period.

- (h) The Arbitrator shall determine whether or not adequate reasons exist for the termination, by the Registrar, of the appointment of the chief executive officer, director or executive officer concerned.
- (i) If under paragraph (h) the Arbitrator decides that adequate reasons exist for the termination of the appointment, the Arbitrator shall confirm the termination of the appointment in writing addressed to the Registrar and the chief executive officer, director or executive officer concerned, whereupon the termination shall immediately take effect.
- (j) If under paragraph (h) the Arbitrator determines that adequate reasons do not exist for the termination of the appointment, the Arbitrator shall reject the termination by written notice to the Registrar and to the chief executive officer, director or executive officer concerned, whereupon the appointment of the person in question shall continue with full force and effect.
- (k) A termination in terms of this section shall be final and binding and shall not be subject to review as envisaged in section 9.

(6A) Subsections (5) and (6) apply with changes required by the context to the appointment of a currently serving non-executive director as chairperson of the board of directors of a bank or controlling company.

(7) This section, where applicable, shall apply *mutatis mutandis* in respect of any branch or a controlling company.

#### **60A. Compliance function**

(1) Notwithstanding anything to the contrary in any law, a bank shall establish an independent compliance function as part of the risk management framework of the bank.

(2) The compliance function shall be headed by a compliance officer of the bank, who shall perform his or her functions with such care and skill as can reasonably be expected from a person responsible for such a function in a similar institution.

(3) The appointed compliance officer shall perform his or her functions subject to such requirements and conditions as may be prescribed in the Regulations relating to Banks.

#### **60B. Corporate Governance**

(1) Notwithstanding anything to the contrary in any law, the board of directors and executive officers of a bank shall establish and maintain an adequate and effective process of corporate governance, which shall be consistent with the nature, complexity and risks inherent in the activities and the business of the bank concerned.

(2) The process of corporate governance shall be established with the objective of achieving the bank's strategic and business objectives efficiently, effectively, ethically and equitably (within acceptable risk parameters), to ensure-

- (a) compliance with the strategic framework and guidelines established for the bank or controlling company;
- (b) commitment by the executive officers of the bank or controlling company to adhere to corporate behaviour that is universally recognised and accepted as correct and

proper;

- (c) a balance of interests of the shareholders and other interested persons who may be affected by the conduct of directors or executive officers of the bank or controlling company within a framework of effective accountability;
  - (d) that mechanisms and procedures are established and maintained to minimize or avoid potential conflicts of interests between the business interests of the bank or controlling company and the personal interests of directors or executive officers of the bank or controlling company;
  - (e) responsible conduct by the directors and executive officers of the bank or controlling company;
  - (f) the achievement of the maximum level of efficiency and profitability of the bank within an acceptable risk profile for the bank or controlling company;
  - (g) the timely, accurate and meaningful disclosure of matters that are material to the business of the bank or controlling company or the interests of the shareholders of or other persons having an interest in the bank or controlling company;
  - (h) that the board retains control over the strategic and business direction of the bank or controlling company, whilst enabling its executives to manage the bank's or controlling company's operations and the achievement of the agreed strategic and business objectives; and
  - (i) compliance with all applicable laws and regulations.
- (3) A bank shall establish and maintain the process of corporate governance in accordance with any requirements that may be prescribed in the Regulations relating to Banks.

#### **61. Appointment of auditor**

- (1) Notwithstanding the provisions of Chapter X of the Companies Act -
- (a) no person shall hold office as auditor of a bank or a controlling company unless the appointment of such person as such auditor has been approved by the Registrar; and
  - (b) any person contemplated in paragraph (a) shall be appointed for such period and on such conditions as may be prescribed.
- (2) A bank or a controlling company shall within 30 days of the appointment in accordance with the provisions of Chapter X of the Companies Act of a person as auditor thereof apply to the Registrar on the prescribed form for the Registrar's approval of such appointment.
- (3) The Registrar may -
- (a) refuse an application under subsection (2) for the Registrar's approval of the appointment of an auditor if-
    - (i) the application seeks the re-appointment of an auditor who has already served as auditor of the bank in question for the prescribed number of years consecutively; or
    - (ii) any grounds for withdrawal of approval listed in paragraph (b)(i) to (iv) apply to

the proposed appointee; or

- (b) withdraw any approval of the appointment of an auditor previously granted by the Registrar under this section, if such an auditor-
  - (i) has been convicted of an offence of which dishonesty is an element;
  - (ii) is found to be incompetent or unfit to perform the functions of an auditor;
  - (iii) is under investigation by the Public Accountants' and Auditors' Board; or
  - (iv) fails to disclose and direct or indirect interests which may constitute a conflict of interest in respect of such auditor's duties,

and thereupon the functions and responsibilities of that auditor in respect of that bank shall cease forthwith.

(4) If the Registrar under paragraph (a) of subsection (3) refuses an application for his or her approval of the appointment of an auditor or under paragraph (b) of that subsection withdraws an approval previously granted by him or her, the board of directors of the bank or the controlling company concerned shall appoint another person as auditor and the provisions of subsections (1) and (2) shall apply *mutatis mutandis* in respect of the last-mentioned appointment.

(5) A person appointed under subsection (4) as auditor of a bank shall for the purposes of Chapter X of the Companies Act be deemed to have been so appointed as auditor at the immediately preceding annual general meeting of the bank.

(6) A person appointed under subsection (4) to replace an auditor whose approval has been withdrawn under subsection (3)(b) shall be appointed for the remainder of the period for which the person whom he or she replaces was appointed and is subject to the same conditions as his or her predecessor.

## **62. Appointment of auditor by Registrar**

(1) If a bank for any reason fails to appoint an auditor the Registrar may, notwithstanding the provisions of section 269(4) and 271(1) of the Companies Act, make the necessary appointment.

(2) A person appointed under subsection (1) as auditor of a bank shall be deemed to have been so appointed by that bank.

## **63. Functions of auditor in relation to Registrar**

(1) Notwithstanding anything to the contrary contained in the Auditing Professions Act, 2005 (Act No. 26 of 2005), or the Companies Act, but subject to the provisions of subsections (2) and (3) of this section, the auditor referred to in section 61 or 62 –

- (a) shall, whenever such auditor furnishes, in terms of section 20(5)(b) of the first-mentioned Act, the Public Accountants' and Auditors' Board with copies of the report, acknowledgement of receipt and reply and with the other particulars referred to in that section, relating to an irregularity or suspected irregularity in the conduct of the affairs of the bank for which such auditor has been appointed as auditor, also furnish the Registrar with such copies and particulars; and
- (b) shall in writing inform the Registrar of any matter relating to the affairs of a bank -

- (i) of which such auditor became aware in the performance of such auditor's functions as auditor of that bank; and
  - (ii) which, in the opinion of such auditor, may endanger the bank's ability to continue as a going concern or may impair the protection of the funds of the bank's depositors or may be contrary to the principles of sound management (including risk management) or amounts to inadequate maintenance of internal controls; and
- (c) shall, if requested by the Registrar to do so, furnish him or her with written information relating to a matter referred to in paragraph (b), specified by the Registrar.

(2) Whenever an auditor by virtue of the provisions of subsection (1)(b) or (c) furnishes the Registrar with written information, such auditor may at the same time furnish the chief executive officer of the bank to which such information relates with a copy of the relevant document.

(3) The furnishing in good faith by an auditor of information in terms of subsection (1)(b) or (c) shall in no circumstances be held to constitute a contravention of any provision of the law or a breach of any provision of a code of professional conduct to which such auditor may be subject.

(4) Nothing in subsection (1) contained shall be construed as conferring upon any person any right of action against an auditor which, but for the provisions of that subsection, such person would not have had.

#### **64. Audit committee**

(1) Subject to the provisions of subsection (3), (3A) and (4), the board of directors of a bank and controlling company shall appoint at least three of its members to form and serve on an audit committee.

(2) The audit committee shall-

(a) assist the board of directors -

- (i) in its evaluation of the adequacy and efficiency of the internal control systems, accounting practices, information systems and auditing processes applied within that bank or controlling company, as the case may be in the day-to-day management of its business;
- (ii) to facilitate and promote communication, regarding the matters referred to in subparagraph (i) or any other related matter, between the board of directors and the executive officers of, the auditor appointed under section 61 or 62 for, and the employee charged with the internal auditing of the transactions of, the bank or controlling company, as the case may be;
- (iii) to introduce such measures as in the committee's opinion may serve to enhance the credibility and objectivity of financial statements and reports prepared with reference to the affairs of the bank or controlling company, as the case may be; and

(b) perform such further functions as may be prescribed.

(3) (a) All of the members of the audit committee of a bank shall be persons who are not employees of the bank nor of any of its subsidiaries, its controlling company or any subsidiary of its controlling company: Provided that the chairperson of the board of

directors of the bank or the controlling company shall not be appointed as a member of the audit committee.

- (b) All of the members of the audit committee of a controlling company shall be persons who are not employees of the controlling company nor of any of its subsidiaries, the bank in respect of which it is the controlling company or any subsidiary of that bank: Provided that the chairperson of the board of directors of the controlling company or the bank in respect of which it is the controlling company shall not be appointed as a member of the audit committee.
- (4) The Registrar may upon written application exempt the board of directors of a bank from the duty to appoint an audit committee in respect of that bank if the Registrar is satisfied that the audit committee appointed in respect of the relevant controlling company, in addition to its responsibilities in respect of that controlling company, is able to also adequately assume the responsibilities of an audit committee in respect of that bank.

#### **64A. Risk and capital management committee**

(1) Subject to the provisions of subsection (3) the board of directors of a bank and controlling company shall appoint at least three of its members, of which at least two are non-executive directors, to form and serve on a risk and capital management committee.

(2) The functions of the risk and capital management committee shall be to assist the board of directors –

- (a) in its evaluation of the adequacy and efficiency of the risk policies, procedures, practices and controls applied within that bank or controlling company in the day-to-day management of its business;
- (b) in the identification of the build up and concentration of the various risks to which the bank or controlling company is exposed;
- (c) in developing a risk mitigation strategy to ensure that the bank or controlling company manages the risks in an optimal manner;
- (d) in ensuring that a formal risk assessment is undertaken at least annually;
- (e) in identifying and regularly monitoring all key risks and key performance indicators to ensure that its decision-making capability and accuracy of its reporting is maintained at a high level;
- (f) to facilitate and promote communication, through reporting structures, regarding the matters referred to in paragraph (a) or any other related matter, between the board and the executive officers of the bank or controlling company;
- (g) to establish an independent risk management function, and in the case where the bank or controlling company, forms part of a group, a group risk management function, the head of which shall act as the reference point for all aspects relating to risk management within the bank or controlling company including the responsibility to arrange training of members of the board in the different risk areas to which that bank or controlling company is exposed;
- (h) to introduce such measures as may serve to enhance the adequacy and efficiency of the risk management policies, procedures, practices and controls applied within that bank or that controlling company;



- (i) to co-ordinate the monitoring of risk management on a globalised basis;
- (j) to establish and implement a process of internal controls and reviews to ensure the integrity of the overall risk and capital management process;
- (k) to establish and implement policies and procedures designed to ensure that the bank or the controlling company identifies, measures, and reports all material risks;
- (l) to establish and implement a process that relates capital to the level of risk;
- (m) to establish and implement a process that states capital adequacy goals with respect to risk, taking account of the bank's strategic focus and business plan; and
- (n) to perform such further functions as may be prescribed.

(3) The Registrar may upon written application exempt the board of directors of a bank from the duty to appoint a risk and capital management committee in respect of that bank provided that the Registrar is satisfied that the risk and capital management committee appointed in respect of the relevant controlling company, in addition to its responsibilities in respect of that controlling company, is able to also adequately assume the responsibilities of a risk and capital management committee in respect of that bank.

#### **64B. Directors' affairs committee**

- (1) Subject to the provisions of subsection (3) the board of directors of a bank and controlling company shall establish a director's affairs committee, consisting only of non-executive directors of the bank or controlling company.
- (2) The functions of the directors' affairs committee shall be to assist the board of directors –
  - (a) in its determination and evaluation of the adequacy, efficiency and appropriateness of the corporate governance structure and practices of the bank or controlling company;
  - (b) to establish and maintain a board directorship continuity programme entailing-
    - (i) a review of performance of and planning for successors to the executive directors;
    - (ii) measures to ensure continuity of non-executive directors;
    - (iii) a regular review of the composition of skills, experience and other qualities required for the effectiveness of the board; and
    - (iv) an annual self-assessment of the board as a whole and of the contribution of each individual director;
  - (c) in the nomination of successors to the key positions in the bank or controlling company in order to ensure that a management succession plan is in place;
  - (d) in determining whether the services of any director should be terminated;
  - (e) in ensuring that the bank or controlling company is at all times in compliance with all applicable laws, regulations and codes of conduct and practices; and

- (f) to perform such further functions as may be prescribed.

(3) The Registrar may upon written application exempt the board of directors of a bank from the duty to appoint a directors' affairs committee in respect of that bank provided that the Registrar is satisfied that the directors' affairs committee appointed in respect of the relevant controlling company, in addition to its responsibilities in respect of that controlling company, is able to also adequately assume the responsibilities of a directors' affairs committee in respect of that bank.

**65. Forwarding of certain notices, reports, returns and financial statements to Registrar**

- (1) Whenever a bank or controlling company -
  - (a) forwards 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 such year to its shareholders;
  - (b) gives notice to the Registrar of Companies in terms of section 170(2) of the Companies Act of any intended change in the situation of its registered office or of its postal address;
  - (c) forwards in terms of section 216(2) of the Companies Act a return referred to in that section regarding its directors to the Registrar of Companies; or
  - (d) forwards in terms of section 302(4) of the Companies Act financial statements to the Registrar of Companies,

it shall simultaneously forward a copy of such notice, report, return or statements to the Registrar.

(2) A bank or controlling company shall within 30 days after a general meeting of shareholders forward to the Registrar a copy of the minutes to be kept in respect of such meeting in terms of section 204 of the Companies Act.

**66. Disclosure of issued share capital**

If a bank publishes any statement or issues any document in which the amount of its authorized share capital is mentioned, the amount of its issued share capital shall also be mentioned in such statement or document.

**67. Disclosure of names of certain shareholders**

If, in the case of an individual shareholder in a bank who holds more than 25 per cent of all the issued shares in that bank to which voting rights are attached, the sum of the amounts of such bank's investments with or loans or advances or other exposures to such individual shareholder exceeds the total nominal value of the said shares so held by that individual shareholder, the bank shall in its financial statements mention the name of such individual shareholder.

**68. Special provisions relating to winding-up or judicial management of bank**

- (1) Notwithstanding the provisions of section 69 of this Act and anything to the contrary contained in the Companies Act -
  - (a) the Registrar shall have the right to apply to a competent court for the winding-up of any bank in terms of the Companies Act, and the Registrar shall have the right to oppose any such application made by any other person;
  - (b) no person other than a person recommended by the Registrar shall be appointed by a Master of the High Court as provisional liquidator or liquidator of a bank; and

- (c) the Master shall appoint a person designated by the Registrar, who shall be a person who in the opinion of the Registrar has wide experience of, and is knowledgeable about the latest developments in, the banking industry, to assist a provisional liquidator or liquidator referred to in paragraph (b) in the performance of the functions of such provisional liquidator or liquidator in respect of the bank in question.

(1A) The appointment by the Master of a person in terms of subsection (1)(c) shall be by means of a letter of appointment addressed by the Master to the person appointed and in which is set out -

- (a) the name of the bank in respect of which such person is appointed;
- (b) directions in regard to the remuneration of the person appointed; and
- (c) such other directions incidental to the matter as the Master or the Registrar may deem necessary,

and a copy of such letter of appointment shall be furnished by the Master to the provisional liquidator or liquidator concerned.

(2) During the voluntary winding-up of any bank the liquidator shall furnish the Registrar with such return or statement which the bank concerned would have been obliged to furnish to the Registrar in terms of this Act, were such bank not being wound up, as the Registrar may require.

(3) In the application, in relation to the winding-up of a company which is a bank -

- (a) of section 346 of the Companies Act, subsection (4) of that section shall be deemed to have been amended to read as follows :

"(4)(a) Before an application for the winding-up of a company which is a bank is presented to the Court, a copy of the application and of every affidavit confirming the facts stated therein shall be lodged with the Registrar of Banks and with the Master, or if there is no Master at the seat of the Court, with an officer in the public service designated for that purpose by the Master by notice in the *Gazette*.

(b) The Registrar of Banks or the Master or any such officer may report to the court any facts ascertained by such Registrar, Master or officer which appear to such Registrar, Master or officer to justify the Court in postponing the hearing or dismissing the application, and shall transmit a copy of that report to the applicant or the agent of such applicant and to the said company.";

- (b) of section 357 of the Companies Act, subsection (3) of that section shall be deemed to have been amended to read as follows :

"(3) A copy of every special resolution for the voluntary winding-up of any company which is a bank, passed under section 349, and of every order of court amending or setting aside the proceedings in relation to the winding-up shall, within fourteen days after the registration of the resolution in terms of section 200 or the making of the order, be transmitted by that company to the officers and registrars referred to in paragraphs (a), (b) and (c) of subsection (1), as well as to the Registrar of Banks.".

(4) Deleted.

(5) Notwithstanding anything to the contrary contained in any law, the suspension, cancellation or termination of the registration of a bank while such bank, as a result of an application brought by the Registrar, is being wound up in terms of this section, shall not affect –

- (a) any order or appointment made, direction issued or any other thing done under this section or in terms of the Companies Act, in respect of such bank; or
- (b) any power to be exercised, duty to be executed or right to be enforced in respect of such bank by the Registrar, the Master of the High Court or the provisional liquidator or liquidator, respectively, by virtue of the provisions of this section or the provisions of the Companies Act,

and the Registrar, the Master of the High Court, the provisional liquidator or liquidator, respectively, shall until the affairs of the public company of which the registration as a bank has been so suspended, cancelled or terminated have been completely wound up as contemplated in section 419(1) of the Companies Act or until the winding-up is stayed or set aside by an order of a competent court continue to exercise their respective powers and to perform their respective duties under this section or in terms of the Companies Act, in respect of the public company of which the registration as a bank has been so suspended, cancelled or terminated, as if such suspension, cancellation or termination had not taken place.

#### **69. Appointment of curator to bank**

- (1)
  - (a) If, in the opinion of the Registrar, any bank will be unable to repay, when legally obliged to do so, deposits made with it or will probably be unable to meet any other of its obligations, the Minister may, if he or she deems it desirable in the public interest, with the written consent of the chief executive officer or the chairperson of the board of directors of that bank, appoint a curator to the bank.
  - (b) The Registrar may appoint a person other than a person who is in the employ of the bank under curatorship, who in the opinion of the Registrar has wide experience of and is knowledgeable about the specific field of activities in which the bank under curatorship is predominantly engaged, to assist the curator in the management of the affairs of the bank under curatorship.
  - (c) The person appointed in terms of paragraph (b) shall in respect of the services rendered by that person pursuant to his or her appointment be paid such remuneration out of the funds of the bank under curatorship as the Registrar may after consultation with the curator determine.
- (2) The Minister shall appoint a curator by letter of appointment which shall set out -
  - (a) the name of the bank in respect of which the curator is appointed and the address of its head office;
  - (b) directions in regard to the security which the curator has to furnish for the proper performance of his or her duties;
  - (c) directions in regard to the remuneration of the curator; and
  - (d) such other directions as to the management of the bank concerned or any matter

incidental thereto, including directions in regard to the raising of money by that bank, as the Minister may deem necessary.

(2A) On appointment of a curator-

- (a) the management of the bank concerned shall vest in the curator, subject to the supervision of the Registrar, and any other person vested with the management of the affairs of that bank shall be divested thereof; and
- (b) the curator shall recover and take possession of all the assets of the bank.

(2B) The curator shall-

- (a) subject to the supervision of the Registrar, conduct the management contemplated in subsection (2A)(a) in such a manner as the Registrar may deem to best promote the interest of the creditors of the bank concerned and of the banking sector as a whole;
- (b) comply with any direction of the Registrar;
- (c) keep such accounting records and prepare such annual financial statements, interim reports and provisional annual financial statements as the bank or its directors would have been obliged to keep or prepare if the bank had not been placed under curatorship;
- (d) convene the annual general meeting and any other meeting of members of the bank provided for the Companies Act and, in that regard, comply with all the requirements with which the directors of the bank would in terms of the Companies Act have been obliged to comply if the bank had not been placed under curatorship; and
- (e) have the power to bring or defend in the name and on behalf of the bank any action or other legal proceedings of a civil nature and, subject to the provisions of any law relating to criminal proceedings, any criminal proceedings.

(2C) (a) Notwithstanding the provisions of subsection (3), the curator may dispose of any of the bank's assets in the ordinary course of the bank's business.

- (b) Except in the circumstances contemplated in paragraph (a) the curator may not, notwithstanding the provisions of section 228 of the Companies Act-
  - (i) dispose of any of the bank's assets otherwise than in accordance with the provisions of section 54;
  - (ii) effect a disposal referred to in subparagraph (i) unless a reasonable probability exists that such disposal will enable the bank to pay its debt or meet its obligations and become a successful concern.

(2D) If at any time the curator is of the opinion that there is no reasonable probability that the continuation of the curatorship will enable the bank to pay its debts or meet its obligations and become a successful concern, the curator shall forthwith in writing inform the Registrar of such opinion.

(2E) Any money of the bank that becomes available to the curator shall be applied by him or her in paying the costs of the curatorship and in the conduct of the bank's business in accordance with

the requirements of the curatorship and, as far as the circumstances permit, in the payment of the claims of creditors which arose before the date of the curatorship.

- (2F) (a) Every disposition of its property, which if made by an individual could for any reason be set aside in the event of such individual's insolvency, may, if made by a bank that is unable to pay its debts, be set aside by a court at the suit of the curator in the event of that bank being placed under curatorship, and the provisions of the law relating to insolvency, shall *mutatis mutandis* apply in respect of such disposition.
- (b) For the purpose of this subsection the event which shall be deemed to correspond with a sequestration order under the Insolvency Act, 1936 (Act No. 24 of 1936), in the case of an insolvent, shall be the presentation to the Court of the letter of appointment of the curator.

(2G) The period during which any bank that is a mortgage debtor in respect of any mortgage bond is subject to curatorship in terms of this section shall be excluded in the calculation of any period of time for the purpose of determining whether such mortgage bond confers any preference in terms of section 88 of the Insolvency Act, 1936, as applied to the winding-up of banks in terms of this Act.

(3) The Minister may, in the letter of appointment or at any time subsequent thereto, empower the curator in his or her discretion, but subject to any condition which the Minister may impose -

- (a) to suspend or reduce, as from the date of the curator's appointment as such or any subsequent date, the right of creditors of the bank concerned to claim or receive interest on any money owing to them by that bank;
- (b) to make payments, whether in respect of capital or interest, to any creditor or creditors of the bank concerned at such time, in such order and in such manner as the curator may deem fit;
- (c) to cancel any agreement between the bank concerned and any other party to advance moneys due after the date of the curator's appointment as such, or to cancel any agreement to extend any existing facility, if, in the opinion of the curator such advance or any loan under such facility would not be adequately secured or would not be repayable on terms satisfactory to the curator or if the bank lacks the necessary funds to meet its obligations under any such agreement or if it would not otherwise be in the interests of the bank;
- (d) to convene from time to time, in such manner as the curator may deem fit, a meeting of creditors of the bank concerned for the purpose of establishing the nature and extent of the bank's indebtedness to such creditors and for consultation with such creditors in so far as their interests may be affected by decisions taken by the curator in the course of the management of the affairs of the bank concerned;
- (e) to negotiate with any individual creditor of the bank concerned with a view to the final settlement of the affairs of such creditor with the bank;
- (f) to make and carry out, in the course of the curator's management of the bank concerned, any decision which in terms of the provisions of the Companies Act would have been required to be made by way of a special resolution contemplated in section 199 of the said Act;
- (g) to cancel any lease of movable or immovable property entered into by the bank concerned prior to its being placed under curatorship : Provided that, notwithstanding the provisions of subsection (6), a claim for damages in respect of such cancellation

may be instituted against the bank after the expiration of a period of one year as from the date of such cancellation;

- (h) deleted
- (i) to cancel any guarantee issued by the bank concerned prior to its being placed under curatorship, excluding such guarantee which the bank is required to make good within a period of 30 days as from the date of the appointment of the curator : Provided that, notwithstanding the provisions of subsection (6), a claim for damages in respect of any loss sustained by or damage caused to any person as a result of the cancellation of a guarantee in terms of this paragraph, may be instituted against the bank after the expiration of a period of one year as from the date of such cancellation.

(3A) The curator shall duly record the nature of and the reasons for each act performed by the curator under any power conferred upon the curator in terms of subsection (3), and such records shall be examined as part of the normal audit performed in respect of the affairs of the bank concerned.

(4) The Minister may, at any time and in any manner, amend the directions in the letter of appointment, and the powers granted by the Minister under subsection (3) to the curator.

(5) deleted.

(6) While such bank is under curatorship -

- (a) all actions, legal proceedings, the execution of all writs, summonses and other legal process against that bank shall be stayed and not be instituted or proceeded with without the leave of the court; and
- (b) deleted;

(6A) While a bank is under curatorship the curator shall on a monthly basis furnish the Registrar with a written report containing an exposition of the affairs of the bank concerned and in which it is stated whether or not, in the opinion of the curator, a reasonable probability exists that the bank will be able to pay its debts or to meet its obligations and to become a successful concern.

(6B) Notwithstanding any provision to the contrary contained in this Act, sections 35A, 35B and 46 of the Insolvency Act, 1936 (Act No. 24 of 1936), shall *mutatis mutandis* apply to the curator of any bank under curatorship and to such a bank as if the curator were a trustee of an insolvent estate and the bank were an insolvent or a sequestrated estate as contemplated in those sections;

(7) The Registrar shall as soon as is practicable announce the appointment of a curator and the powers granted to the curator on the appointment of the curator, and any amendment or withdrawal of such powers, by notice in the *Gazette*.

(8) Notwithstanding anything to the contrary contained in any law, the suspension, cancellation or termination of the registration of a bank while such bank is under curatorship in terms of this section shall not affect -

- (a) any appointment made, direction issued, or any other thing done under this section in respect of such bank; or
- (b) any power to be exercised or duty to be executed in respect of that bank under curatorship by the Minister, the Registrar or the curator, by virtue of the provisions of this section,

and the Minister, the Registrar and the curator, respectively, shall until such time as the curatorship is terminated continue to exercise their respective powers and to execute their respective duties under this section in respect of the public company of which the registration as a bank has been so suspended, cancelled or terminated, as if such suspension, cancellation or termination had not taken place

(9) The Minister may-

- (a) at any time withdraw the appointment of a curator;
- (b) upon application by the Registrar withdraw the appointment of a curator.

(10) Curatorship of a bank shall lapse upon-

- (a) the issue by the Minister of written notification to that effect to the curator; or
- (b) the winding-up of the bank in terms of the provisions of section 68.

#### **69A. Investigation of affairs of bank under curatorship**

(1) While a bank is under curatorship, the Registrar may appoint a person to be a commissioner for the purpose of investigating the business, trade, dealings, affairs or assets and liabilities of that bank or of its associate or associates.

(2) The Registrar may appoint a person as an assistant or two or more persons as assistants to the commissioner referred to in subsection (1) in order to assist the commissioner, subject to the control and directions of the Registrar, in an investigation contemplated in subsection (1).

(3) Before the Registrar appoints a commissioner in terms of subsection (1) or a person or persons in terms of subsection (2), the Registrar shall take all reasonable steps to ensure that the person or persons so appointed will be able to report objectively and impartially on the affairs of the bank concerned or the associate or associates of such bank.

(4) A commissioner appointed under subsection (1) and any person or persons appointed under subsection (2) shall for the purpose of their functions in terms of this section have powers and duties in all respects corresponding to the powers and duties conferred or imposed by sections 4 and 5 of the Inspection of Financial Institutions Act, 1998 (Act No. 80 of 1998), upon a registrar or an inspector contemplated in the Inspection of Financial Institutions Act, 1998 : Provided that for the purposes of this section -

- (a) any reference to an "institution" or "financial institution" in sections 4 and 5 of the Inspection of Financial Institutions Act, 1998 shall be deemed to be a reference to a bank under curatorship or any of its associates; and
- (b) any reference to "the registrar" and "an inspector" in sections 4 and 5 of the Inspection of Financial Institutions Act, 1998 shall be deemed to be a reference to the commissioner and any person appointed under subsection (2), respectively.

(5) When an investigation is made under this section and section 4 of the Inspection of Financial Institutions Act, 1998 (Act No. 80 of 1998), subsection (1)(a) of that section shall be deemed to have been amended to read as follows:

“(1) In carrying out an investigation into the business, trade, dealings, affairs or assets and liabilities of a bank under curatorship, a commissioner may –



- (a) administer an oath or affirmation or otherwise examine any person who is or formerly was a director, servant, employee, partner, member or shareholder of the bank: Provided that the person examined, whether under oath or not, may have his or her legal adviser present at the examination: Provided further that on good cause shown the commissioner may direct that the proceedings under this paragraph shall be held *in camera* and not be accessible to the public;”.

(5A) When an investigation is made under this section and section 5 of the Inspection of Financial Institutions Act, 1998 (Act No. 80 of 1998), applies, subsection (1)(a) of that section shall be deemed to have been amended to read as follows :

“(1) In carrying out an investigation into the business, trade, dealings, affairs or assets and liabilities of a bank under curatorship, a commissioner may –

- (a) administer an oath or affirmation or otherwise examine any person, if the commissioner has reason to believe that such a person may be able to provide information relating to the affairs of the bank: Provided that the person examined, whether under oath or not, may have his or her legal adviser present at the examination: Provided further that unless directed otherwise by the commissioner, the proceedings under this paragraph shall be held *in camera* and not be accessible to the public;”.
- (6) (a) Any person examined by a commissioner under this section shall not be entitled, at such examination, to refuse to answer any question upon the ground that the answer would tend to incriminate him or her or upon the ground that he or she is to be tried on a criminal charge and may be prejudiced at such trial by his answer.
  - (b) Where any person gives evidence in terms of the provisions of this section and is obliged to answer questions that may incriminate him or her or, where he or she is to be tried on a criminal charge, may prejudice him or her at such trial, the commissioner shall direct, in respect of such part of the proceedings, that no information regarding such questions and answers may be published in any manner whatsoever.
  - (c) No evidence regarding any questions and answers contemplated in paragraph (b), and no evidence regarding any fact or information that has come to light in consequence of any such questions or answers, shall be admissible in any criminal proceedings, except in criminal proceedings where the person concerned is charged with an offence in terms of subsection (14).
- (7) In addition to the powers conferred upon the commissioner by subsection (4) the commissioner shall for the purpose of the performance of the functions of the commissioner under this section have the power to summon before the commissioner any such person as the commissioner may examine in terms of the provisions of subsection (5).
- (8) If any person who has been duly summoned under subsection (7), and to whom a reasonable sum for the expenses of such person has been tendered, fails to attend before a commissioner at the time and place appointed by the summons without lawful excuse made to the commissioner at the time of the sitting, the commissioner may cause the person so summoned to be apprehended and brought before him for examination.
- (9) Any person duly summoned under subsection (7) shall be entitled to such witness fees as he would have been entitled to if he were a witness in civil proceedings in a magistrate's court.
- (10) The Registrar shall be liable for payment of the costs and expenses incidental to an

investigation held in accordance with the provisions of this section, unless the Registrar directs that the whole or any part of such costs and expenses shall be paid out of the assets of the bank concerned.

(11) A commissioner shall within a period of five months as from the date of his appointment complete his investigation in terms of section (1) and shall within a period of 30 days after completion of such investigation prepare a written report thereon, in which, *inter alia*, shall be stated whether or not, in the opinion of the commissioner -

- (a) it is in the interest of the depositors or other creditors of the bank concerned that the bank remains under curatorship;
- (b) it is in the interest of the depositors or other creditors of the bank concerned that the Registrar, in terms of the provisions of section 68(1)(a), applies to a competent court for -
  - (i) the winding-up of the bank concerned; or
  - (ii) deleted.
- (c) it appears that any business of such bank was carried on recklessly or negligently or with the intent to defraud depositors or other creditors of the bank concerned or any other person, or for any other fraudulent purpose; and
- (d) should it appear that any business of such bank was carried on in the manner contemplated in paragraph (c), any person identified by the commissioner was a party to the carrying on of the business of that bank in such manner.

(12) A report by a commissioner completed in accordance with the provisions of this section shall be forwarded to -

- (a) the Registrar;
- (b) the Minister; and
- (c) in the event of a finding contemplated in subsection (11)(c) and (d), the attorney-general concerned.

(13) Any examination or any report by a commissioner under this section shall be private and confidential unless the Registrar, after consultation with the Minister, either generally or in respect of any part of such examination or such report, directs otherwise.

(14) Any person who -

- (a) has been duly summoned under this section by a commissioner and who fails, without sufficient cause, to attend at the time and place specified in the summons;
- (b) has been duly summoned under this section by a commissioner and who -
  - (i) fails, without sufficient cause, to remain in attendance until excused by the commissioner from further attendance;
  - (ii) refuses to be sworn or to affirm as a witness; or

- (iii) fails, without sufficient cause -
  - (aa) to answer fully and satisfactorily any questions lawfully put to such person by a commissioner, notwithstanding that such answer may tend to incriminate him or her; or
  - (bb) to produce books or papers in the custody of such person or under the control of such person which a commissioner has required him or her to produce;
- (c) wilfully furnishes the commissioner with any false information;
- (d) refuses or fails to comply to the best of his or her ability with any reasonable request made to him or her by the commissioner in the exercise of the commissioner's powers or the performance of the commissioner's duties;
- (e) wilfully hinders the commissioner in the exercise of his powers or the performance of his or her duties, or
- (f) fails to comply with any provision of a direction by the commissioner or the Registrar as contemplated in this section,

shall be guilty of an offence.

(15) The Registrar shall as soon as is practicable after the appointment of a commissioner or any person or persons in terms of subsection (2), by notice in the *Gazette*, announce such appointment.

(16) The provisions of section 69(8) shall *mutatis mutandis* apply in respect of a bank under curatorship of which the registration as a bank is suspended, cancelled or terminated while an investigation under this section in respect thereof is in progress.

(17) For the purposes of subsection (16), the reference in section 69(8) to the Minister and the curator, respectively, shall be deemed to be a reference to a commissioner and any person appointed in terms of subsection (2), respectively.

(18) For the purposes of this section "associate" means an associate as defined in section 37(7).

## CHAPTER VI

### PRUDENTIAL REQUIREMENTS

#### **70. Minimum share capital and unimpaired reserve funds**

- (1) deleted
- (2) (a) A bank of which the business does not include trading in financial instruments shall manage its affairs in such a way that, subject to the provisions of paragraph (b), the sum of its primary and secondary capital and its primary and secondary unimpaired

reserve funds in the Republic does not at any time amount to less than the greater of -

- (i) R250 000 000 or, in the case of such a bank which immediately prior to the date of commencement of this Act was registered as a banking institution or a building society under a law repealed by this Act, R1 000 000; or
- (ii) an amount which represents a prescribed percentage of the sum of amounts relating to the different categories of assets and other risk exposures and calculated in such a manner as may be prescribed.

(b) Notwithstanding the provisions of paragraph (a)-

- (i) the sum of the bank's primary share capital and primary unimpaired reserve funds shall, in the calculation of the aggregate amount which the bank is in terms of paragraph (a) required to maintain, be –

(aa) taken into account to an amount as may be prescribed; and

(bb) calculated by deducting from the amount thereof such amounts as may be prescribed; and

- (ii) the sum of the bank's secondary capital and secondary unimpaired reserve funds shall, in the calculation of the aggregate amount which the bank is in terms of paragraph (a) required to maintain, be-

(aa) taken into account to an amount as may be prescribed; and

(bb) calculated by deducting from the amount thereof such amounts as may be prescribed:

Provided that the sum of the bank's secondary capital and secondary unimpaired reserve funds after the deduction of such amounts as may be prescribed, shall not be taken into account to an amount in excess of the sum of the bank's allocated and qualifying primary share capital and allocated and qualifying primary unimpaired reserve funds.

(2A) (a) A bank of which the business consists solely of trading in financial instruments shall manage its affairs in such a way that, subject to the provisions of paragraph (b), the sum of its primary and secondary capital, its primary and secondary unimpaired reserve funds and its tertiary capital in the Republic does not at any time amount to less than the greater of –

- (i) R250 000 000; or

- (ii) An amount which represents a prescribed percentage of the sum of amounts relating to the different categories of assets and other risk exposures and calculated in such a manner as may be prescribed.

(b) Notwithstanding the provisions of paragraph (a)-

- (i) the sum of the bank's primary share capital and primary unimpaired reserve funds shall, in the calculation of the aggregate amount which the bank is in terms of paragraph (a) required to maintain, be –

- (aa) taken into account to an amount as may be prescribed; and
  - (bb) calculated by deducting from the amount thereof such amounts as may be prescribed;
- (ii) the sum of the bank's secondary capital and secondary unimpaired reserve funds shall, in the calculation of the aggregate amount which the bank is in terms of paragraph (a) required to maintain, be -
- (aa) taken into account to an amount as may be prescribed; and
  - (bb) calculated by deducting from the amount thereof such amounts as may be prescribed:

Provided that the sum of the bank's secondary capital and secondary unimpaired reserve funds after the deduction of such amounts as may be prescribed, shall not be taken into account to an amount in excess of the sum of the bank's allocated and qualifying primary share capital and allocated and qualifying primary unimpaired reserve funds.

- (iii) the sum of a bank's tertiary capital shall, in the calculation of the aggregate amount which the bank is in terms of paragraph (a) required to maintain, be -
- (aa) taken into account to an amount as may be prescribed; and
  - (bb) calculated by deducting from the amount thereof such amounts as may be prescribed:

Provided that, after the deduction of such amounts as may be prescribed, the sum of the bank's secondary capital, secondary unimpaired reserve funds and tertiary capital shall not be taken into account to an amount in excess of the sum of the bank's allocated and qualifying primary share capital and allocated and qualifying primary unimpaired reserve funds; and

- (iv) the total amount of allocated and qualifying secondary capital, allocated and qualifying secondary unimpaired reserve funds and tertiary capital shall be determined as prescribed.

- (2B) (a) A bank of which the business includes trading in financial instruments shall manage its affairs in such a way that, subject to the provisions of paragraph (b), the sum of its primary and secondary capital, its primary and secondary unimpaired reserve funds and its tertiary capital in the Republic does not at any time amount to less than the greater of –

- (i) R250 000 000; or
- (ii) An amount which represents a prescribed percentage of the sum of amounts relating to the different categories of assets and other risk exposures and calculated in such a manner as may be prescribed.

- (b) Notwithstanding the provisions of paragraph (a)-

- (i) the sum of the bank's primary share capital and primary unimpaired reserve funds shall, in the calculation of the aggregate amount which the bank is in terms of paragraph (a) required to maintain, be –

- (aa) taken into account to an amount as may be prescribed; and
  - (bb) calculated by deducting from the amount thereof such amounts as may be prescribed; and
- (ii) the sum of the bank's secondary capital and secondary unimpaired reserve funds shall, in the calculation of the aggregate amount which the bank is in terms of paragraph (a) required to maintain, be -
- (aa) taken into account to an amount as may be prescribed; and
  - (bb) calculated by deducting from the amount thereof such amounts as may be prescribed:

Provided that the sum of the bank's secondary capital and secondary unimpaired reserve funds after the deduction of such amounts as may be prescribed, shall not be taken into account to an amount in excess of the sum of the bank's allocated and qualifying primary share capital and allocated and qualifying primary unimpaired reserve funds.

- (iii) the sum of a bank's tertiary capital shall, in the calculation of the aggregate amount which the bank is in terms of paragraph (a) required to maintain, be -
- (aa) taken into account to an amount as may be prescribed; and
  - (bb) calculated by deducting from the amount thereof such amounts as may be prescribed:

Provided that, after the deduction of such amounts as may be prescribed, the sum of the bank's secondary capital, secondary unimpaired reserve funds and tertiary capital shall not be taken into account to an amount in excess of the sum of the bank's allocated and qualifying primary share capital and allocated and qualifying primary unimpaired reserve funds; and

- (iv) the total amount of allocated and qualifying secondary capital, allocated and qualifying secondary unimpaired reserve funds and tertiary capital shall be determined as prescribed.

#### **70A Minimum capital and reserve funds in respect of a banking group**

(1) Notwithstanding the provisions of section 70(2), (2A) and (2B), a controlling company shall manage its affairs in such a way that-

- (a) subject to the provisions of subsection (2), the sum of its primary and secondary capital, its primary and secondary unimpaired reserve funds and its tertiary capital does not at any time amount to less than an amount which represents a prescribed percentage of the sum of amounts relating to the different categories of assets and other risk exposures and calculated in such a manner as may be prescribed.
- (b) the capital and reserve funds of any regulated entity included in the banking group and structured under such controlling company do not at any time amount to less

than the required amount of capital and reserve funds determined in respect of the relevant regulated entity included in such banking group in accordance with the rules and regulations of the relevant regulator responsible for the supervision of the relevant entity.

(2) Notwithstanding the provisions of subsection (1), in the calculation of the aggregate amount of capital that a controlling company is required to maintain, the sum of a controlling company's-

- (a) primary share capital and primary unimpaired reserve funds shall be-
  - (i) taken into account to an amount as may be prescribed; and
  - (ii) calculated by deducting from the amount thereof such amounts as may be prescribed.
- (b) secondary capital and secondary unimpaired reserve funds shall be-
  - (i) taken into account to an amount as may be prescribed; and
  - (ii) calculated by deducting from the amount thereof such amounts as may be prescribed:

Provided that, after the deduction of such amounts as may be prescribed, the sum of the controlling company's secondary capital and secondary unimpaired reserve funds shall not be taken into account to an amount in excess of the sum of the controlling company's primary share capital and primary unimpaired reserve funds.

- (c) tertiary capital shall be-
  - (i) taken into account to an amount as may be prescribed; and
  - (ii) calculated by deducting from the amount thereof such amounts as may be prescribed:

Provided that, after the deduction of such amounts as may be prescribed, the sum of the controlling company's secondary capital, secondary unimpaired reserve funds and tertiary capital shall not be taken into account to an amount in excess of the sum of the controlling company's allocated and qualifying primary share capital and allocated and qualifying primary unimpaired reserve funds.

## **71. Minimum reserve balance**

Repealed.

## **72. Minimum liquid assets**

(1) A bank shall hold in the Republic liquid assets to a value which does not amount to less than the sum of amounts, calculated as prescribed percentages, but which in no instance may exceed 20 per cent, of such different categories of its liabilities as may be specified by regulation with reference to the time when such liabilities fall due or with reference to any other aspect pertaining to such liabilities.

(2) The amounts of the liquid assets and of the liabilities referred to in subsection (1) shall be

calculated in such manner and be determined at such times as may be prescribed.

(3) A bank shall not pledge or otherwise encumber any portion of the liquid assets held by it in compliance with the provisions of subsection (1) : Provided that the Registrar may, exempt a bank from the prohibition contained in this subsection on such conditions and to such an extent and for such a period as the Registrar may determine.

(4) For the purposes of this section securities which constitute 'liquid assets' as defined in section 1 shall be valued as prescribed.

### **73. Concentration risk**

(1) A bank, controlling company, branch or branch of a bank-

(a) shall not make investments with or grant loans or advances or other credit to any person, to an aggregate amount exceeding 10 per cent of such amount of its capital and reserves as may be prescribed, without first having obtained the permission of its board of directors, or of a committee appointed for such purpose (for the composition of which committee the prior written approval of the Registrar has to be obtained), to make such investments or to grant such loans, advances or other credit; and

(b) shall in the event of the aggregate amount of investments, loans, advances and other credit contemplated in paragraph (a), relating to any private sector non-bank person, exceeding 800 per cent of such an amount of its capital and reserves as may be prescribed, be subject to such additional capital requirements as may be prescribed.

(2) Notwithstanding anything to the contrary contained in this Act, a bank, controlling company, branch or branch of a bank –

(a) shall not without the prior written approval of the Registrar make an investment with or grant a loan, advance or other credit to any private sector non-bank person, which transaction, either alone or together with any previous transaction or transactions entered into by it with that private sector non-bank person, results in the bank, controlling company, branch or branch of a bank being exposed to that private sector non-bank person to an amount exceeding 25 per cent of a prescribed amount;

(b) shall in such manner and on such a form as may be prescribed report to the Registrar whenever it makes an investment with or grants a loan or advance or other credit to any person other than a private sector non-bank person, which transaction, either alone or together with any previous transaction or transactions entered into by it with that other person, results in the bank, controlling company, branch or branch of a bank being exposed to that other person up to an amount exceeding 25 per cent of a prescribed amount;

(c) shall, in the event of the Registrar granting such written approval as contemplated in paragraph (a), be subject to such additional capital requirements as may be prescribed;

(d) shall in the case of any exposure to an industry, sector or geographical area, that exceeds a prescribed amount, comply with such conditions or requirements as may be prescribed, including a requirement to maintain additional capital and reserve funds in respect of the said exposure; and

(e) shall in such manner and on such a form as may be prescribed report such an investment in or such a loan or advance or other credit exposure to a specific



industry, sector or geographical area, which investment, loan, advance or credit exposure, either alone or together with any previous investment, loan, advance or exposure, results in the bank, controlling company or branch of a bank being exposed to that industry, sector or geographical area up to an amount exceeding such a percentage of capital and reserve funds as may be prescribed.

(3) For the purposes of this section -

(a) "person" includes -

- (i) two or more persons, whether natural or juristic persons, the respective exposures to whom constitute a single exposure because of the fact that one of them directly or indirectly exercises control over the other or others; and
- (ii) two or more persons, whether natural or juristic persons, between whom there exists no relationship of control as contemplated in subparagraph (i), but the respective exposures to whom are to be regarded as a single exposure because of the fact that they are so interconnected that should one of them experience financial difficulties, another one or all of them would be likely to experience a lack of liquidity; and

(b) "private sector non-bank person" means a person as defined in paragraph (a) but does not include-

- (i) the central government or other public sector bodies;
- (ii) a bank;
- (iii) a mutual bank;
- (iv) a branch of a bank;
- (v) a branch;
- (vi) a foreign institution that, under an authorisation referred to in section 18A, conducts the business of a bank by means of a branch in the Republic;
- (vii) a controlling company; or
- (viii) any other person designated by the Registrar.

(4) The Registrar may, with the consent of the Minister, exempt with such conditions as the Registrar may determine, such exposures as the Registrar may determine from the provisions of this section by means of a circular as contemplated in section 6(4).

#### **74. Failure or inability to comply with prudential requirements**

(1) If-

- (a) a bank fails to comply with a provision of section 70 or 72, or is unable to comply with any such provision, or
- (b) a controlling company fails to comply with a provision of section 70A, or is unable to comply with any such provision,

the bank or controlling company, as the case may be, shall forthwith in writing report its failure or inability to the Registrar, stating the reasons for such failure or inability.

(2) The Registrar may, notwithstanding the provisions of section 91A, summarily take action

under this Act against a bank or controlling company referred to in subsection (1) or, if in the circumstances the Registrar deems it fit to do so, condone the failure or inability and afford the bank or controlling company concerned an opportunity, subject to such conditions as the Registrar may determine, to comply with the relevant provision within a specified period.

(3) Irrespective whether or not criminal proceedings in terms of this Act have been or may be instituted against a bank or controlling company in respect of any failure or inability referred to in subsection (1), the Registrar may, subject to any condonation granted under subsection (2), by way of a written notice impose upon that bank or controlling company, in respect of such failure or inability, a fine-

- (a) in the case of any failure or inability to comply with the provisions of section 70 or 70A, not exceeding one-tenth of one per cent of the amount of the shortfall for each day on which such failure or inability continues; or
- (b) in the case of any failure or inability to comply with the provisions of section 72, not exceeding three per cent of the amount of the shortfall.

(4) A fine imposed under subsection (3) shall be paid to the Registrar within such period as may be specified in the relevant notice, and if the bank or controlling company concerned fails to pay the fine within the specified period the Registrar may by way of civil action in a competent court recover from that bank or controlling company the amount of the fine or any portion thereof which the Registrar may in the circumstances consider justified.”.

## **75. Returns**

(1) A bank shall, in order to enable the Registrar to determine -

- (a) whether the bank is complying with the provisions of -
  - (i) sections 70 and 72; or
  - (ii) section 10 of the South African Reserve Bank Act, 1989 (Act No. 90 of 1989); or
- (b) the nature and amounts of the bank's assets, liabilities and contingent liabilities,

furnish the Registrar, subject to the provisions of subsection (3A), with returns.

(2) Deleted.

(3) A bank shall, in addition to the returns referred to in subsection (1), furnish the Registrar, subject to the provisions of subsection (3A), with the prescribed returns, including returns relating to the extent and management of risk exposures in the conduct of its business.

(3A) The returns referred to in subsections (1) and (3) shall be prepared in conformity with financial reporting standards in terms of the Companies Act and shall be furnished to the Registrar in respect of such period, at such times and on such a form as may be prescribed.”.

(4) The regulations contemplated in subsection (3) and (3A) may also -

- (a) prescribe that a bank which carries on the business of a bank through the medium of a subsidiary, branch office, agency or other undertaking outside the Republic, shall incorporate in the returns which it is required to furnish in terms of subsections (1) and (3) the required information in respect of such business, and also that such

information shall be furnished separately by the bank on a form so prescribed; and

- (b) prescribe that in the case of a group of banks the holding company in such group shall, in addition to the returns furnished in terms of subsection (1) and (3) by each bank in the group, furnish the Registrar by means of a consolidated return, on a form prescribed, relating to -
- (i) all the banks in that group;
  - (ii) all the subsidiaries of such banks;
  - (iii) the controlling company of such banks and all other subsidiaries of such controlling company;
  - (iv) any juristic person which would have been a subsidiary of any one of such banks or of such controlling company had such juristic person been a company;
  - (v) any juristic person of which the board of directors, or, in the case where such juristic person is not a company, of which the governing body, is accustomed to act in accordance with the directions or instructions of any one of such banks or of such controlling company; and
  - (vi) any trust controlled directly or indirectly by any one of such banks or by such controlling company,

as well as to any business, if any, referred to in paragraph (a), with the information required to be furnished in such first-mentioned returns, or with such other information as the Registrar may require.

(5) A bank shall furnish the Registrar, in respect of those of the respective returns referred to in subsections (1) and (3) which most nearly coincide with the end of the financial year of the bank, with a report by the auditor of the bank in which is stated whether or not those returns fairly and in conformity with financial reporting standards in terms of the Companies Act present those affairs of the bank to which the returns relate, and the Registrar may, if he or she deems it necessary, require the bank so to furnish the Registrar with such a report in respect of any other of those returns furnished during the financial year.

(6) A bank shall, at such times as may be prescribed, furnish the Registrar with such further prescribed information as the Registrar may require.

## CHAPTER VII

### PROVISIONS RELATING TO ASPECTS OF THE CONDUCT OF THE BUSINESS OF A BANK

#### **76. Restriction on investments in immovable property and shares, and on loans and advances to certain subsidiaries**

(1) Subject to the provisions of subsection (2), a bank which invests money in immovable property or in shares of any company, or which lends or advances money to any of its subsidiaries of which the main object is the acquisition and holding or development of immovable property, shall manage its transactions in such investments, loans or advances in such a way that the sum of the amounts -

- (a) invested by it in immovable property, taken at the book value thereof;
- (b) invested by it in shares of any company (excluding preference shares which are not convertible into ordinary shares), taken at the price at which they were acquired; and
- (c) owing to it by any such subsidiary in respect of a loan or an advance granted by it,

does not at any time exceed a prescribed amount.

(2) A bank may with the written approval of the Minister and subject to such conditions as he or she may determine, make investments and grant loans and advances, referred to in subsection (1), to an aggregate amount which exceeds the sum to which it is limited in terms of subsection (1).

#### **77. Restriction on investments with, and loans and advances to, certain associates**

(1) A bank which invests money in debentures, or preference shares of any of its associates (excluding any such associate which is a subsidiary referred to in section 76(1), a bank or a mutual building society), or which lends or advances money to any such associate, or which provides guarantees in respect of liabilities of such associates, shall manage its transactions in such investments, loans, advances or guarantees in such a way that the sum of the amounts -

- (a) invested by it in debentures or preference shares of such associates (excluding debentures or preference shares which are convertible into ordinary shares), taken at the price at which they were acquired;
- (b) owing to it by such associates in respect of loans or advances granted by it; and
- (c) of such guarantees,

does not at any time exceed ten per cent of the amount prescribed.

(2) The sum of the amounts referred to in paragraph (a), (b) and (c) of subsection (1) shall be calculated for the purposes of that subsection by deducting therefrom the amount by which the sum of the issued primary share capital and primary unimpaired reserve funds, referred to in section 76(1), of the bank exceeds the sum of the amounts referred to in paragraphs (a), (b) and (c) of section 76(1).

(3) For the purposes of this section "associate" means an associate as defined in section 37(7).

#### **78. Undesirable practices**

(1) A bank -

- (a) shall not hold shares in any company of which such bank is a subsidiary;
- (b) shall not lend money to any person against security of its own shares or of shares of that bank's controlling company;
- (c) shall not, for the purpose of furthering the sale of its own shares, grant unsecured loans or loans against security which in the opinion of the Registrar is inadequate;
- (d) shall hold all its assets in its own name, excluding any asset -

- (i) *bona fide* hypothecated to secure an actual or potential liability;
  - (ii) in respect of which the Registrar has, on application of the bank concerned, approved in writing that such asset may be held in the name of another person; or
  - (iii) falling within a category of assets designated by the Registrar by notice in the *Gazette* as a category of assets which may be held in the name of another person;
- (e) shall not show in its financial statements or in any return referred to in section 75(1)(b) as an asset any amount representing the cost of organization or extension or the purchase of a business or a loss (including a loss originating from the sale of an asset) or bad debts;
- (f) shall not before provision has been made out of profits for the items referred to in paragraph (e) -
- (i) open any branch or agency or any further branch or agency; or
  - (ii) pay out dividends on its shares;
- (g) shall not, for the purpose of effecting a money lending transaction directly between a lender and a borrower, perform any act in the capacity of an agent except where the funds to be lent in terms of the money lending transaction are entrusted by the lender to the bank subject to a written contract of agency in which, in addition to any other terms thereof, at least the following matters shall be recorded :
- (i) Confirmation by the lender that the bank acts as the agent of the lender;
  - (ii) that the lender assumes, except in so far as the lender may in law have a right of recovery against the bank, all risks connected with the placing by the bank of the funds entrusted to it by the lender, as well as the responsibility to ensure that the bank executes the lender's instructions as recorded in the written contract of agency; and
  - (iii) that no express or implied guarantee regarding the payment of any amount of money owing by one person to another in pursuance of the relevant money lending transaction is furnished by the bank;
- (h) shall not in its accounting records record any asset at a value increased by the amount of a loss incurred upon the realization of another asset;
- (i) shall not conclude a repurchase agreement in respect of a fictitious asset or an asset created by means of a simulated transaction;
- (j) shall not purport to have concluded a repurchase agreement without -
- (i) such agreement being substantiated by a written document signed by the other party thereto; and
  - (ii) the details of such agreement being recorded in the accounts of the bank as well as in the accounts, if any, kept by the bank in the name of such other

party; and

- (k) shall not, without the prior written approval of the Registrar and notwithstanding anything to the contrary contained in any law, pay out dividends from its share capital.
- (2) The Registrar may -
- (a) in writing notify a bank that a practice employed by that bank and specified in the notice constitutes and undesirable practice for that bank; or
  - (b) by notice in the *Gazette* declare a practice specified in that notice to be an undesirable practice for banks specified in that notice or for all banks,

and a bank which, after the expiry of a period of 21 days as from the date of a notice received by it by virtue of paragraph (a) or applicable to it in terms of paragraph (b), employs a practice which constitutes an undesirable practice for it by virtue of such a notice, shall be guilty of an offence.

(3) A bank shall, upon receipt from the Registrar of a written request to that effect, discontinue the publication or issue of any advertisement, brochure, prospectus or similar document, specified in the request, which contains information which is not a correct statement of fact, or the publication or issue of which is, in the opinion of the Registrar, not in the public interest.

#### **79. Shares, debentures, negotiable certificates of deposit, share warrants and promissory notes or similar instruments**

- (1) A bank shall not -
- (a) sections 74 and 75 of the Companies Act notwithstanding, issue shares of no par value or convert any of its shares into shares of no par value;
  - (b) without the written approval of the Registrar and in accordance with conditions that may be determined by the Registrar in writing -
    - (i) issue any preference shares, hybrid debt instruments or debt instruments;
    - (ii) convert any of its shares into preference shares, hybrid debt instruments or debt instruments; or
    - (iii) convert any of its preference shares of a particular class into preference shares of any other class,

that will qualify as primary capital, secondary capital or tertiary capital, as the case may be.
  - (c) issue negotiable certificates of deposit, promissory notes, or any such similar instrument, otherwise than in accordance with such conditions as may be prescribed;
  - (d) section 101 of the Companies Act notwithstanding, issue share warrants to bearer within the meaning of that section.

(2) The aggregate amount representing the value of debt instruments and negotiable certificates of deposit and similar instruments issued by a bank in terms of paragraphs (b)(i) and (c), respectively, of subsection (1) shall at no time exceed an amount representing the prescribed percentage of the aggregate amount of the bank's liabilities in respect of deposits made with it and in respect of such debt instruments, negotiable certificates of deposit and similar instruments.

(3) Notwithstanding anything to the contrary contained in any contract or in the memorandum of association or articles of association of any bank or controlling company, there shall be no differentiation in the voting rights attached to any of the ordinary shares of a bank or a controlling company, and such voting rights shall be exercised in accordance with the determination thereof as provided in section 195(1) of the Companies Act.

(4) The provisions of subsections (1)(a),(b) and (d) shall *mutatis mutandis* apply to a controlling company.

#### **80. Limitation on certain activities of banks**

(1) Deleted.

(2) Deleted.

(3) No bank and no associate of a bank shall, without the prior written approval of the Registrar, either jointly or individually acquire or hold shares in any registered long-term insurer as defined in section 1 of the Long-term Insurance Act, 1998 (Act No. 52 of 1998) or in any short-term insurer as defined in section 1 of the Short-term Insurance Act, 1998 (Act No. 53 of 1998), to the extent to which the nominal value of those shares exceeds 49 per cent of the nominal value of all the issued shares of such long-term insurer or short-term insurer, as the case may be.

(4) Where in any particular case at the commencement of this Act the ratio contemplated in subsection (3) is exceeded, the bank and its associates may retain the shares in question, but they shall not acquire any further shares in such insurer as long as such ratio is so exceeded.

(5) For the purposes of this section -

(a) "associate", in relation to a bank, means -

(i) a holding company of that bank;

(ii) a company of which such holding company is a subsidiary;

(iii) a fellow subsidiary of that bank; or

(iv) a subsidiary (excluding a sub-sub-subsidiary) of that bank or of such fellow subsidiary; and

(b) "sub-subsidiary", in relation to a bank or its fellow subsidiary, means a company which is a subsidiary of such bank or fellow subsidiary by virtue of its being a subsidiary of a subsidiary of that bank or fellow subsidiary.

## CHAPTER VIII

### CONTROL OF CERTAIN ACTIVITIES OF UNREGISTERED PERSONS

#### **81. Order prohibiting anticipated or actual contraventions of certain provisions of Act**

(1) If the Registrar has reason to suspect that any person who is not registered as a bank in terms of this Act nor authorised in terms of the provisions of section 18A(1) to carry on the business of a bank -

- (a) is likely to conduct the business of a bank in contravention of the provisions of section 11(1) or 18A(6); or
- (b) has so contravened the provisions of section 11(1) or 18A(6) or has contravened the



provisions of section 22(4) or (5), or that such a contravention is likely to be continued or repeated,

the Registrar may apply to a division of the High Court having jurisdiction (hereinafter in this section referred to as the court) for an order -

- (i) prohibiting the anticipated contravention referred to in paragraph (a);
- (ii) prohibiting the continuation or repetition of a contravention referred to in paragraph (b); or
- (iii) prohibiting the person concerned from disposing of or otherwise dealing with any of the assets of that person while the contravention suspected of having been committed or of being continued is investigated.

(2) If it is proved to the satisfaction of the court, in the case of an application for an order referred to in -

- (a) subsection (1)(i), that there is a reasonable likelihood that the provisions of section 11(1) or 18A(6) will be contravened by a person concerned as contemplated in subsection (1)(a);
- (b) subsection (1)(ii), that there is a reasonable likelihood that a contravention will be continued or repeated as contemplated in subsection (1) (b); or
- (c) subsection 1(iii), that there is a reasonable likelihood that a contravention has been committed or is being continued as contemplated in subsection (1)(b),

the court may make the relevant order applied for.

## **82. Registrar's power to exact information from unregistered persons**

(1) If the Registrar has reason to suspect that any person who is neither registered as a bank nor authorized in terms of the provisions of section 18A(1) to carry on the business of a bank is carrying on the business of a bank, the Registrar may by notice in writing direct that person to submit to the Registrar such document or to furnish the Registrar with such information, relating to the affairs of that person, as the Registrar may specify in the notice and as may be available to that person.

(2) A document or information referred to in subsection (1) shall be submitted or furnished within such period as the Registrar may specify in the relevant notice or within such extended period as the Registrar may allow on application made by the person concerned before the expiration of the period initially specified in the notice.

(3) Any person who refuses to comply, or fails to comply within the specified or extended period referred to in subsection (2), with a direction issued by the Registrar under subsection (1) shall be guilty of an offence.

## **83. Repayment of money unlawfully obtained**

(1) If as a result of an inspection conducted under section 12 of the South African Reserve Bank Act, 1989 (Act No. 90 of 1989), the Registrar is satisfied that any person has obtained money by carrying on the business of a bank without being registered as a bank or without being authorized, in

terms of the provisions of section 18A(1), to carry on the business of a bank, the Registrar may in writing direct that person to repay, subject to the provisions of section 84 and in accordance with such requirements and within such period as may be specified in the direction, all money so obtained by that person in so far as such money has not yet been repaid, including any interest or any other amounts owing by that person in respect of such money.

(2) Any person who by virtue of the provisions of subsection (1) repays any money referred to in that subsection before the due date for the repayment thereof agreed upon by that person and the person from whom the money was obtained, shall not be obliged to pay any interest or any other amounts which would have been payable in respect of such money for the period from the date of such repayment up to such due date.

(3) Any person who refuses or fails to comply with a direction under subsection (1) -

(a) shall be guilty of an offence; and

(b) shall for the purposes of any law relating to the winding-up of juristic persons or to the sequestration of insolvent estates, be deemed not to be able to pay the debts owed by such person or to have committed an act of insolvency, as the case may be, and the Registrar shall, notwithstanding anything to the contrary contained in any law, be competent to apply for the winding-up of such a juristic person or for the sequestration of the estate of such a person, as the case may be, to any court having jurisdiction.

(4) The provisions of this section shall not be construed as relieving any person from liability to criminal proceedings arising out of a contravention of any provision of this Act or any law repealed by this Act.

#### **84. Management and control of repayment of money unlawfully obtained**

(1) Simultaneously with the issuing of a direction under section 83(1), or as soon thereafter as may be practicable, the Registrar shall by a letter of appointment signed by him or her appoint a person (hereinafter in this section referred to as the manager) to manage and control the repayment of money in compliance with the direction by the person subject thereto.

(1A) (a) The manager shall as soon as may be practical report to the Registrar whether or not the person subject to the relevant direction is, in the manager's opinion, solvent, and if the manager finds that the person subject to the direction is insolvent, the manager shall comment on whether such person is technically or legally insolvent.

(b) On appointment of a manager and whilst the person subject to the relevant direction is under management as contemplated in this section -

(i) the manager shall recover and take possession of all the assets of the person subject to the relevant direction; and

(ii) all actions, legal proceedings, the execution of all writs, summonses and other legal process against the person subject to the relevant direction shall be stayed and not be instituted or proceeded with without the leave of the court and without also serving the application on the Registrar.

(c) If the report referred to in subsection (a) concludes that the person subject to the directive is insolvent, the Registrar may, notwithstanding anything contrary contained in any law relating to liquidation or insolvency apply to a competent court for the winding-up in terms of the Companies Act or the sequestration in terms of

the Insolvency Act, 1936, as the case may be, of the person subject to the directive, and the Registrar shall have the right to oppose any such application made by any other person.

- (d) The Master shall, subject to section 370 of the Companies Act, appoint the person nominated by the Registrar as liquidator or trustee.
- (e) Any written report to the Registrar by an inspector appointed in terms of section 83 or any report by a manager appointed in terms of section 84 is confidential and shall not be disclosed to any person: Provided that the Registrar may, notwithstanding the provisions of section 33(1) of the South African Reserve Bank Act, 1989, furnish such a report to-
  - (i) the person subject to an investigation in terms of section 83 or that is subject to a directive in terms of section 84;
  - (ii) any person or institution contemplated in section 89;
  - (iii) any appropriate division of the South African Police Services or the National Prosecuting Authority;
  - (iv) any other person that can prove, to the satisfaction of the Registrar, a legitimate interest in the matter and only upon payment of a prescribed fee and with the written consent of the person or persons subject to the directive; or
  - (v) any duly appointed provisional liquidator or provisional trustee of the person subject to the directive.
- (f) If the Registrar has issued an instruction in terms of section 84(6) of the Act and a provisional liquidator or provisional trustee of the person subject to the direction is subsequently duly appointed, the Registrar shall be regarded as a creditor of the person subject to the direction and the Registrar shall have the same rights of a creditor in terms of the laws relating to liquidation and insolvency.

(2) The Registrar shall serve a copy of the letter of appointment referred to in subsection (1) upon the person subject to the relevant direction, and such person shall, with effect from the date of the letter of appointment, be prohibited from disposing of or otherwise dealing with such of the assets of such person as are specified in the letter of appointment, except with the written permission of the manager.

(3) The manager shall act under the control of the Registrar, and the manager may from time to time apply to the Registrar for instructions in regard to any matter arising out of or in connection with the performance of his or her duties in terms of subsection (4).

(4) It shall be the duty of the manager -

- (a) to conduct such further investigation into the affairs or any part of the affairs of the person subject to the direction as the manager may deem necessary in order to establish -
  - (i) the true amount of money unlawfully obtained by that person as contemplated in section 83(1);
  - (ii) the identities of all persons from whom such money was so unlawfully obtained;

- (iii) where any such money or any assets into which such money was converted, is kept or can be located; or
  - (iv) any other fact which in the opinion of the Registrar or the manager needs to be established in order to facilitate the repayment of such money in terms of the relevant direction;
- (b) to take all reasonable steps (including the liquidation of assets into which money unlawfully obtained as contemplated in section 83(1) has been converted) which may serve to expedite and ensure the repayment of money in accordance with the requirements of and within the period specified in the relevant direction;
  - (c) to report the suspected commission by any person of any offence of which the manager becomes aware in the course of the performance of his duties as manager in terms of this section, to the responsible prosecuting authorities having jurisdiction in the area in which such offence is so suspected of having been committed; and
  - (d) to perform any other function assigned to the manager by the Registrar in connection with the finalization of the repayment of money in accordance with the relevant direction.
- (5) For the purposes of the performance of the duties as set out in subsection (4), the manager shall, in relation to the person subject to the relevant direction and in relation to the affairs of that person, have the powers conferred by sections 4 and 5 of the Inspection of Financial Institutions Act, 1998 (Act No. 80 of 1998), upon an inspector contemplated in those sections, as if the manager were an inspector and the person subject to the direction were a financial institution contemplated in those sections.
- (6) The manager shall in respect of the services rendered by him in terms of this section and the responsible inspector or inspectors shall in respect of an inspection referred to in section 83(1) conducted under section 12 of the South African Reserve Bank Act, 1989 (Act No. 90 of 1989), be paid such remuneration by the Registrar as the Registrar may determine, and the Registrar may recover an amount equal to the remuneration so paid from the person subject to the direction or the inspection, as the case may be.
- (7) The manager shall hold office until the relevant direction has been fully complied with, but the Registrar may at any time in writing withdraw the appointment of the manager on good cause shown, whereupon the manager shall vacate his or her office.
- (8) Any person who -
- (a) when requested by the manager to take an oath or to make an affirmation, refuses to do so;
  - (b) without lawful excuse refuses or fails to answer to the best of his or her ability a question put to such person by the manager in the exercise of the manager's powers or the performance of the manager's duties, even though the answer may tend to incriminate that person;
  - (d) wilfully furnishes the manager with any false information;
  - (d) refuses or fails to comply to the best of his or her ability with any reasonable request made to such person by the manager in the exercise of the manager's powers or the performance of the manager's duties;

- (e) wilfully hinders the manager in the exercise of the powers or the performance of the duties of the manager; or
- (f) commits any other deed designed to obstruct, or to enable any person to evade, the repayment of money as required by a direction under section 83(1),

shall be guilty of an offence: Provided that no answer given to a question put by the manager to a person in terms of this section and no information derived therefrom may be used against such person in any criminal proceedings.

**CHAPTER IX**  
**GENERAL PROVISIONS**

**85. Certification of returns and other documents**

Any return or other document to be furnished to the Registrar by a bank or controlling company in terms of a requirement of this Act, shall be certified as correct by the chief executive officer and, in the case of such a return, also by the chief accounting officer of the bank or controlling company and be endorsed by such chief executive officer with the date on which it is so certified.

**85A. Approval of eligible institutions**

(1) Notwithstanding anything to the contrary in any law, no bank or controlling company shall, in the calculation of its prescribed minimum amount of required capital and reserve funds, take into account a credit assessment of any external credit assessment institution or export credit agency unless the relevant external credit assessment institution or export credit agency obtained the prior written approval of the Registrar to act as an eligible institution.

(2) Any external credit assessment institution or export credit agency that wishes to be authorised by the Registrar as an eligible institution may apply to the Registrar for authorisation.

(3) An application under subsection (2)-

- (a) shall be made in the prescribed manner;
- (b) shall be accompanied by such information and comply with such requirements as may be prescribed: Provided that the Registrar may impose additional requirements in writing, and
- (c) shall be accompanied by such fee as may be prescribed.

**85B. Verification of information**

The Registrar may require that information submitted to him or her in terms of the Act be verified by such a person, in such a manner and at such intervals as may be prescribed.

**86. Inspection, copies and keeping of documents**

(1) Any person may upon payment of the prescribed fee -

- (a) inspect any document specified in subsection (2) and kept by the Registrar in terms of this Act;
- (b) obtain a certificate from the Registrar as to the contents or any part of the contents of any such document; or
- (c) obtain a copy of or extract from any such document.

(2) The documents referred to in subsection (1) are -

- (a) certificates of provisional or final registration or of the registration of an alteration of the memorandum of association or articles of association or of a change of name of banks and of controlling companies;

- (b) memorandums of association and articles of association of banks and of controlling companies; and
- (c) returns and copies of notices, reports, returns, statements or minutes lodged with the Registrar in terms of section 59, 65 or 75, excluding any return or statement so lodged by means or under cover of a prescribed form which, in terms of the regulation prescribing it, is to be treated as confidential and not available for inspection by the public.

(3) The Registrar shall keep the documents specified in paragraph (c) of subsection (2) for a period of at least 10 years : Provided that the Registrar shall not be required to keep the said documents which relate to a bank or a controlling company of which the registration has lapsed or been cancelled, for a period longer than five years as from the date of termination of such registration.

(4) If the Registrar is of the opinion that a person requires an inspection or any certificate, copy or extract referred to in subsection (1) to promote any public interest, the Registrar may exempt that person from the obligation to pay the prescribed fee in respect of such inspection, certificate, copy or extract.

#### **87. Minors and married women as depositors**

(1) Notwithstanding anything to the contrary contained in any law or the common law, and unless otherwise provided in the memorandum of association or articles of association of a bank, a minor over the age of 16 years or a married woman, whether or not under marital power, may be a depositor with a bank and may without the consent or assistance of his guardian or her husband, as the case may be, execute all necessary documents, give all necessary acquittances and cede, pledge, borrow against, and generally deal with, his or her deposit as he or she thinks fit, and shall enjoy all the privileges and be liable to all the obligations and conditions applicable to depositors.

(2) The husband of a woman who is a depositor with a bank shall, save with her written consent, not be entitled to demand or receive from the bank any particulars concerning the deposits she holds with that bank.

#### **88. Limitation of liability**

88. No liability shall attach to the South African Reserve Bank or, either in his or her official or personal capacity, to any member of the board of directors of the said Bank, the Registrar or any other officer or employee of the said Bank, for any loss sustained by or damage caused to any person as a result of anything done or omitted by such member, the Registrar or such other officer or employee in the *bona fide* performance of any function or duty under this Act.

#### **89. Furnishing of information by Registrar**

Notwithstanding the provisions of section 33(1) of the South African Reserve Bank Act, 1989 (Act No. 90 of 1989), the Registrar may furnish information acquired by him or her as contemplated in that section -

- (a) to any person charged with the performance of a function under any law, provided the Registrar is satisfied that possession of such information by that person is essential for the proper performance of such function by that person; or
- (b) to an authority in a country other than the Republic for the purpose of enabling such authority to perform functions, corresponding to those of the Registrar under this Act, in

respect of a bank carrying on business in such other country: Provided that the Registrar is satisfied that the recipient of the information so provided is willing and able to keep the information confidential within the confines of the laws applicable to the recipient.

## **90. Regulations**

(1) The Minister may make regulations -

- (a) as to any matter which is required or permitted to be prescribed by regulation under this Act;
- (b) subject to the provisions of the Companies Act, providing guidelines relating to the conduct of, and prescribing requirements to be complied with by, a member of the board of directors of a bank in the performance of the functions of such a director;
- (c) prescribing matters in addition to those contemplated in any other provision of this Act, in respect of which fees shall be payable, and the fee payable in respect of each such matter;
- (d) prescribing the manner in which any payment in terms of this Act shall be made to the Registrar;
- (e) prescribing such further returns as the Minister may deem expedient, in addition to those contemplated in any other provision, of this Act, to be furnished by banks to the Registrar;
- (f) prescribing that the financial statements of a bank shall be prepared in conformity with financial reporting standards issued in terms of the Companies Act.
- (g) prescribing the amount of the fee payable in respect of a licence referred to in section 35 or the basis on which such amount shall be calculated, the period within which such fee shall be paid and a fine in respect of late payment of such a fee;
- (h) prescribing the basis on which any movable or immovable assets shall for the purposes of this Act be valued; or
- (i) prescribing, generally, any matter, whether or not connected with any matter specified in paragraphs (a) to (h), inclusive, which the Minister may deem it necessary or expedient to prescribe in order that the objects and purposes of this Act may be better achieved.

(2) A person who is obliged in terms of any provision of this Act to render a return or statement in a prescribed form, shall be deemed not to have rendered that return or statement unless such person has set forth therein all the particulars for which provision is made in the prescribed form.

(3) 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 R2 000 or imprisonment for a period of six months.

## **91. Offences and penalties**

(1) Any person who -

- (a) fails to comply with a direction under section 7;



- (aA) in the completion of any questionnaire contemplated in section 1(1A)(c) or in the furnishing of any prescribed information contemplated in section 60(5) furnishes the Registrar with any information which to the knowledge of such person is untrue or misleading in any material respect; or
- (b) contravenes or fails to comply with a provision of section 7(3), (4) or (5), 34, 35, 37(1), 38(1), 39, 41, 42(1), 52(1) or (4), 53, 55, 58, 59, 60(5)(a)(i), 60(5)(b)(i), 61(2), 65, 66, 67, 70(2), (2A) or (2B), 70A, 72, 73, 75, 76, 77, 78(1) or (3), 79, 80, 84(1A) or 84(2),

shall be guilty of an offence.

(2) A director or employee of a bank or controlling company who, or any company in which such director or employee has a direct interest and which -

- (a) accepts from any person any benefit for or in connection with any advance granted by that bank or by the bank in respect of which that controlling company is registered; or
- (b) otherwise than with the written consent of the Registrar or at a duly advertised public auction purchases any immovable property owned by or mortgaged to that bank or the bank in respect of which that controlling company is registered, and which is sold by or at the instance of the bank in question or is sold at a judicial sale at the instance of any other person,

shall be guilty of an offence.

(3) A bank which, while a shortfall referred to in section 74(3) exists in respect of its business, pays any dividends, shall be guilty of an offence.

(4) Any person convicted of an offence in terms of -

- (a) Section 1(1A)(d), 11(2), 18A(7), 22(4) or 60(5)(a)(i) or (b)(i) read with subsection (1)(b) of this section, shall be liable to a fine or to imprisonment for a period not exceeding ten years or to both a fine and such imprisonment;
- (b) section 17(6), 21, 22(3) or (8), 32(4)(a), 69A(14), 78(2), 82(3), 83(3)(a), 84(1A), 84(8) or subsection (1), (2) or (3) of this section (excluding the offence in terms of subsection (1)(b), referred to in paragraph (a)), shall be liable to a fine or to imprisonment for a period not exceeding five years or to both a fine and such imprisonment; or
- (c) any other provision of this Act in respect of which no specific penalty has been prescribed shall be liable to a fine or to imprisonment for a period not exceeding five years or to both a fine and such imprisonment.

(5) Any person who accepts any benefit in contravention of the provisions of subsection (2)(a) shall pay to the bank concerned the amount or value of such benefit.

(6) If any person fails to submit to the Registrar or to furnish the Registrar with any return, statement, report or other document or information in accordance with a requirement of this Act within the period determined by or under this Act or, if that period has been extended by the Registrar under section 8(2)(a), within the extended period, the Registrar may impose upon such person by way of a notice in writing a fine not exceeding R1000 for every day during which such failure continues.

(6A) If any person submits to the Registrar or furnishes the Registrar with any return, statement,

report or other document or information in accordance with a requirement of this Act containing materially incorrect or inaccurate information that results in that person having to revise, correct or resubmit such a return, statement, report or other document or information, the Registrar may impose upon such person by way of a notice in writing a fine not exceeding R1000 for every day during which such a return, statement, report or other document or information has not been revised, corrected or resubmitted to the satisfaction of the Registrar.

(7) A fine imposed under section (6) or (6A) shall be paid to the Registrar within such period as may be specified in the notice, and if the person concerned fails to pay the fine within the specified period the Registrar may by way of civil action in a competent court recover from such person the amount of the fine or any portion thereof which the Registrar may in the circumstances consider justified.

#### **91A. Power of Registrar to impose penalty**

(1) If the Registrar on reasonable grounds believe that a bank or controlling company has contravened or failed to comply with this Act the Registrar may, after consideration of all material facts, impose a penalty not exceeding R10 000 000 for every day during which contravention or non-compliance with this Act continues.

(2) Before imposing a penalty the Registrar must in writing-

- (a) inform the bank or controlling company of his or her intention to impose a penalty;
- (b) specify the particulars of the alleged contravention or non-compliance;
- (c) provide reasons for the penalty intended to be imposed;
- (d) specify the amount of the penalty intended to be imposed;
- (e) invite interested persons to make representations within a period specified by the Registrar; and
- (f) inform the bank or controlling company that it may be assisted by a legal representative or other adviser.

(3) If the Registrar after consideration of representations made decides to impose a penalty, he or she must by written notice inform the bank or controlling company that it may, within 30 days after the date of the notice, pay the penalty or appeal against the imposition of the penalty to the Minister.

(4) The Minister may after consideration of an appeal confirm, amend or set aside a penalty imposed by the Registrar.

(5) A bank or controlling company may appeal to the High Court of South Africa against a decision contemplated in subsection (4).

(6) Section 88 of the Income Tax Act, 1962 (Act No. 58 of 1962), applies with changes required by the context to an administrative penalty.

- (7) (a) If it is in the public interest, the Registrar may through appropriate media make known the particulars referred to in paragraph (b) after payment of an administrative penalty has been received or any appeal proceedings in relation thereto have been completed.
- (b) The Registrar may publish-

- (i) the name and address of the bank or controlling company;
  - (ii) such particulars of the contravention or non-compliance the Registrar may think fit;
  - (iii) when the contravention or non-compliance occurred; and
  - (iv) the particulars of the administrative penalty imposed.
- (8) The imposition of an administrative penalty shall not be regarded as a conviction in respect of a criminal offence, but no prosecution for contravention or non-compliance in respect of this Act shall thereafter be competent.

## **92. Review of Act**

- (1) The Minister shall appoint a standing committee to review this Act from time to time, and such committee shall consist of such incumbents of offices and other members as the Minister may from time to time determine.
- (2) A member of the standing committee shall hold office for such period as the Minister may determine, and shall be eligible for reappointment on the expiration of the term of office of such a member.
- (3) The standing committee may from time to time, through the medium of the Policy Board for Financial Services and Regulation established by section 2 of the Policy Board for Financial Services and Regulation Act, 1993 (Act No. 141 of 1993), make recommendations to the Minister with regard to amendments to this Act which, in the opinion of the committee, have become advisable owing to changed circumstances or which the administration of this Act has shown to be advisable.
- (4) deleted.

## **93. Interpretation of certain references in existing laws and in other documents**

A reference in any law in force immediately prior to the commencement of the Deposit-taking Institutions Amendment Act, 1993, or in any other document to -

- (a) a deposit-taking institution, discount house, banking institution, banking institution registered under or in terms of the Banks Act, 1965 (Act No. 23 of 1965), or building society registered in terms of the Building Societies Act, 1986 (Act No. 82 of 1986), shall, unless inconsistent with the context or otherwise clearly inappropriate, be construed as a reference to a bank;
- (b) the Registrar of Deposit-taking Institutions or the Registrar of Building Societies shall be construed as a reference to the Registrar :

Provided that -

- (i) any such reference in section 10(1)(i)(xii)(bb), (xiiA) or (xiii)(bb), 10(1)(v) or (vA) or 19(5A) of the Income Tax Act, 1962 (Act No. 58 of 1962), to a building society shall be so construed as a reference to a bank which, prior to its registration as such, had been a building society (within the meaning of the Building Societies Act, 1986) that after the commencement of this Act was registered as a deposit-taking institution by virtue of the provisions of section 33 as those provisions existed prior to the amendment thereof by the Deposit-

taking Institutions Amendment Act, 1993; and

- (ii) any such reference in section 10(1)(w) of the Income Tax Act, 1962, to a deposit-taking institution shall be so construed as a reference to a bank which, prior to its registration as such, had been a banking institution (within the meaning of the Banks Act, 1965) that after the commencement of this Act was registered as a deposit-taking institution by virtue of the provisions of section 33 as those provisions existed prior to the amendment thereof by the Deposit-taking Institutions Amendment Act, 1993.

**94. Amendment of section 3 of Act 61 of 1973, as amended by section 106 of Act 82 of 1986**

Section 3 of the Companies Act is hereby amended by the substitution for paragraph (b) of subsection (1) of the following paragraph :

- "(b) with reference to any company or external company or society which is subject to the provisions of any law relating to **[banks or]** insurance companies or societies in so far as those provisions are inconsistent with the provisions of this Act; or".

**95. Repeal of laws, and savings**

(1) Subject to the provisions of 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, direction, order or directive issued, request made or requirement laid down, and any other thing done under any provision of any law repealed by subsection (1), and which could be made, issued, laid down or done under a provision of this Act, shall be deemed to have been made, issued, laid down or done under the last-mentioned provision.

**96. Short title**

This Act shall be called the Banks Act, 1990.

## Schedule

### LAWS REPEALED

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	Sections 3, 4, 5 and 6
Act No. 89 of 1972	Revenue Laws Amendment Act, 1972	Section 8
Act No. 91 of 1972	Financial Institutions Amendment Act, 1972	Sections 12 to 17, inclusive
Act No. 67 of 1973	Financial Institutions Amendment Act, 1973	Section 4
Act No. 101 of 1976	Financial Institutions Amendment Act, 1976	Sections 37 to 53, inclusive
Act No. 94 of 1977	Financial Institutions Amendment Act, 1977	Sections 17 to 21, inclusive
Act No. 80 of 1978	Financial Institutions Amendment Act, 1978	Sections 18 to 21, inclusive
Act No. 103 of 1979	Financial Institutions Amendment Act, 1979	Sections 27 to 31, inclusive
Act No. 99 of 1980	Financial Institutions Amendment Act, 1980	Sections 45 to 49, inclusive
Act No. 36 of 1981	Financial Institutions Amendment Act, 1981	Sections 23 to 25, inclusive
Act No. 82 of 1982	Financial Institutions Amendment Act, 1982	Sections 16 and 17
Act No. 86 of 1984	Financial Institutions Amendment Act, 1984	Sections 22 to 33, inclusive
Act No. 106 of 1985	Financial Institutions Amendment Act, 1985	Sections 10 to 36, inclusive
Act No. 82 of 1986	Building Societies Act, 1986	The Whole
Act No. 6 of 1987	Financial Institutions Amendment Act, 1987	Sections 3 to 7, inclusive, and 10 to 12, inclusive
Act No. 96 of 1988	South African Reserve Bank, Banking Institutions, Mutual Building Societies and Building Societies Amendment Act, 1988	Sections 2 to 16, inclusive, and 32 to 51, inclusive
Act No. 13 of 1989	Banking Institutions, Mutual Building Societies and Building Societies Amendment Act, 1989	Sections 1 to 6, inclusive, and 11 to 14, inclusive