



South African Reserve Bank  
From the Office of  
the Registrar of Banks

Confidential

2008-05-07

D2/08

**TO ALL BANKS, CONTROLLING COMPANIES AND BRANCHES OF FOREIGN BANKS**

**DIRECTIVE 2/2008 ISSUED IN TERMS OF SECTION 6(6) OF THE BANKS ACT, 1990:  
PROCEDURE TO BE FOLLOWED IN RESPECT OF APPLICATIONS IN TERMS OF THE  
PROVISIONS OF SECTIONS 37, 52 AND/OR 54 OF THE BANKS ACT, 1990.**

**EXECUTIVE SUMMARY**

Banks Act Circular 6/2007 dated 14 November 2007 regarding consultation with banks, controlling companies and branches of foreign banks in respect of directives, circulars and guidance notes refers.

The Banks Act, 1990 (Act No. 94 of 1990 – the Banks Act) and the Regulations relating to Banks (the Regulations) make provision for an institution to submit an application in terms of sections 37, 52 and/or 54 of the Banks Act to the Registrar of Banks (the Registrar). In order for this Office to duly consider such an application this Office deems it necessary to issue this directive to banks and controlling companies in respect of the correct procedure to be followed.

**1. Introduction**

The purpose of this directive is to prescribe the procedure to be followed with regard to applications in terms of the provisions of sections 37, 52 and/or 54 of the Banks Act.

**2. Banks Act references**

An institution that wishes to apply for the acquisition of shares in a bank or controlling company is referred to the provisions of section 37 of the Banks Act. Section 52 of the Banks Act makes provision for an institution to establish or acquire a subsidiary, branch office, other interests or a representative office within or outside the Republic of South Africa. Any application for a compromise, amalgamation, arrangement or affected transaction such as the transfer of assets and/or liabilities should comply with the provisions contained in section 54 of the Banks Act.

**3. Regulations references**

The role and functions of the compliance function as set out in regulation 49 of the Regulations refers. Regulation 49(1) of the Regulations provides that:

"A bank shall have in place as part of its risk-management framework an independent compliance function, which independent compliance function shall ensure that the bank continuously manages its regulatory and supervisory risks, that is, the risk that the bank does not comply with applicable laws and regulations or supervisory requirements."

Regulation 49(5) of the Regulations, however, expressly states that regulation 49 of the Regulations does not derogate from the provisions in the Banks Act and the Regulations, which place the primary responsibility of compliance on directors and executive officers. In this regard, this Office is aware of certain compliance functions not being conducted in the manner envisaged by regulation 49 of the Regulations, specifically with regard to the practices employed by banks in respect of transactions for which applications have to be lodged with this Office in terms of the provisions of section 37, 52 and/or 54 of the Banks Act.

This Office regards it as the duty of compliance officers to ensure that appropriate processes are established in terms of the above-mentioned sections of the Banks Act.

#### **4. Other factors taken into consideration**

It has come to the attention of this Office that certain banks conclude agreements falling within the ambit of the provisions of sections 37, 52 and/or 54 of the Banks Act, albeit conditional upon obtaining regulatory approval in the majority of cases, and that banks make public the existence of such an agreement *prior* to obtaining the required approval from the Registrar and/or the Minister of Finance (the Minister), whichever may be applicable. In some instances, the publication of such an agreement occurs *without* the Registrar having been informed or notified thereof beforehand.

The above-mentioned practice places undue pressure on the Registrar and/or Minister to give due consideration to an application based on an agreement concluded prior to regulatory notice and/or approval. Furthermore, in the event of a transaction in terms of the above-mentioned sections being effected prior to regulatory approval having been obtained, the bank or controlling company concerned runs the risk of such an agreement possibly being null and void, *ab initio*, and not being legally capable of being rectified by means of retrospective approval.

#### **5. Directive**

A bank or controlling company shall ensure that the following procedure is adhered to when negotiating a transaction falling within the ambit of the provisions sections 37, 52 and/or 54 of the Banks Act:

5.1 Banks/controlling companies may enter into negotiations at their own discretion. The Registrar may be informed of such negotiations.

5.2 Once a transaction has been finalised (that is, once a reasonable degree of certainty regarding the structure, as well as the terms and conditions, of the agreement has been reached), or when a contract has been signed, the Registrar shall be informed thereof.

5.3 All contracts shall be made conditional upon obtaining regulatory approval.

5.4 A contract shall not be effected without the requisite regulatory approvals having been obtained beforehand.

5.5 The existence of the contract shall not be made public prior to the requisite approvals having been obtained, or without the written consent of the Registrar.

5.6 Prior to the issuing of a press release in respect of the applicable transaction, such proposed press release, formally adopted by a bank's board of directors, shall be lodged, together with the formal application, with the Registrar in order to obtain the Registrar's prior written approval.

5.7 All applications shall be certified by the prescribed executive officers to the effect that the application complies with the provisions of section 37, 52 and/or 54 of the Banks Act, as the case may be. For purposes of such certification, the prescribed executive officers shall be deemed to be the Chief Executive Officer and the Compliance Officer of the bank or controlling company, or, in instances in which one or both of the above-mentioned persons are absent, the officer certifying the application shall do so in an acting capacity and not on behalf of the absent officer.

An application by a bank and/or a controlling company not complying with the provisions of this directive will not be considered or processed.

#### **6. Acknowledgement of receipt**

Two additional copies of this directive are enclosed for the use of your institution's independent auditors. The attached acknowledgement of receipt, duly completed and signed by both the chief executive officer of the institution and the said auditors, should be returned to this Office at the earliest convenience of the aforementioned signatories.



E M Kruger  
**Registrar of Banks**

The previous directive issued was Directive 1/2008 dated 7 May 2008.