

## THE FINANCIAL SERVICES LAWS AMENDMENT BILL

### Institutions that will be effected by the Financial Services Laws Amendment Bill

#### Table

Act	Schedule
Namibia Financial Institutions Supervisory Authority Act, 2001 (Act No. 3 of 2001)	1
Friendly Societies Act, 1956 (Act No. 25 of 1956)	2
Financial Institutions (Investments of Funds) Act, 1984 (Act No. 39 of 1984)	3
Inspection of Financial Institutions Act, 1984 (Act No. 38 of 1984)	4
Long-term Insurance Act, 1998 (Act No. 5 of 1998)	5
Medical Aid Funds Act, 1995 (Act No. 23 of 1995)	6
Participation Bonds Act, 1981 (Act No. 55 of 1981)	7
Pension Funds Act, 1956 (Act No. 24 of 1956)	8
Short-term Insurance Act, 1998 (Act No. 4 of 1998)	9
Stock Exchanges Control Act, 1985 (Act No. 1 of 1985)	10
Unit Trusts Control Act, 1981 (Act No. 54 of 1981)	11
Usury Act, 1968 (Act No. 73 of 1968)	12

### Important new definitions introduced into the NAMFISA Act

#### “Definitions

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

‘**advice**’ means, subject to subsection (8), any recommendation, guidance or proposal of a financial nature furnished by any means or medium, to any client or group of clients-

- (a) in respect of the purchase of any financial product; or
- (b) in respect of the investment in any financial product; or
- (c) on the conclusion of any other transaction including a loan or cession, aimed at the incurring of any liability or the acquisition of any right or benefit in respect of any financial product; or

- (d) on the variation of any term or condition applying to a financial product on the replacement of any such product, or on the termination of any purchase of or investment in any such product,

and irrespective of whether or not such advice-

- (i) is furnished in the course of or incidental to financial planning in connection with the affairs of the client; or
- (ii) results in any such purchase, investment, transaction, variation, replacement or termination, as the case may be, being effected;

**‘financial crime’** means any of the following:

- (a) an offence that involves corruption, fraud or dishonesty;
- (b) financing, facilitating or being involved in financing or facilitating an offence relating to a financial institution;
- (c) dealing with the proceeds of an offence, whether or not related to a financial institution;
- (d) an offence under the Prevention of Organised Crime Act, 2004 (Act No. 29 of 2004);
- (e) the financing of terrorist activity;
- (f) any offence committed in terms of the Financial Intelligence Act, 2006 (Act No. / of 2006).

**‘financial institution’** means-

- (a) a person that, as a regular feature of its business, provides asset administration services, asset management services, investment management services or investment advisory services to other persons;
- (b) a person that, as a regular feature of its business, administers property, or holds property in safe custody, on behalf of another person (including under a trust);
- (c) a person registered in terms of section 23 of the Public Accountants' and Auditors' Act, 1951 (Act No. 51 of 1951), and who is a member of the Institute of Chartered Accountants of Namibia referred to in that Act;
- (d) a central securities depository, depository institution or a securities clearing house as defined in a prudential standard;

- (e) any of the following:
  - (i) a licensed stock exchange as defined in section 1 of the Stock Exchanges Control Act, 1985 (Act No. 1 of 1985) or any other securities exchange that is declared by regulations to be a financial market in respect of which the registrar may issue prudential standards;
  - (ii) a stock broker licensed under the Stock Exchanges Control Act, 1985 (Act No. 1 of 1985) or a person contemplated in section 4 (1) (f) of that Act;
  - (iii) a member as defined in section 1 of the Stock Exchanges Control Act, 1985 (Act No. 1 of 1985)
- (f) a registered friendly society as defined in section 1 of the Friendly Societies Act, 1956 (Act No. 25 of 1956) or any person in charge of the management of the affairs of such a society;
- (g) an insurer or a reinsurer registered as such under the Short-term Insurance Act, 1998 (Act No. 4 of 1998) or the Long-term Insurance Act, 1998 (Act No. 5 of 1998);
- (h) any of the following:
  - (i) an insurance agent, an insurance broker or a re-insurance broker registered as such under the Short-term Insurance Act, 1998 (Act No. 4 of 1998) or the Long-term Insurance Act, 1998 (Act No. 5 of 1998);
  - (ii) a Lloyd's intermediary registered as such under the Short-term Insurance Act, 1998 (Act No. 4 of 1998);
- (i) any of the following-
  - (i) a medical aid fund as defined in section 1 of the Medical Aid Funds Act, 1995 (Act No. 23 of 1995);
  - (ii) a fund adviser or fund intermediary as defined in section 1 of the Medical Aid Funds Act, 1995 (Act No. 23 of 1995); or
- (j) a credit grantor, moneylender, or lessor as defined in section 1 of the Usury Act, 1968 (Act No. 73 of 1968);
- (k) a debt collector as defined in a market conduct standard;
- (l) a debt administrator as defined in a market conduct standard;

- (m) a credit bureau as defined in a market conduct standard;
- (n) a person rendering pawn services as defined in a market conduct standard;
- (o) a deposit-taking micro-finance institution as defined in a prudential standard and taking deposits not exceeding the limit as set in such prudential standard;
- (p) any person rendering debt consolidation services as defined in a market conduct standard;
- (q) any of the following:
  - (i) a unit trust scheme as defined in section 1 of the Unit Trusts Control Act, 1981 (Act No. 54 of 1981);
  - (ii) a registered management company as defined in section 1 of the Unit Trusts Control Act, 1981;
  - (iii) a trustee as defined in section 1 of the Unit Trusts Control Act, 1981;
  - (iv) a nominee company as defined in section 1 of the Unit Trusts Control Act, 1981;
  - (v) a participation bond scheme as defined in section 1 of the Participation Bonds Act, 1981 (Act No. 55 of 1981);
  - (vi) a person who, in terms of that Act, controls or administers a participation bond scheme;
  - (vii) a person rendering an intermediary service or giving advice to or in connection with any person referred to in subparagraphs (i) to (vi);
- (r) any of the following:
  - (i) a pension fund organization as defined in section 1 of the Pension Funds Act, 1956 (Act No. 24 of 1956);
  - (ii) a fund adviser or fund intermediary as defined in section 1 of the Pension Funds Act, 1956 (Act No. 24 of 1956);
- (s) a debt factoring house as defined in a market conduct standard;
- (t) a person who is a fellow of the Institute of Actuaries of England, the Faculty of Actuaries in Scotland or any like institute, faculty, society or other association regulating the admission to, the qualification or registration for, and the practice of, the profession of actuaries;

- (u) a hedge fund as defined in a prudential standard or any person concerned with the management of such fund;
- (v) the Social Security Commission established by section 3 of the Social Security Act, 1994 (Act No. 34 of 1994);
- (w) the Motor Vehicle Accident Fund established by section 2 of the Motor Vehicle Accidents Fund Act, 2001 (Act No. 4 of 2001);
- (x) generally any person who as a regular feature of that person's business renders an intermediary service or give advice;
- (y) any person who deals with trust property as a regular feature of that person's business; or
- (z) an entity declared by regulation to be a financial institution;
- (aa) a person that renders a financial service of a kind mentioned in paragraphs (a) to (z) of this definition as a regular feature of its business, but who is not registered as a financial institution or authorised to render the financial service under a financial services law;

**"financial product"** means-

- (a) securities and instruments, including-
  - (i) debentures and securitised debt;
  - (ii) any securities as defined in section 1 of the Unit Trust Control Act, 1981 (Act No. 54 of 1981);
  - (iii) any "securities" as defined in section 1 of the Stock Exchanges Control Act, 1985 (Act No. 1 of 1985);
  - (v) any securities as defined by regulation;
  - (vi) any warrant, certificate, and other instrument acknowledging, conferring or creating rights to subscribe to, acquire, dispose of, or convert securities and instruments referred to in subparagraphs (i), (ii), (iii) and (iv);
- (b) a **participatory interest** in a-
  - (i) unit trust scheme as defined in section 1 of the Unit Trusts Control Act, 1981 (Act No. 54 of 1981); or

- (ii) participation bond scheme as defined in section 1 of the Participation Bonds Act, 1981 (Act No. 55 of 1981);
- (c) a long-term or a short-term insurance or reinsurance contract or policy, referred to in the Short-term Insurance Act, 1998 (Act No. 4 of 1998) and the Long-term Insurance Act, 1998 (Act No. 5 of 1998), respectively;
- (d) a benefit provided by-
  - (i) a pension fund organization as defined in section 1(1) of the Pension Funds Act, 1956 (Act No. 24 of 1956) to the members of the organization by virtue of members; or
  - (ii) a friendly society referred to in the Friendly Societies Act, 1956 (Act No. 25 of 1956) to the members of the society by virtue of membership;
- (e) a foreign currency denominated investment instrument, including a foreign currency deposit;
- (f) a deposit as defined in section 1(1) of the Banking Institutions Act, 1998 (Act No. of 1998);
- (g) a medical aid benefit provided by a medical aid fund as defined in section 1 of the Medical Aid Funds Act, 1995 (Act No. 23 of 1995);
- (h) vehicle maintenance plans as defined in a market conduct standard;
- (i) loans disbursed by a moneylender (credit transactions);
- (j) credit extended by a credit grantor (credit transactions);
- (k) debt factoring as defined in a market conduct standard;
- (l) any other product similar in nature to any financial product referred to in paragraph (a) to (k), inclusive declared by the registrar, by notice in the *Gazette* to be a financial product for the purposes of this Act;
- (m) any combined product containing one or more of the financial products referred to in paragraphs (a) to (l), inclusive;
- (n) any financial product issued by any foreign product supplier and marketed in the Republic and which in nature and character is essentially similar or corresponding to a financial product referred to in paragraphs (a) to (m), inclusive;

**‘financial service’** means-

- (a) a service about financial matters, rendered to the public or to a juristic person, including advice, an intermediary service or a service of a kind, or similar to a service, normally rendered by a financial institution; and
- (b) a service declared by the regulations to be a financial service for the purposes of the financial services laws;

**"intermediary service"** means, subject to subsection (8), any act other than the furnishing of advice, performed by a person for or on behalf of a client or product supplier-

- (a) the result of which is that a client may enter into, offers to enter into or enters into any transaction in respect of a financial product with a product supplier; or
- (b) with a view to -
  - (i) buying, selling or otherwise dealing in (whether on a discretionary or non-discretionary basis), managing, administering, keeping in safe custody, maintaining or servicing a financial product purchased by a client from a product supplier or in which the client has invested;
  - (ii) collecting or accounting for premiums or other moneys payable by the client to a product supplier in respect of a financial product; or
  - (iii) receiving, submitting or processing the claims of a client against a product supplier;

**‘market conduct standard’** means a standard made in terms of **section 18BD**;

**‘prudential standard’** means a standard made in terms of section 18CA;

**‘undesirable practice’**, in relation to a financial service or a financial product, means a practice determined in terms of section 18BC to be an undesirable practice in relation to that financial service or financial product;

### **Prohibition on providing services unless registered**

**18AA (1)** A person must not provide, as a regular part of its business, a financial service, unless the person is registered under this Act as a financial institution to provide such service.

(2) Subsection (1) does not apply in relation to the provision of a financial service if another financial services law requires that a person be registered or licensed under that law as a financial institution to provide such service.

## **Registration**

- 18AB** (1) An application for registration of a person as a financial institution in relation to a financial service must be made to the registrar in the manner and form as prescribed by the registrar in a prudential or market conduct standard, as the case may be.
- (2) The registrar may grant the application and register the applicant only if satisfied that the person-
- (a) shall provide the service concerned with integrity, prudence and professional skill; and
  - (b) shall maintain a sound financial position and not impair the financial position of a financial institution or cause or promote instability in the Namibian financial system; and
  - (c) otherwise meets and will continue to meet the requirements of the regulations, the market conduct standards and the prudential standards.
- (3) The registrar may impose conditions on the registration of a person under this Act.
- (4) If an application is refused, or is granted subject to conditions, the registrar must give the applicant notice of the refusal or conditions setting out the reasons for the refusal or the conditions.
- (5) The financial institution must comply with the conditions subject to which it was registered.

## **Prohibition of false and misleading statements—all financial institutions**

- 18BB** (1) A person must not engage in conduct that is misleading or deceptive or is likely to mislead or deceive in relation to a financial service or financial product, including a financial service or financial product provided by another person.
- (2) Without limiting subsection (1), a person must not-
- (a) falsely represent that a financial service or financial product is of a particular standard, quality, value or grade; or
  - (b) falsely represent that a particular person has agreed to acquire a specified financial service or financial product; or
  - (c) represent that financial services or financial products have sponsorship,

- approval, performance characteristics, uses or benefits they do not have; or
- (d) represent that the person has, in relation to financial services or financial product, a sponsorship, approval or affiliation it does not have; or
  - (e) make a false or misleading representation with respect to the price of financial services or financial products; or
  - (f) make a false or misleading representation concerning the need for specified financial services or financial products; or
  - (g) make a false or misleading representation concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy in relation to financial services or financial products.

### **Undesirable practices—all financial institutions**

- 18BC** (1) The registrar may, by notice in the *Gazette*, determine that a specified practice in relation to financial services or financial products is an undesirable practice.
- (2) Before making a determination in terms of subsection (1), the registrar must consult the advisory committee established under this Act, unless the registrar is satisfied that it is necessary to make the determination urgently to protect the interests of clients and potential clients of the financial institutions concerned.
  - (3) A determination in terms of subsection (1) may relate to specified financial services or financial products or to financial services or financial products of a specified kind.
  - (4) A financial institution must not engage in an undesirable practice in relation to a financial service or a financial product.

### **Market conduct standards**

- 18BD** (1) The registrar may, by notice in the *Gazette*, determine standards imposing requirements with respect to-
- (a) the market conduct of financial institutions that are not prudentially regulated financial institutions, or of the affairs of groups comprised of such financial institutions and their subsidiaries, to ensure that the financial institutions or the groups, as the case requires, employ fair market practices in dealings with members of the public and do not to cause or promote instability in the Namibian financial system; or

- (b) the market conduct of financial institutions so as to ensure that the affairs of such institution takes place with integrity, prudence and professional skill.
- (2) Without limiting what a market conduct standard may deal with, such standard may impose requirements on financial institutions with respect to the following-
  - (a) registration or licensing requirements that such financial institutions must comply with for registration or licensing in terms of a financial services law including but not limited to-
    - (i) the manner and form in which financial institutions must apply for registration or licensing;
    - (ii) the requirements that such institutions must comply with to be registered in terms of a financial services law;
    - (iii) fees for applications to be registered or licensed; and
    - (iv) the criteria for determining applications; and
    - (v) the circumstances in which registration can be varied, suspended or revoked;
  - (b) fit and proper person requirements for controllers, managers, directors and other officers of such financial institutions;
  - (c) the governance of such financial institutions;
  - (d) insurance arrangements to be complied with by such financial institutions;
  - (e) the use by such financial institutions of financial instruments (including derivatives) and off-balance sheet transactions;
  - (f) outsourcing;
  - (g) how financial institutions manage risks associated with their businesses;
  - (h) the disclosure of information to the clients or other persons about such financial institutions, their financial services or financial products;
  - (i) reports to be made to the registrar about financial institutions, financial services or financial products;
  - (j) the keeping of records;

- (k) rules for advertising and marketing of financial services and financial products;
  - (l) the powers, duties and functions of controllers, managers, directors and other officers of such financial institutions;
  - (m) the amount of compensation that a person providing advice or an intermediary service may be entitled to in respect of the provision of advice or the rendering of an intermediary service;
  - (n) the combating of financial crime.
- (2) A person that contravenes a market conduct standard made in terms of subsection (1) is guilty of an offence, the penalties for which must be stipulated in such standard.
- (3) The registrar must not make a market conduct standard unless either-
- (a)
    - (i) a draft of the standard has been published in a way that the registrar considers will bring it to the attention of financial institutions to which the standard will apply;
    - (ii) those financial institutions have had at least 45 days after that publication to make representations about the proposed standard to the registrar; and
    - (iii) the registrar had regard to those representations in determining whether to make the standard; or
  - (b) the registrar considers on reasonable grounds that it is necessary to make the standard urgently.
- (4) A market conduct standard made in terms of subsection (3)(b) ceases to have effect at the end of 90 days after it is made, but this subsection does not prevent the registrar from acting under that subsection again.
- (5) The registrar may, by notice in the *Gazette*, revoke or modify a market conduct standard, in which case subsections (3) and (4) apply.

## **POWERS TO REGULATE AND SUPERVISE FINANCIAL INSTITUTIONS**

### **Prudential standards**

- 18CA** (1) The registrar may, by notice in the *Gazette*, determine standards imposing requirements with respect to-

- (a) the conduct of the affairs of prudentially regulated financial institutions, or of the affairs of groups comprised of prudentially regulated financial institutions and their subsidiaries, in a way that ensures that the prudentially regulated financial institutions or the groups, as the case requires, maintain a sound financial position and do not to cause or promote instability in the Namibian financial system; or
- (b) the conduct of the affairs of prudentially regulated financial institutions with integrity, prudence and professional skill.
- (2) Without limiting what a prudential standard may deal with, a prudential standard may impose requirements with respect to any of the following:
  - (a) registration or licensing requirements that such financial institutions must comply with for registration or licensing in terms of a financial services law including but not limited to-
    - (i) the manner and form in which financial institutions must apply for registration or licensing;
    - (ii) the requirements that such institutions must comply with to be registered in terms of a financial services law;
    - (iii) fees for applications to be registered or licensed;
    - (iv) the criteria for determining applications; and
    - (v) the circumstances in which registration can be varied, suspended or revoked;
  - (b) fit and proper person requirements for controllers, managers, directors and other officers of prudentially regulated financial institutions;
  - (c) the governance of prudentially regulated financial institutions;
  - (d) capital, solvency and liquidity requirements;
  - (e) the use by financial institutions of financial instruments (including derivatives) and off-balance sheet transactions;
  - (f) insurance and reinsurance arrangements;
  - (g) outsourcing;
  - (i) how prudentially regulated financial institutions manage risks associated

with their businesses;

- (j) valuation of assets, including that the registrar has the right to change a valuation under circumstances determined in such standard;
- (k) what constitutes a sound financial position;
- (l) the maximum limits to be imposed on specific asset classes for solvency standards;
- (m) norms with respect to minimums (if any) to be invested in locally registered securities per asset class;
- (n) the keeping of records;
- (o) the powers, functions and duties of controllers, managers, directors and other officers of prudentially regulated financial institutions;
- (p) provisions relating to Lloyd's in the context of the short-term insurance business and long-term insurance business as defined the Short-term Insurance Act, 1998 and the Long-term Insurance Act, 1998;
- (q) market conduct rules;
- (r) in the case of a pension fund organization as defined in section 1 of the Pension Funds Act, 1956 (Act No. 24 of 1956), arrangements with regard to allocation of surplus;
- (m) the combating of financial crime.
- (3) A person that contravenes a prudential standard made in terms of subsection (1) is guilty of an offence, the penalties for which must be stipulated in such standard.
- (4) The registrar must not make a prudential standard unless either-
  - (a) (i) a draft of the standard has been published in a way that the registrar considers will bring it to the attention of prudentially regulated financial institutions to which the standard will apply;
  - (ii) those prudentially regulated financial institutions have had at least 45 days after that publication to make representations about the proposed standard to the registrar; and
  - (iii) the registrar had regard to those representations in determining whether to make the standard; or

- (b) the registrar considers on reasonable grounds that it is necessary to make the standard urgently.
- (5) A prudential standard made in terms of subsection (4)(b) ceases to have effect at the end of 90 days after it is made, but this subsection does not prevent the registrar from acting under that subsection again.
- (6) The registrar may, by notice in the Gazette, revoke or modify a prudential standard, in which case subsections (3) and (4) apply.

**OMBUD FOR FINANCIAL SERVICES PROVIDERS**

**Office of Ombud for Financial Services Providers**

- 18EK** (1) There is established an office to be known as the Office of the Ombud for Financial Institutions.
- (2) The functions of the Office are performed by the Ombud for Financial Institutions.
  - (3) The objective of the Ombud is to consider and dispose of complaints in a procedurally fair, informal, economical and expeditious manner and by reference to what is equitable in all the circumstances, with due regard to -
    - (a) the contractual arrangement or other legal relationship between the complainant and any other party to the complaint; and
    - (b) considerations of equity.
  - (4) When dealing with complaints in terms of **sections 27 and 28** the Ombud is independent and must be impartial.