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CONTENTS

No.		Page
	ACT	
3	Financial Institutions Act, 2012	347

GOVERNMENT NOTICE

3	Statement of Objects and Reasons of the	435
	Financial Institutions Act, 2012	

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ACT NO. 3 OF 2012

Financial Institutions Act, 2012**Arrangement of Sections****Sections**

PART I – PRELIMINARY

1. Short title and commencement
2. Interpretation
3. Delegation of powers
4. Application and exemptions

PART II – LICENCES

5. Licences
6. Licensing of financial institutions
7. Fees
8. Licensing criteria and inquiries
9. Minimum capital
10. Decision of Commissioner
11. Conditions
12. Licensing of agents of financial institutions
13. Licensing of ancillary financial service providers
14. Licence and other fees
15. Use of the word “bank” in title
16. Revocation of licence
17. Names of institutions not to be similar
18. Place of business
19. Capital shares and general conditions
20. Investigation of unlawful business
21. Management and control of repayment of money and assets unlawfully obtained

PART III – FINANCIAL REQUIREMENTS
AND LIMITATIONS ON ACTIVITIES

- 22. Capital
- 23. Capital accounts according to risk
- 24. Provision to be made for certain items
- 25. Minimum local assets
- 26. Minimum liquid assets
- 27. Financial activities
- 28. Limitations on specified operations and activities

PART IV – SECRECY

- 29. Secrecy
- 30. Disclosable information

PART V – OFFENCES

- 31. Offences in relation to entries in books, documents etc.
- 32. General penalty
- 33. Offences by institutions, servants and agents
- 34. Failure to maintain minimum requirements

PART VI – AUDITING AND REPORTING

- 35. Appointment of auditors
- 36. Auditor to inform the Commissioner
- 37. Appointment of Audit Committee
- 38. Functions of Audit Committee
- 39. Financial Statements
- 40. Financial records
- 41. Annual accounts

PART VII – DIRECTORS AND OFFICERS

- 42. Board of Directors
- 43. Management
- 44. Qualifications of directors and officers
- 45. Duties of directors and officers
- 46. Conflict of interest

-
47. False and misleading statements
 48. Suspension of director or officer
 49. Appointments of directors, officers and branch managers

PART VIII – SUPERVISION OF FINANCIAL AND OTHER
LICENSED INSTITUTIONS

50. Responsibility for supervision
51. Returns
52. Extension of time
53. Examinations
54. Production of records and information for examiner
55. Power to issue orders or directions
56. Publication of information

PART IX – WINDING UP AND SEIZURE

57. Exceptions to Companies Act
58. Acceptance of deposits or funds by insolvent licensed institutions
59. Seizure of licensed institution
60. Notice of seizure
61. Appeal for Termination of Seizure
62. Powers and duties of Commissioner's appointee upon seizure
63. Effects of seizure
64. Restriction of rights of creditor as to execution in seizure
65. Limitation on duration of seizure

PART X – ABANDONED PROPERTY

66. Unclaimed funds and property
67. Reports and disposition
68. Failure to make a report or payment

PART XI – OTHER REQUIREMENTS AND RESTRICTIONS

69. Reserve for losses due to negligence or dishonesty
70. Restrictions on payments of dividends
71. Credit requirements

PART XII – MISCELLANEOUS

- 72. Power to make regulations or decisions and issue other acts
- 73. Financial holidays
- 74. Substitution for depositor's signature
- 75. Immunity
- 76. Reference to "this Act"
- 77. Appeals
- 78. Transitional provisions
- 79. Repeal

ACT NO. 3 OF 2012

Financial Institutions Act 2012

An Act to repeal and replace the Financial Institutions Act 1999¹, to provide for the authorisation, supervision and regulation of banking and non-banking financial institutions, agents of financial institutions and ancillary financial service providers and for related matters.

Enacted by the Parliament of Lesotho.

PART I – PRELIMINARY

Short title and commencement

1. This Act may be cited as the Financial Institutions Act 2012 and shall come into operation on the date of its publication in the Gazette.

Interpretation

2. In this Act, unless the context otherwise requires -

“affiliate”, in respect of any licensed institution means -

- (a) a company, association, syndicate, partnership or other body of persons corporate or unincorporated in which such licensed institution is a principal shareholder;
- (b) a company, association, syndicate, partnership or other body of persons corporate or unincorporated in which the election of a majority of directors is controlled in any manner by such licensed institution;
- (c) a company of which the licensed institution is a subsidiary, including a holding company;
- (d) a company that is under common control with the licensed institution as a subsidiary of another company, including holding companies, or subject to such com-

mon control by other means as the Commissioner may determine; and

- (e) a company, association, syndicate, partnership or other body of persons corporate or unincorporated that is a principal shareholder of another company in which the licensed institutions also is a principal shareholder;

“ancillary financial service provider” means a person who engages in providing auxiliary services such as electronic fund transfer services, foreign exchange dealing services, supporting services to financial institutions, and other similar auxiliary financial services;

“applicant” means a person interested in obtaining a license under this Act and filing the corresponding application or on behalf of whom such application is filed;

“bank” means a company, incorporated in accordance with the provisions of the Companies Act 2011², which is licensed under this Act to conduct banking business;

“banking business” means the business of receiving funds from the public through the acceptance of money deposit and using such funds for loans or other financial activities;

“borrower” means a person who or institution that, has applied for credit or has entered into a credit agreement with the credit provider;

“branch” means any place of business of a financial institution that is open to the public, and includes a mobile office and an automated teller machine;

“capital base” in respect of any licensed banking financial institution means core capital or tier I and supplementary capital or tier II, and for any licensed non-bank financial institution means an initial investment plus subsequent investments made by an investor into the portfolio;

“collateral substitute” means collateral not ordinarily used as security in conventional banking;

“Commissioner” means the Central Bank of Lesotho established by the Central Bank of Lesotho Act, 2000³;

“company” has the meaning assigned to it in the Companies Act, 2011;

“compulsory savings” means funds that must be contributed to by borrowers of an institution as a condition for receiving a loan either as a percentage of a loan or as a nominal amount;

“control” means having a relationship with a person that makes it possible to exercise a direct or indirect power to determine its financial and operational policy or to influence its decision-making or management pursuant to its Memorandum and Articles of Association or to an agreement or in any other manner;

“core capital” means for non-bank financial institutions, shareholders’ equity in the form of issued and fully paid-up shares including retained reserves approved by the central bank;

“court” in relation to any licensed institution means the High Court of Lesotho and, in relation to any offence against this Act, includes a subordinate court having jurisdiction in respect of that offence;

“credit business” means the business of extending credit to any person from sources other than deposits from the public;

“credit guarantee fund” means a financial back-up aimed at facilitating bank lending to businesses by mitigating the risk of non-repayment;

“deposit” means -

- (a) a sum of money paid on terms -
 - (i) under which it will be repaid, with or without interest or a premium, and either on demand or at a time or in circumstances agreed by or on behalf of the person making the payment and the person receiving it;
 - (ii) which are not referable to the provision of prop-

erty or services or to the giving of security, and for the purposes of this paragraph, money bond is paid on terms which are referable to the provision of property or services or the giving of security if, and only if -

- (iia) it is paid by way of advance or part payment for the sale, hire or other provision of property or services of any kind and is repayable only in the event that the property or services is or are not in fact sold, hired or otherwise provided;
- (iib) it is paid by way of security for payment for the provision of property or services of any kind provided or to be provided by the person by whom or on whose behalf the money is accepted; or
- (iic) it is paid by way of security for the delivery or return of any property, whether in a particular state of repair or otherwise;

- (b) money or other assets contributed by investors to participate in a collective investment scheme;

“deposit taking institution” means a bank or a specialised deposit taking institution;

“deposit taking microfinance business” means a microfinance business in which the person conducting the business holds himself out as accepting deposits on a day to day basis;

“director” includes any person, by whatever title he may be referred to, carrying out or empowered to carry out substantially the same functions in relation to the direction of licensed institution as those carried out by a director of a company incorporated under the Companies Act, 2011 and any person in Lesotho responsible for carrying out such functions for a licensed institution not incorporated in Lesotho;

“exposure” means the risk of loss that a licensed financial institution has with a single person or a group of inter-related persons, because of credit facilities, off-balance sheet items, including guarantees, holding of shares, investments or placements and other contingent liabilities;

“financial activities” means any of the activities referred to in section 27;

“financial cooperative” means a financial institution that is owned and operated by its members to provide products and services that are comparable to those offered by major diversified banks;

“financial institution” means a deposit taking institution or a non-deposit taking institution carrying out financial activities as stipulated in its licence, irrespective of whether it is a banking or a non-banking financial institution;

“financial year” means, for the purpose of this Act, the period from first January until December thirty first of each year;

“foreign financial institution” means a financial institution, authorised or registered to conduct banking or other financial business under the laws of any state, country, colony, or territory other than Lesotho, doing banking business or other financial business in Lesotho, whether incorporated or not;

“group of interrelated persons” in respect of any financial institutions means those persons referred to under section 28(2);

“insider” means -

- (a) a principal shareholder in a licensed institution;
- (b) a member of the board or directors, the audit committee, or any other official of a committee of the licensed institution;
- (c) a member of the senior management of a licensed institution, including the chief executive officer, the president, vice president, chief accountant, chief lending of-

ficer, chief treasury, or their equivalents, as well as any person who alone, or together with one or more has the authority to enter into commitments on account of the licensed institution:

- (d) any employee of a licensed institution who is responsible for the management of one or more of the risks to which a financial institution is exposed namely -
 - (i) solvency risk;
 - (ii) liquidity risk;
 - (iii) credit risk;
 - (iv) currency risk;
 - (v) market risk (position risk);
 - (vi) interest rate risk;
 - (vii) counterparty risk;
 - (viii) technological risk;
 - (ix) operational risk;
 - (x) compliance risk; or
 - (xi) any other risk regarded as material by the bank;
- (e) Any person who is related by marriage, blood or kinship to the second degree or business interest to a person listed in this definition;

“indirect shareholdings” means those shares held alone or in concert with others through a holding company, an agent or other persons or means;

“large exposure” means an exposure of a licensed financial institution

that is equivalent to ten percent or more of its capital base;

“licensed institution” -

- (a) in relation to a financial institution, means an institution licensed under sections 5 and 6; and
- (b) in relation to an agent of a financial institution or an ancillary financial service provider means licensed under section 12 or 13 respectively;

“local financial institution” means a financial institution established under the laws of Lesotho;

“microfinance institution” means an institution licensed to do microfinance business.

“microfinance business” means the business carried on as a principal business of -

- (a) acceptance of deposits;
- (b) employing such deposits wholly or partly by lending or extending credit for the account and at the risk of the person accepting those deposits, including provision of short term loans to small or micro enterprises and low income households, usually characterised by the use of collateral substitutes such as group guarantees or compulsory savings;
- (c) transacting such other activities as may, by regulations under this Act, be prescribed by the Commissioner of Financial Institutions;

“Minister” means the Minister of Finance;

“non-deposit taking institution” means an entity that is not authorised to receive deposits from the public but to perform credit business consisting of certain financial activities as specified in its license as the Commissioner may determine;

“officer” means -

- (a) the chairman or deputy chairman of the board of directors, or president or vice-president;
- (b) the managing director, the general manager, comptroller, the secretary or the treasurer;
- (c) any other individual who holds the title or office or who performs any function similar to those normally performed by the holder of the offices specified in subparagraph (a) or (b);

“person” includes any individual or company, partnership, syndicate, association or body of persons, corporate or unincorporated;

“place of business” means any branch or office of a financial institution in Lesotho, including a mobile agency, open to the public;

“principal interest” means a direct or indirect shareholding of a person, which represents ten percent or more of its capital or the voting rights which makes it possible to exercise a significant influence over such person, as the Commissioner may determine;

“principal officers” means the president, the chief executive officer or the secretary of the board of directors;

“principal shareholder” means a person holding, directly or indirectly, a principal interest in another person;

“promoter” means a person carrying out the necessary tasks for another person to obtain a license under this Act;

“related parties” in respect of any financial institution means -

- (a) any one of its affiliates, insiders or principal shareholders;
- (b) any firm, partnership, syndicate, association, company or other body of persons corporate or unincorporated in

which it or any one or more of its affiliates, insiders or principal shareholders, owner, director, officer, partner, manager, agent, member;

- (c) any individual, firm, partnership, syndicate, association, company or other body or persons corporate or unincorporated of whom or of which it or any one or more of its affiliates, insiders or principal shareholders is a guarantor; or
- (d) any persons deemed related person to the persons referred to in these previous subparagraphs (a), (b), or (c);

“reputable financial institution” means a financial institution licensed to conduct banking or other financial institution business, which is subject to consolidated supervision in accordance with international standards under the laws of any state, country or territory;

“significant influence” means having any interest in a person that makes it possible to exercise a direct or indirect power to determine or control the management or policies of a person;

“specialised deposit taking institution” means a financial institution authorised to receive deposits from the public and to perform other financial activities of a specific nature as stipulated in their licenses, including microfinance institutions, collective investment schemes, financial cooperatives and other institutions of similar character;

“subsidiary” means any company whose voting share is more than fifty percent controlled by another company, including a holding entity;

“unit of risk” means a potential financial loss which may arise from exposures of a financial institution with a group of interrelated persons;

“unsecured advances” or “unsecured credit facilities” means advances or credit facilities granted without security; or, in the case of advances and credit facilities granted against security, any part of such advances and credit facilities which at any given time exceeds the market value of the assets comprising the security given, or which exceeds the valuation ap-

proved by the Commissioner whenever he deems that no market value exists for the said assets.

Delegation of powers

3. The Commissioner may delegate the powers conferred upon him under this Act.

Application and exemptions

4. (1) This Act shall apply to deposit taking and non-deposit taking financial institutions as specified by or pursuant to it.

(2) This Act shall not apply to:

- (a) an institution licensed or registered and supervised by the Commissioner in accordance with the Central Bank of Lesotho Act 2000 and pursuant to the Money Lenders Act 1989⁴, the Building Finance Institutions Act 1976⁵ and the Insurance Act 1976⁶;
- (b) an association, a society and an informal self-help organisation as the Commissioner may determine by notice published in the Gazette.

(3) With the exception of the commercial banks referred to in the Second Schedule, a financial institution may be exempted from all or part of the provisions of this Act as the Commissioner may determine by notice published in the Gazette:

Provided that such exemptions shall not pose risks to the public or endanger the activities of other financial institutions under this Act.

PART II – LICENCES

Licences

5. (1) Banking or credit business as defined in section 2 shall not be transacted, either in Lesotho or abroad by a local financial institution, or in Lesotho by a foreign financial institution, or by any other person, unless that financial institution or person is in possession of a license issued by the Com-

missioner under this Act.

(2) A local financial institution shall not be granted a license under this Act unless it is incorporated as a public company under the Companies Act 2011.

(3) Notwithstanding subsection (2), a company intending to operate as a financial institution shall not be registered without prior written approval of the Commissioner.

(4) A company licensed to carry on banking business in Lesotho on the date on which this Act comes into operation shall be deemed to have been issued a licence under this Act.

(5) Any person who contravenes the provisions of subsection (1) commits an offence and is on conviction, liable to a fine of M20,000 or to imprisonment for a term of one year or both:

Provided that where the person found guilty of such offence is a body corporate, the term of imprisonment set out in the third column of the First Schedule shall apply to any director, officer or person responsible for carrying out such unauthorised business.

Licensing of financial institutions

6. (1) In order to obtain a licence under this Act as a financial institution, an applicant shall apply in writing to the Commissioner and submit -

- (a) authenticated copies of the memorandum and articles of association or, in the case of a foreign financial institution which is not incorporated in Lesotho, such similar documents regulating its affairs;
- (b) a statement of the address of its head office, and the name, nationality, qualifications, experience and address of its chairman, of every director and of every officer;
- (c) if it is a foreign financial institution, a statement from the supervisory authorities of the home country that its principal shareholders, chairman, directors, principal of-

ficers and management team as a whole are fit and proper persons and that it is subject to comprehensive supervision on a consolidated basis;

- (d) where applicable, a copy of audited financial statements for the last two years and that of its head office or parent company;
- (e) the full particulars of the business it proposes to carry on, and of the manner in which it proposes to carry on that business, including but not limited to the operating and financial plans, the system of internal controls, internal audit and accounting and the structure for its functioning;
- (f) the location of the principal and other places of business in Lesotho where it proposes to carry on its activities and, in the case of a mobile agency, the area to be served;
- (g) the prior consent of its home country supervisor where the proposed owner or parent organisation of the applicant is a foreign financial institution; and
- (h) such other information as the Commissioner may require.

(2) The application and every document submitted in accordance with subsection (1) shall be signed by the principal officer of the applicant or the promoter of the applicant.

(3) The Commissioner may amend the terms and conditions of any license when it becomes evident that changes in the circumstances considered in the issuance of such license have occurred.

(4) The Commissioner shall refuse to grant a license if it is not satisfied that the conditions specified by, or pursuant to, this Act for issuing such license are fulfilled, stating in its decision the reasons for such refusal.

(5) A license shall not be granted if:

-
- (a) the information has not been provided as required;
 - (b) there has been a failure in meeting the licensing criteria;
 - (c) there is a serious risk of endangering the financial stability of the market where the proposed financial institution would operate; or
 - (d) the manner in which the applicant proposes to carry on its business may hinder the Commissioner to exercise an effective supervision over the proposed institution.

(6) The Commissioner may make regulations to establish the procedure for any person to obtain a license to act as financial institution under this Act, taking into account whether such application is for acting as a deposit taking financial institution or a non-deposit taking financial institution under this Act.

Fees

7. An applicant shall -

- (a) pay a non-refundable investigation fee to the Commissioner, as the Commissioner may prescribe by notice published in the Gazette; and
- (b) deposit with the Commissioner the registration fee and the licence fee for the first year, as the Commissioner may prescribe by notice published in the Gazette:

Provided that such deposit shall be returned to the applicant if the license has not been granted.

Licensing criteria and inquiries

8. (1) In considering an application for a license, the Commissioner shall conduct such investigation and inquiries as may be deemed necessary to determine whether the applicant, and its promoters, principal shareholders, chairman, directors, principal officers, and management team are fit and proper to be granted a license under this Act.

(2) In conducting such investigation and inquiries, the Commissioner shall, in relation to the applicant, consider:

- (a) the financial resources and history of the applicant;
- (b) its ownership structure;
- (c) the integrity and standing of direct and indirect principal shareholders;
- (d) prior business activities and financial resources;
- (e) the character and experience of -
 - (i) the promoter;
 - (ii) the chairman;
 - (iii) the directors;
 - (iv) the principal officers; and
 - (v) management;
- (f) the adequacy of its capital;
- (g) the convenience and needs of the community it intends to be served;
- (h) the earning prospects afforded by the area primarily to be served;
- (i) the prospective effect on existing financial institutions; and
- (j) such other matters and criteria as the Commissioner may deem appropriate.

(3) Subject to subsections (1) and (2), the Commissioner shall issue regulations to define, in detail, the criteria to be followed in considering an ap-

plication for a license under this Act, taking into account whether such application is for acting as a deposit taking institution or a non-deposit taking institution under this Act.

Minimum capital

9. (1) A financial institutions shall have the minimum capital and be licensed according to the type of activities as provided in the Schedule.

(2) The minimum capital required for each type of financial institution may be amended by the Commissioner from time to time, by notice published in the Gazette.

(3) A type I bank shall not be granted a license unless it fulfils a minimum cash capital of not less than 20 million Maloti or such higher required capital amount.

(4) A type II bank shall not be granted a license unless it fulfils a minimum cash capital of not less than 10 million Maloti or such higher required capital amount.

(5) A type III bank shall not be granted a license unless it fulfils a minimum cash capital of not less than 5 million Maloti or such higher required capital amount.

Decision of Commissioner

10. (1) Within 45 days after the receipt of the complete application, or, where further information has been requested, after the receipt of such information, the Commissioner shall either grant a licence or inform the applicant that he has refused to grant a licence.

(2) Where the Commissioner is unable to observe the 45 day period stipulated in subsection (1) for the application, the Commissioner shall inform the applicant of the delay in writing indicating the reasons for the delay and further period required to take the decision, which period shall not exceed 30 days.

(3) Where the Commissioner has refused to grant a license, a person aggrieved by this decision may appeal against it as stipulated under section 72.

Conditions

11. (1) In granting a licence, the Commissioner may impose conditions to be satisfied by the licensee, including a condition that the licensee carry on business at a designated place or places, or provide or refrain from providing specified services or facilities.

(2) In the case of a foreign financial institution, without limiting the generality of the foregoing, the Commissioner shall require as a condition for the commencement of operations that there be filed with it -

- (a) duly executed instrument in writing, by its terms of indefinite duration and irrevocable, appointing with the prior written approval of the Commissioner a true and lawful agent resident in Lesotho, upon whom any action or proceeding against it on a cause of action arising out of a transaction with its places of business in Lesotho, may be served with the same force and effect as if it were organised in Lesotho had been lawfully served with process therein; and
- (b) a written certificate of designation, which may be changed from time to time thereafter by the filing of a new certificate of designation, specifying the name and address of the officer, agent or other person in Lesotho -
 - (i) to whom such process shall be forwarded; or
 - (ii) upon whom any process not served upon the agent under paragraph (a) may be served.

(3) A financial institution shall be licensed to engage in providing the categories of financial services, including those under section 27, in accordance with its nature of deposit taking financial institution or non-deposit taking financial institution, as set out in this Act.

(4) A person, other than a licensed deposit taking institution, shall not accept any deposits from the public.

(5) Demand deposits or funds from the public repayable on demand

by cheque, draft or order may only be accepted by a licensed commercial bank.

(6) Any person who contravenes the provisions of subsection (4) commits an offence and shall, on conviction, be liable to a fine of M40,000 or to imprisonment for a term of 2 years:

Provided that where the person found guilty of such offence is a body corporate, the term of imprisonment set out in the third column of the First Schedule should apply to any director, officer, or person responsible for carrying out such unauthorised act.

Licensing of agents of financial institutions

12. (1) Any person, acting or proposing to act as agent of a financial institution, who is representing such institution, or undertaking any activity on its behalf in Lesotho, other than in the course of legal proceedings, shall, before engaging in such representation or activity, apply to the Commissioner for a licence under this section.

(2) In applying for a licence, the applicant shall submit in writing to the Commissioner full particulars of -

- (a) his authority to make the application;
- (b) the business he proposes to carry on;
- (c) the manner in which, and the place where, he proposes to carry on such business;
- (d) proof of satisfactory financial performance in the last 5 years;
- (e) adequacy of capital and financial backing by a parent company;
- (f) competence of management team and staff; and
- (g) proof of a good track record in complying with the laws, established practices, and norms, in the country of origin, supported by the authorities of the home country.

(3) An applicant shall, upon the granting of a licence, pay to the Commissioner the licence fee for agents of a financial institution as prescribed in the regulations to be made by the Commissioner.

(4) The Commissioner may amend the terms and conditions of any such licence.

(5) The Commissioner may, at his discretion, refuse to grant such licence.

(6) A person who contravenes the provisions of subsection (1) commits an offence, and is on conviction, liable to a fine of M20,000 or to imprisonment for a term of one year or both:

Provided that where the person found guilty of such offence is a body corporate, the term of imprisonment set out in the third column of the First Schedule shall apply to any director, officer, or person responsible for carrying out such unauthorised act.

Licensing of ancillary financial service providers

13. (1) An ancillary financial service provider shall not conduct its or his business without holding a valid license issued by the Commissioner in accordance with the regulations made under this Act.

(2) On the application of a person who intends to conduct ancillary financial service, the Commissioner shall consider such application and issue a licence if the applicant meets the requirements indicated in the regulations made by the Commissioner.

(3) A person who contravenes the provisions of subsection (1) commits an offence and is, on conviction, liable to a fine of M20,000 or to imprisonment for a term of one year:

Provided that where the person found guilty of such offence is a body corporate, the term of imprisonment set out in the third column of the First Schedule shall apply to any director, officer or person responsible for carrying out such unauthorised business.

License and other fees

14. (1) A licensed institution shall, so long as its licence is not revoked, pay to the Commissioner on or before the first day of January of each year, licence fees as prescribed in the regulations to be made by the Commissioner.

(2) The Commissioner may from time to time, by notice published in the Gazette, amend the schedule of fees and specify such other annual fees which shall be paid by a licensed institution.

Use of the word "bank" in title

15. (1) A person other than a bank, or an agent of a bank licensed under section 12, shall not use the word "bank" or any of its derivatives in any language, or any other word indicating the transaction of banking or credit business, in the name, description or title under which such person is transacting business in Lesotho, or make or continue to make any representation to such effect in any bill-head, letter-paper, notice, advertisement or in any other manner whatsoever for the purpose of transacting business in Lesotho.

(2) Nothing in subsection (1) shall prevent a person from using the word "bank" or any of its derivatives in any language, when -

- (a) it is for the sole purpose of establishing a company for the purpose of applying for a licence to act or operate as a bank under this Act;
- (b) it is included in the title of an association formed by banks for the purpose of representing the common interests of the members of such association; or
- (c) it is expressly permitted by the Commissioner, in cases where the use of the word 'bank' will not induce the public to errors as to the nature of the operations performed by the entity receiving the permission.

(3) The Commissioner may, at any time, direct in writing, any person to withdraw, amend, or refrain from making any representation to such effect in any bill-head, letter-paper, notice, advertisement or in any other manner for the purpose of transacting business in Lesotho, which in its sole discretion it

considers to be misleading and inducing the public to errors as to the nature of the operations intended to be performed in connection with the concerned representation or endangering the activities of the financial institutions under this Act.

(4) A person who contravenes the provisions of subsection (1) commits an offence and if the person fails or refuses to comply with the direction under sub-section (3), the person shall, on conviction, be liable to a fine of M40,000 or to imprisonment for a term of 2 years or both:

Provided that where the person found guilty of such offence is a body corporate, the term of imprisonment set out in the third column of the First Schedule shall apply to any director, officer, or person responsible for carrying out such unauthorised act.

Revocation of licence

16. (1) The Commissioner may revoke the licence of any licensed institution if the holder -

- (a) fails to commence operations within a period of 6 months following the grant of the licence;
- (b) has, in the opinion of the Commissioner, obtained the licence on the strength of untrue or misleading information furnished by any person to the Commissioner;
- (c) fails to comply with the conditions of the licence or with any measure required by the Commissioner in accordance with section 55;
- (d) ceases to carry on the business for which he is licensed or in the case of a financial institution of which the main place of business is situated outside Lesotho, the authorisation to conduct banking or financial business is revoked by the competent authority in such other country;
or
- (e) is in breach of any other provision of this Act.

(2) Before revoking the licence of any institution, the Commissioner shall give such institution a notice of his intention to do so, and shall afford it a reasonable opportunity to show cause why such licence should not be revoked:

Provided that in no event shall a licence be revoked earlier than 14 days after the notice of intention is served on the institution: and

Provided further that the Commissioner may obtain a temporary injunction upon application to the court for the suspension of any part or all the business being conducted by such institution after the notice of intention has been served upon it.

(3) Where the Commissioner has revoked a licence, he shall as soon as possible, publish the notice of the revocation in the Gazette and use other means appropriately calculated to inform the public of such revocation, including where possible, publication of notice of revocation in a newspaper of general circulation in each of the places in which there is situated a place of business of the licensed institution.

Names of institutions not to be similar

17. (1) A licensed institution shall not be granted or continue to hold a licence under a name -

- (a) that is prohibited by law;
- (b) which so closely resembles the name of an existing licensed institution as would be likely, in the opinion of the Commissioner, to mislead the public;
- (c) that is the same as or, in the opinion of the Commissioner, similar to, any existing trade-mark or trade name, or corporate name of a body corporate, except where the trade name or trade mark is being changed or the body corporate is being dissolved or is changing its corporate name and the consent to the use of the trade mark or trade name, or corporate name is signified to the Commissioner in such manner as the Commissioner may require.

(2) A financial institution shall not carry on business as a commercial bank, merchant or investment bank, mortgage or savings bank unless it uses as part of its name the word "bank" or one of its derivatives.

(3) Except with the written consent of the Commissioner, no licensed institution shall use, or refer to itself by a name other than the name under which it is licensed.

Place of business

18. (1) A licence granted under sections 5 to 14 shall authorise the licensee to carry on business at the place or places designated in the licence, and a copy of the licence shall be displayed in each of its places of business.

(2) A licensed institution shall not open a new place of business or change the location of, or close an existing place of business without the prior written consent of the Commissioner.

(3) Before granting consent, the Commissioner may require to be satisfied by inspection whether the new place of business or the licensed institution as relocated, will continue to meet the applicable criteria.

Capital shares and general conditions

19. (1) All shares endowed with voting rights, which are issued by a local financial institution shall be in registered form.

(2) Without prior approval of the Commissioner, a person may not acquire or hold either directly or indirectly, acting alone or through or in concert with other persons, any interest in the capital share of a local financial institution which would confer upon him a voting share that reaches or exceeds ten per cent, twenty five percent, thirty three percent or fifty percent of the total.

(3) A financial institution, its directors and external auditors shall notify the Commissioner upon acquiring knowledge of any acquisition of shareholdings exceeding the percentages referred to in subsection (2) as shall further be specified in regulations made by the Commissioner.

(4) In considering any application made under subsection (2) for such approval, the Commissioner may call for such information as he may re-

quire, and an approval shall not be granted if:

- (a) the applicant does not meet or not continue to meet the criteria of a fit and proper person required to be a principal share-holder of a financial institution, as established by or pursuant to this Act;
- (b) the proposed acquisition or increased shareholding may have adverse effects on the stability and proper management of the concerned financial institution; and
- (c) the new ownership structure resulting from the approval may hinder the Commissioner from exercising supervision over the concerned financial institution.

(5) Unapproved acquisitions in excess of the percentages referred to in subsection (2) shall be reversed within a period not longer than 30 calendar days by the applicant after the date on which he has received notification of the decision from the Commissioner.

(6) If the acquisitions are not reversed, the Commissioner may make an application to court for directions in respect of the speedy and efficient sale of such excess to interested parties that shall be approved by the Commissioner; and return the moneys attained to the applicant or direct that such moneys be transferred to the custody of the Commissioner until they are delivered to such applicant.

(7) During the time the unapproved excess of shares remain the property of the applicant, the voting rights of such shares shall be suspended and the Commissioner shall take all necessary actions to leave without effects any decisions approved by using such voting rights.

(8) Without the prior approval of the Commissioner, no local financial institution shall -

- (a) enter into a merger or consolidation;
- (b) transfer the whole or any part of its assets in Lesotho other than in the ordinary course of its business;

- (c) effect an increase or reduction of its authorised share capital or a reduction of its paid-up capital;
- (d) alter its name as set out in its licence; or
- (e) amend its memorandum or articles of association.

(9) Without the prior approval of the Commissioner, no foreign financial institution which is not incorporated in Lesotho shall -

- (a) transfer the whole or any part of its assets in Lesotho other than in the ordinary course of its business;
- (b) effect a reduction of its assigned capital in Lesotho; or
- (c) alter its name as set out in its licence.

(10) A person who contravenes the provisions of subsections (2), (3), (4), (5), (6), (7), (8) and (9) commits an offence and is, on conviction, liable to a fine of M40,000 or to imprisonment for a term of 2 years or both:

Provided that where the person found guilty of such offence is a body corporate, the term of imprisonment set out in the third column of the First Schedule shall apply to any director, officer, or person responsible for carrying out any contravention of such provisions.

Investigation of unlawful business

20. (1) Whenever the Commissioner has reason to suspect that any person is engaging in banking or credit business or acting or pretending to act, whether acting alone or through or in concert with one or more other persons, as a financial institution, an agent of a financial institution or an ancillary financial service provider without a valid license under this Act, he shall call for and examine the books or other documents, accounts, records, titles, securities or cash or any assets of, or in the possession of, such person or other persons referred to above, in order to ascertain whether such person is so acting.

(2) In the event of a situation as described under subsection (1), the Commissioner may appoint inspectors or examiners and for the purposes of the performance of duties under their appointment, they shall, with necessary mod-

ification, in relation to the person subject to investigation and in relation to the affairs of that person, have the powers conferred by sections 53 and 54, upon an examiner contemplated in those sections, as if they were an examiner and the person subject to the direction were a financial institution contemplated in those sections. In particular, the inspectors may take possession of any books or other documents, accounts, records, titles, securities or cash or any assets to which they have access under subsection (1) where in their opinion:

- (a) the inspection, copying, or the making of extracts thereof, cannot reasonably be undertaken without taking possession of them;
- (b) they may be interfered with, disposed or destroyed unless they take possession of them; or
- (c) they may be needed as evidence in any legal proceedings, whether civil or criminal, which may be instituted under or in connection with this Act, or any other law.

(3) If, as a result of an inspection conducted by the inspectors appointed under subsection (2), the Commissioner is satisfied that any person has obtained money by engaging in banking or credit business or acting or pretending to act as described under subsection (1) without having a valid license under this Act, the Commissioner shall in writing direct that person to repay, subject to the provisions of section 21 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 and any other amounts owing by that person in respect of such money.

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

- (a) commits an offence and shall, on conviction, be liable to a fine of M40,000 or to imprisonment for a period of 2 years; and
- (b) shall for the purposes of any law relating to the winding up of 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 Commissioner shall, notwithstanding anything to the contrary contained in any law, apply for the winding-up of such a person or for the sequestration of the estate of such a person, as the case may be, to any court having jurisdiction.

(5) Where a person transacts banking or credit business or acts or pretends to act, whether acting alone or through or in concert with one or more other persons, as a financial institution, or an agent of a financial institution or an ancillary financial service provider, without being licensed as required by this Act, such person and the other persons referred to above commits an offence and shall, on conviction, be liable to a fine of M40,000 or to imprisonment for a period of 2 years:

Provided that where the person found guilty of such offence is a body corporate, the term of imprisonment set out in the third column of the First Schedule shall apply to any director, officer, or person responsible for carrying out such unauthorised act and this sanction shall be doubled in the case where the concerned person refuses to make available for examination the books, accounts and records referred to in subsection (1), after having been duly requested to do so by the Commissioner or the inspectors, or if any information supplied or item produced by him is false in any material particular, or refuses or fails to comply with a direction under subsection (3).

(6) Nothing in subsections (4) and (5) shall relieve any person from liability to criminal proceedings arising out of any contravention of the provisions of this Act or any other law.

(7) A competent court may, after hearing any challenge, injunction, appeal or any similar measure regarding any decisions undertaken by the Commissioner, the inspectors or the manager under this section and section 20, award monetary damages to injured parties, but shall not enjoin, stay, suspend, vary or set aside such decisions.

Management and control of repayment of money and assets unlawfully obtained

21. (1) Simultaneously with the issuing of a direction under section 20(3), or as soon thereafter as may be practicable, the Commissioner shall, by a letter of appointment, 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.

(2) On appointment -

- (a) the manager shall, as soon as may be practical report to the Commissioner whether or not the person subject to the relevant direction is, in the manager’s opinion, solvent or insolvent;
- (b) the manager shall recover and take possession of all the assets of the person subject to the relevant direction.

(3) If the report referred to in subsection (2)(a) concludes that the person subject to the directive is insolvent, the Commissioner shall, notwithstanding anything contrary contained in any law relating to liquidation or insolvency, apply to a competent court for the winding-up or the sequestration, as the case may be, in terms of the applicable law of the person subject to the directive and the competent court shall appoint as liquidator or trustee, as the case may be, the person nominated by the Commissioner.

(4) The manager shall, in respect of the services rendered by him in terms of this section, and the inspectors shall, in respect of an inspection referred to in section 21(2), be paid such remuneration by the Commissioner as the Commissioner may determine and the Commissioner 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. In such case, the Commissioner shall be regarded as a creditor of the person subject to the direction and the Commissioner shall have the same rights of a creditor in terms of the laws relating to liquidation and insolvency.

(5) The Commissioner 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 his assets including those that may have been identified in the letter of appointment, except with the written permission of the manager.

(6) The manager shall act under the control of the Commissioner.

and the manager may, from time to time, apply to the Commissioner for instructions in regard to any matter arising out of, or in connection with, the performance of his duties in terms of subsection (7).

(7) 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 exact amount of money unlawfully obtained by that person as contemplated in section 20(3);
 - (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 Commissioner 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 20(3) 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 law enforcement agency having jurisdiction in the area in which such offence is so suspected or having been committed; and

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- (d) to perform any other function assigned to the manager by the Commissioner in connection with the finalisation of the repayment of money in accordance with the relevant direction.

(8) For the purposes of the performance of the duties as set out in subsection (7), the manager shall, with necessary modification, 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 53 and 54, upon an examiner contemplated in those sections, as if the manager were an examiner and the person subject to the direction were a financial institution contemplated in those sections.

(9) The manager shall hold office until the relevant direction has been fully complied with, but the Commissioner may, at any time, in writing, withdraw the appointment of the manager on good cause shown, whereupon the manager shall vacate his office.

(10) A person who:

- (a) when requested by the manager to take an oath or to make an affirmation before a relevant authority, refuses to do so;
- (b) without lawful excuse refuses or fails to answer to the best of his 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;
- (c) wilfully furnishes the manager with any false information;
- (d) refuses or fails to comply, to the best of his 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 20(3),

commits an offence and is, on conviction, liable to a fine of M40,000 or to imprisonment for a term of 2 years, or both:

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.

PART III – FINANCIAL REQUIREMENTS AND LIMITATIONS ON ACTIVITIES

Capital

22. (1) A financial institution shall, at all times, maintain unimpaired, the minimum required capital, either paid-up or assigned if it is a foreign financial institution not incorporated in Lesotho.

(2) In this section -

- (a) “paid-up share capital” means capital obtained through the issuance of ordinary shares or non-cumulative non-redeemable (perpetual) preferred shares, excluding such ordinary or preference shares issued in pursuance of the capitalisation of reserves from a revaluation of assets; and
- (b) “assigned capital” means capital funds transferred from the head office of a foreign financial institution which is not incorporated in Lesotho and specifically assigned to the capital account of such foreign financial institution licensed to operate in Lesotho. Such assigned capital funds shall be maintained in Lesotho in such form as may be acceptable to the Commissioner and shall serve the same purposes under this Act as the paid-up share capital.

(3) A financial institution shall maintain a reserve account and, be-

fore any dividend is declared or any profit is transferred to the head office, parent company or elsewhere, shall transfer to such account out of the net profits of each year, after due provision has been made for taxation, a sum equal to not less than the minimum amounts specified in subsection (4).

- (4) There shall be transferred each year to its reserve account a sum equal to -
- (a) not less than fifty per cent of its net profits until the balance in the reserve account is equal to one-half the amount of its paid-up share or assigned capital account; or
 - (b) not less than twenty-five per cent of its net profits whenever the balance in the reserve account is equal to more than one-half but is less than the whole amount of the paid-up share or assigned capital account.
- (5) The reserve account shall neither be reduced nor impaired:

Provided that the impairment of the reserve account shall be permitted when it is the only means of preventing an impairment of paid-up share or assigned capital, in which case the Commissioner shall be notified within 10 days of the amount of such impairment.

(6) Whenever there is an impairment of the paid-up share or assigned capital or impairment of its reserve account, no financial institution shall declare credit or pay any dividend or make any other transfer from profits.

Capital accounts according to risk

23. The Commissioner shall, by regulations made under this Act, require deposit taking institutions, and may require non-deposit taking institutions, to maintain capital base accounts in an amount not less than a percentage of total assets, contingencies and off-balance-sheet commitments as the Commissioner may specify as capital adequacy ratio, taking into account the different types of risks taken by such financial institution:

Provided that such the regulations shall include provisions to:

- (a) define core capital (Tier I) and Supplementary (Tier II) capital;
- (b) define core capital or core capital to constitute at least fifty percent of the total qualifying capital (core capital and supplementary);
- (c) prescribe that the Commissioner may require financial institutions to maintain a minimum percentage of capital adequacy ratio at all times and that the Commissioner may be able to modify such percentage by regulations or instructions for individual financial institutions, as the case may be;
- (d) establish that the Commissioner will be able to impose by regulations specific capital charges for market risk, operational risk and other risks as defined by the Commissioner;
- (e) stipulate the criteria to require higher minimum capital adequacy ratio for individual financial institutions;
- (f) determine how capital requirements under or pursuant to this Act shall apply to the different categories of financial institutions, taking into account whether they are deposit taking institutions or non-deposit taking institutions; and
- (g) prescribe the remedial measures that may be imposed by the Commissioner, in case a financial institution subject to capital adequacy requirements fails to comply with capital requirements under or pursuant to this Act.

Provision to be made for certain items

24. In making the calculations necessary to ascertain that a financial institution has complied with the requirements of sections 22 and 23, provision shall be made to the satisfaction of the Commissioner and of the auditor of such institution appointed under section 35(1) for the following items -

- (a) depreciation of assets and bad or doubtful debts;
- (b) operating and accumulated losses;
- (c) preliminary expenses, representing expenses relating to organisation or extension or the purchase of business or goodwill;
- (d) the value of any assets lodged or pledged to secure liabilities incurred under any law where all the liabilities (including contingent liabilities) so secured are not included in the calculation and where the effect of such lodging or pledging is that such assets are not available for the purpose of meeting the liabilities of the institution to the public; and
- (e) such other items as may be prescribed by regulations, made under this Act.

Minimum local assets

25. (1) The Commissioner may, by regulations made under this Act, require a financial institution to maintain a prescribed minimum amount of local assets against such liabilities and capital accounts as may be specified in the regulations.

(2) For the purposes of this section, "local assets" means any asset consisting of advances and credit facilities to persons doing business or resident in Lesotho, properties and other assets situated in Lesotho and such other assets as may be specified in the regulations.

Minimum liquid assets

26. (1) The Commissioner may, by regulations made under this Act, determine the minimum, or minimum average of liquid assets which a financial institution shall hold at any time, or over the period of time against such liabilities as may be specified in the regulations.

(2) If a financial institution fails to comply with the regulations made under subsection (1), it shall, immediately, in writing, report such failure

