



# GOVERNMENT GAZETTE

## OF THE

# REPUBLIC OF NAMIBIA

N\$2.00

WINDHOEK - 23 June 2009

No. 4284

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## General Notice

### BANK OF NAMIBIA

No. 100

2009

#### DECLARATION ON THE CONDUCT OF ACTIVITIES THAT ARE DEEMED TO BE THE ACCEPTANCE OF DEPOSITS FROM THE PUBLIC

Notice is hereby given to the public, in terms of paragraph (d) of the definition of “receiving funds from the public” under section 1 of the Banking Institutions Act, 1998 (Act No. 2 of 1998), that the issuance of certain classes of preference shares shall be deemed to fall within the meaning of “receiving of funds from the public”, for the purpose of ascertaining if a person is conducting banking business.

#### 1. Definitions

Terms used in this Notice are as defined in the Banking Institutions Act, 1998 (BIA), except where expressly defined hereunder, or as reasonably implied by the contextual usage.

**“Public”** refers to any person or entity, other than a banking institution, statutory body, or other institutions referred to under section 2(2) of the BIA.

**“Debt Instruments”** Debt instruments as defined under section 1 of the BIA includes debentures as defined in section 1(1) of the Companies Act, or any other security or document issued by any entity, evidencing or acknowledging the liability

of a person or the company to repay an amount of money specified in the security or other document, subject to the conditions whereto the security or document is issued.

## **2. Classification of preference shares as debt instruments**

Preference shares take various forms; the difference is in the substance of their contractual arrangements, rather than the legal form. In line with the definition of debt instruments provided above, preference shares where the contracts contain the following features shall be deemed to be debt rather than equity instruments:

- (a) If they are redeemable at a specified date in future, for a specified amount, at the option of the holder (investor) of such preference shares; or
- (b) If they are perpetual and cumulative in nature, with a requirement to pay a specified amount of dividend in perpetuity; or
- (c) If they are convertible into a specified amount of ordinary shares at the option of the holder (investor) of such preference shares.

## **3. Conditions under which issuance of preference shares constitutes banking business**

### **“Receiving of funds from the public” through issuance of preference shares**

When preference shares that are deemed to be debt instruments are issued to members of the public, and the funds raised are used for the purpose of granting advances, loans, credit to the public, for investments or any other purpose not permitted by the BIA, as a regular feature of business, the person issuing such preference shares shall be regarded as “receiving funds from the public”, as defined under clause (d) of section 1 of the BIA.

Therefore, any entity or person receiving funds from the public through the issuance of preference shares described in section 2 above, without the permission of the Bank of Namibia is deemed to be conducting illegal banking business.

It follows from this paragraph that, the establishment of a Trust or Special Purpose Vehicle by any person (i.e. including banking institutions) to facilitate the issuance of preference shares for the purposes of on-lending or securing investments shall be construed to be carrying on illegal banking business.

## **4. Directives and Prohibitions**

Section 5 of the BIA stipulates, *inter alia*, that no person shall conduct banking or receive, accept or take deposits by any means, including advertising or soliciting, procure or attempt to procure a deposit, unless such a person is authorized under section 10 and 11 of the BIA to conduct banking business.

It is against this background that the Bank hereby directs all entities with existing preference share schemes that qualifies as debt instruments as outlined above, issued in the jurisdiction of Namibia by any person, while such person is not authorized by the Bank in accordance with the provisions of the BIA to undertake such activities, to dissolve such schemes.

## **5. Effective date**

This notice is effective as from 1 July 2009.

**6. Enquiries**

Any questions relating to this Notice should be addressed to the Director of Banking Supervision, Bank of Namibia, telephone number: +264 61 2835040.

**T.K. ALWEENDO**  
**GOVERNOR**

Windhoek, 26 May 2009

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