Banking Regulation

in 27 jurisdictions worldwide

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Regulatory framework

1. What are the principal governmental and regulatory policies that govern the banking sector?

In general, governmental and regulatory policy dictates that the objectives of securing systemic stability in the economy, ensuring institutional safety and soundness, and promoting consumer protection, are obtained. The South African Reserve Bank (SARB) is the central bank of South Africa and its focus is on stability, which includes price stability, financial stability and the stability of the banking system. The SARB recognises, in the performance of its duties, the need to pursue balanced economic development and growth based on the principles of a market system, private and social initiative, effective competition, and social fairness.

The SARB also has the responsibility for promoting the soundness of the domestic banking system through the effective and efficient application of international regulatory and supervisory standards and to minimise systemic risk.

2. Please summarise the primary statutes and regulations that govern the banking industry.

The following primary statutes and regulations govern the banking industry:

- the Banks Act 1990 (Banks Act) and regulations published in terms thereof, provide for the regulation and supervision of the taking of deposits from the public;
- the South African Reserve Bank Act 1989 regulates specifically the SARB and the monetary system;
- the National Payment Systems Act 1998 (NPS Act) provides for the management, administration, operation, regulation and supervision of payment, clearing and settlement systems in South Africa;
- the Inspection of Financial Institutions Act 1998 provides for the inspection of the affairs of financial institutions (such as banks) and for the inspection of the affairs of unregistered entities conducting the business of financial institutions;
- the Currency and Exchanges Act 1933 regulates legal tender, currency, exchanges and banking. Exchange Control Regulations issued in terms of that Act imposes exchange control that restricts the export of capital from South Africa;
- the Financial Intelligence Centre Act 2001 (FICA) establishes a Financial Intelligence Centre and a Money Laundering Advisory Council in order to combat money laundering activities and the financing of terrorist and related activities; and
- the Financial Advisory and Intermediary Services Act 2002 (FAIS) regulates the rendering of certain financial advisory and intermediary services to clients;
- the Mutual Banks Act 1993 provides for the regulation and supervision of the activities of mutual banks;
- the Co-operative Banks Act 2007 provides for the regulation and supervision of cooperative banks. The legislation acknowledges member-based financial services cooperatives as a different tier of the official banking sector. Note however, that rules to be implemented in terms of this Act are still in draft form; and
- the National Credit Act 2005 (NCA) regulates consumer credit and improved standards of consumer information, prohibits certain unfair credit and credit-marketing practices as well as reckless credit granting, provides for debt reorganisation in cases of overindebtedness, regulates credit information and provides for registration of credit bureaux, credit providers and debt-counselling services.

3. Which regulatory authorities are primarily responsible for overseeing banks?

The following regulatory authorities are responsible for overseeing banks:

- the SARB as the central bank and, more particularly the registrar of banks (registrar) who is an officer of the SARB, are primarily responsible for overseeing banks. The SARB has also, in terms of the NPS Act, recognised the Payment Association of South Africa (PASA) as a payment system management body with the object of organising, managing and regulating the participation of its members (ie, banks) in the payment system;
- the Financial Intelligence Centre by monitoring and giving guidance to banks as accountable institutions regarding the performance by them of their duties and their compliance in terms of FICA;
- the Financial Services Board established in terms of the Financial Services Board Act 1990 to provide for the establishment of a board to supervise compliance with laws regulating financial institutions and the provision of financial services; and
- the National Credit Regulator established in terms of the NCA whose responsibilities include the registration of credit providers and monitoring the consumer credit market and industry to ensure that prohibited conduct is prevented or detected and prosecuted.

4. Describe the extent to which deposits are insured by the government.

Describe the extent to which the government has taken an ownership interest in the banking sector and intends to maintain, increase or decrease that interest.

Deposits are in general not insured by the government. However, cooperative banks, once registered and compliant with the Co-operative Banks Act will eventually, once the entire regulatory framework is in place, be covered by an explicit deposit insurance scheme as set out in that Act. The government has no ownership interest in the banking sector.
5 Which legal and regulatory limitations apply to transactions between a bank and its affiliates? What constitutes an ‘affiliate’ for this purpose? Briefly describe the range of permissible and prohibited activities for financial institutions and whether there have been any changes to how those activities are classified.

A bank requires the prior written approval of the registrar to:

- establish or acquire a subsidiary within or outside South Africa;
- invest in a joint venture within or outside South Africa if the investment exceeds certain thresholds;
- establish, open or acquire a branch office or representative office outside South Africa;
- create, establish or acquire a trust outside South Africa of which the bank is a major beneficiary; any financial or business undertaking outside South Africa under the bank’s direct or indirect control; or any interest in any undertaking with a registered office or principal place of business outside South Africa; or
- create a division within or outside South African where another person conducts his business through that division.

Banks are also required to furnish the registrar with particulars relating to its shareholding or other interest in its subsidiaries. Furthermore, no reconstruction of companies within a group of which a bank or a controlling company or subsidiary of a bank is a member may be effected without the prior written approval of the registrar.

There is no statutory or other definition of ‘affiliate’, but generally speaking ‘affiliate’ would include:

- subsidiaries of a bank (being companies in which the bank holds or controls a majority of the voting rights at either shareholder or board level either through itself or through one or more other subsidiaries);
- controlling companies of a bank (being a company of which the bank is a subsidiary as referred to above or a company that otherwise controls a bank by meeting certain requirements in the Banks Act referred to in question 18); and
- joint ventures, divisions and branch offices of the bank referred to in question 5.

A bank is not permitted to:

- hold shares in any company of which such bank is a subsidiary;
- lend money to any person against security of its own shares or of shares of its controlling company;
- grant unsecured loans or loans against security which in the opinion of the registrar is inadequate for the purpose of furthering the sale of its own shares;
- show bad debts, losses or certain costs as assets in its financial statements or returns;
- pay out dividends on its shares or open any branch or agency before provision has been made out of profits for such bad debts, losses and certain costs;
- act as agent for the purpose of a money-lending transaction between a lender and a borrower, except in terms of a written contract of agency which confirms that the bank acts as the agent of the lender, that the lender assumes all risks and related responsibilities and that payment is not guaranteed by the bank;
- record in its accounting records any asset at a value increased by the amount of a loss incurred upon the realisation of another asset;
- conclude a repurchase agreement in respect of a fictitious asset or an asset created by means of a simulated transaction;
- purport to have concluded a repurchase agreement without the agreement being substantiated by a written document signed by the other party, and the details of the agreement being recorded in the accounts of the bank as well as in the accounts which may be kept by the bank in the name of the other party; and
- pay out dividends from its share capital, without the prior written approval of the registrar.

A bank must hold all its assets in its own name, excluding any asset:

- bona fide hypothecated to secure an actual or potential liability;
- in respect of which the registrar has approved in writing that the asset may be held in the name of another person; or
- falling within a category of assets designated by the registrar as assets which may be held in the name of another person.

There have been no changes as to how the above-mentioned activities are classified.

6 What are the principal regulatory challenges facing the banking industry?

New legislation recently published may pose regulatory challenges to the banking industry, since compliance with such legislation will require, among other things, procedural and system changes and amendments to terms and conditions of certain banking products. These include:

- the Consumer Protection Act 2008 (CPA), which became fully effective on 31 March 2011 and which intends, among other things, to:
  - promote a fair, accessible and sustainable marketplace for consumer products and services and for that purpose to establish national norms and standards relating to consumer protection;
  - provide for improved standards of consumer information;
  - prohibit certain unfair marketing and business practices; and
  - promote a consistent legislative and enforcement framework relating to consumer transactions and agreements; and
- the Protection of Personal Information Bill.

Generally, the Bill’s purposes appear twofold, namely to protect personal information at the national level and to ensure a free flow of information or data within South Africa and between countries. Specifically, the Bill aims to:

- give effect to an aspect of the right of privacy, by ensuring that personal information is protected. This right, found in section 14 of the South African Constitution, is balanced against other rights, particularly the rights of access to information and freedom of expression;
- facilitate the free flow of information both within South Africa and across borders; and
- establish minimum thresholds, which are in line with international standards, to regulate processing of personal information (the ‘information protection principles’).

The Companies Act 2008, which repealed the Companies Act 1973, introduced new concepts into South African law regarding, inter alia, the incorporation, registration, organisation and management of companies and set-up of new oversight and regulatory bodies.

7 How has regulation changed in response to the recent crisis in the banking industry?

Notwithstanding the turmoil experienced in international financial markets, the South African banking system remained stable and the banks were adequately capitalised. South African banks have been largely shielded against the direct effects of the global financial crisis. The reasons given were, among others, the fact that domestic banks had not invested heavily in high risk or complex instruments and had very limited foreign credit exposure on their loan books.

There were therefore no changes to regulations or to practices by regulatory authorities, other than the amendments to the regulations to comply with the Basel Capital Accord (please refer to question 17).
The SARB has also become more closely involved in international forums, particularly the Group of Twenty (G-20), as part of a coordinated global policy response to the crisis. In addition, the SARB has maintained a greater focus on financial stability in general.

8 In what ways do you anticipate the legal and regulatory policy changing over the next few years?

No major changes are anticipated other than compliance with any amendments to the Basel Capital Accord and harmonising domestic regulatory standards with minimum international standards. According to the SARB, the changes should not have a material impact on South African banks, which remain well capitalised and characterised by low leverage ratios. The proposals regarding liquidity are likely to pose a greater challenge, but given the relatively long phasing-in period, they are not viewed as being insurmountable (please refer to question 17).

The government has recently announced that in line with global developments, there are further steps to be taken to enhance the regulatory framework and improve financial services. The proposed reforms include a shift to a ‘twin peak’ system of financial regulation, with market conduct under the Financial Services Board and prudential regulation in the SARB. An inter-agency financial stability oversight committee will be formed, and a Council of Financial Regulators.

Supervision

9 How are banks supervised by their regulatory authorities? How often do these examinations occur and how extensive are they?

Banks are subject to inspections by the regulatory authorities. Official inspection can take various forms. Banks are requested and required by various pieces of legislation to submit, at regular intervals, specific financial and other reports, which are then analysed by the regulatory authorities with a view to spotting undesirable developments, such as potential default trends.

In addition, banks are subjected to on-site inspections in which case the authorities undertake a type of external audit of the bank, but with specific reference to the prudential and conduct-of-business requirements. Regulatory bodies may also conduct inspections when complaints are received by the public. Informally, supervisors may also engage in presentations to and meetings with the board of directors of banks.

10 How do the regulatory authorities enforce banking laws and regulations?

Laws and regulations are enforced by virtue of powers granted in terms of applicable legislation, which may include requiring the bank to hold more capital and even the imposition of fines. In extreme circumstances, banking licences may be revoked.

11 What are the most common enforcement issues and how have they been addressed by the regulators and the banks?

Enforcement of legislation is addressed in terms of powers granted by the different Acts. In addition, regulators may have the statutory power to issue guidelines (in the form of circulars as to how the provisions of the Acts are to be applied and interpreted) and directives based on the provisions of the Acts for certain (more detailed) activities and how these are to be conducted.

The most common enforcement issues were introduced when the NCA became effective. If forms part of a new wave of measures aimed at protecting consumers (see question 6) and making credit and banking services more accessible. The NCA changed the legal landscape regarding consumer credit comprehensively and apart from the cost of compliance which was prohibitive, numerous problems of interpretation have also given rise to a spate of litigation.

12 How has bank supervision changed in response to the recent crisis?

Please refer to question 7.

Capital requirements

13 Describe the legal and regulatory capital adequacy requirements for banks. Must banks make contingent capital arrangements?

A bank must manage its affairs in such a way that the sum of its primary and secondary capital, its primary and secondary unimpaired reserve funds and (where the bank trades in financial instruments) its tertiary capital in South Africa does not at any time amount to less than the greater of 2.50 million rand or an amount which represents a prescribed percentage of the sum of amounts relating to the different categories of assets and other risk exposures of the bank calculated as prescribed in the regulations relating to banks.

A bank must furthermore hold in South Africa liquid assets amounting to not less than the sum of amounts, calculated as prescribed percentages not exceeding 20 per cent, of such different categories of its liabilities as may be prescribed in the regulations relating to banks. A bank may not pledge or encumber any portion of these liquid assets. The registrar is empowered to exempt the bank from this prohibition on such conditions and to such an extent and for such a period as he may determine.

Although a bank is obliged to furnish the registrar with returns regarding the nature and amounts of the bank’s assets, liabilities and contingent liabilities and returns relating to the extent and management of risk exposures in the conduct of its business, no contingent capital arrangements are required.

14 How are the capital adequacy guidelines enforced?

If a bank fails or is unable to comply with prudential requirements, it must forthwith in writing report its failure or inability to the registrar, stating the reasons therefor. The registrar may summarily take action against the bank, or if he deems fit, may condone its failure or inability and afford it an opportunity to comply. The registrar may by written notice impose a fine on the bank. If the bank fails to pay the fine within the time specified in the notice, the registrar may recover the amount by way of civil action.

15 What happens in the event that a bank becomes undercapitalised?

Please refer to question 14.

16 What are the legal and regulatory processes in the event that a bank becomes insolvent?

If the registrar is of the opinion that any bank will be unable to repay deposits made with it or will probably be unable to meet any other of its obligations, the minister of finance may, if he deems it desirable in the public interest, with the written consent of the CEO or chairperson of the board of directors of that bank, appoint a curator to the bank. On the appointment of a curator the management of the bank vests in such curator, subject to the supervision of the registrar, and those who until then were vested with its management are divested of it. The curator must recover and take possession of all the assets of the bank. The appointment of a curator does not amount to the bank being wound up or liquidated.

Subject to the supervision of the registrar, the curator must manage the bank in such manner as the registrar may deem best to promote the interests of the creditors of the bank and of the banking sector as a whole. Where the curator is of the opinion that there is no
reasonable probability that the continuation of the curatorship will enable the bank to pay its debts or meet its obligations and become a successful concern, he must inform the registrar forthwith of such an opinion.

The provisions of the Companies Act 1973 with respect to the liquidation or winding-up of companies also apply to a bank unable to pay its debts, with a few qualifications:

- a copy of the application for compulsory winding-up and all the founding affidavits must be lodged with the master of the High Court and with the registrar. The registrar or the master may report to the court facts which may justify the court's postponing the hearing or dismissing the application; and
- a copy of the special resolution for the voluntary winding-up of a bank and copy of every order of court amending or setting aside proceedings relating to the winding-up must be lodged with the registrar as well as with the functionaries listed in the Companies Act.

The registrar has the right to apply to court for the winding-up of a bank. Only a person recommended by the registrar may be appointed as the provisional or final liquidator of such a bank. The registrar may also require the appointment of a person designated by him by reason of his knowledge and experience of the banking industry to assist the provisional liquidator, or liquidator.

During the voluntary winding-up of a bank the liquidator must furnish the registrar with such returns or statements which the bank would have been obliged to furnish were it not being wound up, as the registrar may require.

3.5 during the voluntary winding-up of a bank, the liquidator must furnish the registrar with such returns or statements which the bank would have been obliged to furnish were it not being wound up, as the registrar may require.

Have capital adequacy guidelines changed, or are they expected to change in the near future?

The Regulations Relating to Banks, issued under the Banks Act, has recently been amended to give effect to Basel 2.5. These amendments aim to:

- strengthen the risk coverage of the capital framework;
- reduce risk from certain securitisation and off-balance-sheet activities;
- discourage excessive lending;
- strengthen board and senior management oversight in banks and banking groups;
- increase public disclosure; and
- strengthen the oversight of bankers’ remuneration.

These amendments were implemented on 1 January 2012. The SARB is also in the process of finalising further amendments for purposes of Basel III, in order to comply with the latest internationally agreed regulatory and supervisory standards. The minimum requirements contained in the Basel III framework are to be phased in as from 1 January 2013.

Ownership restrictions and implications

Describe the legal and regulatory limitations regarding the types of entities and individuals that may own a controlling interest in a bank.

What constitutes ‘control’ for this purpose?

A bank may be controlled by an approved controlling company, by another bank or by a foreign institution approved by the registrar. A person is deemed to exercise control over a bank if:

- the bank is a subsidiary of the controlling company; or
- that person alone or together with his associates:
  - holds shares in the bank of which the total nominal value represents more than 50 per cent of the nominal value of all the issued shares of the bank, unless he or they are unable to influence decisively the outcome of the voting at a general meeting due to limitations on the voting rights attached to the shares;
  - is entitled to exercise more than 50 per cent of the voting rights in respect of the issued shares of the bank; or
  - is entitled or has the power to determine the appointment of the majority of the directors of that bank.

Are there any restrictions on foreign ownership of banks?

There is no specific restriction of foreign ownership of banks, but there are restrictions on shareholding. In general, a shareholder may not acquire or hold more than 15 per cent of the shares of a bank or controlling company without the permission of the minister of finance or the registrar. In considering the requisite permission, the registrar or minister may consult the Competition Commission. The registrar or the minister must be satisfied that the proposed acquisition of shares will not be contrary to the public interest and to the interests of the bank or its depositors or of the controlling company. Note that exchange control approval will also be required.

What are the legal and regulatory implications for entities that control banks?

Apart from the fact that controlling companies must be registered and approved, investments made by a controlling company or loans and advances made, other than in the banking sector and in fixed property intended for use in the conducting of the business of a bank, may not exceed a prescribed percentage of a prescribed amount.

What are the legal and regulatory duties and responsibilities of an entity or individual that controls a bank?

A controlling company must manage its affairs in such a way that the sum of its primary and secondary capital, reserve funds and its tertiary capital does not at any time amount to less than the prescribed percentage of the sum of amounts relating to the different categories of assets and other risk exposures, calculated as prescribed. In addition, the capital and reserve funds of any regulated entity included in the banking group and structured under the controlling company must not at any time amount to less than the required amount of capital and reserve funds determined in respect of the relevant regulated entity, in accordance with the relevant regulator responsible for the supervision of the relevant regulated entity.

What are the implications for a controlling entity or individual in the event that a bank becomes insolvent?

None.

Changes in control

Describe the regulatory approvals needed to acquire control of a bank.

How is ‘control’ defined for this purpose?

Application for registration as a controlling company must be made in the banking group and structured under the controlling company must not at any time amount to less than the required amount of capital and reserve funds determined in respect of the relevant regulated entity, in accordance with the relevant regulator responsible for the supervision of the relevant regulated entity.

Are the regulatory authorities receptive to foreign acquirers? How is the regulatory process different for a foreign acquirer?

Foreign institutions have acquired shareholding in South African banks. Although the regulatory process is not different for a foreign acquirer in terms of the Banks Act, exchange control approval will nevertheless be required.
What factors are considered by the relevant regulatory authorities in considering an acquisition of control of a bank?

The registrar shall not grant an application for registration as a controlling company unless he is satisfied that:

- the registration of the applicant as a controlling company will not be contrary to the public interest;
- in the case of an applicant intending to control any bank, the applicant will be able to establish control;
- no provision of the memorandum of association or articles of association of the applicant and no interest which any person has in the applicant is inconsistent with the Banks Act;
- every director or executive officer of the applicant is a fit and proper person to hold office and has sufficient knowledge and experience; and
- the applicant is in a financially sound condition.

Describe the required filings for an acquisition of control of a bank.

Please refer to question 23.

What is the typical time frame for regulatory approval for both a domestic and a foreign acquirer?

The time frame is not regulated and it is not possible to estimate.

In its annual report, the SARB focused its attention on the worldwide financial crisis. The SARB is of the view that the crisis showed that financial stability should be seen as a separate objective and the SARB has been given a mandate to take a leading role in maintaining financial stability. To this end, the SARB’s Financial Stability Committee (FSC) has been reconstituted and given responsibility for macroprudential oversight and policy implementation. The SARB’s view is that at this stage there are no obvious threats to domestic financial stability: credit extension by banks is subdued and there is no evidence of incipient asset market bubbles.

The SARB’s microprudential responsibilities have also been impacted by global developments with respect to the regulatory and supervisory environment. As a member of the Basel Committee on Banking Supervision, the SARB has been an active participant in the deliberations on banking regulatory reform (please refer to question 17).
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