



**Tuvalu**

# **BANKING COMMISSION ACT**

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Tuvalu

## BANKING COMMISSION ACT

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Tuvalu

# BANKING COMMISSION ACT

## AN ACT TO REGULATE BANKING AND FOR OTHER PURPOSES<sup>1</sup>

Commencement [1 June 2011]

### PART I PRELIMINARY

#### 1 Short Title

This Act may be cited as the Banking Commission Act.

#### 2 Commencement

This Act shall come into operation on the day on which the Minister by notice appoints.<sup>2</sup>

#### 3 Definitions

In this Act, unless the contrary intention appears:

“**Administrator**” means any person who is an officer of a bank or other juridical person, including any member of the board of directors or the audit committee, or the head of a department of the organisation;

“**Affiliate**” of a bank or other person means a subsidiary of such person or a company of which the person is a subsidiary or a company that is under common control with the person;

“**Bank**” means a person engaged in the business of accepting deposits in Tuvalu from residents and non-residents and using such funds to make extensions of credit or investments for the account of and at the risk of the person carrying on the business, including branches of banks organised in other jurisdictions;

“**Branch office**” means a place of business that forms a legally dependent part of a financial institution and that conducts financial activities;

“**Capital**” means the net worth or own funds of a bank that is the difference between its assets and liabilities in accordance with balance sheet accounts that reflect International Accounting Standards;

“**Capital distribution**” means a distribution of cash or other property by a bank to its owners made on account of that ownership, but not including (i) any distribution consisting only of shares of the bank or rights to purchase such shares or (ii) any amount paid on deposits of a cooperative bank;

“**Commission**” means the Banking Commission established under Part II of this Act;

“**Credit**” means any advances or commitments to advance funds by a bank to a person that are conditioned on the obligation of the person to repay the funds or that are repayable from specific property pledged by or on behalf of the person. The term includes a contractual liability of a bank to advance funds to or on behalf of a person, indebtedness evidenced by a lease financing transaction in which the bank is the lessor and an overdraft funded by the bank on behalf of a person. The term does not include accrued but uncollected interest or discounted interest;

“**Credit documentation**” means, with respect to an agreement entered into by a bank with any other person for the provision of credit:

- (1) financial statements of the borrower dated not more than 12 months as may be required by a bank and any guarantor of the borrower’s indebtedness;
- (2) a description of any collateral over which the lender has any mortgage or charge as security for the due payment of the indebtedness to it and an appraisal of its value;
- (3) a statement of the terms of the credit, including the principal amount, rate of interest, schedule of repayments and the borrower's objective or purpose for borrowing, and a signed note evidencing the borrower’s obligation to repay the amount of credit; and
- (4) the signature of each person who authorised the credit on behalf of the bank;
- (5) financial information, collateral appraisals and inspection reports and officer servicing diaries and notes;

“**Deposit**” means a sum of money received on terms:

- (1) that it is to be repaid in full, with or without interest or premium of any kind, and either on demand or at a time agreed by or on behalf of the person making the payment and the person receiving it; and

- (2) that are not referable to the provision of property or services or the giving of security;

whether or not evidenced by any entry in a record of the person receiving the sum, or by any receipt, certificate, note or other document;

“**Dollars**” means Australian Dollars or the equivalent in non-Australian currency;

“**Equity interest**” means any ownership right or voting right with respect to a person or undertaking;

“**Executive officers**” are those bank officers who have authority to make or influence bank policy;

“**Foreign bank**” or “**foreign branch bank**” means a bank organized under the laws of another jurisdiction with a branch office or subsidiary in Tuvalu;

“**Licence**” means an authorisation issued by the Commission granting the right to a person to engage in financial activities;

“**Minister**” means the Minister responsible for Finance;

“**Person**” includes an individual, a company, partnership, association and any group of persons acting in concert, whether or not incorporated;

“**Principal shareholder**” means a person that owns directly or indirectly ten percent or more of any class of shares with voting rights of a bank;

“**Quorum**” means a majority of the elected board of directors of a bank;

“**Related persons**” to a bank include: (1) any administrator of the bank, (2) any principal shareholder of the bank; (3) any person who is related to such administrator or principal shareholder by marriage, consanguinity to the second degree, or business interest and the business interests of any such person; (4) any legal person that has a significant interest in a person in which the bank has a significant interest;

“**Significant interest**” means a direct or indirect holding of an interest in a person or undertaking that represents the equivalent of twenty percent or more of the equity or of any class of shares with voting rights, or that makes it possible to exercise a significant influence over the management or policies of that person or undertaking;

“**Subsidiary**” means any person in which another person or group of persons acting in concert holds: (1) the equivalent of fifty percent or more of any class of shares with voting rights, or (2) a significant interest that permits such other person or group of persons to exercise effective control over the management or policies of the subsidiary.

#### 4 Prohibitions and exemptions

- (1) No person shall engage in the business of a bank without an effective licence issued by the Commission.

- (2) No person shall use the word “bank” or a derivative of this word in respect of a business, product, or service without an effective licence as a bank issued by the Commission, unless such usage is established or recognized by law or international agreement, or unless it shall be clear from the context in which the word “bank” is used that it does not concern financial activities. With respect to any violation of (1) and (2) of this Section, the Commission may: (a) fine the entity, person, board members, and executive officers (in the case of a corporation) up to five thousand dollars (\$5,000) per day that such violation continues; (b) order the entity or person to cease and desist the offending activity; and (c) if the entity is a Tuvalu corporation, instruct the Registrar of Companies to dissolve the legal entity.
- (3) No bank shall use words in its title that are misleading concerning the bank's financial condition, legal status, or indicating any connection with governmental or international institutions.
- (4) No bank organised outside Tuvalu shall be permitted to engage directly in taking deposits in Tuvalu unless the activity is undertaken through a branch office or subsidiary for which an effective licence has been issued by the Commission.
- (5) No person shall engage in the business of providing non-deposit financial services without first obtaining a licence from the Commission under Part X of the Act.
- (6) No person shall make a misstatement of material fact or false representation or do anything to create a false appearance or engage in any manipulative device or practice in relation to taking of deposits.
- (7) No person required to obtain a license under this Act shall be registered under the Companies and Business Registration Act until the licence has been obtained.

## **PART II     BANKING COMMISSION**

### **5     Establishment of the Banking Commission**

- (1) The Banking Commission of Tuvalu is hereby established as an independent regulatory agency with full capacity under the law of Tuvalu, and, in particular, the capacity to contract, to incur liabilities, to acquire and to dispose of movable and immovable property, and to be a party to legal proceedings.
- (2) The Commission is an independent agency of Tuvalu and shall enjoy operational independence and adequate resources to exercise its powers and fulfil its duties and obligations under this Act and regulations promulgated hereunder. This independence shall be respected and no person shall seek to improperly to influence any Commission Board member or employee in the

discharge of his or her duties or to interfere in the activities of the Commission, except in the execution of a specific authority or duty under the law.

## 5A Organization of the Commission

- (1) The Commission shall have a Governing Board, one Executive Commissioner, and staff as determined necessary by the Executive Commissioner.
- (2) The Governing Board shall be composed of five (5) members: the Executive Commissioner, who shall serve as Chairman, the Minister of Finance, and three citizens of Tuvalu, who shall represent the interests of the general public. Citizen members shall be appointed by the Prime Minister with the advice and consent of Parliament for a term of three (3) years but may from time to time be re-appointed, provided the term of only one citizen member shall expire during any given year. The Prime Minister shall not appoint a person that is related within the second degree of consanguinity to the Prime Minister or any member of his Cabinet. Citizen members may not be an officer, employee or shareholder in a bank or non-deposit financial institution licensed or supervised by the Commission.
- (3) No person shall serve on the Commission, including as a member of the Governing Board or be appointed as Executive Commissioner, while they are a Member of Parliament.
- (4) A member of the Governing Board may resign on written notice to the Prime Minister. Where there is a vacancy on the Governing Board, the Prime Minister shall appoint a new board member in accordance with subsection (2) of this Section.
- (5) A member of the Commission, including any member of the Governing Board and Executive Commissioner, may be removed from office or employment for cause as set forth below upon a finding by the Prime Minister that the member:
  - (a) has become ineligible to serve on the Commission pursuant to subsections (2) or (3) of this Section;
  - (b) has been convicted in any jurisdiction of an offense involving dishonesty or fraud;
  - (c) has become insolvent, bankrupt or otherwise suspended payments to or compounded with their creditors;
  - (d) is guilty of serious misconduct in relation to their duties as may be determined by an independent tribunal commissioned by Parliament, provided at least one member of the tribunal must be or have been a judicial officer in Tuvalu, or another jurisdiction, members of the tribunal have no direct or indirect interest in any bank supervised or regulated by the Commission, and the findings of the tribunal are made public immediately after the removal of the Governing Board member;

- (e) has been disqualified or suspended by a competent authority from practicing a profession;
- (f) has suffered a final judgment for non-payment of a debt and has either not paid the judgment in full or is in arrears in payment under a court order; or
- (g) has been directly or indirectly concerned in the management of a bank or other type of financial institution in any jurisdiction which has had its licence revoked or has been wound up by a court in any jurisdiction.

## **5B Functions of the Governing Board**

- (1) The Governing Board shall adopt policies for the operation of the Commission in accordance with this Act and supervise their implementation. In carrying out its functions, the Governing Board must periodically assess the overall condition of the banking sector.
- (2) The Executive Commissioner shall report not less than once every calendar quarter to the Governing Board on the administration and internal operations of the Commission, on the implementation of the Commission's supervisory and regulatory policies, and on the level of compliance with the Act by banks. The Executive Commissioner shall also report to the Governing Board all events and conditions that have or may be expected to have a significant effect on the administration or operations of the Commission and on the execution of its policies and on banks.

## **5C Powers of the Governing Board**

- (1) The Governing Board shall have the following powers:
  - (a) to establish policies for the supervision and regulation of banks;
  - (b) to formulate and adopt the annual budget of the Commission and submit the same to the Ministry of Finance;
  - (c) to issue the annual report on the activities of the Commission to the Prime Minister and Parliament;
  - (d) to adopt the by-laws of the Commission and determine the policies applicable to the administration and operations of the Commission;
  - (e) to promulgate all regulations and prudential requirements, in accordance with Section 49 of this Act, issued under this Act;
  - (f) to review and approve or reject, on the advice and recommendation of the Executive Commissioner, applications for licences for banks;
  - (g) to adopt supervisory enforcement measures, including but not limited to, the conclusion of memoranda of understanding between the Commission

- and banks' Board of Directors; determination of the insolvency of a bank; or modification, suspension, or withdrawal of licenses of banks;
- (h) to approve all reports and recommendations that the Commission is to make to the Prime Minister or to the Parliament;
  - (i) to decide on the Commission's participation in international organizations;
  - (j) to promulgate staff regulations on the internal organization and job classification in the Commission and rules on the rights, duties, and obligations of the employees of the Commission;
  - (k) to appoint and set the compensation of the Executive Commission and to engage auditors, attorneys, consultants, and other professional advisers;
  - (l) to take enforcement measures under Part VII, including ordering any bank to take remedial actions, or imposing money penalties as may be provided in this Act and any regulations promulgated hereunder; and
  - (m) to decide on all other matters which are by law under the jurisdiction of the Commission.
- (2) The Executive Commissioner shall be responsible for the implementation of decisions by the Governing Board.
- (3) All powers that are not specifically delegated to the Executive Commissioner shall be vested in the Governing Board. Within the limitation of the his or her other powers, the Executive Commissioner shall have the authority to take all actions required or deemed advisable by him or her for the administration or operations of the Commission, including, without limitation: entering into contractual commitments on behalf of the Commission; and appointment the employees of the Commission.
- (4) Notwithstanding the generality of subsection (3), the Executive Commissioner shall:
- (a) manage the operations of the Commission;
  - (b) organize the functioning of the Commission;
  - (c) formulate and enact rules for the functioning and development of the information system of the Commission;
  - (d) commission periodic audits of the administration and operations of the Commission as directed by the Governing Board concerning compliance with the laws and regulations that apply to the Commission;
  - (e) commission an audit of the accounts and records and budgetary and accounting procedures and controls of the Commission as directed by the Governing Board.
  - (f) supervise and regulate, as provided in this Act and other applicable laws and regulations, all banks and shall enforce the provisions of this Act and other applicable laws and regulations;

- (g) examine each bank at least annually or more often as the Executive Commissioner deems necessary to safeguard the interests of depositors, creditors, and stockholders, and to enforce the provisions of this Act, except the Executive Commissioner may defer an examination for no more than six months if the Executive Commissioner considers the deferment necessary for the efficient enforcement of this Act.
  - (h) decide on other matters that are under the jurisdiction of the Executive Commissioner or when authorized by the Governing Board.
- (4) The Commission shall by resolution establish which, if any, duties the Executive Commissioner may assign to the staff.
  - (5) The Executive Commissioner shall receive compensation as may be established by the Commission. Other members of the Governing Board shall receive compensation of \$35 for each meeting of the Governing Board.
  - (6) The Executive Commissioner and staff members of the Commission shall not have other employment, whether gainful or not, without the prior written approval of the Governing Board.
  - (7) Commission members and staff of the Commission have a fiduciary duty to the Commission and to the institutions it regulates to place the Commission's interests and those institutions' interests before their own pecuniary interest.

### **5D Interim powers of the Minister**<sup>3</sup>

Until the Commission commences operations, the Minister shall have the following interim powers:–

- (a) Perform the functions and powers of the Commission, and any reference in this Act to the Commission shall be construed accordingly; and
- (b) The Minister may delegate his functions and powers under paragraph (a) to the Permanent Secretary of Finance.

### **6 Meetings of the Commission**

- (1) The Commission shall meet as often as the business of the Commission may require but not less frequently than once each calendar quarter.
- (2) Special Meetings of the Commission may be called by the Executive Commissioner. Meetings of the Commission may also be called at the written request of a majority of the members of the Governing Board.
- (3) The Commission shall establish rules for the conduct of its meetings, voting, minutes, and other procedural matters.

- (4) Meetings of the Commission shall be open to the public unless matters concerning business confidential information of a bank is being discussed. Meetings may be open to the public in part and closed in part.
- (5) A majority of the Governing Board members shall constitute a quorum for the transaction of business.
- (6) The Attorney General or his or her designee shall act as legal counsel to the Commission.

## **7 Objectives and basic tasks**

- (1) The primary objective of the Commission shall be to ensure the liquidity, solvency and stability of banks in Tuvalu pursuant to the requirements of this Act and any regulations promulgated hereunder..
- (2) The Commission shall license, supervise and regulate banks, provided that nothing herein shall be construed to pre-empt or preclude other entities of the National Government, including, but not limited to, the Attorney General, the Registrar of Companies, and the Bureau of Customs and Taxation, from exercising authority over financial institutions pursuant to laws granting such authority to such entities.

## **8 Cooperation with public bodies**

- (1) The Commission shall cooperate with public authorities in pursuing its objectives and shall, in accordance with this Act, take such actions as it deems necessary to promote such cooperation in the performance of its functions.
- (2) The Commission shall represent Tuvalu in international councils and organizations concerning the supervision and regulation of banks and non-deposit financial service providers.
- (3) The Commission may provide information to international institutions and to supervisory and law enforcement authorities of other nations on banks and non-deposit financial service providers operating in Tuvalu in fostering international cooperation.

### **8A Communications with Parliament**

The Commission shall inform Parliament on a regular and timely basis of its analysis of financial sector developments and on statistical information, including with respect to financial sector structure and payments.

**8B Confidentiality of Information**

- (1) All information obtained, either directly or indirectly, by the Commission relative to the financial condition of any bank, whether obtained through examination or otherwise, except published statements, and all files and records of the Commission relative thereto shall be confidential, and shall not be disclosed by the Executive Commissioner or any officer, employee or agent of the Commission. Further provided that no such information shall be divulged to any member of the Governing Board nor shall any member of the Governing Board be given access to such files, records or information of the Commission; provided, however, the Executive Commissioner may disclose to the Governing information, files and records pertinent to any hearing or matter pending before the Commission. Further provided that the Executive Commissioner may, in his or her discretion, if deemed necessary or proper to the enforcement of the laws of Tuvalu or another jurisdiction, and in the best interest of the public, may divulge information to any public authority or international institution.
- (2) Any person who contravenes this section commits an offence and shall be liable upon conviction to a fine not exceeding \$10,000 or imprisonment for a period not exceeding two years.

**PART III LICENSING****9 Licensing authority of the Commission**

The Commission shall have sole responsibility for the issuance of licences to banks.

**10 Minimum capital and the maintenance bank activities**

- (1) A bank must maintain at all times unimpaired paid up capital of not less than \$2,000,000 (two million) or such higher amounts as the Commission may determine from time to time by order or through regulation.
- (2) The Commission shall establish prudent and appropriate minimum capital adequacy requirements for all banks that reflect the risks that banks undertake to include defining the components of capital. In making a determination under this subsection, the Commission shall have regard to the following:
  - (a) The scale and nature of the bank's financial liabilities, including its deposits;
  - (b) The nature of the bank's assets and the degree of risk associated with them; and
  - (c) The nature of the banking business carried on by the bank.

Provided That: a bank must comply with a determination made by the Commission within one month, or such longer period as the Commission may prescribe, after the determination is made

## 11 Licence application

- (1) Licences shall be applied for in writing to the Commission and shall be accompanied by the following basic information with supporting documentation:
  - (a) the qualifications and experience of the proposed administrators, including business or professional history for the past ten years;
  - (b) the amount of the proposed capital of the financial institution and the amount that may have previously been paid in or subscribed to provided that no capital may be contributed in kind;
  - (c) a business plan setting out, inter alia, the organizational structure, operating procedures and policies, systems of internal controls and the types of financial activities envisaged and projected financial statements for three years.
  - (d) the name, residence, business or professional history for the past ten years and financial statements for the past three years of each person who proposes to be a principal shareholder, and the amount and percentage of proposed shareholding. For the purpose of this subparagraph (4), the proposed ownership interest of affiliated persons shall be aggregated to determine the amount of the proposed ownership interest;
  - (e) for proposed Internet banks as described in Section 39, evidence satisfactory to the Commission of the following:
    - (i) systems to identify, monitor, and control transactional risk from the bank's use of technology are adequate for the nature and scope of proposed activities; and
    - (ii) policies and processes for management of third-party services with respect to oversight and quality control are adequate.
- (2) The Commission may request an applicant to submit such additional or supplemental information as it believes necessary for the proper exercise of its functions.
- (3) The licence relating to a branch office or subsidiary of a bank under the law of another jurisdiction (hereafter referred to as a "foreign bank") shall be applied for by the foreign bank. The application for such licence shall be accompanied by such information, in addition to the information required by subsection (1), as prescribed by regulation.

## 12 Licence decision

- (1) Within two months from the date of its receipt of an application for a licence that has been completed to the satisfaction of the Commission, or its receipt of correspondence regarding the status of or a question about the application for a licence, the Commission shall grant preliminary approval of, or deny, the application and notify the applicant of its decision in writing. Decisions refusing a licence shall include an explanation of the grounds on which the licence was refused and shall not be subject to appeal before the High Court.
- (1A) the grounds for denial of an application may include that the information submitted by the applicant is, in the opinion of the Commission, insufficient to determine whether the applicant meets the criteria for approval of an application, with specific reference to the information deemed to be insufficient.
- (1B) The Commission shall grant a licence only if it is satisfied that:
  - (i) the business plan is based on reasonable assumptions and demonstrates that the bank will become profitable within a reasonable amount of time;
  - (ii) the bank will comply with all provisions of this Act; and
  - (iii) the qualifications, experience, integrity and financial capacity of its administrators and principal shareholders and the capitalization are appropriate for its business plan and for the financial activities that the bank will engage in.
- (2) In the case of preliminary approval of an application for a licence, the Commission shall enumerate the conditions for the bank to receive a licence to commence the business in which it will be authorised to engage. Such conditions shall relate to:
  - (a) the payment by shareholders of initial capital funds;
  - (b) the hiring and training of staff;
  - (c) the lease or purchase of operations equipment and the establishment of operating systems including internal controls;
  - (d) the lease or purchase of a business premises;
  - (e) the engagement of an auditor or chief accountant; and
  - (f) the registration with the Internal Revenue Department (tax office) and, when applicable, with local government authorities.
- (3) If a proposed bank fails to comply within one year with the conditions to receive the licence to commence operations, the preliminary approval for the application for a licence shall become void.
- (4) If the Commission determines that the conditions described in paragraph (2) of this Section (which conditions may also include an on-site examination of the

institution's premises) have been satisfied, the Commission shall issue forthwith final approval for a licence to commence operations.

- (5) Licences concerning a subsidiary or branch office of a foreign bank shall be granted only if:
  - (a) the foreign bank is authorised to engage in the business of receiving money deposits or other repayable funds in the jurisdiction or foreign country where its head office is located;
  - (b) the competent authorities that supervise the financial activities at the head office of the foreign bank concerned have given their written consent to the granting of such licence; and
  - (c) the Commission determines that the foreign bank is adequately supervised on a consolidated basis by its home country supervisory authorities.
- (6) Branches of foreign banks must maintain assigned capital of an amount to be prescribed by regulation under terms and conditions satisfactory to the Commission.

### **13 Scope of licence fees**

- (1) A licence shall be granted for an indefinite period of time and shall not be transferable. It shall be a condition to each licence that is granted that the licensee shall maintain compliance with the licencing criteria of section 12 for the duration of the licence.
- (2) The Commissions may charge fees for: (i) the initial processing of a licence application; and (ii) the issuance of a preliminary approval for a licence. Such fees shall not be refunded if a licence application is denied. A bank does not commence business or ceases operations or if the licence is revoked pursuant to Section 14.

### **14 Revocation of a licence**

- (1) The licence of a bank may be revoked only by the decision of the Commission upon request from the bank, following an infraction under the Act, or one or more of the following grounds:
  - (a) the licence has been obtained on the basis of false information submitted by or concerning the application, including regarding the qualifications, experience or integrity of its proposed administrators and principal shareholders, or other material irregularities that occurred in connection with the licence application;
  - (b) the bank has exceeded the terms of its licence or failed to commence operations within three months after receipt of the licence, or such further period as may be determined by the Commission;

- (c) another bank that holds a significant interest in the bank has had its licence revoked;
  - (d) a merger, amalgamation, or sale of substantially all the assets of the bank has occurred;
  - (e) the owner or owners of the bank have decided to dissolve or to liquidate the bank, or the bank has ceased to exist as a legally or operationally independent entity; or
  - (f) the activities of the bank during its first three years of operation differ substantially from those presented in the application for a licence and, in the opinion of the Commission, such deviation is not justified by changed economic circumstances; and
  - (g) the bank has submitted to the Commission false material information concerning the bank's financial condition.
- (2) Before any action is taken under subsection (1)(a) of this Section, the Commission shall give a bank written notice of its intentions to do so, and shall afford the bank a reasonable opportunity to show cause at a meeting of the Commission with a quorum present why such action should not be taken. The Commission shall consider any representations made by the bank and shall issue its decision in writing, with specific grounds for its decision. Any decision of the Commission shall be based on good cause shown. A decision by the Commission shall be final and shall not be subject to appeal before the High Court.
- (3) The licence issued to a foreign bank concerning one or more branch offices must be revoked by the Commission if the foreign bank does not have the authority, or has lost the authority, to engage in the business of receiving money deposits or other repayable funds in the foreign country where its head office is located.
- (4) A decision by the Commission to revoke or not to revoke a licence shall be communicated forthwith in writing to each bank or branch office and shall give the grounds for the decision.

## 15 Publication and effect of licence revocation

- (1) The decision to revoke a licence shall within 72 hours be made public through publication of a notice to that effect in one newspaper of general circulation or by radio broadcast through a prominent radio station .
- (2) The decision to revoke a licence shall become effective on the date of such publication by exhibition or on such a later date as the decision shall specify.
- (3) During the winding up of its affairs, the bank shall otherwise continue to be subject to the supervision and regulation of the Commission, as if it were licenced.

## **PART IV ORGANISATION AND ADMINISTRATION**

### **16 Organisation and independence**

- (1) Banks, except branches of foreign banks, shall be bodies corporate under the Companies Act or any other relevant law with shares registered in the name of the beneficial owner. The provisions of this Act shall prevail to the extent of any inconsistency with the Companies Act or other relevant laws; in particular, the minimum capital required by this Act must be fully paid in.
- (2) Branches of foreign banks shall have a board of directors and committees, as prescribed in Sections 20 - 22, as if the branch were a locally organized corporation.
- (3) Each bank shall enjoy legal, operational, financial and administrative autonomy from any other person, including the Commission and any agency or political subdivision of the government, unless the law, this Act or regulations or orders issued pursuant thereto specifically otherwise provide. This autonomy shall be respected and no person shall seek improperly to influence any administrator of a financial institution, except in the execution of a specific authority or duty under the law.

### **17 Management, books of account and identity of banks incorporated in Tuvalu**

- (1) A bank incorporated in Tuvalu must have a full-time manager in Tuvalu who has the authority to act on behalf of the bank.
- (2) A bank's books of accounts, including a daily ledger, must be kept in Tuvalu.
- (3) A bank must trade only in the name designated on its licence.

### **18 Restrictions on ownership and holdings**

- (1) To have legal effect, the transfer, in one or more transactions, of an equity interest in a bank shall require the prior written authorisation of the Commission if, as a result of such transfer, any one person or number of persons acting in concert would, directly or indirectly, become a principal shareholder in such financial institution or would own more than twenty percent of the aggregate of all ownership interests, of the bank. Decisions shall be based upon whether, as determined by the Commission, the qualifications, experience, and integrity of the proposed shareholders, the source of the funds used and the financial capacity of the person to provide additional financial support if needed by the bank are appropriate for their significant ownership of the bank.
- (2) No bank shall, alone or in concert with one or more persons, directly or indirectly: (i) hold an equity in a juridical person or undertaking that is engaged

in other financial activities that either represents a significant interest or exceeds as to its net current value the equivalent of fifteen percent of the bank's paid-in capital; or (ii) permit the aggregate net current value of all such equity interests to exceed the equivalent of fifty percent, or such greater percentage as the Commissions shall establish from time to time by regulation of the bank's regulatory capital.

- (3) No such authorisation under subsection (2) shall be required for:
- (a) Equity interests that have been acquired in lieu of repayment of credit granted by the bank, in which case the bank shall entirely dispose of such equity interests within one year from the date they are acquired or within such longer period of time as the Commission may decide not exceeding two years; or
  - (b) Equity interests held as an agent.

## **19 Mergers, etc.**

- (1) To have legal effect, the acquisition, merger, amalgamation or sale of substantially all assets of a bank, or the assumption by any entity of any amount of deposit liabilities of a bank, shall require the prior written authorisation of the Commission.
- (2) Determination shall be based upon whether the proposed transaction would result in a substantial lessening of competition and on whether the criteria described in Section 12 are met, as though the determination were for the issuance of an initial licence.

## **20 Administrative structure of banks**

- (1) The board of directors of banks shall be responsible for establishing the policies for the operations of the bank and for supervision of their implementation.
- (2) Each bank shall have an audit committee. Each bank shall also have a risk management committee or separate credit and asset and liability management committee.
- (3) The board of directors of a bank shall be comprised of an uneven number of neither less than five nor more than nine members. A majority of board members must not work as administrators of the bank. Board members of the bank shall be appointed by the general meeting of shareholders of the bank for a period of not more than four years; they may be re-appointed for subsequent periods. The general meeting of shareholders of a bank may establish remuneration for board members; provided, however, that remuneration of the board of directors and administrators shall be subject to approval of the Commission for the first three years of a bank's operations.

- (4) The board of directors of a bank and its members cannot delegate their responsibilities to others.
- (5) All persons elected or appointed as administrators of a bank must at all times be of good repute and must meet the criteria established by regulation regarding qualifications, experience and integrity. Prior to assuming office, members of the board of directors of a bank must be approved by the Commission.

## 21 Disqualification and removal

- (1) A person shall not be eligible to become or to continue as a member of the board of directors of a bank if he or she has:
  - (a) By law been deprived by a court or a regulatory body of a competent jurisdiction of the right to sit on the governing body of a juridical person;
  - (b) Served at any time during the immediately preceding twelve-month period, on the Commission;
  - (c) Been convicted of a crime for which he or she could have been sentenced to imprisonment;
  - (d) Been a party to a transaction that violates this Act, as determined by the Commission; or
  - (e) Suffered a final judgment for non-payment of a debt or has been an administrator of an entity that has been liquidated because of insolvency.
- (2) Members of the board of directors of a bank, except those who have filed a written obligation against proposed credits, shall be jointly and severally liable for losses sustained by a bank from credit extended in violation of Section 29. Such liability may not be paid directly or indirectly by the bank which they serve or by the proceeds of any professional liability insurance or other indemnity policy.
- (3) A natural person who is a principal shareholder of a bank or a principal shareholder of a juridical person that is an affiliate of a bank and who is described in subsection (1) above shall divest his or her interest in voting shares of the bank to below the level of a principal shareholder or the affiliate of a bank shall divest its interest in voting shares of the bank to below the level of principal shareholder. If he or affiliate fails to do so within sixty days of becoming disqualified, his or the affiliate's shares in the bank shall lose the right to vote and to receive capital distribution. After an additional period of six months, if the divestiture is not accomplished, the Commission may order that all shares in the bank held by the principal shareholder or affiliate of the bank be transferred to a receiver for sale at auction and the net proceeds, less expenses of sale, will be remitted to the disqualified shareholder or affiliate.

## 22 Committees

- (1) Each bank shall establish an audit committee that shall consist of three members appointed by the general meeting of shareholders of the bank for a period of two years which shall be renewable. A foreign bank shall have an audit committee appointed by its local board of directors. A person shall not be eligible to serve on the audit committee if he is described in subsection (1), parts (a) – (e) of Section 21. Members of the board of directors shall not concurrently serve on the audit committee. Members of the audit committee shall receive compensation in amounts to be determined by the board of directors of the bank and approved by the Commission. The audit committee shall:
  - (a) establish appropriate accounting procedures and accounting controls, including those prescribed by the Commission, supervise compliance with such procedures, recommend to the general meeting of shareholders the appointment of external auditors when applicable, and, as it deems appropriate, commission ad hoc audits at the expense of the bank of some or substantially all of the bank's books and records;
  - (b) monitor compliance with this Act and laws and regulations applicable to the bank and report to the board of directors thereon;
  - (c) engage experts at the expense of the bank to assist in the fulfillment of the committee's responsibilities; and
  - (d) deliver opinions on any matters submitted to it by the board of directors or that it wished to address.
- (2) The audit committee shall meet ordinarily once per quarter and extraordinarily when convened by the board of directors or by two of its members. Decisions shall be taken by a majority of the members present and abstentions shall be allowed. Minutes of the meetings shall be recorded.
- (3) Each bank shall establish a risk management committee that shall consist of three members of the board of directors who shall serve for a term of two years which shall be renewable. The risk management committee shall:
  - (a) establish and monitor implementation of policies and procedures for credit appraisal, loan administration, and asset and liability management including those prescribed by regulation, including such matters as underwriting standards, approval of large extensions of credit and all equity investments, requirements for collateral for credit, requirements for single and related borrower lending limits, requirements for the placement of loans and advances on non-accrual or suspended interest status, overdraft facilities, classification of and provisioning for value-impaired assets, pursuit of borrowers and issues in default and managing interest rate and market risk.
  - (b) monitor compliance with the laws and regulations applicable to credit and other risks and report to the board of directors thereon; and

- (c) deliver opinions on any matter submitted to it by the board of directors or that or that it wishes to address.
- (4) The risk management committee shall meet ordinarily once per month and extraordinarily when convened by the board of directors or by two of its members. Decision shall be taken by a majority of the members present and no abstentions shall be allowed.
- (5) Banks may establish separate credit and asset and liability management committee to perform functions described in subsection (3).
- (6) Banks located in outer atolls (outside Funafuti), or banks of small size, may request authority from the Commission to maintain a partial or total overlap in the composition of their board of directors, audit committee and risk management committee. The Commission, when considering such a request, shall take into consideration the size of the bank and the community, and whether compliance with subsection (a) of this section would present a hardship to the bank. In the event that approval is granted, the committee or committees as so constituted shall perform all of the functions prescribed under this Act of boards of directors, audit committees and risk management committees.

## 23 Secrecy

- (1) Current and former administrators, employees and agents of banks shall keep secret, and not use for personal use or gain by other banks that they serve or have served, or permit to be examined by others, any non-public information that they obtained in the course of their service to the bank.
- (2) The information described in subsection (1) may be disclosed only to the Commission, including its inspectors and the auditors appointed by it, to external auditors of the bank, to juridical authorities as the law shall provide, to foreign bank supervisory authorities, to staff of public international finance organizations in performance of their duties, and when the protection of the bank's own interest in legal proceedings requires disclosure.

## 24 Prevention of money laundering

- (1) This section is subject to the requirements of the Proceeds of Crime Act.
- (2) No bank shall conceal, convert or transfer cash or other property knowing that such property is derived from criminal activity, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in such activity to evade the legal consequences of his action.
- (3) The knowledge described in subsection (2) may be inferred from objective factual circumstances.

- (4) Notwithstanding Section 23, banks shall on their own initiative inform authorities in Tuvalu responsible for combating money laundering of any evidence that property is derived from criminal activity and provide, at the authorities' request, any additional information, in accordance with the procedures established by applicable legislation. Banks shall accept as clients only those whose identity and beneficial ownership is known and whose source of funds and wealth can reasonably established to be legitimate.
- (5) Banks shall establish written policies on the identification of and follow-up on suspicious activities, and they shall retain records of customer transactions for at least five years.

## **25 Disclosure of conflict of interest; fiduciary obligations**

- (1) An administrator of a bank who is party to a material contract or a proposed material contract with the bank or is an administrator of, or has a material interest in or a material relations to any person who is a party to a material contract or a proposed material contract with the bank, shall disclose in writing to the bank the nature and extent of the material interest or relation.
- (2) The disclosure required by subsection (1) shall be made by the administrator when the contract or proposed contract comes or ought to reasonably come to the attention of the administrator.
- (3) A general notice in writing to the board of director of the bank by an administrator, disclosing from time to time, not no less than annually, the names and addresses and reasonable full particulars of the administrator's material, commercial, financial, agricultural, industrial or other business or family interests that such a person has at the time, and stating that the person is to be regarded as interested in any material contract between the bank and any person named in the disclosure, shall be a sufficient declaration of conflict of interest, if so disclosed, shall not disqualify the interested person for purposes of constituting a quorum.
- (4) An administrator who has a material interest or a material relation within the scope of subsections (1) or (2) shall leave any meeting at which the contract or proposed contract discussed, and shall refrain from voting on any matter related thereto that becomes the subject of action by the board of directors of the banks, provided that such interest, if so disclosed, shall not disqualify the interested person for purposed of constituting a quorum.
- (5) For the purposes of subsections (1) and (2), an interest shall materialize if it is material with reference to wealth, business or family (any person who is related by marriage or the second degree of consanguinity) interests of the person having the interest, and a person has a material interest in any company if the person owns, directly or indirectly, a significant interest in the company, or is an administrator of the company, and any partnership if the person is a partner.

- (6) Where an administrator fails to disclose a material conflict of interest in accordance with this section:
  - (a) a court of competent jurisdiction may, on the application of a bank, a bank shareholder or the Commission set aside the contract on such terms as it thinks fit; and
  - (b) the Commission may, by written order, suspend the administrator from office for any period not exceeding one year, or remove the administrator for office permanently.
- (7) Administrators and employees of banks have a fiduciary duty to the bank that they serve and to the bank's customers to place the bank's interests and its customers' interests before their own personal interests.
- (8) Banks shall introduce suitable arrangements and procedures so that they and their administrators and employees are not placed in a situation where their duty to one customer conflicts with duty to another, or where their own interest conflicts with their duty to a customer.

## **PART V OPERATIONAL REQUIREMENTS**

### **26 General prudential principles**

- (1) Banks shall conduct their administration and operations in accordance with sound administrative and accounting procedures, the requirements of this Act and the regulations and orders issued by the Commission.
- (2) Banks shall maintain adequate capital and sufficient liquid resources and ensure that their assets are diversified as to risk of loss.

### **27 Financial activities**

- (1) Banks shall be authorised in their licence to engage in financial activities described in subsection (2) below and other activities as the Commission may from time to time determine are incidental to the business of banking.
- (2)
  - (a) receiving deposits (in the form of demand deposits, time deposits, or other forms of deposits) which may or may not bear interest in one currency;
  - (b) buying or selling for a bank's own account debt securities or guaranteed by the Government of Tuvalu or by government or central banks of the G-10 or European Union countries that are denominated and payable in Dollars and that have a term to maturity not exceeding one year;
  - (c) extending credit to households and to enterprises;

- (d) providing payment and collection services;
  - (e) issuing and administering means of payment (including payment cards, travellers' checks and bankers' drafts);
  - (f) buying and selling for exchange for cash and for the account of a customer;
  - (g) providing for safekeeping of securities and other valuables; and
  - (h) such other activities as may be prescribed by regulation.
- (3) No bank shall engage in activities that exceed those authorised by its licence.

## **28 Prohibited anti-competitive transaction and practices**

- (1) Banks shall not enter into transactions or engage in practices that would provide them, alone or together with others, a position of dominance on the money, capital or foreign exchange markets, and not engage in manipulative devices or practices that could result in an unfair advantage for themselves or for third parties.
- (2) No bank shall require any person to contract to receive any financial service or any goods or other service from an affiliate as a condition of being permitted to contract with the bank to receive any financial service.
- (3) No bank shall provide credit enhancement for or extend credit to facilitate the purchase of underwritten securities, placed or distributed by it or its affiliates.

## **29 Prudential requirements**

- (1) Banks shall observe the following limits and those prescribed by regulation:
  - (a) the ratios and exposures to be maintained by a bank concerning its assets, risk-weighted assets, and off-balance sheet items and various categories of capital and reserves; provided, that the regulatory capital to risk-weighted assets ratio shall not be less than fifteen percent (15%);
  - (b) the maximum aggregate amount of credits that a bank shall be permitted to have committed or outstanding to or for the benefit of any single person or group of interrelated persons as shall be defined by regulation shall be not exceed twenty percent (20%) of its regulatory capital; and
  - (c) the aggregate amount of credits that exceed ten percent of a bank's regulatory capital shall not exceed eight hundred percent (800%) of a bank's regulatory capital.
- (2) Banks shall observe the following requirements when prescribed by regulation:
  - (a) requirements concerning the minimum aggregate amount of liquid assets or specific categories of such assets in relation to the amount of liabilities or specific categories of liabilities;

- (b) requirements concerning the maximum aggregate amount of real estate investments or specific categories thereof;
  - (c) requirements concerning the classification and evaluation of assets and provisions to be made on the basis of such classification and evaluation against substandard and non-performing loans, and the time when earnings on non-performing loans may no longer be accounted for as income except as received in cash; and
  - (d) prohibitions, restrictions or conditions concerning:
    - (i) the types of forms of credits and investments made;
    - (ii) matching as to maturity and interest rate in respect of assets and liabilities; and
    - (iii) unhedged positions in foreign currencies, precious metals or precious stones, exceeding a specific size.
- (3) No bank shall make a capital distribution if, in the opinion of the Commission, after making the distribution, the bank would have less than the minimum regulatory capital. Each bank must inform the Commission of its intention to make a capital distribution and the amount thereof thirty days prior to the proposed distribution.
- (4) No bank may engage directly in industry, commerce or services other than banking activities.
- (5) No bank shall extend credit secured by its own equity securities.
- (6) No bank shall purchase its own equity securities without prior authorisation from the Commission which will be refused if , in the opinion of the Commission, the bank has or would have after the proposed transaction less than the minimum amount of capital.

### **30 Corporate records and records of transaction**

- (1) Every bank shall prepare and maintain at its head office written records containing:
- (a) its charter and by-laws and all amendments thereto;
  - (b) a register of its shareholders, including the number of shares registered in the name of each shareholder;
  - (c) minutes of each meeting and resolutions of the shareholders and board of directors;
  - (d) accounting records exhibiting clearly and correctly the state of its business affairs, explaining its transactions and financial position so as to enable the Commission to determine whether the institution has complied with all the provisions of this Act;

- (e) records showing, for each customer, on a daily basis, particulars of its transactions with or for the account of that customer, and the balance owing to or by that customer; and
  - (f) such other records as required by this Act, or by regulation or order of the Commission.
- (2) Every foreign bank shall cause to be created and shall maintain at the branch office in Tuvalu copies of proper credit documentation.

### **31 Community reinvestment**

Each bank has an obligation to help to meet the credit needs of credit-worthy residents from which it obtains deposits, including low-income residents, consistent with maintaining the solvency and liquidity of the bank.

### **32 Transactions with related persons**

- (1) Banks shall not enter into a transaction with or for the benefit of related persons of the bank, if such transaction would be entered into on less favourable terms and conditions, or would not be entered into at all, with or for the benefit of persons who are not so related to the bank.
- (2) No bank shall extend credit to or for the benefit of a related person as is as a result thereof: (i) the aggregate amount outstanding on all credits extended by the bank to any one person so related to the bank would exceed ten percent of a bank's regulatory capital; or (ii) the aggregate amount outstanding on credits to all persons so related to the bank would exceed one hundred percent of the bank's regulatory capital.
- (3) Credit extended by any bank to any related financial institution shall be subject to additional conditions or restrictions as shall be prescribed by regulation of the Commission. For the purposes of this subsection, a related financial institution shall be any institution in which the bank holds a significant interest.

## **PART VI ACCOUNTS, FINANCIAL STATEMENTS, AUDIT, REPORTING, EXAMINATION**

### **33 Accounts and financial statements**

- (1) Banks shall maintain at all times accounts and records and prepare annual financial statements adequate to reflect their operations and financial conditions in accordance with International Accounting Standards Board and other international standards setting bodies.

- (2) Accounts and financial statements shall be in such form and detail as shall be prescribed by regulation.
- (3) The accounts, records and financial statements of a bank shall reflect the operations and financial condition of its subsidiaries and branch offices, both on and individual and on a consolidated basis.

### **34 Audit**

- (1) No later than 120 days following the end of the financial year, each bank shall be audited by an independent, external auditor approved by the Commission and recommended to the general meeting of shareholders by its audit committee. The audit committee shall:
  - (a) assist it in maintaining proper accounts and records, including the manner prescribed by the Commission according to Section 33 (2);
  - (b) prepare an annual report together with an audit opinion as to whether the financial statements present a full and fair view of the financial condition of the bank according to the provision of this Act;
  - (c) review the adequacy of internal audit and control practices and procedures and make recommendations for remediation;
  - (d) within 120 days of the end of the financial year, submit a copy of the audit report and audit letter to the Commission; and
  - (e) inform the Commission about any fraudulent act by an employee of the bank or any of its subsidiaries or any irregularity or deficiency in its administration or operations that should be expected to result in a material loss for the bank or such subsidiary.
- (2) For banks whose assets do not exceed an amount established by regulation, the functions described in subsection (1) may be performed by their chief accountant; provided, however, that such accountant shall have no less than five years of professional experience or such other qualifications as may be defined by regulation.

### **35 Disclosure**

- (1) Each bank shall:
  - (i) within thirty days of each calendar quarter, post in its lobby at a point accessible to the general public a fair and true summary of its quarterly balance sheet in such format as may be prescribed by the Commissioner at the end of the previous calendar quarter;
  - (ii) within four months of the end of the financial year, post in its lobby at a point accessible to the general public a fair summary of its financial statements in accordance with the regulations;

- (iii) for banks subject to Section 34(1), within four months of the end of the financial year, publish its auditor's opinion for the preceding financial year;
  - (iv) publish an annual report; and
  - (v) provide copies of its annual report to the public on request without charge.
- (2) Each bank shall regularly notify its customers of the precise nature of the business of the bank, and of the terms and conditions associated with the deposits made and credits received by them, including the compound annual interest rate of interest, in accordance with regulations.
- (3) Branch offices of foreign banks shall publish balance sheets and income statements at a "branch office only" and on a consolidated basis.

### **36 Reports and examinations**

- (1) Each bank shall prepare and submit to the Commission reports concerning its administration and operations, liquidity, solvency, and profitability, and those of its subsidiaries, for an assessment of the financial condition of the bank and each of its subsidiaries on an individual and a consolidated basis. The reports shall be prepared in such form and detail and shall be submitted at such intervals as shall be prescribed by regulation.
- (2) Each bank and each of its subsidiaries shall be subject to examination by examiners or auditors appointed by the Commission. If the Commission determines to use auditors, then it may require the bank to pay the expense of such auditors. The Commission's examiners may include officials of the authority or another country that is charged with the prudential supervision of financial activities in that country if it concerns the examination of a bank that is a branch or subsidiary of a foreign bank that has its head office in that country; or has a significant interest in a foreign bank that is located in that country.
- (3) The Commission's examiners and its auditors may, with respect to a bank:
- (a) examine the accounts, books, documents and other records of the bank or its subsidiaries; and
  - (b) require administrators, employees and agents of the bank or subsidiary to provide all such information on any matter relating to its administration on any matter relating to its administration and operations as the shall reasonably request.
- (4) Each bank and each of its subsidiaries shall admit and cooperate fully with the examiners of the Commission and any auditors appointed by the Commission. No one shall attempt to harass, intimidate, or exert undue influence on an examiner of the Commissions or the auditors appointed by it.

- (5) Each affiliate of a bank and providers of professional or operations services to banks shall provide such information to the Commission as the Commission may reasonably request concerning the bank's operations and relations with such persons.

## **PART VII INFRINGEMENTS, PENALTIES, REMEDIAL MEASURES**

### **37 Infringements, penalties, remedial measures**

- (1) The remedial measures and penalties provided for infringements described in this section shall be determined by the Commission.
- (2) The Commission must take the following actions or impose the following penalties with respect to a bank if it determines that the bank or any of its administrators or principal shareholders is guilty of an infringement consisting of: (i) the violation of a provision of this Act or of any regulation or order of the Commission; or (ii) the violation of any condition or restriction attached to an authorisation issued to a bank by the Commission:
  - (a) issue written warnings;
  - (b) enter into a written agreement with the board of directors providing for a program of remedial action;
  - (c) issue written order to cease and desist from such infractions and to undertake remedial action;
  - (d) impose civil penalties on the bank or on its administrators or principle shareholders in an amount of one hundred dollars to one thousand dollars per day for each day that the infraction continues; provided, however, that civil penalties shall be of similar amount for comparable banks with comparable total assets for the same type of infraction;
  - (e) suspend temporarily or dismiss administrators from positions in a bank;
  - (f) impose restrictions on the operations of the bank;
  - (g) revoke the bank's licence and order it to dissolve under applicable law; or
  - (h) revoke the bank's licence and appoint receiver for the bank under this Act.
- (3) In addition to the measures described in subsection (2) above, the Commission shall require the bank to adopt a capital restoration plan satisfactory to the Commission that provides for a bank to attain capital adequacy within 30 days from the determination of the Commission.
- (4)

- (a) The civil penalties described in subsection (2) may be applied to any person who violates any of the provision of Section 4.
  - (b) The Commission shall also, notwithstanding any other provision of law, be authorised to liquidate the business of such person.
- (5) It shall be a criminal offence punishable by a maximum fine of \$10,000 or imprisonment for a maximum of five years, or both, for a person to wilfully make a misstatement of material fact or fail to state a fact necessary to make information presented not misleading in connection with an application for credit to a bank.
- (6) The measures and penalties provided in this section shall not preclude application of other civil penalties or criminal penalties as provided in other legislation in force.
- (7) Any civil penalties imposed in accordance with subsection (2) (d) or proceeds realized in accordance with (4) (b) shall be paid to the Consolidated Fund.

## **PART VIII ELECTRONIC BANKING**

### **38 Computer access**

- (1) Banks may provide to their customers remote access to their accounts through computers by proprietary personal computer software or the Internet (hereinafter “computer access”).
- (2) Banks that permit computer access may permit customers to transfer funds between accounts, initiate payments and apply for credit by computer.
- (3) Banks that permit computer access must provide customers using computer access with a privacy policy statement that includes information about what information concerning customers is to be collected and how the information will be used, and permit such customers to opt out of information sharing concerning them by banks with their affiliates or with non-affiliated third parties.
- (4) Banks providing computer access must maintain adequate security for their Internet or proprietary platforms, including adequate systems for customer authentication and for physical and logical protection against unauthorised external access by individual penetration attempts, computer viruses, denial of service and other forms of electronic access.

### 39 Internet banking

- (1) Banks may be established that provide services to customers through delivery channels, including the Internet, automated teller machines and telephone, and by mail, but not at physical offices (hereinafter “Internet banks”).
- (2) Internet banks must have adequate systems to identify, monitor and control transactional risk from the bank’s use of technology.
- (3) Internet banks must have adequate security for their Internet platforms, including adequate systems for customer authentication and for physical and logical protection against unauthorised external access by individual penetration attempts, computer viruses, denial of service and other forms of electronic access.
- (4) Internet banks may provide operational functions themselves or with third party service providers; provided that the third party service providers agree that their services to the bank will be subject to regulation and examination by the Commission to the same extent as if such services were being performed by the bank itself on its own premises. Such operational functions may include item processing, Web hosting, credit checking, credit and debit services, customer service, data processing, Internet service access and processing loan operations.
- (5) Internet banks may host Web pages of third parties or provide links to third-party web sites to enable banks’ customers to receive financial products and services; provided that banks shall make clear to customers when they are establishing a transaction with the bank and when they are not. Such banks must advise customers that they do not provide or guaranty the products or services available to customers through third party Websites. Banks may receive funder’s fees for purchases by their customers of third party products or services originated from banks’ Websites.

## PART IX RECEIVERSHIP FOR BANKS

### 40 Bases for initiation of receivership

- (1) If the Commission determines that a bank is insolvent, the Commission must revoke the licence of that bank and forthwith take possession and control of that bank through a receiver appointed by the Commission.
- (2) For the purposes of this Act:
  - (a) a bank shall be deemed to be insolvent if:
    - (i) the bank is not paying its obligations in full as they fall due; and
    - (ii) the value of the liabilities of the bank exceeds the value of the assets of the bank.

- (b) the value of the bank's assets, liabilities and regulatory capital shall be determined in accordance with valuation standards and procedures prescribed by regulation.
- (3) A receiver may be a person from the private sector or a person appointed by the Commission who meets the qualifications prescribed by regulation. The Commission may, for good cause, dismiss a receiver it appoints. The Commission shall establish the terms of the receiver's compensation, consistent with the requirements of Section 45 (1) which may include incentives for meeting the objectives described in Section 42 (1) and penalties for failure to meet such objectives.
- (4) The compensation of the receiver and the experts that are engaged, reimbursement of their expenses, and expenses of the Commission in execution of this Part with respect to a bank shall be paid from the assets of the bank. Payments to the receiver shall be made on a current basis if in the judgment of the receiver there are sufficient liquid assets; provided, however, that the receiver's agents shall not receive in any calendar month a larger pro rata share in payment than depositors described in Section 43 (1) (a) receive in payment of their claims. Any moneys owing to the receiver at the end of the term of receivership shall be paid from the proceeds from the sales of the bank assets with the priority described in Section 43.

#### **41 Notice and registration of receivership**

- (1) Whenever a receiver is appointed, the receiver shall within two days of such appointment post in each office of the bank a notice announcing such action pursuant to this Act, specifying the effective date and time of possession by the receiver and specifying that:
  - (a) authorisation of bank employees to commit the financial responsibility of the bank transactions with customers has been cancelled;
  - (b) persons who previously had authorisation to give instructions on behalf of the bank with respect to payment or transfer of the bank's assets or assets managed by the bank are no longer so authorised;
  - (c) the bank's licence has been revoked.
- (2) The receiver shall within 72 hours of such appointment, publish a notice to the same effect in one newspaper of general circulation or by radio broadcast through a prominent radio station and arrange for the publication of such notice in a similar manner each week for the next four weeks. .

#### **42 Powers and duties of receiver; effects of receivership**

- (1) A receiver shall have all the powers of the administrators and shareholders of the bank for which he or she has been appointed and, notwithstanding that the

bank's licence has been revoked, may, subject to subsection (2), operate the bank in its own name, and shall take the action in selling the bank or its assets that, in his or her opinion, is likely to result in satisfying more of the bank's liabilities to depositors and other creditors within one year from the date of his or her appointment; provided, that the Commission may extend the receivership for a further period of up to six months if, in its opinion, such extension will result in a material increase in the satisfaction of the bank's liabilities. Subject to the primary objective of maximum satisfaction of the bank's liabilities to creditors, the receiver shall expedite the sale of the bank or its assets and payments to creditors.

- (2) A receiver may:
  - (i) continue any operations other than the taking of deposits and extending credit to other than existing customers in relation to outstanding assets;
  - (ii) discontinue any operations;
  - (iii) borrow money on an unsecured basis, if borrowing is not possible on the security of the assets of the bank;
  - (iv) stop or limit the payment of any obligation;
  - (v) employ or dismiss any officer, employee, or professional advisor; and
  - (vi) execute any instrument in the name of the bank, and initiate or defend and conduct in its name any action or legal proceeding.
- (3) The receiver shall have unrestricted access to and control over the offices, books of account and other records, and other assets of the bank for which he or she has been appointed and its subsidiaries. Any person who wilfully interferes with a receiver's access to and control over the offices, books of account and other records, and other assets of a bank for which he or she has been appointed shall be guilty of a criminal offence and subject to imprisonment for a period of not less than one year nor more than five years or fined in an amount not less than one thousand dollars per day nor more than ten thousand dollars per day for each day that the offense continues, or both. At the request of a receiver, a police officer shall assist the receiver to gain access to bank premises or control over bank records and other assets by use of force, without the need for an order of a court of law.
- (4) The Commission shall approve or deny a merger of the bank with another bank, or sale of substantially all the bank's assets to any one bank, subject to Section 19 of this Act.
- (5) The powers of the administrators shall be suspended during a receivership; provided, however, that they may be instructed by the receiver to exercise specified functions for the bank; further provided, that such persons are subject to dismissal by the receiver from their positions at the bank and shall thereupon cease to receive compensation from the bank.

- (6) Forthwith upon his or her appointment, the receiver shall secure the assets of the bank to seek to prevent their dissipation by theft or other improper action, by taking actions including, but not limited to, the following:
  - (a) changing the locks (and limiting access to the new keys) on external entrances to the bank's offices and on doors to internal offices which contain financial assets or information or equipment which could enable a person to gain unlawful access to financial assets;
  - (b) changing or establishing access codes to the bank's computers and granting access to not more than three trustworthy employees; or
  - (c) suspending the payment of capital distributions in general and payment of any kind to administrators and principal shareholders; provided, however, that base compensation may be paid to administrators for services rendered in their capacity as administrators of the bank.
- (7) Forthwith upon his or her appointment, the receiver shall establish a new balance sheet for the bank, based on his or her determination of liquidation values of the bank's assets with a corresponding reduction in the value of the bank's liabilities in the reverse order of priority in payment of distributions in a liquidation of a bank's assets described in section 43. Liabilities shall be deemed due and payable and interest shall cease to accrue as of the date of the appointment of the receiver. Unmatured liabilities shall be discounted to present value at the discount rate published by the Commission on the date of appointment of a receiver.
- (8) Within one month of taking possession of a bank, the receiver shall make an inventory of the assets and property of the bank and transmit a copy thereof to the Commission, which shall make a copy available for examination by the public.
- (9) After fifteen days from the date of his or her appointment, the receiver may make available for withdrawal by depositors or payment to other creditors such amounts as in his or her opinion may appropriately be used for that purpose; provided, however, that all depositors or other creditors who are similarly situated shall be treated in the same manner; and further provided, that before a general distribution of payments to creditors of the bank or the assumption of the bank's liabilities by another bank, creditors other than those described in Section 43 (1) (b) shall receive no more than fifty percent of the amount of their allowed claims as determined by the receiver.
- (10) When a receiver has taken possession of a bank:
  - (a) shareholders' rights shall be extinguished except for the right to receive dividends, if any, under Section 43 (4) and the right to receive any net payment received from the sale of the bank or substantially all its assets if the receiver determines that the bank had positive net worth at the time of sale; and

- (b) the receiver may sell the assets of the bank, or arrange for the assumption of liabilities of the bank on terms he or she considers fair.
- (11) The procedures for determining of the validity and priority of claims and for liquidation of bank assets and return of bank customers' property shall be prescribed by regulation; provided, however, that the sale of bank assets shall be in a transparent and commercially reasonable manner by one or more methods of auction or negotiated transactions.
- (12) Any assets of the bank that have not been sold at the end of the term of the receivership may be abandoned by the receiver or given to a charitable institution that promotes public health or education that wishes to accept them. Creditors of the bank shall have no claim against any such assets.
- (13) The receiver shall report each month to the Commission on the progress of the receivership, including the most recent financial statements of the bank, statements of sources and uses of funds, information concerning the prospects for the sale of the bank or its assets, and projections of payment of the bank's liabilities.

#### **43 Priorities in payment of claims**

- (1) In any liquidation of a bank's assets, allowed secured claims shall be paid to the extent of the realization of the security or the security shall be delivered to the secured creditor, and from the proceeds other allowed claims shall be paid in priority to all other debt, in the order of the class of claims of claims described below:
  - (a) necessary and reasonable expenses incurred by the receiver and the Commission, including professional fees, in application of the provisions of this Part;
  - (b) deposits up to an amount not exceeding two thousand dollars per depositor; and
  - (c) other claims of creditors against the bank.
- (2) If the amount available for payment for any class of claims listed under subsection (1) is insufficient to provide payment in full, such claims shall abate in equal proportions.
- (3) After payment of all claims filed, any remaining allowable claims that were not filed within the time specified by regulation for filing shall be paid.
- (4) Any proceeds remaining after all claims of depositors and other creditors have been paid shall be distributed among shareholders of the bank in accordance with their rights and interests.

**44 Final reporting to the Commission**

- (1) Once the proceeds for the sale of assets of a bank have been distributed pursuant to Section 43, the receiver shall provide a report to the Commission that includes income and expense and sources and uses of funds statements during the period of receivership.
- (2) Upon approval by the Commission of the report by a receiver described in subsection (1), the Commission and the receiver shall be relieved of any further responsibility in connection with the receivership of a bank.

**45 Miscellaneous receivership provisions**

- (1) Professional employees appointed to represent or assist a receiver or the Commission in connection with a receivership shall not be paid amounts greater than are payable to employees or agents of banks for similar services, except that the Commission may authorise payment at higher rates, if the Commission determines that paying such higher rates is necessary in order to recruit and retain necessary personnel.
- (2) The Commission shall have authority to indemnify a receiver and his or her agents for their actions on such terms as the Commission deems proper.
- (3) All claims arising out of or in connection with the insolvency of a bank or a bank in receivership against a bank receiver or the Commission in relation to a bank licenced under this Act shall be finally settled in accordance with the provisions of this Act. No appeals from the acts of a receiver or the Commission may be taken except that the bank's shareholders holding not less than ten percent of any class of shares with the right to vote may appeal against the appointment of a receiver for a bank.
- (4) Any court proceeding arising out of or in connection with a bank insolvency or a bank in receivership against a bank administrator, receiver, or the Commission in relation to a bank licenced under this Act shall be brought before the Supreme Court.
- (5) If the owners of a bank wish to voluntarily liquidate the bank under other law, they shall submit a request for approval of the liquidation to the Commission accompanied by such information as may be prescribed by regulation. The Commission shall make due inquiry into the affairs of the bank and may approve the voluntary liquidation under other applicable law or determine that this Act applies and appoint a receiver pursuant to Section 41.

## PART X NON-DEPOSIT FINANCIAL SERVICES

### 46 Providers of non-deposit financial services to be licenced

- (1) A person desiring to provide one or more non-deposit financial services in Tuvalu shall apply to the Commission for a licence authorising it to engage in that activity. The applicant shall provide the Commission such information concerning its administrators, principal shareholders, financial condition and proposed operations including its business plan, as the Commission may request; and the application shall be accompanied by such fee as the Commission may prescribe. In acting upon the proposal, the Commission shall consider whether the qualifications, experience and integrity of the applicant's administrators and principal shareholders, and the proposed capitalization, are appropriate for its business plan and for the non-deposit financial services the applicant proposes to offer. The Commission shall have discretion to approve the proposal where it makes favourable findings on the above criteria; and to disapprove the proposal where the findings are unfavourable. The Commission may impose such conditions in connection with its issuance of a licence to a provider of non-deposit financial services as it believes appropriate.
- (2) Providers of non-deposit financial services shall comply with Section 24 of this Act aimed at the prevention of money laundering.
- (3) The Commission, may make guidelines and policy statements applicable to providers of non-deposit financial services. The Commission may invoke the remedial measures provided in Part VII in connection with such entities; and it may, at its discretion, determine that provisions of this Act are applicable to providers of non-deposit financial services as well.

## PART XI MISCELLANEOUS

### 47 Licences of existing institutions; compliance with the Act

- (1) Entities conducting the business of a bank or non-deposit provider of financial services in Tuvalu on the effective date of this Act that wish to continue such operations must submit an application to the Commission in accordance with Section 1 (in the case of banks) or Section 46 (in the case of providers of non-deposit financial services) within 90 days following the effective day of this Act. Entities that have not submitted an application by such a date or whose application has been denied pursuant to the provisions of Section 12 or Section 46 of this Act shall cease to conduct their business of a bank or non-deposit provider of financial services and wind up their affairs. Cessation of business or winding up shall be in accordance with applicable laws or regulations, and shall be initiated within ninety days after the effective date of this Act, in the

case of a bank or a non-deposit provider of financial services that has not submitted an application, or on the date of notification of denial of their licence application, in the case of a bank or non-deposit provider of financial services whose application has been denied. The Commission may, at its own discretion, appoint a receiver to liquidate the business of entities that must wind down their affairs in accordance with the provisions of this subsection. The Commission may, for good cause shown, extend the time periods provided for compliance with this subsection.

- (2) Banks and non-deposit providers of financial services whose organisation, administration, operations or financial condition do not comply in one or more material respects with the requirements of this Act or with any regulation issued pursuant thereto shall comply with the requirements of this Act as follows: (i) for requirements described in Part I, within twelve months from the effective date of this Act; for the requirements described in Parts V and VI, within eighteen months from the effective date of this Act; provided, that the Commission may extend such periods for a maximum term of six months. The Commission shall also be authorised, for good cause shown, to allow non-deposit providers of financial services appropriate transitional periods for compliance with this Act.
- (3) Notwithstanding Section 27, banks with customers existing on the date of introduction of this Act to Parliament to whom a bank had credit outstanding on average of at least ten thousand dollars in the previous twelve months may continue to extend such credit to such customers.

#### **48 Supervisory powers of the Commission**

The Commission shall be empowered to issue orders, or guidance, to visit such offices of banks and non-deposit providers of financial services, and to examine such accounts, books, documents and other records as the Commission shall deem necessary or advisable to give effect to the provisions of this Act. Without limiting the generality of the foregoing grant of authority, the Commission shall be authorised, at its discretion, to:

- (a) issue guidelines or standards relating to the protection of consumers in connection with their dealings with banks and non-deposit providers of financial services.
- (b) taking into account the existence, or the absence, of competition in the delivery of banking and non-deposit financial services, to establish standards regarding the maximum level of fees and charges that may be levied by banks and non-deposit providers of financial services in connection with the provision of banking services to consumers in Tuvalu.

## 49 Regulations

- (1) Only the Commission shall be empowered to propose regulations, issue orders or guidance, visit the offices of banks, and to examine such accounts, books documents and other records as the Commission deems necessary or advisable to give effect to the provisions of this Act. Provided, however, no regulation proposed by the Commission shall become effective without the approval of Parliament.
- (2) The Commission shall forward all proposed regulations to the Prime Minister who shall within ten (10) calendar days of the next sitting of Parliament forward the proposed regulation to the Parliament.
- (3) A regulation proposed by the Commission may be approved or disapproved by a resolution of Parliament within 60 (sixty) calendar days of its submission by the Prime Minister. Any regulation proposed by the Commission which is not acted upon by the Parliament within 60 (sixty) calendar days of its submission by the Prime Minister shall be considered approved and become effective and fully enforceable by the Commission.

## 50 Judicial review

- (1) Except as otherwise provided in this Act, all actions and decisions of the Commission shall be subject to review by the High Court.
- (2) Notwithstanding, any other provisions of law, in any court proceeding arising out of or in conjunction with this Act that is filed against the Commission or an officer, employee, or agent thereof:
  - (a) the sole question before the High Court in determining whether the defendant exceeded clear authority acted in an arbitrary or capricious manner in light of the facts and the relevant laws and regulations.
  - (b) an administrator, employee, or agent of the Commission shall not be liable for damages or otherwise liable for acts or omissions performed pursuant to and in the course of his or her duties and responsibilities unless such acts or omissions constitute intentional wrongful conduct; and
  - (c) the action of the Commission in question may continue without restriction during the period of an appeal and any further judicial proceedings related to the appeal, unless the person initiating the review can demonstrate:
    - (i) that failure to stay, enjoin or suspend the action would cause such person irreparable harm; and
    - (ii) that such person has a shown a strong likelihood of success on the merits.

**51 Repeal and Saving**

- (1) This Act repeals the Banking Act 2010.
- (2) This Act has effect despite the Companies Act 1991 and if there is any conflict between the provisions of this Act and the Companies Act 1991, the provisions of this Act prevail.

**ENDNOTES**

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<sup>1</sup> Act 3 of 2011

Amended by Act 4 of 2015, commencement 21 October 2015 (GN 30/2015)

<sup>2</sup> GN 27/2015

<sup>3</sup> Inserted by Act 4 of 2015