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GOVERNMENT NOTICE

SOUTH AFRICAN RESERVE BANK

No. 2

1 January 2008

BANKS ACT, 1990 (ACT NO. 94 OF 1990)**DESIGNATION OF AN ACTIVITY NOT FALLING WITHIN THE MEANING OF
“THE BUSINESS OF A BANK” (SECURITISATION SCHEMES)**

Under paragraph (cc) of the definition of “the business of a bank”, in section 1 of the Banks Act, 1990 (Act No. 94 of 1990), I, Errol Melville Kruger, Registrar of Banks, hereby designate, with the approval of the Minister of Finance, the activity set out in paragraph 2 of the Schedule, and which is performed in accordance with the conditions set out in paragraphs 4 to 16 of the Schedule, as an activity that does not fall within the meaning of “the business of a bank”.

E M KRUGER
Registrar of Banks

SCHEDULE

1. In this Schedule, **“the Act”** means the Banks Act, 1990 (Act No. 94 of 1990), and any word or expression to which a meaning has been assigned in the Act shall bear such meaning and, unless the context otherwise dictates-

“asset” means an asset as defined in the Framework for the Preparation and Presentation of Financial Statements in terms of Financial Reporting Standards, as amended from time to time;

“asset-backed commercial paper (“ABCP”) programme” means a programme in terms of which predominately commercial paper with an original maturity of one year or less is issued to investors, which commercial paper is backed by assets or other exposures held in an insolvency remote special-purpose institution, or such other programme as may be specified in writing by the Registrar;

“associate” means an associate as defined in International Accounting Standard 28 (AC 110), Investments in Associates, as amended from time to time;

“associated company”, in relation to an institution other than a bank or an institution within a banking group that transfers assets in terms of a traditional securitisation scheme or risk in terms of a synthetic securitisation scheme to a special-purpose institution, means a subsidiary or fellow subsidiary of that institution and includes an associate of that institution;

“clean-up call” in relation to-

- (a) a traditional securitisation scheme means an option that makes provision for-
 - (i) the commercial paper issued in terms of the said securitisation scheme to be called or repaid before all the underlying or securitisation exposures have been repaid;
 - (ii) the repurchase of the remaining securitisation exposures and assets,

that is, the repurchase of the remaining securitisation exposures and assets once the pool balance or outstanding securities have fallen below a specified level;

- (b) a synthetic securitisation scheme means a contractual provision or clause that provides for the termination of credit protection when the amount of the underlying exposures is less than a specified amount;

“commercial paper” means-

- (a) any written acknowledgement of debt, irrespective whether the maturity thereof is fixed or based on a notice period, and irrespective whether the rate at which interest is payable in respect of the debt in question is a fixed or floating rate; or
- (b) debentures or any interest-bearing written acknowledgement of debt issued for a fixed term in accordance with the provisions of the Companies Act; or
- (c) preference shares,

but does not include bankers' acceptances;

“Commercial Paper Notice” means Government Notice No. 2172, published in *Government Gazette* No. 16167 on 14 December 1994;

“Companies Act” means the Companies Act, 1973 (Act No. 61 of 1973), as amended;

“credit-enhancement facility” means any facility or arrangement in terms of which the provider of such a facility or obligor under the arrangement is obliged to absorb losses associated with-

- (a) the assets transferred in terms of a traditional securitisation scheme; or
- (b) the risk transferred in terms of a synthetic securitisation scheme,

including both a first-loss credit-enhancement facility and a second-loss credit-enhancement facility;

“credit-enhancing interest-only strip” means an asset that-

- (a) represents a valuation of cash flows related to future margin income; and
- (b) is subordinated;

“credit rating” means a rating assigned by an eligible institution to commercial paper issued in respect of a traditional or synthetic securitisation scheme;

“delayed payment on asset” means a delayed payment on assets that does not result directly or indirectly from a default or potential default in respect of the underlying asset, but which results, *inter alia*, from administrative or technical difficulties experienced in respect of the collection of payments in respect of the underlying asset;

“disclosure document” means—

- (a) a prospectus; or
- (b) a placing document; or
- (c) an offering circular; or
- (d) any other document with similar import,

published in order to provide certain information relating to a traditional or synthetic securitisation scheme to prospective investors in the said securitisation scheme;

“domestic rating” means a rating that-

- (a) is tiered against an assumed best possible rating, which is usually that of the national Government;
- (b) does not incorporate the sovereign risks of South Africa;
- (c) gives an indication of the relative risks only within the Republic of South Africa; and
- (d) may not necessarily be comparable across different countries;

“equity share capital” means equity share capital as defined in section 1 of the Companies Act;

“excess spread” in relation to a securitisation scheme means income received by a special-purpose institution, net of any relevant costs and expenses;

“Financial Services Board” means the board established by section 2 of the Financial Services Board Act;

“Financial Services Board Act” means the Financial Services Board Act, 1990 (Act No. 97 of 1990), as amended;

“first-loss credit-enhancement facility” means a credit-enhancement facility that represents the first level of credit enhancement in a traditional or synthetic securitisation scheme;

“implicit support” means support provided by a bank or another institution within a banking group of which such a bank is a member to any party involved in a securitisation scheme in excess of a predetermined contractual obligation;

“insolvency remote”, in respect of a special-purpose institution, means that the assets of such a special-purpose institution shall not be subject to any claim of an institution-

- (a) transferring assets in terms of a traditional securitisation scheme; or
- (b) transferring risk in terms of a synthetic securitisation scheme,

to the special-purpose institution, as a result of such a transferring institution's insolvency;

“institution” includes a bank or any other institution within a banking group;

“institutions within a banking group” means the following institutions that may form part of a banking group:

- (a) All banks in such a group.
- (b) All subsidiaries, joint ventures, or associates of such banks.
- (c) The controlling company of such banks.
- (d) All other subsidiaries, joint ventures and associates of such bank controlling company.
- (e) Any other entity designated by the Registrar;

“liquidity facility” means a facility provided in respect of a traditional or synthetic securitisation scheme in order to cover deficiencies in cash flows within the said securitisation scheme(s), resulting from, amongst other things,

- (a) time differences between the payment of interest and principal on the assets transferred, or other payments due in terms of a traditional securitisation scheme, and payment in respect of the senior commercial paper; or
- (b) time differences between the payment of interest and principal on assets that serve as collateral, purchased in terms of a synthetic securitisation scheme, and payment in respect of the senior commercial paper; or
- (c) market disruptions; or
- (d) a combination of any of the matters specified above,

and which facility does not constitute a credit-enhancement facility;

“national Government securities” means all loan stock issued by the national Government or instruments guaranteed by the national Government;

“originator” in relation to-

- (a) a traditional securitisation scheme means an institution that, whether at the commencement or during the life of the traditional securitisation scheme, transfers assets from its own balance sheet, which assets are assets other than national Government securities or qualifying items, in terms of a traditional securitisation scheme;
- (b) a synthetic securitisation scheme means an institution that, whether at the commencement or during the life of the synthetic securitisation scheme, uses a credit-derivative instrument to transfer the risk associated with a specified pool of assets, other than national Government securities or qualifying items, to investors without actually selling the assets;
- (c) an asset-backed commercial paper programme means an institution that serves as a sponsor in respect of the programme that acquires exposures other than from the sponsor’s own balance sheet,

Provided that when-

- (i) the assets, other than national Government securities or qualifying items, referred to in paragraph (a) above; or
- (ii) the risk associated with a specified pool of assets, other than national Government securities or qualifying items, referred to in paragraph (b) above,

constitute 10 per cent or less of the total assets or risks transferred, such an institution shall for purposes of this Schedule be regarded as-

- (A) a repackager; or
- (B) when such an institution also acts as a sponsor in respect of the same securitisation scheme, as a sponsor;

“parties involved in a securitisation scheme” means a special-purpose institution, parties acting in primary roles and parties acting in secondary roles;

“preference share”, when issued by a special-purpose institution that is a company, means such preference shares not forming part of the equity share capital of the special-purpose institution;

“primary role” means the participation by an institution in a traditional or synthetic securitisation scheme as an originator, remote originator, sponsor or a repackager;

“qualifying items” means all loan stock listed on the Bond Exchange of South Africa, or any other loan stock listed on a financial exchange licensed by the Financial Services Board;

“Registrar” means the Registrar of Banks designated in terms of section 4 of the Act;

“remote originator” means an institution that directly or indirectly lends money to a special-purpose institution in order for the special-purpose institution to take transfer of assets in terms of a traditional securitisation scheme or risk in terms of a synthetic securitisation scheme;

“repackager” means an institution that, whether at the commencement or during the life of a traditional or synthetic securitisation scheme, acquires and subsequently-

- (a) transfers the assets; or
- (b) transfers the risk relating to assets,

consisting of national Government securities or qualifying items of third parties via its balance sheet in terms of a traditional or synthetic securitisation scheme: Provided that an institution that, whether at the commencement or during the life of the traditional or synthetic securitisation scheme, acquires and subsequently transfers the assets or risk(s) relating to assets, consisting of assets other than national Government securities or qualifying items of third parties via its balance sheet in terms of the said traditional or synthetic securitisation scheme, shall for purposes of this Schedule be regarded as an originator;

“revolving assets” mean loan facilities or other underlying transactions in terms of which debtors under such loan facilities or other underlying transactions are permitted to vary, within an agreed limit, the amount utilised in terms of the underlying transaction, or to repay amounts in terms of the underlying transactions at their own discretion, subject, in certain circumstances, to a minimum amount per payment period or in accordance with a fixed repayment schedule;

“secondary role” means the participation by an institution in a traditional or synthetic securitisation scheme, as a provider of a credit-enhancement facility, a provider of a liquidity facility, an underwriter, a purchaser of senior commercial paper, a servicing agent or a counterparty to a transaction included in the trading book of a bank;

“second-loss credit-enhancement facility” means a credit-enhancement facility that represents the second and further levels of credit enhancement in a traditional or synthetic securitisation scheme: Provided that-

- (a) such facility benefits from a substantial first-loss credit-enhancement facility, that is, when the first-loss credit-enhancement facility covers some multiple, as opposed to a fraction, of historical losses or expected losses estimated by way of simulation or other technique; and
- (b) such facility may be drawn only after the first-loss credit-enhancement facility has been exhausted,

and when there has not been compliance with the above conditions, the facility concerned shall for purposes of calculating a bank's prescribed capital requirement be regarded as a first-loss credit-enhancement facility in terms of this Schedule;

“servicing agent” means an institution that acts as servicing agent in relation to the collection of the amounts due in terms of a traditional or synthetic securitisation scheme;

“senior commercial paper” means commercial paper issued in terms of a traditional or synthetic securitisation scheme, the purchase of which commercial paper does not constitute providing a first-loss or second-loss credit-enhancement facility;

“short-term liquidity facility” means a liquidity facility provided in respect of a traditional or synthetic securitisation scheme, for a period of less than one year;

“special-purpose institution” means a company or trust, insolvency remote, incorporated, created or used solely for the purpose of the implementation and operation of a traditional or synthetic securitisation scheme;

“sponsor” in relation to-

- (a) a traditional securitisation scheme means an institution that facilitates, whether at the commencement or during the life of the traditional securitisation scheme, in the capacity of arranger and/or structuror, the indirect transfer of assets, that is, not from the institution's own balance sheet, to a special-purpose institution;

- (b) a synthetic securitisation scheme means an institution that facilitates, whether at the commencement or during the life of the synthetic securitisation scheme, in the capacity of arranger and/or structuror, the indirect transfer of risk, that is, not from the institution's own balance sheet, to a special-purpose institution;
- (c) an asset-backed commercial paper programme means an institution that, in fact or in substance-
 - (i) manages or advises the programme; and
 - (ii) places securities into the market; and/or
 - (iii) provides a liquidity facility to the asset-backed commercial paper programme; or
 - (iv) provides a credit-enhancement facility to the asset-backed commercial paper programme,

which institution shall for purposes of this Schedule be regarded as an originator;

“synthetic securitisation scheme” means a scheme whereby a special-purpose institution-

- (a) issues commercial paper to investors; and
- (b) uses the proceeds of such issuance primarily to obtain-
 - (i) credit-risk exposure relating to-
 - (A) an underlying asset;
 - (B) a reference entity; or
 - (C) a reference asset,through the use of funded or unfunded credit-derivative instruments or guarantees, and
 - (ii) assets that serve as collateral; and

- (c) makes payments primarily-
 - (i) in respect of the commercial paper so issued; or
 - (ii) to an institution acting in a secondary role,

which payments are made from-

- (A) the cash flows arising from the assets that serve as collateral;
and
- (B) the fees and/or premium paid to the special-purpose institution by an institution acting as an originator, remote originator or repackager;

“traditional securitisation scheme” means a scheme whereby a special-purpose institution-

- (a) issues commercial paper to investors; and
- (b) uses the proceeds of such issue primarily to obtain or invest in assets; and
- (c) makes payments primarily-
 - (i) in respect of the commercial paper so issued; or
 - (ii) to an institution acting in a secondary role,

which payments are made from-

- (A) the cash flows arising or proceeds derived from the assets transferred to such a special-purpose institution by an originator or a repackager;
- (B) the cash flows arising or proceeds derived from assets in which the special-purpose institution invested; or
- (C) facilities granted to the special-purpose institution by an institution in accordance with the provisions of this Schedule;

“transfer” in relation to-

- (a) a traditional securitisation scheme means the sale and transfer of assets; or
- (b) a synthetic securitisation scheme means the transfer of risk by means of a credit-derivative instrument or guarantee, or

such other method of transfer as may be directed or specified in writing by the Registrar;

“underlying asset” means-

- (a) an asset transferred in terms of a traditional securitisation scheme; or
- (b) an asset that serves as collateral in terms of a synthetic securitisation scheme;

“underlying transaction” means the transaction in terms of which-

- (a) an asset that is transferred by an institution in terms of a traditional securitisation scheme; or
- (b) the risk that is transferred by an institution in terms of a synthetic securitisation scheme,

had its origin;

“underwriting” means exposure that includes all underwriting commitments, whether in writing or verbally, including all note-issue facilities and revolving underwriting facilities in respect of which the contingent risk arises from the bank's role as underwriter of such issues, guaranteeing to provide funds when other parties have refused to do so.

2. Designation of activity

- (1) Under paragraph (cc) of the definition of “the business of a bank”, in section 1 of the Act, the Registrar hereby designates, with the approval of the Minister of Finance, the acceptance by a special-purpose institution of money from the general public against the issue of commercial paper by the aforementioned special-purpose institution, in respect of either a traditional or synthetic securitisation scheme, as an activity that does not fall within the meaning of “the business of a bank”: Provided that-
 - (a) when an institution within a banking group acts in a primary or secondary role, or both a primary and a secondary role, in respect of-

- (i) a traditional securitisation scheme, there shall be compliance by such an institution within a banking group with the relevant conditions set out in paragraphs 4 and 6 to 17 of this Schedule;
 - (ii) a synthetic securitisation scheme, there shall be compliance by such an institution within a banking group with the relevant conditions set out in paragraphs 5 to 17 of this Schedule,
- (b) when an institution other than an institution within a banking group acts in a primary or a secondary role or both a primary and a secondary role in respect of-
- (i) a traditional securitisation scheme, there shall be compliance with the relevant conditions set out in paragraphs 4 and 14 to 16 of this Schedule;
 - (ii) a synthetic securitisation scheme, there shall be compliance with the relevant conditions set out in paragraphs 5 and 14 to 16 of this Schedule;
- (c) no transactions other than transactions directly relating to a traditional or synthetic securitisation scheme shall be entered into by or on behalf of the special-purpose institution.

3. Interpretation

- (1) In this Schedule, the provisions of the subparagraphs under the headings of "General" provide general commentary and descriptions and-
- (a) shall be ignored in so far as the provisions of the said subparagraphs are in conflict with the specific provisions of the remainder of the Schedule;
 - (b) shall not be regarded as imposing additional obligations on any of the parties involved in a traditional or synthetic securitisation scheme.

4. Traditional securitisation scheme

(1) General

- (a) Normally-
 - (i) a traditional securitisation scheme is likely to involve-
 - (A) the legal and economic transfer of assets to; or

- (B) assets legally and economically acquired by,
- a special-purpose institution that issues commercial paper that are claims against the said assets transferred or acquired;
- (ii) different classes of commercial paper are issued, and each class has a different priority claim on the cash flows originating from the underlying pool of assets;
 - (iii) the junior or subordinated risk positions can absorb losses without interrupting contractual payments to more senior tranches;
 - (iv) the potential risk of loss for the investors in commercial paper issued by the special-purpose institution primarily depends upon the performance of the underlying assets obtained by the special-purpose institution.
- (b) There will tend to be substantially higher loss severity for lower rated tranches in a traditional securitisation scheme than for higher rated tranches. Within a traditional securitisation structure, investors in junior tranches will suffer a total loss before the investors in more senior tranches incur any loss.
- (c) A bank that transfers assets to a special-purpose institution in terms of a traditional securitisation scheme may be allowed to exclude from the calculation of its required capital and reserve funds the assets so sold when the transfer constitutes, amongst other things, a "true sale". A "true sale" is likely to occur when the conditions relating to limiting of association, as specified below, are met.
- (2) *Conditions relating to limiting of association with assets*
- (a) The transfer of assets to or acquisition of assets by a special-purpose institution shall totally divest the transferring institution and all its associated companies and, when the transferring institution is a bank, divest any other institution within the banking group of which such a bank is a member, of all rights and obligations originating from the underlying transactions and all risks in connection with the assets transferred or acquired: Provided that-
 - (i) the transferring institution may in terms of a separate transaction act in a secondary role and, when such transferring institution is a bank, act in such a secondary role in accordance with the requirements specified in this Schedule;

- (ii) when the transferring institution is a bank, which bank wishes to act in a secondary role, a significant amount of credit risk associated with the assets transferred to the special-purpose institution shall be transferred to third parties;
 - (iii) once the assets have been transferred to or acquired by a special-purpose institution, any holder of an instrument subsequently issued by the special-purpose institution shall have the right to pledge or exchange the said instrument without restriction, that is, neither the transferring institution nor any of its associated companies shall have a right to impose restrictive conditions in respect of the ability of investors in instruments issued by the special-purpose institution to pledge or exchange the said instruments, provided that the provisions of this sub-item (iii) in no way shall prevent a special-purpose institution to place restrictive conditions on the transferability of instruments issued by it in accordance with the provisions or requirements of relevant laws issued from time to time in respect of the transferability of specified instruments.
- (b) Subject to the provisions of item (a) above relating to limiting of association with assets, the transferor shall not maintain any effective or indirect control over the assets transferred to a special-purpose institution, that is, the assets shall be legally isolated from the institution that transferred the assets in such a way that the assets and the benefits that relate to the assets shall be placed beyond the reach of the institution that transferred the assets, and its creditors, even in the event of bankruptcy or liquidation, provided that-
 - (i) when the transferring institution is a bank or any other institution within the banking group of which such a bank is a member, the relevant bank/institution shall obtain an opinion from an independent qualified legal counsel, which opinion shall confirm that the bank/institution complies with the requirements specified in item (a) above and in this item (b);
 - (ii) the transferor shall be deemed to have maintained effective control over the transferred assets when the transferor-
 - (A) is able to repurchase from the special-purpose institution the previously transferred assets in order to realise their benefits;
 - (B) is obligated to retain the risk relating to the transferred assets;
 - (iii) the retention of any servicing rights by the institution that transferred the assets to the special-purpose institution in

respect of the assets transferred shall not constitute indirect control of the assets transferred.

- (c) Subject to the provisions of items (a) and (b) relating to limiting of association with assets, neither the special-purpose institution nor any of its creditors shall have a right of recourse against an institution acting in a primary role or any of its associated companies or, when such an institution is a bank, against any other institution within the banking group of which such a bank is a member, in respect of costs, expenses or losses incurred in connection with any of the assets after the transfer thereof in terms of the traditional securitisation scheme.
- (d) Item (c) relating to limiting of association with assets shall not apply when the special-purpose institution has a right of recourse against an institution acting in a primary role or any of its associated companies or, when such an institution is a bank, against any other institution within the banking group of which such a bank is a member in respect of losses incurred in connection with any of the assets after the transfer thereof in terms of a traditional securitisation scheme, and such right of recourse emanates from warranties given by such an institution in respect of assets so transferred: Provided that-
 - (i) the warranties do not relate to the future creditworthiness of the obligor in terms of the assets transferred; and
 - (ii) the warranties do not relate to matters that do not fall within the control of the institution providing the warranties.
- (e) No commercial paper issued to investors by the special-purpose institution in respect of assets transferred shall constitute a direct or indirect obligation of the institution that transferred the assets, that is, investors who invest in commercial paper issued by the special-purpose institution shall only have a claim in respect of the underlying pool of assets transferred.
- (f) When payments in respect of assets transferred in terms of a traditional securitisation scheme are routed through the agency of an institution or any of its associated companies or, when such an institution is a bank, through the agency of any other institution within the banking group of which such a bank is a member, acting in a primary role, neither the said institution nor any of its associated companies shall be under any obligation to remit funds to the special-purpose institution unless and until the payments are actually received from the obligor.
- (g) An asset of an institution or of any of its associated companies or, when such an institution is a bank, of any other institution within the

banking group of which such a bank is a member shall not be transferred to a special-purpose institution if the transfer will result in a breach of any of the terms of the relevant underlying transaction.

- (h) Any contractual arrangement relating to a clean-up call in respect of the assets transferred to the special-purpose institution shall comply with the conditions specified in paragraph 11 below.
- (i) When an institution transfers an undrawn commitment to lend money to a borrower, the transfer shall be effected by-
 - (i) novation;
 - (ii) assignment, accompanied by written consent to the right to transfer the said commitment by the borrower; or
 - (iii) such other means as may be specified in writing by the Registrar.
- (j) The agreement between the institution transferring assets in terms of a traditional securitisation scheme and the special-purpose institution shall be such that, in the event of the terms of an underlying transaction being amended, the special-purpose institution, and not the transferring institution, or any of the transferring institution's associated companies or, when such a transferring institution is a bank, any other institution within the banking group of which such a bank is a member will be subject to the terms so amended.
- (k) A bank or another institution within a banking group of which such a bank is a member, acting in a primary role, may replace, at its own discretion, any asset transferred in terms of a traditional securitisation scheme, excluding a non-performing asset, with an asset of equivalent credit quality.
- (l) A bank or another institution within a banking group of which such a bank is a member, acting in a primary role, may repurchase assets from a special-purpose institution only when such repurchase is conducted in compliance with the conditions specified below.
 - (i) The repurchase of assets shall be conducted on market-related terms and conditions.
 - (ii) Such a bank or other institution within a banking group of which such a bank is a member shall not have any prior obligation to repurchase assets from the special-purpose institution.

- (iii) The repurchase of assets from the special-purpose institution shall be subject to the bank's normal credit approval and review processes.
- (iv) When the institution acting in a primary role is a bank, the total value of assets or risk associated with assets repurchased from a special-purpose institution in terms of this subparagraph, other than in the bank's normal course of trading in Government securities and qualifying items, and held on the books of the bank at any time, shall not exceed 10 per cent of the maximum value of the pool of assets or risk associated with assets held by the special-purpose institution, that is, at least 90 per cent of the risk associated with assets transferred to a special-purpose institution shall be transferred to third parties: Provided that the Registrar may in the Registrar's sole discretion and subject to such conditions as the Registrar may determine allow a bank to repurchase assets in excess of this limitation.
- (v) A bank or another institution within a banking group of which such a bank is a member may repurchase non-performing assets only if such a bank's or other institution's external auditors have certified that the said assets are being acquired at fair market value, which value shall reflect the non-performing status of the asset.
- (vi) To the extent that such a repurchase of assets amounts to such a bank or another institution within a banking group of which such a bank is a member providing a liquidity facility, the provisions in this Schedule relating to liquidity facilities shall apply in addition to the provisions of this subparagraph.
- (m) Once a traditional securitisation scheme has been perfected, the transfer by a bank acting in a primary role of further assets in terms of that scheme shall be permissible only for purposes of maintaining the capital value of the portfolio of assets included in the scheme: Provided that-
 - (i) such a transfer of further assets shall not amount to the provision of a credit-enhancement facility; and
 - (ii) the Registrar may in the Registrar's sole discretion and subject to such conditions as the Registrar may determine allow such a bank to transfer further assets in excess of this limitation.

- (n) When an institution acting in a primary role, by itself or together with its associated companies, and, when such an institution is a bank, such a bank, by itself or together with any institution or institutions within a banking group of which such a bank is a member, enters into a swap agreement with a special-purpose institution that intentionally bears losses in respect of the assets transferred to the special-purpose institution in terms of a traditional securitisation scheme and which losses are for the account of the institution that acts in a primary role, the said institution shall comply with the provisions of paragraph 6 below.
- (o) The securitisation transaction shall not contain any clauses that-
- (i) require from the institution that transferred the assets to alter systematically the quality of the underlying exposures such that the pool's weighted average credit quality is improved;
 - (ii) after the transaction's inception, allow for increases in respect of a credit-enhancement facility provided by the institution that transferred the assets to the special-purpose institution;
 - (iii) increase the yield payable to parties involved in the securitisation scheme other than the institution that transferred the assets, such as investors and third-party providers of credit enhancements, in response to a deterioration in the credit quality of the underlying pool.
- (p) An institution acting in a primary role, by itself or together with its associated companies, and, when such an institution is a bank, such a bank, by itself or together with any institution or institutions within a banking group of which such a bank is a member, shall not-
- (i) in the case of a special-purpose institution that is a company-
 - (A) directly or indirectly acquire or hold any equity share capital in such a special-purpose institution of which the nominal value represents 20 per cent or more of the nominal value of all the issued equity share capital in the special-purpose institution;
 - (B) have the right to determine the outcome of the voting at a general meeting of the special-purpose institution;
 - (ii) in the case of a special-purpose institution that is a trust-
 - (A) directly or indirectly acquire or hold any beneficial interest in or be a beneficiary of such a special-purpose institution of which the value represents 20 per cent or more of the

interest (beneficial or otherwise) in the property forming the subject matter of the special-purpose institution;

(B) have the right to determine the outcome of the voting at a general meeting of the special-purpose institution.

(q) The board of directors or body of trustees, as the case may be, of a special-purpose institution shall be independent of the institution acting in a primary role and whenever such an institution is a bank, of any other institution within a banking group of which such a bank is a member: Provided that an institution acting in a primary role may-

(i) in the case of a company, appoint one director to its board of directors, which board of directors shall consist of not less than three members; or

(ii) in the case of a trust, appoint one trustee to its body of trustees, which body of trustees shall consist of not less than three members.

(r) The name of a special-purpose institution shall not include the name of the bank acting in a primary role or imply any association with such a bank.

(3) *Support beyond contractual terms*

(a) When a bank, or another institution within a banking group of which such a bank is a member, acting in a primary role, in the opinion of the Registrar, provides implicit support to a securitisation scheme, that is, support beyond the predetermined contractual obligation-

(i) the implicit support shall be regarded as a first-loss credit enhancement facility;

(ii) the bank, as a minimum-

(A) shall maintain capital and reserve funds against all exposures associated with the securitisation scheme;

(B) shall not recognise in the bank's capital and reserve funds any gain relating to the securitisation transaction, such as an amount relating to expected future margin income;

(C) shall disclose to the public sufficiently detailed information relating to the implicit support, including the related capital impact of providing implicit support to a securitisation scheme.

(4) *Legal certainty*

- (a) In cases of uncertainty, a bank or another institution within a banking group of which such a bank is a member acting in a primary role shall obtain a legal opinion confirming that the said institution complies with the aforementioned conditions relating to limiting of association with assets.

(5) *Consideration received in respect of assets transferred*

- (a) When a bank or another institution within a banking group of which such a bank is a member, acting in a primary role, transfers assets to a special-purpose institution in terms of a traditional securitisation scheme, the bank or another institution within a banking group of which such a bank is a member shall receive the amount of consideration paid in respect of the assets so transferred no later than the date of the transfer of the assets: Provided that the Registrar may in the Registrar's sole discretion and subject to such conditions as the Registrar may determine allow a bank or another institution within a banking group of which such a bank is a member to receive the amount of consideration in respect of the assets so transferred on a date later than the date of the transfer of the assets.

5. **Synthetic securitisation scheme**

(1) *General*

(a) Normally-

- (i) a synthetic securitisation scheme refers to a transaction whereby an institution uses a credit-derivative instrument to transfer the risk associated with a specified pool of underlying assets, reference entities or reference assets to a special-purpose institution, which risk is stratified into no less than two risk positions that reflect different degrees of credit risk;
- (ii) the junior or subordinated risk positions can absorb losses without interrupting contractual payments to more senior tranches;
- (iii) the potential risk of loss for the investors in commercial paper issued by the special-purpose institution primarily depends upon the performance of the underlying risk exposures obtained by the special-purpose institution;
- (iv) the packaging of risk relating to multiple underlying assets, reference assets or reference entities for transfer creates risks

that are more complex than those for a single asset or a few assets;

- (v) there will tend to be substantially higher loss severity for lower rated tranches in a synthetic securitisation scheme than for higher rated tranches. Within a synthetic securitisation structure, investors in junior tranches will suffer a total loss before the investors in more senior tranches incur any loss.
- (b) The use of a credit-derivative instrument to transfer risk may lead to a change in the risk profile of the assets remaining on a bank's balance sheet, in terms of both the quality and the spread of risk. For example, the transfer of the risk relating to high-quality exposures may lead to deterioration in the average quality of the asset portfolio remaining on the bank's balance sheet.
- (c) Retention or repurchase of significant securitisation exposures by the institution that transferred the risk may undermine the intent of a synthetic securitisation scheme to transfer risk to third-party investors.
- (d) A bank that wishes to engage in a synthetic securitisation scheme shall have in place a robust risk-management framework, the fundamental elements of which framework are specified in regulation 23(9)(d) of the Regulations relating to Banks.
- (e) A reduction in the credit-risk exposure of a reporting bank as a result of a transaction involving a credit-derivative instrument shall be allowed only to the extent that-
 - (i) the bank achieves an effective and verifiable transfer of risk;
 - (ii) such risk mitigation was not already taken into account in the calculation of the required capital and reserve funds of the reporting bank.

(2) *Conditions relating to a transfer of risk, including risk mitigation*

- (a) In the calculation of a bank's required capital and reserve funds as envisaged in section 70 of the Act, the provisions of regulations 23(7), 23(9), 23(12) and 23(14) of the Regulations relating to Banks regarding credit risk-mitigation instruments, including credit-derivative instruments, insofar as the said provisions are relevant, shall *mutatis mutandis* apply to a synthetic securitisation scheme: Provided that-
 - (i) in the case of a conflict between the provisions of the said regulations and this Schedule, the provisions of this Schedule shall prevail;

- (ii) eligible collateral in respect of a bank's risk exposure shall be limited to the instruments specified in regulation 23(9)(b) of the Regulations relating to Banks;
- (iii) a bank may in the calculation of the bank's required capital and reserve funds recognise eligible collateral pledged as security to the bank by a special-purpose institution;
- (iv) eligible guarantors in respect of a bank's risk exposure shall be limited to the guarantors specified in regulation 23(9)(c) of the Regulations relating to Banks;
- (v) a special-purpose institution shall not qualify as an eligible guarantor in relation to any risk exposure incurred by a bank in terms of this Schedule;
- (vi) a significant amount of credit risk associated with the underlying exposure shall be transferred to third party investors;
- (vii) a bank shall calculate any maturity mismatches in respect of credit protection obtained in accordance with the relevant requirements specified in regulation 23(9)(e) of the Regulations relating to Banks provided that-
 - (A) when the exposures in the underlying pool have different maturities, the bank shall use the longest maturity in order to determine the maturity of the pool;
 - (B) subject to the provisions of item (i) below, a bank that adopted the standardised approach for the measurement of the bank's exposure in respect of a securitisation scheme, which bank acts in a primary role, shall in accordance with the requirements specified in regulation 23(6)(h) of the Regulations relating to Banks deduct from its capital and reserve funds all retained positions that are unrated or rated below investment grade;
 - (C) a bank that adopted the IRB approach for the measurement of the bank's exposure in respect of a securitisation scheme, which bank acts in a primary role, shall in accordance with the relevant requirements specified in regulation 23(11) of the Regulations relating to Banks deduct from its capital and reserve funds any retained positions that are unrated;

- (D) a bank shall disregard any maturity mismatch relating to any instrument that is deducted from the bank's capital and reserve funds.
- (b) Subsequent to the transfer of risk by an institution that acts in a primary role to a special-purpose institution in terms of a synthetic securitisation scheme, the said special-purpose institution shall have no right of recourse against an institution acting in a primary role or any of its associated companies or, when such an institution is a bank, against any other institution within the banking group of which such a bank is a member in respect of costs, expenses or losses incurred in connection with any of the risks transferred: Provided that the transferring institution may in terms of a separate transaction act in a secondary role and, when such transferring institution is a bank, act in such a secondary role in accordance with the provisions of this Schedule.
- (c) Item (b) relating to the transfer of risk shall not apply when the special-purpose institution has a right of recourse against an institution acting in a primary role or any of its associated companies or, when such an institution is a bank, against any other institution within the banking group of which such a bank is a member in respect of losses incurred in connection with any of the risk after the transfer thereof in terms of a synthetic securitisation scheme, and such right of recourse emanates from warranties given by such an institution in respect of risk so transferred: Provided that-
- (i) the warranties do not relate to the future creditworthiness of the obligor in terms of the risk transferred; and
- (ii) the warranties do not relate to matters that do not fall within the control of the institution providing the warranties.
- (d) The risk relating to an asset or a credit commitment of an institution or of any of its associated companies or, when such an institution is a bank, of any other institution within the banking group of which such a bank is a member shall not be transferred to a special-purpose institution if the transfer will result in a breach of any of the terms of the relevant underlying transaction.
- (e) A bank or another institution within a banking group of which such a bank is a member, acting in a primary role, may replace, at its own discretion, the risk relating to any asset transferred in terms of a synthetic securitisation scheme, excluding the risk relating to a non-performing asset, with the risk relating to an asset of equivalent credit quality.
- (f) A bank or another institution within a banking group of which such a bank is a member, acting in a primary role, may repurchase risk

relating to an asset from a special-purpose institution only when such repurchase is conducted in compliance with the conditions specified below.

- (i) The repurchase of risk relating to an asset shall be conducted on market related terms and conditions.
- (ii) Such a bank or other institution within a banking group of which such a bank is a member shall not have any prior obligation to repurchase risk relating to an asset from the special-purpose institution.
- (iii) The repurchase of risk relating to an asset from the special-purpose institution shall be subject to the bank's normal credit approval and review processes.
- (iv) When the institution acting in a primary role is a bank, the total value of risk relating to assets repurchased from a special-purpose institution in terms of this item, other than in the bank's normal course of trading in Government securities and qualifying items, and held on the books of the bank at any time, does not exceed 10 per cent of the maximum value of the pool of risk relating to assets held by the special-purpose institution: Provided that the Registrar may in the Registrar's sole discretion and subject to such conditions as the Registrar may determine allow a bank to repurchase risk relating to assets in excess of this limitation.
- (v) A bank or another institution within a banking group of which such a bank is a member may repurchase the risk relating to a non-performing asset only if such a bank's or other institution's external auditors have certified that the said risk is acquired at fair market value, which value shall reflect the risk relating to the non-performing status of the asset.
- (vi) To the extent that such a repurchase of risk amounts to such a bank or another institution within a banking group of which such a bank is a member providing a liquidity facility, the provisions in this Schedule relating to liquidity facilities shall apply in addition to the provisions of this subparagraph.
- (g) Once a synthetic securitisation scheme has been perfected, the transfer by a bank acting in a primary role of further risk in terms of that scheme shall be permissible only for purposes of maintaining the capital value of the portfolio of risk included in the scheme: Provided that-
 - (i) such a transfer of further risk shall not amount to the provision of a credit-enhancement facility; and

- (ii) the Registrar may in the Registrar's sole discretion and subject to such conditions as the Registrar may determine allow such a bank to transfer further risk in excess of this limitation.

- (h) A bank that acts as an originator in a synthetic securitisation scheme may invest in commercial paper issued by the special-purpose institution in terms of the synthetic securitisation scheme: Provided that-
 - (i) the said investment shall be in respect of the most senior commercial paper only; and
 - (ii) a material portion of the commercial paper shall be represented by mezzanine positions that are transferred to third parties.

- (i) Retained senior unrated tranches will not be recognised for risk-mitigation purposes unless-
 - (i) external protection is obtained from a recognised protection provider or is in the form of eligible collateral; or
 - (ii) all of the following conditions are met-
 - (A) the most senior rated commercial paper with a rating of AAA or higher, or the equivalent thereof, shall be demonstrably legally subordinated to or rank *pari passu* with the said unrated tranche;
 - (B) the remaining maturity of the said subordinated rated positions shall be equal to or longer than the remaining maturity of the unrated position; and
 - (C) the first-loss and second-loss credit-enhancement facilities are treated in accordance with the provisions of paragraph 6.

- (j) When an institution acting in a primary role, by itself or together with its associated companies, and, when such an institution is a bank, such a bank, by itself or together with any institution or institutions within a banking group of which such a bank is a member, enters into a swap agreement with a special-purpose institution that intentionally bears losses in respect of the risk transferred to the special-purpose institution in terms of a synthetic securitisation scheme and which losses are for the account of the institution that acts in a primary role, the said institution shall comply with the provisions of paragraph 6 below.

- (k) In order to promote market discipline-
- (i) Credit risk relating to underlying assets, reference assets or reference entities shall be transferred to more than one investor, other than an institution that acts in a primary role, by means of the issue of senior commercial paper by a special-purpose institution: Provided that the Registrar may in the Registrar's sole discretion and subject to such conditions as the Registrar may determine allow a placement with one investor.
 - (ii) A significant amount of the commercial paper shall be rated by a credit-rating agency: Provided that the Registrar may in the Registrar's sole discretion and subject to such conditions as the Registrar may determine allow a securitisation structure that is unrated.
 - (iii) Subject to the provisions of subitems (i) and (ii) above, a significant amount of the externally rated credit risk relating to underlying assets, reference assets or reference entities shall be issued to investors.
- (l) The instrument used to transfer risk to a special-purpose institution shall not contain terms or conditions that limit the amount of credit risk transferred. As a minimum, such terms or conditions shall not include-
- (i) Significant materiality thresholds below which threshold credit protection is deemed not to be triggered even when a credit event occurs.
 - (ii) The termination of the protection as a result of deterioration in the credit quality of the underlying or reference credit exposure.
 - (iii) A clause that-
 - (A) requires an institution that acts as an originator to alter the underlying or reference credit exposures in order to improve the asset pool's weighted average credit quality;
 - (B) increases an institution's cost of credit protection in response to a deterioration in the quality of the asset pool;
 - (C) increases the yield payable to parties other than the institution that acts as an originator, such as investors and third-party providers of credit enhancements, in response to a deterioration in the credit quality of the underlying or reference asset pool;

- (D) provides for an increase in a retained first-loss position or credit-enhancement facility provided by an institution that acts as an originator after the transaction's inception.
- (m) Any contractual arrangement relating to a clean-up call in respect of risk transferred to the special-purpose institution shall comply with the conditions specified in paragraph 11 below.
- (n) A bank or another institution within a banking group of which such a bank is a member, acting in a primary role, which bank/institution wishes to recognise the risk mitigation effect relating to a synthetic securitisation scheme, shall obtain a legal opinion from an independent legal counsel, which legal opinion shall confirm-
- (i) the bank's compliance with the conditions specified in this subparagraph (2);
 - (ii) the enforceability of the relevant contract(s) in all relevant jurisdictions.
- (o) An institution acting in a primary role, by itself or together with its associated companies, and, when such an institution is a bank, such a bank, by itself or together with any institution or institutions within a banking group of which such a bank is a member, shall not-
- (i) in the case of a special-purpose institution that is a company-
 - (A) directly or indirectly acquire or hold any equity share capital in such a special-purpose institution of which the nominal value represents 20 per cent or more of the nominal value of all the issued equity share capital in the special-purpose institution;
 - (B) have the right to determine the outcome of the voting at a general meeting of the special-purpose institution;
 - (ii) in the case of a special-purpose institution that is a trust-
 - (A) directly or indirectly acquire or hold any beneficial interest in or be a beneficiary of such a special-purpose institution of which the value represents 20 per cent or more of the interest (beneficial or otherwise) in the property forming the subject matter of the special-purpose institution;
 - (B) have the right to determine the outcome of the voting at a general meeting of the special-purpose institution.

- (p) The board of directors or body of trustees, as the case may be, of a special-purpose institution shall be independent of the institution acting in a primary role and, whenever such an institution is a bank, of any other institution within a banking group of which such a bank is a member: Provided that an institution acting in a primary role may-
- (i) in the case of a company, appoint one director to its board of directors, which board of directors shall consist of not less than three members; or
 - (ii) in the case of a trust, appoint one trustee to its body of trustees, which body of trustees shall consist of not less than three members.
- (q) The name of a special-purpose institution shall not include the name of the bank acting in a primary role or imply any association with such a bank.

(3) *Support beyond contractual terms*

- (a) When a bank, or another institution within a banking group of which such a bank is a member, acting in a primary role, in the opinion of the Registrar, provides implicit support to a securitisation scheme, that is, support beyond the predetermined contractual obligation-
- (i) the implicit support shall be regarded as a first-loss credit enhancement facility;
 - (ii) the bank, as a minimum-
 - (A) shall maintain capital and reserve funds against all exposures associated with the securitisation scheme;
 - (B) shall not recognise in the bank's capital and reserve funds any gain relating to the securitisation transaction, such as an amount relating to expected future margin income;
 - (C) shall disclose to the public sufficiently detailed information relating to the implicit support, including the related capital impact of providing implicit support to a securitisation scheme.

6. Credit-enhancement facilities

(1) General

- (a) The purpose of a credit-enhancement facility is to protect investors in a traditional or synthetic securitisation scheme from losses occurring in the pool of assets or risk exposures acquired by the special-purpose institution. Credit-enhancement facilities can be provided on a transaction-specific or programme-wide basis.
- (b) Normally-
 - (i) transaction-specific credit enhancement serves as the first layer of loss protection and addresses the unique characteristics and credit risk of the underlying or reference asset;
 - (ii) a programme-wide facility serves as a second layer of loss protection, absorbing losses in excess of the transaction-specific enhancement, which losses are typically due to the size and composition of the credit portfolio;
 - (iii) credit-enhancement facilities includes any facility or arrangement in terms of which the provider of the said facility provides added credit protection to other parties involved in the securitisation scheme.

(2) Conditions relating to credit-enhancement facilities

- (a) A bank, or another institution within a banking group of which such a bank is a member, may provide, notwithstanding the fact that such a bank or other institution is also acting in a primary role, a credit-enhancement facility in respect of a traditional or synthetic securitisation scheme provided that-
 - (i) There shall be no recourse to the bank or such other institution within a banking group beyond a fixed contractual obligation specified in the facility.
 - (ii) The credit-enhancement facility shall have a specified maturity date, that is, the date on which the assets are, or the commercial paper is, redeemed, whichever date is soonest, or such an earlier date as may be agreed between the parties involved in a securitisation scheme.

- (iii) Subject to reasonable qualifying conditions, parties involved in a traditional or synthetic securitisation scheme or a person acting on behalf of these parties shall have the unequivocal right to select an alternative party to provide a credit-enhancement facility.
 - (iv) The credit-enhancement facility shall be documented in a manner that clearly distinguishes such a facility from any other facility provided by the bank or such other institution within the banking group in respect of the securitisation scheme.
 - (v) The credit-enhancement facility shall be transacted on market related terms and conditions, including matters relating to price and fee.
 - (vi) The credit-enhancement facility shall be subject to the bank's normal credit approval and review processes.
 - (vii) Payment of any fee or other income for the facility shall not be further subordinated or be subject to deferral or waiver beyond what is specifically provided for in the order of priority and other payment entitlement provisions.
 - (viii) The details of the credit-enhancement facility shall be disclosed in the disclosure document issued in respect of the relevant securitisation scheme.
- (b) A bank or another institution within a banking group of which such a bank is a member may provide a first-loss credit-enhancement facility and a second-loss credit-enhancement facility provided that-
- (i) the first-loss and the second-loss credit-enhancement facilities shall be separately documented;
 - (ii) the separate first-loss credit-enhancement facility shall provide substantial protection, that is, a multiple of historical losses or expected losses estimated by way of simulation or other technique, to a second-loss credit-enhancement facility;
 - (iii) the second-loss facility shall consist of subordinated securities or some form of marketable credit enhancement that can be traded by the bank at any time provided that the Registrar may in the Registrar's sole discretion and subject to such conditions as the Registrar may determine allow a bank to provide a second-loss facility that deviates from the provisions of this subitem.

When an institution fails to comply with the aforementioned conditions, the first-loss credit-enhancement facility and the second-loss credit-enhancement facility shall be treated as a first-loss credit-enhancement facility when the bank calculates its capital-adequacy ratio.

- (c) A bank or another institution within a banking group of which such a bank is a member, acting in a primary role, may provide credit enhancements in terms of the provisions of this paragraph 6 only to the extent that the provision of such a facility have been determined at the commencement of the relevant securitisation scheme provided that the Registrar may in the Registrar's sole discretion and subject to such conditions as the Registrar may determine allow a bank or such other institution to alter such determination during the duration of the said securitisation scheme.
- (d) When a bank or another institution within a banking group of which such a bank is a member, acting in a primary role, transfers assets to a special-purpose institution at a price below book value, the difference between the book value and the aforementioned lesser amount shall be regarded as a first-loss credit-enhancement facility unless the said difference is recognised as a loss in the income statements of the institution concerned.
- (e) A bank shall in the calculation of its required capital and reserve funds in terms of the provisions of section 70 of the Act, comply with such further conditions or requirements relating to a first-loss credit-enhancement facility or a second-loss credit-enhancement facility as may be prescribed in the Regulations relating to Banks.

7. Liquidity facilities

(1) General

- (a) Normally, a liquidity facility enables a special-purpose institution to make timely payments of principal and interest amounts to investors, notwithstanding market disruptions or timing differences in the receipt of principal and interest amounts from the pool of assets that was securitised or obtained as collateral, and payment in respect of the senior commercial paper.

(2) Conditions relating to liquidity facilities

- (a) A liquidity facility-
 - (i) shall not be associated with the credit risk of the underlying or reference asset;

- (ii) shall have a specified maturity date;
 - (iii) shall be duly documented in a manner that clearly distinguishes the facility from any other facility provided by a bank or another institution within a banking group of which such a bank is a member in respect of the securitisation scheme;
 - (iv) shall be transacted on market related terms and conditions, including matters relating to price and fee;
 - (v) shall be subject to the bank's normal credit approval and review processes;
 - (vi) may be reduced or terminated at the instance of the bank or such other institution within the banking group concerned should a specified event relating to a deterioration of asset quality occur;
 - (vii) shall contain a reasonable asset quality test to ensure that-
 - (A) the utilisation of such a facility would not cover deteriorated or defaulted assets;
 - (B) when the assets covered by the liquidity facility consist of assets that are externally rated, the facility shall be utilised only to fund assets that at the time of funding are rated investment grade, or better;
 - (viii) shall provide for the termination of the facility when-
 - (A) there is no longer a sufficient level of performing assets of good quality to cover the amount of any new or existing utilisation in terms of the liquidity facility; or
 - (B) the credit-enhancement facilities have been exhausted, that is, there is no longer a sufficient level of credit enhancement to cover the amount of any new or existing utilisation in terms of the liquidity facility;
- (b) There shall be no recourse to a bank or another institution within a banking group of which such a bank is a member, which bank or institution provided a liquidity facility, beyond a fixed contractual obligation specified in the facility.
- (c) Subject to reasonable qualifying conditions, the parties involved in a securitisation scheme or a person acting on behalf of these parties shall have the unequivocal right to select an alternative party to provide a liquidity facility.

- (d) The documentation relating to the facility shall clearly identify and limit the conditions for utilisation and, in particular, shall state that the facility may not be utilised as a permanent revolving facility in order to provide credit enhancement or to cover losses sustained in respect of the securitisation scheme.
- (e) The utilisation of the liquidity facility shall be effected by the special-purpose institution and not directly by the investors.
- (f) Subject to the provisions of item (a)(i) above, the debts resulting from the utilisation of the liquidity facility shall not be subordinated to the interests of investors in the securitisation scheme provided that the debts resulting from the utilisation of the liquidity facility may be subordinated to the debts resulting from the utilisation of other liquidity facilities whenever multiple liquidity facilities are provided to a securitisation scheme.
- (g) Payment of any fee or other amounts due in respect of the liquidity facility shall not be further subordinated or subjected to deferral or waiver beyond what is explicitly provided for in the order of priority and payment entitlement provisions.
- (h) The salient features of the liquidity facility shall be disclosed in the disclosure document issued in respect of the securitisation scheme.
- (i) The disclosure document issued in respect of the traditional or synthetic securitisation scheme shall contain a clear and unequivocal statement that-
 - (i) the obligations of the bank or another institution within the banking group concerned in respect of a liquidity facility do not significantly extend beyond the salient features disclosed in accordance with item (h) above;
 - (ii) the bank or another institution within the banking group concerned will not support the securitisation scheme beyond the obligations stipulated in subitem (i) above.

8. Underwriting

(1) Conditions relating to underwriting

- (a) A bank acting as an originator or remote originator in respect of a traditional or synthetic securitisation scheme may act as an underwriter in respect of such a scheme provided that-
 - (i) the assets or risks securitised shall for purposes of calculating a bank's prescribed capital requirement not be regarded as

having been transferred from the bank's balance sheet until at least 90 per cent of the total debt raised by the special-purpose institution, other than debt that is regarded as credit-enhancement facilities in terms of this Schedule, has been issued to third party investors provided that the Registrar may in the Registrar's sole discretion and subject to such conditions as the Registrar may determine vary the said percentage of 90 per cent;

- (ii) once the assets or risks are regarded as having been transferred from the bank's balance sheet in accordance with subitem (i) above, any senior commercial paper held by the said bank acting as an originator or remote originator in respect of the securitisation scheme in excess of 90 per cent of the total debt raised shall for purposes of calculating a bank's prescribed capital requirement be regarded as a second-loss credit-enhancement facility in terms of this Schedule.
- (b) A bank acting as a sponsor or repackager in respect of a traditional or synthetic securitisation scheme may act as an underwriter in respect of such scheme provided that, at the end of the underwriting concession period, any retained-
- (i) senior commercial paper to which an eligible institution has assigned a credit rating of worse than BBB- or the equivalent thereof shall for purposes of calculating a bank's prescribed capital requirement be regarded as a first-loss credit-enhancement facility in terms of the Regulations relating to Banks;
 - (ii) senior commercial paper to which an eligible institution has assigned a credit rating of BBB- or better, or the equivalent thereof, shall for purposes of calculating a bank's prescribed capital requirement be risk weighted in accordance with the relevant requirements specified in the Regulations relating to Banks;
 - (iii) senior commercial paper to which an eligible institution has not assigned a credit rating shall for purposes of calculating a bank's prescribed capital requirement be treated in accordance with the relevant requirements specified in the Regulations relating to Banks.

9. Servicing

(1) *Conditions relating to servicing*

- (a) A bank or another institution within a banking group may undertake, notwithstanding the fact that such a bank or other institution is acting in a primary role, the role of servicing agent in respect of a traditional or synthetic securitisation scheme provided that-
- (i) a formal servicing agreement shall be in place, which agreement shall specify the services to be provided and the standard for the performance of the services;
 - (ii) confirmation shall be included in the disclosure document that the servicing agent, in its capacity as servicing agent, is under no obligation to fund payments owed in respect of the securitisation scheme, absorb losses incurred in respect of the assets or risk transferred to the special-purpose institution concerned, or otherwise recompense investors for losses incurred in respect of the said securitisation scheme;
 - (iii) the servicing agent may withdraw, at its own discretion and subject to a reasonable period of notice, from its commitments as servicing agent;
 - (iv) services and remuneration shall be provided in accordance with market related terms and conditions.
- (b) When payments due in terms of an underlying transaction are made through the agency of a bank that acted in a primary role or of any other institution within the banking group of which such a bank is a member, the bank or such other institution shall not transfer any funds to the special-purpose institution in respect of such payments unless such payments have actually been received from the obligor in terms of the underlying transaction.
- (c) Item (b) above shall not preclude a servicing agent from providing a short-term advance, at the servicing agent's sole discretion, in order to cover an unexpected shortfall arising from delayed payments on assets provided that such a short-term advance shall comply with the relevant requirements specified in regulation 23(6)(h) of the Regulations relating to Banks.
- (d) Payment of any fee or other amounts due in respect of the services of a bank or another institution within a banking group acting as a servicing agent may not be further subordinated, or be subject to deferral or waiver, beyond what is explicitly provided for in the order of priority set forth in the provisions of the securitisation scheme that regulate entitlement to payment.

10. Transactions included in the trading book**(1) Conditions relating to transactions included in the trading book of a bank**

(a) A bank, including a bank acting in a primary role, may enter into transactions with a special-purpose institution, which transactions are subsequently included in the trading book of the said bank, provided that-

(i) there shall be no recourse to the bank beyond the fixed contractual obligations provided for in the transaction that is included in the trading book of the bank;

(ii) there shall be no obligation on the bank to enter into any further transaction(s) with the special-purpose institution;

(iii) the transactions that are included in the trading book of the bank shall be entered into in accordance with market related terms and conditions;

(iv) the transactions that are included in the trading book of the bank shall not involve the acquisition of-

(A) commercial paper issued by the special-purpose institution; or

(B) assets, risk or a beneficial interest in assets, held by the special-purpose institution in terms of a traditional or a synthetic securitisation scheme,

other than in accordance with the provisions of this Schedule.

(b) The relevant provisions of the Regulations relating to Banks shall apply to any transaction entered into between a bank and a special-purpose institution in respect of a traditional or synthetic securitisation scheme, which transaction-

(i) is included in the trading book of the said bank;

(ii) complies with the conditions specified in item (a) above.

(c) When a bank enters into a transaction with a special-purpose institution in respect of a traditional or synthetic securitisation scheme, which transaction is included in the trading book of the bank, and the transaction does not comply with the conditions specified in item (a) above, the transaction concerned shall be regarded as a first-loss credit-enhancement facility in terms of this

Schedule read with the provisions of regulation 23(6)(h) of the Regulations relating to Banks.

11. Clean-up calls

(1) *Conditions relating to clean-up calls*

An institution that acts in a primary role in respect of a traditional or synthetic securitisation scheme-

- (a) shall not be required to maintain capital in respect of any clean-up call contained in the said securitisation scheme provided that-
 - (i) the exercise of the clean-up call shall not be mandatory, that is, the exercise of the clean-up call shall, in form and in substance, be at the discretion of the institution that acted in a primary role;
 - (ii) the clean-up call shall not be structured in a manner that would prevent losses from being allocated to providers of credit enhancement or positions held by investors, or otherwise structured to provide credit enhancement;
 - (iii) in the case of-
 - (A) a traditional securitisation scheme, the clean-up call shall not be exercisable unless the outstanding amount relating to the original underlying portfolio or commercial paper issued is equal to or less than 10 per cent;
 - (B) a synthetic securitisation scheme, the clean-up call shall not be exercisable unless the outstanding amount relating to the original underlying/reference portfolio is equal to or less than 10 per cent;
 - (iv) when a clean-up call is found to serve as a credit-enhancement facility when exercised, the Registrar shall, in the discretion of the Registrar, based on the requirements specified in item (b) and paragraph 17 below, take appropriate action against the institution that acted in a primary role.
- (b) shall in respect of a securitisation scheme that contains a clean-up call, which clean-up call does not comply with the requirements specified in item (a) above, calculate and maintain a capital requirement in accordance with the requirements specified below.
 - (i) In the case of a traditional securitisation scheme, the institution that acts in a primary role-

- (A) shall calculate and maintain a capital requirement in respect of the underlying assets as if the assets/exposures were not securitised;
 - (B) shall not recognise any gain-on-sale in respect of the underlying exposures.
- (ii) In the case of a synthetic securitisation scheme, the institution that purchased the credit protection shall maintain capital against the aggregate amount of credit exposure as if the institution did not obtain any credit protection in respect of the relevant credit exposure provided that the institution that acted in a primary role shall treat all call provisions other than a clean-up call, which call provision effectively terminates the transaction and purchased credit protection on a specific date, in accordance with the requirements specified in regulation 23(9)(e) of the Regulations relating to Banks, which regulation relates to maturity mismatches.

12. Securitisation of revolving assets

(1) *General*

- (a) Revolving assets refer to any credit exposure in respect of which the amount drawn by an obligor against a credit facility varies within an agreed limit. An example of revolving assets is credit-card receivables.
- (b) When compared to other types of securitisation, schemes to securitise revolving assets normally introduce increased liquidity, counterparty, credit, legal and moral risk. The aforementioned risks arise from the complexity of the arrangements, the fluctuating nature and indefinite maturity of the underlying exposures, and the shared interest of the originator and investors.
- (c) Securitisation schemes in respect of revolving assets often provide for an early amortisation mechanism.

(2) *Conditions relating to the securitisation of revolving assets*

- (a) An institution that acts as an originator, which institution wishes to engage in the securitisation of revolving assets-
 - (i) shall have in place board-approved policies and procedures, and adequate systems to identify, measure, monitor, control and report the risks relating to the scheme, including the increased credit, counterparty and liquidity risk;

- (ii) shall maintain capital against the sum of the originator's interest and the investors' interest in accordance with the relevant requirements specified in regulations 23(6)(h) or 23(11), as the case may be, of the Regulations relating to Banks.
 - (b) A traditional or synthetic securitisation scheme that involves the transfer of revolving assets or the risk relating to such assets to a special-purpose institution shall contain terms and conditions that, amongst other things, ensure that-
 - (i) the investors' interest in the said scheme is not systematically favoured over the originator's interest owing to the transfer of higher quality exposures;
 - (ii) assets or risks that are transferred into the securitised pool are randomly selected from the underlying pool of exposures when only a portion of a particular class of revolving assets is securitised.
- (3) Securitisation of revolving assets with no early amortisation features

A bank or another institution within a banking group of which such a bank is a member, acting as an originator or a remote originator in respect of a traditional or synthetic securitisation scheme involving the ongoing transfer of revolving assets or risk relating to such assets, shall in accordance with the relevant requirements specified in regulations 23(6), 23(8), 23(11) or 23(13) of the Regulations relating to Banks, as the case may be, apply a credit-conversion factor and the relevant risk-weight attributable to the said revolving assets or risk concerned to the notional amount of the revolving assets or risks that are transferred to the special-purpose institution.

13. Early amortisation

(1) General

- (a) An early amortisation mechanism, when triggered, allows investors to be paid out prior to the originally stated maturity of the senior commercial paper held by them, that is, investors will be paid out on an earlier date than what would have been the case had an early amortisation event not occurred. The implication is that once the early amortisation mechanism has been triggered, the institution that acts as an originator will become exposed to any subsequent exposures arising from the underlying pool of accounts and the said institution will have to fund the said exposures.

Such an early amortisation mechanism can in effect partly shield investors from fully sharing in the losses of the underlying accounts to the extent that the early amortization provision trigger is generally

related to deterioration in the quality of the underlying pool of exposures.

- (b) Early amortisation provisions may provide for either a controlled or an uncontrolled mechanism. A controlled early amortisation mechanism shall comply with the requirements specified in item (a) of subparagraph (2) below, resulting in a somewhat lower potential risk for the institution acting as an originator.
 - (c) An early amortisation mechanism that does not comply with the conditions for a controlled mechanism specified in item (a) of subparagraph (2) below shall be regarded as an uncontrolled mechanism for purposes of this Schedule.
- (2) *Conditions relating to a controlled early amortisation mechanism in respect of revolving assets*
- (a) As a minimum, a controlled early amortisation mechanism in respect of revolving assets shall comply with the conditions specified below.
 - (i) The institution acting in a primary role shall have in place an appropriate capital and liquidity plan to ensure that it has sufficient capital and liquidity available in the event of an early amortisation.
 - (ii) Throughout the duration of the amortisation period, there shall be a *pro rata* sharing between investors in the said securitisation scheme and the institution that acts as an originator of interest, principal, expenses, losses and recoveries based on the beginning-of-the-month balance of the originator's and investor's relative share of receivable amounts outstanding.
 - (iii) The institution that acts as an originator shall set a period for amortisation that would be sufficient for a minimum of 90 per cent of the total debt outstanding at the beginning of the early amortisation period to have been repaid or recognised as being in default.
 - (iv) The pace of repayment shall not be any more rapid than would be the case if a straight-line amortisation over the period set out in sub-item (iii) above had been applied.

14. Issue of commercial paper

(1) Conditions relating to the issue of commercial paper

- (a) Notwithstanding anything to the contrary contained in the Commercial Paper Notice, a special-purpose institution may issue commercial paper only for purposes of a traditional or synthetic securitisation scheme in accordance with the conditions specified in items (b) and (c) below.
- (b) The commercial paper-
 - (i) shall be issued or transferred only in minimum denominations equal to or greater than an initial principal value of R1 million, unless the commercial paper is-
 - (A) listed on a licensed financial exchange;
 - (B) endorsed by a bank;
 - (C) issued for a period of longer than five years; or
 - (D) backed by an explicit national Government guarantee;
 - (ii) shall be issued only by a juristic person authorised in writing by the Registrar to issue commercial paper pursuant to a traditional or synthetic securitisation scheme, in accordance with the provisions of this Schedule and subject to such further conditions as the Registrar may determine in such written authorisation.
- (c) A special-purpose institution issuing commercial paper pursuant to a traditional or synthetic securitisation scheme shall publish a disclosure document relating to the said issue of commercial paper, which disclosure document, as a minimum, shall contain the information prescribed in paragraph 16 of this Schedule.

15. Appointment of auditor

(1) Conditions relating to the appointment of an auditor

- (a) The board of directors or the trustee, as the case may be, of a special-purpose institution established for purposes of a traditional or synthetic securitisation scheme shall appoint an auditor, who, in addition to his or her normal duties as auditor, shall be required-
 - (i) to satisfy himself or herself that, on the basis of the information presented to him or her by the special-purpose institution, there

shall be compliance with the relevant provisions of this Schedule with regard to the conduct of the traditional or synthetic securitisation scheme; and

- (ii) if such an auditor has so satisfied himself or herself, to furnish a statement to that effect, which statement shall be included in the disclosure document issued by the special-purpose institution with regard to the traditional or synthetic securitisation scheme, in accordance with the provisions of paragraph 16 of this Schedule.

16. Disclosure

(1) General

- (a) Investors in a traditional or synthetic securitisation scheme shall be made aware that the instruments in which they invest do not represent deposits in a bank, but that the instruments are subject to investment risk, including possible delays in repayment and loss of income and principal amounts invested, and that the institution that acts in a primary role and its associated companies and, when the institution that acts in a primary role is a bank, any other institution within the banking group of which such a bank is a member, do not guarantee the capital value or performance of the instruments issued by the special-purpose institution.

(2) Conditions relating to disclosure

- (a) A disclosure document shall be issued by a special-purpose institution in respect of a traditional or synthetic securitisation scheme, which document, as a minimum, shall clearly state, amongst other things-
 - (i) the name of the special-purpose institution;
 - (ii) the name of the auditor of the special-purpose institution;
 - (iii) the total amount of commercial paper to be issued by the special-purpose institution;
 - (iv) whether or not the particular issue of commercial paper is listed;
 - (v) a description of the assets transferred or the portfolio credit-derivative instrument used to transfer risk and the nature of such risk;

- (vi) the cash flows arising from the assets transferred or purchased as collateral, or the premiums received, that will be utilised for the payments by the special-purpose institution in respect of the commercial paper issued;
 - (vii) confirmation by the auditor of the special-purpose institution that the issue of commercial paper pursuant to a securitisation scheme complies in all respects with the relevant provisions of this Schedule;
 - (viii) the details of any credit-enhancement facilities;
 - (ix) the details of any liquidity facilities;
 - (x) that the institution acting in a primary role is not obliged to support any losses suffered by the special-purpose institution or investors in the special-purpose institution in respect of a traditional or synthetic securitisation scheme;
 - (xi) that the board of directors or the trustees of the special-purpose institution are independent from the institution acting in a primary role and, whenever such an institution is a bank, of any other institution within a banking group of which such a bank is a member;
 - (xii) all other information that may reasonably be necessary to enable an investor to ascertain the nature of the financial and commercial risk of his or her investment.
- (b) The Registrar may prescribe additional disclosure requirements in respect of a traditional or synthetic securitisation scheme.
- (c) A disclosure document relating to the issue of commercial paper pursuant to a traditional or synthetic securitisation scheme-
- (i) shall in the case of a special-purpose institution that is a company, be signed by two directors of such a company who are duly authorised to sign;
 - (ii) shall in the case of a special-purpose institution that is a trust, be signed by two senior officials of such a trust who are duly authorised to sign.
- (d) Once a disclosure document has been signed by the persons indicated in item (c) above, such signatories shall be deemed to have authorised the issue of such a disclosure document.

- (e) Every signature to a disclosure document shall be dated, and the latest of such dates shall be deemed to be the date of the disclosure document.

17. Non-compliance

(1) *Conditions relating to non-compliance by a bank or banking group*

- (a) When a bank acting as an originator, a remote originator or a repackager in the execution of a traditional or synthetic securitisation scheme does not comply with any of the conditions specified in this Schedule-
 - (i) the assets transferred by such an institution in terms of a traditional securitisation scheme shall for purposes of the calculation of the bank's capital requirement be reflected as assets on the balance sheet of the bank concerned;
 - (ii) the risk transferred by such an institution in terms of a synthetic securitisation scheme shall for purposes of the calculation of the bank's capital requirement be reported as if the bank had not obtained any credit protection;
 - (iii) the Registrar may preclude such a bank from future participation in a securitisation scheme in a primary role.
- (b) When the risks resulting from non-compliance by a bank with any of the conditions set out in this Schedule are regarded by the Registrar as excessive relative to the bank's qualifying capital and reserve funds, the Registrar may impose a capital requirement in addition to the ratio prescribed in the Regulations relating to Banks.

(2) *Conditions relating to non-compliance by a special-purpose institution*

Chapter VIII of the Act shall apply when a special-purpose institution effects a securitisation scheme that is not in compliance with the provisions and requirements specified in this Schedule provided that any non-compliance by a bank or banking group with the provisions and requirements specified in this Schedule, as envisaged in subparagraph (1) above, shall not necessarily mean that the relevant special-purpose institution is in non-compliance with the provisions and requirements specified in this Schedule, that is, the compliance or non-compliance by a special-purpose institution with the provisions and requirements specified in this Schedule shall independently be assessed from the compliance or non-compliance by a bank or banking group with the provisions and requirements specified in this Schedule.

18. Short title and commencement

This Exemption Notice shall be called the Exemption Notice relating to Securitisation Schemes and shall come into operation on 1 January 2008.

19. Repeal of laws

Government Notice No. R. 681, published in *Government Gazette* No. 26415 on 4 June 2004, is hereby repealed in its entirety with effect from 1 January 2008.

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