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GOVERNMENT NOTICE

DEPARTMENT OF AGRICULTURE

No. R. 681

4 June 2004

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 Accounting Statement AC. 000 issued by the South African Institute of Chartered Accountants as amended from time to time;

“associate” means an associate as defined in Accounting Statement AC. 110 issued by the South African Institute of Chartered Accountants 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;

“commercial paper” means-

- (a) any written acknowledgement of debt, irrespective of whether the maturity thereof is fixed or based on a notice period, and irrespective of whether the rate at which interest is payable in respect of the debt in question is a fixed or a 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);

“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 rating” means a domestic rating assigned by a credit-rating agency to commercial paper issued in respect of a traditional or a synthetic securitisation scheme;

“credit-rating agency” means a credit-rating agency approved by the Registrar in the Registrar’s sole discretion;

“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 from, *inter alia*, 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 a synthetic securitisation scheme to prospective investors in the said securitisation scheme;

“domestic rating” means a rating that is tiered against an assumed best possible rating, which is usually that of the national Government, and which rating does not incorporate the sovereign risks of South Africa and which gives an indication of the relative risks only within the Republic of South Africa and which is not comparable across different countries;

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

“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);

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

“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 a 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 indicated 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; or
- (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:

Provided that when-

- (a) the assets, other than national Government securities or qualifying items, referred to in paragraph (a) above; or
- (b) 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: Provided that parties acting in secondary roles shall exclude providers of credit-enhancement facilities;

“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 a synthetic securitisation scheme as an originator, remote originator, sponsor or 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 a 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 a synthetic securitisation scheme: Provided that an institution that, whether at the commencement or during the life of the traditional or the synthetic securitisation scheme, acquires and subsequently transfers the assets or the 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” means loan facilities or other underlying transactions in terms of which debtors under such 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 a 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 to parties involved in a traditional or a 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 a synthetic securitisation scheme;

"senior commercial paper" means commercial paper issued in terms of a traditional or a 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 a synthetic securitisation scheme, for a period of less than one year;

"special-purpose institution" means a company or a trust, insolvency remote, incorporated or created solely for the purpose of the implementation and operation of a traditional or a 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;

“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 credit-risk exposure and 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,

from-

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

“trading book of a bank” includes-

- (a) proprietary positions in financial instruments that are held for resale or that are taken by the bank with the intention of benefiting in the short term from actual or expected differences between the buying and selling prices of the financial instruments, or from other price or interest-rate variations, or

positions in financial instruments arising from matched principal broking, or positions taken in order to hedge other elements of the trading book;

(b) exposures that are due to unsettled transactions, free deliveries and over-the-counter derivative instruments, including exposure resulting from-

(i) repurchase agreements and securities-lending transactions based on securities included in the trading book, as contemplated in subparagraph (a);

(ii) resale agreements and securities-borrowing transactions,

and subject to at least the conditions that-

(i) exposures are marked to market on a daily basis;

(ii) collateral is adjusted in order to take account of material changes in the value of the underlying securities involved in the agreement or transactions in question; and

(iii) an agreement exists allowing the claims of the bank to be offset automatically and immediately against the claims of its counterparty in the event of default;

(c) exposures, in the form of fees, commission, interest, dividends and margin on exchange-traded derivatives, that are directly related to the items included in subparagraphs (a) or (b) above,

but does not include a transaction provided for elsewhere in this Schedule;

“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 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,

from-

- (i) the cash flows arising or proceeds derived from the assets transferred to such a special-purpose institution by an originator or a repackager; or
- (ii) 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

such other method of transfer as may be approved 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 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 a 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 a 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 16 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 16 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 13 to 16 of this Schedule;
 - (ii) a synthetic securitisation scheme, there shall be compliance with the relevant conditions set out in paragraphs 5 and 13 to 16 of this Schedule;
- (c) no transactions other than transactions directly relating to a traditional or a 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 a synthetic securitisation scheme.

4. Traditional securitisation scheme

(1) General

- (a) A traditional securitisation scheme involves the legal and economic transfer of assets to a special-purpose institution that issues commercial paper that are claims against the said assets transferred. Different classes of commercial paper are normally issued, and each class has a different priority claim on the cash flows originating from the underlying pool of assets.
- (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) In terms of the Act, a bank shall maintain capital and reserve funds in respect of its assets, off-balance-sheet activities and other risk exposures acquired in the conduct of its business, as may be prescribed in the Regulations relating to Banks.
- (d) A bank that sells 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 set out below, are met.

(2) *Conditions relating to limiting of association with assets*

- (a) The transfer of assets to 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: 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 subject to the provisions of this Schedule.
- (b) Subject to the provisions of item (a) relating to limiting of association with assets, the 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 assets after the transfer thereof in terms of the traditional securitisation scheme.
- (c) Item (b) 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.
- (d) When payments in respect of assets transferred in terms of a traditional securitisation scheme are routed through an institution or any of its associated companies or, when such an institution is a bank, through any other institution within the banking group of which such a bank is a member, acting in a primary role, the said institution shall be under no obligation to remit funds to the special-purpose institution unless and until the payments are received from the obligor.
- (e) 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.
- (f) 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 approved by the Registrar.
- (g) 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.
- (h) 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.
- (i) 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 following conditions:
 - (i) The repurchase of assets is 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 has no 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 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, does not exceed 10 per cent of the maximum value of the pool of 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 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.
- (j) 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 may 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.
- (k) 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.
- (l) 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, may not-
- (i) in the case of a special-purpose institution that is a company-
 - (aa) 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;

(bb) 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-

(aa) 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;

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

(m) 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.

- (n) 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 support to a securitisation scheme beyond the contractual terms relating to the said scheme, the aforementioned support shall be regarded as a first-loss credit enhancement facility and the bank shall as a minimum maintain capital and reserve funds against all exposures associated with the 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) 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 assets to a special-purpose institution. Normally, the resulting credit exposures have different levels of seniority.
- (b) The packaging of risk relating to multiple underlying assets, reference assets or reference entities for transfer may create risks that are more complex than those for a single asset or a few assets.
- (c) 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.
- (d) 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 a deterioration in the average quality of the asset portfolio remaining on the bank's balance sheet.

- (e) Retention or repurchase of significant securitisation exposures may undermine the intent of a synthetic securitisation scheme to transfer risk.
- (f) 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 set out in regulation 21(14) of the Regulations relating to Banks.
- (g) 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 amounts reported in line items 1 to 4 of the form DI 400, prescribed in the Regulations relating to Banks.

(2) *Conditions relating to a transfer of risk*

- (a) The provisions of regulation 21(14) of the Regulations relating to Banks regarding credit-derivative instruments, in so far as the said provisions are relevant, shall *mutatis mutandis* apply to a synthetic securitisation scheme: Provided that, in the case of a conflict between the provisions of regulation 21(14) of the Regulations relating to Banks and this Schedule, the provisions of this Schedule shall prevail.

- (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 subject to 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 following conditions:
 - (i) The repurchase of risk relating to an asset is 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 has no prior obligation to repurchase risk relating to an asset from the special-purpose institution.
 - (iii) The repurchase of risk relating to an 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 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, however, 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 may 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-
 - (aa) 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;
 - (bb) the remaining maturity of the said subordinated rated positions shall be equal to or longer than the remaining maturity of the unrated position; and
 - (cc) 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 a deterioration in the credit quality of the underlying or reference credit exposure.
 - (iii) A clause that-
 - (aa) requires an institution that acts as an originator to alter the underlying or reference credit exposures such that it can result in improvements in the asset pool's weighted average credit quality;
 - (bb) increases an institution's cost of credit protection in response to a deterioration in the quality of the asset pool;
 - (cc) 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;

- (dd) provides for increases in a retained first-loss position or credit enhancement provided by an institution that acts as an originator after the transaction's inception.
- (m) 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, may not-
 - (i) in the case of a special-purpose institution that is a company-
 - (aa) 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;
 - (bb) 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-
 - (aa) 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;
 - (bb) have the right to determine the outcome of the voting at a general meeting of the special-purpose institution.

- (n) 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.
- (o) 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 support to a securitisation scheme beyond the contractual terms relating to the said scheme, the aforementioned support shall be regarded as a first-loss credit enhancement facility and the bank shall as a minimum maintain capital and reserve funds against all exposures associated with the 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 conditions relating to the transfer of risk.

6. Credit-enhancement facilities

(1) *General*

- (a) The purpose of a credit-enhancement facility is to protect investors in a traditional or a 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 a programme-wide basis.
- (b) Normally, 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. 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.

(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 a synthetic securitisation scheme: Provided that-

- (i) There is 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 has 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 a synthetic securitisation scheme or a person acting on behalf of these parties has the unequivocal right to select an alternative party to provide a credit-enhancement facility.
- (iv) The credit-enhancement facility is 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 already 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 first-loss credit-enhancement facility shall for the purpose of calculating a bank's prescribed capital requirement be treated as an impairment against the bank's primary capital and reserve funds.
- (c) For the purpose of calculating a bank's prescribed capital requirement, a second-loss credit-enhancement facility shall be treated as a direct credit substitute, and the face amount of the facility shall attract a risk weighting of 100 per cent, provided that the associated credit risk of the second-loss credit-enhancement facility is the equivalent of investment grade, that is, a rating of BBB- or an equivalent rating, or better. A second-loss credit-enhancement facility that does not meet the aforementioned criteria shall for the purpose of calculating a bank's prescribed capital requirement be treated as an impairment against the bank's primary capital and reserve funds.
- (d) The aggregate amount of capital maintained by a bank in terms of items (b) and (c) above shall be limited to the amount of capital that the bank would have been required to maintain in respect of all the assets or credit risk inherent in the assets transferred had it not been for the securitisation scheme.
- (e) A bank may provide a first-loss credit-enhancement facility, together with a second-loss credit-enhancement facility: Provided that-
- (i) the first-loss and the second-loss credit-enhancement facilities are separately documented;

- (ii) the bank can demonstrate that the separate first-loss credit-enhancement facility provides 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 consists 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 for capital-adequacy purposes.

- (f) 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.
- (g) 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.

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 shall not be associated with the credit risk of the underlying or reference asset(s).
- (b) A bank or another institution within a banking group of which such a bank is a member, acting in a primary role as a repackager or a sponsor, may provide a liquidity facility in respect of a traditional or a synthetic securitisation scheme: Provided that-
 - (i) there is no recourse to the bank or such other institution within a banking group beyond a fixed contractual obligation specified in the facility;
 - (ii) the liquidity facility has a specified maturity date;

- (iii) subject to reasonable qualifying conditions, the parties involved in a securitisation scheme or a person acting on behalf of these parties has the unequivocal right to select an alternative party to provide a liquidity facility;
- (iv) the liquidity facility is 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 liquidity facility shall be transacted on market-related terms and conditions, including matters relating to price and fee;
- (vi) the liquidity facility shall be subject to the bank's normal credit-approval and review processes;
- (vii) the liquidity facility 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;
- (viii) the liquidity facility has a reasonable asset-quality test to ensure that the utilisation of such a facility would not cover deteriorated or defaulted assets;
- (ix) the liquidity facility provides for the termination of the facility when-
 - (aa) 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

- (bb) 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;
- (x) the liquidity-facility documentation clearly identifies and limits the conditions for utilisation and, in particular, states 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;
- (xi) the utilisation of the liquidity facility is effected by the special-purpose institution and not directly by the investors;
- (xii) subject to the provisions of item (a) 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;
- (xiii) payment of any fee or other amounts due in respect of the liquidity facility may 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;
- (xiv) the salient features of the liquidity facility shall be disclosed in the disclosure document issued in respect of the securitisation scheme;

- (xv) the disclosure document issued in respect of the traditional or the synthetic securitisation scheme contains a clear and unequivocal statement that-
 - (aa) the obligations of the bank or such other institution within the banking group concerned in respect of a liquidity facility do not significantly extend beyond the salient features disclosed in accordance with subitem (xiv) above; and
 - (bb) the bank or such other institution within the banking group concerned will not support the securitisation scheme beyond the obligations stipulated in paragraph (aa) above.
- (c) When a bank or another institution within a banking group of which such a bank is a member, acting as a servicing agent, a repackager or a sponsor in respect of a securitisation scheme, and that provides a liquidity facility in respect of such a securitisation scheme, complies with the conditions set out in item (b) above, the following credit-conversion factors shall apply in respect of such a facility-
 - (i) 20 per cent credit-conversion factor in respect of any liquidity facility with an original maturity of one year or less;
 - (ii) 50 per cent credit-conversion factor in respect of any liquidity facility with an original maturity of more than one year.

The aforementioned credit-conversion factors shall be applied to-

- (i) the highest risk weighting assigned to any of the senior commercial paper covered by the liquidity facility when the

liquidity is provided directly against the commercial paper issued in terms of the securitisation scheme; or

(ii) the risk weighting assigned to the senior commercial paper rated AAA or the equivalent thereof when-

(aa) the liquidity is provided directly against an underlying asset; and

(bb) the liquidity facility is for a lesser amount than the amount of the senior commercial paper rated AAA or the equivalent thereof issued in terms of the securitisation scheme; and

(cc) the liquidity facility ranks as more senior than the said senior commercial paper issued in terms of the securitisation scheme.

(d) A bank or another institution within a banking group of which such a bank is a member, acting as a servicing agent, a repackager or a sponsor in respect of a securitisation scheme, may provide a short-term liquidity facility that may be utilised only in the event of a general market disruption. The said short-term liquidity facility shall be assigned a risk weight of 0 per cent, provided that there is compliance with the provisions of item (b) above.

(e) When a bank that provides a liquidity facility in respect of a traditional or a synthetic securitisation scheme does not comply with the conditions set out in this paragraph, the liquidity facility concerned shall be regarded as a first-loss credit-enhancement facility provided by the aforementioned bank in terms of this Schedule: Provided that the aggregate amount of capital maintained by the said bank in terms of this item (e) shall be limited to the

amount of capital that the bank would have been required to maintain in respect of all the assets or credit risk inherent in the assets transferred to the special-purpose entity in terms of the securitisation scheme if the said assets or credit risk inherent in the assets were actually held on the balance sheet of the bank that provided the said liquidity facility.

8. Purchase of senior commercial paper

(1) General

- (a) A bank acting in a primary role and subsequently investing in commercial paper issued by a special-purpose institution shall have in place adequate risk-management systems and controls to ensure that the bank does not accumulate disproportionate levels of aggregate exposure to commercial paper issued by the special-purpose institution.
- (b) A bank that acted in a primary role and subsequently invests in a disproportionate level of commercial paper issued by a special-purpose institution may contravene, amongst other things, the conditions relating to an effective and verifiable transfer of risk and sufficient market discipline.
- (c) A well-diversified portfolio of tranching commercial paper or risk exposures may exhibit higher default correlations among the underlying tranches than a well-diversified portfolio of similar-rated corporate loans owing to the idiosyncratic nature of the credit risk inherent in a single corporate loan that can be reduced through diversification within a larger corporate portfolio.

(2) *Conditions relating to rated structures*

- (a) Notwithstanding anything to the contrary contained in the Regulations relating to Banks, senior commercial paper to which a credit-rating agency has assigned a credit rating shall for purposes of calculating a bank's prescribed capital requirement attract the following risk weightings when purchased by a bank, regardless of whether such a bank is also acting in a primary role:
 - (i) 20 per cent in respect of senior commercial paper rated AAA to AA- or the equivalent thereof;
 - (ii) 50 per cent in respect of senior commercial paper rated A+ to A- or the equivalent thereof;
 - (iii) 100 per cent in respect of senior commercial paper rated BBB+ to BBB- or the equivalent thereof;
 - (iv) 150 per cent in respect of senior commercial paper rated BB+ to BB- or the equivalent thereof.
- (b) Senior commercial paper rated B+ or below, or the equivalent thereof, and unrated tranches in a rated structure 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: 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 assign a specified risk weighting to an unrated tranche in a rated structure, instead of treating the said unrated tranche as a first-loss credit-enhancement facility.

(3) *Conditions relating to unrated structures*

- (a) When a traditional or a synthetic securitisation scheme is unrated, an institution that invests in or that guarantees the most senior position in such an unrated structure shall apply the "look-through" approach prescribed in item (b) below, provided that the composition of the underlying or reference pool is known at all times.
- (b) The most senior commercial paper in an unrated structure shall attract the risk weighting applicable to the assets transferred in terms of a traditional securitisation scheme or the risk transferred in terms of a synthetic securitisation scheme when purchased or guaranteed by a bank, regardless of whether such a bank is also acting in a primary role: Provided that, should the transferred assets or risk comprise assets or risk that attracts different risk weightings, the unrated senior commercial paper shall attract the risk weighting assigned to the assets or risk with the highest risk weighting.
- (c) All exposures other than the most senior position in a traditional or a synthetic securitisation scheme that are unrated 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. The deduction from capital in respect of the exposures other than the most senior position is appropriate given the absence of information regarding the unrated risk positions.

(4) *Granularity*

- (a) When the Registrar is of the opinion that the credit risk inherent in a traditional or a synthetic securitisation scheme is higher than the credit risk inherent in a well-diversified portfolio of similar-rated corporate exposure, owing to higher default correlations in the

portfolio of assets or risk that was securitised, the Registrar may prescribe higher risk weightings in respect of the commercial paper issued by the special-purpose institution in respect of the relevant securitisation scheme than the risk weightings prescribed in this paragraph 8.

9. Underwriting

(1) *Conditions relating to underwriting*

(a) A bank acting as an originator or a remote originator in respect of a traditional or a 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 a repackager in respect of a traditional or a 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 a credit-rating agency 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 this Schedule;
 - (ii) senior commercial paper to which a credit-rating agency 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 provisions of paragraph 8(2) of this Schedule;
 - (iii) senior commercial paper to which a credit-rating agency has not assigned a credit rating shall for purposes of calculating a bank's prescribed capital requirement be treated in accordance with the provisions of paragraph 8(3) of this Schedule.

10. 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 a synthetic securitisation scheme: Provided that-

- (i) a formal servicing agreement is in place, which agreement has to specify the services to be provided and the standard for the performance of these services;
 - (ii) confirmation is 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 are 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 provisions of paragraph 7 relating to liquidity facilities.

- (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.

11. Transactions included in the trading book

(1) *Conditions relating to transactions that are 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 a bank are entered into in accordance with market-related terms and conditions;

- (iv) the transactions that are included in the trading book of a bank do not involve the acquisition of commercial paper issued by the special-purpose institution, or assets, 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 provisions of the Regulations relating to Capital-adequacy Requirements ("CAR") for Banks' Trading Activities in Financial Instruments shall apply to any transaction entered into between a bank and a special-purpose institution in respect of a traditional or a synthetic securitisation scheme, which transaction is included in the trading book of the said bank and 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 a 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.

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. 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 amortisation-provision trigger is generally related to a deterioration in the quality of the underlying pool of exposures.

- (d) Early amortisation provisions may provide for either a controlled or an uncontrolled mechanism. A controlled early amortisation mechanism has to meet the requirements set out in item (a) of subparagraph (4) below, resulting in a somewhat lower potential risk for the institution acting as an originator.

- (e) An early amortisation mechanism that does not meet the conditions for a controlled mechanism set out in item (a) of subparagraph (4) below will be regarded as an uncontrolled mechanism for purposes of this Schedule.

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

- (a) An institution that wishes to engage in the securitisation of revolving assets shall-
 - (i) ensure that it has board-approved policies and procedures, and adequate systems in place to identify, measure, monitor, control and report the risks relating to the scheme, including the increased credit, counterparty and liquidity risk;
 - (ii) maintain capital against the sum of the originator's interest and the investors' interest in accordance with the provisions set out below in all cases in which the said institution acts as an originator: Provided that the aggregate amount of capital maintained shall be limited to an amount equal to the capital requirement that would have applied had the exposures not been securitised.
- (b) A traditional or a 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 ensure, amongst other things, 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) Subject to the provisions of item (b) below, 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 a synthetic securitisation scheme involving the ongoing transfer of revolving assets or risk relating to such assets, shall apply a credit-conversion factor of 10 per cent and the risk-weighting attributable to the revolving assets or risk concerned to the notional amount of the revolving assets or risks that are transferred to the special-purpose institution.
- (b) Notwithstanding the provisions of item (a) above, the Registrar may approve, subject to such conditions as the Registrar may determine, a credit-conversion factor to be applied to the notional amount of the revolving assets or risk relating to such assets transferred to a special-purpose institution.

(4) *Securitisation of revolving assets with early amortisation features*

- (a) As a minimum, a controlled early amortisation mechanism shall meet the following conditions:
 - (i) the institution acting in a primary role shall have an appropriate capital and liquidity plan in place 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 is 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 receivables 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 subitem (iii) above had been applied.

(b) 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 securitisation scheme involving the ongoing transfer of revolving assets or risk relating to such assets, shall apply a credit-conversion factor of-

- (i) 20 per cent and the risk weighting attributable to the revolving assets concerned to the notional amount of the revolving assets or risk relating to such assets transferred to a special-purpose institution in respect of all uncommitted retail credit exposures that contain controlled early amortisation features;

- (ii) 50 per cent and the risk weighting attributable to the revolving assets concerned to the notional amount of the revolving assets or risk relating to such assets transferred to a special-purpose institution in respect of all committed retail credit and all non-retail exposures that contain controlled early amortisation features;
 - (iii) 100 per cent and the risk weighting attributable to the revolving assets concerned to the notional amount of the revolving assets or risk relating to such assets transferred to a special-purpose institution in respect of all committed retail credit and all non-retail exposures that contain uncontrolled early amortisation features.
- (c) For the purposes of this item, retail exposure means any exposure to a person of less than R1 million.

13. 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 a synthetic securitisation scheme in accordance with the conditions specified in items (b) and (c) below.
- (b) The commercial paper shall-
 - (i) 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-

- (aa) listed on a licensed financial exchange;
 - (bb) endorsed by a bank;
 - (cc) issued for a period of longer than five years; or
 - (dd) backed by an explicit national Government guarantee;
- (ii) be issued only by a juristic person authorised in writing by the Registrar to issue commercial paper pursuant to a traditional or a synthetic securitisation scheme, in accordance with the provisions of this Schedule and subject to such other conditions as the Registrar may determine in such written authorisation.
- (c) A special-purpose institution issuing commercial paper pursuant to a traditional or a 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 15 of this Schedule.

14. 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 a 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 the 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 the synthetic securitisation scheme, in accordance with the provisions of paragraph 15 of this Schedule.

15. Disclosure

(1) General

- (a) Investors in a traditional or a 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 a 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 a synthetic securitisation scheme.
- (c) A disclosure document relating to the issue of commercial paper pursuant to a traditional or a synthetic securitisation scheme shall-
- (i) 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) 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.

16. Non-compliance

(1) *Conditions relating to non-compliance*

- (a) When a bank acting as an originator, a remote originator or a repackager in the execution of a traditional or a synthetic securitisation scheme does not comply with any of the conditions set out 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 with any of the conditions set out in this Schedule by a bank acting as an originator, a remote originator or a repackager in the execution of a traditional or a synthetic securitisation scheme 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.

- (c) Chapter VIII of the Act shall apply when a special-purpose institution effects a securitisation scheme that is not in compliance with this Schedule.

17. Repeal of laws

- (a) Government Notice No.1375, published in *Government Gazette* No. 22948 on 13 December 2001, is hereby repealed in its entirety.
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