

## **Government Gazette**

**Vol. 417, No. 20977, 10 March 2000**

### **GENERAL NOTICE**

**Notice 1147 of 2000**

### **DEPARTMENT OF HOUSING**

#### **PROPOSED HOME LOAN AND MORTGAGE DISCLOSURE LEGISLATION**

The Department of Housing hereby publishes the **Home Loan and Mortgage Disclosure Bill, 2000** for public information, discussion and comment.

Comments should be sent or faxed to: The Director-General, Department of Housing, Private Bag X644, PRETORIA, 0001, fax (012) 341 8512, for attention Mr R Thatcher.

Comments must be received on or before 10 April 2000.

### **REPUBLIC OF SOUTH AFRICA**

#### **HOME LOAN AND MORTGAGE DISCLOSURE BILL, 2000**

**(MINISTER OF HOUSING)**

### **BILL**

**To promote fair lending practices among financial institutions which provide home loans; to require disclosure by financial institutions engaged in the provision of home loans of certain information in their reports and annual financial statements; to establish an Office of Disclosure to monitor compliance with the disclosure requirements of this Act; to rate such financial institutions and make such rating public; to amend the definition of housing loan in the Usury Act; to empower the Minister to introduce measures, through regulation, to promote the sustainable provision of home loans to under and un-served segments of the population; and to provide for matters connected herewith.**

### **PREAMBLE**

**WHEREAS** in tempts of section 9 of the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996),

(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3).

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is estab~bed that the discrimination is fair;

**AND WHEREAS** in terms of section 26 of the said Constitution everyone has, *inter alia*, the right to have access to adequate housing and the state must take reasonable legislative and other measures,

within its available resources, to achieve the progressive realisation of this right;

**AND WHEREAS** in terms of section 32(1) of the Constitution everyone has the right of access to -

- a. any information held by the state; and
- b. any information that is held by another person and that is required for the exercise or protection of any rights;

**AND WHEREAS** in terms of section 2(1)(e)(v) and (vi) of the Housing Act, 1997 (Act No. 107 of 1997) national, provincial and local spheres of government must, *inter alia*, promote:

- The effective functioning of the housing market while levelling the playing fields and taking steps to achieve equitable access for all to that market; and
- Measures to prohibit unfair discrimination on the ground of gender and other forms of unfair discrimination by all actors in the housing development process;

**AND WHEREAS** in the past there has been discrimination by financial institutions, on one or more grounds set out in section 9(3) of the Constitution, when considering or granting home loans;

**AND WHEREAS** there is an urgent need to ensure that all financial institutions disclose certain information regarding their business of advancing finance in respect of home loans;

**BE IT THEREFORE ENACTED** by the Parliament of the Republic of South Africa, as follows:

## **CHAPTER I**

### **Introductory provisions**

#### **Definitions**

1. In this Act, unless the context indicates otherwise -
  - i. **"auditors"** means the auditors of the financial institution appointed in terms of the requirements of the Companies Act, 1973 (Act No. 61 of 1973) or any other law;
  - ii. **"borrower"** means any person who is indebted to a financial institution in respect of a home loan;
  - iii. **"Companies Act"** means the Companies Act No. 61 of 1973, as amended from time to time;
  - iv. **"Department"** means the Department of Housing; ~ -
  - v. **"financial institution"** means any bank or mutual bank registered as such under the Banks Act, 1990 (Act No. 94 of 1990) and the Mutual Banks Act, 1993 (Act No. 124 of 1993), respectively, and any other registered financial institution whose business, is, *inter alia*, the acceptance of deposits from the general public and/or the advance of credit to persons, with the security of a registered mortgage bond, for the purpose of providing home loans;
  - vi. **"home"** means a residential structure which a financial institution recognises as collateral, in full or in part, for a home loan;
  - vii. **"home loan"** means a loan or advance by a financial institution to a person for the purposes of purchasing, renovating or improving in any way such owner's home, with the security of a registered mortgage bond;
  - viii. **"Minister"** means the Minister of Housing;
  - ix. **"Office"** means the Office of Disclosure established in terms of section 3;
  - x. **"regulation"** means a regulation made under section 8;
  - xi. **"required information"** means the information set out in section 7;
  - xii. **"secretariat"** means the secretariat established in terms of section 5(1);

#### **Scope of Act**

2. This Act shall apply to all financial institutions within the Republic of South Africa which advance credit to persons, with the security of a registered mortgage bond, for the purposes of a home loan.

#### **Establishment of Office of Disclosure**

3. (1) An office called the Office of Disclosure to be situated within the Department is hereby established.

(2) The members of the Office are to be appointed on the basis of their experience, expertise and specific competence in matters related to banking, housing finance and investment, community economics and civil rights.

(3) The Office consists of a chairperson with the rank equal to that of a Chief Director, a vice-chairperson and not more than 8 other members appointed by the Minister, after consultation with the Minister of Finance, by virtue of their expertise and experience referred to in subsection (2) above.

(4) Such members are to be appointed not because they come from a specific sector of home loan finance but because of their experience and expertise to carry out their tasks.

(5) A member of the Office must -

- a. be a fit and proper person; and
- b. have the necessary experience, expertise and competence referred to in subsection (2) above

(6) A member of the Office is, subject to subsection (7), appointed for the period determined by the Minister at his or her appointment, but not more than three years, and may be re-appointed on the termination of such period.

(7) A member of the Office ceases to be a member if -

- a. he or she resigns;
- b. without the leave of the Office, he or she is absent from three consecutive meetings of the Office;
- c. his or her estate is sequestrated or he or she applies for assistance contemplated in section 10(1)(c) of the Agricultural Credit Act, 1966 (Act No. 28 of 1966);
- d. he or she becomes of unsound mind;
- e. he or she is convicted of an offence and sentenced to imprisonment without the option of a fine;
- f. he or she becomes a member of Parliament, a provincial legislature, a municipal council, the Cabinet or the executive council of a province; or
- g. the Minister terminates his or her office for reasons which are just and fair.

(8) When -

- a. the chairperson of the Office is absent or unable to fulfil any function of the chairperson, the vice-chairperson of the Office must act as chairperson during such absence or incapacity; and
- b. both the chairperson and vice-chairperson of the Office are absent or unable to fulfil any function of the chairperson, the Minister may designate any other member of the Office to act as chairperson during such absence or incapacity.

(9) The first meeting of the Office must be held at the time and place determined by the Minister, and all other meetings of the Office must be held at times and places determined by the chairperson of the Office.

(10) The chairperson or, in his or her absence, the vice-chairperson -

- a. may convene a special meeting of the Office;
- b. must convene such meeting within 14 days of the receipt of a written request signed by at least five members of the Office to convene such meeting.

(11) The quorum for a meeting of the Office is more than 50% of its members.

(12) The chairperson, or in his or her absence the vice-chairperson, determines the procedure at the meetings of the Office.

(13) A member of the Office who is not in the full time service of the State shall be appointed at such remuneration determined by the Minister with the approval of the Minister of Finance.

(14) Members of the Office are to disclose any conflicts of interest, financial or otherwise, which they might have in making any decision relating to their tasks, such disclosure to be made before any decisions are taken.

### **Functions and powers of Office**

4. (1) The functions of the Office are to -

- a. receive the required information contemplated in section 7 from financial institutions;
- b. receive and take into account public comments on financial institutions relating to home loans;
- c. analyse and interpret such required information.
- d. make available to the public information that indicates whether financial institutions are serving the housing credit needs of their communities;
- e. assist in identifying possible discriminatory lending patterns and assist any statutory regulatory body in enforcing compliance with anti-discriminatory legislation;
- f. report to the Minister annually in respect of its work during the preceding year, such report to include an analysis of each financial institution's performance in complying with the terms of the Act; and
- g. make recommendations to the Minister on any matters falling within the purview of this Act.

(2) The powers of the Office are to -

- a. examine financial institutions for the purpose of ascertaining whether they are complying with the provisions of this Act as well as with the provisions of sections 31 and 32 of the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act No.4 of 2000);
- b. advise the Minister on the format, content and timing of disclosure by financial institutions in terms of the requirements of this Act;
- c. require financial institutions, within a reasonable time frame, to substantiate information disclosed in terms of the requirements of this Act, where reasonable doubt may exist in the opinion of the Office that the information disclosed is not fully accurate and/or comprehensive;
- d. institute proceedings to verify the validity of information disclosed by a financial institution, in terms of the requirements of this Act, for which purpose such financial institution shall afford the Office all reasonable access to premises and information and assistance in order to enable the Office to analyse and interpret such information, and
- e. institute charges against a financial institution with the relevant Attorney-General's office in the event of non-compliance by such financial institution with the requirements of this Act or with any reasonable request for information from the Office.

### **Secretariat of the Office**

5. (1) As soon as possible after the commencement of this Act, the Department must establish a secretariat to support the Office in the execution of its functions as set out in section 4.

(2) The secretariat shall comprise officials of the Department.

(3) The Department of Housing shall fund the costs of the secretariat from its own budget.

(4) The secretariat shall cause the establishment and maintenance of an adequate and appropriate financial bookkeeping and management function to fully account for and manage expenditure incurred against its budget and the efficient use of resources at its disposal.

(5) The Director-General: Housing shall be the accounting officer for the Office and shall cause the installation of the necessary financial controls and management measures by the Office to ensure full accountability for expenses incurred by the Office: Provided that, subject to the provisions of the Public Finance Management Act, 1999 (Act No. 1 of

1999),

- a. the secretariat shall be accountable to the Office in relation to any functional matters executed by the secretariat under instructions of the Office as well as all matters pertaining to the budget and expenses incurred by the secretariat.
- b. the Office shall be accountable to the Director-General: Housing in relation to the budgetary allocation made to the Office by the Department of Housing.

#### **Disclosure obligations by financial institution**

6. (1) With effect from the date of the commencement of this Act, every financial institution shall disclose in its annual financial statements and otherwise as prescribed by this Act or by regulation, reliable and timely information, as set out in section 7, that enables the Office to make, amongst others, an accurate assessment of the performance of the financial institution in terms of the requirements of the Act.
- (2) The disclosure by a financial institution of the required information in compliance with the provisions of subsection (1) shall be in addition to any other information which the financial institution is obliged to disclose in its financial statements in terms of the Companies Act or any other law or principle of law.
- (3) The information required to be disclosed in terms of subsection (1) shall be furnished under a separate heading entitled "Disclosure requirements in terms of Home Loan and Mortgage Disclosure Act."
- (4) The auditors of a financial institution shall be required to comment specifically in the financial institution's annual statements on the accuracy and comprehensiveness of information disclosed in terms of subsection (1) and whether there has been compliance by the financial institution with the relevant provisions of this Act.

#### **Information required to be disclosed by financial institutions in their financial statements**

7. (1) The information required to be disclosed by financial institutions in respect of each category of home loans made available, in compliance with section 6 is the following -
  - a. the total number and Rand amount of completed applications for home loan forms received during the financial period in respect of which such financial statements have been prepared in respect of-
    - i. particular categories of borrower as prescribed by regulation; and
    - ii. particular geographic areas as prescribed by regulation.
  - b. the total number and Rand amount of home loan applications for home loans declined and the reasons for such rejections per category of reason as required by regulation issued in terms of section 9, in respect of -
    - i. particular categories of prospective borrower as prescribed by regulation; and
    - ii. particular geographic areas as prescribed by regulation.
  - c. the total number and Rand amount of all home loans closed and disbursed by a financial institution during the financial period in respect of which such financial statements have been prepared.
  - d. the total number and Rand amount of all home loans granted by a financial institution during the financial period in respect of which financial statements have been prepared which were granted -
    - i. to particular categories of borrowers as prescribed by regulation;
    - ii. in respect of particular geographic areas as prescribed by regulation.
  - c. such other information as is prescribed by regulation.
- (2) The information to be furnished in terms of subsection (1) above must be given on a home loan by home loan basis as well as by way of aggregate figures.
- (3) In respect of each financial year financial institutions must in addition to disclosing the

information referred to in subsection (6)(1) disclose the relevant information in respect of the immediately preceding year.

(4) No person may disclose any information acquired on a confidential basis in the course of the application of this Act, except when -

- a. necessary for the purposes of this Act;
- b. required in terms of other legislation; or
- c. ordered by a court.

### **Regulations**

8. The Minister shall, within six months of this Act being published in the *Government Gazette*, in consultation with the Minister of Finance and after consultation with the Governor of the Reserve Bank, make regulations regarding -
- a. any matter which in terms of this Act is required or permitted to be prescribed; and/or
  - b. any matter which is necessary or desirable to advance the objectives of this Act.

### **Amendment to Usury Act, 1968 (Act No. 73 of 1968)**

9. (1) The definition of "housing loan" in section 1 of the Usury Act, 1968 (Act No. 73 of 1968) is hereby amended by the deletion of paragraph (c) of the definition and the substitution therefor of the following paragraph:

"(c) where the loan is a home loan as defined in section 1 of the Home Loan and Mortgage Disclosure Act, 2000 (Act No. of 2000)"

(2) Any reference in the Schedule to the Usury Act, 1968 to an insurer registered in terms of any applicable insurance legislation shall be interpreted to include a reference to a company in respect of which the Registrar of Insurance has made a determination, prior to the repeal of the Insurance Act, 1943 (Act No. 27 of 1943), that the said company does not require registration in terms of that Act.

### **Exemptions**

10. The Minister may at his or her discretion exempt a financial institution or a category of financial institutions from any or all requirements of this Act for a specified period of time which shall not exceed one year and be renewed upon the submission of new evidence to the Minister, in the event of -
- a. a financial institution requiring time to adjust systems and procedures in order to collect and provide the information required and/or institute the necessary information and administrative systems to enable compliance with the requirements of this Act.
  - b. the requirements of this Act, in the view of the Minister, imposing unreasonable and/or unaffordable demands on the resources at the disposal of the financial institution or any specific defined category of financial institution.

### **Offences and penalties**

11. (1) Any person who fails to comply with any provision of this Act is guilty of an offence.
- (2) Any person who is convicted of an offence in terms of subsection (1) shall be liable on each charge to a fine not exceeding R25 000,00 or to imprisonment for a period of one year or to both such fine and imprisonment.

### **Short title and commencement**

12. Act is called the Home Loan and Mortgage Disclosure Act, 2000 and takes effect on a date determined by the President by proclamation in the Gazette.