

REPUBLIC OF SOUTH AFRICA

HOME LOAN AND MORTGAGE DISCLOSURE BILL

*(As introduced in the National Assembly as a section 75 Bill) (Explanatory summary of Bill
published in Government Gazette No 21481 of 18 August 2000) (The English text is the
official text of the Bill)*

(MINISTER OF HOUSING)

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BILL

To promote fair lending practices, which require disclosure by financial institutions of information regarding the provision of home loans; to establish an Office of Disclosure; and to provide for matters connected therewith.

PREAMBLE

WHEREAS, in terms of section 9 of the Constitution—

- (a) everyone is equal before the law and has the right to equal protection and benefit of the law;
- (b) equality includes the full and equal enjoyment of all rights and freedoms;
- (c) legislative and other measures, designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination, may be taken to promote the achievement of equality;
- (d) 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;
- (e) no person may unfairly discriminate directly or indirectly against anyone on one or more grounds listed in paragraph (d); and
- (f) discrimination on one or more of the grounds listed in paragraph (d) is unfair unless it is established that the discrimination is fair;

AND WHEREAS, in terms of section 26(1) and (2) of the Constitution—

- (a) everyone has the right to have access to adequate housing; and
- (b) 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 any information—

- (a) held by the state; and
- (b) 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—

- (a) the effective functioning of the housing market while leveling the playing fields and taking steps to achieve equitable access for all to that market; and
- (b) 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 5

- 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, or any other applicable law;
 - (ii) “borrower” means any person who is indebted to a financial institution in respect of a home loan; 10
 - (iii) “Companies Act” means the Companies Act, 1973 (Act No. 61 of 1973);
 - (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), or the Mutual Banks Act, 1993 (Act No. 124 of 1993), or any other registered financial institution whose business is, in full or in part, either the acceptance of deposits from the general public, the advance of credit to persons or both such acceptance and advance, with the security of a registered mortgage bond or any other form of accepted security, for the purpose of providing home loans; 15
 - (vi) “home” means a residential structure that is recognised by a financial institution as collateral, in full or in part, for a home loan; 20
 - (vii) “home loan” means a loan or advance by a financial institution to a person for purposes of constructing, purchasing, renovating or improving in any way such person’s home, with the security of a registered mortgage bond or any other form of accepted security; 25
 - (viii) “Minister” means the Minister of Housing;
 - (ix) “Office” means the Office of Disclosure established by section 4;
 - (x) “prescribed” means prescribed by regulation;
 - (xi) “regulation” means a regulation made under section 12;
 - (xii) “required information” means the information contemplated in section 3; 30
 - (xiii) “secretariat” means the secretariat contemplated in section 11.

Disclosure obligations by financial institution

- 2.** (1) From the date of the commencement of this Act, every financial institution must disclose the required information in its annual financial statements.
- (2) The disclosure by a financial institution of the required information is 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. 35
- (3) The required information must be furnished under a separate heading entitled, “Disclosure requirements in terms of Home Loan and Mortgage Disclosure Act”.
- (4) The auditors must comment specifically in the financial institution’s annual statements on the accuracy and comprehensiveness of the information disclosed in terms of subsection (1), and whether or not there has been compliance by the financial institution with the relevant provisions of this Act. 40

Information to be disclosed by financial institution

- 3.** (1) A financial institution must, in respect of home loans, disclose the following information: 45

- (a) The total number and amount in rand of completed home loan applications received during the financial period in respect of which the financial statements have been prepared in respect of such—
 - (i) categories of borrowers as may be prescribed; and
 - (ii) geographic areas as may be prescribed; 5
- (b) the total number and amount in rand of home loan applications declined and the reasons for the rejections in respect of such—
 - (i) categories of prospective borrowers as may be prescribed; and
 - (ii) geographic areas as may be prescribed;
- (c) the total number and amount in rand 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; 10
- (d) the total number and amount in rand of all home loans approved by a financial institution during the financial period in respect of which financial statements have been prepared, which must include information in respect of such particular— 15
 - (i) categories of borrowers as may be prescribed; and
 - (ii) geographic areas as may be prescribed; and
- (e) such other information as may be prescribed.
- (2) When a financial institution discloses the required information in terms of subsection (1), it must also disclose such information in respect of the immediately preceding financial year. 20
- (3) No person may disclose the required information unless—
 - (a) it is done in terms of this Act;
 - (b) required in terms of any other legislation; or 25
 - (c) ordered to do so by a court of law.

Establishment of Office of Disclosure

4. There is hereby established an office to be known as the Office of Disclosure.

Functions of Office

5. (1) The Office is responsible for— 30
- (a) receiving the required information;
 - (b) analysing and interpreting the required information;
 - (c) receiving and investigating public comments on financial institutions relating to home loans;
 - (d) making available to the public, information that indicates whether or not financial institutions are serving the housing credit needs of their communities; 35
 - (e) assisting in identifying possible discriminatory lending patterns and assisting any statutory regulatory body in enforcing compliance with anti-discriminatory legislation; 40
 - (f) reporting to the Minister annually in respect of its work during the preceding year, and such report must include an analysis of the performance of each financial institution in complying with the terms of the Act; and
 - (g) making recommendations to the Minister on any matter falling within the scope of this Act. 45
- (2) The Office—
- (a) must ensure that financial institutions comply with this Act and the provisions of item 4 of the Schedule to the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act No. 4 of 2000);
 - (b) must advise the Minister on the format, content and timing of disclosure by financial institutions in terms of the requirements of this Act; 50
 - (c) may require financial institutions to substantiate information disclosed in terms of this Act where reasonable doubt may exist whether or not the information disclosed is fully accurate or comprehensive; and

- (d) may investigate and institute proceedings to verify the validity of information disclosed by a financial institution in accordance with the requirements of this Act, and for that purpose, such financial institution must afford the Office all reasonable assistance and access to premises and information to enable the Office to analyse and interpret such information. 5

Constitution of Office

6. The Office consists of no more than 10 members appointed by the Minister by virtue of their expertise and experience in matters related to banking, housing finance and investment, community economics and civil rights.

Chairperson and deputy chairperson 10

7. (1) The Minister must designate one of the members of the Office as chairperson of the Office and another as deputy chairperson.

(2) (a) When the chairperson is absent or not able to perform his or her functions as chairperson, or when there is a vacancy in the office of chairperson, the deputy chairperson must act as chairperson. 15

(b) If the chairperson and deputy chairperson are absent or not able to perform the functions of chairperson, the members of the Office must elect another member to act as chairperson.

(c) A member acting as chairperson has all the powers and must perform all the duties of the chairperson. 20

Period of office, vacation of office and filling of vacancies

8. (1) A member of the Office must be appointed for such period, not exceeding three years, as the Minister may determine at the time of appointment.

(2) A member of the Office ceases to be a member if—

(a) he or she resigns; 25

(b) without 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); 30

(d) he or she has been declared by a court to be mentally ill or disordered;

(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 an executive council of a province; or 35

(g) the Minister terminates his or her office for reasons which are just and fair.

(3) A member of the Office may be reappointed at the termination of his or her term of office.

(4) If a member of the Office ceases to hold office before the end of his or her term of office, the Minister may, subject to section 7, appoint somebody to fill the vacancy for the remainder of the period of the term of office of the member. 40

Meetings of Office

9. (1) The first meeting of the Office must be held at the time and place determined by the Minister, and thereafter a meeting of the Office must be held at the time and place determined by the chairperson. 45

(2) The 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.

(3) A quorum for a meeting of the Office is more than 50 per cent of its members. 50

(4) The chairperson determines the procedure at the meetings of the Office.

(5) All decisions of the Office must be taken by consensus but where consensus is not reached, the decision of a majority of the members present is the decision of the Office.

(6) In the event of an equality of votes on any matter, the person presiding at the meeting will have a casting vote in addition to that person's deliberative vote. 55

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

Remuneration and allowances of members of Office

10. Any member of the Office who is not in the full-time service of the State must be paid such remuneration and allowances as the Minister may, with the approval of the Minister of Finance, determine. 5

Secretariat

11. (1) The work incidental to the performance of the functions of the Office must be performed by a secretariat consisting of officials of the Department designated for that purpose by the Minister after consultation with the Director-General of Housing. 10

(2) The costs and expenses connected with the application of this Act must be defrayed from money appropriated by Parliament to the Department for that purpose.

(3) Minutes of the proceedings of the Office must be kept and retained by the secretariat. 15

Regulations

12. The Minister must, in consultation with the Minister of Finance and the Governor of the Reserve Bank, make regulations regarding any matter which—

- (a) in terms of this Act is required or permitted to be prescribed; and
- (b) it is necessary or expedient to prescribe in order to achieve or promote the objectives of this Act. 20

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

13. The definition of “housing loan” in section 1 of the Usury Act, 1968 (Act No. 73 of 1968), is hereby amended by the substitution for paragraph (c) of the following paragraph: 25

“(c) where the loan is a home loan as defined in section 1 of the Home Loan and Mortgage Disclosure Act, 2000.”.

Exemptions

14. (1) The Minister may exempt a financial institution, or a category of financial institutions, from any or all of the requirements of this Act for a specified period of time, if the financial institution, or category of financial institutions, requires time to adjust systems and procedures in order to collect and provide the required information, or to collect the necessary information and put in place administrative systems to enable compliance with the requirements of this Act. 30

(2) An exemption contemplated in subsection (1) may not exceed one year, but may be renewed by the Minister upon submission of evidence that any of the circumstances contemplated in subsection (1) still applies to the financial institution, or category of financial institutions. 35

Offences and penalties

15. (1) Any person who contravenes or fails to comply with any provision of this Act is guilty of an offence. 40

(2) A person convicted of an offence in terms of subsection (1) is liable to a fine not exceeding R100 000,00.

Short title and commencement

16. This 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*. 45

MEMORANDUM ON THE OBJECTS OF THE HOME LOAN AND MORTGAGE DISCLOSURE BILL, 2000

Background and contents of Bill

1. Section 2(1)(e)(v) and (vi) of the Housing Act, 1997 (Act No. 107 of 1997), provides that national, provincial and local spheres of government must promote the effective functioning of the housing market while levelling the playing fields and take reasonable steps to achieve equitable access for all to that market, as well as implement measures to prohibit unfair discrimination by all role-players in the housing development process.

2. In terms of section 32(1) of the Constitution, everyone has the right of access to any information held by the state, and any information that is held by any other person and that is required for the exercise and protection of any rights.

3. Previously, there has been discrimination by financial institutions, on one or more of the grounds set out in section 9(3) of the Constitution, when considering or granting a home loan.

4. In order to address the above, this Bill has been drafted. The Bill seeks to—

- (a) promote fair lending practices among financial institutions which provide home loans;
- (b) ensure the disclosure by financial institutions engaged in the provision of home loans of information regarding such provision in their reports and annual financial statements;
- (c) establish an Office of Disclosure to monitor compliance with the above disclosure requirement.

FINANCIAL IMPLICATIONS FOR STATE

5. Costs of the establishment and maintenance of the Office of Disclosure will be for the Department's expense. Based on the structure of the Office as contained in the Bill and taking into account considerations such as transport and subsistence costs, the estimated cost for the first year would amount to R4,98 million. Provision therefor will be made in the Departmental budget.

CONSULTATION

6. The Departments of Finance and Trade and Industry, as well as the Banking Council, were consulted and the Bill was published for public comment in the *Government Gazette* on 10 March 2000. Due consideration was afforded to the comments received.

PARLIAMENTARY PROCEDURE

7. The State Law Advisers and the Department of Housing are of the opinion that this Bill must be dealt with in accordance with the procedure established by section 75 of the Constitution since it contains no provision to which the procedure set out in section 74 or 76 of the Constitution applies.