

# FINANCIAL DISPUTES RESOLUTION COMMISSION

## CODE OF BYLAWS AND PROCEDURES



**\*\* APPROVED BY THE SUPREME COUNCI OF THE  
DA AFGHANISTAN BANK ON DECEMBER 2, 2008**

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## I N T R O D U C T I O N

The Da Afghanistan Bank Law provides for the establishment of a Financial Disputes Resolution Commission "to resolve financial disputes in an amicable manner before the matters are taken to a court of law." (Da Afghanistan Bank Law Article 106.) The law provides for the nomination and appointment of professional members of the Commission, and requires the membership to "draw up its procedures and by-laws and submit them for approval to the Supreme Council of Da Afghanistan Bank" within one month of the Commission's establishment. (Da Afghanistan Bank Law Article 111.)

For two months, a working group of Commission members, with support from USAID/BearingPoint Legal Advisor Katherine Blanchette, worked to develop a draft procedural code. The effort involved intensive review and study of the applicable laws and consideration of logistical, practical, and policy questions. The group's objective has been to establish a body that adheres closely to the vision of the drafters of the Da Afghanistan Bank Law, the Banking Law, and other applicable statutes. In Saratan/July, the draft of the procedural code was submitted to the Supreme Council of Da Afghanistan Bank for review. The Supreme Council also requested that the draft be distributed for public comment and consultation.

The attached materials are the product of the working group's efforts. The first document is the draft of the proposed procedural code itself, assembling all of the group's discussions to date. For reviewers' convenience, when the main text of the procedural code references a provision of the Da Afghanistan Bank Law or the Banking Law, the working group has excerpted that portion of the statute in the footnotes. In addition, when a provision of this proposed code was written to comply with or address an article of one of the statutes, the specific statutory reference is included in the footnotes. Finally, the working group endeavored to keep detailed records of its discussions, which are reflected in numbered entries in the FDRC Working Group Discussion Notes appended to this draft. Parenthetical references to "Working notes" in footnotes of the proposed code allow reviewers to link the proposed text to the working group discussions that led to the text. Thus, in Footnote 1, the reference (Working note 164) corresponds to entry 164 in the Working Group Discussion Notes. Looking at entry 164 of that document enables the reviewer to see a summary of the relevant provisions of law, the procedural question the working group addressed in its discussions, the working group's decision regarding the procedural issue, and its initial draft of procedural language. It is the working group's intention that assembling these detailed background materials will help to ensure the transparency of this drafting process.

Da Afghanistan Bank and the FDRC Working Group welcome comments, input, and suggestions on this proposed code. Although the FDRC Working Group is not bound or required by law to incorporate suggestions, it will give due consideration to all contributions, so as to ensure a fair and inclusive drafting process. To that end, the FDRC Working Group request that comments be returned in writing to \_\_\_\_\_ by no later than \_\_\_\_\_.

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## **CHAPTER I NAME, PURPOSE AND JURISDICTION OF THE FINANCIAL DISPUTES RESOLUTION COMMISSION**

### **Article 1 Name**

This document contains a procedural code for the body that shall be known and referred to as the Financial Disputes Resolution Commission (the "FDRC"). All references in the Banking Law, the Da Afghanistan Bank Law, and the Telecommunications Services Law to the "Financial Disputes Commission," the "Financial Services Tribunal," or the "Commission for Settling Financial Disputes" shall be understood and interpreted to refer to the Financial Disputes Resolution Commission.<sup>1</sup>

### **Article 2 Purpose**

The FDRC shall hear disputed financial cases prior to judicial proceedings, on mediation basis, and shall perform the functions specified in the Banking Law, the Da Afghanistan Bank Law, and the Telecommunications Services Law.

### **Article 3 Jurisdiction of the FDRC**

The FDRC shall have jurisdiction to review the following matters upon receipt of an appropriate application submitted pursuant to these rules:

- 3.1** Decisions of Da Afghanistan Bank ("DAB") whereby the application of a license or a permit or a registration is rejected;
- 3.2** Decisions of DAB whereby a condition or restriction is attached to a license or a registration or a permit;
- 3.3** Decisions of DAB whereby a license or a registration or a permit is revoked;
- 3.4** Decisions of DAB imposing a fine;
- 3.5** Orders issued by DAB to a person engaged in an activity without a valid license or permit from, or registration with, DAB even though such license, permit or registration is required by law;
- 3.6** Decisions of DAB to appoint or to extend the term of appointment of a conservator;
- 3.7** Disputes between financial institutions that are referred to the FDRC pursuant to a written agreement between the parties to the dispute; and
- 3.8** Such other matters as are referred to the FDRC by law, including applications for the opening of bankruptcy proceedings against a bank, supervision of the

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<sup>1</sup> Da Afghanistan Bank Law Article 5. (Working notes 164.) Telecommunications Services Regulation Law Article 10.

administration of bankruptcies of banks, and appeals from persons aggrieved by decisions of the Afghanistan Telecommunications Regulatory Authority ("ATRA") as provided for in the Telecommunications Services Regulation Law.<sup>2</sup>

#### **Article 4 Application of the Code**

- 4.1** This Code applies to all proceedings brought before the FDRC. It is intended to supplement and clarify the relevant procedures described in other applicable laws. In cases of conflict between this Code and other applicable laws, the procedures outlined in applicable laws shall govern.
- 4.2** This Code shall be fairly construed:
- 4.2(a)** To give effect to the objectives of applicable laws and duties assigned to FDRC; and
- 4.2(b)** To assist all Persons in obtaining a just, speedy and inexpensive disposition of every Financial Dispute brought before the FDRC.
- 4.3** At least once every year after adoption of this Code, FDRC shall review the Code in order to add new articles or change or eliminate provisions that are no longer required or that may be detrimental to the attainment of the objectives as set out in the Code.

### **CHAPTER II GENERAL PROCEDURES**

#### **Article 5 Definitions**

For purposes of these procedures, the following definitions apply:

- 5.1** The "Code" means this Code of Bylaws and Procedures, and any amendments or additions made to it.
- 5.2** A "Commencement Hearing" is an initial hearing held by the FDRC in proceedings regarding a Person's failure to comply with a DAB order to cease activities under Banking Law Article 2.
- 5.3** "Date of Service" means the date on which Service is completed.
- 5.4** A "Decision" means any formal ruling of the FDRC regarding the outcome of a Financial Dispute.
- 5.5** A "Filing" is a document submitted to the FDRC after the Initial Application to open a Financial Dispute has been submitted. A Filing contains a request for relief of some kind, or a request for the FDRC to issue some guidance or order, related to the Financial Dispute in which the Filing is submitted.

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<sup>2</sup> Da Afghanistan Bank Law Article 107 (1). (Working notes entry 168.)

- 5.6 A "Financial Dispute" is a matter that falls within the jurisdiction of the FDRC under DAB Law Article 107 or other applicable legal authorities.<sup>3</sup>
- 5.7 A "Financial Institution" is a Person engaged in financial business as established by law.<sup>4</sup>
- 5.8 An "Initial Application" is the document submitted to the FDRC containing a request to begin proceedings in a Financial Dispute.
- 5.9 A "Member" of the FDRC is one of six natural persons appointed by the President of the Islamic Republic of Afghanistan (of whom three are professional lawyers proposed by the Governor of the DAB and three are professional accountants proposed by the Minister of Finance) to serve as professional commissioners with responsibility for hearing disputes brought to the FDRC and making decisions on such disputes.
- 5.10 A "Non-participating Member" of the FDRC is Member who is disabled or unavailable at the time of voting on any FDRC Order or Decision, or who must recuse himself from hearing arguments or participating in decisions related to a Financial Dispute for any reason. The status of Non-participating Member applies only to those Orders, Decisions, or Financial Disputes in which the Member is unable to participate.
- 5.11 An "Order" is an interim ruling of the FDRC regarding a matter related to the progress or processing of a Financial Dispute.
- 5.12 "Participants" in a Financial Dispute include the Person initiating the matter, the any Person(s) responding to the initial filing, other interested persons invited to participate in the hearings by the FDRC according to rules or procedures laid out in this Code.
- 5.13 "Person" includes a natural or juridical person and includes Da Afghanistan Bank, a government or government entity, a joint stock company, a limited liability company, a sole proprietorship, or other corporate entity;
- 5.14 To "Serve" a document or communications or "Service" of documents or communications means delivery to the addressee of the document or communication, unless applicable law or this Code indicates that an alternate means of service is permissible.
- 5.15 A "Subject Person" is a Person who is ordered to do something, or to refrain from doing something, in a decision or an order of either the FDRC or the DAB.

## **Article 6 Official FDRC Matter Number**

- 6.1 FDRC will assign every Financial Dispute an official FDRC matter number.

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<sup>3</sup> Da Afghanistan Bank Law Article 106. (Working notes entry 166.)

<sup>4</sup> Da Afghanistan Bank Law Article 107 (3). (Working notes entry 172.)

## **Article 7 Service and Transmission of Documents**

- 7.1** When applicable law or this Code allows Service by means other than delivery, the Date of Service shall be the date on which the Person attempting Service completes the alternate method of service.<sup>5</sup>
- 7.2** Wherever this Code requires something to be done in writing, it may be done by electronic transmission of written words.
- 7.2(a)** In the event an electronic address to which a document or message is directed is not operational, such document or message shall be deemed to have been sufficiently delivered if a paper copy has been delivered to the recipient's address, or its designated alternate location for receiving documents.

## **Article 8 Timing of Application for FDRC Review**

- 8.1** Applications requesting the FDRC to review a controversy or Financial Dispute shall be filed in accordance with the timelines established by this Code or by applicable law.

## **Article 9 Contents of Initial Application for FDRC Review**

Unless this Code specifies otherwise, Initial Applications shall:

- 9.1** Be made in writing;
- 9.2** Include a brief summary of the factual and legal basis of the dispute for which FDRC review is requested;
- 9.3** Cite the legal authority(ies) conferring jurisdiction on the FDRC;<sup>6</sup>
- 9.4** Attach documents referenced in the request including, in the case of disputes between financial institutions referred pursuant to an agreement between the financial institutions, a copy of the agreement;
- 9.5** Attach a copy of a completed form FDRC-1.<sup>7</sup>
- 9.6** Be Served on other parties to the dispute named or identified in the proceedings; and
- 9.7** Be filed in the offices of the FDRC.<sup>8</sup>

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<sup>5</sup> Banking Law Article 51 (3). (Working notes entry 60.)

<sup>6</sup> Banking Law Article 51 (3). (Working notes entry 58.)

<sup>7</sup> The Form FRDC-1 will be a basic case file cover sheet providing contact and other details for the parties.

<sup>8</sup> Da Afghanistan Bank Law Article 107 (1). (Working notes entry 168.)

**Article 10 Contents of Filings Submitted to the FDRC After Submission of Initial Application**

Filings submitted to the FDRC after the Initial Application shall:

- 10.1 State the proceeding number assigned by FDRC;
- 10.2 State the date and title of the document being filed;
- 10.3 State the relief requested;
- 10.4 State the title and section of the applicable law or regulation on which the Person making the filing relies to support the request for relief;
- 10.5 State the facts upon which the Person making the filing relies to support the request for relief, as well as any other information that may assist FDRC in understanding the Person's position;
- 10.6 Include the name and, where available, electronic address of the Person making the filing. If the Person does not have an electronic address, an alternative address shall be provided;
- 10.7 Attach documents that may be useful in explaining or supporting the Person's request for relief; and
- 10.8 Be clearly organized, with headings to indicate required content.

**Article 11 Amendment of Documents**

FDRC may, on terms that it concludes are reasonable in the circumstances:

- 11.1 Allow Initial Applications or Filings submitted to the FDRC to be amended by the Person that submitted them;
- 11.2 Direct the Person that submitted an Initial Application or a Filing to amend the document if the FDRC concludes that the contents may tend to prejudice or embarrass a Participant, or that the contents may delay a fair disposition of the Financial Dispute; or
- 11.3 Order other amendments necessary to assist the FDRC in performing its duties.

**Article 12 Time**

When the time period within which an action must be taken or completed is fixed by statute or by regulation, the time shall be computed as provided in that statute or regulation. If the statute or regulation does not specify a method for computing the time period, or if there is no applicable statutory or regulatory provision, the following rules shall apply for computing time or determining deadlines regarding matters within the jurisdiction of the FDRC:

- 12.1 The day on which time begins to run is not included;

- 12.2** The last day of the period is included, unless it is a Friday, legal holiday or other day when the FDRC offices are closed. In that case, the period runs until the end of the next business day on which the FDRC offices are open;
- 12.3** When the time allowed is less than seven (7) business days, intermediate Fridays and legal holidays are not included; and
- 12.4** A document that is to be delivered to the FDRC offices shall be delivered by 15:00 (Saturday – Wednesday) on the day that it is due. If a document is delivered on a Thursday or during the month of Ramadan, it shall be delivered by 13:00 hours.
- 12.5** During a proceeding, the FDRC may extend the time permitted for doing an act, unless the time is fixed in a statute or regulation.

### **Article 13 Specifying Procedure for Financial Dispute Proceedings**

During the hearing or the conduct of a Financial Dispute, the FDRC may:

- 13.1** Issue directions regarding procedural matters not directly addressed by this Code or by applicable statutes and regulations, which shall be binding for the duration of the Financial Dispute; or
- 13.2** Dispense with, vary or supplement a provision of this Code if it determines that:
- 13.2(a)** There is compelling reason to believe that doing so will help to serve justice by ensuring an efficient and fair resolution of the Financial Dispute;
- 13.2(b)** Doing so will not prejudice any Participant in the Financial Dispute; and
- 13.2(c)** The proposed change does not violate the requirements of applicable statutes or regulations.
- 13.3** The FDRC will promptly notify Participants of any procedural directions or modifications issued under Article 13.1 or 13.2.

### **Article 14 Participant's Failure to Comply with Requirements of this Code**

- 14.1** Where a Participant in a Financial Dispute has not complied with a requirement of this Code, the FDRC may take reasonable steps to ensure the Participant's compliance. Such steps may include temporarily halting the proceeding until the FDRC is satisfied that the Participant is in compliance with the Code.

### **Article 15 Preliminary Consideration of Application for FDRC Review**

Unless these rules specify a different timeline or procedure, within one week from the date on which an Initial Application is filed, the FDRC shall make a preliminary determination as to whether or not the Initial Application reasonably appears to present a dispute that is within the jurisdiction conferred on FDRC by

law and that merits review, and shall notify the parties of its preliminary determination.<sup>9</sup>

**15.1** If the FDRC concludes that the matter presented reasonably appears to be within its jurisdiction, the FDRC shall summon the requesting party and other entities named in the Initial Application to an initial hearing at which the requesting party will be required to present an overview of its complaints and other parties shall be given an option to offer preliminary responses.

**15.1(a)** The initial hearing shall be held within a reasonable time and in any case no later than thirty (30) days from the date FDRC receives the Initial Application.

**15.1(b)** At the initial hearing the FDRC shall establish a calendar for submission of further written papers, including responses to the original request, and hearings.<sup>10</sup>

#### **Article 16 Party Appealing DAB Order to Certify Compliance**

A complaining party in an appeal shall certify to the FDRC during the initial hearing that it is complying with the terms of the DAB order that is subject to appeal. At the request of DAB, the FDRC may require the complaining party to submit reasonable proof of its compliance.<sup>11</sup>

#### **Article 17 Presence of Participants at Hearings of the FDRC**

**17.1** Participants shall attend hearings and proceedings of the FDRC as directed by these procedures or by the FDRC.

**17.2** Failure to attend hearings as required will subject Participants to all penalties available under law, including in Da Afghanistan Bank Law Article 112.<sup>12</sup>

#### **Article 18 Representation of Participants Before the FDRC**

**18.1** Except as specified in Article 19 of this Code, appearances before the FDRC by Participants that are not natural persons shall be made by an officer of the organization.

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<sup>9</sup> Da Afghanistan Bank Law Article 107 Paragraphs 1-2. (Working notes entries 169-70.)

<sup>10</sup> Da Afghanistan Bank Law Article 107 Paragraphs 1-2. (Working notes entries 169-70.) Banking Law Article 51 (3). (Working notes entries 61-65.)

<sup>11</sup> Banking Law Article 51 (3). (Working notes entry 69.)

<sup>12</sup> Da Afghanistan Bank Law Article 112 reads as follows: "The Commission may by summons require any person to attend, with regard to a case submitted to the commission for settlement and oblige them to present documents and proofs as needed. Any person going against this rule shall be punished."

**18.2** In addition, Participants may designate legal counsel or another qualified representative to assist them in proceedings before the FDRC, provided that such persons are first identified in a written submission to the FDRC that contains:

**18.2(a)** The name and contact details of the representative;

**18.2(b)** A statement signed by the Participant that the representative has been authorized to appear on behalf of the party; and

**18.2(c)** A statement signed by the representative that the representative is knowledgeable about the contents of this Code and will uphold the Code during the course of the representation.<sup>13</sup>

## **Article 19 Representation of DAB Before the FDRC**

The Executive Board of the DAB shall appoint an officer charged with representing the DAB in proceedings before the FDRC. This officer shall prepare written submissions to the FDRC and shall represent the DAB in person during hearings of the FDRC. The officer may designate qualified persons to assist him in these duties, provided that such persons are first identified in a written submission to the FDRC that contains:

**19.1** The name and contact details of such person(s); and

**19.2** An affirmative statement that DAB authorizes the person(s) to assist DAB's designated officer in proceedings before the FDRC.<sup>14</sup>

## **Article 20 Representation of ATRA Before the FDRC**

The Board of ATRA shall appoint an officer charged with representing ATRA in proceedings before the FDRC. This officer shall prepare written submissions to the FDRC and shall represent ATRA in person during hearings of the FDRC. The officer may designate qualified persons to assist him in these duties, provided that such persons are first identified in a written submission to the FDRC that contains:

**20.1** The name and contact details of such person(s); and

**20.2** An affirmative statement that ATRA authorizes the person(s) to assist ATRA's designated officer in proceedings before the FDRC.

## **Article 21 Recovery of FDRC Expenses**

Upon issuing a Decision at the conclusion of a Financial Dispute, the FDRC may recover expenses associated with the cost of managing the proceeding.

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<sup>13</sup> Banking Law Article 2. (Working notes entry 26.)

<sup>14</sup> Banking Law Article 2. (Working notes entry 25.)

**21.1** Except as provided in Article 21.3(a), the FDRC will recover expenses from the losing Participant in the Financial Dispute.

**21.1(a)** In cases involving more than two Participants, the FDRC will make a reasonable determination as to whether each Participant is a losing or a winning party. In the event there are two or more losing Participants in a Financial Dispute, the burden of reimbursing the FDRC for its expenses will be shared equally among those losing Participants.

**21.1(b)** When the Financial Dispute involves the administration of bankruptcy or liquidation proceedings of a bank, expenses will be recovered from the assets of the bank being liquidated.

**21.1(c)** When the losing Participant is the DAB, ATRA, or another entity of the State or agency of the Government, the Participant may, but will not be required to, pay its share of expenses immediately.

**21.1(d)** The FDRC will maintain records of each decision in which the losing Participant is the DAB, ATRA, or another entity of the State or agency of the Government. The records will accurately reflect the total expenses owed by each such entity in connection with each Financial Dispute in which it was a losing Participant, and will reflect whether the amount has been paid or not. Annually, the FDRC will submit a report of total expenses to the appropriate authorities.

**21.2** In cases involving disputes about licensing, permitting, or registration matters brought to the FDRC under Articles 3.1, 3.2, and/or 3.3 of this Code, the FDRC may recover expenses totaling not more than one fourth (1/4) of the applicable fee charged by DAB to process the license, permit, and/or registration at issue. The FDRC will use the same formula to recover expenses in disputes relating to ATRA decisions concerning licensing, permitting or registration brought to the FDRC under Article 3.8 of this Code.

**21.3** In cases which result in a monetary judgment in favor of one or more Participants, the FDRC may recover expenses totaling not more than two (2) percent of the total judgment.

**21.3(a)** In cases that have the potential to result in a monetary judgment, but in which the Participants reach an amicable settlement of their claims before the FDRC reaches a Decision, the FDRC may recover expenses totaling not more than two (2) percent of the total settlement amount, except that the burden of paying the expenses will be divided equally among the Participants, unless the Participants themselves agree to assign an unequal share to one or more of the settling Participants.

**21.4** In all other cases, the FDRC will have the discretion to recover reasonable expenses to be calculated based on the time and expenses incurred by the FDRC

to hear and resolve the Financial Dispute. Such expenses shall not exceed one hundred thousand (100,000) Afghanis.<sup>15</sup>

## **Article 22 Applicability of the Law on Principles of the Commercial Courts**

In cases where a question of procedure is not specifically addressed by this Code, the FDRC will take guidance from relevant provisions of the Law on the Principles of the Commercial Courts, in particular Articles 78 through 207 of that Law.<sup>16</sup>

**22.1** Participants may bring potentially relevant provisions of the Law on the Principles of the Commercial Courts to the attention of the FDRC by submitting a written statement indicating:

**22.1(a)** The provisions of the Law on the Principles of the Commercial Courts which the Participant believes applicable to the situation;

**22.1(b)** The Participant's reason for asserting that the procedural issue is not specifically addressed by this Code; and

**22.1(c)** The basis for the Participant's assertion that the cited provisions of the Law on Principles of the Commercial Courts could apply and could benefit the proceedings.

**22.2** Participants who make submissions to the FDRC under Article 22.1 of this Code shall Serve copies of such submissions on other Participants at the time they are filed with the FDRC. Other Participants may offer additional written submissions to counter or supplement the contents of such filings within \_\_\_ days of service.

## **Article 23 FDRC Decisions by Majority Vote**

**23.1** FDRC Decisions shall reflect the majority vote of the entire membership of the FDRC, other than non-participating members as described in Article 24 of this Code.

**23.2** To expedite the hearing and processing of a Financial Dispute, however, the FDRC may, at its discretion, resolve that a subset of its members shall preside

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<sup>15</sup> The FDRC notes that several categories of disputes for which it is responsible, including, for example, large bankruptcy proceedings, could require substantial time and resources to oversee and to resolve. The expenses associated with such cases could far exceed the maximum expenses identified in Article 21.4. It is possible that there may be exceptional cases in which the potential maximum expenses to recover would need to be raised, through consultation with and with notice to Participants.

<sup>16</sup> Banking Law Article 2. (Working notes entries 36-39.) Originally, Working Group concluded that the provisions of the Law on the Principles of the Commercial Courts with particular applicability included Articles 78 – 230, but Articles 208 through 230 may no longer be as useful in light of the relatively new Arbitration law.

over hearings related to the Financial Dispute. The FDRC shall advise the participants of any such decision in advance.<sup>17</sup>

**23.2(a)** Orders regarding the progress or processing of a Financial Dispute may be issued by the majority vote of the members actually presiding over hearings in the matter.

## **Article 24 FDRC Decisions to be in Writing and Signed**

**24.1** A Decision of the FDRC shall be in writing.

**24.1(a)** A Decision of the FDRC shall be signed by all members of the FDRC other than Non-participating Members. Non-participating Members shall be identified by name on the order.<sup>18</sup>

**24.2** Where an FDRC Decision directs the modification of a DAB decision or order, the FDRC Decision shall:

**24.2(a)** Set forth the basis for ordering the modification;

**24.2(b)** Specify the modification to be made; and

**24.2(c)** Specify the date by which such modification must be made.

## **Article 25 FDRC Decisions Available to the Public**

The original signed copy of an FDRC Decision shall be kept in the offices of FDRC for a reasonable period of time and shall be accessible to the public according to procedures to be posted in the FDRC offices.

## **Article 26 Copies of FDRC Decisions and Orders Effective for Enforcement and Implementation**

For purposes of enforcement or implementation of a Decision of the FDRC, or of any Order of the FDRC that has been issued in written form, photocopies or duplicates of the Decision will be as effective as the original. FDRC will provide a copy of each of its Decisions to all Participants in the Financial Dispute.<sup>19</sup>

## **Article 27 Public Notice**

**27.1** To ensure that information concerning its Decisions is consistently distributed to interested and affected members of the public, FDRC shall maintain a list of widely circulated media sources in which it may publish public notices.

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<sup>17</sup> Banking Law Article 2. (Working notes entry 34.)

<sup>18</sup> Banking Law Article 2. (Working notes entry 13.)

<sup>19</sup> Banking Law Article 2. (Working notes entries 14-16.)

27.2 The list may include both print and electronic media (television and radio) and shall be updated annually.

27.3 A copy of the list will be available to the public in the offices of the FDRC.

#### **Article 28 Conflicts of Interest**

28.1 Professional members of the FDRC shall refrain from participating in matters in which they have a personal or financial interest.

28.2 A party who has reason to believe that one or more members of the FDRC has a personal or financial interest in the matter shall provide written notice of that information to the FDRC.

28.2(a) The relevant member shall consider the notice and shall provide a written statement stating whether he will participate or will refrain from participating in the proceedings, and explaining the basis for his decision.

28.2(b) On its own initiative or at the request of one of the parties, the FDRC may review the member's written statement and may overrule the member's decision by majority vote.<sup>20</sup>

### **CHAPTER III PROCEEDINGS REGARDING DAB DECISIONS CONCERNING LICENSING, PERMITTING, REGISTRATIONS AND FINES**

The provisions of this chapter shall apply to all Financial Disputes submitted to the FDRC pursuant Articles 3.1 to 3.4 of this Code.

#### **Article 29 First Appeal of DAB Orders**

29.1 In the event DAB issues an order concerning: the rejection of an application for a license, permit, or registration; the imposition of a condition or restriction on a license, permit, or registration; the revocation of a license, permit, or registration; or the imposition of a fine to which the bank does not consent, the bank may appeal the matter to the FDRC by filing an Initial Application. The Initial Application shall comply with the requirements of Article 9 of this Code, and in addition shall:

29.1(a) Attach a copy of the order and recount relevant factual history leading to the order;

29.1(b) Contain an affirmative statement by the applicant that it has not consented to the order;

29.1(c) State the factual, procedural, or legal basis for the bank's non-consent; and

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<sup>20</sup> Da Afghanistan Bank Law Article 109 (1). (Working notes entry 174.)

29.1(d) Be served on DAB.<sup>21</sup>

## **Article 30 Second Appeal of DAB Orders**

- 30.1** A decision or order of DAB that has been annulled or modified pursuant to a Decision of the FDRC may be appealed to the courts within fifteen (15) days as permitted by applicable law, or may be appealed to the FDRC a second time by the original complaining party, except that the scope of the second appeal to the FDRC may not ask FDRC to revisit factual or legal matters already addressed during the first appeal. The scope of the second appeal to the FDRC should be limited to matters relating to or arising from enforcement or implementation of the FDRC Decision, or to new facts related to the issue that could not have been raised in the proceedings that followed the Initial Application.
- 30.2** The procedures to be followed in the case of a second appeal to the FDRC shall be the same as the procedures followed in a first appeal, except that the complaining party shall clearly mark its first submission to the FDRC as a **"Second Appeal of DAB Decision/Order."**
- 30.3** The outcome of a second appeal to the FDRC may not be re-appealed to the FDRC, although it will be subject to appeal to the courts as permitted by applicable law.
- 30.4** During the course of a second appeal to the FDRC, a DAB decision or order that has been modified by the FDRC shall continue to be enforced, incorporating the FDRC-required modifications.
- 30.5** During the course of a second appeal to the FDRC, a DAB decision or order that has been annulled by the FDRC shall not be enforced.<sup>22</sup>

## **Article 31 Standard for Annuling or Modifying a Decision or Order of the DAB**

The FDRC may annul or order the modification of a decision or order of the DAB if the FDRC concludes that:

- 31.1** The complaining party has demonstrated that DAB exceeded or abused its legal authority in issuing the decision or order; or
- 31.2** The complaining party has demonstrated that the procedures followed by DAB in reaching its decision or order are inconsistent with the relevant provisions of law, including the standards of good administration set forth in Banking Law Article 98.<sup>23</sup>

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<sup>21</sup> Banking Law Article 51 (3). (Working notes entry 59.)

<sup>22</sup> Banking Law Article 51 (3). (Working notes entry 68.)

<sup>23</sup> Banking Law Article 98 reads as follows:

## **Article 32 Modification of Decisions or Orders of the DAB**

**32.1** If an FDRC Decision requires modification of a decision or order of the DAB, the DAB shall make the required modifications by the date specified in the FDRC Decision. If DAB fails to make a required modification to its decision or order by the date specified in the FDRC Decision, the FDRC may itself incorporate the required modifications into a new version of the DAB decision or order at issue. Such an FDRC-modified decision or order shall:

**32.1(a)** Include the heading Enforceable FDRC Modification of DAB Decision/Order;

**32.1(b)** State the date of the original DAB decision or order;

**32.1(c)** State the date of the FDRC order requiring modifications of the original DAB decision or order;

**32.1(d)** State the date by which DAB was required to make the modification;

**32.1(e)** Affirmatively state that DAB failed to comply with the required order; and

**32.1(f)** Restate the entire substance of the original DAB decision or order with the modifications required by the FDRC. The FDRC-revised decision or order shall be enforceable as though it were an original decision or order of the DAB.<sup>24</sup>

## **CHAPTER IV PROCEEDINGS REGARDING FAILURE TO COMPLY WITH A DAB ORDER TO CEASE ACTIVITIES UNDER BANKING LAW ARTICLE 2**

The provisions of this chapter shall apply to all Financial Disputes submitted to the FDRC pursuant to Article 3.5 of this Code.

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1. Da Afghanistan Bank shall use its legal powers equitably and uniformly and in accordance with sound administrative practices and to achieve the objective for which the power was given.

2. The decisions of the Central Bank taken pursuant to this Law shall be impartial and shall be motivated only by objective and rational considerations; they shall implement the provisions of this law with fairness.

3. In carrying out its tasks, Da Afghanistan Bank shall comply with the provisions of this law.

A burden or restriction which is imposed on a person, or on carrying out an activity or on providing a service, should be proportionate to the benefits, which are expected to result from the imposition of that burden or restriction."

<sup>24</sup> Banking Law Article 51 (3). (Working notes entries 66-67.)

### **Article 33    Timing of Applications to Seize and Secure Assets**

Any application to seize and secure assets pursuant to Banking Law Article 2<sup>25</sup> must be submitted to the FDRC by DAB as quickly as possible and in no case later than twenty-three (23) days after the Subject Person has failed to comply with the order within the time specified by law.<sup>26</sup>

### **Article 34    Contents of Application to Seize and Secure Assets**

An application submitted by DAB pursuant to Banking Law Article 2<sup>27</sup> shall contain a brief and clearly worded summary of the matter(s) to be considered. It shall comply with the requirements of Article 9 of this Code, and in addition shall:

- 34.1** State the date on which DAB served the order requiring the subject person to cease certain activities;
- 34.2** Identify the Subject Person by name and location(s), and if the subject person is not a natural person, identify the names of individuals who are known to serve as officers or representative of the subject person;
- 34.3** State the activities that the DAB order directed the Subject Person to cease;
- 34.4** State the legal and factual grounds for the order issued against the Subject Person, including citations to the relevant law;

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<sup>25</sup> The relevant portions of Banking Law Article 2 read as follows:

If a person engages in activities that are incompatible with this Article, Da Afghanistan Bank may:

1) Serve an order upon that person promptly to cease activities. If within one [calendar] week the activities have not ceased, Da Afghanistan Bank shall apply to the Commission and the Commission shall decide whether the assets, books and records of that person should be seized and secured by Da Afghanistan Bank. Within one week the Commission shall commence hearings concerning the matter in which shall participate the relevant person and such other interested parties as the Commission may invite. Upon conclusion of the hearings, the Commission shall either decide upon the seizure of the assets of that person in accordance with Article 63 or lift the seizure.

2. Upon issuance of a decision to lift the seizure, the Commission may issue an order to Da Afghanistan Bank concerning payment of damages.

3. In case of a liquidation, the proceeds of liquidation shall be used to pay judicial expenses and other costs of Da Afghanistan Bank, depositors and other personal creditors or creditors of the relevant institution, in [that] order of preference, while any remaining assets shall be transferred, as the case may be, to their owner or be forfeited to the State.

<sup>26</sup> Banking Law Article 2. (Working notes entry 3.)

<sup>27</sup> Relevant portions of the Article are excerpted at Footnote 25.

- 34.5 State the DAB's allegations as to the deficiencies in the Subject Person's compliance with the order to date;
- 34.6 Identify, with as much specificity as possible, the category or type of assets, books, and/or records that DAB is requesting approval to seize and secure; and
- 34.7 Provide available contact information for persons who, in the opinion of DAB, are likely to be interested parties in any follow-up hearing, together with a summary of DAB's understanding of the nature of their interest in the proceedings.<sup>28</sup>

**Article 35 Service of Application to Seize and Secure Assets**

- 35.1 FDRC shall Serve a copy of any application submitted by DAB pursuant to Banking Law Article 2<sup>29</sup> on the Subject Person to advise them of the proceedings and of their required appearance.
- 35.2 If the Subject Person declines to accept Service, or if FDRC is unable to effectuate Service after reasonable efforts, FDRC shall obtain the signatures of two witnesses, not employees of the FDRC, to affirm that Service was properly attempted and shall post, in a public place in the FDRC offices, the date and time of proceedings at which the subject person's attendance is required.
- 35.3 At the request of DAB, or in the event that FDRC determines it is necessary to do so, the subject person may be summoned to attend proceedings in accordance with procedures established in Articles 83-91 of the Law on Principles of the Commercial Courts.<sup>30</sup>

**Article 36 Initial Review of Application to Seize and Secure Assets**

FDRC shall endeavor to complete an initial review of the application expeditiously and generally in no more than one (1) week. Following initial review, FDRC shall determine whether DAB should be authorized to seize and secure assets of the Subject Person prior to commencement of the hearing.<sup>31</sup>

**Article 37 Seizure Prior to Commencement of Hearing**

- 37.1 DAB shall be authorized to seize and secure assets, books, and records of the subject person prior to commencement of the hearing when, in the determination of FDRC, DAB demonstrates that:

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<sup>28</sup> Banking Law Article 2. (Working notes entry 4.)

<sup>29</sup> Relevant portions of the Article are excerpted at Footnote 25.

<sup>30</sup> Banking Law Article 2. (Working notes entry 6.) Note that originally the Working Group concluded that service procedures outlined in the Law on Procedure for Obtaining Rights should apply here, but inasmuch as Article 22 of this Code already references the Law on Principles of the Commercial Courts, it was determined that modifying this reference would enhance the clarity of this document.

<sup>31</sup> Banking Law Article 2. (Working notes entry 11.)

**37.1(a)** DAB has acted reasonably with respect to the Subject Person and in a manner consistent with the requirements of Banking Law Article 98;<sup>32</sup> and

**37.1(b)** There are good grounds for seizing and securing the assets.<sup>33</sup>

**37.2** A decision to seize and secure assets of the Subject Person prior to commencement of the hearing shall be published by public notice in the offices of the FDRC and by publication in one or more of the approved sources of widely circulated media.

## **Article 38 Inventory of Assets, Books and/or Records Subject to Seizure**

**38.1** Within one (1) week of any seizure made under authority of any FDRC order, DAB shall prepare, in consultation and cooperation with the Subject Person, a comprehensive inventory list of assets, books, and/or records that have been seized. The inventory shall include a certification by the responsible DAB official that the seized items are adequately secured against loss, damage, or deterioration. The inventory shall be provided to the FDRC and the Subject Person.

**38.2** The FDRC and the Subject Person will cooperate in preparation of the inventory list. Whenever possible, the Subject Person shall affirm the accuracy of the initial list submitted to the FDRC by signing it. If, however, the DAB and the Subject Person are unable to reach agreement on the contents of the inventory list, the Subject Person shall, within one (1) week of its receipt of the initial DAB inventory, file written objections to the inventory with the FDRC and Serve a copy of such objections on the DAB.

**38.3** FDRC shall review the inventory, the certification, and any objections submitted by the Subject Party. If FDRC determines that modifications to the seizure, the inventory, or the storage/security arrangements are required to ensure compliance with the original order, FDRC shall direct DAB to make such modifications.<sup>34</sup>

## **Article 39 Appointment of Conservator Following Seizure**

Upon effectuation of any order to seize and secure assets of a bank, DAB shall certify to FDRC that a conservator has been appointed to act on behalf of the Subject Person.<sup>35</sup>

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<sup>32</sup> Banking Law Article 98 is excerpted at Footnote 23.

<sup>33</sup> Banking Law Article 2. (Working notes entry 12.)

<sup>34</sup> Banking Law Article 2. (Working notes entry 21.)

<sup>35</sup> Banking Law Article 2. (Working notes entry 22.)

## **Article 40 Commencement Hearing**

- 40.1** On a date and at a time specified by the FDRC, but in any case no later than one (1) week after making its initial decision authorizing or declining to authorize an initial seizure of assets, books, and/or records of a subject person, the FDRC shall hold Commencement Hearing concerning the matter, in which shall participate the DAB, the Subject Person, and any interested persons who have been invited to participate in the hearings and who elect to do so.
- 40.2** No fewer than two (2) days prior to the Commencement Hearing, FDRC shall provide written notification of the precise date and time of the Commencement Hearing to the Participants.
- 40.2(a)** If FDRC cannot arrange for notice of the Commencement Hearing to be delivered directly to the prospective hearing participants, FDRC shall post the notice in a publicly accessible location in the FDRC offices.
- 40.2(b)** Absent extraordinary circumstances, a participant's failure to appear at a Commencement Hearing or any subsequent hearing shall not be excused by failure of Service or delayed Service of any written notification of such hearing.
- 40.3** At the Commencement Hearing, the FDRC shall consult with the parties as to the legal and factual questions at issue and an appropriate schedule for addressing them.
- 40.3(a)** Thereafter, the FDRC shall issue an order specifying a schedule for subsequent hearings, listing materials participants must submit to the FDRC, and specifying the schedule for submission of such materials.<sup>36</sup>

## **Article 41 Participation of Interested Persons**

- 41.1** FDRC shall consult with DAB as to the identity of persons who may be interested in participating in the hearings, and may also identify such potentially interested persons from review of the DAB application, the Subject Person's business records, and, when FDRC deems reasonably necessary, from additional filings or submissions on the question that the FDRC may direct DAB and/or the subject person to submit.<sup>37</sup>
- 41.2** Interested persons who are invited to participate in hearings by the FDRC and who elect to attend shall be present in person or shall be represented by legal counsel and/or another qualified representative.<sup>38</sup>

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<sup>36</sup> Banking Law Article 2. (Working notes entries 24, 33, 35.)

<sup>37</sup> Banking Law Article 2. (Working notes entries 27-28.)

<sup>38</sup> Banking Law Article 2. (Working notes entries 29-30.)

**Article 42 Order Regarding Failure to Comply with a DAB Order to Cease Activities Under Banking Law Article 2**

Following the conclusion of such proceedings as it deems necessary to conduct a full and thorough review of the DAB order at issue and the Subject Person's alleged non-compliance with the order, the FDRC will issue an Order directing either:

- 42.1 That the seizure should be lifted; or
- 42.2 That the assets of the subject person should be liquidated.

**Article 43 Procedures for Lifting Seizure**

If the FDRC's Order under Article 42 directs that the seizure be lifted:

- 43.1 The Order shall direct DAB to return the items seized within a specified time period;
- 43.2 DAB shall submit a written certification to the FDRC that all of the seized assets, books, or records identified in the inventory have been returned within the specified period;
- 43.3 Within one (1) week after DAB files the certification, the subject person shall notify the FDRC in writing if there are any grounds to dispute DAB's certification;
  - 43.3(a) In the event of such notification, DAB shall be required to demonstrate that all seized assets, books, and records have been returned in accordance with the inventory.
  - 43.3(b) The FDRC shall review the inventory, the certification, and the statement of grounds for dispute and may determine based on the writings whether all assets, books and records have been returned as required or may determine that further proceedings are required.
  - 43.3(c) In the event that FDRC determines certain assets, books, or records appearing on the inventory have not been returned, FDRC shall order DAB to return them immediately.
  - 43.3(d) In the event DAB is unable to return one or more assets, books, or records, FDRC shall order DAB to compensate the subject person for the loss of the items.<sup>39</sup>
- 43.4 FDRC shall determine if it is appropriate for DAB to pay damages to the subject person. FDRC may make this determination simultaneously with its ruling to lift

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<sup>39</sup> Banking Law Article 2. (Working notes entry 46.)

the seizure, or may require the parties to submit additional papers or arguments on the topic if such additional submissions would aid fair and efficient decision-making.<sup>40</sup>

**43.4(a)** Damages shall be appropriate in cases where FDRC concludes that DAB has violated the standards set forth in Banking Law Article 98,<sup>41</sup> or has otherwise violated the rights of the Subject Person.

**43.4(b)** Following a determination that damages are appropriate, FDRC shall allow both parties a reasonable opportunity to be heard on the amount of damages to be paid, and shall determine the amount after deliberation and due consideration of each party's submissions.

**43.4(c)** The amount of any damages shall be limited to actual losses suffered by the Subject Person as a direct result of DAB actions.<sup>42</sup>

**43.5** Upon conclusion of the procedure specified in this Article, the FDRC shall issue a written Decision stating that the matter has been concluded, explaining the basis for any decision to order compensation or damages, and stating the amount of compensation or damages to be paid.

#### **Article 44 Procedures for Liquidating Assets of the Subject Person**

If the FDRC's Order under Article 42 of this Code directs that the assets of the Subject Person be liquidated:

**44.1** DAB shall appoint a receiver consistent with the provisions of Banking Law Article 54.<sup>43</sup>

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<sup>40</sup> Banking Law Article 2. (Working notes entry 48.)

<sup>41</sup> Relevant portions of the Article are excerpted at Footnote 23.

<sup>42</sup> Banking Law Article 2. (Working notes entry 49.)

<sup>43</sup> In the case of liquidation, Banking Law Article 2 refers to the procedures for forced liquidation under Banking Law Article 63. Banking Law Article 63 states that a forced liquidation "shall be carried out by the conservator as receiver under supervision of DAB and the FDRC." Procedures for appointing a conservator are found in Banking Law Article 54, which reads as follows:

1. Conservators shall be appointed by Da Afghanistan Bank.
2. Persons who would be ineligible to serve as an administrator of a bank pursuant to Article 27 shall not be eligible to serve as conservator for that bank. If conservator becomes ineligible to serve, he shall be replaced by Da Afghanistan Bank.
3. Conservators shall be appointed by Da Afghanistan Bank for a term, not exceeding 18 months. The term of appointment may be extended by Da Afghanistan Bank once for another [such] period. The conservator shall be employed by Da Afghanistan Bank and receive his remuneration from Da Afghanistan Bank. The costs incurred by Da Afghanistan Bank on account of the conservatorship shall be borne by and charged to the bank for which the conservator is appointed.

**44.2** A receiver appointed pursuant to this Article shall have all of the powers and authorities of a receiver listed in Banking Law Article 75,<sup>44</sup> without regard to whether the Subject Person is a bank. The receiver shall liquidate the Subject Person's assets pursuant to Banking Law Article 63<sup>45</sup> and other related provisions of law, except that references to "bankruptcy" and "bankruptcy proceedings" shall be understood to refer to "liquidation" and "liquidation orders under Banking Law Article 2;"<sup>46</sup>

**44.3** Upon conclusion of the procedure specified in this Article, the FDRC shall issue a written Decision stating that the matter has been concluded, and summarizing the results of the liquidation and amounts paid to creditors, the receiver, and other persons, and the amount of assets returned to the Subject Person.

## **CHAPTER V APPOINTMENT OF CONSERVATORS**

The provisions of this chapter shall apply to certain matters submitted to the FDRC pursuant to Article 3.6 of this Code.

### **Article 45 Appeals of Conservatorship Appointments**

**45.1** In the event that a subject bank disputes the grounds for appointing a conservator, or contests the appointment of a particular individual as conservator, the bank may appeal the matter to the FDRC by filing a written application with FDRC

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4. The [decision] appointing a conservator or extending the term of appointment of a conservator shall be in writing, which shall specify the reasons for appointment and the principal duties. Such decision is served on the bank and is recorded in the register of the bank.

<sup>44</sup> Banking Law Article 75 reads as follows:

Upon appointment, the receiver becomes the sole legal representative of the bank, and succeeds to all rights and powers of the shareholders of the bank relating to their shares of capital stock of the bank, the Board of Supervisors of the bank, and the Board of Management of the bank including the power to operate and to liquidate the bank. Claims against the bank are served on the receiver for the bank.

<sup>45</sup> In relevant part, Banking Law Article 63 provides that after a conservator has been appointed to act as receiver in a forced liquidation, the following conditions apply:

- 1) all acts performed by the bank are void and unenforceable, except for acts performed by or by authority of the conservator for the bank, acts deemed beneficial to the estate of the bank by the conservator and ratified by the conservator, and money and securities transfer orders covered by Article 77 of this law;
- 2) all existing conservatory attachments and attachments in aide of execution resting on assets of the bank are lifted;
- 3) the assets of the bank shall be immune from attachment and execution, except for assets encumbered by a mortgage or lien to the extent of the debt secured by such encumbrance; and
- 4) no bankruptcy proceeding may be opened against the bank.

<sup>46</sup> Banking Law Article 2. (Working notes entry 41.)

within thirty (30) days from the date of service of the order of appointment. Such application shall satisfy the requirements of Article 9 of this Code, and in addition shall:

**45.1(a)** Attach a copy of the order and recount relevant factual history leading to the order;

**45.1(b)** Contain an affirmative statement by the applicant that it has not consented to the order;

**45.1(c)** State the factual, procedural, or legal basis for the bank's non-consent; and

**45.1(d)** Be served on DAB and on the named conservator.

**45.2** The appointment will remain effective until a final Decision of the FDRC with respect to the appointment, except that the conservator's powers under Banking Law Article 55<sup>47</sup> may not be employed to prevent the subject bank from appealing the appointment of the conservator. In the event that the FDRC approves the appointment of the conservator, the conservator may continue to act in accordance with the law and terms of appointment.<sup>48</sup>

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<sup>47</sup> Banking Law Article 55 reads as follows:

1. The decision of Da Afghanistan Bank appointing a conservator for a bank takes effect immediately, unless the decision provides otherwise.

2. Da Afghanistan Bank shall have all the powers of the General Meeting of Shareholders, except that the powers specified in sub-paragraphs 6) and 14) of paragraph 1 of Article 23 may be exercised only in circumstances and on terms and conditions that have been approved by the Commission at the request of Da Afghanistan Bank.

3. Appointing a conservator for a bank suspends the powers of the administrators of the bank. The conservator may delegate to other persons, including administrators and employees of the bank, some of his powers, unless Da Afghanistan Bank decides otherwise. In the absence or inability of the conservator to act, Da Afghanistan Bank may exercise the powers of the conservator.

4. Actions taken by a bank after officially appointing a conservator for that bank shall be null and void, unless they are taken by the authority of Da Afghanistan Bank or the conservator, or they are money or securities transfer orders covered by Article 77.

5. A conservator shall be accountable only to Da Afghanistan Bank for the performance of his duties and for the exercise of his powers as conservator. He shall be subject to the duties, rules and instructions given [to him] by Da Afghanistan Bank and the Commission.

<sup>48</sup> Banking Law Article 57 (4). (Working notes entries 75-76.)

**Article 46 Special Conditions for Appealing Appointment of Conservator in Cases of Voluntary Liquidation**

**46.1** A DAB decision appointing a conservator to oversee a voluntary liquidation shall be subject to appeal in the same manner as other conservatorship appointments.

**46.1(a)** The scope of such appeals is limited to challenging a determination by DAB that the voluntary liquidation is not proceeding in an orderly fashion or that the liquidating bank has failed to comply with the obligations set forth in Banking Law Article 62 (3).<sup>49</sup>

**Article 47 Application by DAB for Conservator to Exercise Certain Additional Powers**

**47.1** In the event that DAB, after appointing a conservator, concludes that the conservator needs to exercise the powers set forth in Banking Articles 23(1)(6)<sup>50</sup> or 23(1)(14),<sup>51</sup> DAB, acting for the conservator, shall apply in writing to FDRC for authority to exercise such powers. An application by DAB to exercise the powers set forth in Banking Articles 23(1)(6) or 23(1)(14) shall set forth:

**47.1(a)** The factual history preceding the DAB request to exercise such powers;

**47.1(b)** The legal and business rationales supporting DAB's application; and

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<sup>49</sup> Banking Law Article 62 (3). (Working notes entry 90.) Banking Law Article 62 reads as follows:

1. A bank may be liquidated at the decision of its owners, upon presentation of an application pursuant to Article 15 of this law. The liquidation shall be carried out by the bank, in compliance with the rules of paragraphs 3 and 4 of Article 64 of this law and under supervision of Da Afghanistan Bank.

2. The bank shall provide Da Afghanistan Bank with such documents and information as Da Afghanistan Bank shall request and shall grant the staff of Da Afghanistan Bank access to the buildings, books and records of the bank whenever Da Afghanistan Bank decides that such access is required to discharge its supervisory responsibilities.

3. If the bank fails to comply with the provisions of paragraph 1 and 2 of this Article, Da Afghanistan Bank shall appoint a conservator who shall complete the liquidation of the bank under the supervision of Da Afghanistan Bank.

<sup>50</sup> Banking Law Article 55(2) states that DAB "shall have all the powers of the General Meeting of Shareholders," except for the powers specified in Banking Law Article 23(1) (6) and 23(1)(14), which "may be exercised only in circumstances and on terms and conditions that have been approved by the FDRC at the request of DAB." Banking Law Article 23(1)(6) states that a bank's General Meeting of Shareholders has the authority to "decide on the participation of the bank in the capital stock of other financial institutions."

<sup>51</sup> Banking Law Article 55(2) states that DAB "shall have all the powers of the General Meeting of Shareholders," except for the powers specified in Banking Law Article 23(1) (6) and 23(1)(14), which "may be exercised only in circumstances and on terms and conditions that have been approved by the FDRC at the request of DAB." Banking Law Article 23(1)(14) states that a bank's General Meeting of Shareholders has the authority to "decide on the sale, merger, amalgamation, dissolution and closure of the bank."

**47.1(c)** The timeframe in which DAB requests issuance of a decision by FDRC.<sup>52</sup>

**47.2** DAB shall ensure that it submits the application sufficiently in advance of the proposed transaction to allow the FDRC to make a timely Decision based on full consideration of the matter.<sup>53</sup>

## **Article 48 Powers and Duties of an Appointed Conservator**

**48.1** An appointed conservator shall have all the powers set forth in the Banking Law.

**48.2** When the FDRC issues an order to an entity for which a conservator has been appointed, the conservator shall be responsible for affirming to the FDRC his compliance with the order.<sup>54</sup>

## **CHAPTER VI FORCED LIQUIDATION**

The provisions of this chapter shall apply to certain matters submitted to the FDRC pursuant to Article 3.6 of this Code.

### **Article 49 FDRC Review of Receiver in a Forced Liquidation**

**49.1** FDRC shall exercise general supervision over a conservator who assumes receivership duties in a forced liquidation commenced under Banking Law Article 63.<sup>55</sup>

**49.2** DAB shall ensure that the receiver complies with directives of the FDRC, and shall exercise regular supervisory oversight over the receiver consistent with the guidance and directives of the FDRC.<sup>56</sup>

### **Article 50 Receiver's Application for Authority to Carry out Certain Transactions**

**50.1** A receiver in a forced liquidation may carry out one or more of the transactions listed in Banking Law Article 78<sup>57</sup> only if authorized by the FDRC. The FDRC

<sup>52</sup> Banking Law Article 55 (2). (Working notes entry 71.)

<sup>53</sup> Banking Law Article 55 (2). (Working notes entry 70.)

<sup>54</sup> Banking Law Article 55 (5). (Working notes entry 73.)

<sup>55</sup> Relevant portions of Banking Law Article 63 are excerpted at Footnote 45.

<sup>56</sup> Banking Law Article 63 (3). (Working notes entry 91.)

<sup>57</sup> Banking Law Article 78 states that:

At the request of DAB, in the interest of the banking system and to maximize the value of a bank for its creditors, the FDRC may direct the receiver for the bank on terms and conditions proposed by DAB and approved by the FDRC to do transactions providing for:

- 1) the transfer of all or part of the shares in capital stock of the bank; or

may authorize a receiver in a forced liquidation to carry out such transactions only following an application for such authority from the DAB. The DAB application shall satisfy the requirements of Article 9 of this Code and in addition shall:

**50.1(a)** Set forth the factual history preceding the application;

**50.1(b)** State the legal and business rationales supporting the application;

**50.1(c)** Summarize details of the proposed transaction, including terms and conditions; and

**50.1(d)** Attach documentation of supporting statements or assertions contained in the application.

**50.2** The FDRC may decide to accept or reject the request on the basis of the application papers alone, or may require submission of additional evidence.

**50.3** If the FDRC requires additional evidence, it shall notify DAB, the receiver, and/or any of the prospective parties to the proposed transaction of the additional evidence required, and shall specify the date(s) by which such evidence must be submitted and the Participant(s) responsible for submitting it.

**50.3(a)** FDRC shall limit such requests to information reasonably required to determine whether the proposed transaction is in the interest of the banking system as a whole or will maximize the value of the subject bank for its creditors.

**50.3(b)** Upon receipt of a request for additional information from the FDRC, the recipient shall have fifteen (15) days to supply the requested information, or to submit to FDRC a written request for additional time to respond, setting forth in reasonable detail an explanation as to why it is unable to comply with the deadline.

**50.3(c)** If FDRC grants a request for additional time to respond, it shall specify the new deadline for response.

**50.3(d)** If FDRC denies a request for additional time to respond, the original fifteen (15) day deadline shall apply, except that the fifteen (15) days shall be counted from the date the recipient receives the FDRC order denying the request for additional time to respond.

**50.3(e)** In the event the recipient fails to supply the additional information requested by the FDRC within the required deadline, the FDRC may draw

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2) the transfer of all or part of the assets of the bank or all or part of the liabilities of the bank, or both.

reasonable conclusions from the evidence produced or from the parties' failure to produce such evidence.<sup>58</sup>

## **CHAPTER VII SUSPENSION OF VOTING RIGHTS OF BOARD OF SUPERVISOR MEMBERS UNDER BANKING LAW ARTICLE 21**

The provisions of this chapter shall apply to certain matters submitted to the FDRC pursuant to Article 3.8 of this Code.

### **Article 51 Application for Appointment of Special Administrator Following Suspension of Voting Rights of Board of Supervisors Member**

**51.1** In the event DAB suspends the voting rights of a Board of Supervisors member (a "suspended member") pursuant to Banking Law Article 21 (13),<sup>59</sup> DAB may apply to the FDRC for appointment of a special administrator authorized to exercise the voting rights of such member. Such application shall satisfy the requirements of Article 9 of this Code and in addition shall:

**51.1(a)** State the reason that DAB suspended the member's voting rights;

**51.1(b)** Include a statement as to how replacement will help the Board of Supervisors to fulfill the duties and exercise the powers set out in Banking Law Article 24;<sup>60</sup>

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<sup>58</sup> Banking Law Article 63 (5). (Working notes entry 92.)

<sup>59</sup> Banking Law Article 21 (13) states that

If, at any time, DAB ensures that one or more of the conditions specified or referred to in [Article 21 Paragraph] 6 do not apply with respect to a person having a qualifying holding in a bank, Da Afghanistan Bank may order that person before a date stated in the order to sell or otherwise dispose of his holding in the bank or such part of his holding in the bank as shall be specified in the order.

Article 21 (6) lists eight (8) conditions that must exist before DAB can authorize persons with "qualifying holdings" to engage in certain specified activities.

<sup>60</sup> Banking Law Article 24 identifies the following eight (8) duties of a bank's Board of Supervisors:

- 1) to supervise the administration and operation of the bank;
- 2) to advise the Management Board and the General Meeting of Shareholders;
- 3) to convene each session of the General Meeting of Shareholders and to adopt the agenda for each session; the agendas for sessions convened at the request of shareholders, the Management Board or the Audit Committee shall be adopted by them;
- 4) to authorize transactions of the bank requiring a decision of the General Meeting of Shareholders if needed;
- 5) to warn the Management Board in case of an infraction by the bank of an applicable law or regulation, and to bring the infraction to the attention of Da Afghanistan Bank and the General Meeting of Shareholders. The Board of

**51.1(c)** Identify at least two qualified persons nominated to replace the suspended member, attaching evidence of the nominees' qualifications to assume the replacement.

**51.1(d)** Attach documents relevant to the request.

**51.1(e)** Be Served by DAB on the suspended member and on the affected bank.

**51.2** Within fifteen (15) days of service of such application, the suspended member and/or affected bank shall submit to FDRC, in writing, any objections to the DAB application or to the nominees for replacement:

**51.2(a)** A suspended member submitting such objections shall serve a copy on DAB and the affected bank;

**51.2(b)** An affected bank submitting such objections shall serve a copy on DAB and the suspended member;

**51.2(c)** Any person submitting written objections under this rule shall attach documents relevant to such objections.

**51.3** If it receives no written objections from a suspended member or affected bank within the timeframe set out above, FDRC shall deem that person to consent to the DAB application.

**51.4** FDRC shall review the written submissions and shall inform the parties if it believes a hearing is required to facilitate a Decision, or if additional documentary evidence is required.

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Supervisors may refrain from bringing the infraction to the attention of Da Afghanistan Bank if the infraction was committed for the first time, its adverse effects have been corrected, and appropriate measures have been taken to prevent its recurrence, The Board of Supervisors shall record the infraction and its consequences in the book for minutes of its meetings;

6) to give instructions to the Management Board if needed to ensure sound and prudent management of the bank;

7) to suspend those members of the Board of Managers and members of the Audit Committee who become disqualified to serve pursuant to a provision of this Law or in circumstances where their continued presence on the Management Board or the Audit Committee would be incompatible with sound and prudent management of the bank, and to replace them temporarily with other persons, until the suspended members have been reinstated or permanently replaced by the General Meeting of Shareholders;

8) to represent the bank to the exclusion of the Management Board in all cases where the Board of Supervisors determines that there is a conflict of interest between the bank and two or more members of the Management Board.

## **Article 52 Appointment of Replacement Member**

- 52.1** Upon determining that it has received adequate information to make a Decision, FDRC shall issue a Decision appointing a replacement member if it determines that DAB has provided sufficient evidence to demonstrate the need for such replacement, taking into account the duties and responsibilities set forth in Banking Law Article 24<sup>61</sup> and any objections submitted by the suspended member or the affected bank.<sup>62</sup>
- 52.2** FDRC shall appoint the replacement member from the list of potential replacements submitted by DAB. If it determines that none of the persons identified on the DAB list satisfy the relevant criteria, the FDRC may require submission of additional nominees who satisfy the legal criteria, including Banking Law Articles 24, 27, and 28.<sup>63</sup>
- 52.3** The Decision appointing a replacement member shall specify the conditions the suspended member must fulfill to resume his position on the Board of Supervisors.
- 52.3(a)** The FDRC Decision may specify a timeline within which the conditions must be fulfilled.
- 52.3(b)** The suspended member will not be reinstated until he complies with the Decision and the conditions set out in the Decision, including any deadlines imposed pursuant to Article 52.3(a) of this Code, in accordance with the requirements of the Banking Law.
- 52.3(c)** The suspended member will notify DAB when it has satisfied conditions in the FDRC Decision. DAB shall confirm the accuracy of the suspended member's notification, at which time it shall apply to the FDRC for removal of the special administrator. If DAB fails to act within fifteen (15) days,

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<sup>61</sup> Relevant portions of Banking Law Article 24 are excerpted at Footnote 60.

<sup>62</sup> Banking Law Article 21 (13). (Working notes entries 50, 52.)

<sup>63</sup> Banking Law Article 24 states that Board of Supervisors members must "be natural persons appointed by the General Meeting of Shareholders of the bank for a period of four years.... Members of the Board of Supervisors shall not be associated with the bank through ownership, management function, or employment, except as related to their function [as members of the Board of Supervisors]."

Banking Law Article 27 list the following five criteria for membership on a Board of Supervisors: "1) he is a fit and proper person; 2) he currently does not serve as a member of a Board or Committee of the bank; 3) he has not been deprived of the right to sit on the Board or Committee of which he is or is to be a member; 4) he is not an employee of a state authority other than in a teaching capacity; or 5) he is not related to an administrator of the bank by marriage, relation [of blood or kinship] up to the second degree, and he not is the foster brother [of an administrator of the bank]."

Banking Law Article 28 states that every member of a Board of Supervisors must "disclose in full to the authorized Board or Committee the significant commercial interests that s/he or members of his household have, directly or indirectly. Such disclosures shall be made annually in accordance with guidelines adopted by the General Meeting of Shareholders."

the suspended member or the affected bank may refer the issue to the FDRC for action, attaching all documentation relevant to support the request.

**52.3(d)** When it is satisfied that the suspended member has complied with the conditions for reinstatement set forth in its original Decision, the FDRC shall issue a subsequent decision removing the special administrator. Upon removal of the special administrator by the FDRC, the suspended member will resume his duties and powers as a member of the Board of Supervisors, including his voting rights.<sup>64</sup>

**52.4** Within fifteen (15) days of appointment of any replacement member, DAB shall ensure that such member complies with the disclosure requirements set forth in Banking Law Article 28,<sup>65</sup> if the disclosure was not included in the application for replacement. DAB shall promptly inform the FDRC when disclosure has been completed. In the event that disclosure is not timely completed, FDRC may appoint an alternate to assume the responsibilities of the replacement member.<sup>66</sup>

## **CHAPTER VIII DISPUTES BETWEEN FINANCIAL INSTITUTIONS**

The provisions of this chapter shall apply to matters submitted to the FDRC pursuant to Article 3.7 of this Code.

### **Article 53 Required Notice of Agreements Between Financial Institutions Regarding FDRC Review**

**53.1** Financial institutions that enter into a written agreement providing for the FDRC to resolve disputes involving a question of law shall provide a written notice to the FDRC stating:

**53.1(a)** The date of the agreement;

**53.1(b)** Contact information for all parties to the agreement;

**53.1(c)** A general overview of the subject matter encompassed in the agreement; and

**53.1(d)** The scope of matters conferred to the jurisdiction of the FDRC pursuant to the agreement.

**53.2** The notice shall be signed by all parties to the agreement.

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<sup>64</sup> Banking Law Article 21 (13). (Working notes entry 53.)

<sup>65</sup> The relevant portion of Banking Law Article 28 is excerpted at Footnote 63.

<sup>66</sup> Banking Law Article 21 (13). (Working notes entries 55-56.)

**53.3** If, following review of the notice, FDRC determines that the matters conferred to the jurisdiction of the FDRC pursuant to the agreement constitute questions of law, FDRC shall assign the notification a reference number, shall advise the parties that the notice is accepted, and shall advise the parties of the reference number assigned.

**53.4** If, following review of the notice, FDRC determines that the matters conferred to the jurisdiction of the FDRC pursuant to the agreement do not constitute questions of law, FDRC shall advise the parties that the notice is not accepted and that matters may not be referred under the agreement.<sup>67</sup>

#### **Article 54 Application For Review of Disputes Under a Contract Between Financial Institutions**

**54.1** In the event of a dispute between parties to a contract that has been accepted for review under Article 53 of this Code, one or more of the parties may submit an application requesting the FDRC to review the matter. Such application shall satisfy the requirements of Article 9 of this Code, and in addition shall:

**54.1(a)** State the reference number assigned to the accepted contract;

**54.1(b)** Identify the parties to the dispute, if the parties do not include all of the parties to the accepted contract; and

**54.1(c)** Explain how the dispute arises from the terms of the accepted contract.

#### **Article 55 Additional Proceedings**

**55.1** Following receipt of the Initial Application pursuant to Article 54 of this Code, FDRC shall follow the general procedures for an Initial Hearing and subsequent proceedings set forth in Article 15 of this Code.

### **CHAPTER IX RECEIVERSHIP AND BANKRUPTCY**

The provisions of this chapter shall apply to certain matters submitted to the FDRC pursuant to Article 3.8 of this Code.

#### **Article 56 DAB Petition to Open Bankruptcy Proceedings**

**56.1** A petition to open bankruptcy proceedings filed by DAB shall be made in writing, shall be filed with the FDRC, and a copy shall be served on the subject bank. The petition shall:

**56.1(a)** Include identifying information of the subject bank;

**56.1(b)** State the statutory basis for opening bankruptcy proceedings;

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<sup>67</sup> Da Afghanistan Bank Law Article 107 (3). (Working notes entry 171.)

**56.1(c)** Include a brief factual summary explaining why the statutory sections cited apply;

**56.1(d)** Include identifying and contact information for the nominated receiver(s) as well as a list of proposed activities including suggestions for distinguishing those that require prior approval by the FDRC and those that may be undertaken without such approval;

**56.1(e)** List any known court proceedings against the bank including the location of the court, the relevant case number(s), and, to the extent possible, the parties; and

**56.1(f)** Attach financial statements of the bank certified by DAB supporting the petition, together with other documentary evidence deemed helpful or necessary by DAB.

## **Article 57 Creditors' Petition to Open Bankruptcy Proceedings**

**57.1** A petition to open bankruptcy proceedings filed by creditors shall be made in writing, shall be filed with the FDRC, and a copy shall be served on the subject bank. The petition shall:

**57.1(a)** Include identifying information of the subject bank;

**57.1(b)** State the statutory basis for opening bankruptcy proceedings;

**57.1(c)** Include a brief factual summary explaining why the statutory sections cited apply;

**57.1(d)** Attach documentary evidence supporting the petition and showing that the bank is not paying its financial obligations as they fall due; and

**57.1(e)** List any known court proceedings against the bank.

## **Article 58 Exceptional Circumstances Requiring Non-Public Hearings**

**58.1** All petitions to open bankruptcy proceedings shall state whether the petitioner is aware of exceptional circumstances that may merit conducting the required hearing in a non-public forum so as to protect the interests of the banking system as a whole, or the interests of the subject bank's customers, partners, or creditors.

**58.2** Any of the participants required to attend the hearing to consider the merits of the petition may, at the beginning of the hearing, advise the FDRC of any such circumstances not explained in the original petition.

**58.3** Based on the information submitted by the petitioner or one or more of the other participants, the FDRC shall determine whether exceptional circumstances exist, and shall notify the participants of its decision.<sup>68</sup>

## **Article 59 Hearing to Consider Petitions to Open Bankruptcy Petitions**

**59.1** Immediately upon appointment of a conservator under Banking Law Article 67,<sup>69</sup> the DAB shall notify FDRC of the identity and contact information of the conservator. If for any reason FDRC does not receive this information in sufficient time to notify the conservator of the time and location of the hearing required under Banking Law Article 68,<sup>70</sup> the DAB shall be responsible for ensuring the conservator's presence at the hearing.

**59.2** At the initial hearing to consider the creditors' petition to open bankruptcy proceedings as described in Article 59 of this Code, DAB shall:

**59.2(a)** Nominate a receiver by presenting identifying and contact information for the nominated receiver, together with a list of proposed activities including suggestions for distinguishing those that require prior approval by the FDRC and those that may be undertaken without such approval; or

**59.2(b)** Explain any decision not to appoint a conservator or nominate a receiver following review of the creditors' petition.

**59.3** In reaching a decision to grant or deny a petition to open bankruptcy proceedings filed by creditors, FDRC shall give due weight to any decision by DAB not to appoint a conservator or nominate a receiver on the grounds that allegations in the petition to open bankruptcy proceedings are not credible.<sup>71</sup>

**59.4** In the absence of directions to the contrary from the FDRC, hearings under Banking Law Article 68 shall commence at 10:30 in the morning on the second

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<sup>68</sup> Banking Law Article 68 (1). (Working notes entry 94.)

<sup>69</sup> Banking Law Article 67 is excerpted at Footnote 71.

<sup>70</sup> Banking Law Article 68 states that:

1. Upon filing of a petition for opening bankruptcy proceedings against a bank, the Commission shall summon Da Afghanistan Bank and any other petitioner, and the conservator to attend a public hearing to consider the petition. Under exceptional situations the Commission may decide to conduct a non-public hearing. The hearing shall begin within two days from the time of filing of the petition.

2. If the petition is filed by Da Afghanistan Bank, the hearing shall be concluded within one week. If the petition is filed by creditors of the bank, the hearing shall be concluded within two weeks. At the conclusion of the hearing, the Commission shall either reject the petition or grant the petition.

<sup>71</sup> Banking Law Article 66. (Working notes entry 101.)

business day following the day that the petition was received by the FDRC, and shall be held in the offices of the FDRC.<sup>72</sup>

**59.5** Following the conclusion of the hearing required under Banking Law Article 68, the FDRC shall issue a decision granting or rejecting the petition to open bankruptcy proceedings.

**59.5(a)** Article 59.2 is intended to ensure that the FDRC has an opportunity to receive and consider the input and advice of DAB before declaring a bank to be bankrupt. FDRC shall take account of this input and any advice offered by DAB.

**59.5(b)** Before the deadline specified in Banking Law Article 68 (2) (or any reasonable extension thereof), FDRC shall orally notify the legal representative of DAB of its proposed decision regarding the declaration of bankruptcy, and shall solicit the legal representative's input on that proposed decision.<sup>73</sup>

**59.5(c)** FDRC's written decision regarding the declaration of bankruptcy shall state that the consultation occurred, and, in the event of disagreement between the FDRC and DAB's legal representative, shall explain the reason for the FDRC's disagreement.<sup>74</sup>

**59.6** A decision rejecting a petition to open bankruptcy proceedings shall identify one or more of the rationales permitting a rejection as listed in Banking Law Article 69.<sup>75</sup>

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<sup>72</sup> Banking Law Article 68 (1). (Working notes entry 95.)

<sup>73</sup> Banking Law Articles 74/95. (Working notes entry 106.)

<sup>74</sup> Banking Law Articles 74/95. (Working notes entry 106.)

<sup>75</sup> Bank Law Article 69 states that:

1. A petition for opening bankruptcy proceedings against a bank must be rejected by the Commission if:

- 1) the petition does not meet the requirements of the law; or
- 2) Da Afghanistan Bank opposes the petition under paragraph 2 of this Article.

2. If the petition is made by creditors of the bank, Da Afghanistan Bank may oppose the petition only if:

1) Da Afghanistan Bank has determined that no statutory ground for opening bankruptcy proceedings against the bank applies; the Commission may require Da Afghanistan Bank to produce evidence supporting its determination, including financial statements of the bank certified by Da Afghanistan Bank;

2) Da Afghanistan Bank shows to the Commission that, before the application for opening bankruptcy proceedings against the bank was served upon Da Afghanistan Bank, the banking license of the bank had been revoked and a conservator had been appointed to liquidate the bank; [or]

**59.6(a)** In exceptional circumstances, the FDRC may reject a petition to open bankruptcy proceedings for reasons other than those outlined in Banking Law Article 69. If it makes such a decision, the FDRC shall identify and explain the exceptional circumstances in its order.<sup>76</sup>

**59.7** A decision granting a petition to open bankruptcy proceedings shall include identification and contact information for the receiver.

**59.7(a)** The opinion shall include or attach the amount and schedule of remuneration to be paid to the receiver, as well as the terms and conditions of the receiver's employment, which shall include the indemnification by DAB that is required under Banking Law Article 74 (2).<sup>77</sup>

**59.7(b)** If the receiver is a different person than the conservator, the opinion shall briefly state the reason(s) for replacing the conservator.<sup>78</sup>

**59.8** In the event DAB does not submit a signed indemnification agreement developed under Article 63 of this Code with its opening petition or, in the case of a creditor-initiated bankruptcy petition, at the initial hearing, DAB shall complete and sign the agreement within one (1) week from the date of FDRC's decision declaring a bank bankrupt. The original copy of the agreement shall be delivered to the receiver, and copies shall be provided to the subject bank and the FDRC. A

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3) Da Afghanistan Bank submits to the Commission a decision of the President of Afghanistan in accordance with Article 61 that the stability of the banking system of Afghanistan requires the rehabilitation of the bank.

3. At its request, Da Afghanistan Bank shall be granted two weeks by the Commission in which to submit such evidence or decision, before the Commission rules on the petition. Otherwise, the Commission may reject a petition for opening bankruptcy proceedings against a bank only if:

- 1) the petition does not fulfill the conditions required by Article 66, paragraph 2 of this law;
- 2) any document or other evidence submitted to the Commission in support of the petition is false or inaccurate; [or]
- 3) the bank demonstrates to both the Commission and Da Afghanistan Bank that payments of supplemental subscriptions to the capital of the bank have been received by the bank in immediately available funds sufficient to eliminate the grounds for opening bankruptcy proceedings against the bank under Article 65 of this law.

<sup>76</sup> Banking Law Articles 69/71. (Working notes entry 98.)

<sup>77</sup> Banking Law Article 74(2) states:

Da Afghanistan Bank shall pay all remaining expenses incurred by the receiver on account of the receivership to the extent that the authorized expenses exceed the assets of the bank available to meet such expenses.

<sup>78</sup> Banking Law Article 74. (Working notes entry 100.)

receiver shall not be required to commence work until he has received a copy of this indemnification.<sup>79</sup>

## **Article 60 Automatic Termination of Conservatorship**

A conservatorship opened under Banking Law Article 67<sup>80</sup> shall automatically terminate upon rejection by the FDRC of the creditors' petition to open bankruptcy proceedings.<sup>81</sup>

## **Article 61 Standards for Determining When a Petition to Open Bankruptcy Proceedings is Frivolous**

**61.1** A petition to open bankruptcy proceedings shall be considered frivolous only when the FDRC determines it lacks any merit and was filed in bad faith or with bad intentions.

**61.2** In the event the FDRC determines that a petition to open bankruptcy proceedings is frivolous, FDRC shall advise the petitioner, the subject bank, and the DAB if it concludes there is evidence suggesting that the bank or DAB may have incurred costs as a result of the hearing.

**61.2(a)** If FDRC concludes that such evidence exists, the parties shall, within fifteen (15) days, provide statements to the FDRC setting forth their arguments as to the extent of such costs, together with evidence relating to those arguments.

**61.2(b)** The parties shall serve copies of the submitted evidence on one another.

**61.2(c)** Following receipt and exchange of the arguments and accompanying evidence, the FDRC shall set a date for a hearing to consider the matter, and shall thereafter determine the amount of costs, if any, to be paid by the petitioner(s) to the subject bank and/or to the DAB.<sup>82</sup>

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<sup>79</sup> Banking Law Article 74 (2). (Working notes entry 103.)

<sup>80</sup> Banking Law Article 67 specifies the relation between appointment of a conservator in a bankruptcy proceeding and other provisions of the Banking Law, as follows:

"1. As soon as the situation referenced in Article 66, paragraph 2 is realized, a conservator shall be appointed by Da Afghanistan Bank pursuant to Article 56 on the ground that the bank is not paying its financial obligations as they fall due.

2. The conservator appointed in accordance with Article 56 of this law shall action in accordance with Article 56 of this law. The provisions of Article 57 of this law shall not apply to the conservator.

3. The decisions of Da Afghanistan Bank appointing a conservator shall not be subject to review by the Commission."

<sup>81</sup> Banking Law Article 67. (Working notes entry 93.)

<sup>82</sup> Banking Law Article 70 (1). (Working notes entry 96.)

**61.3** In the event that FDRC concludes a petition for bankruptcy is frivolous, the subject bank or the DAB may request that the matter be referred for criminal prosecution under Banking Law Article 70(2)<sup>83</sup> or related provisions of the penal code.

**61.3(a)** Upon receipt of such a request, the FDRC shall forward a copy of the complete file of the case to the office of the Attorney General, after the fifteen (15) day period for appealing the matter to the courts has passed.

**61.3(b)** In the event the petitioner appeals the finding that its petition is frivolous to the courts within the fifteen (15) day period, the FDRC shall not forward the case file to the office of the Attorney General unless ordered to do so by the appropriate authorities.<sup>84</sup>

## **Article 62 Public Announcement of the Opening of Bankruptcy Petitions**

**62.1** As soon as possible and in any case no later than one (1) week after any decision to accept a petition to open bankruptcy proceedings,<sup>85</sup> the FDRC shall arrange to announce the decision in one (1) or more of the publications identified in the list of widely circulated media sources maintained by the FDRC.

**62.1(a)** FDRC shall endeavor to ensure that the notice is published in the source most likely to be distributed in the areas where the subject bank has offices, and may require the bank to provide information as to the best outlets for this purpose.

**62.2** In addition, FDRC shall, within one (1) week, submit a notice of the announcement to the authorities responsible for publishing the Official Gazette, for inclusion in the next edition of that publication.

**62.3** The notices shall include the name of the subject bank, the date the bank was declared bankrupt, and the name and contact information of the appointed receiver.<sup>86</sup>

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<sup>83</sup> Bank Law Article 70(2) states:

Anyone who is found guilty of filing a frivolous petition for opening bankruptcy proceedings against a bank shall be punished by imprisonment for a period not exceeding 1 year or by the payment of a fine not exceeding 25,000 Afghani or both.

<sup>84</sup> Banking Law Article 70 (2). (Working notes entry 97.)

<sup>85</sup> The Working Group considered whether it would be advisable to require public announcements of decisions rejecting petitions to open bankruptcy proceedings, but concluded that it would be best to avoid such announcements, because they raise the prospect of promoting rumors about bank stability that could be damaging to a bank's reputation or financial health.

<sup>86</sup> Banking Law Articles 72/73. (Working notes entry 99.)

**Article 63 Model Terms of Reference, Compensation, and Indemnification for Receivers**

- 63.1** Annually, in consultation with DAB, the FDRC shall develop model terms of reference and compensation standards for receivers. The standards shall allow for reasonable flexibility of compensation depending on the nature of the work to be performed in a bankruptcy and the qualifications of the receiver.
- 63.2** All receivers shall be compensated within the parameters established by the model terms of reference and compensation standards. The model terms of reference and compensation standards shall be publicly available in the offices of the FDRC.<sup>87</sup>
- 63.3** In consultation with DAB, the FDRC shall develop an indemnification agreement that satisfies the requirements of Banking Law Article 74 (2).<sup>88</sup>
- 63.3(a)** The indemnification agreement may be updated periodically, as needed based on changes in applicable law or in bankruptcy practice.
- 63.3(b)** The indemnification agreement shall be publicly available in the offices of the FDRC.

**Article 64 FDRC Approval Required for Receiver's Bankruptcy-Related Activities**

- 64.1** Before undertaking any action in connection with the bankruptcy, a receiver shall apply to the FDRC in writing for permission or authority to perform the action. The application shall include a brief statement of:
- 64.1(a)** The activities(s) proposed;
- 64.1(b)** The proposed timeline for the activities;
- 64.1(c)** The statutory and/or business rationale behind the activity; and
- 64.1(d)** The time by which a decision is requested from the FDRC in order to facilitate the proposed activities.
- 64.2** In describing proposed activities, the application may refer broadly to categories of activities identified under the relevant statutes as being properly within the authority of a receiver. The receiver shall serve a copy of the application on the subject bank and on the DAB.

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<sup>87</sup> Banking Law Article 74 (1). (Working notes entry 102.)

<sup>88</sup> Banking Law Article 74(2) is excerpted at Footnote 77.

**64.3** The FDRC shall issue a decision granting, denying, or directing the submission of further information about the requested activities.

**64.4** The receiver shall undertake the proposed activities only upon receipt of an order granting the request to perform the activities.

**64.4(a)** The only exception to the above requirement shall be in the case of activities identified in the decision appointing the receiver as those which the receiver may undertake without the need for involvement by the FDRC.

**64.5** However, a receiver may, at any time, request guidance from the FDRC concerning his activities, including activities for which prior authorization has been granted.<sup>89</sup>

## **Article 65 Appointment of Professionals to Assist Receiver in Fulfilling His Functions**

**65.1** A receiver seeking additional professional assistance to fulfill his functions may submit a written application to FDRC stating:

**65.1(a)** The type of assistance required and the reasons such assistance is needed;

**65.1(b)** The name, contact details, and professional qualifications of the attorney, accountant, or specialist (the "professional") from whom the receiver seeks assistance;

**65.1(c)** The compensation and other terms and conditions of employment proposed for the professional; and

**65.1(d)** Evidence that the professional satisfies the conditions of independence.

**65.2** "Independent" under this section shall mean that the professional:

**65.2(a)** Is not employed by the subject bank and has not been employed by the subject bank in the past year;

**65.2(b)** Is not an employee of the DAB;

**65.2(c)** Is not a business partner, associate, or close relative of the receiver; and

**65.2(d)** Has no personal interest in the outcome of the proceedings and is not subject to conflicts of interest that would compromise the person's ability to

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<sup>89</sup> Banking Law Article 74 (3). (Working notes entry 105.)

perform the proposed activities in a manner that best serves the interest of the banking system as a whole and the creditors of the subject bank.

**65.3** Evidence that a professional nominated to assist a receiver in fulfilling his duties satisfies the conditions of independence may be offered in the form of affirmative testimony by the nominated professional that he satisfies the conditions of "independence" as defined in Article 65.2 of this Code.<sup>90</sup>

**65.4** The nominated professional(s) may begin work only upon decision of the FDRC that their employment is justified and complies with the requirement of independence.

**65.4(a)** In reaching such a decision, the FDRC may accept the proposed compensation and terms and conditions of employment, or may modify them to ensure consistency with reasonable business standards and to preserve the interests of creditors.

**65.4(b)** In the event FDRC makes such modification(s), the nominated professional shall have the option to reject the modified terms within one (1) week of the decision by submitting a written statement to that effect to the FDRC, with copies to the receiver and to the DAB. If the FDRC does not receive such a statement within one (1) week, the modified terms and conditions of compensation and/or employment shall be deemed accepted.<sup>91</sup>

## **Article 66 Resignation, Disability, or Death of Receiver**

**66.1** Within one (1) week of being informed that a receiver has become disabled by resignation, death, or lack of capacity, DAB shall identify a person on the list of pre-qualified receivers to perform receivership duties on a temporary basis ("temporary replacement") and shall provide written notice of its nomination of the person to the FDRC.

**66.2** The FDRC shall have one (1) week to inform the DAB if the person is not acceptable. If the FDRC determines that the nominated person is not acceptable, DAB shall promptly nominate an alternative.

**66.3** If the FDRC does not issue a determination that the nominee is unacceptable within the required time frame, the temporary replacement shall be deemed accepted, and DAB shall publish a notice of the replacement. The notice shall include:

**66.3(a)** The name of the bank and of the disabled receiver;

**66.3(b)** The name and contact information of the temporary replacement;

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<sup>90</sup> Banking Law Article 74 (4). (Working notes entry 108.)

<sup>91</sup> Banking Law Article 74 (4). (Working notes entry 107.)

**66.3(c)** An affirmative statement that the temporary replacement has agreed to assume the position under the same terms and condition, and for the same remuneration, as the disabled receiver;

**66.3(d)** An affirmative statement that the temporary replacement satisfies the criteria set forth in Banking Law Article 54;<sup>92</sup> and

**66.3(e)** The date on which the term of the temporary replacement shall expire.<sup>93</sup>

**66.4** Within a reasonable time not exceeding one (1) month following the appointment of the temporary receiver, DAB shall nominate one or more persons from the list of pre-qualified receivers to assume the duties of the receivership on a permanent basis. The nomination shall:

**66.4(a)** Be in writing;

**66.4(b)** Include identifying and contact information for the nominated receiver(s), as well as a list of proposed activities including suggestions for distinguishing those that require prior approval by the FDRC and those that may be undertaken without such approval; and

**66.4(c)** The proposed amount and schedule of remuneration and terms of conditions of employment.

**66.5** The person serving as temporary replacement may be nominated.

**66.6** FDRC shall appoint a receiver from among the nominees presented by DAB, unless good grounds exist for appointing another individual.

**66.7** The decision appointing the receiver shall be served on the subject bank, DAB, and any creditors identified at that point, and shall specify a date by which the books, records, and remaining assets of the subject bank are to be transferred to the control of the replacement receiver.

**66.8** In addition, FDRC shall arrange for notice of the replacement, together with contact information for the replacement receiver, to be published in the same publications that published the original announcement of bankruptcy.<sup>94</sup>

**66.9** In the event that DAB fails to nominate one (1) or more persons to the post of replacement receiver within the timeframe specified above, the FDRC shall name

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<sup>92</sup> Banking Law Article 54 states that "Persons who would be ineligible to serve as an administrator of a bank pursuant to Article 27 shall not be eligible to serve as conservator for that bank." Banking Law Article 27 is excerpted at Footnote 63.

<sup>93</sup> Banking Law Article 74 (5). (Working notes entry 109.)

<sup>94</sup> Banking Law Article 74 (5). (Working notes entry 109.)

a replacement receiver and shall set the remuneration and the terms and conditions of employment.<sup>95</sup>

#### **Article 67 Investigation of Receiver's Performance or Eligibility by FDRC**

- 67.1** When the FDRC receives information that a receiver may not be diligently performing the receiver's tasks or may no longer be eligible to serve as a conservator pursuant to Banking Law Article 54 (2),<sup>96</sup> FDRC will investigate the matter, and may require the receiver or the DAB to supply information and evidence concerning the receiver's performance.
- 67.2** If FDRC deems the information to be credible, and determines that replacement of the receiver will be in the best interest of the bank or its creditors, it shall consult with DAB to name a replacement receiver from the list of pre-qualified receivers maintained by DAB.
- 67.3** The decision appointing the receiver shall be served on the subject bank, DAB, and any creditors identified at that point, and shall specify a date by which the transfer of books, records, and remaining assets of the subject bank are to be transferred to the control of the replacement receiver.
- 67.4** In addition, FDRC shall issue a written opinion announcing the replacement receiver. FDRC shall arrange for notice of the replacement, together with contact information for the replacement receiver, to be published in the same publications that published the original announcement of bankruptcy.<sup>97</sup>

#### **Article 68 Transfer of Books, Records, and Assets to Replacement Receiver**

DAB shall be responsible for supervising the transfer of books, records, and remaining assets of the subject bank into the possession of a replacement receiver, and for ensuring that the transfer is completed within the timeline specified in the FDRC decision appointing the replacement receiver.<sup>98</sup>

#### **Article 69 Applications to Authorize Further Proceedings in Court Cases Stayed by Bankruptcy**

- 69.1** Any party to a court proceeding that has been stayed by a decision of bankruptcy may apply to the FDRC for leave for the matter to continue. Such an application shall:
- 69.1(a)** Be in writing;

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<sup>95</sup> Banking Law Article 74 (7). (Working notes entry 110.)

<sup>96</sup> Banking Law Article 54(2) and related provisions of law are excerpted at Footnote 92.

<sup>97</sup> Banking Law Article 74 (6). (Working notes entries 111-12.)

<sup>98</sup> Banking Law Article 74 (8). (Working notes entry 113.)

- 69.1(b)** Identify the court and matter number(s) of the relevant proceedings;
  - 69.1(c)** Describe the questions of fact and law before the court in the relevant proceedings;
  - 69.1(d)** State the monetary value of the dispute;
  - 69.1(e)** Describe the basis for the request that the proceeding be allowed to continue; and
  - 69.1(f)** Be Served on DAB and on the other parties to the proceeding.
- 69.2** Within fifteen (15) days from the date of service, DAB or any of the other parties to the proceeding may submit written objections to the application for FDRC consideration.<sup>99</sup>
- 69.3** The FDRC shall grant leave for a stayed court proceeding to continue when the subject bank or a party to the proceedings demonstrates that there exist extraordinary circumstances that mean allowing the proceeding to continue will:
- 69.3(a)** Be in the interest of the banking system as a whole;
  - 69.3(b)** Maximize the value of a bank for its creditors; or
  - 69.3(c)** Address an urgent need of the bank or one of the parties.<sup>100</sup>

**Article 70 Applications to Authorize Transactions Specified in Banking Law Article 78**

- 70.1** Any application to undertake one or more transactions pursuant to Banking Law Article 78<sup>101</sup> must be submitted by DAB to FDRC. DAB may work cooperatively with a receiver or a prospective participant in a proposed transaction to prepare such an application. The application shall:
- 70.1(a)** Be in writing;
  - 70.1(b)** Set forth the details of the proposed transaction including identifying all known prospective parties, and all terms and conditions proposed by DAB;
  - 70.1(c)** Describe the proposed timeline for the transaction;

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<sup>99</sup> Banking Law Article 76 (3). (Working notes entry 118.)

<sup>100</sup> Banking Law Article 76 (3). (Working notes entry 119)

<sup>101</sup> Banking Law Article 78 is excerpted at Footnote 57.

**70.1(d)** Explain how the proposed transaction will maximize the value of the bank for its creditors or will serve the interests of the banking system as a whole; and

**70.1(e)** Be Served on the receiver. In addition, the application may be served on any prospective participants in the proposed transaction at the discretion of DAB.<sup>102</sup>

**70.2** DAB may propose that the receiver for a bank be directed to perform one or more of the transactions described in Banking Law Article 78 at any time after a petition to open bankruptcy proceedings has been filed but before liquidation proceedings have concluded.<sup>103</sup>

**70.3** The FDRC may:

**70.3(a)** Accept a transaction proposed under Banking Law Article 78;

**70.3(b)** Reject the proposed transaction;

**70.3(c)** Direct DAB to provide additional information concerning the proposed transaction; or

**70.3(d)** Request that DAB modify the proposed transaction. In response to such a request, DAB may revise the application to reflect new or alternative terms and conditions to the proposed transaction, or may decline to make the requested modifications, in which case FDRC shall have the option to reject the application.<sup>104</sup>

**70.4** In considering whether a proposed transaction will maximize the value of the bank for its creditors or will serve the interests of the banking system as a whole, the FDRC will consider whether the proposed transaction ensures that there is adequate compensation to the bank in exchange for any shares or assets to be transferred. In appropriate circumstances, adequate compensation may be non-cash compensation.<sup>105</sup>

## **Article 71 Receiver's Initial Report**

**71.1** Within thirty (30) days from the date of appointment, the receiver shall prepare an initial report identifying transactions, acts, proceedings, attachments, existing liabilities, and other actions that are, or that may be affected by the decision of bankruptcy, and shall submit the report to the FDRC.

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<sup>102</sup> Banking Law Article 78. (Working notes entry 120.)

<sup>103</sup> Banking Law Article 78 (2). (Working notes entry 122.)

<sup>104</sup> Banking Law Article 78. (Working notes entry 123.)

<sup>105</sup> Banking Law Article 78. (Working notes entry 121.)

71.2 The report shall be made available to the public at the offices of the FDRC, and may be subject to amendment as additional information becomes available to the receiver.<sup>106</sup>

## **Article 72 Receiver's Property Report**

72.1 Within two weeks from the date of initial appointment following the opening of bankruptcy proceedings, the receiver shall prepare and submit to the FDRC a property report satisfying the requirements of Banking Law Article 79.<sup>107</sup>

72.2 In exceptional circumstances, when the receiver is unable to gather or review all of the information needed to prepare a complete property report within the applicable deadline, the receiver may file a partial report accompanied by a request for leave to extend the deadline for completing the report.

72.3 The initial property report, and all supplements or subsequent quarterly reports, shall, on the first page, state the date when the next quarterly update is due to be prepared.<sup>108</sup>

72.4 Property reports shall be available for inspection, in the offices of the FDRC, by creditors of the subject bank whose claims are included on the list of approved claims.<sup>109</sup>

## **Article 73 Procedures for Correcting Property Reports**

73.1 Creditors who have reviewed a property report and believe the report to be incomplete, erroneous or lacking in merit may submit written proposals for

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<sup>106</sup> Banking Law Article 76 (2)-(7). (Working notes entry 116.)

<sup>107</sup> Banking Law Article 79 states:

1. Within two weeks from the date of the Commission decision opening bankruptcy proceedings against a bank, the receiver shall submit to the Commission an asset and property report listing:

- 1) the assets of the bank, including claims of the bank on account of unpaid subscriptions of capital stock of the bank, loan and guarantee agreements, and agreements of purchase or sale, as well as the book values and estimated liquidation values of the assets;
- 2) the contracts pursuant to which property of the bank is held by the counter parties, including rental, lease and collateral agreements;
- 3) the contracts pursuant to which the bank receives services; [and]
- 4) the significant transactions entered into by the bank during the period of thirty days immediately preceding the date of the bankruptcy decision.

2. The report provided in paragraph 1 of this Article shall be updated quarterly and shall be made available to the creditors of the bank whose claims are included on the list of approved claims prepared pursuant to Article 81 of this law.

<sup>108</sup> Banking Law Article 79. (Working notes entry 124.)

<sup>109</sup> Banking Law Article 79 (2). (Working notes entry 125.)

correction to the receiver, with a copy to the FDRC, thirty (30) or more days before the deadline for submission of the next quarterly property report. Such proposals must identify the suspected error with as specifically as possible and must attach supporting documentation, where available.

- 73.2** The receiver shall investigate and respond to the proposal in the next quarterly report, either amending the report to reflect the suggestions in the proposal, or noting that the proposal has been rejected.<sup>110</sup>

## **Article 74 Registration of Claims Against a Bankrupt Bank**

- 74.1** Persons seeking to register claims against a bankrupt bank shall complete the registration, and submit documentary evidence and the information required by Banking Law Article 80 (2)<sup>111</sup> within sixty (60) days from the date the decision opening bankruptcy proceedings against the bank is published.

**74.1(a)** Bank employees shall be entitled to register claims for wages due, but such claims may also be identified by the receiver.

**74.1(b)** Persons holding demand deposits in a bankrupt bank shall be entitled to register claims for their demand deposits, but such claims may also be identified by the receiver.

- 74.2** A claimant who has received, or who has the potential to receive, partial payment on his claim in a foreign country shall identify the amount and source of such actual or prospective payment. Failure to identify such foreign sources for claim recovery may, at the discretion of the FDRC, be cause for disqualifying the remainder of the creditor's claim.<sup>112</sup>

- 74.3** The FDRC may determine, on its own initiative or at the request of DAB, of the receiver, or of any person who appears to have a creditable claim as a creditor of the bank, that the final deadline for submission of claims may be extended by thirty (30) days.<sup>113</sup>

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<sup>110</sup> Banking Law Article 79 (2). (Working notes entry 126.)

<sup>111</sup> Banking Law Article 80(2) states

2. Claims shall be registered together with documentary evidence of the claim and the following information:

- 1) the name and address of the creditor;
- 2) the amounts of interest and other charges, penalties and taxes included in the principal amount of the claim; [and]
- 3) details concerning any mortgage, lien or guarantee securing the claim, including the name and address of any guarantor.

<sup>112</sup> Banking Law Article 80 (1). (Working notes entries 127-28.)

<sup>113</sup> Banking Law Article 80 (1). (Working notes entry 129.)

**74.4** Upon request made at the time a claim is submitted for registration, creditors shall be entitled to receive a registration receipt. The registration receipt shall:

**74.4(a)** Acknowledge the claim has been filed with the receiver;

**74.4(b)** Show the date of such filing;

**74.4(c)** State the amount of the claim; and

**74.4(d)** Indicate the number appearing on the claim itself, and the number assigned to the claim in the registry books of the FDRC.

**74.5** In the event of any error in the form or content of the receipt, the contents of the claim registration documents shall govern.<sup>114</sup>

## **Article 75 Provisional Registration of Claims**

**75.1** All claims submitted to the receiver within the deadline for submission shall be provisionally registered.

**75.1(a)** When a receiver determines that a claim lacks information or supporting evidence required by Banking Law Article 80(2),<sup>115</sup> the receiver may direct the claimant to supplement its submission.

**75.1(b)** The receiver may consider a claimant's failure or inability fully to comply with such a direction in making recommendations as to the admissibility of the claim.<sup>116</sup>

## **Article 76 Receiver's List of Admitted and Contested Claims**

**76.1** The receiver shall review all registered claims according to the standards set out in Banking Law Article 81,<sup>117</sup> and shall prepare a list that either admits or contests each registered claim.

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<sup>114</sup> Banking Law Article 80 (1). (Working notes entry 130.)

<sup>115</sup> Banking Law Article 80(2) is excerpted in Footnote 111.

<sup>116</sup> Banking Law Article 80 (2). (Working notes entry 131.)

<sup>117</sup> Banking Law Article 81 states

1. Only claims that are registered in accordance with Article 80 may be admitted, except that claims on account of deposits recorded in the books or records of the bank and claims for the bank's employees' unpaid salaries (exclusive of bonuses, amounts due upon severance, or any other payment due the bank's employees in excess of their base salaries) shall be admitted for the amounts so recorded without registration.

2. Claims recorded in the books or records of the bank by the receiver shall be admitted without further proof. Claims registered for an amount that is less than the amount recorded by the bank shall be admitted only for the lesser amount.

**76.1(a)** The receiver may admit one portion of a registered claim and contest another portion of the same claim. In that case, the claim shall be recorded in both the lists of admitted and contested claims, specifying the amount that is admitted and the amount that is contested.

**Article 77 FDRC Review of the Receiver's List of Admitted and Contested Claims**

**77.1** The receiver shall submit the lists of admitted and contested claims to the FDRC for review and approval within thirty (30) days from the final deadline for registration of claims.

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3. Creditors of the bank with claims secured by a mortgage or lien resting on assets of the bank may register their claims for the amount by which the amount of the claim exceeds the expected sales value of the asset in a similar auction. Any claim so registered shall not be admitted unless title to the asset has been otherwise transferred pursuant to Article 85 of this law.

4. Claims whose value is uncertain may be admitted for a value estimated by the receiver.

5. After examining the registered claims, the receiver shall record the claims admitted by him on a list of admitted claims and the claims contested by him on a separate list specifying the reasons for his opposition. The mentioned lists shall for each claimant specify name and address, the amounts of his claims, and whether the claims are secured by collateral; claims of equal ranking shall be listed together, in the order of their priority of payment.

6. The lists mentioned in paragraph 5 of this Article shall be completed and submitted to the Commission for approval within thirty days from the deadline for claims. The receiver shall submit quarterly updated lists to the Commission for approval. Before approving the lists, the Commission may move claims from one list to the other in consultation with the receiver. The Commission may specify the evidence required for the approval of contested claims.

7. The Commission shall set dates for hearings where creditors whose claims are contested may submit evidence to prove their claims to the receiver and the Commission, provided that such hearings shall be held not later than sixty days after the date on which the list of contested claims is submitted to the Commission. Creditors shall be notified only once of the date of each hearing by mail (which may include electronic mail) and by notice published by the receiver. Claims for which the creditor fails to appear at the hearing of which he has been notified by mail shall be regarded as rejected. Creditors whose claims have been rejected shall be notified by the receiver in writing.

8. The approval by the Commission of claims shall be final. Claims approved by the Commission shall be recorded on a list kept by the receiver. Creditors whose claims have been approved by the Commission shall be notified by the receiver in writing.

9. No payment shall be made by the receiver on account of claims that are rejected by the Commission. The creditor whose claim has been rejected by the Commission may appeal the decision of the Commission within two weeks after the date of receipt of notice of the decision.

- 77.2** Before approving the lists of admitted and contested claims, the FDRC may move claims from one list to another.
- 77.3** If the FDRC reviews an "admitted" claim and does not direct that the claim be moved to the list of "contested" claims, the claim automatically becomes an "accepted" claim without the need for further action.<sup>118</sup>
- 77.4** After approval of the two (2) lists by the FDRC, claims on the list of "admitted" claims shall be considered "accepted" claims.
- 77.5** A claim that is accepted by the FDRC shall not subsequently be shifted to the list of "contested" claims. A contested claim that has been the subject of a hearing may be moved to the list of accepted claims if the FDRC determines that the claimant has provided satisfactory evidence to support the claim.<sup>119</sup>

## **Article 78 Standards for Approving Claims**

- 78.1** In considering whether or not a registered claim should be listed as "admitted," or "accepted," the receiver and the FDRC will consider:
- 78.1(a)** The completeness and validity of documentation submitted pursuant to Banking Law Article 80;<sup>120</sup>
- 78.1(b)** Whether an identifiable legal basis for the claim exists; and
- 78.1(c)** The certainty of the amount of the claim or, in the case of claim amounts estimated pursuant to Banking Law Article 81 (4),<sup>121</sup> whether there is credible evidence as to the reliability of the estimate.<sup>122</sup>

## **Article 79 Review of Contested Claims**

- 79.1** The FDRC will set dates for hearings at which creditors whose claims are contested may submit evidence to prove their claims to the receiver and the FDRC. The hearings will be held within sixty (60) days after the date on which the list of contested claims is finalized by the receiver at the direction of the FDRC. The FDRC will notify creditors of the date of the hearing(s) at which they are to appear by mail and by public announcement.<sup>123</sup>
- 79.2** Where efficiency of the hearing process can be enhanced without compromising the right of persons whose claims are contested to be heard, or where duplication

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<sup>118</sup> Banking Law Article 81 (6). (Working notes entry 136.)

<sup>119</sup> Banking Law Article 81 (7). (Working notes entry 133.)

<sup>120</sup> The relevant portion of Banking Law Article 80 is excerpted at Footnote 111.

<sup>121</sup> Banking Law Article 81 is excerpted at Footnote 117.

<sup>122</sup> Banking Law Article 81 (6). (Working notes 132.)

<sup>123</sup> Banking Law Article 81 (7). (Working notes entry 134.)

of hearings can be prevented, the FDRC may group related claims to be heard simultaneously during the course of one hearing.<sup>124</sup>

**79.3** Following the hearing, the FDRC shall decide whether the contested claim will be approved or rejected.

**79.3(a)** The receiver shall prepare one (1) list of all approved claims and one (1) list of all rejected claims and shall provide a copy of the lists to the FDRC. The lists of approved and rejected claims shall be updated following the FDRC's review of each quarterly report.

**79.3(b)** The receiver shall serve written notification of the FDRC decision regarding each claim to the claimant who registered the claim.

**79.3(c)** The receiver must notify a creditor that its claim has been rejected within a reasonable time, and in no case later than any date specified in the FDRC decision rejecting the creditor's claim(s).<sup>125</sup>

## **Article 80 Appeal of Rejected Claims**

**80.1** A claimant whose claim has been rejected by the FDRC may appeal the decision by submitting a written request for reconsideration to the FDRC, and serving a copy of the request on the receiver. The request must:

**80.1(a)** Be filed within two (2) weeks of the date the creditor receives notice of the decision;

**80.1(b)** Briefly summarize the factual or legal grounds for the creditor's contention that the decision was in error; and

**80.1(c)** Supply any documents not previously received by the FDRC which the creditor believes to be relevant to the review.

**80.2** The FDRC will review the request and may:

**80.2(a)** Overrule or uphold its original decision on the basis of the claimant's request alone; or

**80.2(b)** Request further written submissions or argument from the claimant, the receiver, or both, on a date to be determined by the FDRC.<sup>126</sup>

**80.3** Following a review of a request for reconsideration, the FDRC may overturn its original decision if it concludes that there was a factual or legal error in the first

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<sup>124</sup> Banking Law Article 81 (7). (Working notes entry 135.)

<sup>125</sup> Banking Law Article 81 (7). (Working notes entry 140.)

<sup>126</sup> Banking Law Article 81 (9). (Working notes entries 138-39.)

review, or if the request for reconsideration raises new information that could not have been presented in original hearing.<sup>127</sup>

## **Article 81 Liquidation Plan**

**81.1** Within ninety (90) days from the date of the decision of the FDRC opening bankruptcy proceedings against a bank, the receiver shall prepare and submit to the FDRC for its approval a detailed liquidation plan for the bank. The plan shall include:

**81.1(a)** A current pro forma balance sheet showing the assets and liabilities of the bank valued at their estimated liquidation value and a pro forma balance sheet of the expected assets and liabilities of the bank at a date about three (3) months later; the balance sheets shall show liabilities as admitted claims of creditors as well as approved claims and contested claims of creditors;

**81.1(b)** Quarterly statements of past and projected income and expenses of the bank;

**81.1(c)** A progress report on the sale and on plans for the sale of major assets or groups of assets of the bank;

**81.1(d)** A report on the judicial or extrajudicial pursuit of claims of the bank, including court action to obtain annulment of fraudulent agreements and the transfers made and rights created by them;

**81.1(e)** A report on illegal activities of administrators of the bank and actions to obtain compensation for the bank;

**81.1(f)** A report on the continuation or termination of ongoing contracts, such as insurance, employment and service contracts of the bank, including a detailed analysis of financial provisions for bank employees;

**81.1(g)** A report on the liabilities of the bank and a schedule of expected payments to creditors of the bank during the next quarter; and

**81.1(h)** A report on past and future costs and expenses of receivership.

**81.2** The liquidation plan shall be updated quarterly. After its approval by the FDRC, the liquidation plan shall be available for inspection by the creditors of the bank whose claims are included on the list of approved or accepted claims.<sup>128</sup>

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<sup>127</sup> Banking Law Article 81 (9). (Working notes entry 141.)

<sup>128</sup> Banking Law Article 87 (2). (Working notes entry 151.)

**81.3** In its decision approving a liquidation plan, the FDRC may require the receiver to submit updates on its progress in implementing the plan at intervals to be determined by the FDRC.

**81.4** Following approval of the liquidation plan by the FDRC, the receiver may make advance payments to demand depositors, up to the amount authorized by law, without awaiting approval of a distribution schedule.

**81.4(a)** Each such payment shall be accompanied by a statement explaining that the payment is an advance made for the convenience of the depositor but that the sums shall be subject to the bank's right of set-off until such time as the liquidation has been completed.<sup>129</sup>

**81.5** A receiver who fails to comply with the plan of liquidation or fails to submit required progress updates may be subject to removal.<sup>130</sup>

## **Article 82 Receiver's Authority to Terminate Contracts**

**82.1** A receiver shall serve notice of contract termination under Banking Law Article 83<sup>131</sup> on the counterparty to the contract and on the FDRC. The notice shall:

**82.1(a)** Be dated;

**82.1(b)** Identify the specific contract(s) subject to termination; and

**82.1(c)** State the deadline for the counterparty to register a claim for compensation for breach of contract.<sup>132</sup>

**82.2** For purposes of the receiver's authority unilaterally to terminate contracts, "reasonable time" means the time within which creditors are permitted to register claims against the subject bank.

**82.2(a)** In exceptional circumstances, the receiver is authorized to terminate a contract after the expiration of this period.

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<sup>129</sup> Banking Law Article 91. (Working notes entry 154.)

<sup>130</sup> Banking Law Article 87 (1). (Working notes entry 150.)

<sup>131</sup> Banking Law Article 83 states

All current contracts or portions of contracts of a bankrupt bank for the delivery of goods or services, including contracts of sale, rental and lease contracts, hire purchase contracts and employment contracts, may be terminated unilaterally by the receiver within a reasonable time after the petition for opening bankruptcy proceedings has been granted, provided that the counterparty of the bank shall have registered a claim for compensation for breach of contract.

<sup>132</sup> Banking Law Article 83. (Working notes entry 143.)

**82.2(b)** The counterparty shall be entitled to the same amount of time to register its claim as given to other creditors, except that the time period shall begin on the first day after the counterparty receives the notice of termination served by the receiver.

**82.2(c)** A notice of termination served after expiration of the time for registering claims against the subject bank shall affirmatively state the nature of the exceptional circumstances, and shall advise the counterparty of the extended period for registering any resulting claim. The extension applies only to a claim arising from the termination of the contract, and not to any other claims the counterparty may be able to assert as a creditor of the subject bank.<sup>133</sup>

**82.2(d)** The reasonableness of the date of any contract termination made pursuant to Banking Law Article 83 is subject to review by the FDRC. The FDRC may undertake such review on its own initiative or at the written request of the subject bank's counterparty.<sup>134</sup>

### **Article 83 Receiver's Authority to Negotiate and Settle Claims**

**83.1** A receiver's terms of reference may authorize the receiver to enter into settlement negotiations regarding claims at or below a specified value.

**83.2** The receiver may enter into negotiations regarding claims above the value set in his terms of reference after seeking, and receiving, the FDRC's written authorization for such negotiations.

**83.3** All proposed settlements of claims must be reviewed and approved by the FDRC prior to finalization.<sup>135</sup> The FDRC shall accept a proposed settlement of claims when it determines that the terms and conditions are acceptable to both parties and will not compromise the rights of other creditors.<sup>136</sup>

### **Article 84 Authorization to Sell Assets of a Bankrupt Bank via Private Sale**

**84.1** In exceptional circumstances, a receiver responsible for selling assets securing approved claims of creditors against a subject bank and otherwise required to be sold at public auction may apply to the FDRC for authority to conduct a private sale of the goods. The application shall:

**84.1(a)** Be in writing;

**84.1(b)** Be served on the creditor whose claim is secured and on the DAB;

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<sup>133</sup> Banking Law Article 83. (Working notes entry 144.)

<sup>134</sup> Banking Law Article 83. (Working notes entry 145.)

<sup>135</sup> Banking Law Article 84. (Working notes entry 146.)

<sup>136</sup> Banking Law Article 84. (Working notes entry 147.)

**84.1(c)** Explain the receiver's basis for concluding that a public auction is not feasible or is unlikely to be productive;

**84.1(d)** Propose one or more prospective buyers;

**84.1(e)** Propose a prospective sales price; and

**84.1(f)** Include or attach evidence that the sales price is reasonable under the circumstances.

**84.2** The sale may proceed only if the FDRC approves the receiver's application to proceed.<sup>137</sup>

**84.3** The receiver or a creditor may ask the FDRC to resolve a dispute as to the value of an asset that secures an approved claim of the creditor against a subject bank and that is to be sold via private sale. The request may be made prior to or during the FDRC's review of the receiver's application to dispose of the asset via private sale. The request shall:

**84.3(a)** Be filed in writing with the FDRC;

**84.3(b)** Be served on the other party to the dispute and on the DAB;

**84.3(c)** Explain the basis for the dispute; and

**84.3(d)** Include or attach evidence of reasonable prices based on prior market sales of similar goods, or if market evidence is lacking or is insufficient, based on public auction sales of similar goods.

**84.4** The other party to the dispute may submit its own evidence within fifteen (15) days from the date of filing.

**84.5** The receiver shall not proceed with any proposed private sale until the FDRC has reached a decision on the matter.<sup>138</sup>

## **Article 85 Authorization to Hold a General Meeting of Creditors of a Bankrupt Bank**

**85.1** The receiver may apply to the FDRC for permission to hold a general meeting of creditors of a bankrupt bank. The application shall:

**85.1(a)** Be submitted in writing to the FDRC;

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<sup>137</sup> Banking Law Article 85 (1). (Working notes entry 148.)

<sup>138</sup> Banking Law Article 85 (3). (Working notes entry 149.)

**85.1(b)** Explain the receiver's basis for believing that a general meeting of creditors would facilitate efficient liquidation of the bank benefit the creditors as a whole;

**85.1(c)** State the objectives of the proposed meeting and propose an agenda designed to achieve those objectives;

**85.1(d)** Propose a means of ensuring that all creditors will have an equal opportunity to participate in the proposed meeting; and

**85.1(e)** Be accompanied by a statement prepared by DAB setting forth DAB's support for the proposed meeting.

**85.2** The FDRC will approve the application if FDRC determines that the proposed meeting will help the receiver gather information needed to complete the liquidation process, and will facilitate the efficient liquidation of the bank, or will benefit the creditors as a whole.<sup>139</sup>

**Article 86 Authorization to Form a Committee of Creditors of a Bankrupt Bank**

**86.1** The receiver may apply to the FDRC for permission to form a committee of creditors of a bankrupt bank. The application shall:

**86.1(a)** Be submitted in writing to the FDRC;

**86.1(b)** Explain the receiver's basis for believing that a committee of creditors is desirable to represent and protect significant interests of one or more classes or groups of creditors without improperly privileging the class or group;

**86.1(c)** Set forth the proposed functions and authorities of the committee of creditors; and

**86.1(d)** Be accompanied by a statement prepared by DAB setting forth DAB's support for the formation of the committee of creditors.

**86.2** The FDRC will approve the application if FDRC determines that formation of a committee of creditors will help the receiver protect the interests proposed meeting will facilitate representation or protection of significant interests of one or more classes or groups of creditors.<sup>140</sup>

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<sup>139</sup> Banking Law Article 90 (1). (Working notes entry 152.)

<sup>140</sup> Banking Law Article 90 (2). (Working notes entry 153.)

## **Article 87 Payment of Claims**

- 87.1** The receiver shall maintain a prioritized list of claims that have been approved by the FDRC. The list shall rank claims in the following order of priority:
- 87.1(a)** The claims on account of deposits that are not in the form of debt securities up to a maximum amount of 20,000 Afghanis per depositor;
- 87.1(b)** All costs and expenses on account of the administration of the bankruptcy;
- 87.1(c)** Liabilities of the bank on account of conservatorship and rehabilitation;
- 87.1(d)** Taxes and other government payments due during the two years preceding the date of the bankruptcy decision;
- 87.1(e)** Claims of unsecured creditors, including claims of bank employees. Unsecured claims shall be prioritized based on the date that the claim was approved.<sup>141</sup>
- 87.2** At any time, the receiver may submit the proposed list of prioritized claims to the FDRC for approval as a distribution schedule.
- 87.2(a)** The FDRC will approve the distribution schedule if it accurately reflects the information available at the time it is submitted and if approval will facilitate the fair and efficient liquidation of the bank.
- 87.2(b)** Additional distribution schedules may be submitted and approved as the bankruptcy proceedings continue, and until such time as the FDRC concludes all creditor claims have been identified in accordance with the law.
- 87.3** Immediately after the approval of a distribution schedule by the FDRC, the receiver shall make the payments listed in that distribution schedule (to the extent amounts have not already been paid to demand depositors in accordance with Article 81.4 of this Code or partially paid from foreign sources as identified in the creditor's original claim filing).
- 87.4** Following payment of amounts on the final distribution schedule, any remaining assets of the bank shall be transferred to the owners of the bank pro rata to their respective ownership shares.
- 87.4(a)** Amounts included in a final approved distribution schedule that cannot be paid because the creditors cannot be identified or contacted shall be deposited in an account with Da Afghanistan Bank.

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<sup>141</sup> Banking Law Article 92 (1). (Working notes entry 155.)

**87.4(b)** The receiver and DAB shall jointly determine the documentary evidence or other proof a creditor will be required to present to DAB to claim amounts held in such an account.

**87.4(c)** The receiver shall prepare a notice advising of the creation of the account, listing the claims for which creditors cannot be identified or contacted, and setting forth the evidentiary requirements for claiming such amounts, and shall submit the notice to FDRC.

**87.4(d)** Upon approval by the FDRC, the FDRC shall arrange for the notice to be published in the Official Gazette and at least one of the widely circulated media sources in which it may publish public notices.

**87.4(e)** Upon expiration of the period for which DAB is required to maintain the account, any unpaid amounts shall be transferred to the state.<sup>142</sup>

## **Article 88 Bankruptcy of a Non-Resident Bank**

**88.1** When a non-resident bank is subject to bankruptcy proceedings, conservatory measures, or bank rehabilitation measures in a foreign country, the non-resident bank or the DAB may apply to the FDRC to determine to what extent the proceedings or measures should be recognized with respect to the non-resident bank's domestic branch offices and representative offices. The application shall:

**88.1(a)** Be in writing;

**88.1(b)** Identify the foreign jurisdiction of the relevant proceedings and provide contact details for the responsible court, conservator, or other responsible officials; and

**88.1(c)** Provide details as to the nature of the proceedings and measures to which the bank is subject in the foreign jurisdiction, attaching relevant portions of the applicable foreign law(s).

**88.2** In the event an agreement or memorandum of understanding between DAB and the relevant regulatory authority in the foreign jurisdiction exists, FDRC shall determine the applicability of the foreign proceedings on the basis of such agreement.

**88.3** In the event no such agreement or memorandum of understanding exists, or in the event an existing agreement or memorandum of understanding provides no guidance on the question, FDRC will determine the applicability of the foreign

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<sup>142</sup> Banking Law Article 92. (Working notes entry 156-58.)

proceedings according to the principles of Afghan law and with concern for creditors and depositors of the non-resident bank.<sup>143</sup>

## **Article 89 Transfer of Assets to Liquidator of a Non-Resident Bank**

**89.1** When a non-resident bank is in liquidation in the country where its head office is located or where it principally carries on business, DAB may apply to the FDRC for authority to transfer to the liquidator in that country certain assets of the non-resident bank. The application shall:

**89.1(a)** Be in writing;

**89.1(b)** Identify the foreign jurisdiction of the relevant proceedings and provide contact details for the responsible court and/or liquidator;

**89.1(c)** Identify the particular assets that DAB deems it advisable to transfer;

**89.1(d)** Explain how transfer of such assets will serve the interest of creditors of the bank; and

**89.1(e)** Be Served on the non-resident bank.

**89.2** If the non-resident bank opposes the proposed transfer of assets, it may submit a brief written statement setting forth the basis of its opposition within two (2) weeks from the date it receives service of the DAB application.

**89.3** The DAB application and any papers in opposition that are filed with the FDRC shall attach relevant portions of the applicable foreign law(s).

**89.4** In the event an agreement or memorandum of understanding between DAB and the relevant regulatory authority in the foreign jurisdiction exists, FDRC shall determine the applicability of the foreign proceedings on the basis of such agreement.

**89.5** In the event no such agreement or memorandum of understanding exists, or in the event an existing agreement or memorandum of understanding provides no guidance on the question, FDRC will determine whether assets should be transferred according to the principles of Afghan law and with concern for creditors and depositors of the non-resident bank.<sup>144</sup>

## **Article 90 Termination of Liquidation Proceedings**

**90.1** When the liquidation plan is fully executed with the exception of final payment to the receiver for his services, the receiver shall submit a written report of the receivership to the FDRC. The report shall state the date on which each phase of

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<sup>143</sup> Banking Law Article 94 (3). (Working notes entry 159.)

<sup>144</sup> Banking Law Article 94 (4). (Working notes entry 160.)

the liquidation plan was completed, and shall assemble documentation necessary to demonstrate the completion of each phase of the liquidation plan, including the distribution schedule.

**90.2** Following an initial review of the report of the receivership, the FDRC will accept the report if it is complete and provides a clear and comprehensive chronology of the bankruptcy and liquidation. The FDRC will reject the report if it does not meet these standards. The FDRC shall advise the receiver of its decision.

**90.2(a)** The receiver may revise and re-submit a rejected report.

**90.3** After the FDRC has accepted the report of the receivership, the receiver shall petition for discharge and termination of the bankruptcy proceedings. The FDRC shall grant the petition if it determines that all assets of the bank have been liquidated and the proceeds have been paid to the creditors of the bank or deposited with DAB to remain available for payment to creditors of the bank pursuant to Banking Law Article 92 (3).<sup>145</sup>

**90.4** Final payment for the receiver's services shall be disbursed when the FDRC authorizes the discharge and termination. The FDRC shall publish the notice of termination of bankruptcy proceedings in the Official Gazette and in one or more of the widely circulated media sources in which it may publish public notices.<sup>146</sup>

## **CHAPTER X REHABILITATION PROCEDURES**

The provisions of this chapter shall apply to certain matters submitted to the FDRC pursuant to Article 3.8 of this Code.

### **Article 91 Application to Transfer Assets of a Bank Under Rehabilitation**

**91.1** DAB may apply to the FDRC to issue a Decision requiring all or part of the assets and liabilities of a bank under rehabilitation to be transferred to a bridge bank established and capitalized by the state and holding a banking license issued by DAB. Such application shall satisfy the requirements of Article 9 of this Code, and in addition shall:

**91.1(a)** Identify the subject bank;

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<sup>145</sup> Banking Law Article 92 (3) states

3. Immediately after the approval of a distribution schedule by the Commission, the receiver shall make the payments listed in that distribution schedule. Amounts included in a distribution schedule that cannot be paid because the creditors cannot be identified or contacted shall be deposited in an account with Da Afghanistan Bank. The receiver shall publish a notice in one newspaper of general circulation in the country inviting these creditors to come forward. The amounts so deposited shall remain available for payment to the creditors or their heirs until the statute of limitations for the claims has run out. The unpaid amounts shall be transferred to the state.

<sup>146</sup> Banking Law Article 96 (1). (Working notes entries 161-63.)

**91.1(b)** Identify the bridge bank to which DAB requests assets be transferred;

**91.1(c)** Identify the assets and/or liabilities proposed to be transferred;

**91.1(d)** State the legal and business rationale for DAB's conclusion that the proposed transfer will conserve the assets of the subject bank and assist in the efforts to manage its business on a going concern basis;

**91.1(e)** Identify any obligations of the bank to creditors that would be excluded from such a transfer and explain the legal and business rationale for excluding such obligations, and identify how DAB proposes to protect the interests of such creditors;<sup>147</sup> and

**91.1(f)** State the timeframe in which DAB requests issuance of a decision by FDRC.

**91.2** DAB shall ensure that it submits the application sufficiently in advance of the proposed transaction to allow the FDRC to make a timely Decision based on full consideration of the matter.

## **Article 92 Additional Proceedings**

**92.1** Following receipt of the Initial Application pursuant to Article 91 of this Code, FDRC shall follow the general procedures for an Initial Hearing and subsequent proceedings set forth in Article 15 of this Code. Subsequent proceedings may include oversight of the conduct of any transfer that is requested and authorized by the FDRC.

## **CHAPTER XI APPEALS FROM DECISIONS OF THE AFGHANISTAN TELECOMMUNICATIONS REGULATORY AUTHORITY**

The provisions of this chapter shall apply to certain matters submitted to the FDRC pursuant to Article 3.8 of this Code.

### **Article 93 Application For Review of a Decision by the Afghanistan Telecommunications Regulatory Authority**

**93.1** Service Providers, Users and other Interested Parties, as those terms are defined in the Telecommunications Services Regulatory Law, aggrieved by a decision of the Afghanistan Telecommunications Regulatory Authority may appeal to the FDRC within thirty (30) days from the date of ATRA's decision. Such an application shall comply with the requirements of Article 9 of this Code and in addition shall:

**93.1(a)** Specify the date of the ATRA decision under review;

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<sup>147</sup> Banking Law Article 61 (3). (Working notes entry 79.)

**93.1(b)** Explain the legal basis for the complaining party's disagreement with the ATRA decision;

**93.1(c)** Set forth any facts relevant to the complaining party's disagreement with the ATRA decision;

**93.1(d)** Be served on ATRA; and,

**93.1(e)** If the complaining party is a licensee as that term is defined in the ATRA Code of Practice, contain an affirmative statement by the licensee that it will not disconnect or otherwise change any of the services provided to its end users that are the subject of or included in the appeal during the time that the appeal is proceeding, unless such a disconnection or other change has been ordered by ATRA.

#### **Article 94 Additional Proceedings**

**94.1** Following receipt of the Initial Application pursuant to Article 93 of this Code, FDRC shall follow the general procedures for an Initial Hearing and subsequent proceedings set forth in Article 15 of this Code.