

GENERAL NOTICE

NOTICE 627 OF 2003

NATIONAL TREASURY**PUBLICATION OF BANKS AMENDMENT BILL, 2003**

The Minister of Finance intends tabling the Banks Amendment Bill, 2003 in Parliament during the third Parliamentary term. The Bill is published in accordance with Rule 241(1)(c) of the Rules of the National Assembly.

Interested persons and institutions are invited to submit written representation on the Bill to the Secretary to Parliament by no later than 28 March 2003.

All submissions must be addressed to:

**The Secretary to Parliament
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Committee Section
Parliament of the RSA
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GENERAL EXPLANATORY NOTE :

- [] Words in bold type in square brackets indicate omissions from existing enactments.
- _____ Words underlined with a solid line indicate insertions in existing enactments.

BILL

To amend the Banks Act, 1990, so as to rectify gender insensitive provisions; to amend certain definitions and insert certain new definitions; to allow the Registrar to give information to banks by means of a circular; to clarify certain provisions in line with their practical application; to provide for the use of a name that includes the word 'bank'; to update references to legislation and institutions; to substitute or delete obsolete provisions and references; to provide for the establishment of a compliance function and to require banks to establish and maintain an adequate process of corporate governance; to make further provision regarding the appointment of auditors by a bank; to make further provision regarding the fiduciary duty and a duty of care and skill resting on directors and to extend such duties to chief executive officers and executive officers of banks and bank controlling companies; to grant certain powers relating to the institution of action for breach of the fiduciary duties to the Registrar; to provide for the formation of certain committees and to determine their functions; to provide for new offences and the increase of penalties for existing offences; and to provide for matters connected therewith.

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

Amendment of section 1 of Act 94 of 1990, as amended by Government Notice R.1765 of 30 July 1991, section 1 of Act 42 of 1992, sections 1 and 25 of Act 9 of 1993, section 1 of Act 26 of 1994, section 1 of Act 55 of 1996 and section 1 of Act 36 of 2000

1. Section 1 of the Banks Act, 1990 (hereinafter referred to as the principal Act), is hereby amended-

- (a) by the substitution in subsection (1) for the definition of "close relative" of the following definition:

" **'close relative'** , in relation to any person, means -

- (a) **[his]** a spouse;
 (b) **[his]** a child, stepchild, parent or stepparent;
 (c) the spouse of any of the persons mentioned in paragraph (b);";
- (b) by the insertion in subsection (1) after the definition of "co-operative" of the following definition:

" **'corporate governance'** , in relation to the management of a bank or a controlling company, includes all structures, processes, policies, systems and procedures whereby the bank or controlling company is governed;";

- (c) by the insertion in subsection (1) after the definition of "deposit" of the following definition:
" **director**, includes an executive director and non-executive director unless expressly stated otherwise;";
- (a) by the substitution in subsection (1) for the definition of "employee in charge of a risk management function" of the following definition:
 " **employee in charge of a risk management function** , in relation to a bank means that employee of the bank who is ultimately responsible for the management of one or more of the following types of risk to which the bank is exposed, namely-
- (a) solvency risk;
 - (b) liquidity risk;
 - (c) credit risk;
 - (d) currency risk;
 - (e) market risk (position risk);
 - (f) interest rate risk;
 - (g) counterparty risk;
 - (h) technological risk;
 - (i) operational risk; **[or]**
 - (j) compliance risk; or
 - (k) any other risk regarded as material by that bank;" ;
- (e) by the substitution in subsection (1) for the definition of "executive officer" of the following definition:
 " **executive officer**, in relation to any institution-
- (a) that is not a bank, includes any manager, the compliance officer, the secretary of the company and any director who is also an employee of such an institution;
 - (b) that is a bank, includes any employee **[of the bank] who is a director or** who is in charge of a risk management function of the bank, the compliance officer, secretary of the company or [and] any manager of the bank who is responsible, or reports, directly to the chief executive officer of the bank;" ;
- (f) by the substitution in subsection (1) for paragraph(f) of the definition of "liquid assets" of the following paragraph:
 "(f) Securities issued by virtue of section 66 of the Public Finance Management Act, 1999 (Act No. 1 of 1999), to fund the National Government;"
- (g) by the insertion in subsection (1) after the definition of "Regulations relating to Banks' Financial Instrument Trading" of the following definition:
" **Regulations relating to branches** means the regulations titled "Conditions for conducting business of bank by foreign institution by means of branch in Republic" published by Government Notice No. R. 1414 of 28 December 2000;";
- (h) by the substitution in subsection (1) for paragraph (c) of the definition of "the business of a bank" of the following paragraph:
 "(c) the utilization of money, or of the interest or other income earned on money, accepted by way of deposit as contemplated in paragraph (a)-
- (i) for the granting by any person, acting as lender in **[his] such person's** own name or through the medium of a trust or a nominee, of loans to other persons;
 - (ii) for investment by any person, acting as investor in **[his] such person's** own name or through the medium of a trust or a nominee; or
 - (iii) for the financing, wholly or to any material extent, by any person of any other business activity conducted by **[him] such person** in his or her own name or through the medium of a trust or a nominee;" ;
- (i) by the substitution in subsection (1) for the words preceding subparagraph (i) of the proviso to item (aa) of the definition of "the business of a bank" of the following words:

- "the acceptance of a deposit by a person who does not **[hold himself out as accepting] purport to accept** deposits on a regular basis and who has not advertised for or solicited such deposit: Provided that-";
- (j) by the substitution in subsection (1) for subparagraph (ii) of the proviso to item (aa) of the definition of "the business of a bank" of the following subparagraph:
- "(ii) a person and any person controlled directly or indirectly by **[him]** the first-mentioned person (whether such control is through shareholding or otherwise) or managed by **[him]** such first-mentioned person, and a subsidiary of such last-mentioned person, who accepts deposits as contemplated in this paragraph shall for the purposes of subparagraph (i) of this proviso be deemed to be one person;"
- (k) by the substitution in subsection (1A) for subparagraphs (i) and (ii) of paragraph (a) of the following subparagraphs, respectively:
- "(i) **[His]** The general probity of that person;
- (ii) **[his]** the competence and soundness of judgment of that person for the fulfilment of the responsibilities of the office in question; and"
- (l) by the substitution in subsection (1A) for subparagraphs (iv) and (v) of paragraph (b) of the following subparagraphs, respectively:
- "(iv) had taken part in any business practices that, in the opinion of the Registrar, were deceitful, prejudicial or otherwise improper (whether unlawful or not) or which otherwise brought discredit on **[his]** that person's methods of conducting business; or ;
- (v) had taken part in or been associated with any such other business practices as would, or had otherwise conducted himself or herself in such a way as to, cast doubt his or her competence and soundness of judgment.";
- (m) by the substitution in subsection (1A) for paragraph (c) of the following paragraph:
- "(c) The Registrar shall be entitled, at any time to request any person to complete a questionnaire that is designed to enable, and such person shall provide the Registrar with such information as may be necessary to enable the Registrar to form an opinion, as contemplated in this subsection, regarding the qualities of that person."; and
- (n) by the substitution in subsection (1A) for paragraph (d) of the following paragraph:
- "(d) **[If the Registrar has under paragraph (c) addressed a request to a person who is to be appointed as a director or an executive officer of a bank or a controlling company and such person has refused or failed to comply with such request, the provisions of section 60(5)(b) shall *mutatis mutandis* apply to the appointment of that person as such a director or such an executive officer]** Any person who refuses or fails to comply with a request addressed to that person by the Registrar under paragraph (c) shall be guilty of an offence."

Amendment of section 5 of Act 94 of 1990

2. Section 5 of the principal Act is hereby amended by the substitution for subsection (2) of the following subsection:

"**(2)** Any delegation under subsection (1)(a) shall not prevent the exercise of the relevant power by the Registrar **[himself]** personally."

Amendment of section 6 of Act 94 of 1990, as amended by section 25 of Act 9 of 1993 and section 3 of Act 26 of 1994

3. Section 6 of the principal Act is hereby amended—

(a) by the substitution for subsection (1) of the following subsection :

"(1) In addition to the powers and duties conferred or imposed upon him or her by this Act, the Registrar shall, for the purposes of the performance of his or her functions under this Act, have powers and duties in all respects corresponding to the powers and duties conferred or imposed by the Inspection of Financial Institutions Act, **[1984 (Act No.**

38 of 1984)] 1998 (Act No. 80 of 1998), upon a registrar contemplated in the last-mentioned Act.";

- (b) by the substitution for subsection (2) of the following subsection:
- "(2) Any reference in this Act to an inspection or investigation made under this section shall be construed as a reference to an inspection made in accordance with the provisions of the Inspection of Financial Institutions Act, [1984] 1998."; and
- (c) by the substitution for subsection (4) of the following subsection :
- "(4) The Registrar may from time to time by means of a circular furnish banks with guide- lines regarding the application and interpretation of the provisions of this Act or provide banks with any other information.".

Amendment of section 7 of Act 94 of 1990, as amended by sections 3 and 25 of Act 9 of 1993 and section 3 of Act 36 of 2000

4. Section 7 of the principal Act is hereby amended-

- (a) by the substitution in subsection (1) for paragraph (a) of the following paragraph:
- "(a) direct a bank or a controlling company or a subsidiary of a bank or controlling company to furnish the Registrar, at such time or times or at such intervals or in respect of such period or periods as may be specified in the notice, with such information as may be specified in the notice and as the Registrar may reasonably require for the performance of his or her functions under this Act; or"; and
- (b) by the insertion after subsection (1) of the following subsection:
- "(1A) The report required by the Registrar under paragraph (b) shall be drawn up at the expense of the bank, controlling company or subsidiary in question.".

Amendment of section 8 of Act 94 of 1990

5. Section 8 of the principal Act is hereby amended by the substitution for subsection (2) of the following subsection:

- "(2) The Registrar may, after consideration of an application referred to in subsection (1) -
- (a) grant the application and extend by such period as he or she may determine the period within which the return, statement, report or other document or information had to be submitted or furnished; or
- (b) refuse the application,
- and shall in writing notify the person who lodged the application of **[his] the Registrar's** decision.".

Amendment of section 9 of Act 94 of 1990, as substituted by section 4 of Act 36 of 2000

6. Section 9 of the principal Act is hereby amended-

- (a) by the substitution in subsection (2) for paragraph (a) of the following paragraph:
- "(a) one shall be appointed on account of his or her knowledge of law and shall be the **[chairman] chairperson**.";
- (b) by the substitution for subsection (2A) of the following subsection:
- "(2A) In any review under subsection (1), the board of review is, subject to the provisions of subsection (8), confined to establishing whether or not, in the taking of the relevant decision, the Registrar exercised his or her discretion properly and in good faith.";
- (c) by the substitution for subsection (4) of the following subsection:
- "(4) If before or during any review under subsection (1) it transpires that any member of the board of review has any direct or indirect personal interest in the outcome of that review, such member shall recuse himself or herself and **[he] such a member** shall be replaced by a person temporarily appointed, subject to the provisions of subsection (2), by the Minister for the purposes of the review.";

- (d) by the substitution for subsection (4A) of the following subsection :
- "(4A) If before or during any review under subsection (1), it transpires that any member of the board of review will, due to illness, absence from the Republic or for any other *bona fide* reason be unable to participate or continue to participate in that review, ~~[he] such member~~ shall be replaced by a person temporarily appointed, subject to the provisions of subsection (2), by the Minister for the purposes of the review." ;
- (e) by the substitution for subsection (5) of the following subsection :
- "(5) A member of the board of review shall hold office for a period of three years and shall on the expiration of ~~[his] such member's~~ term of office be eligible for reappointment." ;
- (f) by the substitution for subsection (6) of the following subsection :
- "(6) Any casual vacancy that occurs on the board of review shall be filled by the appointment by the Minister, subject to the provisions of subsection (2), of another member, and any person so appointed shall hold office for the unexpired portion of the period of office of ~~[his] the predecessor of such a member.~~ ;
- (g) by the substitution in subsection (8) for paragraph (a) of the following paragraph :
- "(a) summon any person who, in its opinion, may be able to give material information for the purposes of the review or who it believes has in his or her possession or custody or under his or her control any document which has any bearing upon the decision under review, to appear before it at a time and place specified in the summons, to be interrogated or to produce that document, and retain for examination any document so produced;" ;
- (h) by the substitution in subsection (8) for paragraph (c) of the following paragraph :
- "(c) call any person present at the review proceedings as a witness and interrogate ~~[him] such person~~ and require ~~[him] such person~~ to produce any document in his or her possession or custody or under his or her control, and such a person shall be entitled to legal representation at his or her own expense." ;
- (i) by the substitution for subsection (9) of the following subsection :
- "(9) Subject to the provisions of subsection (2A), the procedure at the review shall be determined by the ~~[chairman] chairperson~~ of the board of review." ;
- (j) by the substitution for subsection (13) of the following subsection :
- "(13) If the board of review sets aside any decision by the Registrar, the prescribed fees paid by the applicant in respect of the review in question shall be refunded to ~~[him] the applicant.~~ and if the board of review varies any such decision, it may in its discretion direct that the whole or any part of such fees be refunded to the applicant." ; and
- (k) by the substitution for subsection (14) of the following subsection :
- "(14) A member of the board of review shall in respect of his or her services be paid such remuneration, including reimbursement for transport, travelling and subsistence expenses incurred by him or her in the performance of his or her functions as such a member, as the Minister may from time to time determine."

Amendment of section 10 of Act 94 of 1990

7. Section 10 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection :

"(1) The Registrar shall annually submit to the Minister a report on his or her activities in terms of this Act during the year under review."

Amendment of section 12 of Act 94 of 1990, as amended by sections 5 and 25 of Act 9 of 1993

8. Section 12 of the principal Act is hereby amended –

(a) by the substitution for subsection (2) of the following subsection :

"(2) An application under subsection (1) –

- (a) shall be made in the **[prescribed]** manner and on the **[prescribed]** form prescribed in the Regulations relating to Banks; and
- (b) shall be accompanied by a statement containing the **[prescribed]** information prescribed in the Regulations relating to Banks."; and
- (b) by the substitution in subsection (3) for the words preceding paragraph (a) of the following words:
"The Registrar may require an applicant contemplated in subsection (1) to furnish him or her with -".

Amendment of section 13 of Act 94 of 1990, as amended by sections 6 and 25 of Act 9 of 1993

9. Section 13 of the principal Act is hereby amended –

- (a) by the substitution for subsection (1) of the following subsection :
"(1) Subject to the provisions of subsection (2), the Registrar may, after considering all information, documents and reports furnished to him or her for the purposes of an application under section 12, grant or refuse the relevant application or grant the application subject to such conditions as he or she may determine.";
- (b) by the substitution in subsection (2) for the words preceding paragraph (a) of the following words:
"The Registrar shall not grant an application made under section 12 unless he or she is satisfied-"; and
- (c) by the substitution for subsection (3) of the following subsection:
"(3) When the Registrar grants or refuses an application made under section 12, he or she shall give written notice of that fact to the applicant concerned."

Amendment of section 14 of Act 94 of 1990, as amended by section 25 of Act 9 of 1993 and section 6 of Act 26 of 1994

10. Section 14 of the principal Act is hereby amended–

- (a) by the substitution in subsection (1) for paragraph (b) of the following paragraph:
"(b) success has not been achieved within a period of **[six]** 12 months as from the date of the granting of the said authorization, with the formation, in accordance with the proposals contained in the application for the said authorization, of the proposed bank."; and
- (b) by the substitution for subsection (2) of the following subsection:
"(2) When the Registrar revokes an authorization in terms of subsection (1), he or she shall give written notice of that fact to the person to whom the authorization was granted."

Amendment of section 15 of Act 94 of 1990, as amended by section 25 of Act 9 of 1993 and section 7 of Act 26 of 1994

11. Section 15 of the principal Act is hereby amended by the substitution for subsection (2) of the following subsection :

- "(2) The Registrar shall grant the approval referred to in subsection (1) only if he or she is of the opinion that the company concerned will probably, having regard to the provisions of section 17, be eligible for registration as a bank in terms of this Act."

Amendment of section 16 of Act 94 of 1990, as substituted by section 8 of Act 26 of 1994

12. Section 16 of the principal Act is hereby amended –

- (a) by the substitution in subsection (2) for paragraph (a) of the following paragraph:
"(a) be made in the **[prescribed]** manner and on the **[prescribed]** form prescribed in the Regulations relating to Banks; and";

- (b) by the substitution in subsection (2)(b)(ii) for item (dd) of the following item:
 - "(dd) the full names and the addresses of the **[chairman]** chairperson, the other directors and the executive officers of the institution; and";
- (c) by the substitution for subsection (3) of the following subsection:
 - "(3) The Registrar may require an applicant contemplated in subsection (1) to furnish him or her with such information or documents, in addition to information and documents furnished by the applicant in terms of subsection (2), as the Registrar may deem necessary."; and
- (d) by the substitution for subsection (4) of the following subsection:
 - "(4) The application and every document lodged in terms of subsection (2) or (3) shall be signed by the **[chairman]** chairperson or the chief executive officer of the institution.".

Amendment of section 17 of Act 94 of 1990, as substituted by section 9 of Act 26 of 1994

13. Section 17 of the principal Act is hereby amended

- (a) by the substitution in subsection (1) for the words preceding paragraph (a) of the following words:
 - "Subject to the provisions of subsection (2), the Registrar shall, after considering all information and documents furnished to him or her in terms of section 16 for the purposes of an application under that section, grant such application if he or she is satisfied-";
- (b) by the substitution in subsection (2) for the words preceding paragraph (a) of the following words:
 - "Notwithstanding the provisions of subsection (1), the Registrar may refuse an application for the registration of an institution as a bank if he or she is of the opinion-";
- (c) by the substitution for subsection (3) of the following subsection:
 - "(3) When the Registrar in terms of this section grants or refuses an application for registration, he or she shall give written notice of that fact to the applicant concerned."; and
- (d) by the substitution for subsection (4) of the following subsection:
 - "(4) If the Registrar in terms of this section grants an application for registration he or she shall, subject to the provisions of section 18, and on payment by the applicant of the prescribed registration fee, provisionally register the institution concerned as a bank and issue to the institution, on the prescribed form, a certificate of registration as a bank." -

Amendment of section 18 of Act 94 of 1990, as substituted by section 10 of Act 26 of 1994

14. Section 18 of the principal Act is hereby amended by the substitution for subsection (2) of the following subsection:

- "(2) In addition to any other condition which the Registrar may impose under subsection (1) he or she may impose a condition requiring the institution concerned to take within a specified period such steps in terms of the Companies Act as may be necessary to alter its memorandum of association or articles of association in accordance with the requirements of the Registrar.".

Amendment of section 18A of Act 94 of 1990, as inserted by section 11 of Act 26 of 1994

15. Section 18A of the principal Act is hereby amended -

- (a) by the substitution in subsection (2) for the words preceding paragraph (a) of the following words:
 - "To obtain the authorization of the Registrar as contemplated in subsection (1), the foreign institution concerned shall in the **[prescribed]** manner and on the **[prescribed]** form prescribed in the Regulations relating to branches lodge with the Registrar a written application which shall be accompanied by -";

- (b) by the substitution in subsection (3) for the words preceding paragraph (a) of the following words:
- "The Registrar may require the foreign institution applying in terms of subsection (2) to furnish him or her with-";
- (c) by the substitution for subsection (4) of the following subsection:
- "(4) When the Registrar grants or refuses an application in terms of subsection (2) for authorization to conduct the business of a bank by means of a branch in the Republic, he or she shall give written notice of that fact to the applicant concerned.";
- (d) by the substitution for subsection (5) of the following subsection:
- "(5) The Registrar shall not grant an application in terms of subsection (2) unless he or she is satisfied that proper supervision as contemplated in subsection (3)(b) is or will be exercised by the responsible supervisory authority of the foreign institution's country of domicile."; and
- (e) by the substitution for subsection (6) of the following subsection:
- "(6) If the Registrar grants an application referred to in subsection (4) he or she shall on the prescribed form issue to the foreign institution concerned a certificate of authorisation to conduct the business of a bank by means of a branch in the Republic."

Amendment of section 18B of Act 94 of 1990, as inserted by section 11 of Act 26 of 1994

16. Section 18B of the principal Act is hereby amended-

- (a) by the substitution in subsection (2) for paragraph (a) of the following paragraph:
- "(a) inform the foreign institution of his or her intention to cancel or suspend, as the case may be, such authorisation;" and
- (b) by the substitution for subsection (3) of the following subsection:
- "(3) After considering any representations received within the specified period from the foreign institution concerned by virtue of the provisions of subsection (2)(c), the Registrar may in his or her discretion-
- (a) proceed with the cancellation or suspension in terms of subsection (1) of the authorisation; or
- (b) refrain from taking any further steps in terms of subsection (1), and the Registrar shall in writing inform the foreign institution concerned of his or her decision in terms of this subsection."

Amendment of section 22 of Act 94 of 1990, as amended by sections 7 and 25 of Act 9 of 1993, section 15 of Act 26 of 1994 and section 5 of Act 36 of 2000

17. Section 22 of the principal Act is hereby amended-

- (a) by the substitution for subsection (1) of the following subsection:
- "(1) Subject to the provisions of subsection (2), an institution which is registered as a bank or a foreign institution which is authorised under section 18A to conduct the business of a bank by means of a branch in the Republic or an institution which is registered as a representative office of a foreign institution under section 34 shall not -
- (a) in the case of such bank use, or refer to itself by, a name other than the name under which it is so registered; or
- (b) in the case of such foreign institution, in respect of the branch concerned use, or refer to the branch by, a name other than the name under which the conduct of the business of a bank in the Republic was so authorised,
- or any literal translation or abbreviation of such name which has been approved by the Registrar: Provided that the Registrar may, if he or she deems it desirable, authorise the use of a name by which such bank or foreign institution is otherwise generally known.";
- (b) by the insertion after subsection (2) of the following subsection:
- "(2A) A bank may, with the prior written consent of the Registrar, in conjunction with its registered name and subject to such conditions as the Registrar may determine use or refer to a name of a division brand

or product of that bank, which name includes the word "bank" or any derivative thereof."

- (c) by the substitution for subsection (4) of the following subsection:

"(4) Any person who, in connection with any business conducted by **[him] such person** -

- (a) uses[, or refers to himself by,] any name, description or symbol indicating, or calculated to lead persons to infer, that **[he] such person** is a bank registered as such under this Act; or
- (b) in any other manner **[holds himself out] purports** to be a bank registered as such under this Act, while **[he] such person** is not so registered as a bank, shall be guilty of an offence."; and

- (d) by the substitution in subsection (5) for paragraph (a) of the following paragraph:

"(a) the business in question is a bank or a foreign institution which is authorised under section 18A to conduct the business of a bank by means of a branch in the Republic or an institution that is registered as a representative office of a foreign institution under section 34 or".

Amendment of section 24 of Act 94 of 1990, as amended by section 25 of Act 9 of 1993 and section 17 of Act 26 of 1994

18. Section 24 of the principal Act is hereby amended –

- (a) by the substitution in subsection (1) for the words preceding paragraph (a) and for paragraph (a) of the following words and paragraph respectively:

"The Registrar shall, before canceling or suspending under section 23 the registration of a bank, in a written notice addressed to the **[chairman] chairperson** or chief executive officer of the institution concerned -

- (a) inform the institution of his or her intention to cancel or suspend, as the case may be, such registration;"; and

- (b) by the substitution for subsection (2) of the following subsection:

"(2) After considering any representations received within the specified period from the institution concerned by virtue of the provisions of subsection (1)(c), the Registrar may in his or her discretion -

- (a) proceed with the cancellation or suspension, in terms of section 23, of the registration; or
- (b) refrain from taking any further steps in terms of section 23, and the Registrar shall in writing inform the **[chairman] chairperson** or chief executive officer of the institution concerned of his or her decision in terms of this subsection."

Amendment of section 25 of Act 94 of 1990, as amended by section 25 of Act 9 of 1993 and section 18 of Act 26 of 1994

19. Section 25 of the principal Act is hereby amended by the substitution for subsection (2) of the following subsection –

"(2) A competent court for the purposes of subsection (1) shall be any **[provincial or local]** division of the **[Supreme] High** Court of South Africa within the area of jurisdiction of which the registered office, referred to in section 170 of the Companies Act, of the bank concerned is situated."

Substitution of section 27 of Act 94 of 1990, as substituted by section 20 of Act 26 of 1994

20. The following section is hereby substituted for section 27 of the principal Act:

"Cancellation of registration at request of bank

27. The Registrar shall cancel the registration of a bank upon submission to him or her by the institution concerned of a special resolution

contemplated in section 200 of the Companies Act authorising such cancellation." .

Substitution of section 28 of Act 94 of 1990, as substituted by section 21 of Act 26 of 1994

21 . The following section is hereby substituted for section 28 of the principal Act:

"Cancellation of registration upon winding-up

28. When the affairs of a bank have been completely wound up as contemplated in section 419(1) of the Companies Act, the responsible Master of the [Supreme] High Court shall transmit to the Registrar a copy of the certificate referred to in that section, and the Registrar shall upon receipt of such copy cancel the registration of the bank concerned."

Amendment of section 30 of Act 94 of 1990, as substituted by section 8 of Act 9 of 1993 and amended by section 23 of Act 26 of 1994

22. Section 30 of the principal Act is hereby amended by the substitution for paragraphs (b) and (c) of the following paragraphs, respectively:

- "(b) of every consent to the establishment in the Republic of a representative office of a foreign institution which has been granted by [him] the Registrar in terms of section 34; and
- (c) every authorization to conduct the business of a bank by means of a branch in the Republic which has been granted by [him] the Registrar to a foreign institution under section 18A."

Amendment of section 32 of Act 94 of 1990, as amended by section 25 of Act 9 of 1993 and section 25 of Act 26 of 1994

23. Section 32 of the principal Act is hereby amended by the substitution for subsection (2) of the following subsection:

"(2) Different directions and periods may under subsection (1) be determined in respect of different kinds of deposits: Provided that in determining such directions and periods no preference shall be given to any such member of the public which [he] such person does not in law enjoy."

Amendment of section 34 of Act 94 of 1990, as amended by section 25 of Act 9 of 1993, section 27 of Act 26 of 1994 and section 2 of Act 55 of 1996

24. Section 34 of the principal Act is hereby amended -

- (a) by the substitution for subsection (2A) of the following subsection:

"(2A) A foreign institution applying in terms of subsection (2) may be required by the Registrar to furnish him or her with such information and documents as he or she may deem necessary, over and above any information and documents which have been furnished by such foreign institution by virtue of that subsection.";
- (b) by the substitution in subsection (2B) for the words preceding paragraph (a) of the following words:

"After having considered all information and documents furnished to [him] the Registrar for the purposes of an application in terms of subsection (2), the Registrar may grant the application, either unconditionally or subject to such conditions as he or she may determine, if the Registrar is satisfied that-";
- (c) by the substitution for subsection (5) of the following subsection:

"(5) Representative offices established in accordance with the provisions of this section shall furnish the Registrar, at such time or times or at such intervals or in respect of such period or periods and in such form as may be prescribed, with such prescribed information as [he] the Registrar may require reasonably for purposes of the performance of his or her functions under this Act."; and
- (d) by the addition of the following subsection:

"(6) Representative offices established in accordance with this section shall conduct their business subject to such conditions as may be prescribed."

Amendment of section 37 of Act 94 of 1990, as amended by section 4 of Act 42 of 1992, section 25 of Act 9 of 1993 and section 30 of Act 26 of 1994

25. Section 37 of the principal Act is hereby amended –

(a) by the substitution in subsection (1) for paragraph (c) of the following paragraph:

"(c) of which the total nominal value together with the total nominal value of such shares already held by such person and by **[his] the** associate or associates of such person.";

(b) by the substitution for subsection (2) of the following subsection:

"(2) (a) If, subject to the provisions of paragraph (c)–

- (i) any person has for a period of 12 months or such shorter period as the Registrar may deem fit held so many shares in a bank or controlling company as **[he] such person** may in accordance with the provisions of subsection (1) hold therein, **[he] such person** may, if the Registrar has granted permission in writing thereto, acquire more than 15 per cent, but not exceeding 24 per cent, of those shares as contemplated in the said subsection;
- (ii) the said person has for a period of 12 months or such shorter period as the Registrar may deem fit held 24 per cent of those shares as so contemplated **[he] such person** may, if the Registrar has granted permission in writing thereto, acquire more than 24 per cent, but not exceeding 49 per cent, of those shares as contemplated in the said subsection (1);
- (iii) the said person has for a period of 12 months or such shorter period as the Minister may deem fit held 49 per cent of those shares as contemplated in the said subsection (1) **[he] such person** may, if the Minister has, through the Registrar, granted permission thereto in writing, acquire more than 49 per cent, but not exceeding 74 per cent, of those shares as contemplated in the said subsection; and
- (iv) the said person has for a period of 12 months or such shorter period as the Minister may deem fit held 74 per cent of those shares as contemplated in the said subsection (1) **[he] such person** may, if the Minister has, through the Registrar, granted permission thereto in writing, acquire more than 74 per cent of those shares as contemplated in the said subsection.

(b) In considering granting permission in terms of paragraph (a) the Registrar or the Minister, as the case may be may consult with the Competition Commission established in terms of the Competition Act, 1998 (Act No 89 of 1998).

(c) Notwithstanding the provisions of paragraph (a), the Registrar or the Minister, as the case may be, may, if in a particular case **[he] the Registrar or the Minister, as the case may be**, deems it fit to do so, grant permission for the acquisition of shares as contemplated in subparagraph (i), (ii), (iii) or (iv) of paragraph (a) without the applicant for such permission having held shares for the period of 12 months or any shorter period as required in any of the said subparagraphs.";

(c) by the substitution for subsection (3) of the following subsection:

"(3) If any person at the commencement of the Deposit-taking Institutions Amendment Act, 1992, already holds more than 15 per cent of the shares in a bank or controlling company as contemplated in subsection (1), **[he] such person** may not acquire more of those shares as contemplated in the said subsection before **[he] such person** has obtained the appropriate permission in terms of subsection (2)."; and

(d) by the substitution for subsection (5) of the following subsection:

"(5) If, in the case of a shareholding contemplated in–

- (a) subsection 2(a)(i) and (ii), the Registrar; or
- (b) subsection (2)(a)(iii) and (iv), the Minister,

is of the opinion that the retention of such shareholding in a bank or controlling company by a particular shareholder will be to the detriment of the bank or controlling company concerned, **[he]** the Registrar or the Minister, as the case may be, may by way of application on notice of motion apply to the division of the **[Supreme]** High Court in whose area of jurisdiction the head office of the bank or controlling company is situated, for an order-

- (i) compelling such shareholder to reduce, within a period determined by the court, **[his]** the shareholding of that person in that bank or controlling company to a shareholding, as contemplated in subsection (1), with a total nominal value of not more than 15 per cent of the total nominal value of all the issued shares of that bank or controlling company; and
- (ii) limiting, with immediate effect, the voting rights that may be exercised by such shareholder by virtue of **[his]** the shareholding of that person to 15 per cent of the voting rights attached to all the issued shares of the bank or controlling company concerned."

Amendment of section 38 of Act 94 of 1990, as amended by section 17 of Act 85 of 1992 and section 25 of Act 9 of 1993

26. Section 38 of the principal Act is hereby amended by the substitution for paragraph (c) of subsection (2) of the following paragraph:

"(c) for a period of not more than six months, in the name of a stock-broker or of a company established by **[him]** such stockbroker for a purpose mentioned in section 12(3) of the Stock Exchanges Control Act, 1985 (Act No. 1 of 1985), or of a company controlled by the bank or of an employee of the bank, if it is necessary that the shares be so allotted, issued or registered in order to facilitate delivery to the purchaser or to protect the rights of the beneficiary in respect of those shares or where the beneficiary is not known;"

Amendment of section 39 of Act 94 of 1990, as amended by section 25 of Act 9 of 1993 and section 31 of Act 26 of 1994

27. Section 39 of the principal Act is hereby amended by the substitution for the words preceding paragraph (b) of the following words:

"Any person desiring shares in a bank or controlling company to be allotted or issued to **[him]** such person or to be registered in **[his]** the name of such a person or in whose name such shares are registered, and any person acting on behalf of such a person, shall at the written request of the bank or controlling company furnish it with -".

Amendment of section 41 of Act 94 of 1990, as amended by section 25 of Act 9 of 1993

28. Section 41 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection:

"(1) No person shall-

- (a) either personally or by proxy granted to any other person, cast a vote attached to; or
- (b) receive a dividend payable on, any share in a bank or controlling company allotted or issued to **[him]** such a person or registered in **[his]** the name of such person in contravention of a provision of this Act."

Amendment of section 42 of Act 94 of 1990, as amended by section 5 of Act 42 of 1992, section 25 of Act 9 of 1993 and section 33 of Act 26 of 1994

29. Section 42 of the principal Act is hereby amended by the substitution for subsection (2) of the following subsection:

"(2) For the purposes of this Act a person shall be deemed to exercise control over a bank if, in the case where that person is a company, the bank is a subsidiary

of that company, or, whether or not that person is a company, if that person **[by himself] alone** or together with his or her associates-

- (a) holds shares in the bank of which the total nominal value represents more than 50 per cent of the nominal value of all the issued shares of the bank, unless, due to limitations on the voting rights attached to the shares so held by the person **[by himself] alone** or together with his or her associates, as the case may be, such person voting **[on his own] independently** or such person and his or her associates voting as a group, is or are unable to decisively influence the outcome of the voting at a general meeting of the bank;
- (b) is entitled to exercise more than 50 per cent of the voting rights in respect of the issued shares of that bank, or
- (c) is entitled or has the power to determine the appointment of the majority of the directors of that bank, including-
 - (i) the power to appoint or remove, without the concurrence of any other person, all or the majority of such directors; or
 - (ii) the power to prevent any person from being appointed a director without his or her consent,

and if a person's appointment as a director of the bank follows necessarily from his or her appointment as a director of the person first-mentioned in this subsection, the first-mentioned appointment shall for the purposes of this subsection be deemed to be an appointment by virtue of a power of a person so first-mentioned."

Amendment of section 43 of Act 94 of 1990, as amended by section 25 of Act 9 of 1993 and section 34 of Act 26 of 1994

30. Section 43 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection:

"(1) A public company-

- (a) which desires to exercise control over any bank; or
 - (b) which is a controlling company, as defined in section 1 of the Companies Act, in respect of any other public company which has applied in terms of section 16 for registration as a bank,
- may apply to the Registrar on the **[prescribed]** form prescribed in the Regulations relating to Banks for registration as a controlling company in respect of that bank or proposed bank, as the case may be."

Amendment of section 44 of Act 94 of 1990, as amended by section 10 of Act 9 of 1993

31. Section 44 of the principal Act is hereby amended-

- (a) by the substitution for subsection (1) of the following subsection :
 - "(1) Subject to the provisions of subsection (2), the Registrar may, after considering all information, documents and particulars furnished in terms of section 43 for the purposes of an application under that section, grant or refuse the relevant application or grant the application subject to such conditions as he or she may impose.";
- (b) by the substitution in subsection (2) for the words preceding paragraph (a) of the following words:
 - "The Registrar shall not grant an application made under section 43 unless he or she is satisfied-";
- (c) by the substitution for subsection (3) of the following subsection:
 - "(3) When the Registrar in terms of this section grants or refuses an application for registration as a controlling company, he or she shall give written notice of that fact to the applicant concerned.";
- (d) by the substitution in subsection (4) for paragraph (a) of the following paragraph:
 - "(a) If the Registrar in terms of this section grants an application he or she shall, upon compliance by the applicant with the conditions subject to which the application was granted and on payment of the prescribed registration fee, register the applicant concerned as a controlling company in respect of the bank concerned and on the prescribed form issue to the applicant a certificate of registration as a controlling company in respect of the bank concerned.";

- (e) by the substitution in subsection (5) for the words preceding paragraph (a) of the following words:

"In addition to any other condition which the Registrar may impose under subsection (1), he or she may impose a condition requiring an applicant which applied for registration as a controlling company in the circumstances referred to in section 43(1)(a)-"; and

- (f) by the substitution in subsection (6) for paragraph (a) of the following paragraph:

"(a) Whenever the Registrar has imposed a condition referred to in subsection (5)(b), he or she may, after consultation with the applicant concerned, designate a person to investigate, independently of the applicant, and to advise the Registrar on, the reasonableness and fairness of the basis and conditions on which the applicant intends to make the share offer in compliance with the condition."

Substitution of section 47 of Act 94 of 1990

32. The following section is hereby substituted for section 47 of the principal Act :

"Cancellation of registration at request of controlling company

47. The Registrar shall cancel the registration of a controlling company upon submission to him or her by the controlling company of a special resolution contemplated in section 200 of the Companies Act authorizing such cancellation."

Amendment of section 50 of Act 94 of 1990

33. Section 50 of the principal Act is hereby amended by the substitution for the words following upon paragraph (b) of the following words:

"shall manage its transactions in such investments in such a way that the amount of such investments does not at any time exceed 40 per cent of the sum of [its] the share capital and reserve funds of the controlling company and any bank under its control calculated on a consolidated basis in the manner prescribed."

Amendment of section 51 of Act 94 of 1990, as amended by sections 11 and 25 of Act 9 of 1993

34. Section 51 of the principal Act is hereby amended by the deletion of subsection (3).

Amendment of section 52 of Act 94 of 1990, as amended by section 3 of Act 55 of 1996

35. Section 52 of the principal Act is hereby amended -

- (a) by the substitution in subsection (1) for paragraph (a) of the following paragraph:

"(a) establish a subsidiary or create a division in the manner prescribed within or outside the Republic or enter into an agreement having the effect that any company becomes its subsidiary or such division within or outside the Republic;"; and

- (b) by the substitution for subsection (3) of the following subsection :

"(3) The Registrar may require an applicant contemplated in subsection (2) to furnish him or her with such information, in addition to particulars furnished by the applicant in terms of that subsection, as the Registrar may deem necessary."

Amendment of section 54 of Act 94 of 1990, as substituted by section 6 of Act 42 of 1992 and amended by sections 12 and 25 of Act 9 of 1993, Proclamation No. 132 of 1994, section 36 of Act 26 of 1994 and section 5 of Act 55 of 1996

36. Section 54 of the principal Act is hereby amended-

- (a) by the substitution in subsection (2) for the words preceding paragraph (a) of the following words:
- "The Minister shall not grant his or her consent referred to in subsection (1) unless---";
- (b) by the substitution for subsection (7) of the following subsection:
- "(7) Upon registration of a bank by the Registrar in terms of subsection (6), he or she shall issue a certificate of registration to the bank concerned.";
- (c) by the substitution for subsection (8) of the following subsection:
- "(8) The Registrar of Companies, every Master of the **[Supreme]** High Court and every officer or person in charge of a deeds registry or any other office, if, in **[his]** the office of such Registrar, Master, officer or person or any register under **[his]** the control of such Registrar, Master, officer or person there—
- (a) is registered any title to property belonging to, or any bond or other right in favour of, or any appointment of or by; or
- (aA) is registered any share, stock, debenture or other marketable security in favour of; or
- (b) has been issued any licence to or in favour of, any bank which has amalgamated with any other bank or any bank which has transferred all or part of its assets and liabilities to any other bank or person, shall, if satisfied—
- (i) that the Minister has consented in terms of subsection (1) to the amalgamation or transfer; and
- (ii) that such amalgamation or transfer has been duly effected, and upon production to **[him]** such Registrar, Master, officer or person of any relevant deed, bond, share, stock, debenture, certificate, letter of appointment, licence or other document, make such endorsements thereon and effect such alterations in **[his]** the registers of such Registrar, Master, officer or person as may be necessary to record the transfer of the relevant property, bond or other right, share, stock, debenture, marketable security, letter of appointment or licence and of any rights thereunder to the amalgamated bank or, as the case may be, to the bank or person that has taken transfer of the said assets and liabilities."; and
- (d) by the substitution in subsection (11)(c) for the words preceding subparagraph (ii) of the following words:
- "neither the Securities Regulation Panel established by section 440B of the Companies Act nor its executive committee or its executive director shall furnish any clearance, decision or ruling in respect of a matter submitted to it or **[him]** such executive director in terms of the provisions of the above-mentioned Code or Rules, and which matter relates to an affected transaction, as defined in section 440A(1) of the Companies Act involving-".

Amendment of section 56 of Act 94 of 1990, as amended by section 25 of Act 9 of 1993

37. Section 56 of the principal Act is hereby amended—

- (a) by the substitution in subsection (3) for the words preceding paragraph (a) of the following words:
- "The Registrar shall not grant any application referred to in subsection (2) if he or she is of the opinion-"; and
- (b) by the substitution in subsection (5) for paragraph (b) of the following paragraph:
- "(b) in the case of a special resolution relating to a change of name, change the name of the bank concerned in **[his]** the register of banks, and issue to the bank concerned a certificate of such change of name.".

Amendment of section 57 of Act 94 of 1990, as amended by section 25 of Act 9 of 1993

38. Section 57 of the principal Act is hereby amended by the substitution for subsection (3) of the following subsection:

"(3) If a bank refuses or fails to alter its memorandum of association or articles of association in accordance with a direction of the Registrar under subsection (1), the Registrar may submit a copy of that direction to the Registrar of Companies, who shall thereupon deal with the proposed alteration contained therein in accordance with the Companies Act as if it were contained in a special resolution adopted by the bank concerned and submitted to **[him] the Registrar of Companies** by that bank in accordance with that Act."

Amendment of section 59 of Act 94 of 1990, as amended by sections 13 and 25 of Act 9 of 1993 and section 38 of Act 26 of 1994

39. Section 59 of the principal Act is hereby amended—

(a) by the substitution in subsection (2) for paragraph (b) of the following paragraph:

"(b) the number and class of shares registered in **[his] the name of the shareholder;**" and

(b) by the substitution in the proviso to subsection (2) for the words preceding item (aa) of paragraph (ii) of the following words:

"that the name of a shareholder and the particulars referred to in paragraphs (a) to (e), inclusive, shall, subject to subsection (3), not be included in such a list if the total nominal value of the shares registered in **[his] the name of the shareholder** -",

Amendment of section 60 of Act 94 of 1990, as substituted by section 1 of Act 81 of 1991 and amended by section 25 of Act 9 of 1993 and section 39 of Act 26 of 1994

40. Section 60 of the principal Act is hereby amended -

(a) by the substitution for subsection (1) of the following subsection:

"(1) Each director, chief executive officer and executive officer of a bank **[or controlling company shall stand in a fiduciary relationship] owes a fiduciary duty and a duty of care and skill to the bank [or controlling company, as the case may be,**] of which **[he] such a person** is a director, chief executive officer or executive officer.";

(b) by the insertion of the following subsections after subsection (1):

"(1A) Each director, chief executive officer and executive officer of a bank owes a duty towards the bank to -

- (a) act *bonafide* for the benefit of the bank;
- (b) avoid any conflict between the bank's interests and the interests of such a director, chief executive officer or executive officer, as the case may be;
- (c) possess and maintain the knowledge and skill that may reasonably be expected of a person holding a similar appointment and carrying out similar functions as are carried out by the director, chief executive officer or executive officer of that bank; and
- (d) exercise such care in the carrying out of his or her functions in relation to that bank as may reasonably be expected of a diligent person holding the same appointment under similar circumstances, and who possesses both the knowledge and skill mentioned in paragraph (c) and any such additional knowledge and skill as the director, chief executive officer or executive officer in question may have.

(1B) (a) The Registrar may institute action in terms of section 424 of the Companies Act against any director, chief executive officer or executive officer of a bank who was knowingly a party to the carrying on of the business of the bank in the manner envisaged in that section.

(b) Notwithstanding anything to the contrary in any law, any amount recovered as a result of proceedings instituted by the Registrar as envisaged in paragraph (a), shall be utilised—

- (i) first to reimburse all expenses reasonably incurred by the Registrar in bringing such proceedings;
- (ii) thereafter to off-set any amount paid to depositors by the Registrar, a deposit insurance scheme, or any governmental body, as part or full compensation for the losses suffered by depositors as a result of the bank being unable to repay their deposits; and
- (iii) thereafter for the *pro rata* repayment of the losses of depositors."
- (c) by the substitution for subsection (2) of the following subsection:
- "(2) Without derogating from the **[generality of the expression 'fiduciary relationship' in subsection (1), the provisions of that subsection imply that a director-]** provisions of subsections (1) and (1A), a director, chief, executive officer or executive officer of a bank shall in the performance of his or her functions in respect of that bank, observe such guidelines and comply with such requirements as may be prescribed under section 90(1)(b).
- [(a) shall, in relation to the bank or controlling company of which he is a director, act honestly and in good faith and, in particular, shall exercise such powers as he may have to manage or represent the bank or controlling company, exclusively in the best interests and for the benefit of the bank and its depositors or of the controlling company, as the case may be; and**
- (b) shall, in the performance of his functions as director of such bank or controlling company, observe such guidelines and comply with such requirements as may be prescribed under section 90(1)(b).]**";
- (d) by the substitution for subsection (5) of the following subsection :
- "(5) (a) (i) Every bank **[and every controlling company shall, at least 30 days prior to the appointment of a new director (whether for the purpose of the filling of a casual vacancy or in any other circumstances) to its board of directors becoming effective, in writing furnish the Registrar with the prescribed information in respect of the proposed new director]** shall give the Registrar written notice of the nomination of any person for appointment as a non-executive member of its board of directors by furnishing the Registrar with the prescribed information in respect of the nominee.
- (ii) The notice shall reach the Registrar at least 30 days prior to the proposed date of appointment.
- (iii) The Registrar may object to the proposed appointment by means of a written notice, stating the grounds for the objection, given to the chairperson of the board of directors of the bank and to the nominee, within 20 days of receipt of the notice referred to in subparagraph (ii).
- (iv) If the Registrar objects to the proposed appointment as envisaged in subparagraph (iii), the bank shall not appoint the nominee and any purported appointment shall have no legal effect: Provided that the bank or nominee may dispute the Registrar's objection, in which case the provisions of subsection (6)(d) to (k), inclusive, shall apply *mutatis mutandis*
- (b) (i) [No appointment of a new director to the board of directors of any bank or controlling company, as contemplated in paragraph (a), shall have legal force for the purpose of this Act or any other law unless the prescribed information in respect of such director has been furnished to the Registrar in accordance with the provisions of paragraph (a)]** Every bank shall give the Registrar written notice of the appointment of chief executive officer, executive director or executive officer by furnishing the Registrar with the prescribed information in respect of the appointee.
- (ii) The Registrar may object to the appointment by means of a written notice, stating the grounds for the objection, given to the chief executive, or acting chief executive officer of the bank, and to the appointee, within 20 working days of receipt of the notice referred to in subparagraph (i).
- (iii) If the Registrar objects to the appointment in terms of subparagraph (ii), the appointment shall be terminated within 14 working days of receipt of the Registrar's notice of objection by the bank: Provided that

the bank or appointee may dispute the Registrar's objection, in which case the provisions of subsection (6)(d) to (k), inclusive, shall *mutatis mutandis* apply.

(iv) Notwithstanding anything to the contrary in any law or in any agreement, the appointment by a bank of a chief executive officer, executive director or an executive officer shall be subject to the resolute condition that the appointment is not terminated under subparagraph (iii).";

(e) by the addition to subsection (5) of the following paragraph:

"(c) For the purpose of this subsection 'every bank means the chief executive officer, or in the case where it concerns the appointment of the chief executive officer, such member of the board of directors as may be designated by the board of directors.'"; and

(f) by the substitution for subsection (6) of the following subsection:

"(6) (a) [The provisions of subsection (5) shall not be construed as rendering the appointment of a director referred to in that subsection subject to the approval of the Registrar] Without derogating from any law, the appointment of a chief executive officer, executive director or executive officer of a bank may be terminated by the Registrar if the chief executive officer, executive director or executive officer concerned is not, or is no longer, a fit and proper person to hold that appointment, or if it is not in the public interest that such chief executive officer, executive director or executive officer continues to hold such appointment.

(b) If the Registrar wishes to terminate the appointment of a chief executive officer, executive director or executive officer of a bank, as envisaged in paragraph (a), the Registrar shall notify the following parties in writing of his or her intention and of the grounds for the proposed termination-

- (i) the chief executive officer, executive director or executive officer concerned;
- (ii) the chairperson of the board of directors of that bank (except if the chairperson of the board is the person whose appointment the Registrar wishes to terminate in which case each director of the bank concerned shall be notified); and
- (iii) the chief executive officer of that bank, (except if the chief executive officer is the person whose appointment the Registrar wishes to terminate in which case the deputy chief executive officer shall be notified).

(c) The written notice referred to in paragraph (b) shall notify such parties that they are entitled to submit written representations to the Registrar in response to that notice.

(d) Any affected party who wishes to respond to the Registrar's written notice shall submit written representations in response to that notice to the Registrar within 14 working days of receipt of the Registrar's notice, or within such longer period as the Registrar may, upon written application by the affected party concerned, allow.

(e) The Registrar shall, within 14 working days of receipt of a written representation referred to in paragraph (d)-

- (i) consider the representation;
- (ii) decide whether or not the appointment of the chief executive officer, executive director or executive officer concerned should be terminated for the reasons contemplated in paragraph (a); and
- (iii) give notice to the affected parties, referred to in paragraph (b), of his or her decision in writing.

(f) If, after having considered any written representation in respect of the chief executive officer, executive director or executive officer concerned, the Registrar remains of the view that such officer's appointment should be terminated, or if no written representation is submitted to the Registrar within the period allowed under paragraph (d), the Registrar shall refer the matter to the Arbitration Foundation of South Africa or its successor-in-law, or any other body designated by the Registrar by means of a notice in the *Gazette* (hereinafter referred to as

the "Arbitrator") for arbitration in terms of expedited procedures approved by the Registrar in writing, and published in the *Gazette*.

(g) The Registrar shall make the request for arbitration referred to in paragraph (f) -

- (i) in writing; and
- (ii) within three working days after the expiry of the 14 day period referred to in paragraph (e) or, if the affected parties do not submit any written representations to the Registrar within the period allowed under paragraph (d), within three working days after the expiry of that period.

(h) The Arbitrator shall determine whether or not adequate reasons exist for the termination, by the Registrar, of the appointment of the chief executive officer, executive director or executive officer concerned.

(i) If under paragraph (h) the Arbitrator decides that adequate reasons exist for the termination, the Arbitrator shall confirm the termination of the appointment in writing addressed to the Registrar and the chief executive officer, executive director or executive officer, whereupon the termination shall immediately take effect.

(j) If the Arbitrator determines that adequate reasons do not exist for the termination, the Arbitrator shall reject the termination by written notice to the Registrar and to the chief executive officer, executive director or executive officer concerned, whereupon the appointment of the person in question shall continue with full force and effect.

(k) A termination in terms of this section shall not be subject to review in terms of section 9.

(7) This section, where applicable shall apply *mutatis mutandis* in respect of any branch or a controlling company."

Insertion of sections 60A and 60B in Act 94 of 1990

41. The following sections are hereby inserted in the principal Act after section 60:

"Compliance function

60A. (1) Notwithstanding anything to the contrary in any law, a bank shall establish an independent compliance function as part of the risk management framework of the bank.

(2) The compliance function shall be headed by a compliance officer of the bank, who shall perform his or her functions with such care and skill as can reasonably be expected from a person responsible for such a function in a similar institution.

(3) The appointed compliance officer shall perform his or her functions subject to such requirements and conditions as may be prescribed in the Regulations relating to Banks.

Corporate Governance

60B. (1) Notwithstanding anything to the contrary in any law, the board of directors and executive officers of a bank shall establish and maintain an adequate and effective process of corporate governance, which shall be consistent with the nature, complexity and risks inherent in the activities and the business of the bank concerned.

(2) The process of corporate governance shall be established with the objective of achieving the bank's strategic and business objectives efficiently, effectively, ethically and equitably (within acceptable risk parameters), to ensure-

- (a) compliance with the strategic framework and guidelines established for the bank or controlling company ;
- (b) commitment by the executive officers of the bank or controlling company to adhere to corporate behaviour that is universally recognised and accepted as correct and proper ;
- (c) a balance of interests of the shareholders and other interested persons who may be affected by the conduct of directors or executive officers

- of the bank or controlling company within a framework of effective accountability;
- (d) that mechanisms and procedures are established and maintained to minimise or avoid potential conflicts of interests between the business interests of the bank or controlling company and the personal interests of directors or executive officers of the bank or controlling company;
 - (e) responsible conduct by the directors and executive officers of the bank or controlling company;
 - (f) the achievement of the maximum level of efficiency and profitability of the bank within an acceptable risk profile for the bank or controlling company;
 - (g) the timely, accurate and meaningful disclosure of matters that are material to the business of the bank or controlling company or the interests of the shareholders or other persons having an interest in the bank or controlling company;
 - (h) that the board of directors retains control over the strategic and business direction of the bank or controlling company, whilst enabling its executives to manage the bank's or controlling company's operations and the achievement of the agreed strategic and business objectives; and
 - (i) compliance with all applicable laws and regulations;
- (3) A bank shall establish and maintain the process of corporate governance in accordance with any requirements that may be prescribed in the Regulations relating to Banks."

Amendment of section 61 of Act 94 of 1990, as amended by sections 14 and 25 of Act 9 of 1993

42. Section 61 of the principal Act is hereby amended—

- (a) by the substitution for subsection (1) of the following subsection:

"(1) Notwithstanding the provisions of Chapter X of the Companies Act—

 - (a) no person shall hold office as auditor of a bank or a controlling company unless [his] the appointment of such person as such an auditor has been approved by the Registrar; and
 - (b) a bank of which the total assets as at the close of its last preceding financial year exceeded [R10 000 000 000] the amount prescribed from time to time shall appoint not less than two auditors who are independent of each other.";
- (b) by the substitution for subsection (2) of the following subsection:

"(2) A bank shall within 30 days of the appointment in accordance with the provisions of Chapter X of the Companies Act of a person as auditor thereof, apply to the Registrar on the prescribed form for [his] the Registrar's approval of such appointment.";
- (c) by the substitution for subsection (3) of the following subsection:

"(3) The Registrar may[, **without being required to furnish any reason therefore**]-

 - (a) refuse an application under subsection (2) for [his] the Registrar's approval of the appointment of an auditor -
 - (i) if the application seeks the re-appointment of an auditor who has already served as auditor of the bank in question for the prescribed number of consecutive years; or
 - (ii) if the grounds for withdrawal of approval listed in paragraph (b)(i) to (iv) apply to the proposed appointee; or
 - (b) withdraw any approval of the appointment of an auditor previously granted by the Registrar under this section, if such an auditor -
 - (i) has been convicted of an offence of which dishonesty is an element;
 - (ii) is found to be incompetent or unfit to perform the functions of an auditor;

- (ii) is under investigation by the Public Accountants' Board; or fails to disclose any direct or indirect interests which may constitute or conflict of interest in respect of such auditor's duties.

and thereupon the functions and responsibilities of that auditor in respect of that bank **[concerned]** shall cease forthwith .";

- (d) by the substitution for subsection (4) of the following subsection:

"(4) If the Registrar under paragraph (a) of subsection (3) refuses an application for his or her approval of the appointment of an auditor or under paragraph (b) of that subsection withdraws an approval previously granted by him or her, the board of directors of the bank concerned shall appoint another person as auditor and the provisions of subsections (1) and (2) shall apply *mutatis mutandis* in respect of the last-mentioned appointment"; and

- (e) by the addition of the following subsection:

"(6) A person appointed under subsection (4) to replace an auditor whose approval has been withdrawn under subsection (3)(b) shall be appointed for the remainder of the period for which the person whom he or she replaces was appointed and is subject to the same conditions as his or her predecessor."

Amendment of section 63 of Act 94 of 1990, as amended by section 7 of Act 42 of 1992, sections 15 and 25 of Act 9 of 1993 and section 40 of Act 26 of 1994

43. Section 63 of the principal Act is hereby amended –

- (a) by the substitution for subsection (1) of the following subsection:

"(1) Notwithstanding anything to the contrary contained in the Public Accountants' and Auditors' Act, 1991 (Act No. 80 of 1991), or the Companies Act, but subject to the provisions of subsections (2) and (3) of this section, the auditor referred to in section 61 or 62 -

- (a) shall, whenever **[he]** such auditor furnishes, in terms of section 20(5)(b) of the first-mentioned Act, the Public Accountants' and Auditors' Board with copies of the report, acknowledgement of receipt and reply and with the other particulars referred to in that section, relating to an irregularity or suspected irregularity in the conduct of the affairs of the bank for which **[he]** such auditor has been appointed as auditor, also furnish the Registrar with such copies and particulars; and
- (b) shall in writing inform the Registrar of any matter relating to the affairs of a bank –
- (i) of which such auditor became aware in the performance of **[his]** such auditor's functions as auditor of that bank; and
- (ii) which, in the opinion of such auditor, may endanger the bank's ability to continue as a going concern or may impair the protection of the funds of the bank's depositors or may be contrary to the principles of sound management (including risk management) or amounts to inadequate maintenance of internal controls; and
- (c) shall, if requested by the Registrar to do so, furnish him or her with written information relating to a matter referred to in paragraph (b), specified by the Registrar." ;

- (b) by the substitution for subsection (2) of the following subsection:

"(2) Whenever an auditor by virtue of the provisions of subsection (1)(b) or (c) furnishes the Registrar with written information, **[he]** such auditor may at the same time furnish the chief executive officer of the bank to which such information relates with a copy of the relevant document."; and

- (c) by the substitution for subsection (4) of the following subsection :

"(4) Nothing in subsection (1) contained shall be construed as conferring upon any person any right of action against an auditor which, but for the provisions of that subsection, **[he]** such person would not have had."

Amendment of section 64 of Act 94 of 1990, as amended by section 25 of Act 9 of 1993, section 41 of Act 26 of 1994 and section 8 of Act 36 of 2000

44. Section 64 of the principal Act is hereby amended –

- (a) by the addition to subsection (2) of the following paragraph:
 "(d) perform such further functions as may be prescribed."; and
- (b) by the substitution for subsection (3) of the following subsection:

"(3) All of the members of the audit committee may be, and the majority of such members, including the [chairman] chairperson of the audit committee, shall be, persons who are not employees of the bank nor of any of its subsidiaries, its controlling company or any subsidiary of its controlling company: Provided that the [chairman] chairperson of the board of directors of the bank shall not be appointed as a member of the audit committee."

Insertion of sections 64A and 64B in Act 94 of 1990

45. The following sections are hereby inserted in the principal Act after section 64:

"Risk Committee

64A. (1) The board of directors of a bank shall appoint at least three of its members, of whom at least two are non-executive directors, to form a risk committee –

- (2) The functions of the risk committee shall be to–
- (a) assist the board in its evaluation of the adequacy and efficiency of the risk policies, procedures, practices and controls applied within that bank in the day-to-day management of its business ;
- (b) assist the board in the identification of the build up of and concentration of the various risks to which the bank is exposed;
- (c) assist the board in developing a risk mitigation strategy to ensure that the bank manages the risks in an optimal manner ;
- (d) assist the board in ensuring that a formal risk assessment is undertaken at least annually;
- (e) assist the board in identifying and regularly monitoring all key risks and key performance indicators to ensure that its decision-making capability and accuracy of its reporting is maintained at a high level;
- (f) facilitate and promote communication, through reporting structures regarding the matters referred to in paragraph (a) or any other related matter, between the board and the executive officers of the bank;
- (g) ensure the establishment of an independent risk management function , and in the case where the bank forms part of a group, a group risk management function, the head of which will act as the reference point for all aspects relating to risk management within the bank, including the responsibility to arrange training of members of the board in the different risk areas to which that bank is exposed;
- (h) introduce such measures as may serve to enhance the adequacy and efficiency of the risk management policies, procedures, practices and controls applied within that bank;
- (i) co-ordinate the monitoring of risk management on a globalised basis and
- (j) perform such further functions as may be prescribed.

Director's Affairs Committee

64B. (1) The board of directors of a bank shall establish a director's affairs committee, consisting only of non-executive directors of the bank.

- (2) The functions of the director's affairs committee shall be to–
- (a) assist the board of directors in its determination and evaluation of the adequacy, efficiency and appropriateness of the corporate governance structure and practices of the bank ;
- (b) establish and maintain a board directorship continuity programme entailing–

- (i) a review of the performance of, and planning for successors to the executive directors;
 - (ii) measures to ensure continuity of non-executive directors;
 - (iii) a regular review of the composition of skills, experience and other qualities required for the effectiveness of the board; and
 - (iv) an annual assessment, of the board as a whole and of the contribution of each individual director;
- (c) assist the board in the nomination of successors to the key positions in the bank in order to ensure that a management succession plan is in place;
- (d) assist the board in determining whether the employment of any director should be terminated;
- (e) assist the board in ensuring that the bank is at all times in compliance with all applicable laws, regulations and codes of conduct and practices; and
- (f) perform such further functions as may be prescribed."

Amendment of section 68 of Act 94 of 1990, as amended by sections 16 and 25 of Act 9 of 1993, section 42 of Act 26 of 1994 and section 9 of Act 36 of 2000

46. Section 68 of the principal Act is hereby amended –

- (a) by the substitution in subsection (1) for paragraph (c) of the following paragraph:

"(c) the Master shall appoint a person designated by the Registrar, who shall be a person who in the opinion of the Registrar has wide experience of, and is knowledgeable about the latest developments in, the banking industry, to assist a provisional liquidator or liquidator referred to in paragraph (b) in the performance of **[his]** the functions of such provisional liquidator or liquidator in respect of the bank in question."; and

- (b) by the substitution in subsection (3) for paragraph (a) of the following paragraph:

"(a) of section 346 of the Companies Act, subsection (4) of that section shall be deemed to have been amended to read as follows:

'(4) (a) Before an application for the winding-up of a company which is a bank is presented to the Court, a copy of the application and of every affidavit confirming the facts stated therein shall be lodged with the Registrar of Banks and with the Master, or if there is no Master at the seat of the Court, with an officer in the public service designated for that purpose by the Master by notice in the *Gazette*.

(b) The Registrar of Banks or the Master or any such officer may report to the court any facts ascertained by **[him]** such Registrar, Master or officer which appear to **[him]** such Registrar, Master or officer to justify the Court in postponing the hearing or dismissing the application, and shall transmit a copy of that report to the applicant or **[his]** the agent of such applicant and to the said company."; and" .

Amendment of section 69 of Act 94 of 1990, as amended by section 8 of Act 42 of 1992, sections 17 and 25 of Act 9 of 1993, section 43 of Act 26 of 1994, section 6 of Act 55 of 1996 and section 10 of Act 36 of 2000

47. Section 69 of the principal Act is hereby amended-

- (a) by the substitution in subsection (1) for paragraph (a) of the following paragraph:

"(a) If, in the opinion of the Registrar, any bank will be unable to repay, when legally obliged to do so, deposits made with it or will probably be unable to meet any other of its obligations, the Minister may, if he or she deems it desirable in the public interest, with the written consent of the chief executive officer of the **[chairman]** chairperson of the board of directors of that bank, appoint a curator to the bank.";

- (b) by the substitution in subsection (1) for paragraph (c) of the following paragraph:
- "(c) The person appointed in terms of paragraph (b) shall in respect of the services rendered by **[him] that person** pursuant to his or her appointment be paid such remuneration out of the funds of the bank under curatorship as the Registrar may after consultation with the curator determine.";
- (c) by the substitution in subsection (2) for paragraph (b) of the following paragraph:
- "(b) directions in regard to the security which the curator has to furnish for the proper performance of his or her duties:";
- (d) by the substitution for subsection (2D) of the following subsection:
- "(2D) If at any time the curator is of the opinion that there is no reasonable probability that the continuation of the curatorship will enable the bank to pay its debts or meet its obligations and become a successful concern, **[he] the curator** shall forthwith in writing inform the Registrar of such opinion.";
- (e) by the substitution for subsection (2E) of the following subsection:
- "(2E) Any money of the bank that becomes available to the curator shall be applied by him or her in paying the costs of the curatorship and in the conduct of the bank's business in accordance with the requirements of the curatorship and, as far as the circumstances permit, in the payment of the claims of creditors which arose before the date of the curatorship.";
- (f) by the substitution in subsection (3) for the words preceding paragraph (a) of the following words:
- "The Minister may, in the letter of appointment or at any time subsequent thereto, empower the curator in his or her discretion, but subject to any condition which the Minister may impose - ";
- (g) by the substitution for paragraphs (a), (b), (c) and (d) of subsection (3) of the following paragraphs, respectively:
- "(a) to suspend or reduce, as from the date of **[his] the curator's** appointment as **[curator] such** or any subsequent date, the right of creditors of the bank concerned to claim or receive interest on any money owing to them by that bank ;
- (b) to make payments, whether in respect of capital or interest, to any creditor or creditors of the bank concerned at such time, in such order and in such manner as **[he] the curator** may deem fit;
- (c) to cancel any agreement between the bank concerned and any other party to advance moneys due after the date of **[his] the curator's** appointment as **[curator] such**, or to cancel any agreement to extend any existing facility, if, in the opinion of the curator, such advance or any loan under such facility would not be adequately secured or would not be repayable on terms satisfactory to the curator or if the bank lacks the necessary funds to meet its obligations under any such agreement or if it would not otherwise be in the interests of the bank ;
- (d) to convene from time to time, in such manner as **[he] the curator** may deem fit, a meeting of creditors of the bank concerned for the purpose of establishing the nature and extent of the bank's indebtedness to such creditors and for consultation with such creditors in so far as their interests may be affected by decisions taken by the curator in the course of the management of the affairs of the bank concerned;"
- (h) by the substitution in subsection (3) for paragraph (f) of the following paragraph:
- "(f) to make and carry out, in the course of **[his] the curator's** management of the bank concerned, any decision which in terms of the provisions of the Companies Act would have been required to be made by way of a special resolution contemplated in section 199 of the said Act;"
- (i) by the substitution for subsection (3A) of the following subsection:

- "(3A) The curator shall duly record the nature of and the reasons for each act performed by **[him] the curator** under any power conferred upon **[him] the curator** in terms of subsection (3), and such records shall be examined as part of the normal audit performed in respect of the affairs of the bank concerned."
- (j) by the substitution for subsection (4) of the following subsection:
- "(4) The Minister may, at any time and in any manner, amend the directions in the letter of appointment, and the powers granted by **[him] the Minister** under subsection (3) to the curator."; and
- (k) by the substitution for subsection (7) of the following subsection:
- "(7) The Registrar shall as soon as is practicable announce the appointment of a curator and the powers granted to **[him] the curator** on **[his] the appointment of the curator**, and any amendment or withdrawal of such powers, by notice in the *Gazette*."

Amendment of section 69A of Act 94 of 1990, as inserted by section 44 of Act 26 of 1994 and amended by section 11 of Act 36 of 2000

48. Section 69A of the principal Act is hereby amended –

- (a) by the substitution for subsection (2) of the following subsection:
- "(2) The Registrar may appoint a person as an assistant or two or more persons as assistants to the commissioner referred to in subsection (1) in order to assist the commissioner, subject to **[his] the control and directions of the Registrar**, in an investigation contemplated in subsection (1).";
- (b) by the substitution for subsection (3) of the following subsection :
- "(3) Before the Registrar appoints a commissioner in terms of subsection (1) or a person or persons in terms of subsection (2), **[he] the Registrar** shall take all reasonable steps to ensure that the person or persons **[he appoints] so appointed** will be able to report objectively and impartially on the affairs of the bank concerned or the associate or associates of such bank.";
- (c) by the substitution for subsection (4) of the following subsection:
- "(4) A commissioner appointed under subsection (1) and any person or persons appointed under subsection (2) shall for the purpose of their functions in terms of this section have powers and duties in all respects corresponding to the powers and duties conferred or imposed by **[section 4(1), (2), (3), (4) and (6)] sections 4 and 5** of the Inspection of Financial Institutions Act, **[1984 (Act No. 38 of 1984-hereinafter in this section referred to as the Inspection Act)] 1998 (Act No. 80 of 1998)**, upon a registrar or an inspector contemplated in the Inspection of Financial Institutions Act, 1998; Provided that for the purposes of this section-
- (a) any reference to an 'institution' or a 'financial institution' in **[section] sections 4 and 5** of the **[Inspection Act] Inspection of Financial Institutions Act, 1998**, shall be deemed to be a reference to a bank under curatorship or any of its associates; and
- (b) any reference to 'the registrar' and 'an inspector' in **[section] sections 4 and 5** of the **[Inspection Act] Inspection of Financial Institutions Act, 1998**, shall be deemed to be a reference to the commissioner and any person appointed under subsection (2), respectively." ;
- (d) by the substitution for subsection (5) of the following subsection:
- "(5) When an investigation is made under this section and section 4 of the Inspection of Financial Institutions Act, 1998 (Act No. 80 of 1998), applies, subsection (1)(a) of that section shall be deemed to have been amended to read as follows:
- '(1) In carrying out an investigation into the business, trade, dealings, affairs or assets and liabilities of a bank under curatorship, a commissioner may -
- (a) administer an oath or affirmation or otherwise examine any person who is, or formerly was, a director, servant, employee, partner, member or shareholder of the institution: Provided that the person examined, whether under oath or not, may have

his or her legal adviser present at the examination: Provided, further, that on good cause shown the commissioner, may direct that the proceedings under this paragraph shall be held *in camera* and not be accessible to the public;"

- (e) by the insertion of the following subsection after subsection (5):

"(5A) When an investigation is made under this section and section 5 of the Inspection of Financial Institutions Act, 1998 (Act No. 80 of 1998), applies subsection (1)(a) of that section shall be deemed to have been amended to read as follows:

"(1) In carrying out an investigation into the business, trade, dealings, affairs or assets and liabilities of a bank under curatorship, a commissioner may -

- (a) administer an oath or affirmation or otherwise examine any person, if the commissioner has reason to believe that such a person may be able to provide information relating to the affairs of the bank: Provided that the person examined, whether under oath or not, may have his or her legal adviser present at the examination: Provided, further, that on good cause shown the commissioner, may direct that the proceedings under this paragraph shall be held *in camera* and not be accessible to the public;"

- (f) by the substitution in subsection (6) for paragraphs (a) and (b) of the following paragraphs, respectively:

"(a) Any person examined by a commissioner under this section shall not be entitled, at such examination, to refuse to answer any question upon the ground that the answer would tend to incriminate him or her or upon the ground that he or she is to be tried on a criminal charge and may be prejudiced at such trial by his or her answer.

(b) Where any person gives evidence in terms of the provisions of this section and is obliged to answer questions that may incriminate him or her or, where he or she is to be tried on a criminal charge, that may prejudice him or her at such trial, the commissioner shall direct, in respect of such part of the proceedings, that no information regarding such questions and answers may be published in any manner whatsoever.";

- (g) by the substitution for subsection (7) of the following subsection:

"(7) In addition to the powers conferred upon the commissioner by subsection (4) the commissioner shall for the purpose of the performance of **[his] the** functions of the commissioner under this section have the power to summon before **[him] the commissioner** any such person as **[he] the commissioner** may examine in terms of the provisions of subsection (5).";

- (h) by the substitution for subsection (8) of the following subsection:

"(8) If any person who has been duly summoned under subsection (7) and to whom a reasonable sum for **[his] the** expenses of such person has been tendered, fails to attend before a commissioner at the time and place appointed by the summons without lawful excuse made to the commissioner at the time of the sitting, the commissioner may cause the person so summoned to be apprehended and brought before **[him] the commissioner** for examination.";

- (i) by the substitution for subsection (9) of the following subsection:

"(9) Any person duly summoned under subsection (7) shall be entitled to such witness fees as **[he] such person** would have been entitled to if he **[were] or she had been** a witness in civil proceedings in a magistrate's court.";

- (j) by the substitution in subsection (11) for the words preceding paragraph (a) of the following words:

"A commissioner shall within a period of five months as from the date of **[his] the commissioner's** appointment complete **[his] the** investigation in terms of subsection (1) and shall within a period of 30 days after completion of such investigation prepare a written report thereon, in which, *inter alia*, shall be stated whether or not, in the opinion of the commissioner-"; and

(k) by the substitution for subsection (14) of the following subsection:

- "(14) Any person who -
- (a) has been duly summoned under this section by a commissioner and who fails, without sufficient cause, to attend at the time and place specified in the summons;
 - (b) has been duly summoned under this section by a commissioner and who-
 - (i) fails, without sufficient cause, to remain in attendance until excused by the commissioner from further attendance;
 - (ii) refuses to be sworn or to affirm as a witness; or
 - (iii) fails, without sufficient cause-
 - (aa) to answer fully and satisfactorily any questions lawfully put to **[him]** such person by a commissioner, notwithstanding that such answer may tend to incriminate him or her; or
 - (bb) to produce books or papers in **[his]** the custody of such person or under **[his]** the control of such person which a commissioner has required him or her to produce;
 - (c) wilfully furnishes the commissioner with any false information;
 - (d) refuses or fails to comply to the best of his or her ability with any reasonable request made to him or her by the commissioner in the exercise of **[his]** the commissioner's powers or the performance of **[his]** the commissioner's duties;
 - (e) wilfully hinders the commissioner in the exercise of his or her powers or the performance of his or her duties; or
 - (f) fails to comply with any provision of a direction by the commissioner or the Registrar as contemplated in this section,
- shall be guilty of an offence."

Amendment of section 70 of Act 94 of 1990, as amended by section 9 of Act 42 of 1992, sections 18 and 25 of Act 9 of 1993, section 45 of Act 26 of 1994 and section 12 of Act 36 of 2000

49. Section 70 of the principal Act is hereby amended -

- (a) by the substitution in subsection (2)(a) for subparagraph (ii) of the following subparagraph:
 - "(ii) an amount which represents a prescribed percentage of the sum of amounts calculated by multiplying the average of the amounts (as shown in the returns furnished to the Registrar in terms of section 75**[(1)(a)(ii)]** of such different categories of-
 - (aa) assets; and
 - (bb) other risk exposures in the conduct of its business,";
- (b) by the substitution in subsection (2B)(a)(ii) for item (aa) of the following item:
 - "(aa) a prescribed percentage of the sum of amounts calculated by multiplying the average of the amounts (as shown in the returns furnished to the Registrar in terms of section 75**[(1)(a)(ii)]**), of such different categories of-
 - (A) assets; and
 - (B) other risk exposures in the conduct of its business, as may be prescribed in the Regulations relating to Banks, by the risk weights, expressed as percentages, so prescribed in respect of such different categories of assets and other risk exposures; and"

Amendment of section 72 of Act 94 of 1990, as amended by section 10 of Act 42 of 1992, section 25 of Act 9 of 1993 and section 14 of Act 36 of 2000

50. Section 72 of the principal Act is hereby amended by the substitution for subsection (3) of the following subsection:

- "(3) A bank shall not pledge or otherwise encumber any portion of the liquid assets held by it in compliance with the provisions of subsection (1): Provided that the Registrar may exempt a bank from the prohibition contained in this subsection

on such conditions and to such an extent and for such a period as [he] the Registrar may determine."

Amendment of section 73 of Act 94 of 1990, as substituted by section 15 of Act 36 of 2000

51. Section 73 of the principal Act is hereby amended by the substitution in subsection (1) for paragraph (b) of the following paragraph:

"(b) shall in the event of the aggregate amount of investments, loans, advances and other credit contemplated in paragraph (a), relating to any private sector non-bank person, exceeding 800 per cent of such an amount of its capital and reserves as may be prescribed, be subject to such additional capital requirements as may be prescribed."

Amendment of section 74 of Act 94 of 1990, as amended by sections 20 and 25 of Act 9 of 1993

52. Section 74 of the principal Act is hereby amended -

(a) by the substitution for subsection (2) of the following subsection:

"(2) The Registrar may summarily take action under this Act against a bank referred to in subsection (1) or, if in the circumstances [he] the Registrar deems it fit to do so, condone the failure or inability and afford the bank concerned an opportunity, subject to such conditions as the Registrar may determine, to comply with the relevant provision within a specified period."; and

(b) by the substitution for subsection (4) of the following subsection:

"(4) A fine imposed under subsection (3) shall be paid to the Registrar within such period as may be specified in the relevant notice, and if the bank concerned fails to pay the fine within the specified period the Registrar may by way of civil action in a competent court recover from that bank the amount of the fine or any portion thereof which [he] the Registrar may in the circumstances consider justified."

Amendment of section 75 of Act 94 of 1990, as amended by section 12 of Act 42 of 1992, sections 21 and 25 of Act 9 of 1993 and section 47 of Act 26 of 1994

53. Section 75 of the principal Act is hereby amended by the substitution for subsection (5) of the following subsection:

"(5) A bank shall furnish the Registrar, in respect of those of the respective returns referred to in subsections (1) and (3) which most nearly coincide with the end of the financial year of the bank with a report by the auditor of the bank in which is stated whether or not those returns fairly and in conformity with generally accepted accounting practice present those affairs of the bank to which the returns relate, and the Registrar may, if he or she deems it necessary, require the bank so to furnish [him] the Registrar with such a report in respect of any other of those returns furnished during the financial year."

Substitution of section 76 of Act 94 of 1990, as amended by section 2 of Act 81 of 1991, section 2 of Act 81 of 1991, section 25 of Act 9 of 1993 and section 48 of Act 26 of 1994

54. The following section is hereby substituted for section 76 of the principal Act :

"Restriction on investments in immovable property and shares, and on loans and advances to certain subsidiaries

76. (1) Subject to the provisions of subsection (2), a bank which invests money in immovable property or in shares of any company, or which lends or advances money to any of its subsidiaries **[of which the main object is the acquisition and holding or development of immovable property,]** shall manage its transactions in such investments, loans or advances in such a way that the sum of the amounts-

(a) invested by it in immovable property, taken at the book value thereof;

- (b) invested by it in shares of any company (excluding preference shares which are not convertible into ordinary shares), taken at the price at which they were acquired; and
- (c) owing to it by any such subsidiary in respect of a loan or an advance granted by it,

does not at any time exceed a prescribed amount.

(2) A bank may with the written approval of the Minister and subject to such conditions as he or she may determine, make investments and grant loans and advances, referred to in subsection (1), to an aggregate amount which exceeds the sum to which it is limited in terms of subsection (1).".

Amendment of section 77 of Act 94 of 1990, as amended by section 13 of Act 42 of 1992, section 25 of Act 9 of 1993 and section 49 of Act 26 of 1994

55. Section 77 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection :

"(1) A bank which invests money in debentures or preference shares of any of its associates (excluding any such associate which is a subsidiary referred to in section 76(1), a bank or a mutual building society), or which lends or advances money to any such associate, or which provides guarantees in respect of liabilities of such associates, shall manage its transactions in such investments, loans, advances or guarantees in such a way that the sum of the amounts-

- (a) invested by it in debentures or preference shares of such associates (excluding debentures or preference shares which are convertible into ordinary shares), taken at the price at which they were acquired;
- (b) owing to it by such associates in respect of loans or advances granted by it; and
- (c) of such guarantees,

does not at any time exceed ten per cent of **[its liabilities, excluding its liabilities in respect of capital and reserves]** the amount prescribed."

Amendment of section 78 of Act 94 of 1990, as amended by section 25 of Act 9 of 1993 and section 50 of Act 26 of 1994

56. Section 78 of the principal Act is hereby amended:

- (a) by the substitution in subsection (1) for paragraph (b) of the following paragraph:

"(b) shall not lend money to any person against security of its own shares or of shares of that bank's controlling company";

- (b) by the substitution in subsection (1) for paragraph (g) of the following paragraph:

"(g) shall not, for the purpose of effecting a money lending transaction directly between a lender and a borrower, perform any act in the capacity of an agent except where the funds to be lent in terms of the money lending transaction are entrusted by the lender to the bank subject to a written contract of agency in which, in addition to any other terms thereof, at least the following matters shall be recorded:

- (i) Confirmation by the lender that the bank acts as **[his]** the agent of the lender;
- (ii) that the lender assumes, except in so far as **[he]** the lender may in law have a right of recovery against the bank, all risks connected with the placing by the bank of the funds entrusted to it by the lender, as well as the responsibility to ensure that the bank executes the lender's instructions as recorded in the written contract of agency; and
- (iii) that no express or implied guarantee regarding the payment of any amount of money owing by one person to another in pursuance of the relevant money lending transaction is furnished by the bank;"

- (c) by the addition to subsection (1) of the following paragraph:

"(k) shall not without the prior written approval of the Registrar and notwithstanding anything to the contrary contained in any law, pay out dividends from its share capital."

Amendment of section 81 of Act 94 of 1990, as amended by section 25 of Act 9 of 1993 and section 53 of Act 26 of 1994

57. Section 81 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection:

"(1) If the Registrar has reason to suspect that any person who is not registered as a bank in terms of this Act nor authorized in terms of the provisions of section 18A(1) to carry on the business of a bank -

- (a) is likely to conduct the business of a bank in contravention of the provisions of section 11(1) or 18A(6); or
- (b) has so contravened the provisions of section 11(1) or 18A(6) or has contravened the provisions of section 22(4) or (5), or that such a contravention is likely to be continued or repeated,

the Registrar may apply to a division of the **[Supreme] High** Court having jurisdiction (hereinafter in this section referred to as the court) for an order -

- (i) prohibiting the anticipated contravention referred to in paragraph (a);
- (ii) prohibiting the continuation or repetition of a contravention referred to in paragraph (b); or
- (iii) prohibiting the person concerned from disposing of or otherwise dealing with any of **[his] the [or its]** assets of that person while the contravention suspected of having been committed or of being continued is investigated."

Amendment of section 82 of Act 94 of 1990, as amended by section 25 of Act 9 of 1993 and section 54 of Act 26 of 1994

58. Section 82 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection:

"(1) If the Registrar has reason to suspect that any person who is neither registered as a bank nor authorized in terms of the provisions of section 18A(1) to carry on the business of a bank is carrying on the business of a bank, the Registrar may by notice in writing direct that person to submit to **[him] the Registrar** such document or to furnish **[him] the Registrar** with such information, relating to the affairs of that person, as the Registrar may specify in the notice and as may be available to that person."

Amendment of section 83 of Act 94 of 1990, as amended by section 25 of Act 9 of 1993 and section 55 of Act 26 of 1994

59. Section 83 Of the principal Act is hereby amended -

- (a) by the substitution for subsection (1) of the following subsection:

"(1) If as a result of an inspection conducted under section 12 of the South African Reserve Bank Act, 1989 (Act No. 90 of 1989), the Registrar is satisfied that any person has obtained money by carrying on the business of a bank without being registered as a bank or without being authorized, in terms of the provisions of section 18A(1), to carry on the business of a bank, the Registrar may in writing direct that person to repay, subject to the provisions of section 84 and in accordance with such requirements and within such period as may be specified in the direction, all money so obtained by **[him] that person** in so far as such money has not yet been repaid, including any interest or any other amounts owing by **[him] that person** in respect of such money."; and

- (b) by the substitution for subsection (3) of the following subsection:

"(3) Any person who refuses or fails to comply with a direction under subsection (1) -

- (a) shall be guilty of an offence; and
- (b) shall for the purposes of any law relating to the winding-up of juristic persons or to the sequestration of insolvent estates, be deemed not to be able to pay **[his] the debts owed by such person** or to have committed an act of insolvency, as the case may be, and the Registrar shall, notwithstanding anything to the contrary contained in any law, be competent to apply for the winding-up of such a juristic person or for the sequestration of the estate of such a person, as the case may be, to any court having jurisdiction."

Amendment of section 84 of Act 94 of 1990

60. Section 84 of the principal Act is hereby amended –

(a) by the substitution for subsection (1) of the following subsection :

"(1) Simultaneously with the issuing of a direction under section 83(1), or as soon thereafter as may be practicable, the Registrar shall by a letter of appointment signed by him or her appoint a person (hereinafter in this section referred to as the manager) to manage and control the repayment of money in compliance with the direction by the person subject thereto.";

(b) by the substitution for subsection (2) of the following subsection:

"(2) The Registrar shall serve a copy of the letter of appointment referred to in subsection (1) upon the person subject to the relevant direction, and such person shall, with effect from the date of the letter of appointment, be prohibited from disposing of or otherwise dealing with such of **[his] the** assets of such person as are specified in the letter of appointment, except with the written permission of the manager.";

(c) by the substitution for subsection (3) of the following subsection :

"(3) The manager shall act under the control of the Registrar, and **[he] the manager** may from time to time apply to the Registrar for instructions in regard to any matter arising out of or in connection with the performance of his or her duties in terms of subsection (4).";

(d) by the substitution in subsection (4) for paragraph (c) of the following paragraph:

"(c) to report the suspected commission by any person of any offence of which **[he] the manager** becomes aware in the course of the performance of his or her duties as manager in terms of this section , to the **[attorney-general] responsible prosecuting authorities** having jurisdiction in the area in which such offence is so suspected of having been committed; and";

(e) by the substitution in subsection (4) for paragraph (d) of the following paragraph :

"(d) to perform any other function assigned to **[him] the manager** by the Registrar in connection with the finalization of the repayment of money in accordance with the relevant direction."

(f) by the substitution for subsection (5) of the following subsection:

"(5) For the purposes of the performance of **[his] the** duties as set out in subsection (4), the manager shall, in relation to the person subject to the relevant direction and in relation to the affairs of that person, have the powers conferred by **[section 4(1), (2), (3) and (4)] sections 4 and 5** of the Inspection of Financial Institutions Act, **[1984 (Act No. 38 of 1984)] 1998 (Act No. 80 of 1998)**, upon an inspector contemplated in **[that section] those sections**, as if the manager were an inspector and the person subject to the direction were a financial institution contemplated in **[that section] those sections**.";

(g) by the substitution for subsection (6) of the following subsection:

"(6) The manager shall in respect of the services rendered by him or her in terms of this section and the responsible inspector or inspectors shall in respect of an inspection referred to in section 83(1) conducted under section 12 of the South African Reserve Bank Act, 1989 (Act No. 90 of 1989), be paid such remuneration by the Registrar as **[the Minister] the Registrar** may determine, and the Registrar may recover an amount equal to the remuneration so paid from the person subject to the direction or the inspection, as the case may be.";

(h) by the substitution for subsection (7) of the following subsection:

"(7) The manager shall hold office until the relevant direction has been fully complied with, but the Registrar may at any time in writing withdraw the appointment of the manager on good cause shown , whereupon the manager shall vacate his or her office."; and

(i) by the substitution for subsection (8) of the following subsection :

"(8) Any person who-
(a) when requested by the manager to take an oath or to make an affirmation, refuses to do so;

- (b) without lawful excuse refuses or fails to answer to the best of his or her ability a question put to [him] such person by the manager in the exercise of [his] the manager's powers or the performance of [his] the manager's duties, even though the answer may tend to incriminate that person ;
 - (c) wilfully furnishes the manager with any false information ;
 - (d) refuses or fails to comply to the best of his or her ability with any reasonable request made to [him] such person by the manager in the exercise of [his] the manager's powers or the performance of [his] the manager's duties
 - (e) wilfully hinders the manager in the exercise of [his] the powers or the performance of [his] the duties of the manager; or
 - (f) commits any other deed designed to obstruct, or to enable any person to evade, the repayment of money as required by a direction under section 83(1),
- shall be guilty of an offence: Provided that no answer given to a question put by the manager to a person in terms of this section and no information derived therefrom may be used against such person in any criminal proceedings."

Amendment of section 86 of Act 94 of 1990, as amended by section 25 of Act 9 of 1993

61. Section 86 of the principal Act is hereby amended by the substitution for subsection (4) of the following subsection:

"(4) If the Registrar is of the opinion that a person requires an inspection or any certificate, copy or extract referred to in subsection (1) to promote any public interest, [he] the Registrar may exempt that person from the obligation to pay the prescribed fee in respect of such inspection, certificate, copy or extract."

Substitution of section 88 of Act 94 of 1990

62. The following section is hereby substituted for section 88 of the principal Act:

"Limitation of liability

88. No liability shall attach to the South African Reserve Bank or, either in his or her official or personal capacity, any member of the board of directors of the said Bank, the Registrar or any other officer or employee of the said Bank, for any loss sustained by or damage caused to any person as a result of anything done or omitted by such member, the Registrar or such other officer or employee in the *bona fide* performance of any function or duty under this Act."

Amendment of section 89 of Act 94 of 1990

63. Section 89 of the principal Act is hereby amended by the substitution for the words preceding paragraph (a) of following words:

"Notwithstanding the provisions of section 33(1) of the South African Reserve Bank Act, 1989 (Act No. 90 of 1989), the Registrar may furnish information acquired by him or her as contemplated in that section-".

Amendment of section 90 of Act 94 of 1990, as amended by section 25 of Act 9 of 1993

64. Section 90 of the principal Act is hereby amended

- (a) by the substitution in subsection (1) for paragraph (b) of the following paragraph :

"(b) subject to the provisions of the Companies Act, providing guidelines relating to the conduct of, and prescribing requirements to be complied with by, a member of the board of directors of a bank in the performance of [his] the functions [as] of such a director;"

- (b) by the substitution in subsection (1) for paragraph (i) of the following paragraph:
- "(i) prescribing, generally, any matter, whether or not connected with any matter specified in paragraphs (a) to (h), inclusive, which **[he]** the Minister may deem it necessary or expedient to prescribe in order that the objects and purposes of this Act may be better achieved."; and
- (c) by the substitution for subsection (2) of the following subsection :
- "(2) A person who is obliged in terms of any provision of this Act to render a return or statement in a prescribed form, shall be deemed not to have rendered that return or statement unless **[he]** such person has set forth therein all the particulars for which provision is made in the prescribed form."

Amendment of section 91 of Act 94 of 1990, as amended by sections 23 and 25 of Act 9 of 1993, section 56 of Act 26 of 1994 and section 16 of Act 36 of 2000

65. Section 91 of the principal Act is hereby amended

- (a) by the substitution for subsection (1) of the following subsection:
- "(1) Any person who—
- (a) fails to comply with a direction under section 7;
- (aA) in **[completing]** the completion of any questionnaire contemplated in section 1(1A)(c) or in the furnishing of any prescribed information contemplated in section 60(5) furnishes the Registrar with any information which to the knowledge of such person is untrue or misleading in any material respect~~[,]~~; or
- (b) contravenes or fails to comply with a provision of section 7(3), (4) or (5), 34,35,37(1), 38(1), 39,41,42(1), 52(1) or (4), 53, 55,58,59, 60(5)(a)(i), 60(5)(b)(i), 61(2), 65, 66, 67, 70(2), (2A) or (2B), 70A, 72, 73, 75, 76, 77, 78(1) or (3), 79, 80 or 84(2),
- shall be guilty of an offence.";
- (b) by the substitution for subsection (4) of the following subsection:
- "(4) Any person convicted of an offence in terms of—
- (a) section 1(1A)(d), 11(2), [18A(6) or] 18A(7), 22(4) or 60(5)(a)(i) or (b)(i) read with subsection (1)(b) of this section, shall be liable to a fine **[not exceeding R100 000]** or to imprisonment for a period not exceeding **[five] ten** years or to both **[such] a** fine and such imprisonment; **[or]**
- (b) section 17(6), 21, 22(3) or (8), 32(4)(a), 69A(14), 78(2), 82(3), 83(3)(a), 84(8) or subsection (1), (2) or (3) of this section (excluding the offence in terms of subsection (1)(b), referred to in paragraph (a)), shall be liable to a fine **[not exceeding R10 000]** or to imprisonment for a period not exceeding **[six months] five years** or to both **[such] a** fine and such imprisonment; or
- (c) any other provision of this Act in respect of which no specific penalty has been prescribed shall be liable to a fine or to imprisonment for a period not exceeding five years or to both a fine and such imprisonment. "
- (c) by the substitution for subsection (6) of the following subsection :
- "(6) If any person fails to submit to the Registrar or to furnish the Registrar with any return, statement, report or other document or information in accordance with a requirement of this Act within the period determined by or under this Act or, if that period has been extended by the Registrar under section 8(2)(a), within the extended period, the Registrar may impose upon **[him]** such person by way of a notice in writing a fine not exceeding **[R100] R1000** for every day during which such failure continues.";
- (d) by the insertion after subsection (6) of the following subsection :
- "**(6A)** If any person submits to the Registrar or furnishes the Registrar with any return, statement, report or other document or information in accordance with a requirement of this Act containing materially incorrect or inaccurate information that results in that person having to revise, correct or resubmit such a return, statement, report or other document or

information, the Registrar may impose upon such person by way of a notice in writing a fine not exceeding R1000 for every day during which such a return, statement, report or other document or information has not been revised, corrected or resubmitted to the satisfaction of the Registrar."; and

- (e) by the substitution for subsection (7) of the following subsection :

"(7) A fine imposed under subsection (6) or (6A) shall be paid to the Registrar within such period as may be specified in the notice, and if the person concerned fails to pay the fine within the specified period the Registrar may by way of civil action in a competent court recover from such person the amount of the fine or any portion thereof which the Registrar may in the circumstances consider justified."

Amendment of section 92 of Act 94 of 1990, as amended by section 57 of Act 26 of 1994

66. Section 92 of the principal Act is hereby amended:

- (a) by the substitution for subsection (2) of the following subsection:

"(2) A member of the standing committee shall hold office for such period as the Minister may determine, and shall be eligible for reappointment on the expiration of **[his]** the term of office of such a member.";

- (b) by the deletion of subsection (4).

Short title

67. This Act is called the Banks Amendment Act, 2003.

**MEMORANDUM ON THE OBJECTS OF THE BANKS AMENDMENT
BILL, 2003**

1. BACKGROUND

During the public hearings of the Banks Amendment Act, 2000 (Act No. 36 of 2000), in October 2000, the Finance Committee of the National Council of Provinces directed that the gender insensitive provisions of the Banks Act, 1990 (Act No. 94 of 1990 — hereinafter referred to as "the principal Act") be amended during the 2001 Parliamentary session in order to reflect the constitutional imperative in this regard. The vast majority of the amendments to the principal Act, in the present Bill, have, therefore, been drafted in order to comply with the above-mentioned directive. Certain further issues have emerged as a result of recent bank failures and the report pertaining to the affairs of Regal Treasury Private Bank Limited delivered by Adv J Myburgh SC (hereinafter referred to as the "Regal report"). These issues have also been addressed by means of the legislative amendments proposed in the Bill. The Office for Banks, in its day-to-day consultations and contact with banks and its consultations with supervisory authorities in other countries and with international standard-setting bodies such as the Basel Committee on Banking Supervision ("the Basel Committee"), has also identified certain further aspects in which the principal Act is in need of improvement. In order to effect such improvements, certain amendments of the principal Act are proposed in the present Bill, which may be explained as follows :

2. CLAUSES ADDRESSING AMENDED LEGISLATION

2.1 Definition of "liquid assets"

The principal Act previously provided that stocks issued under the Exchequer Act, 1975 qualified as "liquid assets" for purposes of the Act. The Exchequer Act, 1975 was, however repealed by the Public Finance Management Act, 1999 (Act No. 1 of 1999 - hereinafter referred to as the "Public Finance Management Act") and the consequential amendment to the principal Act was accordingly effected by the Banks Amendment Act, 2000.

Subsequently, however, it has become apparent that securities issued by virtue of section 66 of the Public Finance Management Act encompass a far wider array of securities than was the case with the Exchequer Act and all of which wider array of securities cannot comfortably be regarded as "liquid assets" by the Registrar. The amendment, therefore, proposes to limit such securities only to securities that are issued to fund the National Government as was the position with the Exchequer Act, 1975 .

2.2 Amendments relating to Inspection of Financial Institutions Act

The Inspection of Financial Institutions Act, 1984 (Act No. 38 of 1984) was repealed by the Inspection of Financial Institutions Act, 1998 (Act No. 80 of 1998). The proposed amendment to the principal Act effects reference to the latter Act as well as to the relevant sections thereof.

2.3 Substitution of subsection 37(2)(b)

Subsection 37(2)(b) of the principal Act requires the Registrar to consult with the Competition Commission before considering an application for the acquisition in excess of 15 percent of the ordinary shares in a bank or a bank controlling company. The amendments to the Competition Act, 1998 (Act No. 89 of 1998) that came into effect on 1 February 2001, effectively afford the Competition Commission concurrent jurisdiction with regard to share acquisitions in banks and banking mergers. The provisions of subsection 37(2)(b) of the principal Act have in the light of the above-mentioned developments become superfluous and it is proposed that it be substituted to reflect the concurrent jurisdiction of the Competition Commission in order to enhance regulatory certainty in this regard.

3. CLAUSES CLARIFYING AND REFLECTING EXISTING PRACTICES

3.1 Insertion of a definition of and reference to "Regulations relating to branches "

Various sets of regulations have been issued in terms of the provisions of the principal Act in order to effectively and efficiently regulate the banking industry. In order to avoid confusion, however, it has become necessary to define each set of regulations and to refer to a specific set of regulations where appropriate. The proposed amendments clarify the position with regard to the Regulations relating to branches .

3.2 Insertion of the words "at any time" in relation to when the Registrar may request a person to complete a questionnaire and providing for an offence

Section 1(1 A)(c) of the principal Act provides that the Registrar may request any person to complete a questionnaire in order to form an opinion regarding the qualities of that person. The purpose of this provision is to determine whether or not any person in the employ of a bank or controlling company is fit and proper. The questionnaire, referred to as form DI 020, is contained in the Regulations relating to Banks .

Although the Registrar has always contended that the Registrar could, at any time, request a person to complete such a questionnaire, some individuals were of the opinion that the Registrar could only insist upon such questionnaire at the time of the appointment of such a person as a director or executive officer of a bank or a bank controlling company. The proposed amendment is aimed at reflecting existing practice. Any refusal or failure to reply to such a request will be an offence.

3.3 Issuing of circulars by the Registrar of Banks to provide information

Section 6(4) of the principal Act provides that the Registrar may issue a circular to furnish banks with guidelines regarding the application and interpretation of the provisions of the Act. In practice, however, the circular is also used to provide banks with information and advice on various topics. The proposed amendment is aimed at reflecting existing practice.

3.4 Furnishing of an auditor's report at the expense of the bank, controlling company or subsidiary concerned

Section 7 of the principal Act provides that the Registrar may direct a bank, controlling company or subsidiary to furnish the Registrar with an auditor's report. The practice has always been that such a report was to be commissioned at the reasonable expense of the bank, controlling company or subsidiary concerned. In a recent matter, however, this practice was challenged. The proposed amendment is aimed at reflecting the existing practice and to clarify the position in this regard .

3.5 References to the Regulations relating to Banks

When a person wishes to apply for authorisation to establish a bank or for registration as a bank or for registration as a controlling company in terms of the provisions of sections 12, 16 or 43 of the principal Act, respectively, the Act states that such an application should be made "in the prescribed manner and on the prescribed form". The application form, referred to as form DI 002, is, however, contained in the Regulations relating to Banks. The proposed amendment is aimed at referring prospective applicants to the Regulations relating to Banks in order to clarify the position and to reduce unnecessary inquiries in this regard.

3.6 Revocation of authorisation to establish a bank

Section 14(1) of the principal Act provides that the Registrar may revoke the authorisation granted for the establishment of a bank if the Registrar is satisfied that success with the formation of the bank has not been achieved within a period of six months. Section 16(1) of the principal Act, however, provides that an applicant may at any time during the period of 12 months, commencing on the date that authorisation to establish a bank was granted, apply for registration as a bank.

It would thus appear as though section 16(1) of the principal Act grants an applicant 12 months, after authorisation to establish a bank has been granted, to successfully form the bank. If the Registrar, however, revokes the authorisation after six months in terms of the provisions of section 14(1) of the principal Act, it could be regarded as a premature or unfair administrative action. The proposed amendment aims to address the apparent anomaly.

3.7 Usage by a bank of a name of its division, brand or product that includes the word "bank "

Section 22(1) of the principal Act provides that a bank may only refer to itself by the name under which it was registered. In practice, however, banks have, for business reasons, established divisions, brands and products that have names containing the word "bank". In all cases the Registrar had approved such names subject to certain conditions that are aimed at preventing confusion in the market place and with the general public. The proposed amendment is aimed at reflecting existing practice and to create legal certainty in this regard.

Subsections 22(1) and 22(5) of the principal Act have been amended to provide that an institution registered under section 18A to conduct the business of a bank by means of a branch in the Republic, as well as an institution that is registered as a representative office of a foreign institution in terms of the provisions of section 34 may also refer to itself by a name including the word "bank".

3.8 Order prohibiting anticipated or actual contraventions of certain provisions of the principal Act

Section 81 of the principal Act provides that the Registrar may apply to the High Court for certain legal relief if the Registrar has reason to suspect that any person who is not registered as a bank is likely to contravene certain provisions of the Act. The provision should, however, also refer to branches of foreign institutions authorised in terms of the provisions of section 18(A)(1) of the principal Act. The proposed amendment is aimed at providing legal certainty in this regard.

4. CLAUSES ADDRESSING AMENDED INSTITUTIONAL NAMES

Substituting Supreme Court with High Court

The proposed amendments have been necessitated by the change of the name of the Supreme Court to that of the High Court.

5. CLAUSES ENABLING SUBORDINATE LEGISLATION

5.1 Regulations relating to representative offices

Section 34 of the principal Act provides for the establishment of a representative office of a foreign bank in the Republic of South Africa. Representative offices are not permitted to do banking business and are not regulated on a regular basis. In the recent past, however, it has become evident that the Minister may require the power to issue regulations in respect of representative offices in order to effectively regulate such offices on a regular basis. The proposed amendment aims to enable the Minister to issue such regulations.

5.2 Compliance function

As a result of the complexity of banking business and the rapidly changing regulatory environment, it was necessary to obligate banks to establish a compliance function in order to enhance the risk management framework of a bank.

The compliance function shall be headed by a compliance officer, whose functions and duties have already been provided for in the Regulations relating to Banks. The proposed amendment aims to enable the Minister to issue such regulations with regard to the compliance officer and to create legal certainty in this regard.

5.3 Corporate Governance

Since banks are regarded as special institutions that fulfill a unique role within a modern economy, it is necessary to require a greater degree of care and skill from the directors and executive managers of a bank than is normally required in respect of duties of directors of other companies. In order to provide for such requirements it is necessary for the Minister to issue regulations in this regard from time to time. Certain regulations pertaining to corporate governance have already been incorporated in the Regulations relating to Banks. The proposed amendments aim to define the term "corporate governance" and to enable the Minister to issue such regulations with regard to corporate governance and to create legal certainty in this regard .

5.4 Audit Committee

The proposed amendment is an enabling provision providing the Minister with the power to prescribe certain further functions in relation to the audit committee by regulation.

6. CLAUSES DELETING CERTAIN PROVISIONS

6.1 Deletion of section 51(3)

Subsection 51(3) of the principal Act has become outdated and it is proposed that it be deleted from the principal Act.

6.2 Minimum share capital

Sections 70(2)(a)(ii) and 70(2b)(a)(ii)(aa) of the principal Act refer to section 75(l)(a)(ii) of the principal Act. This reference is wrong and the amendment aims to rectify the position.

7. CLAUSES DEALING WITH OTHER ISSUES

7.1 Definition of "director"

Since the proposed amendments to section 60 of the principal Act differentiate between non-executive directors and executive directors regarding the objections that the Registrar may raise with regard to their appointments, it is necessary to define the term "director".

7.2 Definition of "employee in charge of a risk management function"

Paragraph (j) inserts compliance risk in order to include the compliance officer into the definition of executive officer.

7.3 Definition of "executive officer"

The definition of executive officer in relation to banks and non-banks has been extended to include the secretary of the company and the compliance officer. Since the secretary of a company and the compliance officer fulfill a pivotal role in the corporate governance structures and compliance functions of a company, any requirements pertaining to corporate governance, compliance and the appointment of a company secretary and compliance officer will also be applicable. The definition has also been augmented to include executive directors in order to clarify the provisions of section 60 of the principal Act.

7.4 Investments by controlling companies

Section 50 of the principle Act provides that controlling companies should manage their affairs in such a way that the amount of certain specified investments does not exceed 40% of the controlling company's share capital and reserve funds. Due to the principle of consolidated supervision of banking groups it has become necessary to calculate the 40% limit on the share capital and reserve funds in relation to both the bank

and the controlling company on a consolidated basis. The calculation of the amount will be prescribed by regulation.

7.5 Establishment of subsidiaries

Section 52 of the principle Act provides that a bank shall not establish a subsidiary without the approval of the Registrar. It has, however, transpired, that this requirement could be circumvented in the case where a bank acquires a business directly as a division. The proposed amendment aims to prevent such circumvention.

7.6 Appointment of directors, chief executive officer and executive officers of a bank or controlling company

Ad section 60(1) of the principal Act:

The fiduciary duties of directors towards a company, except in so far as they depend on statutory provisions expressly limited to directors, apply equally to any officers of the company who are authorised to act on the company's behalf, and, in particular, to those acting in a managerial capacity. In terms of the Banks Act a "chief executive director" means a person who, either alone or jointly with one or more other persons, is responsible under the direct authority of the board of directors of the bank for conducting the business of the bank. Likewise, an "executive officer" of a bank includes any employee who is in charge of a risk-management function of the bank, and any manager who is responsible or reports directly to the chief executive officer.

Having regard to the wide powers of modern chief executive officers and managers, and the importance of the risk-management function in respect of "the business of a bank", it is important that the corporate governance measures developed by common law in respect of directors, be extended not only to directors, but also to include chief executive officers and executive officers of banks (the latter persons are hereinafter collectively referred to as "management").

The proposed amendment, in contradistinction to the existing provisions of the Banks Act which refer to a "fiduciary relationship" only, codifies the generally accepted common law principles of a fiduciary duty and a duty of care and skill owed to the company.

Ad proposed section 60(1A)

The principal Act neither defines the duty of care and skill nor does it provide such a requirement. The proposed amendment therefore not only imposes a duty of care and skill on each director, chief executive officer and executive officer of a bank, but also clearly defines the parameters of such a duty. It also clarifies the common law uncertainty relating to the test applicable to the determination of whether or not the duty has been discharged. Common law interpretations seem to favour a subjective test, whereas the definition provided for in the proposed amendment requires an objective test.

In any event, the duty of one person to act *bona fide* in the interest of someone else, and for the former person not to prefer his or her interests above those of the latter, does not arise merely from the term "fiduciary relationship", but rather from the factual situation in terms whereof the former person stands in such a position of trust and power over the property of the latter that the law requires the former to act in the latter's best interest. Since it is evident that such a factual situation exists between a director, chief executive officer and executive officers of a bank and that bank, the proposed amendment places the core notions of the duties underlying that factual relationship on management.

Owing to policy considerations and for reasons of legal uncertainty, no attempt has been made to define the terminology of the proposed section 60(1A). The core notions underlying the proposed statutory duty are similar to those underlying the common law fiduciary duty of directors, and, despite various fruitless efforts in that regard by the legal fraternity, no specific meaning has been given to date, or is likely to be given in future to the term "fiduciary duty". The core notions, likewise, cannot be defined and the possible breach of such duties should depend on the question of whether society, having regard to the peculiar facts of the matter, condemns the particular conduct in question as unreasonable and improper. Since the community's perception of what standard of

conduct the law should expect from those who assume ascendancy or dominance over the property and affairs of others will change with the passage of time, such an open-ended approach has the benefit of permitting these changing community perceptions to be encompassed in the law .

Paragraphs (c) and (d) of the proposed section 60(1 A) introduce an objective test for both the duty of skill and the duty of care of management. The wording of the paragraphs are aimed at disallowing an actual lower level, either of skill or of care on the part of a manager, to result in the lowering of either the required level of care or skill, as the case may be, that may reasonably be expected of a manager under the same circumstances. Consequently, the level required in each particular case is limited to a minimum level of care and skill that could reasonably be expected from a manager holding the same position in a similar bank under the same circumstances. A subjective test will apply only if the manager in question holds a higher level of skill than the minimum level that may be required in terms of the objective test, in which case the higher level of skill must be taken into account in the determination of whether a reasonable manager, possessing such additional skill, would have acted in the same manner as the manager in question under the same circumstances .

The amendments suggested in the said paragraphs (c) and (d) have the effect of readdressing the currently outdated minimalistic standards set by our positive law in respect of the duty of care and skill and bring about a measure of conformity between these very light duties and the strict fiduciary duties of managers.

Ad proposed section 60(1B)

In terms of common law, the fiduciary duty and the duty of care and skill are owed by the directors to the company of which they are directors. Accordingly, it serves no purpose to burden a director with various conflicting duties towards divergent stakeholders in the company, since a director would be acting in breach of his or her common law duties towards the company if such a director were to prefer his or her supposed "duty" towards a stakeholder over his or her duty towards the company .

The main purpose of the proposed legislation is to provide depositors (by far the largest source of funding of a bank) with the protection that they may reasonably expect against their exploitation by means of reckless, negligent or fraudulent management of the business of their bank .

Accordingly, in order for banks to be managed adequately and with due regard to the interests of the bank (including the interest of depositors), the suggested amendment introduces a substantive principle to resolve such conflicts and affords the Registrar with the power to institute an action in terms of the provisions of section 424 of the Companies Act against any director, chief executive officer or executive officer who was knowingly a party to the carrying on of the business of the bank in the manner envisaged in that section .

Furthermore, the proposed amendment makes it clear that the company, as opposed to the shareholders, is the beneficiary of the statutory fiduciary duty and duty of care and skill.

Ad proposed section 60(2)

Owing to the current provisions of section 60(2) of the Banks Act, a director of a bank stands in a "fiduciary relationship" to the bank or controlling company of which he or she is a director. Such "fiduciary relationship" implies that a director must act honestly and in good faith, and in the best interest and for the benefit of the bank and its depositors, or of the controlling company, and must observe the guidelines pertaining to directors as may be prescribed by regulation. These guidelines are contained in Regulation 39 of the *Regulations relating to Banks* .

However, having regard to the nature of these guidelines, it is evident that the guidelines refer to the common law duties of care and skill of directors, as opposed to their common law fiduciary duties. Therefore, it is clear that the consequences of the current provisions of section 60(2)(b) of the Banks Act, read with regulations 39(1), (2) and (3) of the *Regulations relating to Banks*, are that fiduciary duties are confused with duties of care and skill.

The suggested amendments to subsection (2) of section 60 not only repeal the confusing part of the section, but extend the provisions of the section to include the chief executive officers and executive officers as well. The proposed amendment still provides

for guidelines and requirements to be prescribed by means of regulations in addition to the duties of management as set out in subsections (1) and (1A). Regulations of the nature as envisaged, however, may not adversely affect the duties of management as set out in subsections (1) and (1A) of section 60.

Ad proposed sections 60(5 and 60(6)

Section 60(5) of the Banks Act provides for the furnishing of prescribed information with regard to the appointment of a new director of a bank or controlling company only. Such prescribed information is obtained by means of a prescribed form (Form DI 020), although such form may also be used to obtain information in respect of a serving director or executive officer of a bank or controlling company, or in respect of any other person.

The proposed amendment extends the provisions of subsection (5)(a) to chief executive officers and executive officers of banks and controlling companies. In such format, the provisions comply with the minimum requirements set by the *Core Principles*, which require a framework of banking laws providing supervisors of banks with powers to gather information in respect of directors and managers of banks.

Section 60(5)(b), read with regulation 41(1) of the *Regulations relating to Banks*, does not currently specify the purposes for which such information should be obtained, but merely specifies that the appointment of a director of a bank or a controlling company will not have legal force unless the information is rendered to the Registrar in the manner prescribed. The only reasonable inference, however, that may be drawn from the provisions of sections 60(5), read with 60(6) of the Banks Act, further read with Regulation 41 of the *Regulations relating to Banks*, is that the Registrar is not authorised to exercise a qualitative judgement on the qualities of a designated new director of a bank or a controlling company.

The Registrar should evidently concern himself or herself merely with establishing whether the bank or controlling company in question has considered the prescribed information required in Form DI 020 in respect of such director, in order for that institution to make a qualitative judgement as to the qualities of the designated director, before appointment of the same. Accordingly, once an existing bank or controlling company has considered the relevant information and has rendered the duly completed Form DI 020 to the Registrar at least 30 days prior to the appointment of such person as a director, that appointment becomes effective without the Registrar having authority to prevent it.

Moreover, these foregoing provisions are not reconcilable with the provisions of section 1(1A) of the Banks Act which deal with the appointment of directors, executive officers or any other person to a bank or a controlling company and which provides the Registrar with authorisation to exercise a qualitative judgment with regard to the appointment of such persons. The provisions of section 1 (1A), despite granting the Registrar authorisation to exercise a qualitative judgement with regard to the fit and proper qualities of directors, executive officers or any other persons, unfortunately do not provide the Registrar with any powers to prevent the appointment of such persons to a bank or a controlling company if the Registrar does not regard them as fit and proper to hold such appointments. In addition, the Banks Act fails to extend the provisions of its section 60(6) to include all persons in respect of whom DI 020 forms need to be rendered, thereby creating the impression that the appointment of all executive officers (in contradistinction to directors) is subject to the approval of the Registrar.

The *Core Principles* require that the aforesaid information should be gathered in order for the supervisors to be able to exercise a qualitative judgement with regard to such persons. Furthermore, the *Core Principles* require a banking law framework that provides supervisors of banks with proper authorisation to remove or replace existing managers or directors of banks or to restrict their powers, prevent the appointment of persons as directors or managers of banks and to disqualify persons from becoming managers or directors of banks.

The proposed amendment to paragraph (b) of section 60(5) extends its provisions to include chief executive officers and executive officers of banks and controlling companies and renders the proposed appointment affords the Registrar with the power to object to a proposed appointment of a director, chief executive officer or executive officer. The Registrar is, however, required to provide written reasons for his objection, whereupon the appointee has a reasonable period to answer to such reasons for the objection.

In cases where the Registrar wishes to pursue the matter and persists in objecting to the appointment after receiving representations by the appointee, such appointment, will have no legal effect in the case of non-executive directors, and in the case of executive members, the appointment will be terminated within fourteen days upon receipt thereof. Should the decision by the Registrar, however, be challenged the matter will be referred to the Arbitration Foundation of South Africa for arbitration in terms of expedited procedures approved by the Registrar. The reason for the distinction between non-executive members and executive members and officers is that non-executive members are appointed by an administrative process provided by the Companies act, whereas executive members and officers are appointed as employees of the company and where the principles of Labour Law and the Law of Contract are applicable.

7.7 Appointment of more than one auditor and the rotation of audit firms

Section 61(1)(a) of the principal Act provides that the appointment of an auditor to a bank should be approved by the Registrar. It is proposed that the provisions of the subsection be extended to the appointment of an auditor by the bank controlling company also as it is commensurate with the established principle of consolidated supervision of banks and bank controlling companies by the Registrar.

Section 61(1)(a) of the principal Act provides that a bank with total assets exceeding R10 000 000 may appoint not less than two auditors. This requirement has proved to be somewhat rigid and it is proposed to prescribe the amount by regulation.

The proposed section 61(3) aims to ensure the independence of a bank's auditor at all times by means of a system of compulsory rotation and under such conditions as may be prescribed by regulation.

7.8 New Committees

Due to recent banking failures has it become necessary for certain committees to assist the board of directors of a bank in their management of the bank. For this purpose it has become necessary to provide for the establishment of a Risk Committee and a Director's Affairs Committee. Although some banks have already established such committees, it is necessary, in the interest of sound risk management and corporate governance, to make the establishment of such committees to be compulsory in every bank.

7.9 Large Exposures

This amendment includes a reference in section 73(1) of the principal Act to any "public sector non-bank person" in order to clarify the provision and to bring it in line with the Regulations relating to Banks.

7.10 Restriction on investments in shares

Section 76 of the principal Act restricts investments made by banks. The proposed amendment aims to clarify that such restrictions relate to investments in shares of any company and not only property companies, as was the interpretation by a sector of the industry.

7.11 Restriction on investments with associates

Section 77 of the principal Act restricts investments made by banks to its associates. The restriction relates to a percentage of a bank's liabilities in respect of capital and reserves. This calculation has, however, become outdated and a new calculation has been prescribed by the Regulations relating to Banks. This amendment clarifies the position in this regard.

7.12 Undesirable practices

Section 78 of the principal Act contains a list of activities and practices that the Act regards as undesirable. The Regal Report identified a shortcoming in section 78(1)(b) of the principal Act which provided that banks shall not lend money to any person against security of its own shares. The report recommended that this be extended to the shares of that bank's controlling company also.

Recent amendments to the Companies Act, 1973 have made it possible for companies to pay dividends out of the share capital of that company. Since the capital requirement of a bank forms an essential part of its prudential requirements, it is proposed that section 78(1)(k) be inserted to prohibit banks from paying out dividends from their share capital without to the prior written approval of the Registrar of Banks.

7.13 Recovering of expenses in respect of an inspection or management of unauthorised persons

Sections 81 to 84 of the principal Act provide for the control of activities of unregistered persons. As a result of the complexity of certain cases and time-consuming process to investigate complaints of unregistered persons doing the business of a bank and due to the lack of resources, the Registrar outsources such inspections to professional auditing firms. The costs and expenses involved in such an inspection are borne by the budget allocated to the Office for Banks by the South African Reserve Bank.

Where it is found that a person has indeed contravened the provisions of the principal Act by illegally taking deposits from the general public, the Registrar may appoint a manager to seize the assets of such a person and to repay such funds as the manager may find back to the investors. The Registrar also outsources this service to professional auditing firms.

Section 84(6) of the principal Act provides that the manager be paid such remuneration by the Registrar as the Minister may determine.

It is proposed that the Minister be removed from the provisions of this subsection since the payment for the above-mentioned services is for the budget of the South African Reserve Bank. It is also, however, proposed that the costs and expenses relating to the inspection of an authorised person be included in the subsection. This would provide the Registrar with the legal right to recover the costs and expenses of both the inspection and the fund management from the person subject to the inspection or management.

7.14 Increased penalties

As a result of inflationary factors as well as the extent and severity of some of the contraventions of the principal Act, especially those related to the illegal taking of deposits from the general public, it is proposed that the fines and prison terms for convictions of offences be increased.

DEPARTMENTS/ BODIES/PERSONS CONSULTED

The provisions of the Bill have been debated and approved by the Standing Committee for the Revision of the Banks Act. Consultation with various stakeholders was undertaken over a period of two years on various of the proposals. The stakeholders include:

- The National Treasury;
- The Financial Services Board;
- The Banking Council;
- Individual banks;
- Auditing firms; and
- The Competition Commission.

The Bill was also published in the *Government Gazette* and on the website of the South African Reserve Bank for comment by the general public.

FINANCIAL IMPLICATIONS

None

PARLIAMENTARY PROCESS

The National Treasury and the State Law Advisers are of the opinion that this Bill should be dealt with in terms of the provisions of section 75 of the Constitution since it contains no provision to which the procedure set out in section 74 or 76 of the Constitution applies.