MEMORANDUM ON THE OBJECTS OF THE BANKS AMENDMENT BILL, 2007

1. BACKGROUND TO THE BILL

1.1 On 26 June 2004 the International Basel Committee on Banking Supervision published an amended capital framework for banks entitled "International Convergence of Capital Measurement and Capital Standards: A Revised Framework", generally referred to and known as "Basel II". The primary objective of Basel II is to replace the 1988 Capital Accord to further strengthen the soundness and stability of the international banking system by the adoption of stronger risk management practices by the banking industry. Basel II has important implications for the capital frameworks of banks and the regulatory framework and supervisory processes applicable to banks.

1.2 Given the potential negative effects of not implementing Basel II on the South African banking industry, it is prudent to implement Basel II in its entirety and to amend the legal framework to facilitate its implementation.

1.3 An Accord Implementation Forum ("AIF") was established to manage and co-ordinate the implementation of Basel II. The Registrar of Banks chairs the Steering Committee of the AIF and its members include delegates from National Treasury, various departments of the South African Reserve Bank, the banks and the auditing profession. The Regulatory Framework Sub-Committee ("RFSC") of the Steering Committee was tasked to review the current legal framework relating to banks and to identify necessary amendments to give effect to Basel II.

1.4 The RFSC identified a number of amendments to the Banks Act that are necessary to give effect to Basel II and assisted the Office of the Registrar

of Banks in the drafting of the draft Banks Amendment Bill. The Bill is thus the result of an inclusive and consultative process between this Office, the banking industry and other role-players since 2004.

1.5 The proposed implementation date for Basel II is 1 January 2008. To achieve this date it is important to promulgate the amendments well in advance as the amendments will require the banks and the Office of the Registrar of Banks to effect crucial information technology system changes to be able to implement the amendments.

1.6 The draft Bill primarily contains amendments to the Banks Act necessitated by the revised Framework on International Convergence of Capital Measurement and Capital Standards published by the International Basel Committee on 26 June 2004. Additional amendments that have become necessary since the Banks Act was last amended in 2003 due to industry developments or to clarify certain provisions, are also proposed.

1.7 In summary the Basel II amendments aim to create a sufficiently robust regulatory environment that will enable the Registrar to properly discharge his/her respective roles and responsibilities in respect of banks, controlling companies and banking groups on a solo, cross-border or consolidated basis. The Banks Act pertaining to the supervision of banks and in particular as it relates to the following aspects are strengthened -

1.7.1 regulation of all relevant banks and banking groups on a consolidated basis;
1.7.2 stating the respective roles and responsibilities of consolidating and host supervisors;
1.7.3 providing for cooperation and sharing of information between supervisors;

1.7.4 clarifying the responsibilities of banks, banking groups, boards of directors of banks and banking groups;

1.7.5 increasing the reporting requirements of and providing comprehensive disclosure requirements for banks and banking groups;

1.7.6 facilitating the various options available to banks and banking groups in calculating minimum capital requirements in respect of credit risk exposure, market risk exposure and operational risk exposure; and

1.7.7 elaborating the supervisory review process in order to, amongst other things, assess the capital adequacy and control environment of banks and banking groups.

1.8 The other proposed amendments are largely of a technical nature and include the following:

1.8.1 **extending the regulatory authority** of the Registrar to divisions and controlling companies of banks in certain respects where his or her regulatory authority is currently limited to banks;

1.8.2 clarifying and strengthening the **powers of the Registrar** to ensure compliance with the Act. The Registrar is authorised to issue circulars, guidance notes and directives, request information from relevant institutions, impose administrative penalties, etc. The power of the Registrar to object to the appointment of directors and executive officers is also clarified;

1.8.3 imposing an **obligation on the Registrar** to keep a register of registered controlling companies, branches, eligible institutions, representative offices of foreign institutions or the subsidiaries and branches of banks; and

1.8.4 effecting a number of **technical and editorial amendments** such as –

- correcting references to Acts repealed since the last amendment to the Act (for instance, replacing the reference to the Insurance Act, No 27 of 1943 with a reference to the Long-term Insurance Act, No 52 of 1998);
- clarifying that a reference to a "bank" includes a reference to a "branch"; and
- clarifying the meaning of the term "assets and liabilities" when such is transferred.

2. OBJECTS OF THE BILL

The Objects of the draft Bill are to –

2.1 facilitate the implementation of Basel II; and

2.2 align the Act to changing supervisory policy, market developments and practical considerations.

3. SUMMARY OF THE BILL

The following is a brief summary of the Bill:

Section 1: Definitions

"Allocated capital and reserve funds" - This definition is moved from section 70 to the definitions in section 1 of the Act.

"chief executive officer" - To reflect the differences in the legal nature of a bank and a branch of a foreign institution.

"consolidating supervisor" and "host supervisor" - To give effect to the latest international practice of referring to the home supervisor as the consolidating supervisor and to facilitate the following Basel II requirements –

- Basel II should be applied on a consolidated basis to all relevant banks and banking groups;

- Clarifying the respective roles and responsibilities of consolidating and host supervisors;
- the need for cooperation between consolidating and host supervisors;
- the sharing of information between consolidating and host supervisors.

"deposit" - To correct references to Acts repealed since the last amendment to the Act. The following references are corrected:

- Insurance Act, No 27 of 1943 replaced with Long-term Insurance Act, No 52 of 1998;
- Insurance Act, No 27 of 1943 replaced with Short-term Insurance Act, No 53 of 1998.

Subparagraph (vi) is replaced and a new subparagraph (ix) is inserted to give effect thereto.

"Division" - To clarify what constitutes a "division" to facilitate the effective enforcement of section 52 in as far as it relates to the establishment of divisions of a bank in conjunction with third parties that are not banks.

"eligible institution" and "external credit assessment" - Basel II is a risk sensitive framework in terms of which external credit assessments or ratings issued by external credit assessment institutions form an integral part of calculating a bank's minimum required capital and reserve funds. Based on the important role that external credit assessment institutions or eligible institutions will play in determining a bank's minimum required capital and reserve funds, and the requirements of Basel II, a definition relating to eligible institution and external credit assessment is included in the Act.

"Hybrid-debt instrument" - To facilitate the use of the term in the Act (section 79) and the Regulations.

"primary share capital" - As Basel II provides supervisors the discretion to take minority interests into account with the calculation of primary capital on a consolidated basis, a provision is added to the definition of "primary capital" enabling the percentage of minority interests that would qualify as primary capital to be prescribed by regulation.

"primary and secondary unimpaired reserve funds" - In terms of international best practice, supervisors, amongst other things, need to keep the following matters in mind when they conduct consolidated supervision in respect of a banking group –

- Robust definitions relating to the elements of qualifying capital and reserve funds are necessary. One example is that instruments that qualify as capital of an insurer may not qualify as capital of a bank;
- The suitability, quality and availability of capital is equally important since, for example, a subordinated loan in a banking subsidiary may be included in the consolidation of group capital but may strictly not be available as capital for the group but only for the banking subsidiary.

Currently the definitions of primary and secondary unimpaired reserve funds only include references to "a/ the bank". It is proposed that the definitions also make reference to a controlling company.

Furthermore, recently adopted International Financial Reporting Standards (IFRS), amongst other things, prescribe the manner in which entities, including banks and banking groups, have to account for certain fair value adjustments. It is proposed that the definitions of primary and/or secondary unimpaired reserve funds include wording such as "… such percentage of a reserve arising from compliance with financial reporting standards." The percentage would then be prescribed in the Regulations.

The definitions exclude a fund required to be maintained in terms of any other law from qualifying as primary or secondary reserves. It is, however, possible that in the dynamic environment of banking and accounting, it might happen that certain statutory funds may qualify as primary or secondary reserves. In order to accommodate this possibility it is proposed that the definitions contain an enabler to prescribe such funds by means of regulation.

"qualifying capital and reserve funds" - This definition is moved from section 70 to the definitions in section 1 of the Act.

"Securitisation scheme" - To facilitate the use of the term in the Act and the Regulations.

"tertiary capital" – To align the definition of the term with Basel II requirements.

Sections 1 and 70: Delete references to CAR Regulations

The provisions of the Regulations relating to Banks' Financial Instrument Trading (CAR Regulations) have been incorporated into the proposed amended Regulations. It is therefore proposed that the reference to the CAR Regulations be deleted in sections 1 and 70 of the Act.

Section 4(3): Written arrangements relating to respective roles and responsibilities and cooperation between consolidating and host supervisors

Basel II, amongst other things, clearly states that-

- in order to reduce the compliance burden and avoid regulatory arbitrage, the methods and approval processes used by a bank at the group level may be accepted by the consolidating supervisor at the local level, provided that they adequately meet the host supervisor's requirements;
- whenever possible, supervisors should avoid performing redundant and uncoordinated approval and validation work in order to reduce the implementation burden on banks, and conserve supervisory resources.

Furthermore in terms of the requirements of the Basel Concordat, before granting consent to the creation of a cross-border establishment, the host supervisor and the bank's or banking group's consolidating supervisor should each review the allocation of supervisory responsibilities recommended in Basel II in order to determine whether its application to the proposed establishment is appropriate.

Sharing of information and cooperation between supervisors are prerequisites for the effective supervision of a banking group on a consolidated basis. Sharing of information does not only relate to sharing of information between bank supervisors but also with securities or insurance supervisors.

Furthermore Core Principle 24 states that: *A key component of consolidated supervision is establishing contact and information exchange with the various other supervisors involved, primarily host country supervisory authorities.*

It is proposed that the aspects pertaining to cooperation agreements be explicitly stated in the Act.

Section 4(4): Supervisory review process

Pillar 2 of Basel II deals comprehensively with the supervisory review process.

Based on the requirements of pillar 2 of Basel II, it is proposed that section 4 of the Act be amended to impose a duty on the Registrar to implement and maintain a supervisory review process.

Section 4(5): Mapping of external ratings

In terms of the requirements of Basel II, supervisors have to assign eligible external credit assessment institutions' ("eligible institution") assessments to the risk weights available under the standardised risk weighting framework, that is, deciding which assessment categories correspond to which risk weights.

The mapping process has to be objective and it should result in a risk weight assignment consistent with the level of credit risk reflected in the Basel II Accord and should cover the full spectrum of risk weights. Annexure 2 of Basel II contains comprehensive information to assist supervisors with the process of assigning credit assessments to the relevant risk weights.

Based on the requirements of Basel II relating to the mapping of external ratings, it is proposed that section 4 of the Act be amended to provide for such mapping process.

Section 4(6): National discretion

Since Basel II recognises that-

- the regulation and supervision of banks or banking groups is not an exact science; and
- discretionary elements within the supervisory review process are inevitable,

the new framework contains various items of national discretion.

Furthermore Basel II requires-

- supervisors to carry out their obligations in a transparent and accountable manner;
- supervisors to make publicly available items of national discretion.

Based on the requirements of Basel II relating to items of national discretion, it is proposed that section 4 of the Act be amended to provide for the exercise of such discretion, in consultation with the banks.

Section 4(7): Disclosure of information

Basel II, amongst other things-

- requires supervisors to make publicly available the criteria to be used in the review of banks' internal capital assessments;
- states that when supervisors choose to set target or trigger ratios or to set categories of capital in excess of the regulatory minimum, factors that may be considered in doing so should be publicly available;
- requires the supervisory process for recognising eligible institutions to be made public in order to avoid unnecessary barriers to entry;
- requires supervisors to make publicly available items of national discretion.

Based on the requirements of Basel II relating to disclosure of certain information, it is proposed that section 4 of the Act be amended to provide for such disclosure of information.

Section 6(4): Circulars, guidance notes and directives

Currently section 6(4) of the Act states that "The Registrar may from time to time by means of a circular furnish banks with guidelines regarding the application and interpretation of the provisions of this Act or provide banks with any other information".

Based on the fact that Basel II clearly makes provision for-

- eligible external credit assessment institutions;
- external auditors of banks or banking groups,

to fulfill certain duties, it is proposed that the ambit of section 6(4) be broadened to also include a controlling company, an eligible institution (rating agency) and an auditor of a bank or controlling company;

It is furthermore proposed that the provisions of section 6(4) clearly distinguish between circulars, guidance notes and directives:

- Circulars may be issued by the Registrar to furnish banks with guidelines regarding the application and interpretation of the provisions of the Act. Guidelines issued under a Circular are not obligatory.
- Guidance notes may be issued by the Registrar in respect of market practices that banks may or may not consider in the conduct of their business and which are not mandatory for banks to implement but merely provide banks with further information.
- Directives may be issued by the Registrar, after consultation with the affected parties, to prescribe certain processes or procedures to be followed by banks with regard to certain processes or procedures necessary in the administration of the Act. The legal nature of directives is that it would be obligatory for banks to comply with its prescriptions.

Section 7: Furnishing of information by banks

The Public Accountants' and Auditors' Act, 1991 (Act No. 80 of 1991) has been repealed by the Auditing Professions Act, 2005 (Act No. 26 of 2005). It is proposed that the reference be corrected in this provision.

Section 9: Review of decisions by the Registrar

The Public Accountants' and Auditors' Act, 1991 (Act No. 80 of 1991) has been repealed by the Auditing Professions Act, 2005 (Act No. 26 of 2005). It is proposed that the reference be corrected in this provision.

Section 12: Application for authorization to establish bank

The Public Accountants' and Auditors' Act, 1991 (Act No. 80 of 1991) has been repealed by the Auditing Professions Act, 2005 (Act No. 26 of 2005). It is proposed that the reference be corrected in this provision.

Section 18A: Branches of foreign institutions

Although the legal nature of the structure of a branch differs from that of a bank, most of the prescriptions of the Act apply equally to banks and branches, with a few exceptions.

Other legislation, such as anti-money laundering legislation, only refers to banks. It is, however clear that branches are also required to comply with the prescriptions.

In order to provide legal certainty to this issue, however, it is necessary to explicitly provide that a reference to "bank" in the Act or other legislation includes a reference to a "branch", unless expressly stated otherwise.

Section 30: Publication of information relating to banks, branches, controlling companies, eligible institutions and representative offices of foreign institutions and the keeping of records by the Registrar

Section 30 of the Act requires that the Registrar keeps a register of all registered banks, but does not require the Registrar to also keep a register of registered controlling companies, branches, eligible institutions, representative offices of foreign institutions or the subsidiaries and branches of banks.

In the light of the prescriptions of Basel II on consolidated supervision it is proposed that branches of foreign institutions, controlling companies and eligible institutions be included in the section.

Section 37: Permission for acquisition of shares in bank or controlling company

Section 37(1) places restrictions on the acquisition of the "…total nominal value of all the issued shares of the bank or controlling company…"

Since the Act was promulgated it has become common practice, at least amongst the major banks, to issue non-redeemable, non-cumulative preference shares comprising up to 20% of their primary capital and possibly more if non-qualifying shares are included. These preference shares usually do not have voting rights similar to those of ordinary shareholders.

In future, various forms of hybrid instruments (shares with some debt characteristics) will be issued, further increasing the total nominal value of all the issued shares of a bank or controlling company. It is therefore now quite possible for a single shareholder to own less than 15%, 24%, 49%, or 74% of the nominal value of all the issued shares of the bank or controlling company whilst breaching the thresholds in respect of the voting rights attached to those shares of the bank or bank controlling company.

The practice whereby certain share agreements provide for the transfer of voting rights from one shareholder to another shareholder is also a factor that has necessitated the proposed amendment.

It is recommended that this section be amended to also make the thresholds applicable to the voting rights in respect of the issued shares of a bank or controlling company that is exercisable by a person.

Section 43: Registration of controlling companies

Section 43(1) of the Act provides that a public company that *desires* to exercise control over a bank, *may* apply for registration as a controlling company.

It is proposed to amend the section to read that a public company that intends to exercise control over a bank *shall* apply for registration as a controlling company.

Section 50: Investments by controlling companies

Section 50 of the Act provides that a controlling company investing money in undertakings other than banks or in fixed property not being used for the purpose of conducting the business of a bank 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 share capital and reserve funds.

It is proposed that the section be amended to properly reflect the accounting standards in this regard. It is proposed that the section be amended to provide that the amount of the said investments does not exceed a percentage as prescribed of the share capital and reserve funds of the controlling company

calculated on a consolidated basis as prescribed. (The manner of the calculation will then be provided for in the Regulations).

It is also proposed to apply the similar provisions to loans and advances by controlling companies.

Section 52: Subsidiaries, branch offices, other interests and representative offices of banks and controlling companies

The enforcement and administration of section 52 of the Act have become problematic due to certain interpretation issues and somewhat unclear wording of the section.

It is proposed that section 52 of the Act be amended to provide for a prior approval process if banks or controlling companies wish to establish or acquire subsidiaries within or outside South Africa. It is also proposed that the section also provides for the direct and indirect establishment or acquisition of subsidiaries.

It is furthermore proposed to regulate the establishment of divisions, involving non-bank third parties, by banks for reasons set out in paragraph 1 above.

Section 54: Compromises, amalgamations, arrangements and affected transactions

As a result of the wording of section 54 of the Act, and the various legal interpretations assigned to the term “assets **and** liabilities” the enforcement of its provisions has become somewhat problematic for the Bank Supervision Department.

Some of the concerns raised in the interpretation of section 54 of the Act include the following:

- Technically a bank cannot sell a pool car, fixed property or any other asset without the Minister's approval.
- The section refers to the transfer of assets **and** liabilities. Questions have been raised as to applicability of this section if and when banks transfer only assets in the normal course of business.

As a result of the issues set out above, it is proposed that section 54 of the Act be amended to address the difficulties in this regard.

Section 59: Returns regarding shareholders

Currently section 59 of the Act prescribes different reporting thresholds for domestic and foreign shareholders. For example, the name and certain particulars of a foreign shareholder is not required when the total nominal value of the shares registered in the name of the shareholder is less than the lower of R100 000 or one per cent of the total nominal value of all the issued shares. Although R100 000 may have been a substantial amount for investment in shares when the Act was written in 1990, it is unlikely to still be the case and it may be considered to prescribe similar reporting thresholds for domestic and foreign shareholders, namely a one per cent reporting threshold.

Furthermore the one per cent threshold currently relates to "… less than one per cent **of the total** nominal value of **all the issued shares** of …" This means, for example, that the details of a person that holds 3 per cent of the ordinary shares, that is, shares with permanent voting rights, but less than one per cent of **the total nominal value of all the issued shares**, are not required to be reported.

It is proposed that the detailed provisions be contained in the Regulations and that section 59 be amended to enable such prescriptions by Regulations.

Section 60: Directors of bank or controlling company

Section 60 of the Act was substantially amended in 2003 to provide the Registrar with powers to object to the appointment of directors and executive officers.

Since the promulgation of the amendments to section 60 of the Act and the establishment of a policy and procedure by the Bank Supervision Department in this regard, it has transpired that the provisions contain certain deficiencies.

The identified deficiencies in relation to section 60 of the Act include the following:

- Section 60(5) of the Act provides for two different procedures for the appointment by a bank of non-executive directors and executive-directors and

executive officers, respectively. The section also provides for two different processes for the Registrar to object to the appointment of non-executive directors and executive-directors and executive officers, respectively. This distinction has proved to be impractical and has resulted in legal uncertainty in this regard. It is proposed that the processes and procedures pertaining to the appointment of and the subsequent objection to the appointment of both non-executive directors and executive directors and officers be the same.

- Section 60(6) of the Act provides for a procedure of objection only in relation to executive directors and officers. It is necessary for the wording to be amended in order to reflect the legal position. The omission of non-executive directors is clearly a drafting oversight and needs to be corrected.

Section 63: Functions of auditor in relation to registrar

The Public Accountants' and Auditors' Act, 1991 (Act No. 80 of 1991) has been repealed by the Auditing Professions Act, 2005 (Act No. 26 of 2005). It is proposed that the reference be corrected in this provision.

Sections 64, 64A and 64B: Audit, risk and directors' affairs committee

Currently the provisions of sections 64, 64A and 64B of the Act only relate to banks.

Based on the fact that -

- the content of the said sections is equally relevant for a controlling company and banking groups; and
- Basel II clearly states that the scope of application of the framework will include, on a fully consolidated basis, any holding company that is the parent entity within a banking group to ensure that it captures the risk of the whole banking group,

it is necessary to require both a bank and its controlling company to establish and use the various committees.

It is, however, also necessary that the Registrar be afforded the power to exempt a bank from establishing such committees in cases where the Registrar is

satisfied that the relevant committee of the controlling company adequately performs the tasks also in respect of the bank.

As a result of the prescriptions of Basel II introducing a risk sensitive approach to the management of a bank, requiring banks to relate risk to capital and requiring banks to maintain a sound capital management process, it is proposed that the name of the Risk Committee be changed to the "Risk and capital management committee", and to add the provisions setting out the required functions of the said committee.

The Corporate Laws Amendment Bill, 2006 also contains certain provisions relating to Audit Committees. It is proposed that this Act be amended to reflect the provisions of the said Bill.

Section 70: Minimum share capital and unimpaired reserve funds

Currently section 70 of the Act provides that, in the calculation of the aggregate amount of capital that a bank is required to maintain, the sum of the bank's secondary capital and secondary unimpaired reserve funds shall be taken into account to an amount not exceeding the sum of the bank's allocated and qualifying primary share capital and allocated and qualifying primary unimpaired reserve funds, that is, the split may be 50:50.

In order for the legislative framework to remain in line with international regulatory and supervisory requirements and developments, it is proposed to amend section 70 as set out in the Bill.

Section 70A: Minimum capital and reserve funds in respect of a controlling company

The current requirements of section 70A of the Act provide that a controlling company has to maintain capital and reserve funds equal to the sum of the required capital amounts of the individually regulated entities, as determined by their respective regulators, *plus* a capital proxy amount in respect of unregulated entities.

Neither the Act nor the Regulations, however, require a banking group at any stage to calculate *consolidated or aggregated risk positions or exposures* before calculating a capital requirement for the banking group based on the consolidated or aggregated amount of risk exposure, not even in respect of a locally incorporated bank and its foreign branches.

The abovementioned position is, however, not sufficiently comprehensive since Basel II, amongst other things, clearly states that-

- the framework will be *applied on a consolidated basis* to internationally active banks;
- the consolidating country supervisor is responsible for the oversight of the implementation of the framework for a banking group on a consolidated basis;
- the scope of application of the framework will include, on a fully consolidated basis, any holding company that is the parent entity within a banking group to ensure that it captures the risk of the whole banking group;
- the framework will also apply to all internationally active banks at every tier within a banking group, also on a fully consolidated basis. A three-year transitional period for applying full sub-consolidation will be provided for those countries where this is not currently a requirement.

The aforementioned requirements mean that-

- individual entities within a banking group have to be adequately capitalised on a stand-alone basis; and
- based on the overall activities and aggregated amount of risk exposures incurred by entities included in the banking group, the banking group has to be adequately capitalised.

Based on the aforementioned requirements and the requirements specified in paragraph 3 above relating to robust definitions in respect of the elements of qualifying capital and reserve funds, it is proposed that section 70A of the Act be amended as proposed in the Bill.

Section 73: Large exposures

Currently section 73 of the Act deals comprehensively with various matters relating to the exposure of a bank, controlling company, branch or branch of a bank to a single person, including-

- requirements for the board of directors to approve exposures in excess of certain amounts;
- requirements to maintain additional capital and reserve funds in respect of certain exposures to a private-sector non-bank person;
- reporting requirements to the Registrar; and
- comprehensive definitions relating to a "person" and a "private sector non-bank person".

However, Basel II clearly states that-

- "… supervisors should assess the extent of a bank's credit risk concentrations, how they are managed, and the extent to which the bank considers them in its internal assessment of capital adequacy under Pillar 2. Such assessments should include reviews of the results of a bank's stress tests. Supervisors should take appropriate actions where the risks arising from a bank's credit risk concentrations are not adequately addressed by the bank…";
- concentration risk does not only relate to counterparty exposure but also exposure to an industry, sector or a geographical area.

Finally, due to the size of certain corporate conglomerates in relation to banks, the uniqueness of certain corporate structures and the extent of corporate concentration in South Africa, it may be considered to also include an enabling provision in section 73 of the Act that will allow the Registrar, with the approval of the Minister of Finance, to exempt certain concentrations or exposures from the requirements of the Act or the Regulations that would otherwise be in force, which exemption will be for such time and subject to such conditions as may be prescribed by the Minister or specified in writing by the Registrar.

It is therefore proposed to change the heading of this section to "Concentration risk" and to add the provisions as set out in the Bill.

Section 74: Failure or inability to comply with prudential requirements

Currently section 74 of the Act only relates to the failure or inability of a bank to comply with prudential requirements.

However, due to the requirements of Basel II that, amongst other things, clearly state that-

- the framework will be *applied on a consolidated basis* to internationally active banks;
- the scope of application of the framework will include, on a fully consolidated basis, any holding company that is the parent entity within a banking group to ensure that it captures the risk of the whole banking group;
- the framework will also apply to all internationally active banks at every tier within a banking group, also on a fully consolidated basis. A three-year transitional period for applying full sub-consolidation will be provided for those countries where this is not currently a requirement,

it is proposed that provisions of section 74 of the Act be amended as set out in the Bill.

Sections 75 and 90: Returns and regulations

The Act and the Regulations contain various references to Statements of Generally Accepted Accounting Practice.

Recently South Africa adopted International Financial Reporting Standards (IFRS).

The latest proposed amendments to the Companies Act provides for a definition of “financial reporting standards” as well as the establishment of a “Financial Reporting Standards Council”.

It is therefore proposed that the terms “Generally Accepted Accounting Practice” be removed from the Act and replaced with a reference to the financial reporting standards issued by the Financial Reporting Standards Council as set out in section 440S of the Companies Act.

Section 76: Restriction on investments in immovable property and shares, and on loans and advances to certain subsidiaries

The principal Act was amended during 2003 resulting in certain deletions from subsection section 76(1) of the Act. These deletions were however misaligned with the provisions of the regulations in this regard.

It is therefore proposed to amend the section in order to properly reflect the provisions contained in the Regulations.

Section 79: Shares, debentures and NCDS

Currently section 79 of the Act only refers to a bank that needs to obtain approval or comply with certain conditions in respect of the issue of certain instruments.

However, based on the fact that Basel II requires consolidating supervisors to also regulate the capital adequacy of a banking group and a controlling company, it is proposed that the provisions of section 79 of the Act be amended to also apply to a controlling company.

Currently section 79(1)(c) of the Act only refers to negotiable certificates of deposit that may not be issued otherwise than in accordance with prescribed conditions. Following certain amendments to the Income Tax Act, banks recently commenced issuing instruments such as promissory notes instead of negotiable certificates of deposit.

Since instruments such as negotiable certificates of deposit and promissory notes are instruments of similar characteristics, it is proposed that the heading of section 79 and the content of section 79(1)(c) of the Act to include the wording "… negotiable certificates of deposit, promissory notes or instruments of similar characteristics …"

With the advent of so-called hybrid instruments, it is necessary to also include such instruments in this provision.

Sections 81-84: Control of certain activities of unregistered persons

One of the main problems in enforcing sections 81 to 84 of the Act is the fact that once inspectors have been appointed to investigate a person operating an illegal scheme, it invariably happens that such a person is liquidated or sequestrated. Such a liquidation or sequestration negates the work done by the inspectors, and the higher fees charged by the appointed liquidator/trustee of the insolvent estate are to the detriment of depositors in such a scheme.

For various reasons, BSD has been loathe to become involved in the liquidation process of unregistered persons. Their experience in the recent past, however, has made it imperative that the Registrar becomes involved to some degree.

It is proposed that provision is made that whilst a person operating an illegal scheme is under investigation or management in terms of the provisions of the Act, such a person may not be liquidated or sequestrated by any person, save with the leave of the court and only once the Registrar has been notified of such an application.

It is also proposed that a duly appointed fund manager should report to the Registrar on the solvency of the person operating the illegal scheme. When the person is found to be solvent, the manager may repay depositors as provided for in section 84 of the Act. When a person is found to be insolvent, the Registrar may apply for the liquidation of the person and will be able to recommend the liquidator to be appointed as well as agree to the liquidator's fee structure in this regard.

New Section 85A: Approval of eligible institutions

In terms of the requirements of paragraph 90 of Basel II, supervisors are responsible for determining whether or not an eligible institution meets the criteria listed in paragraph 91 of Basel II, and as such may be regarded as an approved eligible institution.

Furthermore-

- the assessments of eligible institutions may be recognised on a limited basis, that is, by type of claims or by jurisdiction;

- Basel II requires the supervisory process for recognising eligible institutions to be made public in order to avoid unnecessary barriers to entry.

Based on the aforementioned requirements of Basel II, it is proposed that section 85A of the Act be included as a new section in the Act.

New Section 85B: Verification of information

In terms of international best practice, all information submitted in respect of a bank or controlling company and its foreign branches, subsidiaries or joint ventures to a consolidating or host supervisor should be verified in one of three ways, namely:

- by the host supervisory authority;
- by external auditors appointed by either the host or consolidating supervisory authority; and
- by the consolidating supervisory authority.

It is therefore proposed that a new section 85B of the Act be inserted to make provision for the Registrar to request that certain information submitted in respect of a locally incorporated bank or controlling company and its foreign branches, subsidiaries or joint ventures be verified in such a manner and at such intervals as may be prescribed or specified in writing by the Registrar.

The proposed new section in the Act may also serve as an enabling section for the current regulation 45 reports submitted to the Registrar by the external auditors of banks.

Section 89: Furnishing of information by Registrar

Basel II requires that a duty be placed on supervisors to ensure that they satisfy themselves that the recipient of information that is furnished by the supervisor will be able and willing to deal with such information in a confidential manner.

It is proposed that section 89 of the Act be amended to reflect the above-mentioned prescription.

Section 91A: Financial penalties and sanctions or fines for non-compliance

Although the Act provides for the imposition of fines to banks in certain prescribed instances (sections 74 and 91 of the Act), it is clear that the provisions are inadequate with regard to the application of and the compliance to the Act in general.

It is proposed that the Registrar be afforded the power to impose substantial fines or sanctions on banks, including directors and executive officers of banks, for non-compliance to certain provisions of the Act or in respect of certain directives issued by the Registrar. In order for such power to be exercised judiciously and fairly, it is proposed that the decision to impose a fine or sanction be taken only after affording the bank concerned with an opportunity to make representations to the Registrar.

4. ORGANISATIONS AND INSTITUTIONS CONSULTED

4.1 The provisions of the Bill has been debated and recommended to the Minister of Finance by the Standing Committee for the Revision of the Banks Act, established in terms of section 92 of the Banks Act, 1990.

4.2 Consultation with various stakeholders was undertaken over a period of two years on the various proposals. The stakeholders include:

- The National Treasury & Registrar of Banks;
- The Financial Services Board;
- The Banking Association (representing banks in general);
- Individual banks;
- Auditing firms; and
- The Competition Commission.

4.3 In addition, the draft Bill was published on the internet websites of both the National Treasury and the South African Reserve Bank on 7 September 2006 for comment up to and including 7 November 2006. Comments were

primarily received from the Banking Association (representing banks in general), The Standard Bank of South Africa Limited, Investec Bank Limited and Ithala Limited. The Bill was revised where considered necessary in light of comments received.

5. FINANCIAL IMPLICATIONS TO THE GOVERNMENT

5.1 The Bill will not have significant financial implications for Government.

5.2 The Banking Sector will incur significant costs to implement Basel II. The Sector supports the implementation of Basel II as it will enhance their competitiveness in the international market, is aware of the costs associated with the implementation and is willing to incur the associated costs.

6. CONSTITUTIONAL IMPLICATIONS

None.

7. PARLIAMENTARY PROCEDURE

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

7.2 The State Law Advisers are of the opinion that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)*(a)* of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.

REPUBLIC OF SOUTH AFRICA

BANKS AMENDMENT BILL

(As introduced in the National Assembly as a section 75-Bill; explanatory summary of Bill published in Government Gazette No. of) (The English text is the official text of the Bill)

(MINISTER OF FINANCE)

[B - 2007]

GENERAL EXPLANATORY NOTE:

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

B I L L

To amend the Banks Act, 1990 so as to define or further define certain expressions; to extend certain provisions to controlling companies; to clarify certain provisions in line with their practical application; to update references to legislation and institutions; to delete outdated provisions; to provide for the roles and responsibilities of a consolidating supervisor and a host supervisor; to provide for written arrangements relating to the respective roles and responsibilities and co-operation between supervisors; to provide for the sharing of information; to provide for a supervisory review process; to provide for the mapping of external ratings; to provide for the issuance of circulars, directives and guidance notes; to provide for the publication of registrations and deregistrations of branches, controlling companies and representative offices; to provide clarity with regard to the registration of a controlling company; to provide for the calculation of the amount pertaining to the restriction of investments by controlling companies to be prescribed by regulation; to clarify provisions relating to the establishment of a subsidiary by a bank; to amend the provisions pertaining to the transfer of assets and liabilities by a bank; to make further provision regarding the minimum share capital and unimpaired reserve funds of a bank; to extend the provisions pertaining to the issue of certain financial instruments; to provide for the approval of eligible institutions; to provide for the verification of information; to increase the powers of the Registrar and duly appointed manager in respect of an inspection of the activities of unregistered persons; to provide for sanctions and penalties that may be imposed on banks by the Registrar; 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, section 1 of Act 36 of 2000 and section 1 of Act 19 of 2003

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

(a) by the insertion in subsection (1) after the definition of "agency" of the following definition:

"**"allocated capital and reserve funds"** means such amount of qualifying capital and reserve funds as may be approved and assigned by the board of directors of a bank as capital and reserve funds designated to provide for the risks pertaining to the particular nature of such bank's business as contemplated in sections 70(2), 70(2A) or 70(2B), as the case may be;";

(b) by the substitution in subsection (1) of the definition of "chief executive officer" of the following definition:

"**"chief executive officer"**,

(a) in relation to a bank, 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 the conduct of the business of the bank;

(b) in relation to a branch, means a person who, either alone or jointly, with one or more other persons, is responsible for the conduct of the business of the branch;";

(c) by the insertion in subsection (1) after the definition of "company" of the following definition:

"**"consolidating supervisor**" means-

(a) in relation to a foreign supervisor, the supervisor that is responsible for the regulation and supervision, on a consolidated basis, of a foreign institution that is incorporated in that foreign jurisdiction and which conducts the business similar to the business of a bank or controlling company; or

(b) the Registrar, in terms of his or her functions and responsibilities to regulate and supervise a bank, controlling company or banking group on a consolidated basis.";

(d) by the substitution in subsection (1) for subparagraph (vi) of the definition of "deposit" for the following subparagraph:

"(vi) paid by any person to a registered long-term insurer as defined in section 1 of the Long-term Insurance Act, 1998 (Act No. 52 of 1998), as a premium in respect of any kind of policy defined or referred in the Long-term Insurance Act and under which policy that long-term insurer assumes, in return for such premium, such obligation as is described in the Long-term Insurance Act;";

(e) by the insertion in subsection (1) after subparagraph (viii) of the definition of "deposit" of the following subparagraph:

"(ix) paid by any person to a registered short-term insurer as defined in section 1 of the Short-term Insurance Act, 1998 (Act No. 53 of 1998), as a premium in respect of any kind of policy defined or referred in the Short-term Insurance Act and under which policy that short-term insurer assumes, in return for such premium, such obligation as is described in the Short-term Insurance Act;";

(f) by the insertion in subsection (1) after the definition of "director" of the following definition:

"**"division"**, in relation to a bank, means a business unit or section of that bank that conducts its business-

(a) under a name that includes the word "bank" or any derivative thereof, or the words "deposit-taking institution" or "building society", or any derivative thereof; and

(b) under the instruction and within the governance structures of the bank concerned.";

(g) by the insertion in subsection (1) after the definition of "domestic shareholder" of the following definition:

"**"eligible institution"** means an external credit assessment institution or an export credit agency that meets the minimum requirements as prescribed and which institution or agency has been approved in writing by the Registrar.";

(h) by the insertion in subsection (1) after the definition of "executive officer" of the following definition:

"**"external credit assessment"** means an assessment or a rating issued by an eligible institution, which assessment or rating-

(a) relates to the ongoing ability of a person or a country to repay amounts due and payable by the said person or the said country, including any principal amount and related interest; and

(b) meets such requirements as may be prescribed.";

(i) by the insertion in subsection (1) after the definition of "holding company" of the following definition:

"**"host supervisor"** means-

(a) in respect of a foreign supervisor, the supervisor that is responsible for the regulation and supervision of any branch, subsidiary, joint venture or related entity of a bank or controlling company, incorporated or operating within its jurisdiction; or

(b) the Registrar, in terms of his or her functions and responsibilities to regulate or supervise a foreign institution that is incorporated and conducts business similar to the business of a bank in a foreign country and which has been authorised and registered to conduct the business of a bank within the Republic.";

(j) by the insertion in subsection (1) after the definition of "host supervisor" of the following definition:

"**"hybrid-debt instrument"** means a financial instrument that combines certain features of equity financial instruments and debt financial instruments.";

(k) by the substitution in subsection (1) for the definition of "primary share capital" of the following definition:

"**"primary share capital"** means-

(a) capital obtained through the issue of ordinary shares,

(b) capital obtained through the issue of non-redeemable non-cumulative preference shares,

(c) capital obtained through the issue of prescribed categories of preferred securities, or

(d) such percentage of minority interests arising from the consolidation of accounts as may be prescribed,

but excluding such ordinary shares, non-redeemable non-cumulative preference shares or prescribed categories of preferred securities issued in pursuance of the capitalisation of reserves resulting from a revaluation of assets;";

(l) by the substitution in subsection (1) for the definition of "primary unimpaired reserve funds" of the following definition:

"**"primary unimpaired reserve funds"** means -

(a) such funds obtained from actual earnings;

(b) such funds obtained by way of recoveries, premiums on the issue of ordinary or non-redeemable non-cumulative preference shares, a surplus on the realization of capital assets;

(c) such percentage of a reserve arising from compliance with financial reporting standards as may be prescribed; and

(d) such percentage of minority interests arising from the consolidation of accounts as may be prescribed,

and which have been set aside as a general or special reserve, are disclosed as such a reserve in the financial statements of the bank or the controlling company concerned and are available for the purpose of meeting liabilities of or losses suffered by the bank or the controlling company, as the case may be, but does not include any fund required to be maintained in terms of any other law, unless so prescribed;";

(m) by the insertion in subsection (1) after the definition of "public" of the following definition:

"**"qualifying capital and reserve funds"** means the net sum of capital and reserve funds required to be held by a bank, calculated and determined in accordance with the provisions of sections 70 (2), 70(2A) or 70(2B), as the case may be having regard to the nature of such bank's business;";

(n) the deletion in subsection 1 of the definition of "Regulations relating to Banks' Financial Instrument Trading";

(o) by the substitution in subsection (1) for the definition of "secondary capital" of the following definition:

"**"secondary capital"** means-

(a) a prescribed percentage of capital obtained through the issue, with the prior written approval of the Registrar and in accordance with conditions approved by the Registrar in writing and on such further conditions, if any, as may be prescribed, of-

(i) cumulative preference shares;
(ii) ordinary shares, or preference shares other than cumulative preference shares, issued in pursuance of the capitalisation of reserves resulting from a revaluation of assets; or
(iii) prescribed categories of debt instruments;

(b) capital obtained through the issue of instruments constituting primary share capital where the relevant proceeds of such instruments, or any portion thereof, are excluded from qualifying primary share capital as a result of a prescribed limit."

(p) by the substitution in subsection (1) for the definition of "secondary unimpaired reserve funds" of the following definition:

"**"secondary unimpaired reserve funds"** means-

(a) such funds, obtained from actual earnings or by way of recoveries, as may be prescribed and which have been set aside, but which are not disclosed as a general or special reserve in the financial statements or consolidated financial statements of the bank or the controlling company, concerned;

(b) a prescribed percentage of the amount of any surplus resulting from a revaluation of assets and determined as prescribed;

(c) a prescribed amount of general provisions or a reserve held against unidentified and unforeseen losses; **[and]**

(d) funds obtained by way of premiums on the issue of cumulative preference shares or debt instruments issued in accordance with the prescribed conditions, whether or not such funds are

disclosed as a general or special reserve in the financial statements or consolidated financial statements of the bank or the controlling company concerned;

(e) such percentage of a reserve arising from compliance with financial reporting standards as may be prescribed;

(f) such percentage of minority interests arising from the consolidation of accounts as may be prescribed; or

(h) funds constituting primary unimpaired reserve funds where such funds, or any portion thereof, are excluded from qualifying primary reserve funds as a result of a prescribed limit.

but does not include any fund required to be maintained in terms of any other law, unless so prescribed ;";

(q) by the insertion in subsection (1) after the definition of "secondary unimpaired reserve funds" of the following definition:

"**"securitisation scheme"** means a synthetic securitisation scheme or a traditional securitisation scheme as defined in Government Notice No. R. 681 and published in *Government Gazette* No. 26415 on 4 June 2004, as amended or substituted from time to time.";

(r) by the substitution in subsection (1) for the definition of "tertiary capital" of the following definition:

"**"tertiary capital"** means capital obtained by means of unsecured subordinated debt, subject to such conditions as may be prescribed.".

Amendment of section 4 of Act 94 of 1990, as amended by section 2 of Act 36 of 2000

2. Section 4 of the principal Act is hereby amended by the addition of the following subsections:

"(3) The Registrar may from time to time enter into a written cooperation arrangement, such as a memorandum of understanding, with a host supervisor in a foreign jurisdiction, with a consolidating supervisor in a foreign jurisdiction or any other person or institution as the Registrar may deem fit, as the case may be, which cooperation arrangement may include-

(a) a provision that the Registrar may accept the methods and approval processes used by a foreign institution or a bank at group level: Provided that:

(i) such methods and approval processes comply with such conditions as may be prescribed; or

(ii) the Registrar may impose additional conditions or requirements;

(b) a provision that the Registrar may conduct an on-site examination or an inspection of a bank or controlling company that is conducting business by means of a branch, a subsidiary company, joint venture or related entity within the jurisdiction of the relevant host supervisor or consolidating supervisor, as the case may be;

(c) a provision that such a host supervisor in a foreign jurisdiction or such a consolidating supervisor in a foreign jurisdiction, as the case may be, may conduct an on-site examination or an inspection of a branch, a subsidiary company, joint venture or related entity of a bank or a controlling company;

(d) a provision that the Registrar may share information relating to the financial condition and performance of branches, subsidiaries, joint ventures or related entities of a bank or controlling company with the relevant host supervisor;

(e) a provision that the Registrar-

(i) be informed by the relevant host supervisor of adverse assessments of qualitative aspects of the foreign operations of a bank or controlling company; or

(ii) may provide information to the relevant host supervisor regarding significant problems that are being experienced within a bank, controlling company or banking group;

(f) provisions in relation to such other matters as the Registrar may deem to be relevant from time to time.

(4) The Registrar shall implement and maintain a supervisory review process, which process may include any one or any combination of-

(a) an on-site examination, inspection or review of a bank or controlling company and its respective branches, subsidiaries,

joint ventures or related entities, within or outside the Republic;

(b) an off-site review of a bank or controlling company and its respective branches, subsidiaries, joint ventures or related entities, within or outside the Republic;

(c) a discussion with an executive officer, chief executive officer or employee in charge of a risk management function of a bank or controlling company, including a discussion with an executive officer responsible for compliance or internal audit of a bank or controlling company;

(d) a discussion with a member of the board of directors or a member of a board-appointed committee of a bank or controlling company;

(e) a review of the work done by an external auditor of a bank or controlling company;

(f) a review of the periodic reporting in terms of the provisions of this Act by a bank, controlling company or banking group;

(5) In order to ensure the appropriate usage by a bank, a controlling company or a branch, of an external credit assessment issued by an eligible institution, the Registrar-

(a) shall assign such external credit ratings to such risk weights as may be prescribed from time to time; and

(b) shall publicly disclose which external credit assessment or rating issued by an eligible external credit assessment institution relates to which prescribed risk weight.

(6) The Registrar may implement such international regulatory or supervisory standards and practices as he or she deems appropriate after consultation with banks.

(7) Notwithstanding the provisions of section 33 of the South African Reserve Bank Act, the Registrar:

(a) may from time to time publicly disclose the following information:

(i) criteria relating to the review of the internal capital assessments of banks;

(ii) factors relating to the setting of capital adequacy ratios by the Registrar that are in excess of the minimum capital adequacy ratio as prescribed;

(b) shall from time to time publicly disclose the following information:

(i) the process and criteria for recognising eligible institutions,

(ii) international regulatory or supervisory practices and standards implemented in terms of the provisions of sub-section (6).".

Amendment of section 6 of Act 94 of 1990, as amended by section 25 of Act 9 of 1993, section 3 of Act 26 of 1994, section 3 of Act 36 of 2000 and section 3 of Act 19 of 2003

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

(a) by the substitution of subsection (4) of the following subsection:

"(4) The Registrar may from time to time by means of a circular furnish banks, controlling companies, eligible institutions or auditors of banks or controlling companies with guidelines regarding the application and interpretation of the provisions of this Act **[or provide banks with any other information]**.".

(b) by the insertion of the following subsections after subsection (4):

"(5) The Registrar may from time to time by means of a guidance note furnish banks, controlling companies, eligible institutions and auditors of banks or controlling companies with information in respect of market practices or market- or industry developments within or outside the Republic.

(6) (a) The Registrar may from time to time, in writing, after consultation with the relevant bank, controlling company, eligible institution or auditor of a bank or controlling company, issue a directive to such a bank, controlling company, eligible institution or auditor of a bank or controlling company, either individually or collectively, regarding the application of the Act;

(b) The Registrar may in writing, over and above any directive contemplated in paragraph (a), after

consultation with the relevant bank, controlling company, eligible institution or auditor of a bank or controlling company, issue a directive to such a bank, controlling company, eligible institution or auditor of a bank or controlling company, either individually or collectively, requiring such a bank, controlling company, eligible institution or auditor of a bank or controlling company, either individually or collectively, within the period specified in the directive, to-

(i) cease or refrain from engaging in any act, omission or course of conduct or perform such acts as are necessary to remedy the situation;

(ii) perform such acts as are necessary to comply with the directive or to effect the changes; or

(iii) provide the Registrar with such information and documents, relating to the matter as specified in the directive;

(c) The Registrar may after consultation with the relevant bank, controlling company, eligible institution or auditor of a bank or controlling company, subject to the directive, cancel in writing a previously issued directive;

(d) No directive issued by the Registrar shall have retroactive effect;

(e) Any bank, controlling company, eligible institution or auditor of a bank or controlling company that neglects, refuses or fails to comply with a directive issued under this subsection shall be guilty of an offence.".

Amendment of section 7 of Act 94 of 1990, as amended by sections 3 and 25 of Act 9 of 1993, section 3 of Act 36 of 2000 and section 4 of Act 19 of 2003

4. Section 7 of the principal Act is hereby amended by the substitution of the title and subsection (1) of section 7 for the following title and subsection:

"**7. Furnishing of information by banks and controlling companies"**

(1) The Registrar may by notice in writing -

(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

(b) direct such bank, controlling company or subsidiary to furnish the Registrar with a report by a public accountant as defined in section 1 of the **[Public Accountants' and Auditors' Act, 1991 (Act No. 80 of 1991)]** Auditing Professions Act, 2005 (Act No. 26 of 2005), or by any other person with appropriate professional skill, on any matter, or any aspect of any matter, about which the Registrar has directed or may direct under paragraph (a) the bank, controlling company or subsidiary to furnish information.".

Amendment of section 9 of Act 94 of 1990, as substituted by section 4 of Act 36 of 2000 and amended by section 6 of Act 19 of 2003

5. Section 9 of the principal Act is hereby amended by the substitution in subsection (2) for paragraph (c) of the following paragraph:

"(c) one shall be a person registered as an accountant and auditor under **[section 23 of the Public Accountants' and Auditors' Act, 1991 (Act No. 80 of 1991)]** the provisions of the Auditing Professions Act, 2005 (Act No. 26 of 2005), and who in the opinion of the Minister has wide experience of, and is knowledgeable about the latest developments in, the accountants' and auditors' profession.".

Amendment of section 12 of Act 94 of 1990, as amended by sections 5 and 25 of Act 9 of 1993 and by section 8 of Act 19 of 2003

6. Section 12 of the principal Act is hereby amended by the substitution in subsection (3) for paragraph (b) of the following paragraph:

"(b) a report by a public accountant as defined in section 1 of the **[Public Accountants' and Auditors' Act, 1991 (Act No. 80 of 1991)]** Auditing Professions Act, 2005 (Act No. 26 of 2005), or by any other knowledgeable person approved by the Registrar, on such aspects relating to the application in question,".

Amendment of section 18A of Act 94 of 1990, as inserted by section 11 of Act 26 of 1994 and amended by section 15 of Act 19 of 2003

7. Section 18A of the principal Act is hereby amended by the insertion after subsection (7) of the following subsection:

"(8) Any reference to a bank in this Act or in any other Act of Parliament shall, in so far as it may be relevant, include a reference to a branch, unless expressly stated otherwise.".

Amendment of section 30 of Act 94 of 1990, as substituted by section 8 of Act 9 of 1993, amended by section 23 of Act 26 of 1994 and section 22 of Act 19 of 2003

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

"**30. Publication of information relating to banks, controlling companies, eligible institutions and representative offices of foreign institutions and the keeping of records by the Registrar**

(1) The Registrar shall publish a notice in the *Gazette* and shall keep a record of every –

(a) (i) registration of an institution as a bank or a controlling company;

(ii) authorisation granted to conduct the business of a bank by means of a branch; or

(iii) consent granted for the establishment of a representative office by a foreign institution;

(b) (i) cancellation or suspension of the registration of a bank, or controlling company;

(ii) withdrawal of the authorisation to conduct the business of a bank by means of a branch; or

(iii) withdrawal of consent to conduct the business of a representative office by a foreign institution or the closure of such a representative office;

(c) restriction of the activities of a bank, controlling company or branch, as the case may be;

(d) change of the name of a bank, controlling company, branch or representative office of a foreign institution, as the case may be;

(e) permission granted in respect of a compromise, amalgamation or arrangement referred to in Chapter XII of the Companies Act that involves a bank as one of the principal parties to the relevant transaction;

(f) permission granted to an arrangement for the transfer of more than 25 per cent of the assets, liabilities or assets and liabilities of a bank to another person; or

(g) approval granted in respect of an eligible institution,

which is effected or which takes place in terms of this Act.

(2) The Registrar shall keep a record of every-

(a) approval granted to a bank or a controlling company to establish or acquire a subsidiary within or outside the Republic;

(b) approval granted to a bank to establish or acquire a branch of a bank;

(c) approval granted to a bank or a controlling company to acquire an interest in any undertaking having its registered office or principal place of business outside the Republic;

(d) approval granted to a bank or a controlling company to create or acquire a trust outside the Republic of which the bank is a major beneficiary;

(e) approval granted to a bank or controlling company to establish or acquire any financial or other business undertaking under its direct or indirect control; or

(f) approval granted to a bank to establish or acquire a representative office outside the Republic,

which is affected or which takes place in terms of this Act.".

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, section 30 of Act 26 of 1994 and section 25 of Act 19 of 2003

9. Section 37 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 (6), no person shall acquire in a bank or controlling company -

(a) shares of which the total nominal value or voting rights in respect of the issued shares of such bank or controlling company that are exercisable by such person; or

(b) shares of which the total nominal value together with the total nominal value of such shares already held by such person or the voting rights in respect of the issued shares of such bank or controlling company that is exercisable by such person together with the voting rights attached to the shares of such bank or controlling company that are already held and exercisable by such person; or

(c) shares of which the total nominal value together with the total nominal value of such shares already held by such person and by the associate or associates of such person or the voting rights in respect of the issued shares of such bank or controlling company that are exercisable by such person together with the voting rights attached to the shares of such bank or controlling company that are already held and exercisable by such person and by the associate or associates of such person,

amount**[s]** to more than 15 per cent of the total nominal value or the total voting rights, as the case may be, in respect of all the issued shares of the bank or controlling company, without first having obtained permission in accordance with the provisions of subsection (2) for such acquisition.".

(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, or the voting rights in respect of the issued shares of, a bank or controlling company as such person may in accordance with the provisions of subsection (1) hold therein, 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 or the voting rights in respect of the issued 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 or the voting rights in respect of the issued shares as so contemplated 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 or the voting rights in respect of the issued 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 or the voting rights in respect of the issued shares as contemplated in the said subsection (1) 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 or the voting rights in respect of the issued 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 or the voting rights in respect of the issued shares as contemplated in the said subsection (1) such person may, if the Minister has, through the Registrar, granted permission thereto in writing, acquire more than 74 per cent of those shares or the voting rights in respect of the issued 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 provisions 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 the Registrar or the Minister, as the case may be, deems it fit to do so, grant permission for the acquisition of shares or the voting rights in respect of the issued shares as contemplated in subparagraph (i), (ii), (iii) or (iv) of paragraph (a) without the applicant for such permission having held shares or the voting rights in respect of the issued 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]** Banks Amendment Act, 2007, already holds more than 15 per cent of the **[shares]** voting rights in respect of the issued shares in a bank or controlling company as contemplated in subsection (1), such person may not acquire more of **[those shares]** the voting rights in respect of the issued shares as contemplated in the said subsection before such person has obtained the appropriate permission in terms of subsection (2).".

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

"(4) Permission in terms of subsection (2) for the acquisition of shares or the voting rights in respect of the issued shares in a bank or controlling company shall not be granted unless the Registrar or the Minister, as the case may be, is satisfied that the proposed acquisition of shares or the voting rights in respect of the issued shares -

(a) will not be contrary to the public interest; and

(b) will not be contrary to the interests of the bank concerned or its depositors or of the controlling company concerned, as the case may be.".

(e) 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 or voting rights in respect of the issued shares in a bank or controlling company by a particular shareholder will be to the detriment of the bank or controlling company concerned, 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 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, the shareholding or voting rights in respect of the issued shares of that person in that bank or controlling company to a shareholding or voting rights in respect of the issued shares, 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 or voting rights in respect of 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 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.".

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

"(6) The provisions of subsection (1) shall not apply to the acquisition of shares or voting rights in respect of the issued shares in a bank by a controlling company registered as such in respect of that bank.".

Amendment of section 43 of Act 94 of 1990, as amended by section 25 of Act 9 of 1993, section 34 of Act 26 of 1994 and section 30 of Act 19 of 2003

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

"(1) **[A]** Subject to the provisions of section 42, a public company—

(a) **[which desires to exercise]** that intends 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] shall apply to the Registrar on the prescribed form for registration as a controlling company in respect of that bank or proposed bank, as the case may be.".

Amendment of section 50 of Act 94 of 1990 as amended by section 33 of Act 19 of 2003

11. Section 50 of the principal Act is hereby amended by the substitution for the title and section of the following title and sections:

"**50. Investments and loans and advances by controlling companies**

(1) A controlling company investing money -

(a) in undertakings other than banks, institutions which conduct business similar to the business of a bank in a country other than the Republic, controlling companies or companies of which the main object is the holding or development of property which is used or intended to be used mainly for the purpose of conducting the business of a bank; or

(b) in fixed property which is not used or intended to be used mainly for the purpose of conducting the business of a bank,

shall manage its transactions in such investments in such a way that the amount of such investments does not at any time exceed a prescribed percentage **[40 per cent]** of **[the sum]** a prescribed amount of 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]** calculated on a consolidated basis as prescribed.

(2) A controlling company providing loans and advances -

(a) to undertakings other than banks, institutions which conduct business similar to the business of a bank in a country other than the Republic, controlling companies or companies of which the main object is the holding or development of property

which is used or intended to be used mainly for the purpose of conducting the business of a bank; or

(b) in relation to fixed property which is not used or intended to be used mainly for the purpose of conducting the business of a bank,

shall manage its transactions in relation to such loans and advances in such a way that the amount of such loans and advances does not at any time exceed a prescribed percentage of a prescribed amount of the share capital and reserve funds of the controlling company and calculated on a consolidated basis as prescribed.".

Amendment of section 52 of Act 94 of 1990, as amended by section 3 of Act 55 of 1996 and section 35 of Act 19 of 2003

12. Section 52 of the principal Act is hereby amended –

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

"(1) A bank shall not without the prior written approval of the Registrar **[or otherwise than]** and in accordance with such conditions **[approved by the Registrar in writing]** as the Registrar may determine -

(a) establish or acquire 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;

(aA) invest in a joint venture within or outside the Republic if the investment, or the investment together with one or more investments already made by the bank in that joint venture, results in the bank being exposed to an amount representing more than five per cent of its capital and reserves: Provided that for as long as the bank is exposed to the aforementioned extent, such approval must be obtained whenever it seeks to make a further investment in that joint venture;

(b) open or acquire a branch office outside the Republic;

(c) acquire an interest in any undertaking having its registered office or principal place of business outside the Republic;

(d) outside the Republic -

(i) create or acquire a trust of which the bank is a major beneficiary; or

(ii) establish or acquire any financial or other business undertaking under its direct or indirect control; or

(e) establish or acquire a representative office outside the Republic.".

(b) by the insertion in subsection (1) after paragraph (e) of the following paragraph:

"(f) create or acquire a division within or outside the Republic by means of an arrangement or agreement with any person having the effect that such a person conducts his or her business through or by means of such a division.";

(c) by the insertion after subsection (1) of the following subsection:

"(1A) Notwithstanding the provisions of subsection (1), the Registrar may, by means of a circular as contemplated in section 6(4), determine such circumstances and conditions in terms whereof an application as contemplated in subsection (1) is not required.";

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, section 5 of Act 55 of 1996 and section 36 of Act 19 of 2003

13. Section 54 of the principal Act is hereby amended—

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

"(1) (a) No compromise, amalgamation or arrangement referred to in Chapter XII of the Companies Act and which involves a bank as one of the principal parties to the relevant transaction; or **[and]**

(b) no arrangement for the transfer of **[all or any part of]** more than 25 per cent of the assets, liabilities or assets and liabilities of a bank to another person,

shall have legal force unless the consent of the Minister, conveyed in writing through the Registrar, to the transaction in question has been obtained beforehand: Provided that the 25 per cent referred to in subsection (1)(b) shall be calculated by aggregating the amount of the transferred assets, liabilities or assets and liabilities together with any previous transfer of assets, liabilities or assets and liabilities within the same financial year of the bank concerned.

(2) Subsection (1)(b) shall not be applicable to the transfer of assets effected in accordance with a duly approved securitisation scheme.";

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

"(1A) (a) No arrangement for the transfer of 25 per cent or less of the assets, liabilities or assets and liabilities of a bank to another person, shall have legal force unless the consent of the Registrar to the transaction in question has been obtained beforehand.

(b) In the event that only assets are being transferred and the amount of the transferred assets, together with any previous transfer of assets within the same financial year, aggregates to an amount that is less than 10 per cent of the total on-balance-sheet assets of the transferring bank, consent in terms of paragraph (a) is not required: Provided that the transferring bank notifies the Registrar of such a transfer in writing beforehand.

(1B) Subsection (1A) shall not be applicable to the transfer of assets effected in accordance with a duly approved securitisation scheme.";

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

"(c) in the case of a transfer of assets, liabilities or assets and liabilities referred to in subsection (1) **[which entails the transfer by the transferor bank of the whole or any part of its business as a bank,]** such transfer is effected to another

bank or to a person approved by the Registrar for the purpose of the said transfer.".

(d) by the insertion of the following subsection after subsection (2):

"(2A) The Registrar shall not grant his or her consent referred to in subsection (1A) unless he or she is satisfied -

(a) that the transaction in question will not be detrimental to the public interest;

(b) that the transaction in question will not be contrary to the interests of the bank concerned or its depositors or of the controlling company concerned, as the case may be; or

(c) in the case of a transfer of assets, liabilities or assets and liabilities referred to in subsection (1A)(a), such transfer is effected to another bank or to a person approved by the Registrar for the purpose of the said transfer.".

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

"(3) Upon the coming into effect of a transaction effecting the amalgamation of one bank with another bank as contemplated in subsection (2)(b), or effecting the transfer of **[all or part]** such part of the assets, liabilities or assets and liabilities as approved in terms of subsections (1) or (1A), respectively, of one bank to another bank or person as contemplated in subsections (2)(c) or (2A)(c), respectively-

(a) all the assets and liabilities of the amalgamating banks or, in the case of such transfer of assets, liabilities or assets and liabilities as approved in terms of subsections (1) or (1A), respectively, those assets, liabilities or assets and liabilities of the transferor bank that are transferred in terms of the transaction, shall vest in and become binding upon the amalgamated bank or, as the case may be, the bank or person taking transfer of such assets, liabilities or assets and liabilities;

(b) the amalgamated bank or, in the case of such transfer of all the assets and liabilities or, in the case of such transfer of part of the assets, liabilities or assets and liabilities as approved in terms of subsections (1) or

(1A), respectively, the bank or person taking transfer of such assets, liabilities or assets and liabilities, shall have the same rights and be subject to the same obligations as those which the amalgamating banks or, as the case may be, the transferor bank may have had or to which they or it may have been subject immediately before the amalgamation or transfer;

(c) all agreements, appointments, transactions and documents entered into, made, drawn up or executed with, by or in favour of any of the amalgamating banks or, as the case may be, the transferor bank, and in force immediately prior to the amalgamation or transfer, but excluding such agreements, appointments, transactions and documents that, by virtue of the terms and conditions of the amalgamation or transfer, are not to be retained in force, shall remain of full force and effect and shall be construed for all purposes as if they had been entered into, made, drawn up or executed with, by or in favour of the amalgamated bank or, as the case may be, the bank or person taking transfer of the assets, liabilities or assets and liabilities in question; and

(d) any bond, pledge, guarantee or instrument to secure future advances, facilities or services by any of the amalgamating banks or, as the case may be, by the transferor bank, which was in force immediately prior to the amalgamation or transfer, shall remain of full force and effect and shall be construed as a bond, pledge, guarantee or instrument given to or in favour of the amalgamated bank or, as the case may be, the bank or person taking transfer of such assets, liabilities or assets and liabilities, as security for future advances, facilities or services by that bank or person except where, in the case of such transfer, any obligation to provide such advances, facilities or services is not included in the transfer.".

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

"(4) Any compromise, amalgamation or arrangement or any arrangement for the transfer of assets, liabilities or assets and liabilities, referred to in subsections (1) or (1A), respectively, excluding a transfer other than a transfer referred to in subsections (2)(c) or (2A)(c), respectively, shall be subject -

(a) to confirmation at a general meeting of shareholders of each of the banks concerned; or

(b) in the case of a transaction effecting the transfer of assets, liabilities or assets and liabilities of one bank to another bank or a person as contemplated in subsections (2)(c) or (2A)(c), respectively, to confirmation at a general meeting of shareholders of the transferor bank and the bank or person taking transfer of such assets, liabilities or assets and liabilities,

and the notice convening such a meeting shall contain or have attached to it the terms and conditions of the relevant agreement or arrangement.".

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

"(5) Notice of the passing of the resolution confirming, as contemplated in subsection (4), any compromise, amalgamation or arrangement, or any arrangement for the transfer of assets, liabilities or assets and liabilities referred to in subsections (1) or (1A), respectively, together with a copy of such resolution and the terms and conditions of the relevant agreement or arrangement, duly certified by the chairperson of the meeting at which such resolution was passed and by the secretary of the bank or person concerned, shall be sent to the Registrar by each of the banks involved or, in the case of a transaction effecting the transfer of assets, liabilities or assets and liabilities of one bank to another bank or a person as contemplated in subsection (2)(c) or 2(A)(c), respectively, by the relevant transferor bank and the bank or person taking transfer of such assets, liabilities or assets and liabilities, and after having received such notices from all the parties to the relevant agreement or arrangement, the Registrar shall register those notices.".

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

"(8) The Registrar of Companies, every Master of the High Court and every officer or person in charge of a deeds registry or any other office, if, in the office of such Registrar, Master, officer or person or any register under 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, liabilities or assets and liabilities referred to in subsections (1) or (1A), respectively, to any other bank or person shall, if satisfied -

(i) that the Minister has consented in terms of subsection (1) to the amalgamation of transfer or that the Registrar has consented in terms of subsection (1A)(a) to the transfer; and

(iii) that such amalgamation or transfer has been duly effected,

and upon production to 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 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, liabilities or assets and liabilities in question.".

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

"(9) The provisions of this section shall not affect the rights of any creditor of a bank which has amalgamated with or transferred all or part of its assets, liabilities or assets and liabilities referred to in subsections (1) and (1A) respectively to any other bank or person or taken over all or part of the assets, liabilities or assets and liabilities in question of any other bank, except to the extent provided in this section.".

(j) by the substitution of subsection (10) for the following subsection:

"(10) The conditions and any tax benefit which immediately prior to the date of a transfer, referred to in this section, of assets, liabilities or assets and liabilities were applicable in respect of

an investment, referred to in section 10(1)(i)(xii), (xiiA) or (xiii), 10(1)(v), (vA) or (w) or 19(5A) of the Income Tax Act, 1962 (Act No. 58 of 1962), with the transferor bank shall, notwithstanding such a transfer of assets, liabilities or assets and liabilities but subject to the provisions of the said Act, remain applicable to the investment until the expiration of a period of ten years as from the date on which it was initially made or until it is redeemed, whichever occurs first.".

Amendment of section 59 of Act 94 of 1990, as amended by sections 13 and 25 of Act 9 of 1993, section 38 of Act 26 of 1994 and section 39 of Act 19 of 2003

14. The following section is substituted for Section 59 of the principal Act:

"**59. Returns regarding shareholders**

(1) Every bank and every controlling company shall within 90 days of its registration as such, and annually thereafter within 30 days of the thirty-first day of December of each year, furnish the Registrar with a return regarding its shareholders as at the date of the said registration or as on the said thirty-first day of December, as the case may be.

(2) A return referred to in subsection (1) shall contain such information as prescribed.".

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, section 39 of Act 26 of 1994 and section 40 of Act 19 of 2003

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

(a) by the substitution of the title of the section of the following title:

"60. Directors and officers of a bank or controlling company"

(b) by the substitution of subsection (5) of the following subsection:

"(5) (a) Every bank shall give the Registrar written notice of the nomination of any person for appointment as a chief executive officer, director or executive officer by furnishing the Registrar with the prescribed information in respect of the nominee.

(b) The notice shall reach the Registrar at least 30 days prior to the proposed date of appointment.

(c) 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 working days of receipt of the notice referred to in paragraph (b).

(d) If the Registrar objects to the proposed appointment as envisaged in paragraph (c), 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*.

(e) For the purposes of this subsection the term "every bank" shall mean the chief executive officer of such bank, or in the case where it concerns the appointment of the chief executive officer, such member of the board of directors of such bank as may be designated by the board of directors of such bank.".

(c) by the substitution of subsection (6) of the following paragraph:

"(6) (a) Without derogating from any law, the Registrar may object to the appointment or continued employment or appointment of a chief executive officer, **[executive]** director or executive officer of a bank **[may be terminated by the Registrar]** if the Registrar has reason to believe that 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 holds or continues to hold such appointment.

(b) If the Registrar wishes to terminate the appointment or the continued employment or 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 affected 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 notified party shall be entitled, but not obliged to make written representations **[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 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 such 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-title; or any other body designated by the Registrar by means of a notice in the *Gazette* (referred to below 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 of the appointment, 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 concerned, whereupon the termination shall immediately take effect.

(j) If under paragraph (h) the Arbitrator determines that adequate reasons do not exist for the termination of the appointment, 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 be final and binding and shall not be subject to review as envisaged in section 9.";

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 43 of Act 19 of 2003

16. Section 63 of the principal Act is hereby amended by the substitution of subsection (2) for the following subsection:

"(1) Notwithstanding anything to the contrary contained in the **[Public Accountants' and Auditors' Act, 1991, (Act No. 80 of 1991)]** Auditing Professions Act, 2005 (Act No. 26 of 2005), 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 –".

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, section 8 of Act 36 of 2000 and section 44 of Act 19 of 2003

17. The following section is substituted for Section 64 of the principal Act:

"**64. Audit committee**

(1) Subject to the provisions of subsection (3), (3A) and (4), the board of directors of a bank and controlling company shall appoint at least three of its members to form and serve on an audit committee.

(2) The functions of the audit committee shall be to assist the board of directors -

(a) **[assist the board of directors]** in its evaluation of the adequacy and efficiency of the internal control systems, accounting practices, information systems and auditing processes applied within that bank or controlling company, as the case may be in the day-to-day management of its business;

(b) to facilitate and promote communication, regarding the matters referred to in paragraph (a) or any other related matter, between the board of directors and the executive officers of, the auditor appointed under section 61 or 62 for, and the employee charged with the internal auditing of the transactions of, the bank or controlling company, as the case may be;

(c) to introduce such measures as in the committee's opinion may serve to enhance the credibility and objectivity of financial statements and reports prepared with reference to the affairs of the bank or controlling company, as the case may be; and

(d) to perform such further functions as may be prescribed.

(3) All of the members of the audit committee of a bank **[may be, and the majority of such members, including the 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 chairperson of the board of directors of the bank or the controlling company shall not be appointed as a member of the audit committee.

(3A) All of the members of the audit committee of a controlling company shall be persons who are not employees of the controlling company nor of any of its subsidiaries, the bank in respect of which it is the controlling company or any subsidiary of that bank: Provided that the chairperson of the board of directors of the controlling company or the bank in respect of which it is the controlling company shall not be appointed as a member of the audit committee.

[(4) The board of directors of a bank shall be exempt from the duty to appoint an audit committee if such bank is a member of a group of companies in respect of which group annual financial statements are required to be made out in terms of section 288(1) of the Companies Act, provided an audit committee has been appointed for the holding company in that group and such audit committee has assumed the responsibilities of an audit committee in respect of all the banks in that group.]

(4) The Registrar may upon written application exempt the board of directors of a bank from the duty to appoint an audit

committee in respect of that bank provided that the Registrar is satisfied that the audit committee appointed in respect of the relevant controlling company, in addition to its responsibilities in respect of that controlling company, is able to also adequately assume the responsibilities of an audit committee in respect of that bank.".

Amendment of section 64A of Act 94 of 1990, as amended by section 45 of Act 19 of 2003

18. The following section is substituted for Section 64A of the principal Act:

"**64A. Risk and capital management committee**

(1) Subject to the provisions of subsection (3) the **[The]** board of directors of a bank and controlling company shall appoint at least three of its members, of which at least two are non-executive directors, to form and serve on a risk and capital management committee.

(2) The functions of the risk and capital management committee shall be to assist the board of directors –

(a) **[assist the board]** in its evaluation of the adequacy and efficiency of the risk policies, procedures, practices and controls applied within that bank or controlling company, as the case may be, in the day-to-day management of its business;

(b) **[assist the board]** in the identification of the build up and concentration of the various risks to which the bank or controlling company, as the case may be, is exposed;

(c) **[assist the board]** in developing a risk mitigation strategy to ensure that the bank or controlling company, as the case may be, 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) to 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 or controlling company, as the case may be;

(g) **[ensure the establishment of]** to establish an independent risk management function, and in the case where the bank or controlling company, as the case may be forms part of a group, a group risk management function, the head of which shall act as the reference point for all aspects relating to risk management within the bank or controlling company, as the case may be, including the responsibility to arrange training of members of the board in the different risk areas to which that bank or controlling company, as the case may be, is exposed;

(h) to 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 or that controlling company, as the case may be;

(i) to co-ordinate the monitoring of risk management on a globalised basis; **[and]**

(j) in establishing and implementing a process of internal controls and reviews to ensure the integrity of the overall risk and capital management process;

(k) in establishing and implementing policies and procedures designed to ensure that the bank or the controlling company, as the case may be, identifies, measures, and reports all material risks;

(l) in establishing and implementing a process that relates capital to the level of risk;

(m) in establishing and implementing a process that states capital adequacy goals with respect to risk, taking account of the bank's strategic focus and business plan; and

[(j)](n) to perform such further functions as may be prescribed.".

(3) The Registrar may upon written application exempt the board of directors of a bank from the duty to appoint a risk and capital management committee in respect of that bank provided that the Registrar is satisfied that the risk and capital management

committee appointed in respect of the relevant controlling company, in addition to its responsibilities in respect of that controlling company, is able to also adequately assume the responsibilities of a risk and capital management committee in respect of that bank.".

Amendment of section 64B of Act 94 of 1990, as amended by section 45 of Act 19 of 2003

19. The following section is substituted for Section 64B of the principal Act:

"**64B. Directors' affairs committee**

(1) Subject to the provisions of subsection (3) the **[The]** board of directors of a bank and controlling company shall establish a director's affairs committee, consisting only of non-executive directors of the bank or controlling company, as the case may be.

(2) The functions of the directors' affairs committee shall be to assist the board of directors –

(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 or controlling company, as the case may be;

(b) **[establish and maintain]** in establishing and maintaining a board directorship continuity programme entailing-

(i) a review of 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 self-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 or controlling company, as the case may be, in order to ensure that a management succession plan is in place;

(d) **[assist the board]** in determining whether the services of any director should be terminated;

(e) **[assist the board]** in ensuring that the bank or controlling company, as the case may be, is at all times in compliance with all applicable laws, regulations and codes of conduct and practices; and

(f) to perform such further functions as may be prescribed.".

(3) The Registrar may upon written application exempt the board of directors of a bank from the duty to appoint a directors' affairs committee in respect of that bank provided that the Registrar is satisfied that the directors' affairs committee appointed in respect of the relevant controlling company, in addition to its responsibilities in respect of that controlling company, is able to also adequately assume the responsibilities of a directors' affairs committee in respect of that bank.".

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, section 12 of Act 36 of 2000 and section 49 of Act 19 of 2003

20. Section 70 of the principal Act is hereby amended—

(a) by the deletion of subsection (1).

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

"(a) A bank of which the business does not include trading in financial instruments shall manage its affairs in such a way that, subject to the provisions of paragraph (b), the sum of its primary and secondary capital and its primary and secondary unimpaired reserve funds in the Republic does not at any time amount to less than the greater of -

(i) R250 000 000 or, in the case of such a bank which immediately prior to the date of commencement of this Act was registered as a banking institution or a building society under a law repealed by this Act, R1 000 000; or

(ii) an amount which represents a prescribed percentage of the sum of amounts relating to the different categories of

assets and other risk exposures and calculated in such a manner as may be prescribed. **[calculated by multiplying the average of the amounts (as shown in the returns furnished to the Registrar in terms of section 75) of such different categories of-**

(aa) assets; and

(bb) 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.]".

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

"(b) Notwithstanding the provisions of paragraph (a)-

(i) the sum of the bank's primary share capital and primary unimpaired reserve funds shall, in the calculation of the aggregate amount which the bank is in terms of paragraph (a) required to maintain, be - **[calculated by deducting from the amount thereof such amounts as may be prescribed; and]**

(aa) taken into account to an amount as may be prescribed; and

(bb) calculated by deducting from the amount thereof such amounts as may be prescribed; and

(ii) the sum of the bank's secondary capital and secondary unimpaired reserve funds shall, in the calculation of the aggregate amount which the bank is in terms of paragraph (a) require to maintain, be-

(aa) **[calculated by deducting from the amount thereof such amounts as may be prescribed;]** taken into account to an amount as may be prescribed; and

(bb) **[taken into account to an amount not exceeding the sum of the bank's allocated and qualifying primary share capital and allocated and qualifying primary unimpaired reserve funds]**

calculated by deducting from the amount thereof such amounts as may be prescribed;

Provided that the sum of the bank's secondary capital and secondary unimpaired reserve funds after the deduction of such amounts as may be prescribed, shall in no case be taken into account to an amount in excess of the sum of the bank's allocated and qualifying primary share capital and allocated and qualifying primary unimpaired reserve funds.".

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

"(a) A bank of which the business consists solely of trading in financial instruments shall manage its affairs in such a way that, subject to the provisions of paragraph (b), the sum of its primary and secondary capital, its primary and secondary unimpaired reserve funds and its tertiary capital in the Republic does not at any time amount to less than the greater of –

(i) R250 000 000; or

(ii) An amount which represents a prescribed percentage of the sum of amounts relating to the different categories of assets and other risk exposures and calculated in such a manner as may be prescribed. **[the sum of amounts prescribed in the Regulations relating to Banks' Financial Instrument Trading in respect of such a bank's risk exposures in the conduct of its business as may be so prescribed.]**".

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

"(b) Notwithstanding the provisions of paragraph (a)-

(i) the sum of the bank's primary share capital and primary unimpaired reserve funds shall, in the calculation of the aggregate amount which the bank is in terms of paragraph (a) required to maintain, be – **[calculated by deducting from the amount thereof such amounts as may be prescribed] ;**

(aa) taken into account to an amount as may be prescribed; and

(bb) calculated by deducting from the amount thereof such amounts as may be prescribed; and

(ii) the sum of the bank's secondary capital and secondary unimpaired reserve funds shall, in the calculation of the aggregate amount which the bank is in terms of paragraph (a) required to maintain, be -

(aa) **[calculated by deducting from the amount thereof such amounts as may be prescribed]** taken into account to an amount as may be prescribed; and

(bb) **[taken into account to an amount not exceeding the sum of the bank's allocated and qualifying primary share capital and allocated and qualifying primary unimpaired reserve funds]** calculated by deducting from the amount thereof such amounts as may be prescribed;

Provided that the sum of the bank's secondary capital and secondary unimpaired reserve funds after the deduction of such amounts as may be prescribed, shall in no case be taken into account to an amount in excess of the sum of the bank's allocated and qualifying primary share capital and allocated and qualifying primary unimpaired reserve funds.

(iii) the sum of a bank's tertiary capital shall, in the calculation of the aggregate amount which the bank is in terms of paragraph (a) required to maintain, be -

(a) taken into account to an amount as may be prescribed; and

(b) calculated by deducting from the amount thereof such amounts as may be prescribed,

provided that, after the deduction of such amounts as may be prescribed, the sum of the bank's secondary capital, secondary unimpaired reserve funds and tertiary capital shall in no case be taken into account to an amount in excess of the sum of the bank's allocated and qualifying primary share capital and allocated and qualifying primary unimpaired reserve funds.

(iv) the total amount of allocated and qualifying secondary capital, allocated and qualifying secondary unimpaired reserve funds and tertiary capital shall be determined as prescribed **[in the Regulations relating to Banks' Financial Instrument Trading]**.".

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

"(a) A bank of which the business includes trading in financial instruments shall manage its affairs in such a way that, subject to the provisions of paragraph (b), the sum of its primary and secondary capital, its primary and secondary unimpaired reserve funds and its tertiary capital in the Republic does not at any time amount to less than the greater of –

(i) R250 000 000; or

(ii) An amount which represents **[the sum of]** a prescribed percentage of the sum of amounts relating to the different categories of assets and other risk exposures and calculated in such a manner as may be prescribed.

[(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), 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

(bb) an amount which represents the sum of amounts prescribed [in the Regulations relating to Banks' Financial Instrument Trading] in respect of such of the bank's risk exposures in the conduct of its business of trading in financial instruments as may be so prescribed.]".

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

"(b) Notwithstanding the provisions of paragraph (a)-

(i) the sum of the bank's primary share capital and primary unimpaired reserve funds shall, in the calculation of the aggregate amount which the bank is in terms of paragraph (a) required to maintain, be – **[calculated by deducting from the amount thereof such amounts as may be prescribed] ;**

(aa) taken into account to an amount as may be prescribed; and

(bb) calculated by deducting from the amount thereof such amounts as may be prescribed; and

(ii) the sum of the bank's secondary capital and secondary unimpaired reserve funds shall, in the calculation of the aggregate amount which the bank is in terms of paragraph (a) required to maintain, be -

(aa) **[calculated by deducting from the amount thereof such amounts as may be prescribed]** taken into account to an amount as may be prescribed; and

(bb) **[taken into account to an amount not exceeding the sum of the bank's allocated and qualifying primary share capital and allocated and qualifying primary unimpaired reserve funds]** calculated by deducting from the amount thereof such amounts as may be prescribed;

Provided that the sum of the bank's secondary capital and secondary unimpaired reserve funds after the deduction of such amounts as may be prescribed, shall in no case be taken into account to an amount in excess of the sum of the bank's allocated and qualifying primary share capital and allocated and qualifying primary unimpaired reserve funds.

(iii) the sum of a bank's tertiary capital shall, in the calculation of the aggregate amount which the bank is in terms of paragraph (a) required to maintain, be -

(a) taken into account to an amount as may be prescribed; and

(b) calculated by deducting from the amount thereof such amounts as may be prescribed,

provided that, after the deduction of such amounts as may be prescribed, the sum of the bank's secondary capital,

secondary unimpaired reserve funds and tertiary capital shall in no case be taken into account to an amount in excess of the sum of the bank's allocated and qualifying primary share capital and allocated and qualifying primary unimpaired reserve funds.

(iv) the total amount of allocated and qualifying secondary capital, allocated and qualifying secondary unimpaired reserve funds and tertiary capital shall be determined as prescribed **[in the Regulations relating to Banks' Financial Instrument Trading]**.".

Amendment of section 70A of Act 94 of 1990

21. The following section is substituted for Section 70A of the principal Act:

"70A (1) Notwithstanding the provisions of section 70 (2), (2A) and (2B), a controlling company shall manage its affairs in such a way that-

(a) subject to the provisions of subsection (2), the sum of its primary and secondary capital, its primary and secondary unimpaired reserve funds and its tertiary capital does not at any time amount to less than an amount which represents a prescribed percentage of the sum of amounts relating to the different categories of assets and other risk exposures and calculated in such a manner as may be prescribed.

(b) the capital and reserve funds of any regulated entity included in the banking group and structured under such controlling company do not at any time amount to less than the required amount of capital and reserve funds determined in respect of the relevant regulated entity included in such banking group in accordance with the rules and the regulations of the relevant regulator responsible for the supervision of the relevant entity.

(2) Notwithstanding the provisions of subsection (1), in the calculation of the aggregate amount of capital that a controlling company is required to maintain, the sum of a controlling company's-

(a) primary share capital and primary unimpaired reserve funds shall be-

(i) taken into account to an amount as may be prescribed; and

(ii) calculated by deducting from the amount thereof such amounts as may be prescribed.

(b) secondary capital and secondary unimpaired reserve funds shall be-

(i) taken into account to an amount as may be prescribed; and

(ii) calculated by deducting from the amount thereof such amounts as may be prescribed,

provided that, after the deduction of such amounts as may be prescribed, the sum of the controlling company's secondary capital and secondary unimpaired reserve funds shall in no case be taken into account to an amount in excess of the sum of the controlling company's primary share capital and primary unimpaired reserve funds.

(c) tertiary capital shall be-

(i) taken into account to an amount as may be prescribed; and

(ii) calculated by deducting from the amount thereof such amounts as may be prescribed,

provided that, after the deduction of such amounts as may be prescribed, the sum of the controlling company's secondary capital, secondary unimpaired reserve funds and tertiary capital shall in no case be taken into account to an amount in excess of the sum of the controlling company's allocated and qualifying primary share capital and allocated and qualifying primary unimpaired reserve funds.".

Amendment of section 73 of Act 94 of 1990, as substituted by section 15 of Act 36 of 2000 and amended by section 51 of Act 19 of 2003

22. Section 73 of the principal Act is hereby amended-

(a) by the substitution of the title of the section of the following title:

"**73. [Large exposures] Concentration risk"**

(b) by inserting the following paragraphs after paragraph (c) of subsection (2):

"(d) shall in the case of any exposure to an industry, sector or geographical area, that exceeds a prescribed amount, comply with such conditions or requirements as may be prescribed, including a requirement to maintain additional capital and reserve funds in respect of the said exposure: Provided that the Registrar may impose such additional conditions or requirements by means of a directive as contemplated in section 6(6);

(e) shall in such manner and on such a form as may be prescribed report such an investment in or such a loan or advance or other credit exposure to a specific industry, sector or geographical area, which investment, loan, advance or credit exposure, either alone or together with any previous investment, loan, advance or exposure, results in the bank, controlling company or branch of a bank being exposed to that industry, sector or geographical area up to an amount exceeding such a percentage of capital and reserve funds as may be prescribed.".

(c) by the insertion of the following subsection after subsection (3):

"(4) The Registrar may, with the consent of the Minister and in accordance with such conditions as the Registrar may determine, exempt such exposures as the Registrar may determine from the provisions of this section by means of a circular as contemplated in section 6(4).".

Amendment of section 74 of Act 94 of 1990, as amended by sections 20 and 25 of Act 9 of 1993 and section 52 of Act 19 of 2003

23. The following section is substituted for Section 74 of the principal Act:

"74 (1) If-

(a) a bank fails to comply with a provision of section 70 or 72, or is unable to comply with any such provision, or

(b) a controlling company fails to comply with a provision of section 70A, or is unable to comply with any such provision,

the bank or controlling company, as the case may be, shall forthwith in writing report its failure or inability to the Registrar, stating the reasons for such failure or inability.

(2) The Registrar may, notwithstanding the provisions of section 91A, summarily take action under this Act against a bank or controlling company referred to in subsection (1) or, if in the circumstances the Registrar deems it fit to do so, condone the failure or inability and afford the bank or controlling company concerned an opportunity, subject to such conditions as the Registrar may determine, to comply with the relevant provision within a specified period.

(3) Irrespective whether or not criminal proceedings in terms of this Act have been or may be instituted against a bank or controlling company in respect of any failure or inability referred to in subsection (1), the Registrar may, subject to any condonation granted under subsection (2), by way of a written notice impose upon that bank or controlling company, in respect of such failure or inability, a fine-

(a) in the case of any failure or inability to comply with the provisions of section 70, not exceeding one-tenth of one per cent of the amount of the shortfall for each day on which such failure or inability continues;**[or]**

(b) in the case of any failure or inability to comply with the provisions of section 70A, not exceeding one-tenth of one per cent of the amount of the shortfall for each day on which such failure or inability continues; or

(c) in the case of any failure or inability to comply with the provisions of section 72, not exceeding three per cent of the amount of the shortfall.

(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 or controlling company 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 or controlling company the amount of

the fine or any portion thereof which 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, section 47 of Act 26 of 1994 and section 53 of Act 19 of 2003

24. Section 75 of the principal Act is hereby amended-

(a) by the substitution for subsection (3A) of the following subsection:

"(3A) The returns referred to in subsections (1) and (3) shall be prepared in conformity with **[generally accepted accounting practice]** financial reporting standards issued by the Financial Reporting Standards Council in terms of the provisions of section 440S of the Companies Act and shall be furnished to the Registrar in respect of such period, at such times and on such a form as may be prescribed.".

(b) 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]** financial reporting standards issued by the Financial Reporting Standards Council in terms of the provisions of section 440S of the Companies Act 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 the Registrar with such a report in respect of any other of those returns furnished during the financial year.".

Amendment of section 76 of Act 94 of 1990, as amended by section 2 of Act 81 of 1991, section 25 of Act 9 of 1993, section 48 of Act 26 of 1994 and section 54 of Act 19 of 2003

25. Section 76 of the principal Act is hereby amended by the substitution of subsection (1) of the following subsection:

"(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.".

Amendment of section 79 of Act 94 of 1990, as amended by section 25 of Act 9 of 1993 and section 51 of Act 26 of 1994

26. The following section is substituted for Section 79 of the principal Act:

"**79. Shares, debentures, negotiable certificates of deposit, [and] share warrants and promissory notes or similar instruments**

(1) A bank shall not -

(a) sections 74 and 75 of the Companies Act notwithstanding, issue shares of no par value or convert any of its shares into shares of no par value;

(b) without the written approval of the Registrar **[or otherwise than]** and in accordance with conditions **[approved]** that may be determined by the Registrar in writing -

(i) issue any preference shares, hybrid debt instruments or debt instruments;

(ii) convert any of its shares into preference shares, hybrid debt instruments or debt instruments; or

(iii) convert any of its preference shares of a particular class into preference shares of any other class;

that will qualify as primary capital, secondary capital or tertiary capital, as the case may be.

(c) issue negotiable certificates of deposit, promissory notes, or any such similar instrument, otherwise than in accordance with such conditions as may be prescribed;

(d) section 101 of the Companies Act notwithstanding, issue share warrants to bearer within the meaning of that section.

(2) The aggregate amount representing the value of debt instruments and negotiable certificates of deposit and similar instruments issued by a bank in terms of paragraphs (b)(i) and (c), respectively, of subsection (1) shall at no time exceed an amount representing the prescribed percentage of the aggregate amount of the bank's liabilities in respect of deposits made with it and in respect of such debt instruments, **[and]** negotiable certificates of deposit and similar instruments.

(3) Notwithstanding anything to the contrary contained in any contract or in the memorandum of association or articles of association of any bank or controlling company, there shall be no differentiation in the voting rights attached to any of the ordinary shares of a bank or a controlling company, and such voting rights shall be exercised in accordance with the determination thereof as provided in section 195(1) of the Companies Act.

(4) The provisions of subsections (1)(a),(b) and (d) shall *mutatis mutandis* apply to a controlling company.".

Amendment of section 80 of Act 94 of 1990, as amended by section 22 and 25 of Act 9 of 1993 and section 52 of Act 26 of 1994

27. Section 80 of the principal Act is hereby amended by the substitution of subsection (2) for the following subsection:

"(3) No bank and no associate of a bank shall, without the prior written approval of the Registrar, either jointly or individually acquire or hold shares in any registered long-term insurer as defined in section 1 of the Long-term Insurance Act, 1998 (Act No. 52 of 1998) **[Insurance Act, 1943 (Act No. 27 of 1943)]** or in any short-term insurer as defined in section 1 of the Short-term Insurance Act, 1998 (Act No. 53 of 1998), to the extent to which the nominal value of those shares

exceeds 49 per cent of the nominal value of all the issued shares of such **[insurer]** long-term insurer or short-term insurer, as the case may be.

Amendment of section 84 of Act 94 of 1990, as amended by section 60 of Act 19 of 2003

28. Section 84 of the principal Act is hereby amended—

(a) by the insertion of the following subsection after subsection (1):

"(1A) (a) The manager shall as soon as may be practical report to the Registrar whether or not the person subject to the relevant direction is, in the manager's opinion, solvent, and if the manager finds that the person subject to the direction is insolvent, the manager shall comment on whether such person is technically or commercially insolvent.

(b) On appointment of a manager and whilst the person subject to the relevant direction is under management as contemplated in this section -

(i) the manager shall recover and take possession of all the assets of the person subject to the relevant direction; and

(ii) all actions, legal proceedings, the execution of all writs, summonses and other legal process against the person subject to the relevant direction shall be stayed and not be instituted or proceeded with without the leave of the court and without also serving the application on the Registrar.

(c) If the report referred to in subsection (a) concludes that the person subject to the directive is insolvent, the Registrar may, notwithstanding anything contrary contained in any law relating to liquidation or insolvency apply to a competent court for the winding-up in terms of the Companies Act or the sequestration in terms of the Insolvency Act, 1936, as the case may be, of the person subject to the directive, and the Registrar shall have the right to oppose any such application made by any other person.

(d) Notwithstanding anything contrary contained in any law relating to liquidation or insolvency, no person other than a person recommended by the Registrar shall be appointed by a Master of the High Court as provisional liquidator or provisional trustee of the person subject to the directive.

(e) Any written report to the Registrar by an inspector appointed in terms of section 83 or any report by a manager appointed in terms of section 84 is confidential and shall not be disclosed to any person: Provided that the Registrar may, notwithstanding the provisions of section 33(1) of the South African Reserve Bank Act, 1989, furnish such a report to-

(i) the person subject to an investigation in terms of section 83 or that is subject to a directive in terms of section 84;

(ii) any person or institution contemplated in section 89;

(iii) any appropriate division of the South African Police Services or the National Prosecuting Authority;

(iii) any other person that can prove, to the satisfaction of the Registrar, a legitimate interest in the matter and only upon payment of a prescribed fee and with the written consent of the person or persons subject to the directive; or

(iv) any duly appointed provisional liquidator or provisional trustee of the person subject to the directive.

(f) If the Registrar has issued an instruction in terms of section 84(6) of the Act and a provisional liquidator or provisional trustee of the person subject to the direction is subsequently duly appointed, the Registrar shall be regarded as a creditor of the person subject to the direction and the Registrar shall have the same rights of a creditor in terms of the laws relating to liquidation and insolvency.".

Insertion of section 85A in Act 94 of 1990

29. The following section is hereby inserted in the principal Act after section 85:

"**85A. Approval of eligible institutions**

(1) Notwithstanding anything to the contrary in any law, no bank or controlling company shall in the calculation of its prescribed minimum amount of required capital and reserve funds take into account a credit assessment of any external credit assessment institution or export credit agency unless the relevant external credit assessment institution or export credit agency obtained the prior written approval of the Registrar to act as an eligible institution.

(2) Any external credit assessment institution or export credit agency that wishes to be authorised by the Registrar as an eligible institution may apply to the Registrar for authorisation: Provided that the Registrar may authorise an export credit agency as an eligible institution without such application.

(3) An application under subsection (2)-

(a) shall be made in the prescribed manner;

(b) shall be accompanied by such information and comply with such requirements as may be prescribed: Provided that the Registrar may impose additional requirements in writing, and

(c) shall be accompanied by such fee as may be prescribed.".

Insertion of section 85B in Act 94 of 1990

30. The following section is hereby inserted in the principal Act after section 85A:

"**85B. Verification of information**

The Registrar may require that information submitted to him or her in terms of the Act be verified by such a person, in such a manner and at such intervals as may be prescribed.".

Amendment of section 89 of Act 94 of 1990, as amended by section 63 of Act 19 of 2003

31. The following section is substituted for Section 89 of the principal Act:

"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 -

(a) to any person charged with the performance of a function under any law, provided the Registrar is satisfied that possession of such information by that person is essential for the proper performance of such function by that person; or

(b) to an authority in a country other than the Republic for the purpose of enabling such authority to perform functions, corresponding to those of the Registrar under this Act, in respect of a bank carrying on business in such other country**[.]**:

Provided that the Registrar is satisfied that the recipient of the information so provided is willing and able to keep the information confidential within the confines of the laws applicable to the recipient.".

Amendment of section 90 of Act 94 of 1990, as amended by section 25 of Act 9 of 1993 and section 64 of Act 19 of 2003

32. Section 90 of the principal Act is hereby amended by the substitution for paragraph (f) of subsection (1) of the following paragraph:

"(f) prescribing that the financial statements of a bank shall be prepared in conformity with **[generally accepted accounting practice]** financial reporting standards issued by the Financial Reporting Standards Council in terms of the provisions of section 440S of the Companies Act.";

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, section16 of Act 36 of 2000 and section 65 of Act 19 of 2003

33. Section 91 of the principal Act is hereby amended—

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

"(b) contravenes or fails to comply with a provision of section 6(6), 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, 84(1A) or 84(2),

shall be guilty of an offence.";

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

"(b) section 6(6), 17(6), 21, 22(3) or (8), 32(4)*(a)*, 69A(14), 78(2), 82(3), 83(3)*(a)*, 84(1A), 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 or to imprisonment for a period not exceeding five years or to both a fine and such imprisonment; or".

Insertion of section 91A in Act 94 of 1990

34. The following section is hereby inserted in the principal Act after section 91:

"91A. Financial penalties and non-financial sanctions imposed by the Registrar

(1) (a) Notwithstanding the provisions of section 91 and irrespective of whether criminal proceedings in terms of this Act have been or may be instituted against a person, the Registrar may, when he or she is satisfied on available facts and information that such person –

(i) has failed or is unable to comply with a provision of the Act; or

(ii) has failed or is unable to comply with a requirement or directive imposed on such a person by or under this Act,

subject to the provisions of subsection (2), impose a financial penalty or a non-financial sanction, as the case may be, on such a person.

(b) The Registrar may not impose a financial penalty under this section and cancel the registration of a -

(i) bank in terms of sections 23 or 25; or

(ii) controlling company in terms of sections 45 or 46.

(2) The Registrar shall, prior to imposing a financial penalty or a non-financial sanction, as the case may be, on a person, notify such person in writing, of the following:

(a) the nature of the contravention of the Act or of the non-compliance with a requirement or directive imposed on such a person by or under the Act;

(b) the amount of the financial penalty, or in the case of a non-financial sanction, the nature thereof; and

(c) that the person is called upon to show cause within a period specified in the notice, which shall not be less than 30 calendar days as from the date of the notice, why the financial penalty or non-financial sanction, as the case may be, should not be so imposed.

(3) After considering any representations received within the specified period from the person concerned by virtue of the provisions of subsection (2)(c), the Registrar may impose such financial penalty or non-financial sanction, as the case may be, as the Registrar considers to be appropriate and the Registrar shall in writing notify the person of his or her decision in terms of this subsection.

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

(5) A non-financial sanction imposed on a bank or controlling company may include one or more of the following:

(a) the restriction or suspension of certain specified business activities;

(b) withholding of approval for applications submitted in terms of the provisions of this Act;

(c) the restriction or suspension of payments to shareholders;

(d) the restriction or suspension of share repurchases;

(e) the restriction or suspension of the transfer of assets, liabilities or assets and liabilities; or

(f) the imposition of any other measure that the Registrar may deem to be appropriate.

(6) Notwithstanding the provisions of section 33 of the South African Reserve Bank Act, the Registrar may publish the name of the person and the financial penalty or non-financial sanction, as the case may be, that the Registrar has imposed on such person in terms of this section.".

Short title

35. This Act is called the Banks Amendment Act, 2007 and shall come into operation on 1 January 2008.