

REPUBLIC OF SOUTH AFRICA

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# **BANKS AMENDMENT BILL**

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*(As introduced in the National Assembly (proposed section 75); explanatory summary of  
Bill published in Government Gazette No. 35880 of 16 November 2012)  
(The English text is the official text of the Bill)*

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(MINISTER OF FINANCE)

**[B 43—2012]**

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**GENERAL EXPLANATORY NOTE:**

[                    ]     Words in bold type in square brackets indicate omissions from existing enactments.

\_\_\_\_\_             Words underlined with a solid line indicate insertions in existing enactments.

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## **BILL**

**To amend the Banks Act, 1990, so as to define certain expressions and to amend certain definitions; to bring certain provisions in line with their practical application; to update references to legislation and institutions; to extend the use of the name bank to representative offices; to provide that a contravention of the Financial Intelligence Centre Act, 2001, is a cause for suspension or cancellation of registration as a bank; to align the Banks Act, 1990, with the Companies Act, 2008; and to comply further with the requirements of the Basel Committee of Banking Supervision; and to provide for matters connected therewith.**

**B**E 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, section 1 of Act 19 of 2003 and section 1 of Act 20 of 2007**     5

**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) before the definition of “agency” of the following definitions:     10

“**additional tier 1 capital**” means—

(a) those shares that do not represent the most subordinated claim in liquidation but which shares are subordinated to depositors, general creditors and any relevant subordinated debt, and which shares—     15

(i) do not constitute common equity tier 1 capital; and

(ii) comply with such further criteria or conditions as may be prescribed;

(b) such component of, percentage of or component and percentage of minority interest in specified issued instruments or shares, and arising from the consolidation of accounts and calculated in such a manner, as may be prescribed;     20

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

“**additional tier 1 unimpaired reserve funds**” means—

(a) share premium arising from the issue of instruments or shares constituting additional tier 1 capital;     25

- (b) such component of, percentage of or component and percentage of accumulated other comprehensive income and other disclosed reserves arising from compliance with Financial Reporting Standards as may be prescribed;”;
- (b) by the insertion in subsection (1) after the definition of “banking group” of the following definition: 5  
 “ **‘Basel Committee on Banking Supervision’** means a committee of the Bank for International Settlements, the secretariat of which consists of supervisors from central banks and other authorities of member countries and is located in Basel, Switzerland;”;
- (c) by the insertion in subsection (1) after the definition of “close relative” of the following definitions: 10  
 “ **‘Commission’** means the Companies and Intellectual Property Commission established by section 185 of the Companies Act;  
**‘Commissioner’** means the Commissioner appointed in terms of section 189 of the Companies Act;  
**‘common equity tier 1 capital’** means—  
 (a) those shares that represent the most subordinated claim in liquidation, and which shares— 20  
 (i) absorb the first and proportionately greatest share of any losses as the losses occur;  
 (ii) absorb losses proportionately and *pari passu* on a going concern basis; and  
 (iii) comply with such further criteria or conditions as may be prescribed; 25  
 (b) such component of, percentage of or component and percentage of minority interest in specified issued instruments or shares, and arising from the consolidation of accounts and calculated in such a manner, as may be prescribed,  
 but does not include shares issued in pursuance of the capitalisation of reserves resulting from a revaluation of assets; 30  
**‘common equity tier 1 unimpaired reserve funds’** means—  
 (a) share premium arising from the issue of instruments or shares constituting common equity tier 1 capital;  
 (b) retained earnings; 35  
 (c) such component of, percentage of or component and percentage of accumulated other comprehensive income and other disclosed reserves arising from compliance with Financial Reporting Standards, as may be prescribed;”;
- (d) by the substitution in subsection (1) for the definition of “Companies Act” of the following definition: 40  
 “ **‘Companies Act’** means the Companies Act, [1973 (Act No. 61 of 1973)] 2008 (Act No. 71 of 2008);”;
- (e) by the insertion in subsection (1) after the definition of “consolidating supervisor” of the following definition: 45  
 “ **‘control’**, with reference to the control of a company, includes the meaning as provided for in section 2(2) of the Companies Act;”;
- (f) by the substitution in subsection (1) for the definition of “co-operative” of the following definition:  
 “ **‘co-operative’** means a co-operative incorporated in terms of the Co-operatives Act, [1981 (Act No. 91 of 1981), and includes a co-operative society or co-operative company deemed in terms of section 2 of that Act to be incorporated in terms of the said Act] 2005 (Act No. 14 of 2005);”;
- (g) by the substitution in subsection (1) for the definition of “director” of the following definition: 55  
 “ **‘director’** has the meaning ascribed to that word in section 1 of the Companies Act, and includes an executive director and a non-executive director, unless expressly stated otherwise;”;
- (h) by the substitution in subsection (1) for paragraph (b) of the definition of “domestic shareholder” of the following paragraph: 60  
 “(b) which is a company controlled[, *mutatis mutandis* as contemplated in paragraph (a), (b) or (c) of the definition of ‘controlling

- company’ in section 1 of the Companies Act,]** by a person or persons who is or are resident in the Republic or, in the case of a juristic person or persons, was or were formed, established or incorporated by or under a law of the Republic;”;
- (i) by the substitution in subsection (1) for the definition of “financial statements” of the following definition: 5  
 “**‘financial statements’** means annual financial statements referred to in [sections 286 and 288] section 30 of the Companies Act;”;
- (j) by the substitution in subsection (1) for the definition of “holding company” of the following definition: 10  
 “**‘holding company’** [means a holding company as defined in section 1 (4)] has the meaning ascribed to that expression in section 1 of the Companies Act;”;
- (k) by the substitution in subsection (1) for the definition of “liquid assets” of the following definitions: 15  
 “**‘level one high-quality liquid assets’** means—  
 (a) cash;  
 (b) gold coin and bullion;  
 (c) such percentage or amount of central bank reserves as may be determined by the Governor of the Reserve Bank from time to time; 20  
 (d) marketable securities representing claims on or claims guaranteed by sovereigns, central banks, non-central government public sector entities, the Bank for International Settlements, the International Monetary Fund, the European Commission or multilateral development banks that comply with such requirements or such conditions as may be prescribed; 25  
**‘level two high-quality liquid assets’** means—  
 (a) marketable securities representing claims on or claims guaranteed by sovereigns, central banks, non-central government public sector entities or multilateral development banks that comply with such requirements or such conditions as may be prescribed; 30  
 (b) such corporate bonds that comply with such requirements or such conditions as may be prescribed;”;
- (l) by the deletion of the definitions of “primary share capital” and “primary unimpaired reserve funds”; 35
- (m) by the insertion in subsection (1) after the definition of “public” of the following definition:  
 “**‘public company’** has the meaning ascribed to that expression in section 1 of the Companies Act;”;
- (n) by the deletion in subsection (1) of the definition of “Registrar of Companies”; 40
- (o) by the substitution in subsection (1) for the definition of “Regulations relating to branches” of the following definition:  
 “**‘Regulations relating to branches’** means the Regulations titled ‘Conditions for the conducting of the business of a bank by a foreign institution by means of a branch in the Republic’ published by Government Notice No. [R. 1414 of 28 December 2000] 30627 of 1 January 2008, and amended from time to time;”;
- (p) by the deletion in subsection (1) of the definitions of “secondary capital” and “secondary unimpaired reserve funds”; 50
- (q) by the substitution in subsection (1) for the definition of “subsidiary” of the following definition:  
 “**‘subsidiary’** means a subsidiary [as defined] provided for in [section 1(3)] section 3 of the Companies Act;”;
- (r) by deletion in subsection (1) of the definition of “tertiary capital”; 55
- (s) by the insertion in subsection (1) after the definition of “this Act” of the following definitions:  
 “**‘tier 2 capital’** means—  
 (a) those instruments or shares that are subordinated to depositors and general creditors and which instruments or shares— 60  
 (i) do not constitute common equity tier 1 or additional tier 1 capital; and  
 (ii) comply with such further conditions as may be prescribed;”;

- (b) 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 such further conditions, if any, as may be prescribed, of ordinary shares, preference shares or other capital instrument issued in pursuance of the capitalisation of reserves resulting from a revaluation of assets; 5
- (c) such component of, percentage of or component and percentage of minority interest in specified issued instruments or shares, and arising from the consolidation of accounts and calculated in such a manner as may be prescribed; 10
- (d) capital obtained through the issue of instruments or shares constituting common equity tier 1 capital or additional tier 1 capital where the relevant proceeds of such instruments or shares, or any portion thereof, are excluded from qualifying common equity tier 1 capital or additional tier 1 capital as a result of a prescribed limit; 15
- ‘tier 2 unimpaired reserve funds’ means—**
- (a) any premium arising from the issue of instruments or shares that constitute tier 2 capital;
- (b) a prescribed percentage of general provision, general loan loss reserve or other reserve held against unidentified and unforeseen losses that comply with such conditions as may be prescribed;” 20
- and
- (t) by the substitution in subsection (1A)(b) for subparagraph (iii) of the following paragraph: 25
- “(iii) was a director, who has been indicated, as contemplated in section 421(2) of the Companies Act, 1973 (Act 61 of 1973), as the effective cause of a particular company having been unable to pay its debts;”.

**Amendment of section 2 of Act 94 of 1990, as amended by section 2 of Act 26 of 1994 and section 90 of Act 40 of 2007** 30

2. Section 2 of the principal Act is hereby amended by the substitution in paragraph (b) for subparagraph (v) of the following subparagraph:

- “(v) [the Public Investment Commissioners referred to in section 2 of the Public Investment Commissioners Act, 1984 (Act No. 45 of 1984)] the Public Investment Corporation Limited established by section 2 of the Public Investment Corporation Act, 2004 (Act No. 23 of 2004);”.
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**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 19 of 2003 and section 3 of Act 20 of 2007**

3. Section 6 of the principal Act is hereby amended— 40

- (a) by the substitution for subsections (4) and (5) of the following subsections, respectively:

“(4) The Registrar may from time to time by means of a circular furnish banks, controlling companies, representative offices, eligible institutions or auditors of banks or controlling companies with guidelines regarding the application and interpretation of the provisions of this Act. 45

(5) The Registrar may from time to time by means of a guidance note furnish banks, controlling companies, representative offices, 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.”; 50

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

“(a) The Registrar may from time to time, in writing, after consultation with the relevant bank, controlling company, representative office, eligible institution or auditor of a bank or controlling company, issue a directive to such a bank, controlling company, representative office, eligible institution or auditor of a bank or controlling company, either individually or collectively, regarding the application of the Act;” 55

- (c) by the substitution in subsection (1)(b) for the words preceding subparagraph (i) of the following words:  
 “The directive contemplated in paragraph (a) may include the issuing of a non-financial sanction or a directive requiring a bank, a controlling company, a representative office, an eligible institution or an auditor of a bank or controlling company, either individually or collectively, within the period specified in the directive, to—”;
- (d) by the substitution in subsection (6) for paragraph (c) of the following paragraph:  
 “(c) The Registrar may after consultation with the relevant bank, controlling company, representative office, eligible institution or auditor of a bank or controlling company, subject to the directive, cancel in writing a previously issued directive;”;
- (e) by the substitution in subsection (6) for paragraph (e) of the following paragraph:  
 “(e) Any bank, controlling company, representative office, 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 10 of Act 94 of 1990, as amended by section 7 of Act 19 of 2003**

4. Section 10 of the principal Act is hereby amended by the substitution for subsection (2) the following subsection:

- “(2) The Minister shall [lay] table a copy of the report referred to in subsection (1) [upon the Tables] in Parliament within 14 days after receipt of such report, if Parliament is then in ordinary session, or, if Parliament is not then in ordinary session, within 14 days after the commencement of its next ensuing ordinary session.”.

**Amendment of section 13 of Act 94 of 1990, as amended by sections 6 and 25 of Act 9 of 1993 and section 9 of Act 19 of 2003**

5. Section 13 of the principal Act is hereby amended by the deletion in subsection (2) of the word “and” at the end of paragraph (g), the insertion of the word “and” at the end of paragraph (h) and the addition of the following paragraph:

- “(i) in the case of a foreign institution being the applicant, that the responsible consolidating supervisor of the foreign institution—
- (i) has duly authorised the proposed establishment, by the foreign institution, of a bank in the Republic;
  - (ii) accepts, is committed to and complies with the proposals, guidelines and pronouncements of the Basel Committee on Banking Supervision;
  - (iii) is not legally impeded from complying with the provisions of subparagraph (ii);
  - (iv) accepts its responsibilities as a consolidating supervisor;
  - (v) as far as may be reasonably possible, ensures that the members of the board and the executive management of the foreign institution at all times consist of fit and proper persons;
  - (vi) is satisfied with the standard of risk management maintained by the foreign institution; and
  - (vii) is committed to keeping the Registrar informed of any material information regarding the financial soundness of the foreign institution and its bank in the Republic.”.

**Amendment of section 15 of Act 94 of 1990, as amended by section 25 of Act 9 of 1993, section 7 of Act 26 of 1994 and section 11 of Act 19 of 2003**

6. Section 15 of the principal Act is hereby amended by the substitution for subsection (3) of the following subsection:

- “(3) Notwithstanding anything to the contrary contained in the Companies Act, the [Registrar of Companies] Commissioner shall not register in terms of that Act

the memorandum of [association and articles of association] incorporation of a public company formed for the purpose of conducting the business of a bank, unless the application for such registration is accompanied by the approval referred to in subsection (1).”.

**Amendment of section 16 of Act 94 of 1990, as substituted by section 8 of Act 26 of 1994 and amended by section 12 of Act 19 of 2003** 5

7. Section 16 of the principal Act is hereby amended by the substitution in subsection (2)(b) for subparagraph (i) of the following subparagraph:

“(i) two copies each of the institution’s memorandum of [association and articles of association] incorporation;” 10

**Amendment of section 17 of Act 94 of 1990, as substituted by section 9 of Act 26 of 1994 and amended by section 13 of Act 19 of 2003**

8. Section 17 of the principal Act is hereby amended by the substitution in subsection (1) for paragraph (c) of the following paragraph:

“(c) that the memorandum of [association and articles of association] incorporation of the institution [are] is consistent with this Act and [are] is not undesirable for any reason.” 15

**Amendment of section 18 of Act 94 of 1990, as substituted by section 10 of Act 26 of 1994 and amended by section 14 of Act 19 of 2003**

9. Section 18 of the principal Act is hereby amended by the substitution for subsection (2) of the following subsection: 20

“(2) In addition to any other condition which the Registrar may impose under subsection (1), he or she may impose a condition requiring the institution concerned to take within a specified period such steps in terms of the Companies Act as may be necessary to alter its memorandum of [association and articles of association] incorporation in accordance with the requirements of the Registrar.” 25

**Amendment of section 22 of Act 94 of 1990, as amended by sections 7 and 25 of Act 9 of 1993, section 15 of Act 26 of 1994, section 5 of Act 36 of 2000 and section 17 of Act 19 of 2003**

10. Section 22 of the principal Act is hereby amended by the deletion in subsection (1) of the word “or” at the end of paragraph (a), the insertion of the word “or” at the end of paragraph (b) and the addition of the following paragraph: 30

“(c) in the case of such foreign institution, in respect of the representative office use, or refer to the representative office by, a name other than the name under which the representative office was so registered.” 35

**Amendment of section 23 of Act 94 of 1990, as substituted by section 16 of Act 26 of 1994**

11. Section 23 of the principal Act is hereby amended—

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

“(1) The Registrar may subject to the provisions of section 24, in the case of a bank registered as such, [with the consent of] after consultation with the Minister and by notice in writing to the institution concerned cancel, or suspend on such conditions as the Registrar may deem fit, such registration if the institution has not conducted any business as a bank during the period of six months commencing on the date on which the institution was registered as a bank.”; 40 45

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

“The Registrar may, subject to the provisions of section 24, in the case of a bank registered as such, [with the consent of] after consultation with the Minister and by notice in writing to the institution concerned cancel, 50

or suspend on such conditions as the Registrar may deem fit, such registration if—”;

- (c) by the deletion in subsection (2) for the word “or” at the end of paragraph (b), the insertion of the word “or” at the end of paragraph (c) and the addition of the following paragraph:

“(d) the institution concerned has contravened and has been convicted of a material provision of the Financial Intelligence Centre Act, 2001 (Act No. 38 of 2001).”; and

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

“(3) The Registrar may, subject to the provisions of section 24, in the case of a bank registered as such, **[with the consent of]** after consultation with the Minister and by notice in writing to the institution concerned cancel such registration if the institution has ceased to conduct the business of a bank or is no longer in operation.”.

**Amendment of section 24 of Act 94 of 1990, as amended by section 25 of Act 9 of 1993, section 17 of Act 26 of 1994 and section 18 of Act 19 of 2003**

12. Section 24 of the principal Act is hereby amended—

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

“(1) The Registrar **[shall, before cancelling or suspending under section 23 the registration of a bank, in a written notice addressed to the chairperson or chief executive officer of the institution concerned]** may by written notice to the chairperson or chief executive officer of the institution concerned suspend the registration of a bank under section 23 with immediate effect, provided that the Registrar must—

- (a) inform the institution of his or her intention to cancel **[or suspend, as the case may be,]** such registration;
- (b) furnish the institution with the reasons for the intended cancellation **[or suspension]**; and
- (c) call upon the institution to show cause within a period specified in the notice, which shall not be less than 30 days as from the date of the notice, why its registration should not be so cancelled **[or suspended]**.”; and

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

“(a) proceed with the cancellation **[or suspension]**, in terms of section 23, of the registration; or”.

**Substitution of section 27 of Act 94 of 1990, as substituted by section 20 of Act 19 of 2003**

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

**“Cancellation of registration at request of bank**

27. The Registrar shall cancel the registration of a bank upon submission to him or her by the institution concerned of a special resolution **[contemplated in section 200 of the Companies Act]** approved by the shareholders holding no less than 75 per cent of the voting rights entitled to vote on the decision authorising such cancellation.”.

**Substitution of section 28 of Act 94 of 1990, as substituted by section 21 of Act 19 of 2003**

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

**“Cancellation of registration upon winding up**

28. When the affairs of a bank have been completely wound up as contemplated in **[section 419(1)]** section 82(1) of the Companies Act, the responsible Master of the High Court shall transmit to the Registrar a copy



of the certificate referred to in that section, and the Registrar shall upon receipt of such copy cancel the registration of the bank concerned.”.

**Amendment of section 30 of Act 94 of 1990, as substituted by section 8 of Act 20 of 2007**

15. Section 30 of the principal Act is hereby amended by the substitution in subsection (1) for paragraph (e) of the following paragraph: 5

“(e) permission granted in respect of the [**compromise,**] amalgamation, merger or arrangement referred to in [**Chapter XII**] Chapter 5 of the Companies Act, where a bank is the principal party to such [**compromise,**] amalgamation, merger or arrangement;”.

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**Amendment of section 32 of Act 94 of 1990, as amended by section 25 of Act 9 of 1993, section 25 of Act 26 of 1994 and section 23 of Act 19 of 2003**

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

“(b) to change its name and its memorandum of [**association and articles of association**] incorporation within the period and in the manner required by the Registrar.”.

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**Amendment of section 38 of Act 94 of 1990, as amended by section 17 of Act 85 of 1992, section 25 of Act 9 of 1993 and section 26 of Act 19 of 2003**

17. Section 38 of the principal Act is hereby amended— 20

(a) by the substitution in subsection (2) for paragraphs (a), (b) and (c) of the following paragraphs, respectively:

“(a) in the name of [**a trustee of a unit trust scheme as defined in section 1 of the Unit Trusts Control Act, 1981 (Act No. 54 of 1981), or of a nominated company of the trustee approved by the Registrar of Unit Trust Companies**] the trustee or custodian of a collective investment scheme as defined in section 1 of the Collective Investment Schemes Control Act, 2002 (Act No. 45 of 2002), or of a nominated company of the manager or trustee approved by the Registrar of Collective Investment Schemes; 25

(b) in the name of any executor, administrator, trustee, curator, guardian or liquidator [**in the circumstances mentioned in section 103(3) of the Companies Act**] in respect of the estate of a deceased member of the bank or controlling company or of a member whose estate has been sequestrated or of a member who is otherwise under disability or as the liquidator of any body corporate in the course of being wound up which is a member of the bank or controlling company; 30

(c) for a period of not more than six months, in the name of a [**stock-broker or of a company established by such stock-broker for a purpose mentioned in section 12(3) of the Stock Exchanges Control Act, 1985 (Act No. 1 of 1985)**] regulated person as defined in section 1 of the Securities Services Act, 2004 (Act No. 36 of 2004), or of a company controlled by the bank or of an employee of the bank, if it is necessary that the shares be so allotted, issued or registered in order to facilitate delivery to the purchaser or to protect the rights of the beneficiary in respect of those shares or where the beneficiary is not known;”;

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

“(e) in the name of a central securities depository as defined in section 1 of the [**Safe Deposit of Securities Act, 1992**] Securities Services Act, 2004 (Act No. 36 of 2004).”.

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**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, section 30 of Act 19 of 2003 and section 10 of Act 20 of 2007**

18. Section 43 of the principal Act is hereby amended by the substitution in subsection (1) for paragraph (b) the following paragraph: 5

“(b) which is a **[controlling] holding** 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,”.

**Amendment of section 44 of Act 94 of 1990, as amended by section 10 of Act 9 of 1993 and section 31 of Act 19 of 2003** 10

19. Section 44 of the principal Act is hereby amended by the substitution in subsection (2) for paragraph (c) the following paragraph:

“(c) that no provision of the memorandum of **[association and articles of association] incorporation** of the applicant is inconsistent with a provision of this Act or is undesirable in so far as it concerns banks;” 15

**Substitution of section 47 of Act 94 of 1990, as substituted by section 32 of Act 19 of 2003**

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

**“Cancellation of registration at request of controlling company**

47. The Registrar shall cancel the registration of the controlling company upon submission to him or her by the controlling company of a special resolution **[contemplated in section 200 of the Companies Act]** approved by the shareholders holding no less than 75 per cent of the voting rights entitled to vote on the decision authorising such cancellation.” 20

**Amendment of section 51 of Act 94 of 1990, as amended by sections 11 and 25 of Act 9 of 1993 and section 34 of Act 19 of 2003** 25

21. Section 51 of the principal Act is hereby amended—

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

“(b) the provisions of sections 128 to 155 of the Companies Act relating to business rescue and compromise with creditors shall not apply to a bank.”; and 30

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

“(c) the administration of which vests in the **[Registrar of Companies] Commissioner**, shall in respect of companies registered as banks or as controlling companies vest in the Registrar.” 35

**Amendment of section 52 of Act 94 of 1990, as amended by section 3 of Act 55 of 1996, section 35 of Act 19 of 2003 and section 12 of Act 20 of 2007**

22. Section 52 of the principal Act is hereby amended by the substitution in subsection (1) for paragraph (c) of the following paragraph: 40

“(c) acquire an interest in any undertaking having its registered office or principal place of business outside the Republic: Provided that the Registrar may issue a directive, with or without conditions, specifying the circumstances under which a bank will be permitted to notify the Registrar of such an acquisition without having to obtain the prior written approval of the Registrar;” 45

**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, section 36 of Act 19 of 2003, section 13 of Act 20 of 2007 and section 90 of Act 17 of 2009**

23. Section 54 of the principal Act is hereby amended— 5
- (a) by the substitution for the heading of the following heading: 10  
“**Amalgamations, mergers and arrangements**”;
- (b) by the substitution in subsection (1) for paragraph (a) of the following paragraph: 10  
“(a) [a **compromise,**] an amalgamation, merger or arrangement referred to in [Chapter XII] Chapter 5 of the Companies Act and which involves a bank as one of the principal parties to the relevant transaction; and”;
- (c) by the substitution in subsection (4) for the words preceding paragraph (a) of the following words: 15  
“Any [**compromise,**] amalgamation or merger or [**arrangement or**] any arrangement for the transfer of assets, liabilities or assets and liabilities, referred to in subsection (1) or (1B), excluding a transfer other than a transfer referred to in subsection (2)(c) or (2A)(c) shall be subject—”;
- (d) by the substitution for subsection (5) of the following subsection: 20  
“(5) Notice of the passing of the resolution confirming, as contemplated in subsection (4), any [**compromise,**] amalgamation or merger or [**arrangement or**] any arrangement for the transfer of assets, liabilities or assets and liabilities referred to in subsection (1) or (1B), 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 (2A)(c), 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.”; 25  
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- (e) by the substitution in subsection (8) for the words preceding paragraph (a) of the following words: 35  
“**The [Registrar of Companies] Commissioner,** 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] Commissioner,** Master, officer or person or any register under the control of such [**Registrar] Commissioner,** Master, officer or person there—”;
- (f) by the substitution in subsection (8) for the words following paragraph (ii) of the following words: 40  
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“and upon production to such [**Registrar] Commissioner,** 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] Commissioner,** 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”;
- (g) by the substitution in subsection (8A) for the words following paragraph (b) of the following words: 55  
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“upon submission to the [**Registrar of Companies] Commissioner,** or the Master, officer or person referred to in subsection (8), as the case may be, of a written confirmation by the Registrar of Banks that the Minister, on the recommendation of the last-mentioned Registrar and after consultation with the Commissioner of the South African Revenue Service has consented to the waiver of such tax, fees or charges.”;
- (h) by the deletion of subsection (10); 60

- (i) by the substitution in subsection (11) for paragraphs (a) and (b) of the following paragraphs, respectively:
- “(a) [**Chapter XVA**] Chapter 5 of the Companies Act; or
  - (b) the [**Securities Regulation Code on Take-overs and Mergers published by Government Notice No. R.29 dated 18 January 1991, and any amendment thereof; or**] Fundamental Transactions and Takeover Regulations contained in Chapter 5 of the Companies Regulations, 2011, published under Government Notice R. 351 in Government Gazette No. 34239 on 26 April 2011,”;
- (j) by the deletion in subsection (11) of paragraph (c); and
- (k) by the substitution in subsection (11) for the words following paragraph (c) and preceding paragraph (ii) of the following words:
- “neither the [**Securities Regulation**] Takeover Regulation Panel established [**by section 440B**] in terms of section 196 of the Companies Act nor its executive committee or its executive director shall furnish any clearance, decision or ruling in respect of a matter submitted to it or such executive director in terms of the provisions of [**the above-mentioned Code or Rules**] Chapter 5 of the Companies Act and the Takeover Regulations, and which matter relates to an affected transaction, as defined in section [**440A(1)**] 117 of the Companies Act involving—”.

#### **Amendment of section 55 of Act 94 of 1990**

24. Section 55 of the principal Act is hereby amended by the substitution for paragraph (a) of the following paragraph:

- “(a) in respect of which annual financial statements are required to be made out in terms of [**section 288 (1)**] section 30 of the Companies Act; and”.

#### **Amendment of section 56 of Act 94 of 1990, as amended by section 25 of Act 9 of 1993 and section 37 of Act 19 of 2003**

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

- (a) by the substitution for the heading of the following heading:
- “**Alteration of memorandum of incorporation, and change of name**”;
- (b) by the substitution for subsection (1) of the following subsection:
- “(1) No—
- (a) alteration, in terms of section [**55, 56 or 62**] 16 of the Companies Act, of the memorandum of [**association or articles of association**] incorporation of a company registered as a bank; or
  - (b) change, in terms of section [**44**] 16(8) of the Companies Act, of the name of any such company,
- shall have legal force for the purposes of this Act or any other law unless such alteration or change has been approved in writing by the Registrar prior to the registration thereof by the [**Registrar of Companies**] Commissioner.”;
- (c) by the substitution for subsection (4) for the following subsection:
- “(4) A bank shall within 21 days of the registration by the [**Registrar of Companies**] Commissioner of an alteration of its memorandum of [**association or articles of association**] incorporation or a change of its name, furnish the Registrar with a certified copy of the special resolution which sets out the alteration or change of name, as the case may be.”;
- (d) by the substitution in subsection (5) for paragraph (a) of the following paragraph:
- “(a) in the case of a special resolution relating to an alteration of a memorandum of [**association or articles of association**] incorporation, register the alteration in question and issue to the bank concerned a certificate to the effect that the said alteration has been registered by the Registrar with effect from a date specified in the certificate; or”;
- (e) by the substitution for subsection (7) of the following subsection:
- “(7) The provisions of subsections (1), (2) and (3) shall not apply with respect to any alteration of a bank’s memorandum of [**association or**

**articles of association]** incorporation in accordance with a direction by the Registrar under this Act.”.

**Substitution of section 57 of Act 94 of 1990, as amended by section 25 of Act 9 of 1993 and section 38 of Act 19 of 2003**

26. The following section is hereby substituted for section 57 of the principal Act: 5

**“Alteration of memorandum of [association or articles of association] incorporation in accordance with direction of Registrar**

57. (1) The Registrar may at any time in writing direct a bank to effect such alteration, not contrary to a provision of this Act, to its memorandum of **[association or articles of association]** incorporation as the Registrar may deem desirable in order to remove anomalies or undesirable divergences in the activities of different banks. 10

(2) An alteration directed by the Registrar under subsection (1) shall on or before the day of the first annual general meeting, referred to in **[section 179] section 61(7)** of the Companies Act, following upon the date of such direction, be submitted for consideration to the shareholders of the bank concerned. 15

(3) If a bank refuses or fails to alter its memorandum of **[association or articles of association]** incorporation in accordance with a direction of the Registrar under subsection (1), the Registrar may submit a copy of that direction to the **[Registrar of Companies]** Commissioner, who shall thereupon deal with the proposed alteration contained therein in accordance with the Companies Act as if it were contained in a special resolution adopted by the bank concerned and submitted to the **[Registrar of Companies]** Commissioner by that bank in accordance with that Act.”. 20 25

**Substitution of section 58 of Act 94 of 1990, as substituted by section 37 of Act 26 of 1994**

27. The following section is hereby substituted for section 57 of the principal Act:

**“Information regarding directors and officers**

58. Every bank and every controlling company shall within 30 days of its registration as such, furnish the Registrar with a copy of its **[register]** record of directors and officers **[referred to in section 215 of the Companies Act]**.”. 30

**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, section 40 of Act 19 of 2003 and section 15 of Act 20 of 2007** 35

28. (1) Section 60 of the principal Act is hereby amended—

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

“**(1) [Each]** Without derogating from the application of sections 77 and 78 of the Companies Act, each director, chief executive officer and executive officer of a bank owes a fiduciary duty and a duty of care and skill to the bank of which such person is a director, chief executive officer or executive officer.”; 40

(b) by the substitution in subsection (1A) for the words preceding paragraph (a) of the following words: 45

“**[Each]** Without derogating from the application of sections 77 and 78 of the Companies Act, each director, chief executive officer and executive officer of a bank owes a duty towards the bank to—”;

(c) by the substitution in subsection (1B) for paragraph (a) of the following paragraph: 50

“(a) The Registrar may institute action in terms of section 77 of the Companies Act or section 424 of the Companies Act, 1973 (Act 61 of 1973), against any director, chief executive officer or executive of the

Bank who was knowingly a party to the carrying out of the business of the bank in the manner envisaged in that section.”;

(d) by the addition in subsection (5) to paragraph (a) of the following proviso:

“: Provided that the Registrar may return the written notice to the bank concerned on the grounds that it is incomplete or that it contains an error, in which case the requirement for the Registrar to object to the appointment within a period of 20 working days is stayed”; and

(e) by the addition of the following subsection:

“(8) A bank or a controlling company shall not appoint any person to a position of, or refer to any employee as, a director unless that person or employee has been appointed as a director of that bank or controlling company in terms of section 66 of the Companies Act.”.

(2) The provisions of subsection (1)(e) come into force on a date 12 months after the date on which this Act takes effect.

**Amendment of section 61 of Act 94 of 1990, as amended by section 14 of Act 9 of 1993 and section 42 of Act 19 of 2003**

**29.** Section 61 of the principal Act is hereby amended—

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

“Notwithstanding the provisions of [**Chapter X**] Part C of Chapter 3 of the Companies Act—”;

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

“(2) A bank or a controlling company shall within 30 days of the appointment in accordance with the provisions of [**Chapter X**] Part C of Chapter 3 of the Companies Act of a person as auditor thereof, apply to the Registrar on the prescribed form for the Registrar’s approval of such appointment.”;

(c) by the substitution in subsection (3)(b) for subparagraph (iii) of the following subparagraph:

“(iii) is under investigation by the [**Public Accountants’ and Auditors’ Board**] Independent Regulatory Board for Auditors; or”;

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

“(5) A person appointed under subsection (4) as auditor of a bank shall for the purpose of [**Chapter X**] Part C of Chapter 3 of the Companies Act be deemed to have been so appointed as auditor at the immediately preceding annual general meeting of the bank.”.

**Amendment of section 62 of Act 94 of 1990, as amended by section 25 of Act 9 of 1993**

**30.** Section 62 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection:

“(1) If a bank for any reason fails to appoint an auditor the Registrar may, notwithstanding the provisions of sections [**269(4) and 271(1)**] 90 and 91 of the Companies Act make the necessary appointment.”.

**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, section 40 of Act 26 of 1994, section 43 of Act 19 of 2003 and section 16 of Act 20 of 2007**

**31.** Section 63 of the principal Act is hereby amended by the substitution in subsection (1) for paragraph (a) of the following paragraph:

“(a) shall, whenever such auditor furnishes, in terms of section 20(5)(b) of the first-mentioned Act, the [**Public Accountants’ and Auditors’ Board**] Independent Regulatory Board for Auditors with copies of the report, acknowledgement of receipt and reply and with the other particulars referred to in that section, relating to an irregularity or suspected irregularity in the conduct of the affairs of the bank for which such auditor has been appointed as auditor, also furnish the Registrar with such copies and particulars; and”.

**Amendment of section 64 of Act 94 of 1990, as substituted by section 17 of Act 20 of 2007**

32. Section 64 of the principal Act is hereby amended—

- (a) by the deletion in subsection (2) of the word “and” at the end of paragraph (a) and the insertion after paragraph (a) of the following paragraphs: 5
- “(aA) in accordance with section 90 of the Companies Act, nominate a registered auditor who is independent of the bank or controlling company for appointment as an auditor of the bank or controlling company, as the case may be;
- (aB) determine the terms of engagement of, and the fees to be paid to, the auditor; 10
- (aC) ensure that the appointment of the auditor complies with the provisions of the Companies Act and any other legislation relating to the appointment of auditors;
- (aD) determine, subject to the provisions of the Companies Act, the nature and extent of any non-audit services that the auditor may provide to the bank or controlling company, as the case may be, or that the auditor shall not provide to the bank or controlling company, or a related company as defined in the Companies Act; 15
- (aE) pre-approve any proposed agreement with the auditor for the provision of non-audit services to the bank or controlling company, as the case may be; 20
- (aF) prepare a report, to be included in the annual financial statements for that financial year—
- (i) describing how the audit committee carried out its functions; 25
- (ii) stating whether the audit committee is satisfied that the auditor was independent of the bank or the controlling company, as the case may be; and
- (iii) commenting on the financial statements, the accounting practices and the internal financial control of the bank or the controlling company, as the case may be; 30
- (aG) receive and shall appropriately deal with any concerns or complaints, whether from within or outside the bank or controlling company, as the case may be, or on its own initiative, relating to—
- (i) the accounting practices and internal audit of the bank or controlling company; 35
- (ii) the content or auditing of the financial statements of the bank or controlling company;
- (iii) the internal financial controls of the bank or controlling company; or 40
- (iv) any other related matter;
- (aH) make submissions to the board of directors on any matter concerning the accounting policies of, financial control of, records of and reporting by the bank or controlling company;
- (aI) perform any other function determined by the board of directors, including the development and implementation of a policy and plan for a systematic, disciplined approach to evaluate and improve the effectiveness of risk management, control, and governance processes within the bank or controlling company; and”;
- (b) by the insertion after subsection (2) of the following subsections: 50
- “(2A) Nothing in this section precludes the appointment by a company at its annual general meeting of an auditor other than one nominated by the audit committee: Provided that if such an auditor is appointed, the appointment is valid only if the audit committee is satisfied that the proposed auditor is independent of the company. 55
- (2B) In considering whether, for the purposes of subsections (2)(aA) and (2A), a registered auditor is independent of a company, the audit committee of that company must—
- (a) ascertain whether or not that auditor receives any direct or indirect remuneration or other benefit from the bank or controlling company, except— 60
- (i) as auditor; or

- (ii) for rendering such other services to the bank or controlling company as are permitted in terms of subsection (6)(d);
  - (b) consider whether or not the auditor’s independence may have been prejudiced—
    - (i) as a result of any—
      - (aa) previous appointment as auditor; or
      - (bb) consultancy, advisory or other work undertaken by the auditor for the bank or controlling company; and
    - (ii) by taking into account any other criteria relating to independence or conflict of interest that are prescribed by the Independent Regulatory Board for Auditors established by the Auditing Profession Act, 2005 (Act No. 26 of 2005), in respect of the bank or controlling company and, if the bank or controlling company is a member of a group of companies, any other company within that group.
- (2C) Neither the appointment nor the duties of an audit committee reduce the powers and duties of the board or the directors of the company, except in respect of the appointment, fees and terms of engagement of the auditor.
- (2D) A company shall pay all expenses reasonably incurred by its audit committee, including the fees of any consultant or specialist engaged by the audit committee to assist it in the performance of any of its functions.”; and
- (c) by the insertion after subsection (3) of the following subsection:
    - “(3A) Notwithstanding the provisions of the Companies Act, the board of a bank or controlling company, as the case may be, must appoint a person to fill any vacancy on the audit committee within 90 business days after the vacancy arises.”.

**Insertion of section 64C in Act 94 of 1990**

33. The following section is hereby inserted in the principal Act after section 64B: 30

**“Remuneration committee**

- 64C.** (1) Subject to subsection (3), the board of directors of a bank or controlling company shall establish a remuneration committee, consisting only of non-executive directors of the bank or controlling company.
- (2) The functions of the remuneration committee shall be to assist the board of directors—
- (a) to oversee the compensation system’s design and operation;
  - (b) to exercise competent and independent judgment on compensation policies, processes and practices and the incentives created for managing risk, capital and liquidity;
  - (c) to evaluate practices by which compensation is paid for potential future revenues in respect of which the timing and likelihood of realization remain uncertain;
  - (d) to ensure that all relevant decisions are consistent with an assessment of the bank or controlling company’s financial condition and future prospects;
  - (e) to work closely with the bank or controlling company’s risk and capital management committee in the evaluation of the incentives created by the compensation system;
  - (f) to ensure that the bank or controlling company’s compensation policy, processes and procedures are in compliance with the relevant requirements specified in the Regulations and such further requirements as may be specified in writing by the Registrar;
  - (g) to conduct an annual compensation review independently of management, which review shall, among other things, assess the bank or controlling company’s compliance with the Regulations and such further requirements as may be specified in writing by the Registrar;
  - (h) to ensure that the remuneration of employees in the risk control and compliance functions is determined independently of all relevant



business areas, and is adequate to attract qualified and experienced staff; and

- (i) to ensure that performance measures are based principally on the achievement of the board approved objectives of the bank or controlling company and its relevant functions.

(3) The Registrar may upon written application exempt the board of directors of a bank from the duty to appoint a remuneration committee in respect of a bank if the Registrar is satisfied that the remuneration 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 remuneration committee in respect of that bank.”.

**Amendment of section 65 of Act 94 of 1990, as amended by section 25 of Act 9 of 1993**

34. Section 65 of the principal Act is hereby amended— 15

- (a) by the substitution in subsection (1) for paragraphs (b), (c) and (d) of the following paragraphs, respectively:

“(b) gives notice to the **[Registrar of Companies]** Commissioner in terms of section **[170(2)] 23(3)(b)(ii)** of the Companies Act of any intended change in the situation of its registered office **[or of its postal address]**;

(c) forwards in terms of section **[216(2)] 70(6)** of the Companies Act a **[return]** notice referred to in that section regarding its directors to the **[Registrar of Companies]** Commissioner; or

(d) forwards in terms of section **[302(4)] 33** of the Companies Act, financial statements to the **[Registrar of Companies]** Commissioner.”; and

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

“(2) A bank or controlling company shall within 30 days after a general meeting with shareholders, forward to the Registrar a copy of the minutes to be kept in respect of such meeting in terms of section **[204] 24(3)(d)** of the Companies Act.”.

**Amendment of section 68 of Act 94 of 1990, as amended by section 16 of Act 9 of 1993, section 42 of Act 26 of 1994, section 9 of Act 36 of 2000 and section 46 of Act 19 of 2003**

35. Section 68 of the principal Act is hereby amended—

- (a) by the substitution for the heading of the following heading:

**“Special provisions relating to winding-up [or judicial management] of bank”;**

- (b) by the insertion after subsection (2) of the following subsection: 40

“(2A) During the winding-up of a company which is a bank—

(a) a copy of any resolution or application for such winding up, together with all accompanying documentation including every affidavit confirming the facts stated therein, shall be lodged with the Registrar and with the Master, or if there is no Master at the seat of the Court, an officer in a public service designated for such purpose by the Master by notice in the *Gazette*; and

(b) the Registrar or the Master or officer contemplated in paragraph (a) may report to the Court any facts ascertained by such Registrar, Master or officer which appear to such Registrar, Master or officer to justify the Court in postponing the hearing or dismissing the application, and shall transmit a copy of that report to the applicant concerned or the agent of such applicant and to the company concerned.”;

- (c) by the deletion in subsection (3) of paragraph (a); 55

- (d) by the substitution in subsection (3) for paragraph (b) of the following paragraph:
- “(b) of section 357 of the Companies Act, 1973 (Act No. 61 of 1973), subsection (3) of that section shall be deemed to have been amended to read as follows: 5
- “(3) A copy of every special resolution for the voluntary winding-up of any company which is a bank, passed under section **[349]** 80 of the Companies Act, 2008 (Act No. 71 of 2008), and of every order of court amending or setting aside the proceedings in relation to the winding up shall, within 14 10 days after registration of the resolutions **[in terms of section 200]** with the Commission established in terms of section 189 of the Companies Act, 2008, or the making of an order, be transmitted by that company to the officers and registrars referred to in paragraph (a), (b) and (c) of subsection (1) as well as to the Registrar **[of Banks]**”; and 15
- (e) by the substitution in subsection (5) for the words following paragraph (b) of the following words:
- “and the Registrar, the Master of the High Court, the provisional liquidator or liquidator, respectively, shall, until the affairs of the public 20 company of which the registration as a bank has been so suspended, cancelled or terminated have been completely wound up as contemplated in section **[419(1)] 82(1)** of the Companies Act or until the winding-up is stayed or set aside by an order of a competent court continue to exercise their respective powers and to perform their respective duties under this 25 section or in terms of the Companies Act, in respect of the public company of which the registration as a bank has been so suspended, cancelled or terminated, as if such suspension, cancellation or termination had not taken place.”.

**Amendment of section 69 of Act 94 of 1990, as amended by section 8 of Act 42 of 1992, section 17 of Act 9 of 1993, section 43 of Act 26 of 1994, section 6 of Act 55 of 1996, section 10 of Act 36 of 2000 and section 47 of Act 19 of 2003** 30

- 36.** Section 69 of the principal Act is hereby amended—
- (a) by the substitution in subsection (1) for paragraph (a) of the following paragraph: 35
- “(a) If, in the opinion of the Registrar, any bank will be unable to repay, when legally obliged to do so, deposits made with it or will probably be unable to meet any other of its obligations, the Minister may, if he or she deems it desirable in the public interest, **[with the written consent of]** by notifying the chief executive officer or the chairperson of the board of directors of that bank in writing, appoint a curator to the bank.”; 40
- (b) the substitution in subsection (2B) for paragraph (a) of the following paragraph:
- “(a) subject to the supervision of the Registrar, conduct the 45 management contemplated in subsection (2A) (a) in such a manner as the Registrar may deem to best promote the interests of the creditors of the bank concerned and of the banking sector as a whole and the rights of employees in accordance with relevant labour legislation.”;
- (c) the substitution in subsection (2C)(b) for the words preceding subparagraph (i) of the words: 50
- “Except in the circumstances contemplated in paragraph (a) the curator may not, notwithstanding the provisions of section **[228]** 112 of the Companies Act—”; and
- (d) by the substitution in subsection (3) for paragraph (f) of the following paragraph: 55
- “(f) to make and carry out, in the course of the curator’s management of the bank concerned, any decision which in terms of the provisions of the Companies Act or the bank’s memorandum of incorporation would have been required to be made by way of a special resolution 60

contemplated in section [199] 65 of the said Act and in terms of the bank's memorandum of incorporation;".

**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, section 49 of Act 19 of 2003 and section 20 of Act 20 of 2007** 5

37. Section 70 of the principal Act is hereby amended—
- (a) by the substitution in subsection (2)(a) for the words preceding subparagraph (i) of the following words:
- “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]** common equity tier 1 capital, additional tier 1 capital and tier 2 capital and its common equity tier 1 unimpaired reserve funds, additional tier 1 unimpaired reserve funds and tier 2 unimpaired reserve funds in the Republic does not at any time amount to less than the greater of—”; 10 15
- (b) by the substitution in subsection (2)(b)(i) for the words preceding item (aa) of the following words:
- “the sum of the bank's **[primary share]** common equity tier 1 capital and [primary] common equity tier 1 unimpaired reserve funds shall, in the calculation of the aggregate amount which the bank is in terms of paragraph (a) required to maintain, be—”; 20
- (c) by the substitution in subsection (2)(b)(ii) for the words preceding item (aa) of the following words:
- “(ii) the sum of the bank's **[secondary]** additional tier 1 capital and [secondary] additional tier 1 unimpaired reserve funds shall, in the calculation of the aggregate amount which the bank is in terms of paragraph (a) required to maintain, be—”; 25
- (d) by the deletion in subsection (2)(b) of the proviso to subparagraph (ii);
- (e) by the addition in subsection (2) to paragraph (b) of the following subparagraph: 30
- “(iii) the sum of the bank's tier 2 capital and tier 2 unimpaired reserve funds shall, in the calculation of the aggregate amount which the bank is in terms of paragraph (a) required to maintain, be— 35
- (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.”;
- (f) by the substitution in subsection (2A)(a) for the words preceding subparagraph (i) of the following words: 40
- “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]** common equity tier 1 capital, additional tier 1 capital and tier 2 capital, and its common equity tier 1 unimpaired reserve funds, additional tier 1 unimpaired reserve funds and tier 2 unimpaired reserve funds in the Republic does not at any time amount to less than the greater of—”; 45
- (g) by the substitution in subsection (2A)(b)(i) for the words preceding item (aa) of the following words: 50
- “the sum of the bank's **[primary share]** common equity tier 1 capital and [primary] common equity tier 1 unimpaired reserve funds shall, in the calculation of the aggregate amount which the bank is in terms of paragraph (a) required to maintain, be—”; 55
- (h) by the substitution in subsection (2A)(b)(ii) for the words preceding item (aa) of the following words: 60
- “the sum of the bank's **[secondary]** additional tier 1 capital and [secondary] additional tier 1 unimpaired reserve funds shall, in the calculation of the aggregate amount which the bank is in terms of paragraph (a) required to maintain, be—”; 60
- (i) by the deletion in subsection (2A)(b) of the proviso to subparagraph (ii);

- (j) by the substitution in subsection (2A)(b)(iii) for the words preceding item (aa) of the following words:  
 “the sum of a bank’s **[tertiary] tier 2 capital and tier 2 unimpaired reserve funds** shall, in the calculation of the aggregate amount which the bank is in terms of paragraph (a) required to maintain, be—”; 5
- (k) by the deletion in subsection (2A)(b) of the proviso to subparagraph (iii);
- (l) by the substitution in subsection (2A)(b) for subparagraph (iv) of the following subparagraph:  
 “(iv) the total amount of allocated and qualifying **[secondary] common equity tier 1 capital, allocated and qualifying [secondary] common equity tier 1 unimpaired reserve funds [and tertiary capital], allocated and qualifying additional tier 1 capital, allocated and qualifying additional tier 1 unimpaired reserve funds, allocated and qualifying tier 2 capital and allocated and qualifying tier 2 unimpaired reserve funds** shall be determined as prescribed.”; 10 15
- (m) by the substitution in subsection (2B)(a) for the words preceding subparagraph (i) of the following words:  
 “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] common equity tier 1 capital, additional tier 1 capital and tier 2 capital and its common equity tier 1 unimpaired reserve funds, additional tier 1 unimpaired reserve funds and tier 2 unimpaired reserve funds** in the Republic does not at any time amount to less than the greater of—”; 20 25
- (n) by the substitution in subsection (2B)(b)(i) for the words preceding item (aa) of the following words:  
 “the sum of the bank’s **[primary share] common equity tier 1 capital and [primary] common equity tier 1 unimpaired reserve funds** shall, in the calculation of the aggregate amount which the bank is in terms of paragraph (a) required to maintain, be—”; 30
- (o) by the substitution in subsection (2B)(b)(ii) for the words preceding item (aa) of the following words:  
 “the sum of the bank’s **[secondary] additional tier 1 capital and [secondary] additional tier 1 unimpaired reserve funds** shall, in the calculation of the aggregate amount which the bank is in terms of paragraph (a) required to maintain, be—”; 35
- (p) by the deletion in subsection (2B)(b) of the proviso to subparagraph (ii);
- (q) by the substitution in subsection (2B)(b)(iii) for the words preceding item (aa) of the following words:  
 “the sum of a bank’s **[tertiary] tier 2 capital and tier 2 unimpaired reserve funds** shall, in the calculation of the aggregate amount which the bank is in terms of paragraph (a) required to maintain, be—”; 40
- (r) by the deletion in subsection (2B)(b) of the proviso to subparagraph (iii); and
- (s) by the substitution in subsection (2B)(b) for subparagraph (iv) of the following subparagraph:  
 “(iv) the total amount of allocated and qualifying **[secondary] common equity tier 1 capital, allocated and qualifying [secondary] common equity tier 1 unimpaired reserve funds [and tertiary capital], allocated and qualifying additional tier 1 capital, allocated and qualifying additional tier 1 unimpaired reserve funds, allocated and qualifying tier 2 capital and allocated and qualifying tier 2 unimpaired reserve funds** shall be determined as prescribed.”. 45 50

**Amendment of section 70A of Act 94 of 1990, as substituted by section 21 of Act 20 of 2007** 55

38. Section 70A of the principal Act is hereby amended—

- (a) by the substitution in subsection (1) for paragraph (a) of the following paragraph:  
 “(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] common equity tier 1 capital, additional tier 1 capital and tier 2 capital, and its common** 60

- equity tier 1 unimpaired reserve funds, additional tier 1 unimpaired reserve funds and tier 2 unimpaired reserve funds 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) by the substitution in subsection (2)(a) for the words preceding subparagraph (i) of the following words:  
 “[**primary share**] common equity tier 1 capital and [**primary**] common equity tier 1 unimpaired reserve funds shall be—”;
- (c) by the substitution in subsection (2)(b) for the words preceding subparagraph (ii) of the following words:  
 “[**secondary**] additional tier 1 capital and [**secondary**] additional tier 1 unimpaired reserve funds shall be—”;
- (d) by the deletion in subsection (2)(b) of the proviso to subparagraph (ii);
- (e) by the substitution in subsection (2)(c) for the words preceding subparagraph (i) of the following words:  
 “[**tertiary**] tier 2 capital and tier 2 unimpaired reserve funds shall be—”;  
 and
- (f) by the deletion in subsection (2) of the proviso to paragraph (c).

**Substitution of section 72 of Act 94 of 1990, as amended by section 10 of Act 42 of 1992, section 25 of Act 9 of 1993, section 14 of Act 36 of 2000 and section 50 of Act 19 of 2003**

39. The following section is hereby substituted for section 72 of the principal Act:

**“Minimum liquid assets**

72. (1) A bank shall hold in the Republic level one high-quality liquid assets to a value which does not amount to less than the sum of amounts, calculated as prescribed percentages, but which in no instance may exceed 20 per cent, of such different categories of its liabilities as may be specified by regulation with reference to the time when such liabilities fall due or with reference to any other aspect pertaining to such liabilities.

(2) The amounts of the level one high-quality liquid assets and of the liabilities referred to in subsection (1) shall be calculated in such manner and be determined at such times as may be prescribed.

(3) A bank shall not pledge or otherwise encumber any portion of the level one high-quality liquid assets held by it in compliance with the provisions of subsection (1): Provided that the Registrar may, exempt a bank from the prohibition contained in this subsection on such conditions and to such an extent and for such a period as the Registrar may determine.

(4) For the purposes of this section securities which constitute ‘level one high-quality liquid assets’ as defined in section 1 shall be valued as prescribed.”.

**Amendment of section 79 of Act 94 of 1990, as substituted by section 26 of Act 20 of 2007**

40. Section 79 of the principal Act is hereby amended—
- (a) by the substitution in subsection (1) for paragraph (a) of the following paragraph:  
 “(a) sections [74 and 75] 35(2) and 36 of the Companies Act notwithstanding, issue shares of no par value or convert any of its shares into shares of no par value;”;
- (b) by the substitution in subsection (1)(b) for the words following subparagraph (iii) of the following words:  
 “that will qualify as [**primary**] common equity tier 1 capital, [**secondary**] additional tier 1 capital or [**tertiary**] tier 2 capital, as the case may be;”;
- (c) by the deletion in subsection (1) of paragraph (d); and
- (d) by the substitution for subsection (3) of the following subsection:

“(3) Notwithstanding anything to the contrary contained in any contract or in the memorandum of **[association or articles of association]** incorporation 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 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]** for members of ordinary shares and each holder of an ordinary share in a bank or controlling company shall be entitled to that proportion of the total votes in the bank or controlling company which the aggregate amount of the nominal value of the shares held by him or her bears to the aggregate amount of the nominal value of all the shares issued by such bank or controlling company.”

**Amendment of section 84 of Act 94 of 1990, as amended by section 60 of Act 19 of 2003 and section 28 of Act 20 of 2007**

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

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

“(1) Simultaneously with the issuing of a direction under section 83(1), or as soon thereafter as may be practicable, the Registrar shall by a letter of appointment signed by him or her appoint a person (hereinafter in this section referred to as the **[manager] repayment administrator**) to manage and control the repayment of money in compliance with the direction by the person subject thereto: Provided that the Registrar may afford the person subject to the directive a reasonable period of time to devise and implement an alternative plan of action that is in the interests of the investors and to which the Registrar has no objection.”;

(b) by the substitution in subsection (1A) for paragraphs (a) and (b) of the following paragraphs, respectively:

“(a) The **[manager] repayment administrator** shall at the request of the Registrar, as soon as may be practicable report to the Registrar whether or not the person subject to the relevant direction is, in the **[manager’s] repayment administrator’s** opinion, solvent, and if the **[manager] repayment administrator** finds that the person subject to the direction is insolvent, the **[manager] repayment administrator** shall comment on whether such person is technically or legally insolvent.

(b) On appointment of a **[manager] repayment administrator** and whilst the person is subject to the relevant direction **[is under management]** as contemplated in this section—

(i) the **[manager] repayment administrator** 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] legal process documentation** on the Registrar.”;

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

“(d) The Master shall, subject to section 370 of the Companies Act, 1973 (Act 61 of 1973), appoint the person nominated by the Registrar as liquidator or trustee.”;

(d) by the substitution in subsection (1A)(e) for the words preceding the proviso of the following words:

“Any written report to the Registrar by an inspector appointed in terms of section 83 or any report by a **[manager] repayment administrator** appointed in terms of **[section 84]** this section is confidential and shall not be disclosed to any person”;

- (e) by the substitution for subsections (2) and (3) of the following subsections, respectively:
- “(2) The Registrar shall serve a copy of the letter of appointment referred to in subsection (1) upon the person subject to the relevant direction, and such person shall, with effect from the date of the letter of appointment, be prohibited from disposing of or otherwise dealing with such of the assets of such person as are specified in the letter of appointment, except with the written permission of the **[manager] repayment administrator**. 5
- (3) The **[manager] repayment administrator** shall act under the control of the Registrar, and the **[manager] repayment administrator** may from time to time apply to the Registrar for instructions in regard to any matter arising out of or in connection with the performance of his or her duties in terms of subsection (4).”;
- (f) by the substitution in subsection (4) for the words preceding paragraph (a) of the following words:
- “It shall be the duty of the **[manager] repayment administrator**—”;
- (g) by the substitution in subsection (4)(a) for the words preceding subparagraph (i) of the following words:
- “to conduct such further investigation into the affairs or any part of the affairs of the person subject to the direction as the **[manager] repayment administrator** may deem necessary in order to establish—”;
- (h) by the substitution in subsection (4)(a) for subparagraph (iv) of the following subparagraph:
- “(iv) any other fact which in the opinion of the Registrar or the **[manager] repayment administrator** needs to be established in order to facilitate the repayment of such money in terms of the relevant direction;”;
- (i) by the substitution in subsection (4) for paragraphs (c) and (d) of the following paragraphs, respectively:
- “(c) to report the suspected commission by any person of any offence of which the **[manager] repayment administrator** becomes aware in the course of the performance of his or her duties as **[manager] repayment administrator** in terms of this section, to the responsible prosecuting authorities having jurisdiction in the area in which such offence is so suspected of having been committed; and 30
- (d) to perform any other function assigned to the **[manager] repayment administrator** by the Registrar in connection with the finalization of the repayment of money in accordance with the relevant direction.”;
- (j) by the substitution for subsections (5), (6), (7) and (8) of the following subsections, respectively:
- “(5) For the purposes of the performance of the duties as set out in subsection (4), the **[manager] repayment administrator** shall, in relation to the person subject to the relevant direction and in relation to the affairs of that person, have the powers conferred by sections 4 and 5 of the Inspection of Financial Institutions Act, 1998 (Act No. 80 of 1998), upon an inspector contemplated in those sections, as if the **[manager] repayment administrator** were an inspector and the person subject to the direction were a financial institution contemplated in those sections. 50
- (6) The **[manager] repayment administrator** shall in respect of the services rendered by him or her in terms of this section and the responsible inspector or inspectors shall in respect of an inspection referred to in section 83(1) conducted under section 12 of the South African Reserve Bank Act, 1989 (Act No. 90 of 1989), be paid such remuneration by the Registrar as the Registrar may determine, and the Registrar may recover an amount equal to the remuneration so paid from the person subject to the direction or the inspection, as the case may be. 55
- (7) The **[manager] repayment administrator** shall hold office until the relevant direction has been fully complied with, but the Registrar may at any time in writing withdraw the appointment of the **[manager] repayment administrator** on good cause shown, whereupon the **[manager] repayment administrator** shall vacate his or her office. 60

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

**Amendment of section 86 of Act 94 of 1990, as amended by section 61 of Act 19 of 2003**

42. Section 86 of the principal Act is hereby amended by the substitution in subsection (2) for paragraphs (a) and (b) of the following paragraphs, respectively:
- “(a) certificates of provisional or final registration or of the registration of an alteration of the memorandum of association or articles of association applied for in terms of the Companies Act, 1973 (Act No. 61 of 1973), or of the memorandum of incorporation or of a change of name of banks and of controlling companies;
  - (b) memorandums of association or articles of association approved under the Companies Act, 1973 (Act No. 61 of 1973), or memorandums of incorporation of banks and of controlling companies; and”.

**Amendment of section 87 of Act 94 of 1990, as amended by section 25 of Act 9 of 1993**

43. Section 87 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection:
- “(1) Notwithstanding anything to the contrary contained in any law or the common law, and unless otherwise provided in the memorandum of **[association or articles of association]** incorporation of a bank, a minor over the age of 16 years or a married woman, whether or not under marital power, may be a depositor with a bank and may without the consent or assistance of his guardian or her husband, as the case may be, execute all necessary documents, give all necessary acquittances and cede, pledge, borrow against, and generally deal with, his or her deposit as he or she thinks fit, and shall enjoy all the privileges and be liable to all the obligations and conditions applicable to depositors.”.



**Substitution of section 88 of Act 94 of 1990, as substituted by section 62 of Act 19 of 2003**

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

**“Limitation of liability**

88. No liability shall attach to the South African Reserve Bank or, either 5  
in his or her official or personal capacity, to any member of the board of  
directors of the said Bank, the Registrar or any other officer or employee of  
the said Bank, including an inspector duly appointed in terms of section 11  
or 12 of the South African Reserve Bank Act, 1989 (Act No. 90 of 1989),  
or to a repayment administrator duly appointed in terms of section 84 of this 10  
Act, for any loss sustained by or damage caused to any person as a result of  
anything done or omitted by such member, the Registrar or such other  
officer or employee in the *bona fide* performance of any function or duty  
under this Act.”.

**Amendment of section 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, section 16 of Act 36 of 2000, section 65 of Act 19 of 2003 and section 32 of Act 20 of 2007** 15

45. Section 91 of the principal Act is hereby amended by the substitution in subsection (1) for paragraph (b) of the following paragraph:

“(b) contravenes or fails to comply with a provision of section 7(3), (4) or (5), 20  
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),”.

**Short title**

46. This Act is called the Banks Amendment Act, 2012. 25

## MEMORANDUM ON OBJECTS OF BANKS AMENDMENT BILL, 2012

### 1. BACKGROUND TO BILL

1.1 The mission of the South African Reserve Bank's Bank Supervision Department ("BSD") is to promote the soundness of the banking system and to contribute to financial stability. A sound banking system and financial stability are two of the prerequisites for the attainment of the mission of the South African Reserve Bank ("SARB") which is "the achievement and maintenance of price stability".

1.2 In order to promote the soundness of the banking system it is imperative that the regulation and supervision of banks are based on international standards and best practice. The framework for the regulation and supervision of banks and bank controlling companies in South Africa are contained in the following tiers of legislation:

1.2.1 Banks Act, 1990 (Act No. 94 of 1990) (the "Banks Act");

1.2.2 Regulations relating to Banks<sup>1</sup> (the "Regulations");

1.2.3 Directives issued by the Registrar of Banks (the "Registrar") in terms of section 6(6) of the Banks Act.

1.3 In order to facilitate the implementation of Basel II, both the Banks Act and the Regulations were comprehensively amended during 2007, which amendments became effective on 1 January 2008.

1.4 During October 2006, the Basel Committee on Banking Supervision ("BCBS") of the Bank for International Settlements issued a revised version of their Core Principles for Effective Banking Supervision (the "Core Principles"). The BSD thoroughly assessed its compliance with the revised Core Principles and identified a number of shortcomings in the legal framework and supervisory process.

1.5 During 2008, the BSD was subjected to and involved in a number of international assessments, namely—

- a voluntary pilot project by the World Bank to assess BSD's implementation of Basel II;
- a scheduled Financial Sector Assessment Programme by the World Bank and the International Monetary Fund ("IMF");
- a scheduled assessment of South Africa's compliance with anti-money laundering and the combat of terrorist financing recommendations of the Financial Action Task Force.

Although the reports pertaining to the above-mentioned assessments have been favourable in general, there are some areas of the legal framework that needed attention to fully comply with the stated standards and requirements.

1.6 The BSD has participated in working groups that were established by National Treasury in order to comment on and implement proposals by the G20 working groups that were established to deal with the causes and effects of the global financial crises.

1.7 Apart from the developments internationally, the BSD has to take cognizance of the developments within the banking industry, the markets and new or amending legislation that might have an effect on banks and banking regulation or supervision.

1.8 During July 2009 the BCBS issued the three papers that are aimed at providing revised guidelines to supervisors in implementing the Basel II framework. The BSD has designated staff members to study these papers and to respond to them within certain prescribed time-lines. The papers are as follows:

1.8.1 Revisions to the Basel II market risk framework;

1.8.2 Guidelines for computing capital for incremental risk in the trading book; and

1.8.3 Proposed enhancements to the Basel II framework.

1.9 The Companies Act, 2008 (Act No. 71 of 2008) (the "2008 Companies Act"), was promulgated in April 2009 and took effect on 1 May 2011.

1.9.1 Since banks are also public companies, the amendments brought about by the 2008 Companies Act have a profound impact on both the business of banks and the regulatory framework governing banks.

1.9.2 The BSD commissioned an external legal consultant to conduct a thorough comparison of the 2008 Companies Act with the Banks Act in order to advise the BSD of the various changes and possible impact on the Banks Act.

<sup>1</sup> GNR.3 of 1 January 2008, published in Government *Gazette* No. 30629.

1.10 As a result of the on-going global financial crisis and requirements set by the Financial Stability Board at their various meetings during 2009 and 2011, the BCBS issued further prescriptions relating to banking supervision in a document entitled “Basel III: a global regulatory framework for more resilient banks and banking systems” (“Basel III”) during December 2010, which was revised in July 2011. The prescriptions relate mainly to the strengthening of the global capital framework and liquidity standards for banks. These prescriptions have necessitated the insertion of a number of definitions contained in the Banks Act.

## 2. OBJECTS OF BILL

The objects of the Bill are to—

- 2.1 align its provisions to the 2008 Companies Act;
- 2.2 comply further with the requirements of the BCBS; and
- 2.3 align the Banks Act to changing supervisory policy, market developments and certain practical considerations.

## 3. PROPOSED AMENDMENTS TO BANKS ACT

### 3.1 Definitions (section 1(1))

3.1.1 Inserting definitions of “additional tier 1 capital” and “additional tier 1 unimpaired reserve funds” in compliance with Basel III.

3.1.2 Inserting a definition of the “Basel Committee on Banking Supervision”.

3.1.3 Inserting the definition of “Commissioner” contained in the 2008 Companies Act and the consequent substitution of the word “Registrar of Companies” with “Commission” wherever such term appears in the Banks Act, being sections 15(3), 51(2)(c), 54(8), 54(8A), 56(1), 56(4), 57(3), 65(1)(b), 65(1)(c) and 65(1)(d).

3.1.4 Inserting definitions of “common equity tier 1 capital” and “common equity tier 1 unimpaired reserve funds” in compliance with Basel III.

3.1.5 Updating the definition of “Companies Act”.

3.1.6 The obsolete reference to the Co-operatives Act, 1981 (Act No. 91 of 1981), in the definition of “co-operative” needs to be replaced with the correct reference, namely “Co-operatives Act, 2005 (Act No. 14 of 2005)”.

3.1.7 Inserting a definition of “control” with reference to section 2(2) of the 2008 Companies Act.

3.1.8 Although no amendment is strictly required, it is proposed that the definition of “director” be amended to be in line with the 2008 Companies Act, as this definition can only cast the regulatory net wider and increase the ability of the Registrar to regulate directors of banks and controlling companies.

3.1.9 The expression “as contemplated in paragraph (a), (b) or (c) of the definition of ‘controlling company’ in section 1 of the Companies Act” needs to be deleted from paragraph (b) of the definition of “domestic shareholder”. These provisions refer to in the expression have not existed in the repealed Companies Act, 1973 (Act No. 61 of 1973 (the “1973 Companies Act”), for quite some time and do not appear in the 2008 Companies Act.

3.1.10 The expression “sections 286 and 288” in the definition of “financial statements” refers to the 1973 Companies Act and needs to be substituted with the expression “section 30” which is the analogous section in the 2008 Companies Act.

3.1.11 The expression “section 1 (4)” in the definition of “holding company” refers to the 1973 Companies Act and needs to be substituted with a reference to section 1, being the analogous section in the 2008 Companies Act.

3.1.12 Replacing the definition of “liquid assets” with a definition of “level one high-quality liquid assets” in compliance with Basel III.

3.1.13 Inserting a definition of “level two high-quality liquid assets” in compliance with Basel III.

3.1.14 Deleting the definitions of “primary share capital” and “primary unimpaired reserve funds”.

3.1.15 Inserting a definition of “public company” as defined in the 2008 Companies Act.

3.1.16 Deleting the definition of “Registrar of Companies”, as it has become obsolete.

3.1.17 Replacing an obsolete reference in the definition of “Regulations relating to branches”, with an updated one, namely “Government Gazette No. 30627 of 1 January 2008”.

3.1.18 Replacing the definitions of “secondary capital” and “secondary unimpaired reserve funds” with definitions of “tier 2 capital” and “tier 2 unimpaired reserve funds” respectively, in compliance with Basel III.

3.1.19 Amending the definition of “subsidiary” to comply with the 2008 Companies Act.

3.1.20 Deleting the definition of “tertiary capital” in compliance with Basel III.

3.1.21 Section 1(1A)(b)(iii) of the Banks Act is amended to refer to the 1973 Companies Act. In terms of item 9(1) of Schedule 5 to the 2008 Companies Act, section 421(1) (and Chapter XIV) of the 1973 Companies Act continue to apply with respect to the winding-up and liquidation of companies in terms of the 2008 Companies Act until such time as the Minister, by notice in the *Government Gazette*, determines otherwise. The reference in section 1 (1A)(b)(iii) should be to section 424 of the 1973 Companies Act.

3.1.22 The Banks Act is amended by the substitution for the expression “memorandum of association and articles of association” of the expression “memorandum of incorporation” wherever such expression appears in section 15(3), section 16(2)(b)(i), section 17(1)(c), section 18(2), section 32(1)(b), section 44(2)(c), heading of section 56, section 56(1)(a), section 56(4), section 56(5)(a), heading of section 57 section 57(1), section 57(3), section 79(3), section 86(2)(a) and (b) and section 87(1). These amendments are necessary in order to ensure that obsolete terminology is not used in the Banks Act.

### **3.2 Exclusions from application of Banks Act (section 2)**

The references to “Public Investment Commissioners” and the “Public Investment Commissioners Act, 1984” are obsolete and need to be amended to refer to the “Public Investment Corporation Act, 2004 (Act No. 23 of 2004)”.

### **3.3 Powers of inspection of, and guidelines by, Registrar (section 6)**

3.3.1 Section 6(4), (5) and (6) provides that the Registrar may issue circulars, guidance notes and directives to banks, controlling companies, eligible institutions (rating agencies) and auditors.

3.3.2 The section, however, does not include representative offices, and it is hereby proposed to include representative offices.

### **3.4 Annual report by Registrar (section 10)**

It is proposed to amend the wording of section 10(2) in order to state the provision in plain language.

### **3.5 Granting and refusal of application for authorisation (section 13)**

3.5.1 It is proposed that additional requirements relating to the foreign consolidating supervisor are inserted when a foreign institution applies for registration as a bank.

3.5.2 This amendment is necessitated by a comment made in the joint assessment report of the IMF and World Bank (2010) relating to the BSD’s compliance with the revised Basel Core Principles.

### **3.6 Use of name “bank” (section 22)**

It is proposed that the provisions of section 22 also be made applicable to representative offices.

### **3.7 Cancellation or suspension of registration by Registrar (section 23) and Notice by Registrar of intention to cancel or suspend registration (section 24)**

3.7.1 The IMF is of the opinion that there are severe limitations on the Registrar’s authority to cancel or suspend a bank’s licence. These constraints limit the Registrar’s ability to act decisively in case of emerging problems at a bank; in particular the delay of at least 30 days between the announcement of such measures and their actual application. The IMF also states that while it may be more appropriate to consult with

the Minister before cancelling or suspending a bank licence, the final decision should rest with the Registrar.

3.7.2 Sections 23 and 24 of the Banks Act contain provisions relating to the grounds and process to be followed when the registration of a bank is cancelled or suspended. It requires, amongst others, that the Registrar addresses a written notice to a bank affording it 30 days to show cause why its registration should not be cancelled. In addition it requires that the actual suspension or deregistration should be done with the consent of the Minister.

3.7.3 It is proposed that sections 23 and 24 be amended to afford the Registrar the power to suspend a bank's registration on the grounds set out in section 23 after consultation with the Minister of Finance and to cancel the registration after affording such a bank a 30 day period to reply to the Registrar's intention to cancel the registration.

3.7.4 It is furthermore proposed that a provision be inserted to provide that a material contravention and conviction of the Financial Intelligence Centre Act, 2001 (Act No. 38 of 2001), is a cause for the suspension or cancellation of the registration of a bank. This amendment is necessitated by a recommendation made by the Financial Action Task Force in their report following an assessment of anti-money laundering measures in South Africa during 2008.

### **3.8 Cancellation of registration at request of bank (section 27)**

3.8.1 In terms of the 2008 Companies Act, companies are entitled to vary the thresholds and requirements for "special resolutions".

3.8.2 A company may, in its Memorandum of Incorporation ("MOI"), provide that a special resolution shall be passed if supported by 60 per cent of the votes.

3.8.3 Further, a company's MOI can provide for a different percentage threshold with respect to different matters (so long as there is always a margin of 10 per cent between the highest ordinary resolution threshold—which can never be less than 50 per cent—and the lowest special resolution threshold).

3.8.4 In addition, the 2008 Companies Act and the draft regulations, contain no provision for the procedure for the registration of special resolutions (presumably this will be dealt with in the final draft regulations which are yet to be published).

3.8.5 The amendment specifies a 75 per cent requirement for the passing of special resolutions.

### **3.9 Cancellation of registration upon winding-up (section 28)**

The reference in section 28 of the Banks Act to section 419(1) of the Companies Act needs to be replaced with the reference to the analogous section of the 2008 Companies Act, namely section 82(1).

### **3.10 Publication of information relating to banks, controlling companies, eligible institutions and representative offices of foreign institutions and the keeping of records by the Registrar (section 30)**

3.10.1 This section needs to be amended to make reference to the concept of a "merger" (introduced in the 2008 Companies Act).

3.10.2 In addition, the reference to Chapter XII (of the 1973 Companies Act) needs to be replaced with the analogous Chapter in the 2008 Companies Act, namely Chapter 5.

### **3.11 Registration of shares in name of nominees (section 38)**

3.11.1 The reference to the Unit Trust Control Act, 1981 (Act No. 54 of 1981), needs to be replaced with the Collective Investment Schemes Control Act, 2002 (Act No. 45 of 2002).

3.11.2 The references to the Stock Exchanges Control Act, 1985 (Act No. 1 of 1985), and the Safe Deposit of Securities Act, 1992 (Act No. 85 of 1992), need to be replaced with the Securities Services Act, 2004 (Act No. 36 of 2004).

3.11.3 Section 38 provides that no person can hold shares in a bank or controlling company, other than the beneficial shareholders, save with the consent of the Registrar, or in terms of certain listed exceptions. One of these exceptions is when those shares are held by a curator, executor etc. There does not seem to be an analogous section to section

103(3) of the 1973 Companies Act in the 2008 Companies Act. It is therefore proposed that the substance of section 103(3) of the 1973 Companies Act be incorporated into section 38(2)(b) of the Banks Act.

### **3.12 Application for registration as controlling company (section 43)**

3.12.1 There is no definition of “controlling company” in either the 1973 Companies Act or in the 2008 Companies Act.

3.12.2 The expression “controlling company” in subsection (1)(b) needs to be replaced with the expression “holding company” as that expression is defined in the 2008 Companies Act and because the applicant (holding company) will only become a “controlling company” (bank) when its application has been approved in terms of the provisions of the Banks Act.

### **3.13 Cancellation of registration at request of controlling company (section 47)**

3.13.1 In terms of the 2008 Companies Act, companies are entitled to vary the thresholds and requirements for “special resolutions”.

3.13.2 A company may, in its MOI provide that a special resolution shall be passed if supported by 60 per cent of the votes.

3.13.3 Furthermore, a company’s MOI can provide for a different percentage threshold with respect to different matters (so long as there is always a margin of 10 per cent between the highest ordinary resolution threshold—which can never be less than 50 per cent—and the lowest special resolution threshold).

3.13.4 The amendment specifies a 75 per cent requirement for the passing of special resolutions.

### **3.14 Application of Companies Act to banks and controlling companies (section 51)**

Banks cannot be subject to Chapter 6 of the 2008 Companies Act, which deals with Business Rescue, because the Banks Act has specific provisions that deal with a bank that has financial difficulty, namely those contained in sections 68 and 69 of the Banks Act. It is therefore proposed that in order to avoid confusion a provision is included stating that banks is not subject to sections 128 to 155 of the 2008 Companies Act.

### **3.15 Subsidiaries, branch offices, other interests and representative offices of banks and controlling companies (section 52)**

3.15.1 Section 52 of the Banks Act provides that banks and controlling companies require the Registrar’s prior written approval, amongst others, when acquiring an interest in any business undertaking outside the Republic.

3.15.2 Since the provision has a wide application and since banks and controlling companies have experienced some difficulty in conducting certain businesses abroad, it is proposed that the Registrar be afforded the power to issue a directive to specify under which circumstances a mere notification of a transaction would suffice.

### **3.16 Compromises, amalgamations, arrangements and other affected transactions (section 54)**

3.16.1 The 2008 Companies Act does not provide for “compromises” and hence the term needs to be deleted from section 54.

3.16.2 Section 54 also needs to be amended to make reference to the concept of a “merger” (introduced in the 2008 Companies Act).

3.16.3 In addition, the reference to Chapter XII (of the 1973 Companies Act) needs to be replaced with a reference to the analogous section in the 2008 Companies Act, namely Chapter 5.

3.16.4 The reference to Chapter XVA of the 1973 Companies Act needs to be replaced with the reference to the analogous section of the 2008 Companies Act, namely Chapter 5.

3.16.5 In addition to the reference to Chapter 5, reference should also be made to the Takeover Regulation Panel defined in the 2008 Companies Act as the “Panel”, and the new Takeover Regulations.

### **3.17 Reconstruction within group of companies (section 55)**

The reference in section 55(a) of the Banks Act to section 288(1) of the 1973 Companies Act needs to be replaced with the reference to the analogous section of the 2008 Companies Act, namely section 30.

### **3.18 Alteration of memorandum of association or articles of association (section 56)**

3.18.1 The references in section 56(1)(a) of the Banks Act to sections 55, 56 and 62 of the 1973 Companies Act need to be replaced with the reference to the analogous section of the 2008 Companies Act, namely section 16.

3.18.2 The reference in section 56(1)(b) of the Banks Act to section 44 of the 1973 Companies Act needs to be replaced with the reference to the analogous section of the 2008 Companies Act, namely section 16(8).

3.18.3 The references to “Registrar of Companies” and “memorandum of association or articles of association” need to be replaced by references to “Commission” and “memorandum of incorporation”, respectively.

### **3.19 Alteration of memorandum of association or articles of association in accordance with direction of Registrar (section 57)**

3.19.1 The reference in section 57 of the Banks Act to section 179 of the 1973 Companies Act needs to be replaced with the reference to the analogous section of the 2008 Companies Act, namely section 61(7).

3.19.2 The references to “Registrar of Companies” and “memorandum of association or articles of association” need to be replaced by references to “Commission” and “memorandum of incorporation”, respectively.

### **3.20 Information regarding directors and officers (section 58)**

3.20.1 The reference in section 58 of the Banks Act to section 215 of the 1973 Companies Act needs to be deleted.

3.20.2 The expressions “directors” and “public officers” are already defined in the Banks Act and reference to section 215 of the 1973 Companies Act may lead to confusion as it made reference to the record of directors and officers whereas the analogous section (section 24(3)(b)) of the 2008 Companies Act only makes reference to the record of directors.

### **3.21 Directors and officers of bank or controlling company (section 60)**

3.21.1 References to sections 77 and 78 of the 2008 Companies Act relating to the liability of directors need to be included in section 60 of the Banks Act.

3.21.2 In terms of item 9(1) of Schedule 5 to the 2008 Companies Act, section 419 (and Chapter XIV) of the 1973 Companies Act should continue to apply with respect to the winding-up and liquidation of companies in terms of the 2008 Companies Act until such time as the Minister, by notice in the Government *Gazette*, has determined otherwise. In this regard, the reference to section 424 of the 1973 Companies Act needs to be retained.

3.21.3 A number of notifications to the National Treasury in respect of appointments as directors or executive officers of banks or controlling companies are incomplete and may contain errors. The current practice is to return those notifications to the bank or controlling company concerned with a notification that the period of 20 working days will be stayed and will only be applicable again when a proper amended notification is received. It is proposed that subsection (5)(c) be amended to provide for this already existing practice.

3.21.4 It has come to the notice of the National Treasury that some banks have established management structures that contain post classifications of directors in cases

where such persons have not been appointed in terms of the provisions of the Companies Act. The Banks Act and Regulations relating to Banks contain specific references to directors and stipulate the rights, duties and obligations of those directors comprehensively. The use of the title “director” in relation to a post or person that has not been established or appointed as such in terms of the Companies Act could potentially lead to confusion and uncertainty as to the status, rights, duties and obligations of such person. It is proposed that a provision be inserted to provide that banks may have positions of or refer to employees as directors only when they have been appointed as directors in terms of section 66 of the 2008 Companies Act.

3.21.5 As a result of practical and legal issues to reverse the above-mentioned structures by some banks, it is suggested that the provision comes into force 12 months from date of promulgation of this Bill.

### **3.22 Appointment of auditor (section 61)**

3.22.1 The reference to Chapter X of the 1973 Companies Act in section 61 of the Banks Act needs to be replaced with a reference to the analogous section of the 2008 Companies Act, namely Chapter 3.

3.22.2 The reference to the “Public Accountants’ and Auditors’ Board” in section 61 of the Banks Act must be replaced with a reference to the “Independent Regulatory Board for Auditors”.

### **3.23 Appointment of auditor by Registrar (section 62)**

The reference in section 62 of the Banks Act to sections 269(4) and 271(1) of the 1973 Companies Act must be replaced with a reference to the analogous sections of the 2008 Companies Act, namely sections 90 and 91.

### **3.24 Functions of auditors in relation to Registrar (section 63)**

The reference to ‘the “Public Accountants’ and Auditors’ Board” ’ in section 63 of the Banks Act must be replaced with a reference to ‘the “Independent Regulatory Board for Auditors” ’.

### **3.25 Audit Committee (section 64)**

3.25.1 The amendments proposed to section 64 of the Banks Act effectively seek to combine the requirements in the 2008 Companies Act and the Banks Act in respect of an audit committee in one comprehensive clause.

3.25.2 Due to a number of processes and requirements applicable to the appointment of members to an audit committee by banks and controlling companies, the period of 40 days appears to be inadequate. It is proposed that the period is increased to 90 days.

### **3.26 Remuneration Committee (section 64C)**

It is proposed that the establishment of a remuneration committee should be prescribed by the Banks Act for banks and controlling companies, hence by the insertion of a new section 64C.

### **3.27 Forwarding of certain notices, reports, returns and financial statements to registrar (section 65)**

It is proposed that the references to the sections of the 1973 Companies Act in section 65 of the Banks Act be replaced by references to the analogous sections of the 2008 Companies Act.



### **3.28 Special provisions relating to winding-up or judicial management (section 68)**

3.28.1 Section 68 of the Banks Act does not deal with judicial management, and hence it is proposed that it should be removed from the heading of that section.

3.28.2 It is also suggested that section 68 of the Banks Act be amended so as to provide that any application, resolution and all accompanying papers for any winding up of a company which is a bank must be lodged with the Registrar prior to any such winding up order being made.

3.28.3 Section 357 of the 1973 Companies Act continues to apply and it is proposed that section 68(3)(b) should be amended to make reference to the fact that this is a section in the 1973 Companies Act.

3.28.4 Section 349 of the 1973 Companies Act has been repealed and the reference to that section should be replaced, with a reference to the analogous provision in the 2008 Companies Act, namely section 80.

3.28.5 The reference to section 419 in section 68(5)(b) of the Banks Act should likewise be replaced with a reference to the analogous section in the 2008 Companies Act, namely section 82(1).

### **3.29 Appointment of curator to bank (section 69)**

3.29.1 The IMF (in their assessment report on compliance with the Core Principles) recommended that the Registrar's powers be increased with regard to the appointment of a curator to a bank in terms of section 69 of the Banks Act.

3.29.1.1 Section 69 provides that a curator may be appointed by the Minister of Finance with the written consent of the CEO or Chairperson of the bank concerned.

3.29.1.2 The IMF is of the opinion that the requirements relating to the CEO or Chairperson hamper the ability of the Registrar to act decisively when a bank encounters serious difficulty.

3.29.1.3 It is recommended that section 69 of the Banks Act should be amended to replace the requirement of having to obtain the written consent of the CEO or Chairperson of the bank concerned with a written notification.

3.29.2 The reference in section 69(2C)(b) of the Banks Act to section 228 of the 1973 Companies Act needs to be replaced with a reference to the analogous section of the 2008 Companies Act, namely section 112.

3.29.3 The reference in section 69(3)(f) of the Banks Act to section 199 of the 1973 Companies Act needs to be replaced with a reference to the analogous section of the 2008 Companies Act, namely section 65.

3.29.4 Since there is a great deal of additional flexibility in relation to the manner in which a company may regulate special resolutions in the MOI of the company, a reference to the MOI has been included in section 69.

### **3.30 Minimum share capital and unimpaired reserve funds (section 70)**

The proposed amendments seek to align the definitions of certain classes of capital and unimpaired reserve funds with Basel III.

### **3.31 Minimum capital and reserve funds in respect of a banking group (section 70A)**

The proposed amendments seek to also align the definitions of certain classes of capital and unimpaired reserve funds in this section with Basel III.

### **3.32 Minimum liquid assets (section 72)**

The proposed amendments seek to align the definitions of certain classes of liquid assets with Basel III.

### **3.33 Shares, debentures, negotiable certificates of deposit, share warrants and promissory notes or similar instruments (section 79)**

3.34.1 Section 79(1)(a) of the Banks Act indicates that banks may not issue shares of no par value or convert shares into shares of no par value. The 2008 Companies Act, in section 35, actually does away with the concept of par value shares (except when it

comes to banks which are specifically carved out from the ambit of section 35). The reference in section 79(1)(a) of the Banks Act must be replaced by the analogous section in the 2008 Companies Act, namely section 35 (containing the reference to par value shares) and section 36 (referring to the authorisation and reclassification of shares).

3.33.2 An amendment to section 79(1)(b) to reflect the definitions of certain classes of capital prescribed by Basel III is also proposed.

3.33.3 The 2008 Companies Act makes no reference to share warrants, and it is proposed that section 79(1)(d) of the Banks Act should be deleted.

3.33.4 Section 79(3) of the Banks Act makes it clear that there shall be no differentiation in any of the ordinary shares of a bank and then refers to section 195(1) of the 1973 Companies Act which provides that in respect of all public companies, a member shall—

- if the share capital is divided into shares of par value, be entitled to that proportion of the total votes in the company which the aggregate amount of the nominal value of the shares held by him bears to the aggregate amount of the nominal value of all the shares issued by the company;
- if the share capital is divided into shares of no par value, be entitled to one vote in respect of each share he holds.

3.33.5 There is no analogous provision in the 2008 Companies Act restricting differentiated voting rights for members of ordinary shares in public companies. Section 37(1) of the 2008 Companies Act provides that all the shares of the same class have the same rights “except to the extent that the MOI provides otherwise”. In order to maintain the status quo in respect of the voting rights of the ordinary shares of banks, it is proposed that section 79(3) be amended to incorporate into section 79(3) of the Banks Act the provisions of section 195(1) of the 1973 Companies Act.

### **3.34 Management and control of repayment of money unlawfully obtained (section 84)**

3.34.1 The appointment of a “manager” to control and manage the repayment process once a directive has been issued to this effect seems to be confusing to members of the public and others. The term “manager” is interpreted to mean manager of the company, which is not the case. The proposal is to substitute the term “manager” with the term “repayment administrator” to avoid any possible confusion.

3.34.2 Section 84(1A)(a) of the Banks Act provides that a manager (“repayment administrator”) should report on the insolvency of the person under investigation. This requirement has caused a number of legal and practical difficulties in recent investigations and is somewhat superfluous, in light of the fact that where person is unable to repay when directed to do so, it is already regarded as an act of insolvency in terms of section 83(3)(b) of the Banks Act. It is proposed that such a report only be submitted at the request of the Registrar.

3.34.3 In a number of cases the National Treasury has afforded the person being investigated an opportunity to present it with a plan of repayment or conversion. Although senior counsel’s opinion is that the forbearance could be justified on the facts in the majority of cases, it could be challenged in others. It is proposed that section 84 of the Banks Act should be amended to specify the options that may be exercised once a directive to repay has been issued. It is proposed that a proviso to this effect be added to section 84(1) of the Banks Act.

3.34.4 In terms of item 9(1) of Schedule 5 to the 2008 Companies Act, section 419 (and Chapter XIV) of the 1973 Companies Act continues to apply with respect to the winding-up and liquidation of companies in terms of the 2008 Companies Act until such time as the Minister, by notice in the *Government Gazette*, has determined otherwise. In this regard, reference will need to be made to section 370 of the 1973 Companies in section 84 (1A)(d) of the Banks Act.

### **3.35 Limitation of liability (section 88)**

3.35.1 A legal opinion concluded that the wording of section 88 of the Banks Act is somewhat vague when it comes to the limitation of liability of duly appointed inspectors in respect of the investigation of illegal deposit-taking schemes and managers in respect of the repayment of money illegally obtained.

3.35.2 It is proposed that the term “other officer” be expressly extended to include the above-mentioned inspectors and managers.

#### **4. ORGANISATIONS AND INSTITUTIONS CONSULTED**

4.1 The provisions of the Bill have 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.

4.2 Consultation with various stakeholders was undertaken over a period of a year on the various proposals. The stakeholders include—

- The National Treasury;
- The Financial Services Board;
- The Banking Association;
- Individual banks;
- National Credit Regulator;
- Financial Intelligence Centre;
- Auditing firms;
- The Competition Commission; and
- Auditor General

#### **5. FINANCIAL IMPLICATIONS FOR STATE**

The Bill will not have significant financial implications for the State.

#### **6. PARLIAMENTARY PROCEDURE**

6.1 The State Law Advisers and the National Treasury are of the opinion that this Bill must be dealt with in terms of the procedure established by the provisions of section 75 of the Constitution of the Republic of South Africa, 1996, since it contains no provision to which the procedure set out in section 74 or 76 of the Constitution applies.

6.2 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 the provisions 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.