

REPUBLIC OF SOUTH AFRICA

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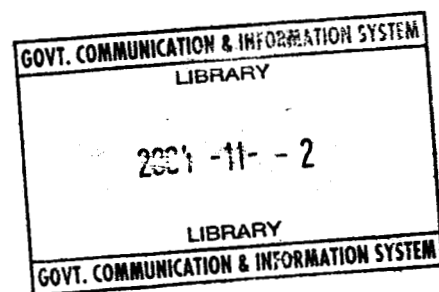
# NATIONAL PAYMENT SYSTEM AMENDMENT BILL

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*(As amended by the Portfolio Committee on Finance (National Assembly))*  
*(The English text is the official text of the Bill)*

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(MINISTER OF FINANCE)



[B 14D—2004]

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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 National Payment System Act, 1998, so as to provide for the withdrawal of recognition of a payment system management body by the South African Reserve Bank; to provide for designated settlement systems; to enable payments to third persons; and to provide for the issuance of directives by the South African Reserve Bank; 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 78 of 1998

1. Section 1 of the National Payment System Act, 1998 (hereinafter referred to as the principal Act), is hereby amended—

(a) by the insertion after the definition of “clear” or “clearing” of the following definitions:

“ **‘clearing, netting and settlement agreements’** means written agreements with regard to clearing, netting or settlement, concluded between Reserve Bank settlement system participants or designated settlement system participants;

**‘Companies Act’** means the Companies Act, 1973 (Act No. 61 of 1973);

**‘designated settlement system’** means a settlement system designated in terms of section 4A;

**‘designated settlement system operator’** means the person specified in the notice referred to in section 4A(5) as the operator of that system;

**‘designated settlement system participant’** means—

(a) a person that is a participant in the designated settlement system in accordance with the rules governing the operation of the system; or

(b) a person that is an operator of the designated settlement system;”;

(b) by the substitution for the definition of “netting” of the following definition:

“ **‘netting’** means the determination of the nett payment obligations between two or more settlement system participants within a payment clearing house or the determination of the nett settlement obligations between two or more settlement system participants within **[the payment]** a settlement system;”;

(c) by the substitution for the definition of “payment clearing house” of the following definition:

“ **‘payment clearing house (PCH)’** means an arrangement between two or more Reserve Bank settlement system participants, excluding a desig-

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nated settlement system operator, governing the clearing or netting of payment instructions between those Reserve Bank settlement system participants;”;

- (d) by the substitution for the definition of “payment instruction” of the following definition: 5  
 “**‘payment instruction’** means an instruction to [a system participant to] transfer funds or make a payment;”;
- (e) by the substitution for the definition of “payment obligation” of the following definition: 10  
 “**‘payment obligation’** means an indebtedness that is owed by one settlement system participant to another as a result of the clearing of one or more payment instructions;”;
- (f) by the substitution for the definition of “payment system” of the following definition: 15  
 “**‘payment system’** means a system that enables payments to be effected [between a payer and a beneficiary] or facilitates the circulation of money and includes any instruments and procedures that relate to the system;”;
- (g) by the insertion after the definition of “payment system management body” of the following definition: 20  
 “**‘PCH system operator’** means a person, other than a designated settlement system operator, that clears on behalf of any two or more Reserve Bank settlement system participants;”;
- (h) by the substitution for the definition of “person” of the following definition: 25  
 “**‘person’** includes a trust;”;
- (i) by the insertion after the definition of ‘Reserve Bank’ of the following definitions: 30  
 “**‘Reserve Bank settlement system’** means a settlement system established and operated by, or under the control of, the Reserve Bank;  
**‘Reserve Bank settlement system participant’** means—  
 (a) the Reserve Bank;  
 (b) a bank, a mutual bank or a branch of a foreign institution; or  
 (c) a designated settlement system operator, that participates in the Reserve Bank settlement system;  
**‘settlement’** means the discharge of settlement obligations;”;
- (j) by the substitution for the definition of “settlement instruction” of the following definition: 35  
 “**‘settlement instruction’** means an instruction given to [the] a settlement system by a settlement system participant or by a [payment clearing house] PCH system operator on behalf of a Reserve Bank settlement system participant to effect settlement [of one or more payment obligations or to discharge any other obligation of one system participant to another system participant];”;
- (k) by the substitution for the definition of “settlement obligation” of the following definition: 40  
 “**‘settlement obligation’** means an indebtedness that is owed by one settlement system participant to another as a result of one or more settlement instructions;”;
- (l) by the substitution for the definition of “settlement system” of the following definition: 50  
 “**‘settlement system’** means a system [established and operated by the Reserve Bank] for the discharge of payment or settlement obligations or the discharge of payment and settlement obligations between [system] participants in that system;”;
- (m) by the insertion after the definition of “settlement system” of the following definition: 55  
 “**‘settlement system participant’** means—  
 (a) a Reserve Bank settlement system participant; or  
 (b) a designated settlement system participant;”;
- (n) by the insertion after the definition of “South African Reserve Bank Act” of the following definition: 60  
 “**‘systemic risk’** means the risk that failure of one or more settlement system participants, for whatever reason, to meet their payment

obligations or their settlement obligations may result in any or all of the other settlement system participants being unable to meet their respective payment or settlement obligations.”;

- (o) by the substitution for the definition of “system operator” of the following definition:

“ ‘**system operator**’ means a person, other than a designated settlement system operator, authorised in terms of section 4(2)(c) **[authorised by the payment system management body]** to provide **[clearing processing]** services **[on behalf of]** to any two or more **[system participants or a payment clearing house]** persons in respect of payment instructions.”; and

- (p) by the deletion of the definition of “system participant”.

#### Amendment of section 2 of Act 78 of 1998

2. Section 2 of the principal Act is hereby amended by the substitution for paragraph (b) of subsection (3) of the following paragraph:

“(b) may at any time be withdrawn in writing by **[that] the** board.”.

#### Amendment of section 3 of Act 78 of 1998

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

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

“(2) The Reserve Bank may recognise a payment system management body as contemplated in subsection (1) if **[that Bank] the Reserve Bank** is satisfied that—

- (a) the payment system management body, as constituted, fairly represents the interests of **[all banks, mutual banks and branches of foreign institutions participating in the payment system] its** members;
- (b) the deed of establishment or constitution, as the case may be, and the rules of the payment system management body, including the rules relating to admission as members of that body, are fair, equitable and transparent; and
- (c) **[it] the payment system management body will [be enabled] enable the Reserve Bank to adequately oversee the affairs of the payment system management body and its members and will assist the Reserve Bank in the discharge of the Reserve Bank’s responsibilities, specified in section 10(1)(c)(i) of the South African Reserve Bank Act, regarding the monitoring, regulation and supervision of payment, clearing and settlement systems.”;**

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

“(2A) (a) The Reserve Bank may, if it is no longer satisfied that the payment system management body complies with the requirements specified in subsection (2) and after it has consulted with the members of the payment system management body, withdraw its recognition of the payment system management body.

(b) Such withdrawal of recognition will in no way affect any arrangements made, including rules and agreements, or authorisations given by the payment system management body prior to such withdrawal, unless otherwise determined by the Reserve Bank.”;

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

“(3) Besides the Reserve Bank, the following may also be members of a payment system management body:

- (a) A bank, mutual bank or branch of a foreign institution; and
- (b) an institution or body referred to in section 2 of the Banks Act, 1990, and in paragraph (dd)(i) of the definition of ‘the business of a bank’ in section 1 of that Act,

that complies with the entrance and other applicable requirements laid down in the rules of the payment system management body.”;

- (d) by the insertion of the following subsection after subsection (3):

“(3A) The institutions or bodies referred to in subsection (3)(b) that comply with the entrance criteria for limited membership as

- recommended by the payment system management body and approved by the Reserve Bank in terms of section 4(2)(c)(i), may be granted limited membership by such a payment system management body.”;
- (e) by the substitution for subsection (4) of the following subsection:
- “(4) No **[body, member of that body or any other person]** person may participate in the Reserve Bank settlement system unless—
- (a) such person is the Reserve Bank, a bank, a mutual bank or a branch of a foreign institution and, in the case [of that] where a payment system management body[, the body is] has been recognised by the Reserve Bank as [a payment system management body in terms of] contemplated in subsection (1), such person is a member of the payment system management body so recognised; or
- (b) **[in the case of that other person, the person is a member of a payment system management body recognised by the Reserve Bank as contemplated in paragraph (a)]** such person is a designated settlement system operator.”; and
- (f) by the addition of the following subsection:
- “(5) No person may be allowed to clear as contemplated in section 4(2)(d)(i) unless, in the case where a payment system management body has been recognised by the Reserve Bank as contemplated in subsection (1), such person is a member of the payment system management body so recognised.”.

#### Amendment of section 4 of Act 78 of 1998

4. Section 4 of the principal Act is hereby amended—
- (a) by the substitution, in subsection (1), for the words preceding paragraph (a) of the following words :
- “The objects of the payment system management body are to organise, manage and [control] regulate, in relation to its members, all matters affecting payment [obligations and the clearing or netting of payment obligations] instructions and, in connection with those objects—”;
- (b) by the substitution for subsection (2) of the following subsection:
- “(2) In addition to any other provisions thereof, the rules of the payment system management body must empower that body—
- (a) to admit members and to regulate, control and, with the approval of the Reserve Bank, terminate membership;
- (b) to constitute, establish or dissolve any body, committee or forum consisting of its members and which has an impact on, [interfaces] interacts with, has access to or makes use of payment, clearing or settlement systems or operations;
- (c) to—
- (i) [determine the] recommend for approval by the Reserve Bank, criteria subject to which any person is granted limited membership of the payment system management body or is to be authorised to act as a system operator or a PCH system operator within [the] a payment system [in order to provide specific services to one or more members of the payment system management body or to act on behalf of those members]; and
- (ii) authorise that person to act as [such] a system operator or PCH system operator in accordance with those criteria; and
- (d) to [determine] recommend for approval by the Reserve Bank criteria subject to and in accordance with which a member that is also a Reserve Bank settlement system participant may be authorised to [introduce any person to provide payment services.]—
- (i) allow a bank, mutual bank or branch of a foreign institution that is not a Reserve Bank settlement system participant to clear; or
- (ii) clear on behalf of a bank, a mutual bank or a branch of a foreign institution that is not a Reserve Bank settlement system participant;

Provided that the member shall settle payment obligations on behalf of such bank, mutual bank or branch of a foreign institution referred to in subparagraphs (i) and (ii)."

#### Insertion of section 4A in Act 78 of 1998

5. The following section is hereby inserted in the principal Act after section 4:

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#### "Designated settlement systems

**4A. (1)** The Reserve Bank may designate a settlement system if such designation is in the interest of the integrity, effectiveness, efficiency or security of the payment system.

(2) In considering the designation of any settlement system, the Reserve Bank may require from the settlement system—

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- (a) the rules of the settlement system; and
- (b) any additional information it may deem appropriate.

(3) In considering the designation of a settlement system, the Reserve Bank may have regard to any or all of the following matters:

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- (a) The purpose and scope of the settlement system;
- (b) the rules of the settlement system;
- (c) any laws or regulatory requirements relating to the operation of the settlement system, and the extent to which the settlement system complies with those laws or regulatory requirements;
- (d) the importance of the settlement system to the national financial and payment system;
- (e) any other matters that the Reserve Bank considers appropriate.

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(4) The Reserve Bank must designate a settlement system as a designated settlement system for purposes of this Act by notice in the *Gazette* and give written notice of such designation to the designated settlement system operator.

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(5) The notice in the *Gazette* must specify—

- (a) the settlement system that is the subject of the designation;
- (b) the person who is the operator of the settlement system that is the subject of the designation; and
- (c) any terms and conditions to which the designation is subject.

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(6) The Reserve Bank may vary or revoke any designation made under subsection (4)—

- (a) by amending or revoking any condition to which the designation is subject; or
- (b) by making the designation subject to a new condition or new conditions.

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(7) In determining whether or not to vary or revoke a designation, the Reserve Bank may have regard to the matters mentioned in subsection (3) or any or all of the following:

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- (a) Any failure to comply with any condition to which the designation is subject;
- (b) whether or not the designated settlement system has ceased to operate;
- (c) whether or not the designated settlement system operator has knowingly furnished information or documents which are false or misleading in any material respect to the Reserve Bank in connection with the designation of the system;
- (d) whether or not it is in the public interest to revoke the designation;
- (e) any other matters that the Reserve Bank considers appropriate.

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(8) (a) No variation of the conditions to which a designation is subject or revocation of designation shall have retroactive effect.

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(b) The variation or revocation shall not affect the validity or enforceability of the rules of the designated settlement system, nor shall it affect any payment to or out of the account of a settlement system participant or netting or settlement that took place, prior to the coming into effect of the variation or revocation.

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(9) The Reserve Bank shall, after having given written notice to the designated settlement system operator, vary or revoke the designation of the settlement system by notice in the *Gazette*."

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## Substitution of section 5 of Act 78 of 1998

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

### “Settlement provision

5. (1) Settlement is effected in money or by means of entries passed through the Reserve Bank settlement system or a designated settlement system. 5

(2) A settlement that has been effected in money or by means of an entry to the credit of the account maintained by a settlement system participant in the Reserve Bank settlement system or a designated settlement system is final and irrevocable and may not be reversed or set aside. 10

(3) An entry to or payment out of the account of a designated settlement system participant to settle a payment or settlement obligation in a designated settlement system is final and irrevocable and may not be reversed or set aside.”

## Amendment of section 6 of Act 78 of 1998

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7. Section 6 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection:

“(1) No person may clear payment instructions unless that person is a **[system participant.]—**

(a) Reserve Bank settlement system participant; or 20  
(b) bank, mutual bank or branch of a foreign institution that is allowed to clear in terms of section 4(2)(d)(i).”

## Substitution of section 7 of Act 78 of 1998

8. The following section is hereby substituted for section 7 of the principal Act:

### “Payments to third persons

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7. A person may as a regular feature of that person’s business accept money or payment instructions from any other person for purposes of making payment on behalf of that other person to a third person to whom that payment is due, if—

(a) the first-mentioned person is the Reserve Bank, a bank, mutual bank, branch of a foreign institution, or a designated settlement system operator; or 30

(b) the first-mentioned person is the postal company defined in section 1 of the Post Office Act, 1958 (Act No. 44 of 1958), or the Postbank as defined in section 51 of the Postal Services Act, 1998 (Act No. 124 of 1998); or 35

(c) the money is accepted or payment made in accordance with directives issued by the Reserve Bank from time to time in terms of section 12.”

## Substitution of section 8 of Act 78 of 1998

9. The following section is hereby substituted for section 8 of the principal Act:

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### “[Netting agreements and netting rules] Curatorship or liquidation

8. (1) The provisions of this section apply despite anything to the contrary in the law relating to insolvency or in the Companies Act, the Banks Act or the Mutual Banks Act.

(2) If **[a system participant is wound up or placed under judicial management or]** a curator or similar official is appointed to a settlement system participant, the curator or similar official is bound by any— 45

(a) provision contained in [a written netting agreement] the settlement system rules or in clearing, netting and settlement agreements to which that settlement system participant is a party, or any [netting] 50  
rules and practices applicable to the settlement system participant in

relation to such agreements[, is binding upon the liquidator, judicial manager or curator as the case may be, in respect of any payment or settlement obligation —

- (a) which has been determined through netting prior to the issue of the winding-up order or judicial management order or the appointment of the curator, as the case may be; and
- (b) which is to be discharged on or after the date of the winding-up order, judicial management order or the appointment of the curator, as the case may be, or the discharge of which was overdue on the date of the winding-up order, judicial management order or appointment of the curator, as the case may be.]; and

- (b) payment or settlement that is final and irrevocable in terms of section 5(2) or (3).

(3) A curator or similar official appointed to a settlement system participant may give written notice to the Reserve Bank to withdraw such participant's participation in the Reserve Bank settlement system, in which event such settlement system participant shall no longer be entitled to clear or participate in the Reserve Bank settlement system, other than for purposes of discharging payment or settlement obligations in accordance with the settlement system rules or clearing, netting and settlement agreements to which that settlement system participant is a party, or any rules and practices applicable to the settlement system participant in relation to such agreements.

(4) When an application for the winding-up of a Reserve Bank settlement system participant is made, a copy of—

- (a) the application for winding-up, when it is presented to the court; and
  - (b) any subsequent winding-up order, when it is granted,
- must be lodged with the Reserve Bank as soon as practicable.

(5) When a copy of an application for winding-up or subsequent winding-up order is lodged with the Reserve Bank in terms of subsection (4) and the Reserve Bank settlement system participant in respect of whom the copy is lodged is a designated settlement system participant, the Reserve Bank must as soon as practicable after having received the copy, notify the designated settlement system operator.

(6) If a settlement system participant is wound up, the liquidator or similar official is bound by—

- (a) any provision contained in the rules of the settlement system or in clearing, netting and settlement agreements to which that settlement system participant is a party, or any rules and practices applicable to the settlement system participant in relation to such agreements; and
- (b) any payment or settlement that is final and irrevocable in terms of section 5(2) or (3).

(7) A settlement system participant in respect of whom a copy of a winding-up order has been lodged with the Reserve Bank in terms of subsection (4) must no longer be entitled to clear or participate in any settlement system, other than for purposes of discharging payment or settlement obligations in accordance with the rules of the settlement system or clearing, netting and settlement agreements to which that settlement system participant is a party, or any rules and practices applicable to the settlement system participant in relation to such agreements.

(8) Notwithstanding any written law or rule of law, a court shall not recognise or give effect to—

- (a) an order of a court exercising jurisdiction under the law of insolvency in a place outside the Republic of South Africa; or
- (b) an act of a person appointed in a place outside the Republic of South Africa to perform a function under the law of insolvency there, in so far as the making of the order or doing of the act would be prohibited under this Act for a court in the Republic of South Africa or a curator or similar official or liquidator or similar official.”.



## Substitution of section 9 of Act 78 of 1998

10. The following section is hereby substituted for section 9 of the principal Act:

### “Utilisation of assets provided as security

9. Despite anything to the contrary in any law relating to insolvency, any asset of a settlement system participant which was provided prior to the issue of any order for that settlement system participant's winding-up by that participant to the Reserve Bank or the designated settlement system operator as security for a loan in respect of its settlement obligations, may be utilised by the Reserve Bank or the designated settlement system operator, as the case may be, to the extent required for the discharge of those settlement obligations of the settlement system participant.”

## Amendment of section 10 of Act 78 of 1998

11. Section 10 of the principal Act is hereby amended—

(a) by the substitution for subsection (1) of the following subsection: 15

“(1) The Reserve Bank has access to any information relating to [the volumes or values of payment and settlement instructions or payment and settlement obligations] a payment system and the Reserve Bank settlement system, and [system participants] any person must on request provide such information to the Reserve Bank in such form and at such times as the Reserve Bank may require.”; 20

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

“(b) identifying a specific Reserve Bank settlement system participant,”; 25

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

“(3) Despite subsection (2) of this section and section 33 of the South African Reserve Bank Act, the Reserve Bank may disclose any information of which the disclosure is necessary to protect the integrity, effectiveness or security of the payment system, or if required by law to do so;”.

## Amendment of section 11 of Act 78 of 1998

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

(a) by the substitution for subsections (2), (3), (4), (5) and (6) of the following subsections, respectively: 35

“(2) If any Reserve Bank settlement system participant considers itself [wronged] aggrieved by a decision taken by the Reserve Bank under a provision of this Act, the matter is deemed to constitute a dispute between that Reserve Bank settlement system participant and the Reserve Bank, which dispute must be settled as provided in this section. 40

(3) The Reserve Bank settlement system participant concerned must, within three (3) months after the decision of the Reserve Bank, in writing, furnish the Reserve Bank with full particulars of its grievance, and thereafter the Reserve Bank settlement system participant and the Reserve Bank must attempt to settle the dispute by consensus within seven business days of the receipt by the Reserve Bank of those particulars. 45

(4) If the Reserve Bank settlement system participant and the Reserve Bank do not succeed in settling the dispute as contemplated in subsection (3), they may agree to attempt to settle the dispute by mediation within a further period of 10 business days. 50

(5) Mediation as contemplated in subsection (4) means a process whereby—

(a) the Reserve Bank settlement system participant concerned and the Reserve Bank agree on a mediator; 55

- (b) the mediator familiarises himself or herself with the position held by the Reserve Bank settlement system participant concerned and the Reserve Bank, respectively;
- (c) the mediator, the Reserve Bank settlement system participant concerned and the Reserve Bank discuss the dispute at a meeting attended by them all; 5
- (d) the Reserve Bank settlement system participant concerned and the Reserve Bank at or following such meeting attempt to settle the dispute by consensus; and
- (e) the Reserve Bank settlement system participant concerned and the Reserve Bank share the mediator's costs equally." 10
- (6) If the Reserve Bank settlement system participant concerned and the Reserve Bank are unable to settle the dispute by consensus as contemplated in either subsection (3) or (5), the dispute must be referred— 15
- (a) to a single arbitrator to be agreed on between the Reserve Bank settlement system participant and the Reserve Bank; or
- (b) failing such agreement, to an arbitrator appointed at the request of the Reserve Bank settlement system participant and the Reserve Bank by a recognised body concerned with the facilitation and promotion of the resolution of disputes by means of mediation or arbitration." 20
- (b) by the substitution for subsection (9) of the following subsection:  
 "(9) The decision of the arbitrator is final and binding on the Reserve Bank settlement system participant concerned and the Reserve Bank." 25

#### Amendment of section 12 of Act 78 of 1998

#### 13. Section 12 of the principal Act is hereby substituted for the following section—

- "(1) The Reserve Bank may from time to time, after consultation with the payment system management body, issue directives to any person regarding a payment system or the application of the provisions of this Act. 30
- (2) In considering whether or not to issue a directive in terms of subsection (1), the Reserve Bank may have regard to any or all of the following aspects:
  - (a) That reasonable grounds exist to believe that any person is engaging in or is about to engage in any act, omission or course of conduct, with respect to the payment system, that results or is likely to result in systemic risk; 35
  - (b) that reasonable grounds exist to believe that any person is engaging in or is about to engage in any act, omission or course of conduct, with respect to the payment system that is or will be contrary to the public interest relative to the integrity, effectiveness, efficiency or security of the payment system; 40
  - (c) the public interest;
  - (d) the integrity, effectiveness, efficiency or security of the payment system;
  - (e) national financial stability;
  - (f) any other matters that the Reserve Bank considers appropriate.
- (3) The Reserve Bank may in writing, over and above any directive contemplated in subsection (1), issue a directive to a person requiring such person, within the period specified in the directive, to— 45
  - (a) cease or refrain from engaging in the act, omission or course of conduct or perform such other acts as are necessary to remedy the situation; or
  - (b) perform such acts as are necessary to comply with the directive or to effect the changes; or 50
  - (c) provide the Reserve Bank with such information and documents, relating to the matter as specified in the directive.
- (4) The provisions of this section shall not apply to a designated settlement system. 55
- (5) The Reserve Bank may, after consultation with the payment system management body, cancel in writing any previously issued directives.
- (6) In considering whether or not to cancel a directive in terms of subsection (5), the Reserve Bank must have regard to the factors referred to in subsection (2). 60

(7) No directive issued by the Reserve Bank shall have any retroactive effect.

(8) Any person who neglects, refuses or fails to comply with a directive issued under subsection (1) or (3) is guilty of an offence.

(9) (a) A directive issued in terms of subsection (1) takes effect three months after it has been issued or on such earlier date as may be determined by the Reserve Bank.

(b) A directive issued in terms of subsection (3) takes effect immediately.”.

#### Amendment of section 13 of Act 78 of 1998

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

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

“(1) Despite anything to the contrary in any [legislation] law relating to the retention of records, the Reserve Bank, Reserve Bank settlement system [and system] participants, PCH system operators and system operators must retain all records obtained by them during the course of the operation and administration of [the] a payment or Reserve Bank settlement system for a period of five years [as] from the date of each particular record.”;

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

“(2) Subsection (1) shall not apply to a designated settlement system operator, and any obligation of such a settlement system in relation to the retention of records shall be specified as a condition of the designation of such a settlement system under section 4A(5).”; and

(c) by the addition of the following subsection:

“(3) The retention of records in terms of subsection (1) may be effected as envisaged in section 16 of the Electronic Communications and Transactions Act, 2002 (Act No. 25 of 2002).”.

#### Insertion of Section 13A in Act 78 of 1998

15. The following section is hereby inserted in the principal Act after section 13:

##### “Application for court order

**13A.** Irrespective of whether criminal proceedings have been or may be instituted against a person in respect of an offence in terms of any section of this Act, the Reserve Bank may apply to a High Court having jurisdiction for an order directing a person to comply with this Act or a directive issued in terms of this Act.”.

#### Substitution of section 14 of Act 78 of 1998

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

##### “Penalties

**14.** Any person convicted of an offence referred to in—

(a) section 6(2)[, 7(5)] or [12(3)] 12(8), is liable to a fine not exceeding R1 million or to imprisonment for a period not exceeding five years, or to both such fine and such imprisonment; [or]

(b) section 10(4), is liable to a fine [not exceeding R1 000] or to imprisonment for a period not exceeding [six months] two years, or to both [such] a fine and such imprisonment.”.

#### Short title

17. This Act is called the National Payment System Amendment Act, 2004.

## **MEMORANDUM ON THE OBJECTS OF THE NATIONAL PAYMENT SYSTEM AMENDMENT BILL, 2004**

### **1. BACKGROUND**

- 1.1 The Standing Committee for the Review of the Act has reviewed the National Payment System Act, 1998 (Act No. 78 of 1998,) ("the Act") as required in terms of section 15, to cater for new developments.
- 1.2 The most important development is the proposed inclusion of the South African ("SA") Rand in the multi-currency Continuous Linked Settlement ("CLS"). Other matters include the clarification of the role of the payment system management body (currently the Payments Association of South Africa), the issuance of directives by the South African Reserve Bank ("SARB") and payments to third persons.

### **2. OBJECTS**

#### **2.1 Designated settlement systems and consequential amendments**

- 2.1.1 The Bill seeks to amend or insert certain definitions to allow designated settlement system operators (e.g. CLS Bank) to participate in the settlement system. CLS Bank will have a settlement account with the Reserve Bank to enable the Rand settlement leg in foreign exchange transactions.
- 2.1.2 The amendment of the settlement provisions is proposed to cater for finality of settlement relative to designated settlement systems (i.e. pay-ins, pay-outs and settlement in relation to CLS).
- 2.1.3 Amendments are also proposed to cater for the protection of various agreements, the rules and practices and finality of settlement in the event of curatorship or liquidation of Reserve Bank settlement system participants and designated settlement system participants. The protection will apply in relation to both South African and foreign liquidators and curators.

#### **2.2 Payment system management body and consequential amendments**

The Bill seeks to amend the Act to cater for the possibility of withdrawal of the recognition of the payment system management body by the SARB. The amendments also clarify the roles between the SARB and the payment system management body and allow limited membership to the payment system management body (i.e. limited membership by non-banks).

#### **2.3 Payments to third persons**

The provision of payment services by non-banks as envisaged in the current Act could not be implemented. The provisions relating to payments to third persons would be amended to an enabling provision. It is envisaged that directives will be issued after consultation with the payment system management body and various stakeholders. A three months grace period will be given before implementation.

#### **2.4 Directives by Reserve Bank**

The Bill seeks to amend the Act to grant wider powers to the SARB in relation to the issuance of directives, to discharge its oversight obligations and ensure the integrity, effectiveness, efficiency and security of the payment system. Directives will be issued in consultation with the payment system management body.

## **2.5 Other general amendments to provide clarity**

Miscellaneous amendments are proposed and new provisions to be inserted will clarify certain definitions, the utilisation of assets as security to the SARB or payment clearing house, access to information, settlement of disputes and retention of records.

## **3. FINANCIAL IMPLICATIONS FOR STATE**

None.

## **4. DEPARTMENTS/ORGANISATIONS CONSULTED**

Consultations were held, amongst others, with the following bodies:

The National Treasury, the Department of Trade and Industry, the Department of Communications, the banking industry, the payments industry, Payments Association of South Africa, Smart Cards Society of South Africa and the South African National Payments Forum ("SANPAY").

## **5. CONSTITUTIONAL IMPLICATIONS**

None.

## **6. PARLIAMENTARY PROCEDURE**

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