

REPUBLIC OF SOUTH AFRICA

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# BANKS 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 56B—2000]

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REPUBLIEK VAN SUID-AFRIKA

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# BANKWYSIGINGSWETSONTWERP

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*(Soos gewysig deur die Portefeuljekomitee oor Finansies (Nasionale Vergadering) (Die Afrikaanse teks is die amptelike vertaling van die Wetsontwerp)*

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(MINISTER VAN FINANSIES)

[W 56B—2000]

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## GENERAL EXPLANATORY NOTE:

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

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

# BILL

To amend the Banks Act, 1990, so as to define or further define certain expressions; to provide for the designation of more than one Deputy Registrar of Banks; to regulate the conducting of a due diligence audit of the financial condition of a bank; to substitute a process of review for a process of appeal against decisions of the Registrar of Banks; to make further provision regarding the use of a name by a bank or by a foreign institution that conducts the business of a bank by means of a branch in the Republic; to prohibit the appointment of an employee of a bank as chairperson of the audit committee of that bank or the appointment of the chairperson of the board of directors of a bank as a member of the audit committee of that bank; to do away with the process of judicial management of a bank that is in financial difficulties and, instead, to regulate the process of curatorship of such a bank more comprehensively; to increase, and to further regulate the making of regulations with regard to, the minimum capital and unimpaired reserve funds required to be maintained by a bank, including a bank of which the business includes or consists solely of trading in financial instruments; to charge the controlling company in a banking group with the responsibility to ensure the maintenance of a certain aggregate of the respective amounts of minimum capital and reserve funds required to be maintained by the respective entities constituting such banking group; to extend the Registrar of Banks' discretion to exempt a bank from the prohibition on the pledging or encumbering of its liquid assets; to introduce further safeguards in respect of large exposures constituting credit risks to banks and to apply such safeguards also to controlling companies, local branches of foreign banking institutions and foreign branches of local banks; and to create and prescribe penalties for certain further offences; and to provide for incidental matters.

**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 and section 1 of Act 55 of 1996**

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

(a) by the insertion in subsection (1) after the definition of “bank” of the following definitions:

- “ ‘banking group’ means a group consisting of two or more persons, whether natural or juristic persons, that are predominantly engaged in financial activities and one or more of which is a bank and—
- (a) each of which persons is an associate, as defined in section 37(7), of any one of the others; or
  - (b) which persons are so interconnected that should one of them experience financial difficulties, another one or all of them would likely be adversely affected,
- irrespective of whether any of those persons is domiciled in the same country as any of the others;
- ‘branch’ means an institution that is not a public company as contemplated in section 11(1), but by means of which a foreign institution conducts the business of a bank in the Republic under an authorization referred to in section 18A;
- ‘branch of a bank’ means an institution by means of which a bank conducts the business of a bank outside the Republic;”;
- (b) by the substitution in subsection (1) for the definition of “board of appeal” of the following definition:
    - ‘board of **[appeal]** review’ means the board of **[appeal]** review established by section 9(2);”;
  - (c) by the substitution in subsection (1) for paragraph (f) of the definition of “liquid assets” of the following paragraph:
    - (f) **[stocks issued under section 19 of the Exchequer Act, 1975 (Act No. 66 of 1975), with a maturity date of not more than three years to the last redemption date]** securities issued by virtue of section 66 of the Public Finance Management Act, 1999 (Act No. 1 of 1999);”;
  - (d) by the insertion in subsection (1) after the definition of “prescribed” of the following definitions:
    - “ ‘primary share capital’ means capital obtained through the issue of ordinary shares, non-redeemable non-cumulative preference shares or prescribed categories of preferred securities, excluding such ordinary shares, non-redeemable non-cumulative preference shares or prescribed categories of preferred securities issued in pursuance of the capitalization of reserves resulting from a revaluation of assets;
    - ‘primary unimpaired reserve funds’ means funds obtained from actual earnings or by way of recoveries, premiums on the issue of ordinary or non-redeemable non-cumulative preference shares or a surplus on the realization of capital assets, and which have been set aside as a general or special reserve, are disclosed as such a reserve in the financial statements of the bank concerned and are available for the purpose of meeting liabilities of or losses suffered by the bank, but does not include any fund required to be maintained in terms of any other law;”;
  - (e) by the insertion in subsection (1) after the definition of “regulation” of the following definitions:
    - “ ‘Regulations relating to Banks’ means the Regulations relating to Banks as amended or re-enacted from time to time under section 90;
    - ‘Regulations relating to Banks’ Financial Instrument Trading’ means the Regulations relating to Banks’ Financial Instrument Trading as published by Government Notice No. R.1058 of 21 August 1998, and as amended from time to time;”;
  - (f) by the insertion in subsection (1) after the definition of “Reserve Bank” of the following definitions:
    - “ ‘secondary capital’ means a prescribed percentage of capital obtained through the issue, with the prior written approval of the Registrar and in accordance with conditions approved by the Registrar in writing and on such further conditions, if any, as may be prescribed, of—
    - (a) cumulative preference shares;
    - (b) ordinary shares, or preference shares other than cumulative preference shares, issued in pursuance of the capitalization of reserves resulting from a revaluation of assets; and
    - (c) prescribed categories of debt instruments;
    - ‘secondary unimpaired reserve funds’ means—
    - (a) such funds, obtained from actual earnings or by way of recoveries, as may be prescribed and which have been set aside, but which are

- not disclosed as a general or special reserve in the financial statements of the bank concerned;
- (b) a prescribed percentage of the amount of any surplus resulting from a revaluation of assets and determined as prescribed;
  - (c) a prescribed amount of general provisions held against unidentified and unforeseen losses; and
  - (d) funds obtained by way of premiums on the issue of cumulative preference shares or debt instruments issued in accordance with the prescribed conditions, whether or not such funds are disclosed as a general or special reserve in the financial statements of the bank concerned,
- but does not include any fund required to be maintained in terms of any other law;” and
- (g) by the insertion in subsection (1) after the definition of “subsidiary” of the following definition:
- “ ‘tertiary capital’ means—
- (a) accrued current-period uncanceled net profits derived from trading activities; or
  - (b) capital obtained by means of unsecured subordinated loans negotiated, subject to such conditions as may be prescribed;”.

#### **Amendment of section 4 of Act 94 of 1990**

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

“(2) The Reserve Bank may, subject to the approval of the Minister, designate **[an officer or employee]** so many officers or employees in its service as it may deem necessary, but not exceeding four, as Deputy **[Registrar]** Registrars of Banks, who shall, subject to the control and directions of the Registrar, be competent to perform any function which the Registrar is permitted or required to perform.”.

#### **Amendment of section 7 of Act 94 of 1990, as amended by section 3 of Act 9 of 1993**

3. Section 7 of the principal Act is hereby amended by the addition of the following subsections:

- “(3) No due diligence audit of the financial condition of any bank shall be conducted without the Registrar first having been notified in writing of the intention to do so.
- (4) The person at whose request a due diligence audit of the financial condition of a bank has been conducted shall furnish the Registrar with a copy of the audit report.
- (5) No person shall without the written consent of the Registrar disclose to any other person, except to the bank whose financial condition was the subject of the due diligence audit, any information contained in a report referred to in subsection (4).”.

#### **Substitution of section 9 of Act 94 of 1990, as amended by section 2 of Act 42 of 1992, section 4 of Act 9 of 1993 and section 4 of Act 26 of 1994**

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

##### **“Review of decisions of Registrar**

9. (1) Any person aggrieved by a decision taken by the Registrar under a provision of this Act may within the prescribed period and in the prescribed manner and upon payment of the prescribed fees **[appeal against such**

**decision to the board of appeal]** apply for a review of that decision by the board of review established by subsection (2).

(2) For the purpose of this Act, there is hereby established a board of **[appeal] review** which shall consist of **[five] three** members, appointed by the Minister and of whom—

- (a) one shall be appointed on account of his knowledge of law and shall be the chairman;
- (b) **[three]** one shall be **[persons]** a person who in the opinion of the Minister **[have]** has wide experience of, and **[are]** is knowledgeable about the latest developments in, the banking industry; and
- (c) one shall be a person registered as an accountant and auditor under section 15 of the Public Accountants' and Auditors' Act, 1991 (Act No. 80 of 1991), and who in the opinion of the Minister has wide experience of, and is knowledgeable about the latest developments in, the accountants' and auditors' profession.

(2A) In any review under subsection (1), the board of review is, subject to the provisions of subsection (8), confined to establishing whether or not, in the taking of the relevant decision, the Registrar exercised his discretion properly and in good faith.

**[(3) For the purposes of the hearing of every appeal in terms of subsection (1), the board of appeal shall be constituted as follows, namely—**

- (a) the chairman;
  - (b) at least two of the members appointed under subsection (2)(b), designated by the chairman; and
  - (c) the member appointed under subsection (2)(c),
- and any reference to the board of appeal in subsections (4), (7), (8), (9), (10), (11), (12) and (13) shall be deemed to be a reference to the board of appeal as so constituted.]**

(4) If before or during **[the hearing of any appeal in terms of]** any review under subsection (1) it transpires that any member of the board of **[appeal] review** has any direct or indirect personal interest in the outcome of that **[appeal] review**, such member shall recuse himself and he shall be replaced by [—

- (a) in the case of the member referred to in subsection (2)(a), a person temporarily appointed, subject to the provisions of that subsection, by the Minister for the purposes of the hearing of that appeal;
- (b) in the case of a member referred to in subsection (2)(b), one of the other members referred to in that subsection or, if all the members referred to in subsection (2)(b) have been designated as contemplated in subsection (3)(b), a person temporarily appointed, subject to the provisions of subsection (2)(b), by the Minister for the purposes of the hearing of that appeal; or
- (c) in the case of the member referred to in subsection (2)(c), a person temporarily appointed, subject to the provisions of that subsection, by the Minister for the purposes of the hearing of that appeal] a person temporarily appointed, subject to the provisions of subsection (2), by the Minister for the purposes of the review.

(4A) If before or during any review under subsection (1), it transpires that any member of the board of review will, due to illness, absence from the Republic or for any other *bona fide* reason be unable to participate or continue to participate in that review, he shall be replaced by a person temporarily appointed, subject to the provisions of subsection (2), by the Minister for the purposes of the review.

(5) A member of the board of **[appeal] review** shall hold office for a period of three years and shall on the expiration of his term of office be eligible for reappointment.

(6) Any casual vacancy that occurs on the board of **[appeal] review** shall be filled by the appointment by the Minister, subject to the provisions of

subsection (2), of another member, and any person so appointed shall hold office for the unexpired portion of the period of office of his predecessor.

(7) **[An appeal]** A review under subsection (1) shall **[be heard]** take place on the date and at the place and time fixed by the board of **[appeal]** review, which shall **[previously]** give notice in writing **[notify]** to the **[appellant]** applicant as well as the Registrar thereof. 5

(8) The board of **[appeal]** review may for the purposes of **[an appeal lodged with it]** a review under subsection (1)—

- (a) summon any person who, in its opinion, may be able to give material information **[concerning the subject of the appeal]** for the purposes of the review or who it believes has in his possession or custody or under his control any document which has any bearing upon the **[subject of the appeal]** decision under review, to appear before it at a time and place specified in the summons, to be interrogated or to produce that document, and retain for examination any document so produced; 10 15
- (b) administer an oath to or accept an affirmation from any person called as a witness at the **[appeal]** review; and
- (c) call any person present at the **[hearing of the appeal]** review proceedings as a witness and interrogate him and require him to produce any document in his possession or custody or under his control, and such a person shall be entitled to legal representation at his own expense. 20

(9) Subject to the provisions of subsection (2A), the procedure at the **[hearing of an appeal]** review shall be determined by the chairman of the board of **[appeal]** review. 25

(10) The board of **[appeal]** review may after **[hearing the appeal—(a)]** the review confirm, set aside or vary the relevant decision of the Registrar **[and]**

**(b) direct the Registrar to execute the decision of the board of appeal in connection therewith].** 30

(11) The decision of a majority of the members of the board of **[appeal]** review shall be the decision of that board **[: Provided that in the event of an equality of votes the chairman shall have a casting vote in addition to a deliberative vote.].** 35

(12) The decision of the board of **[appeal]** review shall be in writing, and a copy thereof shall be furnished to the **[appellant]** applicant as well as to the Registrar.

(13) If the board of **[appeal]** review sets aside any decision by the Registrar, the prescribed fees paid by the **[appellant]** applicant in respect of the **[appeal]** review in question shall be refunded to him, and if the board of **[appeal]** review varies any such decision, it may in its discretion direct that the whole or any part of such fees be refunded to the **[appellant]** applicant. 40

(14) A member of the board of **[appeal]** review shall in respect of his services as such a member be paid such remuneration, including reimbursement for transport, travelling and subsistence expenses incurred by him in the performance of his functions as such a member, as the Minister may from time to time determine.”. 45

#### **Amendment of section 22 of Act 94 of 1990, as amended by section 7 of Act 9 of 1993 and section 15 of Act 26 of 1994** 50

**5.** Section 22 of the principal Act is hereby amended by the substitution for subsections (1) and (2) of the following subsections:

“(1) Subject to the provisions of subsection (2), an institution which is registered as a bank or a foreign institution which is authorized under section 18A to conduct the business of a bank by means of a branch in the Republic shall not— 55

- (a) in the case of such bank use, or refer to itself by, a name other than the name under which it is so registered; or
- (b) in the case of such foreign institution, in respect of the branch concerned use, or refer to the branch by, a name other than the name under which the conduct of the business of a bank in the Republic was so authorized, 5
- or any literal translation or abbreviation [**thereof**] of such name which has been approved by the Registrar: Provided that the Registrar may, if he deems it desirable, authorize the use of a name by which such bank or foreign institution is otherwise generally known.
- (2) An institution [**referred to in subsection (1)**] which is registered as a bank 10 may, with the consent of the Registrar, in conjunction with its registered name or the name of which the use was authorized by the Registrar under the proviso to subsection (1) use, or refer to itself by, the name of another bank with which it has amalgamated or all the assets and liabilities of which have, as contemplated in section 54(1), been transferred to it or, in the case of a change of name, the name 15 by which it was previously known.”.

**Amendment of section 31 of Act 94 of 1990, as amended by section 24 of Act 26 of 1994**

6. Section 31 of the principal Act is hereby amended by the substitution for paragraph (b) of the following paragraph: 20
- “(b) in the case of a registration cancelled by the Registrar under section 23, upon expiry of 30 days after the date of the notice referred to in subsection (1), (2) or (3) of that section or, if an [**appeal against**] application for the review of such [**cancellation**] a decision to cancel was lodged with the board of [**appeal**] review in terms of section 9 before the expiry of the said 30 days and 25 the board of [**appeal**] review has confirmed such cancellation, upon the date on which the institution concerned is notified of such confirmation;”.

**Amendment of section 49 of Act 94 of 1990**

7. Section 49 of the principal Act is hereby amended by the substitution for paragraph (a) of the following paragraph: 30
- “(a) in the case of a registration cancelled by the Registrar under section 45, upon expiry of 30 days after the date of the notice referred to in subsection (1) of that section or, if an [**appeal against**] application for the review of such [**cancellation**] a decision to cancel was lodged with the board of [**appeal**] review in terms of section 9 before the expiry of the said 30 days and the board 35 of [**appeal**] review has confirmed such cancellation, upon the date on which the controlling company concerned is notified of such confirmation;”.

**Amendment of section 64 of Act 94 of 1990, as amended by section 41 of Act 26 of 1994**

8. Section 64 of the principal Act is hereby amended by the substitution for subsection (3) of the following subsection: 40
- “(3) All of the members of the audit committee may be, and the majority of such members, including the chairman of the audit committee, shall be, persons who are not employees of the bank nor of any of its subsidiaries, its controlling company or any subsidiary of its controlling company: Provided that the chairman of the board 45 of directors of the bank shall not be appointed as a member of the audit committee.”.

**Amendment of section 68 of Act 94 of 1990, as amended by section 16 of Act 9 of 1993 and section 42 of Act 26 of 1994**

9. Section 68 of the principal Act is hereby amended— 50
- (a) by the substitution for subsection (1) of the following subsection:

“(1) Notwithstanding the provisions of section 69 of this Act and anything to the contrary contained in the Companies Act—

- (a) the Registrar shall have the right to apply to a competent court for the winding-up of any bank **[or for an order placing any bank under judicial management]** in terms of the **[said]** Companies Act, and the Registrar shall have the right to oppose any such application made by any other person; 5
  - (b) no person other than a person recommended by the Registrar shall be appointed by a Master of the **[Supreme] High** Court as provisional liquidator **[provisional judicial manager]** or liquidator **[or judicial manager]** of a bank; and 10
  - (c) the Master shall appoint a person designated by the Registrar, who shall be a person who in the opinion of the Registrar has wide experience of, and is knowledgeable about the latest developments in, the banking industry, to assist a provisional liquidator **[provisional judicial manager]** or liquidator **[or judicial manager]** referred to in paragraph (b) in the performance of his functions in respect of the bank in question.”; 15
  - (b) by the substitution in subsection (1A) for the words following on paragraph (c) of the following words: 20
    - “and a copy of such letter of appointment shall be furnished by the Master to the provisional liquidator **[provisional judicial manager]** or liquidator **[or judicial manager]** concerned.”;
  - (c) by the deletion of subsection (4); and
  - (d) by the substitution for subsection (5) of the following subsection: 25
    - “(5) Notwithstanding anything to the contrary contained in any law, the suspension, cancellation or termination of the registration of a bank while such bank, as a result of an application brought by the Registrar, is being wound up **[or under judicial management]** in terms of this section, shall not affect— 30
    - (a) any order or appointment made, direction issued or any other thing done under this section or in terms of the Companies Act, in respect of such bank; or
    - (b) any power to be exercised, duty to be executed or right to be enforced in respect of such bank by the Registrar, the Master of the **[Supreme] High** Court or the provisional liquidator **[provisional judicial manager]** or liquidator **[or judicial manager]**, respectively, by virtue of the provisions of this section or the provisions of the Companies Act, 35
- and the Registrar, the Master of the **[Supreme] High** Court, the provisional liquidator **[provisional judicial manager]** or liquidator **[or judicial manager]**, respectively, shall[— 40
- (i) **in the case of such winding-up**, until the affairs of the public 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) of the Companies Act or until the winding-up is stayed or set aside by an order of a competent court [;or 45
  - (ii) **in the case of such judicial management, until the judicial management order is cancelled by a competent court**], 50
- continue to exercise their respective powers and to perform their respective duties under this 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.”. 55

**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 and section 6 of Act 55 of 1996**

10. Section 69 of the principal Act is hereby amended—

(a) by the substitution for paragraph (a) of subsection (1) of the following paragraph: 5

“(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 deems it desirable in the public interest, with the written consent of the chief executive officer or the chairman of the board of directors of that bank, appoint a curator to the bank.”; 10

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

“(2A) On appointment of a curator—

(a) the management of the bank concerned shall vest in the curator, subject to the supervision of the Registrar, and any other person vested with the management of the affairs of that bank shall be divested thereof; and 15

(b) the curator shall recover and take possession of all the assets of the bank. 20

(2B) The curator shall—

(a) subject to the supervision of the Registrar, conduct the 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; 25

(b) comply with any direction of the Registrar;

(c) keep such accounting records and prepare such annual financial statements, interim reports and provisional annual financial statements as the bank or its directors would have been obliged to keep or prepare if the bank had not been placed under curatorship; 30

(d) convene the annual general meeting and any other meeting of members of the bank provided for by the Companies Act and, in that regard, comply with all the requirements with which the directors of the bank would in terms of the Companies Act have been obliged to comply if the bank had not been placed under curatorship; and 35

(e) have the power to bring or defend in the name and on behalf of the bank any action or other legal proceedings of a civil nature and, subject to the provisions of any law relating to criminal proceedings, any criminal proceedings.

(2C) (a) Notwithstanding the provisions of subsection (3), the curator may dispose of any of the bank’s assets in the ordinary course of the bank’s business. 40

(b) Except in the circumstances contemplated in paragraph (a) the curator may not, notwithstanding the provisions of section 228 of the Companies Act— 45

(i) dispose of any of the bank’s assets otherwise than in accordance with the provisions of section 54;

(ii) effect a disposal referred to in subparagraph (i) unless a reasonable probability exists that such disposal will enable the bank to pay its debts or meet its obligations and become a successful concern. 50

(2D) If at any time the curator is of the opinion that there is no reasonable probability that the continuation of the curatorship will enable the bank to pay its debts or meet its obligations and become a successful concern, he shall forthwith in writing inform the Registrar of such opinion. 55

(2E) Any money of the bank that becomes available to the curator shall be applied by him in paying the costs of the curatorship and in the conduct of the bank’s business in accordance with the requirements of the curatorship and, as far as the circumstances permit, in the payment of the claims of creditors which arose before the date of the curatorship. 60

(2F) (a) Every disposition of its property, which if made by an individual could for any reason be set aside in the event of such individual's insolvency, may, if made by a bank that is unable to pay its debts, be set aside by a court at the suit of the curator in the event of that bank being placed under curatorship, and the provisions of the law relating to insolvency shall *mutatis mutandis* apply in respect of such disposition. 5

(b) For the purposes of this subsection the event which shall be deemed to correspond with a sequestration order under the Insolvency Act, 1936 (Act No. 24 of 1936), in the case of an insolvent, shall be the presentation to the Court of the letter of appointment of the curator. 10

(2G) The period during which any bank that is a mortgage debtor in respect of any mortgage bond is subject to curatorship in terms of this section shall be excluded in the calculation of any period of time for the purpose of determining whether such mortgage bond confers any preference in terms of section 88 of the Insolvency Act, 1936, as applied to the winding-up of banks in terms of this Act.”; 15

(c) by the deletion of paragraph (h) of subsection (3);

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

“(4) The Minister may, at any time and in any manner, amend **[or withdraw]** the directions in the letter of appointment, and the powers granted by him under subsection (3) to the curator.”; 20

(e) by the deletion of subsection (5);

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

“(6A) While a bank is under curatorship the curator shall **[on the expiration of a period of one year as from the date of his appointment as such, and thereafter biannually upon the expiration of every period of six months]** on a monthly basis furnish the Registrar with a written report containing an exposition of the affairs of the bank concerned and in which it is stated whether or not, in the opinion of the curator, **[it is in the interest of the depositors of the bank concerned that the bank remains under curatorship]** a reasonable probability exists that the bank will be able to pay its debts or to meet its obligations and to become a successful concern.”; and 25

(g) by the addition of the following subsections: 30

“(9) The Minister may—

- (a) at any time withdraw the appointment of a curator;
- (b) upon application by the Registrar withdraw the appointment of a curator.

(10) Curatorship of a bank shall lapse upon— 40

- (a) the issue by the Minister of written notification to that effect to the curator; or
- (b) the winding-up of the bank in terms of the provisions of section 68.”.

#### **Amendment of section 69A of Act 94 of 1990, as inserted by section 44 of Act 26 of 1994** 45

11. Section 69A of the principal Act is hereby amended by the deletion of subparagraph (ii) of paragraph (b) of subsection (11).

#### **Amendment of section 70 of Act 94 of 1990, as amended by section 9 of Act 42 of 1992, section 18 of Act 9 of 1993 and section 45 of Act 26 of 1994** 50

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

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

“(1) For the purposes of this Act—

‘allocated capital and reserve funds’ means such amount of qualifying capital and reserve funds as may be approved and assigned by the board 55

of directors of a bank as capital and reserve funds designated to provide for the risks pertaining to the particular nature of such bank's business as contemplated in subsection (2), (2A) or (2B), as the case may be; 'qualifying capital and reserve funds' means the net sum of capital and reserve funds required to be held by a bank, calculated and determined in accordance with the provisions of subsection (2), (2A) or (2B), as the case may be, having regard to the nature of such bank's business.";

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

"(2) (a) A bank of which the business does not include trading in financial instruments shall manage its affairs in such a way that, subject to the provisions of [subsections (3) and (5)(a)] paragraph (b), the sum of its [issued] primary and secondary [share] capital and its primary and secondary unimpaired reserve funds in the Republic does not at any time amount to less than the greater of—

[(a)](i) [R50 000 000] R250 000 000 or, in the case of such a bank which immediately prior to the date of commencement of this Act was registered as a banking institution or a building society under a law repealed by this Act, R1 000 000; or

[(b)](ii) an amount which represents a prescribed percentage of the sum of amounts calculated by multiplying the average of the amounts (as shown in the returns furnished to the Registrar in terms of section 75(1)(a)(ii)) of such different categories of—

[(i)](aa) assets; and

[(ii)](bb) other risk exposures in the conduct of its business, as may be prescribed in the Regulations relating to Banks, by the risk weights, expressed as percentages, so prescribed in respect of such different categories of assets and other risk exposures.

(b) Notwithstanding the provisions of paragraph (a)—

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

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

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

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

(c) by the insertion of the following subsections after subsection (2):

"(2A) (a) A bank of which the business consists solely of trading in financial instruments shall manage its affairs in such a way that, subject to the provisions of paragraph (b), the sum of its primary and secondary capital, its primary and secondary unimpaired reserve funds and its tertiary capital in the Republic does not at any time amount to less than the greater of—

(i) R250 000 000; or

(ii) an amount which represents the sum of amounts prescribed in the Regulations relating to Banks' Financial Instrument Trading in respect of such a bank's risk exposures in the conduct of its business as may be so prescribed.

(b) Notwithstanding the provisions of paragraph (a)—

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

- calculated by deducting from the amount thereof such amounts as may be prescribed;
- (ii) the sum of the bank's secondary capital and secondary unimpaired reserve funds shall, in the calculation of the aggregate amount which the bank is in terms of paragraph (a) required to maintain, be— 5
- (aa) calculated by deducting from the amount thereof such amounts as may be prescribed; and
- (bb) taken into account to an amount not exceeding the sum of the bank's allocated and qualifying primary share capital and allocated and qualifying primary unimpaired reserve funds; 10
- (iii) the sum of the bank's tertiary capital shall, in the calculation of the aggregate amount which the bank is in terms of paragraph (a) required to maintain, be calculated as prescribed; and
- (iv) the total amount of allocated and qualifying secondary capital, allocated and qualifying secondary unimpaired reserve funds and tertiary capital shall be determined as prescribed in the Regulations relating to Banks' Financial Instrument Trading. 15
- (2B) (a) A bank of which the business includes trading in financial instruments shall manage its affairs in such a way that, subject to the provisions of paragraph (b), the sum of its primary and secondary capital, its primary and secondary unimpaired reserve funds and its tertiary capital in the Republic does not at any time amount to less than the greater of— 20
- (i) R250 000 000; or 25
- (ii) an amount which represents the sum of—
- (aa) a prescribed percentage of the sum of amounts calculated by multiplying the average of the amounts (as shown in the returns furnished to the Registrar in terms of section 75(1)(a)(ii)), of such different categories of— 30
- (A) assets; and
- (B) other risk exposures in the conduct of its business, as may be prescribed in the Regulations relating to Banks, by the risk weights, expressed as percentages, so prescribed in respect of such different categories of assets and other risk exposures; and 35
- (bb) an amount which represents the sum of amounts prescribed in the Regulations relating to Banks' Financial Instrument Trading in respect of such of the bank's risk exposures in the conduct of its business of trading in financial instruments as may be so prescribed. 40
- (b) Notwithstanding the provisions of paragraph (a)—
- (i) the sum of the bank's primary share capital and primary unimpaired reserve funds shall, in the calculation of the aggregate amount which the bank is in terms of paragraph (a) required to maintain, be calculated by deducting from the amount thereof such amounts as may be prescribed; 45
- (ii) the sum of the bank's secondary capital and secondary unimpaired reserve funds shall, in the calculation of the aggregate amount which the bank is in terms of paragraph (a) required to maintain, be— 50
- (aa) calculated by deducting from the amount thereof such amounts as may be prescribed; and
- (bb) taken into account to an amount not exceeding the sum of the bank's allocated and qualifying primary share capital and allocated and qualifying primary unimpaired reserve funds; 55
- (iii) the sum of the bank's tertiary capital shall, in the calculation of the aggregate amount which the bank is in terms of paragraph (a) required to maintain, be calculated as prescribed; and
- (iv) the total amount of allocated and qualifying secondary capital, allocated and qualifying secondary unimpaired reserve funds and 60

tertiary capital shall be determined as prescribed in the Regulations relating to Banks' Financial Instrument Trading.”; and

(d) by the deletion of subsections (3) and (5).

#### Insertion of section 70A in Act 94 of 1990

13. The following section is hereby inserted in the principal Act after section 70: 5

#### “Minimum capital and reserve funds in respect of banking group

**70A.** (1) Notwithstanding the provisions of section 70(2), (2A) and (2B), a controlling company shall manage its affairs in such a way that, subject to the provisions of subsection (2), the sum of the capital and reserve funds of the banking group structured under such controlling company does not at any time amount to less than the sum of the amounts of the required capital and reserve funds determined, in respect of the respective entities constituting such banking group, in accordance with the rules and regulations of the respective regulators responsible for the supervision of those entities, plus such amount as may be prescribed by the Registrar in respect of entities that are included in such banking group but are not subject to the supervision of a regulator. 10 15

(2) Notwithstanding the provisions of subsection (1), the sum of the banking group's capital and reserve funds shall, in the calculation of the aggregate amount that the banking group is in terms of subsection (1) required to maintain, be calculated by deducting from the amount thereof such amounts as may be prescribed.”. 20

#### Amendment of section 72 of Act 94 of 1990, as amended by section 10 of Act 42 of 1992

14. Section 72 of the principal Act is hereby amended by the substitution for subsections (3) and (4) of the following subsections: 25

“(3) A bank shall not pledge or otherwise encumber any portion of the liquid assets held by it in compliance with the provisions of subsection (1): Provided that the Registrar may [if he deems it necessary on account of any special circumstances in which a bank may find itself] exempt [such] a bank from the prohibition contained in this subsection on such conditions and to such an extent and for such a period as he may determine. 30

(4) For the purposes of this section securities which constitute ‘liquid assets’ as defined in section 1 shall be valued as prescribed.”. 35

#### Substitution of section 73 of Act 94 of 1990, as substituted by section 46 of Act 26 of 1994

15. The following section is hereby substituted for section 73 of the principal Act:

#### “Large exposures

**73.** (1) A bank, controlling company, branch or branch of a bank—  
(a) shall not make investments with or grant loans or advances or other credit to any person, to an aggregate amount exceeding [an amount representing a prescribed percentage of such bank's capital and reserves] 10 per cent of such amount of its capital and reserves as may be prescribed, without first having obtained the permission of its board of directors, or of a committee appointed for such purpose [by its board of directors (at least one of the members of which committee shall be a director of the bank who is not in its employ nor in the employ of any of its subsidiaries, its controlling company or any subsidiary of its controlling company)] (for the composition of which committee the prior written approval of the 40 45 50

- Registrar has to be obtained), to make such investments or to grant such loans, advances or other credit; and
- (b) shall in the event of the aggregate amount of investments, loans, advances and other credit contemplated in paragraph (a) exceeding 800 per cent of such an amount of its capital and reserves as may be prescribed, be subject to such additional capital requirements as may be prescribed. 5
- (2) Notwithstanding anything to the contrary contained in this Act, a bank, controlling company, branch or branch of a bank—
- (a) shall not without the prior written approval of the Registrar make an investment with or grant a loan, advance or other credit to any private sector non-bank person, which transaction, either alone or together with any previous transaction or transactions entered into by it with that private sector non-bank person, results in the bank, controlling company, branch or branch of a bank being exposed to that private sector non-bank person to an amount exceeding 25 per cent of a prescribed amount; 10
- (b) shall in such manner and on such a form as may be prescribed report to the Registrar whenever it makes an investment with or grants a loan or advance or other credit to any person other than a private sector non-bank person, which transaction, either alone or together with any previous transaction or transactions entered into by it with that other person, results in the bank, controlling company, branch or branch of a bank being exposed to that other person up to an amount exceeding 25 per cent of a prescribed amount; and 15
- (c) shall, in the event of the Registrar granting such written approval as contemplated in paragraph (a), be subject to such additional capital requirements as may be prescribed. 20
- (3) For the purposes of this section—
- (a) 'person' includes— 30
- [(a)](i) two or more persons, whether natural or juristic persons, the respective exposures to whom constitute a single exposure because of the fact that one of them directly or indirectly exercises control over the other or others; and
- [(b)](ii) two or more persons, whether natural or juristic persons, between whom there exists no relationship of control as contemplated in [paragraph (a)] subparagraph (i), but the respective exposures to whom are to be regarded as a single exposure because of the fact that they are so interconnected that should one of them experience financial difficulties, another one or all of them would be likely to experience a lack of liquidity; and 35
- (b) 'private sector non-bank person' means a person as defined in paragraph (a) but does not include—
- (i) the central government or other public sector bodies; 40
- (ii) a bank;
- (iii) a mutual bank;
- (iv) a branch of a bank;
- (v) a branch;
- (vi) a foreign institution that, under an authorization referred to in section 18A, conducts the business of a bank by means of a branch in the Republic; 50
- (vii) a controlling company; or
- (viii) any other person designated by the Registrar.”.

**Amendment of section 91 of Act 94 of 1990, as amended by section 23 of Act 9 of 1993 and section 56 of Act 26 of 1994 55**

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

“(b) contravenes or fails to comply with a provision of section 7(3), (4) or (5), 34, 35, 37(1), 38(1), 39, 41, 42(1), 52(1) or (4), 53, 55, 58, 59, 61(2), 65, 66, 67, 70(2), (2A) or (2B), 70A, 72, 73, 75, 76, 77, 78(1) or (3), 79, 80 or 84(2),”.

**Short title**

**17.** This Act is called the Banks Amendment Act, 2000.

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## **MEMORANDUM ON THE OBJECTS OF THE BANKS AMENDMENT BILL, 2000**

During the period since the promulgation of the Banks Amendment Act, 1996 (Act No. 55 of 1996), the Office for Banks, in the process of its administration of the Banks Act, 1990 (Act No. 94 of 1990 — “the principal Act”), in its day-to-day consultations and contact with banks and, importantly, its consultations with supervisory authorities in other countries and with international standard-setting bodies such as the Basle Committee on Banking Supervision (“the Basle Committee”), has identified certain further aspects in which the principal Act is in need of improvement. In order to effect such improvements, certain amendments of the principal Act are proposed in the present Bill, the most significant of which may be explained as follows:

### **Clause 1(a): Definition of the expressions “banking group”, “branch” and “branch of a bank”**

As a concomitant of the principle of consolidated supervision of financial conglomerates that include banks, now being introduced for the first time in the proposed section 70A of the principal Act, the concept of a “banking group” has been created and needs to be defined.

The expressions “branch” and “branch of a bank” are relevant in the context of section 73 of the principal Act which until now dealt solely with safeguards in the event of large exposures to which banks may become subject. These safeguards will in terms of the proposed amendments now be extended also to large exposures of, *inter alia*, branches by means of which foreign institutions conduct the business of a bank in the Republic (identified as a “branch”), and to large exposures of branches by means of which South African banks conduct banking business outside the Republic (identified as a “branch of a bank”).

### **Clause 1(b): Substitution for the definition of “board of appeal” of the definition of “board of review”**

A definition of the expression “board of review” has become necessary in view of the proposed substitution, in terms of clause 4 of the Bill, of a process of review of, instead of the current process of appeal against, decisions of the Registrar of Banks.

### **Clause 1(c): Amendment of definition of “liquid assets”**

Basic to the limitation of securities qualifying as liquid assets to securities of a short or medium term to maturity, is the consideration of the credit risk that long-term securities might entail. However, it has become to be realised that, the State being the issuer, securities issued by virtue of section 66 of the Public Finance Management Act, 1999, do not entail such a risk. It is consequently proposed that the limitation of a period of three years to redemption date be done away with in respect of public stock.

### **Clauses 1(d) and 1(f): Re-positioning in principal Act of definitions of “primary share capital”, “primary unimpaired reserve funds”, “secondary capital” and “secondary unimpaired reserve funds”**

The above-mentioned definitions have thus far been situated in section 70(1) of the principal Act. However, as the relevant expressions are of general application throughout the principal Act and are also used in the regulations under the Act it has been decided to re-position the relevant definitions, without any material change to the contents thereof, to the traditional definition section, namely section 1, of the principal Act.

### **Clause 1(g): Definition of the expression “tertiary capital”**

As a corollary to the new additional capital requirements, proposed in the amendment of section 70 of the principal Act by clause 12 of the Bill, necessitated by banks’

increased participation in trading in financial instruments, the concept of “tertiary capital” has now been introduced and needs to be defined.

## **Clause 2: Provision for more than one Deputy Registrar of Banks**

The South African Reserve Bank is in terms of section 4(2) of the principal Act currently confined to the designation of one of its officers or employees as a Deputy Registrar of Banks. In view of a drastic growth of the activities and responsibilities of the Office for Banks a restructuring of the different areas of responsibility within that Office has become an urgent necessity. Such restructuring *inter alia* entails a flatter reporting structure with a Deputy Registrar of Banks heading each of the several specialised areas of activity for which the Office for Banks is responsible. The amendment proposed in clause 2 of the Bill will consequently allow the Reserve Bank, with the approval of the Minister of Finance, to designate more than one of its officers or employees, to a maximum of four, as Deputy Registrars of Banks.

## **Clause 3: Regulation of the conducting of a due diligence audit of the financial condition of a bank**

The amendment of section 7 of the principal Act, proposed in clause 3 of the Bill, is designed to ensure the confidentiality of a report compiled in consequence of a due diligence audit of the financial condition of a bank, irrespective of whether such audit has been commissioned by the Registrar of Banks or by some other interested party. Such confidentiality is considered advisable in the interest of the bank under audit, its depositors and possible future transferees of all or any part of the assets and liabilities of such bank.

## **Clause 4: Substitution for the current process of appeal against decisions of the Registrar of Banks of a process of review**

Section 9 of the principal Act as originally enacted and currently still in force was intended to provide a mechanism for the expeditious resolution of complaints regarding decisions of the Registrar of Banks taken in the performance of his functions under the principal Act. In essence the so-called “appeal” envisaged a process whereby, in the event of a person being dissatisfied with a decision of the Registrar, it could be established whether the Registrar in taking the decision duly applied his mind and acted in a lawful, reasonable and procedurally correct and fair manner.

However, on the few occasions when section 9 was applied its provisions were found to be lacking in clarity and not to provide sufficient guidance as to the extent of the powers of investigation of and intervention in decisions of the Registrar by the board of appeal. In the result the procedure proved not to be conducive to an expeditious resolution of complaints regarding decisions of the Registrar of Banks.

The amendment of section 9 of the principal Act, proposed in clause 4 of the Bill, is aimed at confirming the relevant procedure as a true review of administrative action and to clearly circumscribe the ambit of the functions of the board of review. It is emphasised that the proposed amendment does not in any way influence or curtail an aggrieved person’s normal legal remedies, including an application to a court of law.

## **Clause 5: Permission for a banking institution to use or refer to itself by a name other than the name under which it is registered**

As presently worded section 22 of the principal Act prohibits a banking institution from using or referring to itself by a name other than the name under which it is registered. In view of the goodwill and identification value attaching to established names it is considered desirable, especially in the case of local branches of foreign banks of international standing, to allow the Registrar of Banks in his discretion to authorise the use of a name other than the one under which the banking institution is registered but

by which such institution is otherwise generally known. The amendment of section 22 of the principal Act proposed in clause 5 of the Bill will empower the Registrar to authorise the use of such other name by a banking institution.

### **Clauses 6 and 7: Consequential amendments**

Clauses 6 and 7 of the Bill propose consequential amendments only, flowing from the proposed amendment of section 9 of the principal Act in terms whereof a process of review is substituted for the current process of appeal against decisions of the Registrar of Banks.

### **Clause 8: Further consolidation of the non-executive principle in respect of members of a bank's audit committee**

Section 64 of the principal Act already provides that the majority of the members of the audit committee of a bank shall be persons who are not employees of the bank, nor of any of the bank's subsidiaries, its controlling company or any subsidiary of its controlling company. It is generally accepted that executive directors of a public company such as a bank are employees of that company. The amendment of section 64 of the principal Act, proposed in clause 8 of the Bill, is aimed at further consolidating this principle of good corporate governance, emphasised *inter alia* in the King Report. In terms of the proposed amendment—

- (i) an employee of the bank or of a subsidiary or the controlling company of the bank or of a subsidiary of such controlling company may not be appointed as the chairman of the bank's audit committee; and
- (ii) the chairperson of the board of directors of the bank may not serve as a member of the bank's audit committee.

### **Clauses 9 and 10: Abrogation of the expedient of judicial management of a bank in financial distress in favour of an enhanced process of curatorship over such bank**

In recent lawsuits involving banks in financial distress it emerged that judicial management of such a bank (provided for in section 68 of the principal Act) and the placing of such a bank under curatorship (provided for in section 69 of the principal Act) to a large extent served the same purpose, namely to be an intermediate stage culminating in either the bank's financial rehabilitation or, if unsuccessful, its winding-up. It would appear that judicial management has tended to fall into disuse as an efficacious mechanism of company law. On the other hand the particular form of curatorship provided for in section 69 of the principal Act is considered the preferred route in view of the unique characteristics of banks as custodians of depositors' funds. It is consequently proposed that the provision for judicial management of a bank in financial difficulties be deleted from section 68 of the principal Act (clause 9 of the Bill) and that the mechanism of curatorship over such a bank provided for in section 69 of the principal Act be retained and regulated more comprehensively (clause 10 of the Bill).

### **Clause 11: Consequential amendment**

Clause 11 of the Bill only proposes a consequential amendment flowing from the deletion from section 68 of the reference to judicial management.

### **Clause 12: Supplementation of the minimum capital and reserve funds requirements for banks**

Section 70 of the principal Act sets out the minimum capital and reserve funds requirements with which banks must comply as a prudential measure. It is proposed in clause 12 of the Bill that section 70 be amended in the following respects:

- (a) The aggregate minimum amount of primary and secondary capital and primary and secondary unimpaired reserve funds banks are required to maintain is increased from R50 million to R250 million. This increase is necessitated by the following factors:
  - (i) Inflationary growth since 1994 when the relevant amount was increased from R10 million to R50 million by section 45 of the Banks Amendment Act, 1994 (Act No. 26 of 1994);
  - (ii) the expansion of banks' areas of activity, *inter alia* increased trading in financial instruments, with resultant additional risks that require capital coverage;
  - (iii) increased international competition, requiring increased capital provisioning to enable local banks to remain competitive.
- (b) A distinction is drawn between banks of which the business includes or consists solely of trading in financial instruments and banks that do not participate in such trading. The first-mentioned banks will, because of the material difference between the risk profiles of banks' traditional banking activities and such financial instrument-trading activities, be required to maintain an additional form of capital, namely tertiary capital, as defined.

**Clause 13: Introduction of minimum capital and reserve funds requirements in respect of a banking group**

Clause 13 of the Bill proposes the insertion of a new section, section 70A, in the principal Act. In this section the controlling company in a banking group (as defined) is charged with the responsibility to ensure the maintenance of a certain aggregate of the respective amounts of minimum capital and reserve funds required to be maintained by the respective entities constituting such banking group.

The introduction of this new provision is necessary so as to give effect to the principle of consolidated supervision (supervision of financial conglomerates of which one or more than one bank is a member or are members). This principle is one of the twenty-five principles laid down in the Core Principles for Effective Banking Supervision issued by the Basle Committee during September 1997. The Office for Banks has hitherto not been able to adequately conduct such consolidated supervision and the proposed new provision will enable it to comply with the international norm.

**Clause 14: Broadening of Registrar of Bank's discretion to permit pledging or encumbrance otherwise of a bank's liquid assets**

As worded at present section 72(3) of the principal Act allows the Registrar of Banks to exempt a bank from the prohibition on the pledging or encumbrance otherwise of any part of its liquid assets only if the Registrar deems it necessary on account of any special circumstances in which such bank may find itself. However, a more effective utilisation of their liquid assets by banks, without derogating from the prudential considerations basic to the maintenance of such assets, is supported by the Reserve Bank. The utilisation by banks of liquid assets for the purposes of settlement under the national payment system already takes place on a regularised basis and cannot be ascribed to "special circumstances in which a bank may find itself".

The amendment of section 72(3) of the principal Act, proposed in clause 14 of the Bill, will allow banks the flexibility, subject to exemption by the Registrar, to use their liquid assets for purposes of intraday accommodation at the Reserve Bank discount window. Such utilisation will be in harmony with the prevailing practice in the national payment system.

**Clause 15: Further safeguards in respect of large exposures constituting credit risks to banks and extension of such safeguards to controlling companies, local branches of foreign banks and foreign branches of local banks**

Section 73 of the principal Act deals with large exposures of banks to single entities, which exposures could constitute credit risks to the lending banks. The amendments to section 73 proposed in clause 15 of the Bill are again aimed at bringing our legislation in the relevant regard in line with the principles relating to large exposures as laid down in the Basle Committee's Core Principles for Effective Banking Supervision, mentioned above. More specifically, the proposed amendments provide for—

- (i) the prescribed safeguards in the case of large exposures also to apply to controlling companies, local branches of foreign banks and foreign branches of local banks in future;
- (ii) the imposition of additional capital requirements in the event of the aggregate of large exposures exceeding 800 per cent of a prescribed amount of the lending institution's capital and reserves;
- (iii) the Registrar of Banks's written approval first to be obtained before the lending institution commits itself to an exposure to a private sector non-bank person (as defined) amounting to more than 25 per cent of a prescribed amount; and
- (iv) a report to be made by the lending institution to the Registrar of Banks in the event of an exposure to a person other than a private sector non-bank person (i.e. any of the entities specified in subparagraphs (i) to (viii) of section 73(3)(b)), which exposure exceeds 25 per cent of a prescribed amount.

**PERSONS OR BODIES CONSULTED**

The Bill was laid before, considered and approved by the Standing Committee for the Revision of the Banks Act, being the committee appointed under and functioning in terms of section 92 of the principal Act and on which the majority of banks are represented.

**FINANCIAL IMPLICATIONS FOR STATE**

None.

**PARLIAMENTARY PROCEDURE**

The State Law Advisers and the Department of Finance 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.