

REPUBLIC OF SOUTH AFRICA

FINANCIAL SERVICES BOARD AMENDMENT BILL

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

(MINISTER OF FINANCE)

[B 62B—99]

REPUBLIEK VAN SUID-AFRIKA

WYSIGINGSWETSONTWERP OP DIE RAAD OP FINANSIËLE DIENSTE

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

(MINISTER VAN FINANSIES)

[W 62B—99]

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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 Financial Services Board Act, 1990, so as to insert a definition; to amend the provisions dealing with the functions of the Financial Services Board; to make further provision for the appointment of members of the Financial Services Board and its executive; to amend certain outdated provisions; to repeal the provision relating to the pension rights of certain officers and employees; to provide for consultation before the imposition of levies on financial institutions; to repeal the provision regarding the printing of the annual report; to make further provision for the provision of information and assistance to other regulatory authorities; to make further provision for the limitation of liability of certain functionaries, bodies and persons; to further regulate the prohibition on the use of a name or description implying a connection with the Financial Services Board; and to further regulate the constitution and functions of the board of appeal; and to provide for matters connected therewith.

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

Amendment of section 1 of Act 97 of 1990, as amended by section 1 of Act 41 of 1992, section 67 of Act 104 of 1993 and section 5 of Act 22 of 1997

1. Section 1 of the Financial Services Board Act, 1990 (hereinafter referred to as the principal Act), is amended by the insertion after the definition of “Minister” of the following definition:

“ ‘supervision’, in relation to supervision by the board over the performance of functions by the executive officer in terms of any law, means—

(a) the determination by the board that a particular function or category of functions—

(i) may not be performed by the executive officer without the prior approval of the board;

(ii) may be performed by the executive officer in accordance with guidelines issued by the board; or

(iii) may be performed by the executive officer in his or her discretion; and

(b) the periodical reporting to the board by the executive officer on the performance of his or her functions at such a time and in such a manner as may be determined by the board,

and ‘supervise’ shall have a corresponding meaning;”.

Substitution of section 3 of Act 97 of 1990

2. The following section is substituted for section 3 of the principal Act:

“Functions of board

3. The functions of the board are—

- (a) to supervise the **[exercise of control, in terms of any law, over the 5 activities of] compliance with** laws regulating financial institutions **[and over] and the provision of financial services; [and]**
- (b) to advise the Minister on matters concerning financial institutions and financial services, either of its own accord or at the request of the Minister; **and** 10
- (c) **to promote programmes and initiatives by financial institutions and bodies representing the financial services industry to inform and educate users and potential users of financial products and services.”.**

Substitution of section 4 of Act 97 of 1990

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

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“Constitution of board

4. (1) The board shall **[consist of] be governed by** so many members as the **[State President] Minister may deem necessary and appoint, with due regard to the interests of the users of financial services and the suppliers of financial services, including financial intermediaries, and the public 20 interest.**

(2) The **[State President] Minister** may appoint an alternate member for every member of the board.

(3) The **[State President] Minister** shall appoint a member of the board as the **[chairman] chairperson** and another member as the deputy 25 **[chairman] chairperson.**

(4) If the **[chairman] chairperson** is absent or is for any reason unable to act as **[chairman] chairperson** the deputy **[chairman] chairperson** shall perform the functions of the **[chairman] chairperson.”.**

Amendment of section 5 of Act 97 of 1990, as amended by section 68 of Act 104 of 30 1993

4. Section 5 of the principal Act is amended by the substitution for paragraph (b) of the following paragraph:

“(b) if, in the opinion of the **[State President] Minister, he or she is actually engaged in the business of a financial institution or actually engaged in the 35 rendering of a financial service: Provided that the [State President] Minister may, in consultation with the recognised association or organisation of the relevant financial institution or financial service in which such person is actually engaged, appoint a person who would otherwise be disqualified in terms of this paragraph from being a ‘member of the board;’.** 40

Amendment of section 6 of Act 97 of 1990

5. Section 6 of the principal Act is amended by the substitution for subsection (2) of the following subsection:

“(2) The **[State President] Minister** may at any time terminate the membership of any member or alternate member of the board if in the opinion of the **[State 45 President] Minister** sufficient reasons exist therefor.”.

Amendment of section 7 of Act 97 of 1990

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

- “(1) A member or alternate member of the board shall hold office, subject to the provisions of section 6, for such period, not exceeding three years, as the [State 5 President] Minister may determine at the time of his or her appointment: Provided that—
- (a) the term of office of not more than 50 per cent of the members or alternate members of the board shall expire within any calendar year; and
 - (b) if at the expiry of the term of office of a member or alternate member of the board a successor has not been appointed as provided for in this subsection, such member or alternate member shall continue in office for a further period not exceeding six months until reappointed or until a successor is appointed, whichever occurs first.”.

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Amendment of section 9 of Act 97 of 1990, as amended by section 2 of Act 41 of 1992 15

7. Section 9 of the principal Act is amended by the substitution for subsection (4) of the following subsection:

- “(4) The executive shall consist of the executive officer, the deputy executive officers, **[and] the chief actuary and such other** officers or employees of the board as the board may from time to time appoint to the executive, on such conditions as it deems fit.”.

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Amendment of section 10 of Act 97 of 1990

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

- “(2) Such a committee shall consist of so many members of the board or so many other persons or so many members or other persons as the board may deem necessary, and the board may at any time dissolve or reconstitute such a committee: Provided that the nomination and appointment of other persons to a committee of the board shall not cease upon the vacation of office of a member of the board who served on such a committee.”.

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Amendment of section 13 of Act 97 of 1990, as amended by section 3 of Act 41 of 1992

9. Section 13 of the principal Act is amended by the substitution for paragraph (c) of subsection (1) of the following paragraph:

- “(c) officers and employees placed at the disposal of the board under section 35 **[14(3)(a)] 15(3)(a) of the Public Service Act, [1984 (Act No. 111 of 1984)] 1994 (Proclamation No. 103 of 1994).**”.

Amendment of section 14 of Act 97 of 1990, as amended by section 1 of Act 84 of 1992

10. Section 14 of the principal Act is amended by the substitution for subsection (1) of the following subsection: 40

- “(1) The board may pay to the persons in its employ, or provide them with, such remuneration, allowances, bonuses, subsidies, pension and other employment benefits as the board may, after having obtained such professional advice as it may deem fit, consider as being competitive in the open market **[for the manpower concerned and may determine without being subject to any provisions of the Public Service Act, 1984 (Act No. 111 of 1984)]** but with due regard to section 18(b).”.

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Repeal of section 15 of Act 97 of 1990

11. Section 15 of the principal Act is repealed.

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Amendment of section 15A of Act 97 of 1990, as inserted by section 2 of Act 84 of 1992

12. Section 15A of the principal Act is amended—

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

“(1A) (a) Before imposing levies referred to in subsection (1), the board must publish the proposed levies in such manner as it considers appropriate in order to bring the proposed levies to the attention of the financial institutions in question and the users of financial services rendered by these institutions, together with a statement that representations about the proposed levies may be made to the board within a specified time.”

(b) Before imposing levies the board must have regard to any representations made in pursuance of the statement referred to in paragraph (a).

(c) Paragraphs (a) and (b) do not apply where the board, with the approval of the Minister, is of the opinion that the delay involved in complying with those paragraphs would be prejudicial to the functions of the board in terms of section 3(a) and (c).”; and

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

“(c) The board [may] shall before taking a decision contemplated in paragraph (b)(i), grant the financial institution concerned the opportunity deemed fit by the board to be heard.”.

Substitution of section 18 of Act 97 of 1990, as substituted by section 5 of Act 41 of 1992

13. The following section is substituted for section 18 of the principal Act:

“Consultation with Minister

18. The board and [the executive officer, deputy executive officers and chief actuary] members of the executive contemplated in section 9(4)—

(a) shall consult with the Minister [in] on any matter relating to the exercise of such powers and the performance of such duties under this Act or any other law as the Minister may determine from time to time; [and the board and the executive officer shall directly] and

(b) may consult with the Minister in connection with any [other] matter [it or he] which any of them wishes to bring to the attention of the Minister.”.

Amendment of section 21 of Act 97 of 1990, as amended by section 69 of Act 104 of 1993

14. Section 21 of the principal Act is amended by the deletion of subsection (3),

Amendment of section 22 of Act 97 of 1990, as amended by section 7 of Act 41 of 1992

15. Section 22 of the principal Act is amended by the substitution for subsection (2) of the following subsection:

“(2) Notwithstanding the provisions of subsection(1), the executive officer may, unless he or she is of the opinion that any such disclosure or rendering of assistance will not be in the public interest, but subject to guidelines issued by the board—

(a) disclose to any foreign financial or investment services regulatory or supervisory authority, or any other regulatory or supervisory authority for financial or investment services in the Republic, including the Registrar of Medical Schemes and a self-regulatory body approved by the board, information relating to a particular financial or other institution or financial or other service or a particular individual who is or was involved in a particular financial institution or financial service, if the executive officer is of the opinion that [taking into consideration the public interest] such informa-

tion will be of importance to the relevant **[foreign financial services] regulatory or supervisory authority, Registrar of Medical Schemes or self-regulatory body; and**
(b) disclose to any foreign financial or investment services regulatory or supervisory authority any information required in terms of any agreement, 5
communiqué or memorandum of understanding concluded by the board or the executive officer with any such authority, and may render any assistance to such authority:
 Provided that the board or the executive officer may impose conditions relating to the use that may be made of any information or assistance and the **Preservation of 10**
confidentiality in respect thereof.”.

Substitution of section 23 of Act 97 of 1990

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

“Limitation of liability

23. The Minister, the board, a member or alternate member of the board 15
 or the board of appeal or any officer or employee in the employment of the board shall not be liable **[in respect of any *bona fide* exercise of a discretion in the performance of any function by him] for any loss sustained by, or damage caused to, any person as a result of anything done or omitted by any such functionary, body or person in the *bona fide*, but not 20**
grossly negligent, exercise of any power or the carrying out of any duty or the performance of any function under or in terms of this Act or any other law.”.

Substitution of section 24 of Act 97 of 1990

17. The following section is substituted for section 24 of the principal Act: 25

“Restriction on use of name or description implying connection with board

24. No person shall apply to any company, body, firm, business or 30
 undertaking a name or description signifying or implying some connection between such company, body, firm, business or undertaking and the board unless the person—
(a) has been authorised by the board to do so; and
(b) complies with the conditions determined by the board.”.

Amendment of section 26 of Act 97 of 1990, as amended by section 8 of Act 41 of 1992 35

18. Section 26 of the principal Act is amended—

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

“(1) There is hereby established a board of appeal, which shall consist of three persons with an alternate for each of them (hereafter referred to as ‘the members of the board of appeal’), appointed by the Minister, of 40
 whom—

- (a) one shall be a person appointed on account of his or her wide experience and expert knowledge of law, who shall be the [chairman] chairperson;
- (b) one shall be **[one of the members of the board]** a person appointed on account of his or her wide experience and expert knowledge of financial institutions and financial services; and 45
- (c) one shall be a person registered as an accountant and auditor under **[section 23 of] the Public Accountants’ and Auditors’ Act, [1951 (Act No. 51 of 1951)] 1991 (Act No. 80 of 1991),** and who in the 50
 opinion of the Minister has wide experience of, and expert knowledge of the latest developments in, the accountants’ and auditors’ profession.”;

- (b) by the substitution for subsection (1A) of the following subsection:
 “(1A) The executive officer shall designate [an officer of the board] any person to act as secretary of the board of appeal.”;
- (c) by the insertion after subsection (1A) of the following subsection:
 “(1 B) (a) When the board of appeal deems it necessary for the hearing 5
of a particular appeal that the board of appeal should be assisted by an
assessor having expert knowledge of a particular matter, the board of
appeal may co-opt any such person to participate in the appeal as an
assessor of the board of appeal.
 (b) Such assessor may not participate in any decision of the board of 10
appeal.”;
- (d) by the insertion after subsection (2) of the following subsection:
 “(2A) The noting of an appeal in terms of subsection (2) does not
suspend the operation or execution of the decision pending the decision
of the board of appeal, unless the board of appeal, on the application of 15
a party, directs otherwise.”;
- (e) by the substitution for paragraph (b) of subsection (3) of the following
 paragraph:
 “(b) in the case of the member referred to in subsection (1)(b), [**one of**
the other members of the board] a person temporarily appointed 20
[by the Minister] subject to the provisions of that subsection; and”;
- (f) by the substitution for subsection (6) of the following subsection:
 “(6) An appeal shall be heard on the date and at the place and time
 fixed by the board of appeal, which shall in writing notify [**the appellant**
as well as the executive officer] the parties to the appeal thereof.”; 25
- (g) by the substitution for subsection (9) of the following subsection:
 “(9) [**The appellant as well as the executive officer]** Any party to an
appeal shall be entitled to be represented at an appeal by a legal
[practitioner] representative.”;
- (h) by the substitution for subsection (10) of the following subsection: 30
 “(10) The board of appeal may after hearing the appeal—
 (a) confirm, set aside or vary the relevant decision against which the
 appeal was brought;
 (b) order that the decision of the board of appeal be given effect to; or
 (c) refer any matter back for consideration or reconsideration by the 35
 executive officer in accordance with such directions as the board of
appeal may lay down.”;
- (i) by the substitution for subsection (12) of the following subsection:
 “(12) The decision of the board of appeal shall be put in writing, and
 a copy thereof shall be furnished to [**the appellant as well as to the 40**
executive officer] every party to the appeal.”; and
- (j) by the substitution for subsection (14) of the following subsection:
 “(14) (a) The board of appeal may make such order as to costs,
 including an order regarding the refunding of any fees paid in terms of
 subsection (2), as it may deem suitable and fair.
 (b) An order as to costs shall have legal force and maybe enforced as
 if it were issued in civil proceedings in a division of the High Court of
 South Africa within whose area of jurisdiction the board of appeal held
 its sitting.”. 45

Substitution of section 28 of Act 97 of 1990

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

.’Application of Act

28. The provisions of this Act shall not affect the operation of any bank
 or mutual [building society or building society] bank registered in terms
 of the Banks Act, [1965 (Act No. 23 of 1965)] 1990 (Act No. 94 of 1990), 55
or the Mutual [Building Societies Act, 1965 (Act No. 24 of 1965), or the
Building Societies Act, 1986 (Act No. 82 of 1986)] Banks Act, 1993 (Act
No. 124 of 1993), respectively, in respect of any bank or [building society]

mutual bank business carried on by such a bank or [building society;
mutual bank in accordance with the provisions of the said Acts.”.

Savings and transitional provisions

20. (1) The repeal of section 15 of the principal Act by section 11 shall not affect— 5
- (a) the previous operation of section 15 or anything done under, in terms of or by virtue of section 15; or
 - (b) any right, privilege, obligation or liability acquired, accrued or incurred under, in terms of or by virtue of section 15.

(2) The provisions of this Act shall not affect anything done or omitted under, in terms of or by virtue of any provision of the principal Act, before the date of commencement of this Act, which could have been done or omitted under, in terms of or by virtue of a provision of the principal Act as amended by this Act: Provided that anything specifically done by the Financial Services Board under sections 3(a) and 13(3) of the principal Act prior to the date of commencement of sections 1 and 2 of this Act, shall continue to have legal force unless the executive officer of that Board after the date of commencement of this Act decides otherwise, and shall in any such case, be deemed to have been done by that executive officer. 10 15

- (3) The provisions of this Act shall not affect—
- (a) any legal proceedings in which the said Financial Services Board is involved, and which are pending in any court of law immediately prior to the date of commencement of this Act, which proceedings shall proceed in all respects until final disposal thereof, as if this Act had not been passed; and 20
 - (b) any international agreement, memorandum of understanding or *communiqué* concluded before the date of commencement of this Act by the said Financial Services Board, provided that any functions or duties entrusted or imposed on, or rights granted to, that Board under , in terms of or by virtue of any such agreement, memorandum or *communiqué* shall upon the date of commencement of this Act devolve on the executive officer of that Board. 25

Amendment of laws

21. The laws mentioned in the Schedule are amended to the extent indicated in the third column thereof. 30

Substitution of long title of Act 97 of 1990

22. The following long title is hereby substituted for the long title of the principal Act: 35
- “To provide for the establishment of a board to [exercise supervision over the business of] supervise compliance with laws regulating financial institutions and the provision of financial services; and for matters connected therewith.”.

Short title and commencement

23. This Act is called the Financial Services Board Amendment Act, 2000. and comes into operation on a date fixed by the President by proclamation in the *Gazette*.

SCHEDULE

LAWS AMENDED

(Section 21)

No. and year of law	Short title	Extent of amendment
Act No. 32 of 1996	Supervision of Financial Institution Rationalisation Act, 1996	1. The amendment of section 2 by the deletion of subsection (6).
Act No. 80 of 1998	Inspection of Financial Institutions Act, 1998	<p>1. The amendment of section 1 by the addition to the definition of “financial institution” of the following paragraph:</p> <p>“(c) for the purposes of implementation of any agreement, <i>communiqué</i> or memorandum of understanding referred to in section 3A, any person referred to in that section;”</p> <p>2. The insertion of the following section after section 3:</p> <p>“Inspections for purposes of agreements, <i>communiqués</i> and memoranda of understanding</p> <p>3A. The registrar may at any time instruct an inspector to carry out an inspection in accordance with the provisions of sections 4 and 5, pursuant to and for the purposes of implementation of any agreement, <i>communiqué</i> or memorandum of understanding contemplated in section 22(2)(b) of the Financial Services Board Act, 1990 (Act No. 97 of 1990), of the affairs or part of the affairs of any person referred to in, or identified by the requesting authority acting in terms of, any such agreement, <i>communiqué</i> or memorandum, and who is present or resident in the Republic.”.</p>

MEMORANDUM ON THE OBJECTS OF THE FINANCIAL SERVICES BOARD AMENDMENT BILL

1. SCOPE OF BILL

The Bill proposes amendments to the Financial Services Board Act, 1990 (Act No. 97 of 1990) (the Act), with consequential amendments to the Supervision of Financial Institutions Rationalisation Act, 1996 (Act No. 32 of 1996), and the Inspection of Financial Institutions Act, 1998 (Act No. 80 of 1998).

2. AMENDMENTS

2.1 Amendment of section 1 of the Act

(a) *Current position*

The Act uses the words “supervision” and “supervise” on a number of occasions to describe the relationship between the executive officer and the Financial Services Board (the board). These words have been given a particular meaning in the common law and can be construed to mean that the board “controls” the activities of the executive officer. The executive officer is also the “registrar” in terms of several regulatory laws, which impose obligations on the executive officer as registrar directly, and decisions made by the registrar are subject to appeal. Applying the aforesaid construction of the words “supervision” and “supervise”, it would mean that the board has to approve all decisions made by the executive officer, including decisions delegated to clerical functions, such as noting changes of addresses.

(b) *New approach*

A new definition is introduced into section 1 of the Act whereby the words “supervision” and “supervise” are defined to refer to three tiers of decisions. These being a first level of significant decisions which the board has to approve, a second level of decisions where the executive officer must make decisions within guidelines set by the board and a third level of less significant decisions where the executive officer can make his or her own decisions.

(c) *Reason*

The reason for this approach derives from litigation where it has been questioned whether decisions taken by the executive officer in the capacity of “registrar” were taken under “supervision” of the board. Since invalidity of decisions may result if this has not been done and since the board cannot confirm every minute decision, the separation of the decisions into various categories allows for significant decisions to be taken under close supervision, less significant decisions to be taken within guidelines and routine decisions to be taken freely. This maintains sufficient checks and balances and retains a streamlined and efficient decision-making process within the Financial Services Board.

2.2 Amendment of section 3 of the Act

(a) *Current position*

Two functions are stated for the board in this section. The first function is that the board should exercise control in terms of any law over the activities of financial institutions and over financial services. This is not correct, as the board does not exercise such control.

The section does not state any function for the board in relation to investor education.

(b) *New approach*

The function of the board in relation to financial institutions is rephrased to state clearly that the board is to supervise the compliance with financial **regulatory** laws by those parties to whom these laws apply.

Furthermore, a new function is formulated whereby the board has to promote **programmes** and initiatives by financial institutions and industry representative bodies to inform and educate the users and potential users of financial services.

(c) *Reason*

The board does not really “exercise control” nor was it ever intended to do so as stated in the Act at present. The function is more clearly stated to be the supervision of compliance with financial laws. It is accepted that regulatory authorities should promote investor education. The proposed additional responsibility of the board will enable that this dimension of the board be developed.

The changes to the functions of the board must be read together with the savings and transitional provisions of clause 20 of the Bill, as well as the proposed changes to the long title of the Act in clause 22.

2.3 Amendment of section 4 of the Act**(a) *Current position***

Uncertainty prevails as to whether the “board” is the body established by section 2 or whether it refers to its governing body, in a number of sections. It is **also** uncertain whether the board, if it “consists” of its members will continue to exist if the appointments of the members lapse.

Currently the members of the board are appointed by the President.

(b) *New approach*

By referring to the board as the body established by section 2 and distinguishing it from the members of the board who govern its functioning, a clearer distinction is made and the continued existence of the board where terms of appointment expire is clarified.

Members of the board will be appointed by the Minister.

2.4 Amendment of sections 5 and 6 of the Act

These are consequential amendments arising from the amendment of section 4.

2.5 Amendment of section 7 of the Act**(a) *Current position***

The Act prescribes that members of the board are appointed by the State President for a term of office not exceeding three years.

(b) *New approach*

The new approach is to commence a process of rotation, retaining the three year limit, and to **make** provision for an extension of the term of members of the board if their reappointment or the appointment of other members cannot **take** place **timeously**. The extension is for a six month period only. The quorum for a meeting of the board continues to be a majority of its members (section 8(3)).

(c) Reason

A rotation regime is considered superior to one where the expiry of the period of office is **conterminous** for all members. It is not always possible to secure the reappointment of board members within the three year period, resulting in their terms of office expiring before new members have been appointed, thereby creating administrative difficulties within the board if it has to function without having members appointed to its board.

2.6 Amendment of section 9 of the Act**(a) Current position**

The executive as defined comprises only the executive officer, deputy executive officers and the chief actuary.

(b) New approach

As the executive deals with regulatory, operational and administrative matters, it will be possible to appoint other senior employees of the board, such as the general manager: management services, to the executive, because much of its agenda deals with financial and administrative matters.

(c) Reason

Practical experience has shown that it is necessary that other senior employees should serve on the executive by virtue of the nature of their responsibilities. Flexibility is needed if changes are made to the internal structures of the board to cope with changing supervisory requirements.

2.7 Amendment of section 10 of the Act**(a) Current position**

The continued existence of committees of the board is uncertain when the terms of office of members of the board serving on such committee expire.

(b) New approach

The functioning of committees will be preserved where the terms of office of relevant members of the board expire.

(c) Reason

The continued functioning of committees is essential and their appointment should not be affected by the vacation of office of members of the board.

2.8 Amendment of sections 13 and 14 of the Act

These are technical amendments to repeal outdated provisions and to give effect to the proposed amendment of section 18 (clause 13).

2.9 Amendment of section 15 of the Act**(a) Current position**

This section preserves the pension rights of officers and employees transferred from the public service to the Financial Services Board.

(b) New approach

The preservation is repealed.

(c) Reason

The original preservation was a temporary arrangement to coincide with the establishment of the board during 1990. A decision was **taken** by the Department of Finance not to **make** any further payments in terms of the existing section 15. It must be read together with the savings and transitional provisions of clause 20 of the Bill and consequential amendment to the Supervision of Financial Institutions Rationalisation Act, 1996, referred to in the Schedule to the Bill.

2.10 Amendment of section 15A of the Act*(a) Current position*

The board has the right to impose levies on financial institutions, but is not required to follow a consultative role in that regard.

(b) New approach

A compulsory consultative process prior to imposing levies is introduced by this amendment.

(c) Reason

The amendment arises from a recommendation by the Committee of Inquiry into the role of the Financial Services Board (the Rabie Report, 10 September 1996) which recommended a consultative approach in this regard.

2.11 Amendment of section 18 of the Act

This is a consequential amendment arising from the amendment of section 9.

2.12 Amendment of section 21 of the Act*(a) Current position*

It is required that the Financial Services Board should file a report in both official languages.

(b) New approach

The reference to two languages is obsolete and should be deleted.

(c) Reason

It is not considered necessary to specifically require an annual report in two languages which involves unnecessary costs. Deleting this requirement will not impact on the actual report or its contents which remain obligatory. It will still be the responsibility of the board to act within the Constitution concerning the use of official languages if and when required to do so.

2.13 Amendment of section 22 of the Act*(a) Current position*

Section 22 of the Act places a strict onus of secrecy on the board and its employees. Subsection (2) allows disclosure of confidential information to foreign financial services supervisory authorities.

(b) New approach

The new approach expands the ability of the executive officer to provide that information not **only** to the foreign authorities, but also to other supervisory authorities within the Republic. It furthermore expands the ability of the executive officer to

assist such regulatory authorities and will improve the executive officer's ability to provide assistance under Memorandums of Understanding concluded with foreign regulators.

(c) Reason

The need for closer co-operation between regulators internationally is required by the greater internationalisation of the financial services sector and evolving practice by international supervisory authorities. Placing a constraint on co-operation between local supervisory authorities, places an unacceptable impediment on them, especially in the supervision of conglomerate groups. The amendment must be read with the savings and transitional provisions of clause 20 of the Bill and the consequential amendments to the Inspection of Financial Institutions Act, 1998, referred to in the Schedule to the Bill.

2.14 Amendment of section 23 of the Act

(a) Current position

This section establishes an indemnity for the board, its members, the members of the appeal board and the officers, the employees of the board, in case of a *bona fide* exercise of a discretion in the performance of their functions.

(b) New approach

The new approach is to provide the indemnity in respect of the *bona fide*, but not grossly negligent, exercise of powers, carrying out of duties or performance of functions under the Act or any other law under the jurisdiction of the board.

(c) Reason

The need to expand the indemnity to include other laws, as well as the improvement in the wording, follow an improvement contained in the 'Stock Exchanges Control Amendment Act, 1995 (Act No. 54 of 1995), and the Financial Markets Control Amendment Act, 1995 (Act No. 55 of 1995). The improvement is required in view of the increase in delictual claims against regulators in the financial services industry. This will provide the necessary immunity in the case of delictual actions in respect of acts performed in good faith, with the exclusion of gross negligence. It does not preclude liability for wilful acts or omissions as a result of which damage is caused.

2.15 Amendment of section 24 of the Act

(a) Current position

Section 24 at present prohibits any person from using the name or logo of the board under any circumstances.

(b) New approach

The new approach is to allow usage of the name and logo of the board by other parties with the approval of the board and subject to conditions determined by the board.

(c) Reason

It is foreseen that it may become necessary for the board, as regulator, to confirm that various entities are registered to conduct certain types of regulated business lawfully. In order to do so, it will be necessary for the board's logo to be applied in the process. The amendment will enable this to take place.

2.16 Amendment of section 26 of the Act

(a) *Current position*

This section sets out the appeal procedure for any person affected by a decision of the registrar and establishes an appeal board for that purpose. It is currently required that one member of the appeal board must also be a member of the board and does not allow for the appointment of alternates.

(b) *New approach*

The section is amended to reconstitute the appeal board by removing the requirement that one member should also be a member of the board, and requiring that all three members of the board be independent. It also allows for the appointment of alternates. A number of technical improvements to this procedure are also introduced.

(c) *Reason*

The reconstitution of the appeal board arises from the amendment to the requirement that the registrar be supervised by the board, implying control of the registrar and thereafter having one of the board's members sitting on an appeal board to adjudicate on an appeal by a person affected by a decision by the registrar. This is considered to be administratively unjust. The proposed amendment will rectify this problem, and improve the appeal procedure in other respects as well. The amendment must be read with the savings and transitional provisions of clause 20 of the Bill.

2.17 Amendment of section 28 of the Act

This is a technical amendment to correct the references to banks and building societies as a result of intervening amendments to legislation.

3. CONSULTATION

The bodies consulted and their responses are summarised in Annexure A to this Memorandum.

4. ORGANISATIONAL AND PERSONNEL IMPLICATIONS

The Bill has no organisational or personnel implications for the State.

5. FINANCIAL IMPLICATIONS

The Bill does not have any financial implications for the State.

6. COMMUNICATION IMPLICATIONS

The Bill has no communication implications in addition to the commencement of the Bill as an Act of Parliament being published in the *Gazette*.

7. PARLIAMENTARY PROCEDURE

The State Law Advisers and the Financial Services Board 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.

SUMMARY OF CONSULTATIVE PROCESS

The following persons were consulted, and they responded as follows:

1. Parties who supported the Bill as circulated

M3 Capital
Swiss Re Southern Africa
Banking Council of SA
Sanlam

2. Parties who made no comment on the Bill

Department of Finance
Deputy Minister of Finance
Policy Board for Financial Services and Regulation
Portfolio Committee on Finance (National Assembly)
Select Committee on Finance (National Council of Provinces)
Members of the Board: Financial Services Board
Prof J P van Niekerk
Prof R Vivian
Prof H A Lambrechts
Prof S R van Jaarsveld
Insurance Law Society of SA — Unisa
Bond Exchange of SA
SAFEX
Office for Public Enterprises
Office of the Auditor-General
Select Committee on Public Accounts
Standing Committee on Public Accounts
SARS
Ombudsman for Banking
Ombudsman for Long-term Insurance
Ombudsman for Short-term Insurance
Pension Funds Adjudicator
Commission of Enquiry into the Affairs of the Masterbond Group
Actuarial Society of SA
Association for the Advancement of Black Accountants
Association of Banking Lawyers of SA — Rau
Association of Law Societies
Black Lawyers Association
Black Management Forum
Chartered Institute of Management Accountants

Consulting Actuaries Society of SA
 Corporate Lawyers Association of SA
 General Council of the Bar of SA
 Lawyers for Human Rights
 National NGO Coalition
 SA Institute of Chartered Secretaries and Administrators
 Business Practices Committee
 Registrar of Companies
 Business South Africa
 Consumer Institute of SA
 National Consumers Affairs Office
 Departments of Economic Affairs of most Provinces
 Pension Lawyers Association
 Public Accountants and Auditors Board
 SA Law Commission
 Registrar of Medical Schemes
 Securities Regulation Panel
 National African Federated Chamber of Commerce and Industry
 Free Market Foundation
 National Consumer Forum
 Registrar of Banks
Afrikaanse Handelsinstituut
 South African Chamber of Business
 National Black Consumer Union
 Association of General Banks
 Institute of Bankers in South Africa
 Association of Property Unit Trust Management Companies
 Association of Trust Companies in SA
 Association of Unit Trusts of SA
 Public Property Syndication Association
 SA Property Owners' Association
 Association of Black Securities and Investment Professionals
 Association of Bond Issuers of SA
 Association of Corporate Treasures of SA
 Fund Managers Association of SA
 Institute of Financial Markets
 Shareholders' Association of SA
 Trustee Board Limited
 Financial Intermediaries Federation of Southern Africa
 Insurance Brokers Council
 SA Black Insurance Brokers Association

Life Underwriters Association of SA
SA Reinsurance Offices' Association
SA Society of Medical Underwriters
National Council of Trade Unions
Financial Markets Advisory Board
SA Insurance Brokers Association
Institute of Loss Adjusters of Southern Africa
SA Risk and Insurance Management Association
Cosatu
Nehawu
Pension Funds Advisory Committee
SA Reinsurance Brokers Association
Insurance Institute of SA
SA Insurance Association
SA Society of Claims Administrators
Fedsal
Advisory Committees on Long-term and Short-term Insurance
Unit Trusts Advisory Committee
Institute of Life and Pensions Advisers

3. Parties who disagreed or requested changes to the Bill

Persons/bodies consulted	Comments received	Minor changes		Major changes		Disagree	
		Accepted	Refused	Accepted	Refused	Accepted	Refused
1. Association of Participation Mortgage Scheme Managers							
1.1 Clause 23			X				
2. Deneys Reitz							
2.1 Clause 23			X				
3. Mpumalanga Provincial Government							
3.1 Clause 7		X					
3.2 Clause 8		X					
3.3 Clause 1		X					
3.4 Clause 2		X					
3.5 Clause 15(3)		X					
3.6 Clauses 20 and 21		X					
4. Northern Province Consumer Affairs							
4.1 Clause 1			X				
5. South African Institute of Chartered Accountants							
5.1 Clause 1			X				
5.2 Clause 18(1)			X				
5.3 Clause 18(a)		X					
5.4 Clause 18(e)			X				
5.5 Clause 18(h)		X					
6. Johannesburg Stock Exchange							
6.1 Clause 6		X					
6.2 Clause 13		X					
6.3 Clause 17		X					
6.4 Clause 18(c)			X				
6.5 Clause 18(h)		X					
7. Institute of Pension Consultants and Administrators							
7.1 Clause 7		X					
7.2 Clause 16							X
7.3 Clause 18(h)					X		
7.4 Clause 18(k)						X	

Persons/bodies consulted	'Comments received	Minor changes		Major changes		Disagree	
		Accepted	Re-fused	Accepted	Re-fused	Accepted	Re-fused
8. Munich Reinsurance Company or Africa Ltd							
8.1 Clause 12					x		
8.2 Clause 21		x					
9. Life Offices Association							
9.1 Clause 1 and 2					x		
9.2 Clause 4		x					
9.3 Clause 7		x					
9.4 Clause 8			x				
9.5 Clause 10		x					
9.6 Clause 12			x				
9.7 Clause 13		x					
9.8 Clause 15					x		
9.9 Clause 16			x				
9.10 Clause 18							x
10. South African Reserve Bank							
10.1 Pre-ample		x					
10.2 Clause 12		x					
10.3 Clause 21		x					