

OFFICE OF THE PRESIDENT

No. 2074 2 December 1994

NO. 26 OF 1994: BANKS AMENDMENT ACT, 1994.

It is hereby notified that the President has assented to the following Act, which is hereby published for general information:

General Explanatory Note:

Words in ***bold italic*** indicate omissions from existing enactments.

Words in *italic* indicate insertions in existing enactments.

ACT

To amend the Banks Act, 1990, so as to define or further define certain expressions; to create a sanction for a refusal or failure by an aspirant director or executive officer of a bank or controlling company to complete a questionnaire at the request of the Registrar of Banks; to replace an obsolete expression; to extend the powers of the said Registrar to hold discussions, with a view to achieving effective supervision, with the executive management of banks and their associates; to substitute for the concepts of provisional and final registration as a bank the single concept of registration as a bank; to provide for the conduct by foreign institutions of the business of a bank in the Republic by means of a branch; to further regulate the procedure for the establishment by a foreign institution of a representative office in the Republic; to make other and additional provision with regard to the payment of annual licence fees in respect of banking business; to rationalize a multiplicity of provisions governing the acquisition of shares in banks and controlling companies; to further regulate the transfer by a bank of the whole or any part of its business; to extend the categories of employees of banks and their associates who shall be debarred from holding the office of a director of such a bank; to create a sanction for a failure to furnish the Registrar of Banks with the prescribed information regarding proposed appointments of new directors to the board of directors of banks and controlling companies; to provide more specific guidelines regarding matters to be reported to the said Registrar by the auditor of a bank; to extend the categories of employees of banks and their associates who shall be debarred from serving on a bank's audit committee; to provide for the appointment of certain knowledgeable persons to assist in the judicial management or liquidation of banks; to regulate the effect of the suspension, cancellation or termination of the registration of a bank while such bank is being wound up, under judicial management or under curatorship; to provide for the appointment of a commissioner to investigate the affairs of a bank under curatorship or of its associates; to increase, and to further regulate the making of regulations with regard to, the minimum share capital and unimpaired reserve funds required to be maintained by a bank; to make further provision with regard to large exposures by banks; to further regulate the furnishing by banks of returns to the Registrar of Banks; to authorize the making of regulations with regard to the restriction of banks' investments in immovable property and shares and of the granting by banks of loans and advances to certain subsidiaries; to further regulate the role of banks as agents in the effecting of moneylending transactions; to effect a certain textual change; to prohibit any differentiation in the voting rights attached to the ordinary shares of a bank or a controlling company; to further regulate certain criminal matters; and to provide for the making of recommendations to the Minister of Finance regarding amendments to the Banks Act, 1990, through the medium of the Policy Board for Financial Services and Regulation; and to provide for matters connected therewith.

(English text signed by the President.) (Assented to 23 November 1994.)

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

Amendment of section 1 of Act 94 of 1990, as amended by Government Notice No. R. 1765 of 30 July 1991, section 1 of Act 42 of 1992 and sections 1 and 25 of Act 9 of 1993

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

(a) by the substitution in subsection (1) for the definition of "bank" of the following definition: " 'bank' means a public company registered ***provisionally or finally*** as a bank in terms of this Act;";

(b) by the substitution in subsection (1) for the definition of "executive officer" of the following definition: "executive officer", in relation to any institution, includes any ***general manager or deputy general manager*** of such *and institution and, in relation to an institution that is a bank, any employee who is in charge of a risk management function of that bank*

(c) by the deletion in subsection (1) of the definition of "mutual building society";

(d) by the insertion in subsection (1) immediately before the definition of "person" of the following definition:

"mutual bank' means a mutual bank as defined in section 1(1) of the Mutual Banks Act, 1993 (Act No. 124 of 1993);";

(e) by the substitution in subsection (1) for paragraph (a) of the definition of "the business of a bank" of the following paragraph:

*"(a) the acceptance of deposits from the general public (including persons in the employ of the person so accepting deposits) as a regular feature of the business in question ***including, in relation to a bank, from persons in its employ***;"; and*

(f) by the addition to subsection (1A) of the following paragraph:

"(d) If the Registrar has under paragraph (c) addressed a request to a person who is to be appointed as a director or an executive officer of a bank or a controlling company and such person has refused or failed to comply with such request, the provisions of section 60(5)(b) shall mutatis mutandis apply to the appointment of that person as such a director or such an executive officer."

Amendment of section 2 of Act 94 of 1990, as amended by section 25 of Act 9 of 1993

2. Section 2 of the principal Act is hereby amended by the substitution for paragraph (vi) of the following paragraph: "(vi) any mutual ***building society*** bank; or".

Amendment of section 6 of Act 94 of 1990, as amended by section 25 of Act 9 of 1993

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

*"(3) Neither the provisions of this section nor any other provision of this Act shall be construed as prohibiting the Registrar from holding discussions, from time to time, with the chief executive officer of any bank, or with any *executive officer* or employee ***of that bank***, designated by such chief executive officer, of-*

(a) that bank;

(b) any subsidiary or controlling company of that bank, or any other subsidiary of such controlling company;

(c) any juristic person which would have been a subsidiary of that bank or of its controlling company had such juristic person been a company;

(d) any juristic person of which the board of directors or, in the case where such juristic person is not a company, of which the governing body is accustomed to act in accordance with the directions or instructions of that bank or its controlling company; or

(e) any trust controlled directly or indirectly by that bank or its controlling company,

*with a view to achieving effective supervision **of such bank** by the Registrar, on an individual or a consolidated basis, of that bank or the group of banks of which that bank is a member. "*

Amendment of section 9 of Act 94 of 1990, as amended by section 2 of Act 42 of 1992 and section 4 of Act 9 of 1993

4. Section 9 of the principal Act is hereby amended-

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

"(b) ***one at least two*** of the members appointed under subsection (2)(b), designated by the chairman; and";

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

(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"; and

(c) by the substitution for subsection (11) of the following subsection: "(11) The decision of a majority of the members of the board of appeal 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.*".

Amendment of section 11 of Act 94 of 1990, as amended by section 25 of Act 9 of 1993

5. Section 11 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection:

"(1) *Subject to the provisions of section 18A*, no person shall conduct the business of a bank unless such person is a public company and is ***provisionally or finally*** registered as a bank in terms of this Act."

Amendment of section 14 of Act 94 of 1990, as amended by section 25 of Act 9 of 1993

6. Section 14 of the principal Act is hereby amended by the substitution in subsection (1) for the words preceding paragraph (a) of the following words:

"The Registrar may at any time prior to the ***provisional*** registration, in terms of section 17, of a bank, revoke the authorization granted for the establishment of such a bank if the Registrar is satisfied that-".

Amendment of section 15 of Act 94 of 1990, as amended by section 25 of Act 9 of 1993

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

"(2) The Registrar shall grant the approval referred to in subsection (1) only if he is of the opinion that the company concerned will probably, having regard to the provisions of section 17, be eligible for ***provisional*** registration as a bank in terms of this Act."

Substitution of section 16 of Act 94 of 1990, as amended by section 25 of Act 9 of 1993

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

"Application for registration as bank

16.(1) An applicant to whom the Registrar has under section 13 granted authorization for the establishment of a bank (hereinafter in this Chapter referred to as the institution) may at any time during the period of 12 months commencing on the date of the granting of the said authorization apply to the Registrar for the *provisional* registration of the institution as a bank, provided such authorization has not been revoked in terms of section 14(1).

(2) An application under subsection (1) shall-

(a) be made in the prescribed manner and on the prescribed form; and

(b) be accompanied by -

(i) two copies each of the institution's memorandum of association and articles of association;

(ii) a written statement in which is set out-

(aa) the full and the abbreviated name of the institution as well as the literal translations thereof;

(bb) the address of the institution's head office as well as its postal address;

(cc) full particulars of the business the applicant proposes to conduct and of the manner in which it proposes to conduct such business; and

(dd) the full names and the addresses of the chairman, the other directors and the executive officers of the institution; and

(iii) a list of shareholders in the institution, as at the date of the application, drawn up in accordance with the requirements with which a return referred to in section 59 has to comply.

(3) The Registrar may require an applicant contemplated in subsection (1) to furnish him with such information or documents, in addition to information and documents furnished by the applicant in terms of subsection (2), as the Registrar may deem necessary.

(4) The application and every document lodged in terms of subsection (2) or (3) shall be signed by the chairman or the chief executive officer of the institution."

Substitution of section 17 of Act 94 of 1990, as amended by section 25 of Act 9 of 1993

9. The following section is hereby substituted for section 17 of the principal Act:

"Granting or refusal of application for registration

17. (1) Subject to the provisions of subsection (2), the Registrar shall, after considering all information and documents furnished to him in terms of section 16 for the purposes of an application under that section, grant such application if he is satisfied-

(a) that the business the applicant proposes to conduct is that of a bank;

(b) that the applicant does not propose to adopt undesirable methods of conducting business; and

(c) that the memorandum of association and articles of association of the institution are consistent with this Act and are not undesirable for any reason.

(2) Notwithstanding the provisions of subsection (1), the Registrar may refuse an application for the **provisional** registration of an institution as a bank if he is of the opinion-

(a) that any of the requirements specified in section 13(2) is no longer complied with by or in respect of the institution concerned;

(b) that the institution concerned, when **provisionally or finally** registered as a bank, will probably not be able to comply with a provision of this Act, or is likely to pursue a practice contrary to a provision of this Act;

(c) that an interest which any person has in the institution concerned is inconsistent with a provision of this Act;

(d) that the interests of potential depositors with the institution concerned will be detrimentally affected by the manner in which the institution proposes to conduct its business, or for any other reason; (e) that the name of the institution concerned-

(i) is identical with a name under which an existing bank or a mutual **building society bank** has already been **provisionally or finally** registered;

(ii) so closely resembles the name of an existing bank or mutual **building society bank** that the one is likely to be mistaken for the other;

(iii) is identical with, or closely resembles, the name under which any bank or any other institution which was registered under any law repealed by this Act, or any mutual **building society bank**, was previously registered and that reasonable ground for objection against the use of that name by the institution concerned exists; or

(iv) is likely to mislead the public; or

(f) that the application does not comply with a requirement of this Act.

(3) When the Registrar in terms of this section grants or refuses an application for **provisional** registration, he shall give written notice of that fact to the applicant concerned.

(4) If the Registrar in terms of this section grants an application for **provisional** registration he shall, subject to the provisions of section 18, and on payment by the applicant of the prescribed registration fee, **provisionally** register the institution concerned as a bank and issue to the institution, on the prescribed form, a certificate of **provisional** registration as a bank.

(5) An institution which is for the first time **provisionally** registered as a bank shall not commence doing the business of a bank until it has furnished proof to the Registrar that it complies with the provisions of section 70.

(6) An institution which contravenes the provisions of subsection (5) shall be guilty of an offence."

Substitution of section 18 of Act 94 of 1990, as amended by section 25 of Act 9 of 1993

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

"Conditions of registration

18.(1) The **provisional** registration under section 17 of an institution as a bank shall be **for a period of 12 months and shall be** subject to the prescribed conditions and to such further conditions, if any, as the Registrar may determine.

(2) The Registrar may in his discretion and subject to the same or any other or further conditions, from time

to time before its expiration renew such provisional registration for periods not exceeding 12 months at a time: Provided that-

(a) no bank shall remain provisionally registered as such for an aggregate period exceeding five years; and

(b) without derogating from the Registrar's discretion in terms of this subsection to grant or refuse the renewal of such provisional registration, the Registrar may accept the fact that the institution concerned has not, during the period of six months expiring on the last day of the period of 12 months referred to in subsection (1), conducted any business as a bank, as a conclusive ground for the refusal of such a renewal.

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

(4) (a) An appeal in terms of section 9 by a bank against the Registrar's refusal to renew or further renew its provisional registration shall, notwithstanding the provisions of section 9, be lodged before such provisional registration or renewed provisional registration expires. (b) If the provisional registration or renewed provisional registration expires while an appeal referred to in paragraph (a) is being considered, such provisional registration or renewed provisional registration, as the case may be, shall be deemed to have been renewed or further renewed until the appellant is notified of the board of appeal's decision on the appeal."

Insertion of sections 18A and 18B in Act 94 of 1990

11. The following sections are hereby inserted in the principal Act after section 18:

Branches of foreign institutions

18A.(1) An institution which has been established in a country other than the Republic and which lawfully conducts in such other country a business similar to the business of a bank (hereinafter in this section referred to as the foreign institution) may, notwithstanding the provisions of section 11(l), with the prior written authorization of the Registrar and subject to the prescribed conditions and to such further conditions, if any, as the Registrar may determine, conduct the business of a bank by means of a branch in the Republic.

(2) To obtain the authorization of the Registrar as contemplated in subsection (1), the foreign institution concerned shall in the pre-scribed manner and on the prescribed form lodge with the Registrar a written application which shall be accompanied by-

(a) a written statement containing the prescribed information; and

(b) the prescribed fee.

(3) The Registrar may require the foreign institution applying in terms of subsection (2) to furnish him with-

(a) such information or documents, in addition to information and documents furnished by the foreign institution in terms of subsection (2); or

(b) such further information with regard to the nature and extent of supervision exercised or to be exercised by the responsible supervisory authority of the foreign institution's country of domicile in respect of-

(i) the proposed branch in the Republic;

(ii) the foreign institution itself; or

(iii) any group of institutions of which the foreign institution may form a part, as the Registrar may deem necessary.

(4) When the Registrar grants or refuses an application in terms of subsection (2) for authorization to conduct the business of a bank by means of a branch in the Republic, he shall give written notice of that fact to the applicant concerned.

(5) The Registrar shall not grant an application in terms of subsection (2) unless he is satisfied that proper supervision as contemplated in subsection (3)(b) is or will be exercised by the responsible supervisory authority of the foreign institution's country of domicile.

(6) If the Registrar grants an application referred to in subsection (4) he shall on the prescribed form issue to the foreign institution concerned a certificate of authorization to conduct the business of a bank by means of a branch in the Republic.

(7) Any foreign institution that conducts the business of a bank by means of a branch in the Republic without having obtained the Registrar's written authorization referred to in subsection (1) shall be guilty of an offence.

Cancellation or suspension of authorization by Registrar and notice by Registrar of intention to cancel or suspend authorization

18B. (1) The Registrar may, subject to the provisions of subsections (2) and (3), in the case of 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, with the consent of the Minister and by notice in writing to the foreign institution concerned cancel, or suspend on such conditions as the Registrar may deem fit, such authorization if the foreign institution concerned has failed to comply with a prescribed condition or a further condition, contemplated in section 18A(1), to which its authorization is subject.

(2) The Registrar shall, before cancelling or suspending under subsection (1) the authorization of a foreign institution referred to in subsection (1), in a written notice addressed to the foreign institution concerned-

(a) inform the foreign institution of his intention to cancel or suspend, as the case may be, such authorization;

(b) furnish the foreign institution with the reasons for the intended cancellation or suspension; and

(c) call upon the foreign institution to show cause within a period specified in the notice, which shall not be less than 30 days as from the date of the notice, why its authorization should not be so cancelled or suspended.

(3) After considering any representations received within the specified period from the foreign institution concerned by virtue of the provisions of subsection (2)(c), the Registrar may in his discretion-

(a) proceed with the cancellation or suspension in terms of subsection (1) of the authorization; or

(b) refrain from taking any further steps in terms of subsection (1), and the Registrar shall in writing inform the foreign institution concerned of his decision in terms of this subsection."

Repeal of section 19 of Act 94 of 1990, as amended by section 25 of Act 9 of 1993

12. Section 19 of the principal Act is hereby repealed.

Repeal of section 20 of Act 94 of 1990, as amended by section 25 of Act 9 of 1993

13. Section 20 of the principal Act is hereby repealed.

Amendment of section 21 of Act 94 of 1990, as amended by section 25 of Act 9 of 1993

14. Section 21 of the principal Act is hereby amended-

(a) by the insertion of the word "or" at the end of paragraph (a);

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

"(b) an application for ***provisional or final*** registration as a bank, ***or***"; and

(c) by the deletion of paragraph (c).

Amendment of section 22 of Act 94 of 1990, as amended by sections 7 and 25 of Act 9 of 1993

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

(a) by the substitution for subsection (1) of the following subsection: "(1) Subject to the provisions of subsection (2), an institution which is ***provisionally or finally*** registered as a bank shall not use, or refer to itself by, a name other than the name under which it is so registered, or any literal translation or abbreviation thereof which has been approved by the Registrar.";

(b) by the substitution for subsection (4) of the following subsection: "(4) Any person who, in connection with any business conducted by him-

(a) uses, or refers to himself by, any name, description or symbol indicating, or calculated to lead persons to infer, that he is a bank ***provisionally or finally*** registered as such under this Act; or

(b) in any other manner holds himself out to be a bank ***provisionally or finally*** registered as such under this Act, while he is not so registered as a bank, shall be guilty of an offence. ";

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

"(a) the business in question is a bank *or is authorized under section 18A to conduct the business of a bank by means of a branch in the Republic*; or";

(d) by the substitution for paragraph (b) of subsection (6) of the following paragraph:

(b) whose application for ***provisional*** registration as a bank has been granted by the Registrar under section 17 and which has not been formed in accordance with paragraph (a) of this subsection under a name which already includes the word 'bank' or the words 'deposit-taking institution' or 'building society', or a derivative thereof, may before its ***provisional*** registration take the necessary steps in accordance with the Companies Act to include such word, words or derivative in its name."; and

(e) by the substitution for subsection (7) of the following subsection:

"(7) The Registrar may in writing direct a company referred to in subsection (6) whose name includes the word 'bank' or the words 'deposit-taking institution' or 'building society', or any derivative thereof, to remove such word, words or derivative from its name-

(a) in the case of a company referred to in paragraph (a) of that subsection, if it fails to apply in terms of section 16(1) for ***provisional*** registration as a bank within the period of 12 months referred to in that section, or if its application for such registration is refused under section 17; and

(b) in the case of a company referred to in paragraph (b) of that subsection, if it fails to comply, within a reasonable time after its application for ***provisional*** registration has been granted under section 17, with the conditions subject to which it was ***provisionally*** registered.".

Substitution of section 23 of Act 94 of 1990, as amended by section 25 of Act 9 of 1993

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

"Cancellation or suspension of registration by Registrar

23. (1) The Registrar may, subject to the provisions of section 24, in the case of a bank ***which is provisionally*** registered as such, with the consent of the Minister and by notice in writing to the institution concerned cancel, or suspend on such conditions as the Registrar may deem fit, such ***provisional*** registration if the institution has not conducted any business as a bank during the period of six months commencing on the date on which the institution was ***for the first time provisionally*** registered as a bank.

(2) The Registrar may, subject to the provisions of section 24, in the case of a bank ***which is provisionally or finally*** registered as such, with the consent of the Minister and by notice in writing to the institution concerned cancel, or suspend on such conditions as the Registrar may deem fit, such ***provisional or final*** registration if-

(a) it has, in the opinion of the Registrar, been obtained on the strength of untrue or misleading information furnished by any person and such person has, on account of having so furnished such information, been convicted of an offence in terms of section 21; ***or***

(b) in the case of a bank of which the main place of business is situated in a country other than the Republic, the authorization in terms of which the institution concerned is authorized to conduct business in such other country similar to the business of a bank, is revoked by the competent authority in such other country;***or***

(c) the institution concerned has failed to comply-

(i) with a prescribed condition or a further condition, contemplated in section 18(1), to which its registration is subject; or

(ii) with a condition imposed by the Registrar under section 18(2)

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

Amendment of section 24 of Act 94 of 1990, as amended by section 25 of Act 9 of 1993

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

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

"The Registrar shall, before cancelling or suspending under section 23 the ***provisional or final*** registration of a bank, in a written notice addressed to the chairman or chief executive officer of the institution concerned-";

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

(c) call upon the institution to show cause within a period specified in the notice, which shall not be less than 30 days as from the date of the notice, why its ***provisional or final*** registration ***as the case may be*** should not be so cancelled or suspended."; and

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

"(a) proceed with the cancellation or suspension, in terms of section 23, of the ***relevant*** registration; or".

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

18. Section 25 of the principal Act is hereby amended-

(a) by the substitution for subsection (1) of the following subsection: "(1) The Registrar may by way of application on notice of motion apply to a competent court for an order cancelling or suspending the [provisional or final] registration of a bank if in the opinion of the Registrar there exist grounds, other than the grounds referred to in section 23, justifying such cancellation or suspension. ";

(b) by the substitution in subsection (4) for the words preceding paragraph (a) of the following words: "In addition to any other grounds which the court may consider sufficient to justify the granting of an order under subsection (1) cancelling or suspending the *provisional or final* registration of a bank, such an order may also be granted if the institution concerned-"; and

(c) by the substitution for paragraph (c) of subsection (4) of the following paragraph: "(c) has failed to comply with a requirement of this Act which is applicable to it in its capacity as a *provisionally or finally* registered bank;"

Amendment of section 26 of Act 94 of 1990, as amended by section 25 of Act 9 of 1993

19. Section 26 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection: "(1) The Registrar may, in lieu of an application under section 25(1), by written notice to a *provisionally or finally registered* bank in respect of which, in the opinion of the Registrar, any of the circumstances mentioned in paragraphs (a) to (e), inclusive, of section 25(4) is present, restrict the activities of the institution concerned as a bank in such respects and on such conditions as the Registrar may specify in the notice."

Substitution of section 27 of Act 94 of 1990, as amended by section 25 of Act 9 of 1993

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

"Cancellation of registration at request of bank

27. The Registrar shall cancel the *provisional or final* registration *as the case may be* of a bank upon submission to him by the institution concerned of a special resolution contemplated in section 200 of the Companies Act authorizing such cancellation."

Substitution of section 28 of Act 94 of 1990, as amended by section 25 of Act 9 of 1993

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

"Cancellation of registration upon winding-up

28. When the affairs of a bank have been completely wound up as contemplated in section 419(1) of the Companies Act, the responsible Master of the Supreme Court shall transmit to the Registrar a copy of the certificate referred to in that section, and the Registrar shall upon receipt of such copy cancel the *provisional or final* registration *as the case may be* of the bank concerned."

Amendment of section 29 of Act 94 of 1990, as amended by section 25 of Act 9 of 1993

22. Section 29 of the principal Act is hereby amended-(a) by the substitution for paragraph (a) of subsection (1) of the following paragraph: "(a) the *provisional or final* registration was suspended under section 23; or"; and

(b) by the substitution for subsection (2) of the following subsection: "(2) Application for an order discharging

an order under section 25 whereby the **provisional or final** registration of a bank has been suspended by the court, may be made to the competent court referred to in section 25(2).".

Amendment of section 30 of Act 94 of 1990, as substituted by section 8 of Act 9 of 1993

23. Section 30 of the principal Act is hereby amended-

(a) by the substitution for subparagraph (i) of paragraph (a) of the following subparagraph: "(i) **provisional or final** registration of an institution as a bank;";

(b) by the substitution for subparagraph (ii) of paragraph (a) of the following subparagraph: "(ii) cancellation or suspension of **such a** the registration of a bank;";

(c) by the deletion of subparagraph (iii) of paragraph (a);

(d) by the deletion of the word "and" at the end of paragraph (a);

(e) by the substitution for paragraph (b) of the following paragraph: "(b) of every consent to the establishment in the Republic of a representative office of a foreign institution which has been granted by him in terms of section 34; and"; and

(f) by the addition of the following paragraph: "*(c) of every authorization to conduct the business of a bank by means of a branch in the Republic which has been granted by him to a foreign institution under section 18A.*".

Amendment of section 31 of Act 94 of 1990, as amended by section 25 of Act 9 of 1993

24. Section 31 of the principal Act is hereby amended by the deletion of paragraph (a).

Amendment of section 32 of Act 94 of 1990, as amended by section 25 of Act 9 of 1993

25. Section 32 of the principal Act is hereby amended by the substitution in subsection (1) for the words preceding paragraph (a) of the following words: "Whenever an institution which is **provisionally or finally** registered as a bank ceases to be registered as such, the Registrar may in writing order that institution-".

Insertion of section 33A in Act 94 of 1990

26. The following section is hereby inserted in the principal Act after section 33:

"Reregistration after commencement of Banks Amendment Act, 1994

33A.(1) Every institution which on the date immediately preceding the date of commencement of the Banks Amendment Act, 1994 (hereinafter in this section referred to as the Amendment Act), is a bank that has been provisionally or finally registered as such under the provisions of this Act as those provisions existed prior to the amendment thereof by the Amendment Act shall, in accordance with and subject to the provisions of subsections (2) and (3), be reregistered as a bank by the Registrar in terms of the provisions of this Act as so amended, as soon as is practicable after the said date of commencement.

(2) The Registrar shall, when complying with the provisions of subsection (1), issue to the institution in question a certificate of registration as a bank.

(3) The reregistration of an institution in terms of this section shall be subject mutatis mutandis to the provisions of section 18.

(4) Upon the reregistration of an institution in terms of this section its previous provisional or final registration

as a bank, as the case may be, shall be deemed to have lapsed and any certificate of registration issued in respect thereof shall be deemed to have been cancelled.

(5) No fees shall be payable in respect of a reregistration in terms of this section."

Amendment of section 34 of Act 94 of 1990, as amended by section 25 of Act 9 of 1993

27. Section 34 of the principal Act is hereby amended-

(a) by the substitution in subsection (2) for the words following upon paragraph (d) of the following words: "and the application shall be accompanied by *the prescribed fee and* a certificate of the competent authority in the other country in question to the effect that the foreign institution concerned is by or under the laws of that other country authorized to conduct a business in such country similar to the business of a bank."; and

(b) by the insertion of the following subsection after subsection (2): "*(2A) If the Registrar grants an application in terms of subsec-tion (2) for his consent to the establishment of a representative office in the Republic he shall on the prescribed form issue to the foreign institution concerned a certificate of authorization for the establishment of a representative office in the Republic.*".

Substitution of section 35 of Act 94 of 1990, as amended by section 25 of Act 9 of 1993

28. The following section is hereby substituted for section 35 of the principal Act: "Annual licence

35. A bank,*a branch by means of which a foreign institution is under section 18A authorized to conduct the business of a bank in the Republic and a representative office established in terms of section 34 shall obtain from the receiver of revenue of the district in which its registered office referred to in section 170 of the Companies Act is situated Registrara bank's business licence pertaining to its particular business in respect of each year ending on the thirty-first day of December against payment of the prescribed licence fees.*"

Repeal of section 36 of Act 94 of 1990, as amended by section 3 of Act 42 of 1992 and section 25 of Act 9 of 1993

29. Section 36 of the principal Act is hereby repealed.

Amendment of section 37 of Act 94 of 1990, as amended by section 4 of Act 42 of 1992 and section 25 of Act 9 of 1993

30. Section 37 of the principal Act is hereby amended by the substitution for subsection (7) of the following subsection: "(7) For the purposes of this section 'associate' ***means an associate as defined in section 36(10)-***

(a) in relation to a natural person, means-

(i) a close relative of that person; or

(ii) any person who has entered into an agreement or arrangement with the first-mentioned person, relating to the acquisition, holding or disposal of, or the exercising of voting rights in respect of, shares in the bank or controlling company in question;

(b) in relation to a juristic person-(i) which is a company, means any subsidiary or holding company of that company, any other subsidiary of that holding company and any other company of which that holding company is a subsidiary;

(ii) which is a close corporation registered under the Close Corpora-tions Act, 1984 (Act No. 69 of 1984), means any member thereof as defined in section 1 of that Act;

(iii) which is not a company or a close corporation as contemplated in this paragraph, means another juristic person which would have been a subsidiary of the first-mentioned juristic person-

(aa) had such first-mentioned juristic person been a company; or

(bb) in the case where that other juristic person, too, is not a company, had both the first-mentioned juristic person and that other juristic person been a company;

(iv) means any person in accordance with whose directions or instructions the board of directors of or, in the case where such juristic person is not a company, the governing body of such juristic person is accustomed to act; and

(c) in relation to any person-

(i) means any juristic person of which the board of directors or, in the case where such juristic person is not a company, of which the governing body is accustomed to act in accordance with the directions or instructions of the person first-mentioned in this paragraph; and

(ii) includes any trust controlled or administered by that person."

Amendment of section 39 of Act 94 of 1990, as amended by section 25 of Act 9 of 1993

31. Section 39 of the principal Act is hereby amended by the deletion of paragraph (a).

Substitution of section 40 of Act 94 of 1990, as amended by section 25 of Act 9 of 1993

32. The following section is hereby substituted for section 40 of the principal Act:

"Absence of wrongful intent

40. If a bank or a controlling company or any director, officer, employee or agent of a bank or controlling company in good faith and on the strength of information reasonably obtained acts or fails to act and thereby unknowingly contravenes the provisions of section **36 or** 38, such act or failure to act shall not constitute an offence."

Amendment of section 42 of Act 94 of 1990, as amended by section 5 of Act 42 of 1992 and section 25 of Act 9 of 1993

33. Section 42 of the principal Act is hereby amended-

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

"(1) Subject to the provisions of section **36(2)** 37, no person other than a bank or an institution which has been approved by the Registrar and which conducts business similar to the business of a bank in a country other than the Republic may exercise control over a bank, unless such person is a public company and is registered as a controlling company in respect of such bank."; and

(b) by the substitution for subsection (3) of the following subsection: "(3) For the purposes of this section 'associate' means an associate as defined in section **36(10)** 37(7)".

Amendment of section 43 of Act 94 of 1990, as amended by section 25 of Act 9 of 1993

34. Section 43 of the principal Act is hereby amended by the substitution for paragraph (b) of subsection (1) of the following paragraph: "(b) which is a controlling company, as defined in section 1 of the Companies Act, in

respect of any other public company which has applied in terms of section 16 for *provisional* registration as a bank,".

Amendment of section 48 of Act 94 of 1990, as amended by section 25 of Act 9 of 1993

35. Section 48 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection: "(1) If the *provisional or final* registration of a bank in respect of which a controlling company is registered, is cancelled, the registration of that controlling company in respect of that bank shall be deemed to have been cancelled simultaneously."

Amendment of section 54 of Act 94 of 1990, as substituted by section 6 of Act 42 of 1992 and amended by sections 12 and 25 of Act 9 of 1993 and by Proclamation No. 132, 1994

36. Section 54 of the principal Act is hereby amended-

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

(c) in the case of a transfer of assets and liabilities referred to in subsection (1) which entails the transfer by the transferor bank of the whole or any part of its business as a bank, such transfer is effected to another bank *only* or *in the case where such assets and liabilities vest in a branch of the transferor bank situated in Walvis Bay, as defined in section I of the Transfer of Walvis Bay to Namibia Act, 1993 (Act No. 203 of 1993) to an institution in the Republic of Namibia* a person approved by the Registrar *for the purpose of the said transfer*.";

(b) by the substitution for subsections (3), (4) and (5) of the following subsections, respectively: "(3) Upon the coming into effect of a transaction effecting the amalgamation of one bank with another bank as contemplated in subsection (2)(b), or a transaction effecting the transfer of assets and liabilities of one bank to another bank *or person* as contemplated in subsection (2)(c)-

(a) all the assets and liabilities of the amalgamating banks or, in the case of such transfer of assets and liabilities, of the bank by which the transfer is effected, shall vest in and become binding upon the amalgamated bank or, as the case may be, the bank *or person* taking over such assets and liabilities;

(b) the amalgamated bank or, in the case of such transfer of assets and liabilities, the bank *or person* taking over such assets and liabilities, shall have the same rights and be subject to the same obligations as those which immediately before the amalgamation or transfer the amalgamating banks or, as the case may be, the bank by which the transfer has been effected may have had or to which they or it may then have been subject to;

(c) all agreements, appointments, transactions and documents entered into, made, drawn up or executed with, by or in favour of any of the amalgamating banks or, as the case may be, the bank by which the transfer has been effected, and in force immediately prior to the amalgamation or transfer, shall remain of full force and effect and shall be construed for all purposes as if they had been entered into, made, drawn up or executed with, by or in favour of the amalgamated bank or, as the case may be, the bank person taking over the assets and liabilities in question; and

(d) any bond, pledge, guarantee or instrument to secure future advances, facilities or services by any of the amalgamating banks or, as the case may be, by the bank transferring such assets and liabilities, which was in force immediately prior to the amalgamation or transfer, shall remain of full force and effect and shall be construed as a bond, pledge, guarantee or instrument given to or in favour of the amalgamated bank or, as the case may be, the bank *or person* taking over such assets and liabilities, as security for future advances, facilities or services by that bank *or person*.

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

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

(b) in the case of a transaction effecting the transfer of assets and liabilities of one bank to another bank or a person as contemplated in subsection (2)(c), to confirmation at a general meeting of shareholders of the bank by which the transfer is effected and the bank or person taking over such assets and liabilities, and the notice convening such a meeting shall contain or have attached to it the terms and conditions of the relevant agreement or arrangement.

(5) Notice of the passing of the resolution confirming, as contemplated in subsection (4), any compromise, amalgamation or arrangement, or any arrangement for the transfer of assets and liabilities, together with a copy of such resolution and the terms and conditions of the relevant agreement or arrangement, duly certified by the chairman of the meeting at which such resolution was passed and by the secretary of the bank or person concerned, shall be sent to the Registrar by each of the banks involved in the case of a transaction effecting the transfer of assets and liabilities of one bank to another bank or a person as contemplated in subsection (2) (c), the bank by which the transfer is effected and the bank or person taking over such assets and liabilities, and the Registrar shall, after having received such notices from all the **banks which are** parties to the relevant agreement or arrangement, register such notices."; (c) by the substitution for paragraph (a) of subsection (6) of the following paragraph:

"(a) of any amalgamation of two or more banks, the registration of the individual banks which were parties to the amalgamation shall be deemed to be cancelled and the Registrar shall withdraw those registrations and, on payment by the bank created by the amalgamation of the prescribed registration fee, register such bank, subject mutatis mutandis to the provisions of **subsection (7)** section 18, as a bank; or";

(d) by the substitution for subsection (7) of the following subsection: "(7) *A* Upon registration of a bank by the Registrar in terms of subsection (6), he shall *issue a certificate of registration to the bank concerned-*

(a) in the case where all the parties to the relevant amalgamation were finally registered as banks at the time, be a final registration as a bank;

(b) in the case where all the parties to the relevant amalgamation were provisionally registered as banks at the time, be a provisional registration as a bank; or

(c) in the case where some of the parties to the amalgamation were finally registered and some were provisionally registered as banks at the time, be a final or a provisional registration as a bank, in the discretion of the Registrar, and the Registrar shall upon such registration issue the applicable certificate of registration to the bank concerned."

(e) by the substitution for subsections (8) and (9) of the following subsections, respectively: "(8) The Registrar of Companies, every Master of the Supreme Court and every officer in charge of a deeds registry or any other office in which-

(a) is registered any title to property belonging to, or any bond or other right in favour of, or any appointment of or by; or

(b) has been issued any licence to or in favour of, any bank which has amalgamated with any other bank, **or** any bank which has transferred all its assets and liabilities to any other bank or person or any bank which has transferred part of its assets and liabilities to a wholly owned subsidiary of the transferor bank's controlling company, shall, if he is satisfied-

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

(ii) that such amalgamation or transfer has been duly effected, and upon the production to him of any relevant deed, bond, certificate, letter of appointment, licence or other document, make such endorsements thereon and

effect such alterations in his registers as may be necessary to record the transfer thereof and of any rights thereunder to the amalgamated bank or, as the case may be, *to the bank or person or the said wholly owned subsidiary* which has so taken over the said assets and liabilities.

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

(f) by the deletion of paragraph (i) of subsection (11).

Substitution of section 58 of Act 94 of 1990, as amended by section 25 of Act 9 of 1993

37. The following section is hereby substituted for section 58 of the principal Act:

"Information regarding directors and officers

58. *A Every bank shall within 30 days of its provisional registration as such and a every* controlling company shall within

30 days of its registration as such, furnish the Registrar with a copy of its register of directors and officers referred to in section 215 of the Companies Act." .

Amendment of section 59 of Act 94 of 1990, as amended by sections 13 and 25 of 9 of 1993

38. Section 59 of the principal Act is hereby amended-

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

(b) by the substitution for subsection (5) of the following subsection: "(5) For the purposes of this section 'associate' means an associate as defined in section ~~36(10)~~ 37(7).".

Amendment of section 60 of Act 94 of 1990, as substituted by section 1 of Act 81 of 1991 and amended by section 25 of Act 9 of 1993

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

(a) by the substitution for paragraph (a) of subsection (3) of the following paragraph: "(a) a bank shall be employees of that bank *or of any of its subsidiaries*, or of *its* such bank's controlling company, or of any of such controlling company's subsidiaries"; and

(b) by the substitution for subsection (5) of the following subsection: "(5) (a) Every bank and every controlling company shall, at least ~~14~~ 30 days prior to the appointment of a new director (whether for the purpose of the filling of a casual vacancy or in any other circumstances) to its board of directors becoming effective, in writing furnish the Registrar with the *name and curriculum vitae* prescribed information in respect of the proposed new director.

(b) *No appointment of a new director to the board of directors of any bank or controlling company, as contemplated in paragraph (a), shall have legal force for the purpose of this Act or any other law unless the prescribed information in respect of such director has been furnished to the Registrar in accordance with the provisions of paragraph (a).*".

Amendment of section 63 of Act 94 of 1990, as amended by section 7 of Act 42 of 1992 and sections 15 and 25 of Act 9 of 1993

40. Section 63 of the principal Act is hereby amended-

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

"(a) shall, whenever he furnishes, in terms of section **26(3)(b)** 20(5)(b) of the first-mentioned Act, the Public Accountants' and Auditors' Board with copies of the report, acknowledgement of receipt and reply and with the other particulars referred to in that section, relating to an irregularity or suspected irregularity in the conduct of the affairs of the bank for which he has been appointed as auditor, also furnish the Registrar with such copies and particulars; and"; and (b) by the substitution for subparagraph (ii) of paragraph (b) of subsection (1) of the following subparagraph:

"(ii) which, in the opinion of such auditor, may ***be of concern to the Registrar having regard to the Registrar's supervisory functions, in terms of this Act, in respect of the bank concerned endanger the bank's ability to continue as a going concern or may impair the protection of the funds of the bank's depositors or may be contrary to principles of sound management (including risk management) or amounts to inadequate maintenance of internal controls; and***".

Amendment of section 64 of Act 94 of 1990, as amended by section 25 of Act 9 of 1993

41. Section 64 of the principal Act is hereby amended by the substitution for subsection (3) of the following subsection: "(3) All of the members of the audit committee may be, and the majority of such members 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.*".

Amendment of section 68 of Act 94 of 1990, as amended by sections 16 and 25 of Act 9 of 1993

42. Section 68 of the principal Act is hereby amended-

(a) by the deletion of the word "and" at the end of paragraph (a) of subsection (1);

(b) by the insertion of the word "and" at the end of paragraph (b) of subsection (1);

(c) by the addition of the following paragraph to subsection (1): "*(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, liquidator or judicial manager referred to in paragraph (b) in the performance of his functions in respect of the bank in question.*";

(d) by the insertion of the following subsection after subsection (1): "*(1A) The appointment by the Master of a person in terms of subsection (1)(c) shall be by means of a letter of appointment addressed by the Master to the person appointed and in which is set out-*

(a) the name of the bank in respect of which such person is appointed;

(b) directions in regard to the remuneration of the person appointed; and

(c) such other directions incidental to the matter as the Master or the Registrar may deem necessary, and a copy of such letter of appointment shall be furnished by the Master to the provisional liquidator, provisional judicial manager, liquidator or judicial manager concerned.";

(e) by the substitution for subsection (2) of the following subsection: "(2) During the voluntary winding-up of

any bank the liquidator shall furnish the Registrar with *every* such return or statement which the bank concerned would have been obliged to furnish to the Registrar in terms of this Act, were such bank not being wound up, *as the Registrar may require.*"; and

(f) by the addition of the following subsection:

"(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-

(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 Court or the provisional liquidator, provisional judicial manager, liquidator or judicial manager, respectively, by virtue of the provisions of this section or the provisions of the Companies Act, and the Registrar, the judicial manager, liquidator or judicial manager, respectively, shall-

(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

(ii) in the case of such judicial management, until the judicial management order is cancelled by a competent court, 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."

Amendment of section 69 of Act 94 of 1990, as amended by section 8 of Act 42 of 1992 and sections 17 and 25 of Act 9 of 1993

43. Section 69 of the principal Act is hereby amended- (a) by the substitution for paragraph (a) of subsection (1) of the following paragraph:

*"(a) If any bank is in the opinion of the Registrar in financial difficulties, the Minister may, if he deems it desirable in the public interest, **after consultation with and** 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, and thereupon the provisions of paragraphs (b) to (g), inclusive, and (i) to (1), inclusive, of section 433, and sections 434(2), 436, 437 and 440, of the Companies Act shall apply mutatis mutandis, in so far as such provisions are not inconsistent with the provisions of this section, in relation to the bank and to the curator: Provided that for the purposes of this section the powers conferred and the duties imposed by the first-mentioned provisions upon the court, the Master and the judicial manager, respectively, shall devolve upon the Minister, the Registrar and the curator, respectively."*

(b) by the substitution for paragraph (b) of subsection (1) of the following paragraph: *"(b) The Registrar **shall may** appoint a person, other than a person who is in the employ of the bank under curatorship, who in the opinion of the Registrar has wide experience of and is knowledgeable about the specific field of activities in which the bank under curatorship is predominantly engaged, to assist the curator in the management of the affairs of the bank under curatorship."*; and

(c) by the addition of the following subsection: *"(8) Notwithstanding anything to the contrary contained in any law, the suspension, cancellation or termination of the registration of a bank while such bank is under curatorship in terms of this section shall not affect-*

(a) any appointment made, direction issued, or any other thing done under this section in respect of such bank; or

(b) any power to be exercised or duty to be executed in respect of that bank under curatorship by the Minister, the Registrar or the curator, by virtue of the provisions of this section, and the Minister, the Registrar and the curator, respectively, shall until such time as the curatorship is terminated continue to exercise their respective powers and to execute their respective duties under this section 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."

Insertion of section 69A in Act 94 of 1990

44. The following section is hereby inserted in the principal Act after section 69:

"Investigation of affairs of bank under curatorship

69A. (1) While a bank is under curatorship, the Registrar may appoint a person to be a commissioner for the purpose of investigating the business, trade, dealings, affairs or assets and liabilities of that bank or of its associate or associates.

(2) The Registrar may appoint a person as an assistant or two or more persons as assistants to the commissioner referred to in subsection (1) in order to assist the commissioner, subject to his control and directions, in an investigation contemplated in subsection (1).

(3) Before the Registrar appoints a commissioner in terms of subsection (1) or a person or persons in terms of subsection (2), he shall take all reasonable steps to ensure that the person or persons he appoints will be able to report objectively and impartially on the affairs of the bank concerned or the associate or associates of such bank.

(4) A commissioner appointed under subsection (1) and any person or persons appointed under subsection (2) shall for the purpose of their functions in terms of this section have powers and duties in all respects corresponding to the powers and duties conferred or imposed by section 4(1), (2), (3), (4) and (6) of the Inspection of Financial Institutions Act, 1984 (Act No. 38 of 1984 - hereinafter in this section referred to as the Inspection Act), upon a registrar or an inspector contemplated in the Inspection Act: Provided that for the purposes of this section-

(a) any reference to a 'financial institution' in section 4 of the Inspection Act shall be deemed to be a reference to a bank under curatorship or any of its associates; and

(b) any reference to 'the registrar' and 'an inspector' in section 4 of the Inspection Act shall be deemed to be a reference to the commissioner and any person appointed under subsection (2), respectively.

(5) In the application, in relation to an investigation under this section, of section 4 of the Inspection Act, subsection (2) of that section shall be deemed to have been amended to read as follows: ' (2) (a) In carrying out an investigation into the business, trade, dealings, affairs or assets and liabilities of a bank under curator-ship, a commissioner may examine under oath, in relation to such bank or any of its associates, any person who is or formerly was a director, an auditor, an attorney, a valuator, an agent, a servant, an employee, a member, a debtor, a creditor or a shareholder of that bank or any of its associates, or any person whom the commissioner deems capable of giving information concerning the business, trade, dealings, affairs or assets and liabilities of that bank or such an associate, and the commissioner may administer an oath or affirmation to that person for the purpose of such an examination: Provided that the person examined, whether under oath or not, may have his legal adviser present at the examination.

(b) Unless directed otherwise by the commissioner, the proceedings under paragraph (a) shall be held in camera and not be accessible to the public.'

(6) (a) Any person examined by a commissioner under this section shall not be entitled, at such examination, to

refuse to answer any question upon the ground that the answer would tend to incriminate him or upon the ground that he is to be tried on a criminal charge and may be prejudiced at such trial by his answer.

(b) Where any person gives evidence in terms of the provisions of this section and is obliged to answer questions that may incriminate him or, where he is to be tried on a criminal charge, may prejudice him at such trial, the commissioner shall direct, in respect of such part of the proceedings, that no information regarding such questions and answers may be published in any manner whatsoever.

(c) No evidence regarding any questions and answers contemplated in paragraph (b), and no evidence regarding any fact or information that has come to light in consequence of any such questions or answers, shall be admissible in any criminal proceedings, except in criminal proceedings where the person concerned is charged with an offence in terms of subsection (14).

(7) In addition to the powers conferred upon the commissioner by subsection (4) the commissioner shall for the purpose of the performance of his functions under this section have the power to summon before him any such person as he may examine in terms of the provisions of subsection (5).

(8) If any person who has been duly summoned under subsection (7) and to whom a reasonable sum for his expenses has been tendered, fails to attend before a commissioner at the time and place appointed by the summons without lawful excuse made to the commissioner at the time of the sitting, the commissioner may cause the person so summoned to be apprehended and brought before him for examination.

(9) Any person duly summoned under subsection (7) shall be entitled to such witness fees as he would have been entitled to if he were a witness in civil proceedings in a magistrate's court.

(10) The Registrar shall be liable for payment of the costs and expenses incidental to an investigation held in accordance with the provisions of this section, unless the Registrar directs that the whole or any part of such costs and expenses shall be paid out of the assets of the bank concerned.

(11) A commissioner shall within a period of five months as from the date of his appointment complete his investigation in terms of subsection (1) and shall within a period of 30 days after completion of such investigation prepare a written report thereon, in which, inter alia, shall be stated whether or not, in the opinion of the commissioner-

(a) it is in the interest of the depositors or other creditors of the bank concerned that the bank remains under curatorship;

(b) it is in the interest of the depositors or other creditors of the bank concerned that the Registrar, in terms of the provisions of section 68(1)(a), applies to a competent court for-

(i) the winding-up of the bank concerned; or

(ii) an order placing the bank under judicial management;

(c) it appears that any business of such bank was carried on recklessly or negligently or with the intent to defraud depositors or other creditors of the bank concerned or any other person, or for any other fraudulent purpose; and

(d) should it appear that any business of such bank was carried on in the manner contemplated in paragraph (c), any person identified by the commissioner was a party to the carrying on of the business of that bank in such manner.

(12) A report by a commissioner completed in accordance with the provisions of this section shall be forwarded to-

- (a) the Registrar;*
- (b) the Minister; and*
- (c) in the event of a finding contemplated in subsection (11)(c) and*
- (d), the attorney-general concerned.*

(13) Any investigation or any report by a commissioner under this section shall be private and confidential unless the Registrar, after consultation with the Minister, either generally or in respect of any part of such investigation or such report, directs otherwise.

(14) Any person who-

(a) has been duly summoned under this section by a commissioner and who fails, without sufficient cause, to attend at the time and place specified in the summons;

(b) has been duly summoned under this section by a commissioner and who-

(i) fails, without sufficient cause, to remain in attendance until excused by the commissioner from further attendance;

(ii) refuses to be sworn or to affirm as a witness; or

(iii) fails, without sufficient cause-

(aa) to answer fully and satisfactorily any question lawfully put to him by a commissioner, notwithstanding that such answer may tend to incriminate him; or

(bb) to produce books or papers in his custody or under his control which a commissioner has required him to produce;

(c) wilfully furnishes the commissioner with any false information;

(d) refuses or fails to comply to the best of his ability with any reasonable request made to him by the commissioner in the exercise of his powers or the performance of his duties;

(e) wilfully hinders the commissioner in the exercise of his powers or the performance of his duties; or

(f) fails to comply with any provision of a direction by the commissioner or the Registrar as contemplated in this section, shall be guilty of an offence.

(15) The Registrar shall as soon as is practicable after the appointment of a commissioner, or of any person or persons under subsection (2), by notice in the Gazette, announce such appointment.

(16) The provisions of section 69(8) shall mutatis mutandis apply in respect of a bank under curatorship of which the registration as a bank is suspended, cancelled or terminated while an investigation under this section in respect thereof is in progress.

(17) For the purposes of subsection (16), the reference in section 69(8) to the Minister and the curator shall be deemed to be a reference to a commissioner and any person appointed under subsection (2), respectively.

(18) For the purposes of this section 'associate' means an associate as defined in section 37(7)."

Amendment of section 70 of Act 94 of 1990, as amended by section 9 of Act 42 of 1992 and sections 18 and 25 of Act 9 of 1993

45. Section 70 of the principal Act is hereby amended-(a) by the substitution in subsection (1) for the definition of "secondary share capital" of the following definition: " ' secondary share capital' means **-(a) a prescribed percentage of capital** obtained through the issue, with the prior written approval of the Registrar and in accordance with conditions approved by the Registrar in writing *and such further conditions if any, as may be prescribed*, of-

*(a) cumulative preference shares **excluding, in the case of such cumulative preference shares issued in pursuance of the capitalization of reserves resulting from a revaluation of assets, 50 per cent of the capital represented thereby;** and*

*(b) **50 per cent of the capital represented by** 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 and includes loan capital obtained by way of debt instruments issued subject to-***

*(i) **the condition that the debt instruments are issued for a minimum period of five years;***

*(ii) **the condition that the debt instruments may be redeemed before maturity only at the option of the bank concerned and with the prior written approval of the Registrar;***

*(iii) **the condition that, notwithstanding the provisions of any other Act, in the event of the winding-up of the bank concerned, the capital amount of the debt instruments shall not be repaid until the claims of other creditors have been fully satisfied; and***

*(iv) **such further conditions, if any, as may be prescribed;"**;*

(b) by the substitution in subsection (1) for the definition of "secondary unimpaired reserve funds" of the following definition: " ' secondary unimpaired reserve funds' means-(a) *such funds, obtained from actual earnings or by way of recoveries, as may be prescribed and which have been set aside as contemplated in the definition of 'primary unimpaired reserve funds' in this subsection (except such funds obtained by way of premiums on the issue of ordinary or non-redeemable non-cumulative preference shares), and which are available for the purpose contemplated in that definition* but which are not disclosed as a general or special reserve in the financial statements of the bank concerned; **and includes-**

*(a) (b) **50 per cent a prescribed percentage** of the amount of any surplus resulting from a revaluation of assets and determined as prescribed **in subsection (4);***

(b) (c) general provisions held against unidentified and unforeseen losses; and

*(c) (d) funds obtained by way of premiums on the issue of cumulative preference shares or debt instruments issued in accordance with the **provisions of paragraphs (i) to (iv), inclusive, of the definition of 'secondary share capital' 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.";*

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

"(a) **R10 000 000 R50 000 000** or, in the case of 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, **RI 000 000;** or";

(d) by the substitution for subsection (3) of the following subsection: "(3) Notwithstanding the provisions of subsection (2)-

(a) the amount obtained by way of the issue, after the date of commencement of this Act, of debt instruments and which may in terms of this section rank as secondary share capital shall (except in the case of such debt instruments which are to be converted into shares representing capital which may in terms of this section rank as primary or secondary share capital) during the fifth year preceding the maturity of such debt instruments be reduced by an amount equal to 20 per cent of the amount so obtained and annually thereafter by an amount which in each successive year is increased by 20 per cent of the amount so obtained; and

(b) the sum of a bank's issued secondary share capital and secondary unimpaired reserve funds may, in the calculation of the aggregate amount which, such bank is in terms of subsection (2) required to maintain by way of issued primary and secondary share capital and primary and secondary unimpaired reserve funds, be taken into account to an amount not exceeding **50 per cent of the above-mentioned aggregate amount** sum of such bank's issued primary share capital and primary unimpaired reserve funds.";

(e) by the deletion of subsection (4);

(f) by the deletion of subparagraphs (i), (ii), (iii) and (v) of paragraph (a) of subsection (5);

(g) by the substitution for item (aa) of subparagraph (vi) of paragraph (a) of subsection (5) of the following item: "(aa) shares *directly or indirectly* held by the bank in any other bank;"; and

(h) by the deletion of subsections (6) and (7).

Substitution of section 73 of Act 94 of 1990, as substituted by section 11 of Act 42 of 1992 and amended by section 25 of Act 9 of 1993

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

"Large exposures

73. (1) A bank shall not make investments with or grant loans or advances or other credit to any **individual** person, to an aggregate amount exceeding an amount representing a prescribed percentage of such bank's capital and reserves, 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*), to make such investments or to grant such loans, advances or other credit.

(2) A bank 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 **individual** person, which transaction, either alone or together with any previous transaction or transactions entered into by it with that person, results in the bank being exposed up to an amount exceeding an amount representing a prescribed percentage of its capital and reserves.

(3) For the purposes of this section 'person' includes-(a) 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) two or more persons, whether natural or juristic persons, between whom there exists no relationship of control as contemplated in paragraph (a), 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,".

Amendment of section 75 of Act 94 of 1990, as amended by section 12 of Act 42 of 1992 and sections 21 and 25 of Act 9 of 1993

47. Section 75 of the principal Act is hereby amended-(a) by the substitution in subsection (1) for the words following upon paragraph (b) of the following words: "furnish the Registrar, subject to the provisions of subsection (2) (3A), with **a return on the prescribed form and in respect of the prescribed period** returns.";

(b) by the deletion of subsection (2);

(c) by the substitution for subsection (3) of the following subsection: "(3) A bank shall, in addition to the returns referred to in subsection (1) **in respect of such period, at such times and on such form as may be prescribed**, furnish the Registrar, *subject to the provisions of subsection (3A)*, with the prescribed returns, including returns relating to the extent and management of risk exposures in the conduct of its business.";

(d) by the insertion of the following subsection after subsection (3): "*(3A) The returns referred to in subsections (1) and (3) shall be prepared in conformity with generally accepted accounting practice and shall be furnished to the Registrar in respect of such period, at such times and on such a form as may be prescribed. and*

(e) by the substitution for subsections (4), (5) and (6) of the following subsections, respectively: "(4) The regulations contemplated in subsections (1) **and** (3) and (3A) may also-(a) prescribe that a bank which carries on the business of a bank through the medium of a subsidiary, branch office, agency or other undertaking outside the Republic, shall incorporate in the returns which it is required to furnish in terms of subsections (1) and (3) the required information in respect of such business, and also that such information shall be furnished separately by the bank on a form so prescribed; and

(b) prescribe that in the case of a group of banks the holding company in such group shall, in addition to the returns furnished in terms of subsections (1) and (3) by each bank in the group, furnish the Registrar by means of a consolidated return, on a form prescribed, relating to- _

(i) all the **companies** banks in that group;

(ii) *all the subsidiaries of such banks;*

(iii) *the controlling company of such banks and all other subsidiaries of such controlling company;*

(iv) *any juristic person which would have been a subsidiary of any one of such banks or of such controlling company had such juristic person been a company;*

(v) *any juristic person of which the board of directors, or, in the case where such juristic person is not a company, of which the governing body, is accustomed to act in accordance with the directions or instructions of any one of such banks or of such controlling company; and*

(vi) *any trust controlled directly or indirectly by any one of such banks or by such controlling company, as well as to any business, if any, referred to in paragraph (a), with the information required to be furnished in such first-mentioned returns, or with such other information as the Registrar may require.*

(5) A bank shall **within such period as the Registrar may on the application of such bank approve** furnish the Registrar, in respect of **that one** those of the *respective* returns referred to in **subsection (1)(b) subsections (1) and (3)** which most nearly **coincides** coincide with the end of the financial year of the bank with a report by the auditor of the bank in which is stated whether or not **that return** those returns fairly and in conformity with generally accepted accounting practice **presents** *present* those affairs of the bank to which the **return** **relates** returns relate, and the Registrar may, if he deems it necessary, require the bank so to furnish him with such a report in respect of any other of those returns furnished during the financial year.

(6) A bank shall, at such times as may be prescribed, furnish the Registrar with *the such* further prescribed information *regarding its assets, liabilities and contingent liabilities as the Registrar may require.*".

Amendment of section 76 of Act 94 of 1990, as amended by section 2 of Act 81 of 1991 and section 25 of Act 9 of 1993

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

"(1) Subject to the provisions of subsection (2), a bank which invests money in immovable property or in shares, or which lends or advances money to any of its subsidiaries of which the main object is the acquisition and holding or development of immovable property, shall manage its transactions in such investments, loans or advances in such a way that the sum of the amounts-

(a) invested by it in immovable property, taken at the book value thereof;

(b) invested by it in shares (excluding preference shares which are not convertible into ordinary shares), taken at the price at which they were acquired; and

(c) owing to it by any such subsidiary in respect of a loan or an advance granted by it,

does not at any time exceed *the* a prescribed amount *of its issued primary and secondary share capital and primary and secondary unimpaired reserve funds referred to in section 70, plus that part of the amount of any surplus resulting from a revaluation of assets and which in terms of paragraph (a) of the definition of 'secondary unimpaired reserve funds' in section 70 does not rank as secondary unimpaired reserve funds: Provided that if immovable property or an undertaking is bought in by a bank to protect an investment (including a loan or an advance), the amount of such an investment shall for a period of five years from the date of purchase not be taken into account for the purposes of this subsection.*".

Amendment of section 77 of Act 94 of 1990, as amended by section 13 of Act 42 of 1992 and section 25 of Act 9 of 1993

49. Section 77 of the principal Act is hereby amended by the substitution for subsection (3) of the following subsection: "(3) For the purposes of this section 'associate' means an associate as defined in section ~~36(10)~~ 37(7)".

Amendment of section 78 of Act 94 of 1990, as amended by section 25 of Act 9 of 1993

50. Section 78 of the principal Act is hereby amended by the substitution for paragraph (g) of subsection (1) of the following paragraph: (g) shall not, for the purpose of effecting a money lending transaction directly between a lender and a borrower, perform any act in the capacity of an agent *except where the funds to be lent in terms of the money lending transaction are entrusted by the lender to the bank subject to a written contract of agency in which, in addition to any other terms thereof, at least the following matters shall be recorded:*

(i) *Confirmation by the lender that the bank acts as his agent;*

(ii) *that the lender assumes, except in so far as he may in law have a right of recovery against the bank, all risks connected with the placing by the bank of the funds entrusted to it by the lender, as well as the responsibility to ensure that the bank executes the lender's instructions as recorded in the written contract of agency; and*

(iii) *that no express or implied guarantee regarding the payment of any amount of money owing by one person to another in pursuance of the relevant money lending transaction is furnished by the bank;".*

Amendment of section 79 of Act 94 of 1990, as amended by section 25 of Act 9 of 1993

51. Section 79 of the principal Act is hereby amended-

(a) by the substitution for subparagraphs (i) and (ii) of paragraph (b) of subsection (1) of the following subparagraphs, respectively:

"(i) issue any preference shares or ***debentures debt instruments***;

(ii) convert any of its shares into preference shares or ***debentures debt instruments***; or";

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

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

(4) The provisions of subsection (1)(a) shall mutatis mutandis apply to a controlling company. "

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

52. Section 80 of the principal Act is hereby amended by the deletion of subsections (1) and (2).

Amendment of section 81 of Act 94 of 1990, as amended by section 25 of Act 9 of 1993

53. Section 81 of the principal Act is hereby amended-(a) by the substitution in subsection (1) for the words preceding paragraph (a) of the following words: "If the Registrar has reason to suspect that any person who is not ***provisionally or finally*** registered as a bank in terms of this Act-";

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

(a) is likely to conduct the business of a bank in contravention of the provisions of section 11(1) or 18A(6); or

(b) has so contravened the provisions of section 11(1) or 18A(6) or has contravened the provisions of section 22(4) or (5), or that such a contravention is likely to be continued or repeated,"; and

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

(a) subsection (1)(i), that there is a reasonable likelihood that the provisions of section 11(1) or 18A(6) will be contravened by a person concerned as contemplated in subsection (1)(a);".

Amendment of section 82 of Act 94 of 1990, as amended by section 25 of Act 9 of 1993

54. Section 82 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection: "(1) If the Registrar has reason to suspect that any person who is ***not provisionally or finally neither*** registered as a bank ***in terms of this Act nor authorized in terms of the provisions of section 18A(1) to carry on the business of a bank*** is carrying on the business of a bank, the Registrar may by notice in writing direct that person to submit to him such document or to furnish him with such information, relating to the affairs of that person, as the Registrar may specify in the notice and as may be available to that person. "

Amendment of section 83 of Act 94 of 1990, as amended by section 25 of Act 9 of 1993

55. Section 83 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection: "(1) If as a result of an inspection conducted under section 12 of the South African Reserve Bank Act, 1989 (Act No. 90 of 1989), the Registrar is satisfied that any person has obtained money by carrying on the business of a bank without being **provisionally or finally** registered as a bank *or without being authorized, in terms of the provisions of section 18A(1), to carry on the business of a bank*, the Registrar may in writing direct that person to repay, subject to the provisions of section 84 and in accordance with such requirements and within such period as may be specified in the direction, all money so obtained by him in so far as such money has not yet been repaid, including any interest or any other amounts owing by him in respect of such money."

Amendment of section 91 of Act 94 of 1990, as amended by sections 23 and 25 of Act 9 of 1993

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

"(b) contravenes or fails to comply with a provision of section 34, 35, **36(1), (6) or (7)** 37(1), 38(1), 39, 41, 42(1), 52(1) or (4), 53, 55, 58, 59, 61(2), 65, 66, 67, 70(2), 72, 73, 75, 76, 77, 78(1) or (3), 79, 80 or 84(2)," and

(b) by the substitution for subsection (4) of the following subsection: "(4) Any person convicted of an offence in terms of-

(a) section 11(2), *18A(6)* or 22(4), shall be liable to a fine not exceeding R100 000 or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment; or

(b) section 17(6), 21, 22(3) or (8), 32(4)(a), *69A (14)* , 78(2), 82(3), 83(3)(a), 84(8) or subsection (1), (2) or (3) of this section, shall be liable to a fine not exceeding R10 000 or to imprisonment for a period not exceeding six months or to both such fine and such imprisonment."

Amendment of section 92 of Act 94 of 1990

57. Section 92 of the principal Act is hereby amended by the substitution for subsection (3) of the following subsection: "(3) The standing committee may from time to time, *through the medium of the Policy Board for Financial Services and Regulation established by section 2 of the Policy Board for Financial Services and Regulation Act, 1993 (Act No. 141 of 1993)*, make recommendations to the Minister with regard to amendments to this Act which, in the opinion of the committee, have become advisable owing to changed circumstances or which the administration of this Act has shown to be advisable."

Short title and commencement

58. (1) This Act shall be called the *Banks Amendment Act, 1994*, and shall come into operation on a date fixed by the President by proclamation in the Gazette.

(2) Different dates may under subsection (1) be fixed in respect of different provisions of this Act.
