

REPUBLIC OF SOUTH AFRICA

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# MUTUAL BANKS AMENDMENT BILL

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*(As introduced in the National Assembly as a section 75 Bill)*

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(MINISTER OF FINANCE)

[B 3—99]

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REPUBLIEK VAN SUID-AFRIKA

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# WYSIGINGSWETSONTWERP OP ONDERLINGE BANKE

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*(Soos ingedien in die Nasionale Vergadering as 'n artikel 75-wetsontwerp)*

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(MINISTER VAN FINANSIES)

[W 3—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 Mutual Banks Act, 1993, so as to delete a definition and to define or further define certain expressions; to extend the powers of the Registrar of Banks to hold discussions, with a view to achieving effective supervision, with the executive management of mutual banks or of their associates; to substitute for the concepts of provisional and final registration as a mutual bank the single concept of registration as a mutual bank; to delete residual references to terminating mutual building societies; to make other provision with regard to the payment of annual licence fees in respect of mutual bank business; to include employees of associates of mutual banks in the limit placed on the number of employees that may serve as directors of a mutual bank; to prohibit the appointment of officers of associates of mutual banks as auditors of such mutual banks; to provide more specific guidelines regarding matters to be reported to the said Registrar by the auditor of a mutual bank; to include employees of associates of mutual banks in the limit placed on the number of employees that may serve on a mutual bank's audit committee; to make further provision with regard to large exposures of mutual banks; to further regulate the furnishing by mutual banks of returns to the Registrar of Banks; to authorize the making of regulations with regard to the restriction of mutual banks' investments in immovable property and shares and of the granting by mutual banks of loans and advances to certain subsidiaries; and to further regulate the role of mutual banks as agents in the effecting of money-lending transactions; and to provide for matters connected therewith.

**B**E IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

**Amendment of section 1 of Act 124 of 1993, as amended by section 1 of Act 25 of 1994**

1. Section 1 of the Mutual Banks Act, 1993 (hereinafter referred to as the principal Act), is hereby amended— 5
- (a) by the insertion in subsection (1) after the definition of “director” of the following definition:
- “ ‘employee in charge of a risk management function’, in relation to a mutual bank, means that employee of the mutual bank who is ultimately responsible for the management of one or more of the following types of risk to which the mutual bank is exposed, namely— 10
- (a) solvency risk;
- (b) liquidity risk;
- (c) credit risk; 15

- (d) currency risk;
  - (e) market risk (position risk);
  - (f) interest rate risk;
  - (g) counterparty risk;
  - (h) technological risk;
  - (i) operational risk; or
  - (j) any other risk regarded as material by that mutual bank;”; 5
- (b) by the substitution in subsection (1) for the definition of “executive officer” of the following definition: 10
- “ ‘executive officer’, in relation to any institution—
- (a) that is not a mutual bank, includes any [general] manager [or deputy general manager] of [a mutual bank] such an institution;
  - (b) that is a mutual bank, includes any employee of the mutual bank who is in charge of a risk management function of the mutual bank, and any manager of the mutual bank who is responsible, or reports, directly to the chief executive officer of the mutual bank;” 15
- (c) by the substitution in subsection (1) for paragraph (b) of the definition of “mutual bank” of the following paragraph: 20
- “(b) that is **[provisionally or finally]** registered as a mutual bank in terms of this Act;”; and
- (d) by the deletion in subsection (1) of the definition of “registered”.

#### Amendment of section 4 of Act 124 of 1993

2. Section 4 of the principal Act is hereby amended by the substitution for subsection (3) of the following subsection: 25
- “(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 mutual bank, or with any executive officer or employee [of that mutual bank], designated by such chief executive officer, of— 30
- (a) that mutual bank; or
  - (b) any associate of that mutual bank,
- with a view to achieving effective supervision [of such mutual bank] by the Registrar, on an individual or a consolidated basis, of that mutual bank or of that mutual bank and any of its associates.”. 35

#### Amendment of section 9 of Act 124 of 1993 35

3. Section 9 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection:
- “(1) No person shall hold himself out to be a mutual bank unless such person is **[provisionally or finally]** registered as a mutual bank in terms of this Act.”.

#### Amendment of section 12 of Act 124 of 1993 40

4. Section 12 of the principal Act is hereby amended by the substitution in subsection (1) for the words preceding paragraph (a) of the following words: 45
- “The Registrar may at any time prior to the **[provisional]** registration, in terms of section 14, of a mutual bank revoke the authorization granted for the establishment of such mutual bank if the Registrar is satisfied that—”.

### Substitution of section 13 of Act 124 of 1993

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

#### “Application for registration as mutual bank

13. (1) An applicant to whom the Registrar has under section 11 granted authorization for the establishment of a mutual 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 mutual bank, provided such authorization has not been revoked in terms of section 12(1). 5 10

(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 of the institution’s articles;  
     (ii) a written statement in which is set out— 15  
         (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 proposed mutual bank will conduct and of the manner in which such business will be conducted; and 20  
         (dd) the full names and the addresses of the **[chairman]**, chairperson the other directors and the executive officers of the institution; and 25  
     (iii) a list of proposed shareholders in the institution, setting out the full name, occupation and residential or business address of the subscriber, the number and type of shares he or she takes and the nominal value of such shares.

(3) The Registrar may require an applicant contemplated in subsection (1) to furnish him or her 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. 30

(4) The application and every document lodged in terms of subsection (2) or (3) shall be signed by the **[chairman]** chairperson or the chief executive officer of the institution.”. 35

### Substitution of section 14 of Act 124 of 1993

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

#### “Granting or refusal of application for registration

14. (1) Subject to the provisions of subsection (2), the Registrar shall, after considering all information and documents furnished to him or her in terms of section 13 for the purposes of an application under that section, grant such application if he or she is satisfied— 40

(a) that, according to its articles, the institution will be a mutual bank;  
 (b) that the methods of conducting the business of the proposed mutual bank, as laid down in its articles, are not undesirable; and 45  
 (c) that the articles of the institution are consistent with this Act and 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 mutual bank if he or she is of the opinion— 50

(a) that any of the requirements specified in section 11(2) is no longer being complied with by or in respect of the institution concerned;

- (b) that the institution concerned, when **[provisionally or finally]** registered as a mutual 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; 5
  - (d) that the interests of potential depositors with or borrowers from the institution concerned will be detrimentally affected by the manner in which the institution proposes to conduct its business, or for any other reason; 10
  - (e) that the name of the institution concerned—
    - (i) is identical with a name under which an existing mutual bank **[terminating mutual building society]** or bank has already been **[provisionally or finally]** registered;
    - (ii) so closely resembles the name of an existing mutual bank **[terminating mutual building society]** or bank that the one is likely to be mistaken for the other; 15
    - (iii) is identical with, or closely resembles, the name under which any mutual bank or bank **[or terminating mutual building society]** or any institution that was registered under any law repealed by this Act, was previously registered and that there is reasonable ground for objection against the use of that name by the institution concerned; or 20
    - (iv) is likely to mislead the public; or
  - (f) that the application does not comply with a requirement of this Act. 25
- (3) When the Registrar in terms of this section grants or refuses an application for **[provisional]** registration, **[he]** the Registrar 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 or she shall, subject to the provisions of section 15, and on payment by the applicant of the prescribed registration fee, **[provisionally]** register the institution concerned as a mutual bank and issue to the institution, on the prescribed form, a certificate of **[provisional]** registration as a mutual bank. 30
- (5) An institution that is for the first time **[provisionally]** registered as a mutual bank shall not commence doing business in that capacity until it has furnished proof to the Registrar that it complies with the provisions of section 48. 35
- (6) An institution that contravenes the provisions of subsection (5) shall be guilty of an offence.”. 40

#### Substitution of section 15 of Act 124 of 1993

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

##### “Conditions of registration

15. (1) The **[provisional]** registration under section 14 of an institution as a mutual 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. 45

**[(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—** 50

- (a) no mutual 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 55

last day of the period of 12 months referred to in subsection (1), conducted any business as a mutual 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] the Registrar** may impose a condition requiring the institution concerned to take within a specified period such steps as may be necessary to alter its articles in accordance with the requirements of the Registrar. 5

**[(4) (a) An appeal in terms of section 7 by a mutual bank against the Registrar's refusal to renew or further renew its provisional registration shall, notwithstanding the provisions of section 7, be lodged before such provisional registration or renewed provisional registration expires.** 10

**(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.]".** 15

#### **Repeal of sections 16 and 17 of Act 124 of 1993** 20

8. Sections 16 and 17 of the principal Act are hereby repealed.

#### **Amendment of section 18 of Act 124 of 1993**

9. Section 18 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 : 25
 

“(b) an application for **[provisional or final]** registration as a mutual bank, **[or]”**; and
- (c) by the deletion of paragraph (c).

#### **Amendment of section 19 of Act 124 of 1993**

10. Section 19 of the principal Act is hereby amended by the substitution for subsection (2) of the following subsection: 30

“(2) Whenever a juristic person registered under the Companies Act is **[for the first time provisionally]** registered as a mutual bank in terms of this Act, the Registrar shall in writing notify the Registrar of Companies of such registration, and upon receipt by the Registrar of Companies of such notice he or she shall 35 remove the name of such juristic person from the register of companies.”.

#### **Amendment of section 20 of Act 124 of 1993**

11. Section 20 of the principal Act is hereby amended—

- (a) by the substitution for subsection (1) of the following subsection: 40
 

“(1) Subject to the provisions of subsection (2), an institution that is **[provisionally or finally]** registered as a mutual 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 that has been approved by the Registrar.”; and
- (b) by the substitution for subsections (4) and (5) of the following subsections, 45
 

respectively:

“(4) Any person who, in connection with any business conducted by **[him]** that person uses, or refers to himself or herself by, any name, description or symbol indicating, or calculated to lead persons to infer, that **[he]** that person is a mutual bank **[provisionally or finally]** registered as such under this Act, while **[he]** the person is not so registered as a mutual bank, shall be guilty of an offence. 50

(5) No person shall use in respect of any business a name or description that includes the words “building society”, or any derivative thereof, unless the business concerned is a mutual bank or a bank **[or a terminating mutual building society]**.”.

#### Substitution of section 21 of Act 124 of 1993

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

#### “Cancellation or suspension of registration by Registrar

21. (1) The Registrar may, subject to the provisions of section 22, in the case of a mutual bank **[that 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 mutual bank during the period of six months commencing on the date on which the institution was **[for the first time provisionally]** registered as a mutual bank.

(2) The Registrar may, subject to the provisions of section 22, in the case of a mutual bank **[that 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 18; or

(b) the institution concerned has failed to comply—

(i) with a prescribed condition or a further condition, contemplated in section 15(1), to which its registration is subject; or

(ii) with a condition imposed by the Registrar under section 15(2).

(3) The Registrar may, subject to the provisions of section 22, in the case of a mutual bank **[that 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 business as a mutual bank or is no longer in operation.”.

#### Amendment of section 22 of Act 124 of 1993

13. Section 22 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 21 the **[provisional or final]** registration of a mutual bank, in a written notice addressed to the **[chairman]** chairperson 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 21, of the **[relevant]** registration; or”.

**Amendment of section 23 of Act 124 of 1993**

14. Section 23 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 mutual bank if, in the opinion of the Registrar, there are grounds, other than the grounds referred to in section 21, 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 that 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 mutual bank, such an order may 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 that is applicable to it in its capacity as a **[provisionally or finally]** registered mutual bank;”.

**Amendment of section 24 of Act 124 of 1993**

15. Section 24 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 23(1), by written notice to a **[provisionally or finally registered]** mutual bank in respect of which, in the opinion of the Registrar, any of the circumstances mentioned in section 23(4) is present, restrict the activities of the institution concerned as a mutual bank in such respects and on such conditions as the Registrar may specify in the notice.”.

**Substitution of section 25 of Act 124 of 1993**

16. The following section is hereby substituted for section 25 of the principal Act:

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

25. The Registrar shall cancel the **[provisional or final]** registration **[as the case may be]** of a mutual bank upon submission to him or her by the institution concerned of a special resolution by its members authorizing such cancellation.”.

**Amendment of section 26 of Act 124 of 1993**

17. Section 26 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 21; or”; and
  - (b) by the substitution for subsection (2) of the following subsection:
 

“(2) Application for an order discharging an order under section 23 whereby the **[provisional or final]** registration of a mutual bank has been suspended, may be made to the competent court referred to in section 23(2).”.

**Amendment of section 27 of Act 124 of 1993**

18. Section 27 of the principal Act is hereby amended—
- (a) by the substitution for paragraphs (a) and (b) of the following paragraphs, respectively:
    - “(a) **[provisional or final]** registration of an institution as a mutual bank;
    - (b) cancellation or suspension of **[such a]** the registration of a mutual bank”; and
  - (b) by the deletion of paragraph (c).

**Amendment of section 28 of Act 124 of 1993**

19. Section 28 of the principal Act is hereby amended by the deletion of paragraph (a).

**Amendment of section 29 of Act 124 of 1993**

20. Section 29 of the principal Act is hereby amended by the substitution in subsection (1) for the words preceding paragraph (a) of the following words: 5  
 “Whenever an institution that is **[provisionally or finally]** registered as a mutual bank ceases to be registered as such, the Registrar may in writing order that institution—”.

**Insertion of section 30A in Act 124 of 1993**

21. The following section is hereby inserted in the principal Act after section 30: 10

**“Reregistration after commencement of Mutual Banks Amendment Act, 1999**

**30A.** (1) Every institution which on the date immediately preceding the date of commencement of the Mutual Banks Amendment Act, 1999 (hereinafter in this section referred to as the Amendment Act), is a mutual 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 subsections (2) and (3), be reregistered as a mutual 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. 15 20

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

(3) The reregistration of an institution in terms of this section shall be subject *mutatis mutandis* to section 15. 25

(4) Upon the reregistration of an institution in terms of this section its previous provisional or final registration as a mutual 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.”. 30

**Substitution of section 31 of Act 124 of 1993**

22. The following section is hereby substituted for section 31 of the principal Act:

**“Annual licence**

**31.** A mutual bank shall obtain from the **[receiver of revenue of the district in which its head office is situated]** Registrar a **[mutual bank]** 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 fee.”. 35 40

**Amendment of section 37 of Act 124 of 1993**

23. Section 37 of the principal Act is hereby amended by the substitution for subsection (12) of the following subsection:

“(12) Notwithstanding anything to the contrary in any law or the common law or in any agreement contained, not more than 49 per cent, rounded off to the next lower integral number, of the directors of a mutual bank shall be employees of that mutual bank or of any of its associates: Provided that in respect of any matter put to the vote at a meeting of the board of directors of a mutual bank such directors who are employees of that mutual bank or of any of its associates shall together not 45

have a vote in excess of 49 per cent of the total vote cast by all the directors present and voting at that meeting.”.

#### **Amendment of section 43 of Act 124 of 1993**

24. Section 43 of the principal Act is hereby amended by the substitution for subsection (2) of the following subsection:

“(2) For the purposes of the proviso to subsection (1), the date on which a mutual bank is in terms of section 14(4) **[provisionally]** registered as a mutual bank shall be deemed to be the date of its incorporation.”.

#### **Amendment of section 45 of Act 124 of 1993**

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

“(b) Any such auditor shall be an accountant and auditor registered as such in terms of the Public Accountants’ and Auditors’ Act, 1991 (Act No. 80 of 1991), who is engaged in public practice, and no officer of a mutual bank or of any of its associates, and no firm of which such an officer is a member or employee, shall be appointed as an auditor of that mutual bank.”.

#### **Amendment of section 46 of Act 124 of 1993**

26. Section 46 of the principal Act is hereby amended by the substitution in subsection (1) for subparagraph (ii) of paragraph (b) of the following subparagraph:

“(ii) which, in the opinion of such auditor, may **[be of concern to depositors of the mutual bank concerned]** endanger the mutual bank’s ability to continue as a going concern or may impair the protection of the funds of the mutual 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 47 of Act 124 of 1993**

27. Section 47 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 mutual bank nor of any of its associates.”.

#### **Amendment of section 51 of Act 124 of 1993**

28. Section 51 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection:

“(1) A mutual bank shall not make investments with, or grant loans or advances or other credit to, any person, to an aggregate amount exceeding an amount representing a prescribed percentage of such mutual bank’s capital and reserves, without first having obtained the permission of its board, or of a committee appointed for such purpose by its board (at least one of the members of which committee shall be a **[non-executive]** director of the mutual bank who is not in its employ nor in the employ of any of its associates), to make such investments or to grant such loans, advances or other credit.”.

#### **Amendment of section 53 of Act 124 of 1993**

29. Section 53 of the principal Act is hereby amended—

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

“(1) A mutual bank shall, in order to enable the Registrar to determine—

- (a) whether the mutual bank is complying with the provisions of sections 48 and 50 of this Act or of section 10A of the South African Reserve Bank Act, 1989 (Act No. 90 of 1989), as applied by section 49 of this Act; or
- (b) the nature and amounts of the mutual bank's assets, liabilities and contingent liabilities,
- 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 mutual bank shall, in addition to the returns referred to in subsection (1), **[in respect of such period, at such times and on such a form as may be prescribed]** furnish the Registrar, subject to 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) and (5) of the following subsections, respectively:
- “(4) A mutual bank shall **[within such period as the Registrar may on the application of such mutual 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 mutual bank, with a report by the auditor of the mutual 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 mutual bank to which the **[return relates]** returns relate, and the Registrar may, if he or she deems it necessary, require the mutual bank so to furnish him or her with such a report in respect of any other of those returns furnished during the financial year.
- (5) A mutual 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 55 of Act 124 of 1993

30. Section 55 of the principal Act is hereby amended by the substitution in subsection (1) for the words following upon paragraph (c) of the following words:

“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 48, 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 48 does not rank as secondary unimpaired reserve funds: Provided that if immovable property or an undertaking is bought in by a mutual 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 56 of Act 124 of 1993

31. Section 56 of the principal Act is hereby amended by the substitution for subsection (2) of the following subsection:

“(2) The sum of the amounts referred to in paragraphs (a), (b) and (c) of subsection (1) shall be calculated for the purposes of that subsection by deducting therefrom the amount by which the sum of the issued primary share capital and primary unimpaired reserve funds, referred to in section **[55(1)]** 48(1), of the

mutual bank exceeds the sum of the amounts referred to in paragraphs (a), (b) and (c) of section 55(1).”.

#### **Amendment of section 59 of Act 124 of 1993**

32. Section 59 of the principal Act is hereby amended by the substitution in subsection (1) for subparagraph (ii) of paragraph (e) of the following subparagraph: 5  
 “(ii) that the lender assumes, except in so far as he or she may in law have a right of recovery against the mutual bank, all risks connected with the placing by the mutual bank of the funds entrusted to it by the lender, as well as the responsibility to ensure that the mutual bank executes the lender’s instructions as recorded in the written contract of agency; and”.

#### **Amendment of section 62 of Act 124 of 1993**

33. Section 62 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection:  
 “(1) A mutual bank that is **[finally]** registered as **[a mutual bank]** such in terms of this Act and that desires to carry on business as a bank may with the approval of the Registrar and under the authority of a special resolution adopted at a special general meeting of members of the mutual bank be converted into such a bank in accordance with the provisions of this Chapter.”.

#### **Amendment of section 68 of Act 124 of 1993**

34. Section 68 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection: 20  
 “(1) Within 14 days of any conversion in terms of section 67, the company established by the conversion shall forward two certified copies of its certificate of incorporation and its memorandum and articles of association to the Registrar, and upon receipt of such documents the Registrar shall, against payment of the prescribed registration fee, issue to it a certificate of **[final]** registration as a bank.”.

#### **Amendment of section 69 of Act 124 of 1993**

35. Section 69 of the principal Act is hereby amended by the substitution in subsection (1) for the words preceding paragraph (a) of the following words : 30  
 “The juristic person that existed as a mutual bank before the conversion shall, notwithstanding the conversion, continue to exist as a juristic person, but in the form of a public company deemed to be registered **[finally]** as a bank in terms of the Banks Act, 1990, and as from such conversion—”.

#### **Amendment of section 71 of Act 124 of 1993**

36. Section 71 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection: 35  
 “(1) Two or more mutual banks may with the written approval of the Registrar amalgamate and become one mutual bank, and a mutual bank may with like approval transfer all or part of its assets and liabilities to another mutual bank or to a bank **[finally]** registered as such in terms of the Banks Act, 1990 (Act No. 94 of 1990).”.

#### **Amendment of section 77 of Act 124 of 1993**

37. Section 77 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection: 45  
 “(1) When the affairs of a mutual bank have been completely wound up as contemplated in section 419(1) of the Companies Act, as applied by sections 74 and 75 of this Act, the responsible Master of the Supreme Court shall transmit to the Registrar a certificate to that effect and the Registrar shall upon receipt of such

certificate cancel the **[provisional or final]** registration **[as the case may be]** of the mutual bank concerned.”.

**Short title**

**38.** This Act shall be called the Mutual Banks Amendment Act, 1999, and shall come into operation on a date fixed by the President by proclamation in the *Gazette*.

## **MEMORANDUM ON THE OBJECTS OF THE MUTUAL BANKS AMENDMENT BILL, 1999**

### **Introduction**

The Mutual Banks Act, 1993 (Act No. 124 of 1993) (hereinafter referred to as the principal Act), governs the establishment, activities and supervision by the Registrar of Banks of mutual banks. Mutual banks are the successors to the former permanent mutual building societies. Due to the convergence of the business operations of banks and building societies that took place over the years, the concept of a building society was finally done away with in 1993 and the concept of a mutual bank was created instead by the principal Act. The essential difference between a mutual bank and an ordinary, public company bank lies in the ownership of the two different types of banks. Whereas an ordinary, public company bank is owned by the persons who have invested in its share capital, which share capital is represented by equity shares that are freely transferable, mutual banks can be said to be “owned” by its members. Members of a mutual bank are persons who have invested in any of the different types of shares issued by mutual banks, such as permanent interest-bearing shares, indefinite period shares and fixed period shares. In contrast with shareholders of an ordinary, public company bank who share in the profits of the bank by way of dividends paid on their shareholdings, members of a mutual bank receive a return on their investment with the mutual bank in the form of interest payable on the specific type of mutual bank share in which they have invested. Of the different types of shares issued by mutual banks it is only the permanent interest-bearing shares (the so-called “PIBS”) that are freely transferable and can be traded in. However, since mutual banks are mutual societies and not public companies as ordinary banks are, mutual bank PIBS are not listed or traded on the Johannesburg Stock Exchange. All shares issued by mutual banks are essentially of the nature of certificates of deposit.

Although there is nothing in law to stop a mutual bank from offering the full range of banking services that are offered by ordinary banks, mutual banks tend, due to their historic origins, to focus their services more on individual as opposed to corporate clients. Their lending operations are also predominantly of the retail as opposed to the wholesale type. As regards the acquisition of an ownership stake in the institution, it can be said that a mutual bank is more accessible to the ordinary man in the street than the ordinary, public company banks. There are currently four registered mutual banks, holding, in total, capital amounting to R1 035 331 000. Despite their unique characteristics, the same standards and methods of supervision can and are sought to be exercised by the Registrar of Banks in respect of mutual banks as those exercised by him or her in respect of the other, ordinary banks (hereinafter referred to as equity banks).

Having regard to the above-mentioned facts, it is the object of the Bill to achieve the greatest degree of conformity between the provisions of the principal Act and those of the Banks Act, 1990 (Act No. 94 of 1990), that is technically and logically possible. In particular, it is sought to adapt the principal Act in the same, fairly extensive, manner that the Banks Act, 1990, was adapted by the Banks Amendment Act, 1994 (Act No. 26 of 1994).

The most significant proposals contained in the Bill can be explained as follows:

### **Clause 1(a): Definition of “employee in charge of a risk management function”**

The definition of the expression “executive officer” in the principal Act, as it is to be amended by clause 1(b) of the Bill, will also include a reference to “an employee in charge of a risk management function”. Clause 1(a) will, in aid of legal certainty, provide the definition for “employee in charge of a risk management function”.

**Clause 1(b): Amendment of the definition of “executive officer”**

The object of this amendment is twofold, namely—

- (a) to ensure that mutual bank employees who, although not filling posts at general manager level, are nevertheless in charge of the highly responsible function of risk management, are subject to an equal degree of scrutiny by the Registrar of Banks as that accorded to officers at general management level; and
- (b) to extend the concept of “executive officer” so as to include managers (i.e. persons below general manager level) who are responsible directly to, or report directly to, the chief executive officer of the mutual bank.

**Clauses 1(c) and (d): Deletion of reference to “provisional” or “final” registration from the definition of “mutual bank” and deletion of definition of “registered”**

These amendments flow from the proposed change of the process of registration of mutual banks, discussed below with reference to clauses 3 to 20, etc.

**Clause 2: Amplification of section 4(3) of the principal Act**

Currently the Registrar of Banks is empowered by section 4(3) of the principal Act periodically to hold discussions with the chief executive officer of a mutual bank, or with an employee designated by such officer, with a view to achieving effective supervision of such mutual bank. In view of the greater emphasis placed on consolidated supervision (i.e. taking cognisance also of the affairs of other juristic persons associated with a mutual bank and whose financial fortunes may have an impact on the financial position of the mutual bank), it has become necessary to empower the Registrar also to hold such discussions with appropriate officers, designated by the said chief executive officer of a mutual bank, of such associates of a mutual bank.

The amendment proposed in clause 2 achieves this result.

**Clauses 3 to 20, inclusive, and clauses 24, 33, 34 and 37: Substitution for the concepts of provisional registration and final registration as a mutual bank of the single concept of registration as a mutual bank**

With regard to the registration of new mutual banks, the principal Act currently provides that such new mutual bank shall first be provisionally registered for a period of 12 months (which period can be renewed for further periods of 12 months at a time up to a maximum of five years in the aggregate) and that a mutual bank may, at any time while it is so provisionally registered, apply for and be granted final registration. The philosophy behind this procedure, which to a large extent is a historical legacy of the principal Act’s predecessor, the Mutual Building Societies Act of 1965, appears to be that a new mutual bank should first go through a “trial period” during which its performance and viability can be gauged by the supervisory authorities, before its final acceptance as a proven, well-established institution.

However, in view of the extensive capital and reserves and other prudential requirements introduced by the principal Act in 1993, and to which all new mutual banks are subject from their inception, the basis of the said philosophy has to a large extent fallen away. Furthermore, in the experience of the Office for Banks gained during the period before the procedure of provisional registration was abandoned in respect of equity banks, and despite that Office’s best efforts to put the matter in perspective, the concept of “provisional” registration carried with it a (totally unwarranted) negative connotation that caused unjust discrimination by investors against provisionally registered institutions.

In the circumstances, and in view of the fact that the principal Act provides adequate mechanisms to cancel the registration even of finally registered mutual banks of which the performance is not up to standard, it is proposed in the Bill to do away with the procedure of “provisional” followed by “final” registration and to substitute therefor a single act of registration as a mutual bank. All the above-mentioned clauses are necessary to rectify the principal Act in this respect.

**Clause 21: Reregistration of mutual banks currently registered**

This clause proposes the insertion of a new section in the principal Act in which provision is made for the automatic reregistration by the Registrar of Banks of all mutual banks that are currently registered as such. This is a consequential amendment flowing from the proposed doing away with the current two-stage registration procedure discussed above, and is necessary because the current registrations are expressed in the relevant registration certificates as either provisional or final, as the case may be, which distinction will, as proposed, no longer apply.

**Clause 22: Adjustment in respect of annual business licence to be obtained by mutual banks**

The proposed amendment provides for the obtaining, in future, of the mutual bank’s annual business licence directly from, and the payment of the annual licence fee to, the Registrar of Banks instead of the Receiver of Revenue. The adjustment is necessitated by the fact that the administration of mutual banks’ annual licensing and, in particular, the calculation of the applicable licence fee according to the formula prescribed in the regulations under the principal Act, take place in the Office for Banks. A similar adjustment had already been effected in respect of the equity banks in 1994 and will to a very small extent compensate the South African Reserve Bank for the considerable administrative expenses incurred in its Bank Supervision Department in the performance of its function of the supervising of mutual banks, towards which expenses the Reserve Bank receives no funds from any source.

**Clause 23: Amendment of section 37(12) with regard to the limitation on employees as directors of mutual banks**

Section 37(12) of the principal Act provides that not more than 49% of the directors of a mutual bank shall be employees (i.e. executive directors) of that mutual bank. The same consideration basic to this limitation (namely to discourage the adoption of board resolutions that may serve the immediate ends of the mutual bank’s executive management but are, viewed objectively and in the long term, not in the best interests of the mutual bank) has been found to apply in the case of persons serving in the executive management of such mutual bank’s associates, which persons may also have an indirect interest in influencing board resolutions of the mutual bank. The purpose of the amendment proposed in clause 23 is to extend the existing limitation so as to include the last-mentioned persons.

**Clause 25: Extension of the prohibition on the appointment of officers of mutual banks as auditors of such mutual banks**

Section 45(1)(b) of the principal Act currently prohibits the appointment of officers (for example, directors) of mutual banks as auditors of those mutual banks. It is deemed advisable, in further support of the objectives of the prohibition (namely, to ensure truly independent and impartial auditing of the mutual bank), to extend the relevant prohibition also to officers of associates of the mutual bank in question. Clause 25 will amplify section 45(1)(b) of the principal Act in this respect.

**Clause 26: Amendment of section 46(1) so as to provide more specific guidelines regarding matters to be reported to the Registrar of Banks by the external auditor of a mutual bank**

Section 46(1)(b)(ii) of the principal Act requires the external auditor of a mutual bank to report to the Registrar of Banks any matter relating to the affairs of a mutual bank of which such auditor becomes aware during the performance of his functions as auditor of that mutual bank and which in his or her opinion may be of concern to depositors of the mutual bank in question. Following complaints received from the external auditors of equity banks that a phrase comparable to the one underlined above and that used to appear in the Banks Act, 1990, was too vague, gave insufficient guidance to auditors and placed an unreasonable onus upon them, the Banks Act was amended in 1994 so as to set forth more specific guidelines as to what matters should be reported to the Registrar of Banks by the auditor.

Clause 26 of the Bill proposes the improvement of the provisions of section 46(1)(b) of the principal Act in the same way as the Banks Act was improved in this respect in 1994.

**Clause 27: Extension of the limitation on employees' membership of a mutual bank's audit committee**

A mutual bank is required by section 47(1) of the principal Act to appoint at least three of its board members to form an audit committee. The essential purpose of such an audit committee is to ensure adequate financial control and to continuously strive to enhance the credibility and objectivity of financial statements and reports prepared with reference to the affairs of the mutual bank. In terms of section 47(3) the majority of the members of such audit committee shall be persons who are not employees of the mutual bank (i.e persons who are not executive directors of the mutual bank). It is proposed in clause 27 that this disqualification for membership of a mutual bank's audit committee be extended to also include employees of associates of such mutual bank; basically for the same reasons as those discussed above relative to clause 23.

**Clause 28: Extension of the requirement that at least one member of a mutual bank's large exposures scrutiny committee be a non-executive director**

Section 51(1) of the principal Act currently provides that a mutual bank shall not make investments with, or grant loans or advances or other credit to, any person to an aggregate amount exceeding a prescribed percentage of its capital and reserves, without first having obtained the permission of its board or of a committee appointed for such purpose by its board. The said section further provides that at least one of the members of such committee shall be a director not in the employ of that mutual bank (i.e. a non-executive director). It is proposed in clause 28 of the Bill that the relevant requirement be extended so as to provide that such member of the committee in question be a person not in the employ of the mutual bank nor of any of the mutual bank's associates. This position already exists in the case of equity banks since the amendment of the Banks Act in 1994, and the reason therefor is broadly the same as that discussed above relative to clause 23.

**Clause 29: Editorial correction of section 53**

Section 53 of the principal Act currently refers to a single return relating to the capital and reserves and minimum liquid assets of a mutual bank to be furnished to the Registrar of Banks. There are in actual fact several separate returns being furnished by mutual banks to the Registrar of Banks in terms of the Regulations relating to Mutual Banks for supervision purposes. The amendments to section 53 contained in clause 29 of the Bill are mainly of an editorial nature so as to reflect the facts regarding the submission of returns to the Registrar correctly.

**Clauses 30 and 31: Amendment of section 55 so as to consign certain matters to prescription by regulation**

Section 55 of the principal Act regulates mutual banks' investments in immovable property and shares and their granting of loans and advances to subsidiaries involved in the holding and development of immovable property. With regard to the calculation of the aggregate amount to which mutual banks' exposure to these items are restricted, section 55(1) contains provisions of a prescriptive, procedural nature which, it is felt, should more properly be dealt with by regulation, as is already being done in respect of the equity banks. Clause 30 effects the necessary adjustment in this regard of section 55(1) while clause 31 merely effects a consequential amendment of section 56 of the principal Act which flows from the proposed amendment of section 55(1).

**Clause 32: Amendment of section 59 so as to further regulate the role of mutual banks acting as agents in money-lending transactions**

Section 59(1)(e) of the principal Act stipulates the conditions subject to which mutual banks are permitted to act as agents in the effecting of money-lending transactions and sets forth, *inter alia*, the responsibilities of the mutual bank and the lender, respectively, with regard to such transactions. The object of the amendment of section 59(1)(e) proposed in clause 32 of the Bill is to make it clear that it shall be the responsibility of the lender to ensure that the mutual bank executes the lender's instructions as recorded in the relevant contract of agency between the lender and the mutual bank.

**Clauses 35 and 36: Deletion from sections 69 and 71 of outdated references to the final registration of equity banks**

In section 69 of the principal Act, which deals with the conversion of a mutual bank into an equity bank, and section 71, which deals, *inter alia*, with the transfer by a mutual bank of its assets and liabilities to an equity bank, there still occur references to banks (i.e. equity banks) finally registered as such. Since the amendment of the Banks Act, 1990, by the Banks Amendment Act, 1994 (Act No. 26 of 1994), this distinction is no longer valid and needs to be deleted, as proposed in clauses 35 and 36 of the Bill.

**INSTITUTIONS AND BODIES CONSULTED**

As stated in the Introduction, the amendments proposed in this Bill are almost exclusively a reproduction, for purposes of the principal Act, of identical amendments and adaptations effected to the Banks Act in 1994, and stem from the need to secure the greatest degree of conformity between the provisions of the principal Act and the Banks Act that is technically and logically possible. In the circumstances the initiative in the preparation of the Bill has been taken by the Office for Banks in consultation with the existing mutual banks.

The Bill was, furthermore, laid before the Standing Committee for the Revision of the Banks Act, the committee that is empowered by section 93 of the principal Act read with section 92 of the Banks Act, 1990, to make recommendations, through the medium of the Policy Board for Financial Services and Regulation, to the Minister of Finance with regard to amendments to the principal Act which, in the opinion of the committee, have become advisable owing to changed circumstances or which the administration of the principal Act has shown to be advisable. Finally, the Bill was laid before and considered by the Policy Board for Financial Services and Regulation.

**PARLIAMENTARY PROCEDURE**

The State Law Advisers and the Department of Finance are of the opinion that this Bill must be dealt with in accordance with 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.