Banks Amendment Bill: Matrix

Response by National Treasury to Comments received by Members of the Standing Committee on Finance and Members of the Public

13 August 2013

KEY TO CLASSIFICATION OF AMENDMENTS:

	Update of Act in line with new international requirements
	Alignment with Companies and other Acts
	Regulatory gap: Powers of the Registrar (primarily due to alignment with international standards)
	Regulatory gap: Amendments to enhance clarity & certainty

Clause In Banks Act 1990	Section in tabled bill	Commentator	Summary of concern/ comment	National Treasury response
1(1)	1	Investec	Commentator has recommended that the Bill refer to the broader definition provided on the BIS website.	**Disagreed.** Not clear what the concern is with this definition as provided.
5	3		*(a)* That the following be a new clause: "**Amendment of section 5 of Act 94 of 1990, as amended by section 2 of Act 19 of 2003** **3.** Section 5 of the principal Act is hereby amended by the substitution in subsection (1) for paragraph *(a)* of the following paragraph:: *(a)* "delegate to any officer or employee of	**New provision** The new provision extends the Registrar's power to delegate to include delegation to other financial sector regulators. This is to ensure that under the twin peaks regulatory structure, the powers and obligations created by this Bill can be delegated to the appropriate regulator, which may or may not be located within the SARB.

			the Reserve Bank or another financial sector regulator any power conferred upon the Registrar by or under this Act; or"'	
10 (2)	4	Investec	The provision, that the Minister table the Registrar's Annual Report in Parliament should be stated in plain language.	**Agreed.** Minor adjustments to the wording, in order to promote clarity have been proposed.
13	5		The Honourable Ms Dlamini-Dubazana said that the word 'committed' did not put whoever was supposed to submit the information to the Registrar under compulsion, as he or she would submit only if he or she had a commitment to do so. Ms Dlamini-Dubazana wanted to make it compulsory to give such information, or any material information regarding the financial soundness of the foreign institution, rather than saying that this person should have the commitment to do so.	**Agreed.** The phrases relating to 'commitments' have been removed.

23	11		Ms Dlamini-Dubazana referred to the amendment of Section 23. She quoted the deleted words 'removed with the consent of' and the insertion 'with the consent of the Minister'. It seemed to her that one was giving more powers to the Registrar, rather than to the Minister. The Registrar would consult with the Minister. However, she could not see the powers of the Minister in relation to the cancellation or suspension of licensing in respect of this foreign institution. She suggested that the Committee apply its mind to letting the Registrar consult with the Minister, but letting the Minister do the cancellation or suspension of licensing.	For Section 68 (winding up/judicial management) and 69 (curatorship) there had been no change to the Minister's role. There has been extensive discussion between the National Treasury, the Reserve Bank and the IMF on this issue. The IMF had proposed that even curatorship should be solely the responsibility of the registrar of banks. However, National Treasury felt that the Minister should be involved in a decision of such magnitude. However, de-registration or suspension of a bank was a slightly different process. It was not clear that the Minister had to be involved in all aspects of the de-registration. National Treasury will take guidance from the Committee on this issue. The current proposed wording is "… with the consent of the Governor and after consultation with the Minister…", which should ensure an appropriate level of oversight while also ensuring that the Registrar is able to act swiftly and decisively.
23(2)(d)	11	Investec	Latest measures on Anti-money Laundering assessment report should be consulted for a detailed commentary	**No longer necessary.** Following further discussions with the FIC, it has been agreed that subsection (c) should be removed.

27	13	Investec	The Companies Act 71 of 2008, provides for alterable provisions in the MOI of the company, same shall apply inter alia to thresholds and requirements for special resolutions. CIPC guidance note: 1 of 2011 provides that shareholder resolutions contemplated in section 65 of the Act need not to be filed with CIPC in order or same to be regarded as legally binding on the company, as such the special resolution becomes effective when passed.	**Disagreed.** Investec is correct that the new Companies Act allows a company to prescribe its own thresholds for special resolutions. It is, however, desired to prescribed by law that in the case of a deregistration decision such a special resolution shall be carries by 75% of the votes. It is possible, where appropriate, in legislation to provide for additional requirements beyond those that are contained in the Companies Act.
30(1)(e)	15	Investec	Section 114 and the entire chapter 5 of the Companies Act refers of scheme of arrangements. Kindly correct the wording of the document.	**Disagreed** It is correct that the term “scheme of arrangements” is used in Chapter5 of the Companies Act, but the term “arrangements” is used consistently and in numerous provisions throughout the Banks Act. The current use of the term “arrangements” has not created any confusion, and amending all of the references in the Banks Act may have the potential to introduce some confusion. It is therefore proposed to retain the consistent usage of “arrangements”.
3	18	Investec	“An entity will only be deemed to be a controlling company provided that the provisions of section 3.2 of	It is not clear what the nature of the concern is in this instance. The provision as it is currently

			the Companies Act has been complied with."	crafted is appropriate, and is not ambiguous.
47	20	Investec	The Companies Act 71 of 2008, provides for alterable provisions in the MOI of the company, same shall apply inter alia to thresholds and requirements for special resolutions. CIPC guidance note: 1 of 2011 provides that shareholder resolutions contemplated in section 65 of the Act need not to be filed with CIPC in order or same to be regarded as legally binding on the company, as such the special resolution becomes effective when passed.	**Disagreed.** Investec is correct that the new Companies Act allows a company to prescribe its own thresholds for special resolutions. It is, however, desired to prescribed by law that in the case of a deregistration decision such a special resolution shall be carries by 75% of the votes. It is possible, where appropriate, in legislation to provide for additional requirements beyond those that are contained in the Companies Act.
51(b)	21	Investec	It is argued that this provision is unnecessary. As per the provision of section 5(4)(b)(gg) of the Companies Act, should a contravention exist between the provisions of the Companies Act and that of the Banks Act, the provisions of the Banks Act will prevail, as such, the provisions of chapter 6 of the Companies Act will not apply.	**Disagreed.** It is strongly felt that that it is necessary to make this explicit in order to avoid the potential confusion or dispute.
58	27	Investec	Section 24(3)(b) of the Companies Act only refers to record of directors, however, section 1 definition of director includes inter alia any person occupying the position of a director, or alternative director , by whatever name designated. Such definition in the broad	It is not clear what the nature of the concern is in this instance.

			sense may also refer to officers of a company.	
65(1)(a), (c) and (d)	34	Investec	The Companies Act section 23(3)(b)(ii), 70(6) and 33(1) refer to the filling of notice and not the giving of a notice. Kindly amend the wording.	**Agreed.** Wording amended to ensure consistency with the Companies Act.
64C	33		Mr Harris asked with reference to Clause 33 providing for the remuneration committee. Could not one go further. Surely the real power of making sure that pay was linked to performance was in the reporting requirements to be established, and in boosting the influence of shareholders over the pay of bankers. He could understand what National Treasury was trying to do by way of that Clause, but unless one added the requirement that reporting was boosted and that shareholders had more influence, he was concerned that this amendment would be relatively toothless. How did the amendment relate to the reporting requirements and the remuneration provisions in general in the Companies Act? Did the relevant Sections in the Companies Act apply to banks? (Clause 33)	**Agree in principle**. It is, however, difficult for shareholders to monitor remuneration practices on a continuous basis. For this reason the onus is placed on the Board of Directors and the Registrar of Banks. This is in line with the approach followed by other jurisdictions[1]. This section should be read together both with section 51 of the Banks Act (which establishes that a bank is subject to the Companies Act) and with the updated banking regulations (in particular, two Regulations included in the 15 December 2011 issue of Government Gazette No 34838. Refer Chapter 3 of the Regulations with specific reference to Regulation 39(5)(j-o) and Regulation 39(16)(a)(iii)). In particular, the new approach to remuneration proposes that: • In determining the size of the variable compensation pool, the bank takes into account the full range of current and potential future risks including, but not limited to, market, credit, operational, liquidity, strategic and reputational

[1] For a comprehensive analysis of the approach other jurisdictions have taken to implementing the Principles for Sound Compensation Practices, see http://www.financialstabilityboard.org/publications/r_120613.pdf. For the original principles see http://www.financialstabilityboard.org/publications/r_0904b.pdf and for the relevant regulations see Chapter 3 of the Banking Regulations, which are available at http://www.treasury.gov.za/legislation/35950_12-12_ReserveBankCV01.pdf

				risk • In determining the size of the variable compensation pool, the bank takes into account compliance with policiesand procedures and the effectiveness of internal controls • The bank differentiates among risks affecting the firm, the business unit and the individual for the purpose of allocating reward to business units and individuals • The risk adjustment takes severe risks or stress conditions into account • The severity of the risk adjustment is proportional to the quality of the performance measure i.e. the greater the uncertainty relating to the realisation of the performance measure, the more severe the risk adjustment

88	44		Mr Harris was not surprised to see the limitation of liability amendment to the Act's Section 88. More and more bills which came to the Committee extended more limitation of liability to regulators than to the Ministry or the National Treasury. He wanted a better justification for extending that limitation of liability. As the National Treasury knew, this Committee was concerned with it in general, and had already requested an opinion from the State Law Advisers, to help it understand whether this extension of immunity to the actions of regulators was actually justified. All the substituted Section 88 was saying was that if the managers were doing their job correctly, then they should not face liability (Clause 44). It was not a blanket limitation of liability. There was a list of duties stated in the Banks Act.	This is not a new clause, and dates from the original 1990 Act. The only proposal is to extend the limitation of liability to an inspector or to a repayment administrator (the underlined portions). However, such an extension is at the discretion of the Committee.

89	New clause (would be clause 45)		**“Amendment of section 89 of Act 94 of 1990, as amended by section 63 of Act 19 of 2003 and by section 30 of Act 20 of 2007** **45.** Section 89 of the principal Act is hereby amended by the insertion of the following subsection: “(2) <u>The Registrar must inform the Minister and the Governor of the South African Reserve Bank of any matter that in the opinion of the Registrar may pose significant risk to the banking sector, the economy, financial stability or financial markets more generally.</u>.”	**New provision** This clause is proposed, in order to ensure that the Minister and the Governor of the South African Reserve Bank are informed of significant risks to the banking sector and the financial markets more generally that the Registrar may become aware of. This will greatly facilitate the ability of the Minister and Governor to monitor systemic risks.