

REPUBLIC OF SOUTH AFRICA

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# **SOUTH AFRICAN POSTBANK LIMITED AMENDMENT BILL**

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*(As introduced in the National Assembly (proposed section 75); explanatory summary of  
Bill and prior notice of its introduction published in Gazette No 46204 of 6 April 2022)  
(The English text is the official text of the Bill)*

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(MINISTER OF COMMUNICATIONS AND DIGITAL TECHNOLOGIES)

**[B 12—2022]**

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

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

**To amend the South African Postbank Limited Act, 2010, so as to amend and insert certain definitions; to amend the objects of the Act; to provide for the transfer in shareholding from the South African Post Office SOC Limited to Government and the creation of a bank controlling company for “The Postbank SOC Limited” in terms of the Banks Act, 1990; to provide for the appointment of the chief executive officer and the chief financial officer; and to provide for matters connected therewith.**

**Amendment of section 1 of Act 9 of 2010, as amended by section 1 of Act 44 of 2013**

(a) by the insertion after the definition of “Banks Act” of the following definition:

“ ‘**bank controlling company**’ means the controlling company of The Postbank SOC Limited and has the meaning ascribed to it in section 1(1) of the Banks Act;”;

(b) by the insertion after the definition of “Board” of the following definitions: 10

“ ‘**chief executive officer**’ means the chief executive officer appointed in terms of section 18:

**‘chief financial officer’** means the chief financial officer appointed in terms of section 18;

**‘Commissioner’** means the Commissioner as defined in section 1 of the Companies Act;”;

(c) by the substitution for the definition of “Companies Act” of the following definition:

“ ‘Companies Act’ means the Companies Act, [1973 (Act No. 61 of 1973) 2008 (Act No. 71 of 2008)”; 20

(d) by the substitution for the definition of “Company” of the following definition:

“ ‘Company’ means The Postbank SOC Limited;” and

(e) by the insertion after the definition of “Minister” of the following definition:

“‘**person**’ means a juristic or natural person;”. 25

## Amendment of section 2 of Act 9 of 2010

### 2. Section 2 of the principal Act is hereby amended—

- (a) by the substitution for the words preceding paragraph (a) of the following words:
 

“The object of this Act is to provide for the incorporation of the Postbank Division of the Post Office as a **[legal person]** Company and bank controlling company, with the aim of the Company—”;
- (b) by the substitution for paragraph (b) of the following paragraph:
 

“(b) rendering **[transactional]** financial and banking services and lending facilities through, amongst others, [existing] the infrastructure of the Post Office and any other means of delivery the Company may deem appropriate for its operational needs;”;
- (c) by the deletion of the word “and” at the end of paragraph (e);
- (d) by the substitution for the full stop at the end of paragraph (f) of ”; and”; and
- (e) by the addition after paragraph (f) of the following paragraph:
 

“(g) acting as the commercial bank owned by the State to render financial and banking services to the public.”.

## Amendment of section 3 of Act 9 of 2010, as amended by section 2 of Act 44 of 2013

### 3. Section 3 of the principal Act is hereby amended—

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

“(1) The Minister must take the necessary action for the formation and incorporation of a **[public]** state-owned company [with a share capital and for a certificate to commence business to be issued to the Company] and a bank controlling company in terms of the Companies Act.”;
- (b) by the substitution for subsection (2) of the following subsection:
 

“(2) (a) **[Notwithstanding section 32 of the Companies Act, the Post Office]** The Government shall, upon incorporation of the Company and the bank controlling company, be the **[sole member and]** shareholder of the **[Company]** bank controlling company.

(b) The bank controlling company shall hold 100% shares in the Company on behalf of Government represented by the Minister.

(c) The bank controlling company shall exercise oversight over the Postbank and ensure that the Company exercises sound risk management and governance practices, in accordance with the Banks Act.

(d) The Minister shall consider and approve any other shareholding with the concurrence of the Minister of Finance and in accordance with the requirements of the Banks Act and the Companies Act.”;
- (c) by the substitution for subsection (3) of the following subsection:
 

“(3) (a) The name of the Company is **[the “South African”]** “The Postbank SOC Limited” and no other person, except the Company, may carry on any business or be registered with that name or with a name that is similar to “The Postbank”.

(b) The name of the bank controlling company is the South African Postbank SOC Limited and no other entity, other than the Postbank, may carry on any business or be registered with that name or with a name that is similar to “South African Postbank SOC Limited.”;
- (d) by the substitution for subsection (4) of the following subsection:
 

“(4) The Minister must on behalf of **[the Post Office]** Government, sign and file the **[memorandum and articles of association]** Memorandum of Incorporation, Notice of Incorporation and all other documents necessary for the formation and incorporation of the Company and the bank controlling company.”;
- (e) by the substitution for subsection (5) of the following subsection:
 

“(5) The **[Registrar of Companies]** Commissioner must—

  - (a) register the **[memorandum and articles of association]** Memorandum of Incorporation as signed and filed in terms of subsection (4);

- (b) incorporate the Company as a **[public]** state-owned company under the name “[**South African**] The Postbank SOC Limited”; and
- (bA) incorporate the bank controlling company as a company under the name “South African Postbank SOC Limited. 5
- [(c) **with the concurrence of the Minister, issue to the Company a certificate to commence business.**];
- (f) by the substitution for subsection (6) of the following subsection:
  - “(6) The sole business of the bank controlling company is to act as the controlling company (as defined in section 1(1) of the Banks Act).”; and 10
- (g) by the addition after subsection (6) of the following subsection:
  - “(7) The Minister must apply to register the bank controlling company in accordance with section 43 of the Banks Act.”.

#### **Amendment of section 9 of Act 9 of 2010, as amended by section 5 of Act 44 of 2013**

- 4. Section 9 of the principal Act is hereby amended by the substitution in subsection (2) for paragraph (a) of the following paragraph: 15

“(a) The Company, the bank controlling company and the Post Office must, with the concurrence of the Minister and the Minister of Finance, conclude an agreement which governs cooperation between the Company, the bank controlling company and the Post Office.”. 20

#### **Amendment of section 10 of Act 9 of 2010**

- 5. Section 10 of the principal Act is hereby amended—

- (a) by the substitution for subsection (2) of the following subsection:
  - “(2) The members of the Board are appointed or reappointed by the Minister, with the concurrence of the Minister of Finance **[and the Post Office]**, and the concurrence shall be deemed to have been granted, should such a response not be forthcoming within 30 days from the receipt of the request by the Minister of Finance.”; and 25
- (b) by the addition after subsection (2) of the following subsections:
  - “(3) The members of the Board of the Company are also the members of the Board of the bank controlling company. 30
  - (4) The Board must exercise control over the Company.
  - (5) The members of the Board are appointed or reappointed by the Minister in the same manner contemplated in section 12(1) and in accordance with the requirements of the Banks Act. 35
  - (6) The Board of the bank controlling company shall be the same as the one serving on the Company.”.

#### **Amendment of section 12 of Act 9 of 2010**

- 6. Section 12 of the principal Act is hereby amended—

- (a) by the substitution in subsection (1) for paragraph (a) of the following paragraph: 40
  - “(a) **[seven]** not less than five and not more than nine non-executive members appointed from among the persons nominated in terms of section 14(1)(a); and”; 45
- (b) by the deletion in subsection (1) of paragraph (b);
- (c) by the substitution in subsection (1) for paragraph (c) of the following paragraph:
  - “(c) the **[managing director]** chief executive officer and the chief financial officer, who **[is an]** are executive [member] members of the Board by virtue of office that they hold.”; 50
- (d) by the substitution for subsection (2) by the deletion of the word “and” at the end of paragraph (a);
- (e) by the substitution in subsection (2)(b) for the full stop at the end of subparagraph (ii) of the word “; and” and the addition of the following paragraph: 55
  - “(c) are determined to be fit and proper persons in terms of section 1(1A) of the Banks Act.”.

### Amendment of section 14 of Act 9 of 2010, as amended by section 7 of Act 44 of 2013

#### 7. Section 14 of the principal Act is hereby amended—

- (a) by the deletion of subsection (1)(b);
- (b) by the substitution in subsection (5) for paragraph (b) of the following paragraph:
 

“(b) If a suitable person or the required number of suitable persons are not nominated as contemplated in subsections (1)(b) or (4), the Minister may, with the concurrence of the Minister of Finance **[and the Post Office]**, identify and appoint the required number of further members.”;
- (c) by the substitution in subsection (6) for paragraph (a) of the following paragraph:
 

“(a) The Minister must, within 30 days after **[consensus]** concurrence has been reached with the Minister of Finance **[and the Post Office]** regarding the appointment of members as contemplated in section 10(2)—”;
- (d) by the deletion of subsection (6)(a)(i); and
- (e) by the substitution in subsection (8) for paragraph (a) of the following paragraph:
 

“(a) Any vacancy occurring in the Board must be filled in the same way as the departing members was appointed **[to the Board]**.”.

### Insertion of section 15A in Act 9 of 2010

#### 8. The following section is hereby inserted in the principal Act, after section 15:

##### “Functions of bank controlling company

- 15A.** (1) The bank controlling company will be the controlling company for the Company.
- (2) The bank controlling company shall itself not conduct any operating activities of its own, other than ownership of the Company.
- (3) The bank controlling company will hold 100% shares of the Company.
- (4) The bank controlling company shall exercise additional oversight over the bank, ensuring that the bank operating company exercises sound risk management and governance practices, in accordance with the South African Reserve Bank requirements as provided for in the Banks Act.”.

### Amendment of section 18 of Act 9 of 2010, as amended by section 9 of Act 44 of 2013

#### 9. Section 18 of the principal Act is hereby amended—

- (a) by the substitution for the heading of the following heading:
 

**“Appointment of [managing director] chief executive officer and chief financial officer”;**
- (b) by the substitution in subsection (1) of the following subsection:
 

“(1) (a) The Board must, with the approval of the Minister, appoint a **[managing director] chief executive officer** who **[must perform any work incidental to the functions of]** shall have the overall responsibility for implementation of the Board’s strategy for the Company and **[ensure that the]** management of the day-to-day affairs of the Company **[meet its objects]** and any other functions as delegated by the Board from time to time.

(b) The Board, with the concurrence of the Minister, shall appoint the chief financial officer who shall assist the chief executive officer and the Board with discharging their responsibilities over the financial affairs of the Company and any other functions as may be delegated from time to time.

(c) The chief executive officer and the chief financial officer shall be appointed for a term not exceeding five years, which appointment may, with the approval of the Minister, be renewed for another term based on performance.”;

- (c) by the substitution for subsection (2) of the following subsection:  
 “(2) The Board must invite applications for the posts of **[managing director]** chief executive officer and chief financial officer by publishing advertisements in the media or the selection process approved by the Board with the concurrence of the Minister, and this may include as a head hunting process in accordance with the relevant prescripts.”; and 5
- (d) by the substitution in subsection (3) for the words preceding paragraph (a) of the following words:  
 “A person appointed as **[managing director]** chief executive officer or chief financial officer—”. 10

#### Amendment of section 19 of Act 9 of 2010

#### 10. Section 19 of the principal Act is hereby amended—

- (a) by the substitution for the heading of the following heading:  
 “**Conditions of appointment of [managing director] chief executive officer and chief financial officer**”; 15
- (b) by the substitution in subsection (1) for paragraph (a) of the following paragraph:  
 “(a) The appointment of the **[managing director]** chief executive officer and chief financial officer is subject to the conclusion of a performance contract entered into between the Board and the **[managing director]** chief executive officer and the Board and the chief financial officer, respectively.”; 20
- (c) by the substitution for subsection (2) of the following subsection:  
 “(2) The **[managing director]** chief executive officer and chief financial officer **[holds]** hold office on the terms and conditions determined by the Board, with the concurrence of the Minister.”; 25
- (d) by the substitution for subsection (3) of the following subsection:  
 “(3) The **[managing director is]** chief executive officer and chief financial officer are entitled to a remuneration package determined by the Board, with the concurrence of the Minister and the Minister of Finance, and the concurrence shall be deemed to have been granted, should such a response not be forthcoming within 30 days from the receipt of the request by the Minister of Finance.”; 30
- (e) by the substitution for subsection (4) of the following subsection:  
 “(4) The **[managing director is]** chief executive officer and chief financial officer are accountable to the Board.”; and 35
- (f) by the addition after subsection (4) of the following subsections:  
 “(5) The Board may in writing appoint any senior employee of the Company to act as chief executive officer or chief financial officer when the holder of that office— 40  
 (a) is temporarily unable to perform the duties connected with that office;  
 (b) has been suspended from office; or  
 (c) has vacated or has been removed from that office and a new chief executive officer or chief financial officer, as the case may be, has not yet been appointed. 45  
 (6) In the case of a vacancy contemplated in subsection (5), the Board must fill the vacancy within a reasonable period of time, which may not exceed 120 days.  
 (7) An acting chief executive officer or acting chief financial officer may exercise all the powers and must perform all the duties of the chief executive officer or chief financial officer for a period not exceeding 120 days or as determined by the Board with the concurrence of the Minister. 50  
 (8) Executives of Postbank are required to undergo a fit and proper assessment exercise to determine whether they have the requisite skills, knowledge and expertise to occupy those positions critical for the bank in terms of section 13(2)(fA) and (g) of the Banks Act.”. 55

### Amendment of section 20 of Act 9 of 2010

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

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

“(b) such persons as the **[managing director]** chief executive officer may, with the concurrence of the Board, appoint.”; and 5

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

“(2) The Board must determine the structure or organogram of the Company and the conditions of service, remuneration and service benefits of the personnel of the Company after consultation with the **[managing director]** chief executive officer and with the concurrence of the Minister and the Minister of Finance.”. 10

### Insertion of section 20A in Act 9 of 2010

12. The following section is hereby inserted in the principal Act after section 20:

#### “Bank controlling company’s organisational structure” 15

**20A.** (1) The operations of the bank controlling company will consist primarily of compliance, risk management and governance functions.

(2) The Board shall remain ultimately responsible for ensuring that its approved strategy is implemented and that the group’s purpose is fulfilled.

(3) The Board also accepts its responsibility to ensure that risks are adequately identified, measured, managed and monitored and that good governance is maintained. 20

(4) (a) The Board will be supported by the Company Secretary who shall provide governance support as well.

(b) The secretariat resource shall be shared with the Company. 25

(5) The Board shall discharge its duties through policies and frameworks supported by Board committees established in terms of the Companies Act, the Banks Act and the Public Finance Management Act.”.

### Amendment of section 22 of Act 9 of 2010

13. Section 22 of the principal Act is hereby amended— 30

- (a) by the substitution for the heading of the following heading:

“**Funds of Company and bank controlling company**”;

- (b) by the substitution for the words preceding paragraph (a) of the following words:

“The funds of the Company and bank controlling company consist of—”; and 35

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

“(a) capital vested in the Company and bank controlling company by virtue of section 7;”.

### Amendment of section 23 of Act 9 of 2010

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

#### “Inspection of financial accounts and documents of Company and bank controlling company”

**23.** The Minister or any officer in the public service authorised by the Minister in writing has full access to all the financial accounts and documents of the Company and of the bank controlling company, and the Board must at all times furnish to the Minister or to such officer, as the case may be, all such information as may reasonably be required.”. 45



## Amendment of section 24 of Act 9 of 2010

15. The following section is hereby substituted for section 24 of the principal Act:

### “Application of Public Finance Management Act

24. The Company and the bank controlling company [is] are subject to the Public Finance Management Act.”.

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## Amendment of section 28 of Act 9 of 2010

16. Section 28 of the principal Act is hereby amended—

- (a) by the substitution for the heading of the following heading:
 

“[Certain] **Exemption from certain provisions of Companies Act [may be declared inapplicable to Company]**”;
- (b) by the substitution for subsection (1) of the following subsection:
 

“(1) (a) The Minister, with the concurrence of the Minister of Finance, may, in terms of section 9 of the Companies Act, request the Minister of Trade [and], Industry and Competition to [declare any provision] grant a total, partial or conditional exemption from one or more provisions of the Companies Act [to be inapplicable] applicable to the Company or the bank controlling company.”;

(b) The request must be fully motivated by the Company or the bank controlling company, as the case may be.”;
- (c) by the substitution for subsection (2) of the following subsection:
 

“(2) (a) The [Registrar of Companies] Commissioner must publish particulars about the request and the motivation contemplated in subsection (1) by notice in the *Gazette*.

(b) In [such] the notice [,] contemplated in paragraph (a), the [Registrar] Commissioner must invite interested persons to submit representations to a person named in the notice within a period stipulated in that notice.”; and
- (d) by the substitution in subsection (3) for paragraph (b) of the following paragraph:
 

“(b) [The] Before granting an exemption in terms of section 9 of the Companies Act and in addition to the provisions of that section, the Minister of Trade [and], Industry and Competition [may only issue the declaration if] must consider the representations contemplated in subsection (2) and be satisfied on reasonable grounds that the [inapplicability of that provision to] request for exemption for the Company or the bank controlling company—

  - (i) will contribute to the Company’s or the bank controlling company’s efficiency;
  - (ii) will not reduce or limit the Company’s or the bank controlling company’s accountability as a public entity or reduce the transparency of its functioning and operations; [and]
  - (iii) will not be prejudicial to the rights, interests or claims of the Company’s creditors or employees or to the rights or interests of any other person[.];
  - (iv) will not reduce or limit the Company’s or bank controlling company’s functioning or accountability as a bank or bank controlling company; and
  - (v) will not affect the effective regulation and supervision of the Company and the bank controlling company in terms of the Banks Act.”.

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### Amendment of long title of Act 9 of 2010

17. The following long title is hereby substituted for the long title of the principal Act:

**“To provide for the incorporation of the Postbank Division of the South African Post Office; to provide for the transfer of the enterprise of that Division to the Postbank company; to provide for the governance and functions of the Postbank company; to provide for the transfer in shareholding from the South African Post Office to Government; through the creation of a bank controlling company for The Postbank SOC Limited in terms of the Banks Act, 1990; and to provide for matters connected therewith.”.**

### Amendment of Arrangement of Sections in Act 9 of 2010

18. The Arrangement of Sections after the long title of the principal Act is hereby amended—

- (a) by the insertion after the expression “15. Resignation, removal from office and vacating of office” of the following:
  - “15A. Functions of bank controlling company”;**
- (b) by the substitution for the expression “18. Appointment of managing director” of the following:
  - “18. Appointment of [managing director] chief executive officer and chief financial officer”;**
- (c) by the substitution for the expression “19. Conditions of appointment of managing director” of the following:
  - “19. Conditions of appointment of [managing director] chief executive officer and chief financial officer”;**
- (d) by the insertion after the expression “20. Personnel of Company” of the following:
  - “20A. Bank controlling company’s organisational structure”;**
- (e) by the substitution for the expression “22. Funds of Company” of the following:
  - “22. Funds of Company and bank controlling company”;** and
- (f) by the substitution for the expression “28. Certain provisions of Companies Act may be declared inapplicable to Company” of the following:
  - “28. [Certain] Exemption from certain provisions of Companies Act [may be declared inapplicable to Company]”.**

### Substitution of short title of Act 9 of 2010

19. The short title is hereby substituted for the short title of the principal Act.

#### “Short title and commencement

**32.** This Act is called the South African Postbank SOC Limited Act, 2010, and takes effect on a date determined by the President in the *Gazette*.”.

### Short title and commencement

**20.** This Act is called the South African Postbank Limited Amendment Act, 2022, and comes into operation on a date fixed by the President published in the *Gazette*.

## MEMORANDUM ON THE OBJECTS OF THE SOUTH AFRICAN POSTBANK LIMITED AMENDMENT BILL, 2022

### 1. BACKGROUND

- 1.1. The South African Postbank Limited Act, 2010 (Act No. 9 of 2010) (“the Act”), provides for the incorporation of the Postbank Division of the South African Post Office (“SAPO”) as a separate legal entity, the transfer of the enterprise of that Division to the Postbank Company, the governance and functions of the Postbank Company and matters connected therewith. The Postbank Company was accordingly incorporated and registered with the Companies and Intellectual Property Commission on 19 April 2017 as the South African Postbank SOC Limited. The incorporation of the Postbank Company as a separate legal entity has been critical to enable the actual application to the South African Reserve Bank (“SARB”) for a full banking licence in terms of the Banks Act. This enabled the actual lodgment of the actual banking licence application.
- 1.2 The actual banking licence application is being adjudicated by the SARB. From the onset, the banking licence application process has been prolonged in nature with rigorous and stringent outlined administrative, compliance and regulatory requirements from the SARB that had to be complied with throughout. All the SARB requirements have been complied with, and there have been two main challenges to the completion of the banking licence process. The two main challenges are: (1) the previous legislative conflict which prevented state-owned entities from being eligible to apply for registration with the SARB as either banks or Bank Controlling Companies (“BCC”); and (2) the SAPO Group not meeting the “BCC” structure requirements.
- 1.3 The first challenge has been addressed through, the amendment to the Banks Act, 1990 (Act No. 94 of 1990) (“Banks Act”), as contained in the Financial Matters Amendment Act, 2019 (Act No. 18 of 2019). The Banks Act is currently applicable to national state-owned companies as well. The only remaining challenge relates to the BCC structure which is being addressed through the current proposed amendments to the Act.
- 1.4 Section 43 (1) of the Banks Act provides for a public company that intends to exercise control over any bank, and reads as follows:
 

**“Application for registration as controlling company**

**43.** (1) Subject to section 42, a public company—

  - (a) that intends to exercise control over any bank; or
  - (b) which is a holding 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 registration as a bank,

shall apply to the Authority on the form prescribed or registration as a controlling company in respect of that bank or proposed bank, as the case may be.

  - (2) An application referred to in subsection (1) shall be accompanied by such information and documents as may be prescribed.
  - (3) A public company applying in terms of subsection (1) for registration as a controlling company shall submit such additional particulars in connection with its application as the Authority may require”.
- 1.5 The BCC is accordingly required to be registered in terms of section 43(1) of the Banks Act to exercise control over the Postbank. The BCC is required as a shareholder of reference for capital adequacy and in terms of compliance and submission of statutory monthly returns as stipulated in the Banks Act regulations and circulars. The implication is that the BCC will step in to recapitalise and support its subsidiary bank if it runs into financial difficulties.

One of the key requirements is that the BCC must be in a financially sound position in terms of section 44(2)(e) of the Banks Act.

- 1.6 However, clause 3(b) of the Bill states that “upon the incorporation of the Postbank Company, SAPO shall be the sole member and shareholder of the Company”. This implies that SAPO needed to be registered as a BCC for Postbank. The current challenge with SAPO is that, although its operations stabilised after the prolonged crippling strike of 2014, the entity is not yet profitable. It is therefore currently not in a financially sound position to meet the requirements for registration as a BCC. There are therefore risks that, in its current form, very high capital adequacy requirements would be required if SAPO were to be the direct shareholder of Postbank.
- 1.7 Both the Department of Communications and Digital Technologies (“Department”) and National Treasury, in consultation with the SAPO and the SARB, held numerous engagements to mitigate and find an optimal alternative structure that will comply with the requirements of the Banks Act.
- 1.8 The alternative BCC structure proposed by the National Treasury was eventually agreed upon by the two respective Ministers, wherein the Minister of Communications and Digital Technologies will now become the sole owner and shareholder of Postbank and its BCC. The ownership of Postbank is removed completely from the SAPO. This is to mitigate against the abovementioned risks associated with the structure envisaged in the Postbank Act, which makes SAPO the sole owner and shareholder of the Postbank.
- 1.9 The option selected was the most viable and cost-effective to mitigate against the risk that government would be obliged to provide on-going support to SAPO in order to maintain the structure of the SAPO group as the result of the ownership of Postbank. SAPO’s non-banking services corroborated by the current financial position poses a threat to the safeguarding of depositors’ funds. The separation will enable direct focus on both entities (SAPO and Postbank) in terms of the exact CAPEX requirements for each without being distorted by non-core businesses. It is also worth noting that in terms of the Bill, there is nothing preventing SAPO from being reconsidered for shareholding or part thereof in future, should the financial situation change to the point of meeting the requirements of the Banks Act.
- 1.10 The implementation of the agreed alternative BCC structure resulted in the Department proposing amendments to the Act in the Bill.
- 1.11 The proposed amendments are necessary to meet the section 43 requirements of the Banks Act, which would require that the Postbank BCC will have to be incorporated in terms of the Companies Act, 2008 (Act No. 71 of 2008) (“Companies Act”), for it to apply as a national state-owned entity that will exercise control over the bank in terms of the Banks Act.
- 1.12 The submission of the section 43 application to the SARB is the final step in the Postbank’s banking licence application for it to be considered having complied fully with all the requirements as stipulated in the Banks Act.

## **2. OBJECTS OF THE BILL**

The objects of the Bill are to amend the Act, so as to substitute and insert certain definitions; to adjust the establishment and shareholding arrangements for the Postbank through the creation of a new banking controlling company (BCC); to facilitate its establishment and registration as a BCC in terms of the Banks Act; and to provide for matters connected therewith.

### 3. SUMMARY OF THE BILL

Clause 1 seeks to amend section 1 of the Act. It provides that definitions contained in the Bill are amended or inserted for better understanding and interpretation relating to additional clauses.

#### 3.2 Clause 2

- 3.2.1 Clause 2 seeks to amend section 2 of the Act. This clause provides for the amendment of section 2 by removing the words “legal person” and replace it with “company and bank controlling company” and by deleting “transactional” and replacing it with “banking and financial services”. This is to ensure better use of the language and interpretation of the Act.
- 3.2.2 Clause 2 also seeks to amend section 2(b) of the Act, after the words “Post Office” to insert the words “any other means of delivery the company may deem appropriate for its operational needs”. This amendment seeks to give the Postbank operational flexibility in terms of the means of delivery of services to avoid solely depending on the SAPO infrastructure. Postbank shall also be able to take advantage of the Fintech opportunities.
- 3.2.3 Clause 2 further provides for the amendment of section 2 of the Act by the addition of paragraph (g) which provides a further object of the Act for the Postbank Division of the Post Office to act as the delivery arm of government to effectively deliver financial and payment services to citizens. This amendment seeks to expand on the objectives of the Postbank. The insertion of a new paragraph (g) in section 2 of the Act seeks to distinguish the Postbank from the normal banks as the Postbank shall be a state-owned commercial bank conducting “the business of a bank” as defined in the Banks Act. This shall ensure that the Postbank shall act as the delivery arm of government to effectively deliver financial and payment services to citizens.

#### 3.3 Clause 3

- 3.3.1 Clause 3 provides for the amendment of section 3 of the Act to ensure the establishment of the BCC in terms of the Banks Act.
- 3.3.2 Clause 3 further provides for the amendment of section 3 of the Act to allow the Minister to consider and approve any other shareholding with the concurrence with the Minister of Finance and in line with the requirements of the Banks Act and the Companies Act.
- 3.3.3 Clause 3 further provides for the name of the BCC as the “South African Postbank SOC Limited” and that no other person, other than the Postbank, may carry on any business or be registered with that name.
- 3.3.4 Clause 3 further provides for the amendment of section 3 of the Act to provide that the BCC will hold 100% shares in the company on behalf of government representing the Minister and that the BCC will exercise oversight over the Postbank and ensures that the company exercises sound risk management and governance practices, in line with the Banks Act and its regulations.
- 3.3.5 It also provides for the Minister to apply to register the BCC in accordance with section 43 of the Banks Act.

### **3.4 Clause 4**

- 3.4.1 Clause 4 provides for the amendment of section 9 of the Act by the insertion of paragraph (g) in subsection (1) to provide that the Company may use any infrastructure to render its services where the Post Office is not available or does not cater for its operational needs.
- 3.4.2 Clause 4 further provides for the substitution of section 9(2)(a) of the Act to provide that the Company, the BCC and the Post Office must, with the concurrence of the Minister, conclude an agreement which governs cooperation between the Company, the BCC and the Post Office.

### **3.5 Clause 5**

- 3.5.1 Clause 5 provides for the amendment of section 10 of the Act to provide that the Minister appoints or reappoints the members of the Board with the concurrence of the Minister of Finance. The concurrence of the Minister of Finance shall be deemed to have been granted should such a response not be forthcoming within 30 days from the receipt of the request.
- 3.5.2 Section 10 of the Act is also amended to provide that the members of the Board of the Company are also members of the Board of the BCC and for the members of the Bank Controlling Board to be appointed or reappointed by the Minister in the same manner prescribed in section 12(1) of the Act and in accordance with the requirements of the Banks Act.

### **3.6 Clause 6**

- 3.6.1 Clause 6 provides for the amendment of section 12 of the Act, which provides for the composition of the Board. This amendment seeks to ensure that when the members of the Board are appointed they are fit and proper persons in terms of the Banks Act.
- 3.6.2 Clause 6 further provides for the amendment of section 12(1)(c) by replacing the words “managing director” with the words “chief executive officer and the chief financial officer, who are the executive members of the Board by virtue of office that they hold”.

### **3.7 Clause 7**

Clause 7 provides for the amendment of section 14 of the Act to delete reference to the Post Office as it will no longer be the controlling company of the Postbank.

### **3.8 Clause 8**

- 3.8.1 Clause 8 provides for the insertion of section 15A into the Act to provide for the functions of the BCC. In terms of this clause, the BCC will be the controlling company of the Postbank.
- 3.8.2 The provision further provides for the BCC to exercise additional oversight over the Postbank and to ensure that bank operating company exercises sound risk management and governance practices in line with SARB requirements of the Banks Act and its regulations.

### **3.9 Clause 9**

- 3.9.1 Clause 9 provides for the amendment of section 18 of the Act to provide for the substitution of the words “managing director” with the

words “chief executive officer” and “chief financial officer”, respectively.

- 3.9.2 Section 18 of the Act is further amended to provide for the appointment and terms of office of the acting chief executive officer and chief financial officer by the Board.

### **3.10 Clause 10**

- 3.10.1 Clause 10 provides for the amendment of section 19 of the Act to provide for the substitution of the words “managing director” with the words “chief executive officer and chief financial officer” in the heading of this section and in the subsections of section 19 of the Act. This is to ensure that the conditions of employment for chief executive officer and chief financial officer are also catered for.
- 3.10.2 Section 19 is further amended to ensure the process in the appointment of the chief financial officer, the requirement to conclude performance agreement with the Board, and determination of the chief financial officer’s remuneration by the Board with the concurrence of the Minister.

### **3.11 Clause 11**

Clause 11 provides for the amendment of section 20 of the Act to provide for the substitution of “managing director” with “chief executive officer” to ensure consistency. The section is amended to further provide for the appointment of the acting chief executive officer and the chief financial officer by the Board.

### **3.12 Clause 12**

- 3.12.1 Clause 12 provides for the insertion of section 20A into the Act to provide for the organisational structure and operations of the BCC, which shall consist primarily of compliance, risk management and governance functions.
- 3.12.2 The section also provides for the Board to remain responsible for ensuring that its approved strategy is implemented and that the group’s purpose is fulfilled. The Board shall also accept responsibility to ensure that risks are adequately identified, measured, managed and monitored and that good governance is maintained and that the board shall discharge its duty through policies and frameworks supported by board committees.
- 3.12.3 The section further provides for the Board Committees to be established in line with the Companies Act, the Banks Act and the Public Finance Management Act.

### **3.13 Clause 13**

Clause 13 provides for the amendment of section 22 of the Act to include the BCC and to also provide for the funds of the BCC in section 22 of the Act.

### **3.14 Clause 14**

Clause 14 provides for the amendment of section 23 of the Act to insert that the BCC also furnish to the Minister or to such officer, as the case may be, all such information as may reasonably be required.

### **3.15 Clause 15**

Clause 15 provides for the amendment of section 24 of the Act to ensure that the BCC is also subject to the Public Finance Management Act.

### **3.16 Clause 16**

Clause 16 provides for the amendment of section 28 of the Act to allow the Minister to request the Minister of Trade, Industry and Competition exemption from certain provisions of the Companies Act applicable to the company or the BCC for the purposes of ensuring incorporation of the two companies and conditions under which exemptions to the Company and the controlling company can be granted.

### **3.17 Clause 17**

Clause 17 provides for the amendment to the long title of the Act to include the establishment and shareholding arrangements for the South African Postbank SOC Limited through the creation of a BCC in terms of the Banks Act.

### **3.18 Clause 18**

Clause 18 provides for amendments to the Arrangement of Sections in the Act.

### **3.19 Clause 19**

Clause 19 provides for the amendment of the short title of the Act, to include reference to the abbreviation “SOC” as required in terms of the Companies Act.

### **3.20 Clause 20**

Clause 20 provides for the short title and commencement of the South African Postbank Limited Amendment Act, 2022.

## **4. DEPARTMENTS/BODIES/PERSONS CONSULTED**

The following stakeholders were consulted:

- (a) Postbank;
- (b) South African Post Office (SAPO); and
- (c) National Treasury.

## **5. FINANCIAL IMPLICATIONS FOR STATE**

- 5.1 It is vital to take cognisance of the fact that the Postbank is not being established from scratch as a bank but it has been an existing division with SAPO from the onset, and was later incorporated as a 100% subsidiary of SAPO. Postbank has been relying on SAPO as the parent company to provide services. As a parent company, SAPO has been responsible for its establishment. The complete removal from SAPO which is required to give effect to the BCC structure in line with the banking licence application requirements, have direct financial implications for SAPO. This is given that apart from the implied decline in the Net Asset Value of the parent (SAPO) brought about by the separation of the Postbank subsidiary from the SAPO Group, there is implied restructuring of the SAPO business. Some proper due diligence would have to be done to compensate SAPO on the goodwill owed to them over the Postbank establishment in the form of recapitalisation. This is critical to cater for the cost of the restructuring (*unbundling*) of SAPO given the eminent separation or unbundling of the Postbank from the group.



- 5.2 The Department has been working with the National Treasury to find a workable solution. National Treasury have submitted that they have considered the fiscal risks that the different BCC structure options presented. As such, Treasury asserted that the costing of the restructuring of SAPO will need to be fed into the budget process considering the impact of the unbundling on the solvency of SAPO. In view of this, the request for financial support to support to mitigate against the financial impact of the Postbank separation is being facilitated through the MTEF funding request processes.

## 6. PARLIAMENTARY PROCEDURE

- 6.1 The Department and the State Law Advisers are of the opinion that this Bill must be dealt with in accordance with the procedure established by section 75 of the Constitution since it contains no provision to which the procedure set out in section 74 or 76 of the Constitution applies.
- 6.2 The Constitution prescribes the classification of Bills, therefore a Bill must be correctly classified otherwise it will be constitutionally out of order.
- 6.3 We have considered the Bill against the provisions of the Constitution relating to the tagging of Bills, and against the functional areas listed in Schedule 4 (functional areas of concurrent national and provincial competence) and Schedule 5 (functional areas of exclusive provincial legislative competence) to the Constitution.
- 6.4 For the purposes of tagging, the constitutional court case of *Tongoane and Others v Minister for Agriculture and Land Affairs and Others CCT 100/09 [2010] ZACC 10* confirmed the “substantial measure” test indicated in *Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill 12/99 [1999] ZACC 15*. The test entails that “any Bill whose provisions in substantial measure” falls within a specific Schedule must be classified in terms of that Schedule.
- 6.5 In terms of section 76(3) of the Constitution, a Bill must be dealt with in accordance with the procedure established by either subsection (1) or (2) if it falls within a functional area listed in Schedule 4 to the Constitution.
- 6.6 The issue to be determined is whether the clauses as contained in the Bill, in a substantial measure, fall within a functional area listed in Schedule 4 to the Constitution.
- 6.7 The Bill mainly seeks to amend the Act, to substitute and insert certain definitions therein, to adjust the establishment and shareholding arrangements for the South African Postbank SOC Limited through the creation of a BCC, to provide for the establishment and registration of the BCC in terms of the Banks Act and to provide for matters connected therewith.
- 6.8 The proposed amendments have been examined to establish whether, in substantial measure, they fall within any of the functional areas listed in Schedule 4 to the Constitution. In our view the subject matter of the Bill, which is the establishment of the BCC, does not, in substantial measure, fall within any of the functional areas listed in Schedules 4 or 5 to the Constitution and it does not affect provinces whereby the procedure set out in section 76 of the Constitution would be applicable.
- 6.9 We are of the opinion that since this Bill is an ordinary Bill not affecting provinces and that it must be dealt with in accordance with the procedure set out in section 75 of the Constitution.

**7. REFERRAL TO NATIONAL HOUSE OF TRADITIONAL AND KHOI-SAN LEADERS**

The State Law Advisers are of the opinion that it is not necessary to refer the latest Bill to the National House of Traditional and Khoi-San Leaders in terms of section 39(1)(a) of the Traditional and Khoi-San Leadership Act, 2019 (Act No. 3 of 2019), since it does not contain provisions pertaining to traditional or Khoi-San communities or pertaining to customary law or customs of traditional or Khoi-San communities or pertaining to any matter referred to in section 154(2) of the Constitution.





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