CHAPTER 4

DEVELOPMENTS RELATED TO BANKING LEGISLATION

The purpose of this chapter is to provide a brief overview of the most important developments regarding banking legislation during 1995.

AMENDMENTS TO THE BANKS ACT, 1990

Since the promulgation of the Banks Amendment Act, 1994, this Department, in the process of administering the Banks Act, 1990, and in its day-to-day consultations and contact with banks, has identified certain further aspects in respect of which the Banks Act is in need of improvement. In order to effect such improvements, it is proposed that certain amendments to the Banks Act be made in the course of 1996. The most significant of these proposals can be explained as follows:

❑ Definition of "deposit"

The noun "deposit" is defined in the Banks Act as, basically, "an amount of money paid by one person to another person subject to an agreement in terms of which an equal amount or any part thereof will be ... repaid ...". It is intended to amend the said definition to make it clear that an amount of money so paid and to be repaid remains a deposit, regardless of whether the repayment is made by the person originally accepting the deposit or by any other person.

❑ Terms related to definition of "executive officer"

The expression "executive officer", in relation to a bank, is defined in the Banks Act as also including an "employee in charge of a risk management function". With a view to legal certainty, it is regarded necessary also to provide a definition for "employee in charge of a risk management function". Since it is also regarded necessary to provide further elucidation of the expression "executive officer", it is proposed that the word "manager", which forms part of the definition of "executive officer", also be defined.

❑ Financial intermediaries

The effect of paragraph (ff) of the definition of "the business of a bank" in section 1 of the Banks Act is to allow the acceptance of funds from the general public by financial intermediaries other than banks, provided that –

- the main business activities of such financial intermediaries (such as trust companies, stockbrokers, audit firms, etc.) are regulated or controlled in terms of, by or under an Act of Parliament; and

- such intermediaries are specially designated by the Registrar of Banks, by notice in the Government Gazette, and such intermediaries act purely as agents and accept funds from their clients solely for the purpose of the effecting of a money-lending transaction directly between such client, as lender, and a bank, as borrower.

By section 1(g) of the Deposit-taking Institution Amendment Act, 1993 (Act No. 9 of 1993), a proviso was added to the said paragraph (ff) in terms of which such financial intermediaries, whilst still referred to in the said proviso as "agents", were nevertheless allowed to pool funds received from their different clients and, by necessary implication, to place such pooled funds as a lump sum with a bank. On reconsideration, it would now appear that the said paragraph (ff), as currently worded, is inherently contradictory, in that a financial intermediary administering a lump sum of pooled funds cannot place or otherwise deal with such funds other than in his own name, thus rendering him a principal to any transaction effected by him in the execution of the mandates in terms of which the constituent amounts of the pooled funds were entrusted to him by his respective clients.

Amendments are proposed to separate the two different legal relationships, namely pure agency and mandate, currently lumped together in said paragraph (ff), from each other and to deal, in a proposed new paragraph (gg), with the situation in which funds are pooled by a mandatary.

❑ Representative offices

Section 34 of the Banks Act provides for the establishment of a representative office in the Republic by a foreign banking institution. In its current form, section 34 does not provide for the furnishing of sufficient information to the Registrar of Banks to enable him, when considering an application for his consent to the establishment of such a representative office, to discharge his supervisory duties in terms of the minimum requirements laid down by the Basle

Committee on Banking Supervision. Furthermore, a need has been identified for the business of representative offices to be subject to some form of supervision by this Department. To provide for possible legal prescriptions in this regard, section 34 is in need of amplification, so as to empower the Registrar to obtain information, the nature of which is to be prescribed by regulation, from representative offices after their establishment.

❑ Joint ventures

Section 52 of the Banks Act lists various corporate activities within or outside the Republic, such as the establishment of subsidiaries, the opening of branch offices, the acquisition of an interest in a foreign undertaking, the creation of a trust, etc., into which banks and bank controlling companies may not expand without the prior written approval of the Registrar. As listed, the said activities leave a measure of uncertainty as to the freedom of banks and controlling companies to invest in so-called joint ventures, that is, a bank or controlling company entering into a contractual arrangement with one or more other parties jointly to undertake an economic activity.

It is deemed advisable that the entering into such joint ventures by banks and controlling companies also be made subject to the prior written approval of the Registrar of Banks, provided, however, that such approval will be required only when a particular joint venture will expose the bank or controlling company to an amount of more than five per cent of its capital and reserves.

❑ Compromises, amalgamations, arrangements and affected transactions

Section 54(3) of the Banks Act regulates the transfer of assets and liabilities and rights and obligations attendant upon an amalgamation of banks or the transfer of some or all of its assets and liabilities by a bank to another bank or to a person approved by the Registrar of Banks. As currently worded, section 54(3) refers, in a rather generalised manner, to the transfer of all assets and liabilities, rights and obligations, etc., to the amalgamated bank or bank or person taking over the assets and liabilities, and does not address actualities such as a partial transfer of assets and liabilities or a lapse – necessitated by the terms and conditions of the relevant amalgamation or transfer – of rights, obligations or other legal relationships. It is intended to remedy this ostensible defect in the section.

Section 54(8) provides for the endorsement of title deeds, bonds or other documents recording rights, and for the alteration of registers to record the transfer of rights, in the event of an amalgamation of banks or the transfer, by a bank, of all or part of its assets and liabilities. The officials charged with the duty of effecting such endorsements or alterations are the Registrar of Companies, Masters of the Supreme Court and officers in charge of deeds registries. As a result of banks' growing involvement in the capital market, a deficiency has developed in the provisions of section 54(8), in that no mention is made of the transfer of rights to shares, stock, debentures or other marketable securities. Section 54(8) needs to be supplemented in this respect.

Situations unique to the banking sector have indicated a need for some form of cost relief to banks involved in amalgamations or the transfer of their assets and liabilities. Certain transactions, involving the amalgamation of banks or the transfer, by a bank, of its assets and liabilities to another institution, are occasionally entered into in pursuance of a request or recommendation made by the Registrar of Banks in the interests of effective supervision of banks or the maintenance of a stable banking sector and, as such, can be regarded as being of an involuntary nature. It is considered that such transactions merit exemption from standard dues payable to the State, provided, however, that each case be considered individually and that the costs be waived only with the express consent of the Minister of Finance, granted on the recommendation of the Registrar of Banks and after consultation with the Commissioner for Inland Revenue. It is proposed that a mechanism for such cost relief be inserted into this section.

❑ Chairmanship of board of directors

It is proposed that section 60(3) of the Banks Act be amended so as to confine the chairmanship of the board of directors of a bank or a bank controlling company to a non-executive member of such a board. This proposal is in accordance with recommendations

made by the King Committee on Corporate Governance.

- **Set-off while a bank is under curatorship**

  Paragraph (b) of section 69(6) of the Banks Act currently provides that whilst a bank is under curatorship, the operation of set-off in respect of any amount owing by a creditor to such a bank shall be suspended. The object of this provision is self-evident, namely, to create the most favourable circumstances in which the curator can attempt to restore the bank to a state of financial well-being. It has, however, been realised that the relevant provision can have the same deleterious effect on the functioning of, and the risk exposure of participants in, the financial markets that the provisions of the Insolvency Amendment Act, 1995 (Act No. 32 of 1995), seek to eliminate in the case of the insolvency of a participant in those markets. It is consequently proposed, in accordance with a recommendation to this effect received from interested parties, such as The Council of Southern African Bankers, that paragraph (b) of this section be deleted.

AMENDMENTS TO THE REGULATIONS UNDER THE BANKS ACT, 1990

Although the Regulations relating to Banks were rewritten in 1993, becoming effective on 3 January 1994, further amendments, including changes to certain definitions, have become necessary. A new set of the Regulations, incorporating these changes, will be promulgated during the first quarter of 1996.

The most significant amendments that will be incorporated in the Regulations are the following:

- **Regulation 6 – Audit report**

  The auditor is to report annually on any significant weaknesses in the system of internal controls relating to financial and regulatory reporting and to non-compliance with regulation 39(1)(a), concerning the statement to be submitted by serving or prospective directors or executive officers.

- **Form DI 300 – Liquidity risk**

  The DI 300 return has been simplified to reflect cash flows exclusively, with a time frame not exceeding six months.

- **Form DI 310 – Minimum reserve balance and liquid assets**

  The existing return DI 310 has been amended, by deletion of the deductions in respect of repurchase agreements for securities traders.

- **Form DI 400 – Capital adequacy**

  The DI 400 return has been revised to incorporate tertiary capital because of there being a distinction between a trading and a banking book for securities trading activities.

- **Regulation 23(6)(c) – Capital-adequacy risk weightings**

  The definition of "overdues" has been reintroduced, thereby allocating a risk weighting of 100 per cent to overdue monthly instalments on urban residential property.

- **Regulation 23(6)(p) – Table of risk weightings**

  Goodwill has been added to the list of impairments of capital mentioned in the risk-weighting table.

- **Form DI 402 – Counterparty risk**

  The DI 402 return has been expanded to include capital weighting and to recognise the netting of contracts.

- **Form DI 403 – Foreign operations of South African banks**

  An amendment to the DI 403 return entails that it has to be signed by the foreign chief accounting officer and the foreign chief executive officer. In addition, the sectoral classification in section 6.3 has been amended to coincide with the Standard Industrial Classification of all Economic Activities.

- **Form DI 410 – Interest-rate risk**

  The DI 410 return has been simplified, and the reporting of the repricing gap has been reduced to a maximum of six months.

- **Form DI 420 – Market risk**

  The DI 420 return has likewise been simplified, thereby requiring banks to report their value at risk after taking into account their transactions in derivatives.

- **Form DI 500 – Credit risk**

  An amended DI 500 return was published in Government Gazette No. 16383 of 28 April 1995. The sectoral classification under paragraph 5 has also been amended.

- **Form DI 600 – Currency risk**

  The effective net open position, shown as a percentage of net qualifying capital and reserves, has been increased to 15 per cent.

- **Regulation 36(2)(a) and (b)**

  More information has to be furnished when application for expansion, domestically or internationally, is made by a bank.

- **Regulation 37(5) – Conduct of directors**

  The annual reporting by directors and external auditors is to be brought in line with the recommendations of the King Committee on Corporate Governance.

- **General**

  All references to provisional and final registration have been deleted.