

Chapter 3: Developments relating to banking legislation

3.1 Introduction

A key responsibility of the Department is to ensure that the legal framework for the regulation and supervision of banks and banking groups in South Africa remains relevant and current. Consequently, the legal framework pertaining to banking regulation has to reflect local and international market developments, and to comply with the applicable international regulatory and supervisory standards and best practices. Therefore, the Department reviews the banking legislation, that is, the Banks Act, 1990, the Mutual Banks Act, 1993 (Act No. 124 of 1993), the regulations issued in respect thereof and other pieces of related banking legislation on an ongoing basis, and makes recommendations to the Minister to effect the necessary amendments thereto.

This chapter provides some insight into the key initiatives monitored and developments considered by the Department, and the proposed amendments to the Banks Act, 1990 and the Regulations relating to Banks, and the timing thereof. In addition, information relating to illegal deposit-taking, and developments with regard to the Companies Act, 2008 (Act No. 71 of 2008) (New Companies Act) and the Postbank are provided.

3.2 The Banks Act, 1990 and Regulations relating to Banks

The Banks Act, 1990 and Regulations relating to Banks were last comprehensively amended on 1 January 2008, in the main, to comply with the principles and requirements contained in the Basel II framework issued by the Basel Committee. Since then, the Department has been monitoring, among others, the developments relating to G-20 discussions, and the press releases, publications and directives issued by the Basel Committee and the FSB, on the one hand, and developments relating to the new Companies Act; the *King Report on Governance for South Africa* and *King Code of Governance Principles* (King III); and court decisions, on the other, in order to identify possible areas that would necessitate amendments to the Banks Act, 1990 and/or the Regulations relating to Banks.

Finality has not yet been reached on a number of initiatives and developments monitored by the Department. However, where requirements have been finalised and issued by international standard-setting bodies such as the Basel Committee, or in instances where sufficient certainty or clarity has been obtained, the Department formulated further proposed amendments to the Banks Act, 1990 and the Regulations relating to Banks.

various requirements
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3.3 Initiatives monitored and developments considered by the Department

3.3.1 Core Principles for Effective Banking Supervision

During October 2006, the Basel Committee issued a revised version of its Core Principles. Subsequently, the Department thoroughly assessed its compliance with the revised Core Principles, and identified some gaps in the legal framework and supervisory process, most of which have been addressed, while some are in the process of being addressed.

3.3.2 Assessments by international bodies

In 2008 the Department was subjected to, or involved in, a number of international assessments:

- A voluntary pilot project launched jointly by the IMF and World Bank to assess the Department's implementation of Basel II



- A scheduled FSAP by the World Bank and the IMF
- A scheduled assessment of South Africa's compliance with AML/CFT recommendations of FATF.

During 2009–10, the Department was subjected to an Article IV Consultation with the World Bank and the IMF in order to assess its compliance with the Core Principles that were updated and issued by the Basel Committee in October 2006. A ROSC was issued in 2010 in this regard.

Although the reports pertaining to the above-mentioned assessments have been favourable in general, there are some areas of the legal framework that need attention or refinement to comply fully with the stated standards and requirements.

3.3.3 International developments related to the global financial crisis

Following the secondary effects of the global financial and economic crisis, which included the worldwide securitisation markets, the Department commissioned the audit, tax and advisory firm KPMG to conduct an investigation into securitisation schemes operated by banks in South Africa. The final report issued by KPMG suggested certain improvements to the existing legal framework that would be considered by the Department to identify those areas where amendments to the existing framework were required.

During 2010, the Department also participated in various working groups established by the NT in order to comment on, or implement proposals issued by, the G-20 working groups that were established to deal with the causes and effects of the global financial and economic crises. Although the G-20 working groups are considering a large number of issues, not all matters have been finalised. Thus far, the Department has not identified any issue that would necessitate an amendment to the Banks Act, 1990 in this regard, although various amendments to the Regulations relating to Banks have been identified.

At a meeting of the Standing Committee for the Revision of the Banks Act, 1990 (Standing Committee) held on 26 April 2010, a proposed first draft of the Banks Amendment Bill, 2010 was approved to be published for public comment. The comments that were received were considered and incorporated where they were found to be necessary or appropriate. Draft 2 of the Banks Amendment Bill, 2010 was tabled and approved subject to certain amendments at a meeting of the Standing Committee held on 9 July 2010. Draft 2 was then published for comment and the Department only received a few comments. Some comments were incorporated into Draft 3 of the Banks Amendment Bill, 2010 that was then tabled at a meeting of the Standing Committee held on 14 September 2010.

Subsequently, the Department received further representations from certain banks that are under consideration. The Department is also considering further amendments to the Banks Act, 1990. The date for the implementation of the new Companies Act, 2008 is, however, crucial before the Banks Amendment Bill, 2010 can be submitted to the Minister and, in turn, for him to initiate the parliamentary process.

Nevertheless, based on the internationally agreed amended requirements, best practices and standards issued by international standard-setting bodies such as the G-20, FSB and the Basel Committee, as discussed in further detail in Chapters 1 and 2 of this report, and in accordance with the mission of the Department to promote the soundness of the banking system and to minimise systemic risk through the effective and efficient application of international regulatory and supervisory standards, and in order to ensure that the regulatory framework for banks and banking groups remains relevant and current, the Department commenced a formal process to amend the Regulations relating to Banks.

Furthermore, since the introduction on 1 January 2008 of the amended Regulations relating to Banks that incorporated, among other things, the requirements of the internationally agreed Basel II framework, the Department took various internal policy decisions in respect of specific matters that also needed to be incorporated into the Regulations relating to Banks, and identified areas in these Regulations relating to Banks that required correction or further clarification.

KPMG commissioned to conduct an investigation into securitisation schemes

formal process to amend the Regulations relating to Banks



In this regard, on 15 March 2010, 30 June 2010 and 17 December 2010 the Department respectively issued for comment Drafts 1, 2 and 3 of the proposed amended Regulations relating to Banks. The background to, and the details of, the aforementioned respective draft regulations were presented to, and considered and discussed by, the Standing Committee at its respective meetings indicated above during 2010.

It is envisaged that the proposed amended Regulations relating to Banks will be finalised and presented to the Standing Committee for final consideration and approval during the third quarter of 2011, whereafter it will be submitted to the Minister for final consideration and approval. In accordance with an international agreement regarding the implementation of specified amended requirements issued by the Basel Committee during July 2009, the amended Regulations relating to Banks will be implemented in South Africa on 1 January 2012. The latest draft version of proposed amendments to the Regulations relating to Banks is available at [www.resbank.co.za/Regulation and supervision/Bank Supervision/Banking legislation](http://www.resbank.co.za/Regulation%20and%20supervision/Bank%20Supervision/Banking%20legislation).

In accordance with internationally agreed transitional arrangements, the implementation of further requirements related to the strengthening of capital requirements and the introduction of global liquidity standards, as set out in the Basel III documentation published by the Basel Committee on 16 December 2010, and discussed in further detail in Chapters 1 and 2 of this report, will be phased in during predefined periods, which will commence on 1 January 2013.

3.3.4 Companies Act, 2008 (Act No. 71 of 2008)

The New Companies Act was promulgated in April 2009 but is set to become effective only during the second quarter of 2011.

Owing to the fact that banks are also public companies, the provisions of the New Companies Act have a profound effect on banks and some of the provisions of the Banks Act, 1990. The provisions of the New Companies Act have been incorporated into the Banks Amendment Bill, 2010 where applicable and/or appropriate.

3.3.5 Current directives, circulars and guidance notes

This Department is currently considering the inclusion of relevant provisions contained in previously issued directives, circulars and guidance notes into either the Banks Amendment Bill, 2010 or the proposed amended Regulations relating to Banks.

3.4 Proposed amendments to the Banks Act, 1990

The proposed amendments set out below are the provisions as set out in Draft 2 of the Banks Amendment Bill 2010. Draft 3 of the Banks Amendment Bill, 2010 is being further refined and will be resubmitted to the Standing Committee before being published for comment during 2011.

Definitions (section 1(1))

Inserting a definition of the Basel Committee on Banking Supervision.

Inserting the definition of 'Commission' contained in the New Companies Act and the consequent substitution of the word 'Registrar of Companies' with 'Commission' wherever such term appears in the Banks Act, 1990, being section 15(3); section 51(2)(c); section 54(8) and (8A); section 56(1) and (4); section 57(3); and section 65(1)(b), (c) and (d).

Amending the reference in the definition of 'Companies Act' to (Act No. 71 of 2008).

Replacing the reference to the Co-operatives Act, 1981 (Act No. 91 of 1981) with the Co-operatives Act, 2005 (Act No. 14 of 2005).

the amended Regulations to be implemented in South Africa on 1 January 2012

the New Companies Act has a profound effect on banks

Draft 3 of the Banks Amendment Bill, 2010 is being further refined



Inserting a definition of 'control' with reference to section 2(2) of the New Companies Act.

Amending the definition of 'director' to be in line with the New Companies Act as this definition may cast the regulatory net wider, and increase the ability of the Registrar to regulate directors of banks and controlling companies.

Deleting the words "as contemplated in paragraphs (a), (b) or (c) of the definition of 'controlling company'" from the definition of "domestic shareholder". These sections have not existed in the 1973 Companies Act for quite some time and do not appear in the New Companies Act.

Substituting the words "sections 286 and 288" in the definition of "financial statements" with the words "section 30", which is the analogous section in the New Companies Act.

Substituting the words "section 1(4)" in the definition of 'holding company' with a reference to section 1, being the analogous section in the New Companies Act.

Replacing the reference to the Co-operatives Act, 1981 (Act No. 91 of 1981) with the Co-operatives Act, 2005 (Act No. 14 of 2005) in the definition of 'liquid assets'.

Inserting a definition of 'public company' as defined in the New Companies Act.

Deleting the definition of 'Registrar of Companies' as it has become obsolete.

Replacing the reference to the *Government Gazette* as No. 30627 of 1 January 2008 in the definition of 'Regulations relating to branches'.

Substituting the words "section 1(3)" with a reference to section 1, being the analogous section in the New Companies Act.

Amending section 1(1A) paragraph (b)(iii) of the Banks Act, 1990 to refer to the Companies Act 61 of 1973. In terms of item 9(1) of schedule 5 of the New Companies Act, section 421(1) (and Chapter XIV) of the 1973 Companies Act shall continue to apply with respect to the winding-up and liquidation of companies in terms of the New Companies Act until such time as the Minister, by notice in the *Government Gazette*, has determined otherwise. In this regard, reference will need to be made to the 1973 Companies Act and section 424 shall be identified as being a section of the 1973 Companies Act.

Amending the Banks Act, 1990 by the substitution for the words "memorandum of association and articles of association" of the words "memorandum of incorporation", wherever such term appears being section 15(3); section 16(2)(b)(i); section 17(1)(c); section 18(2); section 32(1)(b); section 44(2)(c); section 56(heading) section 56(1)(a); section 56(4); section 56(5)(a); section 57(heading) section 57(1); section 57(3); section 79(3); section 86(2)(a) and (b); and section 87(1). These amendments are made to ensure that obsolete terminology is not used in the Banks Act, 1990.

Exclusions from application of Act (section 2)

The references to "Public Investment Commissioners" and the "Public Investment Commissioners Act, 1984" are to be amended to the "Public Investment Corporations Act, 2004 (Act No. 23 of 2004)".

Annual report by Registrar (section 10)

It is proposed that the wording of subsection (2) of section 10 be amended in order to state the provision in plain language.

Granting and refusal of application for authorization (section 13)

It is proposed that similar requirements relating to the foreign consolidating supervisor be inserted when a foreign institution applies for registration as a bank as is currently required of a consolidating supervisor when a foreign institution applies for the registration as a branch.



Use of the name bank (Section 22)

It is proposed that the provisions of this section also be made applicable to representative offices.

Cancellation or suspension of registration by the Registrar (Section 23)

It is proposed that a clause be inserted to make provision for a material contravention and conviction of FICA to be a cause for the suspension or cancellation of the registration of a bank.

Cancellation of registration at request of the bank (section 27)

It is proposed that the provision specifies a 75 per cent requirement for the passing of a special resolution.

Cancellation of registration upon winding-up (section 28)

The reference to section 419(1) of the 1973 Companies Act needs to be replaced with section 82(1) being the analogous reference in the New Companies Act.

Publication of information relating to banks, controlling companies, eligible institutions and representative offices of foreign institutions and the keeping of records by the Registrar (section 30)

This section needs to be amended to make reference to the concept of a “merger” as introduced in the New Companies Act and to replace the reference to Chapter XII of the 1973 Companies Act with the analogous reference in the New Companies Act, being Chapter 5.

Registration of shares in name of nominees (section 38)

The reference to the Unit Trust Control Act, 1981 is to be replaced with the Collective Investment Schemes Control Act, 2002 and the reference to the Stock Exchanges Control Act, 1985 is to be replaced with the Securities Services Act, 2004.

Application for registration as controlling company (section 43)

Since there is no definition of ‘controlling company’ in either the 1973 Companies Act or in the New Companies Act the cross-reference needs to be deleted.

Cancellation of registration at request of controlling company (section 47)

It is proposed that the provision specifies a 75 per cent requirement for the passing of a special resolution.

Application of Companies Act to banks and controlling companies (section 51)

Section 51 of the Banks Act, 1990 amends certain provisions of the 1973 Companies Act relating to the details of directors that need to be displayed on the correspondence of banks. However, there is no analogous section in the New Companies Act and should thus be deleted.

Subsidiaries, branch offices, other interests and representative offices of banks and controlling companies (section 52)

Section 52 of the Banks Act, 1990 provides that banks and controlling companies require the Registrar’s prior written approval, among others things, when acquiring an interest in any business undertaking outside the Republic of South Africa. Since the provision has a wide application, and banks and controlling companies have experienced some difficulty in conducting certain businesses abroad, it is recommended that the Registrar be afforded the power to issue a directive to specify under which circumstances a mere notification of a transaction would suffice.

Compromises, amalgamations, arrangements and other affected transactions (section 54)

The New Companies Act does not provide for “compromises” and hence the term needs to be deleted from the heading, as well as from the body of section 54.

Section 54(1)(a) needs to be amended to make reference to the concept of a “merger” as introduced by the New Companies Act.

The reference to Chapter XVA of the 1973 Companies Act needs to be replaced with the reference to the analogous chapter of the New Companies Act being Chapter 5.

Reconstruction within group of companies (section 55)

The reference in section 55(a) to section 288(1) of the 1973 Companies Act needs to be replaced with the reference to the analogous section of the New Companies Act, being section 30.

Alteration of memorandum of association or articles of association (section 56)

The references in section 56(1) of the Banks Act, 1990 to sections 44, 55, 56 or 62 of the 1973 Companies Act need to be replaced with the reference to the analogous section of the New Companies Act, namely section 16.

Alteration of memorandum of association or articles of association in accordance with direction of the Registrar (section 57)

The reference in section 57 of the Banks Act, 1990 to section 179 of the 1973 Companies Act needs to be replaced with the reference to the analogous section of the New Companies Act, namely section 61(7).

Information regarding directors and officers (section 58)

The reference in section 58 of the Banks Act, 1990 to section 215 of the 1973 Companies Act needs to be replaced with the reference to the analogous section of the New Companies Act, namely section 24(3)(b).

Directors and officers of a bank or controlling company (section 60)

Include references to section 77 of the New Companies Act relating to the liability of directors.

In terms of item 9(1) of schedule 5 of the New Companies Act, section 419 (and Chapter XIV) of the 1973 Companies Act shall continue to apply with respect to the winding-up and liquidation of companies in terms of the New Companies Act until such time as the Minister, by notice in the *Government Gazette*, has determined otherwise. In this regard, reference will need to be made to the 1973 Companies Act and section 424 shall be identified as being a section of the 1973 Companies Act.

Subsection (5)(c) of the Banks Act, 1990 is to be amended to provide for the already existing practice whereby the period of 20 working days is stayed when a form BA 020 is received that is either incomplete or that contains material errors.

It is proposed that a provision be inserted to provide that banks may have positions of or refer to employees as directors only when such persons have been appointed as a director in terms of section 66 of the 1973 Companies Act.

Appointment of auditor (section 61)

The reference to Chapter X of the 1973 Companies Act in section 61 of the Banks Act, 1990 needs to be replaced with the reference to the analogous chapter of the New Companies Act, namely Chapter 3.

The reference to “Public Accountants’ and Auditors’ Board” in section 61 of the Banks Act, 1990 is to be replaced with “Independent Regulatory Board for Auditors”.

Appointment of auditor by the Registrar (section 62)

The reference in section 62 of the Banks Act, 1990 to sections 269(4) and 271(1) of the 1973 Companies Act need to be replaced with the reference to the analogous sections of the New Companies Act, namely sections 90 and 91.

Functions of auditors in relation to Registrar (section 63)

The reference to “Public Accountants’ and Auditors’ Board” in section 63 of the Banks Act, 1990 is to be replaced with “Independent Regulatory Board for Auditors”.



Audit Committee (section 64)

The amendments to section 64 of the Banks Act, 1990 effectively combine the requirements in the New Companies Act and the Banks Act, 1990 in one comprehensive clause.

Owing to a number of processes and requirements applicable to the appointment of members to the Audit Committee by banks and controlling companies, the period of 40 days is inadequate. It is proposed that the period be increased to 90 days.

Remuneration Committee (section 64C)

It is proposed that a Remuneration Committee be prescribed by the Banks Act, 1990 for banks and controlling companies, and that its composition and functions be prescribed by inserting a new section 64C into the Banks Act, 1990.

Forwarding of certain notices, reports, returns and financial statements to the Registrar (section 65)

The references to sections of the 1973 Companies Act are to be replaced with references to the analogous sections of the New Companies Act.

Special provisions relating to winding-up or judicial management (section 68)

The section does not deal with judicial management, and hence the wording should be removed from the heading of the section.

Section 346 of the 1973 Companies Act has been replaced altogether (except to the extent necessary to give full effect to the provisions of Part G of Chapter 2).

It is suggested that section 68 of the Banks Act, 1990 be amended to provide for any application, resolution and all accompanying papers for any winding-up of a company which is a bank need to be lodged with the Registrar prior to such any winding-up order being made.

Section 357 of the 1973 Companies Act continues to apply and thus section 68(3)(b) should be amended to make reference to the fact that this is a section in the 1973 Companies Act.

Section 349 of the 1973 Companies Act has been deleted in its entirety and should be replaced with a reference to the analogous provision in the New Companies Act, being section 80.

The reference to section 419 in section 68(5)(b) of the Banks Act, 1990 must be replaced with a reference to the analogous section in the New Companies Act, being section 82(1).

Appointment of a curator for a bank (section 69)

The reference in section 69(2C)(b) of the Banks Act, 1990 to section 228 of the 1973 Companies Act needs to be replaced with the reference to the analogous section of the New Companies Act, namely section 112.

The reference in section 69(3)(f) of the Banks Act, 1990 to section 199 of the 1973 Companies Act needs to be replaced with the reference to the analogous section of the New Companies Act, namely section 65.

Shares, debentures, negotiable certificates of deposit, share warrants and promissory notes or similar instruments (section 79)

Section 79(1)(a) of the Banks Act, 1990 indicates that banks may not issue shares of no par value or convert shares into shares of no par value. The New Companies Act, in section 35, actually does away with the concept of par value shares (except when it comes to banks that are specifically carved out from the ambit of section 35). The reference in section 79(1)(a) of the Banks Act, 1990 should be replaced with the analogous section in the New Companies Act, namely section 35 (containing the reference to par value shares) and section 36 (referring to the authorisation and reclassification of shares).



The New Companies Act makes no reference to share warrants and thus section 79(1)(d) should be deleted.

Section 79(3) of the Banks Act, 1990 makes it clear that there shall be no differentiation in any of the ordinary shares of a bank and then refers to section 195(1) of the 1973 Companies Act. There is no analogous provision in the New Companies Act, hence it is proposed that section 79(3) be amended to incorporate the provisions of section 195(1) of the 1973 Companies Act.

Management and control of repayment of money unlawfully obtained (Section 84)

In terms of item 9(1) of schedule 5 of the New Companies Act, section 419 (and Chapter XIV) of the 1973 Companies Act shall continue to apply with respect to the winding-up and liquidation of companies in terms of the New Companies Act until such time as the Minister, by notice in the *Government Gazette*, has determined otherwise. In this regard reference will need to be made to the 1973 Companies Act.

Limitation of liability (section 88)

It is proposed that the term “other officer” be extended expressly to include “the inspectors and managers” mentioned above.

3.5 Illegal deposit-taking

The Department is primarily responsible for the regulation and supervision of registered banks in the Republic of South Africa. The Department neither registers nor supervises any other investment scheme. The Banks Act, 1990, however, provides that no person may conduct the “business of a bank” unless such a person is a public company and registered as a bank.

The “business of a bank” is defined in the Banks Act, 1990 and can be described as the soliciting or advertising for, or the acceptance of deposits from the general public as a regular feature of the business in question. There are a number of exclusions and exemptions to the above-mentioned definition.

One of the exemptions that was issued by the Registrar with the approval of the Minister under paragraph (cc) of the definition of “the business of a bank” in section 1 of the Banks Act, 1990 is the so-called Commercial Paper Notice that was published as Notice No. 2172 in *Government Gazette* No. 16167 on 14 December 1994 (CP Notice).

The issue of commercial paper (including debentures) by companies is legal, *provided* the issuer fully complies with the conditions stated in the CP Notice. When an issuer does not comply with one or more of the conditions of the CP Notice, the issue of debentures could constitute illegal deposit-taking in terms of the provisions of the Banks Act, 1990.

A deposit is comprehensively defined in the Banks Act, 1990, but can simply be described as 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 on demand, on a specified or unspecified date or in circumstances agreed upon. There are also a number of specified exceptions to the above-mentioned general definition.

Because of the legal principle of *commixtio* and the legal nature of money, when one person hands over an amount of money to another, such money (physical notes and coin) generally becomes the property of the person receiving the money, which becomes part of his or her estate. When in such a case the receptor steals the money or becomes insolvent, the transferor of such money is left in a very precarious position in that he or she is left with an unsecured concurrent claim.

This is one of the reasons why deposit-taking, that is, the conducting of the business of a bank, is such a perilous business and why banks are regulated to the degree that they are. If the taking of deposits from the general public is a precarious business for banks despite their regulation

the issue of debentures could constitute illegal deposit-taking



and ongoing supervision, it is progressively fraught with risk when deposits are taken from the general public by unregulated and unsupervised persons and entities.

The Department is afforded certain powers in terms of sections 81 to 84 of the Banks Act, 1990 to control the activities of unregistered persons. These activities are, however, confined to illegal deposit-taking only. The above-mentioned provisions provide, among other things, that the Registrar may do the following in respect of unregistered persons that are suspected of taking deposits from the general public in contravention of the Banks Act, 1990:

- Apply to court for an order prohibiting anticipated or actual schemes involved in illegal deposit-taking
- Extract information from unregistered persons
- Inspect the affairs of an unregistered person (inspectors are appointed by the Governor or a Deputy Governor of the Bank in terms of the provisions of the South African Reserve Bank Act, 1989 (Act No. 90 of 1989) (SARB Act))
- Direct such a person to repay such money if the Registrar is satisfied that a person has illegally taken deposits from the general public
- Appoint a manager to manage and control the repayment of the money unlawfully obtained.

The Department understands the rationale for the above-mentioned powers to be the following:

- Banks are subjected to stringent regulation and meticulous supervision in exchange for the right to accept deposits from the general public. It is unfair and untenable to allow unregistered persons not subjected to the same regulation and meticulous supervision to compete with banks in an unfettered manner. Depositors are easily misled into thinking that such institutions are subject to the same stringent regulation and meticulous supervision as banks. They are therefore unwittingly risking their investment funds while labouring under the mistaken belief that the repayment of their funds and their returns are “guaranteed”. The regulation of banks described above is a costly but necessary exercise in the public interest and incurred at the public’s expense. The unregulated person, however, has the advantage of freedom brought about by non-regulation and therefore competes with the regulated person unfairly. The Department is therefore empowered to take action against unregistered persons in order to prevent unfair competition with registered banks.
- Notwithstanding the fact that the taking of deposits from the general public by an unregistered person is a criminal offence, such schemes are more often than not characterised by an element of fraud, and are harmful not only to the established and regulated banking system, but also to the economy as a whole. In order therefore to prevent a secondary illegal, harmful and/or fraudulent “banking” system from developing, it is necessary for the Department to have and enforce the above-mentioned powers.
- Another purpose of the above-mentioned powers is to contribute to depositor or investor protection.

Since the Department neither registers nor supervises unregistered persons, it is generally not aware of such schemes unless it is informed thereof by members of the public. The Department therefore only reacts to complaints received from the general public that contain sufficient details and documentary evidence to justify the Department invoking its powers in terms of the Banks Act, 1990.

During the year under review, the Department received a number of complaints, with supporting documentary evidence, pertaining to certain business activities conducted by a number of institutions. In the cases where the Department had reason to suspect that such institutions were accepting deposits from the general public as a regular feature of their business without being registered as a bank, it invoked its powers in terms of the Banks Act, 1990.

Experience has shown that when an institution conducts its business in contravention of the Banks Act, 1990, there is a reasonable likelihood that such an institution might also be contravening other legislation. The Department has therefore, as a rule, forwarded relevant information to other regulatory bodies such as the Financial Services Board, South African Revenue Service (SARS) and the Department of Trade and Industry (dti) for further investigation in terms of legislation under the administration of those bodies.

powers to control the activities of unregistered persons

depositors are easily misled

schemes characterised by an element of fraud

the Department received a number of complaints



When it is found that the business conducted by a person and/or institution does not constitute illegal deposit-taking, the Department does not have the legal power to investigate such a person and/or institution. The Department will, for instance, not involve itself in, among others, the following cases:

- When a person has committed fraud or theft in the operation of a scheme. These crimes are handed over to, and dealt with by, the South African Police Service
- When a person has been sequestered or an institution has been liquidated, the provisions of the Insolvency Act, 1936 take precedence over the provisions of the Banks Act, 1990, and it becomes a matter for the courts and the appointed trustee or liquidator to deal with
- When a person or institution is operating a scheme involving money-laundering, the matter is referred to, and dealt with by, the FIC.

During 2010, staff members of the Department were subpoenaed in a number of cases that had been under its inspection to provide evidence in court proceedings relating to the prosecution of persons that had allegedly contravened the Banks Act, 1990.

A case in point is the criminal trial of the operators of the Krion investment scheme that was investigated by the Department during 2001–02. The criminal trial of the alleged originator of the Krion scheme, Marietjie Prinsloo, and six other accused was held in the Pretoria High Court before Ms Justice Cynthia Pretorius and two assessors in the course of 2010. The charges ranged from racketeering to money laundering; fraud; theft; and contravening legislation relating to banks, companies, close corporations and income tax.

On 14 October 2010, almost eight years after their arrest, Marietjie Prinsloo and members of her family, whose R1,5 billion investment scheme left thousands of investors penniless, were sentenced. Marietjie Prinsloo was sentenced to an effective 25 years' imprisonment. Prinsloo's former husband, Burt Prinsloo, daughter Yolanda Lemstra, and niece, Izabel Engelbrecht, were each sentenced to an effective 12 years' imprisonment. Yolanda's husband, Gerrit Lemstra, was sentenced to an effective 15 years' imprisonment, while Prinsloo's son, Cobus Pelsler, received a 5-year jail sentence. Izabel's husband, Hendrik Engelbrecht, was given a suspended sentence on two charges.

The Department compiled a five-year review of schemes investigated from January 2006 to December 2010 (refer to Table 3.1). During this period members of the general public invested approximately R14,4 billion in illegal deposit-taking schemes that were investigated by the Department, at an associated cost, as at the date of this report, of approximately R105 million in the form of payments to appointed inspectors and managers. These associated costs will further escalate pending finalisation of the investigations pertaining to the number of current schemes as reflected in Table 3.1 below. The Department received 78 new complaints relating to illegal deposit-taking schemes during the five years under review. A total of 94 schemes were investigated and 68 schemes were finalised.

Table 3.1: Inspections relating to illegal deposit-taking schemes

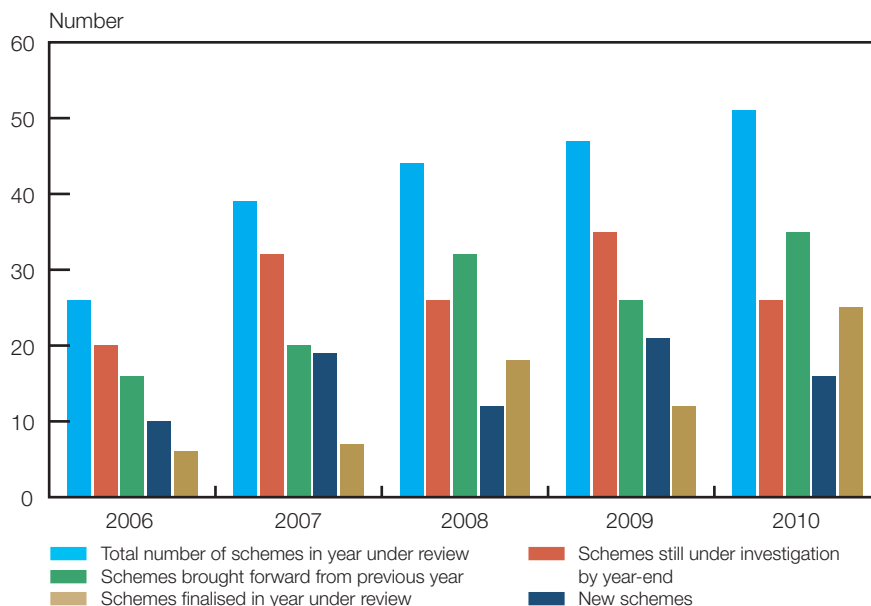
Year	Schemes brought forward from previous years	New schemes	Total number of schemes in year under review	Schemes still under investigation at year end	Schemes finalised in year under review
2006.....	16	10	26	20	6
2007.....	20	19	39	32	7
2008.....	32	12	44	26	18
2009.....	26	21	47	35	12
2010.....	35	16	51	26	25

During 2010, 16 new investigations, together with 35 investigations carried over from previous years, were undertaken. Of the total of 51 investigations, 25 had been completed and 26 still remained under investigation as at 31 December 2010.

a five-year review of schemes investigated



Figure 3.1 Inspection of illegal deposit-taking schemes



It is evident from Figure 3.1 that the total number of schemes investigated by the Department has been increasing steadily over the five-year period under review. On the one hand, it could indicate an increase in the prominence of such schemes or, on the other, an increase in the reporting of such schemes to the Department; or it could be a combination of both. One of the issues in this regard remains the timely reporting of such schemes to the Department. Schemes are usually reported only once there has been a default, meaning that such schemes had been in operation for some time involving a large number of investors and their funds, before they are brought to the Department's attention. An added challenge in this regard is that once these schemes have been reported to the Department and investigators are appointed, it takes a further period to establish the true nature of the business and the possible contravention of the Banks Act, 1990 due to the complexities of the scheme at hand. The investigation into the affairs of Sharemax Investments (Pty) Limited (Sharemax) is a case in point.

Sharemax is a private company that has operated countrywide as a facilitator or promoter in the unlisted property investment industry since 1999. Sharemax has successfully promoted property projects of more than R4 billion with about 30 000 investors investing in Sharemax's property projects. Sharemax focuses on suburban shopping centres in which individuals invest and are part owners of such commercial property. Each project or syndication is housed in a separately registered company which, in the majority of cases, acquires a shopping centre. The directors of Sharemax also become the directors of the newly established company. Members of the public are invited by means of a registered prospectus to invest in the company by means of a less than 1 cent share in the company, coupled with a R999 999,99 debenture. Investors are promised approximately 10 per cent annual return, payable monthly (depending on the product). The monthly returns are funded by the rental income generated by the leases of premises in the shopping centre.

The investigation found that Sharemax currently serviced more than 30 property syndications. The majority of the property syndications was established by purchasing an existing shopping centre by means of funds raised from the public, in essence, by means of debentures. By agreement, Sharemax would be entitled to a portion of the initial investment and a monthly administration fee. Two property syndications were, however, established by purchasing land for property development. These syndications are Zambezi Shopping Centre and The Villa Shopping Centre, both in the Pretoria area.

Apart from the complexities of the scheme operated by Sharemax, the Department and the appointed inspectors were confronted by legal issues raised by the attorneys of Sharemax in

schemes investigated increased steadily



a number of instances. This had an impact on the speed with which the investigation could be completed. The Department obtained a legal opinion from senior counsel which confirmed its initial view that the funding model of Sharemax did not comply fully with the conditions prescribed by the CP Notice. Hence, the Department consulted with the CEO of Sharemax and the company attorney to discuss the opinion. Thereafter, the Department was satisfied that the funding model of Sharemax was in contravention of the CP Notice and was tantamount to illegal deposit-taking. The Department then invoked its powers in terms of section 83 of the Banks Act, 1990, and directed Sharemax and all the property syndication companies under its management to repay the funds illegally obtained. The Department also appointed inspectors as managers to manage the repayment process.

It was evident from the outset that the directive to repay could not be immediately adhered to. Owing to the fact that each property syndication was housed in a separate company that had a fixed property as an asset, the Department instructed the managers to investigate options to resolve the matter without having to resort to liquidation of all the companies. Various options were considered and a number of offers to purchase some of the property syndication companies were received, but were not followed through by the prospective purchasers.

Sharemax then decided to restructure its board of directors and to appoint three independent directors to its board and the boards of all the property syndication companies. Sharemax retained two executive directors on these boards. The Department afforded the newly established boards an opportunity to construct a resolution plan in respect of each property syndication company in an attempt to resolve the matter at hand. These plans should be forthcoming in 2011.

3.6 Update on co-operative banks

The establishment of the Co-operative Banks Development Agency (CBDA) in terms of section 54 of the Co-operative Banks Act, 2007 (Act No. 40 of 2007) (Co-operatives Banks Act), brought about the twin regulatory and supervisory units comprising the Bank and the CBDA. The Bank established the Co-operative Banking Supervision Unit (CBSU) and the CBDA a supervision unit. Their immediate tasks included overseeing the processes of, among other things, the drafting of regulations in terms of section 86 of the Act, the drafting of the rules required in terms of sections 46(1) read with 57(1) of the Act and the registration of applicants seeking to register as co-operative banks.

Following the passing of the Regulations relating to Co-operative Banks, which were signed into law on 1 July 2009 by the Minister of Finance, the Co-operative Banks Act, 1990 combined rules were approved by the Minister on 5 January 2010 and published in *Government Gazette* No. 32860 dated 12 January 2010 under the heading, "Co-operative Banks Act Supervisors' Rules".

During 2010, a total of 16 applications had been received to register co-operative banks, of which 4 are eligible to be regulated by the Bank. As at 31 December 2010 only 1 of these applications had been formally approved. It should be noted that the CBDA Supervisor has the authority to exercise the powers and perform the functions conferred in terms of the Act in respect of primary co-operative banks that hold deposits of R1 million to R20 million with at least 200 members, while primary co-operative banks that hold more than R20 million in deposits, as well as secondary and tertiary co-operatives banks, are supervised by the Bank Supervisor of Co-operative Banks.

Further developments in the co-operative banking environment were the new appointments and reappointments of members of the board of the CBDA following the expiry of the term of office at the end of July 2010 of board members, who were appointed on 15 August 2008. A statement from the Cabinet meeting of 15 September 2010 confirmed the appointments of Ms O Matshane and Mr P Koch as new members of the board for a period of three years with effect from 1 October 2010. In addition, the following were reappointed as members of the board: Mr S Ndwandwe (Chairperson), Adv E J Kuzwayo (Deputy Chairperson), Ms D Hamilton; Mr K Mahuma; Mr V Satgar and Mr J Theron.

newly established boards afforded an opportunity to construct a resolution plan

16 applications had been received to register co-operative banks



3.7 Update on Postbank

The Department of Communications introduced the South African Postbank Bill into Parliament for the first time in November 2009. After a lengthy consultation process, the South African Postbank Limited Act, 2010 (Act No. 9 of 2010) (Postbank Act) was passed by Parliament and the President assented to it on 1 December 2010 and it was published in *Government Gazette* No. 33835 of 3 December 2010.

The *White Paper on Postal Policy* of 14 May 1998, envisaged that the Bank would exercise supervisory control over the activities of the Postbank in terms of the provisions of the Banks Act, 1990. One of the key steps that had to be taken in achieving this goal was the corporatisation of the Postbank as a public company with the ultimate aim of registering and operating as a bank.

Up until the passing of the Postbank Act, the Postbank owed its existence to sections 51(1), (3) and (4), 52, 53, 55 and 58 of the Postal Services Act, 1998 (Act No. 124 of 1998), and had been operating under an exclusion notice provided for in terms of section 2(vii) of the Banks Act, 1990.

The Postbank Act provides for the incorporation of the Postbank, a Division of the South African Post Office, and for the transfer of the enterprise of that division to the Postbank Company.

In view of the provisions of the Postbank Act, Postbank is required to apply to the Department for registration as a bank in terms of the provisions of the Banks Act, 1990. In the event that the Postbank satisfies the requirements, it will fall under the Banks Act, 1990 regulatory regime. Until such time, however, the status quo of the Postbank will remain and it will continue to fulfil the functions it currently performs.

Postbank required to apply to the Department for registration as a bank