

Chapter 3: Developments relating to banking legislation

3.1 Introduction

The Department continually strives to ensure that the legal framework for the regulation and supervision of banks and banking groups in South Africa remains relevant and current. Ideally the legal framework pertaining to banking regulation has to reflect local and international market developments and should comply with the applicable international regulatory and supervisory standards, and best practices. The Department therefore reviews all banking legislation, including the Banks Act, 1990 (Act No. 89 of 1990) (the Banks Act), the Mutual Banks Act, 1993 (Act No. 124 of 1993) (the Mutual Banks Act), the Regulations issued in terms thereof and other pieces of related banking legislation on an ongoing basis. The Department makes recommendations to the Minister of Finance to effect the necessary amendments thereto.

3.2 The Banks Act, 1990

As was reported in the Department's 2011 *Annual Report*,³⁹ the Banks Act was last amended on 1 January 2008, mainly to comply with the requirements and principles of the Basel II framework. Since then, the Department has been monitoring the developments relating to the G-20 discussions, and publications and directives issued by the Basel Committee and the FSB. Other developments relating to the new Companies Act, 2008 (Act No. 71 of 2008) (the new Companies Act) *King III Report on Corporate Governance for South Africa 2009* and court decisions were also observed in order to identify possible areas that would necessitate further amendments to the Banks Act.

In terms of section 92 of the Banks Act, the Minister of Finance appoints a standing committee to review the Banks Act from time to time and to advise him on amendments to the Banks Act. However, the Standing Committee for the Revision of the Banks Act did not convene during 2012.

The Banks Amendment Bill, 2012 (the Bill) was approved by Cabinet, subject to certain amendments, and tabled in Parliament in November 2012. The Bill is due to be promulgated later in 2013.

The proposed amendments contained in the Bill were discussed comprehensively in the Department's 2009 *Annual Report*⁴⁰ and contains a number of minor amendments. The Bill materially differs from the draft that was discussed in the Department's 2009 *Annual Report* only in respect of the following provisions:

Section 1: Definitions

New definitions relating to capital, unimpaired reserve funds and liquid assets in compliance with the Basel III framework, together with the consequential amendments to sections 70, 70A, 72 and 79 of the Banks Act have been included in the Bill.

Section 60: Directors and officers of a bank or controlling company

Subsection (8) of the Banks Act was inserted to prohibit the reference to any person employed by a bank or a controlling company as a director, unless such an employee has been appointed as a director of that bank or controlling company in terms of the new Companies Act.

It is proposed that a proviso be inserted⁴⁰ that the provisions of subsection (8) of the Banks Act come into force 12 months after the date on which the amendments take effect.

39 Section 3.2.

40 Available at <http://www.resbank.co.za/Publications/Reports/Pages/BankSupervisionAnnualReports.aspx>.

Section 64: Audit committee

It is proposed that a new subsection (2A) be inserted after subsection (2) of the Banks Act provided that nothing in section 64 of the Banks Act precludes the appointment by a company of an auditor other than the one nominated by the audit committee, provided that the appointment shall only be valid if the audit committee is satisfied that the proposed auditor is independent of the company.

Section 69: Appointment of curator to bank

Subsection 1(a) of the Banks Act remains unchanged except for the fact that the written consent of the chief executive officer or the chairperson of the bank is no longer required, as it is now proposed, but that they be notified in writing of the appointment of a curator to the bank.

It is furthermore proposed that subsection (2B)(a) of the Banks Act be substituted with the provision that the appointed curator to a bank shall be subject to the supervision of the Registrar and shall conduct the management of the bank in such a manner as the Registrar may deem to be in the best interests of the creditors of the bank concerned, of the banking sector as a whole and of the rights of employees in accordance with the relevant labour legislation.

3.3 Update regarding amendments to the Regulations relating to Banks

As reported in the Department's 2011 *Annual Report*,⁴¹ the requirements contained in the Basel 2.5 framework issued by the Basel Committee were incorporated into the Regulations and implemented with effect from 1 January 2012. Based on the requirements, best practices and standards that were finalised by international standard-setting bodies such as the G-20, the FSB and the Basel Committee during 2012, including the enhancements to the Basel III framework, the Department proposed further amendments to the Regulations during 2012.

Furthermore, during 2012 the Department received various proposed amendments to the Regulations from banks, auditors of banks, risk specialists and analysts in the Department, and other departments in the Bank. The Department also took various internal policy decisions in respect of specific matters that would impact the regulation and supervision of banks and incorporated them into the Regulations. Areas that required amendment or further clarification were also identified and addressed accordingly.

The Department subsequently issued drafts 1, 2 and 3 of the proposed amended Regulations for comment and review by all relevant persons on 30 March 2012, 17 August 2012 and 26 September 2012 respectively. In order to ensure that the Department and all key players remained updated in respect of all relevant discussions held or questions raised in respect of the proposed amended Regulations, various staff members and risk specialists of the Department attended and actively participated in all relevant working groups, task groups or forums established by key players such as BASA.

Furthermore, in order to ensure that all relevant proposals and comments in respect of the proposed amended Regulations were duly considered, researched and debated, the Department continued to hold internal Policy Committee meetings as and when required.

This comprehensive process of amending the Regulations culminated in a meeting held with the relevant representatives of banks, BASA and other interested persons on 31 October 2012. The meeting was hosted by Deputy Governor Lesetja Kganyago of the Bank to confirm that all substantive comments raised by the aforementioned key players had been duly addressed.

41 Sections 1.1 and 1.2.



The proposed amended Regulations were subsequently presented to the Minister of Finance for his consideration and approval. On 21 November 2012, the Minister of Finance approved the amended Regulations which, in line with the Basel III framework, essentially address both bank-specific and broader, systemic risks by

- raising the quality of capital, with a focus on common equity and the quantity of capital to ensure banks are better able to absorb losses;
- enhancing the risk coverage of the regulatory framework, including exposures related to counterparty credit risk;
- introducing capital buffers which should be built up in prosperous times so that they can be drawn down during periods of stress;
- introducing a leverage ratio to serve as a backstop to the risk-based capital requirement and to prevent the build-up of excessive leverage in the financial system;
- raising standards for supervision and risk management (Pillar 2) and public disclosures (Pillar 3);
- introducing the monitoring of proposed minimum liquidity standards to improve banks' resilience to acute short-term stress and to improve longer-term funding; and
- introducing additional capital buffers for the most systemically important institutions to address the issue of such institutions being 'too big to fail'.

The implementation period for several of the Basel III requirements that were incorporated into the Regulations commenced on 1 January 2013 and includes transitional arrangements which will be phased in until 1 January 2019. The transitional arrangements are available to give banks time to meet the higher standards while still supporting lending to the economy. On 12 December 2012, the amended Regulations were published in *Government Gazette* No. 35950 and implemented with effect from 1 January 2013.

The Department continues to monitor, among other things, the developments relating to the G-20 discussions, and the press releases, publications and directives issued by the Basel Committee and the FSB, including further work being conducted by the Basel Committee related to the Basel III framework, in order to identify possible further areas that would necessitate amendments to the Regulations.

The Department is committed to remaining fully compliant with international standards and market best practices relating to the regulation and supervision of banks and banking groups.

3.4 Illegal deposit-taking

During the year under review the Department received a number of enquiries and complaints, with supporting documentary evidence, pertaining to the business activities of certain persons that were suspected of accepting deposits from the general public as a regular feature of their business without being registered as a bank.

During the year under review staff members of the Department were subpoenaed to provide evidence in court proceedings relating to the prosecution of persons who were allegedly contravening the Banks Act. The Department, together with the appointed temporary inspectors or managers, also provided assistance to the prosecuting authorities if and when required or requested to do so.

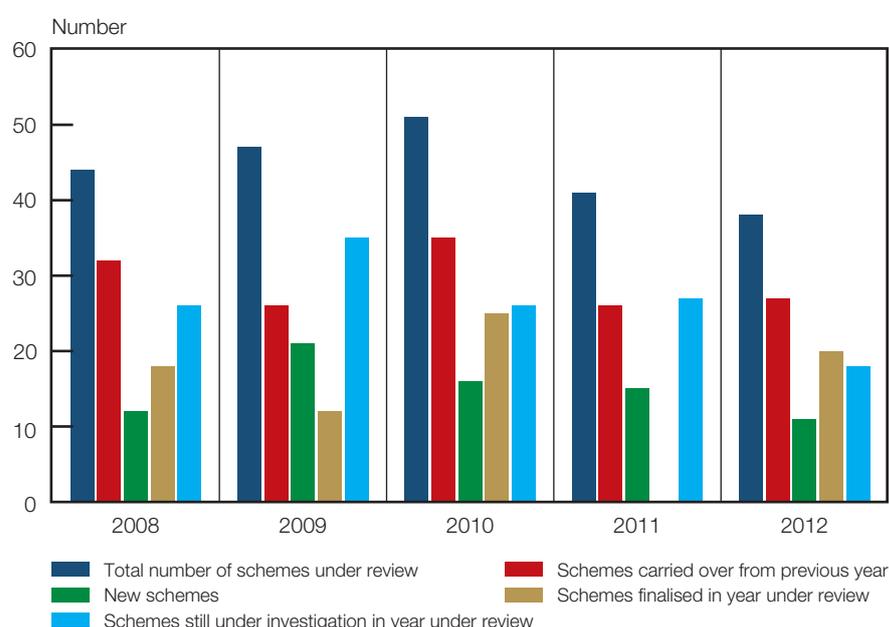
Table 3.1 Inspections relating to illegal deposit-taking schemes

Year	Total number of schemes under review	Schemes carried over from previous years	New schemes	Schemes finalised in year under review	Schemes still under investigation
2008.....	44	32	12	18	26
2009.....	47	26	21	12	35
2010.....	51	35	16	25	26
2011.....	41	26	15	14*	27
2012.....	38	27	11	20	18

* Erratum: Total number of schemes finalised in 2011 was 14, not 13 as stated in the Department's 2011 *Annual Report*, thereby reducing the number of schemes still under inspection as at 31 December 2011 to 27

The Department has compiled a five-year review of schemes investigated from January 2008 to December 2012 (refer to Table 3.1 and Figure 3.1). During this period, the Department appointed temporary inspectors in respect of 75 cases relating to illegal deposit-taking schemes. A total of 146 schemes were carried over from previous years and 89 schemes were finalised during the above-mentioned five-year period. During 2012, 11 new investigations and 27 investigations carried over from previous years were undertaken. Of the 38 investigations, 20 had been completed and 18 still remained under investigation as at 31 December 2012.

Figure 3.1 Inspections relating to illegal deposit-taking schemes



Although the statistics seem to indicate that there is a decreasing trend in the number of illegal deposit-taking inspections, this is not the case. Certain inspections prompted the Department to extend the original mandates given to inspectors to also inspect companies and/or individuals related to these schemes. This was because some of the schemes had established a number of franchisees and/or schemes following a similar *modus operandi* simply by duplicating the original scheme under a different name.



In its 2011 *Annual Report*,⁴² the Department undertook to undertake a public awareness campaign during 2012 to inform the public about illegal deposit-taking schemes and the methods employed by their operators. In this regard, the Department, in conjunction with the Strategy and Communications Department of the Bank, conducted a public awareness campaign entitled “Beware of oMashayana” (Beware of Con-artists) and emphasised the message that, as a general rule, if an offer sounds too good to be true, it usually is. The importance of only investing through accredited and regulated entities was also emphasised.

42 Section 3.5.4.

3.5 Developments regarding Postbank

As mentioned in the Department’s 2011 *Annual Report*,⁴³ the South African Postbank Limited Act, 2010 (Act No. 9 of 2010) (the Postbank Act) is aimed at transforming Postbank from a division of the South African Post Office to a separate entity registered in terms of the new Companies Act and to bring it under the supervisory control of the Department. The Department expressed its concerns over discrepancies between the Postbank Act and the Banks Act to the Minister of Communications, following which the Department of Communications responded by drafting the South African Postbank Limited Amendment Bill to address the matters raised by the Department. The South African Postbank Limited Amendment Bill was subsequently published for public comment in *Government Gazette* No. 35843 of 31 October 2012.

43 Section 3.7.