MEMORANDUM ON THE OBJECTS OF THE BANKS AMENDMENT BILL, 2010 (Draft 4)

1. BACKGROUND TO THE BILL

1.1 The mission of the Bank Supervision Department (“BSD”) is to promote the soundness of the banking system through the effective and efficient application of international regulatory and supervisory standards. A sound banking system is one of the prerequisites for the attainment of the mission of the South African Reserve Bank (“SARB”) which is "the achievement and maintenance of price stability".

1.2 In order to promote the soundness of the banking system it is imperative that the regulation and supervision of banks are based on international standards and best practice. The framework for the regulation and supervision of banks and bank controlling companies in South Africa are contained in the following tiers of legislation:

1.2.1 Banks Act, 1990 (Act No. 94 of 1990 – the “Banks Act”);
1.2.2 Regulations relating to Banks (1 January 2008 – the “Regulations”);
1.2.3 Directives issued by the Registrar of Banks (the “Registrar”) in terms of the provisions of section 6(6) of the Banks Act.

1.3 In order to facilitate the implementation of Basel II both the Banks Act and the Regulations were comprehensively amended during 2007, which amendments became effective on 1 January 2008.

1.4 During October 2006 the Basel Committee on Banking Supervision (“BCBS”) of the Bank for International Settlements (“BIS”) issued a revised version of their Core Principles for Effective Banking Supervision (the “Core Principles”). The BSD thoroughly assessed its
compliance with the revised Core Principles and identified a number of shortcomings in the legal framework and supervisory process.

1.5 During 2008 the BSD was subjected to and involved in a number of international assessments:

1.5.1 A voluntary pilot project by the World Bank to assess BSD’s implementation of Basel II;
1.5.2 A scheduled Financial Sector Assessment Programme (“FSAP”) by the World Bank and the International Monetary Fund (“IMF”);
1.5.3 A scheduled assessment of South Africa’s compliance with anti-money laundering (“AML”) - and the combat of terrorist financing (“CFT”) recommendations of the Financial Action Task Force (“FATF”).

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 to fully comply with the stated standards and requirements.

1.6 The BSD has participated in working groups that were established by National Treasury in order to comment on and implement proposals by the G20 working groups that were established to deal with the causes and effects of the global financial crises.

1.7 Apart from the developments internationally, BSD has to take cognizance of the developments within the banking industry, the markets and new or amending legislation that might have an effect on banks and/or banking regulation or supervision.

1.8 During July 2009 the BCBS issued the three papers listed below that are aimed at providing revised guidelines to supervisors in
implementing the Basel II framework. The BSD has designated staff members to study these papers and to respond to them within certain prescribed time-lines.

1.8.1 Revisions to the Basel II market risk framework;
1.8.2 Guidelines for computing capital for incremental risk in the trading book; and
1.8.3 Proposed enhancements to the Basel II framework.

1.9 The Companies Act, 2008 (Act No. 71 of 2008 – the “2008 Companies Act”) was promulgated in April 2009 but is set to become effective only during the second half of 2010.

Since banks are also public companies the amendments brought about by the 2008 Companies Act will have a profound impact on both the business of banks and the regulatory framework governing banks. The BSD commissioned an external legal consultant to conduct a thorough comparison of the 2008 Companies Act with the Banks Act in order to advise the BSD of the various changes and possible impact on the Banks Act.

2. OBJECTS OF THE BILL

The objects of the Bill are to –

2.1 align its provisions to the new Companies Act; and
2.2 align the Act to changing supervisory policy, market developments and practical considerations.
3. PROPOSED AMENDMENTS TO THE BANKS ACT

3.1 Definitions (Section 1(1))

3.1.1 Inserting a definition of the Basel Committee on Banking Supervision.

3.1.2 Inserting the definition of "Commissioner" contained in the 2008 Companies Act and the consequent substitution of the word "Registrar of Companies" with "Commission" wherever such term appears in the Banks Act, 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).

3.1.3 Amending the reference in the definition of “Companies Act” to (Act No. 71 of 2008).


3.1.5 To insert a definition of “control” with reference to section 2(2) of the 2008 Companies Act.

3.1.6 Although no amendment is strictly required it is recommend that the definition of “director” be amended to be in line with the 2008 Companies Act as this definition can only cast the regulatory net wider and increase the ability of the Registrar to regulate directors of banks and controlling companies.

3.1.7 The words “as contemplated in paragraphs (a), (b) or (c) of the definition of ‘controlling company’ in Section 1 of the Companies Act”
need to be deleted 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 2008 Companies Act.

3.1.8 The words “sections 286 and 288” in the definition of “financial statements” refer to the reference in the 1973 Companies Act and need to be substituted with the words “section 30” which is the analogous section in the 2008 Companies Act.

3.1.9 The words “section 1 (4)” in the definition of holding company” refer to the 1973 Companies Act and need to be substituted with a reference to Section 1, being the analogous section in the Companies Act.


3.1.11 Inserting a definition of “public company” as defined in the 2008 Companies Act.

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

3.1.13 Replacing the reference to the Government Gazette as No. 30627 of 1 January 2008 in the definition of “Regulations relating to branches”.

3.1.14 The words “section 1 (3)” refer to the 1973 Companies Act and need to be substituted with a reference to Section 1, being the analogous section in the 2008 Companies Act.
Section 1(1A) paragraph (b)(iii) of the Banks Act is amended to refer to the Companies Act 61 of 1973. In terms of item 9(1) of schedule 5 of the 2008 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 2008 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.

The Banks Act is amended 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.

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)".
3.3 **Powers of inspection of, and guidelines by, Registrar (Section 6)**

3.3.1 Sections 6(4), 6(5) and 6(6) provides that the Registrar may issue circulars, guidance notes and directives to banks, controlling companies, eligible institutions (rating agencies) and auditors.

3.3.2 The sections, however, do not include representative offices and it is hereby proposed to include representative offices.

3.4 **Annual report by Registrar (Section 10)**

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

3.5 **Granting and refusal of application for authorization (Section 13)**

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

3.5.2 This amendment is necessitated by a comment made in the joint assessment report of the IMF/World Bank (2010) relating to BSD’s compliance with the revised Basel Core Principles

3.6 **Use of the name bank (Section 22)**

3.6.1 It is proposed that the provisions of this section also be made applicable to representative offices.
3.7 Cancellation or suspension of registration by Registrar (Section 23) and Notice by Registrar of intention to cancel or suspend registration (Section 24)

3.7.1 The IMF is of the opinion that there are severe limitations on the Registrar’s authority to cancel or suspend a bank’s licence. These constraints limit the Registrar’s ability to act decisively in case of emerging problems at a bank – in particular the delay of at least 30 days between the announcement of such measures and their actual application. The IMF also states that while it may be more appropriate to consult with the Minister before cancelling/suspending a bank licence and that the final decision should rest with the Registrar.

3.7.2 Sections 23 and 24 of the Banks Act contain provisions relating to the grounds and process to be followed when the registration of a bank is cancelled or suspended. It requires, amongst others, that the Registrar addresses a written notice to a bank affording it 30 days to show cause why its registration should not be cancelled. In addition it requires that the actual suspension/deregistration should be done with the consent of the Minister.

3.7.3 It is proposed that sections 23 and 24 be amended to afford the Registrar the power to suspend a bank’s registration on the grounds set out in section 23 after consultation with the Minister of Finance and to cancel the registration after affording such a bank a 30 day period to reply to the Registrar’s intention to cancel the registration.

3.7.4 It is furthermore proposed that a provision be inserted to provide that a material contravention and conviction of the Financial Intelligence Centre Act is a cause for the suspension or cancellation of the registration of a bank. This amendment is necessitated by a

3.8 **Cancellation of registration at request of the bank (Section 27)**

3.8.1 In terms of the 2008 Companies Act, companies are entitled to vary the thresholds and requirements for “special resolutions”.

3.8.2 A company may, in its Memorandum of Incorporation (“MOI”), provide that a special resolution shall be passed if supported by 60% (sixty percent) of the votes.

3.8.3 Further, a company's MOI can provide for a different percentage threshold with respect to different matters (so long as there is always a margin of 10% between the highest ordinary resolution threshold - which can never be less than 50% - and the lowest special resolution threshold).

3.8.4 In addition, the 2008 Companies Act and the draft regulations, contain no provision for the procedure for the registration of special resolutions (presumably this will be dealt with in the final draft regulations which are yet to be published).

3.8.5 The amendment specifies a 75 percentage requirement for the passing of this type of a resolution
3.9 **Cancellation of registration upon winding-up (Section 28)**

3.9.1 The reference in Section 28 to Section 419(1) of the Companies Act needs to be replaced with the reference to the analogous section of the 2008 Companies Act, being Section 82(1).

3.10 **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)**

3.10.1 This section needs to be amended to make reference to the concept of a "merger" (introduced in the 2008 Companies Act).

3.10.2 In addition, the reference to Chapter XII (of the 1973 Companies Act) needs to be replaced with the analogous section in the 2008 Companies Act, being Chapter 5.

3.11 **Registration of shares in name of nominees (Section 38)**

3.11.1 The reference to the Unit Trust Control Act, 1981 is to be replaced with the Collective Investment Schemes Control Act, 2002.

3.11.2 The reference to the Stock Exchanges Control Act, 1985 is to be replaced with the Securities Services Act, 2004.

3.11.3 Section 38 provides that no person can hold shares in a bank or controlling company, other than the beneficial shareholders, save with the consent of the Registrar, or in terms of certain listed exceptions.
One of these exceptions is when such shares are held by a curator, executor etc. There does not seem to be an analogous section to section 103(3) of the 1973 Companies Act in the 2008 Companies Act. It is therefore proposed that the substance of section 103(3) be incorporated into section 38(2) (b) of the Banks Act.

3.12 Application for registration as controlling company (Section 43)

3.12.1 There is no definition of “controlling company” in either the 1973 Companies Act or in the 2008 Companies Act. This cross reference needs to be deleted.

3.12.2 The term “controlling company” in subsection (1)(b) needs to be replaced with the term “holding company” as the term “holding company” is defined with reference to the 2008 Companies Act and because the applicant (holding company) will only become a (bank) “controlling company” when its application has been approved in terms of the provisions of the Banks Act.

3.13 Cancellation of registration at request of controlling company (Section 47)

3.13.1 In terms of the 2008 Companies Act, companies are entitled to vary the thresholds and requirements for “special resolutions”.

3.13.2 A company may, in its MOI provide that a special resolution shall be passed if supported by 60% (sixty percent) of the votes.

3.13.3 Further, a company's MOI can provide for a different percentage threshold with respect to different matters (so long as there is always a margin of 10% between the highest ordinary resolution threshold -
which can never be less than 50% - and the lowest special resolution threshold).

3.13.4 In addition, the 2008 Companies Act and the draft regulations, contain no provision for the procedure for the registration of special resolutions (presumably this will be dealt with in the final draft regulations which are yet to be published).

3.13.5 The amendment specifies 75 percentage required for the passing of this type of resolution

3.14 **Application of Companies Act to banks and controlling companies (Section 51)**

3.14.1 Section 51 of the Banks Act amends certain provisions of the 1973 Companies Act relating to the details of directors which need to be displayed on the correspondence of banks. However there is no analogous section in the 2008 Companies Act and can be deleted.

3.15 **Subsidiaries, branch offices, other interests and representative offices of banks and controlling companies (Section 52)**

3.15.1 Section 52 of the Banks Act provides that banks and controlling companies require the Registrar’s prior written approval, amongst others, when acquiring an interest in any business undertaking outside the Republic.

3.15.2 Since the provision has a wide application and since 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.

3.16 **Compromises, amalgamations, arrangements and other affected transactions (Section 54)**

3.16.1 The 2008 Companies Act does not provide for “compromises” and hence the term needs to be deleted from the heading as well as the body of section 54.

3.16.2 Section 54(1) (a) needs to be amended to make reference to the concept of a “merger” (introduced in the 2008 Companies Act).

3.16.3 In addition the reference to Chapter XII (of the 1973 Companies Act) needs to be replaced with a reference to the analogous section in the 2008 Companies Act, being Chapter 5.

3.16.4 The reference to Chapter XVA of the Companies Act needs to be replaced with the reference to the analogous section of the 2008 Companies Act being Chapter 5.

3.16.5 In addition the remainder of subsection 11 needs to refer to the provisions of Chapter 5, the Takeover Regulation Panel defined in the 2008 Companies Act as the “Panel”, and the new Takeover Regulations. Although the Takeover Regulations were published in draft form in December 2009 in terms of Government Gazette 32832, the final regulations have not yet been published.
3.17 **Reconstruction within group of companies (Section 55)**

3.17.1 The reference in Section 55(a) to Section 288(1) of the Companies Act needs to be replaced with the reference to the analogous section of the 2008 Companies Act, being Section 30.

3.18 **Alteration of memorandum of association or articles of association (Section 56)**

3.18.1 The references in Section 56(1) (a) of the Banks Act to Sections 55, 56 or 62 of the 1973 Companies Act need to be replaced with the reference to the analogous section of the 2008 Companies Act being Section 16.

3.18.2 The reference in Section 56(1) (b) of the Banks Act to Section 44 of the 1973 Companies Act needs to be replaced with the reference to the analogous section of the 2008 Companies Act, being Section 16(8).

3.18.3 The references to “Registrar of Companies” and “memorandum of association or articles of association” are to be amended to “Commission” and “memorandum of incorporation” (including the heading) respectively.

3.19 **Alteration of memorandum of association or articles of association in accordance with direction of Registrar (Section 57)**

3.19.1 The reference in section 57 of the Banks Act to Section 179 of the 1973 Companies Act needs to be replaced with the reference to the analogous section of the 2008 Companies Act, being section 61(7).
3.19.2 The references to “Registrar of Companies” and “memorandum of association or articles of association” are to be amended to “Commission” and “memorandum of incorporation” (including the heading) respectively.

3.20 **Information regarding directors and officers (Section 58)**

3.20.1 The reference in Section 58 of the Banks Act to Section 215 of the 1973 Companies Act needs to be replaced with the reference to the analogous section of the 2008 Companies Act, being section 24(3)(b).

3.21 **Directors and officers of a bank or controlling company (Section 60)**

3.21.1 Include references to section 77 of the 2008 Companies Act relating to the liability of directors.

3.21.2 In terms of item 9(1) of schedule 5 of the 2008 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 2008 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.

3.21.3 A number of notifications to this Department in respect of appointments as directors or executive officers of banks or controlling companies are incomplete and/or contain errors. The practice is to return such notifications to the bank or controlling company concerned with a notification that the period of 20 working days will be stayed and
will only again be applicable when a proper amended notification is received. It is proposed that subsection (5) (c) be amended to provide for the already existing practice.

3.21.4 It has come to the notice of this Office that some banks have established management structures that contain post classifications of directors in cases where such persons have not been appointed in terms of the provisions of the Companies Act. The Companies Act, Banks Act and Regulations relating to Banks contain specific references to directors and stipulate the rights, duties and obligations of such directors comprehensively. The use of the title of “director” in relation to a post or person that has not been established or appointed as such in terms of the Companies Act could potentially lead to confusion and uncertainty as to the status, rights, duties and obligations of such persons in this regard. 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 Companies Act.

3.22 Appointment of auditor (Section 61)

3.22.1 The reference to Chapter X of the 1973 Companies Act in Section 61 of the Banks Act needs to be replaced with the reference to the analogous section of the 2008 Companies Act, being Chapter 3.

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

3.23 Appointment of auditor by Registrar (Section 62)

3.23.1 The reference in Section 62 of the Banks Act 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 2008 Companies Act, being sections 90 and 91.

3.24 **Functions of auditors in relation to Registrar (Section 63)**

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

3.25 **Audit Committee (Section 64)**

3.25.1 The remainder of the substantial amendments to section 64 of the Banks Act effectively combines the requirements in the Companies Act and the Banks Act in one comprehensive clause.

3.25.2 Due 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 is increased to 90 days.

3.26 **Remuneration Committee (Section 64C)**

3.26.1 It is proposed that a remuneration committee be prescribed by the Banks Act for banks and controlling companies and to prescribe it composition and functions by inserting a new section 64C into the Banks Act.
3.27  **Forwarding of certain notices, reports, returns and financial statements to registrar (Section 65)**

3.27.1 The references to sections of the 1973 Companies Act are to be replaced by references to the analogous sections of the 2008 Companies Act.

3.28  **Special provisions relating to winding-up or judicial management (Section 68)**

3.28.1 The section does not deal with judicial management, and hence it should be removed from its heading.

3.28.2 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),

3.28.3 In terms of item 9(1) of schedule 5 of the 2008 Companies Act, 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 2008 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.

3.28.4 It is suggested that section 68 of the Banks Act 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.
3.28.5 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.

3.28.6 Section 349 of the Companies Act has been deleted altogether and should be replaced with a reference to the analogous provision in the 2008 Companies Act, being section 80.

3.28.7 The reference to section 419 in section 68(5) (b) of the Banks Act must be replaced with a reference to the analogous section in the 2008 Companies Act, being section 82(1).

3.29 **Appointment of curator to bank (Section 69)**

2.29.1 The IMF (in their assessment report on compliance with the Core Principles) recommended that the Registrar’s powers be increased with regard to the appointment of a curator to a bank in terms of section 69 of the Banks Act.

2.29.1.1 Section 69 provides that a curator be appointed by the Minister of Finance with the written consent of the CEO or Chairperson of the bank concerned.

2.29.1.2 The IMF is of the opinion that the requirements relating the Minister and the CEO/Chairperson hamper the ability of the Registrar to act decisively when a bank encounters serious difficulty.

2.29.1.3 It is recommended that section 69 be amended to replace the Minister with the Governor of the South African Reserve Bank and to replace the requirement of having to obtain the written consent of the CEO/Chairperson of the bank concerned with a written notification.
3.29.2 The reference in Section 69 (2C)(b) of the Banks Act to section 228 of the 1973 Companies Act needs to be replaced with the reference to the analogous section of the 2008 Companies Act, being section 112.

2.29.3 The reference in Section 69 (3)(f) of the Banks Act to section 199 of the 1973 Companies Act needs to be replaced with the reference to the analogous section of the 2008 Companies Act being section 65.

2.29.4 Since there is a great deal of additional flexibility in relation to the manner in which a company may regulate special resolutions in the MOI of the company and a reference to the MOI has been included in this section.

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

3.30.1 Section 79(1) (a) of the Banks Act indicates that banks may not issue shares of no par value or convert shares into shares of no par value. The 2008 Companies Act, in section 35, actually does away with the concept of par value shares (except when it comes to banks which are specifically carved out from the ambit of section 35). The reference in Section 79(1)(a) of the Banks Act should be replaced by the analogous section in the 2008 Companies Act, being section 35 (containing the reference to par value shares) and section 36 (referring to the authorisation and reclassification of shares).

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

3.30.3 Section 79(3) of the Banks Act 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 which provides that in respect of all public companies, a member shall, (a) if the share capital is divided into shares of par value, be entitled to that proportion of the total votes in the company which the aggregate amount of the nominal value of the shares held by him bears to the aggregate amount of the nominal value of all the shares issued by the company; (b) if the share capital is divided into shares of no par value, be entitled to one vote in respect of each share he holds.

3.30.4 There is no analogous provision in the 2008 Companies Act restricting differentiated voting rights for members of ordinary shares in public companies as section 37(1) of the 2008 Companies Act provides that all the shares of the same class have the same rights “except to the extent that the MOI provides otherwise”. In order to maintain the status quo in respect of the voting rights of the ordinary shares of banks, it is proposed that section 79(3) be amended to incorporate the provisions of section 195(1) of the 1973 Companies Act.

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

3.31.1 The appointment of a “manager” to control and manage the repayment process once a directive has been issued to this effect seems to be confusing to members of the public and others. The term “manager” is interpreted to mean manager of the company – which is not the case. The proposal is to substitute the term “manager” with the term “repayment administrator” to avoid any possible confusion.

3.31.2 Section 84(1A) (a) of the Banks Act provides that a manager (“repayment administrator”) should report on the insolvency of the
company/person under investigation/management. This requirement has caused a number of legal and practical difficulties in recent investigations and is somewhat superfluous in the light of the fact that where a company/person is unable to repay when directed to do so, it is already regarded as an act of insolvency in terms of section 83(3)(b) of the Banks Act. It is proposed that such a report only be submitted at the request of the Registrar.

3.31.3 In a number of cases this Department has afforded the company/person being investigated an opportunity to present it with a plan of repayment or conversion. Although senior counsel’s opinion is that the forbearance could be justified on the facts in the majority of cases, it could be challenged in others. It is suggested that section 84 of the Banks Act be amended to specify the options that may be exercised once a directive to repay has been issued. It is proposed that a proviso be included to this effect.

3.31.4 In terms of item 9(1) of schedule 5 of the 2008 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 2008 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 and section 370 identified as being a section of the 1973 Companies Act.

3.32 Limitation of liability (Section 88)

3.32.1 A legal opinion concluded that the wording of section 88 is somewhat vague when it comes to the limitation of liability of duly appointed inspectors in respect of the investigation of illegal deposit-taking
schemes and managers in respect of the repayment of money illegally obtained.

3.32.2 It is proposed that the term "other officer" be expressly extended to include the above-mentioned inspectors and managers.

4. **ORGANISATIONS AND INSTITUTIONS CONSULTED**

4.1 The provisions of the Bill has been debated and recommended to the Minister of Finance by the Standing Committee for the Revision of the Banks Act, established in terms of section 92 of the Banks Act, 1990.

4.2 Consultation with various stakeholders was undertaken over a period of a year on the various proposals. The stakeholders include:

- The National Treasury;
- The Financial Services Board;
- The Banking Association;
- Individual banks;
- National Credit Regulator;
- Financial Intelligence Centre;
- Auditing firms; and
- The Competition Commission.
- Auditor General

5. **FINANCIAL IMPLICATIONS FOR THE STATE**

5.1 The Bill will not have significant financial implications for the State.
6. CONSTITUTIONAL IMPLICATIONS

None

7. PARLIAMENTARY PROCEDURE

7.1 The State Law Advisers and the National Treasury are both of the opinion that this Bill must be dealt with in terms in accordance with the procedure established by the provisions of section 75 of the Constitution of the Republic of South Africa (Act 108 of 1996 – the “Constitution”) since it contains no provision to which the procedure set out in section 74 or 76 of the Constitution applies.

7.2 The State Law Advisers are of the opinion that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of the provisions of section 18(1) (a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.

1 Please note that the Bill (Drafts 1 to 4) has not been submitted to the State Law Advisors as yet and that paragraphs 7.1 and 7.2 of this memorandum have been included in anticipation of their opinion in this regard.