REPUBLIC OF SOUTH AFRICA

FINANCIAL SECTOR LAWS AMENDMENT BILL

(As amended by the Standing Committee on Finance (National Assembly))
(The English text is the official text of the Bill)

(MINISTER OF FINANCE)

[B 15B—2020]

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GENERAL EXPLANATORY NOTE:

[ ]	Words in bold type in square brackets indicate omissions from existing enactments.
_____	Words underlined with a solid line indicate insertions in existing enactments.

BILL

To amend—

- **the Insolvency Act, 1936, to clarify that the provisions of the Financial Sector Regulation Act, 2017, apply to the liquidation or sequestration of the estate of a designated institution; to exclude dispositions made in case of resolution from the application of the Insolvency Act; to clarify and refine the application of certain provisions of the Insolvency Act;**
- **the South African Reserve Bank Act, 1989, to provide for the performance of resolution functions by the Reserve Bank;**
- **the Banks Act, 1990, to exclude banks in resolution from the application of certain provisions; to provide for set-off against any amounts paid by the Corporation for Deposit Insurance; to repeal certain provisions;**
- **the Mutual Banks Act, 1993, to provide for the issuing of guidance notes and directives by the Prudential Authority; to provide for an offence in the case of non-compliance with a directive; to repeal certain provisions; to exclude a mutual bank in resolution from the application of certain provisions;**
- **the Competition Act, 1998, to exclude transactions in relation to resolution from the application of certain provisions; and to provide for consultation with the Competition Commission in relation to certain transactions;**
- **the Financial Institutions (Protection of Funds) Act, 2001, to exclude designated institutions in resolution from the application of certain provisions;**
- **the Co-operative Banks Act, 2007, so as to repeal certain provisions; and to exclude the application of certain provisions to co-operative banks as designated institutions;**
- **the Companies Act, 2008, to provide for the winding up of a company in resolution in certain circumstances; to exclude transactions, amalgamations or mergers or arrangements in relation to resolution from the application of certain provisions; to exclude an institution in resolution from the application of a Chapter;**
- **the Financial Markets Act, 2012, to exclude designated institutions from the application of certain provisions; and to exclude designated institutions in resolution from the application of certain provisions;**
- **the Financial Sector Regulation Act, 2017, to provide for the establishment of a framework for the resolution of designated institutions to ensure that the impact or potential impact of a failure of a designated institution on financial stability is managed appropriately; to designate the Reserve Bank as the resolution authority; to establish a deposit insurance scheme, including a Corporation for Deposit Insurance and a Deposit Insurance Fund; to provide for co-ordination, co-operation, collaboration and consultation between the**

Corporation for Deposit Insurance and other entities in relation to financial stability and the functions of these entities; to make provision for designated institutions in connection with resolution matters; to further provide for information required to assess a levy; to effect consequential and technical amendments to certain provisions; to accordingly amend the long title and the Arrangement of Sections; and

- **the Insurance Act, 2017, to exclude certain insurers from the application of a Chapter;**

and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

Insertion of section 22A in Act 24 of 1936

1. The following section is hereby inserted in the Insolvency Act, 1936, after section 22:

"**Liquidation of designated institutions**

22A. Notwithstanding the provisions of this Act or any other law, the provisions of the Financial Sector Regulation Act, 2017 (Act No. 9 of 2017), relating to the liquidation of a designated institution as defined in section 1 of that Act, apply to the liquidation or sequestration of the estate of the institution in terms of this Act, and the trustee may not, in terms of this Act or any other law, set aside any action taken or disposition made by the Reserve Bank in the exercise of its resolution functions in terms of the Financial Sector Regulation Act, 2017.".

Amendment of section 35A of Act 24 of 1936, as amended by section 1 of Act 32 of 1995, section 2 of Act 104 of 1996, section 117 of Act 36 of 2004, section 111 of Act 19 of 2012 and section 290 of Act 9 of 2017

2. Section 35A of the Insolvency Act, 1936, is hereby amended by the substitution for the heading of the following heading:

"**Transactions on [exchange] market infrastructure**".

Amendment of section 83 of Act 24 of 1936, as amended by section 24 of Act 16 of 1943, section 27 of Act 99 of 1965, section 30 of Act 54 of 1991, section 290 of Act 9 of 2017, and by section 1 of Act 18 of 2019

3. Section 83 of the Insolvency Act, 1936, is hereby amended—

(a) by the substitution for subsection (5) of the following subsection:

"(5) The creditor shall, as soon as possible after he or she has realized such property, other than property held as security in favour of a secured creditor for obligations arising out of a master agreement defined in section 35B(2) or a transaction referred to in section 35A (including eligible collateral in terms of the applicable standards or rules made under the Financial Sector Regulation Act, 2017 (Act No. 9 of 2017), or the Financial Markets Act, 2012 (Act No. 19 of 2012)), prove in terms of section forty-four the claim thereby secured and **[he]** the creditor shall attach to the affidavit submitted in proof of **[his]** the creditor's claim a statement of the proceeds of the realization and of the facts on which **[he]** the creditor relies for his or her preference.";

(b) by the substitution for subsection (10) of the following subsection:

"(10) Whenever a creditor has realized his or her security, other than property held as security in favour of a secured creditor for obligations arising out of a master agreement defined in section 35B(2) or a transaction referred to in section 35A (including eligible collateral in terms of the applicable standards or rules made under the Financial Sector Regulation Act, 2017 (Act No. 9 of 2017), or the Financial Markets Act, 2012 (Act No. 19 of 2012)), as hereinbefore provided **[he]**

the creditor shall forthwith pay the net proceeds of the realization to the trustee, or if there is no trustee, to the Master and thereafter the creditor shall be entitled to payment, out of such proceeds, of his or her preferment claim if such claim was proved and admitted as provided by section forty-four and the trustee or the Master is satisfied that the claim was in fact secured by the property so realized. If the trustee disputes the preference, the creditor may either lay before the Master an objection under section one hundred and eleven to the trustee's account, or apply to court, after notice of motion to the trustee, for an order compelling the trustee to pay **[him]** the creditor forthwith. Upon such application the court may make such order as to it seems just.'';

(c) by the substitution in subsection (10A)*(a)* for the words preceding subparagraph (i) of the following words:

''Whenever a creditor has realized property held as security in respect of claims arising out of a master agreement defined in section 35B(2) or a transaction referred to in section 35A (including eligible collateral in terms of the applicable standards or rules under the Financial Sector Regulation Act, 2017 (Act No. 9 of 2017), or the Financial Markets Act, 2012 (Act No. 19 of 2012)), such creditor may retain the proceeds of the realization for the settlement of the secured claim and shall as soon as possible after realization—'';

(d) by the substitution in subsection (10A)*(a)*(i) for the words preceding item *(aa)* of the following words:

''give written notice of that fact to the trustee or the Master and provide the trustee or the Master with a certified copy of the master agreement or contract in terms of a transaction referred to in section 35A and an affidavit confirming—''; and

(e) by the substitution in subsection (10A)*(a)*(i) for item *(aa)* of the following item:

''*(aa)* that the master agreement or contract in terms of a transaction referred to in section 35A had been entered into;''.

Amendment of Arrangement of Sections of Act 24 of 1936

4. The Arrangement of Sections of the Insolvency Act, 1936, is hereby amended—

(a) by the insertion after item 22 of the following item:

''22A. Liquidation of designated institutions''; and

(b) by the substitution for item 35A of the following item:

''35A. Transactions on **[exchange]** market infrastructure''.

Amendment of section 10 of Act 90 of 1989, as amended by section 3 of Act 10 of 1993, section 5 of Act 2 of 1996, section 2 of Act 39 of 1997 and section 290 of Act 9 of 2017

5. Section 10 of the South African Reserve Bank Act, 1989, is hereby amended by the substitution in subsection (1) for paragraph *(d)* of the following paragraph:

''*(d)* form a company or acquire shares in a **[limited]** company formed and registered in accordance with the provisions of the Companies Act, **[1973,]** 2008—

(i) for the purposes of the performance of its resolution functions in terms of the Financial Sector Regulation Act, 2017 (Act No. 9 of 2017); or

(ii) if the Board is of the opinion that any such acquisition will be conducive to the attainment of any of the objects of this Act;''.

Amendment of section 51 of Act 94 of 1990, as amended by section 11 of Act 9 of 1993, section 34 of Act 19 of 2003, section 22 of Act 22 of 2013 and section 1 of Act 3 of 2015

6. Section 51 of the Banks Act, 1990, is hereby amended by the deletion in subsection (1) of paragraphs *(c)* and *(d)*.

Amendment of section 54 of Act 94 of 1990, as amended by section 6 of Act 42 of 1992, section 12 of Act 9 of 1993, section 36 of Act 26 of 1994, section 5 of Act 55 of 1996, section 36 of Act 19 of 2003, section 13 of Act 20 of 2007, section 90 of Act 17 of 2009, section 24 of Act 22 of 2013 and section 25 of Act 9 of 1993

7. Section 54 of the Banks Act, 1990, is hereby amended by the insertion after subsection (1C) of the following subsection:

''(1D) This section does not apply to a bank in resolution.''.

Amendment of section 60 of Act 94 of 1990, as substituted by section 1 of Act 81 of 1991 and amended by section 39 of Act 26 of 1994, section 40 of Act 19 of 2003, section 15 of Act 20 of 2007 and section 29 of Act 22 of 2013

8. Section 60 of the Banks Act, 1990, is hereby amended by the substitution in subsection (1B)*(b)* for subparagraph (ii) of the following subparagraph:

''(ii) thereafter to set off against any amount—

(aa) paid by the Corporation for Deposit Insurance established in terms of section 166AE of the Financial Sector Regulation Act, 2017 (Act No. 9 of 2017), to or in respect of depositors of the bank;

(bb) paid to depositors by **[the Authority, a deposit insurance scheme,]** a financial sector regulator as defined in section 1(1) of the Financial Sector Regulation Act, 2017 (Act No. 9 of 2017) or any governmental body**[,]** as part or full compensation for the losses suffered by depositors as a result of the bank being unable to repay their deposits; and''.

Repeal of sections 68, 69 and 69A of Act 94 of 1990

9. (1) Sections 68, 69 and 69A of the Banks Act, 1990, are hereby repealed.

(2) Despite the amendments to the Banks Act, 1990, contained in subsection (1), an investigation by a commissioner in terms of section 69A of the Banks Act, 1990, that is pending and not concluded immediately before the date on which subsection (1) comes into effect must be continued, concluded and reported on by the commissioner in terms of that section as if it had not been repealed.

Amendment of section 89A of Act 94 of 1990, as inserted by section 3 of Act 3 of 2015

10. The following section is hereby substituted for section 89A of the Banks Act, 1990:

''**Fair administrative action**

89A. Any administrative action taken in terms of this Act**[, including any administrative action taken by a curator appointed in terms of section 69,]** is subject to the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000).''.

Amendment of section 91 of Act 94 of 1990, as amended by section 23 of Act 9 of 1993, section 56 of Act 26 of 1994, section 16 of Act 36 of 2000, section 65 of Act 19 of 2003, section 32 of Act 20 of 2007, section 47 of Act 22 of 2013 and section 290 of Act 9 of 2017

11. Section 91 of the Banks Act, 1990, is hereby amended by the substitution in subsection (4) for paragraph *(b)* of the following paragraph:

''*(b)* section 17(6), 21, 22(3) or (8), 32(4)*(a)*, **[69A(14),]** 78(2), 82(3), 83(3)*(a)*, 84(1A), 84(8) or subsection (1), (2) or (3) of this section (excluding the offence in terms of subsection (1)*(b)*, referred to in paragraph *(a)*), shall be liable to a fine or to imprisonment for a period not exceeding five years or to both a fine and such imprisonment.''.

Amendment of section 4 of Act 124 of 1993, as amended by section 2 of Act 54 of 1999 and section 290 of Act 9 of 2017

12. Section 4 of the Mutual Banks Act, 1993, is hereby amended—

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

"**Powers of inspection of, guidance notes, directives and guidelines by, [Registrar] Authority**";

(b) by the substitution for subsections (3) and (4) of the following subsections respectively:

"(3) Neither the provisions of this section nor any other provision of this Act shall be construed as prohibiting the **[Registrar]** Authority from holding discussions, from time to time, with the chief executive officer of any mutual bank, or with any executive officer or employee, designated by such chief executive officer, of—

(a) that mutual bank; or

(b) any associate of that mutual bank,

with a view to achieving effective supervision by the **[Registrar]** Authority, on an individual or a consolidated basis, of that mutual bank or of that mutual bank and any of its associates.

(4) The **[Registrar]** Authority may from time to time by means of a circular furnish mutual banks with guidelines regarding the application and interpretation of the provisions of this Act."; and

(c) by the addition of the following subsections:

"(5) The Authority may, by means of a guidance note, furnish mutual banks and auditors of mutual banks with information in respect of market practices or market or industry developments within or outside the Republic.

(6) The Authority may, in writing, after consultation with the relevant mutual bank or auditor of the mutual bank, issue a directive to such a mutual bank or auditor of a mutual bank, either individually or collectively, regarding the application of the Act and may include the issuing of a non-financial sanction or a directive requiring a mutual bank or an auditor of a mutual bank, either individually or collectively, within the period specified in the directive, to—

(a) cease or refrain from engaging in any act, omission or course of conduct or to perform such acts necessary to remedy the situation;

(b) perform such acts necessary to comply with the directive or to effect the changes required to give effect to the directive; or

(c) provide the Authority with such information and documents relating to the matter specified in the directive.

(7) The directive contemplated in subsection (6) may—

(a) be cancelled in writing by the Authority, after consultation with the mutual bank or auditor of a mutual bank that is subject to the directive; and

(b) not be issued by the Authority with retroactive effect.

(8) Any mutual bank or auditor of a mutual bank that neglects, refuses or fails to comply with a directive issued under this section, shall be guilty of an offence.".

Amendment of section 29 of Act 124 of 1993, as amended by section 20 of Act 54 of 1999

13. Section 29 of the Mutual Banks Act, 1993, is hereby amended by the deletion in subsection (4) of paragraph *(b)*.

Repeal of sections 73, 74, 75, 76 and 77 of Act 124 of 1993

14. Sections 73, 74, 75, 76 and 77 of the Mutual Banks Act, 1993, are hereby repealed.

Insertion of section 78A of Act 124 of 1993

15. The following section is hereby inserted in the Mutual Banks Act, 1993, after section 78:

"**Sections 71, 72, and 78 do not apply to mutual banks in resolution**

78A. Sections 71, 72, and 78 do not apply to a mutual bank in respect of which a determination in terms of section 166J of the Financial Sector Regulation Act.".

Repeal of sections 80 and 81 of Act 124 of 1993

16. Sections 80 and 81 of the Mutual Banks Act, 1993, are hereby repealed.

Amendment of section 92 of Act 124 of 1993, as amended by section 290 of Act 9 of 2017

17. Section 92 of the Mutual Banks Act, 1993, is hereby amended by the substitution in subsection (4) for paragraph *(b)* of the following paragraph:

"*(b)* section 4(8), 14(6), 18, 20(3) or (6), 29(4)*(a)*, 45(22), 59(2) or 84(2) or subsection (1), (2) or (3) of this section, shall be liable to a fine, or to imprisonment for a period not exceeding six months.".

Amendment of Arrangement of Sections of Act 124 of 1993

18. The Arrangement of Sections of the Mutual Banks Act, 1993, is hereby amended—

(a) by the insertion after item 78 of the following item:

"**78A.** Sections 71, 72 and 78 do not apply to mutual banks in resolution"; and

(b) by the deletion of items 80 and 81.

Amendment of section 18 of Act 89 of 1998, as substituted by section 6 of Act 39 of 2000 and amended by section 90 of Act 40 of 2007, section 111 of Act 19 of 2012 and substituted by section 13 of Act 18 of 2018

19. Section 18 of the Competition Act, 1998, is hereby amended by the addition of the following subsection:

"(4) In addition to subsections (2) and (3), if the Governor of the Reserve Bank, or a person authorised by the Governor to do so, has, after consultation with the Competition Commission, determined in writing that this section applies to a transaction in terms of section 166S of the Financial Sector Regulation Act, 2017 (Act No. 9 of 2017)—

(a) the Competition Commission may not make a decision in terms of section 13(5)*(b)* or 14(1)*(b)* in relation to the transaction;

(b) the Competition Tribunal may not make an order in terms of section 16(2) in relation to the transaction; and

(c) sections 13(6) and 14(2) do not apply in relation to the transaction.".

Insertion of section 9B in Act 28 of 2001

20. The following section is hereby inserted in the Financial Institutions (Protection of Funds) Act, 2001, after section 9A:

"**Sections 5 and 6 do not apply to designated institutions in resolution**

9B. Sections 5 and 6 do not apply to an institution of which a determination, in terms of section 166J of the Financial Sector Regulation Act, 2017, is in force.".

Amendment of Arrangement of Sections of Act 28 of 2001

21. The Arrangement of Sections of the Financial Institutions (Protection of Funds) Act, 2001, is hereby amended by the insertion after item 9A of the following item:

"**9B.** Sections 5 and 6 do not apply to designated institutions in resolution".

Amendment of section 1 of Act 40 of 2007, as amended by section 240 of Act 45 of 2013 and section 290 of Act 9 of 2017

22. Section 1 of the Co-operative Banks Act, 2007, is hereby amended by the substitution in subsection (1) for the definition of 'Fund' of the following definition:

" **'Fund'** means the Deposit Insurance Fund established in terms of section 166BD of the Financial Sector Regulation Act;".

Repeal of sections 24, 25, 26 and 30 of Act 40 of 2007

23. Sections 24, 25, 26 and 30 of the Co-operative Banks Act, 2007, are hereby repealed.

Insertion of section 30A in Act 40 of 2007

24. The following section is hereby inserted in the Co-operative Banks Act, 2007, after section 30:

"**Co-operative Banks as designated institutions in terms of Financial Sector Regulation Act, 2017**

30A. Sections 27, 28, and 29 do not apply to a co-operative bank in respect of which a determination in terms of section 166J of the Financial Sector Regulation Act is in force.".

Amendment of section 55 of Act 40 of 2007, as amended by section 251 of Act 45 of 2013 and section 290 of Act 9 of 2017

25. Section 55 of the Co-operative Banks Act, 2007, is hereby amended by the deletion in subsection (1) of paragraph *(g)*.

Amendment of section 80 of Act 40 of 2007

26. Section 80 of the Co-operative Banks Act, 2007, is hereby amended by the substitution for paragraph *(b)* of the following paragraph:

"*(b)* contravene or fail to comply with section 3(2), 10, 21(1)**[,]** or 23 **[or 25(4)]**;".

Amendment of section 81 of Act 71 of 2008

27. Section 81 of the Companies Act, 2008, is hereby amended—

(a) by the deletion in subsection (1) of the word "or" at the end of paragraph *(e)*; and

(b) by the insertion of the word "or" at the end of paragraph *(f)* and the addition of the following paragraph:

"*(g)* in the case of a designated institution as defined in the Financial Sector Regulation Act, 2017 (Act No. 9 of 2017), the Reserve Bank has applied to the court for an order to wind up the company on the grounds that the company has been placed in resolution in terms of that Act and there are no reasonable prospects that the company will cease to be in resolution.".

Amendment of section 112 of Act 71 of 2008, as amended by section 69 of Act 3 of 2011

28. Section 112 of the Companies Act, 2008, is hereby amended by the insertion in subsection (1) after paragraph *(a)* of the following paragraph:

"*(a*A*)* to which section 166S of the Financial Sector Regulation Act, 2017 (Act No. 9 of 2017), applies;".

Amendment of section 113 of Act 71 of 2008

29. Section 113 of the Companies Act, 2008, is hereby amended by the insertion after subsection (1) of the following subsection:

"(1A) This section does not apply to an amalgamation or merger to which section 166S of the Financial Sector Regulation Act, 2017 (Act No. 9 of 2017), applies.".

Amendment of section 114 of Act 71 of 2008, as amended by section 70 of Act 3 of 2011

30. Section 114 of the Companies Act, 2008, is hereby amended by the substitution in subsection (1) for the words preceding paragraph *(a)* of the following words:

"Unless **[it]** the company is in liquidation, **[or]** in the course of business rescue proceedings in terms of Chapter 6 or the arrangement is one to which section 166S of the Financial Sector Regulation Act, 2017 (Act No. 9 of 2017), applies, the board of a company may propose and, subject to subsection (4) and approval in terms of this Part, implement any arrangement between the company and holders of any class of its securities by way of, among other things—".

Amendment of section 128 of Act 71 of 2008, as amended by section 81 of Act 3 of 2011

31. Section 128 of the Companies Act, 2008, is hereby amended by the addition of the following subsection:

"(4) This Chapter does not apply to an institution in respect of which a determination in terms of section 166J of the Financial Sector Regulation Act, 2017 (Act No. 9 of 2017), is in force.".

Amendment of section 3 of Act 19 of 2012, as amended by section 290 of Act 9 of 2017

32. Section 3 of the Financial Markets Act, 2012, is hereby amended by the substitution for subsection (1) of the following subsection:

"(1) Sections 100 to 103 do not apply in relation to the South African Reserve Bank, or a **[bank]** designated institution as defined in section 1(1) of the Financial Sector Regulation Act, 2017 (Act No. 9 of 2017).".

Amendment of section 60 of Act 19 of 2012, as amended by section 290 of Act 9 of 2017

33. Section 60 of the Financial Markets Act, 2012, is hereby amended by the addition of the following subsection:

"(5) If the market infrastructure is a designated institution in resolution as defined in section 1(1) of the Financial Sector Regulation Act, 2017 (Act No. 9 of 2017), the Authority must give notice to the Reserve Bank before taking any action in terms of this section.".

Amendment of section 64 of Act 19 of 2012, as amended by section 290 of Act 9 of 2017

34. Section 64 of the Financial Markets Act, 2012, is hereby amended by the addition of the following subsection:

"(7) This section does not apply to a designated institution in resolution as defined in section 1(1) of the Financial Sector Regulation Act, 2017 (Act No. 9 of 2017).".

Amendment of section 1 of Act 9 of 2017

35. Section 1 of the Financial Sector Regulation Act, 2017, is hereby amended—

(a) by the insertion in subsection (1) after the definition of ''administrative penalty order'' of the following definitions:

'' **'agreement'** includes an arrangement or an understanding, whether in writing or not;

'' **'bank'** means each of the following:

(a) a bank as defined in the Banks Act;

(b) a branch as defined in the Banks Act;

(c) a mutual bank as defined in the Mutual Banks Act, 1993 (Act No. 124 of 1993); or

(d) a co-operative bank as defined in the Co-operative Banks Act, 2007 (Act No. 40 of 2007);'';

(b) by the insertion in subsection (1) after the definition of ''benchmark'' of the following definitions:

'' **'Board'** means the Board of the Corporation referred to in section 166AI;

'bridge company' means a company incorporated in terms of section 166F;'';

(c) by the insertion in subsection (1) after the definition of ''Chief Executive Officer'' of the following definition:

'' **'Chief Executive Officer of the Corporation'** means the Chief Executive Officer of the Corporation appointed in terms of section 166AL(1), and includes a person acting as the Chief Executive Officer of the Corporation;'';

(d) by the insertion in subsection (1) after the definition of ''control function'' of the following definition:

'' **'Corporation'** means the Corporation for Deposit Insurance established by section 166AE;'';

(e) by the insertion in subsection (1) after the definition of ''Court'' of the following definition:

'' **'covered deposit'** means the portion of a qualifying deposit covered by the Deposit Insurance Fund provided for in section 166AB;'';

(f) by the insertion in subsection (1) after the definition of ''credit agreement'' of the following definitions:

'' **'creditor hierarchy'** means the order in which a liquidator must, in terms of the Insolvency Act, read with sections 166U and 166W, apply property to satisfy claims of creditors;

'critical function', in relation to a designated institution, means a function that is—

(a) essential to, or that contributes substantially to, financial stability and is performed by the designated institution; or

(b) provided to, and essential to the continued operation of, the designated institution;'';

(g) by the insertion in subsection (1) after the definition of ''debarment order'' of the following definitions:

'' **'deposit'** has the meaning assigned to it in section 1(1) of the Banks Act;

'deposit insurance levy' means a levy of that name that may be imposed by legislation, in accordance with section 166BC;

'deposit insurance premium' means a premium imposed by legislation, in accordance with section 166BG;

'depositor' means a person that holds a deposit as defined in section 1 of the Banks Act;'';

(h) by the insertion in subsection (1) after the definition of ''Deputy Governor'' of the following definitions:

'' **'designated institution'** means a designated institution as defined in section 29A;

'designated institution in resolution' means a designated institution in respect of which a determination in terms of section 166J(2), is in force;

'director' means a director of the Corporation;'';

(i) by the addition in subsection (1) to the definition of ''financial sector body'' of the following paragraphs:

''*(g)* the Reserve Bank, in relation to its resolution functions; and

(h) the Corporation;'';

(j) by the insertion in subsection (1) after the definition of ''financial year'' of the following definition:

'' **'flac instrument'** means a financial instrument issued by a designated institution, being an instrument that—

(a) complies with the requirements prescribed by a prudential standard for a flac instrument; and

(b) is of a kind that is not counted for the purpose of determining whether the designated institution satisfies the applicable requirements of—

(i) Chapter VI of the Banks Act;

(ii) Chapter V of the Mutual Banks Act, 1993 (Act No. 124 of 1993);

(iii) Chapter III of the Co-operative Banks Act, 2007 (Act No. 40 of 2007); or

(iv) Chapter 6 of the Insurance Act, 2017 (Act No. 18 of 2017),

or prudential standards made for the purposes of any of those provisions;'';

(k) by the insertion in subsection (1) after the definition of ''Friendly Societies Act'' of the following definition:

'' **'Fund'** means the Deposit Insurance Fund established by section 166BD;'';

(l) by the insertion in subsection (1) after the definition of ''industry ombud scheme'' of the following definition:

'' **'Insolvency Act'** means the Insolvency Act, 1936 (Act No. 24 of 1936);'';

(m) by the insertion in subsection (1) after the definition of ''ombud scheme'' of the following definition:

'' **'orderly resolution of a designated institution'** means the management of the affairs of the designated institution as provided in Chapter 12A in a way that—

(a) assists in maintaining financial stability;

(b) ensures that the critical functions performed by the designated institution continue to be performed; and

(c) in the case of a bank, protects the interests of depositors;'';

(n) by the insertion in subsection (1) after the definition of ''payment system'' of the following definitions:

'' **'payment system operator'** means an operator of a payment system, and includes—

(a) a designated settlement system operator as defined in section 1 of the National Payment System Act; and

(b) a payment clearing house system operator as defined in section 1 of the National Payment System Act;

'payment system participant' includes—

(a) a settlement system participant as defined in section 1 of the National Payment System Act;

(b) a Reserve Bank settlement system participant as defined in section 1 of the National Payment System Act; and

(c) a clearing system participant as defined in section 1 of the National Payment System Act;'';

(o) by the insertion in subsection (1) after the definition of ''person'' of the following definition:

'' **'placing a designated institution in resolution'** refers to making a determination in terms of section 166J(2) in relation to the designated institution;'';

(p) by the insertion in subsection (1) after the definition of ''Public Finance Management Act'' of the following definition:

'' **'qualifying deposit'** means a deposit with a bank, other than—

(a) a deposit evidenced by a bearer deposit instrument; or

(b) a deposit where the depositor holds the deposit in the capacity of—

(i) a financial institution, excluding a financial institution that is a co-operative financial institution as defined in section 1(1) of the Co-operative Banks Act;
(ii) the national government, a provincial government, a local government or an organ of state;
(iii) an entity listed in Schedule 2 to the Public Finance Management Act;
(iv) the Corporation for Public Deposits established by section 2 of the Corporation for Public Deposits Act, 1984 (Act No. 46 of 1984); or
(v) the Public Investment Corporation established by section 2 of the Public Investment Corporation Act, 2004 (Act No. 23 of 2004);'';

(q) by the insertion in subsection (1) after the definition of ''Reserve Bank Act'' of the following definitions:

'' **'resolution'**, of a designated institution, means the management of the affairs of the designated institution as provided for in Chapter 12A;
'resolution action' means action in terms of section 166S;
'resolution function' means a function or a power—
(a) conferred on the Reserve Bank for the purpose of; or
(b) performed by the Reserve Bank in connection with,
the resolution of a designated institution (including a function or power conferred or performed for the purpose of reducing the risk that a designated institution may need to be placed in resolution);
'resolution practitioner', for a designated institution, means a person appointed in terms of section 166O;'';

(r) by the insertion in subsection (1) after the definition of ''service provided by a market infrastructure'' of the following definition:

'' **'share'** means a share as defined in section 1 of the Companies Act;'';

(s) by the insertion in subsection (1) after paragraph *(a)* of the definition of ''supervised entity'' of the following paragraph:

''*(a*A*)* a designated institution that is not otherwise a licensed financial institution;''; and

(t) by the insertion in subsection (1) after the definition of ''systemically important financial institution'' of the following definition:

'' **'systemically important payment system'** means a payment system designated in terms of section 29B;''.

Amendment of section 7 of Act 9 of 2017

36. Section 7 of the Financial Sector Regulation Act, 2017, is hereby amended—

(a) by the deletion in subsection (1) of the word ''and'' at the end of paragraph *(g)*; and

(b) by the insertion of the word ''and'' at the end of paragraph *(h)* and the addition of the following paragraph:

''*(i)* the orderly resolution of designated institutions in resolution and, in connection with that, protection of depositors in banks through a deposit insurance scheme and containing the cost to the Republic of the steps taken.''.

Substitution of section 9 of Act 9 of 2017

37. The following section is hereby substituted for section 9 of the Financial Sector Regulation Act, 2017:

''**Inconsistencies between Act and other [financial sector] laws**

9. (1) In the event of any inconsistency between a provision of this Act, other than a Regulation or a regulatory instrument made under this Act, and a provision of another Act that—
(a) is a financial sector law; or

(b) deals with the failure or insolvency of a company or the appointment of a statutory manager, curator or similar person to a designated institution,

the provision of this Act prevails.

(2) In the event of any inconsistency between a provision of a Regulation or a regulatory instrument made in terms of this Act and a provision of a Regulation or a regulatory instrument made—

(a) in terms of a specific financial sector law; or

(b) in terms of another law that deals with the failure or insolvency of a company or the appointment of a statutory manager, curator or similar person to a designated institution,

the provision of the Regulation or regulatory instrument made in terms of this Act prevails.''.

Amendment of section 26 of Act 9 of 2017

38. Section 26 of the Financial Sector Regulation Act, 2017, is hereby amended—

(a) by the substitution in subsection (1) for paragraphs *(a)* and *(b)* of the following paragraphs, respectively:

" *(a)* co-operate and collaborate with the Reserve Bank, including in relation to its resolution functions, and with each other, to maintain, protect and enhance financial stability;

(b) provide such assistance and information to the Reserve Bank, including in relation to its resolution functions, and the Financial Stability Oversight Committee, to maintain or restore financial stability as the Reserve Bank or the Financial Stability Oversight Committee may reasonably request;'';

(b) by the insertion in subsection (1) after paragraph *(b)* of the following paragraph:

''*(b*A*)* provide such assistance and information to the Reserve Bank in relation to designated institutions and its resolution functions as the Reserve Bank may reasonably request;''; and

(c) by the substitution in subsection (1) for paragraph *(d)* of the following paragraph:

''*(d)* gather information from, or about, financial institutions and designated institutions that concerns financial stability or affects or may affect the performance of the Reserve Bank's resolution functions.''.

Amendment of section 27 of Act 9 of 2017

39. Section 27 of the Financial Sector Regulation Act, 2017, is hereby amended—

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

''**Memoranda of understanding [relating to financial stability]**'';

(b) by the insertion after subsection (1) of the following subsection:

''(1A) Not later than six months after this subsection takes effect, the financial sector regulators and the Reserve Bank must amend the memoranda of understanding to include a provision with respect to how they will co-operate and collaborate with, and provide assistance to, each other and otherwise perform their roles and comply with their duties relating to designated institutions.''; and

(c) by the insertion after subsection (3) of the following subsection:

''(3A) The Reserve Bank may enter into memoranda of understanding with either or both—

(a) the Corporation; and

(b) a body in a foreign country that has functions corresponding to the resolution functions of the Reserve Bank,

with respect to how they will co-operate and collaborate with, and provide assistance to, each other in connection with their functions in relation to a resolution in terms of this Act or the law of the foreign country.''.

Substitution of section 28 of Act 9 of 2017

40. The following section is hereby substituted for section 28 of the Financial Sector Regulation Act, 2017:

"**Roles of other organs of state in relation to financial stability and resolution**

28. An organ of state, other than a financial sector regulator, must—

(a) in performing its functions, have regard to the implications of its activities on financial stability**[;]** and the Reserve Bank's resolution functions;

(b) provide such assistance and information to the Reserve Bank and the Financial Stability Oversight Committee so as to maintain and restore financial stability as the Bank or the Committee may reasonably request**[.]**; and

(c) provide such assistance and information to the Reserve Bank in relation to designated institutions and its resolution functions as the Reserve Bank may reasonably request.".

Substitution of heading to Part 6 of Chapter 2 of Act 9 of 2017

41. The following heading is hereby substituted for the heading to Part 6 of Chapter 2 of the Financial Sector Regulation Act, 2017:

"***Part 6***

Systemically important financial institutions and payment systems".

Insertion of sections 29A and 29B in Act 9 of 2017

42. The following sections are hereby inserted in the Financial Sector Regulation Act, 2017, after section 29:

"**Designated institutions**

29A. (1) In this Act, 'designated institution' means each of the following:

(a) A bank;

(b) a systemically important financial institution;

(c) the payment system operator and participants of a systemically important payment system;

(d) a company that is a holding company of a bank, a systemically important financial institution, or a payment system operator of a systemically important payment system; and

(e) subject to any determination in terms of subsection (2), if a bank or a systemically important financial institution is a member of a financial conglomerate in terms of section 160, each of the other members of the financial conglomerate.

(2) The Governor may, by written notice to a person or body that is a designated institution because of subsection (1)*(e)*, determine that the person or body is not a designated institution.

Designation of systemically important payment systems

29B. (1) *(a)* The Governor may, by written notice to the payment system operator of a payment system, designate the payment system as a systemically important payment system.

(b) The power of the Governor in terms of paragraph *(a)* may not be delegated.

(2) Subsection (1) does not apply to a payment system owned or operated by the Reserve Bank.

(3) Before designating a payment system in terms of subsection (1) as a systemically important payment system, the Governor must—

(a) give the Financial Stability Oversight Committee notice of the proposed designation and a statement of the reasons why the designation is proposed, and invite the Committee to provide advice on the proposal within a specified reasonable period; and

(b) if, after considering the Financial Stability Oversight Committee's advice, the Governor proposes to designate the payment system in terms of subsection (1), invite the payment system operator of the payment system to make submissions on the matter, and give the operator a reasonable period to do so.

(4) In deciding whether to designate a payment system in terms of subsection (1), the Governor must take into account at least the following:

(a) The size and complexity of the payment system;

(b) the interconnectedness of the payment system with the financial system;

(c) whether there are readily available substitutes for the payment services that the payment system provides;

(d) recommendations of the Financial Stability Oversight Committee;

(e) submissions made by or for the payment system operator; and

(f) any Regulation made in terms of section 288.''.

Amendment of section 30 of Act 9 of 2017

43. Section 30 of the Financial Sector Regulation Act, 2017, is hereby amended—

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

''**Prudential standards and regulator's directives in respect of systemically important financial institutions and designated institutions**'';

(b) by the substitution in subsection (1) for the words preceding paragraph *(a)* of the following words:

''To mitigate the risks that systemic events may occur, the Reserve Bank may, after consulting the Prudential Authority, **[direct]** give a directive to the Prudential Authority requiring it to impose, either through prudential standards or regulator's directives, requirements applicable to one or more specific systemically important financial institutions or to such institutions generally in relation to any of the following matters:'';

(c) by the insertion in subsection (1) of the word ''and'' at the end of paragraph *(g)*;

(d) by the deletion in subsection (1) of paragraph *(h)*;

(e) by the insertion after subsection (1) of the following subsections:

''(1A) To mitigate the risk that a designated institution may need to be placed in resolution, the Reserve Bank may, after consulting the Prudential Authority, give either or both of the following directives to the Prudential Authority:

(a) A directive to make one or more prudential standards that do any of the following:

(i) Specify the characteristics of flac instruments;

(ii) prescribe requirements for the conduct of valuations for the purposes of section 166Q; or

(iii) prescribe requirements for record keeping, data management and reporting to the Reserve Bank or the Prudential Authority; and

(b) a directive to issue a regulator's directive to a specified designated institution requiring the designated institution to hold flac instruments to at least the value specified in the Reserve Bank's directive.

(1B) Subsection (1A) does not apply to a designated institution that is an operator of a systemically important payment system.

(1C) Without limiting the matters that the Reserve Bank must consider in relation to subsection (1A)*(b)* in a particular case—

(a) it must consider the—

(i) capital that the designated institution is required to hold in terms of a financial sector law;

(ii) assets and liabilities of the designated institution;

(iii) difficulties that the Reserve Bank may face in performing its resolution functions in relation to the designated institution if the designated institution does not hold flac instruments to at least the value proposed; and

(iv) impact on the viability of the designated institution of holding flac instruments to at least the value proposed; and

(b) it may also consider international best practice.''; and

(f) by the substitution for subsection (2) of the following subsection:

''(2) The Prudential Authority may comply with a directive in terms of subsection (1) or (1A).''.

Repeal of section 31 of Act 9 of 2017

44. Section 31 of the Financial Sector Regulation Act, 2017, is hereby repealed.

Substitution of section 91 of Act 9 of 2017

45. The following section is hereby substituted for section 91 of the Financial Sector Regulation Act, 2017:

''**Applicability of Promotion of Administrative Justice Act [to administrative action by financial sector regulators]**

91. [The] Subject to this Act and to the specific financial sector laws, the Promotion of Administrative Justice Act applies to any administrative action taken by the Reserve Bank, a financial sector regulator or the Corporation in terms of this Act or a specific financial sector law.''.

Amendment of section 105 of Act 9 of 2017

46. Section 105 of the Financial Sector Regulation Act, 2017, is hereby amended by the substitution in subsection (3) for paragraph *(b)* of the following paragraph:

''*(b)* matters on which a regulatory instrument may be made by the Prudential Authority in terms of this Act or a specific financial sector law;''.

Amendment of section 109 of Act 9 of 2017

47. Section 109 of the Financial Sector Regulation Act, 2017, is hereby amended by the substitution for subsection (2) of the following subsection:

''(2) A financial sector regulator may not make a standard aimed at assisting in maintaining financial stability, including a standard related to designated institutions in resolution, without the concurrence of the Reserve Bank.''.

Amendment of section 129 of Act 9 of 2017

48. Section 129 of the Financial Sector Regulation Act, 2017, is hereby amended by the substitution for subsection (1) of the following subsection:

''(1) This Chapter applies to—

(a) information gathering, supervisory on-site inspections and investigations by the Prudential Authority or the Financial Sector Conduct Authority; and

(b) investigations in relation to a designated institution in resolution by an investigator appointed in terms of section 134(1A), or a person appointed to assist the investigator.''.

Amendment of section 134 of Act 9 of 2017

49. Section 134 of the Financial Sector Regulation Act, 2017, is hereby amended—

(a) by the insertion after subsection (1) of the following subsection:

''(1A) The Reserve Bank may, in writing, appoint a person as an investigator to conduct an investigation into the business, trade, dealings, affairs or assets and liabilities—

(a) of a designated institution in resolution; and

(b) if the appointment so provides, of one or more companies in the group of companies of which the designated institution is part,

before the designated institution was placed in resolution, and may appoint any person to assist the investigator in carrying out the investigation.''; and

(b) by the substitution for subsection (3) of the following subsection:

''(3) *(a)* The financial sector regulator must issue an investigator appointed in terms of subsection (1) with a certificate of appointment**[, which must be in the possession of the investigator when]**.

(b) The Reserve Bank must issue an investigator appointed in terms of subsection (1A) with a certificate of appointment.

(c) When an investigator exercises any power or performs any duty in terms of this Act, **[and such]** the investigator must—

(i) be in possession of a certificate of appointment; and

(ii) produce the certificate of appointment at the request of any person in respect of whom such power is being exercised.''.

Insertion of section 135A in Act 9 of 2017

50. The following section is hereby inserted in the Financial Sector Regulation Act, 2017, after section 135:

''**Investigations into designated institutions in resolution**

135A. The investigator appointed to conduct an investigation in relation to a designated institution in resolution must conduct the investigation in accordance with this Chapter and, within the period specified by the Reserve Bank in the appointment, report to the Reserve Bank whether, in the investigator's opinion—

(a) the designated institution should—

(i) be wound up;

(ii) remain in resolution for a specified period or until a specified event occurs; or

(iii) cease to be in resolution;

(b) any business of the designated institution was, before it was placed in resolution, carried on negligently, recklessly or fraudulently; and

(c) proceedings, including criminal proceedings, should be instituted against any person in connection with the conduct of the business of the designated institution before it was placed in resolution.''.

Insertion of Chapter 12A in Act 9 of 2017

51. The following Chapter is hereby inserted in the Financial Sector Regulation Act, 2017, after Chapter 12:

''**CHAPTER 12A**

RESOLUTION OF DESIGNATED INSTITUTIONS

Part 1

General provisions with respect to designated institutions

Exercise of Reserve Bank's powers

166A. (1) The Reserve Bank is the resolution authority, and has the resolution functions conferred on it by this Act.

(2) The resolution functions of the Reserve Bank are performed by the Governor.

Reserve Bank's resolution objectives

166B. The objective of the Reserve Bank in performing its resolution functions is to assist in maintaining financial stability and protecting the interests of depositors of banks through the orderly resolution of designated institutions that are in resolution.

Reserve Bank's resolution functions

166C. (1) In order to achieve its objective set out in section 166B, the Reserve Bank must perform its resolution functions in relation to a designated institution, and ensure that the affairs of a designated institution in resolution are managed so as to maintain, as far as practicable, financial stability.

(2) To the extent that is practicable and consistent with subsection (1), the Reserve Bank must, in performing its resolution functions in relation to a designated institution, including managing the affairs of a designated institution in resolution—

(a) have regard to, and seek to minimise any adverse impact on, the interests of shareholders and creditors of other members in the group of companies of which the designated institution forms part; and

(b) comply with and ensure that the designated institution in resolution complies with the applicable labour laws.

(3) The Reserve Bank may, in relation to the resolution of a designated institution, consider the possible impact that its action may have on the financial stability of a foreign jurisdiction where the designated institution is registered.

Winding up and similar steps in respect of designated institutions

166D. (1) Despite any other law, none of the following steps may be taken in relation to a designated institution without the concurrence of the Reserve Bank:

(a) Suspending, varying, amending or cancelling a licence issued to that designated institution;

(b) adopting a special resolution to wind up the designated institution voluntarily;

(c) applying to a court for an order that the designated institution be wound up;

(d) appointing an administrator, statutory manager, trustee, liquidator, provisional liquidator or curator for or of the designated institution;

(e) adopting a resolution to begin business rescue proceedings and place the designated institution under supervision;

(f) applying to a court for an order in terms of section 131 of the Companies Act to place the designated institution under supervision and commencing business rescue proceedings;

(g) adopting a business rescue plan for the designated institution;

(h) any step corresponding to, or having the same or a similar effect to a step mentioned in paragraph *(f)* or *(g)*;

(i) entering into an agreement for amalgamation or merger as defined in section 1 of the Companies Act of the designated institution with a company;

(j) the designated institution entering into a compromise arrangement referred to in section 155 of the Companies Act with creditors of the designated institution; and

(k) any action by a financial sector regulator to reduce the value of an outstanding claim against the designated institution or to convert an instrument issued by the designated institution to another instrument, whether such action is taken in terms of a financial sector law or agreement.

(2) A step referred to in subsection (1) that is taken without the Reserve Bank's concurrence is void.

Resolution planning

166E. The Reserve Bank must, on the basis of risk analysis conducted in consultation with a financial sector regulator, take adequate and appropriate steps to plan for the potential need for the orderly resolution of a designated institution.

Bridge companies

166F. (1) *(a)* The Reserve Bank may, for the purposes of exercising and performing its resolution functions, incorporate a company in accordance with the Companies Act.

(b) The company must, upon incorporation, be wholly owned by the Reserve Bank.

(2) The Reserve Bank may, for the purposes of facilitating the orderly resolution of a designated institution in resolution, transfer some or all of the shares that it holds in a bridge company to any person.

(3) *(a)* If a bridge company is being used in connection with the resolution of a designated institution in resolution, the Reserve Bank must formulate a plan for the bridge company to meet all requirements in terms of applicable financial sector laws.

(b) The plan must be formulated in consultation with the authorities responsible for the relevant financial sector laws.

(4) A bridge company of which the Reserve Bank is the sole shareholder, and an officer or employee of such a bridge company, are exempt from requirements in terms of a financial sector law until the bridge company applies for a licence in terms of the financial sector law.

Act of, and evidence of, insolvency

166G. (1) An action taken by the Reserve Bank, or by a designated institution in terms of this Act, is not an act of insolvency and is not admissible as evidence of the insolvency of a designated institution or member of a group of companies of which a designated institution is part.

(2) An action taken by the Reserve Bank in the exercise or performance of the Reserve Bank's resolution functions, and an action that the Reserve Bank causes a designated institution in resolution to take—

(a) is not invalid merely because of the operation of the Companies Act or any other Act specified in the Regulations made for purposes of this section; and

(b) is not a breach of a duty that the Reserve Bank may owe to the designated institution, or that the Reserve Bank or the designated institution may owe to the shareholders or creditors of the designated institution, including an obligation in terms of an agreement.

Liquidation

166H. (1) Despite any other provision of this Act, the Companies Act or the Insolvency Act—

(a) the Reserve Bank may apply to a competent court in terms of the Companies Act for the winding-up of a designated institution on the grounds that the institution has been placed in resolution and there are no reasonable prospects that the institution will cease to be in resolution; and

(b) no person other than a person recommended by the Reserve Bank may be appointed as provisional liquidator or liquidator of a designated institution.

(2) The Reserve Bank may appoint a person who, in the opinion of the Reserve Bank, has suitable experience and expertise to advise the provisional liquidator or liquidator of a designated institution, whether or not the designated institution was in resolution upon the appointment of the liquidator or provisional liquidator.

(3) The provisional liquidator or liquidator must consult the person or persons appointed in terms of subsection (2), and must have regard to his or her advice in performing his or her functions as provisional liquidator or liquidator.

(4) Despite any other law, the suspension, cancellation or termination of a licence of a designated institution, while it is being wound up on an application by the Reserve Bank, does not affect—

(a) any order or appointment made, direction issued or any other thing done in terms of this section or the Insolvency Act in respect of such designated institution; or

(b) any power to be exercised, duty to be executed or right to be enforced in respect of such designated institution by the Reserve Bank, the Master of the High Court or the provisional liquidator or liquidator in terms of this section or the Insolvency Act.

(5) The suspension or revocation of a licence of a designated institution under a financial sector law, whether or not the designated institution is in resolution or is being wound up, does not affect—

(a) the obligations and liabilities the designated institution has in connection with the licence; or

(b) the powers of the Reserve Bank or a financial sector regulator under a financial sector law in relation to the designated institution.

(6) Notwithstanding anything to the contrary contained in any law, a liquidator or a trustee in liquidation may not cancel or set aside a disposition made, or a transaction or an action taken, by the Reserve Bank in exercising its resolution functions in terms of this Act.

Delegation of Reserve Bank's resolution functions

166I. (1) The Reserve Bank may, in writing—

(a) delegate any of the Reserve Bank's resolution functions; and

(b) at any time amend a delegation in terms of paragraph *(a)*.

(2) Subject to subsection (4), a delegation in terms of this section may be made to—

(a) a Deputy Governor;

(b) a staff member of the Reserve Bank;

(c) the resolution practitioner appointed for a designated institution;

(d) a financial sector regulator; or

(e) the Corporation.

(3) This section does not permit the Reserve Bank to delegate—

(a) a power in terms of section 166J; or

(b) the power to delegate contained in this section.

(4) A delegation in terms of subsection (2)*(c)* must be limited to resolution functions.

(5) A delegation in terms of this section—

(a) is subject to the limitations and conditions specified in the delegation;

(b) does not divest the Reserve Bank of responsibility in respect of the delegated power or duty; and

(c) may be revoked in writing at any time.

(6) Anything done by a delegate in terms of the delegation must be regarded as having been done by the Reserve Bank.

Part 2

Placing designated institutions in resolution

Determination by Minister to place designated institution in resolution

166J. (1) If in the opinion of the Reserve Bank—

(a) a designated institution is, or will likely be, unable to meet its obligations, irrespective of whether or not the designated institution is insolvent; and

(b) it is necessary to ensure the orderly resolution of the designated institution to—

(i) maintain financial stability; or

(ii) in the case of a bank or a member of a group of companies of which a bank is a member, to protect depositors of the bank,

the Reserve Bank may recommend to the Minister that the designated institution be placed in resolution.

(2) The Minister may, after considering a recommendation in terms of subsection (1) and if he or she considers that—

(a) the designated institution is or will probably be unable to meet its obligations, whether or not the designated institution is insolvent; and

(b) it is necessary to ensure the orderly resolution of the designated institution—

(i) to maintain financial stability; or

(ii) in the case of a bank or a member of a group of companies of which a bank is a member, to protect depositors of the bank,

make a written determination, addressed to the Governor, placing the designated institution in resolution.

(3) The 'obligation' contemplated in subsections (1) and (2) includes an obligation in terms of a prudential standard.

(4) The Reserve Bank must notify the Managing Director or the chairperson of the board of directors of the designated institution of the determination by the Minister.

(5) The Reserve Bank must publish each determination made in terms of subsection (2).

(6) Failure to comply with subsection (4) or (5) does not invalidate a recommendation or a determination in terms of this section.

When designated institution ceases to be in resolution

166K. (1) If—

(a) a designated institution is in resolution; and

(b) the Reserve Bank is of the opinion that it is no longer necessary that the designated institution remain in resolution—

(i) to maintain financial stability; or

(ii) in the case of a bank or a member of a group of companies of which a bank is a member, to protect depositors of the bank,

the Reserve Bank must recommend to the Minister that the Minister revoke the determination made in terms of section 166J(2) by which the designated institution was placed in resolution.

(2) The Minister may, after considering a recommendation made in terms of subsection (1), revoke the determination.

(3) The Reserve Bank must publish each revocation, but failure to do so does not invalidate the revocation.

(4) A designated institution also ceases to be in resolution when a liquidator, other than a provisional liquidator, is appointed for the designated institution, unless the court orders otherwise.

Placing designated institution in resolution not termination or acceleration event

166L. (1) A provision of an agreement is of no effect to the extent that the provision, on the basis that a designated institution has been or is proposed to be placed in resolution, or on the basis of a resolution action or proposed resolution action in relation to a designated institution—

(a) confers a right, or imposes an obligation, on a person; or

(b) accelerates or varies an obligation of a person,

whether or not the person is a party to the agreement.

(2) Subsection (1) does not apply in relation to an obligation to give notice to a person.

Reserve Bank to manage and control affairs of designated institution

166M. (1) While a designated institution is in resolution, the Reserve Bank has the power and authority to manage and control the affairs of the designated institution, and to exercise any of the powers of the governing

body and the shareholders or a class of shareholders of the designated institution, including powers, to the exclusion of the governing body and officers, and the shareholders, of the designated institution.

(2) Without limiting subsection (1), the powers of the designated institution, the governing body and the shareholders of the designated institution referred to in that subsection include the following powers:

(a) To convene meetings of creditors of the designated institution to consult with them in relation to the exercise and proposed exercise of those powers and the powers of the Reserve Bank in terms of this Act;

(b) to negotiate with a creditor of the designated institution with a view to the final settlement of the claims of the creditor against the designated institution; and

(c) to propose and enter into arrangements or compromises between the designated institution and all its creditors, or all the creditors of a class of the designated institution's creditors, in terms of section 155 of the Companies Act.

Reserve Bank not holding company

166N. The Reserve Bank is not, merely because of this Chapter, a holding company of a designated institution in resolution.

Resolution practitioners

166O. (1) The Reserve Bank must, subject to subsection (2), as soon as practicable after a designated institution is placed in resolution, appoint, in writing, a person to be the resolution practitioner for the designated institution while it is in resolution, with specified powers and functions delegated to the person in terms of section 166I.

(2) The Reserve Bank may not appoint a person in terms of subsection (1) if the Reserve Bank is of the opinion that, in the circumstances, it is not necessary to do so to achieve the orderly resolution of the designated institution.

(3) The Reserve Bank may at any time, in writing, terminate the appointment of a resolution practitioner for a designated institution in resolution.

(4) A resolution practitioner appointed for a designated institution in resolution must—

(a) comply with any instruction from the Reserve Bank in relation to the designated institution;

(b) give the Reserve Bank, at least monthly, a report on his or her activities in relation to the designated institution; and

(c) comply with the other terms of his or her appointment.

Transfer of shares in designated institutions in resolution

166P. (1) A share of a designated institution in resolution may not be traded without the approval of the Reserve Bank.

(2) Subsection (1) does not prevent a transfer of a share—

(a) on the death of the shareholder;

(b) to comply with an order of a court; or

(c) in circumstances specified in a prudential standard.

(3) A purported transfer contrary to subsection (1) is of no effect.

Part 3

Resolution measures

Valuation

166Q. (1) *(a)* Before the Reserve Bank takes a resolution action in relation to a designated institution in resolution, or a designated institution in resolution takes such action, the Reserve Bank must obtain a valuation of the assets or liabilities involved.

(b) The valuation must state the amount that, in the valuator's opinion, would be realised from the asset, or the amount that, in the valuator's opinion, would be the amount payable on the liability, in a winding up of the designated institution.

(c) The purpose of the valuation is to inform the Reserve Bank in relation to the resolution action.

(2) As soon as practicable after a designated institution ceases to be in resolution, the Reserve Bank must obtain a valuation of the assets and liabilities that were dealt with in the resolution action.

(3) The Reserve Bank, in engaging a valuation for the purpose of this section, must specify the assumptions the valuator must make in conducting the valuation.

(4) A valuation in terms of this section must be carried out—

(a) by a valuator that meets the requirements prescribed in; and

(b) otherwise in accordance with the requirements prescribed in,

a prudential standard made for this section.

(5) The Reserve Bank must make valuations obtained in terms of this section available to the creditors and shareholders of the designated institution.

Powers

166R. (1) If the Reserve Bank determines that it is necessary to do so for the orderly resolution of a designated institution in resolution, the Reserve Bank may do any of the following:

(a) Subject to subsection (3), by notice to the other parties to an agreement to which the designated institution is a party, being an agreement that came into effect before the designated institution was put in resolution, cancel the agreement with effect from the date stated in the notice, which date must be after the date of the notice;

(b) subject to subsection (4), by written notice to the parties and lodging notice to that effect with the court or arbitrator, suspend specified legal proceedings or arbitration proceedings to which the designated institution is a party;

(c) despite subsection (3), and subject to subsection (4), by written notice to the parties, suspend the institution of any claim for damages in respect of loss sustained by a person resulting from a cancellation of an agreement in terms paragraph *(a)*;

(d) subject to subsection (4), by written notice to the parties to an agreement to which a designated institution is a party, suspend an obligation of a party to the agreement; or

(e) subject to subsection (5), by notice published in the Register, prohibit the commencement of specified legal proceedings or arbitration proceedings against the designated institution.

(2) The Reserve Bank may exercise the power in terms of subsection (1)*(a)* only—

(a) if the agreement prefers one creditor of the designated institution over another creditor of the same class;

(b) if the agreement is unreasonably onerous on the designated institution;

(c) if the agreement is a lease of movable or immovable property entered into before the designated institution was placed in resolution; or

(d) to the extent that the agreement is a guarantee issued by the designated institution before the designated institution was placed in resolution, excluding a guarantee that the designated institution is required to make good within 30 days after the designated institution was placed in resolution.

(3) Cancellation of an agreement in terms of subsection (1)*(a)* does not affect the rights of the parties to the agreement, which rights accrued before the date the cancellation takes effect.

(4) A notice in terms of subsection (1)*(b)*, *(c)* or *(d)* must specify the period of the suspension, which must be a reasonable period.

(5) A notice in terms of subsection (1)*(e)* must specify the period of the prohibition, which must be a reasonable period.

(6) A notice in terms of subsection (1)*(b)*, *(c)*, *(d)* or *(e)* further suspends the operation of any time barring terms, whether in an agreement or a law, and includes the suspension of the running of prescription in terms of the Prescription Act, 1969 (Act No. 68 of 1969), for the specified period.

Resolution action, including restructuring and bail in

166S. (1) If the Reserve Bank determines that it is necessary for the orderly resolution of a designated institution in resolution that the designated institution enter into a particular transaction, the designated institution may enter into the transaction, and may do so despite any law or agreement that would otherwise restrict or prevent it from doing so, including a law or agreement that requires consent or approval by a specified person.

(2) For the purpose of this section, 'transaction' includes each of the following:

(a) Transferring, creating an interest in, or dealing in any other way with, assets and liabilities of a designated institution; and

(b) an amalgamation or merger, or a scheme of arrangement of a kind referred to in Chapter 5 of the Companies Act that involves, as one of the parties, a designated institution.

(3) *(a)* In making a determination in terms of subsection (1), the Reserve Bank must consult the Prudential Authority.

(b) A determination made in terms of subsection (1), in respect of a transaction referred to in subsection (2)*(b)*, must be made after consultation with the Competition Commission.

(4) When the transaction comes into effect—

(a) the assets and liabilities of the parties that are transferred in terms of the transaction vest in, and become binding upon, the parties in accordance with the terms of the transaction;

(b) a party to the transaction in whom an asset vests, or which is liable under the transaction, has the same rights and is subject to the same obligations as those that the transferor may have had, or to which it may have been bound, immediately before the transfer; and

(c) in the case of an amalgamation or merger—

(i) all agreements, appointments, transactions and documents entered into, made, drawn up or executed with, by or in favour of, any of the amalgamating or merging parties and in force immediately before the transaction came into effect, remain of full force and effect and must be construed, for all purposes, as if they had been entered into, made, drawn up or executed with, by or in favour of the amalgamated or merged entity; and

(ii) any bond, pledge, guarantee or instrument to secure future advances, facilities or services by any of the amalgamating or merging parties, remains of full force and effect and must be construed for all purposes as a bond, pledge, guarantee or instrument given to or in favour of the amalgamated or merged entity as security for future advances, facilities or services by that entity.

(5) Subsection (4)*(c)*(i) does not apply to agreements, appointments, transactions and documents that, by virtue of the terms and conditions of the transaction, are not to be retained in force after the amalgamation or merger.

(6) Despite any law or agreement, including the designated institution's memorandum of incorporation, a designated institution in resolution may, if the Reserve Bank determines that it is necessary to do so for the orderly resolution of the designated institution, do either or both of the following:

(a) Cancel a share of the designated institution that is valued, in terms of section 166Q(1), at zero value, in liquidation; or

(b) issue new shares of the designated institution, on terms approved by the Reserve Bank.

(7) If the Reserve Bank determines that it is necessary to do so for the orderly resolution of a designated institution in resolution, the Reserve

Bank may, by written order, do any of the following in relation to an agreement to which the designated institution is a party:

(a) By notice to a party to the agreement to which an amount is or may become payable by the designated institution, in terms of the agreement or arrangement, reduce the amount that is or may become payable, subject to sections 166Q and 166V; or

(b) by written notice to all the other parties to the agreement, cancel the agreement.

(8) Subject to subsection (7)*(a)*, cancellation of an agreement in terms of subsection (7)*(b)* does not affect the rights of the parties to the agreement, which rights accrued before the date the cancellation takes effect.

(9) Subsection (7) does not apply to the following:

(a) An unsettled exchange traded transaction, including a transaction on a licenced exchange;

(b) a derivative instrument as defined in section 1 of the Financial Markets Act;

(c) a deposit where the deposit holder is the Corporation for Public Deposits established by section 2 of the Corporation for Public Deposits Act, 1984 (Act No. 46 of 1984); or

(d) a transaction in the settlement system between two or more settlement system participants as provided for in the National Payment System Act.

(10) An action in terms of this section does not, by itself, give rise to any right by a party to, or a person who holds an interest in, an agreement referred to in subsection (7).

Outcome of resolution actions

166T. The Reserve Bank may exercise and perform its resolution powers in terms of this Part, and its associated powers, in relation to a liability of a designated institution in resolution in a way that results in the liability being substituted with a shareholding in the designated institution or in a bridge company.

Creditor hierarchy and equality of claims

166U. (1) The Reserve Bank must not take a resolution action, and must ensure that a designated institution in resolution does not take a resolution action, if it appears to the Reserve Bank that the result of the action would be that the value of a claim of a creditor of the designated institution would be reduced.

(2) Subsection (1) does not apply—

(a) to the claims of shareholders; or

(b) if the claims of creditors and shareholders of the designated institution that rank lower in the creditor hierarchy have been reduced to zero.

(3) Failure to comply with subsection (1) does not invalidate the action taken.

(4) *(a)* In taking resolution action in relation to a designated institution in resolution, the Reserve Bank must treat claims of creditors and shareholders of the designated institution that would have the same ranking in insolvency equally.

(b) The Reserve Bank must ensure that, when a designated institution in resolution takes resolution action, claims of creditors and shareholders of the designated institution that would have the same ranking in insolvency are treated equally.

(c) Paragraphs *(a)* and *(b)* do not apply if the Reserve Bank determines that it is necessary to treat the claims differently to effect the orderly resolution of the designated institution.

'No creditor worse off' rule

166V. (1) The Reserve Bank must not take resolution action in relation to a designated institution in resolution that would result in a creditor or shareholder of the designated institution receiving less than the creditor or shareholder would have received if the designated institution had been wound up.

(2) The value of assets to which the creditor or shareholder becomes entitled in relation to the action must be taken into account in applying subsection (1).

(3) Failure to comply with subsection (1) does not invalidate an acquisition of property by a *bona fide* purchaser for value who is not aware of the failure to comply (but may give rise to a right to compensation in the creditor or shareholder).

(4) As soon as practicable after the Reserve Bank receives a valuation in terms of section 166Q(2) in respect of a designated institution in resolution, the Reserve Bank must—

(a) consider, having regard to the valuation, whether a creditor or shareholder of the designated institution received, in respect of resolution action, less than it would have received if the designated institution had been wound up; and

(b) if it considers that such a creditor or shareholder received less than it would have received if the designated institution had been wound up, determine the amount of the shortfall.

(5) If the Reserve Bank makes a determination in terms of subsection (4)*(b)*, the creditor or shareholder is entitled to recover from the designated institution the amount of the shortfall.

(6) Subsection (5) does not limit any claim that the creditor or shareholder may have for any additional amount.

Ranking of claims

166W. (1) Subject to the provisions of this Act, claims against a designated institution in resolution will rank in the order provided in the Insolvency Act, regardless of whether the claim arose before or during the resolution.

(2) Notwithstanding the provisions of any law, if a designated institution is placed in liquidation, the trustee or liquidator must—

(a) after payment of any preferred creditors provided for in the Insolvency Act, and before the payment of any unsecured creditors, apply the balance of the free residue in liquidation in the payment of any claims proved against the estate in question which were covered as a covered deposit in terms of this Act with interest thereon calculated as provided for in section 103(2) of the Insolvency Act;

(b) after payment of any unsecured creditors, apply the balance of the free residue in liquidation in the payment of any claims proved against the estate in question arising in connection with flac instruments as defined in this Act; and

(c) after the payment of flac instruments or, if no claims in connection with flac instruments have been made, then after the payment of unsecured creditors, apply the balance of the free residue in liquidation in the payment of any claims proved against the estate in question arising in connection with the amounts in terms of debt instruments designated as regulatory capital in terms of a financial sector law in the order prescribed in the financial sector law.

(3) Any payments made by the trustee or liquidator in terms of subsection (2)*(c)* must be paid in the order prescribed in the financial sector law or, if the financial sector law does not prescribe the order, they must rank equally and abate in equal proportion, if necessary.

(4) Notwithstanding the provisions of any law, the Reserve Bank must apply any money of the designated institution in resolution that becomes available to the resolution authority in paying the cost of the resolution and, subject to the provisions of this Act, in the payment of the claims of creditors which arose before the date of resolution.

Registration of transactions

166X. A person in charge of a register that records—

(a) title to property belonging to, or a bond or other right in favour of, or any appointment of or by, any person; or

(b) a share, stock, debenture or other marketable security,

must, on presentation by the Reserve Bank or a person authorised by the Reserve Bank of a certificate as to a transfer effected by a transaction in terms of this Part, and the relevant documents of title, record the transfer effected by the transaction.

Costs of resolution

166Y. The Reserve Bank may recover from a designated institution in resolution, or from a designated institution after it ceases to be in resolution, amounts that the Reserve Bank incurs in exercising and performing its resolution functions in relation to the designated institution while in resolution.

Part 4

Protections

Administrative process for actions taken by Reserve Bank in terms of Chapter

166Z. (1) This section applies in relation to the following actions taken by the Reserve Bank:

(a) An action in terms of section 166J(1); and

(b) an action in relation to a designated institution in resolution, being an action that adversely affects the rights of any person (a 'person concerned') and that has a direct, external legal effect.

(2) The Reserve Bank must, subject to subsection (3), before taking an action to which this section applies—

(a) publish a notice of the action with a statement that—

(i) states the reasons for the proposed action; and

(ii) includes information relevant to the matter; and

(b) invite any person concerned to make representations to the Reserve Bank on the matter within a reasonable period specified in the notice, which period may not exceed 14 days.

(3) In deciding whether to take the action, the Reserve Bank must take into account all submissions received by the end of the period specified in terms of subsection (2)*(b)*.

(4) If the Reserve Bank determines that compliance with subsections (1) and (2) in respect of a proposed action is likely to affect financial stability adversely, or defeat the object of the proposed action, the Reserve Bank may take the action without complying with those subsections.

(5) *(a)* If the Reserve Bank takes an action to which this section applies without complying with subsection (1) or (2), it must publish a statement of the reasons why the subsections were not complied with.

(b) Any person concerned may make submissions to the Reserve Bank within one month after publication of the statement.

(c) The Reserve Bank must consider the submissions and, as soon as practicable, publish a further notice stating what action, if any, the Reserve Bank proposes to take on the matter, including whether the Reserve Bank proposes to rescind or revoke the action or to provide concerned persons with restitution.

(6) The Reserve Bank must not rescind or revoke an action taken in terms of section 166J or 166K.

(7) In respect of an action to which this section applies, the procedure specified in this section applies instead of the procedure prescribed by section 3(2) and section 4(1), (2) and (3) of the Promotion of Administrative Justice Act.

Part 5

Banks in resolution—covered deposits

Corporation to ensure bank depositors have reasonable access to their covered deposits

166AA. (1) Where a bank is in resolution, the Corporation must apply the Fund in one or more of the following ways to ensure that depositors of the bank have reasonable access to their covered deposits:

(a) To reimburse the bank in resolution for payments the bank has made while in resolution to depositors in respect of covered deposits;

(b) to reimburse depositors of the bank in resolution in respect of covered deposits; or

(c) to make payments in terms of an agreement related to a transaction referred to in section 166S(1), being an agreement in relation to the covered deposits of the bank in resolution.

(2) An agreement referred to in subsection (1)*(c)* may include any of the following:

(a) A secured loan to the bank in resolution;

(b) a loss sharing agreement between the Corporation and the bank in resolution or a person assuming liability for covered deposits of the bank in resolution; or

(c) a guarantee in favour of the bank in resolution, the Reserve Bank or another person in respect of the bank's obligations in relation to the covered deposits of the bank in resolution.

(3) *(a)* The Corporation may only enter into an agreement referred to in subsection (1)*(c)* if the Corporation believes that the agreement will contribute to the orderly resolution of the bank in resolution.

(b) The cost to the Fund in terms of the agreement may not exceed the total amount of covered deposits held by the bank in resolution.

(c) Paragraph *(b)* does not apply to costs incurred by the Corporation when exercising its functions in terms of section 166AF.

Limit of cover for covered deposits

166AB. (1) The maximum amount that may be applied from the Fund in respect of a depositor of a bank in resolution is the lesser of—

(a) the sum of—

(i) the total of the amounts standing to the credit of the accounts with the bank held by the depositor alone; and

(ii) for each account with the bank held by the depositor together with one or more other persons, an amount calculated as the amount standing to the credit of the account divided by the number of account holders of the account; and

(b) the amount prescribed by the Minister in Regulations made for the purposes of this section.

(2) A reference in subsection (1) to the amount standing to the credit of an account is a reference to the amount standing to the credit of the account as at the date the bank was placed in resolution.

Payments made in error or as result of fraud

166AC. If—

(a) the Corporation makes one or more payments out of the Fund as contemplated by section 166AA in respect of a depositor with a bank in resolution;

(b) the total amount paid was more than was permitted by section 166AB; and

(c) the excess amount paid was paid because of—

(i) an error by the Corporation or the bank in resolution, whether before or after the bank was placed in resolution, including a failure of the bank to comply with an obligation to provide information; or

(ii) fraud, except fraud by an official or employee of the Corporation,

the Corporation is entitled to recover the excess amount from the bank in resolution.

Corporation substituted for depositor in respect of claims

166AD. If the Corporation makes a payment out of the Fund as contemplated by section 166AA in respect of a depositor of a bank in resolution, the Corporation may, in terms of this section, assume and exercise the rights and remedies of the depositor against the bank to the extent of the payment.

Part 6

Corporation for Deposit Insurance—establishment, functions and governance

Establishment

166AE. The Corporation for Deposit Insurance is hereby established.

Objective and functions

166AF. (1) The objective of the Corporation is, through the provision of deposit insurance and carrying out its functions in terms of subsection (2), to support the Reserve Bank in fulfilling its objective of, and responsibility for, protecting and maintaining financial stability in terms of section 3(2) of the Reserve Bank Act and for protecting, enhancing and restoring or maintaining financial stability in terms of section 11 of this Act.

(2) The functions of the Corporation are—

(a) to establish, maintain and administer the Fund in accordance with this Chapter, in the interest of the holders of covered deposits; and

(b) to promote awareness among financial customers, of the protections afforded by this Chapter.

Membership

166AG. (1) A bank is a member of the Corporation from the date it is licensed or registered in terms of the relevant financial sector law that allows it to hold covered deposits.

(2) If a bank was licensed or registered in terms of the relevant financial sector law before the establishment of the Corporation, it will be a member of the Corporation from the date the Corporation is established.

(3) When applying for a bank licence or registration, a bank must provide the responsible authority with information that will enable it to meet the requirements of the Corporation.

Governance of Corporation

166AH. The Corporation must manage its affairs, including the Fund, in an efficient and effective way, and establish and implement appropriate and effective governance systems and processes, having regard to internationally accepted standards.

Board

166AI. (1) The affairs of the Corporation are managed and controlled by a Board of directors, which, subject to this Act, exercises the powers and performs the duties conferred or imposed upon the Corporation by this Act and any other law.

(2) The Board consists of no more than eight persons, namely—

(a) a representative from the National Treasury appointed by the Director-General;

(b) a Deputy-Governor appointed by the Governor;
(c) the Chief Executive Officer;
(d) the Commissioner;
(e) the Chief Executive Officer of the Corporation;
(f) the Group Chief Financial Officer of the Reserve Bank; and
(g) no more than two persons appointed by the Governor as directors with the concurrence of the Minister.

(3) A director of the Board appointed in terms of subsection (2)*(g)*—

(a) holds office for a term of no more than five years, as the Governor may determine;
(b) is, at the expiry of that term, eligible for re-appointment for one further term of no more than five years; and
(c) must vacate office before the expiry of a term of office if that person—
(i) resigns from office, by giving at least three months written notice to the Governor or a shorter period that the Governor may accept; or
(ii) is removed from office.

(4) The Governor must, at least three months before the end of the first term of office of a director of the Board appointed in terms of subsection (2)*(g)*, inform the director of the Board whether the Governor proposes to seek the re-appointment of the person as a director of the Board.

(5) The Governor must, subject to due process, remove a director of the Board appointed in terms of subsection (2)*(g)* from office if the director of the Board becomes a disqualified person.

(6) The Governor must, subject to due process and with the concurrence of the Minister, remove a director of the Board appointed in terms of subsection (2)*(g)* from office if the director—

(a) is unable to perform the duties of office for health or other reasons;
(b) has failed in a material way to discharge any of the responsibilities of office, including any responsibilities entrusted in terms of legislation; or
(c) has acted in a way that is inconsistent with continuing to hold the office.

(7) Without limiting subsection (6)*(b)*, a director of the Board appointed in terms of subsection (2)*(g)* must be taken to have failed in a material way to discharge the responsibilities of office if he or she is absent from two consecutive meetings of the Board without the leave of the Board.

(8) The Governor, with the concurrence of the Minister, may appoint one of the members of the Board, except the one mentioned in subsection (2)*(e)* or *(f)*, as chairperson, and the Board may elect, from among themselves, another director of the Board as vice-chairperson.

(9) *(a)* A director of the Board may nominate a person to act as alternate for him or her at a particular Board meeting, or Board meetings generally, where the director is unable to attend.

(b) If the Board agrees, the nominee has, for meetings where the director of the Board is unable to attend, the same rights and obligations as the director of the Board.

(10) A person may not act as an alternate if the person—

(a) is a disqualified person; or
(b) is not ordinarily resident in the Republic.

Functions of Board

166AJ. The Board of directors must—

(a) generally oversee the management and administration of the Corporation to ensure that it is efficient and effective; and
(b) act for the Corporation in the following matters:
(i) Authorising the Chief Executive Officer of the Corporation to sign, on behalf of the Corporation, memoranda of understanding and amendments to memoranda of understanding;
(ii) appointing members of committees contemplated in this Part and giving directions regarding the conduct of the work of a committee;

(iii) determining, in relation to a bank in resolution, how to apply the Fund as contemplated by section 166AA;
(iv) making determinations of the deposit insurance levy for the purposes of the legislation that imposes the levy; and
(v) any other matter assigned in terms of a financial sector law to the Board of directors.

Meetings of Board and decisions

166AK. (1) Meetings of the Board must be held at such times as the Board or the chairperson of the Board may determine.

(2) An audio or audio-visual conference among a majority of the directors of the Board, which enables each participating director of the Board to hear and be heard by each of the other participating directors of the Board, must be regarded as a meeting of the Board, and each participating director of the Board must be regarded as being present at such a meeting.

(3) Except where subsection (2) applies, meetings of the Board are held at places determined by the chairperson of the Board.

(4) The chairperson of the Board presides at all meetings of the Board at which he or she is present.

(5) If the chairperson of the Board is absent or is unable to act as chairperson, the vice-chairperson must act as chairperson.

(6) If both the chairperson of the Board and the vice-chairperson of the Board are absent from a meeting of the Board, the directors of the Board present must elect one of the directors present to act as the chairperson.

(7) A quorum for a Board meeting is a majority of the directors of the Board, which must include the person appointed in terms of section 166AI(2)*(a)* or his or her alternate and a Deputy-Governor appointed by the Governor or his or her alternate.

(8) *(a)* A decision of a majority of the directors of the Board present and voting at a Board meeting, is taken to be a decision of the Board.

(b) If the votes are equal, the person presiding at the meeting has a casting vote in addition to a deliberative vote.

(9) A decision of the Board or an act performed under the authority of the Board is not invalid merely because there is a vacancy on the Board.

(10) The Board must cause a record to be kept of the proceedings at the meetings of the Board.

(11) The Board may make rules in relation to the holding of, and procedure at, meetings of the Board.

(12) Despite subsection (8), the Board may take a decision by means of the signing by a majority of the directors of the Board, without their being present at any meeting of the Board, of a document containing such a decision, and that decision must be noted in the records of the next ensuing meeting of the Board.

Appointment of Chief Executive Officer of Corporation

166AL. (1) The Board must appoint an employee of the Reserve Bank who has appropriate expertise in the financial sector, as Chief Executive Officer of the Corporation.

(2) When appointing a person as Chief Executive Officer of the Corporation, the person and the Board must agree, in writing, on—

(a) the performance measures that will be used to assess the Chief Executive Officer of the Corporation's performance; and
(b) the level of performance to be achieved against those performance measures.

(3) A person may not be appointed or hold office as Chief Executive Officer of the Corporation if the person—

(a) is a disqualified person; or
(b) is not ordinarily resident in the Republic.

(4) The Chief Executive Officer of the Corporation—

(a) is responsible for the day-to-day management and administration of the Corporation; and

(b) except as provided in section 166AJ*(b)*, must perform the functions of the Corporation, including exercising the powers and carrying out the duties associated with those functions.

(5) When acting in terms of subsection (4), the Chief Executive Officer of the Corporation must implement the policies and strategies adopted by the Board.

(6) The Board may appoint a senior staff member of the Corporation to act as Chief Executive Officer of the Corporation when the Chief Executive Officer of the Corporation is absent from office or otherwise unable to perform the functions of office.

Term of office of Chief Executive Officer of Corporation

166AM. (1) A person appointed as the Chief Executive Officer of the Corporation—

(a) serves in a full-time executive capacity;

(b) holds office for a term no longer than five years, as the Board may determine;

(c) is, at the expiry of that term, eligible for re-appointment for one further term; and

(d) must vacate office before the expiry of a term of office if he or she—

(i) resigns as Chief Executive Officer of the Corporation, by giving at least three months written notice to the Board, or a shorter period that the Board may accept; or

(ii) is removed from office as Chief Executive Officer of the Corporation.

(2) The Board must, at least three months before the end of the first term of office of the Chief Executive Officer of the Corporation, inform the Chief Executive Officer of the Corporation whether the Board proposes to re-appoint him or her as Chief Executive Officer of the Corporation.

Removal of Chief Executive Officer of Corporation

166AN. (1) The Board must, subject to due process, remove the Chief Executive Officer of the Corporation from office if the Chief Executive Officer becomes a disqualified person.

(2) The Board may remove the Chief Executive Officer of the Corporation from office on the grounds that the Chief Executive Officer—

(a) is unable to perform the duties of office for health or other reasons;

(b) has failed in a material way to achieve the level of performance against the performance measures agreed to in terms of section 166AL(2);

(c) has failed in a material way to discharge any of the responsibilities of office, including any responsibilities entrusted in terms of legislation; or

(d) has acted in a way that is inconsistent with continuing to hold the office.

(3) Without limiting subsection (2)*(c)*, the Chief Executive Officer of the Corporation must be taken to have failed in a material way to discharge the responsibilities of office if he or she is absent from two consecutive meetings of the Board without the leave of the Board.

Committees

166AO. (1) The Board may establish committees as it considers necessary.

(2) The Board must, at least, establish an investment committee to review the investment portfolio of the Fund, which committee must make recommendations to the Board regarding the investment of the Fund.

(3) A committee established in terms of this section consists of such directors as the Board may select and, if the Board so decides, such staff members of the Corporation as the Board may select.

(4) A committee established in terms of this section must be chaired by a director of the Board, other than the Chief Executive Officer of the Corporation.

(5) The functions, procedures and membership of a committee established in terms of this section are determined by the Board.

(6) The chairperson of each committee established in terms of this section must ensure that minutes of each meeting of that committee are kept in a manner determined by the Board.

Duties of directors of Board and members of committees

166AP. A director of the Board, and a member of a committee established in terms of section 166AO must—

(a) act honestly in all matters relating to the Corporation; and

(b) perform the functions of office as a director or member—

(i) in good faith;

(ii) for a proper purpose; and

(iii) with the degree of care and diligence that a reasonable person in the director's or member's position would exercise.

Disclosure of interests

166AQ. (1) A director of the Board must disclose, at a meeting of the Board, or in writing to each of the other directors, any interest in any matter that is being or may be considered by the Board that—

(a) the director has; or

(b) a person who is a related party to the director has.

(2) A disclosure referred to in subsection (1) must be made as soon as practicable after the director of the Board becomes aware of the interest.

(3) A director of the Board who has, or who has a related party who has, an interest that is required to be disclosed in terms of subsection (1), may not participate in the consideration of, or decision on, a matter to which the interest relates unless—

(a) the director has disclosed the interest as required by subsection (1); and

(b) the other directors have decided that the interest does not affect the proper execution of that director's functions in relation to the matter.

(4) Subsections (1) to (3) apply, with the necessary changes required by the context, to members of committees established in terms of section 166AO.

(5) *(a)* Each member of the Corporation's staff and each person to whom a power or function of the Corporation has been delegated must make timely, proper and adequate disclosure of his or her interests, including the interests of a related party, that could reasonably be seen as interests that may affect the proper execution of his or her functions of office or the delegated power.

(b) The Chief Executive Officer of the Corporation must ensure that paragraph *(a)* is complied with.

(6) For the purposes of this section, it does not matter—

(a) whether an interest is direct, indirect, pecuniary or non-pecuniary; or

(b) when the interest was acquired.

(7) For the purposes of this section, a person does not have to disclose—

(a) the fact that that person, or a person who is a related party to that person, is—

(i) an official or employee of the Reserve Bank; or

(ii) a financial customer of a financial institution; or

(b) an interest that is not material.

(8) The Chief Executive Officer of the Corporation must maintain a register of all disclosures made in terms of this section and of all decisions made in terms of this section.

Share capital

166AR. (1) The share capital of the Corporation is R1 000 000, but may be increased by the Board at any time.

(2) Only the Reserve Bank and the Republic may hold a share of the Corporation.

(3) The liability of the Reserve Bank as holder of a share in the Corporation is limited to the amount unpaid in respect of the share.

Financial year of Corporation

166AS. A financial year of the Corporation ends on 31 March.

Surplus funds

166AT. (1) The amount of any surplus funds of the Corporation, after deducting expenses of the Corporation and making proper provisions at the end of each financial year of the Corporation, must be credited to the Fund.

(2) Subsection (1) does not prevent amounts of surplus funds being credited to the Fund at other times.

Bookkeeping and auditing

166AU. The Corporation must—

(a) cause proper account to be kept of all financial transactions, assets and liabilities of the Corporation and of the Fund; and

(b) cause financial statements to be compiled in respect of each financial year and submit copies of those statements, after auditing required by law, to the Minister and the Reserve Bank.

Annual report

166AV. (1) The Corporation must, within six months after the end of each financial year, submit to the Minister and the Reserve Bank a report on its operations, and the operations of the Fund, during the financial year.

(2) The Minister must table a copy of the report referred to in subsection (1) and the financial statements referred to in section 166AU*(b)* in Parliament at the same time as the Minister tables copies of the reports referred to in section 32(3) of the Reserve Bank Act.

Winding up of Corporation

166AW. The Corporation may not be wound up except by, or on authority of, an Act.

Staff and resources

166AX. (1) The Corporation must determine the personnel, accommodation, facilities, use of assets, resources and other services that it requires to function effectively.

(2) The Corporation may—

(a) enter into secondment arrangements in respect of persons;

(b) engage persons on contract otherwise than as employees;

(c) enter into contracts;

(d) acquire or dispose of property;

(e) insure itself against any loss, damage, risk or liability that it may suffer or incur; and

(f) do anything else necessary for the performance of its functions.

(3) The Corporation may not enter into a secondment arrangement in respect of a person, or engage a person on contract, unless the person and the Corporation have agreed in writing on—

(a) the performance measures that will be used to assess that person's performance; and

(b) the level of performance that must be achieved against those measures.

Resources provided by Reserve Bank

166AY. (1) The Reserve Bank must provide the Corporation with the personnel, accommodation, facilities, use of assets, resources and other services determined in accordance with section 166AX(1) and as agreed to by the Reserve Bank.

(2) The Reserve Bank must second the personnel that it provides in terms of subsection (1) to the Corporation.

Duties of directors, committee members and staff members

166AZ. (1) A person who is or has been a director of the Board, a member of a committee established in terms of section 166AO or a staff member of the Corporation, may not use that position or any information obtained as a result of holding that position to—

(a) improperly benefit himself or herself or another person;

(b) cause improper detriment to the Corporation's or the Reserve Bank's ability to perform its functions; or

(c) cause improper detriment to another person.

(2) For the purposes of this section, 'benefit' and 'detriment' are not limited to financial benefit or detriment.

Co-operation and collaboration with financial sector regulators and Reserve Bank

166BA. (1) The Corporation, the financial sector regulators and the Reserve Bank must co-operate and collaborate with one another to assist the Corporation to exercise its powers and perform its functions in terms of this Act, including by providing assistance and information promptly regarding any matter of which the regulators and the Reserve Bank become aware of that affects or may affect the performance of any of those powers or functions of the Corporation.

(2) Without limiting subsection (1), the financial sector regulators must comply with any reasonable request from the Corporation, including requests to

(i) determine standards;

(ii) issue directives; and

(iii) promote awareness among financial customers of the protections afforded by this Chapter.

Memoranda of understanding

166BB. (1) The Corporation may enter into memoranda of understanding with—

(a) the Reserve Bank;

(b) a financial sector regulator; or

(c) a body in a foreign country that has powers or functions corresponding to its powers or functions.

(2) The validity of an action taken by the Corporation in terms of this Act or a financial sector law is not affected by a failure to comply with this section or a memorandum of understanding contemplated in subsection (1).

Deposit insurance levy

166BC. (1) The Corporation may charge its members deposit insurance levies in accordance with this Part, read with legislation that empowers the imposition of levies, to fund the operations of the Corporation and administration of the Fund.

(2) Deposit insurance levies are payable to the Corporation at the time specified by the Corporation in accordance with the legislation that empowers the imposition of the levies.

Part 7

Deposit Insurance Fund

Deposit Insurance Fund

166BD. (1) A fund called the Deposit Insurance Fund is established.

(2) The Fund is held by the Corporation.

(3) The Corporation must establish an account at the Reserve Bank for the purposes of the Fund.

(4) The Fund consists of—

(a) the amount standing to the credit of the account established in terms of subsection (3);

(b) the investments made with money of the Fund; and

(c) the other assets of the Corporation attributable to the Fund.

(5) There must be credited to the Fund—

(a) surplus funds of the Corporation referred to in section 166AT;

(b) amounts collected as deposit insurance premiums as envisaged in section 166BG;

(c) interest and other amounts earned from investments of the Fund;

(d) amounts recovered by the Corporation attributable to amounts paid out of the Fund; and

(e) other amounts received by the Corporation for the purposes of, or in connection with, the Fund.

(6) The Fund may only be applied as follows:

(a) To make payments in terms of section 166AA, including in terms of agreements contemplated by that section;

(b) by way of investments in terms of section 166BE(1); or

(c) to repay amounts paid into the Fund in error.

Investment

166BE. (1) The Corporation may apply money standing to the credit of the Fund by way of investment consistent with the investment strategy for the Fund.

(2) The Corporation must formulate, review regularly and give effect to an investment strategy for the Fund, which strategy must be aimed at achieving the objective of the Corporation by ensuring that the Fund is able to make payments required by this Chapter.

(3) In formulating and reviewing the investment strategy for the Fund, the Corporation must consider, among other things, the risk involved in making, holding and realising, and the likely return from, the Fund's investments.

Information

166BF. The Prudential Authority, Financial Sector Conduct Authority and members of the Corporation must comply with any request by the Corporation for information relevant to the performance of the Corporation's functions in terms of this Act.

Part 8

Contributions to Fund

Deposit insurance premiums

166BG. (1) The Corporation may collect deposit insurance premiums from its members in accordance with this Part to ensure that the Fund is able to make payments required by this Chapter.

(2) The Corporation must publish premiums, that have been collected, in the Register and on its website.

(3) Premiums are payable to the Corporation at the time specified by the Corporation, or at a time agreed to by the Corporation.

Fund liquidity

166BH. (1) Members of the Corporation that hold covered deposits must maintain a minimum amount in the account of the Fund as specified by the Corporation in a standard.

(2) The Corporation must pay interest to members on the amount referred to in subsection (1), which interest must be specified in the standard.''.

Amendment of section 241 of Act 9 of 2017

52. Section 241 of the Financial Sector Regulation Act, 2017, is hereby amended—

(a) by the substitution for subsection (3) of the following subsection:

''(3) A supervised entity must not fail or refuse to comply with a requirement issued in terms of subsection (1).''; and

(b) by the addition of the following subsection:

(4) In this section, 'information' does not include aggregate statistical data or information that does not disclose the identity of a person.''.

Amendment of section 248 of Act 9 of 2017

53. Section 248 of the Financial Sector Regulation Act, 2017, is hereby amended by the substitution in subsection (4) for paragraph *(b)* of the following paragraph:

''*(b)* The Tribunal and the Corporation, although **[it is]** they are not **[a]** public **[entity]** entities in terms of the Public Finance Management Act, must also comply with the requirements in paragraph *(a)*.''.

Amendment of section 250 of Act 9 of 2017

54. Section 250 of the Financial Sector Regulation Act, 2017, is hereby amended by the insertion after paragraph *(g)* of the following paragraph:

''*(g*A*)* the Corporation;''.

Substitution of section 265 of Act 9 of 2017

55. The following section is hereby substituted for section 265 of the Financial Sector Regulation Act, 2017:

''**Duties of members and staff of certain bodies**

265. A person who contravenes sections 46(1) or (2), 52, 69(1) or (2), **[or]** 74 or 166AZ commits an offence and is liable on conviction to a fine not exceeding R5 000 000 or imprisonment for a period not exceeding five years, or to both a fine and such imprisonment.''.

Amendment of section 267 of Act 9 of 2017

56. Section 267 of the Financial Sector Regulation Act, 2017, is hereby amended by the substitution for subsection (1) of the following subsection:

''(1) A supervised entity that contravenes section 131(1)*(b)* or section 241(3), commits an offence and is liable on conviction to a fine not exceeding R1 000 for each day during which the offence continues.''.

Substitution of section 285 of Act 9 of 2017

57. The following section is hereby substituted for section 285 of the Financial Sector Regulation Act, 2017:

"**Immunities**

285. The State, the Minister, the Reserve Bank, the Governor and Deputy Governors, a financial sector regulator, a member of the Executive Committee**[,]** or the Prudential Committee, a member of a subcommittee of the Prudential Authority or the Financial Sector Conduct Authority, a member of the Tribunal, the Ombud Council, a member of the Ombud Board, an employee of the State, a board member or officer of the Reserve Bank, a staff member of a financial sector regulator, a staff member of the Reserve Bank, the Corporation, a Board member, a staff member of the Corporation, a resolution practitioner appointed for a designated institution in resolution and a person appointed or delegated by a financial sector regulator, **[or]** the Reserve Bank or the Corporation to exercise a power or perform a function or duty in terms of a financial sector law is not liable for, or in respect of, any loss or damage suffered or incurred by any person arising from a decision taken or action performed in good faith in the exercise of a function, power or duty in terms of a financial sector law.".

Amendment of Schedule 2 to Act 9 of 2017

58. Schedule 2 to the Financial Sector Regulation Act, 2017, is hereby amended by the insertion after the item relating to the Long-Term Insurance Act and the Short-Term Insurance Act of the following item:

"This Act, in so far as it relates to matters within the objectives of—	
(a) the Prudential Authority	Prudential Authority
(b) the Financial Sector Conduct Authority	Financial Sector Conduct Authority
(c) the Reserve Bank	Reserve Bank".

Amendment of Schedule 3 to Act 9 of 2017

59. Schedule 3 to the Financial Sector Regulation Act is hereby amended by the insertion after item 20 of the following item:

"**20A.** A list of designated institutions, indicating which of them are in resolution".

Amendment of long title of Act 9 of 2017

60. The Financial Sector Regulation Act, 2017, is hereby amended by the substitution for the long title of the following long title:

"**To establish a system of financial regulation by establishing the Prudential Authority and the Financial Sector Conduct Authority, and conferring powers on these entities; to preserve and enhance financial stability in the Republic by conferring powers on the Reserve Bank; to establish the Financial Stability Oversight Committee; to provide for the establishment of a framework for the resolution of designated institutions to ensure that the impacts or potential impact of a failure of a designated institution on financial stability are managed appropriately; to designate the Reserve Bank as the resolution authority; to establish a deposit insurance scheme, including a Corporation for Deposit Insurance; to regulate and supervise financial product providers and financial services providers; to improve market conduct in order to protect financial customers; to provide for co-ordination, co-operation, collaboration and consultation among the Reserve Bank, the Prudential Authority, the Financial Sector Conduct Authority, the Corporation for Deposit Insurance, the National Credit Regulator, the Financial Intelligence Centre and other organs of state in relation to financial stability and the functions of these entities; to establish the Financial System Council of**

Regulators and the Financial Sector Inter-Ministerial Council; to provide for making regulatory instruments, including prudential standards, conduct standards and joint standards; to make provision for the licensing of financial institutions; to make comprehensive provision for powers to gather information and to conduct supervisory on-site inspections and investigations; to make provision in relation to significant owners of financial institutions and the supervision of financial conglomerates in relation to eligible financial institutions that are part of financial conglomerates; to make provision for designated institutions in connection with resolution matters; to provide for powers to enforce financial sector laws, including by the imposition of administrative penalties; to provide for the protection and promotion of rights in the financial sector as set out in the Constitution; to establish the Ombud Council and confer powers on it in relation to ombud schemes; to provide for coverage of financial product and financial service providers by appropriate ombud schemes; to establish the Financial Services Tribunal as an independent tribunal and to confer on it powers to reconsider decisions by financial sector regulators, the Ombud Council and certain market infrastructures; to establish the Financial Sector Information Register and make provision for its operation; to provide for information sharing arrangements; to create offences; to provide for regulation-making powers of the Minister; to amend and repeal certain financial sector laws; to make transitional and savings provisions; and to provide for matters connected therewith.''.

Amendment of Arrangement of Sections of Act 9 of 2017

61. The Arrangement of Sections of the Financial Sector Regulation Act, 2017, is hereby amended—

(a) by the substitution for item 9 of the following item:

''**9.** Inconsistencies between Act and other **[financial sector]** laws'';

(b) by the substitution for item 27 of the following item:

''**27.** Memoranda of understanding **[relating to financial stability]**'';

(c) by the substitution for item 28 of the following item:

''**28.** Roles of other organs of state in relation to financial stability and resolution'';

(d) by the substitution for the heading to Part 6 of Chapter 2 of the following heading:

''Systemically important financial institutions and payment systems'';

(e) by the insertion after item 29 of the following items:

''**29A.** Designated institutions

29B. Designation of systemically important payment systems'';

(f) by the substitution for item 30 of the following item:

''**30.** Prudential standards and regulator's directives in respect of systemically important financial institutions and designated institutions'';

(g) by the substitution for item 91 of the following item:

''**91.** Applicability of Promotion of Administrative Justice Act **[to administrative action by financial sector regulators]**'';

(h) by the insertion after item 135 of the following item:

''**135A.** Investigations into designated institutions in resolution''; and

(i) by the insertion after item 166 of the following items:

''**CHAPTER 12A**

RESOLUTION OF DESIGNATED INSTITUTIONS

Part 1

General provisions with respect to designated institutions

166A. Exercise of Reserve Bank's powers
166B. Reserve Bank's resolution objectives
166C. Reserve Bank's resolution functions
166D. Winding up and similar steps in respect of designated institutions
166E. Resolution planning

Amendment of section 52 of Act 18 of 2017

62. Section 52 of the Insurance Act, 2017, is hereby amended by the substitution in subsection (1) for paragraph *(a)* of the following paragraph:

''*(a)* This Chapter does not apply to a branch of a foreign reinsurer, a Lloyd's underwriter **[or]**, Lloyd's or an insurer that is a designated institution in terms of the Financial Sector Regulation Act.''.

Short title

63. (1) This Act is called the Financial Sector Laws Amendment Act, 2020, and comes into effect on a date determined by the Minister by notice in the *Gazette*.

(2) Different dates may be determined by the Minister in respect of the coming into effect of different provisions of this Act.

MEMORANDUM ON THE OBJECTS OF THE FINANCIAL SECTOR LAWS AMENDMENT BILL, 2020

1. BACKGROUND

1.1 In 2011, the Republic of South Africa (''Republic'') commenced with the process of regulatory reforms for its financial sector in line with its international commitments in the G-20 Group of Member States Forum. A broad policy document titled '*A safer financial sector to serve South Africa better*' was published, which had several key policy objectives for the regulation of systemically important financial institutions, including the improvement of the Republic's resolution and crisis management framework to reduce the probability of systemic failure.

1.2 In 2015, the National Treasury, South African Reserve Bank (''Reserve Bank'') and Financial Sector Conduct Authority (then known as the Financial Services Board) published a more comprehensive policy document '*Strengthening South Africa's Resolution Framework*', which formed the basis of the proposals contained in the Financial Sector Laws Amendment Bill (''Bill''). Key among these are the manner in which banks and designated financial institutions will be resolved, the powers and functions of the Reserve Bank as the Resolution Authority and the establishment of a Deposit Insurance Fund.

1.3 On 22 August 2017, the Financial Sector Regulation Act, 2017 (Act No. 9 of 2017) (''Financial Sector Regulation Act''), was assented to by the President. This ushered in a 'Twin Peaks' system of financial regulation in terms of which a Prudential Authority and a Financial Sector Conduct Authority were established. One of the aims of the Financial Sector Regulation Act was to enhance financial stability in the Republic by conferring powers on the Reserve Bank in furtherance of its primary objective of financial stability in terms of the said Act. Section 12 of the Financial Sector Regulation Act specifically tasks the Reserve Bank with monitoring risks to financial stability and taking steps to mitigate those risks. The Bill proposes to establish a framework for the resolution of banks and other systemically important financial institutions in case of failure or imminent failure of the institution. In view of the risk of serious disruption and potential outright systemic failure to the financial system caused by the failure of a bank, a speedy resolution of the institution could be a more appropriate action than the current framework which primarily entails curatorship, business rescue proceedings and judicial management to a lesser extent. Resolution in an orderly fashion, managed and controlled by the Reserve Bank, affords greater protection to depositors, and taxpayers, who might otherwise have to foot the bill to keep a financially distressed institution afloat.

1.4 The Bill proposes the establishment of a Deposit Insurance Fund, which would help to ensure that holders of covered deposits at a bank in resolution will have access to their funds; to limit severe financial hardship for bank depositors; and to limit the exposure of public funds to the cost of a bank failure. The Fund would be financed by premiums from licensed banks, which are members of the Corporation for Deposit Insurance (''Corporation''). The Corporation will be tasked with the administration of the Fund.

2. OBJECTIVES OF BILL

2.1 The Bill proposes to establish a framework for the orderly resolution of banks, systemically important non-bank financial institutions and holding companies of banks or systemically important non-bank financial institutions that are designated by the Governor of the Reserve Bank as systemically important.

2.2 Resolution refers to a process during which a competent authority, the Resolution Authority, takes over the control and management of the affairs of a designated institution that is failing or likely to fail in order to restructure or

resolve the institution with the use of resolution tools in a manner that seeks to protect financial stability and minimise the reliance on public funds.

2.3 The aim of creating a resolution framework is to ensure that the impact of a failure by a bank, or systemically important financial institution, is managed in an orderly manner. It is proposed that the process of resolution takes place under the management and control of the Reserve Bank, which will be the Resolution Authority. In order to provide for this, certain amendments to the Financial Sector Regulation Act are proposed. More particularly, a new Chapter 12A is to be inserted to deal with the resolution objectives, powers and functions of the Reserve Bank; and to provide for a Deposit Insurance Fund and the establishment of a Corporation for Deposit Insurance to administer the Fund.

2.4 To give effect to the amendments proposed above, a number of consequential amendments are required to the Insolvency Act, 1936 (Act No. 24 of 1936) (''Insolvency Act''), the South African Reserve Bank Act, 1989 (Act No. 90 of 1989) (''Reserve Bank Act''), the Banks Act, 1990 (Act No. 94 of 1990) (''Banks Act''), the Mutual Banks Act, 1993 (Act No. 124 of 1993) (''Mutual Banks Act''), the Competition Act, 1998 (Act No. 89 of 1998) (''Competition Act''), the Financial Institutions (Protection of Funds) Act, 2001 (Act No. 28 of 2001) (''Financial Institutions Act''), the Co-operative Banks Act, 2007 (Act No. 40 of 2007) (''Co-operative Banks Act''), the Companies Act, 2008 (Act No. 71 of 2008) (''Companies Act''), the Financial Markets Act, 2012 (Act No. 19 of 2012) (''Financial Markets Act''), the Financial Sector Regulation Act, 2017 (Act No. 9 of 2017) (''Financial Sector Regulation Act''), and the Insurance Act, 2017 (Act No. 18 of 2017) (''Insurance Act'').

2.5 The amendments to the Mutual Banks Act provide for the issuing of guidance notes and directives to mutual banks by the Prudential Authority (which has replaced the Registrar of Banks).

3. STRUCTURE OF BILL

3.1 The Bill consists of 11 Parts, each Part containing amendments to a specific piece of existing legislation. The Parts and the relevant clauses are set out in paragraph 3.4 with a short summary of the content.

3.2 The main thrust of the Bill is contained in clause 52, which inserts a new Chapter, dealing with resolutions, in the Financial Sector Regulation Act. The creation of the new resolution regime requires a number of amendments to various other Acts, which are dealt with in chronological and numerical order as listed below.

3.3 Clause 12 proposes an additional power for the Prudential Authority (which replaces the Registrar of Banks) to issue not only guidelines regarding the application and interpretation of the Mutual Banks Act but also guidance notes (containing information on market practices or industry developments) and directives.

3.4 **Clauses of Bill**

Part 1: Amendment to Insolvency Act, 1936 (Act No. 24 of 1936)

Clause 1: Insertion of section 22A of Insolvency Act, 1936

The proposed new provision clarifies that the provisions of the Financial Sector Regulation Act apply to the liquidation or sequestration of the estate of a designated institution, and excludes dispositions made in case of resolution from the application of the Insolvency Act.

Clause 2: Amendment of section 35A of Insolvency Act, 1936

It is proposed that the heading of section 35A of the Insolvency Act be amended to align with the content of the section as it has recently been amended.

Clause 3: Amendment of section 83 of Insolvency Act, 1936

It is proposed to amend section 83 of the Insolvency Act to refine the wording of the section to ensure that the section applies appropriately to transactions in terms of section 35A of the Act.

Clause 4: Amendment of Arrangement of Sections of Insolvency Act, 1936

This clause proposes to adjust the Arrangement of Sections of the Insolvency Act to reflect the amendments proposed in clauses 1 and 2.

Clause 5: Amendment of section 10 of South African Reserve Bank Act, 1989

The proposed amendment makes provision for the exercise and performance by the Reserve Bank of its resolution functions envisaged in the proposed Chapter 12A of the Financial Sector Regulation Act (see clause 51).

Clause 6: Amendment of section 51 of Banks Act, 1990

This clause proposes the deletion of subsection (1)*(c)*, as it refers to section 69 of the Banks Act, which is proposed to be repealed by clause 9 of the Bill.

Clause 7: Amendment of section 54 of Banks Act, 1990

This clause proposes the insertion of an additional subsection which provides for the exclusion of banks in resolution from the application of section 54.

Clause 8: Amendment of section 60 of Banks Act, 1990

The existing provision confers a power upon the Prudential Authority to institute actions against directors, chief executive officers or executives of a bank who contravene section 77 or 424 of the Companies Act. The amendment proposes that money recovered as a result of such action be set off against amounts paid to depositors by the Corporation or a financial sector regulator.

Clause 9: Repeal of sections 68, 69 and 69A of Banks Act, 1990

The proposal is to repeal sections 68, 69 and 69A of the Banks Act which deal with winding-up of a bank and placing a bank under curatorship. A separate subsection makes provision for transitional arrangements with regard to investigations of the affairs of a bank under curatorship in terms of section 69A.

Clause 10: Amendment of section 89A of Banks Act, 1990

This amendment proposes to amend section 89A, to remove a reference to a curator appointed in terms of section 69, which is proposed to be repealed by clause 9 of the Bill.

Clause 11: Amendment of section 91 of Banks Act, 1990

This amendment proposes to delete a reference to section 69A, which is proposed to be repealed by clause 9 of the Bill.

Clause 12: Amendment of section 4 of Mutual Banks Act, 1993

This amendment proposes to make provision for the issuing of guidance notes and directives to mutual banks by the Authority. The Authority may also issue non-financial sanctions. A directive addressed by the Authority to a mutual bank or its auditor may require certain action to be taken or refrained from. These requirements will be binding on the mutual bank, or auditor. Technical amendments to adjust the wording of the provision are also proposed.

Clause 13: Amendment of section 29 of Mutual Banks Act, 1993

This clause proposes to delete section 29(4)*(b)* of the Mutual Banks Act as it refers to section 75 of that Act, which is proposed to be repealed by clause 14 of the Bill.

Clause 14: Repeal of sections 73, 74, 75, 76 and 77 of Mutual Banks Act, 1993

This clause proposes to repeal sections 73, 74, 75, 76 and 77 of the Mutual Banks Act in view of the resolution provisions that will replace them. The provisions currently deal with judicial management, winding-up and dissolution of a mutual bank and related matters.

Clause 15: Insertion of section 78A in Mutual Banks Act, 1993

The proposed section excludes mutual banks that are in resolution from the operation of sections 71, 72 and 78 of the Mutual Banks Act. These provisions deal with amalgamation and transfer of mutual bank assets and limitation of liability of members of such banks.

Clause 16: Repeal of sections 80 and 81 of Mutual Banks Act, 1993

This clause proposes to repeal sections 80 and 81 of the Mutual Banks Act as section 80 is not consistent with the proposed amendments to the Act and section 81 refers to section 69 of the Banks Act which is proposed to be repealed by clause 9 of the Bill.

Clause 17: Amendment of section 92 of Mutual Banks Act, 1993

The proposed amendment inserts a reference to the new subsection (8) of section 4 (see clause 12).

Clause 18: Amendment of Arrangement of Sections of Mutual Banks Act, 1993

The clause proposes to adjust the Arrangement of Sections of the Mutual Banks Act to reflect the amendments proposed in clauses 15 and 16.

Clause 19: Amendment of section 18 of Competition Act, 1998

This clause proposes a new subsection to exclude transactions envisaged in the proposed section 166S of the Financial Sector Regulation Act (see clause 51) from the ambit of sections 13, 14 and 16 of the Competition Act.

Clause 20: Insertion of section 9B in Financial Institutions (Protection of Funds) Act, 2001

The proposed new section provides for the exclusion of institutions in resolution from the operation of sections 5 and 6 of the Financial Institutions Act. These sections deal with the appointment of a curator and the powers of the registrar (now the Financial Sector Conduct Authority).

Clause 21: Amendment of Arrangement of Sections of Financial Institutions (Protection of Funds) Act, 2001

This clause proposes to adjust the Arrangement of Sections of the Financial Institutions Act to reflect the changes contained in clause 20.

Clause 22: Amendment of section 1 of Co-operative Banks Act, 2007

This clause proposes the substitution of the definition of ''Fund'' in the Co-operative Banks Act to refer to the Deposit Insurance Fund that is proposed to be established in terms of section 166BD of the Financial Sector Regulation Act.

Clause 23: Repeal of sections 24, 25, 26 and 30 of Co-operative Banks Act, 2007

This clause proposes the repeal of sections pertaining to the Co-operative Banks Deposit Insurance Fund, as these will be replaced by the proposed

provisions on the Deposit Insurance Fund in the Financial Sector Regulation Act (see clause 51).

Clause 24: Insertion of section 30A in Co-operative Banks Act, 2007

This clause proposes the insertion of a new section 30A in the Co-operative Banks Act, to provide that sections 27, 28, and 29 do not apply to a co-operative bank in respect of which a determination in terms of section 166J of the Financial Sector Regulation Act is in force.

Clause 25: Amendment of section 55 of Co-operative Banks Act, 2007

This clause proposes the deletion of section 55(1)*(g)* of the Co-operative Banks Act which refers to section 26 of that Act, that is proposed to be repealed by clause 23 of the Bill.

Clause 26: Amendment of section 80 of Co-operative Banks Act, 2007

This clause proposes to remove the reference to section 25(4) of the Co-operative Banks Act from section 80*(b)* of the said Act due to the proposed repeal of section 25 in clause 23.

Clause 27: Amendment of section 81 of Companies Act, 2008

This proposed amendment allows for a court order to wind up a designated institution in resolution where the Reserve Bank has made an application on the grounds that there is no reasonable prospect that the company will cease to be in resolution.

Clause 28: Amendment of section 112 of Companies Act, 2008

This amendment proposes that section 112 of the Companies Act will not apply to dispositions made by the Reserve Bank in exercising its resolution functions.

Clause 29: Amendment of section 113 of the Companies Act, 2008

This amendment proposes that section 113 of the Companies Act will not apply to amalgamations or mergers made by the Reserve Bank in exercising its resolution functions.

Clause 30: Amendment of section 114 of Companies Act, 2008

This amendment provides for proposals by the board of a company under a proposed scheme of arrangement to not apply when a designated institution is in resolution.

Clause 31: Amendment of section 128 of Companies Act, 2008

This amendment provides for the exclusion of business rescue proceedings whilst the determination by the Minister of Finance to place a designated institution in resolution is in force.

Clause 32: Amendment of section 3 of Financial Markets Act, 2012

This clause proposes to replace the word ‘‘bank’’ with the term ‘‘designated institution’’. The definition of ‘‘designated institution’’ contained in the Financial Sector Regulation Act includes banks but also other financial institutions, payment system operators or holding companies of the aforementioned institutions.

Clause 33: Amendment of section 60 of Financial Markets Act, 2012

The proposed amendment requires that the Authority must give notice to the Reserve Bank before taking any action in terms of section 60 of the Financial Markets Act in relation to a designated market infrastructure in resolution.

Clause 34: Amendment of section 64 of the Financial Markets Act, 2012

This clause proposes a new subsection that excludes the application of

section 64 of the Financial Markets Act from a designated institution in resolution.

Clause 35: Amendment of section 1 of Financial Sector Regulation Act, 2017

This clause proposes to insert various new definitions in the context of the proposed resolution provisions to be inserted. This clause also seeks to amend the definition of ''financial sector body'' by adding, in paragraphs *(g)* and *(h)*, the Reserve Bank, in relation to its resolution functions, and the Corporation.

The definition of ''supervised entity'' is proposed to be amended by adding a reference to a designated institution that is not otherwise a licensed financial institution.

Clause 36: Amendment of section 7 of Financial Sector Regulation Act, 2017

This amendment proposes to expand the object of the Financial Sector Regulation Act, formulated in section 7, to have a regulatory and supervisory framework that also promotes the orderly resolution of designated institutions, where required.

Clause 37: Substitution of section 9 of Financial Sector Regulation Act, 2017

To make provision for the orderly resolution envisaged in the Bill, this amendment proposes to clarify the prevalence of the Financial Sector Regulation Act, and regulations in terms of it, over not only other financial sector laws but also other laws that deal with aspects of failures and insolvencies of companies.

Clause 38: Amendment of section 26 of Financial Sector Regulation Act, 2017

The existing section 26 requires cooperation between the Reserve Bank and financial sector regulators in order to maintain, protect and enhance financial stability. This amendment adds the proposed resolution functions in the Bill to the aspects in respect of which cooperation and assistance are to be afforded.

Clause 39: Amendment of section 27 of Financial Sector Regulation Act, 2017

The existing section 27 makes provision for memoranda of understanding between the Reserve Bank and the financial sector regulators, in relation to financial stability. This amendment proposes to broaden the ambit of this provision to include functions and duties relating to designated institutions. A new subsection (3A) proposes to allow the Reserve Bank to enter into memoranda of understanding with the Corporation and a resolution body in a foreign country.

Clause 40: Substitution of section 28 of Financial Sector Regulation Act, 2017

This amendment proposes to add a reference to resolution functions and information about designated institutions to this section, which deals with the roles of other organs of state in relation to financial stability.

Clause 41: Substitution of heading to Part 6 of Chapter 2 of Financial Sector Regulation Act, 2017

Part 6 currently deals with systemically important financial institutions. The amendments in clause 42 make provision for a definition of a designated institution as a category that includes banks, payment system operators and participants in payment systems, holding companies of banks or other systemically important financial organisations and members of financial conglomerates of which banks or systemically important financial institutions are members. They also make provision for the designation of systemically

important payment systems. An adjustment to the heading of the Part is therefore required.

Clause 42: Insertion of sections 29A and 29B in Financial Sector Regulation Act, 2017

The proposed new section 29A deals with designated institutions by creating a definition and providing for exceptions to the definition.

This clause further proposes to insert section 29B to provide for the designation of payment systems as systemically important payment systems.

Clause 43: Amendment of section 30 of Financial Sector Regulation Act, 2017

The amendment proposes to insert a subsection (1A) to provide for the issuing of directives to designated institutions in order to help prevent a designated institution from being placed in resolution. It also provides for consequential corrections to the wording of the existing section.

Clause 44: Repeal of section 31 of Financial Sector Regulation Act, 2017

Section 31 of the Financial Sector Regulation Act currently deals with winding-up of systemically important financial institutions. In light of the new resolution provisions proposed in section 166D (see clause 51), this clause proposes to repeal section 31.

Clause 45: Amendment of section 91 of Financial Sector Regulation Act, 2017

This amendment provides that the Promotion of Administrative Justice Act applies to any administrative action taken by the Reserve Bank, a financial sector regulator or the Corporation, subject to the Financial Sector Regulation Act and the specific financial sector laws.

Clause 46: Amendment of section 105 of Financial Sector Regulation Act, 2017

Section 105(3) states the matters on which a prudential standard may be made, amongst others matters on which a regulatory instrument may be made by the Prudential Authority in terms of a financial sector law. The textual amendment to paragraph *(b)* adds the Financial Sector Regulation Act as a source of enabling legislation.

Clause 47: Amendment of section 109 of Financial Sector Regulation Act, 2017

This amendment proposes to include a reference to a ‘‘standard related to designated institutions in resolution’’ to the standards that require the concurrence of the Reserve Bank.

Clause 48: Amendment of section 129 of Financial Sector Regulation Act, 2017

Chapter 9 of the Financial Sector Regulation Act provides for information gathering, inspections and investigations by the Prudential Authority or the Financial Sector Conduct Authority. Clause 49 proposes to make further provision for investigations in relation to a designated institution in resolution, where an investigator has been appointed in terms of section 134(1A). (See clause 49 for the insertion of subsection (1A) in the existing section 134).

Clause 49: Amendment of section 134 of Financial Sector Regulation Act, 2017

This clause proposes to insert subsection (1A) to make provision for an investigator to be appointed in relation to a designated institution in resolution. This appointment will be made by the Reserve Bank and this

amendment requires a further amendment to subsection (3) which provides for certificates of appointment to be issued to the relevant investigators.

Clause 50: Insertion of section 135A in Financial Sector Regulation Act, 2017

Section 135A is proposed to be inserted into Chapter 9 of the Financial Sector Regulation Act, to provide for investigations into designated institutions in resolution (see clauses 48 and 49 for consequential amendments related to the appointment of investigators by the Reserve Bank). Investigations should take place within the framework of Chapter 9, and within the timeframe specified by the Reserve Bank. Investigators must report on whether a specific designated institution should be wound up, remain in resolution or cease to be in resolution. They should also report on any negligence, recklessness or fraudulent actions in the business of the designated institution, and whether criminal or other proceedings should be undertaken against persons involved in the conduct of the business prior to being placed in resolution.

Clause 51: Insertion of Chapter 12A in Financial Sector Regulation Act, 2017

This clause proposes to insert Chapter 12A in the Financial Sector Regulation Act. Chapter 12A makes provision for the resolution of designated institutions, and contains the following Parts:

Part 1: General provisions with respect to designated institutions

Proposed section 166A provides for the designation of the Reserve Bank as the resolution authority and confers on it the resolution functions in the Financial Sector Regulation Act. These functions are performed by the Governor of the Reserve Bank.

Proposed section 166B sets out the objectives for the Reserve Bank when performing its resolution functions, which includes assisting in the maintenance of financial stability and protecting the interests of depositors by effecting the orderly resolution of designated institutions that are in resolution.

Proposed section 166C deals with performance of the resolution functions and stipulates that the Reserve Bank, when performing its resolution functions in relation to a designated institution—

- must have regard to and seek to minimise any adverse impact on the interests of shareholders and creditors of the members in the group of companies of which the designated institution forms part;
- must comply with applicable labour laws; and
- may consider the possible impact that this action may have on a foreign jurisdiction.

Proposed section 166D replaces the provisions contained in the repealed section 31 of the Financial Sector Regulation Act (see clause 45) and extends the ambit of the section to designated institutions. The concurrence of the Reserve Bank is required before a number of actions may be taken in respect of designated institutions. These actions include, but are not limited to, cancellation of a licence, winding up, appointing a curator, commencing business rescue operations, entering into an amalgamation or merger agreement, concluding a compromise arrangement with creditors, or any action by a financial sector regulator to reduce the value of an outstanding claim against the designated institution or to convert an instrument issued by the designated institution to another instrument.

Proposed section 166E places a requirement on the Reserve Bank to develop resolution plans for designated institutions.

Proposed section 166F provides for the creation of bridge companies that may be used should a designated entity fail. The powers and duties of the Reserve Bank in the creation and management of these companies are specified.

Proposed section 166G prevents the action of a designated institution entering resolution from being considered as an act of insolvency.

Proposed section 166H provides special provisions for the liquidation of a designated institution where there are no reasonable prospects that the institution will cease to be in resolution.

Proposed section 166I deals with the delegation of some of the Reserve Bank's resolution functions provided for in Chapter 12A.

Part 2: Placing designated institutions in resolution

Proposed section 166J sets out the process for placing a designated institution in resolution. The Minister will have the authority to place a designated institution in resolution upon receiving a recommendation from the Reserve Bank.

Proposed section 166K deals with when a designated institution ceases to be in resolution.

Proposed section 166L excludes the action of being placed in resolution from being considered a termination or acceleration event as may be provided for in agreements entered into with the designated institution.

Proposed section 166M provides for the management and control by the Reserve Bank of a designated institution which has been placed in resolution by the Minister.

Proposed section 166N confirms that the Reserve Bank is not the holding company of the designated institution in resolution.

Proposed section 166O allows for the appointment of a resolution practitioner by the Reserve Bank to assist with the execution of an orderly resolution.

Proposed section 166P suspends the trading of a designated institution's shares while in resolution.

Part 3: Resolution measures

Proposed section 166Q requires the Reserve Bank to conduct a valuation of the assets and liabilities concerned before taking a resolution action, in order to establish, amongst other matters, the liquidation value and to allow for compliance with the safeguards provided in the Financial Sector Regulation Act.

Proposed section 166R provides for moratoria to suspend obligations of agreements entered into by the designated institution in resolution and for the cancellation of certain agreements for, amongst other reasons, reasons similar to those provided for in liquidation.

Proposed section 166S deals with the resolution actions that the Reserve Bank may take in relation to a designated institution in resolution, including actions to write off or convert the liabilities of the institution and transfer its assets and liabilities.

Proposed section 166T confirms that the liabilities of a designated institution in resolution may be converted to a shareholding in a designated institution or a bridge company.

Proposed section 166U requires that resolution action must be taken in line with the creditor hierarchy as provided for in the proposed amendments to the Insolvency Act and that creditors of the same class must be treated equally.

Proposed section 166V creates the safeguard that resolution actions may not result in a creditor or shareholder bearing losses greater than they would have borne should the designated institution have been placed in liquidation.

Proposed section 166W specifies a ranking of claims against the designated institution in resolution.

Proposed section 166X places the obligation on relevant parties to record a transaction which results from an action taken by the Reserve Bank in terms of these proposed provisions.

Proposed section 166Y provides for resolution costs to be recovered by the Reserve Bank from a designated institution in resolution.

Part 4: Protections

Proposed section 166Z provides for the administrative process to be followed by the Reserve Bank when taking resolution actions.

Part 5: Banks in resolution—covered deposits

Proposed section 166AA deals with how the Corporation may apply the Deposit Insurance Fund to ensure that depositors of a bank may have reasonable access to their covered deposits.

Proposed section 166AB deals with the limit of coverage for covered deposits.

Proposed section 166AC deals with the recovery of payments made in error or as a result of fraud.

Proposed section 166AD deals with the substitution of a covered depositor's claim against the designated institution in resolution in favour of the Corporation.

Part 6: Corporation for Deposit Insurance establishment, functions and governance

Proposed section 166AE provides for the establishment of the Corporation.

Proposed section 166AF deals with the objective of the Corporation, and the functions of the Corporation in relation to the Deposit Insurance Fund (''Fund'').

Proposed section 166AG determines that all banks must be members of the Corporation.

Proposed section 166AH places responsibility for efficient corporate governance on the Corporation.

Proposed section 166AI provides for a Board of directors (''Board'') to manage and control the affairs of the Corporation and specifies the composition of the Board.

Proposed section 166AJ deals with the functions of the Board, regarding general management and applying amounts from the Fund.

Proposed section 166AK provides for the different forms of meetings and decision-making by the Board.

Proposed section 166AL deals with the appointment, performance, responsibilities and functions of the Chief Executive Officer of the Corporation.

Proposed section 166AM deals with the term of office of the Chief Executive Officer of the Corporation and provides that the Chief Executive Officer is eligible for re-appointment for one further term at the end of the aforesaid term.

Proposed section 166AN deals with the removal from office of the Chief Executive Officer of the Corporation in certain instances.

Proposed section 166AO provides for the establishment of committees by the Board to perform functions as determined by the Board.

Proposed section 166AP provides for the duties of directors and members of committees.

Proposed section 166AQ sets out the requirements regarding the disclosure of interest by directors, committee members and staff members of the Corporation.

Proposed section 166AR deals with the share capital of the Corporation.

Proposed section 166AS sets the financial year end of the Corporation at 31 March.

Proposed section 166AT provides for surplus funds of the Corporation to be credited to the Fund.

Proposed section 166AU sets out the auditing and bookkeeping requirements of the Corporation.

Proposed section 166AV deals with the annual report of the Corporation, including submission to the Minister and tabling in Parliament.

Proposed section 166AW provides that the Corporation may only be wound up by an Act of Parliament.

Proposed section 166AX provides for the staff and resources necessary for the effective functioning of the Corporation.

Proposed section 166AY provides that the Reserve Bank must provide necessary resources to the Corporation.

Proposed section 166AZ sets limits on the behaviour of present or past directors, committee members and staff members of the Corporation.

Proposed section 166BA creates a requirement for the Corporation, the Reserve Bank and the financial sector regulators to cooperate and collaborate in order to assist the Corporation in the exercise of its powers and the performance of its functions.

Proposed section 166BB provides for the Corporation to enter into memoranda of understanding with the Reserve Bank, a financial sector regulator or a similar body in a foreign jurisdiction.

Proposed section 166BC empowers the potential imposition of a deposit insurance levy to be paid by members to the Corporation in order to fund the operations of the Corporation and the administration of the Fund.

Part 7: Deposit Insurance Fund

Proposed section 166BD provides for the establishment of the Fund, and specifies the amounts to be credited to the Fund and how the Fund may be applied.

Proposed section 166BE sets out requirements for investments of the Fund.

Proposed section 166BF provides that the Prudential Authority and Financial Sector Conduct Authority must provide the Corporation with information that is relevant to the performance of the Corporation's functions.

Part 8: Contributions to Fund

Proposed section 166BG provides for the collection of a deposit insurance premium to be paid by members as contributions to the Fund and also provides for exemptions from this premium in certain circumstances.

Proposed section 166BH would require member institutions that hold covered deposits to maintain a minimum amount in the account of the Fund as specified by the Corporation in a standard**.** The Corporation would pay interest on those amounts in the Fund, as specified in the standard, to the member institutions.

Clause 52: Amendment of section 241 of Financial Sector Regulation Act, 2017

Chapter 16 of the Financial Sector Regulation Act deals with fees and levies charged by financial sector bodies in order to finance their operations.

Section 241 requires information to be provided by an entity in order to assess a specific entity's liability for a levy. The proposed amendment in subsection (3) places an obligation to provide the required information and the new subsection (4) specifies the nature of information to be provided.

Clause 53: Amendment of section 248 of Financial Sector Regulation Act, 2017

Section 248 of the Financial Sector Regulation Act currently stipulates budgeting and reporting requirements for financial sector bodies. Subsection (4)*(a)* sets out the obligations of the Financial Sector Conduct Authority, the Ombud Council, the Office of the Pension Funds Adjudicator, and the Office of the Ombud for Financial Services Providers under the Financial Sector Regulation Act and the Public Finance Management Act, 1999 (Act No. 1 of 1999) (''Public Finance Management Act''). Paragraph *(b)* currently provides that the Tribunal, even though it is not a public entity under the Public Finance Management Act, must comply with the same obligations. The proposed amendment to paragraph *(b)* makes the paragraph applicable to the Corporation as well.

Clause 54: Amendment of section 250 of Financial Sector Regulation Act, 2017

This clause proposes to add the Corporation to the list of designated authorities in section 250.

Clause 55: Substitution of section 265 of Financial Sector Regulation Act, 2017

Contravention of the sections listed in section 265, related to the duties of members and staff of certain bodies is an offence under that section. Clause 55 proposes to add section 166AZ (dealing with the duties of directors of the Board, committee members and staff members of the Corporation) to the list. (See clause 51 for the insertion of section 166AZ).

Clause 56: Amendment of section 267 of Financial Sector Regulation Act, 2017

Section 267(1) currently creates an offence in case of a contravention of section 131(1)*(b)*, which paragraph imposes an obligation to provide information. This clause proposes to include the contravention of section 241(3) which also imposes an obligation to provide information. (See amendment of section 241(3) in clause 52).

Clause 57: Substitution of section 285 of Financial Sector Regulation Act, 2017

This clause proposes to add the following persons to the list of persons who have immunity from liability for loss or damage: The Corporation; a Board member; staff members of the Corporation; a resolution practitioner for a designated institution in resolution; and persons to whom a power, function or duty has been delegated by a financial sector regulator, the Reserve Bank or the Corporation.

Clause 58: Amendment of Schedule 2 to Financial Sector Regulation Act, 2017

Schedule 2 to the Financial Service Regulation Act lists the responsible authorities for the legislation indicated in the Schedule. This clause adds the Financial Sector Regulation Act to the list and stipulates the Prudential Authority and the Financial Sector Conduct Authority as the responsible authorities for matters within their respective objectives.

Clause 59: Amendment of Schedule 3 to Financial Sector Regulation Act, 2017

This clause proposes to add an item to the list of documents that must be published in the Financial Sector Information Register in terms of Part 2 of Chapter 17 of the Financial Sector Regulation Act: A list of the institutions that have been designated, indicating which designated institutions are in resolution.

Clause 60: Amendment of long title of Financial Sector Regulation Act, 2017

This clause proposes to amend the long title of the Financial Sector Regulation Act in order to provide for a framework within which to deal with the resolution of designated institutions; to add the Corporation to the regulators that are obliged to coordinate, cooperate, collaborate and consult in relation to financial stability; and to make provision for designated institutions in connection with resolution matters.

Clause 61: Amendment of Arrangement of Sections of Financial Sector Regulation Act, 2017

This clause proposes to adjust the ''Arrangement of Sections'' in the Financial Sector Regulation Act in line with the amendments proposed in the Bill.

Clause 62: Amendment of section 52 of Insurance Act, 2017

This clause proposes to exclude an insurer that is a designated institution from the application of Chapter 9 of the Insurance Act.

Clause 63: Short title

The final clause indicates the short title for the envisaged Act, and the commencement of the Act.

4. ORGANISATIONS AND INSTITUTIONS CONSULTED

4.1 The National Treasury has engaged the South African Reserve Bank, the Prudential Authority and the Financial Sector Conduct Authority (formerly Financial Services Board) in the development of the Bill.

4.2 On 13 August 2015, the National Treasury, with the cooperation of the South African Reserve Bank and Financial Sector Conduct Authority, published a discussion paper setting out the key elements of the proposed resolution framework titled ''Strengthening South Africa's Resolution framework for financial institutions''. National Treasury held workshops on the discussion paper in Cape Town and Pretoria. The Bill incorporates the policy proposals set out in the discussion paper as revised following the public comment period.

4.3 In May 2017, the South African Reserve Bank, supported by the National Treasury, published a further discussion paper setting out the key design features of a deposit insurance scheme. The publication of the discussion paper was followed by an extensive public consultation period, which included public workshops and targeted engagements with the financial industry. The proposals for the deposit insurance scheme, as revised following the public consultation process, have been incorporated in the Bill.

4.4 On 5 September 2018, a draft version of the Bill was published for public comment, with a deadline for comment of 7 November 2018. Comments from the public consultation process have been incorporated in the Bill.

5. FINANCIAL IMPLICATIONS OF BILL

5.1 Financial implications for the State

The Bill should significantly reduce possible financial implications for the fiscus as it aims to reduce the reliance on public funds to resolve the failure of a designated financial institution. More specifically, the establishment of the Deposit Insurance Fund, which will be privately funded by the banking industry, greatly reduces the need for the State to compensate depositors during a bank failure.

5.2 Financial implications for regulated financial institutions

The financial implications for regulated financial institutions are detailed in the Socio-Economic Impact Assessment that is tabled along with the Bill.

6. CONSTITUTIONAL IMPLICATIONS

The Bill is in line with the aims of the Constitution and any limitations introduced by the Bill comply with section 36 of the Constitution.

7. PARLIAMENTARY PROCEDURE

7.1 The Constitution regulates the manner in which legislation may be enacted by the legislature and thus prescribes the different procedures to be followed for such enactment. The national legislative process is governed by sections 73 to 77 of the Constitution.

7.2 We have considered the Bill against the provisions of the Constitution relating to the tagging of Bills and against the functional areas listed in Schedule 4 (functional areas of concurrent national and provincial legislative competence) and Schedule 5 (functional areas of exclusive provincial legislative competence) to the Constitution.

7.3 A Bill falling within a functional area listed in Schedule 4 to the Constitution must be dealt with in accordance with the procedure set out in section 76. Schedule 4 lists the functional areas of concurrent national and provincial legislative competence. Schedule 5 to the Constitution lists the functional areas of exclusive provincial legislative competence. Therefore, those areas not falling within Schedule 4 and Schedule 5 fall within the exclusive national legislative competence.

7.4 The test for the classification of a Bill, as established in the Constitutional Court judgment of ***Tongoane and Others v National Minister for Agriculture and Land Affairs and Others***[1] (''Tongaone judgment''), is that any Bill with provisions which in ''substantial measure'' fall within a functional area listed in Schedule 4 to the Constitution must be classified in terms of that Schedule.[2] The Tongaone judgment therefore laid down the substantial measures test for

[1] CCT 100/09 [2010] ZACC 10.
[2] *Ibid* paragraph 72.

the tagging of a Bill which requires one to determine whether to a substantial extent the legislation under consideration actually regulates matters falling within Schedule 4 to the Constitution. If so, the Bill must be tagged in terms of section 76 of the Constitution.

7.5 As the Bill does not deal with a functional area listed in Schedule 4 or Schedule 5 to the Constitution, we submit that section 44(1)*(a)*(ii) of the Constitution is applicable with regard to the power of the National Assembly to pass legislation on ''any matter''.

7.6 It is therefore the opinion of the State Law Advisers and the National Treasury that the Bill must be dealt with in accordance with the legislative procedure outlined in section 75 of the Constitution as it contains no provisions to which the procedure set out in section 74 or 76 of the Constitution applies.

7.7 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 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.

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