REPUBLIC OF SOUTH AFRICA

EXPLANATORY MEMORANDUM

ON THE

EXCHANGE CONTROL AMNESTY AND AMENDMENT OF TAXATION LAWS BILL, 2003

[W.P.1 – ‘03]

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EXPLANATION OF THE EXCHANGE CONTROL AMNESTY: CHAPTER I

1. INTRODUCTION

Chapter I of the Bill gives effect to the Exchange Control amnesty proposed in the 2003 Budget Review. Chapter I allows South African residents to disclose their foreign assets accumulated or transferred in contravention of Exchange Control without being exposed to any civil or criminal liability. In order to ensure that this Exchange Control amnesty has maximum effect, Chapter I also contains accompanying tax measures that exonerate South African residents for failing to disclose certain amounts (from both foreign and domestic sources) that should have been taxed if that failure ultimately relates to foreign assets.

2. RATIONALE OF THE EXCHANGE CONTROL AMNESTY

Many South African individuals have a long history of shifting assets offshore in contravention of Exchange Control. These illegal shifts commenced well before the 1980's, having occurred in a variety of ways. The revenue from these illegal foreign assets typically goes unreported for income tax purposes. These foreign assets may even stem from unreported domestically derived amounts.

Government has rightly taken the position that Exchange Control and related tax violations should not be tolerated. However, in recent years, Government has become increasingly aware that many individuals with illegal foreign assets wish to repatriate or regularise their assets but have hesitated to do so out of fear of prosecution. This desire stems from a variety of economic as well as legislative factors.

From an economic point of view, many individuals with illegal offshore assets have found that the world of foreign investments is not rendering the relatively high returns as previously experienced. Current weak economic conditions on the world scene have generally resulted in offshore losses. This weak economic picture is to be compared with local economic growth and investment opportunities. The South African economy continues to grow at a respectable rate despite the current international economic downturn. Moreover, local interest yields are more attractive than those found in developed countries at a time when the local currency is appreciating *vis-à-vis* those currencies.

Due to the introduction of new legislation, the risk of holding undisclosed foreign assets has grown dramatically in recent years. The holding of undisclosed foreign assets is now an income tax violation in addition to an Exchange Control violation. In 1997, individuals became subject to tax on investment income from their foreign assets. In 2001, South Africa's worldwide tax system became fully operational, meaning that individuals

became fully subject to tax on a wider range of their foreign income (except for limited cases such as salaries from long-term services rendered outside South Africa). This system of worldwide taxation was enhanced in 2002 when Government introduced a deemed income provision for the failure to report revenue from foreign assets. Moreover, tax is not the only legislative change. The risk of criminal prosecution for the holding of illegal foreign assets has increased with the introduction of the Financial Intelligence Centre Act, 2001.

The international legislative environment is also a riskier place for illegal foreign assets. Government has greatly expanded its tax treaty network since 1994, thereby facilitating greater international co-operation for South African enforcement. The world community has simultaneously grown increasingly impatient with tax haven countries with bank secrecy and other laws designed to serve as a tax refuge for illegal foreign assets. This impatience with bank secrecy has recently accelerated with the increased understanding that bank secrecy can encourage terrorism and other illegal activities (such as money laundering).

Mindful of the above, Government announced an Exchange Control amnesty. This amnesty is accompanied by supporting tax measures in order to ensure that fears of prosecution from related tax violations do not indirectly undermine the objectives of the Exchange Control amnesty. The objectives of the Exchange Control Amnesty Bill are—

(a) to enable violators of Exchange Control and certain tax acts to regularise their affairs in respect of foreign assets derived from these violations;

(b) to ensure maximum disclosure of foreign assets and to facilitate repatriation thereof to the Republic; and

(c) to extend the tax base by disclosing previously unreported foreign assets.

3. JOINT AMNESTY UNIT

Parties interested in applying for amnesty must do so with the newly established amnesty unit (Clause 22(1)). The amnesty process will be administered by a Chairperson appointed by the Minister (Clauses 2 and 23(1)*(a)*) with support from employees drawn from the South African Reserve Bank ("SARB") and from the South African Revenue Service ("SARS") (Clause 23(1)(*b*) and (*c*)).

The amnesty unit can only grant or refuse approval of amnesty applications within the authority provided under this Chapter. Any action taken by the amnesty unit outside this authority is void (Clause 24(5)).

4. ELIGIBLE PERSONS (CLAUSE 3)

a) Natural Persons and Entities

The amnesty applies to natural persons, close corporations, trusts and deceased estates that hold foreign assets as at 28 February 2003 (Clause 3(1)(*a*) and (*b*)). The amnesty does not apply to companies (either private or public) with foreign assets because companies operate under a wholly separate discretionary regime for purposes of Exchange Control. Unlike these other persons, companies can invest in sizeable business projects offshore upon receipt of Exchange Control approval. These companies must also annually repatriate foreign earnings unless these companies can obtain further Exchange Control approval to retain excess foreign earnings offshore. In order to obtain this further Exchange Control approval, a company with foreign assets must generally demonstrate that this offshore retention is necessary to maintain or expand current foreign operations within the same line of business.

b) South African *versus* Foreign Residents

The amnesty applies only to persons that qualify as South African residents on 28 February 2003. For purposes of this Bill, two definitions of "resident" are required – one for Exchange Control and one for tax – because this Bill contains both Exchange Control and tax aspects (definition of "resident" in Clause 1). For purposes of Exchange Control matters, a resident is a person who has taken up residence or is domiciled in South Africa under the authority of the Exchange Control Regulations, regardless of whether that person has a South African or foreign nationality. For purposes of tax matters, a resident is defined under section 1 of the Income Tax Act (i.e., is "ordinarily resident" or satisfies the "physical presence" test).

Foreign persons have been excluded from the amnesty since most foreign persons are simply not subject to Exchange Control or South African tax on their foreign assets. The only class of foreign persons that may seriously be interested in an Exchange Control amnesty are those foreign persons who have left the country while still qualifying as residents (i.e., persons who left the country without applying for emigration facilities under the Exchange Control Regulations). These persons, however, would still qualify as a resident for purposes of this amnesty.

Example. Facts. Individual, age 33, lived in South Africa until age 30. Individual left South Africa for the United Kingdom in 2000 in order to pursue a U.K. job opportunity which Individual still holds. Individual plans to return to South Africa within a year or two. Individual never applied for emigration facilities under the Exchange Control Regulations.

Result. Individual qualities as a resident for purposes of the Exchange Control and tax amnesties. Individual never departed the country for Exchange Control purposes and Individual remains a resident under the Income Tax Act (i.e., is ordinarily resident).

c) Applicants

The amnesty is designed for two sets of parties (defined in the Bill as "applicants") – those seeking relief for Exchange Control violations and those seeking relief for tax violations relating to foreign assets. An applicant can:

(i) apply for Exchange Control relief if that person holds direct beneficial ownership of one or more foreign assets on 28 February 2003,[1] the value of which has been wholly or partly derived from assets held in contravention of Exchange Control (Clause 3(1)(*a*));

(ii) apply for tax relief if that person holds direct beneficial ownership of one or more foreign assets on 28 February 2003, the value of which has been wholly or partly derived from amounts required to be declared in terms of the Income Tax Act[2] and in terms of the Estate Duty Act (Clause 3(1)(*b*)).

For purposes of the Bill, the term "foreign assets" (as defined in Clause 1) means any funds held in foreign currency (i.e., all undisclosed foreign currency notes whether held abroad or domestically) as well as any assets transferred from or accumulated outside South Africa. Eligible persons may apply for Exchange Control relief, tax relief or both (see Clause 9). Neither form of relief is tied to the other.

Example (1). Facts. On 28 February 2003, Individual[3] owns all the shares of Foreign Company. Foreign Company owns £1 million of foreign assets obtained in contravention of Exchange Control and £2 million of foreign assets obtained without any contravention.

Result. Individual can apply for amnesty with respect to the Foreign Company shares because the value of those shares is partly derived from Exchange Control violations.

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[1] The amnesty applies only to persons holding foreign assets as at 28 February 2003 because these persons have holdings that provide some benefit to the country as consideration for the amnesty. Persons with these foreign holdings can repatriate their assets to enhance the South African currency or can provide a long-term expansion of the tax base.

[2] The amnesty covers Donations Tax and Secondary Tax on Companies but not PAYE deducted by an employer and withholding tax on royalties. The latter withholding-type taxes fall outside the scope of the amnesty because these violations represent a breach of fiduciary duty to other private parties, not just a violation that worked solely to the detriment of Government.

[3] Unless specifically stated otherwise, each party mentioned in the examples to this explanatory memorandum is a domestic resident.

Example (2). Facts. On 28 February 2003, Individual owns all the shares of Foreign Company 1, which in turn owns all the shares of Foreign Company 2. Foreign Company 2 generates £100 000. £15 000 should have been reported as taxable income for Individual in 2001 (as an inclusion under section 9D of the Income Tax Act).

Result. Individual is eligible for amnesty because the value of the Foreign Company 1 shares are partly derived from a violation of the Income Tax Act.

Yet, "foreign assets" do not generally include any foreign bearer instruments (as defined in Clause 1) if the identity of the instrument's beneficial owner cannot be determined by reference to the instrument itself or by the party issuing that instrument. This exclusion from "foreign assets" is designed to eliminate anonymous holdings that could otherwise represent funds obtained from criminal activity (such as drug smuggling and related money laundering). This exclusion eliminates instruments, such as numbered bank accounts and foreign bearer bonds. However, an applicant may obtain amnesty for foreign bearer instruments if the applicant can prove that the financial instrument is derived from the applicant's own funds held for at least 18 months prior to acquiring the foreign bearer instrument.

Example (3). Facts. Individual opened a bank account in Italy on 1 January 1998 with deposits in contravention of Exchange Control. On 1 January 2002, the total funds accumulated in this account were €10 000. On 2 January 2002, individual closed the account and purchased foreign bearer bonds equal to the value of €10 000. These foreign bearer bonds remained in the possession of Individual as at 28 February 2003.

Result. Individual may apply for exchange control relief. Individual can prove that the foreign bearer bonds stem from a bank account held in Individual's name for a period of 4 years (which exceeds the required 18 month period).

d) Facilitators

Advisors and facilitators who assisted illegal accumulations or transfers offshore have no foreign assets to bring to the table as consideration for amnesty relief.[4] Moreover, these parties remain uncompromised by

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[4] The only item of value that can be obtained from these advisors and facilitators is disclosure of the means by which funds were transferred or accumulated offshore. Nonetheless, full disclosure with verification would be problematic because this form of disclosure would lead to accusations of a "witch hunt," and disclosure which does not implicate any person or provide any substantiation would be meaningless because this level of disclosure cannot be verified. More importantly, the amnesty is not intended to act as a confession about past crimes. The key to the amnesty relates solely to the disclosure of foreign assets.

the amnesty. Applicants seeking amnesty relief cannot be forced to reveal names of the advisors or facilitators who assisted, and names voluntarily revealed to the amnesty unit cannot be passed on to SARB or SARS. More importantly, SARB and SARS will not have any power to force the disclosure of names from the applicant (either during the amnesty process or upon subsequent review) (Clause 26). Hence, advisors and facilitators generally do not need amnesty relief since these parties cannot be exposed to the prosecuting authorities as a result of the amnesty. Government is also reluctant to grant a wholesale amnesty to institutional parties engaged in criminal activities since the very nature of their professional status requires a higher standard of conduct.

That said, the amnesty is available to a small class of facilitators whose anonymity could potentially be compromised by the amnesty despite the above protections (clause 3(1)(c)). As will be discussed, facilitators seeking amnesty must apply with an applicant seeking amnesty (i.e., a party holding foreign assets as at 28 February 2003) (Clause 8(a)). In order to fall within this small class of facilitators, the party involved must additionally qualify as a resident and either be:

i) a natural person, or
ii) a related party (entity) to the applicant.

This party must have assisted an applicant (other than solely in an advisory capacity) on or before 28 February 2003 by accumulating or transferring assets outside South Africa in violation of Exchange Control or tax (as long as those foreign assets are no longer beneficially held by that assisting party).[5] The assistance envisioned by this rule is of a complacentory a nature which is more likely to be traceable than pure outside advice. This assistance often involves physical assistance to transfer funds offshore (putting money into travel suitcases) or deliberately providing false records (through under- or over-invoicing). Parties engaged in both assistance of this type and advisory support will be eligible for amnesty since both forms of support become indistinguishable.

As far as entities are concerned, the amnesty for facilitators is restricted to related parties. A "related party" (as defined in Clause 1) qualifies as a facilitator if that party is:

i) A company that is wholly owned by an applicant (and/or that applicant's relatives if the applicant is a natural person); or
ii) A trust or deceased estate of which the applicant is a beneficiary.

[5] Parties with foreign assets as at 28 February 2003 have been excluded from the definition of eligible facilitators as a technical matter because persons with these assets may make their own applications for amnesty.

Natural persons need not be related because a close traceable relationship with the applicant can come in many forms. For instance, a natural person could be an employee of a close corporation seeking amnesty, a trustee of a trust seeking amnesty, or an executor of a deceased estate seeking amnesty.

Example. Facts. On 28 February 2003, Individual owns all the shares of Domestic Company. Individual also owns £700 000 in a foreign bank account. These funds stemmed from amounts illegally shifted offshore by Domestic Company in contravention of Exchange Controls (as well as tax) through under-invoicing. Individual never reported the taxable foreign growth of these funds.

Result. Individual can apply for amnesty relief as an applicant because Individual owns foreign assets as at 28 February 2003 that stem from Exchange Control (and tax) violations. Domestic Company cannot apply as an applicant because Domestic Company does not hold any illegal foreign assets as at 28 February 2003, but Domestic Company may apply jointly as a facilitator due to its assistance in illegally shifting funds offshore.

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As stated above, this small class of facilitators was included within the amnesty because subsequent review of an applicant's affairs could easily lead to the identification of these facilitators without SARB or SARS forcing the applicant to disclose names. For instance, SARB or SARS could easily begin checking the affairs of a wholly owned export company of a natural person receiving amnesty on the suspicion that the applicant artificially shifted funds offshore through the company. SARB or SARS could also begin questioning the employees of a close corporation receiving amnesty relief or a trustee of a comparable trust. Entity facilitators were kept extremely narrow because an entity (as opposed to a natural person such as an employee) must be truly linked to the applicant in economic ownership terms to create an obvious nexus for an investigation. More importantly, amnesty relief should only be extended to an entity if the entity is a mere legal extension of the applicant's economic ownership affairs. Use of an entity in this manner only worked to the detriment of Government in terms of fiduciary duties. Similar uses of lesser-owned entities may work to the detriment of other parties (e.g. other shareholders not related to the applicant).

5. SPECIAL RULES FOR FOREIGN DISCRETIONARY TRUSTS (CLAUSE 4)

Special rules are required for foreign discretionary trusts because of the unique ownership of foreign assets involved. In a foreign discretionary trust scenario, a South African person illegally transfers assets without

consideration to a foreign discretionary trust with all beneficiaries having an interest in the foreign discretionary trust assets only at the discretion of the trustees. These discretionary beneficiaries can potentially include South African residents who may wish to repatriate assets once the assets are vested in them, but are unwilling to do so because the foreign discretionary trust acquired or accumulated those foreign assets in violation of Exchange Control.

Without special rules, foreign assets in foreign discretionary trusts of this kind would not fall within the amnesty because no South African technically holds any foreign asset as at 28 February 2003. Failure to cover this situation would seriously hamper the potential impact of the amnesty because many parties acting in violation of Exchange Control shifted assets offshore through foreign trusts of this kind.

In order for a foreign asset held in a foreign discretionary trust to be eligible for amnesty, the foreign asset must satisfy a series of requirements, and the donor (or the deceased estate of the donor) must make an election with respect to that foreign asset (Clause 4(1)). Lastly, the founding document for the trust must be submitted with the amnesty application (Clause 4(4)).

In terms of the foreign asset requirements, the foreign discretionary trust must hold that asset as at 28 February 2003 (Clause 4(1)). Secondly, the foreign discretionary trust must have acquired the asset by way of donation (either during life or through a deceased estate) from the donor making the election (Clause 4(2)(a)). Thirdly, the foreign asset held in the foreign discretionary trust must be wholly or partly derived from assets accumulated or transferred in violation of Exchange Control or the Income Tax Act (Clause 4(2)(b)). Fourthly, the asset must not have vested in any beneficiary (Clause 4(2)(c)).[6]

If the electing party makes the election, that party is deemed to have owned that asset for purposes of the amnesty and for purposes of the Income Tax Act (Clause 4(3)(a)). For purposes of the amnesty, the electing party is deemed to have held the foreign asset from the date the foreign discretionary trust acquired the asset, thereby providing full amnesty for that asset since the date of the foreign discretionary trust's illegal acquisition (Clause 4(3)(a)(i)). For purposes of the Income Tax Act, the asset is deemed directly held by the electing party as from the first day of the 2002/2003 tax year ending on or before February 2003 (Clause 4(3)(a)(ii)). This deemed direct ownership lasts until the foreign discretionary trust disposes of the foreign asset. This deemed ownership means that the electing party will be taxable directly on the income generated from the foreign asset as if that the electing party held that asset directly as well as upon the subsequent disposal of that asset (at fair market value).[7]

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6 If a foreign asset in a trust does vest to a South African beneficiary, the beneficiary could instead apply for amnesty relief directly.

7 This deemed direct ownership also eliminates the need for the trust attribution rules of sections 7(5), 7(8) and 25B of the Income Tax Act as well as paragraphs 70, 72 and 80 of the Eighth Schedule (Clause 4(3)(b)).

Example (1). Facts. On 28 February 2003, Foreign Discretionary Trust holds £1 million of foreign assets derived from funds donated in 1998 by Individual in violation of Exchange Control. The trustees are empowered to award the entire trust proceeds to Individual, Individual's family (all of whom are also South African residents), or a charity.

Result. Because no resident beneficiary technically holds any rights to the foreign trusts assets, no amnesty relief can be obtained under the general rules. However, due to the special discretionary foreign trust election, Individual (the donor) can elect to be treated as if Individual directly held the illegal foreign assets. This election means that Individual can qualify for amnesty relief with respect to those foreign assets for violations dating back to 1998, and that Individual will be directly taxed on the income or gain from those assets from 1 March 2002 until Discretionary Foreign Trust disposes of those assets. For instance, if foreign trust assets vest in a family member beneficiary in June 2004, Individual will be taxable on the income generated from those assets until that date and will be subject to tax on the vesting of those assets at fair market value.

Example (2). Facts. Individual, who is the founder of Foreign Discretionary Trust, loaned funds in 1998 to Foreign Discretionary Trust in violation of Exchange Control. The loan initially amounted to £2 million. Foreign Discretionary Trust also invested the return received, thereby holding £2 million of foreign assets as at 28 February 2003 after market fluctuations. The trustees are empowered to award any of the trust's capital or income to Individual, Individual's family (some of whom are South African residents) and a charity of the trustee's choosing.

Result. The election for discretionary foreign trusts does not apply because the assets were not received by way of donation. However, Individual can apply for amnesty with respect to the loan because the loan qualifies as a foreign asset held by Individual as at 28 February 2003.

6. MINIMUM ENTRY REQUIREMENTS (CLAUSES 5, 6(4) AND 10)

Amnesty relief from Exchange Control and tax violations is predicated on a few minimum requirements. Failure to satisfy these minimum requirements will prevent both forms of amnesty *per se*. These minimum requirements are as follows:

a) Applicants and facilitators seeking amnesty must submit an application by way of sworn affidavit or solemn declaration (Clause 5).

b) Applicants and facilitators seeking amnesty must submit their applications to the amnesty unit within the 6-month window period for the amnesty (i.e., from 1 June 2003 and ending on 30 November 2003) (Clause 5).

c) Applicants seeking amnesty relief must confirm that no foreign assets (inside outside the potential scope of the amnesty as well as any foreign bearer instruments) held by that applicant have been partly or wholly derived from an unlawful activity (Clauses 6(4) and 10(1)(*c*)). Facilitators seeking amnesty relief must similarly confirm that they had no reason to believe any foreign assets accumulated or transferred from South Africa on behalf of an applicant were derived from an unlawful activity (Clause 8(*b*)). For purposes of this test, the definition of "unlawful activity" means an "unlawful activity" as defined under the Prevention of Organised Crime Act (Act No. 121 of 1998) other than—

   i) any violation of Exchange Control, Income Tax (including Donations Tax and the Secondary Tax on Companies), or Estate Duty; or
   ii) any activity constituting a misrepresentation or non-disclosure necessary to facilitate that violation.

   This requirement ensures that parties engaged in more serious forms of criminal activity, such as drugs and related money laundering, cannot participate in the amnesty. Illegal misrepresentations or non-disclosures were excluded from disqualifying crimes because these crimes typically act as a prerequisite for the violations targeted by the amnesty. Hence, a misstatement of corporate records through under-invoicing or over-invoicing will not prevent a party from submitting an amnesty application, even if that misrepresentation qualifies as an offence under company law relating to a breach of fiduciary obligations. However, amnesty relief cannot be construed to exonerate the company law violation itself.

d) Lastly, the amnesty does not apply if SARB or SARS delivers a notice of audit, investigation or other enforcement action before submission of an application (Clause 10(1)(b)). This disqualifying notice must involve a possible Exchange Control violation, possible undeclared foreign revenue, or possible undeclared domestic amounts accumulated or converted into foreign assets. The purpose of an amnesty is to provide relief to the extent parties unilaterally come forward and disclose their illegal activity, thereby disclosing previously unsuspected foreign assets and income and saving the enforcement authorities the administrative cost of investigation. Parties under audit, investigation or enforcement action do not provide this *quid pro quo* because the administrative cost for the disclosure has already been incurred. Exclusion of these parties is consistent with international best practice involving amnesties.

   This exclusion applies if SARB or SARS delivers notice of a possible foreign asset violation to the applicant or to any facilitator who previously acted on the applicant's behalf (or their representatives). In technical terms, delivery of this notice means: (a) handing notice to the relevant party, (b) sending notice to the relevant party by registered post at the last known address, (c) faxing notice to the relevant party

(followed by a formal handing over of notice or sending by registered post), and (d) electronic notice to the relevant party (followed by a formal handing over of notice or sending by registered post) (Clause 1). Notice of this kind can only be ignored if the notice is withdrawn before the 30 November 2003 amnesty cut-off date.

7. EXCHANGE CONTROL AMNESTY

a) Basic Principle

The Exchange Control aspects of the amnesty apply "to the extent" foreign assets are disclosed on an asset-by-asset basis. Stated differently, the amnesty applies to disclosed foreign assets while non-disclosed foreign assets remain subject to potential civil and criminal Exchange Control prosecution. Post-28 February 2003 exchange control violations will also not cause withdrawal of the amnesty (but will remain subject to the full weight of Exchange Control prosecution on going forward).

This principle provides applicants with certainty of amnesty protection for their disclosed assets (i.e., applicants know that the amnesty will apply to disclosed foreign assets even if other illegal foreign assets are subsequently uncovered). This certainty is intended to maximise the number of applicants coming forward and greatly reduces the administrative process of verification. From an administration point of view, the amnesty unit need only focus on the foreign assets disclosed because the applicant still remains exposed with respect to undisclosed foreign assets.

b) Information Required (Clause 6(1))

An applicant's disclosure of a foreign asset requires a statement of that asset's market value as at 28 February 2003 (with the market value determined in the foreign currency of the country in which that asset is situated) as well as a description of that asset's identifying characteristics and location. The market value disclosed of a foreign asset is central to all aspects of the Exchange Control Amnesty. The market value disclosed determines the level of the amnesty protection, the amnesty levy, and the initial tax cost of the asset. The market value of a disclosed foreign asset must generally be supported by—

(a) a valuation certificate by a valuator of the country where that foreign asset is located;
(b) a valuation by a sphere of government of the country where that foreign asset is located; or
(c) any other proof of value as the amnesty unit may on good cause shown allow.

In the case of financial instruments (e.g. bank accounts, brokerage accountsand savings accounts) a different set of supporting information is required. Disclosed foreign financial instruments must generally come with an original or certified copy of a statement of account. This statement must indicate the numerical balance or market value as at 28 February 2003. If a certified statement of account is not available, any other proof of value for that financial instrument can be provided as the amnesty unit may on good cause shown allow.

c) Amnesty Levy (Clauses 11 and 12)

i) Levy Base and Rates

Disclosure of foreign assets for Exchange Control relief is conditioned on an amnesty levy. This levy generally applies at a 5 per cent rate for assets repatriated to South Africa and at a 10 per cent rate for assets held offshore (Clause 12(1)).

The amnesty levy has the same base (known as the leviable amount) regardless of whether the levy rate applies at 5 or 10 per cent. The leviable amount is based on with the total market value of foreign assets disclosed as at 28 February 2003 (Clauses 6(1) and 11(1)). This 28 February 2003 fixed date simplifies administration and compliance. Both Government and the applicant bear the risk of any value changes of the foreign assets occurring after that date. The 5 per cent levy applies to the extent this 28 February 2003 amount is repatriated (except if used to pay the 10 per cent levy). The 10 per cent levy applies after deducting the amount subject to the 5 per cent levy (Clause 12(1)).

Example (1). Facts. Trust discloses £10 million of foreign assets held in violation of Exchange Control as at 28 February 2003. Trust repatriates £6 million to South Africa on 20 September 2003 and holds the remaining £4 million offshore.

Result. The 5 per cent levy applies to the £6 million repatriated. The 10 per cent levy applies to the £4 million remaining offshore.

Example (2). Facts. Trust discloses £3 million of foreign assets held in violation of Exchange Control as at 28 February 2003. This amount increases to £4 million by the time Trust receives amnesty relief. Trust leaves the full amount offshore (less the amount needed to pay the levy).

Result. The 10 per cent amnesty levy applies to the initial £3 million. It makes no difference that the value changed after 28 February 2003. No additional levy is payable in respect of the amount of the 10 per cent levy which is repatriated because the full leviable amount is subject to the 10 per cent levy.

Example (3). Facts. The facts are the same as **Example (2)**, except that Individual repatriates all £4 million.

Result. The 5 per cent amnesty levy applies to the initial £3 million. It makes no difference that the value changed after 28 February 2003.

Example (4). Facts. Trust discloses £8 million of foreign assets held in violation of Exchange Control as at 28 February 2003. The amount increases to £9 million after receiving amnesty approval. Trust repatriates £5 million to South Africa on 20 September 2003 and holds the remaining £4 million offshore.

Result. The 5 per cent levy applies to the £5 million repatriated. The 10 per cent levy applies to £3 million of the £4 million remaining (£8 million amount as at 28 February 2003 less the £5 million repatriated). Trust needs to repatriate a further £300 000 to pay the 10 per cent levy.

An applicant may reduce the leviable amount in two ways. Firstly, an applicant may reduce the leviable amount to the extent the applicant proves the market value of the foreign asset disclosed does not stem from any Exchange Control violation. Secondly, in the case of an applicant who is a natural person, the leviable amount is reduced to the extent that person's permissible foreign capital allowance has not otherwise been availed of (currently R750 000 per person). The permissible foreign capital allowance must be converted into the relevant foreign currency at the SARB published exchange rate on 28 February 2003.

Example (5). Facts. Individual discloses £2 million of foreign assets held in violation of Exchange Control as at 28 February 2003. Individual has never availed of the permissible foreign capital allowance. Individual leaves all £2 million offshore (less the amount repatriated to pay the 10 per cent levy).

Result. The 10 per cent levy applies to the £2 million of foreign assets less the R750 000 permissible foreign investment allowance, converted into pounds as at 28 February 2003.

Example (6). Facts. Individual discloses a £4 million foreign bank account held in violation of Exchange Control as at 28 February 2003. Of this amount, Individual can prove that £500 000 stems from U.K. services and another £20 000 stems from interest thereon. This £520 000 amount was not held in violation of Exchange Control because the U.K. services were rendered after 1997. Individual has availed of R350 000 of the R750 000 permissible foreign capital allowance. Individual leaves all £4 million offshore (less the amount needed to pay the 10 per cent levy).

Result. The 10 per cent levy applies to £3 480 000 (£4 million less the £520 000 legal amount) of the foreign assets less the R400 000 unused, permissible foreign capital allowance. The R400 000 is converted into pounds as at 28 February 2003.

The leviable amount is based on the gross market value of foreign assets without any reduction for liability or expenses. Similarly, the leviable amount is calculated before taking into account any transactional fees or commissions (Clause 12(3)).

Example (7). Facts. Trust owns foreign real estate with a £5 million value that is subject to £2 million foreign debt borrowed in violation of Exchange Control. The foreign real estate was financed solely from the illegal foreign borrowing. Trust does not repatriate any foreign assets.

Result. The leviable base for the amnesty levy is £5 million without offset for the illegal foreign debt.

Example (8). Facts. Trust owns foreign real estate with a £5 million value and subject to £2 million foreign debt. £1 million of the foreign real estate stems from foreign assets transferred in violation of Exchange Control, £2 million from assets shifted or accumulated offshore within the confines of Exchange Control and £2 million of foreign debt. Trust does not repatriate any foreign assets, except to pay for the amnesty levy.

Result. The leviable base for the amnesty levy is £1 million because only this portion stems from assets transferred or accumulated in violation of Exchange Control. The remaining £4 million portion of the asset does not form part of the leviable base because these amounts do not stem from illegal amounts (including the utilisation of the legal foreign borrowing).

ii) Method of Payment (Clause 13)

Applicants must pay the amnesty levy to an authorised dealer (as defined under the Exchange Control regulations) (Clause 1), and payment must come from foreign funds. Payment of the 5 per cent levy for repatriated foreign assets must come from the foreign funds repatriated (Clause 13(2)(a)). Payment of the 10 per cent levy for foreign funds remaining offshore must generally come from any foreign funds not otherwise repatriated (regardless of whether those funds are from the same currency or location) (Clause 13(2)(b)(i)). The only instance when the 10 per cent levy need not come from foreign funds offshore is when foreign funds are no longer remaining; in which case, payment is made from foreign funds repatriated (Clause 13(2)(*b*)(ii))).[8]

[8] These foreign payment requirements, however, cannot be construed so as to require an authorised dealer to accept funds in a foreign currency that the authorised dealer would

Example. Facts. Trust discloses £10 million of foreign assets held in violation of Exchange Control as at 28 February 2003. These assets decline in value of £9 million after that date. Trust repatriates all £9 million to South Africa on 10 October 2003.

Result. The 5 per cent levy applies to the £9 million repatriated (with payment of the 5 per cent levy coming from the amount repatriated). The 10 per cent levy applies to £1 million (i.e., the initial £10 million as at 28 February less the £9 million repatriated). While payment of the 10 per cent levy normally comes from foreign assets remaining offshore, payment of the 10 per cent levy in this instance can come from the repatriated amount because no foreign assets remain.

For purposes of the payment rules just described, foreign funds do not include foreign currency within the Common Monetary Area (i.e., Namibia, Lesotho, and Swaziland) (Clause 13(5)). Funds in this area do not add anything in Exchange Control terms because the Exchange Control regulations already allow free use of funds within this area.

The foreign funds used to pay the levy must be converted into Rands. Applicants must convert the 5 per cent levy into Rands at the ruling spot exchange rate on the date of repatriation (Clause 13(1)(a)). Applicants must convert the 10 per cent levy into Rands at the ruling spot exchange rate on the date of payment (Clause 13(1)(b)). This conversion rate will simplify matters for authorised dealers processing payments.

After receipt of the 5 or 10 per cent levy, authorised dealers must transfer all amounts received into an account held at the Corporation for Public Deposits (Clause 13(3)). The Chairperson must prescribe the time and manner in which the authorised dealer must transfer these amounts into this account. The Corporation for Public Deposits will then transfer these amounts to the National Revenue Fund.

iii) Due Dates (Clause 12 and 13)

The due dates for the levy are generally 3 months after the amnesty unit grants approval. The repatriation required for the 5 and 10 per cent levy rates must occur within this 3-month period, and the actual date of payment must occur within this 3-month period (Clause 12(1) and 13(1)). The amnesty unit may extend this 3-month period for another 3 months for one of two reasons. Firstly, the applicant can seek an extension if the applicant cannot convert the foreign amounts required into Rands within the initial 3-month period (Clauses 12(2)(a) and 13(4)(a)). This lack of convertibility typically occurs when the applicant has foreign assets that cannot be readily sold or used as loan

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otherwise reject. The obligation to convert foreign currency into Rands is the obligation of the applicant, not the authorised dealer.

collateral. Secondly, the applicant can seek an extension if the applicant will repatriate or pay the levy by way of dividends from a foreign company in order to enjoy the proposed benefit of the foreign dividend exemption for holders of a meaningful interest in a foreign company, as announced in the 2003 Budget Review (Clauses 12(2)(b) and 13(4)(b)).

d) Tax Cost Value (Clause 28)

The Exchange Control Amnesty Bill contains a rule to prevent under-valuations of property that could otherwise undermine the amnesty levy. This rule is necessary because issues of valuation are often difficult to quantify even under the best of circumstances. Pursuant to this backstop, a disclosed foreign asset will be deemed to have a tax cost that does not exceed that asset's disclosed market value. This rule applies for purposes of determining the tax cost of trading stock (Clause 28(1)), capital assets (Clause 28(2)), and depreciation calculations (Clause 28(3)). As a result of this rule, applicants undervaluing a disclosed foreign asset (to reduce the amnesty levy) will be forced to incur additional tax upon eventual sale of that asset. Stated differently, under-valuations will only result in deferral versus outright exemption.

Example (1). Facts. Individual owns foreign real estate for investment, which was initially acquired in contravention of Exchange Control for £18 million in July 1999. The foreign real estate has an actual value of £25 million on 28 February 2003, but Individual provides a sworn valuation from a valuator that the real estate is worth only £15 million. This £15 million value is accepted as true by the unit, requiring an amnesty levy of only £1,5 million (i.e., 10 per cent of £15 million) instead of a £2,5 million levy. Individual sells the real estate for £30 million on 15 June 2004. Individual fully utilised all of Individual's permissible foreign capital allowance before the amnesty.

Result. Individual is deemed to automatically have a base cost in the foreign real estate that is limited to £15 million (because this disclosed amount is less than the actual base cost). Individual accordingly reports £15 million of capital gain on the sale (taxable at an effective 10 per cent rate). If the actual base cost had been fully disclosed all along, the time apportionment base cost method would have been £24 million.

Example (2). Facts. The facts are the same as example (1), except that Individual has never utilised any of Individual's permissible foreign capital allowances (and the amnesty levy is reduced accordingly).

Result. The result is the same as Example (1). The use of the permissible foreign capital allowance to reduce the amnesty levy has no impact on tax cost.

Example (3). Facts. Close Corporation owns depreciable foreign assets, which were initially acquired in contravention of Exchange Control for £12 million in 1998. The foreign assets are depreciable over a 10-year period under the straight-line method. Close Corporation provides a sworn statement from a valuator that the foreign assets are worth only £4,5 million and pays a 10 per cent levy on that amount. The foreign assets have a remaining write-off period of 5-years in terms of section 11*(e)*(ix) of the Income Tax Act.

Result. Close Corporation is deemed to automatically have a tax cost in the foreign assets that is limited to £4,5 million (because this disclosed amount is less than the actual tax cost of £26 million). A maximum allowance of £4,5 million may be claimed over the remaining 5-year period (i.e., at £900 000 per year).

e) Exchange Control Relief (Clause 14)

Successful applicants are deemed not to have contravened the Exchange Control rules to the extent of the 28 February 2003 market value of foreign assets disclosed (Clause 14(1)(a)). As stated above, undisclosed foreign assets receive no protection nor do these undisclosed foreign assets undermine the protection afforded for disclosed assets. The same principle follows in terms of foreign assets with partially disclosed market values. The disclosed value portion is covered by the amnesty while the undisclosed value portion is not. This aspect of the amnesty further ensures that applicants do not understate value in order to artificially reduce the amnesty levy.

Example (1). Facts. Individual submits bank statements to the amnesty unit indicating £8 million of undisclosed foreign assets in Foreign Banks A and B. Individual fails to disclose an additional £2 million of illegal assets held in Foreign Bank C.

Result. The amnesty applies to the extent of the £8 million in Foreign Banks A and B (even if 10 per cent levy is reduced for any unused R750 000 foreign permissible capital allowance). Individual remains fully exposed to penalty under Exchange Control for the £2 million undisclosed amount in Bank C.

Example (2). Facts. Individual owns foreign real estate as an investment. The foreign real estate has an actual value of £25 million on 28 February 2003, but Individual provides a sworn valuation from a valuator that the real estate is worth only £15 million. This statement is accepted as true by the amnesty unit. Individual sells the real estate for £30 million on 15 June 2004. SARB subsequently re-examines the issue determining that the real value was indeed £25 million on 28 February 2003.

Result. Amnesty relief fully applies to the £15 million disclosed amount. Individual remains fully exposed to penalty under Exchange Control for the £10 million non-disclosed amount.

In addition, amnesty relief fully applies to all undisclosed foreign assets that are no longer held by an applicant as at 28 February 2003 (except if that foreign asset is no longer held because that applicant donated that asset to another)[9] (Clause 14(1)(*b*)). This amnesty coverage is intended to protect applicants from being exposed to investigation from SARB with respect to prior year violations that are no longer relevant. This aspect of the amnesty also spares applicants from maintaining voluminous records of prior year violations.

Example (3). Facts. Individual submits bank statements to the amnesty unit indicating £8 million of undisclosed foreign assets in Foreign Banks A and B as at 28 February 2003. In 1998, Individual also had undisclosed foreign assets of £1 million in Foreign Bank C. The account in foreign Bank C was closed on 10 July 2002 and transferred to foreign Bank D.

Result. The amnesty fully applies to foreign assets that no longer exist. In order for Individual to remain liable for Exchange Control violations, the Bank C amount must exist in undisclosed form on 28 February 2003 (in the undisclosed foreign Bank D).

8. ACCOMPANYING TAX MEASURES

a) Accompanying Tax Measure #1: Amnesty for Failure to Disclose Foreign Income

i) Basic Principle

As with the exchange control amnesty, the accompanying tax measures for failure to disclose foreign income will also apply "to the extent" income from underlying foreign assets is disclosed on an asset-by-asset basis. These measures apply to disclosed foreign income on foreign assets while non-disclosed foreign income remains subject to potential income tax liability, interest, and penalties. Post-28 February 2002 income tax violations will also not cause withdrawal of the amnesty but will similarly remain subject to potential tax liability, interest, penalties and criminal prosecution.

As stated above, this principle promotes certainty of amnesty protection for disclosed income. Applicants know that the amnesty will apply to disclosed foreign income on foreign assets even if other foreign income has not been disclosed. Further, this principle reduces

[9] In this latter instance, the applicant may well qualify for amnesty relief as a facilitator when joining another person's amnesty application.

the administrative process of verification because the amnesty unit need only focus on disclosed amounts.

ii) Information Requirement #1: Asset-by-Asset Disclosure (Clause 6(2))

For purposes of obtaining tax relief, disclosure of foreign revenue entails two basic requirements. Firstly and most importantly, the applicant must disclose foreign receipts and accruals that:

- arise during the applicant's last year of assessment ending on or before 28 February 2003, and
- relate to disclosed foreign assets held on 28 February 2003 (Clause 6(2)(*a*)).

Secondly, the applicant must disclose the identifying characteristics of the foreign asset, including its location (Clause 6(2)(*b*)).

Example (1). Facts. Individual owns Foreign Bank Account with a balance of $102 000 as at 28 February 2003. Of this amount, $2 000 was generated as foreign interest from 1 March 2002, and another $40 000 was generated as foreign interest before that date. None of these amounts were ever disclosed on Individual's income tax returns.

Result. Foreign Bank Account potentially falls within the amnesty because $40 000 of the account stems from undisclosed foreign receipts and accruals arising before 1 March 2002 (i.e., the period before Individual's 2002-2003 year of assessment). In order to receive amnesty relief, Individual must disclose the $2 000 arising during the 2002-2003 year of assessment to the Amnesty Unit as well as identifying characteristics of that account.

Example (2). Facts. Close Corporation has a tax year ending on 31 December. Close Corporation owns various foreign shares in a foreign brokerage account with value attributable to foreign receipts and accruals that have not been disclosed for many years.

Result. The key year at issue is the year of assessment from 1 January 2002 until the end of 31 December 2002 (the last year of assessment ending on or before 28 February 2003). In order to receive amnesty relief, Close Corporation must disclose foreign receipts and accruals (e.g., dividends) arising from those shares during that year as well as identifying characteristics of that account.

Deductions and other related tax issues pertaining to the foreign asset need not be disclosed to the amnesty unit because the core violation of concern is the failure to disclose economic gross revenue.

iii) Information Requirements #2: Statement of Foreign Assets and Liabilities (Clause 7)

An applicant applying for tax relief must attach a statement of that applicant's disclosed foreign assets and liabilities for the last day of the assessment year ending on or before 28 February 2002. This statement must reflect disclosed foreign assets at both their historical cost and estimated market value. The standard for estimating market value need not meet the standard for determining value required for Exchange Control relief (see paragraph 7.b) of thismemorandum)).

This statement provides an additional level of verification for determining gross receipts and accruals for the year of assessment ending on or before 28 February 2003. This historic cost and liability information acts as a balance sheet comparison of starting and ending foreign assets for that year (useful for performing a capital reconciliation). The fair market value information assists income determination for future years (see section 78(1A) of the Income Tax Act)

If an applicant fails to properly furnish information required for the statement of foreign assets and liabilities, SARS may estimate the values of all disclosed foreign assets and liabilities for the last day of the assessment year ending on or before 28 February 2002. Failure to provide this information does not prevent the applicant from receiving amnesty relief.

iv) Information Requirement #3: Income Tax Return

The last requirement involves the submission of tax returns. Specifically, the applicant must have furnished to the Commissioner a 2002/2003 tax return or received a letter from the Commissioner granting an extension (Clause 10(2)). In cases where an extension is granted, a 2002/2003 tax return must be submitted by 29 February 2004 or the amnesty approval becomes invalid (Clause 20(1)(a)).

This tax return requirement is independently verified by the amnesty unit. Failure to satisfy this requirement will prevent any amnesty tax relief *per se* because one important objective of the Act is to promote disclosure on an ongoing basis. Submission of the 2002/2003 tax return ensures this ongoing disclosure.

v) Exemption for Failure to Disclose (Clause 15)

Successfully disclosed foreign assets are deemed not to trigger any tax, civil liabilities, interest, or any criminal offence stemming from previously undisclosed foreign sources of income. Full amnesty protection also automatically applies to foreign amounts stemming from undisclosed foreign assets that are no longer held by the applicant as at 28 February 2003 (e.g. closed foreign bank accounts).[10] This latter aspect of the amnesty effectively prevents SARS from re-opening the applicant's foreign asset affairs before 28 February 2002 (all of which are no longer relevant unless associated with continuing foreign assets that remain undisclosed).

In other words, the essential effects of the amnesty are two-fold. Firstly, failure to disclose foreign income earned prior to the tax year ending on or before 28 February 2003 is fully shielded. Secondly, the sole price of this shield is continuing liability for the 2002/2003 tax year. Failure to disclose foreign receipts and accruals involving other foreign assets for the 2002/2003 tax year will remain subject to the full force of the law.

Example (1). Facts. Individual owns a total of 100 IBM shares on 28 February 2003, none of which were ever previously reported for income tax purposes. Of this number, 60 IBM shares were held online. The other 40 IBM shares were purchased and held through a foreign brokerage firm. The IBM shares generated $5 000 of dividends during the 2002/2003 tax year, of which $3 000 stems from the 60 IBM on-line shares and $2 000 stems from the 40 IBM brokerage shares. Individual discloses the $3 000 of dividends from the 60 IBM shares held online but remains silent as to the remaining 40 brokerage shares.

Result. Under the to the extent principle, the amnesty applies on an asset-by-asset basis. The amnesty applies with respect to the 60 IBM on-line shares but not with respect to the 40 IBM brokerage shares.

Example (2). Facts. Individual owns a brokerage account in Guernsey. Individual initially transferred funds equal to £35 000 pounds, which were converted into foreign shares. The value of these shares increased to £100 000 on 28 February 2002. This growth stems from unreported foreign dividends, unreported capital gains from sold foreign shares, and unrealised growth. Individual generates another £8 000 foreign dividends from 1 March 2002 until the end of 28 February 2003.

Result. The amnesty applies to all undisclosed foreign dividends and foreign capital gains arising before 1 March 2002. As a consideration

[10] The only exemption to this rule is for assets no longer held due to donations. Parties seeking relief for donated foreign assets may well qualify for relief as a facilitator.

for this amnesty, Individual must disclose the £8 000 of foreign dividends arising from 1 March 2002 until 28 February 2003.

Example (3). Facts. Individual first accumulates $50 000 offshore in June 1998, all of which is placed in Foreign Bank Account A. This account generates $6 000 of undisclosed interest from that date until the beginning of 2000. In 2000, Individual places the $56 000 of funds into Foreign Brokerage Account that is used to purchase foreign shares. These shares generate $4 000 of dividends in 2001, and these dividends are invested in foreign bonds. From 1 March 2002 until the end of 28 February 2003 the foreign shares generate $2 000 of dividends, and the foreign bonds generate $400 of interest.

Result. The amnesty applies to all undisclosed foreign interest and dividends arising before 1 March 2002. As a consideration for this amnesty, Individual must disclose the $2 000 of foreign dividends and $400 of foreign interest arising from 1 March 2002 until the end of 28 February 2003.

b) Accompanying Tax Measure #2: Amnesty for Failure to Disclose Domestic Amounts Transferred Offshore

i) Basic Principle

Much of the foreign assets that are the subject of the amnesty stem from undisclosed domestically generated amounts. Many parties with these foreign assets generated the initial income from a domestic business without disclosing that domestic business income to SARS. These undisclosed amounts were then shifted offshore in contravention of Exchange Control and any further foreign income continued in its undisclosed state.

It is understood that failure of the amnesty to cover related domestic non-disclosures would seriously undermine the intended disclosure of foreign assets sought by the amnesty. Without domestic relief, parties may be reluctant to come forward because these parties may fear disclosure of foreign assets to SARS may inevitably lead SARS to an investigation of the underlying non-disclosure of domestic amounts. Hence, non-disclosure of domestic amounts is additionally covered by the amnesty to the extent the domestic non-disclosures relate to foreign assets accumulated or transferred offshore.

In particular, the amnesty covers underlying domestic tax violations relating to the Income Tax Act, 1962, as well as the Estate Duty Act, 1955. As stated previously at the beginning of this explanatory memorandum, the amnesty will not cover tax violations, such as PAYE to be withheld by employers, withholding tax on royalties, the skills development levy, UIF and RSC Levy. These taxes have been excluded from the amnesty because violations of this nature typically breach fiduciary duties with respect to sums held on behalf of another

(such as wrongful use of PAYE funds from unrelated employee salaries).

ii) Information Required (Clause 6(3))

In order to obtain amnesty for domestic tax violations, an applicant must disclose two basic items of information. Firstly, the applicant must disclose the domestic amounts previously not declared to SARS (in terms of the Income Tax Act, 1962 or Estate Duty Act, 1955) to the extent those amounts were initially accumulated as or converted into foreign assets. Secondly, the applicant must disclose the dates of conversion or accumulation.

The applicant must provide documentary proof of the dates and amounts of the initial accumulation or conversion if the accumulation or conversion occurs within 5 years before the relevant 2002/2003 tax year. The applicant can rely on any other form of evidentiary support (e.g. a sworn statement) for accumulations or conversions occurring before this 5-year period.

As elsewhere, these requirements are designed to solicit the minimum information required for amnesty relief. The applicant does not disclose how these funds were derived.

iii) Domestic Tax Amnesty Levy (Clause 16)

Amnesty for domestic tax relief is conditioned on the payment of a domestic amnesty levy. This levy equals two per cent of the amount initially accumulated or converted into foreign assets that are the subject of amnesty relief. This amount must be converted into Rand at the exchange rate published by the SARB for the date of initial accumulation or conversion. This levy must be paid within three months after the amnesty unit grants approval.

iv) Domestic Tax Relief (Clause 17(1))

Successful applicants receive amnesty for undisclosed domestic amounts accumulated or converted into foreign assets. Amnesty means that successful applicants are deemed not liable under the Income Tax Act, 1962, (including donations tax and STC) or under the Estate Duty Act, 1955, equal to the taxes otherwise due on the amounts disclosed. This amnesty protects applicants in respect of domestic amounts uncovered by SARS on or before the date of accumulation or conversion into foreign assets. Amnesty additionally eliminates interest, civil or criminal penalties thereon.

Example. Facts. Individual generates the following amounts:

Tax Year	Ending Foreign Value	Foreign Interest	Transfer Offshore	Unreported Domestic Income
2002-2003	R80 000 (Bank B)	R12 000	-	R35 000
2001-2002	R68 000 (Bank B)	R10 000	-	R40 000
2000-2001	R58 000 (Bank B)	R 8000	-	R30 000
1999-2000	R50 000 (Bank B)	R 6000	R20 000	R30 000
1998-1999	R24 000 (Bank B)	R4000	-	R30 000
1997-1998	R20 000 (Bank A)	R3000	-	R30 000
1996-1997	R17 000 (Bank A)	R2000	-	R28 000
1995-1996	R15 000 (Bank A)	-	R15 000	R25 000
1994-1995	-	-	-	R30 000

Result.
Exchange Control. Individual can apply for Exchange Control relief by paying the amnesty levy at a 5 or 10 per cent rate on the R80 000 in Bank B as at 28 February 2003.

Tax Relief for Undisclosed Foreign Receipts and Accruals. Individual can apply for tax relief with respect to undisclosed foreign income by reporting the R12 000 of interest income for the 2002-2003 year of assessment. This amnesty relief covers all the foreign interest generated between 1996 and the end of the 2001/2002 year of assessment (i.e., the current Bank B and the closed Bank A amounts).

Tax Relief for Undisclosed Domestic Amounts. Individual can additionally apply for tax relief for the unreported domestic amounts shifted offshore at the price of the domestic amnesty levy. This levy amounts to R700 ((R20 000 + R15 000) x 2%). This amnesty coverage affords Individual relief for R15 000 of undisclosed domestic amounts uncovered by SARS with respect to the period before the end of the 1995-1996 year of assessment. This amnesty coverage also affords Individual relief for an additional R20 000 of undisclosed amounts uncovered by SARS with respect to any period before the end of the 1999-2000 year of assessment.

c) Miscellaneous

i) Tax Amnesty Relief Not Available for Amounts Already within the Tax System (Clause 18)

Amnesty relief is intended only for parties with undisclosed revenues relating to undisclosed foreign assets. Amnesty relief is not intended to benefit amounts already within the tax system. The amnesty should not become a tool for undermining revenues that Government could have otherwise obtained. Hence, the tax amnesty will not apply to any foreign or domestic amount:

- on which payment has already been made by the time the application for amnesty relief has been submitted; or
- is payable or becomes payable by virtue of any return or information submitted to SARS by the applicant (or by the applicant's representative) to the extent that information is submitted before the date of the amnesty application.

ii) Tax Reductions Unavailable for Amnesty Disclosed Amounts (Clause 19)

Taxpayers cannot benefit from tax reductions (deductions, allowances, assessed losses, assessed capital losses and foreign tax rebates) to the extent these reductions relate to amnesty disclosed amounts. Taxpayers should not receive both the benefit of not paying full tax on non-disclosed revenues while receiving the benefit of related deductions, allowances, losses and foreign tax rebates. Taxpayers should only receive the benefit from reductions if they are associated with underlying revenues properly within the tax net.

9. AMNESTY FOR FACILITATORS

a) Amnesty for Assisting the Applicant (Clause 8(a) and (b))

As stated in paragraph 4.d) of this memorandum, amnesty relief applies only to a limited number of facilitators that may easily be traceable if an applicant comes forward requesting amnesty relief (even though the applicant will not, and cannot be forced to, disclose the names of any parties that assisted the applicant as an advisor or facilitator). In order to receive amnesty relief for assisting an applicant, a facilitator must satisfy two basic requirements. Firstly, the facilitator must jointly apply for amnesty relief with an amnesty applicant on the same amnesty application form (clause 8(a)). Secondly, the facilitator must confirm that the facilitator has no reason to believe that the foreign assets transferred or accumulated on the applicant's behalf were partly or wholly derived from unlawful activities. As discussed in paragraph 6.c) of this memorandum, the definition of "unlawful activities" means "unlawful activities" as defined under the Prevention of Organised Crime Act (Act no. 121 1998) other than—

i) any violation of Exchange Control, Income Tax (including Donations Tax and the Secondary Tax on Companies), or Estate Duty; or

ii) any activity constituting a misrepresentation or non-disclosure necessary to facilitate that violation.

Facilitators satisfying these requirements will receive amnesty for assisting the applicant with the Exchange Control and tax violations for which the applicant receives amnesty. Hence, facilitators will only be

granted relief to the extent the applicant discloses illegal foreign assets held as at 28 February 2003. This limitation is consistent with the goals of the amnesty, which are to repatriate or promote the disclosure of foreign assets. Undisclosed foreign assets cannot qualify for amnesty relief.

b) Amnesty for the Facilitators' Domestic Violations Committed While Assisting the Applicant (Clause 8(c))

Facilitators who illegally transferred or accumulated foreign assets on behalf of an applicant may have incurred direct tax violations of their own. In particular, these facilitators may have shifted assets offshore by under-reporting domestic amounts that served as a precondition for the illegal shift offshore. This form of violation typically involved a wholly owned entity acting on the applicant's behalf or a family member illegally donating assets offshore. Facilitators of this kind may receive amnesty relief for their domestic violations at the price of a 2 per cent levy (Clauses 16 and 17(2)).

This form of amnesty relief mirrors the amnesty relief for applicants seeking amnesty for failure to disclose domestic amounts transferred offshore (see paragraph 8.b)). Hence, the facilitator in this situation must disclose two basic items of information. Firstly, the facilitator must disclose the domestic amounts previously not declared to SARS (in terms of the Income Tax Act, 1962 (including donations tax and STC) or Estate Duty Act, 1955) to the extent these amounts were initially accumulated or converted into foreign assets (Clause 8*(c)*(i)). Secondly, the facilitator must disclose the dates of conversion or accumulation (Clause 8*(c)*(ii) and (iii)), along with the appropriate evidentiary support. In addition, the facilitator must have furnished to the Commissioner a 2002/2003 tax return (or received a letter from the Commissioner granting an extension, but this extension may not extend beyond 29 February 2004) (Clauses 10(2) and 20(1)*(a)*).

Example (1). Facts. On 28 February 2003, Individual owns all the shares of Domestic Company. Individual also owns £700 000 in a foreign bank account. These foreign bank funds stemmed from amounts illegally shifted in 1996 by Domestic Company in contravention of Exchange Controls (as well as income tax) through under-invoicing. Domestic Company failed to disclose £500 000 of income through this method of invoicing.

Result. Individual can apply for amnesty relief as an applicant because Individual owns foreign assets as at 28 February 2003 that stem from Exchange Control (and income tax) violations. Although Domestic Company cannot submit an amnesty application on its own because Domestic Company does not hold any illegal foreign assets as at 28 February 2003, Domestic Company may apply as a facilitator due to its assistance in illegally shifting funds offshore. Upon payment of the 2 per cent levy (i.e. £10 000 converted into Rands on the 1996

date of conversion), Domestic Company receives amnesty for failure to disclose £500 000 of domestic amounts arising on or before the 1996 shift offshore.

Example (2). Facts. On 28 February 2003, Individual owns £120 000 in a foreign bank account. These funds stem from a 1998 donation from Mother that was in contravention of Exchange Control and went unreported for purposes of the Donations Tax. The donation amounted to £90 000.

Result. Individual can apply for amnesty relief as an applicant because Individual owns foreign assets as at 28 February 2003 that stem from Exchange Control (and Donations Tax) violations. Although Mother cannot submit an amnesty application on her own because Mother does not hold any illegal foreign assets as at 28 February 2003, Mother may apply as a facilitator due to her assistance in illegally shifting funds offshore. Upon payment of the 2 per cent levy (i.e., £1 800 converted into Rands on the 1998 date of conversion), Mother receives amnesty for failing to disclose £90 000 of domestic amounts arising on or before the 1998 shift offshore.

10. INVALIDITY OF AMNESTY APPROVAL (CLAUSE 20)

The amnesty is designed to maximise certainty for applicants by minimising the information required and by maximising objective criteria. Consistent with this principle, the amnesty minimises on the situations in which amnesty approval will be rendered invalid. These situations amount to violations that run contrary to the applicant's core commitments made in the application.

Failure to submit the relevant 2002/2003 tax return on or before 29 February 2004 triggers invalidity of the foreign and domestic tax aspects of the amnesty (even if SARS grants an extension to submit the tax return after 29 February 2004) (Clause 20(1)(a)). This time limitation for the 2002/2003 tax return ensures that the amnesty process as a whole can be finalised as soon as possible.

More notably, amnesty applications will be deemed invalid if it is subsequently determined that the applicant held any foreign asset (including any foreign bearer instrument) that stems from "unlawful activities" (see paragraph 6 of this memorandum) (Clause 20(1)(b)).

The Exchange Control and domestic tax amnesty levies are normally returned if an approval is subsequently found to be invalid. However, no refund is made if the invalidity stems from the discovery of foreign assets associated with unlawful activities (Clause 20(2)).

11. PROCEDURAL PROTECTIONS

a) Appeal Procedures (Clause 21)

Because the amnesty minimises the information requested and maximises objective criteria for approval, few legal disputes are envisioned during the amnesty approval process. This approach again encourages applications. Applicants will be confident that their applications will be successfully approved if the law is followed (without concern for discretionary hidden barriers), and applicants can be confident that their applications will be given swift review.

Nonetheless, situations may arise in which disputes will arise. In these situations, applicants can appeal adverse decisions (i.e., denial of approval) as a matter of due process. Applicants may appeal adverse decisions of the amnesty unit by lodging an objection to the Chairperson who must refer the matter to a panel. This panel consists of one senior person from SARS and one senior person from the Exchange Control Department of SARB (Clause 21(1) and (2)). If the panel does not produce the desired result for the applicant, the applicant may resort to the formal court process, starting with the Tax Court described in section 83(2) of the Income tax act (Clause 21(3)). Facilitators seeking amnesty relief are similarly entitled to the same multi-tiered appeal process.

b) Secrecy and Use of Information (Clauses 24 and 26)

The application process is designed to provide maximum privacy of an applicant (and a facilitator's affairs). The process is designed so that secrecy is maintained throughout the approval process and full protectionis afforded afterwards.

i) Approval Process

Members of the amnesty unit are subject to the same secrecy provisions as members of SARS dealing with income tax returns (see Section 4 of the Income Tax Act, 1962) (Clause 24(3)). Therefore, other Government departments (including SARB and SARS) cannot obtain access to amnesty unit information unless one of the limited secrecy waivers apply. However, members of the amnesty unit can obtain information from SARB and SARS despite their normal secrecy provisions in order for the amnesty unit to process amnesty applications (Clause 24(4)).

ii) Subsequent Use of Approved and Unapproved Applications

The rules for the retention and Government use of an applicant's records can be split into two categories. One set of rules exist for approved applications, and a second set of rules exist for unsuccessful applications.

Regarding approved applications, both the General Manager of the Exchange Control department of the SARB and the Commissioner for SARS will receive copies of approved applications solely in order to give effect to the objects of the amnesty (Clause 26(1)). These institutions will use approved applications to update the applicant's information. These records will ensure full amnesty protection for applicants. These records are not intended to serve as a basis for triggering investigations.

Only the names of applicants and facilitators receiving amnesty are to be passed on to the General Manager or the Commissioner in the case of approved applications. The amnesty unit will ensure that all names of parties that have been mistakenly revealed by the applicant on information submitted will not be further reflected on the documentation passed on to the General Manager and the Commissioner.

With respect to non-approved applications, any information contained on the applications may not be disclosed to anyone (Clause 26(3)). On the date of termination of the amnesty unit, the applications must be submitted to the National Treasury to be retained there for a period of at least five years. The reason therefore is that documentation held by the amnesty unit is available to the Auditor General until the amnesty unit is terminated, whereafter it should remain available to the Auditor General at the National Treasury in order to conclude the Auditor General's audits. Although the office of the Auditor General could have held the documents directly, the view is held that this function would not fall under its mandate. The National Treasury will be subject to the same secrecy requirements as the amnesty unit (Clause 26(3)).

Similar treatment of identities is required for information passed on to the Minister in terms of the Minister's reporting obligations to Parliament. All information passed on to the Minister by the Chairperson of the amnesty unit must be in a form that does not disclose the names of applicants or facilitators seeking amnesty (Clause 29).

c) The Amnesty Unit, SARB and SARS Cannot Force Disclosure of Names

Notwithstanding the provisions of any other Act, the amnesty unit, SARS and SARB cannot request details from an applicant (or a facilitator) regarding any person not applying for amnesty relief who advised or assisted the applicant to accumulate or transfer assets

offshore (Clause 26(2)). In essence, this aspect of the Bill protects other parties outside the amnesty by limiting the investigation powers of SARS and SARB. The purpose behind this limitation is to ensure that these other parties are not compromised by the amnesty, leaving them in the same position as before.

12. MINISTERIAL REGULATIONS (CLAUSE 30)

The Act provides the Minister with broad regulatory authority to give effect to the objects and purposes of the amnesty. This regulatory authority is mainly intended to address unintended consequences, anomalies, or incongruities that may unexpectedly arise during the amnesty review process. This broad grant of regulatory authority is necessary because the short time-frame for the amnesty makes it impossible to address these issues in a timely fashion within the normal Parliamentary review process.

As far as unintended consequences, anomalies, and incongruities are concerned, special attention is directed to foreign discretionary trusts, foreign assets indirectly held through foreign companies, the change of residence of an applicant, the residence of a trust, and situations involving assets that are only partly derived in violation of Exchange Control or certain tax acts.

EXPLANATION OF GENERAL TAX LAW AMENDMENTS: CHAPTER II

13. TRANSFER DUTY AMENDMENT (CLAUSE 31: AMENDMENT TO SECTION 2 OF THE TRANSFER DUTY ACT)

Transfer duty is levied in terms of section 2 of the Transfer Duty Act on the acquisition of fixed property in South Africa. Currently, the rates for property acquired by natural persons are—

- 0% on the first R100 000 of the value of the property;
- 5% on the value from R100 001 up to R300 000; and
- 8% on the value above 300 000.

To further encourage the acquisition of property (especially for lower-income households), the Minister of Finance has proposed that the graduated rate structure be further adjusted as follows:

- 0% on the first R140 000 of the value of the property;
- 5% on values from R140 001 up to R320 000; and
- 8% on value above R320 000.

The new rate structure will apply from 1 March 2003 in respect of acquisitions of property on or after that date.

14. INCOME TAX AMENDMENTS

a) Rate and Bracket Adjustments (Clause 32 and Schedule 1: Amendment to Section 5(2) of the Income Tax Act)

The Bill gives effect to a key feature of the 2003 Budget Review by providing R13,3 billion of personal income tax relief. This relief comes in terms of rate and bracket adjustments. This measure will increase real disposable income for wide portions of the public and will stimulate demand in the economy for goods and services while affording an opportunity to boost personal savings. These rate and bracket adjustments are fully contained in Schedule 1 of the Bill.

b) Co-ordinating the Income Tax Definition of Resident with the Tax Treaty Definition (Clause 33: Amendment to the Definition of "Resident" in Section 1 of the Income Tax Act)

i) Present Law

Under current law, an individual qualifies as a resident for purposes of the Income Tax Act if that individual is "ordinarily resident" in the Republic or is physically present in the Republic for a certain period of

time. A company qualifies as a resident for purposes of the Income Tax Act if that company—

- is incorporated, established, or formed within South Africa; or
- has its place of effective management in South Africa.

Agreements for the avoidance of double taxation provide a separate set of rules for the definition of resident (usually under Article 4 of those treaties). Under most of these tax treaties, a person is a resident of a country if that person is liable to tax therein by reason of that person's domicile, residence, place of incorporation, place of management, or other criteria of a similar nature (i.e., is viewed as a resident under the domestic tax laws of that country). If a person is a resident of two countries by virtue of the criteria just described, that person's residence is determined by virtue of various tie-breaker rules.

ii) Reasons for Change

The current relationship between the definition of "resident" contained in the Income Tax Act and the definition of "resident" contained in agreements for the avoidance of double taxation is unclear. It is technically possible for a taxpayer to qualify as a foreign resident for tax treaty purposes (thereby being eligible for tax treaty benefits) while remaining a resident for Income Tax purposes in terms of the definition in the Act.

This situation creates an unintended third category of taxpayers with uncertain status. For instance, companies who are South African residents for income tax and tax treaty purposes are subject to a 30 per cent income tax rate and a 12,5 per cent rate under the Secondary Tax on Companies. Companies who are not South African residents for income tax and tax treaty purposes are subject solely to a 35 income tax rate. On the other hand, if a company is a South African resident under the Income Tax Act, 1962, and a foreign resident under a tax treaty, the result creates an uncertain situation. In this situation, the company may be subject to a 30 per cent income tax rate but not to the Secondary Tax on Companies. This situation could also possibly lead to the avoidance of the "thin capitalisation" rules of Section 31(3) of the Income Tax Act.

iii) Proposal

The Bill aligns the Income Tax Act, 1962, to agreements for the avoidance of double taxation so that both regimes operate in unified fashion. Any person exclusively deemed to be a resident of another country for purposes of one or more tax treaties (by virtue of tax treaty tie-breaker rules or otherwise) will not be a resident for purposes of the Income Tax Act, 1962, regardless of any other rules pertaining to the definition of resident contained therein. This proposal will come into operation on 26 February 2003.

c) **Primary and Secondary Rebate Adjustments (Clause 35: Section 6(2) of the Income Tax Act)**

The Bill provides primary and secondary rebate adjustments as a further measure of tax relief for lower and middle-income earners. The primary rebate will increase from R4 860 to R5 400. The secondary rebate will increase from R3 000 to R3 100. These increases will mean that taxpayers below age 65 can now receive R30 000 of income tax free (in lieu of the prior R27 000 threshold amount). Taxpayers of age 65 and above can now receive R47 222 of tax-free income (in lieu of the prior R42 640 threshold amount).

d) **Interest (and Dividend) Exemption (Clause 36: Section 10(1)(*i*) of the Income Tax Act)**

The Bill increases the interest (and dividend) exemption for individuals as a measure to encourage savings. Special relief is additionally provided for those of age 65 and over in order to assist retired persons living on a fixed income.

The interest (and dividend) exemption is currently R6 000 for taxpayers under age 65 and R10 000 for taxpayers age 65 years and above. This exemption will increase to R10 000 for taxpayers under age 65 and to R15 000 for taxpayers age 65 years and above.

e) **Increased Turnover Limit for Small Business Corporations (Clause 37: Section 12E(4) of the Income Tax Act)**

Small business corporations are subject to a tax rate of 15 per cent on the first R150 000 of taxable income and may write off investment expenditure in the year in which it is incurred.

Under current law, small business corporation status is subject to a R3 million turnover limit. The Bill increases this limit to R5 million to ensure that a larger number of small businesses enjoy these benefits. This will shift the definition in favour of middle-tier businesses, which are said to be a greater stimulus for job creation. This amendment will apply with effect from years of assessment ending on or after 1 April 2003.

f) **Secondary Tax on Company Departure Charge (Clause 38: Section 64C(3) of the Income Tax Act)**

i) **Present Law**

Under current law, taxpayers shifting their income tax residence offshore are subject to an exit charge under the capital gains tax provisions. This exit charge triggers a deemed disposal of all the taxpayer’s assets immediately before expatriation (paragraph 12(2)*(a)*

of the Eighth Schedule to the Income Tax Act). The purpose of this exit charge is to ensure that capital gains arising onshore are taxed before exiting the South African capital gains tax net.

ii) Reasons for Change

The Secondary Tax on Companies ("STC") does not contain an exit charge for expatriating companies. As a result, companies could possibly escape the STC net on domestic earnings by shifting their residence offshore.

iii) Proposal

In order to prevent expatriation from becoming a possible means of escaping the STC net, the STC exit charge will apply when a company shifts its income tax residence offshore. This exit charge triggers STC for all profits and reserves available for distribution immediately before that company ceases to be a resident. This charge includes any profit available for distribution (as contained in the definition of "dividend" in section 1 of the Income Tax Act). However, in making this profit calculation, all distribution prohibitions and limitations contained in the company's memorandum, articles of association, founding statement, or other agreements are disregarded.

Example. Facts. Foreign Company owns all the shares of Subsidiary. Subsidiary is incorporated in South Africa. Subsidiary moves its place of effective management to Country X at a time when Subsidiary has R150 000 of profits available for distribution. South Africa and Country X have an agreement for the avoidance of double taxation that deems Subsidiary to be solely a resident of Country X after taking into account the tie-breaker rules contained therein.

Result. Subsidiary no longer qualifies as a South African resident under the Income Tax Act (see the amendment to the definition of resident of section 1) when its place of effective management shifts to Country X. Subsidiary is subject to the STC as if it distributed R150 000 immediately before it ceased to be a resident.

This provision comes into operation on 26 February 2003. This STC charge was not given prospective effect due to concerns that certain companies may use the delay to accelerate their departure efforts before a prospective STC charge would come into effect. The current proposal does not fully address all of the issues relating to this STC exit charge, many of which involve the proper co-ordination of section 64B (actual dividend) with section 64C (deemed dividends). These co-ordination issues will be fully addressed in terms of proposed legislation to be presented before Parliament during the latter half of this year.

15. CUSTOMS AND EXCISE AMENDMENTS

a) Air Passenger Departure Tax (Clause 40: Section 47B of the Customs and Excise Act)

The air passenger departure tax has not been adjusted for inflation since its introduction in 2001. The air passenger departure tax has accordingly been adjusted upward by 10 per cent. In nominal terms, this change means that the tax will increase from R50 to R55 per passenger flying to Botswana, Lesotho, Namibia and Swaziland, and the rate will increase from R100 to R110 for all other international flight destinations. The rate changes for Botswana, Lesotho, Namibia and Swaziland will be published by way of notice in the *Gazette*, and the rate change from R100 to R110 for other countries is contained in the Bill.

These changes will generally come into operation for flights commencing on or after 1 July 2003. However, the new rates will not apply for flight tickets purchased and issued before this Bill is promulgated.

b) Adjustment to Excise Duties on Alcoholic Beverages and Tobacco Products and to Schedule No. 1 of the Customs and Excise Act (Clauses 41 and 50)

The Bill provides new Customs and Excise rates and date of commencement thereof as outlined in Schedule 2. It arises from the taxation proposals tabled by the Minister of Finance during his Budget Speech.

Clause 50 provides for the continuation of the amendments to the Schedules to the Customs and Excise Act effected by the Minister of Finance during the 2002 calendar year.

16. STAMP DUTIES AMENDMENTS – REPEAL OF DUTIES ON INSURANCE AND FIXED DEPOSITS (CLAUSES 42 TO 45)

Stamp Duties and similar charges are gradually being eliminated in line with international best practice. These charges mostly generate little revenue. The Bill contains further steps in this direction by removing Stamp Duties on new insurance policies and new fixed deposit accounts. This removal will mainly assist lower and middle-income individuals who mainly invest through savings vehicles of this kind. This proposal comes into effect from 1 April 2003.

One related item left unchanged by this proposal involves negotiable certificates of deposit. Negotiable certificates of deposit are classified as “marketable securities” under the Stamp Duties Act, 1968, but are subject to

tax as fixed deposit accounts. These instruments fall outside the current proposal because this proposal is directed toward instruments held by lower and middle-income individuals as stated above, whereas negotiable certificates of deposit typically entail large sums of money that are utilised by commercial entities. Any changes to the Stamp Duties Act, 1968, regarding negotiable certificates of deposit will be addressed as part of the miscellaneous amendment process due in the latter half of 2003.

17. VALUE-ADDED TAX AMENDMENTS – INCREASED THRESHOLD COMMERCIAL ACCOMMODATION (CLAUSE 47: SECTION 1 OF THE VALUE-ADDED TAX)

The supply of commercial accommodation falls within the ambit of the VAT (i.e., is a taxable supply), whereas the supply of residential accommodation does not. Under current law, the monetary threshold for distinguishing commercial accommodation from residential accommodation amounts to actual or reasonably expected supplies that exceed R48 000 per year. The Bill increases this threshold to amounts in excess of R60 000. This threshold provides an objective mechanism for eliminating holiday homes and the like from the VAT input system. Hence, the threshold is being adjusted upward to ensure that this threshold keeps pace with inflation.

18. TAX ON RETIREMENT FUNDS – REDUCTION IN RATE (CLAUSE 49: SECTION 2 OF THE TAX ON RETIREMENT FUNDS ACT)

Government first introduced the Tax on Retirement Funds at a 17 per cent rate in 1996 and then increased the rate to 25 per cent in 1998. During this period, Government (as articulated in the Katz Commission Reports) was mainly concerned with the tax neutrality of retirement savings vehicles *vis-à-vis* other savings vehicles. Due to subsequent changes in the law, however, this balance has changed, leaving retirement savings vehicles in a less favourable position. Government has since reduced personal income taxes as well as increased the primary and secondary rebates. Government has additionally significantly increased the exemption level for domestic interest.

Government has also become concerned that the current 25 per cent rate for the Tax on Retirement Funds creates a further disincentive in terms of retirement savings for lower and middle-income households. Many of these households, especially those failing within the 18 per cent marginal bracket, now find themselves subject to a rate of tax on their retirement savings in excess of their standard rate.

Mindful of the above, the Bill reduces the Tax on Retirement Funds from a 25 per cent rate to an 18 per cent rate. This rate reduction will take effect on 1 March 2003.

19. SHARING OF INFORMATION BETWEEN SARB AND SARS (CLAUSES 34, 39, 46, AND 48)

a) Present Law

SARB generally cannot gain access to taxpayer information from SARS due to the legislative secrecy provisions contained in various tax Acts. SARS's ability to obtain access to records from SARB is similarly limited due to the legislative secrecy provisions contained in its governing Act.

b) Reasons for Change

Enforcing Exchange Control and the taxation of foreign income presents unique difficulties. Officials need to overcome information barriers posed by geographical boundaries and by foreign legal restrictions. It is accordingly essential that extra measures be taken in order to ensure an enhanced flow of information to overcome these difficulties. One major hurdle in terms of information flows is the lack of secrecy waivers between SARB and SARS. This lack of secrecy waivers prevents the free flow of information between the two organizations, thereby preventing SARB and SARS from obtaining vital information from each other that would improve mutual law enforcement.

c) Proposal

The Bill contains secrecy waivers between SARB and SARS in order to overcome the information exchange difficulties outlined above. SARS will provide secrecy waivers in terms of Section 4 of the Income Tax Act, Section 4 of the Customs and Excise Act, and Section 6 of the Value-Added Tax Act. This secrecy waiver will allow Exchange Control officials with access to taxpayer information. SARB will provide a secrecy waiver in terms of Section 33 of the South African Reserve Bank Act, thereby providing tax officials with access to Exchange Control information. This increased free flow of information between SARB and SARS will increase the enforcement capabilities of both organisations relating to foreign violations.