

MEMORANDUM ON THE OBJECTS OF THE SOUTH AFRICAN RESERVE BANK AMENDMENT BILL, 2010

1. OBJECTS OF THE BILL

1.1 The South African Reserve Bank Amendment Bill, 2010 (“the Bill”) will amend the South African Reserve Bank Act, 1989 (Act No. 90 of 1989) (“the Act”) in order to achieve the following objectives:

1.1.1 To stop shareholders of the South African Reserve Bank (“the Bank”) from circumventing the Act's current limitation of a maximum of 10 000 shares per shareholder;

1.1.2 to allow for the nomination of directors by a broader base of the South African public and to broaden representation on the Board of the Bank (“the Board”);

1.1.3 to provide for the establishment of a Panel for the election of directors;

1.1.4 to define clear criteria regarding when persons are disqualified from serving on the Board;

1.1.5 to provide for the confirmation of Board nominees against ‘fit and proper’ and fiduciary criteria;

1.1.6 to clarify the powers and functions of the Board, which will primarily be those of governance, with all remaining powers and duties of the Bank as set out in section 10 of the Act being vested in and being exercised by the Governor and Deputy Governors; and

1.1.7 to provide for the possibility of the Governor and Deputy Governors to be re-appointed to serve a term of less than five years.

2. CLAUSE BY CLAUSE ANALYSIS

Clause 1

2.1 Clause 1 of the Bill provides for the insertion of new definitions for “associate”, “close relative”, “elected director”, “employee of Government”, “Government”, “NEDLAC” and “Panel”, and the deletion of the definition of “shareholders’ representative”. The new definitions which are inserted are terms which are utilised in the amendments contained in the Bill.

Clause 2

2.2 Clause 2 amends section 4 of the Act. Recent consultations with stakeholders have revealed a need for the Bank’s independent directors to be drawn from a broader base of the South African public. This will be achieved through a proposed insertion to section 4 of the Act (“*Board of Directors*”), which provides in the new subsection (1A) for nominations by any shareholder, current director of the Bank or member of the general public.

2.3 The proposed section 4(1G) requires Board nominees to be confirmed against the above-stated criteria by a Panel to be chaired by the Governor of the Bank. The Panel is further comprised of a retired judge, one person nominated by the Minister of Finance and three members nominated by NEDLAC. A definition of “Panel” is proposed for insertion in section 1, and the proposed section 4(1D) deals with the composition of the Panel.

2.4 The proposed section 4(1G)(c) requires the Panel to submit a list of confirmed candidates to shareholders no later than 30 days before the general meeting at which directors will be elected. If more than three nominees have qualified for any vacancy, only the three most suitable candidates will be listed (proposed section 4(1H)).

2.5 The proposed insertion of section 4(2)(aA) introduces 'fit and proper' requirements for the Bank's directors, based on an objective assessment commensurate with skills and experience. These requirements are based on requirements contained in the Banks Act, 1990 (Act No. 94 of 1990), where they have proved effective. The proposed new paragraph makes it clear that the Bank's directors owe their fiduciary duty and duty of care and skill to the Bank.

2.6 The proposed insertion of the new paragraphs 4(3)(d) and (e), which contemplates that elected directors shall have knowledge and skill in the sector which they represent and makes provision for one director with knowledge and skill in labour and one director with knowledge and skill in mining. The amendment to section (4)(3)(a) consequently reduces the number of directors with knowledge and skill in "commerce" or "finance" from four to two. The director with knowledge and skill in agriculture is retained.

2.7 Currently, non-residents, directors and employees of banking institutions, members of Parliament and certain others are excluded from being appointed or elected as directors of the Bank. It is proposed by an amendment to section 4(4) of the Act that these grounds be extended to

include unrehabilitated insolvents, persons dismissed from positions of trust for misconduct, persons with criminal records, and persons with mental and other incapacities, persons who are contractually incapacitated and persons employed by Government.

2.8 The proposed subsection 4(5) will result in the termination of a director's tenure on the grounds listed in section 4(4), as well as the further grounds of absenteeism, failure to declare conflicts of interest, or the unlawful disclosure of privy information.

Clause 3

2.9 The principle that the Board of the Bank undertakes a governance role and that the other powers of the Bank, including policy, will vest in and be exercised by the Governor and Deputy Governors, is specifically addressed. This will be achieved through a proposed insertion of a new section 4A dealing with the functions and powers of the Board.

2.10 The proposed insertion of section 4A specifies the functions and powers to be exercised by the Board of the Bank, which relate to contributing to the governance of the Bank and specifies further that all remaining powers and duties vest in and are exercised by the Governor and Deputy Governors.

Clause 4

2.11 Clause 4 of the Bill provides for amendments to section 5 of the Act. It is proposed that it may be desirable, in respect of the re-appointment of a

Governor and Deputy Governor, to provide for the possibility of a term of office of less than five years. This will be achieved through a proposed amendment to section 5(1) of the Act, which deals with the term of office for Governors and Deputy Governors.

Clause 5

2.12 Clause 5 of the Bill provides for the amendment of section 6 of the Act. The consequential amendments to section 6 of the Act, arise from the amendments to section 4 of the Act which are contained in clause 2 of the Bill, regarding the election of directors by shareholders. The clause also makes provision for acting appointments to the Board.

Clause 6

2.13 Clause 6 provides for the amendment of section 8 of the Act. The amendments widen the scope of this section so that the Governor and Deputy Governors may in future delegate their original powers of management to other officials of the Bank. The existing provision in the Act provides for the delegation by Governors and Deputy Governors only of powers that have been delegated to them by the Board.

Clause 7

2.14 Clause 7 of the Bill provides for the amendment of section 22 of the Act, to strengthen the limitation on the maximum number of shares that a shareholder may hold, by additionally taking into account holdings of “associates” as defined in the new definition which would be inserted into the

Act by clause 1. These amendments are intended to prevent shareholders from circumventing the limits of shareholding by individuals.

Clause 8

2.15 Clause 8 of the Bill provides for the amendment of section 23 of the Act, in line with the amendments which are effected to section 22 of the Act, in order to prevent circumventing of the limitation on the maximum number of shares that a shareholder may hold.

Clause 9

2.16 Clause 9 of the Bill contains the short title.

3. OTHER DEPARTMENTS/BODIES CONSULTED

The South African Reserve Bank

4. FINANCIAL IMPLICATIONS

The proposed amendments will have no direct financial implications.

5. CONSTITUTIONAL IMPLICATIONS

None

6. COMMUNICATION IMPLICATIONS

6.1 The manner in which the Bank's seven independent directors will henceforth be nominated and elected will need to be communicated to shareholders directly, by written notification.

6.2 The opportunity for the broader South African public to nominate representatives to the Bank's Board will need to be communicated.

7. PARLIAMENTARY PROCEDURE

7.1 The State Law Advisers and the National Treasury are of the opinion that this Bill must be dealt with in accordance with the procedure established by section 75 of the Constitution, since it contains no provision which the procedure set out in section 74 or section 76 of the Constitution applies.

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