

supervision to enforce compliance with the provisions of the Banks Act.¹⁰⁶¹ It further had comprehensive enforcement powers that it could apply inter alia where banks failed to meet the conditions for their continued licensing or prudential requirements.¹⁰⁶²

South Africa, as BIS-member and G20-member, has also over the years aligned itself with various international standards on banking regulation, such as the *Basel Core Principles of Effective Banking Supervision*,¹⁰⁶³ and implemented the Basel II (minimum regulatory capital, capital management and market discipline) reforms on 1 January 2008 until December 2011, and subsequently phased in Basel 2.5 (improved risk coverage and increased capital requirements with a particular focus on trading instruments exposed to credit risk) from January 2011 to December 2012 followed by Basel III reforms since January 2013 (raising the quality of capital, enhancing the risk coverage of the regulatory framework, introducing capital buffers, introducing a leverage ratio to prevent build-up of excessive risk; monitoring of minimum liquidity standards and introducing additional capital buffers for Systemically Important Financial Institutions).¹⁰⁶⁴

The SARB's robust approach to banking regulation was instrumental in keeping the banking industry largely safe and sound without continuous widespread bank failures.¹⁰⁶⁵ Although some banks did fail on occasion it was generally smaller banks that encountered failure and not the large systemically important banks. South Africa did not experience extended periods bank failure but a series of bank failures nevertheless occurred in the 1990s followed by a small bank crisis in 2003 and 2004, as discussed below. Notably,

¹⁰⁶¹ Section 11 and 12 of the Reserve Bank Act 89 of 1990.

¹⁰⁶² Section 23 to 29 of the Banks Act 94 of 1990 (cancellation of a bank's registration and withdrawal of its license); section 26 (restriction of certain activities of banks); section 74 (failure or inability to comply with prudential requirements); section 90 (offences and penalties).

¹⁰⁶³ Core Principles for Effective Banking Supervision (Basel Core Principles) September 1997 available at <https://www.bis.org/publ/bcbasc102.pdf> (accessed 12 August 2021).

¹⁰⁶⁴ The South African Reserve Bank, *South Africa's implementation of Basel II and Basel III* available at <https://www.resbank.co.za/PrudentialAuthority/Deposit-takers/Banks/Supervision/Pages/South-Africa%27s-implementation-of-Basel-II-and-Basel-III.aspx> accessed 12 March 2019. See also the South African Reserve Bank, *Financial Stability Review, 2020* available at <https://www.resbank.co.za/Lists/News%20and%20Publications/Attachments/9956/FSRMay2020.pdf> accessed on 12 June 2020 32-39 for a review of progress with Basel III implementation in South Africa. For detail regarding the various Basel concordats see the Basel website at <https://www.bis.org/publ/bcbasc312.pdf> (accessed 4 May 2019).

¹⁰⁶⁵ As observed in the *SARB resolution approach discussion paper* at 10: bank failures in South Africa are "a rare event."

although it was a BIS–member as well as a G20-member, South Africa never operated an explicit deposit insurance framework.¹⁰⁶⁶ This meant that in the event of bank failure there was a possibility, but not a guarantee, that the bank would be bailed-out with public funds to maintain financial stability and protect depositors.

Having had a robust bank regulatory framework over the course of many years the need for an explicit deposit insurance framework was simply not perceived as a matter of pressing urgency. In fact, the large banks that dominated the banking sector were well-capitalized and safe and sound hence depositors’ money was generally not regarded to be at risk. Thus, requiring protection under a deposit protection framework that would impose levies and premiums on banks, thereby slicing into the capital they could use to earn greater profits, was not on top of the regulatory agenda. In the absence of an explicit deposit protection framework in the South African banking industry there was thus only ‘implicit’ deposit insurance operating on the principle of constructive ambiguity and therefore no guarantee that if a bank failed there would be a bail-out facilitated by dipping a hand into taxpayers’ money. However, some bailouts were extended to banks that were considered systemic in the South African financial system, such as when African bank failed in 2014,¹⁰⁶⁷

The absence over the course of many years of an explicit and privately funded deposit insurance system in South Africa has however been regarded as representing a gap in the design of the financial safety net aimed at promoting financial stability.¹⁰⁶⁸ The 2008 GFC, as discussed in Chapter One, albeit that it did not affect South Africa as severely

¹⁰⁶⁶ See para 7 below.

¹⁰⁶⁷ Van Heerden “Deposit Protection in South Africa: Recent Developments” 2020 *Journal of International Banking Law and Regulation* 45. Regarding implicit deposit insurance and the concept of constructive ambiguity see further Anginer, Demirguc-Kunt “Bank runs and moral hazard: a review of deposit insurance” World Bank Policy Research Working Paper 8589 available at <http://documents1.worldbank.org/curated/en/548031537377082747/pdf/WPS8589.pdf> accessed 29 October 2019 (hereinafter Anginer & Demirguc-Kunt); Demirguc-Kunt, Kane, Laeven “Deposit Insurance Database” IMF Working Paper WP/14/118 available at <https://www.imf.org/en/Publications/WP/Issues/2016/12/31/Deposit-Insurance-Database-41710> accessed 29 October 2019. Regarding the failure of African Bank see Van Heerden “The Rescue of African Bank: a Step Forward in Banking Regulation in South Africa” 2017 *Journal of International Banking Law and Regulation (J.I.B.L.R)* 350.

¹⁰⁶⁸ South Africa (2017) South African Reserve Bank (SARB). *Designing a deposit insurance scheme for South Africa – a discussion paper.*”

on a financial level as some other countries, however also impacted the trajectory and paradigm of financial sector regulation in South Africa given that the country committed itself at the G20-summit in Seoul in 2010 to align with the international financial reform agenda.¹⁰⁶⁹ Following a financial regulatory system review that began in 2007 and gained momentum post GFC South Africa thus embarked on comprehensive reforms of its approach to financial regulation.

At the heart of these reforms was a move from a silo sectoral model of financial regulation towards a Twin Peaks model of financial regulation by objective,¹⁰⁷⁰ as encapsulated in the *Financial Sector Regulation Act 2017* (FSRA) which eventually came into operation in August 2017 and sets out the architecture of the South African Twin Peaks Model. The overriding objective for the adoption of the Twin Peaks model in South Africa was to ensure a safe and sound and more efficient financial sector in the interests of all South Africans by minimizing the possibility of threats to financial stability¹⁰⁷¹ and protecting customers by ensuring that financial institutions treat them fairly.¹⁰⁷²

¹⁰⁶⁹ The G20 Seoul Summit Leaders' Declaration available at <http://www.g20.utoronto.ca/2010/g20seoul.html> accessed (4 April 2020). See also the G20 Seoul Summit Action Plan and Table containing policy commitments by G20 members at 38 available at https://www.mofa.go.jp/policy/economy/g20_summit/2010-2/commitments.pdf (accessed 7 February 2021).

¹⁰⁷⁰ Godwin "Introduction to special issue – the twin peaks model of financial regulation and reform in South Africa" 2018 *Law and Financial Markets Review* 151-153.

¹⁰⁷¹ In terms of section 4(1) (a), (b) and (c) of the FSRA, financial stability means "the ability by financial institutions to generally provide financial products and financial services, and of market infrastructures to generally perform their functions and duties in terms of financial sector laws without interruption; the capability of financial institution to provide financial products and financial services and of market infrastructures to continue to perform their functions and duties in terms of financial sector laws, without interruption despite changes in economic circumstances; and there is general confidence in the ability of financial institutions to continue to provide financial products and financial services; and the ability of market infrastructures to continue to perform their functions and duties without interruption, regardless of the changes in economic circumstances".

¹⁰⁷² Section 7 (1) of the FSRA sets out the objectives of the Act and provides as follows "The object of this Act is to achieve a stable financial system that works in the interests of financial customers and that supports balanced and sustainable economic growth in the Republic, by establishing, in conjunction with the specific financial sector laws, a regulatory and supervisory framework that promotes – financial stability; the safety and soundness of financial institutions; the fair treatment and protection of financial customers; the efficiency and integrity of the financial system; the prevention of financial crime; financial inclusion; transformation of the financial sector; and confidence in the financial system." See also South Africa (2018) National Treasury. Press Release: *New Twin Peaks Regulators Established*.1.

The South African Twin Peaks model comprises of three peaks, namely the newly established Prudential Authority (PA)¹⁰⁷³ and the newly established Financial Sector Conduct Authority (FSCA),¹⁰⁷⁴ as twin regulators responsible for prudential and market conduct regulation respectively, with the South African Reserve Bank (SARB), as central bank,¹⁰⁷⁵ an apex peak tasked with financial stability.¹⁰⁷⁶ As part of its comprehensive stability mandate, which has now for the first time been captured explicitly in legislation,¹⁰⁷⁷ the FSRA requires the SARB to take all reasonable steps to prevent systemic events¹⁰⁷⁸ from occurring and to swiftly reduce the adverse effects of such a systemic event if it has occurred or is impending as well as to manage the systemic event and its effects.¹⁰⁷⁹ Note should further be taken that, in the Twin Peaks model introduced

¹⁰⁷³ The Prudential Authority was established in terms of section 32(1) of the FSRA to promote and enhance the safety and soundness of financial institutions that provide financial products and securities; to promote and enhance the safety and soundness of market infrastructures; to protect financial customers against the risk that those financial institutions may fail to meet their obligations; and to assist in maintaining financial stability. See section 33 of the FSR Act for the objectives of the PA.

¹⁰⁷⁴ Established in terms of section 56(1) of the FSRA, the Financial Sector Conduct Authority is a national public entity for the purposes of the Public Finance Management Act whose objective is to enhance and support the efficiency and integrity of financial markets; and protect financial customers by, inter alia: promoting fair treatment of financial customers by financial institutions; and providing financial customers and potential financial customers with financial education programs, and otherwise promoting financial literacy and the ability of financial customers and potential financial customers to make sound financial decisions as well as assist in maintaining financial stability.

¹⁰⁷⁵ As indicated, the *Currency and Banking Act* 31 of 1920 established the SARB as South African central bank. Currently, the SARB is regulated under the South African Reserve Act 90 of 1989 while its position as central bank is entrenched in section 223 of the Constitution of the Republic of South Africa 1996.

¹⁰⁷⁶ See sections 32-34 of the FSR Act 2017 regarding the establishment, objective and functions of the PA and sections 56-58 regarding the establishment, objectives and functions of the FSCA. The framework for the SARB's financial stability mandate is captured in sections 11-31 of the FSR Act 2017. See further Van Heerden & Van Niekerk 'The Financial Stability Mandate of the South African Central Bank in the Post-Crisis landscape' 2018 *Journal of International Banking Law and Regulation* 414.

¹⁰⁷⁷ Section 11 of the FSRA read with sections 12 to 19.

¹⁰⁷⁸ A systemic event is defined in terms of section 1 of the *Financial Sector Regulation Act* FSRA as "an event or circumstance, including one that occurs or arises outside the Republic, that may reasonably be expected to have a substantial adverse effect on the financial system or on economic activity in the Republic, including an event or circumstance that leads to a loss of confidence that operators of, or participants in, payment systems, settlement systems or financial markets, or financial institutions, are able to continue to provide financial products or financial services, or services provided by a market infrastructure."

¹⁰⁷⁹ Section 15(1) (a), (b) (i) and (ii) of the FSRA.

by the FSRA, the SARB no longer has the mandate of prudential supervision of banks as this mandate has now been given to the Prudential Authority.¹⁰⁸⁰

In alignment with the international financial reform agenda post-GFC to which South Africa as G-20 member committed at the G-20 Seoul Conference in 2010,¹⁰⁸¹ the SARB together with the National Treasury, inter alia, embarked on a regulatory journey to establish a new legislative framework that would facilitate the resolution of failing institutions in an orderly and transparent manner aimed at reducing the use of government funding to bail out such institutions.¹⁰⁸² This new resolution framework would be a crucial pillar of the SARB's expanded and explicit financial stability mandate.¹⁰⁸³ In tandem with the establishment of this new resolution framework, South Africa also sought to introduce a legislative framework for an explicit deposit insurance scheme (EDIS) as discussed below.

5.1.2 Implicit deposit protection in South Africa

As Okeahalam observes, despite robust bank supervision, South Africa is however not immune against bank failures that result in loss of their deposits by depositors.¹⁰⁸⁴ Generally, as pointed out, these bank failures involve smaller non-systemic banks or banks with a limited client base, which made it possible for government to compensate the retail depositors through implicit deposit protection administered by the SARB.¹⁰⁸⁵ Although there is currently no statutory framework capturing the obligation to reimburse depositors of failed banks, the SARB has, since the 1980s, compensated small depositors

¹⁰⁸⁰ See section 33 and 34 of the FSRA. See further Van Heerden & Van Niekerk “The role of the SARB as central bank in the South African Twin Peaks model” in Godwin & Schmulow (eds) *The Cambridge Handbook of Twin Peak Financial Regulation* (2020) 153.

¹⁰⁸¹ See National Treasury A safer financial sector to serve South Africa better (February 2011) available at

<http://www.treasury.gov.za/documents/national%20budget/2011/A%20safer%20financial%20sector%20to%20serve%20South%20Africa%20better.pdf> (accessed 22 September 2020).

¹⁰⁸² South Africa (2017) South African Reserve Bank *Financial Stability Review* (2nd) edition 28.

¹⁰⁸³ SARB *Financial Stability Review* (2017) 28. This new resolution regime has been incorporated into the FSRA through the Financial Sector Laws Amendment Act 23 of 2021 as Chapter 12 A, comprising sections 166A to 166Z.

¹⁰⁸⁴ Okeahalam “The Political economy of bank failure and supervision in the Republic of South Africa” 1998 *African Journal of Political Science* 35.

¹⁰⁸⁵ SARB *Financial Stability Review* (2017) 28.

whilst leaving large depositors as well as shareholders to bear some of the losses of these failed banks.¹⁰⁸⁶

In addition to the bank failures in the 1990s and the small bank crisis of 2002/2003, the following bank failures occurred, mainly due to inadequate capital and poor governance, since the enactment of the Banks Act 94 of 1990:¹⁰⁸⁷ Alpha Bank (1990), Cape Investment Bank (1991), Pretoria Bank, Sechold Bank (1993), Prima Bank (1994), African Bank (1995), Community Bank, and the Islamic Bank of South Africa (November 1997); FBC Fidelity Bank Ltd (1999), Cashbank (2000), and Regal Treasury Bank (2002). ABSA Bank further acquired Bankorp in 1995. Later the South African “small bank crisis of 2002/2003” occurred, the “first wave” commencing with a run on Saambou Bank in February 2002 and the bank being placed in curatorship in February 2009, followed by the failure of another seven banks (BOE Bank, Merrill Lynch, TA Bank, FirstCorp, PSG Investment Bank and International Bank). The “second wave” of bank failures commenced in September 2002 and involved the failure of Brait Merchant Bank (September 2002), Corpcapital (November 2002), Old Mutual Bank (December 2002), SECIB Bank (February 2003) and Unibank (March 2003). A “third wave of bank failures” followed that involved Nedcor Investment and Cape of Good Hope (February 2003), ING and Rand Merchant Bank (July 2003) and African Merchant Bank (September 2003).¹⁰⁸⁸

Approximately a decade later two memorable bank failures occurred, namely the failures of African Bank Investments Ltd and VBS Mutual Bank. Before its failure, African Bank Investments Ltd was the largest unsecured lender in South Africa, advancing loans without the backing of a mortgage or security.¹⁰⁸⁹ In August 2014, African bank issued an advisory warning of significant losses due to bad debts.¹⁰⁹⁰ Following this announcement,

¹⁰⁸⁶ SARB *Annual Report* (1998) 12. See also Lugulu *Addressing the moral hazard through explicit deposit insurance: A comparative appraisal of the Kenya Deposit Insurance Act 2012* (Unpublished University of Pretoria LLD thesis 2019) 185.

¹⁰⁸⁷ See Okeahalam “The political economy of bank failure and supervision in the Republic of South Africa” 1998 *African Journal of Political Science* 29 at 35-38.

¹⁰⁸⁸ See Havemann *Lessons from South African bank failures 2002 to 2014* (Unpublished PhD Economics Thesis, University of Stellenbosch, 2019) 11-12.

¹⁰⁸⁹ Batra “African bank goes under central bank’s curatorship amidst mounting credit losses” 2014 *NUS Risk Management Institute Weekly Credit Brief* 1.

¹⁰⁹⁰ Oxford Business Group *The Report South Africa 2014* (2014) 50

its share price dropped 60%, ultimately leading to the announcement of curatorship a few days later.¹⁰⁹¹ On the eve of its demise, African bank was described as systemic to the South African banking sector, based on its extensive client base, its niche role in financial inclusion as well as the negative impact on the socio-political environment.¹⁰⁹² Following the African bank scare, the SARB moved swiftly to maintain confidence in the financial sector¹⁰⁹³ by placing the bank under curatorship.¹⁰⁹⁴

Soon after the African Bank collapse, the VBS Mutual Bank¹⁰⁹⁵ failed in 2016. In a *Press conference*¹⁰⁹⁶ held by SARB on the 11th May 2018, SARB Governor Lesetja Kganyago stated that VBS bank had experienced liquidity challenges that emanated from the maturity of a large concentration of deposits from municipalities and was exacerbated by the termination of other sizeable deposits and the inability to source sufficient funding timeously.¹⁰⁹⁷ These liquidity challenges resulted in difficulty to settle its obligations in the National Payments System on several occasions.¹⁰⁹⁸ The bank was therefore placed

¹⁰⁹¹ At the time it was placed under curatorship, the balance sheet of African bank presented a stark picture. The crisis of African bank was not one of liquidity in the sense of being unable to honour cash withdrawals. Instead, its troubles resulted from non-performing loans to over-stretched clientele. See Dow, Jespersen & Tily (Eds) *Money, Method and Contemporary Post-Keynesian Economics* (2018) 50.

¹⁰⁹² Dow, Jespersen & Tily (2018) 50.

¹⁰⁹³ Tjiane *Curatorship of banks as a measure to rescue failing banks* (Unpublished Master of Laws dissertation, University of Pretoria, 2015) 5.

¹⁰⁹⁴ Tjiane (2015) 5.

¹⁰⁹⁵ VBS Mutual bank was established in 1982 as the Venda Building Society. VBS came under the spotlight in 2016 when it provided a loan of R7.8 million to the then President Jacob Zuma to help him repay money spent while upgrading his personal residence at Nkandla. In March 2018, VBS was placed under curatorship as a result of severe liquidity crisis. An independent investigation and report, commissioned by the SARB and authored by senior Advocate Terry Motau, revealed that nearly R1.9 billion in 'gratuitous payments' were made by VBS to 53 individuals and other entities. See *Open Secrets Corporations and Economic Crime Report – The Bankers* (2018) 39.

¹⁰⁹⁶ South African Reserve Bank (SARB) *Remarks by the Governor of the South African Reserve Bank Lesetja Kganyago in a press conference held on 11th March 2018: VBS Mutual Bank*.

¹⁰⁹⁷ SARB, *Press conference: VBS Mutual Bank* (2018) 2.

¹⁰⁹⁸ *Ibid.*

under curatorship¹⁰⁹⁹ with effect from the 11th March 2018.¹¹⁰⁰ Given the nature of its financial woes which included wide-scale theft of funds by bank officials, it was subsequently placed in liquidation 13 November 2018.

In his speech, the Governor gave the assurance that the (then) Office of the Registrar of banks, having been tasked with the promotion of the safety of depositors' funds placed with banks, had to ensure that depositors retain confidence and trust in the South African banking system.¹¹⁰¹ For this reason, the SARB guaranteed the reimbursements of deposits in VBS in the amount of R50 000 per depositor albeit that no explicit deposit framework was in place at the time to regulate depositor protection.¹¹⁰²

In principle, in accordance with the Lender of Last Resort (LOLR) of the SARB as central bank, a South African bank experiencing temporary liquidity problems may be assisted with some emergency liquidity assistance (ELA), provided it is solvent.¹¹⁰³ Thus, immediately upon realizing that a bank is potentially experiencing financial difficulties, the SARB has to launch a special investigation to establish whether such bank indeed suffers from a liquidity or solvency problem.¹¹⁰⁴ If the investigation reveals that the bank's liquidity problem is temporary, the SARB has to then decide, in the interest of the stability of the banking system, whether or not to provide temporary emergency liquidity assistance against security provided by the bank.¹¹⁰⁵

¹⁰⁹⁹ Section 69 of the Banks Act 90 of 1989 read with section 69A provides for curatorship and an inquiry into the affairs of a bank under curatorship. Simply defined, curatorship is a managed insolvency tool that allows regulators of a financial institution that is likely to fail to meet its financial obligations subject to the necessary approvals, to appoint a competent and qualifying person to take over the management of the institution. See SARB *Strengthening South Africa's resolution framework* (2015) 30. The curatorship process will be repealed once the FSLA Bill comes into operation. See section of the 12(1) of the FSLA Bill 2018 which provides that "the Banks Act 1990, is hereby amended by the repeal of sections 68, 69 and 69A.

¹¹⁰⁰ SARB *Press conference: VBS Mutual Bank* (2018) 2.

¹¹⁰¹ *Ibid.*

¹¹⁰² *Ibid.*

¹¹⁰³ Section 10(f) of the South African Reserve Bank Act (SARB Act) 90 of 1989 allows the SARB to grant loans and advances under certain circumstances.

¹¹⁰⁴ Section 11(1) of the SARB Act provides that the SARB "may appoint inspectors to carry out inspections of the affairs of the bank, or of any part thereof, of a bank or a mutual bank." See also SARB *Commemorative Publication* (2017) 65.

¹¹⁰⁵ Section 10(1)(s) of the SARB Act 1989.

The decision to provide ELA facilities by the SARB is discretionary and it is usually based on the severity of the implications of a bank failure for the stability of the monetary and financial systems of South Africa.¹¹⁰⁶ Since the SARB is a non-profit public institution with a public interest role, any ELA assistance is typically done at the expense of taxpayers' funds.¹¹⁰⁷ This means that in circumstances in which depositors' funds were lost or likely to be lost during a bank failure, the SARB, with the concurrence of the Government, stepped in to ensure that depositors were repaid a substantial part of their deposits.¹¹⁰⁸

In the SARB Financial Stability Review of 2017 it was stated that, viewed from the banking sector perspective, the advantage of the implicit deposit insurance arrangements which South Africa had in place, was that it does not put direct cost on the banking sector.¹¹⁰⁹ It was pointed out that, in any event, the country had to date not experienced the failure of any of the large banks hence these banks never felt the need to lobby for, and partake in, an explicit deposit insurance scheme.¹¹¹⁰ In fact, any suggestions¹¹¹¹ to introduce an EDIS in South Africa were always countered with various counterarguments, including issues of affordability, the concentrated banking system dominated by few large banks as well as the risk of moral hazard.¹¹¹²

¹¹⁰⁶ SARB *Commemorative Publication* (2017) 67.

¹¹⁰⁷ De Jager (2010) *De Jure* 230.

¹¹⁰⁸ Mbuya *The Pillars of Banking* 219.

¹¹⁰⁹ SARB *Financial Stability Review* (2017) 28.

¹¹¹⁰ In relating deposit insurance to bank failures in South Africa, Okeahalam reckons it is necessary to compare the cost and benefits of a limited explicit guarantee and the increased bank monitoring that would result from the establishment of a deposit insurance corporation, with that of the current implicit deposit insurance. See Okeahalam & Maxwell 'Deposit insurance design and bank regulation in South Africa' 2001 *Journal of Financial Regulation and Compliance* 139.

¹¹¹¹ In 1998, in his article, Okeahalam made a case for the introduction of a deposit guarantee scheme similar to the one which prevailed in the US under the *Federal Deposit Insurance Corporation Improvement Act* (FDICIA) 1991 where rules were clearly substituted for discretion. See Okeahalam "The Political Economy of bank failures and supervision in SA" 1998 *African Journal of Political Science* 41. Ngaujake also presented a case for the establishment of EDIS in South Africa in his Master of Commerce thesis in 2003. According to Ngaujake, the absence of a well-defined depositor protection arrangement in South Africa provides further impetus for the speedy introduction of EDIS as such move would be a desirable departure from the implicit guarantee offered by the SARB, which is discretionary and uncertain. See Ngaujake *Protecting depositors and promoting financial stability in South Africa: Is there a case for the introduction of deposit insurance?* (Master of Commerce thesis, Rhodes University 2003) 93.

¹¹¹² SARB *Strengthening South Africa's resolution framework for financial institutions* (2015) 33.

However, as indicated in Chapter One, the 2008 GFC prompted a fresh look into the role of depositor protection and its ability to protect depositors and contribute to financial stability by staving off bank runs and moral hazard that occasion bank failure as well as its interaction with resolution frameworks where it can fund certain resolution actions or facilitate prompt payouts to depositors in the event that a bank is liquidated.¹¹¹³ Against this background, the SARB and National Treasury issued a policy document in 2015 titled '*Strengthening South Africa's Resolution Framework for Financial Institutions*'¹¹¹⁴ (the 2015 *Policy Document*) which set out the motivation and policy proposal for strengthening the framework for the resolution of designated financial institutions in South Africa. As part of this framework, the establishment of an EDIS and its design features were preliminarily explored.¹¹¹⁵

In 2017, the SARB and the National Treasury gave further momentum to the initiative to establish an EDIS with another document titled '*Designing a deposit insurance scheme for South Africa*' (a *Discussion Paper*).¹¹¹⁶ This *Discussion Paper* contained more concrete proposals for the establishment of an explicit deposit insurance scheme for South Africa. Following the aforesaid policy documents, the South African Government tabled the *Financial Sector Laws Amendment Bill*¹¹¹⁷ in Parliament during August 2018 which sought to give effect to the proposals contained in the aforesaid policy documents. An updated version of the aforesaid Bill was introduced in 2020 and the *Financial Sector Laws Amendment Act* was eventually enacted in 2021.¹¹¹⁸ This Act, which is yet to be put into operation, introduces an EDIS framework as well as a resolution framework into the Financial Sector Regulation Act, being the framework law for the South African Twin Peaks Model. The main features of the South African EDIS, as conceptualized in the

¹¹¹³ Chapter 1, paragraph 1.2.1.

¹¹¹⁴ SARB: National Treasury *Strengthening South Africa's resolution framework for financial institutions* (2015).

¹¹¹⁵ Refer to the relevant pages and annexure

¹¹¹⁶ SARB: Financial Stability Department *Designing a deposit insurance scheme for South Africa – a discussion paper* (2017).

¹¹¹⁷ *Financial Sector Laws Amendment Bill* 2018 as introduced in the National Assembly (proposed section 75): Explanatory summary of Bill published in Government Gazette No 41955 of 05 October 2018.

¹¹¹⁸ Financial Sector Laws Amendment Act 23 of 2021.

aforesaid policy documents and incorporated into the *Financial Sector Regulation Act* via the *Financial Sector Laws Amendment Act* are analysed below.

5.2 The transition to an EDIS in South Africa

5.2.1 Strengthening South Africa's resolution framework for financial institutions (2015)

The transition to an EDIS in South Africa commenced in 2008 when the National Treasury circulated a draft *Deposit Insurance Bill* for comments.¹¹¹⁹ However, a range of challenges complicated the completion of that initiative.¹¹²⁰ Subsequently the initiative was revived with a policy document titled '*Strengthening South Africa's Resolution Framework for financial institutions*' (the *Policy Document*) setting out the motivation and proposals for a strengthened framework for the resolution of designated financial institutions in South Africa, including proposals for the introduction of an EDIS.¹¹²¹

In the aforesaid *Policy Document*, the National Treasury expressed the view that introducing an EDIS would provide the SARB that would be the designated resolution authority, with more options for funding a particular resolution strategy without resorting to the use of public funds.¹¹²² It was stated that the introduction of an EDIS would enable the resolution of failed banks to be conducted efficiently, economically and impartially compared to the current implicit guarantee system.¹¹²³ The *Policy Document* proposed that South Africa should implement an EDIS in line with the requirements of the *Key*

¹¹¹⁹ Although the National Treasury makes a mention of this Bill, all efforts to find it yielded no results. See South African National Treasury (NT) *A safer financial sector to serve South Africa better* (2011) 66.

¹¹²⁰ Some of the challenges included the need to take into account the specifics of the South African financial system, in particular, the fact that South Africa is dominated by four big banks. See NT *A safer financial sector* (2011) 66.

¹¹²¹ According to Francois, the establishment of explicit deposit insurance scheme will ensure that depositors who are most exposed to an asymmetry of information and thus least able to hedge themselves against financial loss in the event of a bank failure. See South African Reserve Bank (SARB) *Opening remarks by Francois Groepe, Deputy Governor of the South African Reserve Bank, at the public workshop on proposals to establish a deposit insurance scheme for South Africa* (2017) 2.

¹¹²² *Ibid.*

¹¹²³ Ngaujake (2003) 96.

Attributes, but that it should be implemented in such a way that it does not put excessive costs on the banking system.¹¹²⁴

In particular, the *Policy Document* recommended that before an EDIS could be implemented in South Africa, certain considerations regarding coverage had to be addressed.¹¹²⁵ It was inter alia pointed out that a key question that policymakers need to ask is whether the proposed EDIS should cover all depositors or only a certain class of depositors such as retail and small business depositors.¹¹²⁶ The *Policy Document* recommended introducing a deposit insurance scheme to protect vulnerable depositors who are most exposed to information asymmetry and who are most likely to suffer in the event of a bank failure.¹¹²⁷ An additional consideration, according to the *Policy Document*, was whether only permanent residents of South Africa or also foreign depositors should be covered under the proposed EDIS.¹¹²⁸ Moreover, considering that South Africa has a rare history of bank failures compared to various other countries on the African continent,¹¹²⁹ the *Policy Document* proposed taking into consideration the cost of introducing an EDIS to the banking system.¹¹³⁰

¹¹²⁴ SARB *Strengthening South Africa's resolution framework for financial institutions* (2015) 35.

¹¹²⁵ Ngalawa, Tchana & Viegi believe that countries wishing to implement EDIS need to decide on the type of deposits that will be covered and the type of financial institutions that will be included or excluded from the coverage. See Ngalawa, Tchana & Viegi 'Banking instability and deposit insurance: The role of moral hazard' 2016 *Journal of Applied Economics* 334.

¹¹²⁶ In this regard, it is recommended that policymakers define clearly in law, prudential regulations or by-laws, what an insurable deposit is. Thereafter, the determined amount should adequately cover the large majority of depositors to meet the public policy objectives of the deposit insurance system. See IADI *Enhanced Guidance for Effective Deposit Insurance Systems: Deposit Insurance Coverage* (2013) 7.

¹¹²⁷ The reasoning behind this rests on the assumption that in the event of a bank failure, small depositors are more exposed to the risk of loss than large depositors because of their inability as well as lack of means to assess the financial health of banks compared to institutional depositors. The justification for protecting small depositors is also based on the fact that they (small depositors) are thought to be more adversely affected by losses incurred during a bank failure. See Ngaujake (Master of Commerce thesis, Rhodes University 2003) 50.

¹¹²⁸ SARB *Strengthening South Africa's resolution framework for financial institutions* (2015) 35.

¹¹²⁹ See for example, Nyaude (LLD Thesis, University of Pretoria, 2021) where she provides various examples of bank failures in Zimbabwe.

¹¹³⁰ SARB *Strengthening South Africa's resolution framework for financial institutions* (2015) 36.

With respect to funding, the *Policy Document* recommended that South Africa adopt a hybrid¹¹³¹ approach to the funding of the deposit insurance system.¹¹³² This would require a levy to be charged on all banks to pre-fund the EDIS to the targeted level.¹¹³³ However, Treasury observed that there should be a formal legislative provision for government to provide funding in the event of a shortfall during the build-up period of the Fund as well as thereafter.¹¹³⁴ It was further pointed out that the provision should also specify how the funding provided by the government should be recovered.¹¹³⁵ According to the *Policy Document*, proposals on the South African deposit insurance system should take into consideration the base on which premiums should be levied as well as the level of the premiums.¹¹³⁶ Moreover, given the high level of concentration in the South African banking sector, it was proposed that banks should be charged premiums on a flat-rate structure which can later be changed to a risk-based fee after its establishment.¹¹³⁷

The *Policy Document* proposed that the trigger for deposit insurance payouts to depositors should be when the SARB invokes the deposit insurance system.¹¹³⁸ As the SARB would be the resolution authority in the proposed bank resolution dispensation, the *Policy Document* indicated that the decision to invoke the deposit insurance scheme was best left to the SARB and should depend on the resolution strategy it adopts. However, it

¹¹³¹ A hybrid funding mechanism is a form of funding that involves elements of both ex-ante and ex-post funding such as charging levies before a bank failure, increasing premiums, charging additional levies and receiving the proceeds of liquidations. See SARB *Strengthening South Africa's resolution framework for financial institutions* (2015) 37.

¹¹³² Long before the South African government could announce the move towards an EDIS, Ngaujake proposed that should South Africa introduce EDIS, the South African policymakers should consider adopting an ex ante deposit insurance system instead of relying on ex post assessments and contributions. He also recommended integrating some aspects of ex post system into the ex-ante system, thus making it a hybrid mechanism. See Ngaujake (2003) 105. See also SARB *Strengthening South Africa's resolution framework for financial institutions* (2015) 37.

¹¹³³ SARB *Strengthening South Africa's resolution framework for financial institutions* (2015) 39.

¹¹³⁴ *Ibid.*

¹¹³⁵ According to the *Policy Document*, the funding provided by the government should be recovered through a combination of liquidation proceeds and levies on surviving banks afterwards. SARB *Strengthening South Africa's resolution framework for financial institutions* (2015) 39.

¹¹³⁶ SARB *Strengthening South Africa's resolution framework for financial institutions* (2015) 39.

¹¹³⁷ See Chapter 2, para 2.5.9.

¹¹³⁸ SARB *Strengthening South Africa's resolution framework for financial institutions* (2015) 39.

emphasized that the payout of depositors' funds should be facilitated as soon as possible after a bank has entered resolution.¹¹³⁹

5.2.2 Designing a deposit insurance scheme – a Discussion Paper (2017)

The aforesaid *Policy Document* was followed up with a *Discussion Paper*¹¹⁴⁰ issued by SARB (in its capacity as proposed new resolution authority) in May 2017, containing proposals on the key design features of the envisaged South African EDIS. This discussion paper should be read in conjunction with the 2015 *Policy Document*.¹¹⁴¹ According to the *Discussion Paper*, and in line with what was stated in the *Policy Document*, the key objective for introducing an EDIS is to afford protection to less financially sophisticated depositors in the event of a bank failure and to promote the stability of the South African financial system.¹¹⁴² To allow for the prompt payout of depositors' funds when a bank fails as well as to allow the EDIS to financially support other forms of resolution without putting too much costs to it, a 'pay-box plus' mandate was recommended for South Africa.¹¹⁴³ Accordingly, the *Discussion Paper* indicated that the envisaged EDIS will have the legal powers to give effect to its objectives and mandate, including the powers associated with a 'pay-box plus' mandate.¹¹⁴⁴

¹¹³⁹ The *Policy Document* recommended that the pay-out of deposits should be within seven days after the closure of the bank. In this regard, deposit insurance members should be required to implement a single customer view (SCV) recordkeeping to facilitate a rapid pay-out. Accordingly, members should be afforded a reasonable time in which to phase in the necessary information system and other reforms to enable a seven-day pay-out. See International Monetary Fund (IMF) *South Africa Financial Sector Assessment Program: Financial safety net, bank resolution, and crisis management framework – Technical note* (2015) IMF Country Report No 15/53 34. See also SARB *Strengthening South Africa's resolution framework for financial institutions* (2015) 41.

¹¹⁴⁰ SARB: Financial Stability Department *Designing a deposit insurance scheme for South Africa – a discussion paper* (2017).

¹¹⁴¹ SARB *Designing a deposit insurance scheme* (2017) 1.

¹¹⁴² *Ibid.*

¹¹⁴³ SARB *Designing a deposit insurance scheme* (2017) 20.

¹¹⁴⁴ According to the IADI Core Principle 2, the powers associated with a 'pay-box plus mandate' include, but are not limited to: assessing and collecting premiums, levies or other charges; transferring deposits to another bank; reimbursing insured depositors; obtaining directly from banks timely, accurate and comprehensive information necessary to fulfil its mandate; receiving and sharing timely, accurate and comprehensive information within the financial safety-net, and with applicable safety-net participants in other jurisdictions; compelling banks to comply with their legally enforceable obligations to the deposit

The *Discussion Paper* proposed that the EDIS be positioned within the SARB as its subsidiary, making it a separate legal entity with its own legislative framework and governance requirements but located within the SARB as the SARB would be the designated resolution authority.¹¹⁴⁵ It is submitted that this arrangement will help reduce the start-up costs for the EDIS as the logistics of finding a separate location might be too costly. However, to ensure its operational independence, it was proposed that the EDIS should have a governing board consisting of the representatives from the SARB, National Treasury, the Prudential Authority (PA), the Financial Sector Conduct Authority (FSCA) and the Head of the EDIS.¹¹⁴⁶ Once appointed, the *Discussion Paper* indicated that the board should create a framework to govern, inter alia: the frequency of meetings; internal controls; duties and responsibilities; communication processes; transparency; disclosure arrangements and the transparent processes for the appointment and removal of Board members.¹¹⁴⁷

Before determining the scope and level of coverage for the envisaged EDIS, the SARB carried out an in-depth appraisal to determine the exact size and distribution of all deposits held by South African banks with the exclusion of large corporations' deposits.¹¹⁴⁸ As a result of the aforesaid survey, the *Discussion Paper* indicated that the

insurer; setting operational budgets, policies, systems and practices; and entering into contracts. See also SARB *Designing a deposit insurance scheme* (2017) 22.

¹¹⁴⁵ SARB *Designing a deposit insurance scheme* (2017) 22.

¹¹⁴⁶ The FSLAA 23 of 2021 is not clear on who, out of all the appointed Board members, will be Head of the Corporation. However, it is submitted that a representative from the SARB would best serve as Head of the Corporation since they would be having extensive knowledge and expertise in the financial sector.

¹¹⁴⁷ It is recommended that the process for appointing and removing members of the governing body and the deposit insurer's head of management should be clearly set out in law, by-laws, or administrative procedures. See International Association of Deposit Insurers (IADI) *A handbook for the Assessment of Compliance with the Core Principles for Effective Deposit Insurance Systems* (2016) 29. See also SARB *Designing a deposit insurance scheme* (2017) 25.

¹¹⁴⁸ The reason for excluding these large deposits from deposit insurance stems from the belief that these deposits are made by institutions which are financially sophisticated and are therefore able to make informed investment decisions. The deposits that have been classified as large corporations' deposits in South Africa include, inter alia: deposits by banks; deposits by non-bank private financial sector including money market unit trusts, non-money market unit trusts, insurers, pension funds, fund managers and private financial corporate sector institutions; deposits by government, including local, provincial and national government public sector entities, the Public Investment Corporation, other public non-financial corporations and monetary authorities; and bearer deposit instruments such as negotiable certificates of deposit (NCDs) and promissory notes. See generally SARB *Designing a deposit insurance scheme in South Africa* (2017) 28.

envisaged EDIS should extend coverage up to a maximum of R100 000 to all deposits,¹¹⁴⁹ regardless of the type or term of such deposits.¹¹⁵⁰ In the SARB's view, this amount was adequate for the protection of retail as well as small and medium enterprises (SMEs) depositors.¹¹⁵¹ The aforesaid level and scope of coverage was considered appropriate by the SARB to prevent bank runs resulting from retail depositors' *en masse* withdrawals from a financially distressed bank.¹¹⁵² The *Discussion Paper* further indicated that to ensure that the level and scope of coverage meets the stated public objectives, it will be legally required to undergo a review every 5 years.¹¹⁵³

The *Discussion Paper* further proposed that the EDIS should follow an automatic and compulsory membership approach for all registered (licensed) banks in order to avoid adverse selection.¹¹⁵⁴ As pointed out by Lugulu, the purpose of this approach is to avoid giving the stronger and well-capitalized banks the leeway to opt out of the deposit insurance membership, thereby leaving membership to smaller and less capitalized banks only.¹¹⁵⁵ However, whenever a new application for a banking license is lodged, the *Discussion Paper* stated that the EDIS should be consulted to allow it to set conditions for the approval of membership.¹¹⁵⁶ Although it was indicated that the envisaged EDIS will not have the power to reject the approval of a new bank license, the *Discussion Paper* nevertheless proposed that compliance with the requirements of the EDIS should be a

¹¹⁴⁹ Based on the survey of the deposits at all banks, it is estimated that R100 000 would be sufficient to fully cover the deposits of about 98% of the retail depositors in South Africa. See SARB *Deputy Governor Speech* (2017) 4.

¹¹⁵⁰ SARB *Designing a deposit insurance scheme in South Africa* (2017) 31. See also Kawadza "The South African financial safety net: In support of the proposed deposit protection framework" 2018 *South African Law Journal* 520.

¹¹⁵¹ Kawadza (2018) *South African Law Journal* 520.

¹¹⁵² More importantly, it is expected that this level of coverage would help the small banks to expand their funding base and subsequently contribute to the diversification of the banking sector. See SARB *Deputy-Governor Speech* (2017) 4. See also Kawadza (2018) 520.

¹¹⁵³ SARB *Designing a deposit insurance scheme in South Africa* (2017) 28.

¹¹⁵⁴ An adverse selection is defined as the tendency of higher-risks banks to opt for deposit insurance and of lower-risk banks to opt out of deposit insurance when membership in the deposit insurance scheme is voluntary. See SARB *Designing a deposit insurance scheme in South Africa* (2017) 27.

¹¹⁵⁵ Lugulu (2019) 2017.

¹¹⁵⁶ SARB *Designing a deposit insurance scheme in South Africa* (2017) 27.

prerequisite for granting a new license.¹¹⁵⁷ Once a bank becomes a member of the EDIS, its membership should be terminated upon deregistering as a licensed bank.¹¹⁵⁸

To ensure that the deposit insurance scheme does not run out of funds in the event of a bank failure, the SARB indicated that the envisaged EDIS should adopt a partially pre-funded¹¹⁵⁹ mechanism for funding, supplemented by emergency funding as well as post-funding¹¹⁶⁰ arrangements.¹¹⁶¹ In this regard, it was proposed that the EDIS would receive an interest free loan from the SARB as ‘seed funding’ which is to be repaid in due course by levying premiums from the member banks.¹¹⁶² The payment of premiums by banks serve to shield public funds from being applied to bear the costs of depositor reimbursement and moves such burden to the EDIS member banks.¹¹⁶³ Alternatively, to reduce the cost of the initial funding of the EDIS, the *Discussion Paper* indicated that the SARB should consider allowing a once-off reduction in the statutory cash reserve requirement¹¹⁶⁴ from 2.5% to 2.0% of liabilities, as adjusted.¹¹⁶⁵

In order to give practical effect to the initiative to establish an EDIS, the *Discussion Paper* proposed the establishment of a Deposit Insurance Fund¹¹⁶⁶ within the SARB and that

¹¹⁵⁷ *Ibid.*

¹¹⁵⁸ *Ibid.*

¹¹⁵⁹ A pre-funded scheme requires the deposit insurance system to accumulate and maintain a deposit insurance fund to cover deposit insurance claims and related expenses before the bank fails. See SARB *Designing a deposit insurance scheme in South Africa* (2017) 32.

¹¹⁶⁰ In a purely post-funded approach, no money is held in a deposit Insurance fund. This means that in the event of a bank failure, the deposit insurance system receives funding from the banking sector, the government or the central bank to facilitate depositor reimbursements. These funds are then recovered from the surviving banks through premiums. See SARB *Designing a deposit insurance scheme in South Africa* (2017) 32.

¹¹⁶¹ SARB *Designing a deposit insurance scheme in South Africa* (2017) 34. See also Kawadza (2018) 542.

¹¹⁶² SARB *Designing a deposit insurance scheme in South Africa* (2017) 36.

¹¹⁶³ Principle 9 of the *IADI Core Principles* stipulates that the responsibility for paying the deposit insurance should be borne by banks. See also Lugulu (2019) 208.

¹¹⁶⁴ See section 10A of the SARB Act 90 of 1989 for the banks’ requirement to maintain the minimum reserve balances in accounts with the Bank. The South African banks are required to maintain cash reserves of 2.5% in the South African Multiple Option Settlement (SAMOS) system. Lukhele reckons that the proposal to reduce each bank’s Cash Reserve Ratio held by the SARB by 50 basis points to 2% of deposits means that banks would have to transfer the Rand equivalent of that reduction from being an asset on their balance sheet to being a liability. See Lukhele (2017) 39.

¹¹⁶⁵ SARB *Designing a deposit insurance scheme in South Africa* (2017) 37.

¹¹⁶⁶ In his paper, Okeahalam suggested that, given the level of concentration and the high proportion of small deposit balances, a Deposit Insurance Fund in South Africa should have two key features: First, it should have the ability of assuming the role of lender of last resort for the South African government, which

SARB carry the start-up costs¹¹⁶⁷ associated with such fund.¹¹⁶⁸ As indicated, these costs will have to be repaid by member banks in order to adhere to the requirements of the EDIS.¹¹⁶⁹ Notably, Zongwe however observes that a deposit insurance fund that forms part of a government institution may create challenges when money is needed.¹¹⁷⁰ He believes that even an independent or stand-alone deposit insurance fund can only have money at its disposal if the premiums charged are high enough and assumptions made about possible losses are realistic.¹¹⁷¹

It was further proposed in the *Discussion Paper* that after its establishment, the ongoing operating costs of the EDIS would be recovered through an annual membership fee to the deposit insurance scheme which will be levied independently from the contributions to the Deposit Insurance Fund.¹¹⁷² In terms of the *Discussion Paper*, the SARB would provide, in line with the conditions set out in the *South African Reserve Bank Act 90 of 1989*, a committed line of funding to the EDIS for emergency funding purposes which should be recovered through liquidation proceeds as well as contributions by surviving banks.¹¹⁷³

The *Discussion Paper* also recommended that the proposed *Special Resolution Bill* (SR Bill), as mentioned in the 2015 *Policy Document*, should make provision for the EDIS to

means it should be able to meet the costs of the failure of one of the 'big four' banks. Second, considering the extreme level of income inequalities in South Africa, the per account coverage limit of a South African EDIS should be relatively low. See Okeahalam & Maxwell (2001) *Journal of Financial Regulation and Compliance* 139.

¹¹⁶⁷ Start-up costs refer to the initial money that should be available for the fund to become fully operational, including costs associated with implementing the necessary systems, recruiting staff, ensuring that banks can provide the necessary data and information as well as running public awareness campaigns. See SARB *Designing a deposit insurance scheme in South Africa* (2017) 40.

¹¹⁶⁸ The IMF recommended the housing of the SADIC within the SARB so that the operational footprint and costs of the deposit insurance scheme could be minimized to give the SADIC a relatively narrow mandate to collect and invest levies, pay out depositors in the event of a bank failure as well as to make funds available to the Resolution Authority for other types of resolution. See IMF (2015) *IMF Country Report No 15/53* 37.

¹¹⁶⁹ SARB *Designing a deposit insurance scheme in South Africa* (2017) 40.

¹¹⁷⁰ Zongwe "Deposit insurance in Namibia and South Africa: Pricing its necessity and design" 2019 *Annual Banking Law Update* (ABLU) 33.

¹¹⁷¹ Zongwe (2018) 33.

¹¹⁷² SARB *Designing a deposit insurance scheme* (2017) 24. See s10(s) of the Reserve Bank Act 90 of 1989.

¹¹⁷³ SARB *Designing a deposit insurance scheme in South Africa* (2017) 41.

enter into memoranda of understanding (MoU) and other arrangements with other financial safety net participants such as the PA and the FSCA for purposes of sharing information and coordinating activities.¹¹⁷⁴ In these Moues, roles and responsibilities between the different financial safety net participants should be clarified.¹¹⁷⁵

The *Discussion Paper* further pointed out that over the past number of years, South African banks have expanded into foreign countries, especially African countries.¹¹⁷⁶ Consequently, it stated that it is important that the envisaged EDIS enter into bilateral agreements with deposit insurance entities in such foreign jurisdictions, covering the deposits of the local branches of foreign banks in South Africa to determine, inter alia: which deposit insurance system will be responsible for reimbursements and public awareness, as well as to determine how much levies and contributions should be made by the relevant banks.¹¹⁷⁷

In particular, the *Discussion Paper* recommended that the envisaged South African EDIS be implemented in such a way that it will be able to develop a systemic analysis of the banking sector as well as develop early warning systems.¹¹⁷⁸ This would entail having regular meetings between the EDIS, the PA and other financial safety net participants to discuss trends as well as the risks that have been identified in order for them to be addressed.¹¹⁷⁹ The EDIS should also have a legal framework which will clearly specify the triggers for prompt corrective action¹¹⁸⁰ and timely early intervention.¹¹⁸¹ In order to be able to identify risks timely, the EDIS should develop contingency plans and crisis

¹¹⁷⁴ SARB *Designing a deposit insurance scheme in South Africa* (2017) 42.

¹¹⁷⁵ *Ibid.*

¹¹⁷⁶ *Ibid.*

¹¹⁷⁷ *Ibid.*

¹¹⁷⁸ *Ibid.*

¹¹⁷⁹ SARB *Designing a deposit insurance scheme in South Africa* (2017) 43.

¹¹⁸⁰ SARB *Designing a deposit insurance scheme in South Africa* (2017) 43.

¹¹⁸¹ Timely detection of weak or problem banks is crucial for the effective and stable functioning of the financial and deposit insurance systems because they ensure due preparation for expected insured events such as bank failures. Moreover, early identification of weaknesses and threats to the deposit insurance system allows supervisors and other financial safety-net players to take efficient measures for minimizing the probability and costs of bank failures. See IADI *Guidance on early detection and timely intervention for deposit insurance systems* (2013) 4.

management policies and procedures for its core functions.¹¹⁸² It should further formulate and test system-wide crisis preparedness strategies and policies and develop pre- and post-crisis management communication plans with other financial safety net participants.¹¹⁸³

As indicated, the *Discussion Paper* proposed a ‘pay-box plus’ mandate for the EDIS. This means the envisaged EDIS would not only have the power to reimburse depositors, but would also have a say in resolution and would have the power to:¹¹⁸⁴

- (a) Facilitate depositors’ payout and take their place in a ‘liquidation waterfall’;¹¹⁸⁵
- (b) Provide full or partial funding for the cost of a purchase and assumption resolution;¹¹⁸⁶
- (c) Reimburse insured depositors who have been written off through bail-in;¹¹⁸⁷
- (d) Fund the transfers to a bridge bank or the sale to a private sector entity;¹¹⁸⁸
- (e) Fund an open bank resolution.¹¹⁸⁹

¹¹⁸² According to the IADI, a prerequisite for a contingency planning framework is that deposit insurers have in place the necessary tools and procedures to perform its day-to-day functions according to the stated mandate. See IADI *Deposit Insurers’ Role in Contingency Planning and System-wide Crisis Preparedness and Management – Guidance Paper* (2019) 21. See also SARB *Designing a deposit insurance scheme in South Africa* (2017) 44.

¹¹⁸³ SARB *Designing a deposit insurance scheme in South Africa* (2017) 44.

¹¹⁸⁴ *Ibid.*

¹¹⁸⁵ A liquidation waterfall basically refers to the hierarchy of claims in liquidation. The Corporation’s actions will be subject to the rule that no creditor should be worse off as a result of resolution actions than would have been the case in liquidation. In essence, the Corporation will be expected to respect the creditor hierarchy in the Insolvency Act 24 of 1936. See SARB: Financial Stability Department *Ending too big to fail: South Africa’s intended approach to bank resolution* (2019) 19.

¹¹⁸⁶ The FSLAB required the Corporation to provide funding for the cost of purchase and assumption resolution of a failed institution.

¹¹⁸⁷ The FSLAB introduced a new tranche of loss-absorbing instruments, referred to as ‘Flac’ instruments, which will be subordinated to unsecured liabilities and be clearly intended for bail-in resolution. See SARB *Ending too big to fail* (2019) 15.

¹¹⁸⁸ As the designated resolution authority, the SARB will have the ability to restructure a designated institution in resolution. In this regard, section 166R of FSLAB empowers to transfer any or all of the assets and/or liabilities as well as conduct a sale, merger or similar arrangement. See also SARB *Ending too big to fail* (2019) 18.

¹¹⁸⁹ In an open-bank resolution, the bank is allowed to continue to function in its existing form under its own license. The aim of an open-bank resolution strategy is to resolve a failing bank in such a way that the provision of critical functions and critical shared services continues without interruption. As such, the bank

Since the main objective for the South African EDIS would be to put systems in place to be able to effect payouts to depositors, it was proposed that such payouts would be made within 20 working days after the closure of a bank for deposit accounts where ownership is easily identifiable.¹¹⁹⁰

5.2.3 *The Financial Sector Laws Amendment Act 23 of 2021*

As indicated, over the course of many years there were no explicit deposit insurance arrangements in place in South Africa for the protection of depositors in the event of a bank failure.¹¹⁹¹ However, in August 2018, the *Financial Sector Laws Amendment Bill 2018 (FSLAB)* was tabled before Parliament to give effect to the proposals contained in the policy documents discussed above. A revised version of this *Bill* was issued in 2020 and was eventually enacted as the *Financial Sector Laws Amendment Act 23 of 2021 (FSLAA)*, which is yet to be put in operation.

The *Financial Sector Laws Amendment Act 23 of 2021* inserted provisions for an explicit Deposit Insurance framework as part of a new Chapter 12A into the *Financial Sector Regulation Act 9 of 2017* that, once put into operation, will establish the Corporation¹¹⁹² for the South African Deposit Insurance (and further referred to herein as the Deposit Insurance Corporation or Corporation)¹¹⁹³ that will provide a pre-planned, orderly and efficient mechanism to protect depositors.¹¹⁹⁴ The share capital of the Corporation will be R1 000 000 but such share capital may be increased by the Board of the Corporation at any time. Only the SARB and the Government may hold shares in the Corporation.¹¹⁹⁵

stays open for business and is preserved in its existing form. An open-bank resolution is, therefore, often used for banks that are too big and systemically important to fail as their failure would have adverse negative effects on the stability of the financial system. See generally SARB *Ending too big to fail* (2019) 21.

¹¹⁹⁰ SARB, *Designing a deposit insurance scheme for South Africa* (2017) 44.

¹¹⁹¹ SARB *Financial Stability Report* (2018/19) 50.

¹¹⁹² As per section 1 of the FSRA, amended by the FSLAA 2021 'Corporation' means the Corporation for Deposit insurance.

¹¹⁹³ Section 166AD of the FSLAA 23 of 2021. Section 166AW provides that the Corporation may not be wound up except by, or on authority of, an Act.

¹¹⁹⁴ Section 166AD of the FSRA as introduced by the FSLAA 23 of 2021

¹¹⁹⁵ Section 166AR (1) and (2) of the FSRA as introduced by the Financial Sector Laws Amendment Act 2021. Section 166AR (3) limits the liability of the Reserve Bank as holder of a share in the Corporation to

The Corporation must further determine the personnel, accommodation, facilities, use of assets, resources and other services necessary for its effective functioning.¹¹⁹⁶ The SARB will provide such personnel, accommodation, facilities, use of assets, resources and other services to the Corporation and must second the personnel it provides to the Corporation.¹¹⁹⁷

5.2.3.1 Objectives and functions of the Deposit Insurance Corporation

The objective of the Corporation is, by providing deposit insurance and carrying out its functions as set out in section 166AF(2) of the *Financial Sector Regulation Act*, to support the SARB in fulfilling its financial stability mandate.¹¹⁹⁸ To achieve this the Corporation is assigned the following functions:¹¹⁹⁹

(a) to establish, maintain and administer, the Fund established in terms of section 166BC of the *Financial Sector Regulation Act 2017* in the interests of holders of ‘covered deposits’, as explained below,¹²⁰⁰ and

(b) to promote awareness among financial customers of the protections afforded by the deposit insurance framework set out in Chapter 12A of the *Financial Sector Regulation Act 2017*.

the amount unpaid in respect of such share. The financial year end of the Corporation is 31 March - see Section 166AS.

¹¹⁹⁶ Section 166AX (1) of the FSRA as introduced by the FSLAA 2021. In terms of section 166AX(2) the Corporation may “enter into secondment arrangements in respect of persons; engage persons on contract otherwise than as employees; enter into contracts; acquire or dispose of property; insure itself against any loss damage, risk or liability that it may suffer or incur; and do anything else necessary for the performance of its functions.” For purposes of entering into a secondment arrangement in respect of a person, or engaging a person on contract the Corporation and such person must agree in writing on performance measures for assessment of such person’s performance and the level of performance that must be achieved against those measures.

¹¹⁹⁷ Section 166 AY (1) and (2) of the FSRA as introduced by the FSLAA 2021.

¹¹⁹⁸ See section 11 of the FSRA read with section 3(2) of the Reserve Bank Act, 90 of 1989 and section 224 of the Constitution 1996.

¹¹⁹⁹ Section 166AF (2) (a) and (b) of the FSRA as introduced by the FSLAA 2021.

¹²⁰⁰ See par 5.2.3.6 below.

5.2.3.2 Membership

It is provided that a bank will become a member of the Corporation upon its registration or on the day that such bank obtains its license to operate as a deposit-taking institution and is allowed to hold covered deposits.¹²⁰¹ Alternatively, a bank which was licensed or registered in terms of a relevant financial sector law before the establishment of the Corporation will become a member of the Corporation once the latter is established.¹²⁰² The *Act* makes it mandatory for a bank, when applying for a bank license or registration, to provide the responsible authority with information that will enable it to meet the requirements¹²⁰³ of the Corporation.¹²⁰⁴

5.2.3.3 Governance

In terms of section 166AH of the *Act*, the Corporation will appoint a Board of Directors to manage its affairs, including the Fund, that will be required to establish and implement appropriate and effective governance systems and processes, taking into account internationally accepted standards. As such, the affairs of the Corporation will be managed and controlled by the aforesaid Board of Directors, which will be required to exercise the powers and perform the duties conferred and imposed upon the Corporation by the *Financial Sector Regulation Act*.¹²⁰⁵ The Board will be comprised of the following persons:¹²⁰⁶ a representative from the National Treasury appointed by the Director-General of the National Treasury; a Deputy-Governor of the SARB appointed by the Governor; the Chief Executive Officer of the Prudential Authority; the Commissioner of

¹²⁰¹ Section 166AG (1) of the FSRA as introduced by the FSLAA 2021. (1)

¹²⁰² Section 166AG (2) of the FSRA as introduced by the FSLAA 2021.

¹²⁰³ The provision is not clear on the requirements of the Corporation. However, it is suspected that the requirements referred to here are the requirements for becoming a member of the Corporation, inter alia obtaining a bank licence and registering a bank in terms of the relevant legislation.

¹²⁰⁴ Section 166AG (3) of the FSRA as introduced by the FSLAA 2021.

¹²⁰⁵ Section 166AI (1) of the FSRA as introduced by the FSLAA 2021.

¹²⁰⁶ Section 166AI (2) of the FSRA as introduced by the FSLAA 2021. For the appointment of the two other directors of the Corporation's Board by the Governor there must be concurrence with the Minister of Finance. In terms of section 166AI(3) directors will hold office for a 5 year term that can be extended once for a further 5 years. See further section 166AI (4) to (9) regarding inter alia resignation and removal from office of directors.

the Financial Sector Conduct Authority; the Chief Executive Officer of the Corporation; the Group Chief Financial Officer of the SARB; and two other persons appointed by the Governor of the SARB.

In general, the appointed Board will be responsible for overseeing the management and administration of the Corporation to ensure that it operates efficiently and effectively.¹²⁰⁷ Furthermore, the Board will act on behalf of the Corporation in, inter alia:¹²⁰⁸ authorizing the CEO to sign memoranda of understanding and amendments on behalf of the Corporation; appointing members of relevant committees and providing directions on how such committees should conduct their work; making determinations on how to apply the Fund during bank resolution; determining the deposit insurance levy for the purposes of *Financial Sector and Deposit Insurance Levies (Administration) and Deposit Insurance Premiums Bill 2022 (FSDILDIPB)* ;¹²⁰⁹ as well as performing any other matter assigned to it in terms of a financial sector law.

Board meetings will be held at a time determined by the Board or the chairperson of the Board.¹²¹⁰ A quorum for a meeting of the Board is a majority of the directors of the Board with the condition that it must include the representative of the National Treasury appointed by the Director-General of the National Treasury or his alternate and a Deputy Governor or his alternate. A decision of the majority of the directors of the Board present at a meeting constitutes a decision of the Board. If the votes are equal the person presiding at such meeting has a casting vote as well as a deliberative vote.¹²¹¹

An employee of the Reserve Bank (who must not be a disqualified person or a person not ordinarily resident in South Africa) with appropriate expertise in the financial sector will be

¹²⁰⁷ Section 166AJ (a) of the FSRA as introduced by the FSLAA 2021.

¹²⁰⁸ Section 166AJ (b) (i), (ii), (iii), (iv) & (v) of the FSRA as introduced by the FSLAA 2021.

¹²⁰⁹ The Financial Sector and Deposit Insurance Levies (Administration) and Deposit Insurance Premiums Bill has been accepted by the National Council of Provinces and is currently awaiting Presidential assent. See

<https://www.parliament.gov.za/bill/230064#:~:text=To%20provide%20for%20the%20collectionand%20Deposit%20Insurance%20Levies%20Act%2C.pdf> (Accessed 8 October 2022) (hereinafter FSDILDIPB).

¹²¹⁰ Section 166AK (1) of the FSRA as introduced by the FSLAA 2021. See also section 166AK(2) to (6) and (9) to (12) regarding processes to be followed at these meetings.

¹²¹¹ Section 166AK (7) and (8) of the FSRA as introduced by the FSLAA 2021.

appointed as Chief Executive Officer of the Corporation.¹²¹² Except as provided in section 166AJ(b), the Chief Executive Officer will be responsible inter alia, for the day-to-day management and administration of the Corporation and must perform the functions of the Corporation, including exercising the powers and carrying out the duties associated with those functions. When acting as such he must implement the policies and strategies that have been adopted by the Board.¹²¹³

In terms of section 166AO the Board may establish committees it deems necessary. A safeguard provided in relation to dealing with the Fund and ensuring it is not mal-administered, is that the Board must at least establish an investment committee to review the Fund's portfolio and this investment committee must make recommendations regarding the investment of the Fund to the Board.¹²¹⁴

The duties of the Board of Directors and committee members are set out in section 166AP (a) and (b) and entail that they must act honestly in all matters relating to the corporation. In addition, they must perform their functions in good faith; for a proper purpose; and 'with the degree of care and diligence that a reasonable person in the director's or member's position would exercise.; A Director of the Board is further required to disclose any interest in any matter that is being or may be considered by the Board, that the director has, or that a person who is related to such director, has. Such disclosure must be made as soon

¹²¹² Section 166AL of the FSRA as introduced by the FSLAA 2021. When making such appointment, the Board and the appointed person should agree, in writing, on the performance measures that will be used to assess the Chief Executive Officer's performance and the level of performance to be achieved against those performance measures. See section 166AL (2) (a) and (b) of the FSLAA 2021.

¹²¹³ Section 166AL(1) to (5) of the FSRA as introduced by the FSLAA 2021. In terms of section 166AL(6) the Board may appoint a senior staff member of the Corporation to be the acting Chief Executive Officer if the latter is absent from office or otherwise unable to perform his functions. The Chief Executive Officer will hold office for a term of no longer than five years as the Board may determine, serving in a full-time executive capacity. See section 166AM(1). In terms of section 166AN(2) the Board must, subject to following due process, revoke the appointment of a Chief Executive Officer who becomes a "disqualified person". The grounds for removal of the Chief Executive Officer are listed in section 166AN (2) as: where the Chief Executive Officer is unable to perform his duties for health or other reasons; where the Chief Executive Officer has failed in a material way to achieve the level of performance against the performance measures agreed to; where the Chief Executive Officer has failed in a material way to discharge the responsibilities of office, including any responsibilities entrusted in terms of legislation; and where the Chief Executive Officer has acted in a way that is inconsistent with continuing to hold the office.

¹²¹⁴ Section 166AO(1) and (2) of the FSRA as introduced by the FSLAA 2021. See further section 166AO(3) to (6) regarding the composition, functions, procedures and membership of committees established by the Board.

as practicable after the director concerned became aware thereof and must be done at a meeting or in writing to each of the other directors. Absent the aforesaid disclosure such director may not participate in the consideration of, or a decision on, a matter to which such interest relates except if he has properly disclosed the interest and the other directors decided that the interest does not affect the proper execution of the functions of the director concerned in relation to the matter.¹²¹⁵ The duty to disclose possible conflicting interests also extends to the each Member of the Corporations staff and each person to whom a power or function of the Corporation has been delegated.¹²¹⁶

Further duties of directors, committee members and corporation Staff members are set out in section 166AZ and entail that a person who is, or has been, a Board director, committee member or Corporation staff member, may not use that position or any information obtained as a result of holding such position to: improperly benefit himself or another person; cause improper detriment to the ability of the Corporation or SARB to perform its functions; or cause improper detriment to another person. Notably for purposes of section 166AZ 'benefit and 'detriment' are not limited to financial benefit or detriment.¹²¹⁷

5.2.3.4 Cooperation and collaboration with financial sector regulators and SARB

In line with the objective of the *Financial Sector Regulation Act* to encourage cooperation and collaboration¹²¹⁸ between the SARB and financial regulators and between the financial regulators themselves for purposes of financial stability and the broader efficient and effective working of the South African Twin Peaks Model, the Corporation will be obliged, in terms of section 166BA, to co-operate and collaborate with other financial

¹²¹⁵ Section 166AQ (1) to (3) of the FSRA as introduced by the FSLAA 2021.

¹²¹⁶ Section 166AQ(5) provides that :"(a) Each member of the Corporation's staff and each person to whom a power or function of the Corporation has been delegated must make timely, proper and adequate disclosure of his or her interests, including interests of a related party, that could reasonably be seen as interests that may affect the proper execution of his or her functions of office or the delegated power. (b) The Chief Executive Officer of the Corporation must ensure that paragraph (a) is complied with."

¹²¹⁷ Section 166AZ(1) and (2) of the FSRA as introduced by the FSLAA 2021.

¹²¹⁸ Sections 26 and 76 of the FSRA respectively. See also Van Niekerk & Van Heerden "The importance of a legislative framework for the co-operation and collaboration in the Twin Peaks Model of financial regulation" 2020 *SALJ* 110-146.

sector regulators as well as the SARB to assist it to exercise its powers and perform its functions in terms of the FSRA.¹²¹⁹ This includes providing assistance and information and promptly reporting any matter of which it becomes aware of that affects or may affect the performance of any of these powers or functions.¹²²⁰ Furthermore, the financial sector regulators will be expected to comply with any reasonable request from the Corporation, including requests to make standards and issue regulator's directives, in order to promote public awareness among financial customers regarding the protections afforded to them by the new deposit insurance framework incorporated into the *Financial Sector Regulation Act*.¹²²¹

In this regard, the Corporation will enter into a memorandum of understanding (MoU) with the SARB, a financial sector regulator or a body in a foreign country that has powers or functions corresponding to its powers and functions.¹²²² The envisaged MoU and other relevant agreements should clearly elucidate the roles and responsibilities between the different financial safety net participants.¹²²³ Moreover, the Corporation will, in terms of section 166BB of the *Financial Sector Regulation Act*, enter into bilateral arrangements with deposit insurers in countries where South African banks are materially present as well as with the host countries of the head offices of foreign banks with presence in South Africa.¹²²⁴ Notably however, it is provided in section 166BB(2) that '[T]he validity of an action taken by the Corporation in terms of this Act or a financial sector law is not affected by a failure to comply with this section or a memorandum of understanding contemplated in subsection (1).'

Section 166BF further obliges the Prudential Authority, the Financial Sector Conduct Authority and banks that are members of the Corporation to comply with any request by

¹²¹⁹ Section 166BA (1) of the FSRA as introduced by the FSLAA 2021.

¹²²⁰ *Ibid.*

¹²²¹ Section 166AZ (2) of the FSRA as introduced by the FSLAA 2021. In this regard, a budget should be provided and a program implemented by the SADIC manager and member banks to raise public awareness of the existence and limits of the SADIC. The aim of promoting public awareness should be to ensure clarity as to what banks, instruments and values will be covered by the SADIC and conveying this message should be done through media in a form most accessible to retail depositors. See IMF (2015) *IMF Country Report No 15/53* 38.

¹²²² Section 166BB (1) of the FSRA as introduced by the FSLAA 2021.

¹²²³ SARB, *Designing a deposit insurance scheme in South Africa* (2017) 42.

¹²²⁴ *Ibid.*

the Corporation for information that is relevant to the performance of the Corporation's functions in terms of this Act.

5.2.3.5 The Funding of the Corporation

The funding of the operations and administration of the Corporation itself must be distinguished from the Deposit Insurance Fund, discussed below. Section 166AT provides that the amount of any surplus funds of the Corporation, after deducting the corporations' expenses and making proper provisions at the end of each financial year of the Corporation, must be credited to the Fund. This does however not prevent the crediting of amounts of surplus funds to the Corporation at other times.¹²²⁵

In terms of section 166BC (1) the Corporation is permitted to charge member banks certain deposit insurance levies¹²²⁶ to fund the Corporation's operations and the administration of the Fund. These deposit insurance levies are payable to the Corporation at the time specified by the Corporation in accordance with the legislation that empowers the imposition of these levies, once enacted.¹²²⁷

Section 35 of the *Financial Sector Laws Amendment Act 23 of 2021* has introduced some new definitions into section 1 of the FSRA which deal specifically with levies and premiums. A deposit insurance levy is defined as 'a levy of that name that may be imposed by legislation in accordance with section 166BC'. A deposit insurance premium means 'a premium imposed by legislation in accordance with section 166BG'.

5.2.3.6 The Deposit Insurance Fund

The Deposit Insurance Fund will be established in terms of section 166BD of the *Financial Sector Regulation Act* and the Fund will be held by the Corporation, which must establish

¹²²⁵ Section 166AT(1) and (2) of the FSRA as introduced by the FSLAA 2021.

¹²²⁶ Section 1 of the FSRA, as amended by the FSLAA, defines a deposit insurance levy as "a levy of that name that may be imposed by legislation in accordance with section 166BC."

¹²²⁷ Section 166 BC(2) of the FSRA as introduced by the FSLAA 2021.

an account at the SARB for purposes of the Fund.¹²²⁸ The sources of funding of the Fund will consist of;

- (a) the ‘amount standing to’ the Corporation;
- (b) credit in the aforesaid SARB account;
- (c) investments made with the Fund’s money; and

other assets of the Corporation attributable to the Fund.¹²²⁹

Other amounts to be credited to the Fund include:¹²³⁰

- (a) the Corporation’s surplus funds as indicated in section 166AT;
- (b) amounts collected as deposit insurance premiums in accordance with section 166BG;
- (c) interest and other amounts earned from investments of the Fund;
- (d) amounts that the corporation recover in respect of amounts paid out by the Fund (for example to reimburse depositors or support a resolution action such as moving depositors to a bridge bank); and
- (e) other amounts that the Corporation received for purposes of, or in connection with, the Fund.

It is provided that the Corporation may collect premiums¹²³¹ from member banks (sufficient) to ensure that the Fund is able to make the payments it is required to make during bank resolution in terms of Chapter 12A.¹²³² The Corporation is required to publish premiums that have been collected, in the Register and on its website.¹²³³

¹²²⁸ Section 166BD(1) to (3) of the FSRA as introduced by the FSLAA 2021.

¹²²⁹ Section 166BD(4) of the FSRA as introduced by the FSLAA 2021.

¹²³⁰ Section 166BD(5) of the FSRA as introduced by the FSLAA 2021.

¹²³¹ Section 1 of the FSRA, as amended by the FSLAA 2021, defines a “deposit insurance premium” as “a premium imposed by legislation in accordance with section 166BG”.

¹²³² Section 166BG(1) of the FSRA as introduced by the FSLAA 2021.

¹²³³ Section 166BG (2) of the FSRA as introduced by the FSLAA 2021. In terms of s166BG(3) deposit insurance premiums must be paid to the Corporation at the time specified by the Corporation or agreed with the Corporation.

Fund liquidity is addressed in section 166BH which provides that banks that are Corporation members and hold covered deposits must maintain a minimum amount in the Fund's account as specified by the Corporation in a standard.¹²³⁴ The Corporation is thus given the power to arrange certain aspects in standards that it may issue.

The use of the Fund is safe-guarded by the stipulation in section 166(6) that the Fund may only be used:

- '(a) To make payments in terms of section 166AA, including in terms of agreements contemplated by that section;
- (b) by way of investments in terms of section 166BE(1);
- (c) to repay amounts paid into the Fund in error.'

Thus the main application of the Fund is limited to facilitating resolution actions to ensure that depositors who hold covered deposits have reasonable access to such deposits as contemplated in section 166AA, namely: reimbursing the bank in resolution for payments made by such bank to depositors who hold covered deposits; or directly reimbursing depositors of the bank in resolution who hold covered deposits; or making payments in terms of an agreement regarding covered deposits of the bank in resolution as envisaged in section 166S(1); or investing the money as permitted by the *Financial Sector Regulation Act*.¹²³⁵ 'Covered deposits' are defined as 'the portion of a qualifying deposit covered by the Deposit Insurance Fund provided for in section 166AB.'¹²³⁶ A 'qualifying deposit' is now defined in the aforesaid Act and means 'a deposit with a bank, other than-

- (a) a deposit evidenced by a bearer deposit instrument; or
- (b) a deposit where the depositor holds the deposit in the capacity of-
 - (i) a financial institution, excluding a financial institution that is a co-operative financial institution as defined in section 1(1) of the Co-Operative Banks Act;

¹²³⁴ Section 166BH of the FSRA as introduced by the FSLAA 2021. In terms of section 166BH the Corporation must pay interest to member banks on the amount that such member banks must maintain in the Fund's account. Such interest must also be specified in a standard.

¹²³⁵ Section 166 AA(1) of the FSRA as introduced by the FSLAA 2021.

¹²³⁶ Section 1 of the FSRA as amended by the FSLAA 2021.

(ii) the national government, a provincial government, a local government or an organ of state;

(iii) an entity listed in Schedule 2 to the Public Finance Management Act;

(iv) The Corporation for Public Deposits established by section 2 of the Corporation for Public Deposits Act, 1984 (Act No. 46 of 1984); or

(v) The Public Investment Corporation established by section 2 of the Public Investment Corporation Act, 2004 (Act No.23 of 2004).’

Agreements envisaged in section 166AA (1) (c) include: a secured loan to the bank in resolution; or a loss sharing agreement between the bank in resolution or a person assuming liability for the bank in resolution’s covered deposits; or a guarantee in favour of the bank in resolution, by the SARB or another person in respect of the covered deposits of the bank in resolution.¹²³⁷ Notably the cost to the Fund of entering into an agreement as envisaged in section 166AA (2) may not exceed the total amount of covered deposits held by the bank in resolution. This prohibition however does not apply to costs incurred by the Corporation when it exercises its functions in terms of section 166AF.¹²³⁸ Certain safeguards are laid down in the *Financial Sector Regulation Act* regarding investment of the Fund by the Corporation, requiring the Corporation to apply money standing to the Fund’s credit consistent with the ‘investment strategy’ of the Fund, formulated by the Corporation. This investment strategy, which must be reviewed regularly, must be aimed at achieving the objective of the Corporation by ensuring that the Fund is able to make payments as required by Chapter 12A. When the Corporation formulates and reviews the investment strategy for the Fund, it is obliged to consider, inter alia, ‘the risk involved in making, holding and realizing, and the likely return from the Fund’s investments’.¹²³⁹

¹²³⁷ Section 166 AA(2) of the FSRA as introduced by the FSLAA 2021. A caveat is added by section 166AA(3) which provides that the Corporation may only enter into an agreement mentioned in this subsection if the Corporation believes that the agreement will contribute to the bank’s orderly resolution.

¹²³⁸ Section 166AA(3)(a), (b) and (c) of the FSRA as introduced by the FSLAA 2021.

¹²³⁹ Section 166BE of the FSRA as introduced by the FSLAA 2021.

5.2.3.7 *Limit of cover for covered deposits*

In terms of the new explicit deposit insurance framework inserted into the *Financial Sector Regulation Act* a depositor is defined as ‘a person that holds a deposit as defined in section 1 of the Banks Act.¹²⁴⁰ The new regime also caps the protection of covered deposits of a bank in resolution at a certain maximum amount. The maximum amount of coverage is determined by whichever amount is the *lesser* of:¹²⁴¹

‘(a) the sum of-

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

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

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

The legislation does thus not specify a blanket amount that will apply to all depositors and once Chapter 12A of the Financial Sector Regulation Act is put into operation, the Minister will issue regulations prescribing covered amounts.

The aspect of payments made by the Corporation in error or fraud is addressed in section 166AC. It is provided that, if the Corporation makes one or more payments out of the Fund as contemplated by section 166AA above, in respect of a depositor who deposited money in a bank that subsequently was placed in resolution and the total amount paid was more than the amount permitted by section 166AB, and the excess amounts was paid as a result of error by the Corporation or the bank in resolution or fraud (except fraud

¹²⁴⁰ Section 1 of the FSRA as amended by section 35 of the FSLAA 2021.

¹²⁴¹ Section 166AB(1) of the FSRA as introduced by the FSLAA 2021. It is further provided in section 166AB (2) that a reference in section 166(1) to “the amount standing to the credit of an account” is a reference to the amount standing to the credit of the account “as at the date that the bank was placed in resolution.”

by an official or employee of the Corporation), then the Corporation can recover such excess amount from the bank in resolution.¹²⁴²

5.2.3.8 Bookkeeping, auditing and annual reporting

The Corporation is obliged to ensure that proper account is kept of all financial transactions, assets and liabilities of the Corporation and the Fund. It must further cause financial statements to be compiled for each financial year and copies of such statements, after auditing as required by the law, must be submitted to the Minister of Finance and the SARB.¹²⁴³ Within 6 months after the end of each financial year the Corporation must submit a report on its operations, as well as the Fund's operations, to the Minister of Finance and the SARB. This report and the financial statements referred to in section 166AU(b) must be tabled in Parliament when the Minister of Finance also tables copies of the reports referred to in section 32(3) of the Reserve Bank Act.¹²⁴⁴

5.2.3.9 Subrogation

Subrogation in relation to the Deposit Corporation is provided for in section 166AD of the *Financial Sector Regulation Act* which states that if the Corporation makes a payment out of the Fund as envisaged in section 166AA in respect of a depositor of a bank that has been placed in resolution, the Corporation may 'assume and exercise the rights and remedies of the depositor against the bank to the extent of the payment.'¹²⁴⁵

5.2.3.10 Immunity (Legal protection)

¹²⁴² Section 166AC(a) to (c) of the FSRA as introduced by the FSLAA 2021. Section 166(c)(i) covers an error before or after the bank was placed in resolution, including a failure to comply with an obligation to provide information.

¹²⁴³ Section 166 AU (a) and (b) of the FSRA as introduced by the FSLAA 2021.

¹²⁴⁴ Section 166AW of the FSRA as introduced by the FSLAA 2021. These reports referred to in section 32 of the Reserve Bank Act inter alia include the SARB'S financial statements and reports on its assets and liabilities.

¹²⁴⁵ Section 166AD of the FSRA as introduced by the FSLAA 2021.

Provision is further made for immunity in relation to any loss or damage suffered or incurred by any person arising from a decision taken or action performed in good faith in the exercise of power or performance of a function in terms of a financial sector law to include:¹²⁴⁶ the Corporation; a Board member; a staff member of the Corporation; a resolution practitioner appointed for a designated institution¹²⁴⁷ in resolution; and a person appointed or delegated by a financial sector regulator; or the SARB or the Corporation.¹²⁴⁸

5.2.4 Financial Sector and Deposit Insurance Levies (Administration) and Deposit Insurance Premiums Bill B4 of 2022 (FSDILDIPB)

The *Financial Sector and Deposit Insurance Levies (Administration) and Deposit Insurance Premiums Bill B4 of 2022 (FSDILDIPB)* was approved at the National Council of Provinces and was assented to on 6 December 2022 as the *Financial Sector and Deposit Insurance Levies Act, 2022 (FSDILA)* which is yet to be put into operation.¹²⁴⁹ . The aforesaid Act inter alia provides for the collection and administration of levies imposed in terms of the *Financial Sector and Deposit Insurance Levies Act 2022*; to amend the *Financial Sector Regulation Act* to provide for the *Financial Sector and Deposit Insurance Levies Act, 2022* to address the imposition, collection and administration of deposit insurance premiums.¹²⁵⁰

¹²⁴⁶ Section 285 of the *FSRA 2017* as amended by the *FSLAA 2021*.

¹²⁴⁷ A designated institution has been defined in section 29(A) (1) of THE *FSLAA 23 of 2021* as each of the following: a bank; a SIFI; a payment system operator and participants of a systemically important payment system; a company that is a holding company of a bank or a SIFI, or a payment system operator of a systemically important payment system; and subject to any determination, if a bank or a SIFI is a member of a financial conglomerate, each of the other members of the financial conglomerate. The practical implication of this definition of designated institutions is that all banks, mutual banks and cooperative banks will fall under the provisions of the *FSRA*. See ¹²⁴⁷ South African Reserve Bank: *Financial Stability Department Ending too big to fail: South Africa's intended approach to bank resolution* (2019) 9.

¹²⁴⁸ It is recommended that directors, officers and employees of supervisory agencies and resolution authorities should be able to exercise their professional judgement and take necessary action where circumstances require without fear of lawsuits against their actions. See International Monetary Fund (IMF) *South Africa Financial Sector Assessment Program: Financial safety net, bank resolution, and crisis management framework – Technical note* (2015) IMF Country Report No 15/53 34.

¹²⁴⁹ Published in Government Gazette No.47695 of 9 December 2022.

¹²⁵⁰ Preamble of the *FSDILA 2022*. See also the Memorandum on the Objects of the *Financial Sector and Deposit Insurance Levies (administration) and Deposit Insurance Premiums Act 2022* available at https://www.parliament.gov.za/storage/app/media/Bills/2022/B4_2022_Financial_Sector_and_Deposit_In

The SARB will be responsible for the collection and administration, on behalf of the Corporation of the deposit insurance levy referred to in Schedule 6 to the *Financial Sector and Deposit Insurance Levies Act 2022* as well as deposit insurance premiums. These levies and premiums must be collected and administered by the SARB in accordance with section 246 of the *Financial Sector Regulation Act*.¹²⁵¹ The Act further amends, in section 4, the definition of a ‘deposit insurance premium’ in section 1 of the *Financial Sector Regulation Act* to refer to a ‘premium imposed in terms of section 166BG and Schedule 5.’¹²⁵² It also amends the definition of a ‘levy’ to refer to ‘a levy imposed in terms of the Financial Sector and Deposit Insurance Levies Act, and includes interest payable on an unpaid levy.’ A definition of a ‘special levy’ is also provided to mean ‘a levy imposed as a special levy in terms of the Financial Sector and Deposit Insurance Levies Act, and includes interest payable on an unpaid special levy.’ It also inserts a definition of ‘member’ which means ‘a member of the Corporation, in accordance with section 166AG’.

Section 4 of the Act further amends s166BG of the *Financial Sector Regulation Act* to read as follows:

‘(1) There shall be charged, imposed and collected by the Corporation, in accordance with this Act, a premium to be known as the deposit insurance premium, to ensure that the Fund is able to make payments required by this Chapter.

(2) The deposit insurance premium is payable by each member.

(3) The amount of the deposit insurance premium payable in respect of a premium period is determined in accordance with Schedule 5.

(4)(a) Where a member becomes a member during a premium period, or ceases to be a member during a premium period, the premium payable must be proportional to the

urance_Levies_Administration_and_Deposit_Insurance_Premiums_Bill/B4B.pdf (accessed 21 December 2022).

¹²⁵¹ Section 2(2) (b) and 3(1) and 3(2) of the FSDILA 2022.

¹²⁵² A definition is further inserted by section 4 of the FSDILA 2022 of a “premium period” to mean “the period from the first day of a calendar month to the last day of that calendar month, in respect of which a deposit insurance premium is determined in terms of section 166BG and Schedule 5.”

remainder of the premium period during which the entity that is a member or (sic) ceases to be a member.

4(b) Where a premium has already been paid in full for a premium period during which a member ceases to be a member, a refund of the premium must be provided to the former member for the proportion of the premium period subsequent to the cessation of the membership.¹²⁵³

Schedule 6 of the *Financial Sector and Deposit Insurance Levies Act 2022* sets out a Table A that must be used to calculate the deposit insurance premiums that will be collected from banks, co-operative banks, mutual banks, branches of banks - indicating the premium frequency; minimum amount; variable amount(s); description of the variable; and formula for calculation of the premium as well as the maximum premium cap. It further contains a Table F that indicates how the deposit insurance levies that the aforementioned banks will have to pay, will be calculated.

5.3 Interaction between the Deposit Insurance Framework and the Resolution Framework

¹²⁵³ See further section 237, 238 and 239 of the FSRA as amended by section 4 of the FSDILA 2022 which provides for “Fees, levies and deposit insurance premiums: and deposit insurance levies to constitute debts due to the Corporation and for “Budget, fees, levies and deposit insurance proposals” respectively. Notably, section 240 as amended of the FSRA will provide for consultation requirements; section 241 as amended will provide for determinations of information required for assessment of levies or deposit insurance premiums”; section 242 as amended will provide for assessment of levies or deposit insurance premiums whilst section 243 as amended will provide for payments of deposit insurance premiums and levies in instalments and section 244 as amended will provide for interest on late payment or non-payment of deposit insurance premiums and levies. Provision is also made in section 45 as amended for exemption from deposit insurance premiums by the Corporation for a specified period, if the Corporation is satisfied that such exemption: “will alleviate undue financial or other hardship or prejudice to the member, or financial customers due to circumstances outside the control of that member; is not contrary to the public interest; is necessary for developmental or financial inclusion, as well as transformation objectives to facilitate progressive or incremental compliance with the Act, or another financial sector law or other sound reasons; and is necessary to facilitate the affordability of the deposit insurance premiums for the member.” Each such exemption must be published by the Corporation. Section 246 as amended deals with the management of deposit insurance premiums and levies. See also section 247 as amended; section 248 as amended and section 288 as amended that deals with general administrative and operating costs of the Fund and the Corporation’s annual budget and banking and financial accounting arrangements for the administration of deposit insurance levies and premiums, respectively.

As indicated, the SARB is the designated resolution authority in the new resolution framework and will have the resolution functions conferred on it by the Chapter 12A of the *Financial Sector Regulation Act*.¹²⁵⁴ The key objective of the SARB in performing its resolution powers is: firstly, to assist with the maintenance of financial stability; and secondly, to protect the interests of depositors of banks through the orderly resolution of designated institutions that are in resolution.¹²⁵⁵ In pursuance of these objectives, the SARB must carry out its functions regarding a designated institution and ascertain that the affairs of the designated institution in resolution are managed as to maintain financial stability where practicable to do so.¹²⁵⁶

Most importantly, in furtherance of its resolution mandate, the SARB must, *inter alia*:¹²⁵⁷ consider and seek to mitigate any adverse impact on the interests of the shareholders and creditors of other members in the group of companies of which the designated institution forms part; and comply with, and ensure that the designated institution complies with, applicable labour laws.

Accordingly, if in the opinion of the SARB, a bank (solvent or insolvent) is, or will likely be, unable to meet its obligations and it is necessary to ensure the orderly resolution of the designated institution to maintain financial stability or, in the case of a bank or a member or a group of companies of which a bank is a member, to protect depositors of the bank, the SARB may recommend to the Minister that the designated institution be placed in resolution.¹²⁵⁸ To ensure the orderly resolution of the designated institution as well as to maintain financial stability, the Minister may, upon such recommendation, write a determination to the Governor, placing the bank in resolution.¹²⁵⁹

Although it was indicated in the delimitation statement in Chapter One that a discussion of bank resolution is beyond the scope of this thesis, it is nevertheless imperative to make

¹²⁵⁴ Section 166A (1) of the FSRA as introduced by the FSLAA 23 of 2021. The resolution functions are performed by the Governor as per section 166A(2).

¹²⁵⁵ Section 166B of the FSRA as introduced by the FSLAA 23 of 2021.

¹²⁵⁶ Section 166C (1) of the FSRA as introduced by the FSLAA 23 of 2021.

¹²⁵⁷ Section 166C (1) (a) and (b) of the FSRA as introduced by the FSLAA 23 of 2021.

¹²⁵⁸ Section 166J (1) (a) & (b)(i) & (ii) of the FSRA as introduced by the FSLAA 23 of 2021.

¹²⁵⁹ However, the Minister may only do this if he or she considers that the designated institution is or will probably be unable to meet its obligations and it is necessary to protect depositors. See section 166J (2) (a) & (b) (i) & (ii) of the FSRA as introduced by the FSLAA 23 of 2021.

a brief reference to the envisaged resolution framework introduced by the *Financial Sector Laws Amendment Act 23 of 2021* and incorporated into the *Financial Sector Regulation Act* as Chapter 12A for purposes of contextualization and assessment of compliance with the IADI Core Principles. In this regard, in the event that a bank is placed in resolution, the SARB is given the power and authority to manage and control the affairs of such bank and to exercise any of the powers of the governing body and the shareholders or a class of shareholders of the bank that has been placed in resolution.¹²⁶⁰ Accordingly, the SARB will have the power to:

- (a) Convene meetings of creditors of the bank that has been placed in resolution, to consult with them in relation to the exercise and proposed exercise of those powers and the powers of the SARB in terms of the *Financial Sector Laws Amendment Act*,¹²⁶¹
- (b) Enter into negotiations with the creditors of such bank in order to finalize the settlement of the creditors' claims against the bank,¹²⁶² and
- (c) Make proposals and enter into arrangements or compromises between the bank that has been placed in resolution and all its creditors, or all the creditors of a class of the designated institution's creditors in terms of section 155 of the Companies Act.¹²⁶³

Once a failing bank has been placed in resolution, the SARB must, as soon as practicable thereafter, make an appointment in writing, of a person who will assume the role of the resolution practitioner for the said bank while it is in resolution, clearly specifying the powers and functions delegated to the practitioner in terms of section 166I.¹²⁶⁴ However, if in the opinion of the SARB and in consideration of the circumstances at hand, it is not necessary to appoint a resolution practitioner to achieve the orderly resolution of the failing bank, then the SARB may refrain from doing such appointment.¹²⁶⁵

¹²⁶⁰ Section 166M (1) of the FSRA as introduced by the FSLAA 23 of 2021.

¹²⁶¹ Section 166M (2) (a) of the FSRA as introduced by the FSLAA 23 of 2021.

¹²⁶² Section 166M (2) (b) of the FSRA as introduced by the FSLAA 23 of 2021.

¹²⁶³ Section 166M (2) (c) of the FSRA as introduced by the FSLAA 23 of 2021.

¹²⁶⁴ Section 166O (1) of the FSRA as introduced by the FSLAA 23 of 2021.

¹²⁶⁵ Section 166O (2) of the FSRA as introduced by the FSLAA 23 of 2021.

The role of the appointed resolution practitioner will differ from that of a curator and other similar functionaries.¹²⁶⁶ As such, the appointed resolution practitioner for a bank in resolution will be expected to comply with any instruction from the SARB relating to the institution in resolution;¹²⁶⁷ to give a monthly report to the SARB of his or her activities to the designated institution;¹²⁶⁸ and also to comply with all the other terms of his or her appointment.¹²⁶⁹ In consideration of the risk analyses carried out in consultation with the financial sector regulators, the SARB will appropriately take requisite steps to plan for the potential need for the orderly resolution of failing banks.¹²⁷⁰ Whenever it deems fit, the SARB may, for the purpose of pursuing the orderly resolution of a bank that has been placed in resolution, transfer some or all of the shares that it holds in a bridge company to any person.¹²⁷¹ Accordingly, where a bridge company is being used in relation to the resolution of a bank that has been placed in resolution, the SARB must in consultation with the responsible authorities, develop a plan for the bridge company to meet the set criteria in terms of applicable financial sector laws.¹²⁷² The new resolution regime is largely compliant with the FSB key Attributes as discussed in Chapter One and incorporates aspects such as the ‘no creditor worse off than in liquidation’ (NCWOL)-principle, *pari passu* treatment of creditors of the same standing and an improved suite of resolution tools which includes bridge banks as aforementioned as well as a bail in-tool.¹²⁷³

As the Resolution Authority, the SARB is also authorized to enter into memoranda of understanding (MoU) with either or both the Corporation and a body in a foreign country that has functions corresponding to the resolution functions of the SARB.¹²⁷⁴ The MoU must clearly indicate how the SARB and the Corporation or a body in a foreign country will cooperate and collaborate with, as well as assist, each other in connection with their

¹²⁶⁶ SARB *Ending too big to fail* (2019) 23.

¹²⁶⁷ Section 166O (4) (a) of the FSRA as introduced by the FSLAA 23 of 2021.

¹²⁶⁸ Section 166O (4) (b) of the FSRA as introduced by the FSLAA 23 of 2021.

¹²⁶⁹ Section 166O (4) (c) of the FSRA as introduced by the FSLAA 23 of 2021.

¹²⁷⁰ Section 166E of the FSRA as introduced by the FSLAA 23 of 2021.

¹²⁷¹ Section 166F (2) of the FSRA as introduced by the FSLAA 23 of 2021.

¹²⁷² Section 166F (3) (a) & (b) of the FSRA as introduced by the FSLAA 23 of 2021.

¹²⁷³ See Chapter One, paragraph 4.1. See also section 166AA to 166Z of the FSRA as introduced by the FSLAA 23 of 2021.

¹²⁷⁴ Section 27 (3A) (a) & (b) of the FSRA as introduced by the FSLAA 23 of 2021.

functions in relation to a bank resolution in terms of the *Financial Sector Laws Amendment Act 23 of 2021* or the law of the foreign country.¹²⁷⁵

5.4 Compliance with the IAD Core Principles for effective deposit insurance systems

5.4.1 Core Principle 1: Public Policy Objectives

The Corporation's public policy objectives are on par with the recommended standard for deposit insurers as set out in IADI Core Principle 1. As observed, once established the Corporation will, in terms of section 166AF, reimburse depositors of failed banks as well as maintain financial stability of the SA financial system.¹²⁷⁶ This objective is further confirmed by section 166AF that requires the Corporation to apply the Fund to ensure that depositors have reasonable access to their covered deposits by reimbursing the bank in resolution for payments made to depositors; or for reimbursing depositors of covered deposits or for making payment in terms of an agreement related to a transaction mentioned in section 166S(1). The reimbursement of depositors' funds is a clear indication of protection of depositors' interests, which in turn, will bolster depositors' confidence in the banking system, thereby contributing to the stability of the financial system. Better alignment with the public policy objectives would however be achieved if the objectives are rephrased to clearly reflect that protection of depositors and financial stability are both main objectives.

5.4.2 Core Principle 2: Mandates and Powers

The mandate of the Corporation, as set out in section 166AG read with section 166AA (that specifies the various manners in which the Corporation must apply the Fund during resolution) is well aligned with IADI Core Principle 2, as it clearly supports the public policy objectives, namely to protect depositors by establishing, maintaining and administering

¹²⁷⁵ Section 27 (3A) (a) & (b) of the FSRA as introduced by the FSLAA 23 of 2021.

¹²⁷⁶ Paragraph 5.2.3.1.

the Deposit Insurance Fund and promoting awareness of the deposit protection it affords, thereby also promoting financial stability.¹²⁷⁷ The Corporation's mandate and powers, as required by IADI Core Principle 2, are clearly defined and formally specified in Chapter 12A of the *Financial Sector Regulation Act*. As indicated, the Corporation will operate a 'pay-box plus' mandate which means it will not only effect deposit payouts in bank liquidation but will also have other resolution functions for which the deposit insurance fund can be used.¹²⁷⁸ As such, it will possess all the powers of a 'pay-box' plus, including the power to partake in resolution of a failed institution, for example by facilitating the transfer of covered deposits to a bridge bank.¹²⁷⁹ Although the SARB is the designated resolution authority for failed banks in South Africa, the 'pay-box' plus mandate will thus allow the Corporation to provide financial assistance to support the chosen resolution strategy. In particular, a feature that would support the proper execution of the Corporation's mandate and ensure timely intervention by the SARB as resolution authority to whom the Corporation reports, is the Corporation's powers to make requests from other financial sector regulators which will put it in a position to gauge the safety and soundness of its member banks. This information will be shared within the safety net to facilitate swift, appropriate action.

5.4.3 Core Principle 3: Governance

As indicated, the Corporation will be positioned within the SARB, apparently as its subsidiary –although section 166AE merely states '[The] Corporation for Deposit Insurance is hereby established' without stating whether it is indeed a subsidiary of the SARB and a separate juristic person. However, the operational independence of the Corporation is not so clear given that the Reserve Bank as well as the Government hold the shares in the Corporation. There is consequently a danger that the Government may require the Corporation to provide resolution funding in instances where it is not

¹²⁷⁷ Paragraph 5.2.3.1.

¹²⁷⁸ Paragraph 5.2.3.1.

¹²⁷⁹ Paragraph 5.2.3.1.

appropriate or refrain from providing such funding to facilitate an orderly bank resolution where it would indeed be appropriate.

In alignment with Core Principle 3, the Corporation will appoint a Board of Directors, established in terms of section 166I, comprising various safety net participants, being ‘fit and proper’ persons, who are subject to various measures, for example relating to conflict of interest, to ensure good corporate governance, to manage and administer its affairs as well as the affairs of the Fund.¹²⁸⁰ The Group Chief Financial Officer of the SARB is also on the Corporation’s Board thus ensuring oversight in respect of appropriate financial management of the Corporation and the Fund.¹²⁸¹ The process for appointment and removal of members of the Board is transparent. In this regard, it is submitted that the provisions relating to the establishment and implementation of an appropriate and effective governance systems and processes, together with the provisions pertaining to the Corporation’s board of directors adequately meet the requirements of the IADI Core Principle 3 on the governance of an EDIS. As required by IADI Core Principle 3, essential criteria 2, the governing body of the Corporation is held accountable to a higher body given that its reports have to be submitted to the Minister of Finance and the SARB and also tabled in Parliament. The Corporation, once established, will also be sufficiently resourced and have skilled personnel which aspects the SARB will be obliged to assist with.

Good governance in the new South African deposit insurance system is further ensured by section 166AH that obliges the Corporation to manage its own affairs as well as the fund in an efficient and effective way by means of establishing and implementing appropriate and effective governance systems and processes. Alignment with international good practice is ensured by requiring the Corporation to have regard to international best practices when it carries out its corporate governance obligations.

The all-encompassing functions of the Board are clearly specified in section 166AJ (a) and (b) and ties in with the good governance objectives to manage the Corporation as well as the Fund efficiently and effectively by overseeing their management and

¹²⁸⁰ Paragraph 5.2.3.3.

¹²⁸¹ Section 166AI (2) of the FSRA as incorporated by the FSLAA 23 of 2021.

administration and acting for the Corporation in respect of entering into, and amending, memoranda of understanding, appointing committees and giving directions as to how their work should be conducted; determining how the Fund will be applied during bank resolution; determining the deposit insurance levy and any other matters required to be dealt with by the Board in terms of a financial sector law.

Good Corporate governance is also further facilitated by the provisions in section 166AP that requires Board members and committee members to act honestly in all matters relating to the Corporation (and thus by implication in relation to the Fund) and to perform their functions in good faith, for a proper purpose and with the appropriate degree of care and diligence expected of a person in their position as well as the obligation in section 166AQ to disclose conflicts of interest. Provision is also appropriately made for surplus funds of the Corporation to be transferred to the Fund after covering the expenses of the Corporation as well as for appropriate bookkeeping and auditing.¹²⁸² The accountability of the Corporation is addressed through the annual reporting requirements laid down in section 166AV, which requires the Corporation to submit an annual report, which gets tabled in Parliament, to the Minister of Finance and the SARB on both the Corporation's and the Fund's operations.

5.4.4 Core Principle 4: Relationship with other safety-net participants

As indicated, the adoption of the Twin Peaks model in South Africa has brought about significant changes in the financial supervisory architecture.¹²⁸³ In particular, the model introduced separate prudential and market conduct regulators. This means that the effective operation of the Twin Peaks model depends entirely on appropriate and efficient cooperation and collaboration between the financial sector regulators as well as SARB. With the introduction of the new EDIS, the Corporation will also enter into memoranda of understanding (MoUs) with the other safety net participants. A formal and comprehensive framework for cooperation and collaboration and crisis management is provided by

¹²⁸² Section 166AT and 166AU respectively, of the FSRA as introduced by the FSLAA 23 of 2021.

¹²⁸³ Paragraph 5.2.3.4.

section 26,¹²⁸⁴ 27¹²⁸⁵ and 76¹²⁸⁶ of the FSRA that mandates cooperation and collaboration with the SARB and with each other from all financial sector regulators. The said cooperation and collaboration are assigned to assist the Corporation in exercising its powers and performing its functions as set out in the *Financial Sector Regulation Act*. This includes providing assistance and information and promptly reporting any matter of which it becomes aware that affects or may affect the performance of any of the Corporation's powers or functions.¹²⁸⁷

¹²⁸⁴ In terms of section 26 of the FRSA, the financial sector regulators must – “(a) co-operate and collaborate with the Reserve Bank, and with each other, to maintain, protect and enhance financial stability; (b) provide such assistance and information to the Reserve Bank and the Financial Stability Oversight Committee to maintain or restore financial stability as the Reserve Bank or the Financial Stability Oversight Committee may reasonably request; (c) promptly report to the Reserve Bank any matter of which the financial sector regulator becomes aware that poses or may pose a risk to financial stability; and (d) gather information from, or about, financial institutions that concerns financial stability.”

¹²⁸⁵ Section 27 of the FRSA provides that “(1) The financial sector regulators and the Reserve Bank must - not later than six months after this Chapter takes effect, enter into one or more memoranda of understanding with respect to how they will co-operate and collaborate with, and provide assistance to, each other and otherwise perform their roles and comply with their duties relating to financial stability. (2) The financial sector regulators and the Reserve Bank must review and update the memoranda of understanding as appropriate, but at least once every three years. (3) A copy of a memorandum of understanding must, without delay after being entered into or updated, be provided to the Minister and the Cabinet member responsible for consumer credit matters. (4) The validity of any action taken by a financial sector regulator in terms of a financial sector law, the National Credit Act or the Financial Intelligence Centre Act is not affected by a failure to comply with this section or a memorandum of understanding contemplated in this section.”

¹²⁸⁶ Section 76 of the FRSA mandates the financial sector regulators to “(a) generally assist and support each other in pursuing their objectives in terms of financial sector laws, the National Credit Act and the Financial Intelligence Centre Act; (b) inform each other about, and share information about, matters of common interest; (c) strive to adopt consistent regulatory strategies, including addressing regulatory and supervisory challenges; (d) co-ordinate, to the extent appropriate, actions in terms of financial sector laws, the National Credit Act and the Financial Intelligence Centre Act, including in relation to— (i) standards and other regulatory instruments, including similar instruments provided for in terms of the National Credit Act and the Financial Intelligence Centre Act; (ii) licensing; (iii) supervisory on-site inspections and investigations; (iv) actions to enforce financial sector laws, the National Credit Act and the Financial Intelligence Centre Act; (v) information sharing; (vi) recovery and resolution; and (vii) reporting by financial institutions, including statutory reporting and data collection measures; (e) minimise the duplication of effort and expense, including by establishing and using, where appropriate, common or shared databases and other facilities; (f) agree on attendance at relevant international forums; and (g) develop, to the extent that is appropriate, consistent policy positions, including for the purpose of presentation and negotiation at relevant South African and international forums.” The section goes further to provide that the financial sector regulators and the Reserve Bank must, “at least annually as part of their annual reports, or on request, report to the Minister, the Cabinet member responsible for administering the National Credit Act and the National Assembly on measures taken to co-operate and collaborate with each other.”

¹²⁸⁷ Paragraph 5.2.3.4.

In particular, the *Financial Sector Laws Amendment Act 23 of 2021* has amended section 27 of the *Financial Sector Regulation Act* through the insertion of a section 27(3A) that permits the SARB to enter into memoranda of understanding with the Corporation.¹²⁸⁸ This provision is further fortified by section 166AJ (b) (i) from which it is clear that the Corporation will enter into Memoranda of Understanding with the SARB. It is further clear that the Corporation will be deeply involved in crisis management when one has regard to the fact that its Board comprises of top officials from the SARB, the other financial regulators and also National Treasury.¹²⁸⁹

In light of this, the South African EDIS appears well aligned with the requirements of Core Principle 4 regarding cooperation of deposit insurers with other safety net participants. As a new scheme, being able to cooperate with other financial safety-net participants, will ensure that the Corporation is able to identify emerging financial risks in banks early and hence will be able to act well in time to alert the SARB and Prudential Authority thereof and thereby assist in preventing banking crises. It will also facilitate swift depositor reimbursement or swift funding of resolution actions where necessary.

5.4.5 Core Principle 5: Cross-border Coordination

Cross-border coordination is a significant issue, given that South African banks have a systemic presence in various countries, as do some foreign banks have in South Africa, which increases the risk of inter-country financial contagion.¹²⁹⁰ Therefore, the new deposit insurance framework as captured in Chapter 12A of the *Financial Sector Regulation Act* also contains provisions for cross-border coordination between the Corporation and deposit insurers and safety net participants in foreign jurisdictions in which the South African banks operate as well as foreign jurisdictions with banks in South Africa.¹²⁹¹ The requirement that MoUs should be in place with central banks and deposit insurers of these foreign jurisdictions for the purpose of sharing regulatory information is

¹²⁸⁸ Section 39 of the FSLAA 23 of 2021.

¹²⁸⁹ Section 166AI(2) of the FSRA as introduced by the FSLAA 23 of 2021.

¹²⁹⁰ Mortlock, Casal & Berg 'Financial safety nets and bank resolution frameworks in Southern Africa' (2019) *The World Bank Group* 6.

¹²⁹¹ Paragraph 5.2.3.4.

thus aligned with IADI Core Principle 5.¹²⁹² Although not stated in the *Financial Sector Regulation Act*, to be appropriately aligned with the Core Principles, these MoUs will have to undergo a regular review to ensure that they sufficiently take into account resolution-related information requirements.¹²⁹³

5.4.5 Core Principle 6: The Corporation's role in contingency planning and crisis management

Chapter 12 of the Financial Sector Regulation Act does not allude to the exact role of the Corporation in contingency planning and crisis management as envisaged by IADI Core Principle 6. In this regard, it is thus not clear at this stage what role the Corporation will play in contingency planning and crisis management but the exact nature of this role can be expected to be clarified only once Chapter 12A is in operation and the Corporation has been established. It is likely that these arrangements will be set out in a MoU between the Corporation and other safety net participants given the emergency nature of contingency planning and crisis management that would require it to be captured in soft law instruments such as MoUs that can be changed quickly and without protracted Parliamentary intervention.

5.4.6 Core Principle 7: Membership

The South African EDIS is aligned with IADI Core Principle 7 in that membership of the Corporation is compulsory for all registered banks in South Africa.¹²⁹⁴ Notably the FSLAA 23 of 2021 has, through its section 35, inserted a definition of “bank” into section 1 of the FSRA which indicates that a “bank” means any of the following:

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

¹²⁹² SARB *Ending too big to fail* (2019) 49.

¹²⁹³ *Ibid.*

¹²⁹⁴ Paragraph 5.2.3.2.

- (c) a mutual bank as defined in the Mutual Banks Act, 1993 (Act No.124 of 1993); or
- (d) a co-operative bank as defined in the Co-operative Banks Act, 2007 (Act No.40 of 2007).

The Corporation intends to enforce membership by requiring that new applications for bank licenses should also meet the requirements of the Corporation.¹²⁹⁵ Although the Corporation will have no power regarding the granting of new licenses, it is clear that no new bank license application will be approved if a new bank does not meet the requirements for membership of the Corporation. However, the new EDIS does not appear fully compliant with Core Principle 7 as Chapter 12A of the *Financial Sector Regulation Act* does not make provision for termination of membership of the Corporation, nor does it specify what will happen to the covered deposits if a bank loses its license.

5.4.7 Core Principle 8: Coverage

The definitions of 'covered deposit' and 'qualifying deposit' in section 1 of the amended Financial Sector Regulation Act comply with the requirements of IADI Core Principle 8 that seeks clarity on coverage. As observed, the SARB in its 2017 *Discussion Paper* indicated that the Corporation will cover deposits up to a limit of R100 000.¹²⁹⁶ This limit has however not been prescribed in the coverage provisions in Chapter 12A of the *Financial Sector Regulation Act*. The Minister of Finance is, however, given the power to determine the limit of coverage by issuing regulations - thus it can be said that in this regard the coverage provisions are also compliant with IADI Core Principle 8. It is submitted that it is better to provide for the coverage limit to be prescribed by regulation as it will then not be necessary to amend the Act through protracted Parliamentary processes every time that the coverage is increased.

The IADI Core Principles recommend that the deposit insurance should be able to cover the majority of depositors.¹²⁹⁷ As such, the SARB has indicated that the level of coverage

¹²⁹⁵ Paragraph 5.2.3.2.

¹²⁹⁶ Paragraph 5.2.3.7.

¹²⁹⁷ Chapter 2, Paragraph 2.6.8.

by the Corporation will be sufficient to cover about 98% of the retail depositors in South Africa.¹²⁹⁸ Since the coverage will apply equally to all registered banks in South Africa, it is submitted that this will help avoid the competitive distortions between larger banks and smaller banks. As indicated in the 2017 SARB *Discussion Paper*, the South African EDIS will cover a wide variety of deposits, including foreign deposits held at South African banks with the exclusion of deposits from large financial institutions as well as government institutions but this is unfortunately not stated explicitly in the law. The aspects of deposit coverage are aligned with the deposit insurance system's public policy objectives and related design features but no mention is made of the regular review of deposit coverage.

5.4.9 Core Principle 9: Sources and uses of funds

As indicated, the Corporation will operate an *ex ante* EDIS funded through the payment of premiums by member banks.¹²⁹⁹ Since it has been recommended that banks should bear the costs of resolution without burdening public funds, the payment of premiums by Corporation's member banks will, over time, hopefully ensure that there are enough funds in the Deposit Insurance Fund to cover the costs of resolution in the event of a bank failure.¹³⁰⁰ This will guarantee that no or limited, public funds are used to resolve a failed bank and that the cost of resolution are largely borne by bank shareholders and other bank creditors in accordance with the bail-out mechanism included in the resolution regime. As observed, the Corporation intends to charge flat-rate premiums.¹³⁰¹

Alignment with Core Principle 9 is further achieved through the provision inserted in the *Financial Sector Regulation Act* that provides for establishment of the Fund;¹³⁰² provides for levies to be imposed on the member banks to fund the operations of the Corporation and the administration of the Fund;¹³⁰³ provides for premiums to be collected from

¹²⁹⁸ SARB *Designing a Deposit insurance scheme for South Africa* (2017) 30.

¹²⁹⁹ Paragraph 5.2.3.5.

¹³⁰⁰ Paragraph 5.2.3.5.

¹³⁰¹ Ellyne & Cheng (2014) 155.

¹³⁰² Section 166BD of the FSRA as introduced by the FSLAA 23 of 2021.

¹³⁰³ Section 166BC of the FSRA as introduced by the FSLAA 23 of 2021.

member banks;¹³⁰⁴ deals with the application of surplus funds; and the requirement in section 166AA stipulating the ways in which the Corporation must apply the funds to ensure that depositors have reasonable access to their covered deposits as well as the limitation placed on covered deposits by section 166AB. Subrogation of the Corporation is also catered for in section 166AD.

The South African EDIS is thus largely compliant with Core Principle 9 although it can be expected that it will take some years to establish a sufficiently large Deposit Insurance Funds through collecting premiums from member banks hence the SARB's commitment as central bank to provide the EDIS with some initial 'seed funding'.

5.4.10 Core Principle 10: Public Awareness

Provision is made in the functions of the Corporation for the promotion of public awareness thus in principle complying with Core Principle 10.¹³⁰⁵ The *Financial Sector Regulation Act* however, does not specify how such public awareness should be promoted and it will most likely be determined by the committee established by the Corporation to be tasked with promoting public awareness.

5.4.11 Core Principle 11: Legal Protection

The South African EDIS is principally compliant with IADI Core Principle 11 as it provides for the legal protection of the Corporation's staff, shareholders, directors and officers.¹³⁰⁶ The new deposit insurance framework inserted into the *Financial Sector Regulation Act* by the *Financial Sector Laws Amendment Act 23 of 2021* appropriately provides for immunity in relation to any loss or damage suffered or incurred by any person arising from a decision taken or action performed in good faith in the exercise of power or performance of a function in terms of a financial sector laws.¹³⁰⁷ As indicated this immunity inter alia

¹³⁰⁴ Section 166 BG of the FSRA as introduced by the FSLAA 23 of 2021.

¹³⁰⁵ Paragraph 5.2.3.1.

¹³⁰⁶ Paragraph 5.2.3.10.

¹³⁰⁷ Section 285 of the FSRA 2017 as amended by the FSLAA 23 of 2021.

extends to the Corporation; a Board member; and a staff member of the Corporation as well as a person appointed or delegated by the Corporation.

However no specific mention is made that such immunity covers current *and previous* persons in the capacities mentioned as aforementioned.

5.4.12 Core Principle 12: Dealing with parties at fault

The *Financial Sector Regulation Act, as amended by the Financial Sector Laws Amendment Act*, deals with the parties at fault in a bank failure in section 135A.¹³⁰⁸ This provision is titled ‘Investigation into designated institutions in resolution’ and states that:

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

(a) the designated institution should-

(i) be wound up;

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

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

(c) *proceedings, including criminal proceedings, should be instituted against any person in connection with the conduct of the business of the designated institution before it was placed in resolution.*¹³⁰⁹

The South African resolution regime thus complies with Core Principle 12.

¹³⁰⁸ See Section 50 of the FSLAA.

¹³⁰⁹ Author’s emphasis. This provision basically mirrors the Commission of Inquiry into a failed bank’s affairs, previously captured in the repealed section 69A of the Bank’s Act 94 of 1990.

5.4.13 Core Principle 13: Early detection and timely intervention

The early detection of bank stress and accompanying early intervention arrangements are critical elements of every deposit insurer.¹³¹⁰ The reason for this is because the earlier bank stress is detected and responded to, the greater is the prospect of restoring it to financial soundness, thus avoiding its ultimate failure.¹³¹¹ In South Africa the Prudential Authority is tasked with bank supervision in accordance with the *Banks Act 90 of 1994*. The PA undertakes periodic stress testing to facilitate early detection of bank stress.¹³¹² The *Financial Sector Regulation Act* has also given the Prudential Authority a wide range of enforcement powers in section 141 to 153, some of which can be used for purposes of early intervention in bank failure, such as removing some persons from the board of directors. Although the *Banks Act* provides for regular supervisory powers by the PA it does however not contain a provision that sets out a broad range of early intervention measures. The new resolution regime also does not contain such a provision. Accordingly it cannot be said that the South African regime is fully compliant with IADI Core Principle 13.

5.4.14 Core Principle 14: Failure resolution

As pointed out, the *Financial Sector Laws Amendment Act* has introduced a comprehensive new resolution regime as Chapter 12A into the *Financial Sector Regulation Act* and has thus greatly improved South Africa's bank failure resolution regime.¹³¹³ This new regime inter alia requires that the SARB, as resolution authority, develop resolution planning for all designated institutions.¹³¹⁴ New powers for executing a bank resolution have been introduced, including the power of statutory bail-in,¹³¹⁵ the

¹³¹⁰ Mortlock, Casal & Berg (2019) 3.

¹³¹¹ *Ibid.*

¹³¹² IMF Financial Sector Assessment Program: South Africa; Financial Safety Net and Crisis Management (June 2022) available at <https://www.imf.org/-/media/Files/Publications/CR/2022/English/1ZAFEA2022005.aspx> (accessed 11 December 2022).

¹³¹³ See paragraph 5.2.3 above.

¹³¹⁴ SARB *Ending too big to fail* (2019) 28.

¹³¹⁵ Section 166R and 166S of the FSLAA 2021 empowers the SARB to write-down the shares of the designated institution, issue new shares in the designated institution, write-down the liabilities of the designated institution subject to exclusions as well as to convert debt instruments to equity.

power to establish a bridge bank institution¹³¹⁶ and the power to transfer all or part of a bank's assets and liabilities to such a bridge bank.¹³¹⁷ Provision is also made for the interaction between the EDIS and the new resolution regime to ensure optimal bank resolution.

From the perspective of the new explicit South African Deposit Insurance framework it is clear that alignment with Core Principle 14 has been achieved as it will be implemented simultaneously with the new bank resolution regime inserted as Chapter 12A into the FSRA. As required by Core Principle 14 the new bank resolution regime also provide for a defined creditor hierarchy which insulates covered deposits against losses and requires shareholders to take first losses through the application of the bail-in tool provided in section 166 U and section 166S, respectively, of the FSRA as introduced by the FSLAA 23 of 2021.

As appears from brief overview of the South African resolution regime that was provided in this thesis, it can be said that South Africa is largely compliant with the FSB Key Attributes and thus also with IADI Core Principle 14.

5.4.15 Core Principle 15: Reimbursements

As indicated, the Corporation will operate a 'pay-box' plus mandate.¹³¹⁸ This mandate will enable the Corporation to facilitate prompt reimbursements of depositors, set the operational budgets as well as get access to information required to meet its financial obligations to depositors.¹³¹⁹ The *Discussion Paper* proposed that the facilitation of depositor reimbursement be done within 20 working days but no time limit for deposit payouts is mentioned in the Act.

It is clear from the new deposit insurance framework read together with the new bank resolution framework introduced into the *Financial Sector Regulation Act* by the *Financial*

¹³¹⁶ Section 166R of the FSLAA 2021 authorizes the SARB to transfer any or all of the assets and/or liabilities and to conduct a sale, merger or similar arrangement.

¹³¹⁷ SARB *Ending too big to fail* (2019) 14.

¹³¹⁸ Paragraph 5.3.

¹³¹⁹ Paragraph 5.3.

Sector Laws Amendment Act 23 of 2021 that section 166A aims to ensure, through application of the Fund by the Corporation, that depositors have reasonable access to their deposits. Thus the South African EDIS can be said to be largely compliant with IADI Core Principle 15.

5.4.16 Core Principle 16: Recoveries

The new South African EDIS is also compliant with IADI Core Principle 16. Recoveries by the Deposit Insurance Corporation is addressed by section 166Y of the *Financial Sector Regulation Act*, as amended by the *Financial Sector Laws Amendment Act*, in relation to subrogation of claims which makes it clear that the Corporation will be substituted for depositors in respect of claims that the Fund had paid out.¹³²⁰

5.5 Concluding remarks

The adoption of an EDIS in South Africa is a commendable move which will significantly contribute to greater depositor protection, depositor confidence and the promotion of financial stability. It will also enhance the process for resolution of banks through funding of certain resolution actions such as transferring deposits to a bridge bank or facilitating prompt payouts of deposits in the event of bank liquidation. Although not all bigger banks may welcome the new deposit insurance regime as they may be of the view that they are not as much at risk of failure as some small banks, the transition to an EDIS is definitely in the public interest as everyone benefits from a stable financial system. . As indicated in this chapter, the South African banking sector is generally stable. However, a few banks did fail in the past and in the absence of an EDIS, the government had to bear the costs of compensating depositors for their losses on a case-by-case basis. This kind of compensation was discretionary and depended on the availability of funds and has proved to be inadequate over years. Moreover, it was the ordinary taxpayer who had to fund these bailouts, many of whom who were not even depositors in the banks that failed.

¹³²⁰ Paragraph 5.2.3.9.

The regulatory journey towards the new South African EDIS was well-planned and conceptualized in the 2015 *Policy Paper* and 2017 *Discussion Document* and the two drafts of the *Financial Sector Laws Amendment Bill* which was eventually enacted in 2021. The features of the deposit insurance framework inserted into the *Financial Sector Regulation Act* as part of Chapter 12A, which comprises both the new bank resolution regime and the new EDIS, are largely compliant with the IADI Core Principles for Effective Deposit Insurance Systems. Setting up the Corporation and amassing a sizeable deposit insurance fund inter alia through collection of premiums from member banks, will be a venture that will require significant time and resources but it will clearly buttress the South African financial system against systemic collapse.

CHAPTER SIX

CONCLUSION AND RECOMMENDATIONS

6.1 Key objectives of the study

The key objectives of this thesis were to explore the features of the new South African EDIS introduced into the Financial Sector Regulation Act as part of the new Chapter 12A and the extent to which this new EDIS complies with the IADI Core Principles for Effective Deposit Insurance Systems as well as whether any guidance could be taken from the US and Australia as comparative jurisdictions with an EDIS. This objective was premised on the need to close any gaps in the design of the South African EDIS as financial safety net participant in order to provide appropriate depositor protection and promote financial stability in South Africa.

In order to achieve the objectives of this study, the following research objectives were pursued:

- (a) What is the rationale for deposit insurance and why is explicit deposit protection to be preferred above implicit deposit protection?
- (b) What are the international standards (good practice) for efficient explicit deposit insurance schemes and how can the issue of moral hazard be addressed optimally?
- (c) What is the legislative framework and design features of the explicit deposit insurance schemes that are in place in the US as pioneer of explicit deposit insurance and Australia as a comparative jurisdiction that implemented an EDIS relatively recently?
- (d) What is the legislative framework and design features of South Africa's new EDIS?
- (e) Is the new South African EDIS compliant with good practice and if not, in which respects can it be reformed and what guidance can be taken from the IADI Core Principles and the US and Australia in this regard?

It is submitted that these research objectives have been adequately addressed by the study undertaken in this thesis which inter alia explained the rationale for deposit insurance, the reasons why explicit deposit protection is to be preferred above implicit deposit protection albeit that both models pose moral hazard challenges that have to be mitigated through mechanisms such as premiums levied on member banks. An in-depth discussion of the IADI Core Principles as international standard for effective explicit deposit insurance systems was provided in Chapter Two, contextualized by an overview of the key features of effective bank resolution regimes given the dynamic interaction between deposit insurance and bank resolution, which was also explained in the thesis.

The comparative study of the EDIS in the US and Australia pointed out the evolution and main design features of the deposit insurance systems in these countries, benchmarking them also for compliance with the IADI Core Principles and providing an opportunity to extract guidance for purposes of amplifying the South African EDIS framework where necessary.

6.2 Conclusions of the study

6.2.1 The rationale for deposit insurance system

The study commenced with a discussion on the role of banks in society at large.¹³²¹ In particular, the discussion focused on the vulnerability of banks as financial intermediaries and the effect of that susceptibility on the banking sector and the economy as a whole.¹³²² It was indicated that when banks fail, the adverse effects of such failure are spilled externally from the failed bank through credit losses to depositors as well as liquidity losses to both depositors and borrowers.¹³²³ While the failure of a bank is inevitable even in the healthiest financial system, it normally leaves depositors frustrated and panicked at the thought of losing their deposits, leading to loss of confidence in the banking system. To address this, it was pointed out that governments have come up with the concept of

¹³²¹ Chapter 1, para 1.1.

¹³²² *Ibid.*

¹³²³ *Ibid.* See also Kauffman (2007) 56.

deposit insurance system to protect depositors' funds up to a certain limit in the event of a bank failure.

The study pointed out that through a deposit insurance system, the risk of loss of deposits when a bank fails is reduced as a deposit insurance system offers protection of those deposits, guaranteeing the value of those deposits up to a certain limit.¹³²⁴ The study further pointed out that, although the concept of deposit insurance began centuries back, it only gained popularity when it was pioneered in the US in 1933 and it has since evolved, especially post GFC when the IADI Core Principles for Effective Deposit Insurance Systems were issued as international standard for effective EDIS.¹³²⁵

6.3 The international good practice standard for EDIS

This study indicated that the tumultuous 2008 GFC which saw the wide-scale collapse of many financial systems across the globe, reignited the debate on the topic of explicit deposit insurance system globally.¹³²⁶ In particular, the Crisis emphasised the need for depositor protection in the form of explicit deposit insurance system to avoid the use of taxpayers' money in bailing out failed institutions. As a result of the effects of the Crisis on financial markets globally, the Basel Committee on Banking Supervision (BCBS) together with the International Association for Deposit Insurers (IADI) embarked on a journey to establish a set of agreed international principles to serve as a benchmark for countries wishing to introduce explicit deposit insurance systems and for those wishing to reform their existing systems. This resulted in the *IADI Core Principles for Effective Deposit Insurance Systems* which were issued in 2009 and later revised in 2014. The 16 features of the IADI Core Principles and their essential criteria were explored in detail in Chapter 2, setting the scene for benchmarking the EDIS in the US, Australia and in particular South Africa, being the focus of this thesis, for compliance with these international good practice principles.

¹³²⁴ Chapter 1, para 1.1.

¹³²⁵ *Ibid.*

¹³²⁶ Chapter 1, para 1.4.

6.4 Guidance from the US

The first guidance from the US as a G-20 member country is, of course, to have an EDIS as it sets out the parameters of deposit insurance and provides certain and clarity on the nature and extent of depositor protection in a country. Given that, as discussed in Chapter Three, the US introduced the first EDIS as long ago as 1933 and continuously sought to make changes to refine their EDIS to it more effective and also given that it is clear that the IADI Core Principles that were issued in 2011 drew a lot from the US EDIS-model, it is submitted that, apart from acknowledging the need for an EDIS to be continuously refined to stay current and usable. Significant guidance, as pointed out in the features listed below, can be taken by South Africa as guidance for purposes of amplifying its newly introduced EDIS which is not yet in operation.

The US paved the way for using an EDIS to protect depositors, increase depositor confidence in the banking industry and, ultimately, to promote financial stability. It created an operationally independent deposit insurer when it established the FDIC and used 'seed funding' from the US Treasury in conjunction with *ex ante* deposit insurance premiums collected from member banks to establish a deposit insurance fund. By doing so it mitigated the incidence of bank failures as banks were subjected to greater market discipline. Having regard to the new South African EDIS it appears that these features of the US EDIS have been well heeded. The US also assessed bank assets to determine whether they were sufficient to ensure deposit reimbursement in the event of bank failure and depending on the adequacy of such assets, it determined the premium that a specific bank had to pay to become a member of the deposit insurance system. Although the South African EDIS will initially levy flat rate premiums it would be good to later evolve to risk-based premiums to instill more market discipline on banks.

The FDIC was very active in the resolution of failing banks and did not only have a pay-box mandate that involved reimbursing depositors in the event of bank liquidation but had extended functions that involved it in bank supervision and resolution-thus making it a risk-minimizer. South Africa's new deposit insurer, which is yet to be established, will have a pay-box plus-mandate which means that it will have some involvement in resolution, mainly through providing funding for transfer of deposits to bridge banks and

making prompt payouts in liquidation, but as South Africa has the SARB as dedicated resolution authority there is no need for a risk minimizer-deposit insurer in South Africa. The US introduced the concept of a 'new bank' (bridge bank) to take over deposits and other critical functions from a failed bank and to manage same in an orderly manner. This resolution tool, as pointed out in the brief overview of South Africa's resolution regime in Chapter 5, has already been on-boarded. The US EDIS guaranteed reimbursement of covered deposits and increased this protected amount at regular intervals. South Africa will do well to note the need to ensure that protected deposit coverage keeps up with the changing times. The US also introduced the concept of recovery by means of subrogation as a feature of effective bank resolution and as pointed out in Chapter Five, the new South African EDIS also provides for recovery by means of subrogation.

The US EDIS further entrenched the principle that those who willfully cause bank failures should be held accountable for their conduct and be subjected to fines or criminal sanctions. As pointed out in Chapter Five, South Africa has long acknowledged this principle and provided for it in section 69A of the *Banks Act* which has been repealed and which is now provided for in section 140 of the *Financial Sector Regulation Act*.

Notably the US acknowledged the need for an EDIS to evolve to meet the changing exigencies of keeping depositors protected and confident. Noteworthy also, is the ability of the FDIC to terminate the membership of banks that engaged in 'unsafe and unsound practices' and the public notification to depositors of such termination that served to further protect depositor funds. South Africa can usefully take guidance in this regard.

In its role as risk-minimizer the FDIC was also able to apply merger and amalgamation tools to facilitate the orderly resolution of a failing bank hence it created this mechanism as a useful resolution tool, as well as facilitating the use of 'purchase and assumption' and 'recapitalization' as other resolution tools. From the overview provided of the South African resolution regime in Chapter Five, it is evident that South Africa has taken heed in this regard as it has incorporated these resolution tools into its resolution regime which will allow the SARB as resolution authority to have a larger suite of resolution tools that can be applied to also protect depositors better. The US introduced periodic assessment of the 'safety and soundness' of banks and special examinations to determine the

insurance risk posed by a member bank. Whereas the Prudential Authority as new bank supervisor in the South African Twin Peaks model also undertakes periodic assessment of banks as part of its regular supervisory duties, it would be prudent for the prudential authority and the Corporation to undertake special examinations together of banks to determine their insurance risk.

The US EDIS further introduced the concept of early intervention and timely corrective action to promote the health of the banking industry. South Africa would do well to upgrade its approach to early intervention and timely corrective action to prevent bank failures. Legislation was rolled out at regular intervals to keep abreast with the changing needs imposed on deposit insurance to safeguard the interests of depositors and promote financial stability and, as also remarked above, this would be good for South Africa to heed. The establishment of the Resolution Trust Company by the FIRREA 1989 proved to be a very positive step in managing and resolving failed savings associations through the application of a broad range of resolution tools. Another positive intervention occasioned by the FIRREA was the establishment of the Resolution Funding Corporation that provided funding for the resolution activities of the Resolution Trust Company. These developments cemented the notion that effective resolution is dependent on effective resolution funding. South Africa should be guided by this important principle and ensure that its resolution funding, especially those actions that will be funded by the Deposit Insurance Corporation are well-devised and that there are sufficient safeguards in place to prevent losses to the deposit insurance fund.

Also noteworthy is the bar that was introduced to prevent members of the FDIC Board to serve as officers or directors of member banks thus promoting the principle that members of the deposit insurer's board should not have conflicts of interest. This is a principle that can also be on-boarded by South Africa in relation to certain members of the Corporation's board. Notably the US also introduced the principle of compensating non-depositor creditors during bank resolution and as is evident from the brief overview of the South African resolution regime provided in Chapter 5, South Africa's new resolution regime has incorporated the 'no creditor worse off than in liquidation'-principle (NCWOL).

A very important feature introduced by the US EDIS framework was also the safeguards provided by cross-guarantee provisions to protect the deposit insurance funds. These provisions created liability for banks in respect of losses that the FDIC incurred due to default by a bank or any assistance provided by the FDIC to a bank likely to default and cemented the principle of recoveries during bank resolution. South Africa would do well to also provide for such cross-guarantees. The FIRREA also imposed increased capital requirements depending on how well-capitalized a bank was thus permitting intervention sufficiently early into a troubled bank's position to try and avoid failure. The less well-capitalized banks consequently had to maintain higher levels of minimum capital to ensure their safety and soundness. Lack of compliance with required capital levels resulted in the bank being required to provide a capital restoration plan (prompt corrective action) and sanctions such as suspension of FDIC membership was also imposed on non-compliant banks. As mentioned above, the South African EDIS will initially charge a flat rate but could possibly later evolve to charge a risk-based premium in which event it will be necessary to also look at the capital adequacy level of a bank.

Not being complacent about the state of deposit insurance, the US further refined their EDIS through the enactment of the FDICIA 1991 which introduced risk-based insurance premiums that would in addition to providing deposit insurance funding, also serve to curb excessive risk-taking by member banks. Banks were classified according to the adequacy of their capital and banks that fell below minimum capital requirements were visited with progressively more intrusive regulatory restrictions and requirements to ensure their 'safety and soundness'. The FDICIA aimed to encourage early resolution of troubled banks thereby also preserving equity. The lesson for South Africa in this regard is that bank resolution should be triggered sufficiently early to prevent loss of equity and to enable swift depositor protection by, for example, transferring deposits to a bridge bank.

The US EDIS further provided for a repayment agreement plan to be agreed upon by the Treasury and FDIC in the event that Treasury funds were borrowed to be use during bank resolution thus augmenting the modes of funding during resolution and availing the possibility for the deposit insurer to borrow Government funds to facilitate depositor

payouts or transfers of deposits to bridge banks. A similar agreement between the South African Deposit Insurance Corporation and National Treasury is thus advisable.

The FDIRA 2005 hailed yet further amplifications of the US deposit insurance system by introducing five-yearly reviews of the coverage limit of the EDIS and setting standards for the assessment of member banks. It also replaced the fixed designated reserve ratio for the deposit insurance fund with a reserve range - thereby adding some flexibility to the level at which the Fund had to be maintained and also providing for a Fund restoration plan where fund levels dropped too low. All these reforms should be heeded by South Africa. The FDIRA further amended the mode of assessment of premiums to be paid by member banks and encouraged inter-agency consultation, which is an important aspect of coordination and crisis management during bank resolution as it is necessary in facilitating swift depositor payouts or transferring deposits to a bridge bank during resolution. South Africa would do well to consider the mode of assessment of deposit insurance premiums applied in the US to determine whether it can be usefully applied to determine the premiums imposed on South African banks, which although not risk-based, may benefit from some features of premium calculation in the US.

As alluded to in Chapter Three, the 2008 GFC proved to be yet another seismic event that impacted heavily on the evolution of deposit insurance in the US, resulting in the Dodd-Frank Act reforms in 2010. This Act, like its predecessors increased deposit insurance coverage; changed the composition of the FDIC Board; introduced a new assessment base for premiums and also changed the reserve requirements to reflect the base for assessment. It additionally, and very importantly, introduced an orderly resolution regime for systemic banks in a manner that sought to mitigate moral hazard occasioned by bank bailouts which as would be indicated in the IADI Core Principles that were issued thereafter, is a critical part of the safety net within which an effective deposit insurance system is operated. South Africa has fortunately already heeded the lesson that it needed a comprehensive resolution regime with an expanded suite of resolution tools to operate in tandem with its new deposit insurance regime and thereby to ensure appropriate depositor protection and promote financial stability.

6.5 Guidance from Australia

Other than South Africa, Australia is a developed country with a thriving economy. However, what it shares with South Africa is that in both countries, being G-20 member countries, the banking sector is robustly regulated and in both countries, no EDIS framework was in place until relatively recently (2008 for Australia and 2021 for South Africa). Given that Australia, despite its stable banking sector and the argument that stable banks do not give rise to a need for deposit insurance, nevertheless prudently decided to adopt an EDIS, it is submitted that South Africa can take guidance from the 'young' Australian EDIS as elaborated below, the first being that that adopting an EDIS is an essential step towards extending greater depositor protection, and promoting depositor confidence and financial stability.

Notably Australia had some limited form of depositor protection in place since the enactment of the Banking Act 1945 which assigned the Commonwealth Bank the explicit function of depositor protection and required banks to maintain assets not less than the amounts of their deposit liabilities in Australia. Albeit that the 'depositor protection priority'-provision in the Act, which determined that the assets of failing Australian banks were to be made available to meet the bank's liabilities in Australia in priority to all other liabilities of such bank outside Australia, did not present a comprehensive EDIS regime it at least served to instill some confidence in Australian depositors that their deposits would not be lost if their bank went bankrupt. South Africa could consider having a similar type of provision in its EDIS framework. The powers of the Commonwealth Bank to intervene in a troubled bank in order to keep it sound and safe also contributed to financial stability and the power of the Commonwealth Bank to take control of a failing bank until deposits were repaid or until suitable provision was made for repayment of deposits must surely have promoted depositor confidence. As observed in the Guidance from the US, South Africa can benefit by amplifying its approach to early intervention in troubled banks. The Banking Act 1959, which was largely a re-enactment of the 1945 Act also contained a similar 'depositor protection priority'-provision and also required banks to hold assets in Australia to a value not less than the total amount of their deposit liabilities in Australia.

The developments since 2005 with the *Study of Financial Guarantees (Davis Report)* leading to the Council of Financial Regulators recommending the introduction of a private limited EDIS to provide depositors with prompt access to their deposits in the event of bank failure is noteworthy. Although the Council suggested protection of retail depositors at that stage only, the reforms that followed also saw the temporary protection of wholesale depositors through the *Guarantee Scheme for Large Deposits and Wholesale Funding Appropriation Act 129 of 2008*, which is a protection that South Africa, being a developing country would not at this stage be able to take on board.

The Financial Claims Scheme, established under the *Financial System Legislation Amendment (Financial Claims Scheme and Other Measures Act) 105 of 2008*, however provides fertile opportunity for guidance. Notably this EDIS, aimed at protecting Australian retail depositors by giving them certainty regarding the recovery of their deposits and supporting their liquidity, provides for protected depositors in a failed ADI to have access to certain amounts of money to maintain their liquidity *even before* receiving deposit payouts during bank liquidation. It further currently provides significant coverage by protecting retail deposits up to a sizeable amount after initially placing no caps on such guaranteed amounts. However, as indicated in the IADI Core Principles, blanket protection of deposits is not ideal given its ability to increase moral hazard. Notable also is that the amount of deposit coverage was increased to keep up with the exigencies of changing times and as also observed in the guidance from the US, South Africa can also follow this example.

As indicated in Chapter Four, depositor payout in terms of the Financial Claims Scheme is triggered by a declaration by the Minister of Finance that APRA, as the administrator of the scheme, has applied for the winding-up of a specific ADI. Two accounts are kept, one for the funding of depositor payouts (the Financial Claims Scheme Special Account) and one for the administration of the Financial Claims Scheme (the APRA Special Account). The Financial Claims Scheme Special Account is intended for use only in the event that other resolution remedies such as transferring of deposits to another ADI or recapitalization of the failing bank are not feasible or cost-effective and it consequently has to be liquidated. It is clear from the discussion of the South African EDIS that separate

accounts will in practice be kept for the deposit insurance fund and the administration and operating costs of the Corporation.

Given that Australia is an affluent country with a stable funding system the Australian EDIS is *ex post* funded, supported by a standing budgetary appropriation from Government. Even where a country is in the fortunate position that Australia finds itself in compared to South Africa that is resource-constrained, and in which position Australia would in principle be able to provide deposit protection funding *ex post*, it is submitted that it would be better for any country to at least have some *ex ante* funding available to reimburse depositors or transfer their deposits to another bank. As pointed out in this thesis, the mechanism of *ex post* funding in Australia has also been recommended by the IMF to be changed to *ex ante* funding which would enable more orderly bank resolution where funds are already available by the time that a bank fails. In South Africa where bank failures do occur from time to time although they are not rife, it is submitted that having only *ex post* deposit insurance funding would not be feasible and that by at least having some *ex ante* funding crisis management in the event of bank failure would be mitigated and greater depositor confidence and financial stability would be promoted.

A salient feature of the Australian Financial Claims Scheme that would be prudent for South Africa to take on board, is the obligation imposed on ADIs to identify in advance who their protected deposit holders are and developing a 'single customer view' for them to minimize deposit payout errors. Similarly salient is the obligation on Australian banks to provide APRA swiftly with depositor information to ensure prompt payout of deposits.

In alignment with the Core Principles the Australian EDIS also provides for APRA to be subrogated as priority creditor of the failed ADI in respect of payouts made. Recovery of funding of deposit payouts or funding provided to transfer protected deposits to another ADI during resolution, if not fully recoverable from the failed ADI, can be recovered through an *ad hoc* levy on the banking sector. This would also be a prudent approach for South Africa to consider albeit that South African banks who will already be paying levies towards the administration of the deposit insurer and premiums towards the deposit insurance fund, might not quite warm up to this mechanism.

Providing for the Australian Treasury to determine these levies in legislation on an annual basis and in varying amounts depending on whether the levies are restricted or unrestricted is also something that South Africa can take guidance on as well as to take note of the type of sanctions imposed in the event of non-compliance with such levies. Additionally, guidance can also be taken on measures implemented by APRA to facilitate the most cost-effective means for implementation of the Scheme's payments, reporting and communication and how swiftly deposit payouts will be effected under the Financial Claims Scheme.

The reforms brought about by the *Financial Sector Legislation Amendment (Crisis Resolution Powers and Other Measures) Act 2018* which introduced improved resolution powers to be applied to failing ADIs significantly amplified the Australian bank resolution regime thereby also ensuring swift resolution action that would prevent greater loss in equity of the already failing bank and also provide enhanced depositor protection by broadening APRA's mandate to permit the use of the Financial Claims Scheme funds to support a transfer of the failing bank's business.

6.6 Recommendations

As demonstrated in Chapter 5, the new South African EDIS is largely compliant with all 16 IADI Core Principles for Effective Deposit Insurance. However, it was also indicated that there are several respects in which the new deposit insurance regime falls short of full compliance with the Core Principles. Consequently, the following recommendations are made for reform and should ideally be implemented before the deposit guarantee framework is made operational:

6.6.1 Recommendation 1: Objectives

It is recommended that the provision in the legislation stating the Corporation's objectives be amended to clearly reflect that depositor protection and promotion of financial stability are both main objectives of the Corporation.

6.6.2 Recommendation 2: Operational Independence

As indicated, the South African Deposit Insurance Corporation will be positioned within the SARB as its subsidiary. While this may minimize the start-up costs for the Corporation, it may interfere with the operational independence of the SADC. It is thus recommended that a MOU is entered into between SARB and the Corporation to preserve its operational independence. It should further be explicitly stated in the legislation that the Corporation is a separate juristic person.

6.6.3 Recommendation 4: Deposit insurance fund

Safeguards should also be put into the legislation to guard against spending of Corporation funding on directions of the SARB or government in instances where it is not justified to ensure that the Corporation's operational independence is not compromised.

6.6.4 Recommendation 4: Premiums

Provision should however be made in the legislation for the Corporation to change the basis on which premiums are levied at a later stage should it so wish as a risk-based premium will be fairer and will instil greater market discipline.

6.6.5 Recommendation 5: Ad hoc premiums

It is recommended that, in those instances where the deposit insurance fund is not at a sufficient level to cater for all the costs of resolution funding and it is necessary to collect an additional *ad hoc* premium from the banking industry, the legislation expressly caters same.

6.6.6 Recommendation 6: Governance

It is recommended that the legislation provide that the Corporation must have sound governance practices which must include appropriate accountability, internal controls, and transparency and disclosure regimes.

6.6.7 Recommendation 7: Governance assessment

It is recommended that the legislation provide for regular assessment of the Corporation to evaluate the extent to which it meets its mandate.

6.6.8 Recommendation 8: Information-sharing

It is recommended that the legislation set out the process for sharing and on-sharing of confidential information between the Corporation and other safety net participants, financial regulators and foreign regulators.

6.6.9 Recommendation 9: Ongoing information-sharing

It is recommended that the legislation clarifies that the duty to share information is an ongoing obligation.

6.6.10 Recommendation 10: Testing of contingency planning

It is recommended that the legislation obliges the Corporation to annually test its own crisis management plans and contingency planning.

6.6.11 Recommendation 11: Participation in crisis management simulations

It is recommended that the legislation obliges the Corporation to participate in regular simulation exercises and pre-and post-crisis contingency planning for system-wide crisis preparedness and management which should involve all safety net participants.

6.6.12 Recommendation 12: Membership

The conditions, process and timeframe for becoming a member of the EDIS must be explicitly stated in the legislation and must be transparent.

6.6.13 Recommendation 13: Termination of membership

The legislation must clearly state the instances in which the Corporation can terminate a bank's membership and should also indicate the effect that this will have on the said bank's insured deposits (i.e. that their deposits will still be protected until a specified deadline) and impose an obligation on the Corporation to notify depositors of the termination of a bank's membership only after sufficient and swift provision had been made to protect the said deposits in a manner that would prevent a bank run.

6.6.14 Recommendation 14: Withdrawal of licence

The legislation should provide for the Prudential Authority to immediately revoke a bank's licence upon termination of its membership of the EDIS.

6.6.15 Recommendation 15: Protection of foreign deposits

The legislation should specify that foreign retail deposits will also be protected if there are sufficient funds left after South African covered depositors have been reimbursed.

6.6.16 Recommendation 16: Review of coverage

The legislation should provide for a regular 5-year review of deposit coverage to ensure that the deposit coverage remains adequate to preserve depositor confidence.

6.6.17 Recommendation 17: Funding arrangements

The legislation should set out emergency funding arrangements for instances where the deposit insurance fund is insufficient to deal with bank resolution, including the availability of a committed line of liquidity funding from the central bank.

6.6.18 Recommendation 18: Use of resolution funding

Provision should be made in the legislation for the Corporation to expressly and in writing authorise the use of its funds for resolution of banks other than liquidation.

6.6.19 Recommendation 19: Promoting public awareness

Provision should be made in the legislation for the Corporation to inform depositors of deposit insurance levels; where, when and how they can get access to their insured deposits and the information they have to disclose in this regard as well as whether the Corporation will make advance or interim payments.

6.6.20 Recommendation 20: Monitoring of public awareness

The legislation should impose an obligation on the Corporation to monitor its public awareness activities on an ongoing basis and to have the effectiveness of its public awareness programs or activities independently assessed at least at 3-year intervals.

6.6.21 Recommendation 21: Legal Protection

The legislation should clarify that the legal protection for good faith actions taken by the Board and employees of the Corporation extends to current and former Board members and employees.

6.6.22 Recommendation 22: Dealing with parties at fault in bank failure

The legislation must extend the power to investigate and impose liability on persons who were instrumental in bank failure to insiders, related parties and professional service providers who acted for the failed bank.

6.6.23 Recommendation 23: Early intervention

The legislation should be amended to provide for a comprehensive early intervention regime before a troubled bank becomes non-viable.

6.6.24 Recommendation 24: Access to depositor information

The legislation must oblige member banks to provide the Corporation with access to depositor records and to update such information on a regular basis (guidance could be taken from the 'single customer view'- approach in Australia)

6.6.25 Recommendation 25: Audit of reimbursement process

The legislation must provide for an independent audit of the reimbursement process after a deposit pay-out to provide confirmation that the Corporation has appropriate internal controls in place.

6.6.26 Recommendation 26: Cooperation by liquidator

The legislation should provide that the liquidator of a failed bank is obliged to cooperate with the Corporation to facilitate the process of reimbursing depositors and to provide the Corporation, in its capacity as creditor, with information it requires.

6.6.27 Recommendation 27: Review of MoUS

The legislation should provide for all MOUs entered into by the Corporation to be reviewed at least at 3-year intervals.

6.6.28 Recommendation 28: Depositor priority

It is recommended that consideration should be given to inserting a provision similar to the Australian depositor priority provision to ensure that a failed bank assets are availed first to South African depositors.

6.6.29 Recommendation 29: Sanctions

The legislation should specify the sanctions for failure by a member bank to comply with its obligations in respect of deposit insurance levies and premiums.

6.6.30 Recommendation 30: Special examinations

The legislation should provide for the Corporation and Prudential Authority to conduct special examinations into member banks to determine their insurance risk.

6.6.31 Recommendation 31: Bar to prevent conflict of interest

To avoid conflict of interest, the legislation should specify that the two persons who can be appointed by the Governor of SARB as directors on the Board of the Corporation may not hold positions on the Boards of any member banks.

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