

THE BANKING (AMENDMENT) BILL
(No. II of 2013)

Explanatory Memorandum

The object of this Bill is to amend the Banking Act to provide that a bank may restructure its business with the approval of the central bank or where it is required to do so by the central bank.

2. In determining whether to approve or require the restructuring of a bank, the central bank shall have regard to –

- (a) its objects and functions;
- (b) any systemic risk that the bank may pose;
- (c) any incidence which the bank may have on the stability of the financial system of Mauritius;
- (d) the need to further protect the bank's depositors and the public.

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29 March 2013

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ARRANGEMENT OF CLAUSES

Clause

1. Short title
2. Interpretation
3. New section 32A inserted in principal Act
4. Section 64 of principal Act amended
5. Section 101 of principal Act amended
6. Third Schedule added to principal Act
7. Consequential amendments

A BILL

To amend the Banking Act

ENACTED by the Parliament of Mauritius, as follows –

1. Short title

This Act may be cited as the Banking (Amendment) Act 2013.

2. Interpretation

In this Act –

“principal Act” means the Banking Act.

3. New section 32A inserted in principal Act

The principal Act is amended by inserting, after section 32, the following new section –

32A. Transfer of undertaking by bank

(1) Subject to subsection (11), where a bank proposes to restructure its business in a manner that involves the transfer of the whole or part of its undertaking to –

- (a) its parent;

- (b) its wholly owned subsidiary; or
- (c) a wholly owned subsidiary of its parent,

it shall apply, in such form and medium as the central bank may determine, to the central bank for approval and pay such non-refundable processing fee as the central bank may, with the approval of the Minister, determine.

(2) Notwithstanding subsection (1), the central bank may require a bank to restructure its business in the manner referred to in subsection (1).

(3) The central bank shall not give its approval pursuant to subsection (1) or require a bank to restructure its business pursuant to subsection (2), unless it is of the opinion that that it is expedient to do so, having regard to –

- (a) its objects and functions under sections 4 and 5 of the Bank of Mauritius Act;
- (b) any systemic risk that the bank may pose;
- (c) any incidence which the bank may have on the stability of the financial system of Mauritius;
- (d) the need to further protect the bank's depositors and the public.

(4) A bank shall –

- (a) on making an application under subsection (1), submit to the central bank, in such form as the central bank may determine, a provisional list of its assets and liabilities updated as at the day immediately preceding the date of the application; or
- (b) on being required by the central bank to restructure its business under subsection (2), submit, in such form as the central bank may determine and within such time as the central bank may specify, a provisional list of its assets and liabilities updated as at the day immediately preceding the date of the submission.

(5) Where the central bank gives its approval for or requires the restructuring of a bank under this section –

- (a) the central bank shall require the transferor bank to effect the transfer of the undertaking in accordance with such terms and conditions as the central bank may determine;
- (b) the transferor bank shall comply with such other regulatory requirements relating to any part of its business under any enactment and shall submit to the central bank written confirmation of such compliance;
- (c)
 - (i) the transferor bank shall, within 14 days of the approval or requirement, give written notice to each of its shareholders informing him of his right to require the transferor bank to purchase his shares in lieu of being allotted shares in the transferee bank; and
 - (ii) where a shareholder intends to exercise his right under subparagraph (i), he shall, within 28 days of the date of the notice referred to in that subparagraph, require the transferor bank to purchase such shares in the manner set out in section 110 of the Companies Act, provided that reference in section 110 of the Companies Act to –
 - (A) section 109(2)(a) of the Companies Act shall be construed as reference to this subparagraph;
 - (B) the 7 day period under section 110(1) of the Companies Act shall be construed as if that 7 day period were to run from the expiry of the 28-day period under this subparagraph; and
 - (C) the Board of directors, the Board or the company under section 110 of the Companies Act shall be construed as reference to the transferor bank.

(6) Where the central bank is satisfied that the transferor bank has complied with the terms and conditions referred to in subsection (5)(a) and the applicable requirements of this section, the central bank shall –

- (a) authorise the transfer of the undertaking of the transferor bank;
- (b) give public notice of the transfer of the undertaking of the transferor bank and notice thereof in at least 3 daily newspapers, specifying the appointed day as the date on which the transfer shall become effective; and
- (c) notify the Registrar of Companies and the transferor bank accordingly.

(7) Where the central bank has authorised the transfer of the undertaking under subsection (6) –

- (a) the undertaking of the transferor bank shall, on the appointed day, be transferred to the transferee bank in accordance with this section and the terms and conditions set out in the Third Schedule;
- (b) the Registrar of Companies shall issue a Certificate of Transfer of Undertaking under section 346A of the Companies Act.

(8) The transferee bank shall, within 8 days of the appointed day, submit the Certificate of Transfer of Undertaking, together with a final list of the assets and liabilities of the transferor bank updated as at the day immediately preceding the appointed day, to the Registrar-General for registration and transcription, and provide a certified copy thereof to the Conservator of Mortgages.

(9) The Certificate of Transfer of Undertaking shall be evidence of the transfer to and vesting in the transferee bank of the undertaking.

(10) Notwithstanding any other enactment or anything contained in any contract or agreement, nothing in or authorised by this section shall –

- (a) invalidate or discharge any contract or agreement which had been entered into before the transfer of the undertaking;
- (b) constitute a breach of, or default under, or require compliance with any notice or consent provision, including express or implied consent for transfer;
- (c) require any obligation to be performed sooner or later than would have otherwise been the case under any contract or instrument to which the transferor bank is a party or by which it is bound;
- (d) allow any party to any contract to which the transferor bank is a party, or by which it is bound, to terminate that contract where that party would not otherwise have been able to terminate that contract or to treat any interest or right under that contract as terminated;

- (e) entitle any party to any contract to which the transferor bank is a party, or by which it is bound, to modify the terms of that contract where that party would not otherwise have been able to modify those terms or confer a right, interest or benefit on that party which it would not otherwise have had;
- (f) release any surety wholly or in part from all or any liability under or in respect of any contract which had been entered into before the transfer of the undertaking;
- (g) otherwise, in relation to the transferred undertaking, place the transferee bank in a position which is less favourable than the position in which the transferor bank would have been if this section were not in operation; or
- (h) result in a change in the ranking of any security interest forming part of the transferred undertaking.

(11) Nothing in this section shall preclude a bank, other than a bank having made an application under subsection (1) or having been required to restructure its business under subsection (2), from initiating such action for the restructuring of its business as it considers appropriate otherwise than under this section, provided that the approval of the central bank is obtained for the restructuring.

(12) In the event of conflict or inconsistency between any of the provisions of this section and those of the Companies Act or any other enactment, the provisions of this section shall, to the extent of any such conflict or inconsistency, prevail.

(13) The Minister may make regulations to provide for any matter necessary or consequential to the implementation of this section and the Third Schedule.

(14) In this section and the Third Schedule –

“appointed day” means the date on which a transfer of undertaking becomes effective, as specified in the notices under subsection (6);

“assets” means the property, rights, powers, interests and privileges of any description of the transferor bank and includes but shall not be limited to –

- (a) rights, powers, interests and privileges that are –
 - (i) of a personal character (*intuitu personae*);
 - (ii) not lawfully capable of being assigned or performed vicariously;
 - (iii) expressly stated under any agreement creating them to be incapable of being assigned or performed vicariously; or
 - (iv) held by the transferor bank as trustee;
- (b) any shares or interests held by the transferor bank in another entity; and
- (c) rights, powers, interests and privileges existing or arising pursuant to a foreign law, including a contract governed by that foreign law;

“Certificate of Transfer of Undertaking” means a certificate issued under section 346A of the Companies Act, as referred to in subsection (7)(b);

“interests” includes –

- (a) security interests of any description of the transferor bank, whether secured or unsecured;
- (b) security interests witnessed in *pari passu*, *cession de priorité*, security sharing and similar agreements;

“liabilities” means obligations and commitments of the transferor bank and includes but shall not be limited to –

- (a) obligations or commitments that are –
 - (i) of a personal character (*intuitu personae*); or
 - (ii) not lawfully capable of being assigned or performed vicariously;
 - (iii) expressly stated under any agreement creating them to be incapable of being assigned or performed vicariously; or
 - (iv) incumbent on the transferor bank as trustee;

(b) obligations existing or arising pursuant to a foreign law, including a contract governed by that foreign law; and

(c) customer deposit accounts;

“parent” has the same meaning as in the Companies Act;

“Registrar of Companies” means the Registrar of Companies appointed under the Companies Act;

“transferee bank” includes the parent, the wholly owned subsidiary or the wholly owned subsidiary of the parent of the bank to which a transfer of undertaking is being or has been effected under this section;

“transferor bank” –

- (a) means a bank which is authorised by the central bank to transfer its undertaking under this section;
- (b) includes a bank which has applied for approval for, or is required by the central bank to effect, a transfer of undertaking under this section;

“undertaking” includes the whole or part of any business, including a branch.

4. Section 64 of principal Act amended

Section 64 of the principal Act is amended, in subsection (3), by adding the following new paragraph, the word “or” at the end of paragraph (l) being deleted and the full stop at the end of paragraph (m) being deleted and replaced by the words “; or” –

- (n) disclosure of information is required for the purposes of section 32A.

5. Section 101 of principal Act amended

Section 101 of the principal Act is amended, in subsection (1)(c), by adding the words “, other than the Third Schedule”.

6. Third Schedule added to principal Act

The principal Act is amended by adding the Third Schedule set out in the Schedule to this Act.

7. Consequential amendments

(1) The Companies Act is amended by inserting, after section 346, the following new section –

346A. Certificate of Transfer of Undertaking

Where an authorisation for a transfer of undertaking is granted under section 32A of the Banking Act, the Registrar shall, for the purposes of that section, issue a Certificate of Transfer of

Undertaking in such form as may be approved and published in the *Gazette*.

- (2) The Land (Duties and Taxes) Act is amended, in section 2 –
- (a) in the definition of “deed of transfer”, by adding the following new paragraph, the full stop at the end of paragraph (m) being deleted and replaced by a semicolon –
 - (n) a Certificate of Transfer of Undertaking issued under section 346A of the Companies Act.
 - (b) in the definition of “property”, in paragraph (b), by adding the following subparagraph –
 - (viii) any property subject of a transfer under section 32A of the Banking Act;
 - (c) in the definition of “transferor”, by adding the following new paragraph –
 - (k) a transferor bank under section 32A of the Banking Act.
- (3) The Registration Duty Act is amended –
- (a) in section 2, by inserting, in the appropriate alphabetical order, the following new definition –

“Registrar of Companies” means the Registrar of Companies appointed under the Companies Act;
 - (b) in section 3(1), by adding the following new paragraph, the full stop at the end of paragraph (d) being deleted and replaced by a semicolon –
 - (e) a Certificate of Transfer of Undertaking issued under section 346A of the Companies Act.
 - (c) in section 26, by adding the following new paragraph, the full stop at the end of paragraph (i) being deleted and replaced by a semicolon –
 - (j) by the transferee bank under section 32A of the Banking Act.

- (d) in section 36(1), by adding the following new paragraph –
- (o) in respect of a Certificate of Transfer of Undertaking issued under section 346A of the Companies Act, a final list of the assets and liabilities referred to in section 32A(8) of the Banking Act.
- (e) in the First Schedule–
- (i) in Part I, in paragraph J, by adding the following new item –
18. A Certificate of Transfer of Undertaking issued under section 346A of the Companies Act.
- (ii) in Part VII, by adding the following new item –
- (e) A Certificate of Transfer of Undertaking issued under section 346A of the Companies Act.
- (f) in the Second Schedule, by adding the following new item –

17. A Certificate of Transfer of Undertaking issued under section 346A of the Companies Act.	On the value of the assets and liabilities.
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- (g) in the Sixth Schedule, by adding the following new item –

18. A Certificate of Transfer of Undertaking issued under section 346A of the Companies Act.	8 days from the appointed day referred to in section 32A of the Banking Act	50 per cent of duty payable
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(4) The Transcription and Mortgage Act is amended, in section 3, by adding the following new paragraph, the full stop at the end of paragraph (m) being deleted and replaced by a semicolon –

- (n) Certificate of Transfer of Undertaking issued under section 346A of the Companies Act.
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SCHEDULE

[Section 6]

THIRD SCHEDULE

[Section 32A]

1. Where the central bank authorises the transfer of undertaking of a bank under section 32A –

- (a) all assets and liabilities that form part of the undertaking of the transferor bank on the day immediately before the appointed day and are listed in the final list of assets and liabilities submitted to the Registrar-General under section 32A(8), shall, on the appointed day, vest in and continue to be the assets and liabilities of the transferee bank, without the need for any further formality;
- (b) the transferor bank shall, on the appointed day, be released from all liabilities and obligations that form part of its undertaking on the day immediately before the appointed day;
- (c) all proceedings started and pending by or against the transferor bank that form part of the undertaking of the transferor bank on the day immediately before the appointed day shall, on the appointed day, be continued by or against the transferee bank, and the transferee bank shall be entitled to all defences, claims, counterclaims and rights of set-off or compensation which would have been available to the transferor bank in relation to such proceedings;
- (d) any ruling, order or judgment in favour of or against the transferor bank in respect of the undertaking of the transferor bank on the day immediately before the appointed day shall, on the appointed day, be enforceable by or against the transferee bank;
- (e) any mortgage, privilege, charge, bond, pledge, guarantee or any other security interest that form part of the undertaking of the transferor bank on the day immediately before the appointed day and was made or given to secure past, present and future advances, facilities or services by the transferor bank shall, on the appointed day, remain in full force and be considered to be a mortgage, privilege, bond, pledge, guarantee or instrument given to or in favour of the transferee bank, as security for past, present and future advances, facilities or services by the transferee bank, without the need for any further formality;

- (f) every book, record and other document of the transferor bank that form part of its undertaking on the day immediately before the appointed day shall, on the appointed day, vest in the transferee bank.

2. (a) Every person who, on the day immediately before the appointed day, is employed by the transferor bank shall be entitled to be transferred to the transferee bank on terms and conditions which shall be not less favourable than those of his previous employment at the transferor bank.

(b) The period of service of every person employed by the transferor bank who is transferred to the transferee bank shall be deemed to be an unbroken period of service with the transferee bank.

(c) No person employed by the transferor bank shall, on account of his transfer to the transferee bank or any resulting change in his job title, be entitled to claim that his employment has been terminated or adversely affected in breach of any enactment.

(d) Any pension or similar scheme operated by the transferor bank for the benefit of its employees on the day immediately before the appointed day shall, as from the appointed day, be operated by the transferee bank.

3. (a) Subject to paragraph (b), every person who is a shareholder of the transferor bank on the day immediately before the appointed day –

- (i) shall, on the appointed day, be considered to hold in the transferee bank the same proportion of the share capital as he held in the transferor bank immediately before the appointed day; or
- (ii) may exercise his right to require the transferor bank to purchase his shares in accordance with section 32A(5).

(b) Paragraph (a) shall be without prejudice to the right of any shareholder, other than the Government, to cease to be a shareholder –

- (i) of the transferor bank immediately before the appointed day; or
 - (ii) of the transferee bank on or after the appointed day.
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