

BANKING BILL 2015

EXPLANATORY MEMORANDUM

The Bill for the Banking Act 2015 ('the Bill') seeks to provide for the regulation and supervision of banking business, the establishment of a single banking space, the ownership structures for licensed financial institutions, the licensing of financial holding companies, the corporate governance of licensed financial institutions, the framework for the official administration of licensed financial institutions and for incidental and related matters.

The Bill is divided into fourteen parts.

Part I, Preliminary, Clause 1: This Part addresses preliminary matters of the Bill such as the the interpretation of words commonly used in the Bill.

Part II, Licences, Clauses 2 – 18: The Central Bank (the Eastern Caribbean Central Bank) has the authority under this Part to issue and revoke licences. The issuance of one licence will authorize a financial institution to operate within the territorial space of the Currency Union and all branches of a licensed financial institution across the Currency Union will be deemed to be one licensed financial institution. Pursuant to *Clause 15* the Central Bank shall inform the Minister for Finance of the receipt of an application for a licence and of any decision in relation to a licence.

Part III, Ownership Structures, Clauses 19 – 33: This Part establishes a framework for approvals for holding or acquiring more than ten, twenty or fifty percent of the share capital or total voting rights of a local licensed financial institution. *Clause 27* provides for a local licensed financial institution to submit a quarterly report to the Central Bank on ownership and control of the licensed financial institution and *Clause 28* requires a foreign financial institution to submit a report to the Central Bank whenever there is a change in control of the foreign financial institution.

Part IV, Financial Holding Companies, Clauses 34 – 42: This Part confers upon the Central Bank the authority to require the establishment and licensing of financial holding companies in respect of banks that may be part of a corporate group whose activities may be an eclectic mix of financial and non-financial activities.

Part V, Financial Requirements and Limitations, Clauses 43 – 57: *Clauses 43 – 46* set out the minimum capital adequacy requirements. Pursuant to clause 43 the minimum capital required for banks is twenty million dollars and that for credit or other financial institutions is five million dollars, an increase from the existing five million dollars and one million dollars respectively. In an effort to mitigate risks arising from the engagement in certain activities, *Clauses 48 – 54* impose restrictions on certain activities of licensed financial institutions.

Part VI, Audit and Information, Clauses 58 – 68: This Part emphasizes the work of the external auditor in acquiring information on the performance of the licensed financial institution.

Part VII, Supervision, Clauses 69 – 95: *Clauses 69 – 73* establish the framework for consolidated supervision of corporate groups and in that respect allow for the examination of a licensed financial institution and its affiliates. Supervisory measures to bring about corrective action when banks fail to meet prudential requirements, where there are regulatory violations, or where depositors are threatened in any other way are set out in *Clauses 74 - 87*. These corrective action tools include: suspension of particular or all shareholders' rights, including voting rights; prohibition on the distribution of profits to shareholders; suspension or removal of directors and officers; restricting the rate of interest on savings and time deposits; requiring the bank or affiliate to sell, liquidate, or otherwise dispose of an affiliate or part of its business; appointing an observer to monitor the activities of the bank; appointing an administrator with full and exclusive powers to manage and operate the bank; requiring mandatory action (prompt corrective action) in one or more areas for banks that are adequately capitalised but suffering material losses or are undercapitalised; the imposition of restrictions on or the revocation of the licence. In the interest of transparency and public disclosure the Central Bank has the power under *Clause 88* to publish statements on the assets and liabilities of each licensed financial institution.

Part VIII, Corporate Governance, Clauses 96 – 112: Minimum standards for directors, officers, controlling and significant shareholders of a licensed financial institution are embodied in the fit and proper criteria set out in this Part. The requirement to satisfy the fit and proper criteria is ongoing. Under *Clause 100* a licensed financial institution or licensed financial holding company has an obligation to give notice of appointment or election of a director or officer within thirty days of the appointment or election. Where the Central Bank is not satisfied that the person meets the fit and proper criteria it shall direct the removal of the director or officer. Provision is also made in *Clause 102* for removal on the basis of the disqualification of the director or officer upon notification by a special majority of the board of the licensed financial institution and for the automatic disqualification in specified circumstances. *Clauses 103* and *104* preserve the rules of natural justice and accord a right on the licensed financial institution and the director or officer to make written representations to the Central Bank and the Central Bank shall take the representations into account in deciding whether to confirm the direction for removal of the director or officer.

Part IX, Official Administration, Clauses 113 – 136: This Part introduces the concept of official administration. The Central Bank is empowered to appoint an official administrator for any licensed financial institution or licensed financial holding company which requires resolution. Pursuant to *Clause 117* the official administrator may be appointed for a period not exceeding twelve months however that appointment may be extended for a further period not exceeding twelve months if it appears to the Central Bank that additional time is required to ensure an orderly restructuring of the institution. The powers of the official administrator are set out in *Clause 123* which includes the power to manage and operate the financial institution and to exercise all the rights, powers, functions and responsibilities of the board of directors and shareholders of the licensed financial institution. *Clause 126* provides for the imposition of a moratorium on payments by the financial institution and a stay of proceedings against the institution during official administration. The “no creditor worse-off than in liquidation” principle is expressed in *Clause 129*. Such a provision protects creditors and the resolution authority by clarifying that imposition of losses is permitted as long as creditors are not worse off than they would have been had the financial institution been liquidated. Under this Clause the disparate treatment of similarly-situated depositors or other classes of creditors subject to the “no

creditor worse-off than in liquidation” principle is permitted for claims that are of strategic importance to the economy to contain potential systemic impact or to maximize the value for the benefit of all depositors and creditors. *Clauses 132 and 133* authorise the official administrator to carry out a merger of the financial institution, transfer assets and liabilities to a bridge bank or an asset management vehicle established by one or more Participating Governments for the purpose of resolving the financial institution or to restructure the liabilities of the financial institution without the approval of shareholders and creditors which would otherwise be applicable in going concern resolutions. The official administrator also has the ability to set-off past due loans against deposit claims particularly in a purchase and assumption transaction. This would diminish the cost of the transaction and obviate the expenditure of government funds to benefit depositors who have defaulted on their loan obligations to the licensed financial institution.

Part X, Receivership and Compulsory Liquidation, Clauses 137 – 156: This Part establishes a framework for gone concern resolution which contemplates an extra-judicial process for receivership and compulsory liquidation. The Central Bank may appoint a receiver for a licensed financial institution in the circumstances stipulated in *Clause 137* for the purpose of liquidating the financial institution and the Central Bank will have general oversight of that receiver. *Clause 152* establishes the priority of claims in liquidation. The small depositor threshold in the priority of claims is set at \$200,000.00, an increase from the existing \$300.00, and a third tier of depositors that is, insiders (directors, officers and significant shareholders) who would rank lower than all other depositors in the hierarchy of claims in liquidation has been created. This provides a basis for treating some depositors differently from others.

Part XI, Voluntary Liquidation, Clauses 157 – 165: *Clauses 158 - 165* provide a framework for the voluntary liquidation of a licensed financial institution. Pursuant to *Clause 165* the provisions of the Companies Act or any law on or relating to company bankruptcy, reorganization, insolvency or liquidation shall not apply to the liquidation of a licensed financial institution under this Bill.

Part XII, Abandoned Property, Clauses 166 – 173: The items identified in *Clause 166* which include deposits, sums payable on cheques and sums prepaid on credit cards shall be presumed to be abandoned after a period of inactivity of fifteen years. *Clause 167* confers administrative responsibility for all abandoned property except abandoned property in safe deposit boxes on the Central Bank. Abandoned property paid into the custody of the Central Bank shall vest in the Crown fifteen years from the date on which it was paid into the custody of the Central Bank. Pursuant to *Clause 169* items in safe deposit boxes shall be presumed to be abandoned where the lease or rental has expired and five years has elapsed from the expiration of the lease or rental. The Crown has administrative responsibility for abandoned property in safe deposit boxes. Under *Clause 170* the Crown may sell by public auction the contents of the safe deposit box. The proceeds of such sale shall be deposited into an Abandoned Property Fund which has been established pursuant to *Clause 171* under the administration and control of the Minister. The proceeds of sale in the Abandoned Property Fund shall vest in the Crown after a period of ten years. Pursuant to *Clause 172* a person may file a claim for any interest in abandoned property paid into the custody of the Central Bank or delivered to the Crown prior to the expiration of the periods aforementioned. Upon the expiration of the periods no person may make any claim against the Central Bank or the Crown in respect of the abandoned property.

Part XIII, Transfer of Banking Business, Clauses 174 – 176: This Part allows for the issuance of a Banking Business Vesting Order by the Minister to effect the transfer and vesting of banking business acquired by a licensed financial institution.

Part XIV, Miscellaneous Provisions, Clauses 177 – 193: This Part sets out the miscellaneous provisions of the Bill. *Clause 177* provides for the maintenance of the secrecy of banking information except in specified circumstances including where the disclosure: is authorized by the customer, is required for the performance of one's duties under the Bill or is compelled by a court of competent jurisdiction. Under *Clause 179* administrative penalties levied under the Bill shall be paid to the Central Bank and may be recovered by the Central Bank by deduction from any deposit maintained by a licensed financial institution with the Central Bank. *Clause 180* identifies offences in respect of which liability to conviction may be discharged by payment of a fixed penalty. The Central Bank has authority to issue prudential standards under *Clause 183*.

Clause 184 provides for ex-post review by a court of any action taken by the Central Bank or any person appointed by the Central Bank. In such proceedings the court shall take into consideration the public interest. Any action taken under the Bill by the Central Bank, the receiver or official administrator shall be allowed to continue unrestricted notwithstanding the challenge or review before the court. Any relief or redress granted by the court shall be limited to damages. Under *Clause 185* a Participating Government may establish a bridge financial institution or asset management company to facilitate the resolution of a financial institution under Parts IX or X. A Participating Government may provide financing to facilitate the transfer of deposits of a financial institution which has been placed in official administration or receivership. In so doing the Participating Government shall take into consideration its fiscal and debt profile and the costs that would have been incurred in paying out depositors in a liquidation. Where such fiscal costs are incurred the government will have a claim against the assets of the licensed financial institution in liquidation in the same amount and with the same priority as the protected depositors would have had. In the exercise of their functions the official administrator and receiver are accorded immunity from legal process with respect to acts performed in their official capacity as set forth in *Clause 187*. Pursuant to *Clause 190* the Minister, on the recommendation of the Central Bank, may by Order published in the Gazette amend the Schedules to the Bill. Transitional provisions in *Clause 192* provide a period of three hundred and sixty days for an existing licensed financial institution to come into compliance with clause 20 (approvals for acquisition of interest in a local financial institution in excess of the supervisory thresholds of ten, twenty and fifty percent of the share capital or total voting rights), 46 (maintenance of the capital adequacy ratio) and 100 (adoption of fit and proper policy) and four hundred and fifty days to come into compliance with clause 44 (minimum capital requirements). Pursuant to *Clause 193* on citation and commencement the Act may be cited as the Banking Act 2015 and shall come into operation on such date as the Governor may by Notice, published in the Gazette, appoint.

Schedule I - The fees payable by licensed financial institutions are set out in this Schedule.

Schedule II – The types of businesses categorised as business of a financial nature pursuant to section 2 are set out in this Schedule.

Schedule III – Offences in respect of which liability to conviction may be discharged by payment of a fixed penalty pursuant to clause 181 are delineated in this Schedule.

Schedule IV - Notice of opportunity to discharge liability pursuant to clause 181 is to be submitted in the form set out in this Schedule.