
Legal report
November 2011

Towards the Green Investment Bank Act

Legislation to secure the mandate and governance of the UK's
Green Investment Bank

November 2011

Ben Bundock, David Holyoake and Karla Hill, ClientEarth.

This report was written by ClientEarth for and in collaboration with Transform UK.

Table of contents

Executive summary.....	i
1. Introduction	1
1.1 The Green Investment Bank.....	1
1.2 Companies under UK law	1
1.3 Legislation for the Green Investment Bank.....	2
1.4 Time sensitivity.....	3
2. Mandate of the Bank – purpose and functions	4
2.1 Establishing the GIB and linkages with Companies Act 2006.....	4
2.2 ‘GIB International’?	5
2.3 Why the Bank’s mandate should be set in legislation.....	5
2.4 Mandate of the bank - proposed drafting.....	7
3. Shareholding	9
3.1 The right to remove a director	10
3.2 The right to initiate or approve the company’s winding up.....	11
3.3 The right to amend the company’s constitution	11
3.4 Why provisions relating to shareholding must be included in legislation	12
3.5 Shareholding - proposed drafting	12
4. Structure	15
4.1 Bodies comprising the Bank	15
4.2 Subsidiaries of the Bank	16
4.3 Why aspects of the Bank’s structure should be secured in legislation	16
4.4 Structure - proposed drafting.....	17
5. Financial provisions.....	23
5.1 Government guarantee	23
5.2 Powers to borrow	24
5.3 Government controls – finance.....	24
5.4 Distribution of profits.....	25
5.5 Why the financial provisions should be included in legislation	25
5.6 Financial provisions - proposed drafting	26
6. Operations	28
6.1 Operating principles	28
6.2 Business plan.....	28
6.3 Prohibitions	29

6.4	Defining the role of the Secretary of State in the Bank's operations	29
6.5	Clarifying director's duties	30
6.6	Why the Bank's operating framework should be included in legislation	30
6.7	Operations - proposed drafting	31
7.	Accounting, reporting and transparency	35
7.1	Why transparency requirements should be set in legislation	35
7.2	Accounting, reporting and transparency - proposed drafting	36

Executive summary

Investment of up to £1 trillion is needed by 2030 to upgrade, replace and de-carbonise the UK's infrastructure¹ and up to 70% of this will be in green and low carbon technologies.² The Green Investment Bank is required to help deliver this investment. Analysis by Ernst and Young indicates that for the energy sector, only 10–20% of the capital required will be secured unless a Green Investment Bank is established to partner with the market to share the risks implicit in low carbon energy investment.³ By unlocking private sector finance and pursuing a defined environmental mandate, the Green Investment Bank can achieve this at lowest cost to the taxpayer and can be a major catalyst for green growth and green jobs.

The UK government confirmed in May 2011 that the Green Investment Bank ('the Bank') will be enshrined in legislation. This decision is to be warmly welcomed as legislation is absolutely essential to secure investor confidence in the independence and accountability of the institution. This investor confidence will in turn play a major role in enabling the Bank to maximise its potential to leverage private sector investment into the green economy, and support economic recovery and job creation at the scale and speed required.

This report draws on extensive legal and policy analysis. It finds that while some design features can be safely left to the company's articles of association and governed by the Companies Act 2006, several other key aspects of the Bank's design and governance framework clearly require enshrining in statute.

There are five essential objectives that must be achieved by, and visible in legislation in order to deliver the investor confidence and accountability required:

Independence

Independence of the Bank is essential to achieve investor confidence and can only be secured if the appropriate governance structure is secured in legislation. This will include the need to make modifications or qualifications to existing requirements under the Companies Act 2006. For example, without such changes the government would have the right, as sole shareholder, to dismiss any director from the Bank without reason, or to unduly influence the Bank's practices by the threat of such dismissal. Additionally, without protection in statute, key provisions in the Company's constitution could be changed or diluted by the government at any time without public or parliamentary scrutiny. This could include the power to alter the Bank's environmental mandate, governance arrangements or indeed any critical design feature. Legislation can also provide the opportunity to legally ring fence certain powers of the Secretary of State over the Bank, which will increase investor confidence in the institution.

¹ HM Treasury, Infrastructure UK (2010) 'Strategy for National Infrastructure' p. 16.

² E3G analysis based on Holmes, I. Mabey, N. (2010) 'Accelerating the transition to a low carbon economy: The case for a Green Infrastructure Bank' p.9.

³ Ernst and Young, 'Capitalising the Green Investment Bank' (October 2010).

Certainty and permanence

Long-term infrastructure issues can only be tackled by a permanent institution which is free to take decisions which stretch beyond short-term political cycles. To ensure the Green Investment Bank is an enduring institution, the right of shareholders to voluntarily wind up the Bank by resolution (pursuant to the Insolvency Act 1986) must be disapplied. This can only be achieved by statute. Instead it is more appropriate for voluntary winding up to require a Statutory Instrument approved by Parliament. Without this legal protection it would be possible for the government of the day to abolish the Green Investment Bank at whim and without any recourse to Parliament.

The Bank must also endure in the right way. Legal enforceability is an important aspect of ensuring the necessary certainty in the key features of the Bank's design and mandate. As a matter of company law, articles of association are only enforceable in the courts by members of a Company, not by external stakeholders. New legislation would assist all interested parties to hold the Bank to account and will provide greater assurance to investors that key 'red lines' will be adhered to.

Clarity of purpose

Legislation should also serve to minimise policy risk for investors in the green economy by clearly defining the Bank's mandate. This should include enshrining a non-exhaustive list of green objectives where there is broad agreement that a major market failure exists and leveraging private investment is a national, long term priority. While flexibility is essential, an overly broad mandate comes with significant risks of diluting the efficacy of the Bank.

Legislation should also clearly prohibit investment that carries the risk of a high level of environmental damage, for example high carbon energy assets, or projects that reduce CO₂ intensity but result in significant amounts of other environmental damage. The aim should be to provide the institution with a clear mandate without adversely constraining the flexibility it will need to address market failures in the green economy as they arise. Without this balance of high level priorities and prohibitions there is a risk that the Bank would be able to invest in any sector provided the requirements of other laws are not breached. This would open up the institution to being used by future governments to invest in a sector which undermines the transition to a green, sustainable and low carbon economy.

Transparency and accountability

In the wake of the financial crisis, it is essential that the Bank can be held up as epitomising the highest level of banking ethics. As such, key aspects of transparency and accountability should be built into the Bank's institutional framework through legislation. To help achieve this, an Independent Advisory Committee should be set up in Statute, firstly to provide independent advice on future sectoral priorities, and secondly to serve the crucial function of statutory review of the progress of the institution in meeting its public mandate. It would operate in a similar way to the Committee on Climate Change which provides transparent advice to the government on its climate change policies and reviews its success in meeting the UK's carbon budgets. It must be possible to

hold the Bank to its transparency obligations, including consultation and disclosure requirements, and this is best secured by legislation.

Enabling a real bank

It is also important that the legislation anticipates and enshrines the ability of the Bank to borrow and receive government guarantees when required. Whilst the government would retain the final decision on what level of borrowing the Bank can undertake, when a guarantee is provided and on what terms, there are other reasons why it is important that the legislation anticipates and safeguards these integral aspects in the form of enabling powers. In part this is about establishing the requisite degree of visibility for investors – if the legislation does not enshrine or safeguard these features then this will undermine investor confidence in the institution in its critical early stages, and create doubt that it will ever be able to act as a real and proper public bank. In the case of the State guarantee, - it is also conventional and appropriate to enshrine standard procedures for accounting to Parliament regarding the activation of any State guarantee.

*

This report sets out in detail how each of these key objectives can best be achieved and explains the underlying reasons why each provision requires legislative enshrinement. In each chapter, proposed legislative drafting of the majority of key provisions is also included. This legislative drafting is intended to progress the debate on legislation, and includes the majority of the provisions necessary to make the legislation operative. Great care has been taken to strip back the drafting to the minimum number of clauses.

If these key objectives are achieved and visible in legislation, then the government will succeed in cementing investor confidence in this ground-breaking institution, and help ensure that the Green Investment Bank fulfils its enormous potential to catalyse the development of a green and prosperous economy fit for the 21st century.

1. Introduction

The UK government is in the process of establishing a 'Green Investment Bank' ('the Bank'). The fundamental concept of the Bank is very simple: a bank working in the public interest, in pursuit of a public goal – driving the transition to a green and low carbon economy.

Initially the Bank will be given £3 billion of public money, and in due course will need to raise further money most likely on the back of a guarantee provided by the public purse. The Bank must also operate independently of government control, and be run by experienced operators from the financial sector. The combination of public money and a public purpose with day-to-day independence and separation from government creates significant design, governance and accountability challenges. How do we ensure that this institution is run for the benefit of the environment, and that this public money is spent properly, while giving it the independence from government that it needs? How do we ensure these things without placing unmanageable burdens on the Bank and its executives?

The solutions to these challenges lie in the Bank's governance arrangements, which will be defined by the legal obligations of the Bank, its constituents and the government.

1.1 The Green Investment Bank

The government has announced that the Bank will be set up as a company under the Companies Act 2006, and that:

“the GIB will be enshrined in legislation to confirm its independent status as an enduring institution with a key public role”⁴

It has also stated that the government will be the sole shareholder of the Green Investment Bank.⁵ However, at this stage the government's detailed plans for establishing the Bank – and for setting its governance arrangements in place – are unclear.

1.2 Companies under UK law

Companies established and registered under the Companies Act 2006 are governed by the requirements of the Companies Act (and other associated legislation). This legislation seeks to ensure the proper internal running of normal companies, dealing with matters such as registration and administration of the company, the relationship between a company's directors and shareholders, procedure for annual general meetings and much more. The legislation puts in place certain fundamental procedures, structures, rights and duties within companies. In normal

⁴ HM Government, 'Update on the design of the Green Investment Bank' (May 2011), p. 7.

⁵ *Ibid.*, p. 21.

circumstances many of these fundamental requirements cannot be abrogated by individual companies.

Companies also have their own individual constitutions, known as the articles of association (or 'articles'). The articles set the by-laws of the company, and can set the basic management and administrative structures. The articles will often deal with matters such as any particular or limited purposes of a company; the issuing and administration of shares and the different rights attached to different classes of shares; or any particular powers and duties of company directors. However, the freedom of companies to determine these questions in their articles is subject to the fundamental requirements of the Companies Act 2006.

Once established, a company's articles create a special form of contract between the company and its shareholders, and are thereby binding between the company and its shareholders.

1.3 Legislation for the Green Investment Bank

Companies are governed by the Companies Act 2006 and associated legislation, and a company's articles of association allow for tailored and specific governance arrangements to be set in place for that company.

In this context, why is new legislation needed for the Bank?

In this briefing we present the case that there are two central reasons that certain aspects of the Bank's governance structure should be legislated for, rather than dealt with in the company's articles of association. The first relates to certainty and safeguarding – meaning how it can be ensured that the provisions cannot be amended without due scrutiny and accountability, to make sure that the Bank holds a steady course and that fundamental aspects of its governance cannot be manipulated or watered down at a later date. The second relates to legal enforceability – the question of whether given provisions can be enforced against the Bank or the relevant party in a court, and by whom.

Additionally, in some cases the Bank's particular nature and objectives call for qualifications or modifications to the standard requirements under the Companies Act and associated legislation, particularly as regards the powers of shareholders (in this case, the government). These changes can only be effected by a new Act of Parliament.

There is also a further, underlying argument for fundamental provisions of the Bank's governance framework being set in legislation: political legitimacy. The Bank is set to control a large amount of public money and, should a government guarantee be put in place, its financial health will have implications for the UK's financial health. The Bank's success will also be a determining factor in the question of whether the UK meets its climate change objectives and obligations. In this context, it is appropriate and essential that the Bank's mandate, as well as aspects of its governance and accountability structures, are subject to the Parliamentary process.

1.4 Time sensitivity

Regulation (EC) No 794/2004⁶ requires Member States to notify details of the national legal basis for a notified State aid measure, including notification of draft legislative measures where appropriate. It is important and advantageous for the government to arrive at some clarity on the role and content of the legislation establishing the Bank, and its governance arrangements, prior to issuing State aid notification to the Commission (expected in late 2011). These governance arrangements, including the extent to which they are entrenched and enforceable are likely to have a bearing on State aid assessment.

*

This report sets out the key elements of the Bank's governance arrangements that we consider must be set in legislation, and explains in further detail why this is the case. The briefing then proposes how these aspects of the Bank's governance framework could be drafted in legislation, to best achieve the Bank's policy objectives. The analysis and proposed drafting of these essential elements of the legislation are organised into the following chapters; the Mandate of the Bank (its purpose and functions), Shareholding, Structure, Financial provisions, Operations, and Accounting, reporting and transparency. Brief discussion is also given to elements of the Bank's design and governance that need not necessarily be included in the legislation, and that can be safely left, for example, to the Green Investment Bank Company's constitution or corporate documents. Where indicated, one or two of the provisions included may not strictly be necessary for the legislation to function legally but represent important policy decisions that should be enshrined in statute.

⁶ Regulation (EC) No 794/2004, on implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty, of 21 April 2004.

2. Mandate of the Bank – purpose and functions

The Bank's 'mandate' is its mission as an institution: the Bank's purpose and its functions. It will set the direction of the Bank and define the parameters within which it should operate. How the Bank's mandate is defined will guide its activities long into the future, affecting what kinds of projects it can support, and how.

As such it involves a careful balancing act. If its purpose and functions are defined too narrowly, it could constrain the Bank's activities unhelpfully. On the other hand, an overly broad mandate is likely to result in a lack of focus, ineffectiveness in relation to its environmental goals, and the possibility of the Bank's activities veering off course in the future.

The government has stated that the Bank's 'mission' will be:

“to accelerate private sector investment in the UK's transition to a green economy.”⁷

We agree that the Bank's headline purpose should be to drive the United Kingdom's transition to a 'green economy'. Its functions will then define how it must go about this task. We suggest that its primary function should be to make strategic investment to help overcome market failures and investment barriers in order to assist private sector money to flow to the technologies and infrastructure needed for this transition.⁸

The purpose of the Bank will be defined beyond climate change mitigation – so that it can work towards other green objectives where appropriate – but we propose that it be framed in such a way as to make sure that climate mitigation measures are at the top of its ongoing priorities. We propose that a non-exhaustive list of key environmental objectives for the Bank be set in legislation, to place the UK's key climate-related challenges at the top of the Bank's ongoing priorities. These objectives will be essential ongoing priorities for the Bank and the UK. Setting them in legislation will give more certainty to investors and developers as to the Bank's medium and long-term focus. The drafting of these provisions can be done in a way that still provides necessary flexibility, allowing the Bank to respond to new environmental investment needs as they emerge in the future.

2.1 Establishing the GIB and linkages with Companies Act 2006

It is noted that the very first provision of the legislation may well be one stating that there shall be a Companies Act company known as The Green Investment Bank, in order to cement its permanence and to establish the link between this legislation and the Companies Act company. This provision would likely appear before the purpose and functions. Drafting of this type of provision has not been attempted in the legislative drafting that follows due to a lack of visibility on the government's intentions and timelines regarding the formation of the company.

⁷ HM Government, 'Update on the design of the Green Investment Bank' (May 2011).

⁸ The Bank will also have advisory functions – both to the government when developing policy, and to market participants, project developers and others involved in development and deployment of sustainable measures.

2.2 'GIB International'?

It is also important to note that were it deemed important or necessary to enable the Bank to invest in support of climate change efforts overseas at a future point in time, the Bank's statutory mandate would need to be amended and broadened. A simple way to achieve this would be with secondary legislation (regulations); by providing a limited power in the Bank's legislation for the Secretary of State to amend the Bank's purpose.

In this case, further additions and amendments to the Bank's governance framework would also be necessary in order to ensure that the Bank's primary focus (or a minimum percentage of the Bank's activities) remained on the UK, so as to follow through on national objectives and expectations.

2.3 Why the Bank's mandate should be set in legislation

The Bank's purpose, priorities and functions need to be secure and enforceable. The mandate must be safeguarded from easy amendment, and it must be possible to hold the Bank to it. Legislation is the most effective means to achieve these objectives. With the government as sole shareholder in the Bank, provisions of the company's articles of association cannot be adequately safeguarded, and would not be adequately enforceable.

2.3.1 The need for certainty

The mandate of the Bank must, to an appropriate degree, be set in stone. Finance and project developers need certainty and confidence regarding the medium and long-term focus of the Bank's efforts. Investors need confidence that the Bank will operate along consistent lines towards consistent objectives. Environmental groups need confidence that the environmental course set for the Bank will hold. It is therefore essential that the Bank's high level mandate is protected from change at the whim of the government of the day. Future governments may have different ideas about environmental priorities, or indeed whether the environment should be a priority at all. If the Bank is partially privatised in the future, it will also be important to avoid a situation where private investors can amend or dilute the Bank's mandate for profit driven goals. It would seem an unlikely proposition that the Bank, serving a public interest function and guided by statute would ever be completely privatised.

Legislation is the strongest way to safeguard the Bank's mandate from political or other interference and provide the necessary confidence to stakeholders, because an Act of Parliament can only be amended by another Act of Parliament.⁹ A new Act of Parliament requires the passage of a Bill through various phases of Parliamentary scrutiny, and Parliamentary approval. This would ensure due scrutiny of any amendment that the government seeks to make to the Bank's mandate.

⁹ Other than where the Act explicitly provides a Minister of State with the power to amend aspects of the given Act by secondary legislation.

In contrast, were the Bank's mandate set only in its articles of association and not in legislation, it would not be sufficiently safe from amendment. In normal circumstances, a company's articles of association can be amended where 75% of the company's voting members approve it.¹⁰ While companies can choose to 'entrench' certain provisions so that it is more difficult to amend them,¹¹ articles of association can always be amended by the agreement of every shareholder of the company.¹² In the Green Investment Bank, the government will (at least initially) be the sole shareholder. In this case, the government of the day could amend the Bank's mandate at will and without scrutiny. This poses a risk that the Bank's mandate will not be honoured in perpetuity, and raises risks for many categories of investors.

2.3.2 Enforceability

It is also essential that the Bank can be held to its mandate. If the Bank acts inconsistently with its mandate – to give a blunt example, by making an investment that does not benefit the environment – it must be possible for legal action to be brought to stop the Bank from doing so. Legal accountability of this kind is particularly essential given the need for the Green Investment Bank to maintain day-to-day operational independence of government.

If the Bank's mandate was defined only in its articles of association, its enforceability would be limited. Most notably, no one other than shareholders of the company or the company itself would be able to hold the Bank to account.¹³ Therefore where the government is the sole shareholder in the Bank, it would be the only party that could hold the Bank to its mandate. Given the public interest mandate and public funding of the Bank, this is not appropriate: parliamentarians and civil society must also be able to hold the Bank to account. As regards rights for the Secretary of State in his capacity of discussed further on in this report, even the ability of government as shareholder to in all circumstances enforce provisions of articles of association is unclear given jurisprudence on 'insider and outsider rights' within company law.¹⁴

¹⁰ Companies Act 2006 s 21(1); Companies Act 2006 s 283.

¹¹ Companies Act 2006 s 22.

¹² Companies Act 2006 s 22(3)(a).

¹³ No person other than shareholders of a company or the company itself can rely on a provision of a company's articles of association. See *Eley v Positive Government Securities Life Assurance Co.* (1876) 1ExD 88; Contracts (Rights of Third Parties) Act 1999 s 6(1).

¹⁴ This relates to the distinction between a shareholder's so-called 'insider' and 'outsider' rights under a company's articles of association. The case law suggests that a shareholder may not be able to rely on certain of their rights under articles of association, where they are rights conferred on them in 'outsider' capacities (i.e. not as a member of the company qua member). See, for example, *Hickman v Kent or Romney Marsh Sheep-Breeders' Association* [1915] 1 Ch 881; *Beattie v E & F Beattie Ltd* [1938] Ch 708; *Cumbrian Newspapers Group Ltd v Cumberland & Westmorland Herald Newspaper & Printing Co Ltd* [1987] Ch 1. It is possible that the rights of the Secretary of State contained in articles of association could fall outside of the definition of 'insider' rights – hence the need to legislate for certain powers to ensure their legal enforceability.

2.4 Mandate of the bank - proposed drafting

Section (...) Purpose of the Bank

- (1) The purpose of the Bank shall be to drive the United Kingdom's transition to a green economy.
- (2) The Bank shall prioritise investment activities in furtherance of—
 - (a) the decarbonisation of the United Kingdom's power and heat sectors consistent with the recommendations of the Committee on Climate Change, and having regard to the policy of HM government,
 - (b) rapid deployment of renewable energy technologies,
 - (c) reform of the United Kingdom's electricity market and electricity infrastructure,
 - (d) energy efficiency and energy savings,
 - (e) the reduction of emissions from the transport sector,
 - (f) other objectives that the Bank identifies pursuant to the purpose in subsection (1), and
 - (g) attracting investment to the United Kingdom, in the pursuit of the objectives in subsections (a) to (f).

Section (...) General functions of the Bank

- (1) The general functions of the Bank shall be—
 - (a) to identify and engage in investment activities pursuant to its purpose, seeking to address market barriers to investment and provide financial support to increase private sector investment in the development and deployment of environmentally sustainable technologies and measures,
 - (b) to provide expertise, information and advice to HM government during the development and implementation of relevant policy and law, both formally and informally, pursuant to its purpose, and
 - (c) to provide information, advice, education and training to market participants, project developers and others, pursuant to its purpose.
- (2) For the purposes of subsection (1), 'environmentally sustainable technologies and measures' means technologies and measures that are likely to give rise to a significant improvement in environmental sustainability, including climate stability, and are not likely to give rise to a significant risk of harm to human health, or to a significant increase in other environmental harm in the near or long term.

Section (...) Interpretation

In this Bill–

‘financial support’ shall mean the award of any financial product, or combination of product issued to a person or persons pursuant to a business plan.

‘HM government’ shall mean central government and the devolved administrations including the Welsh Ministers, Scottish Ministers and Northern Irish Ministers.

3. Shareholding

It is crucial that the Bank is given an appropriate degree of operational independence from the UK government. The government's proposed position as sole shareholder in the Bank¹⁵ must not undermine that independence. It is therefore necessary for the Bank's legislation to modify a few of the conventional shareholder rights that would normally apply under the Companies Act 2006 and other applicable legislation.

In a company limited by shares, shareholders provide capital to the company, in exchange for certain rights within the company. Almost always these rights will include the right to be paid a periodic dividend (a payment made out of the company's profits), although sometimes this right may be deferred or qualified.

However, the rights of a shareholder may also include the right to vote on a range of important aspects of the running of the company.¹⁶ These matters include whether to:

- amend the company's constitution (requiring the support of 75% of total voting rights within the company);¹⁷
- dismiss a director of the company (requiring a simple majority of total voting rights);¹⁸
- commence the winding up of the company (75%)¹⁹ or approve its winding up where a provision of the company's constitution triggers it (>50%).²⁰

The government has stated that the Department for Business, Innovation and Skills (BIS) will be the sole shareholder of the Green Investment Bank.²¹ The government has also stated that:

“The shareholder will...exercise shareholder controls over board membership, remuneration and other customary matters.”²²

If the UK government, as the Bank's shareholder, were to hold the shareholder rights outlined above, this would seriously compromise the Bank's operational independence from government.

¹⁵ HM Government, 'Update on the design of the Green Investment Bank' (May 2011), p. 21.

¹⁶ Whether and what voting rights attach to a given share (or class of shares) is in usual circumstance determined by a company's articles of association.

¹⁷ Companies Act 2006 s 21(1); Companies Act 2006 s 283.

¹⁸ Companies Act 2006 s 168; Companies Act 2006 s 282.

¹⁹ Insolvency Act 1986 s 84(1)(b).

²⁰ Insolvency Act 1986 s 84(1)(a).

²¹ HM Government, 'Update on the design of the Green Investment Bank' (May 2011), p. 21. The government has stated that BIS' shareholding will be managed by the Shareholder Executive (ShEx), a unit set up within BIS with the goal of being “an effective shareholder of businesses owned or part-owned by the Government and to manage Government's interventions in the private sector in order to secure best value for taxpayer” (BIS website, 'Shareholder Executive' at <http://www.bis.gov.uk/policies/shareholderexecutive>).

²² HM Government, 'Update on the design of the Green Investment Bank' (May 2011), p. 21.

Operational independence from government has been stated as being between necessary and crucial by utilities executives,²³ investor representatives,²⁴ environmental industry representatives,²⁵ green technology specialists and experts,²⁶ a Parliamentary committee,²⁷ and civil society organisations.²⁸ Even the UK government has accepted that it is crucial that the Bank be independent,²⁹ stating in July 2011 that:

“The GIB will be a separate institutional unit at arm's length and with full operational independence. This is crucial for market credibility.”³⁰

Therefore, regular shareholder rights under the Companies Act 2006 and other legislation must be modified and qualified in application to the Bank, by the Bank's legislation. This is crucial in order to preserve the Bank's operational independence from government and any subsequent private shareholders.³¹

We do not consider that the changes to shareholder rights proposed below will create problematic accountability gaps within the Bank. These shareholder rights will still be exercisable where appropriate and reasonable, and with due scrutiny and accountability. Our proposals will merely ensure that shareholder rights cannot be abused.

3.1 The right to remove a director

The right of shareholders to dismiss a director of a company by simple majority and without reason³² should be qualified by the Bank's legislation. It must be ensured that directors may only lawfully be dismissed by the shareholders (in the first instance, government) in particular circumstances and with good reason. Without this qualification the government would be in a

²³ Rupert Steele OBE, Director of Regulation, ScottishPower; Paul Spence, Director of Strategy and Regulation, EDF Energy (House of Commons Environmental Audit Committee, *'Second Report of Session 2010-11, The Green Investment Bank - Volume I: Report, together with formal minutes, oral and written evidence'* HC 505, Ev 73); Centrica plc (House of Commons Environmental Audit Committee, *'Second Report of Session 2010-11, The Green Investment Bank - Volume II: Additional written evidence'*, Ev w63).

²⁴ Penny Shepherd MBE, Chief Executive, UK Sustainable Investment and Finance Association (House of Commons Environmental Audit Committee, *'Second Report of Session 2010-11, The Green Investment Bank - Volume I: Report, together with formal minutes, oral and written evidence'* HC 505, Ev 73).

²⁵ Jonny Mulligan, Chief Executive, Environmental Industries Commission (House of Commons Environmental Audit Committee, *Ibid.*, Ev 73).

²⁶ Sir Rob Margetts, Chairman of Energy Technologies Institute (House of Commons Environmental Audit Committee, *Ibid.*, Ev 14; Ev 97); Philip Wolfe, Director Aldersgate Group (House of Commons Environmental Audit Committee, *Ibid.*, Ev 10)

²⁷ House of Commons Environmental Audit Committee, *Ibid.*, p. 16.

²⁸ Chris Hewett, Green Alliance (House of Commons Environmental Audit Committee, *Ibid.*, Ev 4).

²⁹ Written evidence submitted by Justine Greening MP, the Rt Hon Chris Huhne MP, and the Rt Hon Vince Cable MP (House of Commons Environmental Audit Committee, *Ibid.*, Ev 134).

³⁰ House of Commons Environmental Audit Committee, *'First Special Report of Session 2010-11, The Green Investment Bank: Government Response to the Committee's Second Report of Session 2010-12'* HC 1437, p. 5.

³¹ It may be desirable that in due course the Bank be able to raise further capital by issuing new shares to private or other investors. It is important that if and when this occurs, the Bank's day-to-day operations are similarly independent of parties whose interests may lie in securing the highest possible financial returns for themselves. While the Bank must be run on a sound commercial basis and should at a minimum break even, its public interest objectives must remain central, and must be protected from self-interested investors with a sole interest in maximising financial returns. This would also be possible simply by the allocation only of shares with limited governance rights to private investors (e.g. preference shares).

³² Under Companies Act 2006 s 168.

position to unduly influence the Bank's operations, with its unfettered discretion to sack a director of the Bank.

3.2 The right to initiate or approve the company's winding up

The standard right of shareholders to commence or approve the winding up of a company by resolution should be disapplied in the case of the Green Investment Bank. Instead, the Bank's legislation should provide the Secretary of State with a power to commence the winding up of the Bank by secondary legislation, in the form of an order. This power could ensure that the making of this order requires the positive approval of Parliament by vote, and that it would be subject to due scrutiny in Parliament.³³

Without appropriate checks on the right to commence the winding up of the Bank, the government as sole shareholder would be able to dissolve the Bank at will. This would undermine investor confidence in the Bank's permanence. It could also put the government in a position to unduly and inappropriately influence the Bank's practices under the looming threat of dissolution. Therefore, in our view, a power to commence winding up by passing secondary legislation, subject to Parliamentary review and approval, strikes an appropriate balance between the need for the government to have an 'emergency stop' button that does not require the passing of a new Act, and the need for governmental discretion to be fettered and subject to appropriate scrutiny.

It is also important to note that creditors and other relevant parties (including the company itself or directors of the company) could still apply to the courts under the Insolvency Act to have the Green Investment Bank wound up if the Bank were unable to pay its debts, or if the court was of the opinion that it was just and equitable that it should be wound up.³⁴ The Secretary of State could also apply to the court for the Bank to be wound up where it is 'expedient in the public interest' and the court thinks it just and equitable, but the circumstances in which such a petition may be made are limited.³⁵

3.3 The right to amend the company's constitution

If important aspects of the Bank's governing framework were left to be dealt with in the company's articles of association, the shareholder right to amend the Bank's constitution by 75% vote³⁶ would again pose the risk that the mandate could be easily changed. Throughout this briefing we propose that the most important aspects of the Bank's governing framework be set in legislation. If these

³³ The Bank's legislation should also ensure that an order made by the Secretary of State to wind up the company has the same effect and is subject to the same external procedural requirements as a resolution to voluntarily wind up would be in a normal company. For example, the requirement to notify the London Gazette (or if registered in Scotland, the Edinburgh Gazette) of the decision to wind up (section 85 of the Insolvency Act 1986); or the avoidance of any share transfers made after the decision without the sanction of the liquidator (section 88 of the Insolvency Act 1986).

³⁴ Insolvency Act 1986 s 122. There are other grounds for a court to wind a company up under s 122. For the legal framework dealing with compulsory winding up more broadly, see Insolvency Act 1986 ss 117-162.

³⁵ Insolvency Act 1986 s 124A.

³⁶ Companies Act 2006 s 21(1); Companies Act 2006 s 283.

aspects are indeed entrenched in legislation, there will not be a need to amend this shareholder right under the Companies Act, and indeed this right will provide welcome flexibility in relation to many of the Bank's administrative by-laws.

If, however, fundamental matters (e.g. the Bank's purpose and functions, operating principles, etc) were left to be dealt with in the company's articles of association, it would be imperative that steps were taken to limit the discretion of government to amend such provisions at will, to the extent that is possible.³⁷

3.4 Why provisions relating to shareholding must be included in legislation

Our proposals require provisions of the Companies Act 2006 and Insolvency Act 1986 to be modified and qualified in their application to the Bank.

This cannot be achieved by any other means than an Act of Parliament. Companies cannot elect to disapply or qualify applicable provisions of the Companies Act or Insolvency Act in their articles of association.³⁸

3.5 Shareholding - proposed drafting

Section (...) Modification of Companies Act 2006 and other legislation

In its application to the Bank on and after registration, the Companies Act 2006 and other legislation relating to companies shall have effect with the modifications set out in this Act.

Section (...) Shareholder right to remove director

- (1) This section applies in place of section 168 of the Companies Act 2006 (Resolution to remove director).
- (2) The Bank may by ordinary resolution at a meeting remove a director before the expiration of his period of office, where and only where that director has—
 - (a) breached his or her duties under the Companies Act 2006,
 - (b) been absent from meetings for a period of longer than 3 months without permission,
 - (c) become bankrupt or has made an arrangement with creditors,

³⁷ These steps might be (a) qualifying or disapplying the shareholder right to amend the company's constitution by 75% vote, or (b) making special membership / shareholding arrangements. Amending the application of the right would undermine flexibility in relation to less important aspects of the Bank's administration, and special membership arrangements could not provide the same security around those provisions that legislation can. Regardless, it would be essential that steps were taken to seek to preserve the Bank's independence from government and provide certainty in its governing framework and operations, were the decision taken not to legislate for key aspects of the Bank's governance.

³⁸ The arguments set out in Chapter 2 above relating to certainty and enforceability also apply here.

- (d) been sequestered or, under Scots law, has made an arrangement with, or granted a trust deed for, creditors,
 - (e) [become otherwise unfit or unable to perform his or her functions and duties,]
- and in all the circumstances of the case, it is reasonable to remove them.
- (3) Subsection 2 applies notwithstanding anything in any agreement between the Bank and a director.
 - (4) Special notice is required of a resolution to remove a director under this section or to appoint somebody instead of a director so removed at the meeting at which he is removed.
 - (5) A vacancy created by the removal of a director under this section, if not filled at the meeting at which he is removed, may be filled as a casual vacancy.
 - (6) A person appointed director in place of a person removed under this section is treated, for the purpose of determining the time at which he or any other director is to retire, as if he had become director on the day on which the person in whose place he is appointed was last appointed a director.
 - (7) This section is not to be taken—
 - (a) as depriving a person removed under it of compensation or damages payable to him in respect of the termination of his appointment as director or of any appointment terminating with that as director, or
 - (b) as derogating from any power to remove a director that may exist apart from this section.

Section (...) Voluntary winding up of the Bank

- (1) This section applies in place of section 84 of the Insolvency Act 1986 (“Circumstances in which company may be wound up voluntarily”).
- (2) The Secretary of State may by order voluntarily wind up the Bank.
- (3) For the purposes of the Insolvency Act 1986, an order made under subsection (2) is “a resolution for voluntary winding up.”
- (4) Before the Secretary of State lays an order pursuant to subsection (2) before Parliament, they must give written notice of the order to the holder of any qualifying floating charge to which section 72A of the Insolvency Act 1986 applies.
- (5) Where notice is given under subsection (4) an order under subsection (2) may be laid before Parliament only—
 - (a) after the end of the period of five business days beginning with the day on which the notice was given, or

(b) if the person to whom the notice was given has consented in writing to the passing of the resolution.

(6) Orders under this section are subject to affirmative resolution procedure.

4. Structure

As in most commercial entities, the Bank should be run by a board of directors. In order to ensure the Bank's credibility and fitness for purpose, these directors must primarily be experienced commercial operators. In this context – and indeed in any case – it is important that the Bank has a powerful non-executive body, acting as the Bank's 'conscience'. This body should have the powers and capacity to hold the Bank to its environmental mandate, review its practices, and offer a broader range of expertise and perspectives within the Bank. The roles, powers and constitution of these bodies are fundamental to the Bank's success and effective functioning.

Further, the Bank may wish to operate through subsidiary companies for particular ventures, in order to manage its exposure to liabilities. It is important that any activities of the Bank carried out via subsidiaries are not exempt from the relevant requirements of the Bank's governing framework.

4.1 Bodies comprising the Bank

The Bank's board and non-executive body (the 'Independent Advisory Committee' or 'IAC') should be established and governed by the Bank's legislation. These bodies sit at the heart of the Bank's operations, and as such their functions, constitution and powers should be determined and entrenched in legislation.

The board will be responsible for the management of the Bank, including the formulation and revision of strategy, and overseeing the implementation of that strategy. This will include responsibilities such as the signing off of annual reports and accounts. The board will also be responsible for ensuring that the Bank complies with the requirements of the legislation establishing the Green Investment Bank.

In addition, the IAC is an essential component of our proposed model. The IAC would act as the Bank's 'conscience': its role would be to provide advice and recommendations to the Bank on environmental and other matters, and to hold the Bank to its public interest objectives. It would be constituted with relevant scientific, policy and markets expertise in the environmental field; governmental representatives; and a member of the supervisory board. It would serve the crucial function of independent statutory review of the Bank.

The IAC is also a key point of departure from the UK government's most recent public plans for the structure of the Bank. In the government's model, 'a policy group' has been proposed in a similar (although more dominant) role to the Independent Advisory Committee. This Policy Group would be a Ministerial forum whose decisions would "reflect ministers' policy agendas and priorities",³⁹ and would sign off on the Bank's strategic priorities. We consider that if this structure was reflected in the final GIB model, this degree of control would subject the Bank to undue short-term political influence. It would significantly compromise the Bank's operational independence from

³⁹ HM Government, 'Update on the Design of the Green Investment Bank', (2011) at 21.

government, and perceptions of that independence. This will in turn compromise the confidence of investors and other stakeholders.⁴⁰ While it is important to ensure that the Bank operates in general alignment with the public policy environment, a balance must be struck. We consider that this balance is more appropriately struck by placing legal duties on the Bank to consult with government, and have regard to government policy, and by giving the government limited powers to influence the contents of a business plan.⁴¹ This would also galvanise the ability of government to take swift action to ensure compliance with State aid following any Commission concerns or ex-post examinations.

4.2 Subsidiaries of the Bank

The Bank may wish to form subsidiary companies, in order to carry out specific tasks or engage on specific projects while limiting the Bank's exposure to risk. A subsidiary is a company that is controlled by a parent company (in this case the Bank), but that is a separate company and so has separate legal personality. As a result, the parent company will (in most cases) be protected from the subsidiaries' liabilities in the same way that individual shareholders are protected from the liabilities of the companies in which they hold shares. Together, the Bank and its subsidiaries make up a company 'group'.

However, it is important that the relevant parts of the Bank's governing framework apply to the Bank group as a whole, so that the Bank cannot operate outside of its governing framework simply by forming subsidiaries and channelling resources to them. Therefore the Bank's legislation must specify which of its provisions will apply to the entire Bank group. These are primarily those relating to the Bank's mandate, operations and transparency.

4.3 Why aspects of the Bank's structure should be secured in legislation

The Bank's structure is central to its governance framework. It is crucial that the Bank is run by the qualified individuals, who have the appropriate expertise and are selected in a transparent fashion. As such it will be important that staff, board members and any other affiliates are appointed according to best practice in public appointments. We propose that the public appointments related to the Bank be brought within the remit of the Commissioner for Public Appointments,⁴² and that the Commission's Code of Practice applies to these appointments. The credibility of the appointments process as well as the individuals brought in to run and manage the Bank's activities will have bearing on the Bank's real as well as perceived level of independence from government.

⁴⁰ The Green Investment Bank Commission recommended that at both policy appraisal and evaluation level, the Bank should "provide independent advice to Government on the implications and effectiveness of climate change policies, especially with regards to financing and investment." *Unlocking investment to deliver Britain's low carbon future: Report by the Green Investment Bank Commission*, June 2010, at 14.

⁴¹ The other bodies discussed in the government's model (the shareholder executive and executive management team) are dealt with elsewhere in this briefing (see shareholding), or in the case of the executive management team, do not need to be established or defined by the Bank's legislation.

⁴² Commissioner for Public Appointments, see <http://publicappointmentscommissioner.independent.gov.uk/index.html>

This will be an enduring issue and as such these matters should be dealt with in the Bank's legislation to create mandatory ministerial considerations for the public appointment's process. For the reasons discussed in chapter two, Mandate of the bank, were the Bank's structure established only in the GIB company's articles of association, those provisions would be inadequately safeguarded and binding.

4.4 Structure - proposed drafting

Section (...) Structure of the Bank

- (1) The Bank shall have a board and an Independent Advisory Committee.
- (2) The bodies referred to in subsection (1) shall be constituted in accordance with Schedule 1 and shall have the functions and powers—
 - (a) conferred by Schedule 1, and
 - (b) conferred by any other relevant provision of this Bill.

Section (...) Subsidiaries and the Bank group

- (1) The Bank may create subsidiaries pursuant to its purpose and functions.
- (2) Any specific purposes of subsidiaries of the Bank must be consistent with the Bank's Purpose and functions under sections (...).
- (3) For the purposes of—
 - section (...) (purpose of the Bank)
 - section (...) (general functions of the Bank)
 - section (...) (operating principles)
 - section (...) (business plan)
 - section (...) (prohibitions)
 - section (...) (role of the Secretary of State in operations)
 - section (...) (general disclosure requirements)'the Bank' shall be interpreted as the Bank group where relevant.
- (4) In this section the "Bank group" means the Bank and all companies that are its subsidiaries.
- (5) In this section "subsidiaries" has the meaning given by section 1159 of the Companies Act 2006 (meaning of "subsidiary" etc).

SCHEDULE 1

Bodies

PART 1

The board*Composition of the board*

1. The board shall consist of a chair and no less than [6] and no more than [8] ordinary members.

Appointments and terms of office of the board

- 2.(1) The Secretary of State shall appoint the chair of the board, having regard to the range of expertise and experience to be sought for the board as a whole, as specified in paragraph 2(4) of this Schedule.
 - (2) Before appointing a person to be a chair of the board, the Secretary of State must be satisfied that the person will not have any financial or other interest that is likely to prejudicially affect the carrying out of his or her functions.
 - (3) The chair shall appoint the ordinary members of the board, after consulting with the Secretary of State and taking into account the results of this consultation.
 - (4) In appointing the ordinary members of the board, the chair and the Secretary of State shall have regard to the desirability of ensuring that the board (taken as a whole) has experience in, or knowledge of—
 - (a) corporate investment,
 - (b) commercial banking,
 - (c) fund management,
 - (d) economic analysis and forecasting, and
 - (e) environmental policy, particularly in relation to climate change mitigation.
 - (5) The board shall include—
 - (a) one representative of either the Department of Energy and Climate Change or the Department of Environment, Food and Rural Affairs,
 - (b) one representative of independent environmental groups, and
 - (c) the Chief Executive Officer of the Bank.
 - (6) A member of the board, including the chair, shall hold office and vacate office in accordance with the terms of the member's appointment.

- (7) A member of the board, including the chair, may resign by giving notice to the Secretary of State.
- (8) A person who ceases to be a member of the board, other than by removal pursuant to section (...), may be reappointed.
- (9) The public appointments required pursuant to this paragraph shall fall within the remit of the Commissioner for Public Appointments, and the Code of Practice for Ministerial Appointments to Public Bodies shall apply.

Functions of the board

- 3.(1) The general functions of the board are—
 - (a) to develop the Bank's strategy for the effective achievement of its purpose as specified by section 2 of this Bill,
 - (b) to oversee the implementation of that strategy, and
 - (c) to ensure the compliance of the Bank with the provisions of this Bill.
- (2) Without prejudice to the broad nature of the general functions set out in paragraph 3(1), the board shall have the duty to—
 - (a) prepare and adopt a business plan for the Bank every 5 years, in accordance with Schedule 2,
 - (b) review and where appropriate amend a business plan in accordance with Schedule 2,
 - (c) approve a budget for the Independent Advisory Committee, subject to the approval of the Secretary of State, and
 - (d) perform any other function conferred by this Bill.

Executive appointments

- 4.(1) The chair of the board shall appoint the Chief Executive Officer, having regard to the range of expertise and experience to be sought for the executive team as a whole, as specified in paragraph 4(4) of this Schedule.
- (2) Before appointing a person to be the Chief Executive Officer, the chair of the board must be satisfied that the person will not have any financial or other interest that is likely to prejudicially affect the carrying out of his or her functions.
- (3) The Chief Executive Officer shall appoint their executive officers, after consulting with the chair of the board, and taking into account the results of this consultation.
- (4) In appointing executive officers the Chief Executive Officer and the chair of the board shall have regard to the desirability of ensuring that the Bank's executive team (taken as a whole) has experience in, or knowledge of investment and banking.

- (5) Executives shall hold office and vacate office in accordance with their terms of appointment.

PART 2

The Independent Advisory Committee

Composition of the committee

7. The Independent Advisory Committee (in this Schedule ‘the committee’) shall consist of a chair and no less than 6 ordinary members.

Appointments and terms of office of the committee

8. (1) The Secretary of State shall appoint the chair of the committee, having regard to the range of expertise and experience to be sought for the committee as a whole, as specified in paragraph 8(4) of this Schedule.
- (2) Before appointing a person to be a chair of the committee, the Secretary of State must be satisfied that the person will not have any financial or other interest that is likely to prejudicially affect the carrying out of his or her functions.
- (3) The chair shall appoint the ordinary members of the committee, after consulting with the Secretary of State and taking into account the results of such consultation.
- (4) In appointing the members of the committee, the chair and the Secretary of State must have regard to the desirability of ensuring that the committee (taken as a whole) has experience in, or knowledge of—
- (a) corporate investment,
 - (b) commercial banking,
 - (c) fund management,
 - (d) climate change policy at national and international level,
 - (e) low carbon and other environmentally friendly technologies, including energy production and supply, and
 - (f) technological development and diffusion.
- (5) The committee shall include—
- (a) one representative from the board, and
 - (b) one representative from the Committee on Climate Change.
- (6) A member of the committee, including the chair, shall hold office and vacate office in accordance with the terms of the member’s appointment.
- (7) The Secretary of State may remove a member of the committee, including the chair—
- (a) where the member has been absent from meetings for a period of longer than 3 months,

- (b) where the member has become bankrupt or has made an arrangement with creditors,
- (c) whose estate has been sequestered or who, under Scots law, has made a composition or arrangement with, or granted a trust deed for, creditors, or
- (d) where, in the opinion of the Secretary of State, the member is otherwise unfit or unable to perform his or her functions and duties.

(8) The public appointments required pursuant to this paragraph shall fall within the remit of the Commissioner for Public Appointments, and the Code of Practice for Ministerial Appointments to Public Bodies shall apply.

Functions of the committee

9. (1) The general functions of the committee shall be—

- (a) the provision of advice and recommendations to the board, HM government and other interested persons, and
- (b) to provide independent review of the Bank's activities, pursuant to the objective of ensuring that the Bank fulfils its purpose as specified in section (...) of this Bill,

(2) Without prejudice to the broad nature of the general function set out in paragraph 6(1), the committee shall have—

- (a) the duty to—
 - (i) provide advice and recommendations to the board during the preparation or amendment of a business plan in accordance with Schedule 2['Business plans'],
 - (ii) conduct a periodic review of the Bank's practices and make recommendations as appropriate, in accordance with the requirements of paragraph 10,
 - (iii) initiate a review into the practices of the Bank at any stage where it considers that the Bank has significantly departed from the requirements of this Bill, conducted in accordance with the requirements of paragraph 10,
- (b) the power to provide formal or informal advice, expertise, and information to—
 - (i) investors, market participants and other interested persons concerning matters connected to the activities of the Bank,
 - (ii) HM government concerning matters connected to the activities of the Bank or the development of public policy on environmental matters, and
- (c) any other function conferred by this Bill.

Committee review of the Bank's practices

10.(1) A periodic review of the Bank's practices pursuant to paragraph 9(2)(a)(ii) must be conducted by the committee no less frequently than every [3] years.

(2) Any review conducted by the committee pursuant to its duties under paragraph 9(2)(a)(ii) or paragraph 9(2)(a)(iii) must include—

- (a) an assessment of—

- (i) the extent to which the Bank is contributing to the purpose and priority objectives of the Bank specified in Part 1 of this Bill,
 - (ii) the extent to which the Bank is acting in accordance with the applicable business plan, and
 - (iii) the financial position of the Bank, based on current and projected scenarios,
 - (b) quantitative and qualitative analysis underpinning the assessments required in subparagraph (2)(a), and
 - (c) recommendations, including that the board amends a business plan where appropriate.
- (3) The committee may inspect any records of the Bank, or request and receive any information held by the Bank, for the purposes of a review pursuant to this paragraph.
- (4) Any review conducted pursuant to the committee's duties under paragraph 9(2)(ii) or paragraph 9(2)(iii) must be—
- (a) delivered to—
 - (i) the board,
 - (ii) the Secretary of State,
 - (iii) every shareholder in the company, and
 - (b) laid before Parliament.

5. Financial provisions

We propose that a number of aspects of the Bank's financial management should be set in legislation. The legislation should ideally secure the UK government's guarantee of some or all of the Bank's debt; it should provide the government with some specific and limited powers to intervene in the Bank's financial management so as to protect its liabilities and initial capitalisation; it should enshrine the ability of the Bank to borrow, and it should restrict the distribution of the Bank's profits, to ensure that the Bank cannot be a money-making operation for the Government.

5.1 Government guarantee

It is crucial that the Bank is able to raise money through borrowing. Indeed, the Bank's ability to borrow has been said to be necessary for it truly to be considered a Bank at all. As Chris Huhne, Secretary of State for Energy and Climate Change, has put it:

“Ducks quack, and banks borrow”⁴³

The ability to borrow is fundamental to the Green Investment Bank being able to meet its objectives. A government guarantee for the Bank would demonstrate serious commitment by the government to scale up the Bank's activities as well as enabling it to borrow money at the lowest possible cost.⁴⁴ The government has indicated that the Bank will initially be capitalised with £3 billion, and believes, that (including private finance) the leveraged impact of this will be approximately £18 billion flowing to green investment projects⁴⁵ This falls far short of the amount of capital required to facilitate the scale of private sector investment needed to meet the UK's decarbonisation targets. Ernst & Young has estimated that £450 billion of investment in energy infrastructure alone is required in the UK by 2025 in order to meet our climate change commitments.⁴⁶ In addition, investors have made it clear that without a track record, the Bank will need a government guarantee if it is to secure sufficient funding from the debt capital markets.

There are a number of ways in which a government guarantee could be set in legislation. At the strongest end of the spectrum, the government could provide a statutory guarantee that would mean it would commit to guaranteeing all liabilities of the bank upon its winding up and inability to cover its liabilities.⁴⁷ Alternatively, the government could choose to limit its explicit guarantee to the

⁴³ Chris Huhne, 'I want a green bank as soon as possible' *The Guardian* (letters), 17 December 2010.

⁴⁴ Creditors would be very confident that they would be paid their money back (as the government has very strong credit rating), which would mean that the Bank would have to pay much lower interest rates on its debt due to the reduced risk, thereby reducing the cost of borrowing.

⁴⁵ See generally, <http://www.eaem.co.uk/news/budget-pledge-green-investment-bank>

⁴⁶ Ernst & Young, 'Capitalizing the Green Investment Bank' (October 2010), p. ii.

⁴⁷ This briefing discusses and presents options for an explicit government guarantee, which is likely to provide higher investor confidence and certainty. This is as opposed to an 'implicit guarantee', where a government's willingness to step in is read between the lines on account of the government's degree of involvement and buy-in to an institution. For example, the German KfW Bank is explicitly guaranteed in relation to its publicly issued debt, while State control is regarded as giving rise to an implicit guarantee in relation to the Bank more broadly (House of Commons Environmental Audit Committee, 'Second Report of Session 2010-11, *The Green Investment Bank - Volume I: Report, together with formal minutes, oral and written evidence*' HC 505, Ev 145).

Bank's publicly issued debt (the approach taken by many public banks, including the German government with its KfW Bank),⁴⁸ or to other specific liabilities of the Bank.⁴⁹ The guarantee could also be limited to a specific financial threshold,⁵⁰ or to a class of persons the guarantee will apply to. Finally, the guarantee could be fashioned as a duty to guarantee, thereby committing the government to it upon the passing of the legislation; or (as a much weaker alternative that would do considerably less to bolster investor confidence), as an enabling power, allowing the government to guarantee the Bank at a later point in time.

Regardless of how the government's guarantee is ultimately defined, it is important that the decision, - and decisions concerning other financial provisions, - are made soon and included in the UK's State aid notification. This is important as the form of the guarantee, and other questions such as whether profits are distributed (see below), may well be material factors in the European Commission's assessment of the compatibility of the Bank and its activities with the EU constitution.⁵¹

5.2 Powers to borrow

The ability for the Bank to borrow money, including by issuing bonds, should be enshrined to safeguard it. Although this empowerment may not be necessary as a matter of law to enable the Bank to borrow, future governments may attempt to prevent the Bank from borrowing and the enshrinement of the enabling power may assist in this regard. As borrowing is essential to the Bank being able to leverage the necessary scale of finance needed to facilitate the UK's transition to a low carbon economy, powers to borrow must be entrenched. If necessary, the government may wish to consider legislating to define limits on the powers to borrow, such as setting a cap on maximum borrowing over a given time frame. If these limits are dealt within delegated legislation rather than in the primary Act, it would be advantageous for the primary Act to define what sorts of limits may and may not be imposed, in order not to unduly frustrate the Bank's borrowing activities.

5.3 Government controls – finance

In light of the fact that the GIB Company will be managing a large amount of public money for a public purpose, and that at least some of the Bank's liabilities may be guaranteed by the government, it is appropriate for the government to have some specific and limited controls over the Bank's financial management. One such control that might be set in legislation is a power for the

⁴⁸ Ibid.

⁴⁹ e.g. a government guarantee over any environmental liability insurance offered by the Bank. ClientEarth has had discussions with the Office of Carbon Capture and Storage concerning the desirability of the UK providing Member State insurance or re-insurance to assist early mover CCS operators to meet their financial security obligations under the EU CCS Directive 2009. This is due to the fact that certain liabilities, including liability for CO₂ leakage under the Emissions Trading Scheme Directive, are currently regarded as uninsurable by the private market due to large uncertainties in the future price of carbon. The Government should consider guaranteeing any such financial securities that the Green Investment Bank would be well placed to deliver.

⁵⁰ For example, section 29 of the Communications Act 2003 provides that the Secretary of State may only guarantee borrowing of the OFCOM up to a threshold £5 million.

⁵¹ Treaty of the Functioning of the European Union.

government to give the Bank binding directions concerning the creation or management of reserves.⁵² This would help the government to ensure that the Bank is managing risk in an appropriate way. There may also be other specific and defined powers that it is appropriate to provide to the government.

5.4 Distribution of profits

Given the urgency of the low carbon challenge it is not appropriate for the UK government to raise revenue from the profits of the Bank. The Bank needs – to the extent possible – to be able to reinvest any profits that it generates to pursue its public policy mandate. Therefore we consider the redistribution of profits to the UK government in its capacity as shareholder in the Bank to be inappropriate.

However, the Bank also needs to retain the option to raise further capital by attracting new, private shareholders (with limited governance rights, as discussed in chapter three, Shareholding). In order to do so, it will need to be able to offer the promise of dividends. Therefore the restriction on distribution of profits should only apply to the UK government.

5.5 Why the financial provisions should be included in legislation

It is essential that these fundamental matters of the Bank's financial management and power are protected from amendment and will bind the Bank and others in practice.

The government guarantee is fundamental to creating a credible Bank able to achieve its investment objectives. Legislation can create a legally enforceable duty on the Secretary of State to enter into guarantees on the Bank's borrowing, a duty that can only be qualified or repealed in specific circumstances and with due accountability. Were the government's guarantee secured any other way, it would clearly not be adequately 'locked-in' or binding, for the reasons discussed in chapter three, Mandate of the bank. Furthermore, it is appropriate to establish mechanisms of accountability to parliament for any guarantee or payment thereof. Requirements to lay these details before parliament are standard for state guarantees and are best achieved by legislation.

There is also a degree of uncertainty as to whether rights of the Secretary of State to intervene in the Bank's financial management would always be enforceable against the Bank if set in articles of association. There is a lack of clarity in the relevant case law as to the enforceability of all rights in a company's articles of association, due to the distinction between 'insider' and 'outsider' rights.⁵³

⁵² For example, s6 of the Civil Aviation Act 1971 provides that Secretary of State may give a direction to the Authority (a body corporate) concerning the establishment or management of reserves.

⁵³ This relates to the distinction between a shareholder's so-called 'insider' and 'outsider' rights under a company's articles of association. The case law suggests that a shareholder may not be able to rely on certain of their rights under articles of association, where they are rights conferred on them in 'outsider' capacities (i.e. not as a member of the company qua member). See, for example, *Hickman v Kent or Romney Marsh Sheep-Breeders' Association* [1915] 1 Ch 881; *Beattie v E & F Beattie Ltd* [1938] Ch 708; *Cumbrian Newspapers Group Ltd v Cumberland & Westmorland Herald Newspaper & Printing Co Ltd* [1987] Ch 1. It is possible that the rights of the Secretary of State proposed above relating to the Bank's finances could fall

There is therefore a possibility that if the powers of the Secretary of State that are proposed above were only provided by articles of association, that the Secretary of State would not in practice necessarily be able to rely on them against the Bank. On the other hand, were these powers set in legislation, they would clearly be enforceable in the courts.

Finally, the proposed restriction on distribution of the Bank's profits is designed to avoid the government profiting from the Bank's activities. This restriction would clearly not be effective were the government itself able to amend the requirement at will and without scrutiny. As such, the concerns relating to safeguarding of company articles of association where there is a sole shareholder (discussed in chapter two, Mandate of the bank) are particularly pertinent in relation to these provisions.

5.6 Financial provisions - proposed drafting

Section (...) Guarantees of the Secretary of State

- (1) The Secretary of State [shall] [may] guarantee—
 - (a) the repayment of the principal of any borrowing by the Bank,
 - (b) the payment of interest on any such borrowing, and
 - (c) the discharge of any other financial obligations incurred by the Bank in connection with such borrowing.
- (2) A guarantee made pursuant to subsection (1) shall be made in such manner and on such conditions as the Secretary of State determines.
- (3) Immediately after a guarantee is given under this section, the Secretary of State must lay a statement of the guarantee before each House of Parliament.
- (4) Where any sum is paid by the Secretary of State under a guarantee given under this section, he must lay a statement relating to that sum before each House of Parliament as soon as practicable after the end of each of the financial years—
 - (a) beginning with the one in which the sum is paid, and
 - (b) ending with the one in which the Bank's liabilities under subsection (1) are finally discharged.
- (5) The Secretary of State may make provision by regulations to qualify or remove the duty under subsection(1).
- (6) Regulations under subsection (5) may amend this section by adding, altering or repealing provisions.
- (7) Regulations under this section are subject to affirmative resolution procedure.

outside of the definition of 'insider' rights.

Section (...) Power of the Bank to borrow

- (1) The Bank shall have the power to borrow money, including but not limited to the issuance of bonds, from —
- (a) the Secretary of State,
 - (b) any of the Bank's subsidiaries, and
 - (c) any other legal or natural person.

Section (...) Power of Secretary of State to intervene in reserves

- (1) The Secretary of State may, subject to the approval of the Treasury, give the Bank a direction relating to—
- (a) the establishment or management of reserves,
 - (b) the carrying of sums to the credit of any reserves, or
 - (c) the application of any reserves.
- (2) The Bank must comply with a direction given under subsection (1).

Section (...) Distribution of profits

- (1) No profits shall be distributed to HM government in its capacity as a shareholder or member of the Green Investment Bank Company.
- (2) For the purposes of subsection (1), HM government includes central government and the devolved administrations, and does not include local authorities.

6. Operations

As discussed in chapter two, Mandate of the bank, we consider that the Bank should have a clearly defined mandate that sets its purpose, priorities and functions. We also advise that the Bank's mandate should be supplemented by a range of provisions that help to guide the Bank's direction and operations, as set out below. These provisions should guide its activities and ensure that it works as a proactive and dynamic catalyst for private sector investment in the green economy, and that its investments are truly 'green.' We also consider that the government should be provided with some specific, limited, controls in relation to the Bank's operations.

6.1 Operating principles

The UK government has proposed that the Bank work with 'operating principles', set in its 'long-term charter',⁵⁴ that will shape its business model and operations.⁵⁵ We agree with this proposal, and consider that these operating principles should be set in the Bank's legislation.

The essential operating principles include that the Bank should seek to preserve capital and create positive returns, while maximising its impact in relation to its statutory purpose (a so-called 'double bottom line'); and that it must strive for alignment of its activities with government priorities and policies. Other principles will require the Bank to seek to provide financing that would not otherwise be readily available on the private market, and to prioritise on-lending through commercial banks ahead of direct investment.

The likelihood of the Bank's ongoing compliance with State aid law can also be reinforced by setting particular operating principles in place. We propose that a number of state aid 'tests' be built into the legislated operating principles, for example the 'incentive effect' (that environmental aid must give rise to environmental gains that would not otherwise have occurred but for the aid) and the need to minimise the distortion of the internal market.

6.2 Business plan

We propose that the Bank be required to review and renew its strategic priorities and business approach every five years, analysing and identifying the best ways for it to invest its capital and expertise in pursuit of its overarching objectives. In doing so it should be required to have regard to its statutory purpose, to consult with relevant bodies and the public, and to follow high level guidance set in statute. These requirements would ensure that the Bank has a dynamic and evolving approach to its task, responding to a changing operating environment and world. They would also ensure that it follows an appropriate, open and transparent procedure when deciding its strategic approach.

⁵⁴ HM Government, 'Update on the design of the Green Investment Bank' (May 2011), p. 20.

⁵⁵ *Ibid.*, p. 21.

We therefore consider that the Bank should be required to develop a new business plan every five years, and that it should be required to do so in accordance with specific statutory requirements as to the plan's content and the process for writing it.

We propose that the detailed requirements relating to the business plan might appropriately be placed in a Schedule to the Bank's statute (see below).

6.3 Prohibitions

As safeguards, we propose that the government should consider including a few legal prohibitions on the Bank investing in projects that are likely to cause particular types of social and environmental harm. These prohibitions may be important – if not essential to making sure that the Bank's investments are truly sustainable and 'green'. These prohibitions supplement the Bank's broader mandate: the mandate points the Bank in the right direction and sets some broad limits on its activities, and the prohibitions draw clear lines around the kind of activities the Bank can support.

We propose that these prohibitions relate to circumstances where a project gives rise to a significant risk of: harm to human health; additional pollution; significant harm to biodiversity; or damage to water or land. In some instances projects may be forbidden under EU environmental laws anyway, such as the Habitats Directive.⁵⁶ However, it is also very important to ensure that the balancing of potentially competing environmental agendas does not unduly frustrate the activities of the Bank. For this reason any prohibitions drafted to supplement, or ensure alignment of the bank with, EU environmental laws must be crafted with appropriate thresholds of environmental harm. While the proposed drafting is a starting point on this issue and further analysis is warranted, it points to the conclusion that appropriate legal tests can and should be crafted, drawing from existing environmental legislation and jurisprudence. At a more fundamental level, when the board makes investment decisions, it is important to ensure alignment with existing EU and UK environmental law by requiring consideration of relevant information, including environmental reports that may have been prepared pursuant to the Environmental Impact Assessment Directive⁵⁷ or other laws.

6.4 Defining the role of the Secretary of State in the Bank's operations

It is important that the Secretary of State be given some defined and limited powers to intervene in the Bank's operations.

It is appropriate for the Secretary of State to have a direct power to intervene in the Bank's strategic direction where the Bank is veering significantly outside of its mandate. This power can be carefully limited and defined in legislation so as to avoid the possibility of abuse.

⁵⁶ Council Directive 92/43/EEC 'on the Conservation of natural habitats and of wild fauna and flora'.

⁵⁷ Directive 85/337/EEC 'on the assessment of the effects of certain public and private projects on the environment'.

Further, the government should have a readily enforceable power to compel the Bank to comply with State aid law, where its actions are in breach of the law. The existence of this power in legislation will provide additional reassurance to the European Commission when it is appraising the UK's proposals for the Bank in relation to State aid law.⁵⁸

6.5 Clarifying director's duties

The Companies Act 2006 will place duties on the Bank's directors.⁵⁹ The directors' duties will include the duty to act within powers;⁶⁰ to exercise reasonable care, skill and diligence;⁶¹ and to avoid conflicts of interest.⁶² The directors' duties will make sure that directors of the Bank can be held to certain basic standards of practice in the exercise of their functions.

However, it is desirable for the Bank's legislation to clarify a particular matter in relation to the directors' duty to 'promote the success of the company' under section 172 Companies Act 2006. Section 172 specifies that a director

"must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole."

However, section 172 also specifies that where the purpose of the company is something other than the benefit of its members, the directors' duty is to act in the way he considers, in good faith, would be most likely to promote the success of the company in achieving its purpose.

It is worthwhile for the Bank's legislation to clarify beyond doubt that the Bank's directors' duties under section 172 Companies Act 2006 will relate to the achievement of the Bank's statutory purpose, not to the financial benefit of the Bank's shareholders.

6.6 Why the Bank's operating framework should be included in legislation

The provisions outlined above are central to the Bank's mode of operation, and how it will go about its business. They will guide how the Bank makes investment decisions and develops strategy, and the ability of the Secretary of State to influence the Bank's activities only in the event that it deviates from its purpose or risks breaching State aid or other laws. They will also stop the Bank from using its public and other resources to support potentially harmful activities.

It is therefore essential, as with the Bank's mandate, that these provisions are secure and readily enforceable. As discussed above, investors need confidence that the Bank will operate in an independent and consistent fashion, and setting these provisions in legislation will provide some

⁵⁸ This power will also be particularly important if the decision is taken to privatise the Bank in the future.

⁵⁹ Companies Act 2006 ss 170-181.

⁶⁰ Companies Act 2006 s 171.

⁶¹ Companies Act 2006 s 174.

⁶² Companies Act 2006 s 175.

certainty that this will be the case. Conversely, setting them in the GIB's articles of association with the government as sole shareholder would leave them vulnerable to amendment at the whim of the government. Likewise, it is necessary, right and proper for persons other than the government to be able to hold the GIB to its governing framework. This would not be possible were these provisions set only in the company articles of association, with the government as the sole shareholder in the GIB.

Furthermore, as discussed previously, there is a degree of uncertainty as to whether the Secretary of State's rights to intervene in the Bank's operations would always be enforceable in court if set in articles of association.⁶³ There is therefore a possibility that if the powers of the Secretary of State that are proposed above were only provided by articles of association, that the Secretary of State would not in practice be able to rely on them against the Bank. If this were the case, it would clearly undermine the confidence that the European Commission can have in the government's ability to ensure the Bank's compliance with State aid requirements. On the other hand, were these powers set in legislation, they would clearly be enforceable in the courts.

6.7 Operations - proposed drafting

Section (...) Operating principles

- (1) In determining the Bank's strategy and its individual financing decisions, the Bank must—
 - (a) seek to maximise the contribution of its activities to the achievement of its purpose, while preserving and, where possible, generating capital in the long-term,
 - (b) seek to ensure the financial health of the Bank in the long-term and maintain a robust risk profile across its investments and liabilities,
 - (c) only finance activities where there is robust evidence that that activity will contribute to the achievement of its purpose,
 - (d) seek to align its investment activities with relevant government policy,
 - (e) take all necessary actions to ensure that its activities are compliant with State aid law,
 - (f) seek to provide or facilitate financing that would not otherwise be available from the commercial financial market, and
 - (g) prioritise the facilitation of private sector investment activities above direct investment by the Bank where practicable.

⁶³ As discussed above, there is a lack of clarity in the relevant case law as to the enforceability of all rights in a company's articles of association by shareholders. This relates to the distinction between a shareholder's so-called 'insider' and 'outsider' rights under a company's articles of association. The case law suggests that a shareholder may not be able to rely on certain of their rights under articles of association, where they are rights conferred on them in 'outsider' capacities (i.e. not as a member of the company qua member). See, for example, *Hickman v Kent or Romney Marsh Sheep-Breeders' Association* [1915] 1 Ch 881; *Beattie v E & F Beattie Ltd* [1938] Ch 708; *Cumbrian Newspapers Group Ltd v Cumberland & Westmorland Herald Newspaper & Printing Co Ltd* [1987] Ch 1. It is possible that the right of the Secretary of State proposed above relating to State aid compliance could fall outside of the definition of 'insider' rights.

Section (...) Business plan

The board must prepare and adopt a business plan for the Bank in accordance with Schedule 2.

Section (...) Prohibitions

- (1) The Bank must not approve financial support for a project where, after considering all relevant information and the results of consultation required under paragraph 1(4) of Schedule 2, the Bank is of the view that the approval will further an activity that gives rise to a significant risk of—
- (a) adverse effect on human health,
 - (b) additional pollution,
 - (c) significant harm to biodiversity,
 - (d) land damage, or
 - (e) water damage.

- (2) For the purposes of this section—

‘pollution’ means emissions of pollutants into the air, water, or land, including but not limited to life cycle emissions of greenhouse gases.

‘additional pollution’ means a significant volume of any given pollutant, or any volume of overall pollution, that is additional to the levels or volumes attributable to existing technologies or measures. Carbon dioxide that is permanently stored shall not be considered additional pollution for the purposes of this Bill.

‘water damage’ and **‘land damage’** shall have the same meaning as is defined in article 2 of Directive 2004/35/CE of the European Parliament and Council.

Section (...) Role of the Secretary of State in operations

- (1) The Secretary of State may issue a direction requiring the board to—
- (a) review the Bank’s business plan, or
 - (b) to amend it in a particular fashion,
- subject to the requirements of this section.
- (2) A direction pursuant to subsection (1)(b) may only be made where and to the extent to which a business plan would be likely to lead to the Bank significantly departing from the purpose set out in Part 1 of this Bill.
- (3) The Secretary of State may direct the board to perform an action or refrain from performing an action for the purposes of ensuring compliance with State Aid law.
- (4) The board must comply with a direction issued pursuant to this section.

Section (...) Director's duties

For the purposes of the duty specified in section 172 of the Companies Act 2006 ('Duty to promote the success of the company') 'the purposes of the company' shall consist of the purposes specified in section 1 of this Bill.

SCHEDULE 2

Business plan

1. (1) The board must prepare and adopt a business plan for the Bank—
 - (a) no later than [4] months from the date of commencement of this Bill, and
 - (b) for each succeeding period of five years.
- (2) The board may review and amend a business plan at any stage where it considers such review or amendment necessary or desirable to ensure the achievement of any provisions of this Bill.
- (3) The board must review a business plan, and where appropriate amend it upon receipt of—
 - (a) a recommendation from the Independent Advisory Committee made pursuant to paragraph 10(2)(c) of Schedule 1, or
 - (b) a direction from the Secretary of State made pursuant to section 16.

Content of the business plan

2. (1) For the period of time that a business plan relates to, a business plan must—
 - (a) determine the key environmental objectives for the Bank,
 - (b) determine the key financial objectives for the Bank,
 - (c) identify priority categories of projects for financial support from the Bank,
 - (d) identify key types of financial products or combinations of financial products to be provided for the priority categories of projects, and
 - (e) identify the Bank's business strategy, including
 - (i) the risk profile that the board should seek,
 - (ii) target rates of return for the Bank's investments, and
 - (iii) all other matters necessary for the Bank's strategic management,
- (2) A business plan for the Bank must include—
 - (a) financial and environmental analysis as necessary to satisfy the requirements of subparagraph (1), and
 - (b) a balanced and comprehensive analysis of the extent to which the business plan aligns with government policy.

Process requirements for the business plan

3. (1) When preparing or seeking to amend a business plan, the board must have regard to—
- (a) all relevant environmental information, including but not limited to any relevant environmental reports that may have been prepared pursuant to an environmental impact assessment or strategic environmental assessment,
 - (b) all relevant financial information, and
 - (c) Part 1 and any other relevant provisions of this Bill.
- (2) When preparing or amending a business plan, the board must—
- (a) publish a draft business plan or draft amended business plan and make it available for consultation for a period of no less than 2 months.
 - (b) request the views of—
 - (i) the Secretary of State for Climate and Energy,
 - (ii) the Secretary of State for Environment, Food and Rural Affairs,
 - (iii) the Secretary of State for Business Innovation and Skills,
 - (iv) The Scottish and Welsh Ministers, and the Ministers of Northern Ireland,
 - (v) the Independent Advisory Committee,
 - (vi) the Committee on Climate Change, and
 - (vii) members of the public.
- (3) The board must take into account all responses to this consultation prior to the adoption of a new or amended business plan.
- (4) For the purposes of this paragraph—

‘Environmental Impact Assessment’ shall mean an environmental impact assessment required pursuant to Directive 85/337/EEC of the European Parliament and of the Council, (as amended by Directive 97/11EC and Directive 2003/35/EC.)

‘Strategic Environmental Assessment’ shall mean a strategic environmental assessment required pursuant to the Environmental Assessment of Plans and Programmes Regulations 2004.

7. Accounting, reporting and transparency

The Green Investment Bank must operate transparently, so that it is accountable for the way that it conducts its business. The Bank will be an independent company handling and distributing large amounts of public money in pursuit of public policy objectives, and will most likely rely on a government guarantee to borrow from the capital markets. For this reason its financial security will have implications for the UK's financial health and as such a culture of transparency will be essential.

This means annual accounting and full reporting on the Bank's operations and the achievement of its environmental objectives will be essential. It also means the disclosure of important strategic and operational documents as default practice, and that the Freedom of Information Act is applied.

Some of the transparency requirements of the Companies Act 2006 are adequate for the Bank, and therefore the GIB legislation does not need to supplement or vary them. Primarily, the Bank should be obliged to account financially in exactly the same way that publicly-listed commercial banks do.

However, in light of the distinct nature of the Bank and its objectives, it should also prepare narrative reports that allow for a meaningful assessment of how the Bank's activities are being managed and how successfully it is achieving its environmental purposes. Annual reporting requirements under the Companies Act 2006 should be supplemented with tailored reporting requirements for the Bank's 'business review', introduced in the Bank's legislation.

Further, the Bank should publicly disclose key strategic and operational documents as default practice. There should be a presumption of transparency, only overridden where there are significant considerations that militate against public disclosure (expressed as qualified rights for the Bank not to disclose the information). The Bank should have duties to pro-actively publish these documents, rather than only being required to disclose them when requested (as is the case under the Freedom of Information Act 2000). Specific statutory requirements to this effect are appropriate and necessary.

7.1 Why transparency requirements should be set in legislation

Transparency is crucial to the Bank's ongoing legitimacy, accountability and public acceptance. As such, it must be possible for the Bank to be held to its transparency obligations by enshrining them in legislation. As discussed, setting these provisions in legislation is the most effective way to achieve these objectives and ensure such obligations cannot be amended at the whim of government.

Requirements to disclose are intended to ensure that the Bank is transparent and accountable to Parliament and civil society; it would be nonsensical for those obligations to be enacted in such a way that ensured the Bank could not be relied upon to disclose a given document when requested to.

7.2 Accounting, reporting and transparency - proposed drafting

Section (...) Application of Part 15 Companies Act 2006

- (1) Part 15 Companies Act 2006 applies to the Bank as if it were a 'quoted company'.

Section (...) Content of the directors' report: business review

- (1) This section applies in place of section 417 of the Companies Act 2006 (Contents of directors' report: business review).
- (2) The purpose of the business review is to inform members of the company and public and help them assess how—
 - (a) the directors have performed their duty under section 172 (duty to promote the success of the company), and
 - (b) the Bank has performed in relation to its purposes as specified in this Bill.
- (3) The business review must contain a balanced and comprehensive analysis of—
 - (a) the principal activities of the Bank in the course of the year,
 - (b) the development and performance of the Bank during the financial year,
 - (c) the main trends and factors likely to affect the future development, performance and position of the Bank, and
 - (d) how the Bank has performed in relation to its strategy as set by its business plan at any given time, having particular regard to the content required by Schedule 2 paragraph 2 (content of the business plan).
- (4) In this section, 'development, performance and position of the Bank' means development, performance and position in relation to—
 - (a) the finances of the Bank, and
 - (b) the Bank's purpose as specified by section 2.

Section (...) Content of the directors' report: UK Corporate Governance Code

- (1) The directors' report must contain—
 - (a) a statement of how the Bank has applied the Main Principles set out in the UK Corporate Governance Code, in a manner that would enable readers to evaluate how the principles have been applied, and
 - (b) a statement as to whether the Bank has—
 - (i) complied throughout the accounting period with all relevant provisions set out in the UK Corporate Governance Code, or
 - (ii) not complied throughout the accounting period with all relevant provisions set out in the UK Corporate Governance Code.

- (2) In the case that the Bank has not complied throughout the accounting period with all relevant provisions set out in the UK Corporate Governance Code, the directors' report must set out—
- (a) those provisions that it has not complied with,
 - (b) in the case of provisions whose requirements are of a continuing nature, the period within which, if any, it did not comply with some or all of those provisions, and
 - (c) the Bank's reasons for non-compliance.

Section (...) Laying of annual accounts and reports before Parliament

- (1) The Bank must lay before Parliament a copy of its annual accounts and report for each financial year.
- (2) The Bank must lay its annual accounts and reports as soon as practicable after the end of the financial year for which they are prepared.

Section (...) General disclosure requirements

- (1) The Bank must ensure that—
- (a) every business plan of the Bank prepared in accordance with Schedule 2,
 - (b) all consultation responses to a proposed business plan,
 - (c) all studies or assessments conducted in preparation of a business plan, and their accompanying terms of reference,
 - (d) all reports, formal recommendations and written advice of the Independent Advisory Committee made to any person, and
 - (e) any and all internal working documents of the Bank relating to investment decisions, are made available on a website maintained in accordance with the requirements of this section, subject to the exemptions specified in subsection (2).
- (2) Information contained in documents required to be disclosed by subsection (1) may be withheld or redacted by the Bank where in the reasonable opinion of a qualified person—
- (a) its disclosure would prejudice the commercial interests of any person (including the Bank),
 - (b) its disclosure would, or would be likely to, inhibit—
 - (i) the free and frank provision of advice to or within the Bank,
 - (ii) the free and frank exchange of views within the Bank for the purposes of deliberation;
 - (c) its disclosure would otherwise prejudice, or would be likely to otherwise to prejudice, the effective conduct of the Bank's business,
 - (d) a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in relation to it in legal proceedings, and
 - (e) its disclosure—
 - (i) is prohibited by or under any enactment, or
 - (ii) would constitute or be punishable as a contempt of court,

and in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

- (3) The documents specified in subsection (1) must be made available on a website that is maintained by or on behalf of the Bank.
- (4) Access to the documents specified in subsection (1) on the website must not be—
 - (a) conditional on the payment of a fee, or
 - (b) otherwise restricted, except so far as necessary to comply with any enactment or regulatory requirement (in the United Kingdom or elsewhere).
- (5) The documents specified in subsection (1) must be—
 - (a) made available as soon as reasonably practicable, and
 - (b) kept available until the Bank's winding up.
- (6) The Freedom of Information Act 2000 (C.36) is amended as follows—

In Part VI of Schedule 1, after the words "The Great Britain China Centre" insert – "The Green Investment Bank."

ClientEarth is a non-profit environmental law organisation based in London, Brussels and Warsaw. We are activist lawyers working at the interface of law, science and policy. Using the power of the law, we develop legal strategies and tools to address major environmental issues.

As legal experts working in the public interest, we act to strengthen the work of our partner organisations. Our work covers climate change and energy system transformation, protection of oceans, biodiversity and forests, and environmental justice.

ClientEarth is funded by the generous support of philanthropic foundations and engaged individuals and with operational support from the European Commission's Life+ programme.

For further information please contact

David Holyoake

t. 020 7749 5973

e. dholyoake@clientearth.org

www.clientearth.org

ClientEarth offices:

Brussels

4ème Etage
36 Avenue de Tervueren
Bruxelles 1040
Belgium

London

274 Richmond Road
London E8 3QW
UK

Warsaw

Aleje Ujazdowskie 39/4
00-540 Warszawa
Poland

ClientEarth is a company limited by guarantee, registered in England and Wales, company number 02863827, registered charity number 1053988, registered office 2-6 Cannon Street, London EC4M 6YH, with a registered branch in Belgium, N° d'entreprise 0894.251.512, and with a registered foundation in Poland, Fundacja ClientEarth Poland, KRS 0000364218, NIP 701025 4208