



DRAFT REGULATIONS IN TERMS OF FINANCIAL SECTOR REGULATION ACT, 2017

CONSOLIDATED PUBLIC COMMENTS

31 January 2018

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List of Commentators

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2. The Banking Association South Africa (BASA)	Adri Grobler
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4. The South African Insurance Association (SAIA)	Easvarie Naidoo

COMMENTS ON THE FINANCIAL SECTOR LEVIES BILL

Regulation 2: Exercise of Functions			
Reviewer	Regulation/Subregulation	Issue	Response
BASA	2(1)(b)	<p>It will be helpful to have more clarity regarding who in the Reserve Bank is required to perform the functions of the Prudential Authority.</p> <p>For example, the functions could be performed by the Executive Management of the Reserve Bank. Alternatively, it is suggested that the reference in Regulation 2(1)(b) be aligned with the proposed Section 1A(2)(a) and (b) of the Financial Markets Act, (Act 19 of 2012), as this makes reference to these powers being exercised by the Registrar of Banks.</p>	<i>The Reserve Bank has already established the capacity within the Reserve Bank to carry out the functions of the Prudential Authority, so it is not necessary to specify this in the Regulations. The reference in the Financial Markets Act referred to was necessary in a legal sense, in light of the existing designation of the Registrar of Banks to perform certain functions.</i>
Regulation 3: Management of transitional process to establish Financial Sector Conduct Authority			
Reviewer	Regulation/Subregulation	Issue	Response
BASA	3(1)	<p>Please consider the power of the executive of the Financial Services Board to perform the functions of the Executive Committee of the Financial Sector Conduct Authority in the event that only the Commissioner or only the Deputy Commissioner has been appointed.</p> <p>By way of example, will the executive of the Financial Services Board be led by the Commissioner or Deputy Commissioner (as the case may be), or will the Commissioner or Deputy Commissioner be led by the executive of the Financial Services Board? This is in light of the fact that as the draft regulations stand, the executive of the Financial Services Board will have power of the Financial Sector Conduct Authority until both the Commissioner and the Deputy Commissioner has been appointed.</p>	<i>It is intended that the transitional functions of the FSB executive continue until the Commissioner and Deputy Commissioners are appointed, in case they do not all commence duties at the same time. It is appropriate for the Executive Committee of the FSCA to assume full authority once it is fully appointed and functional.</i>
JSE, BASA, 4 Africa Exchange	3(2)	<i>3(2) The functions referred to in paragraph (a) subregulation 1 include functions relating to— (a) the transfer of staff from the Financial Services Board to the Financial Sector Conduct Authority, staff placements and other human resources matters;</i>	<i>Treasury proposes that the suggested wording be incorporated in final Regulations.</i>
BASA	3(3)	For the sake of clarity, it should be stated which executive is being	<i>Treasury proposes that the suggested wording</i>

		referred to. It is recommended that the statement be amended to provide clarity on which executive is being referred to, as follows: <i>3(3) The executive <u>of the Financial Services Board</u> must fund the performance of the functions referred to in subregulations (1) and (2) from the funds of the Financial Services Board, or the Financial Sector Conduct Authority, as may be applicable.</i>	<i>be incorporated in final Regulations.</i>
Regulation 4: Management of transitional process to establish Financial Services Tribunal			
Reviewer	Section	Issue	Response
JSE	4(2)	<p><i>4(2)(a) From the date that Chapter 15 of the Act comes into effect until the Chairperson of the Tribunal makes Tribunal rules in accordance with section 227 of the Act, the Tribunal must apply the rules, regulations, practice directions and guidelines jointly designated by the Chairperson of the Appeal Board and the Chairperson of the Board of Review, insofar as the Act does not provide for the procedure <u>such</u>,</i></p> <p><i>4(2) (c) If at the date on which the Tribunal is established, a designation has not been made in terms of paragraph (a), the Regulations in respect of appeals to the Appeal Board, 2011, and any practice directions and guidelines issued by the Chairperson of the Appeal Board remain in force, with the necessary changes, and insofar as the Act does not provide for the procedure <u>such</u>, until the Chairperson of the Tribunal makes Tribunal rules in accordance with section 227 of the Act.</i></p>	<i>Treasury is of the view that the current wording included in the published draft Regulations is clearer. It is proposed that the suggested amendment be rejected.</i>
BASA	4(2)(a)	<p>Minor typo error – delete extra space and extra comma.</p> <p><i>4(2)(a) From the date that Chapter 15 of the Act comes into effect until the Chairperson of the Tribunal makes Tribunal rules in accordance with section 227 of the Act, the Tribunal must apply the rules, regulations, practice directions and guidelines jointly designated by the Chairperson of the Appeal Board and the Chairperson of the Board of Review, insofar as the Act does not provide for the procedure,–</i></p>	<i>Treasury proposes that the suggested wording be incorporated in final Regulations.</i>

4 Africa Exchange	4(2)(b)	We are of the view that the Tribunal should first act on the advice or with the prior approval of the Commissioner and/or Deputy Commissioner (if so appointed) and if not yet appointed and until such time on the advice or with the prior approval of the Financial Services Board or the Financial Sector Conduct Authority as the case may be before making any further amendments or repealing any of the rules, regulations, directions and guidelines designated in terms of paragraph (a). This will in our view facilitate the smooth implementation of such rules, regulations and guidelines.	<i>The proposed arrangements are appropriate to enable the establishment of the Tribunal, and draw upon the current rules and procedures developed through practice by the current appeal board and board of review, which have significant experience and are familiar with the type of matters that the Tribunal will be dealing with. Also, as the Tribunal does not only deal with matters only relating to the Financial Sector Conduct Authority, it would be inappropriate for the Tribunal to be acting under the direction of the Financial Sector Conduct Authority. The Tribunal must have some degree of independence from the regulators whose matters the Tribunal is responsible for reconsidering. It is proposed that the suggested amendment be rejected.</i>
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Regulation 5: Publication

Reviewer	Regulation/Subregulation	Issue	Response
JSE	5	We are of the view that publication in the Gazette should also be included to satisfy the requirement to publish a document or information in the Register.	<i>There are a wide variety of documents that would be published on the Register, which would not otherwise explicitly have to be published in the Gazette in terms of the financial sector laws, and it is, therefore, not appropriate to require all documents to be published in the Gazette, at significant expense. It is proposed that the suggested amendment be rejected.</i>

Regulation 6: Application of sections

Reviewer	Regulation/Subregulation	Issue	Response
4 Africa Exchange	6(3)	6(3) In section 301 of the Act, the phrase 'the date on which this section comes into effect' means 'the date on which this subsection <u>section</u> comes into effect'.	<i>The wording as currently included in the provision is necessary in order for section 301 to be properly implemented, as different</i>

			<i>subsections of section 301 will be brought into operation on different dates. It is proposed that the suggested amendment be rejected.</i>
Regulation 7: Advertising vacancy			
Reviewer	Regulation/Subregulation	Issue	Response
BASA	7(1)	7.(1) The National Treasury must advertise the positions of Commissioner or and Deputy Commissioner on the website of the National Treasury, as well as in other appropriate media and request the Financial Sector Conduct Authority, or prior to the establishment of the Financial Sector Conduct Authority, the Financial Services Board, to advertise the positions on its website.	<i>The current wording is appropriate, as it is not necessarily the case that the position of Commissioner and Deputy Commissioners will all be advertised at the same time in future. Treasury proposes that the suggested amendment be rejected.</i>
JSE, 4 Africa Exchange	7(2)	7(2) The advertisement referred to in paragraph (a) subregulation 1 must specify— (a) the appointment criteria to qualify for appointment as a Commissioner or a Deputy Commissioner; (b) information which must be submitted in support of an application; and (c) the date by which applications must be submitted to the Shortlisting Panel.	<i>Treasury proposes that the suggested wording be incorporated in final Regulations.</i>
Regulation 8: Applications for Commissioner and Deputy Commissioner			
Reviewer	Regulation/Subregulation	Issue	Response
JSE	8(2)	8(2)(e) be submitted by the date indicated in the advertisement for the position as the deadline for submission for of applications.	<i>Treasury proposes that the suggested wording be incorporated in final Regulations.</i>
Regulation 9: Shortlisting Panel			
Reviewer	Regulation/Subregulation	Issue	Response
SAIA	9	The short-list should be published and public comments opened for a determined period (note also: the latter can be also be anonymous). This suggested approach will enhance the issue of transparency, as candidates may, on paper appear to possess the qualities/skills required. However, there may be information pertaining to the individual, which is not in the public domain but known within the industry, which may have a bearing on his/her, abilities to be a Deputy/Commissioner. This will assist in the selection process.	<i>It is submitted that a public comment process on the shortlisting of candidates would render the appointment process unnecessarily complex and lengthy. It is submitted that as part of the shortlisting process, the shortlisting panel will scrutinise and vet applicants to determine if they meet the specified requirements for appointment.</i>

4 Africa Exchange	9(1)	It is unclear as to how many persons may be appointed as members to the Shortlisting Panel and quorum for the Shortlisting Panel. Accordingly, we are of the view that the Draft Regulations should specify the minimum number of members required to sit on the Shortlisting Panel and the quorum for the Shortlisting Panel.	<i>Some revisions are proposed for final draft Regulations. Quorum for the Panel is already specified in the provisions for the shortlisting panel in regulation 9(3).</i>
BASA	9(2)	The criteria for appointees to the Shortlisting panel is unclear. The skills and knowledge required for members of the Shortlisting Panel should be clearly articulated in the regulations, particularly as they are tasked with determining the most suitable candidates for the requisite regulatory roles. The Shortlisting Panel should, as a minimum, have sufficient knowledge on the vacancies for which they will be shortlisting. It should also be sufficiently diverse, i.e. a mix of public and private sector.	<i>Some revisions are proposed for final Regulations.</i>
JSE	9(2)	We are of the view that the Regulations should specify the number of persons that will make up the Shortlisting Panel. The Regulations should specify the “appropriate experience” that members of the Shortlisting Panel are required to have.	<i>Some revisions are proposed for final Regulations.</i>
4 Africa Exchange	9(4)(b)	It is unclear as to who will perform the oversight function over the Shortlisting Panel to ensure that the procedure is fair, impartial and transparent. It is our suggestion that an independent party be selected to perform the aforesaid function(s) prescribed in the Draft Regulations.	<i>It is submitted that the structure of operation of the two Panels would be suitable and appropriate. It is submitted that having two panels comprised of persons of a range of financial sector experience and expertise, in both the public and private sector, should provide for a sufficiently transparent process. The procedures of the panels must be fair, impartial and transparent.</i>
4 Africa Exchange	9(6)(a)(ii)	9(6)(a) The Shortlisting Panel must— (i) scrutinise all applications for the positions advertised; (ii) assess whether the interviewed candidates satisfy the appointment criteria <u>and the requirements set out in subregulation 8(2)(a)-(e)</u> ; and (iii) submit a shortlist of four suitable candidates for each advertised position.	<i>Some revisions are proposed for final Regulations.</i>

Regulation 10: Ministerial Panel			
Reviewer	Regulation/Subregulation	Issue	Decision
BASA	10	Ministerial panel – The draft regulation does not note who will be part of the panel. Our recommendation is similar to comments in Regulation 9. Our recommendation is similar to comments in Regulation 9.	<i>Some revisions are proposed for final Regulations.</i>
4 Africa Exchange	10	In general and more specifically with reference to regulation 10 of the Draft Regulations, it is our suggestion that the Minister should be given discretion to convene a Ministerial Panel and thereafter the Ministerial Panel should be given discretion to convene a Shortlisting Panel as opposed to the Minister convening both the Ministerial Panel as well as the Shortlisting Panel. We are of the view that our suggestion would serve as a safeguard against the process being potentially tainted in any respect and /or to prevent undue influence and to ensure separation of powers.	<i>It is submitted that the structure of operation of the two Panels would be suitable and appropriate. It is submitted that having two panels comprised of persons of a range of financial sector experience and expertise, in both the public and private sector, should provide for a sufficiently transparent process. The procedures of the panels must be fair, impartial and transparent.</i>
JSE	10(1)	We are of the view that the Regulations should specify the number of persons that will make up the Ministerial Panel. The Regulations should specify the “appropriate experience” that members of the Ministerial Panel are required to have.	<i>Some revisions are proposed for final Regulations.</i>
4 Africa Exchange	10(1)	It is our suggestion that an appointment criteria be set out for those persons eligible to sit on the Ministerial Panel. Reference to persons of “appropriate experience” is in our view open ended and would need to be clarified and be more specific.	<i>Some revisions are proposed for final Regulations.</i>
4 Africa Exchange	10(2)(a)	<i>10(2) The Ministerial Panel must ensure that the persons who are recommended for appointment as Commissioner or Deputy Commissioner— (a) satisfy the appointment criteria <u>and the requirements set out in subregulation 8(2)(a) to (e)</u>; and</i>	<i>This is proposed to be addressed to revisions in regulation 9 in relation to the Shortlisting Panel.</i>
4 Africa Exchange	10(3)(c)	It is unclear as to who will perform the oversight function over the Ministerial Panel to ensure that the procedure is fair, impartial and transparent. It is our suggestion that an independent party be selected to perform the aforesaid function(s) prescribed in the Draft Regulations. It is also clear that the Minister himself being a member	<i>It is submitted that the structure of operation of the two Panels would be suitable and appropriate. It is submitted that having two panels comprised of persons of a range of financial sector experience and expertise, in</i>

		of the Ministerial Panel cannot perform these function(s) and a potential conflict may arise in this regard.	<i>both the public and private sector, should provide for a sufficiently transparent process. The procedures of the panels must be fair, impartial and transparent.</i>
General			
Reviewer	Regulation/Subregulation	Issue	Decision
JSE	General: Impact Report	The Notice refers to the availability of a comprehensive impact report on the FSRA on Treasury’s website. Clarity is required on whether the impact report referenced is the one titled “Impact Study of Twin Peaks Reforms” dated April 2016. No other impact studies can be found on Treasury’s website.	<i>Yes, the impact report is the impact study referred to.</i>
BASA	General: Scope of s304	Section 304 does not state this specifically. Regulations cannot include reference to additional matters that are not addressed in the Act. This can also be regarded as ultra vires the Act. It is recommended that the words “that are not addressed in the Act” be deleted.	<i>Matters additional to what is provided in the Act do not necessarily go beyond the scope of the Act. Matters necessary for the implementation of the Act, which are not specified in the Act, are specifically empowered in section 304. The wording in the explanatory notice has been refined, however.</i>