

MEMORANDUM ON THE OBJECTS OF THE FINANCIAL SECTOR AND DEPOSIT INSURANCE LEVIES (ADMINISTRATION) AND DEPOSIT INSURANCE PREMIUMS BILL, 2022

1. BACKGROUND TO BILL

1.1 On 22 August 2017, the Financial Sector Regulation Act, 2017 (Act No. 9 of 2017) ("FSRA"), was assented to by the President.

1.2 The object of the FSRA is to achieve a stable financial system that works in the interests of financial customers and supports balanced and sustainable economic growth in the Republic.

1.3 Under the funding model that will be established by the Financial Sector and Deposit Insurance Levies Bill, 2022 ("Levies Bill"), the operations and functioning of the Prudential Authority ("PA"), the Financial Sector Conduct Authority ("FSCA"), the Financial Services Tribunal and the Ombud Council, which are established in terms of the FSRA, as well as the Office of the Pension Funds Adjudicator ("OPFA") and the Office of the Ombud for Financial Services Providers ("OFSP"), will be funded by levies, which are imposed on the financial sector in terms of the Levies Bill, as well as through fees which may be charged in accordance with Chapter 16 of the FSRA in relation to functions or services that they may perform.

1.4 In terms of the Financial Sector Laws Amendment Bill, 2020 (B-15 of 2020) ("FSLA Bill") that is currently being processed by Parliament, the funding of the operations of the Corporation for Deposit Insurance ("Corporation") that will be

established in terms of the envisaged section 166AE of the FSRA, as proposed in the FSLA Bill, and the funding of the administration of the Deposit Insurance Fund ("Fund") that will be established in terms of the envisaged section 166BD of the FSRA, the insertion of which is proposed in the FSLA Bill, is envisaged to be provided by a deposit insurance levy in terms of the envisaged section 166BC, as proposed in the FSLA Bill.

1.5 The Levies Bill is the money bill that provides for the imposition of levies on supervised entities in order to fund the PA, the FSCA, the Financial Services Tribunal, the Ombud Council, the OPFA, the OFSP and the Corporation.

1.6 The Financial Sector and Deposit Insurance Levies (Administration) and Deposit Insurance Premiums Bill, 2022 ("Administration Bill") provides for refinements to the FSRA, and in particular Chapter 16 of the FSRA, which deals with fees and the administration of levies, to ensure that the Chapter is appropriately aligned with the Levies Bill as it has been finalised and appropriately provides for the administration of levies.

1.7 The Administration Bill also provides for the imposition of deposit insurance premiums that will finance the Fund. The premiums will be imposed on members of the Corporation, which are licensed banks, mutual banks, co-operative banks, and branches of foreign banks which conduct business in the Republic. The deposit insurance premiums would help to ensure that holders of covered deposits at a member of the Corporation will have access to their funds; to limit severe financial hardship for depositors; and to limit the exposure of public funds to the cost of a

failure of a member of the Corporation.

2. OBJECTIVE OF BILL

2.1 The Administration Bill seeks to ensure that the FSRA, and in particular Chapter 16 of the FSRA, will provide for the appropriate and effective administration of the levies that are proposed to be imposed in terms of the Levies Bill.

2.2 The Administration Bill further provides for the imposition of deposit insurance premiums in terms of the envisaged section 166BG of the FSRA, as proposed in the FSLA Bill. The Administration Bill proposes to amend the envisaged section 166BG and to insert a Schedule 5 in the FSRA. The Administration Bill further seeks to ensure that Chapter 16 of the FSRA provides for the appropriate and effective administration of the deposit insurance premiums.

2.3 The Administration Bill proposes to align the Pension Funds Act, 1956 (Act No. 24 of 1956) ("PSA"), and the Financial Advisory and Intermediary Services Act, 2002 (Act No. 37 of 2002) ("FAISA"), with the FSRA in respect of the funding of the OPFA and the OFSP.

2.4 Finally, the Administration Bill will delete requirements in the Banks Act, 1990 (Act No. 94 of 1990) ("Banks Act"), and the Mutual Banks Act, 1993 (Act No. 124 of 1993) ("Mutual Banks Act"), relating to the requirement to pay licensing fees. The Administration Bill further provides that licence fees will no longer be imposed by the Prudential Authority in terms of the Banks Act and the Mutual Banks Act. Once

Chapter 16 of the FSRA, as proposed in the FSLA Bill and amended in terms of the Administration Bill, is brought into operation, simultaneously with the Levies Bill, fees will be imposed by the financial sector bodies in terms Chapter 16 of the FSRA and not by the Minister of Finance ("Minister") in terms of regulations.

3. STRUCTURE OF BILL

3.1 Clause 1

This clause provides that words and expressions used in the Administration Bill have the same meaning ascribed to them in the FSRA and the Levies Bill.

3.2 Clause 2

3.2.1 This clause provides that the FSCA is responsible for the collection and administration of the financial sector levy and the special levy, referred to in clauses 2 to 8 and 11 of the Levies Bill, read with Schedules 2 to 5 to the Bill, to provide for the funding of the financial sector bodies. The financial sector levy, referred to in clause 4(1)(a) of the Levies Bill, and the special levy referred to in in clause 8(2)(a) of the Levies Bill, must be collected and administered by the FSCA and paid to the financial sector bodies in accordance with section 246 of the FSRA.

3.2.2 The South African Reserve Bank ("Reserve Bank") is responsible for the collection and administration of the financial sector levy and the special levy, referred to in clauses 2 to 8 and 11 of the Levies Bill, read with Schedule 1 to the Bill, to provide for the funding of the PA.

3.2.3 The Reserve Bank is responsible for the collection on behalf of the Corporation and administration of the deposit insurance levy referred to in clause 9 of the Levies Bill, read with Schedule 6 to the Bill, to provide for the funding of the operations of the Corporation and the administration of the Fund.

3.2.4 The financial sector levies referred to in clause 4(1)(b) of the Levies Bill, the special levies referred to in clause 8(2)(b) of the aforesaid Bill and the deposit insurance levy referred to in clause 9 of the Bill must be collected and administered by the Reserve Bank in accordance with section 246 of the FSRA.

3.3 *Clause 3*

Clause 3 provides that the Reserve Bank is responsible for the collection on behalf of the Corporation and administration of the deposit insurance premiums imposed in terms of the envisaged section 166BG, as proposed in the FSLA Bill, read with the proposed Schedule 5 to the FSRA. The deposit insurance premiums must be collected and administered by the Reserve Bank in accordance with section 246 of the FSRA.

3.4 *Clause 4*

Clause 4 provides that the legislation listed in the Schedule to the Administration Bill are amended to the extent as set out in the Schedule.

3.5 *Clause 5*

This clause provides for the short title and commencement of the Administration Bill.

3.6 *Schedule*

3.6.1 The Administration Bill proposes the substitution of section 30R(1) of the PSA to provide that the funds of the Adjudicator consist of the funds contemplated in section 247(1) of the FSRA, and such funds may only be applied in terms of section 247(2) of that Act. The proposed amendment is a consequential amendment in accordance with the Administration Bill's proposed amendments to the FSRA.

3.6.2 The Administration Bill proposes amendments to section 35 of the Banks Act and section 31 of the Mutual Banks Act to remove the requirement that an annual licence fee must be paid by banks and mutual banks, as banks and mutual banks will alternatively pay levies to the PA in terms of the Levies Bill.

3.6.3 The Administration Bill further proposes amendments to section 90 of the Banks Act and section 91 of the Mutual Banks Act to remove the power of the Minister to make regulations in relation to fees, as in terms of Chapter 16 of the FSRA, which will be brought into operation with the Levies Bill. The power to set fees will reside with the PA and the FSCA and the other financial sector bodies.

3.6.4 The Administration Bill proposes to amend section 22 of the FAISA in order to align the section with how the OPFA and OFSP will be funded in terms of the Levies Bill and the FSRA.

3.6.5 The Schedule to the Administration Bill provides for the amendment and insertion of certain definitions in section 1(1) of the FSRA.

3.6.6 The Schedule further proposes the deletion of section 58(1)(g) of the FSRA, as the FSCA will not be the sole entity responsible for the collection of levies in terms of the Levies Bill. The Reserve Bank will collect levies that are payable to the PA and deposit insurance levies that are payable to the Corporation.

3.6.7 Section 166BG of the FSRA, the insertion of which is proposed in the FSLA Bill, is amended to explicitly provide for the imposition of deposit insurance premiums in accordance with Schedule 5 to the FSRA, the insertion of which is proposed in the Administration Bill.

3.6.8 The Administration Bill proposes to amend section 237 of the FSRA to appropriately refer to the Levies Bill and correctly refer to the imposition and collection of levies imposed in terms of the Levies Bill. Levies referred to in clauses 2 to 8 and clause 11 of the Levies Bill, read with Schedules 2 to 5 of the Levies Bill, to provide for the funding of the financial sector bodies, are payable to the FSCA on the dates and in the manner specified by the FSCA in terms of section 242 of the FSRA, or on the date agreed to by the FSCA. Levies referred to in clauses 2 to 8 and clause 11, read with Schedule 1 to the Levies Bill, to provide for the funding of the PA, are payable to the PA through the Reserve Bank on the dates and in the manner specified by the PA in terms of section 242, or on the date agreed to by the PA. Different levies may be imposed for different types or categories of supervised entities in accordance with the Levies Bill.

3.6.9 The deposit insurance levy referred to in clauses 9 and 12 of the Levies Bill, read with Schedule 6 to that Bill, and the envisaged section 166BC of the FSRA, as

proposed in the FSLA Bill, is payable to the Corporation through the Reserve Bank on the dates and in the manner specified by the Corporation in terms of section 242 of the FSRA, or on the date agreed to by the Corporation. The deposit insurance premium referred to in section 166BG, as proposed in the FSLA Bill, and Schedule 5 to the FSRA, the insertion of which is proposed in the Administration Bill, is payable to the Corporation through the Reserve Bank on the dates and in the manner specified by the Corporation, or on the date agreed to by the Corporation. The Corporation must publish the premiums that have been collected in the Register and on its website.

3.6.10 The Administration Bill proposes a consequential amendment to section 238(1) of the FSRA due to the Bill's proposed amendments to section 237 of the FSRA in order to appropriately cater for deposit insurance premiums.

3.6.11 The Administration Bill proposes amendments to section 239 of the FSRA to appropriately provide for deposit insurance premium proposals, in addition to fees and levies proposals. Section 239(7) of the FSRA is amended by the insertion of paragraph (b) which provides that in respect of levies proposals, the Minister may amend Schedule 5 to the Levies Bill as contemplated in clause 10 of the Levies Bill. The Administration Bill further proposes the insertion of section 239(7A) which provides that in respect of deposit insurance premium proposals by the Corporation, the Minister must approve the proposals for each financial year following the commencement of the section.

3.6.12 The Administration Bill proposes amendments to sections 240 to 243 of the

FSRA to appropriately provide for deposit insurance premiums.

3.6.13 The Administration Bill further proposes an amendment to section 244 of the FSRA to properly address interest arising from the non-payment of levies and deposit insurance premiums.

3.6.14 An amendment to section 245 of the FSRA is proposed in the Administration Bill to enable exemptions to be granted by the Corporation in relation to deposit insurance premiums.

3.6.15 The Administration Bill further proposes to amend section 246 of the FSRA to provide that levies imposed in accordance with the Levies Bill, which are referred to in section 237(3A)(a) of the FSRA, the insertion of which is proposed in the Administration Bill, and interest accrued on those levies in terms of section 244(4)(a) of the FSRA, must be collected by the FSCA and paid into a bank account designated for that purpose, which is in the name and control of the FSCA. Levies imposed in accordance with the Levies Bill, which are referred to in section 237(3A)(b) of the FSRA, and interest accrued on those levies in terms of section 244(4)(b) of the FSRA, must be collected by the Reserve Bank and paid into a bank account designated for that purpose, which is in the name and control of the PA. Each financial sector body's allocation of the levies, in terms of clause 11 of the Levies Bill, and interest, must be transferred by the FSCA to the financial sector body's designated account, in accordance with a payment schedule agreed between the financial sector body and the FSCA.

3.6.16 Deposit insurance premiums imposed in accordance with the envisaged section 166BG, which are referred to in section 237(3B)(a) of the FSRA and interest accrued on those levies in terms of section 244(5), must be collected by the Reserve Bank and paid into the bank account for the Fund referred to in the envisaged section 166BD(3), as proposed in the FSLA Bill.

3.6.17 The Administration Bill proposes an amendment to section 247 of the FSRA to appropriately reflect the purposes for which the deposit insurance levies may be applied by the Corporation.

3.6.18 Section 248 of the FSRA is amended by the Administration Bill to appropriately address financial management by the Corporation of the deposit insurance levies, as well as the deposit insurance premiums paid into the Fund.

3.6.19 The Administration Bill proposes amendments to section 288 of the FSRA to empower the Minister to make regulations in relation to the banking and financial accounting arrangements in relation to the administration of levies, deposit insurance premiums and the Fund.

3.6.20 Furthermore, the Administration Bill proposes an amendment to section 301 of the FSRA by the addition of the following of subsection (8) which provides that a determination of fees in terms of a financial sector law remains in force for the purposes of the envisaged Act and that financial sector law. In addition, an aforementioned determination may be amended or revoked in terms of a new determination of fees made by the financial sector body in terms of section 237(2) of

the FSRA.

3.6.21 The Administration Bill further proposes the insertion of Schedule 5 to the FSRA which lists various deposit insurance premiums.

4. ORGANISATIONS AND INSTITUTIONS CONSULTED

4.1 The National Treasury has engaged the FSCA and the PA in the development of the Administration Bill.

4.2 The Administration Bill was developed in conjunction with the finalisation of the Levies Bill, subsequent to the consultation processes that were undertaken in respect of the Levies Bill. The Administration Bill effects consequential amendments to the FSRA arising from the Levies Bill as finalised.

4.3 On 1 September 2020, the Reserve Bank published the funding paper titled *"The deposit insurance funding model and the implications for banks"* for comment, which outlined the funding model proposed for the deposit insurance scheme ("DIS") in the Republic, including details of its premiums and levies. The policy proposals contained in the funding paper were developed subsequent to significant consultation with banks, by considering country-specific characteristics as well as applicable international standards, such as the Core Principles for Effective Deposit Insurance Systems ("Core Principles") and other guidance issued by the International Association for Deposit Insurers ("IADI"). The funding model and comments received on the funding model, when published for comment, informed the content of Schedule

5 to the FSRA, as proposed in the Administration Bill, which provides for the formulas for the deposit insurance premiums.

5. FINANCIAL IMPLICATIONS OF BILL

5.1 Financial implications for the State:

There are no significant financial implications envisaged for the fiscus.

5.2 Financial implications for regulated financial institutions:

The financial implications for regulated financial institutions are detailed in the Socio-Economic Impact Assessment that is tabled along with the Levies Bill.

6. CONSTITUTIONAL IMPLICATIONS

None.

7. PARLIAMENTARY PROCEDURE

7.1 The Constitution regulates the manner in which legislation may be enacted by the legislature and thus prescribes the different procedures to be followed for such enactment. The national legislative process is governed by sections 73 to 77 of the Constitution.

7.2 The State Law Advisers and the National Treasury have considered the Administration Bill against the provisions of the Constitution relating to the tagging of Bills and against the functional areas listed in Schedule 4 (functional areas of concurrent national and provincial legislative competence) and Schedule 5 (functional areas of exclusive provincial legislative competence) to the Constitution.

7.3 A Bill falling within a functional area listed in Schedule 4 to the Constitution must be dealt with in accordance with the procedure set out in section 76 of the Constitution. Schedule 4 lists the functional areas of concurrent national and provincial legislative competence. Schedule 5 to the Constitution lists the functional areas of exclusive provincial legislative competence. Therefore, those areas not falling within Schedule 4 or Schedule 5, fall within the exclusive national legislative competence.

7.4 The test for the classification of a Bill, as established in the Constitutional Court judgment of *Tongaone and Others v National Minister for Agriculture and Land Affairs and Others*¹ ("Tongaone judgment"), is that any Bill with provisions which, in substantial measure, fall within a functional area listed in Schedule 4 to the Constitution must be classified in terms of that Schedule.² The Tongaone judgment therefore laid down the substantial measures test for the tagging of a Bill, which requires one to determine whether, to a substantial extent, the legislation under consideration actually regulates matters falling within Schedule 4 to the Constitution. If so, the Bill must be tagged in terms of section 76 of the Constitution.

¹ CCT 100/09 [2010] ZACC 10.

² *Ibid* paragraph 72.

7.5 As the Administration Bill does not deal with a functional area listed in Schedule 4 or Schedule 5 to the Constitution, we submit that section 44(1)(a)(ii) of the Constitution is applicable with regard to the power of the National Assembly to pass legislation on "any matter".

7.6 It is therefore the opinion of the State Law Advisers and the National Treasury that the Bill must be dealt with in accordance with the legislative procedure outlined in section 75 of the Constitution as it contains no provisions to which the procedure set out in section 74 or 76 of the Constitution applies.

7.7 The State Law Advisers are of the opinion that it is not necessary to refer the Administration Bill to the National House of Traditional and Khoi-San Leaders in terms of section 39(1)(a)(i) of the Traditional and Khoi-San Leadership Act, 2019 (Act No. 3 of 2019), as the Administration Bill does not contain any provisions which directly affect traditional or Khoi-San communities, or provisions which pertain to customary law or customs of traditional or Khoi-San communities. .