

Financial Services Laws General Amendment Bill, 2013

Presentation to the Standing Committee on Finance

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national treasury

Department:
National Treasury
REPUBLIC OF SOUTH AFRICA

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Purpose

- The National Treasury (“NT”) and Financial Services Board (“FSB”) would like to thank the Standing Committee on Finance for the opportunity to provide formal responses to questions and comments received.
- Submissions were received from the:
 - Association of Savings and Investments South Africa (“ASISA”),
 - South African Insurance Association (“SAIA”),
 - Banking Association of South Africa (“BASA”),
 - Principal Officers Association (“POA”); and
 - Law Review Project (“LRP”).
 - two workshops with members of the committee (13 & 20 March 2013); and
 - public hearings on the Bill (22 & 23 April 2013).
- The NT & FSB response is in the form of the draft “A” Bill, for the Committees consideration.
- This Bill is an URGENT Bill, that will be consistent with coming Twin Peaks.

Background to public consultations on the Bill

- The Bill was approved by the Minister of Finance and Cabinet on 22 February 2012 & released for public comment on 9 March 2012.
- The comment period was extended from 13 April 2012 to 2 May 2012, to accommodate stakeholder requests for an extension.
- A total of 35 submissions were received during the first 2012 public comment process. Each submission was thoroughly considered by the NT & FSB.
- In May 2012, the NT also held an information session with key industry stakeholders including the ASISA, BASA, Institute of Retirement funds and SAIA. Presentations also made to NEDLAC public finance chamber, including the labour constituency.
- In September 2012, the Bill was tabled in Parliament. Takes into account the comments received during consultation process and 35 submissions received.
- In November: NT first briefing on the Bill to the Standing Committee on Finance
- On 13 & 20 March 2013, NT held two workshops with committee members
- Public hearings on the Bill were held on 22 & 23 April 2013.

Background to the Financial Services Laws General Amendment Bill, 2013

- The Bill is urgent as it addresses:
 - Gaps identified by the **IMF/World Bank FSAP** (Fin Sector Assessment Program) to adhere to international standards for financial regulation.
 - Some gaps identified through 2012 peer review by Financial Stability Board.
 - Aligning financial sector legislation with the new **Companies Act**.
 - Ensuring higher consumer protection standards and removing duplication in terms of **Consumer Protection Act**.
 - Dealing with **mergers** in non-banking fin sector.
 - To ensure adequate **emergency powers** to deal with systemic risks to the financial system.
- Many of the gaps were noted in the policy paper “*A Safer Financial Sector to Serve SA better.*”
- The Bill reforms current legislation, and will be consistent with new-order Twin Peak legislation, as well as the TRANSITION into the new system.

Background reminder on Bill

- Making financial regulators/supervisors like Fin Services Board (FSB) and Banking Supervision Dept. much STRONGER, more INTRUSIVE and much TOUGHER – it is meant to be DRACONIAN in line with G20 commitments
- Re-organisation to the Prudential Regulatory Authority in the SARB and transforming the FSB into a new MARKET CONDUCT REGULATOR
- Regulators will need to be protected from legal liability when they act
- Financial Institutions will be held to HIGHER standards on CONSUMER PROTECTION, Market Conduct, Capital Reserves, Liquidity etc.
- Financial Institutions will also have to continue to meet ACCESS targets, as agreed in the Financial Sector Charter

KEY THEMES ARISING FROM PUBLIC SUBMISSIONS AND WORKSHOPS

Key issue 1: Limitation of liability (clause 67)

FSB limitation of liability

- During the public hearings in April 2013, submissions on this section were made to the committee by ASISA, SAIA and BASA.
- NT recommends that the provision be retained as it is in the tabled version of the Bill
- The initial Bill that was circulated for public comment in March 2012 proposed to delete the words “***bona fide, but not grossly negligent***” from the FSB Act. The provision has been amended to address public comments received during the initial consultation process.
- Currently in the tabled Bill the provision provides-
 - “No person shall be liable for any loss sustained by, or damage caused to, any other person as a result of anything done or omitted by that person in the *bona fide* [, **but not grossly negligent,**] exercise of any power or the carrying out of any duty or the performance of any function under or in terms of this Act”
 - Proposal to retain “bona fide” and delete “but not grossly negligent”
 - Consistent with international practice & other regulatory statutes (e.g. Australia, SA SARB & Banks Act and Insurance Core Principles)
 - Affords regulators legal protection, provided powers were exercised in good faith.



Key issue 2: Policyholder Protection Rules (clause 102 & 140)

- During the public hearings in April 2013, submissions on this section were made to the committee by the SAIA and the LRP.
- NT strongly supports the clauses providing for the Registrar to make policyholder protection rules, but in response to submissions received in the public hearings, proposes that the sub-clauses relating to the emergency publication of rules be deleted.
- This approach is consistent with international standards (IAIS ICP 19) and approaches adopted in other jurisdictions.
- The provisions are not intended to enable rules to be made that would only apply to a single insurer or insurance policy. Minor amendments are proposed to a couple of provisions to ensure that this is completely clear.
- The NT is of the view that the provisions are consistent with Constitutional requirements relating to the delegation of powers to make subordinate legislation
- We also provide to the committee the Constitutional Court judgment in *Barkhuizen v Napier*, which examined the Constitutionality of a provision in a short-term insurance contract.

Key issue 3: Delegation of subordinate legislative powers by Parliament

- The Constitutional Court in the case of *Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others* and subsequent cases have recognised the legitimacy and necessity of delegating powers to make subordinate legislation within certain parameters.
- It also is permissible for powers to make subordinate legislation to be delegated to a regulatory body or official, again within certain parameters
- Careful attention has been given in the Policyholder Protection Rules provisions to delineate clear parameters and to provide guidelines, and to provide for appropriate Parliamentary oversight.
- The provisions have been drafted in accordance with the fundamental rule that law making is the function of Parliament and that the purpose of rules is a subordinate one, namely to give effect to the principles and policies set out in the law and not to create new law.

Key issue 4: Re-assigning of powers of the Minister and the Registrar in certain instances

- Members of the committee expressed concern that by removing the requirement to secure the Minister and Court approval for certain actions, this would place too much power with the Registrar.
- The NT is of the view that it is appropriate that these powers be provided to the Registrar.
- Authorising the Registrar to prohibit an insurer from carrying on insurance business without securing the prior approval of the Minister is –
 - consistent with the exiting authorisation afforded to other Registrars to withdraw registrations and licences under legislation administered by the FSB;
 - consistent with the IAIS ICPs that calls for the independence of supervisors;
 - practical as the Registrar that is responsible for the continued supervision of insurers is best placed to determine when such a step is necessary; and
 - subject to the potential recourse to the Appeal Board and Review to the High Court.

Key issue 4: Re-assigning powers of the Minister and the Registrar in certain instances ...

- ***Long-term Insurance Act: Removal of the necessity to obtain a court order in respect of the transfer of long-term insurance business***
 - aims to align the process for the approval of the transfer of insurance business from one insurer to another with the process as set out in the Short-term Insurance Act.
 - will allow for a less lengthy and costly process without negatively impacting policyholders.
 - only applies where an insurer requests a transfer. The Registrar cannot instruct that such a transfer takes place.
 - is consistent with the IAIS ICP 6.10 that requires the transfer of all or a part of an insurer's business to be subject to approval by the supervisor.

Key issue 5: FSB On-site visit powers

- The NT, subsequent to the tabling of the Bill and due to deliberation by the Portfolio Committee on Finance (the Committee) in respect of on-site visit powers, undertook to amend, where appropriate, the proposed provisions to align with the approach adopted in the Credit Ratings Services Act, 2012 (No. 24 of 2012). Therefore, the current proposed amendments to the relevant provisions in the tabled Bill.
- NT proposes to consolidate the on-site visit powers in the Financial Institution (Protection of Funds) Act, 2001 (FI Act). This will ensure alignment of these powers across the FSB.
- To ensure alignment across all FSB legislation it was deemed appropriate to also amend the current provisions of the Financial Markets Act, 2012 (No. 19 of 2012), as well as the Credit Ratings Services Act, 2012 (No. 24 of 2012). The empowering provision to conduct such visits and to instruct inspections remains in the sectors specific laws.

Key issue 5: FSB On-site visit powers...

- The proposed chapter to be included in the FI Act are generally consistent with the approach adopted by the Committee in the Credit Rating Services Act, 2012 but differ slightly in the following respects:
 - additional safeguards to constrain the Registrar from intruding into the personal domain of the regulated person;
 - an additional duty on the Registrar to conduct on-site visits with strict regard to decency and good order;
 - the protection of the regulated person's right to legal professional privilege;
 - greater clarity as to the Registrar's right of access to documents/information of the regulated entity; and
 - greater clarity as to when the Registrar may remove documents of the regulated person and the rights of the regulated person in such an event.

Key issue 7: Effective Consultation

- ASISA, SAIA and BASA commented that given the repeal of advisory committees and the additional powers afforded to the FSB, these powers must be proportionally balanced with an appropriate and robust process of consultation. ASISA supported the provision for an enabling Code of consultation.
- NT agrees with the comments received on this clause. Accordingly, clause 63 has been amended to oblige the FSB to prescribe a code of norms and standards for consultation. It explicitly provides for the types of consultation principles that the Code must address.
- A draft Code setting out some of the key principles is provided to give a sense of what the finalised Code is intended to cover.

Key issue 8: Publication on the FSB website vs *Government Gazette* , and functionality/usability of the FSB official website

- ASISA, SAIA and BASA supported the publication of matters on the official website subject to the FSB website being re-developed. However, some concerns were raised that this may be contrary to the Interpretation Act, 1957 and impede accessibility to documents so published.
- The NT and FSB note the concerns. The FSB has committed to ensuring that the FSB website concerns are addressed.
- The NT will delay the coming into operation of relevant provisions of the Bill until the accessibility and usability of the official website satisfy the requirements that will be stipulated in the accordance with the Code of Consultation.
- The provisions in the Bill are consistent with the Interpretation Act, 1957. All subordinate legislation to continue to be published in the *Government Gazette*, in accordance with section 16 of the Interpretation Act, and will also be published on the FSB official website to promote accessibility.
- The Code of Consultation will address the issue of appropriate stakeholder consultation and accessibility to documentation.

MATERIAL AMENDMENTS PROPOSED IN RESPECTIVE ACTS

Material amendments proposed in the Pension Funds Act

- **Commencing of business (Clause 5):** Every pension fund must, prior to commencing any pension fund business be provisionally or finally registered.
- **Trustee fiduciary duty (Clause 9):** Trustees have a fiduciary duty to members and beneficiaries in respect of accrued benefits or any amount accrued to provide a benefit, as well as a fiduciary duty to the fund, to ensure that the fund is financially sound and is responsibly managed and governed in accordance with the rules .
- **Delegation of Principal Officers functions (Clause 12):** The principal officer may, in writing and in accordance with a system of delegation set out in the rules, delegate any of the principal officer's functions under this Act and the rules of the fund to the deputy principal officer, subject to conditions that the principal officer must determine.

Material amendments proposed in the Pension Funds Act...

- **Fund exercising control (Clause 33):** A fund shall not without the prior approval of the registrar, directly or indirectly, acquire or hold shares or any other financial interest in another entity which results in the fund exercising control over that entity.
- **Inspections and Onsite visit powers (Clause 35):** The registrar may conduct an on-site visit under Chapter 1A of the Financial Institutions (Protection of Funds) Act 2001; or instruct an inspector to conduct an inspection under the Inspection of Financial Institutions Act, 1998.
- **Undesirable business practice (Clause 36):** The registrar may declare that a specific practice or method of conducting business is unacceptable, irregular or undesirable and that such fund, administrator or person must refrain from conducting such practice or method of conducting business.

Material amendments proposed in the Pension Funds Act...

- **Division of pension interest (Clause 52):** any amount assigned from such benefit or individual reserve to a non-member spouse in terms of a decree granted under section 7(8)(a) of the Divorce Act, 1979 or in terms of any order made by a court in respect of the division of assets of a marriage under Islamic law pursuant to its dissolution.
- Associated deletion of definition of non-member spouse.

Material amendments proposed in the FSB Act

- **Code of norms and standards for consultation (Clause 63):** A Code of norms and standards for consultation for the board and Registrars as referred to in Financial Services Board Legislation, which must incorporate specific principles.
- **Utilisation and disclosure of information and co-operation (Clause 66) (amending section 22 of the FSB Act)**
- The NT proposes an amendment to section 22 of the FSB Act to appropriately provide for the sharing of information and co-operation with other regulators, in line with the framework set out in the Protection of Personal Information Bill that will soon be enacted by the NCOP.
- Other consequential amendments repealing provisions in other pieces of FSB legislation that currently provide for information sharing and co-operation with other regulators are proposed, so that section 22 of the FSB Act, as amended, will apply to all of the FSB Registrars.

Material amendments proposed in the Insurance Acts

- **Inspections and Onsite visit powers (Clause 72 & 114):** The registrar may conduct an on-site visit under Chapter 1A of the Financial Institutions (Protection of Funds) Act 2001; or instruct an inspector to conduct an inspection under the Inspection of Financial Institutions Act, 1998.
- **Policyholder Protection Rules (Clause 102 & 140):** To provide for norms and standards with which policies, long-term insurers or types of long-term insurance business must comply; for standardised wording, definitions or provisions that must be included in policies; and ensure that Rules may apply generally; or be limited in application to a particular kind or type of policies, long-term insurers or long-term insurance business.

Material amendments proposed in the Inspections of Financial Institutions Act

- **Disclosure to certain affected parties (Clause 152):** If the registrar has reason to believe that an offence or irregularity has been committed relating to the affairs of an institution inspected under this Act; or an institution so inspected is in an unsound financial condition, he or she may convey any information obtained during an inspection to relevant affected stakeholder as listed.
- **New amendment to section 11 of the Act:**
- To insert a new paragraph (c) “any person, when it appears after considering the outcome of an inspection, that such person was knowingly a party to the carrying of the affairs of the institution in a manner that constituted an irregularity, non-compliance or contravention.”

Material amendments proposed in the Financial Institutions (Protection of Funds) Act

- **On-site visits (Clause 160):** To insert a new chapter relating to onsite visits
- **Curators (Clause 162):** The curator acts under the control of the and in accordance with guidelines prescribed by the registrar by notice in the *Gazette*, and the curator may apply to that registrar for instructions with regard to any matter arising out of, or in connection with, the control and management of the business of the institution. The curator must furnish the registrar concerned with such reports or information concerning the affairs of the institution as the registrar may require.
- **Statutory management (Clause 162):** the registrar may, by agreement with a financial institution and without the intervention of a court, appoint a statutory manager for that financial institution.
- **Recovering Costs (Clause 170):** Any payment received by the board pursuant to an administrative sanction must, after recovering costs, and subject to subsection (2), exclusively be utilised for purposes of consumer education or the protection of the public.

Inspection and Onsite visit power amendments

- “ The registrar may conduct an on-site visit under Chapter 1A of the Financial Institutions (Protection of Funds) Act 2001; or instruct an inspector to conduct an inspection under the Inspection of Financial Institutions Act, 1998”
- **Amendment to the Financial Advisory & Intermediary Services Act: (Clause 177)**
- **Amendment to the Collective Investment Schemes Control Act (Clause 213)**
- **Amendment of Financial Markets Act (Clause 257)**
- **Amendment to the Credit Rating Services Act (Clause 260)**

Conclusion

- Financial Services Laws General Amendment Bill deals with **URGENT** legislative requirements.
- Bill is extensive, and has elicited many public comments (Bill is urgent as need to commit for peer review and to align with existing legislation)
- The Bill should not be confused with coming Twin Peaks legislation, which will be implemented over the next few years.
- This Bill will ensure consistency in the transition period to Twin Peaks, as current sector legislation will still apply over the next five years, until replaced by new-order sector legislation.

Structure of NT supporting response documents

- Supporting Annexures are attached as follows:
 - **Annexure 1:** Financial Services Laws General Amendment “A” Bill
 - **Annexure 2:** Financial Services Laws General Amendment “B” Bill
 - **Annexure 3:** Pension Funds Act response matrix
 - **Annexure 4:** Financial Services Board Act response matrix
 - **Annexure 5:** Insurance Act response matrix
 - **Annexure 6:** Inspection of Financial Institutions Act response matrix
 - **Annexure 7:** Financial Institutions (Protection of Funds) Act response matrix
 - **Annexure 8:** Financial Advisory and Intermediary Services Act response matrix
 - **Annexure 9:** Collective Investment Schemes Control Act response matrix
 - **Annexure 10:** Draft norms and standards for consultation

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Thank You