ANNEXURE TO ASISA SUBMISSION TO THE PARLIAMENTARY STANDING COMMITTEE ON FINANCE: FINANCIAL SECTOR REGULATION BILL, 2015 [b 34-2015]

Extract from Memorandum from G M Budlender SC and C de Villiers dated 15 November 2015

" Ex parte:

ASSOCIATION FOR SAVINGS AND INVESTMENT SOUTH AFRICA

In re:

FINANCIAL SECTOR REGULATION BILL - VARIOUS CONSTITUTIONAL AND ADMINISTRATIVE LAW ISSUES

MEMORANDUM

Furnished to:

ENSafrica

Ref: Julius Oosthuizen/Monique Maree

G M BUDLENDER SC

C DE VILLIERS

Chambers

Cape Town

15 November 2015

Introduction

1. Consultant is the Association for Savings and Investment South Africa ("*ASISA*").

2. Our instructing attorneys furnished ASISA with a memorandum dated 1 June 2015 dealing with constitutional and administrative law aspects of the draft Financial Sector Regulation Bill, 2014 ("*the 2014 draft bill*").[1]

3. Thereafter, ASISA submitted comments to the National Treasury in respect of the 2014 draft bill.

4. National Treasury has released a document entitled "*Comments received on the second draft bill published by National Treasury for comments on 11 December 2014*." It reflects, in tabular form, the submissions received, the relevant clause of the 2014 draft bill, and the decision of National Treasury in that regard ("*the Response*").

5. On 27 October 2015 the Financial Sector Regulation Bill was tabled in Parliament ("*the Bill*").[2] Written submissions on the Bill are due by 16 November 2015. Public hearings are scheduled to be held on 18 and 24 November 2015.

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1 Dated 10 December 2014.

2 [B34-2015].

6. We have been requested to advise ASISA whether the issues raised in the memorandum of 1 June 2015 have been adequately addressed in the Bill. We are requested also to consider section 266(1) of the Bill,[3] which addresses the liability of members of the governing body of a financial institution. We deal also with issues which arise from the redrafting of the relevant sections of the Bill.

7. Given the time constraints for ASISA to submit written submissions to Parliament, we have prepared the memorandum in a form in which we hope will facilitate the incorporation of key aspects into ASISA's broader submissions to Parliament on the Bill as a whole.

The principal issues in respect of the 2014 draft bill

8. The Bill establishes the Prudential Authority and the Financial Sector Authority ("*the Regulators*").[4] The Bill specifies the objects and functions of each of the Regulators.

9. The core issue raised in the memorandum on the 2014 draft bill was the discretionary powers granted to the Regulators to make legislative instruments.

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3 Strictly speaking, these are more correctly referred to as "clauses" rather than as "sections". For the sake of convenience we refer to them as sections.

4 Sections 32 and 56 respectively.

10. Those legislative instruments were defined as constituting subordinate legislation. The bill provided that they could override financial sector laws, including primary legislation made by Parliament.

11. The 2014 draft bill did not stipulate whether the legislative instruments would constitute administrative action in terms of PAJA. It was therefore not clear what remedies would be available to persons who are aggrieved by the content of the instruments.

12. In addition, the 2014 draft bill empowered the Regulators to provide for the retrospective application of the standards; limited the liability of officials for actions taken in good faith; and obliged financial institutions to adhere to interpretation rulings by the Regulators, until a court gave a different interpretation.

13. ASISA pointed to the need for appropriate checks and balances on the exercise of the Regulators' powers to make the legislative instruments. It also proposed that all legislative instruments which will be akin to national legislation should go through a parliamentary process before they become effective.

Overview of National Treasury's response

14. It is apparent from the Response that National Treasury has attempted to address concerns raised by ASISA and by others such as the JSE and BASA which raised similar issues.

15. Broadly speaking, the decisions made by National Treasury and the corresponding proposed changes in the Bill reflect the following:-

15.1 The Regulators' powers in respect of the making of standards are not of a legislative nature, and do not constitute subordinate or delegated legislation. The Bill now refers to the making of regulatory instruments (as opposed to legislative instruments). Those instruments are no longer defined as constituting subordinate legislation (there are some inconsistencies in the Response which we discuss below). Although this is not stated explicitly, the intention appears to be that the making of the regulatory instruments will constitute administrative action under PAJA;

15.2 regulatory instruments are to be submitted to Parliament before they come into operation;

15.3 legislative instruments cannot override financial sector Acts of Parliament, but can (in the event of inconsistency) override or "trump" subordinate legislation made under financial sector Acts;

15.4 the Regulators will not have the power to make regulatory instruments apply retrospectively.

16. We now deal in more detail with how the matters raised by ASISA have been addressed.

Regulatory instruments and trumping of financial sector laws

17. Section 1(3) of the 2014 draft bill provided that "*if there is an inconsistency between a provision of this Act and a provision of another financial sector law or the National Payment System Act, the provisions of this Act prevail*."

18. Given the definitions of "*this Act*" and "*legislative instruments*" in the 2014 draft bill, the effect of section 1(3) was that legislative instruments issued by a Regulator under the bill would, in the event of inconsistency, override both the original legislation (Act of Parliament) referred to in

Schedule 1 of the Bill, and any subordinate legislation which may have been promulgated in terms thereof.[5]

19. The memorandum recommended that:-[6]

19.1 the 2014 draft bill be amended so as to make it clear that (i) the provisions of the Bill itself will prevail over conflicting provisions of any other original legislation contemplated in Schedule 1 of the Bill, and (ii) the legislative instruments in terms of the Bill will prevail over the conflicting provisions of any legislative instruments issued in terms of such original legislation;

19.2 this could be achieved by amending the definitions of "*this Act*" and "*financial sector laws*" respectively, to exclude any reference to legislative instruments, and including a further provision in section 1(3) to encapsulate the recommendations under item (ii) above.

20. The Bill now uses the term "*regulatory instrument*"[7] instead of "*legislative instrument.*" The Response reflects, as decisions, that:-

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5 Para 3.2 of the memorandum.

6 Para 3.9 of the memorandum.

20.1 regulatory instruments, as delegated legislation, cannot and will not trump the provisions of principal legislation (the financial sector laws);[8]

20.2 if regulatory instruments made under the Bill are inconsistent with existing regulatory instruments made under other financial sector laws, the new regulatory instruments will prevail.[9]

21. Clause 9 of the Bill deals with inconsistencies between the Bill (Act) and other financial sector laws. It provides as follows:

"*9. (1) In the event of any inconsistency between a provision of this Act and a provision of another Act that is a financial sector law, the provision of this Act prevails.*

(2) In the event of any inconsistency between a provision of a Regulation or a regulatory instrument made in terms of this Act, and a provision of a Regulation or a regulatory instrument made in terms of this Act, and a provision of a Regulation or a regulatory instrument made in terms of a specific financial sector law, the provision of the

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7 Chapter 7 of the Bill deals with regulatory instruments.

8 Responses to ASISA, pp.129, 130 and 131.

9 Response to ASISA, p.130.

Regulation or regulatory instrument made in terms of this Act prevails."

22. It can be contended that Clause 9(1) does not give effect to the decision that regulatory instruments will not trump the financial sector laws. That is because the definition of "*this Act*" includes the Regulations and regulatory instruments made in terms of this Act.[10] Similarly, the definition of "*financial sector law*" includes "*this Act*" as well as regulations and the regulatory instruments made in terms of the Act.

23. Section 1 of the Bill provides definitions which are to apply *"unless the context indicates otherwise"*. It can be argued with some force that as section 9 clearly distinguishes between *"this Act"* (section 9(1)) and Regulations and regulatory instruments *"made in terms of this Act"* (section 9(2)), the term "this Act" in section 9(1) is intended to refer only to the Act itself. The section does appear to draw a distinction between the Act itself, and Regulations or instruments made in terms of the Act. However, it is desirable that the Bill be amended to clarify the matter and put this beyond doubt.

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[10] Section 1.

Submission of regulatory instruments to Parliament

24. As noted above, ASISA proposed that regulatory instruments should go through a Parliamentary process before becoming effective.[11]

25. The Response reflects, as a decision, that "*Draft regulatory instruments must also be submitted to the National Assembly prior to their finalization and publication.*" [12]

26. A number of issues arise in this regard. We first deal with the broad legal framework applicable to Parliamentary oversight of delegated or subordinated legislation, and then consider the specific proposed provisions.

The legal framework

27. The Constitution of the Republic, 1996 ("*the Constitution*") makes provision for parliamentary oversight of delegated legislation.

28. In terms of section 55(2) of the Constitution, the National Assembly must provide for mechanisms – (a) to ensure that all executive organs of state in the national sphere of government are accountable to it; and (b)

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11 ASISA comment, p.134.

12 Pp. 128 – 129.

to maintain oversight of (i) the exercise of national executive authority, including the implementation of legislation; and (ii) any organ of state.

29. Section 101(3) of the Constitution provides that proclamations, regulations, and other instruments of subordinate legislation must be accessible to the public. In terms of section 101(4), national legislation may specify the manner in which, and the extent to which, instruments mentioned in subsection (3) must be (a) tabled in Parliament; and (b) approved by Parliament.

30. No comprehensive national legislation dealing with this matter has been passed. However, that does not mean that no subordinate legislation has to be tabled in, or approved by, Parliament. That depends on the terms of the particular authorising statute. Various statutes include provisions dealing with the submission of regulations to Parliament. They vary in their content. Examples include the following:-

30.1 In terms of section 75(6)(a) of the National Road Traffic Act 93 of 1996, before the Minister makes any regulation, he or she must cause a draft of the proposed regulations to be referred to Parliament for comment;

30.2 In terms of section 38(2) of the Criminal Law Sexual Offences and Related Matters Act 32 of 2007, any regulation made in terms of section 39(2) must be submitted to Parliament at least 30 days before publication in the *Gazette*.

30.3 Before making any regulations under the national Environmental Management Act 107 of 1998, the Minister must publish a notice in the Gazette setting out the draft regulations and inviting written comments, and must consider all comments received. The Minister must 30 days before the final publication of the regulations, table them in Parliament.[13]

30.4 Certain regulations made in terms of PAJA must, before publication in the *Gazette*, be submitted to Parliament; and certain others must, before publication in the *Gazette*, be approved by Parliament.[14]

The provisions of the Bill

31. Section 100 of the Bill provides as follows:

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13 Section 47. Similar requirements apply to the making of regulations by an MEC.

14 Section 10(4).

"*A maker that makes a regulatory instrument must submit to the National Assembly, within 14 days after the regulatory instrument is made-*

(a) a copy of the regulatory instrument;

(b) a statement explaining the need for, and the intended operation of, the regulatory instrument; and

(c) *a statement of the expected impact of the regulatory instrument.*"

32. Section 103 deals with the commencement of regulatory instruments. Section 103(1) provides that a regulatory instrument may be published in the Register, after the regulatory instrument has been submitted to the National Assembly as required in terms of section 100, and a period of 30 days has elapsed, when Parliament is in session.

33. In terms of section 103(2), a regulatory instrument comes into operation (a) on the date the instrument is published in the Register; or (b) if the instrument provides that it comes into effect on a later date, on the later day.

34. We make the following comments in this regard:

34.1 It is not clear what is to happen when Parliament is not in session. Is section 103(2)(a) intended to refer to a period during which Parliament is in session?

34.2 This procedure does not require the consent or approval of Parliament for the making of the instrument. No mechanism is provided through which Parliament is to consider and express its view of the instrument. The procedure creates only notice to Parliament, and a limited form of public notice. This is not likely to be an effective check on the power.

The status of the regulatory instruments

35. In the memorandum, and in comments made by ASISA and others to National Treasury, concerns were raised in respect of the status or characterization of the legislative instruments (as they were referred to in the 2014 draft bill). These included whether the legislative instruments constitute subordinate or delegated legislation and whether the making of those instruments constitutes administrative action for purposes of PAJA.

36. In the 2014 draft Bill, "*financial sector law*" was defined to include legislative instruments made in terms of this Act. "*Legislative*

instrument" was defined as meaning subordinate legislation made in terms of a financial sector law, including regulations, a prudential standard, a conduct standard, a joint standard, an instrument identified as a legislative instrument in terms of a financial sector law and amendments to those instruments.

37. BASA commented on the 2014 draft bill that, whilst Regulators have always carried out their regulatory functions through directives or guidance/guidelines in addition to laws and regulations, regulation by means of standards is now given "*legislative instrument*" status.

38. Transaction Capital similarly stated that the definition of legislative instrument elevated administrative action to the status of subordinate legislation, and conflated subordinate legislation with matters such as the conduct and prudential standards, which are not properly characterized as subordinate legislation.[15]

39. Although it is not entirely clear from the Response, National Treasury's decision appears to be that the instruments will be of a regulatory nature and will not constitute subordinate or delegated legislation.

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15 P. 33.

40. That was, according to National Treasury, achieved by changing the name of the instruments from "legislative" to "regulatory", and removing the reference in the applicable definition to subordinate legislation.

41. Those changes will, however, not necessarily have the result that a court will not find that the regulatory instruments constitute subordinate or delegated legislation. A number of aspects of the Bill point towards the regulatory instruments constituting subordinate legislation.

42. The Regulators are empowered to make the regulatory instruments in terms of an Act of Parliament. They do so in terms of specific enabling provisions. The regulatory instruments are to be published in the Register, and come into effect from the date of publication in the Register, unless otherwise provided. The Register is effectively equivalent to the *Gazette* for purposes of all financial sector legislation.[16] The standards are of general application (as opposed to applying to individuals). They are thus in various respects very similar to regulations by made a member of the executive in terms of an empowering act.

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[16] See Chapter 17, Part 2 and Section 277(1).

43. The question whether the regulatory instruments constitute administrative action is an important one. It determines what remedies are available to challenge the content of regulatory instruments.

44. The Constitutional Court has not yet finally decided whether, as a general proposition, the making of regulations is administrative action.[17] It does, however, appear that the making of regulations which materially and adversely affect the rights of persons is "*administrative action*" within the meaning of section 33 of the Constitution and PAJA.

45. We note that in *Security Industry Alliance v Private Security Industry Regulatory Authority and Others*,[18] the Supreme Court of Appeal approached the matter on the basis that in the light of the judgment of Chaskalson P in *New Clicks*, it was not in dispute that the decision of the Minister of Police to publish an amendment to regulations on the recommendation of the Private Security Industry Regulatory Authority

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17 See *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)* 2006 (2) SA 311 (CC) ("*New Clicks*"). Chaskalson P and O'Regan J held that the making of regulations is generally administrative action. Ngcobo J, Langa DCJ and Van der Westhuizen J did not decide this general question, but held that the making of this particular regulation constituted administrative action. Sachs J held that PAJA is not generally applicable to the making of subordinate legislation, but that it does apply to the particular regulation. Moseneke J (Madala, Mokgoro, Skweyiya and Yacoob JJ concurring) assumed for purposes of his judgment, but refrained from deciding, that PAJA applied to the making of the particular regulation.

18 2015 (1) SA 169 (SCA).

constituted administrative action.[19] It seems to us that, strictly speaking, the judgments in *New Clicks* do not support this general proposition.

46. The relevance of this issue is that there are broadly two potential avenues for the judicial review of the making of the regulatory instruments:

46.1 If the making of the regulatory instruments is administrative action, then that action can be judicially reviewed in terms of section 33 of the Constitution and PAJA.

46.2 The making of the regulatory instruments can also be judicially reviewed for compliance with the principle of legality, which is an aspect of the rule of law, a foundational value of our constitutional order. This is possible whether or not the making of those instruments is administrative action.

47. We deal with each in turn.

PAJA grounds of review

48. Section 33(1) of the Constitution provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair. In

[19] At para 15.

terms of section 33(3), national legislation must be enacted to give effect to that right and to provide for the review of administrative action by a court. The national legislation which has been enacted is PAJA.

49. To the extent that the regulatory instruments constitute administrative action, section 6(2) of PAJA provides a number of grounds on which they may be judicially reviewed. The most significant of these are that the action was procedurally unfair; that it was *ultra vires* the empowering provision in the legislation; that irrelevant considerations were taken into account or relevant considerations were not taken into account; and that the action was irrational or unreasonable or otherwise unlawful or unconstitutional.

The principle of legality

50. If the making of the regulatory instruments does not constitute administrative action, this does not mean that they are immune from judicial review. The exercise of all public power must comply with the Constitution and the doctrine of legality, which is part of the rule of law.[20]

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[20] *Albutt v Centre for the Study of Violence and Reconciliation and Others* 2010 (3) SA 293 (CC) at para 49.

51. Legality requires that the functionary acts within the scope of the power which is conferred. It also requires rational decision making. It is a requirement of the rule of law that the exercise of public power must not be arbitrary. Decisions, and the manner of making them, must be rationally related to the purpose for which the power was given. If that is not the case, they are in effect arbitrary and inconsistent with the requirement of rationality.[21]

52. The requirement of rationality sets a lower 'bar' than reasonableness. The Constitutional Court pointed out in *Democratic Alliance*[22] that rationality review is really concerned with the evaluation of a relationship between means and ends: the relationship, connection or link between the means employed to achieve a particular purpose, on the one hand, and the purpose or end, on the other hand. "*The aim of the evaluation of the relationship is not to determine whether some means will achieve the purpose better than others but only whether the means employed are rationally related to the purpose for which the power was conferred*".[23] Once there is a rational relationship, the decision or action is constitutionally permissible.

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21 *Democratic Alliance v President of the Republic of South Africa and Others* 2013 (1) SA 248 (CC) at para 27 and the cases cited there ("*Democratic Alliance*").

22 At para 32.

23 As above.

53. The question whether the making of the regulatory instruments constitutes administrative action will depend on the proper interpretation of the Constitution and PAJA. Given that far-reaching powers and wide discretion are conferred on the Regulators, in our view it is desirable that they be subject to the judicial oversight which applies to administrative action. In our view, a court is likely to find that the making of the regulatory instruments constitutes administrative action.

A Regulator's power to reconsider its own decisions

54. Chapter 6 of the Bill deals with administrative actions. Provision is made for the Regulators to reconsider their own decisions.

55. The general approach of administrative law is that while legislative administrative acts may be changed from time to time, the position is different in relation to other administrative acts: once a functionary has made a decision, it cannot revisit or revoke the decision. This doctrine is referred to as "*functus officio*". The underlying rationale is the need for certainty and finality in administrative decision-making. The doctrine is however not absolute. The law recognises that there are circumstances which justify a departure from this general principle.

56. In the 2014 draft bill, the grounds upon which a Regulator could "correct" its own decision were specified: these were if the decision had been procured by fraudulent, dishonest or any other illegal means; or the information on which the decision was based was so inaccurate that the financial sector regulator would not have taken the decision had it been aware of the actual facts; or the decision was, for any other reason, invalid.[24]

57. Section 94 now creates a broad power to reconsider, which is not limited to those circumstances. The Regulator may reconsider, confirm, alter, substitute or revoke its decision, or end or undo any action taken by it as a result of the decision. It may do so at any time, on its own initiative, or on application by an aggrieved person in terms of section 215.

58. These powers are however qualified by section 94(3): the Regulator may not reconsider a decision on its own initiative without the concurrence of the person affected by the decision, if (a) the person had been notified of the decision at the time that the regulator decided to reconsider the decision and (b) the alteration, substitution or revocation would detract from any right or legitimate expectation that accrued to that person as a result of a decision.

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[24] Section 148.

59. This approach recognises the particular need for certainty and finality where a change would detract from rights or legitimate expectations which were created by the original decision. It is consistent with the approach of the common law.

The Tribunal

60. Chapter 15 regulates the Financial Services Tribunal ("*the Tribunal*"). Although this was not raised in the ENS memorandum, we wish to highlight some important aspects.

The function of the Tribunal

61. The draft 2014 bill made provision for the Tribunal to consider administrative appeals. The decisions of the Tribunal would themselves constitute administrative action. They would in turn be subject to review by the courts under PAJA.

62. Such a bifurcated system of administrative appeals and judicial review is well recognised in constitutional and administrative law. There is a

fundamental difference between administrative appeals and judicial review: [25]

62.1 Administrative appeals address the merits of a decision. The tribunal seized with an appeal steps into the shoes of the original decision-maker and decides the matter anew. The appellate tribunal is an administrative body, and is considered to have the expert knowledge which makes it appropriate for it to decide the merits of the administrative decision in question. There are thus good reasons for the creation of administrative appeals.

62.2 Judicial review is more limited in its function. It addresses the way in which the decision was reached, and whether the decision-maker had the power to make the decision - and not the correctness or justice of the decision. It is a function performed by the courts.

63. This distinction is of fundamental importance, and was reflected in the 2014 draft bill.

64. A different approach has now been adopted in the Bill. The Tribunal will now "*judicially review*" the decisions of a Regulator (and the

[25] See the discussion by Cora Hoexter Administrative Law in South Africa (2ed) from page 66.

Ombud Regulatory Council). The consequence is that there will not be any general right of administrative appeal against a decision of the Regulator or the Ombud Regulatory Council.[26]

The Constitution and functions of the Tribunal

65. The Bill deals in sections 214 to 222 with the composition, method of appointment and powers of the Tribunal. The Tribunal is to have the powers of a court under section 8 of PAJA.

66. In our view, this part of the Bill is fundamentally misconceived. The use of the term "judicial" review appears to suggest that the Tribunal will be a court. [27] That is not the case.[28] The members will not have the structural independence from the executive, and the security of tenure, which is required of judges. There is no appeal to higher courts. The tribunal is not an "independent and impartial tribunal" of the kind contemplated in section 34 of the Constitution. In our view, the state cannot validly establish a tribunal such as this, consisting of "judges" appointed by a Minister, to determine legal disputes between the individual and an organ of state for which the Minister is responsible.

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26 Certain administrative appeals are preserved by section 226(2).

27 We note that, in the Response, National Treasury indicated (as a decision) that the Tribunal is not a judicial body (p.239).

28 In the pre-Constitutional era, the Appellate Division held that the Industrial Court established by the Labour Relations Act 28 of 1956 was not a court: *South African Technical Officials' Association v President of the Industrial Court and others* 1985 (1) SA 597 (A).

67. The wording of this part of the Bill suggests an attempt to replace the courts with the Tribunal. We have no doubt that to the extent that the Tribunal is afforded powers to act as a court by undertaking "judicial" review, and to supplant the powers of the ordinary courts under PAJA, the Bill will be held to be inconsistent with the Constitution.

68. In our view, the enactment of these provisions will have one of two results: either

68.1 the provisions will be held to be inconsistent with the Constitution; or

68.2 the provisions will be interpreted in such a manner as not to exclude judicial review by the courts – in other words, there will still be a PAJA review by the courts of decisions made by the Tribunal.[29]

Types of decisions subject to review and grounds for review

[29] Some support for this approach can be found in section 91 of the Bill - PAJA applies to any administrative action taken by a financial sector regulator; and section 222(5) – section 222 does not affect any other right that a person may have. In the Response, National Treasury indicated (as a decision) that the right of a person to approach the High Court is not affected by the chapter dealing with the Tribunal (p.237). See also *South African Technical Officials' Association v President of the Industrial Court and others* 1985 (1) SA 597 (A).

69. Section 231(1) provides that a person aggrieved by a "decision" of a financial sector regulator or the Ombud Regulatory Council may apply to the Tribunal for a "judicial review" on the grounds that the decision was not lawful, reasonable or procedurally fair.

70. These grounds of review are narrower than those provided for in PAJA. This appears to be inconsistent with section 91, which states that PAJA applies to any administrative action taken by a regulator.

71. Section 213 provides that, for the purposes of Chapter 15, "decision" means a decision taken by a financial sector regulator <u>in relation to a specific person</u>. In other words, it does not include an administrative decision of a legislative nature, which applies more broadly. This suggests that judicial review by the courts will continue to apply to legislative administrative decisions. "

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<u>" Interpretation rulings</u>

78. Chapter 12 (Enforcement Powers), Part 1 of the 2014 draft bill dealt with Interpretation Rulings.

79. Clause 131(1) and (2) provided as follows:

" *(1) A financial sector regulator may issue an interpretation ruling on the interpretation of a financial sector law, to facilitate the consistent and uniform application of a financial sector law.*

(2) A financial institution must adhere to the interpretation ruling, until such time as a court attaches a different interpretation to the subject matter of that interpretation ruling."

80. In the memorandum, two issues were raised in this regard:[30]

a. The first was that the provision violates the separation of powers principle, in that it is the judiciary's role to interpret legislation.

b. The second was that it arguably constitutes an unconstitutional abdication by Parliament of its law-making powers. It is an accepted principle in our law that delegated legislation (such as regulations) cannot be used to interpret the Act under which they were promulgated. In this case, instruments which fall short even of delegated legislation (interpretation rulings) would be used to interpret primary legislation.

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30 Paragraphs 6.8 - 6.9.

81. ASISA raised these issues in the comments which it submitted to National Treasury.[31] Similar comments were made by others, including BASA,[32] Transaction Capital[33] and Standard Bank.[34]

82. Broadly, National Treasury's response is that the rulings are not regulatory instruments: the provisions clarify the purpose of the rulings, and recognize that the interpretation of a court prevails. There is precedent in the use of "practices generally prevailing" and binding general rulings in the Tax Administration Act, and the provisions have been revised to clarify that the responsible authority must follow a process of consultation before issuing the ruling, and the binding rulings must be published.[35]

83. The section in the 2014 draft bill dealing with interpretation rulings has now been substantially amended.[36] We highlight a few issues below.

84. First, a new concept of "*guidance notices*" has been introduced.[37] Those are for information, and are not binding.[38]

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31 Response p. 212.

32 Response p. 210.

33 Response p. 211.

34 Response p. 212.

35 Response pp. 210-213.

36 Sections 140 and 141.

37 Section 140.

85. Second, the scope of the interpretation rulings has been narrowed. In the 2014 draft bill, a financial sector regulator was broadly empowered to issue an interpretation ruling in respect of a financial sector law.[39] In terms of the Bill, binding interpretations may be issued on "*the application of a specified provision of that law, in circumstances specified in the interpretation*."[40]

86. Third, the issue of which regulator may issue a binding interpretation of a financial sector law has been clarified. The Bill now specifies that it is "*the responsible authority for a financial sector law*" which may issue such rulings.[41] This prevents a Regulator from issuing interpretation rulings on financials sector laws which for which it is not responsible.

87. There can be no doubt that it would advance the purposes of the Act, and promote predictability and consistency, if the Regulator were to issue guidance notes on how it interprets particular instruments. The difficulty arises from in effect giving those interpretations the force of law, unless and until, they are reversed by a court.

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38 Section 140(2).

39 Section 131(1).

40 Section 141(1).

41 Section 5, read with the definition of "*responsible authority*".

88. In our opinion, the concept of a "binding interpretation" remains constitutionally problematic. "

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" <u>Section 266: liability of directors</u>

90 Part 3 of Chapter 17 deals with offences and penalties. A new section has been introduced dealing with vicarious liability for offences and contraventions. It provides as follows:

"(1) If *a financial institution commits an offence in terms of a financial sector law, each member of the governing body of the financial institution also commits the offence and is liable on conviction to a fine not exceeding the maximum amount of a fine that may be imposed for the commission of the offence, unless it is established that the member took all reasonably practicable steps to prevent the commission of the offence.*

(2) If a key person of a financial institution engages in conduct relating to the provision of financial products or financial services that amounts to a contravention of a financial sector law, the financial institution must be taken also to have engaged in the conduct

unless it is established that the financial institution took all reasonably practicable steps to prevent the conduct."

91 A member of ASISA has raised the concern that the effect of the section is that a member of the governing body (which includes a director of a company) is presumed to be guilty unless "*it is established that the member took all reasonably practical steps to prevent the commission of the offence*". The view was expressed that this section imposes "*strict criminal liability*" and violates the presumption of innocence in section 35(3)(h) of the Constitution.

92 In *S v Coetzee & Others*,[42] the Constitutional Court struck down section 332(5) of the Criminal Procedure Act 51 of 1977 as inconsistent with the interim Constitution. The section provided as follows:-

"*When an offence has been committed, whether by the performance of any act or by the failure to perform any act, for which any corporate body is or was liable to prosecution, any person who was, at the time of the commission of the offence, a director or servant of the corporate body shall be deemed to be guilty of the said offence, unless it is proved that he did not take part in the commission of the offence and that he could not have prevented it, and shall be liable to prosecution therefor,*

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42 1997 (3) SA 527 (CC).

either jointly with the corporate body or apart therefrom, and shall on conviction be personally liable to punishment therefor."

93 The court held that the reversal of the onus violated the presumption of innocence in terms of section 25(3)(c) of the interim Constitution (the equivalent of section 35(3)(h) of the Constitution) and that it was not a justified limitation of that right. The effect of the provision was to permit the conviction of the accused despite the existence of a reasonable doubt as to his or guilt. As Langa J pointed out, the fundamental objection to the reversal of the onus is that it offends against the principle of a fair trial, which requires that the prosecution establish its case without assistance from the accused. [43]

94 On this basis, it appears that section 266 of the Bill is similarly inconsistent with the Constitution and invalid.

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[43] At [40].

CONCLUSION

95 A number of concerns which were raised about the draft bill have now been addressed in the Bill. However, there continue to be significant constitutional and administrative law issues which require to be addressed. In this memorandum we have sought to identify those which seem to be most pressing. ”

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15 November 2015