

## **NATIONAL TREASURY'S PROPOSED AMENDMENTS**

REPUBLIC OF SOUTH AFRICA

### **SELECT COMMITTEE AMENDMENTS TO**

### **FINANCIAL SECTOR REGULATION BILL**

**[B 34B—2015]**

*(As agreed to by the Select Committee on Finance (National Council of Provinces))*

**3n May 2017**

**[B 34C—2015]**

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## **AMENDMENTS AGREED TO**

### **FINANCIAL SECTOR REGULATION BILL [B 34B—2015]**

#### **CLAUSE 58**

1. On page 41, in line 46, after “agreement” to insert “only”.

#### **CLAUSE 79**

1. On page 50, in line 35, to omit “Chief Executive Officer of the Council for” and to substitute “Registrar of”.

#### **CLAUSE 106**

1. On page 58, in line 4, to omit “and”.
2. On page 58, in line 5, after “customers” to insert “and”.
3. On page 58, after line 5, after sub-paragraph (iv) to insert:
  - (v) principles, guiding processes and procedures for the refusal, withdrawal or closure of a financial product or a financial service by a financial institution in respect of one or more financial customers, taking into consideration relevant international standards and practices, and subject to the requirements of any other financial sector law or the Financial Intelligence Centre Act, including—
    - (aa) disclosures to be made to the financial customer; and
    - (bb) reporting of any refusal, withdrawal or closure to a financial sector regulator.
4. On page 58, from line 23, to omit subclause (5) and to substitute:
  - (5) (a) In relation to a credit provider regulated in terms of the National Credit Act, a conduct standard may only be made in relation to a financial service provided in relation to a credit agreement and matters provided for in section 108.
  - (b) A conduct standard referred to in paragraph (a) may only be made after consultation with the National Credit Regulator.

#### **CLAUSE 129**

1. On page 64, from line 17, to omit subclause (3) and to substitute:
  - (3) In relation to the exercise of the powers in terms of this Chapter by the Council for Medical Schemes in respect of a medical scheme, a reference in this Chapter to—
    - (a) a financial sector regulator or the responsible authority must be read as including a reference to the Council for Medical Schemes;

- (b) the head of a financial sector regulator must be read as including a reference to the Registrar of Medical Schemes appointed in terms of section 18 of the Medical Schemes Act;
- (c) a financial sector law must be read as including a reference to regulatory instruments and to the Medical Schemes Act; and
- (d) a licensed financial institution must be read as including a reference to a medical scheme registered in terms of the Medical Schemes Act or an administrator of a medical scheme approved in terms of the Medical Schemes Act.

## CLAUSE 132

1. To omit the clause and to substitute:

### **Powers to conduct supervisory on-site inspections**

**132.** (1) A financial sector regulator may conduct a supervisory on-site inspection at the business premises of a supervised entity with prior notification to the supervised entity and, if the business premises of a supervised entity is a private residence, with the prior agreement of the occupant of the residence.

(2) The purpose for which a financial sector regulator may conduct a supervisory on-site inspection of a supervised entity is to—

- (a) check compliance by the entity with a financial sector law for which the financial sector regulator is the responsible authority, a regulator's directive issued by the financial sector regulator or an enforceable undertaking accepted by the financial sector regulator;
- (b) determine the extent of the risk posed by the entity of contraventions of a financial sector law for which the financial sector regulator is the responsible authority; and
- (c) assist the financial sector regulator in supervising the relevant financial institution.

(3) (a) A financial sector regulator may determine the time and place of a supervisory on-site inspection, provided that the supervisory on-site inspection must be done at a reasonable time within ordinary business hours.

(b) A financial sector regulator must conduct a supervisory on-site inspection with strict regard to—

- (i) an affected person's right to—
  - (aa) dignity;
  - (bb) freedom and security;
  - (cc) privacy; and
  - (dd) other constitutional rights; and
- (ii) decency and good order as the circumstances require, in particular by—
  - (aa) conducting the supervisory on-site inspection discreetly and with due decorum;
  - (bb) causing as little disturbance as possible; and
  - (cc) concluding the supervisory on-site inspection as soon as possible.

(4)(a) An official of a financial sector regulator, when conducting a supervisory on-site inspection, may do any of the following:

- (i) Request any person who has a specified business document that is relevant to the inspection in his, her or its possession or under his, her or its control to produce that document and examine, make extracts from and copy any business document on the premises;
- (ii) question any person on the premises to find out information relevant to the inspection;
- (iii) give the supervised entity a written directive to produce to the financial sector regulator, at a time and place and in a manner specified in the directive, a specified business document that is relevant to the inspection and is in the possession or under the control of the supervised entity;
- (iv) when a business document is produced as required by a directive in terms of subparagraph (iii), examine, make extracts from and copy the document;
- (v) if, as a result of the inspection, the official or the financial sector regulator suspects on reasonable grounds that a contravention of a financial sector law has occurred or is likely to occur—
  - (aa) give a written directive to the supervised entity or the person apparently in control of the premises to ensure that no person removes from the premises, or conceals, destroys or otherwise interferes with, any business document; or
  - (bb) take possession of, and remove from the premises, a business document for the purpose of preventing another person from removing, concealing, destroying or otherwise interfering with the document.

(b) A directive in terms of paragraph (a)(iii) or (v)(aa) is effective if given to a person apparently in control of the premises.

(c) The financial sector regulator must ensure that the person apparently in control of the premises is given a written receipt for the business documents taken as mentioned in paragraph (a)(v)(bb).

(d) The financial sector regulator must ensure that any business document removed as contemplated in paragraph (a)(v)(bb) is returned to the supervised entity when retention of the business document is no longer necessary to achieve the object of a financial sector law.

(e) The supervised entity from whose premises a document was removed as contemplated in paragraph (a)(v)(bb), or its authorised representative, may, during normal office hours and under the supervision of the financial sector regulator, examine, copy and make extracts from the document.

## CLAUSE 135

1. On page 66, from line 32, to omit subclause (1) and to substitute:

(1) A financial sector regulator may instruct an investigator appointed by it to conduct an investigation in terms of this Part in respect of any person, if the financial sector regulator—

- (a) reasonably suspects that a person may have contravened, may be contravening or may be about to contravene, a financial sector law for which the financial sector regulator is the responsible authority; or
- (b) reasonably believes that an investigation is necessary to achieve the objects referred to in section 251(3)(e) pursuant to a request by a designated authority in terms of a bilateral or multilateral agreement or memorandum of understanding contemplated in that section.

#### CLAUSE 137

1. On page 67, from line 38, to omit paragraph (a) of subclause (1) and to substitute:

- (a) Enter any premises at any time—
  - (i) with the prior consent of—
    - (aa) in the case of a private residence, the occupant of the private residence or the part of the private residence to be entered; or
    - (bb) in the case of any other premises, the person apparently in control of the premises,  
after informing that person that—
      - (AA) granting consent will enable the investigator to enter the premises and for the investigator to subsequently search the premises as referred to in paragraph (b) or (c), and to do anything contemplated in subsection (6); and
      - (BB) he or she is under no obligation to admit the investigator in the absence of a warrant; or
  - (ii) without prior consent and without prior notice to any person—
    - (aa) if the entry is authorised by a warrant; or
    - (bb) with the prior authority of the head of a financial sector regulator or a senior staff member of the financial sector regulator delegated to perform the function, if the head of a financial sector regulator or senior staff member on reasonable grounds believes that—
      - (AA) a warrant will be issued under section 138(1) if applied for;
      - (BB) the delay in obtaining the warrant is likely to defeat the purpose for which entry of the premises is sought; and
      - (CC) it is necessary to enter the premises to conduct the investigation and search the premises as referred to in paragraph (b) or (c), and to do anything contemplated in subsection (6); or
  - (cc) if an investigator believes, on reasonable grounds, that—
    - (AA) a warrant will be issued under section 138(1) if applied for;
    - (BB) the delay in obtaining a warrant or authorisation by the head of a financial sector regulator is likely to

defeat the purpose for which entry of the premises is sought; and

(CC) it is necessary to enter the premises to conduct the investigation and search the premises as referred to in paragraph (b) or (c), and to do anything contemplated in subsection (6); and

2. On page 67, from line 54, to omit subclauses (3) and (4) and to substitute:

(3) An investigator exercising powers in terms of this section must do so with strict regard to—

(a) an affected person's right to—

- (i) dignity;
- (ii) freedom and security;
- (iii) privacy; and
- (iv) other constitutional rights; and

(b) decency and good order as the circumstances require, in particular by—

- (i) entering and searching only such areas or objects as are reasonably required for the purposes of the investigation;
- (ii) conducting the search discreetly and with due decorum;
- (iii) causing as little disturbance as possible; and
- (iv) concluding the search as soon as possible.

(4) An entry or search of premises in terms of this Part must be done, at a reasonable time within ordinary business hours, —

(a) unless the warrant authorising it expressly authorises entry at night; or

(b) in the case of a search contemplated in subsection (1)(a)(ii)(bb) or (cc) if the investigator on reasonable grounds believes that the purpose for which the entry and search is sought, is likely to be defeated by a delay, as close to ordinary business hours as the circumstances reasonably permit.

3. On page 68, in line 4, after “on” to insert “the”.

4. On page 68, in line 10, to omit “in” and to substitute “on”.

## CLAUSE 138

1. On page 68, from line 47, to omit paragraph (b) of subclause (1) and to substitute:

(b) The judge or magistrate may issue a warrant in terms of this section —

- (i) on written application by the investigator setting out under oath or affirmation why it is necessary to enter and investigate the premises; and
- (ii) if it appears to the magistrate or judge from the information under oath or affirmation that—
  - (aa) in the case of an investigation under section 135(1)(a), that there are reasonable grounds for suspecting that a contravention of a financial sector law has occurred, may be occurring or may be about to occur;

- (bb) in the case of an investigation under section 135(1)(b), that there are reasonable grounds to believe that the investigation is necessary to comply with a request referred to in that section.

#### CLAUSE 140

1. To omit the clause and to substitute:

##### **Protections**

**140.** (1)(a) A person who is questioned, or required to produce a document or information, during a supervisory on-site inspection contemplated in section 132, or by an investigator in terms of Part 4 of this Chapter, whether in response to a notice contemplated in section 136, or when an investigator is exercising the powers contemplated in section 137(6)(a)(iii) to (v), may object to answering the question or to producing the document or the information on the grounds that the answer, the contents of the document or the information may tend to incriminate the person.

(b) On such an objection, the official of the financial sector regulator conducting the supervisory on-site inspection or the investigator may require the question to be answered or the document or information to be produced, in which case the person must answer the question or produce the document.

(c) An incriminating answer given, and an incriminating document or information produced, as required in terms of paragraph (b), is not admissible in evidence against the person in any criminal proceedings, except in criminal proceedings for perjury or in which that person is tried for a contravention of section 273 based on the false or misleading nature of the answer.

(2) An official of the financial sector regulator conducting a supervisory on-site inspection or an investigator must inform the person of the right to object in terms of this section at the commencement of the supervisory on-site inspection or the investigation.

#### CLAUSE 160

1. To omit the clause and to substitute:

##### **Designation of financial conglomerates**

**160.** (1) The Prudential Authority may designate members of a group of companies as a financial conglomerate.

(2) A financial conglomerate designated in terms of subsection (1) must include both an eligible financial institution and a holding company of the eligible financial institution, but need not include all the members of the group of companies.

(3) Without detracting from section 3(3) and (4) of the Promotion of Administrative Justice Act, and despite section 3(5) of that Act, before designating members of a group of companies as a financial conglomerate in terms of subsection (1), the Prudential Authority must—

- (a) give the holding company of the eligible financial institution notice of the proposed designation and a statement of the purpose of and the reasons why the designation is proposed; and
  - (b) invite the holding company to make submissions on the matter, and give a reasonable period to do so.
- (4) The Prudential Authority must consult the Financial Sector Conduct Authority in connection with any designation in terms of subsection (1).
- (5) A designation in terms of subsection (1) must be for the purpose of facilitating the prudential supervision of the eligible financial institution.
- (6) In deciding whether to designate members of a group of companies as a financial conglomerate in terms of subsection (1), the Prudential Authority must take into account all relevant considerations, including at least the following:
- (a) The risk to effective prudential supervision of the eligible financial institution from the structure of the group of companies;
  - (b) submissions made by or for the holding company; and
  - (c) any other matters that may be prescribed by Regulation.
- (7) The Prudential Authority may designate members of a group of companies as a financial conglomerate in terms of subsection (1) without having complied, or complied fully, with subsection (3) if it is reasonable and justifiable in the circumstances as contemplated in section 3(4)(a) and (b) of the Promotion of Administrative Justice Act and the delay involved in complying, or complying fully, with that subsection in respect of a proposed action is likely to lead to material prejudice to financial customers, prejudicially affect financial stability or defeat the object of the designation.
- (8) (a) If the Prudential Authority designates members of a group of companies as a financial conglomerate in terms of subsection (1) without having complied, or complied fully, with subsection (3), the holding company of the designated financial conglomerate must be given a written statement of the reasons why that subsection was not complied with.
- (b) The holding company may make submissions to the Prudential Authority within one month after being provided with the statement.
- (c) The Prudential Authority must have regard to the submissions, and notify the holding company, as soon as practicable, whether the Prudential Authority proposes to amend or revoke the designation.
- (9) The Prudential Authority must continually reassess designations made, or any decision not to make a designation, in terms of subsection (1), and consider making a designation or reconsider the terms of any designation made if the Prudential Authority becomes aware of a change in the risk profile of the members of a group of companies or a designated financial conglomerate.
- (10) (a) Without detracting from section 3(3) and (4) of the Promotion of Administrative Justice Act, and despite section 3(5) of that Act, the Prudential Authority may amend or revoke a designation in terms of subsection (1) by notice to—
- (i) the holding company of a financial conglomerate; and
  - (ii) any companies that are not currently designated as part of a financial conglomerate, but which it is proposed to include as part of a currently designated financial conglomerate.
- (b) A notice referred to in paragraph (a) must—
- (i) include a statement of the purpose of and the reasons why the amendment to or revocation of the designation is proposed; and

(ii) invite the entities referred to in paragraph (a) to make submissions on the matter, and give a reasonable period to do so.

(11) The Prudential Authority must publish each designation made in terms of this section, and each amendment and revocation of a designation.

#### CLAUSE 161

1. On page 80, in line 2, to omit “14” and to substitute “30”.

#### CLAUSE 162

1. On page 80, from line 10, to omit subclause (1) and to substitute:

(1)(a) The Prudential Authority may, by notice to a holding company of a financial conglomerate, require the holding company to be licensed in terms of this Act.

(b) A notice referred to in paragraph (a) must—

- (i) include a statement of the purpose of and the reasons why the requirement for the holding company to be licensed is proposed; and
- (ii) invite the holding company to make submissions on the matter, and give a reasonable period to do so.

#### CLAUSE 163

1. To omit the clause and to substitute:

#### **Non-operating holding companies of financial conglomerate**

**163.** (1)(a) The Prudential Authority may, by notice to a holding company of a financial conglomerate, require that the holding company be a non-operating company.

(b) A notice referred to in paragraph (a) must—

- (i) include a statement of the purpose of and the reasons why the requirement for the holding company to be a non-operating company is proposed; and
- (ii) invite the holding company to make submissions on the matter, and give a reasonable period to do so.

(2) A requirement in terms of subsection (1) must be for the purpose of managing more effectively risks to the safety and soundness of the eligible financial institution arising from the other members of the financial conglomerate.

(3) In deciding whether to impose a requirement that a holding company be a non-operating company in terms of subsection (1), the Prudential Authority must take into account all relevant considerations, including at least the following:

- (a) The risks to the safety and soundness of the eligible financial institution arising from the other members of the financial conglomerate;
- (b) submissions made by or for the holding company; and

- (c) any other matters that may be prescribed by Regulation.
- (4) A holding company that is given a notice in terms of subsection (1) must comply with the requirements of the notice.

## CLAUSE 165

1. To omit the clause and to substitute:

### **Directives to holding companies**

**165.** (1) The power of the Prudential Authority to issue a directive in terms of section 143 extends to issuing a directive to the holding company of a financial conglomerate imposing requirements on the holding company to manage and otherwise mitigate risks to the prudent management or financial soundness of an eligible financial institution in the conglomerate arising from other members of the conglomerate.

(2) (a) Requirements that a directive contemplated in subsection (1) may impose include requirements with respect to restructuring the financial conglomerate in accordance with a plan submitted to the Prudential Authority by the holding company, and approved by the Prudential Authority within a period agreed by the Prudential Authority.

(b) The Prudential Authority may only issue a directive imposing requirements with respect to restructuring the financial conglomerate if the Authority is objectively satisfied that another type of directive will not achieve the result sought to be attained by requiring restructuring of the financial conglomerate.

(c) In deciding whether to issue a directive imposing requirements with respect to restructuring the financial conglomerate, the Prudential Authority must take into account all relevant considerations, including at least the following:

- (i) The extent to which the existing structure of the financial conglomerate is hindering or is likely to hinder the effective supervision of the financial conglomerate concerned;
- (ii) whether the restructuring of the financial conglomerate is reasonably necessary and appropriate to remedy impediments to the effective supervision of the financial conglomerate; and
- (iii) submissions made by or for the holding company.

(3) The power of the Financial Sector Conduct Authority to issue a directive in terms of section 144 extends to issuing a directive to the holding company of a financial conglomerate requiring the holding company to ensure that a financial institution in the conglomerate complies with a financial sector law for which the Financial Sector Conduct Authority is the responsible authority.

## CLAUSE 166

1. To omit the clause and to substitute:

### **Approval and prior notification of acquisitions and disposals**

**166.** (1) (a) A holding company of a financial conglomerate may not acquire or dispose of a material asset as defined in prudential standards made for this section, without the approval of the Prudential Authority.

(b) A prudential standard made under this subsection must clearly identify what constitutes a material asset.

(2) The Prudential Authority may not give an approval in terms of subsection (1), unless the Authority is satisfied that the acquisition or disposal will not prejudicially affect –

- (a) the prudent management and the financial soundness of an eligible financial institution within the financial conglomerate;
- (b) the ability of the Prudential Authority to determine –
  - (i) how the different types of business of the financial conglomerate are conducted;
  - (ii) the risks of the financial conglomerate and each person that is part of that financial conglomerate; or
  - (iii) the manner in which the governance framework is organised and conducted for the financial conglomerate.

(3) (a) If the Prudential Authority contemplates refusing to grant approval of an acquisition or disposal referred to in subsection (1), prior to taking a decision, the Prudential Authority must notify the holding company of the proposed refusal to grant approval.

(b) A notice referred to in paragraph (a) must—

- (i) include a statement of the reasons for the refusal to grant approval; and
- (ii) invite the holding company to make submissions on the matter, and give a reasonable period to do so.

(4) In deciding whether to grant or refuse a request for approval in terms of subsection (1), the Prudential Authority must take into account all relevant considerations, including at least the following:

- (a) Whether the acquisition or disposal will not prejudicially affect the matters referred to in subsection (2); and
- (b) submissions made in relation to the application for approval, including any submissions made in response to a request for submissions referred to in subsection (3).

(5) An acquisition or disposal in contravention of subsection (1) is void.

#### CLAUSE 214

1. On page 95, in line 46, to omit “it” and to substitute “the Ombud Council”.

#### SCHEDULE 4

1. On page 138, in item 1 of the Amendments to the Banks Act, 1990, to omit paragraph (j) and to substitute:

(j) by the addition of the following subsections:

“(3) Unless the context otherwise indicates, words and expressions not defined in subsection (1) have the same meaning ascribed to them in terms of the Financial Sector Regulation Act.

(4) (a) Any state-owned company, as defined in section 1 of the Companies Act which—

- (i) is conducting the business of a bank in terms of paragraph (cc) of the definition of “the business of a bank” in subsection (1); and
- (ii) has applied for authorisation to establish a bank in terms of section 12 of this Act, immediately before the commencement of this subsection in terms of section 305 of the Financial Sector Regulation Act, 2017,

and its holding company, are deemed to be public companies for purposes of this Act.

(b) For the purposes of the application of paragraph (a), in the event of any inconsistency between a provision of this Act and a provision of another Act, other than the Financial Sector Regulation Act, 2017, the provision of this Act prevails.”.

2. On page 230, in item 31 of the amendments to the Financial Markets Act, 2012, which amends section 50 of that Act, to omit paragraph (f) and to substitute:

(f) by the insertion after subsection (3) of the following subsection:

“(3A) A central counterparty, in addition to the functions referred to in subsections (1), (2) and (3), must—

- (a) interpose itself between counterparties to transactions in securities through the process of novation, legally binding agreement or open offer system;
- (b) manage and process the transactions from the date the central counterparty interposes itself between counterparties to transactions, becoming the buyer to every seller and seller to every buyer, to the date of fulfilment of the legal obligations in respect of such transactions; and
- (c) facilitate its post-trade management functions.”; and