



**PRESENTATION TO THE SELECT COMMITTEE ON
TRADE AND INDUSTRY, ECONOMIC DEVELOPMENT,
SMALL BUSINESS DEVELOPMENT, TOURISM,
EMPLOYMENT AND LABOUR : EMPLOYMENT EQUITY
AMENDMENT BILL - B14 OF 2020**

22 FEBRUARY 2022

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Presentation Overview



- ❑ Background on the FIA
- ❑ Consultation on Targets
- ❑ Sub-Sector Targets
- ❑ Compliance
- ❑ Fines and Penalties
- ❑ Constitutionality

Annexure A: Proposed amendments

BACKGROUND ON THE FIA – WHO IS FIA ?

The Financial Intermediaries Association of South Africa (“FIA”) is a non-profit trade association, registered in terms of the Companies Act, that represents the interests of advisory businesses in the Financial Services Sector.

The FIA’s 1700 member businesses provide financial advice and risk management to thousands of consumers of financial products on a daily basis.

The FIA’s members specialize in non-life (short-term insurance), employee benefits, financial planning, healthcare and investment management.

The FIA’s members are financial services providers (FSPs) who collectively employ in excess of 45 000 people countrywide.

The benefits of advisory businesses in the economy are as follows:

- Advice is based on the needs and risk profile of consumers
- They help educate the consumer on financial wellness which promotes financial education and literacy
- Advisory businesses stimulate competition in the sector which is good for innovation and growth
- Advisory businesses are the gateway for entrepreneurship in the sector

The FIA is fully committed to transformation, and acknowledges that there is more that can be done in the sector - in particular, at senior management level. The FIA therefore supports the proposed amendments to the EEA but urges the Committee and Parliament to consider the comments that follow in this presentation.

CONSULTATION ON TARGETS



- It is the FIA's understanding that the Department of Labour ("DoEL") has consulted with some sectors with regard to the setting of targets in anticipation of the EEA Bill being passed.
- To date, the FIA has not been consulted in terms of the setting of targets under the EEA Bill. It is the view of the FIA that any consultation thus far does not meet the consultation requirement set in section 15A(2) of the EEA Bill as such consultation may only happen when the EEA Bill is promulgated. The FIA therefore does not agree to any targets set outside of the required consultative process.
- Based on member knowledge and expertise, the FIA can add significant value to the consultation with the DoEL on the setting of sub-sector targets for intermediaries.
- The following aspects are unique to intermediaries and will require specific consideration:
 - The time period to become a fully fledged advisory business in South Africa
 - Mandatory qualifications and accreditation, including specific regulatory exams
 - Additional skills required to ensure the success of businesses
 - Input regarding the complex regulatory landscape
 - An understanding of the various earning models such as fees and commission
 - The barriers to enter / red tape as well as the high start up costs for advisory businesses
 - Levels of literacy in the consumer market
- The FIA is committed to the new social consensus on eradicating poverty, inequality and creating jobs.

THE NEED FOR SUB-SECTOR TARGETS



- The financial services sector is different to other sectors where a “one size fits all” target can be applied.
- Diverse and distinct sub-sectors exist, which all have different challenges.
- Examples of sub-sectors are (i) intermediaries (ii) life insurers (iii) non-life insurers (iv) banks and (v) asset managers.
- Section 15A(3) allows for the setting of sub-sector targets and the FIA supports and endorses this.
- Regional demographics have to be considered when sub sector targets are set. The demographics of certain provinces (KZN and Western Cape) do not allow for the application of national targets across the board.
- The NCOP should endorse the approach of setting appropriate targets per sector (or sub-sector) taking regional demographics into account.
- The absence of input from the NCOP will result in national government and the Minister making laws and regulations without considering unique provincial and regional dynamics.
- Please see annexure A for comments on proposed amendments to sections 15A and 20(2A).

COMPLIANCE : IMPACT ON REGULATED ENTITIES



- Compliance ought to be considered in terms of sections 42 (general compliance) and 53 (certificate of compliance) read with the Financial Sector Regulation Act (FSRA).
- Section 42(1) of the EEA provides that the Director General, or any person or body applying the EEA may, in determining whether a designated employer is implementing employment equity in compliance with the EEA, take certain factors into account. Given however, that compliance will not be obtained in the short term, the FIA proposes that instead of taking only compliance into account, consideration should be given to the reasonable steps taken towards compliance.
- Section 53 has the effect that the Minister may only issue a certificate of compliance if the Minister is satisfied, inter alia that (i) the employer has complied with a numerical target set in terms of section 15A or (ii) in respect of any target with which the employer has not complied, the employer has raised a reasonable ground to justify its failure to comply, as contemplated by section 42(4).
- This has the effect that State contracts may only be issued to employers that have been certified as being in compliance with their obligations under the EEA (including sector targets set in terms of s15A) . In the financial services industry however, this has the ability to severely limit the license of a financial services provider.

COMPLIANCE : IMPACT ON REGULATED ENTITIES



- In addition to the EEA, financial service providers are also required to comply with other legislation which also contains transformation imperatives. In this regard, there is a potential conflict if further sector targets are set by a different Regulators and accordingly, the FIA propose that where targets across different legislation do not align, the DoEL should engage with the relevant Regulators, specifically including sections 28 and 78 of the FSRA.
- Section 28 provides that an organ of state (such as the Minister) must in performing its functions (such as identifying economic sectors, prescribing criteria for the identification of sectors and setting numerical targets for the purposes of the Employment Equity Act) 'have regard' to the implications of his activities on financial stability. Section 78 further provides that the Minister, in performing his regulatory or supervisory function in relation to employment and labour at financial institutions, must, to the extent practicable, consult with the financial sector regulators and the Reserve Bank in relation to the performance of that function.
- Please see annexure A for proposed amendments to sections 42(1)(aA) and 53.

FINES AND PENALTIES



- The fines were negotiated at Nedlac when targets were aspirational and not hard-coded.
- The FIA does not believe that the current provisions in respect of fines which are levied for non-compliance with other sections of the Act, should apply to non-compliance with Section 15A.
- The FIA recommends that the Minister consult with the relevant sectors on the appropriate fines and penalties at the time of consultation on the sub-sector targets.
- The FIA is concerned that excessive punitive fines will lead to regulatory failure and a systemic event.

CONSTITUTIONALITY



- The FIA supports section 15A(2) and (3), subject to the proposed amendments hereunder, as it allows for the setting of different targets for different sectors, sub-sectors and regions.
- The current targets in hard-coded form with the current fines and penalties contained in the EEA amount to “quotas” as non-compliance can impact the licences of financial services providers.
- The Constitutional Court in *South African Police Service v Solidarity obo Barnard* 2014 (6) SA 123 (CC) has emphasised that:
 - suitably qualified individuals must be the beneficiaries of affirmative action under the EEA; and
 - measures directed at affirmative action may include preferential treatment and numerical goals but must exclude “quotas”.

Proposed Amendments

Section	Proposed amendments
Section 15A	<p><i>“15A(2) The Minister may, after consulting in consultation with the relevant sectors including Regulators where applicable, and with the advice of the Commission, for the purpose of ensuring the equitable representation of suitably qualified people from designated groups at all occupational levels in the workforce, by notice in the Gazette set numerical targets for any national economic sector identified in terms of subsection (1).”</i></p> <p><i>“15A(3) A notice issued in terms of subsection (2) may set different numerical targets for different occupational levels, sub-sectors or regions within a sector or on the basis of any other relevant factor. Where a sector provides sufficient reasons for such a distinction, such as a difference in skills requirements, the Minister may set different numerical targets per sub-sector or region.”</i></p> <p><i>“15A(4) A draft of any notice that the Minister proposes to issue in terms of subsection (1) or subsection (2) must be published in the Gazette, allowing interested parties at least 30 90 days to comment and engage with the Minister thereon”</i></p>
Section 20(2A)	<p><i>“(2A) The numerical goals set by an employer in terms of subsection (2) must comply with any sectoral target in terms of section 15A that applies to that employer.”</i></p>

Proposed Amendments

Section	Proposed amendments
Section 42(1)(aA)	<p><i>“(aA) whether the employer has complied with a sectoral target or taken reasonable steps to comply with the applicable target as set out in terms of section 15A applicable to that employer.”</i></p>
Section 53	<p>The proposed amendment to section 53 provides that the Minister may only issue a certificate of compliance if the Minister is satisfied, <i>inter alia</i> that:</p> <ul style="list-style-type: none"> • the employer has complied with a numerical target set in terms of section 15A; or • in respect of any target with which the employer has not complied, the employer has raised a reasonable ground to justify its failure to comply, as contemplated by section 42(4). <p>State contracts may only be issued to employers that have been certified as being in compliance with their obligations under the EEA.</p> <p>Given the nature of the financial services industry, such a penalty is akin to severely limiting the license of a financial services provider.</p> <p>The FIA recommends that section 53 be amended as follows:</p> <p><i>“(6) The Minister may only issue a certificate in terms of subsection (2) if the Minister is satisfied that—</i> <i>(a) the employer has complied with a numerical target set in terms of section 15A</i> <i>that applies to that employer or has taken reasonable steps to comply with those targets;”</i></p> <p>In relation to section 53(6)(b), the Bill must set out the factors that are to be considered in determining whether an entity has a reasonable ground which justifies non-compliance, and these factors should be included in the Bill itself. The FIA suggests that the grounds contained in the draft 2018 regulations should be used for this purpose, with the inclusion of “<i>level of progress made towards achieving the targets</i>” and “<i>any other relevant factor</i>”.</p> <p>To the extent that the decision regarding issuing a certificate constitutes administrative action, it would also facilitate compliance with a fair procedure (thus minimising scope for litigation regarding procedural shortcomings in respect of refusals to issue certificates).</p>

Thank you for granting the FIA the opportunity to participate in this process.



Financial Intermediaries Association
of Southern Africa