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SUBMISSION TO THE PORTFOLIO COMMITTEE ON HIGHER EDUCATION AND TRAINING

BY

THE NATIONAL STUDENT FINANCIAL AID SCHEME

COMMENTS ON THE PROPOSED AMENDMENTS TO THE NATIONAL STUDENT FINANCIAL AID SCHEME ACT 56 OF 1999 CONTAINED IN THE HIGHER EDUCATION LAWS AMENDMENT BILL (B14-2011)

25 AUGUST 2011

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1. These comments address the proposals to amend the National Student Financial Aid Scheme Act 56 of 1999 ("the Act") contained in the Higher Education Laws Amendment Bill (B14-2011).

2. The National Student Financial Aid Scheme (NSFAS) supports the proposed amendments to the NSFAS Act so as to empower the Minister to intervene in the case of poor or non-performance or maladministration by the Board; to provide for the dissolution of the Board, as well as the procedure for such removal; to provide for the appointment of an administrator to temporarily take over the management, governance and administration of the Board. These amendments will contribute to the achievement of good corporate governance at NSFAS.

3. Insofar as the proposed amendments repeal the provisions placing an obligation on the employer of a borrower to make deductions from the remuneration of the borrower and to provide for matters connected therewith, NSFAS accepts that section 23 of the Act in its present form is inconsistent with section 34 of the Constitution and invalid. The main reason for this is that it places an obligation on the employer of a borrower to make deductions from the latter's remuneration without the borrower's consent or court intervention.

4. As a result of its concerns in this regard, NSFAS does not currently make new repayment arrangements using section 23 in recovering debts from any borrower employed in either the private or public sector who has not consented to their employer making a deduction.

5. However, NSFAS is of the view that the Act should enable NSFAS to recover loans in an efficient, constitutionally and legally compliant manner. NSFAS is

therefore proposing amendments to Chapter 4 of the Act which deals with the recovery of loans. The amendments proposed by NSFAS will cure the constitutional invalidity of section 23. In terms of the proposed amendment to section 23, no deduction could be made by an employer without the written consent of the borrower. The amended section 23(2) no longer places an obligation on the employer to make the deductions specified in the scales, but the obligation is rather to request the consent of the borrower to make such deductions.

6. It is NSFAS's experience that many borrowers, when faced with the prospect of NSFAS notifying their employers that they have failed to repay their student loans, consent to the deduction being made by their employer to facilitate repayment. Section 23, in its amended form, would continue to serve an important purpose, namely the recovery by NSFAS of loans without having to resort to court.

7. In the period 2000 to 2010, significant amounts were recovered by NSFAS under section 23 amounting to some R350 million through private employers and R1 434 million through the State Persal system from public sector employees whose studies were funded through NSFAS from public funds. During this period, NSFAS notified employees of its intention to use section 23 to recover student loans through their employers, but did not obtain their consent. NSFAS did not notify or obtain the consent of state employees but simply instructed Persal to commence deductions based on a scale of repayments contained in regulations to the NSFAS Act published on 19 July 2001.

8. Currently, based on the average amounts recovered from April to July 2011, NSFAS recovers about R3,6 million a month through employers using section 23 from 6 750 debtors employed in the private sector. In addition, 48 350 debtors currently employed by the State repay R25,3 million a month through Persal.

9. In light of its view that section 23 is unconstitutional, NSFAS has initiated discussions with the Office of the Accountant General in connection with deductions currently being made from Persal in terms of section 23. The OAG is of the view that NSFAS should obtain written consent from each of these borrowers to deduct their student loan repayments through the Persal system. In each case, written consent would have to be preceded by a process to ascertain, amongst other things, the affordability of the proposed repayment. It is likely that the amount recovered through Persal will increase significantly when NSFAS carries out this exercise.

10. The amendment proposed by NSFAS allows section 23 to serve the purpose for which it was originally included in the Act, that is to facilitate the repayment of student loans, in a manner that is consistent with the Constitution. Secondly, NSFAS proposes that section 21, which allows NSFAS to place the name of a borrower on a list of defaulting debtors, be amended to oblige NSFAS to give the borrower a reasonable opportunity to show that he or she is not indebted or, if indebted, to pay an arrear amount, before he or she may be placed on a list as contemplated by section 21. It is submitted that this amendment will provide borrowers with a fair opportunity to avoid being visited with the consequences of being placed on a list of defaulting debtors.

11. Thirdly, a new section 23A is proposed which will allow NSFAS to obtain a judgment against a borrower without having to issue summons and incur the legal costs involved in taking such a step. It should be noted that the judgment can only be obtained after compliance with the provisions of the National Credit Act, 34 of 2005 which provides considerable protections to the borrower such as debt-counselling as well as allowing for conclusion of an agreed plan in respect of further payments.

12. The enforcement provisions in the new section 23A are similar to those conferred on SARS in terms of the Income Tax Act, 58 of 1962 (section 91). Similar provisions also appear in at least the following legislation:

- The Value-Added Tax Act 89 of 1991 (section 40(2)(a));
- The Compensation for Occupational Injuries and Diseases Act, 130 of 1993 (sections 61(1) & (2) and 87(4));
- The Close Corporations Act, 69 of 1984 (sections 15(3)(d) and 70(4)).

13. Provisions similar to those have been upheld by the Constitutional Court as not inconsistent with section 34 of the Constitution.[1] In view of NSFAS the insertion of section 23A is consistent with the Constitution.

[1] *Metcash Trading Ltd v Commissioner, South African Revenue Service* 2001 (1) SA 1109 (CC).