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national treasury
Department:
National Treasury
REPUBLIC OF SOUTH AFRICA

National Treasury responses to comments raised by the Standing Committee on Finance

Following Standing Committee of Finance meeting 5 September 2012

1. General comments raised

Comments were raised referring to the relative stringency of the South African regime relative to other regimes. In particular the concern was raised that following the EU standard was not appropriate.

The European Union (particularly the United Kingdom) is the main market for fundraising for the South African Treasury, state-owned entities, and private companies. For example, six of largest corporates maintain primary or dual listings on the London Stock Exchange (Anglo American, SAB Miller, BHP Billiton and Old Mutual), and ABSA is 60% owned by Barclays. The United States is not a large market for fundraising at allThis due to a number of reasons, mainly the onerous obligations on the Issuer and liability exposure arising out of the exercise.

South Africa is at least 99% compliant and the recommendation that by adopting the CRSB as it is we are confident that SA will be rated "Equivalent" which is what is required for the markets to be available to SA fundraising.

Dodd-Frank is quite extensive on credit ratings agencies, and not necessarily simpler. It creates a very different system from the EU system, and we would have to completely redraft the legislation to follow the US approach. In general, we are better off following the ESMA approach, particularly since most of our companies do business there.

2. Clause 1 Definitions

"**credit rating services**" means data and information analysis, evaluation, approval, issuing or review, of credit ratings."

From the minutes: Adv Swart now suggested keeping the original wording as far as and including 'review', but adding, after a comma, 'for the purposes of credit ratings'.

The Chairperson inferred Members agreement.

Proposed new wording:

National Treasury response: "**credit rating services**" means data and information analysis, evaluation, approval, issuing or review for the purposes of credit ratings."

3. **Clause 3(1)(b)**. The Hon Harris indicated that clause 3(1)(b) is a problem because it may apply to a rating published in London for example but available on the credit rating agency's website in SA.

   The EU regulation provides *"This regulation should apply to credit ratings issued by credit rating agencies registered in the Community".*

   The subsection is then fully aligned with s3(2), which provides "..or issue credit ratings that are published in the Republic..."

   National Treasury response: We propose that the wording following the EU regulation verbatim. *"this Act applies to credit ratings issued by credit ratings registered in the Republic"*

   This will also address the Hon Ambrosini's concern re him on-sending a rating to his girlfriend, which is also covered by 3(4).

4. **Proposal *1: The Hon Harris (Proposal #1 in document):***

   4 (1) A regulated person must for regulatory purposes only use credit ratings that are issued ~~or endorsed~~ by credit rating agencies ~~which are registered in accordance with this Act~~ or by any external credit rating agency in the same group as a credit rating agency.

   National Treasury response Clause 4(1). *"Where a regulated person uses published credit ratings for regulatory purposes, such a regulated person must only use credit ratings that are:*
   (a) issued or endorsed by credit rating agencies which are registered in accordance with this Act or
   (b) Issued or endorsed by an external credit rating agency approved by the registrar"

   (2) The registrar shall publish a list of external credit rating agencies whose credit ratings may be used for regulatory purposes under this section.

National Treasury response. This is already captured under clause 5(10). However, we can agree to additional Clause 18(6) to clarify that is modelled on clause 5(10)
The registrar must maintain a list of external credit ratings agencies who ratings may be endorsed in terms of this section on the FSB official website.

5. **Proposal *1 (continued) : delete Chapter 4...***

Clause 3(2). The Hon Harris indicates that the endorsement regime is a problem because it would be cumbersome for CRAs to obtain approval from the registrar for each rating that they intend to endorse. We are of the opinion that the Bill as it now stands allows for the approval by the registrar of **agencies** and does not require the approval of individual ratings case by case. Section 18(4) stipulates:
(4) (a) A registered credit rating agency must apply to the registrar in the manner prescribed, for the approval of the external credit rating agencies whose credit ratings it intends to endorse under this section."

So, the Bill allows for three types of entities to provide credit rating services, or issue credit ratings in SA:

- SA agencies;
- External agencies, that qualify as external companies in terms of the Companies Act (so they are required to have some form of presence here); (see clause 5)
- External agencies that form part of the group of a SA agency and are approved by the registrar (see new proposed clause 4(1)(b))

6. **Proposal *2 The Hon Harris***

~~19(3) A registered credit rating agency may not, through a contract, agreement or in any other way, limit or reduce the liability that such credit rating agency may incur in terms of this section or in terms of the common law.~~

With:

19(3) A failure to comply with the provisions of this Act does not give rise to any separate right of action for loss, damages or costs by any person unless the right if action already exists in delict or contract."

Section 19(3) *A credit rating agency may not, through a contract, agreement or in any other way, limit or reduce the liability that such credit rating agency may incur in terms of this section or in terms of the common law.*

The intention is that CRAs should not be able to contract out of their common law liability i.e. with respect to loss/harm, conduct, wrongfulness, fault; and causation. These types of provisions in contracts are referred to as exclusion, exemption or disclaimer clauses and seek to protect a person providing a service to another person from personal liability arising from negligence during the performance of that service. Our courts are wary of contractual exclusions, since they do deprive parties of rights that they would otherwise have had at common law. In *Van der Westhuizen v Arnold*2 2002 (6) SA 453 (SCA) at 469D–E it was held:

> *"In the absence of legislation regulating unfair contract terms, and where a provision does not offend public policy or considerations of good faith, a careful construction of the contract itself should ensure the protection of the party whose rights have been limited, but also give effect to the principle that the other party should be able to protect himself or herself against liability insofar as it is legally permissible. The very fact, however, that an exclusion clause limits or ousts common-law rights should make a court consider with great care the meaning of the clause, especially if it is very general in its application."*

In *Naidoo v Birchwood Hotel* [2012] JOL 28826 (GSJ) the Court remark *obiter* that such clauses would probably not withstand constitutional scrutiny. The necessity of enhanced force and clarity in disclaimers is to be found in the Constitutional Court decision of *Barkhuizen v Napier* 2007 (5) SA 323 (CC). Ngcobo J stated that when challenging a contractual term, the question of public policy inevitably arises. But this was no longer difficult to determine because:

> *"Public policy represents the legal convictions of the community; it represents those values that are held most dear by the society. Determining the content of public policy was once fraught with difficulties. That is no longer the case. Since the advent of our constitutional democracy, public policy is now rooted in the values of our Constitution and the values that underlie it . . . human dignity, equality and freedom . . . as given expression by the provisions of the Bill of Rights. Thus a term in a contract that is inimical to the values enshrined in our Constitution is contrary to public policy and is, therefore, unenforceable."*

7. Proposal 3 The Hon Harris

32 Any person who—

(a) <u>deliberately</u> contravenes ~~or fails to comply with~~ section 3(2);

(b) deliberately makes a materially misleading, false or deceptive statement, or deliberately conceals any material fact with respect to any information required to be disclosed under this Act; or

(c) in the execution of duties imposed by this Act, deliberately gives an auditor or compliance officer information which he or she knows to be is false or, misleading or knowingly conceals any material fact, is guilty of an offence and on conviction liable to a fine or to imprisonment for a period not exceeding 10 years or to both a fine and such imprisonment.

National Treasury response: We submit that "deliberately" is not in line with other legislation. However, certain of the proposals could be considered by the committee.