

Financial Services Laws General Amendment Bill, 2012

Presentation to the Standing Committee on Finance

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national treasury

Department:
National Treasury
REPUBLIC OF SOUTH AFRICA

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Background to the Financial Services Laws General Amendment Bill, 2012

- The Financial Services Laws General Amendment Bill, 2012 is an “**Omnibus Bill**”.
 - In future smaller annual Omnibus Bill, similar to the Taxation Laws Amendment Bill, where amendments are effected annually.
- The Bill addresses URGENT issues in 11 financial sector laws, including legislative gaps highlighted after the 2008 financial crisis and to align these laws with the new Companies Act, 2008 and other legislation.
- The Bill aims to ensure that even during the transition to the “Twin Peaks” system, SA has a sounder and better regulated financial services industry which:
 - promotes financial stability;
 - has a strong financial sector regulatory framework; and
 - has enhanced supervisory powers for the regulators.

Overview of legislation amended

- The 11 financial sector laws updated include:
 - Financial Services Board Act,
 - Inspections of Financial Institutions Act,
 - Financial Institutions (Protection of Funds) Act,
 - Short & Long-term Insurance Acts,
 - Pension Funds Act,
 - Financial Advisory and Intermediary Services Act
 - South African Reserve Bank Act
 - Collective Investment Schemes Control Act
 - Financial Services Laws General Amendment Act, 2008
 - Co-operative Banks Act
 - Medical Schemes Act

Background to the Financial Services Laws General Amendment Bill, 2012

- There is still an urgent need to address gaps within financial sector legislation & mitigate existing risks in the financial system.
- The Bill, therefore, addresses several urgent areas:
 - Gaps identified by the **IMF/World Bank FSAP** (Fin Sector Assessment Program) to adhere to international standards for financial regulation.
 - SA is currently undergoing a peer review on implementation of FSAP.
 - Aligning financial sector legislation with the new **Companies Act**.
 - Ensuring higher consumer protection standards and removing duplication in terms of **Consumer Protection Act**.
 - Dealing with **mergers** in non-banking fin sector.
 - To ensure adequate **emergency powers** to deal with systemic risks to the financial system.
- Many of the gaps were noted in the policy paper “ *A Safer Financial Sector to Serve SA better.*”

Background on Twin Peaks reforms after Global Fin Crisis

- Making financial regulators/supervisors like Fin Services Board (FSB) and Banking Supervision Dept. much STRONGER, more INTRUSIVE and much TOUGHER – it is meant to be DRACONIAN in line with G20 commitments
- Re-organisation to the Prudential Regulatory Authority in the SARB and transforming the FSB into a new MARKET CONDUCT REGULATOR
- Regulators will need to be protected from legal liability when they act (e.g. FIDENTIA)
- Financial Institutions will be held to HIGHER standards on CONSUMER PROTECTION, Market Conduct, Capital Reserves, Liquidity etc.
- Financial Institutions will also have to continue to meet ACCESS targets, as agreed in the Financial Sector Charter

Public consultations on the Bill

- The Bill was approved by the Minister of Finance and Cabinet on 22 February 2012 & released for public comment on 9 March 2012.
- The comment period was extended from 13 April 2012 to 2 May 2012, to accommodate stakeholder requests for an extension.
- A total of 35 submissions were received during the public comment process. Each submission was thoroughly considered by the National Treasury (NT) & Financial Services Board (FSB).
- In May 2012, the NT also held an information session with key industry stakeholders including the Association of Savings & Investments SA, Banking Association SA, Institute of Retirement funds, SA Insurance Association.
- NT consulted with NEDLAC chamber and labour federations
- In September 2012, the bill was tabled in Parliament. The tabled bill, reflects changes made to take account of the comments received during the consultation process and the 35 submissions received.

Key issue 1: Aligning to the new Companies Act

The Bill seeks to:

- align terminology used in all FSB legislation with terminology used in the Companies Act (e.g. the new Companies Act redefines “public company” and “subsidiary company”).
- align certain duties stipulated in financial sector legislation with how those duties are reflected in the new Companies Act (e.g. such as the duty to declare interests and duties relating to the investment of trust property, in the Financial Institutions (Protection of Funds) Act).
- ensure that FSB legislation appropriately refers to business rescue procedures in the new Companies Act, while retaining existing enforcement procedures contained in the Financial Institutions (Protection of Funds) Act, so that Registrars have appropriate mechanisms at their disposal to appropriately enforce their legislation.

Key issue 2: Strengthening the regulatory framework and enhancing enforcement powers

The following amendments take into account the **FSAP recommendations & address regulatory gaps** identified in the FSAP:

- Strengthening the operational independence and effectiveness of the Registrar of Insurance, by extending the powers of the Registrar to apply to court for the winding-up of an insurer without first securing the approval of the Minister.
- Empowering the Registrar of Pensions, Insurance & Collective Investment Schemes to take swift and decisive action when necessary to protect consumers and financial stability by:
 - enhancing inspector's powers to summon persons to provide documentation required for an inspection.
 - allowing the Registrar to publish details of inspection, if it is in the public interest to do so.

Key issue 3: Inspections and On-site Visits

- Proposal to include specific amendments to extend the powers of various registrars onsite powers and enable appropriate expertise to be appointed to assist in successfully carrying out an on-site visit.
- On-site powers are different to inspection powers:
 - Inspection powers contained in Inspections Act, are aimed at also investigating unregulated persons conducting the business of financial institutions, can be exercised where entities unlawfully operate outside the regulatory framework. On-sites are limited to FSB regulated entities.
 - On-sites are regular reviews of regulated institutions as part of ongoing supervisory activities, enabled the Registrar to obtain information & detect problems early. For the most part inspections are of a forensic nature

Key issue 3: Inspections and On-site Visits...

- Registrars need the power to be able to appoint suitable skills to assist with on-sites because industry specific, specialised skills such as external auditors, external actuaries may be needed for on-sites. For e.g. overall effective supervision may need to secure assistance from persons with expertise in hedge funds, derivatives or other complex financial instruments.
- In light of recent deliberation in relation to on-site powers, the tabled Bill will, where appropriate, be amended to align to the approach adopted in the Credit Ratings Bill.

Key issue 4: Policyholder Protection Rules

- The Bill empowers the Registrar of Insurance to make Policyholder Protection Rules, to give effect to treating customer fairly principles, without Ministerial approval:
 - Enables the Registrar to act swiftly to protect consumers by improving disclosure in insurance contracts.
 - For e.g. policyholders are misled into thinking that they have “**comprehensive**” motor insurance cover, when in fact, the cover is partial with exclusions. **Standardised policy wording** will help consumers compare insurance policy benefits and risk.
 - In line with international standard, for e.g. IAIS (ICP 19) requires regulators to set requirements to ensure customers are treated fairly, both before a contract is entered into and through to the point at which all obligations under a contract have been satisfied.
 - USA, UK, Singapore, China, South Korea and Malaysia have introduced standard contract provisions, exclusions and definitions.

Key issue 5: Broadening of Advisory Process

- There are currently too many industry advisory bodies, Standing Committees and Boards operating at the expense of the tax payer.
- Aim is to rationalise consultation processes, and broaden to cover all key stakeholders.
- Current legislation is inflexible, and overly prescriptive and restricts to specific persons only (rather than stakeholder representatives)
- Coming twin peak reform will formalise consultation processes with stakeholders, but in the meanwhile
 - Bill enables the Minister to prescribe better standards for consultation on regulatory and policy issues, through a CODE OF ENGAGEMENT, CONSULTATION & COMMUNICATION for the FSB.

Key issue 6: Publication of subordinate legislation

- In light of recent deliberations regarding what constitutes subordinate legislation, the Bill was carefully examined to ensure that the publication of subordinate legislation and actions of the FSB Registrars are appropriately addressed:
 - **Regulations** prescribed by the Minister will continue to be published in the Government Gazette.
 - **Rules** issued by the Registrar, (e.g. Policyholder Protection Rules) will be published for comment and tabled in Parliament, the final rules will be published in the Government Gazette.
 - **Directives, exemptions and other similar subordinate measures** will be published on the **FSB website** rather than the Government Gazette, when restricted to licensed operators. Where a directive or exemption has been issued in the interest of consumer protection, then the Registrar may consider publishing such directives and exemptions in the Government Gazette.
- A list of directives and exemptions which are intended to have general application to be **published annually** as a schedule to the **FSB annual report** that is tabled in Parliament.

Key issue 7: Overlapping Regulatory Powers

- The Bill proposes amendments to the **FSB Act** to deal with overlapping legislation:
 - establishes the FSB as the lead regulator, where there is concurrent jurisdiction & where there is conflicts with other legislation (e.g. Consumer Protection Act, Competition Act and Companies Act) or regulators. (In line with the Banks Act for the banking sector).
 - limits the powers of other regulators, to unilaterally take actions and decisions relating to the fin services sector without consultation (e.g. mergers/competition). (Not applicable to Protection of Personal Information & Promotion of Administrative Justice Acts.)
 - overrides the Consumer Protection Act, the fin sector must be held to **HIGHER STANDARDS** of consumer protection, esp. given shift to twin peaks and a new market conduct regulator/supervisor. Financial contracts may require instantaneous protection (e.g. transfer of funds), and also very long period of protection (e.g. pension funds)
 - Consumer Protection Act exemption in respect of Insurance, Pensions, CIS expired on 1 October 2012. Interim period of overlapping jurisdiction between FSB & Consumer Commission.

Key issue 8: Strengthening Emergency Powers

- The Bill empowers the South African Reserve Bank to act quickly and decisively to mitigate a potential or actual financial systemic or stability risk by removing section 13(c) of the South African Reserve Bank Act, which unduly constrains the ability of the Reserve Bank to provide emergency liquidity to the banking system during a financial crisis.

Key changes to FSB Act amendments in tabled Bill

FSB limitation of liability

- The initial bill proposed to delete the words “**bona fide, but not grossly negligent**” from the FSB Act. The provision has been amended to address public comments.
- Regulators make enemies every time they act against those exploiting the financial system, or policy-holders. Many examples in SA such as Fidentia, & cases against Simon Nash. Those accused abuse the legal system to delay their trials
- No person shall be liable for any loss sustained by, or damage caused to, any other person as a result of anything done or omitted by that person in the *bona fide* [**, but not grossly negligent,**] exercise of any power or the carrying out of any duty or the performance of any function under or in terms of this Act
 - Proposal to retain “bona fide” and delete “but not grossly negligent”
 - Consistent with international practice & other regulatory statutes (e.g. Australia, SA SARB & Banks Act and Insurance Core Principles)
 - Affords regulators legal protection, provided powers were exercised in good faith.

Key changes to FSB Act amendments in tabled Bill...

- **Responsibility of FSB Board:** The clause has been revised to ensure that decisions taken by the enforcement committee will not be overturned by the Board.
- **Emergency powers:** The initial Bill proposed to empower the Minister to act quickly and decisively to mitigate a potential or actual financial systemic or stability risk. In light of the comments received, it is proposed that this amendment be deferred to the broader “Twin Peaks” discussions underway.
- **Consultation on mergers:** The wording of this clause has been refined to provide for the Competition Commission to consult with the Minister and FSB Registrars in respect of mergers in the financial sector.

Key changes to FSB Act amendments in tabled Bill...

- **Conflicts with other legislation:** The wording of this clause has been refined and simplified to appropriately define the relationship of FSB legislation with other legislation.
- **Function of the Board:** The wording of this clause has been refined to extend the functions of the FSB Board to deal with consumer financial education matters
- **Confidentiality:** A new provision has been provided to ensure that information received by the FSB is treated confidentially. This provision does not preclude the FSB from sharing information with fellow Regulators and the NT.

Key changes to the Pension Funds Act in tabled Bill

- Appointment of deputy Principal Officer (PO)
 - Discretion is given to funds for the possible appointment of a deputy PO and delegation of POs functions by the Board.
- Requirement for Board member training
 - Requirement that Board members attain level of skills and training as prescribed by the Registrar within 6 months.
- Fund registration prior to undertaking pension fund business
 - Curb the undertaking of non-registered fund business by requiring funds to approach the Registrar with an application to register.
- Protection for whistle blowers
 - Whistle blowing protection for Board members, valuers, principal/deputy officers, and employees who disclose material information to the Registrar.

Key changes to Pension Funds Act amendments in tabled Bill ...

- Liability of non-payment of contributions extended to certain individuals
 - Liability for the non-payment of pension fund contributions by an employer is extended to certain individuals (e.g. directors, shareholders, partners) within the employer.
- Removal/repeal of advisory committee
 - Enhance independence of Registrar and reduce costs on taxpayer.
- Liability of trustees
 - Provide for circumstances in which a court may find a trustee not liable (trustee acted independently, honestly and reasonably)
- Broader reforms will also deal with how we strengthen trustees, and how govt can assist capacity and education for trustees, and make them less dependent on service industry

Key changes to Insurance Acts in tabled Bill

- **Policyholder Protection Rules provision:** Comments were noted that this clause could extend the scope of delegated powers to the Registrar if there was no Ministerial approval and no public consultation afforded.
 - The wording of the clause has been refined to provide for a reasonable comment period before the PPR is published. In an emergency situation, the Registrar may publish the PPR without public consultation, however the reasons for the emergency publication must be provided for upon publication. It further requires that the PPR be tabled before Parliament. A period for objection by the public and Parliament has been provided.

Other Amendments in tabled Bill

- An amendment to the Co-operatives Banks Act is required to:
 - transfer the supervisory function of the Co-operatives Banks Development Agency to the SARB and provide for the SARB to be the sole supervisor of co-operative banks.
- An amendment to the definition of “business of a medical scheme” in the Medical Schemes Act (MSA), seeks to make the definition of medical schemes clear:
 - required to support Demarcation Regs, which the NT together with the Department of Health (DoH) are finalising. The Regs aim to clearly distinguish health insurance policies from medical schemes policies.
 - Draft Demarcation Regs, released for public comment on 2 March 2012. Total number of 343 comments received.
 - The NT and DoH are still going through a review process, following the public comments. The revised Regs will be released once this review is finalised.

Conclusion

- Financial Services Laws General Amendment Bill deals with **URGENT** legislative requirements.
- Bill is extensive, and has elicited many public comments (some with no formal submissions)
 - Request to take Bill to NEDLAC, even though this has been discussed in a NEDLAC chamber
 - Some criticise on ideological basis on powers of regulators
- NT recommends that SCOF invite those making public comments to submit comments to Parliament and to appear before SCOF
- NT continues to engage with affected NEDLAC constituencies
- Bill is urgent as need to commit for peer review and to align with existing legislation
- Guidance on Parliamentary process as this is not new legislation like FMB and CRS Bills, but more like TLAB as an omnibus bill amending 11 current Acts

Thank You