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Committee Secretaries
Standing Committee on Finance
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Attention: Ms Teboho Sepanya

Dear Ms., Sepanya

FINANCIAL SECTOR LAWS AMENDMENT BILL

We welcome the opportunity to comment on the financial sector laws amendment bill. The Banking Association South Africa has engaged extensively on the content of the bill with National Treasury, the South African Reserve Bank, and our members.

We recognise the urgency of this bill and wish to support the expeditious deliberation of the bill by the Standing Committee on Finance. We will continue engaging our regulator on the specifics of the regulations as they apply to the bill.

We do wish to draw the Standing Committee on Finances attention to a particular matter.

The banking industry and broader financial sector, rely on specific financial instruments to manage risk, moving risk from businesses in the economy to the banking industry, and then from the banking industry to e.g., a counterparty in the international financial markets. This is good for South Africa and the financial sector.

For these financial instruments to be valid, they must be recognised in law as being insolvency remote. In other words, no matter what happens to the South African bank, the South African bank must be able to honour its commitment to the international counterparty, as agreed in the contract.

Global master agreements provide the framework for these financial instruments and are supported by most advanced financial centres and many other jurisdictions, including South Africa, and are underpinned by domestic legal frameworks that recognise the intention of these financial instruments.

The matter for consideration by the Standing Committee on Finance, is that when a South African bank is in distress, either in resolution or under curatorship/bankruptcy, the international counterparty must be able to rely on the South African legal framework to ensure that their rights to performance under the financial contract are upheld. The same legal right is afforded South African banks when an international counterparty in another jurisdiction is in distress, either in resolution or under curatorship/bankruptcy. The South African bank is assured that they can receive the commitments made by the bank under the financial instrument, and not be prejudiced by a person assigned by the regulator or courts to either resolve and make whole, or dissolve and close the international counterparty. Very often the assigned person such as a resolution practitioner or curator is given the right to choose which contracts should be honoured and which should be set aside. It is this discretion that the financial instrument seeks to address and must be provided for within the legal framework to be recognised.

The Banking Association South Africa together with our South African regulators and policymakers have over many years, lobbied for South Africa to be recognised internationally as compliant with these global master agreements. South Africa has achieved a clean international legal opinion which provides comfort to users of these financial instruments to contract with South African banks and other entities as the legal framework meets the international standards.

It has however come to our attention, that at least one advisory law firm in London has evaluated the financial sector laws amendment bill and has already indicated that based on the changes introduced, South Africa will not materially meet the requirements of the international agreement any longer, and South Africa will be red flagged. This will result in further attention on South Africa's legal framework with the resulting potential withdrawal of counterparties across the world.

The financial sector laws amendment bill repeals section 69 of the Banks Act in its entirety, replacing it with the "orderly resolution of a designated institution" by a "resolution practitioner". The amendments to section 83.10 of the Insolvency Act relating to master agreement pledged assets upon the occurrence of a South African bank bankruptcy, would now apply to the proposed "resolution" as well. With the removal of section 69 of the Banks Act, that cured the right of access for a beneficiary, the situation has been reversed and no protection will be afforded under the new legislation. Section 69 of the Banks Act and section 83.10 together provide the necessary legal certainty.

We have raised our concern with the South African Reserve Bank but believe that the current financial sector laws amendment bill should be amended to ensure continuity of the protection afforded under the original intention of bankruptcy as well as the new opportunity for resolution. We do not believe that there should be a review of the matter post implementation of this bill as an Act, as this could take many years to correct, impacting on the banking industry's ability to continue with transferring risk using this global master agreement framework.

In our example, we have used an international counterparty, given the origins of the legal opinion, but the problem applies equally to domestic banks contracting with other domestic banks within South Africa. The domestic bank, not being able to perfect their claim in both instances of resolution and curatorship/bankruptcy, will impact negatively on their risk management, as the pledged assets may be lost to the depositors of that bank. The importance of this matter is best illustrated by reflecting on the size of the domestic market which is estimated by PwC[1] at approximately R17 trillion.

Should the financial sector laws amendment bill not be amended, the beneficiary under the financial instrument will have to approach the court in respect of every contract of pledged collateral. This would potentially make it unworkable for international counterparties and reduce their ability to contract with South African banks, impacting on our ability to mitigate risk internationally. A similar challenge exists for domestic transactions.

An urgent amendment is therefore requested, that reinstate the existing protection and includes the event of resolution.

We have also taken the liberty of suggesting some minor edits to the document in the following section.

We thank you for the opportunity to provide our input into the deliberations of the Standing Committee on Finance on the financial sector laws amendment bill and remain available to the Standing Committee on Finance for any further clarity.

Assuring you of our best attention at all times.

Yours sincerely

B April
General Manager - Prudential Division

[1] Independent research analysis exploring OTC derivatives central clearing for South African market participants – PWC August 2020.

NAME OF PERSON COMPILING SUBMISSION: **Benjamin April**
ORGANISATION: **The Banking Association South Africa**
SUBMISSION DESCRIPTION: **Financial Sector Laws Amendment Bill**

NR	REFERENCE IN ACT/BILL/DOCUMENT	COMMENT (Why is it a problem)	PROPOSED WORDING/COMMENT
1.	**s51(1)(c) is proposed to be deleted.** **Banks Act- s51(1)(d)**	No proposal in FSLAB, however, s51(1)(c) is proposed to be deleted, but not s51(1)(d). Banks Act- s51(1)(d)	**Recommend** section s51(1)(d) to be deleted in addition as there is a reference to a "curator".
2.	**Banks Act-** **s60(1B) (b)(ii) (bb)**	Reference to a financial sector regulator- not a defined term in the Banks Act	**Recommend** defining financial sector regulator in the subsection with reference to the FSRA. **Recommend** updating the definition of FSRA with reference to its no. Thus, Financial Sector Regulation Act No 9 of 2017
3.	**Banks Act -s54(1)(a)**	The FSLAB does not deal with this section specifically, but this is relevant in the context of a new proposed amendment to the FSRA- see comment below in respect of s166S(2)(b) of the FSRA below. Not clear what "arrangement" is intended to include. Chapter 5 of the Companies Act deals inter alia with a Scheme of Arrangement- refer to s114	**Recommend** that the reference to "arrangement" is deleted or that the section refers to a "scheme of arrangement". Should the latter be considered, then the legislator should consider a materiality threshold as applicable to other subsections in section 54 (25% or 10%) as schemes of arrangements by a bank could involve a small portion of one of its classes of shares which may not be of material value, however, may still require the approval of the Minister of Finance.
4.	**Insolvency Act -s22A**	FSRA used twice in this section, but not consistently referenced	**Recommend** that the FSRA be defined under Definitions in the Insolvency Act with its full reference, being FSRA **No 9** of 2017
5.	**Insolvency Act -s83**	FSRA and FMA used various times in the section, but not consistently referenced	**Recommend** that the FSRA and FMA be defined under the Definitions sections in the Insolvency Act with their respective full reference numbers

6.	**Insurance Act- def**	FSRA defined without full reference	**Recommend** that the FSRA be defined with full reference to FSRA, **No 9** of 2017
7.	**FMA- def**	FSRA defined without full reference	**Recommend** that the FSRA be defined with full reference to FSRA, **No 9** of 2017
8.	**S32** **FMA-s3**	There is a reference to a "designated institution" without the cross-reference to the FSRA	**Recommend** adding after "designated institution" … "as defined in the FSRA"
9.	**S33** **FMA- s60 (5)** **"If the market infrastructure is a designated institution in resolution, the** **Authority must give notice to the Reserve Bank before taking any action in terms of this section.''**	The new Subsection 60(5) appears to be unnecessary considering the existing 60(1) and the new section 166D of the FSRA which provides that a cancellation of a license can only happen in concurrence with the Reserve Bank	**Recommend** deleting the new proposed S60(5)
10.	**S34** **FMA- s64(7)**	There is a reference to a "designated institution in resolution" without cross-reference to the defined term in the FSRA	**Recommend** adding after "designated institution in resolution" … "as defined in the FSRA"
11.	**S27,28,29, 30 and 31** **Companies Act- definitions and Chapter5**	The FSRA is referenced in all the amended sections. Best to define FSRA under Definitions in the Companies Act	**Recommend** inserting a definition of the FSRA No 9 of 2017 under definitions in the Companies Act
12.	**S35** **FSRA- def**	"Agreement" is defined as any agreement whether in writing or not	**Recommend** that Agreement be defined as a written agreement to ensure certainty of terms. How will terms be proven if not in writing?
13.	**S51** **FSRA- s166D(1)(i) and (j)**	In both these subsections reference is made to terms such as "amalgamation or merger" and "compromise arrangement". Should these be defined as per the Companies Act?	**Recommend** that if the intention is to refer to transactions as contemplated in the Companies Act, then both these subsections must refer to the Companies Act.

14.	**FSRA-s166S(2)(b)**	Not clear what "arrangement" is intended to include. Chapter 5 of the Companies Act deals inter alia with a Scheme of Arrangement- refer to s114	**Recommend** that the reference to "arrangement" is deleted or that the section refers to a "scheme of arrangement". Should the latter be considered, then the legislator should consider a materiality threshold as applicable to other subsections in section 54 (25% or 10%) as schemes of arrangements by a designated institution could involve a small portion of one of its classes of shares which may not be of material value.
15.	**FSRA-s166S (4)(c)**	The term "amalgamation" is used. The correct term as defined in the Companies Act is "amalgamation or merger"	**Recommend** using the correct term as defined in the Companies Act- add "or merger" after "amalgamation"