

APPENDIX

The draft provisions included in this provision are from draft provisions to regulate the conduct of financial institutions, which the author of the thesis has worked on with colleagues as a drafter of financial sector legislation in the National Treasury,

1. PROPOSED PROVISIONS INDICATING HOW PROPORTIONALITY MAY BE PROMOTED THROUGH INCORPORATION IN LEGISLATIVE PROVISIONS, REFERRED TO IN CHAPTERS 2 AND 4

Proportionality in the application of certain requirements in terms of legislation can be introduced by incorporating proportionality in various provisions of legislation. Proportionality may be included as an element of how the legislation must be applied and the Act must be achieved. The development and application of requirements may permit a proportional approach to regulation and the achievement of the objective of the Act, by providing for the progressive realization of certain requirements. The following draft provisions indicate how in various aspects of legislation, the proportionate exercise of decision-making and the exercise of regulatory powers can be promoted.

X. Proportional application of Act

(1) The Authority must—

- (a) adopt a licensing framework;
- (b) prescribe conduct standards;
- (c) develop and implement its supervisory approach;
- (d) enforce compliance with this Act; and
- (e) consider the granting of exemptions as contemplated in section 8,

in a manner that—

- (i) promotes the object of the Act and supports the achievement of the objective of the Authority as contemplated in section 57 of the Financial Sector Regulation Act; and
- (ii) takes into account, and is proportionate to—
 - (aa) the nature, size, scale and complexity of the risks associated with a type of activity;
 - (bb) the nature, size, scale and complexity of financial institutions;
 - (cc) achieving the purpose of the requirement; and
 - (dd) the significance of risks to the achievement of the object of the Act and the Authority's objectives.

(2) The Authority may issue guidance notices and interpretation rulings as appropriate to facilitate the proportionate application of this Act to financial institutions that are small enterprises, and financial cooperatives, in order to minimise regulatory burden and promote financial inclusion and transformation of the financial sector.

X. General application and supervision of requirements

(1) The requirements set out in this Act must be met by financial institutions on an on-going basis to support an appropriate corporate culture.

(2) The governing body of a financial institution is accountable for compliance with the requirements of this Act.

(3) The Authority must, where requirements imposed under this Act overlap with requirements imposed under another Act that is the responsibility of the Prudential Authority or Reserve Bank, to the extent that is reasonable and practical, —

- (a) supervise compliance with this Act and requirements prescribed in terms of this Act together with the Prudential Authority or Reserve Bank, as appropriate;
- (b) minimise overlaps and avoid contradictions among applicable requirements; or
- (c) prescribe joint standards, or issue guidance notes and interpretation rulings to facilitate the appropriate implementation of requirements in terms of this Act in relation to requirements under the other Act.

(4) Subject to section 105, the requirements in this Act apply, unless expressly excluded in this Act or an exemption has been granted by the Authority, to financial institutions, and with the necessary changes in the interpretation and application of provisions and requirements, to prudentially regulated financial groups and financial conglomerates.

(5) When prescribing requirements in terms of this Act, and when applying requirements contained in this Act, the Authority must consider—

- (a) the content of applicable requirements contained in other legislation; and
- (b) the likely impact of requirements that are proposed to be prescribed, and the actual impact of requirements that are imposed on financial institutions, prudentially regulated financial groups and conglomerates, or other persons to whom the requirements apply.

(6) (a) The Authority must regularly assess the impact of requirements that are imposed on financial institutions, prudentially regulated financial groups and conglomerates, payment services providers and providers of services related to the buying and selling of foreign exchange, or other persons to whom the requirements apply, to determine if the requirements are achieving the intended objective or purpose, and whether the requirements are resulting in unintended consequences or disproportionate impacts on financial institutions, prudentially regulated financial groups and conglomerates, or other persons to whom the requirements apply.

(b) Following an assessment in terms of paragraph (a), the Authority must amend or repeal requirements that are identified as producing unintended consequences or disproportionate impacts on financial institutions, prudentially regulated financial groups and conglomerates, or other persons to whom the requirements apply.

(7) Any policy required by this Act to be made by a financial institution must be subject to approval and oversight by the financial institution's governing body.

Licensing

- (x) Licensing requirements may provide for the progressive realisation of specific requirements, to facilitate the development of a licensee to meet a particular conduct standard within a specified period, including for the promotion of transformation and financial inclusion.

In the application of specific requirements in terms of legislation:

- (x) The product oversight and governance arrangements—
 - (a) must aim to prevent and minimise poor or unfair outcomes for financial customers, support the proper management of conflicts of interests, and ensure that the objectives, interests and characteristics of financial customers are duly considered;
 - (b) may vary depending on the financial product in accordance with the principle of proportionality, taking into consideration the nature, scale and complexity of the relevant business of the financial institution and the complexity of the financial product;
 - (c) must be appropriate to account for risks borne by financial customers or groups of financial customers for a financial product.

X. The financial product oversight arrangements may vary depending on the financial product, in accordance with the principle of proportionality, taking into consideration the nature, scale and complexity of the relevant business of the financial institution and the complexity of the financial product, and that financial institution's business model.

In the making of delegated legislation in terms of principal legislation

X. Conduct standards and joint standards made by Authority

(1) (a) The Authority may make a conduct standard on any matter in respect of which it is required or permitted to make a conduct standard in terms of this Act.

(b) The Authority may make a joint standard in relation to any matter that the Authority may make a conduct standard in terms of this Act.

(c) A conduct standard or joint standard must be aimed at achieving the object of the Act or the stated purpose of the applicable Chapter or Part of this Act.

(2) When prescribing conduct standards, the Authority must consider the—

(a) nature, scale and complexity of different financial institutions, financial products and financial services; and

(b) need to—

(i) provide fair access to appropriate financial products and financial services;

(ii) enable financial customers to understand and compare the nature, value and cost of financial products and financial services;

(iii) enable financial customers to benefit from fair competition for quality financial products and financial services;

(iv) support sustainable business models that enable financial institutions to be able to deliver fair customer outcomes; and

(v) facilitate access to market for emerging financial institutions.

(3) A conduct standard may—

(a) apply to financial institutions, key persons, contractors, representatives or significant owners generally;

(b) apply to financial products, financial services, or the conduct of business in respect of financial products or financial services generally;

(c) be limited in application to particular categories, subcategories, kinds or types of—

(i) financial institutions, key persons, contractors, representatives or significant owners;

(ii) financial products or financial services; or

(ii) activities referred to in Schedule 2;

(d) apply to financial groups or financial conglomerates, or categories of financial groups or financial conglomerates;

(e) apply to a category, kind or type of other related person;

(f) differ based on category or subcategories of financial customers.

(4) A conduct standard may impose requirements for approval by the Authority in respect of specified matters, or be made applicable to existing actions, activities, transactions, policies, contracts, and appointments.

(5) When making conduct standards, the Authority must consider—

(a) the content of applicable requirements contained in other legislation; and

- (b) the impact of requirements on financial institutions and prudentially regulated groups and conglomerates to whom the requirements apply.

2. PROVISION TO ADDRESS TO ALLOW ADMINISTRATORS TO RECONSIDER DECISIONS IN LIMITED CIRCUMSTANCES, TO ADDRESS THE APPLICATION OF THE *FUNCTUS OFFICIO* DOCTRINE AS DISCUSSED IN CHAPTER 2

Section 95 of the Financial Sector Regulation Act 9 of 2017 provides administrators with a limited power to reconsider decisions, in limited circumstances.

Revocation of decisions

95. (1) A financial sector regulator may, by notice to a person in relation to whom the regulator made a decision in terms of a financial sector law (or, if more than one such person, all of them), revoke the decision if—

- (a) the decision was made as a result of fraud or illegality;
- (b) the information on which the decision was made was inaccurate or incomplete and the financial sector regulator would not have made the decision if it had had accurate and complete information; or
- (c) the decision is, for any reason, invalid.

(2) A revocation of a decision in terms of subsection (1) has effect from the date on which the revoked decision was made.

(3) A financial sector regulator may not take action in terms of subsection (1)—

- (a) if the action would adversely affect the existing or accrued rights of any person (except the person in relation to whom the regulator made the decision); or
- (b) if—
 - (i) the financial sector regulator has been notified that an application to the Tribunal or a court in relation to the decision will be made; or
 - (ii) proceedings have commenced in the Tribunal or a court in relation to the decision.

(4) Before a financial sector regulator takes action in terms of subsection (1), it must—

- (a) notify its intention to do so to the person in relation to whom the regulator made a decision; and
- (b) give the person a reasonable period, of at least 14 days, to make submissions to the regulator.

(5) In determining whether to take action in terms of subsection (1), the financial sector regulator must take into account all the submissions received during the period referred to in subsection (4) (b).

3. POSSIBLE PROVISION TO ALLOW AMENDMENT OF SCHEDULE BY MINISTER TO ENSURE LEGISLATION REFERRED TO IN CHAPTER 4

The following draft provision, which the author has worked on as a drafter of financial sector legislation for the National Treasury, is an example of how it might be provided to allow a Minister to amend a Schedule to legislation to update the Schedule, without having to amend the legislation in Parliament.

- (x) The Minister may amend Schedule 2 to ensure that the licensing framework appropriately accommodates —
- (a) activities in relation to a new category financial product that has been designated in terms of section 2 of the Financial Sector Regulation Act;
 - (b) a new activity that has been designated as a financial service in terms of section 3 of the Financial Sector Regulation Act;
 - (c) activities in relation to a new sub-category of financial product;
 - (d) a new sub-category of activity;

4. POSSIBLE PROVISION REQUIRING REVIEW OF LEGISLATION REFERRED TO IN CHAPTERS 4 AND 5

The following draft provision proposes requirements for the review of both original legislation, and delegated legislation made in terms of the original legislation.

X. Review of Act

(1) The National Treasury and the Authority must regularly conduct an assessment of the impact and effectiveness of the Act, and in particular, whether the object of the Act is being achieved, and the purpose of the various Chapters of the Act are being achieved.

(2) In light of the assessment of the Act, amendments to this Act, or new legislation must be developed and tabled in Parliament by the Minister, to—

- (a) address identified shortcomings in the Act that inhibit the effectiveness of its implementation;
- (b) address identified gaps in the legislative framework;
- (c) address unintended consequences that may have arisen in the implementation of this Act;
- (d) promote the effectiveness of the Act and the achievement of the object of the Act and the purpose of the Chapters of the Act.

(3) When legislation referred to in subsection (2) is tabled in Parliament, an impact assessment report must be tabled in Parliament along with the legislation, which identifies—

- (a) the shortcomings identified in the legislation that hampered its effective implementation; and
- (b) explains how the proposed amendments to this Act or the new legislation will address those shortcomings.

(4) The Authority must regularly assess the effectiveness of conduct standards prescribed in terms of this Act, and amend or prescribe new standards to address deficiencies identified in the standards or gaps which exist.

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