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Dear Sir

THE BANKING ASSOCIATION SOUTH AFRICA COMMENTS ON THE CRITICAL INFRSTRUCTURE PROTECTION BILL, 2017

We refer to the invitation for further comments on the latest version [B22B—2017] of the Critical Infrastructure Protection Bill, 2017 (**Bill**). The Banking Association of South Africa previously submitted comments, some of which have been incorporated into the latest version of the Bill, for which we are appreciative.

With reference to version B22B-2017 of the Bill, we would like to suggest the following:

1. Sections 17(4) and 20(4) – (6):

a) There is concern that the application of sections 17(4) and 20(4) – (6) of the Bill[1] whereby information infrastructures can be declared as 'critical infrastructures' by the Minister of Police, should a Cabinet member for State security decide that such infrastructures should not be dealt with under cybersecurity legislation (which is not yet in force), may be constitutionally questionable on the basis, *inter alia*, that legislation should clearly set out objective criteria for decision making, where administrative discretion is granted to the executive.

b) These empowering provisions do not set out such criteria (or any scope of such discretion) and essentially provides the executive with unfettered power to legislate as to when the Act applies, potentially impinging on the constitutional principle of a separation of powers. Additionally, there is no certainty for an owner or controller of such information infrastructures as to which legislation will apply, and how a decision will be made as to which legislation will apply to it – especially where both pieces of legislation impose onerous compliance obligations, the failure of which could result in substantial fines or imprisonment.

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[1] *Section 17(4) Where it appears from the application that the infrastructure contemplated in subsection (1) partly consists of, incorporates or houses, any information infrastructure as contemplated in any legislation on cybersecurity, the National Commissioner must follow the procedure contemplated in section 20(4).*

Section 20(4) The Minister must, in consultation with the Cabinet member responsible for State security, determine the procedure that the National Commissioner and the State Security Agency must follow when dealing with an application contemplated in section 17(4).
(5) Where an application contemplated in section 17(4) is referred to the Cabinet member responsible for State security in terms of any legislation on cybersecurity, the Cabinet member responsible for State security must, within 60 days or such further period as agreed upon between the Ministers, decide whether the infrastructure in question, or any part thereof must be dealt with in terms of any legislation on cybersecurity or not, and inform the Minister in writing of the decision.

(6) Where the Cabinet member responsible for State security decides that an application must not be dealt with in terms of legislation on cybersecurity, the Cabinet member responsible for State security must return the application to the Minister, whereafter the application must be dealt with in terms of this Act.

c) Putting the constitutional question aside, we submit that where the Cabinet Member for state security decides that an information infrastructure should be dealt with under the Critical Infrastructure Protection legislation, and where the impacted infrastructure is owned or controlled by a regulated sector, the relevant regulator must form part of the decision-making process to refer the information infrastructure back within the ambit of this legislation.

Section 17(3)[2] purports to include the head of a government department or head of an organ of state in an application to declare an infrastructure as critical, but for certainty (given that information infrastructure has been specifically excluded from the definition of infrastructure), a similar provision should be set out in section 20(4)-(6), so that the head of a government department or head of an organ of state with functional control over an impacted sector forms part of the decision making process to bring such information infrastructure back into the ambit of the Critical Infrastructure Protection legislation.

2. Powers of the Minister:

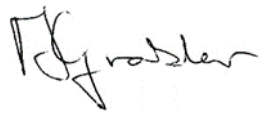
a) There is a concern that while the Bill gives the Minister the power to declare infrastructure as critical infrastructure, it does not adequately circumscribe the extent, limitations and duties associated with this power. Importantly, the Bill does not define the rights of, and protections for, critical infrastructure controllers and owners in the event of such a declaration by the Minister (especially where such owners or controllers are not government agencies).

b) In order to address the above, we would recommend that the Bill provides for the following:

- the designation of a function in the Minister's office that may have access to a critical infrastructure for non-governmental infrastructures;
- the conditions and regularity of the access to a critical non-governmental infrastructures;
- authorisation and identification (certificate of authorisation) of individuals who will have access to a critical non-governmental infrastructure;
- consequences of acting contrary to authorisation;
- the rights of the owner or controller of a critical infrastructure; and
- prohibition on disclosure of information by members of law enforcement/investigator on such critical infrastructures.

We will welcome the opportunity to discuss our comments, should it be required.

Yours Sincerely



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[2] Section 17(3) In the event that a government department or an organ of state has functional control over the sector in which the activities of the infrastructure falls, the application must further contain—
(a) a submission by the head of the government department or head of an organ of state who has functional control over the sector in which the activities of the infrastructure falls to support the application