

# Financial Markets Bill, 2012

*Presentation to Standing Committee on Finance – Responses to Issues Raised During Consultation*

Presenter: Ismail Momoniat | DDG Tax and Financial Sector Policy, National Treasury | 8 August 2012



**national treasury**

Department:  
National Treasury  
REPUBLIC OF SOUTH AFRICA



# Purpose

- Purpose of today is to present National Treasury's responses to stakeholder comments
  - Detailed response document contains responses to each comment raised
  - This presentation summarises the responses
- Accompanied by a **draft** "track changed" Bill – this is to assist the committee
- Majority of changes clarify policy intention and there are no substantive changes to the Bill that was tabled

# There has been extensive stakeholder engagement

- Securities Services Act Review (2009-11)
- Publication of draft Bill on 4 August 2011
- Comments Received
- Public Forum on 5 October 2011
- NT/FSB Working Group reviewed comments with inputs from SROs as needed
- Follow up Treasury-led meetings and correspondence
- Consultative workshops with banks and non-bank financial inst.'s
- Additional meetings with stakeholders including IDBs and PDs
- Submission of the revised Bill to Parliament
- Informal briefing to Parliament earlier this year
- Public forum on 9 May 2012

# Process

Date	Event
7 February	Informal briefing on the two Bills
22 May	Formal briefings on Bills
29 May	Public Hearings
4 June	Initial Feedback on CRSB
1 August	Parliamentary Workshop
<b>8 August</b>	<b>Final Response from Treasury</b>
14/15 August	Deliberations

# Process going forward

Date	Bills	
2012	Credit Ratings Services Bill	G-20 requirements
	Financial Markets Bill	G-20 requirements (OTC Derivatives)
2013 ?	Banks Amendments Bill	Basel III and align to new Companies Act
	Financial Services General Laws Amendment Bill	Annual/ Bi-annual Bill to update various laws, FSAP, etc.
2012/13	Insurance Laws Amendment Bill	
2013	Twin Peaks Architecture Bill	Establish new market conduct regulator, shift prudential regulation to Reserve Bank
2013/14	Twin Peaks Amendment Bill	Additional update of legislation

# Chapter I – Preliminary provisions

Definition	Stakeholder comment	Treasury
“Prescribed by the Minister”	Gazetting required	Agree
“Central securities account”	Too wide	Disagree
“Derivative instrument”	Since Bill was published, international standard setters have new definition - align to IOSCO	Agree
“Juristic person”	Should be defined	Agree
“Nominee “	Clarify that it is regulated nominees	Agree
“Securities”	Money market securities are a special category	Agree
	Reserve Bank share capital should be explicitly excluded	Agree
“This Act”	Align with other legislation	Agree

# Chapter I – Preliminary provisions

Definition	Stakeholder comment	Treasury
“Insolvency proceeding”	Insolvency should commence on filing	Agree
“Execution venue”	Allow for “ <i>exchange-lites</i> ”, i.e. other execution venues	Needs a thorough analysis
“Market infrastructure”	This more accurately defines these entities	Agree
“Inter-dealer broker”	These are different from ordinary stockbrokers and should be treated differently	Agree
“Regulated person”	Extended to match new section 5(1)	Agree
“External parties”	Amend to clarify meaning	Agree

# Chapter I – Preliminary provisions

- Objects of the Act:
  - Should Act explicitly include competition?  
*View is that there is an overlap with Competition Act*



# Chapter II – Regulation and Supervision of Financial Markets

- This chapter has been improved by with headings that distinguish the powers of the Minister and the Registrar
- **Section 5 – Powers of the Minister**
  - s5(1) Not new (formerly s 77)
  - s5(2) Concern raised that there are many unregistered players that operate in the financial system, and that current Securities Services Act does not allow for oversight over these unregistered players. Propose to allow Minister to name such categories, and prescribe regulations for them
  - s5(3) Not new (formerly s 5(6))
- **Section 6 – Powers of the Registrar**
  - s6(3)(o) Requires formal co-operation between Registrar and Governor on systemic risk
  - s6(6) Not new (formerly s 77)

# Chapter III – Exchanges

Major issues raised:

- **Licensing provisions**

s8 (1)(b) principle of good governance

- **Functions of an exchange**

s10(1) principle of fairness & transparency – all MI

s10(2)(j) & s17(2)(s) “integrated” clearing model

s10(2)(l) notification insolvency proceedings – all MI

- **Exchange rules**

s17(2)(s) process for complaints by authorised users against the exchange  
in respect of the exercise of functions

s17(2)(w) transparent pricing – all MI & users

s17(2)(cc) & (dd) inter-dealer brokers

# Chapter IV – Custody and Administration of Securities

Major concerns:

- **Segregation of securities**

- **Functions of a CSD**

s30(2)(m) concerns regarding the CSD's jurisdiction in relation to certificated securities and taking on responsibility for balancing certificated records

s30(2)(t) enabling link-up with external CSD: custody and settlement risks?

s30(2)(s) & (t) Conflicts of Interest – a CSD cannot provide “securities services” as defined in section 1 of the FMB

- **Pledge or cession of securities to secure debt**

Issue Distinction between “pledge in cession to secure a debt” and “out-and-out cession”

s39(1)(a) provisions relating to pledging and out-and-out cession have been retained from the Securities Services Act , with latin cession *in securitatem debiti*. The term “*pledge*” will also be retained to cater for immobilised securities

# Chapter IV – Custody and Administration of Securities

- **Strate Rules/Practise Notes**

Issue                      Requirement to flag too onerous and provide for only one pledge to be registered over any share at any one time

New rules                Practical issues to be addressed in Strate Rules and Practise Notes, based on UNIDROIT concept - to reflect whole securities account that may can be flagged without having to flag each security individually

- **General provision for CSDs (also applied to all MI )**

s28(1)(b)                Principle of good governance

s30(1)                    Principle of fairness & transparency

s30(2)(v)                Insolvency proceedings & transparent pricing

s35(2)(v)                process for complaints by participants against the CSD in respect of the exercise of functions

# Chapter V – Clearing House

- **Central counterparty (CCP ) / clearing house**
  - Concern raised that South African market is too small to justify a fully-fledged CCP for over-the-counter derivatives
  - Majority of transactions are between South African counterparties and foreign banks, and foreign banks may have requirements to clear offshore.
  - Basel III capital and margin requirements by Jan 2013 – no domestic CCP by then
  - Cross-border reach (extra-territoriality) of Dodd-Frank and ESMA
  - For this reason, Bill allows for three different approaches:
    - *External clearing house (equivalent test)*
    - *Registration of foreign clearing house in South Africa*
    - *Domestic clearing house*
- **General provision for clearing house**

S53(2)(n) process for complaints by clearing members against the CSD in respect of the exercise of functions

# Chapter VI – Trade Repository

- **Application for trade repository licence**

Issue                      Concern raised that prescribing an applicant to only be a “*company incorporated in terms of the Companies Act*” effectively excludes an application from an international TR from applying

s54(1)                      Subject to the regulations **prescribed by the Minister**

s55(1)                      **Minister may prescribe** which requirements and to what extent an applicant must comply with

- **Minister regulations**

s54(1) & 57(2)(b)      Decisions made on trade repositories with wide policy impact will be subject to Minister regulation

# Chapter VI – Trade Repository

- **Licensing of trade repository**
  - Framework provides the basis of a TR, while enabling the possibility for outsourcing.
  - Cross-border reach (extra-territoriality) of Dodd-Frank and ESMA - taking into account the global nature of derivative transactions involving local and international counterparties.
  - Need data on total global Rand-referenced derivatives/SA-referenced entities
  - The following options can be considered:
    - *An external TR solution*
    - *Registration of foreign TR in South Africa (equivalent test)*
    - *A local TR solution*

# Chapter VII – Market Infrastructure

- **Cancellation or suspension of licence**

Issue powers afforded to the Registrar in the event a market infrastructure failing to satisfy licence obligations

s10(3)(a) revised - Registrar can only take over supervisory or regulatory responsibility

s59 annual license assessment to replace license renewal

- **Conflicts of Interest**

Issue regulatory functions vs. commercial functions of market infrastructure

s62 manage as per standard prescribed by Registrar

S62(b) assessment subject to public scrutiny

Complaints provision not appropriate for market infrastructures generally (however added in new 17(2)(s), 35(2)(v) and 53(2)(l) for exchanges, central securities depositories and independent clearing houses) .



# Chapter VII – Market Infrastructure

- **Securities Ownership Register (SOR)**

Issue      conflicts of interest with CSD being given authority, through an SOR, to obtain information and conduct activities that effectively allow it to compete directly with the participants

- **Additional business by MI**

s61      systemic risk?

- **Vertical integration**

# Chapter VIII - Code of Conduct

- Code of conduct is on all regulated persons
- Aligns with section 5
- Code of conduct: “based on principle that the regulated person must –  
(i) act honestly and fairly, with due skill, care and diligence and, where applicable, in the interests of a client or member; and  
(ii) uphold the integrity of the financial markets.”

# Chapter IX – Unlisted securities and Nominees

- Section 77 moved to section 5 (improved drafting convention)

# Chapter X – Market Abuse

We aimed to:

- close loopholes that existed under the SSA; and
- to ensure that the ambit of the Act covers the present and possible future market abuse strategies

- **Insider trading**

s78 Introduces a “*dealing for an insider*” contravention where the person dealing is not necessarily an insider

- **Penalty for insider trading**

s82(1)(b) Maximum penalty for insider trading increased

“***an amount of up to R1 million plus***” three times the profit made or loss avoided

penalty in instances where the insider trader does not make a profit where the offender does not make a profit (or a small profit due to the market moving in the opposite direction)

# Chapter X – Market Abuse

- **Compensation**

s82(5)(b)(iv) Previously compensation to victims limited to Insider Trading contraventions. claims officer now has a greater discretion in deciding who's claims should be included in distribution.

- **Negligence in market manipulation**

s80(1)(b) Negligence incorporated as a fault element in prohibited trading practices, with “*reason to suspect*” replaced with “*ought- ...reasonably to have known*” - only an administrative penalty

Knowingly participating in a prohibited trading practice is still a criminal offence.

- **False, misleading or deceptive statements, promises and forecasts**

s81 Reference to manipulative, false or deceptive practices removed- offence now only refers to the effects of the transaction

Duty imposed on a person who made a false or misleading statement to correct same

- **Deeming Provisions**

s80(5) extended definition of “*no change of beneficial ownership*”

# Chapter XI Auditing

- No changes

# Chapter XII - General Provisions

- **Curatorship of provision**

s3(1)(a) Amended to exclude power with regard to the South African Reserve Bank and banks from these provisions (s100 to 103)

- **Regulations**

s107(2)(a) Minister must publish for comment draft of proposed regulation in the Gazette before promulgation

- **Offences and penalties**

s109 Disclosure of confidential information is criminalised

- **High frequency trading**

Enabling framework provided

*Thank you*