



SOUTH AFRICAN RESERVE BANK
Prudential Authority

Position Paper:
Draft Amendments to the Commercial Paper
Exemption Notice, 1994

July 2023

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Annexure A: Questionnaire on the assessment of the expected impact of implementing amendments to the Commercial Paper Exemption Notice

1. **Acronyms and abbreviations**

Banks Act	Banks Act No. 94 of 1990
BASA	The Banking Association South Africa
FSRA	Financial Sector Regulation Act No.9 of 2017
GDP	Gross Domestic Product
PA	Prudential Authority
SARB	South African Reserve Bank
UK	United Kingdom

2. Definitions

“**auditor**” means an auditor as defined in section 1 of the Auditing Profession Act, 2005 (Act No.26 of 2005);

“**Authority**” means the Prudential Authority, a juristic person within the administration of the SARB, established in terms of section 32 of the Financial Sector Regulation Act, 2017 (Act No. 9 of 2017);

“**central government**” means the central government as defined in regulation 67 of the Regulations;

“**other central government**” means such other government, other than the government departments of the Republic of South Africa, as the Authority may determine in writing;

“**commercial paper**” means-

- (a) A short-term secured or unsecured promissory note with a fixed or floating maturity;
- (b) Any call bond;
- (c) Any other secured or unsecured written acknowledgement of debt;
- (d) Debentures or any interest-bearing written acknowledgement of debt issued for a fixed term in accordance with the provisions of the Companies Act No. 71 of 2008

On the conditions that

- (e) The maturity term does not exceed 364 days; and
- (f) is issued to acquire operating capital;

but does not include bankers' acceptances.

“**Companies Act**” means the Companies Act, 2008 (Act No. 71 of 2008);

“**company**” means a company as defined in section 1 of the Companies Act;

“**general public**” means the general public as defined in section 1 of the Banks Act

“**holding company**” means a holding company as defined in section 1 of the Companies Act;

“issuer” means a person issuing commercial paper under the provisions of this Notice;

“licenced exchange” means a licenced exchange as defined in section 1 of the Financial Markets Act, 2012 (Act No. 19 of 2012);

“listed company” means a company, to which the securities must meet the listing requirements of a listed exchange in accordance with the Financial Markets Act, 2012 (Act No. 19 of 2012);

“municipality” means a municipality established in terms of the Local Government: Municipal Structures Act, 1998 (Act No. 117 of 1998)

“operating capital” means the capital acquired for the principal revenue producing activities of the issuer on a day-to-day basis, other than investing activities or financing activities;

“placing document” means the prospectus, pricing supplements, or final terms relevant to the programme memorandum, whether public or private placement;

“public company” means a public company as defined in section 1 of the Companies Act;

“private company” means a private company as defined in section 1 of the Companies Act;

“recognised financial exchange” means an external exchange or an exchange that is recognised as a licensed exchange in terms of its Listing Requirements as approved in terms of the Financial Markets Act, 2012 (Act No. 19 of 2012);

“state-owned company” means a state-owned company as defined in section 1 of the Companies Act;

“subsidiary” means a subsidiary as defined in section 1 of the Companies Act.

“the Regulations” means the Regulations relating to Banks, made under section 90 of the the Banks Act;

“ultimate borrower” means an ultimate borrower as contemplated in paragraph 4 of the Notice;

“unlisted company” means a company as defined in the Companies Act and that participates in transactions of securities as defined in the Financial Markets Act (Act No. 19 of 2012);

“wholly owned subsidiary” means a wholly owned subsidiary as defined in section 1 of the Companies Act;

3. Introduction

- 3.1 In terms of section 11(1) of the Banks Act, no person shall conduct the “business of a bank” unless such person is a public company and registered as a bank in terms of the Bank Act. In terms of the Banks Act, as amended by the Financial Sector Regulation Act, 2017 No.9 of 2017 (FSRA), the Prudential Authority (PA), with the approval of the Minister of Finance (Minister), is entitled to designate certain activities as not being “the business of a bank” for purposes of the Banks Act.
- 3.2 One such activity that has been designated as an activity that does not fall within the definition of “the business of a bank” is the acceptance of money from the general public against the issue of commercial paper in terms of the “Designation of an activity not falling within the meaning of “the business of a bank” (Commercial Paper)” as published in Government Gazette No. 16167 on 14 December 1994 (CP Exemption Notice).
- 3.3 Any non-bank person that issues commercial paper without complying with the provisions of the CP Exemption Notice would be conducting the “business of a bank” and be in contravention of section 11 of the Banks Act.
- 3.4 The objective of the CP Exemption Notice is to enable corporates to access the domestic capital market by issuing commercial paper to raise short term funding from other institutional investors to fund their business/operational activities. The evolution of market practices and the increased focus on financial stability have necessitated a comprehensive review of the legislative framework, which includes a review of the CP Exemption Notice. The CP Exemption Notice has not been updated since its publication in 1994. The review will culminate in the repeal of the existing CP Exemption Notice and replacement thereof with a new notice.
- 3.5 In 2018 the PA conducted an informal consultation with members of The Banking Association South Africa (BASA). At the time, the PA had proposed a Directive as well as some amendments to the CP Exemption Notice and responses were received from BASA as well as the Johannesburg Stock Exchange (JSE). The PA had also requested banks to provide copies of

contracts (including master programmes, and supplementary programmes) that they had undertaken or endorsed for the issuance of commercial paper.

- 3.6 Subsequently, after taking into consideration the information requested from banks in 3.5 above, it came to the attention of the PA that there appears to be regulatory arbitrage between the CP Exemption Notice and the Securitisation Exemption Notice of 2008¹. Specific concerns arise from the term structure of commercial paper issuance, purpose of issuance, outdated definitions, disclosure requirements, use of conduits², among others.
- 3.7 Any commercial paper issued in contravention of the CP Exemption Notice loses its exemption from the definition of “the business of a bank”. As such, the issuance of commercial paper in contravention of the CP Exemption Notice is unlawful and in breach of section 11(1) of the Banks Act as it is tantamount to conducting “the business of a bank” by a person not registered as a bank.
- 3.8 The PA has since proposed amendments to the CP Exemption Notice of 1994 that aim to promote and enhance the safety and soundness of the commercial paper market and its market participants as well as overall financial stability. In proposing these amendments, the PA has also done an assessment of international best practices relating to the issuance of commercial paper and accordingly aligned these practices with the CP Exemption Notice, taking into consideration the nature and structure of the South African financial system.
- 3.9 During the public consultation, the PA will consider responses to an industry questionnaire (see Annexure A of this document) to assess the impact of the proposed amendments to the CP Exemption Notice on the business operations of participants in the domestic commercial paper market.
- 3.10 At an industry meeting held in May 2023, it also came to the PA’s attention that large volumes of corporate bonds are being issued under the CP Exemption Notice for reasons other than short-term funding³ and that limiting CP issuance to a term maturity of 364 days might have liquidity and capital market impacts

¹ See <https://www.resbank.co.za/en/home/publications/publication-detail-pages/prudential-authority/pa-exemption-notices/2002/2734>

² Conduits are institutions that issue securities, including debt securities, to raise capital for revenue generating projects, the funds generated are used by a 3rd party.

³ These include project finance, renewable energy projects and other long-term projects that require longer term financing.

and potentially contribute to financial instability in the sector. The PA will endeavour to solicit these views in the industry questionnaire. This data will be analysed and discussed internally in the PA and SARB.

The PA might consider exploring new instruments to address potential unintended consequences that might arise from the aforementioned proposed amendments to the CP Exemption Notice, while also ensuring compliance with current and proposed amended regulations.

4. Purpose and scope

4.1 The purpose of this position paper is to explain the rationale behind the proposed amendments to the CP Exemption Notice and to state the PA's policy position in this regard.

4.2 The scope of this position paper covers the following key themes:

4.2.1 Amendments to the CP Exemption Notice:

- Expanded definitions in the CP Exemption Notice;
- Explicit term structure for CP issuance;
- A new regulatory return for compliance and monitoring purposes;
- Expanded scope of coverage of the CP Exemption Notice;
- Enhanced disclosure requirements for the issue of commercial paper; and

4.2.2 International practices for commercial paper issuance; and

4.2.3 Industry questionnaire on matters relating to proposed amendments to the CP Exemption Notice.

5. Proposed amendments to the CP Exemption Notice

5.1 Expanded definitions in the CP Exemption Notice

The PA reviewed responses received from the informal consultation with BASA on the CP Exemption Notice and also assessed definitions set by international practices for commercial paper issuance. The proposed set of definitions contained in the CP Exemption Notice are expanded to provide more clarity and transparency regarding compliance with the CP Exemption Notice. These

definitions further support the policy objective to prevent any circumvention or cases of non-compliance with the CP Exemption Notice.

The new and enhanced definitions include the following:

- auditor (new)
- central government (enhanced)
- other central government (new)
- commercial paper (enhanced)
- Companies Act (updated)
- general public (new)
- licenced exchange (new)
- listed company (new)
- municipality (new)
- operating capital (new)
- public company (new)
- private company (new)
- recognised financial exchange (new)
- state-owned company (new)
- subsidiary (new)
- unlisted company (new)

5.2 Explicit term structure for CP issuance

The Draft Amendments in the CP Exemption Notice explicitly provide for a reduction in the term structure of CP issuance to 364 days, which is in alignment with international practices for CP issuance and aligns with the generally accepted purpose of the CP Exemption Notice, that is, to enable corporates to access the domestic capital market by issuing commercial paper to raise short term funding from other institutional investors to fund their business/operational activities. The CP Exemption Notice of 1994 did not specify a term structure,

instead, it was implied that CP could be issued for a minimum 5 years for listed issuance, and a maximum of 5 years for unlisted issuance.

5.3 A new regulatory return for compliance and monitoring purposes

The current CP Exemption Notice of 1994 has a requirement for a regulatory return for commercial paper issuance. However, the purpose of the return is for the collation of economic statistics only and not primarily for supervisory purposes; nor is it effectively used to ensure compliance with the Banks Act and the CP Exemption Notice. This limited purpose of the regulatory return might have inadvertently contributed to the regulatory arbitrage between the application of the CP and the Securitisation Exemption Notices.

To mitigate against the risk of non-compliance with the CP Exemption Notice and to promote transparency, the proposed amendments to the CP Exemption Notice will also include a quarterly regulatory return to be submitted by specified persons⁴ for supervisory purposes, enforcement of the Banks Act, 1990 as well as a collation of economic statistics for monitoring purposes. The requirement is that a detailed return must be submitted to the PA on a quarterly basis for all commercial paper issuances (both listed and unlisted) within fifteen business days of the relevant quarter-end. (see Table 1).

Table 1 Returns concerning commercial paper issuance

A. RETURNS CONCERNING COMMERCIAL PAPER ISSUANCE

(Confidential and not available for inspection by the public)

This return is used for supervisory purposes and enforcement of the Banks Act, 1990. The return is further used for the collation of economic statistics.

Quarter Ended
A. Primary disclosures	
Name of reporting institution
Currency of issue
Name of Auditor

⁴ The Prudential Authority will specify the persons who need to submit the regulatory returns. It is envisaged that it will be, among others the issuer, the ultimate borrower, and/or arranger.

Aggregate Authorised Amount
Purpose of issue
Address
Contact person
Telephone number
Email address

B. Commercial paper: Issued, redeemed, outstanding

	Volumes		Total value	
	Endorsed	Not endorsed	Nominal	Market

(i) Part 1

Outstanding at reporting date

- Listed
- Unlisted

Issued during the quarter

- Listed
- Unlisted

Redeemed during the quarter

- Listed
- Unlisted

(ii) Part 2 ***

New issuances

- **Remaining term of new issues**
- Listed
- Unlisted

- **Rate of return on new issuances (Percentage)**

- Listed
- Unlisted

***If required, attach placing documents

5.4 Expanded scope of coverage of the CP Exemption Notice

The PA reviewed responses received from the informal consultation with BASA on the CP Exemption Notice, consulted with National Treasury and also aligned the scope with other practices internationally.

The following was added to the list of issuers:

- state-owned company;
- municipality;
- other central governments;
- private and public company and;
- unlisted company

5.5 Enhanced disclosure requirements for the issue of commercial paper

In order to keep in line with market developments and international practices, the PA has proposed additional disclosure requirements for the placing documents relating to the issuance of commercial paper for issuers. The scope of disclosure is expanded to capture both private and public placements.⁵ These enhanced disclosure requirements are aimed at the key persons involved in the issuance of commercial paper, namely, the issuer and the auditors. In essence, the enhanced disclosure requirements seek to solicit the following:

- The details of the issuer of commercial paper.
- The details of any guarantee associated with the issuance.
- The obligations of the issuer and continuing obligations of the issuer.
- The obligations and continuing obligations of the auditors.

The information listed above is important to ensure that the issuance of commercial paper in terms of the CP Exemption Notice at all times complies fully with all the relevant requirements specified in the CP Exemption Notice. The enhanced disclosure requirements further make provision for electronic signatures as means to sign and date a placing document or prospectus.

⁵ This includes reverse enquires, where institutional investors enquire with the issuer on a willingness to sell a specific debt instrument, for example bonds, at a specific price and tenor, which may be negotiated and agreed bilaterally.

In order to protect the investor with regard to commercial paper issuance, paragraph 8 in the proposed amendments in the CP Exemption Notice stipulates additional disclosures on the terms of the commercial paper instrument. Thereby, the terms of the commercial paper instrument must provide an investor with sufficient information, including the full terms and conditions of that commercial paper instrument⁶. This includes, among others, ultimate borrower; purpose of issue; listings; applicable credit rating; date of maturity; specified currency of issue and any other relevant information as the PA may determine.

6. International practices for debt issuance: Key issues on regulatory frameworks in select jurisdictions

The PA assessed the regulatory frameworks of the United Kingdom (UK), Australia, United States, European Union, Netherlands, Mauritius, Nigeria and India. Presently, there is scant guidance from the Basel Committee on Banking Supervision (BCBS) on the issuance of commercial paper. In general, a firm engaging in the “business of a bank” must be authorised to do so by a banking regulator. Undertaking the “business of a bank” or banking business without the necessary authorisation from the banking regulator is an offence.

Accordingly, an issuer of commercial paper that does not have the approval from a bank regulator or securities regulator will need to ensure that the issuance of commercial paper does not constitute deposit-taking, which would be in contravention of the relevant banking or securities legislation. In other instances such as the US, commercial paper is not considered to be, nor is it treated as a deposit under US law. Commercial paper in the US is regulated as a debt instrument under the Securities Act thus falling outside the ambit of US banking laws or regulation⁷. In the UK, issuances of commercial paper are considered too sophisticated which has led to authorities excluding professional investors from the regulation of deposit taking activities.

⁶ All programme memorandums associated with the issuance of commercial paper are included.

⁷ See <https://www.sec.gov/about/about-securities-laws#secact1933>

With regards to the term maturity, commercial paper in principle is considered as a short-term debt instrument and in most jurisdictions is issued up to a maximum of 13 months and by firms with high-quality credit ratings on the assumption that such firms will be in a position to pay both interest as well as the principal at maturity.

Higher denominations of commercial paper issuance of USD 100 000 or more are issued to sophisticated investors and professional investors and excludes the general public and/or retail investors. In the international context, commercial paper issuers who default are not permitted to access the commercial paper market for six months from the date of repayment of the defaulted obligation. Non-residents are mostly permitted to invest in commercial paper under foreign exchange regulations in the various jurisdictions.

On disclosure requirements, most jurisdictions generally implement one of two basic approaches, or a combination of the two, in order to ensure appropriate disclosure of information by issuers in view of the interests of investors. The two disclosure approaches are referred to as general disclosure obligations and continuous disclosure obligations. The former approach commonly takes place prior to the issue of commercial paper and the latter takes place periodically after the commercial paper has been issued.

Notwithstanding the different approaches of disclosure, the information disclosed is largely similar in nature and extent. The aim of these disclosure obligations is for investor protection, to ensure the highest levels of transparency and compliance. From a regulatory perspective, enhanced disclosure obligations are paramount to achieving robust supervisory and regulatory outcomes and financial system stability.

7. Industry questionnaire on the proposed amendments to the CP Exemption Notice

The PA will solicit input from the industry questionnaire (refer to Annexure A for the industry questionnaire) on potential benefits and unintended consequences of the proposed amendments to the CP Exemption Notice on institutions that participate in the domestic commercial paper market.

The questionnaire will focus on key issues pertaining to the expanded list of definitions in the CP Exemption Notice, the proposed new maturity term for commercial paper issuance, a revised statutory return for commercial paper issuers and potential operational costs envisaged upon implementation of the CP Exemption Notice, among others.

This input will be considered and where necessary incorporated in the final CP Exemption Notice, which is planned for implementation in January 2025 (proposed).⁸

8. Position of the Prudential Authority

The PA's policy position is that the evolution of market practices, including the increased focus of the financial stability function, and international best practices have necessitated a review of the regulatory structure of commercial paper issuance. Additionally, there appears to be regulatory arbitrage between the application of the CP Exemption Notice and the Securitisation Exemption Notice, with particular reference to the term structure of commercial paper issuance, the purpose of the issuance of commercial paper and disclosure requirements (see Table 2 for the key differences between requirements in the CP Exemption Notice and Securitisation Exemption Notice).

⁸ Subject to change based on operational requirements and comments received from the public consultation.

Table 2 Key differences between the CP Exemption Notice and Securitisation Exemption Notice

Instrument	Commercial Paper Exemption Notice	Amended Commercial Paper Exemption Notice	Securitisation Exemption Notice
Implementation date	1 January 1994	TBC	1 January 2008
Targeted issuers	Listed companies, companies, any juristic persons.	Listed company, unlisted company, public companies, private companies, asset manager, state-owned company, municipalities.	Special purpose vehicles, institutions within banking groups.
Purpose of issue	To raise funding from capital markets for operational needs.	To raise funding from capital markets for operational needs.	To raise funding by transferring an asset or significant credit risk into investable portfolios off-balance sheet by means of traditional securitisation schemes (for funding) or synthetic securitisation schemes (for credit risk hedging or capital management)
Term structure	Listed CP issuance: longer than five years. Unlisted CP issuance: a maximum of 5 years	364 days	Short term asset-backed commercial Paper (ABCP): less than 1 year Other: longer than five years
BCBS guidance	None	None	Yes, Simple, Transparent and Comparable (STC) term and short-term Securitisations
Ultimate borrower	Yes - defined.	Yes - defined.	No.
Originator	N/A	N/A	Yes - applicable as there is a role for the transfer of underlying assets or credit risk.

Sources: Commercial Paper Exemption Notice, Securitisation Exemption Notice

In summary, the following policy areas have been identified and strengthened in the proposed CP Exemption Notice: (i) expanded definitions in the CP Exemption Notice; (ii) an explicit term structure for CP issuance (iii) expanded scope of coverage of the CP Exemption Notice; (iv) a new regulatory return for compliance and monitoring purposes; and (v) enhanced disclosure requirements for the issue of commercial paper.

International regulatory developments relating to debt issuance were also taken into consideration in the proposed amendments to the CP Exemption Notice. The proposed amendments have also considered the fundamentals of the domestic commercial paper market and will further those efforts through the aforementioned industry questionnaire.

Any enquiries relating to this position paper should be addressed to Videshree.Rooplall@resbank.co.za and PA-Submissions@resbank.co.za

Questionnaire on the assessment of the expected impact of implementing amendments to the Commercial Paper Exemption Notice

Background and context

The key purpose of the Commercial Paper (CP) Exemption Notice of 1994 is to enable institutions that participate in the commercial paper market to access the domestic capital market by issuing commercial paper to raise short term funding solely for purpose of the acquisition by the ultimate borrower of operating capital.

The evolution of market practices and the enhanced need for financial stability have since necessitated a comprehensive review of the legislative framework, which includes a review of the CP Exemption Notice. The CP Exemption Notice has not been updated since its publication in 1994. Additionally, it has come to the attention of the Prudential Authority (PA) that there is possible regulatory arbitrage between the application of the CP Exemption Notice and the Securitisation Exemption Notice of 2008.

The PA has proposed draft amendments to the CP Exemption Notice and designated certain activities as not being “the business of a bank” for purposes of the Banks Act. The PA has also conducted an assessment of international practices relating to the issuance of commercial paper and accordingly aligned these practices with the CP Exemption Notice.

The purpose of this questionnaire is to solicit input from the industry regarding potential benefits and unintended consequences of the proposed amendments to the CP Exemption Notice for institutions that participate in the domestic commercial paper market.

Treatment of the responses

The responses received from all interested persons as part of this process will be taken into consideration by the PA in the finalisation of the CP Exemption Notice.

Information gathered through this questionnaire will be treated with strict confidentiality and only used for the purpose indicated above. The responses to the questionnaire will be anonymised and used to assess the possible impact of implementing the proposed amendments to the CP Exemption Notice.

Guidelines for completing the questionnaire

The questionnaire is expected to be completed by issuers of commercial paper as contemplated in the proposed amended Commercial Paper Exemption Notice. Respondents are kindly required to submit the completed questionnaire on or before 11 August 2023 to the PA at Videshree.Rooplall@resbank.co.za and PA-Standards@resbank.co.za

Information on responding institution	
Name of institution	
Name and position of the respondent	
Contact details of the respondent	

1. Does your institution fall in the scope for the implementation of the CP Exemption Notice?

Yes

No

If your response to the above question is “yes”, please elaborate on your participation in the commercial paper market.

2. What is your understanding on the distinction between the CP Exemption Notice and the Securitisation Exemption Notice? (purpose, structure of agreements, use of conduits etc). Please elaborate.

Response:

3. How does your institution expect to be impacted by the adoption of the proposed amendments to the CP Exemption Notice? What are the potential advantages and disadvantages as well as any unintended consequences of implementing the amendments to the CP Exemption Notice? Please provide data where necessary to substantiate your responses.

Response:

4. What are your views on the proposed expanded list of definitions on the amended CP Exemption Notice? Please elaborate.

Response:

5. What are your views on the proposed expanded list of issuers on the amended CP Exemption Notice? Please elaborate.

Response:

6. What are your views on the proposed explicit maturity term of a maximum of 364 days for commercial paper? Please elaborate on the potential impact on your market operations and how such can be addressed.

Response:

7. In your view, are transitional arrangements necessary to implement the proposed maximum maturity term? If yes, what transitional arrangements do you propose?

Response:

8. What are your views with regards to the enhanced disclosure requirements (for issuers, auditors and guarantees) in paragraph 6 relating to placing documents?

Response:

9. What are your views on the additional disclosures on the terms and conditions of the commercial paper instrument for investors? Is there a preference to disclose the terms and conditions on the website of the issuer for investors?

Response:

10. What are your views on the enhanced statutory returns as captured in Annexure A in the CP Exemption Notice? Any specific views on the requirements relating to primary disclosures, additional disclosures, and commercial paper (issued, redeemed, outstanding)?

Response:

11. Are there any additional expected costs of complying with the requirements set out in the amended CP Exemption Notice? Please elaborate.

Response:

12. Are there other potential challenges that could be faced in implementing the amended CP Exemption Notice?

Response:

13. Are there any other matters concerning the amended CP Exemption Notice that you would like to bring to the attention of the Authority?

Response: