



**NATIONAL
TREASURY**



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**THE CHAIRPERSONS OF THE
PORTFOLIO COMMITTEE ON FINANCE
(PCOF) AND THE SELECT COMMITTEE
ON FINANCE (SCOF)**

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**RESPONSES TO REPRESENTATIONS BY ORGANISATIONS AND
INDIVIDUALS TO THE MEETINGS OF THE PCOF AND SCOF ON THE
EXCHANGE CONTROL AMNESTY AND AMENDMENT OF TAXATION
LAWS BILL, 2003 (the Bill)**

1 Introduction

As indicated to you during the hearings on the above-mentioned Bill on 7 April 2003, SARS, the National Treasury and the Exchange Control Department wish to respond as follows to the various points raised by commentators in their submissions on the Bill.

2 Consultation

National Treasury, SARS and the Reserve Bank placed the First Draft Bill on their websites on 2 April 2003 and invited all interested parties to comment electronically. The Bill has been amended taking into account comments received and was approved by Cabinet on 23 April 2003 for Parliamentary submission. National Treasury, SARS and the Reserve Bank placed the Second Draft of the Bill on their websites on 23 April 2003. Comments received after that date, which required further changes to the Bill were pointed out in the presentation to the Committees on 13 May 2003.

3 Responses to specific issues raised in representations by commentators

3.1 Timing of Amnesty legislation

Decisions are being made in haste. If matters pertaining to the exclusion of corporates, other taxes, advisors and facilitators cannot be resolved immediately, the project should be delayed.
(Matthew Lester)

Despite assurances given the public was not given 10 working days to review the Bill. Express concern that there was very little time to resolve identified issues.
(PricewaterhouseCoopers)

In future, it would be appreciated if additional time were permitted for the formulation of comments and submissions.
(Moores Rowland)

It is generally accepted that an amnesty should take effect as soon as possible after its announcement in order to provide certainty to potential applicants and to ensure that ongoing reporting is not stifled in anticipation of the amnesty. Indeed, jurisdictions have been known to commence the formal legislative process on the date that the amnesty is announced.

In order to consider and evaluate representations to the Parliamentary Committees properly it was decided that the tabling of the Bill be delayed. This allowed for the first draft Bill which was made available for public comment to be updated and proposals by commentators to be taken into account. The second draft Bill was placed on the websites of National Treasury, SARS and the Reserve Bank on 23 April 2003. A Word version was made available to the Committees on 5 May 2003. Comments on both drafts were considered and, where appropriate, changes have been made.

3.2 Definitions

The definition of “applicant” should provide for instances where no exchange control contravention occurred but the taxpayer failed to account for a tax liability.

(Association of Trust Companies in South Africa)

The proposal is accepted. It is possible to apply for exchange control amnesty, tax amnesty or both.

The “bearer instruments” held on 28 February 2003 should exclude those instruments which are subsequent to that date converted to acceptable assets. Alternatively the applicant should disclose the source of the assets and how they were accumulated.

(PricewaterhouseCoopers)

The proposals are not accepted. The first gives rise to cut-off and money laundering concerns, as bearer instrument acquired after the announcement date or from unidentified sources could be brought into the amnesty framework. The second would require detailed review and analysis of applications by the amnesty unit, something that has been avoided as far as possible in order to maximise applicants' certainty.

The utilisation of bearer shares held by offshore residents as nominees for South African residents was historically a very popular method of structuring undeclared foreign assets. These arrangements should not be excluded.

(Law Society of South Africa)

The proposal is partly accepted. As bearer instruments raise money laundering concerns they will only be included if the beneficial owner can prove that they were acquired from that beneficial owner's own funds which had been held for a period of at least 18 months prior to the acquisition thereof.

The definitions of “Commissioner” and “General Manager” should include any of their officials, as it is the officials who are the persons who carry out the duties required for a practical implementation of the Bill.

(Law Society of South Africa)

The proposal is accepted in the case of the “General Manager”. The Income Tax Act and the Estate Duty Act already provides that any officer acting under the delegation or under the supervision or control of the Commissioner may also perform the duties to be performed by the Commissioner.

The definition of “foreign assets” should include assets accumulated outside the Republic that were subsequently re-invested in the Republic on behalf of an offshore entity.

(Association of Trust Companies in South Africa)

The proposal is not accepted, as it does not meet the objective of the amnesty which is to ensure maximum disclosure of foreign assets and to facilitate repatriation thereof to the Republic.

The definition of “unauthorised assets” needs to be clarified if it is the intention that it means assets transferred or accumulated in contravention of the exchange control regulations as they stood at the time of the accumulation or transfer.

(KPMG)

This proposal is accepted. The intention is that “unauthorised assets” means assets transferred or accumulated in contravention of the exchange control regulations as they stood at the time of the accumulation or transfer. However, the foreign capital allowance applicable on 28 February 2003 will be taken into account in determining the exchange control amnesty levy payable by individuals. An applicant who held foreign assets on 28 February 2003, which have been wholly or partly derived from unauthorised assets, may apply for amnesty.

The definition of “unlawful activities” is too broad and vague and creates doubt in the minds of residents and advisors as they will not know whether a particular person has committed any breach of any laws other than income tax and exchange control regulations. The definition should refer to “illegal activities” which is defined in other legislation by an exclusive list of activities which constitute illegal activities.

(Law Society of South Africa)

The scope of unlawful activities should be narrowed to serious crimes. If the underlying business activity is legal then contraventions such as of common law and the Companies Act should fall within the scope of the amnesty.

(Moores Rowland)

A failure to provide for amnesty in respect of certain criminal activities, such as contraventions of the Companies Act, could hinder the success of the amnesty.

(SACOB)

The term is so widely defined that it encompasses less serious crimes such as petty theft or a company law contravention and may result in many potential amnesty applicants falling outside the ambit of the relief.

(KPMG)

The exclusions from the definition of “unlawful activities” are too limited, e.g. a breach of fiduciary duties to shareholders in contravention of the Companies Act will preclude the amnesty from applying. Only serious crimes such as drug smuggling, money laundering, racketeering and terrorism should be covered.
(PricewaterhouseCoopers)

This proposal is partly accepted. The scope of the definition of “unlawful activities” has been limited by excluding any offence stemming from a misrepresentation or non-disclosure that was necessary to facilitate an exchange control contravention or failure to comply with the Income Tax Act or the Estate Duty Act. The effect of the change is that a person who committed offences which facilitated an aforementioned contravention or failure to comply will be able to qualify for exchange control or tax amnesty. However, the applicant will not be indemnified for facilitating other offences, e.g. offences in terms of the Companies Act.

3.3 Qualifying persons

Advisors / Facilitators

The success of the amnesty program is going to depend on professionals advising their clients to take advantage of the offer. The exclusion of advisors will detract from the enthusiasm for the amnesty without giving much benefit to SARS.

(Matthew Lester)

An amnesty for advisors/facilitators should be maintained. There will always be a concern that by disclosing information relating to the taxpayer’s offshore funds the identity of the advisor/facilitator will somehow be disclosed and be subject to possible prosecution under the Income Tax Act (section 104 of IT Act - assistance to evade tax).

(SACOB)

The exclusion of tax advisors, financial advisors and attorneys would effectively remove an amnesty for any advisor as the vast majority of any advice would have been obtained through these persons.

(Law Society of South Africa)

The desired result under the amnesty process can only be achieved by the committed participation of financial advisors protected under the Draft Bill. Provision should also be made for amnesty for the employers of facilitators, such as banks.

(Banking Council)

By keeping advisers out of the amnesty I believe this will definitely lead to fewer applications from their clients. If a client chooses to apply the sensible thing for the advisor to do, considering the escalating powers and reach of SARS, would be to sever relations with the client as on-going trail commissions will be traced by SARS.

(Anonymous)

These proposals are addressed indirectly after exploring various alternatives.

There are three alternatives for giving amnesty to the various categories.

- Firstly, an amnesty could have been given to advisors who originally advised applicants on the method of transferring assets offshore in return for full disclosure of the names of the clients they advised as well as the method. This alternative was not feasible as it would have created the perception of a witch hunt.
- Secondly, a blanket amnesty could have been given to all advisors/facilitators who originally advised and assisted their clients. However, this option is not advisable as an amnesty would be granted for undisclosed activities and serious criminal activities could also benefit from such a blanket amnesty. It is not clear what the contraventions are for which amnesty would have been given.
- Thirdly, amnesty is not granted to advisors/facilitators, but their identity is protected. It was decided to follow this last alternative in developing the Bill.

As separate issue, the persons who advise and assist applicants in applying for the amnesty are protected by exempting them from the reporting requirements in terms of the Financial Intelligence Centre Act.

Advisors and facilitators who assisted the illegal shift or accumulation of funds offshore have no foreign assets to contribute as consideration for amnesty relief. These parties are as a general rule not at risk as a result of the amnesty granted to applicants. Applicants are not required to reveal the names of those who assisted them, nor may the amnesty unit, SARS or the Exchange Control Department request their details. The amnesty unit is also required to submit successful applications and supporting documents without the names of any person other than the applicant or applying facilitator to SARS or the Exchange Control Department depending on the type of amnesty approved.

However, the amnesty is available to a small class of facilitators whose anonymity could potentially be compromised by the amnesty despite the protective measure provided for. This would be the situation where a subsequent review of an applicant's affairs could easily reveal the identity of the facilitators without the Exchange Control Department or SARS forcing the applicants to disclose names, e.g. a wholly owned company conducting international business activities.

A company with non-family shareholders would be prohibited from applying as a facilitator.

(Association of Trust Companies in South Africa)

A company held jointly by an applicant and four or fewer other shareholders should qualify as a facilitator.

(PricewaterhouseCoopers)

The proposals are not accepted. Such companies are no longer the

alter ego of the applicant and the possibility of prejudice of a third party shareholder increases drastically.

The disclosure by advisors should exclude the obligation to disclose the exact jurisdictions and the persons who participated in those structures.

(Law Society of South Africa)

Advisors do not qualify for relief in terms of the Bill and no disclosure is required.

Companies

Transfer pricing and other forms of indefensible tax evasion exported a major portion of the money that will be subject to the amnesty. The cost of inclusion of Corporates is minimal for SARS and the exclusion should be reconsidered.

(Matthew Lester)

Include private companies, close corporations and all legal structures in which the applicant has a beneficial interest in order to increase tax receipts and widen the tax base.

(Banking Council)

By not extending the amnesty to companies and trusts may constitute a significant inhibiting factor to the success of the amnesty.

(PricewaterhouseCoopers)

The amnesty should apply to all (including corporations) from the time the opportunity was announced by government on 26 February 2003.

(Law Society of South Africa)

Entities such as companies, clubs and other associations should also be able to apply for amnesty.

(Association of Trust Companies in South Africa)

The proposals are partly accepted. The definition of applicant has been extended to include close corporations and trusts.

Historically corporate vehicles had more legal avenues open to them for the export of funds than individuals. The main thrust of the amnesty is that of an exchange control amnesty in respect of individuals and closely held facilitators. It is not considered appropriate to extend it to companies holding unauthorised assets offshore as they operate under a wholly separate discretionary regime for purposes of exchange control. Unlike natural persons, close corporations or trusts, companies can invest in sizeable business projects offshore upon receipt of Exchange Control approval. These companies must also annually repatriate foreign earnings unless they can obtain further Exchange Control approval to retain excess foreign earnings offshore. In order to obtain this further Exchange Control approval, a company with foreign assets must generally demonstrate that this offshore retention is necessary to maintain or expand current foreign operations within the same line of

business. The granting of exchange control amnesty to companies would result in the unacceptable situation that two pools of assets would have to be regulated and monitored

Provision has also been made for certain persons (facilitators) who assisted an applicant by accumulating foreign assets or transferring funds or assets offshore for the benefit of the applicant to qualify for amnesty where they make a joint application with an applicant. This effectively includes companies all the shares of which are held by an applicant or the applicant's relatives.

See paragraph 3.24 for a discussion of the constitutional implications.

Non-resident individuals

The definition of “resident” does not make specific provision for former residents who may wish to return to South Africa.

(Banking Council)

The proposed legislation should extend to non-residents who relocated offshore without a formal emigration.

(Law Society of South Africa)

The proposal is not accepted. One of the main objectives of the amnesty is to extend the tax base. Non-residents who disclose foreign assets will not be subject to the residence basis of taxation in South Africa and future tax collections will not increase as a result of the disclosure of the assets. It is also doubtful whether such persons would repatriate their funds to South Africa. Non-residents are outside South Africa's jurisdiction and are therefore not subject to South African tax law and exchange control regulations. A further risk of including non-residents is that opportunities would be opened up for criminals to use the amnesty for money laundering. The benefits of the amnesty are, therefore, limited to residents of South Africa.

Persons who have left the country while still qualifying as residents for Exchange Control purposes (i.e., persons who left the country without Exchange Control departure) would still qualify as residents for the Exchange Control portion of this amnesty.

Certain individuals will become non-residents as a result of the change in the definition of “resident” and the amnesty will not apply to them. These individuals may return to SA and should be permitted to apply from overseas. The exclusion of these individuals appear to be at odds with national policy and leaves an additional hurdle to be cleared for many expatriates wishing to return home. South African expatriates in a country with which South Africa has no tax treaty will be treated differently from expatriates in a country where a tax treaty is in place. We submit that the exchange control and tax amnesties be extended to non-residents who were residents at the time of the breach.

(PricewaterhouseCoopers)

The question of the application of a tax treaty will generally arise when an expatriate is considered “ordinarily resident” in South Africa and a resident in the other jurisdiction in terms of a “physical presence” test. SARS Interpretation Note 3 states that; “Although the Income Tax Act does not define “ordinarily resident”, the courts have interpreted the concept to mean the country to which a person would naturally and as a matter of course return from his/her wanderings. It might therefore be called a person’s usual or principal residence and it would be described more aptly, in comparison to other countries as the person's real home. The above approach was followed in the case, *Cohen v CIR* (13 SATC 362) and confirmed in the case *CIR v Kuttel* (54 SATC 298).”

On the other hand, physical presence tests vary from jurisdiction to jurisdiction, but are generally variants of a 183 day in a year rule where the degree of physical presence confers tax residence. Where these conflicting claims of residence are laid the “tie breaker” provisions of the tax treaty come into play.

The tie breaker provisions vary from tax treaty to tax treaty, but paragraph 2 of Article 4 of the OECD Model Convention suggests the following—

“Where by reason of the provisions of paragraph 1 an individual is a resident of both Contracting States, then his status shall be determined as follows:

- a) he shall be deemed to be a resident only of the State in which he has a permanent home available to him; if he has a permanent home available to him in both States, he shall be deemed to be a resident only of the State with which his personal and economic relations are closer (centre of vital interests);
- b) if the State in which he has his centre of vital interests cannot be determined, or if he has not a permanent home available to him in either State, he shall be deemed to be a resident only of the State in which he has an habitual abode;
- c) if he has an habitual abode in both States or in neither of them, he shall be deemed to be a resident only of the State of which he is a national;
- d) if he is a national of both States or of neither of them, the competent authorities of the Contracting States shall settle the question by mutual agreement.”

This set of tests is closer to those that would be applied to determine if a person were resident in terms of the ordinarily resident test than a physical presence test. The amendment to the definition of “resident” will, therefore, have no effect on the majority of expatriates who intend to return to South Africa.

On the other hand, expatriates who have made another country their real home and have only a vague intention or the possibility of a return to South Africa in mind are properly considered non-residents. The comments above in respect of the extension of the amnesty to non-residents apply in this case.

Nominees holding assets

Clarity is required as to the position where assets are declared by a person, but those assets are held in the name of a nominee.

(PricewaterhouseCoopers)

Only persons who hold foreign assets may apply for amnesty under certain circumstances. The concept “held”, “hold” or “holding” has been defined for purposes of the Bill and means direct beneficial ownership of the foreign asset. In essence the applicant must be the owner of the foreign asset.

It is an internationally recognised principle that listed financial instruments are held by nominees for ease of settlement. It is, however, less common in the case of other types of assets. Ownership of an asset held via a nominee will have to be proven to the satisfaction of the amnesty unit.

Executors of estates of persons who died on or before 31 October 2003 where the estate has not been finalised by that date should also be able to apply for amnesty.

(Association of Trust Companies in South Africa)

Extend the amnesty to deceased estates.

(Moores Rowland)

The proposal is accepted. As it would have been the deceased person who contravened exchange controls and there is no person to prosecute for the contravention it is not considered necessary to grant amnesty for exchange control purposes. However, the definition of applicant who may apply for tax relief has been extended to include the executor of a deceased estate which has not been finalised.

3.4 Foreign currency translation rates

Given the diversity of location of assets of people seeking amnesty, it is suggested that the applicable spot rates are made available for a selection of major currencies.

(Banking Council)

The proposal is accepted. A selection of the most important exchange rates on 28 February 2003 to be used to translate the foreign capital allowance to the relevant foreign currencies will be published. The rates will also be made available by the Reserve Bank if required.

The foreign exchange risk in relation to the exchange control levies lies wholly with the fiscus.

(PricewaterhouseCoopers)

The ruling exchange rate on the date of payment of the exchange control levies will determine the amount of the levy to be paid. The risk is

therefore shared between the applicant and the fiscus.

3.5 Non-resident trusts

Foreign discretionary trust structures should be recognised so as not to serve as a disincentive to apply for amnesty and the normal legal and fiscal consequences must follow.

(Association of Trust Companies in South Africa)

Amnesty relief will only apply in respect of assets held by a foreign discretionary trust on 28 February 2003 where the donor of the assets elects that those foreign assets are deemed to be held by that donor. The reason for only allowing a donor to make an election in respect of a foreign discretionary trust is that discretionary beneficiaries, excluding a donor, would not have contravened any exchange control regulations or tax provisions.

Beneficiaries with a vested right to foreign assets held in a trust should be included.

(Law Society of South Africa)

No change is required. Beneficiaries with vested rights to foreign assets are able to apply for the amnesty as the definition of “hold” covers the direct beneficial ownership the vested beneficiary has with respect to the asset.

A beneficiary of a discretionary trust should not be able to elect that the assets of the trust be treated as that person’s own assets as more than one person may elect to be treated as the holder of the assets, the beneficiary may never receive the assets and the beneficiary will not have contravened exchange control regulations.

(KPMG)

By bringing a discretionary trust beneficiary, where the participation is limited to a spes, within the ambit of the legislation prior to the trustees of the trust exercising their discretion will give rise to bizarre results where the levy will be paid on something the beneficiary may never receive.

(Law Society of South Africa)

Why should a beneficiary who was not the donor of a discretionary trust be invited to elect to treat the assets of that trust as their own?

(PricewaterhouseCoopers)

The proposal is accepted. The option for a beneficiary to elect that foreign assets of a discretionary trust be treated as the person’s own assets has been withdrawn. The reason is that such a beneficiary in which the foreign asset has not vested would not have contravened exchange control regulations.

A donor who exercises the election may be subject to double taxation. The assets will be treated as being held personally by the donor and SARS could seek to impose donations tax on the original donation and also attempt to apply section 7(5) or (8) of the IT Act.

(KPMG)

Should the election as contemplated in section 3(2) be made, the donor or beneficiary should not be penalised in terms of section 7 of the IT Act as the foreign assets are not actually at his or her disposal.

(Law Society of South Africa)

The proposal is accepted. Any potential double taxation has been eliminated by deeming the donor who has made the election to have held the assets from the date that they were acquired by the trust. Furthermore, the Bill now specifically provides that the attribution rules, including section 7(5) and (8), do not apply in respect of any income, expenditure or capital gain relating to those foreign assets.

People who have established trust structures will be unwilling to dismantle them. The normal tax rules should apply. It is not clear whether the donor will be entitled to dispose of the assets deemed to be held to the trust or beneficiaries.

(Association of Trust Companies in South Africa)

The amnesty relief for assets held in foreign discretionary trusts is optional and a donor is not obliged to make the election provided for in clause 4. The provisions of clause 4 only apply for purposes of the amnesty and for tax. In reality the trustees of discretionary trust would still be the owners of the assets on behalf of the discretionary beneficiaries.

The provision which deems the donor to have held the foreign asset from 28 February 2003 appears to extend the income tax amnesty to the 2003 year of assessment.

(Association of Trust Companies in South Africa)

The proposal is accepted. This provision will be fully aligned with clause 15.

3.6 Indirectly held assets

Undeclared capital was donated to or provided by way of interest free loans to offshore companies in contravention of exchange controls. These assets are excluded from the amnesty. It seems to be discriminatory that a preference is given to trust arrangements as opposed to offshore company arrangements. Applicants should also be protected from related issues such as transfer pricing and controlled foreign entity provisions.

(Law Society of South Africa)

This is not the case. A donation to a wholly owned company increases the value of the shares held. As the value of the shares is derived from an unauthorised asset, amnesty may be applied for.

In as far as an interest free loan to a company or trust is concerned, a resident may apply for amnesty in respect of an interest free loan made in contravention of exchange control if that loan qualifies as a foreign asset in the hands of the resident. An applicant may also apply for tax amnesty in respect of foreign and domestic income tax violations.

3.7 Application

It is suggested that the commencement of the six month period for application be delayed by three months, as experience has shown that the obtaining of information from foreign banks and institutions can be tedious and time consuming.

(Moores Rowland)

This proposal is partly accepted. The commencement date of the amnesty will be one month later and the final date for applying for the amnesty has been moved to 30 November 2003. Persons who wish to benefit from the amnesty can at this stage commence to obtain information in respect of assets held at the end of tax years ending on or before 28 February 2002 and 28 February 2003, depending on the amnesty relief required.

The amnesty unit should be granted the discretion to extend the period during which an applicant may apply in appropriate circumstances such as illness of the applicant.

(Moores Rowland)

This proposal is not accepted. The objective of the amnesty is to enable applicants to regularise their affairs and to achieve finality and certainty in this regard as soon as possible.

A copy of the format of the anticipated application form is not provided.

(Banking Council)

See Annexure A for a copy of the draft application form.

3.8 Reporting requirements

What if details as to historical cost are no longer available?

(PricewaterhouseCoopers)

If exact information is no longer available a best estimate supported by the available information should be submitted. If estimates have been used the basis for the estimates must be disclosed.

The inclusion of a definition of “historical cost” may be useful given the possible accumulation of foreign assets over a period of time.

(Banking Council)

The inclusion of a definition of historical cost is not considered necessary, as the concept of historical cost is generally well understood. The historical cost of an asset would reflect the actual cost of the asset in the past.

Clarity is required on the level of detail which must be provided in respect of disclosed assets. Should bank account numbers and the details of the bank be provided?

(PricewaterhouseCoopers)

The required identifying characteristics of an asset in the form of a bank account would include the account number as well as the name of the bank.

Greater clarity should be provided of the extent the market value of the foreign asset represents or has been derived from unauthorised assets. Losses could have been sustained on legitimate foreign assets – the impression is created that the overall net position should be legal.

(Banking Council)

It is unclear what disclosure is required in relation to the extent the market value of a foreign asset represents or has been derived from any unauthorised assets, i.e. does it include or exclude growth.

(Moores Rowland)

The explanatory memorandum to the Bill will provide an example to clarify how the market value of foreign assets held wholly or partly in contravention of exchange control on 28 February 2003 is to be reduced by the amount of value not held in contravention and the permissible foreign capital allowance for individuals.

It would be wholly impractical and not logistically practical to obtain statements of account ending on the date of submission of the application.

(Moores Rowland)

The proposal is accepted. The requirement in respect of financial instruments has been changed to require the statement of account indicating the balance or market value on 28 February 2003.

Concur that a provision be inserted which prohibits any authority or person from requesting the applicant to provide details as to how his/her funds were remitted, on whose advice certain structures were put in place and who facilitated the removal.

(KPMG)

The proposal is partly accepted. A provision has been incorporated in the Bill that the amnesty unit, SARS or the Exchange Control Department may not request an applicant to provide details of persons who advised the applicant on the method of accumulating foreign assets or transferring assets from the Republic or assisted with the accumulation or transfer, other than the facilitator who jointly applies with the applicant.

Detailed dates on which the amounts were accumulated or converted may be impossible to supply by facilitators and add to the complexity of the process.

(Banking Council)

Many of the potential applicants will not have records going back far enough and in sufficient detail to meet the disclosure requirements.

(PricewaterhouseCoopers)

Where exact dates are not available for periods prior to 28 February 1998, applicants or facilitators may give a best estimate of the month or other period during which the foreign assets were accumulated or converted. If estimates have been used the basis for the estimates must be disclosed.

3.9 Valuations

Concerned that applicants only have until 31 October 2003 to obtain market valuations of foreign assets as at 28 February 2002 and 28 February 2003.

(PricewaterhouseCoopers)

The date of 31 October 2003 has been moved to 30 November 2003. Nothing prevents potential applicants from commencing with the accumulation of the necessary information. Also see paragraph 3.7.

The requirement is burdensome – refer to the submission of two valuation certificates (valuator and a sphere of government).

(Banking Council)

In this instance the draft legislation requires either a valuation certificate by a valuator of the country where that foreign asset is located **or** a valuation by a sphere of government of the country where that foreign asset is located.

3.10 Date of approval

The amnesty unit should be required to approve or deny applications within time limits.

(PricewaterhouseCoopers)

The proposal is not accepted. No time limit has been specified in the draft Bill. Planning is in progress to ensure the Amnesty Unit deals with

applications as quickly as possible but actual response times will depend on the volume of applications received. In order to expedite the decision making process the criteria for approval or refusal of an application have been specified in the draft Bill. If an applicant complies with all the criteria, provides the information required and is not disqualified on the grounds clearly set out in clause 10 of the draft Bill, the Amnesty Unit *must* approve the application.

3.11 Status of tax returns

Should the amnesty unit confirm the status of tax returns prior to considering an application?

(PricewaterhouseCoopers)

Before an application for tax relief is approved, the amnesty unit should establish whether an income tax return for the last year of assessment ending on or before 28 February 2003 has been submitted or that extension for the submission of the return has been granted.

3.12 Submission of income tax returns

An amendment should be introduced in terms of which SARS will be obliged to grant extension for the submission of tax returns until February 2004 if the taxpayer gives the undertaking that it is applying for tax amnesty relating to foreign assets. This will prevent the administratively and constitutionally unfair situation by virtue of the discretionary conduct of SARS.

(Law Society of South Africa)

The proposal is not accepted. The normal procedures relating to the granting of extension for the submission of tax returns will apply, i.e. an amnesty applicant will not be treated differently from other taxpayers. An application for tax relief may be approved where extension for the submission of the applicant's tax return was granted by the Commissioner, but will be rendered invalid if the return has not been submitted by 29 February 2004. The Income Tax Act contains an objection and appeal process should a taxpayer believe that an extension request has been denied unfairly.

3.13 Leivable amount

The authorised foreign investment allowance taken into account to determine the leivable amount does not take into account growth of the foreign funds.

(PricewaterhouseCoopers)

Although the growth on the amount of the foreign capital allowance which could have been utilised in the past will not benefit from the tax relief, the applicant will get the benefit of the current level of the allowance. Where an applicant utilised part of the foreign capital allowance to invest offshore with approval, only the unutilised portion of the foreign capital

allowance as at 28 February 2003 will qualify as a reduction of the leviable amount. Clearly the leviable amount will exclude the approved amount invested offshore as well as any growth attributable to that approved amount invested offshore.

Sight should not be lost of the following points:

- An applicant may have invested in excess of the foreign capital allowance while law abiding residents were limited to the capital allowance.
- In all probability no tax has been paid on the foreign investment.
- The Exchange Control Department could have confiscated the entire foreign investment.

The deduction of the foreign investment allowance will only be effective if there is specifically referred to Section B.5 of the Exchange Control Rulings issued by the South African Reserve Bank.

(Banking Council)

A generic reference to the permissible foreign capital allowance in terms of the Exchange Control Regulations is used in clause 11 of the Bill.

Uncertainty may arise where the foreign assets are held in the name of only one spouse, whereas the foreign assets may belong to both.

(SACOB)

Only applicants who have a direct beneficial ownership in foreign assets may apply for amnesty. The foreign capital allowance is currently fixed at R750 000 per individual. In the case of a family unit the acceptable foreign capital allowance depends of the facts of the specific case. For spouses married out of community of property the first spouse only qualifies for a foreign capital allowance of R750 000. If the balance of the couple's assets were transferred and registered in the name of the other spouse it will be possible to utilise the further R750 000 capital allowance. Where spouses are married in community of property, disclosed foreign assets registered in the name of one spouse but forming part of their joint estate will qualify for a maximum of R1.5 million foreign capital allowance, reduced by any utilisation of the allowance by either of the spouses on or before 28 February 2003.

More clarity is needed on the apportionment of mixed offshore funds on the basis of the original source thereof. Provision should be made to permit an estimate as to the split between legitimate and illegitimate assets, which may have been blended over the years.

(PricewaterhouseCoopers)

The explanatory memorandum to the Bill will provide an example to clarify how the market value of foreign assets held wholly or partly in contravention of exchange control on 28 February 2003 is to be reduced

by the portion of the value not held in contravention and the permissible foreign capital allowance for individuals.

Clarify the treatment of undisclosed foreign inheritances and income flowing therefrom.

(PricewaterhouseCoopers)

Only from 1 July 1997 were South African residents able to apply to the Exchange Control Department for an exemption in terms of Exchange Control Regulations 6 and 7 to retain inheritances of foreign assets abroad. From 17 March 1998 South African residents are exempted from the provisions of Exchange Control Regulations 6 and 7 in respect of foreign inheritances / legacies. Only inheritances treated in contravention of these rules will constitute unauthorised assets.

If an applicant is successful in an application for exemption for undeclared foreign income, any passive income which may have been earned up until 28 February 2002 as a result of the inheritance of foreign assets will qualify for amnesty relief.

The Bill does not address reconciling errors between the amount repatriated and the amount disclosed as a result of transaction costs or market movements.

(Banking Council)

The proposal is accepted. The exchange control amnesty levy will be calculated with reference to the foreign amount disclosed as at 28 February 2003. No reconciling errors should arise in respect of the domestic tax amnesty levy as it is based on the undeclared amounts accumulated or converted to foreign assets.

The market value of foreign assets should be reduced by the foreign liabilities attached to the asset.

(Banking Council)

The proposal is not accepted. Where an asset was financed using a foreign loan which was in contravention of Exchange Control Regulations, the foreign asset so financed is treated as an unauthorised asset.

3.14 Payment of levy

The most appropriate exchange rate to use when calculating the levy payable is that on 28 February 2003.

(PricewaterhouseCoopers)

The proposal is not accepted. The exchange rate to be used is the ruling spot rate on the date of repatriation of the foreign funds for determination of the 5 per cent levy and the date of payment to the authorised dealer in the case of the 10 per cent levy. The utilisation of these exchange rates will simplify matters for authorised dealers processing payments of the

exchange control amnesty levies.

Where amnesty applicants do not have sufficient disposable funds within the set time frame an additional 2.5% penalty payment on the leviable amount should be imposed. The total obligation should be payable in Rand at the discretion of the chairperson of the amnesty unit. Examples of situations where sufficient foreign assets to pay the levy may not be available are the holding of foreign property or if a foreign trustee refuses to pay funds out of a foreign trust to the donor.

(Banking Council)

The proposal is not accepted. The amnesty is based on the principle that the further utilisation of domestic funds should be limited and that the repatriation of foreign funds be maximised by requiring payment of the exchange control amnesty levy by way of repatriated foreign funds. Persons who are considering making use of the amnesty relief can already start realising foreign assets or arranging foreign financing to pay the exchange control amnesty levy.

Consideration should be given to extending the periods of time for payment of the amnesty levy as it may not be practical to raise funds or dispose of assets within the periods contemplated.

(Moores Rowland)

The proposal is not accepted. The extension of the period for payment by the amnesty unit for a period not exceeding three months is considered to be sufficient. If approval is granted on 30 November 2003, the Bill already makes provision for an applicant to be allowed a further period of not longer than three months to pay the amnesty levy (until 31 May 2004 at the latest) if the applicant proves that the amnesty levy payment cannot reasonably be converted to Rand within three months after date of approval (normally payable by 29 February 2004). Persons who are considering making use of the amnesty relief can already start realising foreign assets or arranging foreign financing to pay the exchange control amnesty levy.

3.15 Scope of relief

Amnesty relief should also be granted for estate duty and donations tax.

(Association of Trust Companies in South Africa)

Amnesty should be granted for donations tax.

(SACOB; PricewaterhouseCoopers)

These proposals are accepted and the Bill has been changed to grant an exemption for donations tax and estate duty to applicants.

The amnesty should provide relief from all fiscal imposts that were payable in respect of the undisclosed foreign assets.

(SACOB)

This proposal is partly accepted. Provision has been made for exemption for certain taxes which could have been imposed in terms of the Income Tax Act as well as the Estate Duty Act.

The amnesty does not cover tax contraventions, such as PAYE to be withheld by an employer, withholding tax on royalties, Skills Development Levy, UIF and RSC levies. These taxes have been excluded from the amnesty because contraventions of this nature typically involved a breach of a fiduciary duty with respect to amounts held or deducted on behalf of another.

Applicants to whom approval for amnesty has been granted should also get exemption from the payment of interest.

(PricewaterhouseCoopers)

The proposal is accepted. The wording of the draft has been changed to provide that the applicant will not be liable for the payment of any amount which could have been imposed in terms of the IT Act, which includes interest.

It is unclear whether the exemption from taxes and penalties extends to donations tax and interest.

(PricewaterhouseCoopers)

The Bill provides for exemption from the payment of donations tax and interest in certain instances.

The definition of foreign assets should refer to assets outside the Common Monetary Area. However, the tax amnesty should apply to assets outside the Republic.

(Law Society of South Africa)

This exchange control amnesty only applies in respect of a foreign asset to the extent it is held in contravention of Exchange Control Regulations. The exchange control amnesty levy may only be paid from foreign assets which exclude funds denominated in the currency of a country which forms part of the common monetary area.

The foreign tax amnesty applies to foreign assets derived from receipts and accruals from Lesotho, Namibia or Swaziland or any other foreign country, i.e. from a source outside South Africa

Can a person apply for tax amnesty in the absence of exchange control contravention? It is not clear whether an amnesty levy would be payable in this case?

(Association of Trust Companies in South Africa)

An applicant may qualify for an exchange control amnesty, a tax amnesty or both. Where an applicant did not contravene exchange control a domestic tax amnesty levy is payable in respect of undeclared amounts

arising in the Republic, but no levy is payable in respect of undeclared foreign income.

Can an applicant apply for conditional amnesty to the extent that there has been contravention?

(Association of Trust Companies in South Africa)

The exchange control amnesty levy is only payable on the leviable amount which is determined with reference to the value of foreign assets which are held in contravention of Exchange Control Regulations.

3.16 Donation of foreign assets

The exclusion of foreign assets which are no longer held as a result of a donation by an applicant should be removed in so far as foreign assets were donated to connected persons, or an offshore company or discretionary trust in which the donor, or connected person is the beneficial owner or beneficiary.

(Law Society of South Africa)

The exclusion of assets donated implies that the applicant is in contravention of the exchange control regulations.

(Banking Council)

The proposal is not accepted. The reason for the exclusion is to preclude persons from obtaining indemnity for assets donated, where the assets donated will not be taken into account in determining an applicant's leviable amount.

3.17 Domestic income

Concerned that SARS could launch independent enquiries into a taxpayer's affairs, especially as regards South African source income to which the amnesty does not apply.

(PricewaterhouseCoopers)

Undeclared South African source income may have been applied in obtaining foreign assets in contravention of exchange control regulations in a substantial number of cases. The absence of tax amnesty for this income could be a significant inhibiting factor for applicants.

(SACOB; KPMG; PricewaterhouseCoopers)

The effectiveness of the amnesty will be greatly enhanced if it could be extended to funds which have not been declared for income tax purposes which are invested abroad. A compromise might be to offer amnesty for penalties and interest in relation to the funds which are invested abroad.

(Moores Rowland; SACOB)

The vast majority of residents who hold assets outside the borders in contravention of the Exchange Control Regulations derived these assets from undeclared capital or profits for tax purposes. These people will be ill-advised to take advantage of

the amnesty as they would not be covered in respect of taxes on South African sourced funds and an application may very well give rise to secondary tax investigations. This will result in the amnesty being of extremely limited application.

(Law Society of South Africa)

In order to encourage applications, all violations of local Revenue Acts which are integral in transferring funds offshore should qualify for amnesty. Alternatively, amnesty applicants taxpayers would be liable for tax but not interest and penalties and a statute of limitation of three years may be provided whereafter the 2001 to 2003 tax years may not be investigated.

(KPMG)

The cost of inclusion of other taxes is minimal for SARS and the exclusion should be reconsidered.

(Matthew Lester)

The exemption from payment of tax should be extended to include any tax that has not been paid in respect of South African sourced assets that on 26 February 2003 were foreign assets.

(Law Society of South Africa)

It would be appropriate to include estate duty within the scope of the amnesty.

(Moore Rowland)

Income tax contraventions may have resulted in consequential VAT or Customs Duty contraventions for which relief is not granted. This may serve as a disincentive to potential applicants/facilitators.

(Association of Trust Companies in South Africa)

These proposals are partly accepted. In addition to the exchange control and foreign income amnesty, provision has also been made for further relief for domestic tax transgressions, i.e. income tax, donations tax, secondary tax on companies and estate duty, which relates to undisclosed foreign assets. The amnesty will not cover other taxes, e.g. VAT, PAYE and SDL. These taxes have been excluded because violations of this kind typically involve the breach of fiduciary obligations, e.g. the wrongful use of PAYE deducted from employees' salaries.

The domestic tax relief is subject to the payment of a 2 per cent domestic tax amnesty levy. The levy is based on amounts not declared to the Commissioner for tax purposes to the extent those amounts were accumulated as or converted to foreign assets.

The imposition of a domestic amnesty levy is punitive in nature and should not be included in the Bill.

(Banking Council)

The proposal is not accepted. The first draft of the Bill was amended to provide for an amnesty for amounts now disclosed relating to domestic income tax and estate duty contraventions at the time. The imposition of an additional 2 per cent levy is a low price to pay for the benefit of domestic tax relief.

It should be assumed that all offshore assets arose from domestic funds which were not declared to SARS except to the extent the applicant can prove otherwise.

(PricewaterhouseCoopers)

This proposal is not accepted. The relationship between funds accumulated or transferred offshore and domestic tax evasion is important to keep a proper audit trail.

Additional comfort is required that an application will not result in an investigation to determine whether there is any other undeclared domestic income which was not used to fund offshore assets.

(PricewaterhouseCoopers)

This proposal is not accepted. This portion of the amnesty is optional. No further comfort can be given in the legislation as it would constitute an amnesty for all undeclared domestic income of an applicant. The Commissioner has already confirmed that the mere utilisation of the amnesty will not be a ground for the selection of an applicant for audit.

3.18 Targeting of applicants

The legislation needs to spell out that applicants will not be prejudiced by SARS and SARB in dealing with their post amnesty tax and exchange control affairs.

(PricewaterhouseCoopers)

This aspect has not been incorporated in the Bill as the existing legislation provides for sufficient protection of individuals and entities who apply for amnesty.

SARS could require taxpayers to identify advisors or facilitators and proceed against them. Consider possibility of restricting SARS right to question taxpayers in this respect.

(PricewaterhouseCoopers)

A subsection has been inserted which provides that the amnesty unit, SARS or the Exchange Control Department may not request details from an applicant in respect of advisors. Furthermore, the amnesty unit is required to submit successful applications and supporting documents to SARS and the Exchange Control Department without reflecting the names of any person other than the applicant or facilitator applying jointly with the applicant. SARS and the Exchange Control Department will not have access to unsuccessful applications as the documentation will be retained by the amnesty unit until termination whereafter it will be transferred to the National Treasury. National Treasury will retain the information for a period of at least five years under the same conditions of secrecy as if the amnesty unit still held the information.

Detailed guidelines of the circumstances under which notice of an audit, investigation or other enforcement will be withdrawn, should be promulgated.

(Law Society of South Africa)

The proposal is not accepted. The person will be notified when a notice of an audit, investigation or other enforcement is to be withdrawn. These cases will be dealt with after due consideration of indications that the person is no longer perceived to be a risk.

The public will want very clear assurances that all information submitted (with the exception of evidence of illegal activities) will not in any way be used against them at any time into the future, whether or not approval has been granted for amnesty.

(Law Society of South Africa)

In the case of approved applications SARS and the Exchange Control Department will get copies of the application and supporting documents in order to effectively grant relief for past transgressions. Applicants also have the option to apply for amnesty for underlying undisclosed income.

Where an approval has not been granted information will not be disclosed to either SARS or the Exchange Control Department, but the application and supporting documents will be submitted to the National Treasury on termination of the existence of the amnesty unit. National Treasury will retain the information for a period of at least five years under the same conditions of secrecy as if the amnesty unit still held the information.

3.19 Invalidity of approval

Where assets have been partially derived from proceeds of unlawful activities, will the amnesty be revoked in full or partially?

(PricewaterhouseCoopers)

Where any foreign assets of an applicant in respect of which approval for amnesty was granted, has in whole or partly been derived from the proceeds of unlawful activities, any approval in respect of that applicant will be void. The reason is that persons who are involved in any criminal activity may not benefit from the amnesty.

The amnesty unit's power to withdraw approval should be limited to circumstances where the applicant has made material non-disclosure or deliberately undermined the process.

(Banking Council)

The approval granted will only be void in a limited number of listed situations, i.e. where the amnesty unit has taken action outside its authority, where the amnesty levies have not been paid, where an applicant has derived any foreign asset or foreign bearer instrument from unlawful activities, or on failure by an applicant or facilitator to submit a

tax return in time in the case of an application for tax relief. Where the approval becomes invalid as a result of the discovery of unlawful activities, any amnesty levies paid will not be refunded.

If an applicant's approval is withdrawn the related party facilitator would be left exposed.

(Association of Trust Companies in South Africa)

This is correct and appropriate in the light of the principle of a joint application.

3.20 Review proceedings

Any review of a decision of the amnesty unit by the High Court must be *in camera*, otherwise the confidentiality of the information under question will be exposed to the public.

(Law Society of South Africa)

Provision has been made for a panel consisting of a senior person from both SARS and the Exchange Control Department to reconsider an application in respect of which an objection was lodged to the Chairperson of the amnesty unit.

If the applicant is still not happy with the decision of the panel the applicant may appeal to the tax court which consists of a judge of the High Court and certain specified members. The proceedings in the tax court are conducted *in camera* as is the case in any other tax dispute. If the applicant decides to take a matter further to the High Court the applicant should be aware that the proceedings will not take place *in camera*.

3.21 Amnesty Unit

The creation of an amnesty unit is absolutely integral to the success of the offshore amnesty program. The only question is the issue of secrecy of information.

(Matthew Lester)

It will be necessary for the amnesty unit to disclose the identity of the applicant and the specific information required to be disclosed to the Reserve Bank and SARS in a manner that will not unduly prejudice the applicant.

(SACOB)

Control over the information held by the unit should be governed by the Act in order to provide certainty and not by way of regulation.

(PricewaterhouseCoopers)

All information submitted to the amnesty unit should not leave its premises, be copied or used directly or indirectly and on the arrival of 31 October 2003 should be destroyed. Taxpayers should keep certified copies as proof, if required in the future.

(Law Society of South Africa)

Where an applicant has been successful, the General Manager or the Commissioner may use any information supplied. The information may implicate other persons and may cause prospective applicants to be reticent about making application. Extend the curb on the use of information to successful applications.

(Moore Rowland)

The proposals are partly accepted. The amnesty unit is established as an independent body which evaluates applications, grants or denies approval. It operates independently from SARS and the Exchange Control Department and all members of the amnesty unit are *mutatis mutandis* subject to the secrecy provisions contained in section 4 of the Income Tax Act. When reading section 4 in this context it should be borne in mind that all references to the Commissioner for SARS should be replaced by a reference to the Chairperson of the amnesty unit.

To further protect the identity of advisors a provision has been inserted which provides that the amnesty unit, SARS and the Exchange Control Department may not request details of advisors from an applicant or facilitator who applied. The amnesty unit is also required to submit successful applications and supporting documents without the names of any person other than the applicant or facilitator applying jointly with the applicant, to SARS or the Exchange Control Department depending on the type of amnesty approved. Information on unsuccessful applications will not be disclosed by the amnesty unit to either SARS or the Exchange Control Department, but will be retained by the amnesty unit until termination whereafter it will be transferred to the National Treasury for a period of at least five years.

Should representatives from authorised dealers not be represented on the independent amnesty unit?

(PricewaterhouseCoopers)

The proposal is not accepted. The amnesty by SARS and the Exchange Control Department relates to the administration and interpretation of tax Acts and exchange control rules. These are aspects which should be dealt with by the organisations responsible for administration of the relevant provisions.

Provide a simplified procedure via the clearing banks for “rats and mice”.

(PricewaterhouseCoopers)

The proposal is not accepted. All applications are to be submitted to the amnesty unit which consists of persons from the Exchange Control Department and SARS which organisations are responsible for the administration of the exchange control rules and tax provisions.

3.22 Records and use of information

The amnesty unit should also not have the power to request information from the applicant relating to persons who advised applicant or assisted an applicant by accumulating foreign assets or transferred funds or assets from South Africa.

(Banking Council)

The proposal is accepted. The Bill has been amended accordingly.

The prohibition of requesting details from an applicant with regard to any other person who assisted the applicant in exchange control contraventions should be extended to all agencies of the state.

(Association of Trust Companies in South Africa)

The proposal is not accepted. Other agencies of the state are not involved in the amnesty process.

SARS and SARB should not be permitted to request information from an applicant with regard to any person who advised the applicant regarding the transgression of the Income Tax Act and the Estate Duty Act.

(Association of Trust Companies in South Africa)

The proposal is not accepted. The amnesty already covers cases where the evasion was integral to the transfer of assets offshore.

Exclude the ability to obtain more information regarding the joint applicant related party facilitator.

(Association of Trust Companies in South Africa)

The proposal is not accepted. This is a joint application and both persons qualify for amnesty.

3.23 Punitive measures

Add the following provision:

“Any taxpayer who

- does not apply for amnesty**
- and would have qualified for amnesty relief**
- who does not apply within the amnesty period**
- and is later successfully challenged by SARS or Excon, will face automatic criminal prosecution.”**

(Matthew Lester)

The proposal is not accepted. Persons who would have qualified for the amnesty but did not apply will be subject to the full force of the law when investigated by SARS or the Exchange Control Department.

3.24 Constitutional issues

The restriction of the amnesty to natural persons could be unconstitutional.

(PricewaterhouseCoopers)

Tax advisors, financial advisors and attorneys are excluded from the amnesty. This distinction is discriminatory and unconstitutional. If there is to be an exclusion it should be limited to professional people regulated by statute or recognised national body who had the intention and knowledge that their advice was directly in contravention with the tax and exchange control legislation as it stood at the time that the advice was given.

(Law Society of South Africa)

By not extending the amnesty to companies and trusts may constitute discrimination.

(PricewaterhouseCoopers)

The provisions precluding eligibility for the amnesty for persons, who have been notified of an audit, investigation or other enforcement action, are unconstitutional. This is unconstitutional on the basis of unfair discrimination, based on particular characteristics being present in the group excluded, namely, being subject to an audit, investigation or other enforcement, which is completely beyond their control.

(Law Society of South Africa)

It is acknowledged that the exercise of all public power must comply with the Constitution which is the supreme law.

The South African Constitutional Court has developed a system of analysis of the guarantee of equality in section 9 of the 1996 Constitution. The first step in that analysis is the question whether the provision differentiates between people or categories of people, and if so, whether the differentiation bears a rational connection to a legitimate government purpose. Even if it does bear a rational connection, it might nevertheless amount to discrimination where the provisions in issue treat persons differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity.

In the equality analysis, the Constitutional Court would as a second step consider whether the Bill directly or indirectly unfairly discriminate against anyone on any of the listed grounds in section 9 of the Constitution.

The enquiry in the present case is confined to **whether the distinctions created by the Amnesty Bill are rational**. In our view the matter does not extend to the question of unfair discrimination inasmuch as the distinctions in question cannot be said to impair the fundamental dignity of those who are excluded, nor do they directly or indirectly unfairly discriminate against anyone on any of the listed grounds in section 9 of the Constitution.

Therefore, the differentiation issues raised in respect of the Amnesty Bill

essentially turn on whether there is a rational basis for the distinction or differentiation in question and a legitimate governmental objective. Research has shown that tax amnesties are a frequent occurrence the world over, and where an amnesty is granted to a particular category of persons, distinctions are unavoidable. The Amnesty Bill differentiates between different individuals and classes but **that is not the same as unfair discrimination**. The making of distinctions and the drawing of lines is entirely permissible provided that the distinction or differentiation is rational. All that rationality requires is that the legislation has a purpose that is not unconstitutional and that it is rational to believe that the legislation will advance this purpose. As has been held by the Constitutional Court, in the governing of a country, the regulation of people without differentiation and without classification is impossible.

In this regard, the scope of the definition of “applicant” has been extended to include close corporations and trusts but excludes companies. The exclusion of companies from taking advantage of the amnesty is justified on the basis that companies have historically enjoyed a more advantageous position with regard to exchange control and that companies are subject to a higher degree of scrutiny in relation to the legality of their actions. Private and public companies operate under a wholly separate discretionary regime for purposes of Exchange Control. Unlike natural persons, close corporations or trusts, companies can invest in sizeable business projects offshore upon receipt of Exchange Control approval. These companies must also annually repatriate foreign earnings unless these companies can obtain further Exchange Control approval to retain excess foreign earnings offshore. In order to obtain this further Exchange Control approval, a company with foreign assets must generally demonstrate that this offshore retention is necessary to maintain or expand current foreign operations within the same line of business. It is rational for the legislature to adopt a distinction of this sort since the problem of non-compliance is apparently more acute in the case of individuals than companies. The legislature is not obliged to adopt an all or nothing approach. It is entitled to exclude certain entities if there is a rational basis for the exclusion. Exclusion on this basis is therefore likely to survive constitutional challenge.

The second point raised is the exclusion of persons who are subject to an audit, investigation or other enforcement action. The purpose of audits and investigations from an exchange control perspective is to increase capital repatriation and the purpose from a tax point of view is to grow the tax base in respect of those people where there is reason to believe that there had been some or other non-compliance with the relevant law.

The purpose of the amnesty is, as is set out in the preamble to the Bill, *inter alia* to provide relief to the extent parties voluntarily come forward to—

- regularise their exchange control and tax affairs in respect of foreign assets;
- to ensure maximum disclosure of foreign assets and to facilitate repatriation thereof; and

- o to extend the tax base.

In this regard it saves the enforcement authorities the administrative cost of investigation. Parties under audit, investigation or enforcement action do not offer this *quid pro quo* because the administrative cost for the disclosure has already been incurred.

It is, therefore, legitimate to draw a distinction between those who are reasonably suspected of contravening or not complying with the relevant laws and those who are not the subject of suspicion but are being afforded the opportunity to make full disclosure in exchange for amnesty. Exclusion on this basis is therefore likely to survive constitutional challenge.

3.25 Financial Intelligence Centre Act reporting requirements

Professional advisors will be unwilling to assist applicants due to the obligation to report suspicion of illegal activities, which include breaches of exchange control regulations. An exemption is required from the reporting requirement in respect of activities which come to someone's attention as a result of the amnesty with effect from 26 February 2003.

(PricewaterhouseCoopers)

Potential applicants would require the assistance of other persons with the application, who would be less than willing to assist given the reporting requirements of the Financial Intelligence Centre Act.

(SACOB)

A delay in resolution of this issue could be viewed as the Minister having effectively granted legal firms an unfair competitive advantage over other advisors such as accountancy firms who traditionally also render taxation and exchange control services, in that information discussed with lawyers is protected from disclosure under the attorney/client privilege.

(PricewaterhouseCoopers)

Any individual approaching an accountable institution for advice on the amnesty or who requests the institution to facilitate the application for amnesty would trigger a reporting requirement on the accountable institution. The reporting requirement relating to queries, advice or assistance about the amnesty should be suspended until the end of the amnesty period.

(Banking Council)

It is imperative to the potential success of the amnesty that the FICA rules be suspended for purposes of potential applicants discussing their options with their advisors.

(KPMG)

The proposal is accepted. An exemption from the reporting requirements is to be granted by way of regulation by the National Treasury in terms of the Financial Intelligence Centre Act in respect of

activities which come to advisors' attention as a result of the amnesty. This exemption has been approved in principle by the Minister and regulations giving effect to it were the subject of a Money Laundering Advisory Council meeting on 12 May 2003.

3.26 Promotion of Access to Information Act

Propose that the right to access to information held by the amnesty unit in terms of the Promotion of Access to Information Act should be excluded.

(Banking Council)

The proposal is not accepted. The Promotion of Access to Information Act gives effect to the constitutional right of access to information held by the State and others. It is the product of the careful consideration of a number of competing rights and should not be the subject of *ad hoc* amendments or restrictions. That said a number of grounds exist in the Promotion of Access to Information Act for denying requesters access to information about applicants under appropriate circumstances.

Two grounds that are most likely to be of application are those relating to the mandatory refusal of access to records that—

- would involve the unreasonable disclosure of personal information about third parties who are natural persons, or
- contain commercial or financial information of third parties.

The Promotion of Access to Information Act also requires that third parties be given notice that records containing information about them have been requested and that they be given an opportunity to oppose the requests.

3.27 Prevention of Organised Crime Act

Concern is raised about the impact of the Prevention of Organised Crime Act on financial advisors who advise clients on amnesty-related matters. The advisor will be committing a money laundering offence by enabling the client to avoid prosecution. An exemption from the reporting requirements and a carefully worded exemption in the Act and the Bill should be provided for.

(Louis de Koker)

The proposal is not accepted. The view is held that the advisor is not assisting the client to avoid prosecution, but to voluntarily regularise the client's affairs in respect of foreign assets attributable to contraventions of Exchange Control Regulations and certain tax provisions.

3.28 General

SARS and SARB need to convince taxpayers/residents that if they don't take advantage of the amnesty they will be caught by other means.

(PricewaterhouseCoopers)

It should be obvious to taxpayers who contravened the law that there is a bigger chance of being identified as a result of SARS's and the Exchange Control Department's increased capacity to enforce the law. Since 2001 South African residents are subject to a worldwide basis of taxation. The reporting requirements in terms of the Financial Intelligence Center Act and the exchange of information articles under South Africa's extensive tax treaty network have further increased the risk of holding undisclosed foreign assets. From an exchange control perspective a contravention of the Exchange Control Regulations in respect of undeclared foreign assets constitutes an ongoing offence. The world community is increasingly intolerant of tax haven countries and has reinforced measures to combat money laundering.

The amnesty unit should assist individuals in a constructive manner when approached with financially innovative structures which are not strictly within the ambit of the Bill.

(Banking Council)

This aspect will be taken into account by the amnesty unit to be formed in considering applications. All applications will be evaluated within the ambit of the legislation governing the amnesty unit.

All actions of notification by either the General Manager or the Commissioner should be suspended from 26 February 2003 to allow individuals to normalise their affairs.

(Banking Council)

Prejudice of persons who might be investigated between the passing of the Bill and the commencement of the amnesty period could be avoided by providing that the last date for the commencement of an investigation to disqualify an applicant be the date of promulgation of the Bill.

(Moore Rowland)

The proposal is not accepted. No reason exists to provide amnesty relief for persons who are being investigated by Government. A cut-off date as proposed will have the practical effect of precluding new investigations until the end of the amnesty application period.

3.29 Exemption from stamp duties

Request that the issuance of negotiable certificates of deposit be exempted in terms of Item 15(2)(b) of the Stamp Duties Act in the light of the repeal of Item 13 of that Act. NCDs were previously stamped under Item 13 as they are by nature fixed deposits. If these instruments were to become subject to duty under Item 15 the stamp duty will increase four fold and may paralyse a critical element of the cash market or result in a pass through cost that would impact heavily on the South African corporate borrower.

(Banking Council)

Negotiable certificates of deposit will remain subject to duty in terms of Item 13 of Schedule 1 to the Stamp Duties Act and the exemption from duty under Item 15(2) will remain. This aspect will be reviewed during the second half of the year.

**Prepared by SARS, the Exchange Control Department of
the Reserve Bank and the National Treasury**

ANNEXURE A

APPLICATION FOR - EXCHANGE CONTROL AMNESTY AND ACCOMPANYING TAX RELIEF

1. APPLICATION SUBMITTED AS

NATURAL PERSON	<input type="checkbox"/>	DECEASED ESTATE	<input type="checkbox"/>	CLOSE CORPORATION	<input type="checkbox"/>
TRUST	<input type="checkbox"/>	FACILITATOR	<input type="checkbox"/>		

2. APPLICANT

NATURAL PERSON

(Including a deceased estate)

SURNAME

FIRST NAMES

IDENTITY/PASSPORT NUMBER

INCOME TAX REFERENCE NO.

TRUST

NAME OF TRUST

INCOME TAX REFERENCE NO.

CLOSE CORPORATION

NAME OF CLOSE CORPORATION

INCOME TAX REFERENCE NO.

CC REGISTRATION NO.

CONTACT DETAILS OF APPLICANT/APPLICANT'S REPRESENTATIVE

NAME AND SURNAME

POSTAL ADDRESS

STREET ADDRESS

WORK TELEPHONE NUMBER Dialling code

HOME TELEPHONE NUMBER Dialling code

CELL PHONE NUMBER

FACSIMILE NUMBER Dialling code

E-MAIL ADDRESS

3. FACILITATOR

THIS SECTION SHOULD BE COMPLETED JOINTLY WITH THE APPLICANT

NATURAL PERSON

SURNAME

FIRST NAMES

IDENTITY/PASSPORT NUMBER

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INCOME TAX REFERENCE NO.

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DECEASED ESTATE

SURNAME

FIRST NAMES

IDENTITY/PASSPORT NUMBER

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INCOME TAX REFERENCE NO.

--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--

NAMES OF BENEFICIARIES

COMPANY/CLOSE CORPORATION

NAME OF COMPANY/CC

INCOME TAX REFERENCE NO.

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CC REGISTRATION NO.

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NAMES OF MEMBERS

TRUST

NAME OF TRUST

INCOME TAX REFERENCE NO.

--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--

NAMES OF BENEFICIARIES

See next page for contact details of facilitator

CONTACT DETAILS OF FACILITATOR/FACILITATOR'S REPRESENTATIVE

NAME AND SURNAME

POSTAL ADDRESS

 Code

STREET ADDRESS

 Code

WORK TELEPHONE NUMBER Dialling code

HOME TELEPHONE NUMBER Dialling code

CELL PHONE NUMBER

FACSIMILE NUMBER Dialling code

E-MAIL ADDRESS

4. ELECTION BY DONOR

a) Has the applicant elected to be deemed to hold any foreign assets actually held by a non-resident discretionary trust on 28 February 2003 Yes No

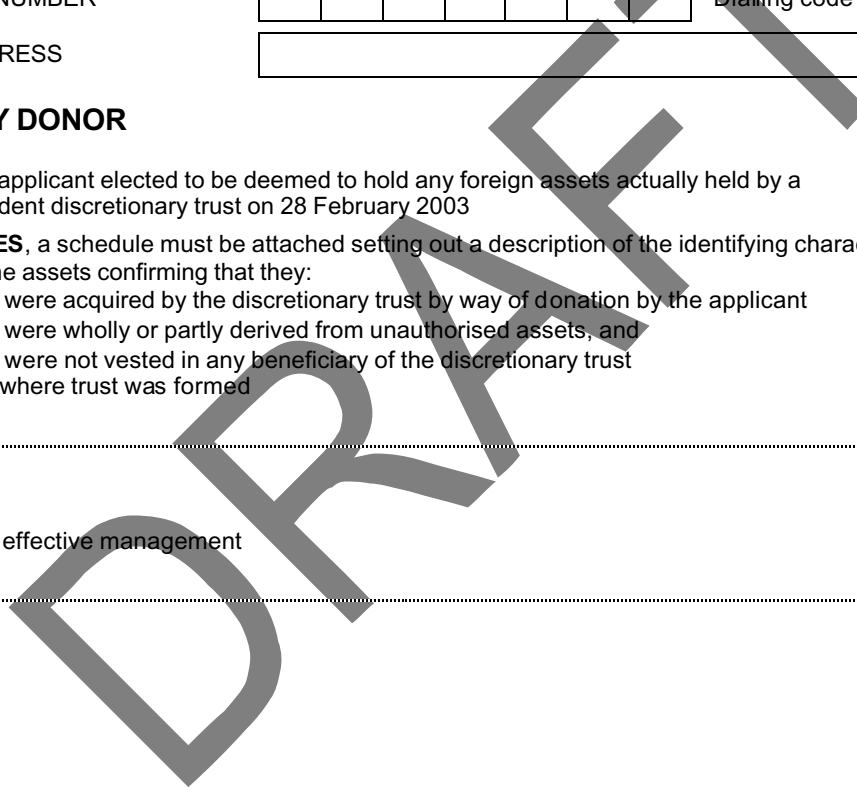
If YES, a schedule must be attached setting out a description of the identifying characteristics and location of the assets confirming that they:

- were acquired by the discretionary trust by way of donation by the applicant
- were wholly or partly derived from unauthorised assets, and
- were not vested in any beneficiary of the discretionary trust

b) Country where trust was formed
.....

and

c) Place of effective management
.....



5. STATEMENT OF FOREIGN ASSETS AS AT 28 FEBRUARY 2003 FOR EXCHANGE CONTROL AMNESTY

NATURE OF THE ASSET	LOCATION OF FOREIGN ASSET	MARKET VALUE IN FOREIGN CURRENCY	SUPPORTING DOCUMENTS Indicating description and value
1. CASH			Declaration
2. CURRENT AND OTHER SHORT – TERM FOREIGN ASSETS (Bank accounts, call deposits, time deposits.)			Original or certified copy of statement of account.
3. LISTED FINANCIAL INSTRUMENTS (Shares, stock, bonds, debentures listed on recognised exchange.)			Statement of account and price as quoted on exchange.
4. OTHER FINANCIAL INSTRUMENTS (Instruments not listed on recognised exchanges, unlisted shares)			Valuation Certificate
5. FIXED PROPERTY			Valuation Certificate
6. INSURANCE POLICIES			Valuation Certificate by insurer of policy
7. INVESTMENT IN COLLECTIVE INVESTMENT SCHEMES (Unit Trusts)			Statement by management company of scheme
8. INTANGIBLE ASSETS			Valuation Certificate of e.g. patents or copyrights
9. OTHER FOREIGN ASSETS			Declaration
Total (Carry forward to Paragraph 8)			

Supporting documents must be provided for all assets, which includes balances and values as at 28 February 2003.

6. STATEMENT OF FOREIGN ASSETS AND LIABILITIES AS AT 28 FEBRUARY 2002 FOR PURPOSES OF TAX RELIEF

NOTE: ALL FOREIGN ASSETS AND LIABILITIES MUST BE REFLECTED AT BOTH HISTORICAL AND ESTIMATED MARKET VALUE AND THE STATEMENT MUST BE ATTACHED TO THIS APPLICATION

7. DOMESTIC TAX RELIEF

a) APPLICANT

DATES ON WHICH AMOUNTS WERE ACCUMULATED OR CONVERTED	AMOUNTS NOT PREVIOUSLY DECLARED FOR			
	INCOME TAX	STC	DONATIONS TAX	ESTATE DUTY
TOTAL (Carry forward to Paragraph 9)				

b) FACILITATOR

DATES ON WHICH AMOUNTS WERE ACCUMULATED OR CONVERTED	AMOUNTS NOT PREVIOUSLY DECLARED FOR			
	INCOME TAX	STC	DONATIONS TAX	ESTATE DUTY
TOTAL (Carry forward to Paragraph 9)				

Note: Documentary proof of the dates and amounts in the form of deposit slips, bank statements, etc, must be provided in respect of amounts accumulated as or converted to foreign assets after 28 February 1998. Documentary proof is preferable in respect of amounts accumulated as or converted to foreign assets on or before 28 February 1998 but may be replaced by other evidence, such as a declaration of amounts and dates by the applicant or facilitator, if necessary.

8. EXCHANGE CONTROL AMNESTY LEVY

Total market value in foreign currency of foreign assets held wholly or partly in contravention of Exchange Control regulations	
Less Total market value of assets not held in contravention of Exchange Control regulations	
Less Unutilised foreign capital allowance – (R750 000 or remaining portion thereof converted to foreign currency at the SARB published rate for 28 February 2003)	
<i>Total liable amount</i>	
Value of assets for repatriation	
5% Levy on repatriated amount	
Value of assets retained off-shore	
10% Levy on retained amount	
Total	R

Note: Levy must be paid to the Corporation for Public Deposits through an authorised dealer

9 DOMESTIC TAX LEVY

	AMOUNTS NOT DECLARED (Converted to Rand at SARB published rate on date of conversion or accumulation)	
	APPLICANT	FACILITATOR
Income Tax		
<i>Plus</i> STC		
<i>Plus</i> Donations Tax		
<i>Plus</i> Estate Duty		
Total Liable amount		
2% Levy thereon		

Note: Levy must be paid to the Corporation for Public Deposits

FACILITATOR

I, (Full names and surname)

.....

Identity number

--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--

Hereby swear/solemnly declare* that the information furnished in paragraph 7(b) above, as well as the supporting documents and statements , are true and correct in every respect and that I have no reason to believe that any of the funds or foreign assets I assisted the applicant to accumulate outside or transfer from the Republic represented or were derived from the proceeds of any unlawful activities.

.....
Signature *Date* *Place*

I certify that prior to my administering the prescribed oath/affirmation*, I put the following questions to the deponent and wrote down his/her answers thereto in his/her presence:

- 1) Do you know and understand the contents of the above statement? Answer
- 2) Do you have any objection to taking the prescribed oath/affirmation? Answer
- 3) Do you regard the prescribed oath/affirmation as binding on your conscience? Answer

I certify that the deponent acknowledges that he/she knows and understands the contents of this statement which was sworn to/affirmed* and signed by the deponent in my presence.

.....
*Justice of the Peace/Magistrate/Commissioner of Oaths**

Designation *Ex officio Republic*

Full first names and surname

Address

.....
Date *Place*

*Delete whichever is not applicable