Annexure A

Aide Memoire

Background

1. This note arises from letters received on 8 and 17 April 2016 Oakbay addressed to the Minister of Finance, and subsequent communication[1].
2. The aim of the meeting was to clarify and explain the current global and national regulatory framework ; and what can and cannot be done by banks and bank clients, in terms of the regulatory framework.
3. We wish to state emphatically that we will contribute in whatever legally permissable way possible to save the jobs of workers.
4. It is therefore imperative that all parties, including Oakbay, abide by the law and regulatory framework summarised below.

OVERVIEW OF FINANCIAL REGULATORY FRAMEWORK FOR BANKS IN SOUTH AFRICA

1 Overview

Domestic banks are not only regulated by domestically, but also by overseas regulators in countries where such financial institutions have a presence or transact with other financial institutions based in that country. For this reason, financial institutions are regulated in terms of tough international standards like Basel III and Financial Action Task Force (FATF) recommendations on anti-money laundering and combating of financing of terrorism (anti-money laundering and counterfinancing terrorism), the latter endorsed by more than 180 countries. Failure to adhere to these standards would lead to our banks to being excluded from the global financial and payments system, which in turn will signficantly reduce economic growth and result in the loss of many jobs. For example, more than a million jobs were lost in 2008 as a result of a bank failure in the USA.

It is essential that South Africa's financial system remains part of the global financial system. Being part of the global financial system facilitates:

- Selling of government bonds to fund the budget deficit and infrastructure
- Funding of the country's current account deficit
- Foreign direct investment, and the generation of jobs
- Trade, both imports and exports, including financing for such trade.
- Access to global payments system, which enables payments for imports and exports., purchasing goods and serves on-line, and being able to use your credit cards overseas
- Insurance and remittances.

The implications of being excluded from global markets would be catastrophic, with long term structural effects. Such an adverse impact can be seen in countries, such as the Islamic Republic of Iran, which have been at the receiving end of sanctions imposed by jurisdictions like the USA and EU.

[1] Corrected for typo in original Aide Memoire provided to Mr N. Howa (24 May 2016) as reflected in REPLY to Parliamentary Question: 1664. Original text read "This note arises from a letters 8 and 17 April 2016 Oakbay addressed to the Minister of Finance, and subsequent communication."

Cabinet has since the 2008 Global Financial Crisis adopted numerous decisions (all available on www.gov.za as part of post-Cabinet media statements) intended to protect the integrity of the South African financial system and introduce measures to make it safer and serve SA better. Cabinet has noted that it is in South Africa's best national interests to ensure that the domestic financial sector is regulated according to international standards in order to promote economic growth and reduce the risk to the national fiscus.

In addition to prudential and anti-money laundering and counter terrorism standards, banks are also expected to comply with market conduct standards, including treating customers fairly, and alternative dispute resolution through the ombuds system.

In addition, it was noted that are 35 deposit-taking banks, of which 17 are locally incorporated. Aside from the four or five banks named by Oakbay, It is not clear whether Oakbay has exhausted its all its options and applied to the other registered banks for banking facilities.

2. How is compliance monitored at an international level?

In order to ensure the consistent implementation of agreed international standards by all countries, all countries subject themselves to a number of assessments and peer reviews. These include, for example, reviews by the G20 on its members (through the Financial Stability Board and IMF's FSAP) and the FATF's Mutual Evaluation assessment process. The intensity of these reviews has been increased following the global financial crisis, with G20 countries and other major economies being evaluated more often under a revised more stringent methodology.

International banking standards prevent a country's government from intervening in the operations of a bank, for example obliging a bank to take on a customer who may pose risk to the bank. Such an intervention will expose South Africa to a negative peer review for undermining its own laws, and for interfering with the operational independence of financial institutions. Further, taxpayer funds will be liable for any damage suffered by banks for accepting such high-risk clients.

3. What could be the consequence of South African banks not complying?

Failure to comply with standards like Basel III and FATF standards exposes a country to punitive measures from overseas regulators. South African financial institutions may also lose or be refused correspondent banking relations with other foreign banks if they are of the view that they operate in, or are not subjected to, a regulatory environment which is not recognised as adequate in the fight against money laundering and terrorism finance. One of the key principles in all the different standards that apply to the financial sector is that of the operational independence of regulators and supervisors.

In 2014, the G20 (through the Financial Stability Board) agreed on a common toolkit available to overseas supervisors to deal with countries deemed to be "non cooperative jurisdictions". The Financial Stability Board describes in its report:

" …a list of measures that could be taken after a jurisdiction is listed as non-cooperative, to safeguard the global financial system and to apply additional pressure to improve the jurisdictions adherence"

These measures, as applied by overseas regulator to their banks, include:

i) Preventing South African banks from doing business with foreign banks;
ii) Banks will have increased regulatory requirements imposed on them by overseas regulators;
iii) International banks will be banned from doing business in South Africa; and
iv) Increased audit requirements.

In addition to these measures, most jurisdictions commonly impose massive fines for specific contraventions and for lapses in anti-money laundering and counterfinancing terrorism regulatory rules by their financial institutions. Such fines can be high, as can be seen by the $8.9 billion fine imposed on BNP Paribas by US Authorities, and could by themselves generate a financial crisis in a smaller economy like ours. SA banks have recently been fined lesser fines by UK and other authorities.

Cabinet has approved the strengthening of current anti-money laundering and counterfinancing terrorism legislation, as evidenced by the Financial Intelligence Amendment Bill currently before Parliament. When enacted, this Bill will require force greater disclosure by clients of banks with regard to beneficial ownership of entities and politically-influential persons who will be subject to enhanced due diligence by the banking sector.

4. What has happened in other countries?

Given the serious and significant consequences of South Africa being found non-compliant with the international regulatory requirements and the large fines foreign regulators may impose, banks have a duty to monitor bank accounts and to take active steps to ensure that their actions meet the regulatory and international requirements. In this respect South Africa is not an outlier. In February, (2015) a leading US bank (J.P. Morgan Chase & Co.) closed more than 100,000 accounts through anti-money-laundering screening and cut ties with over 5,000 individuals that pose risks to the bank.

In the EU and UK, Deutsche Bank, Barclays and UBS, despite the assessed 'low risk' of their operating environment, have taken significant steps including account closures. The three lenders have closed the accounts of between 20,000 and 35,000 customers. The action by these leading European banks illustrate the increased seriousness and aggressiveness with which the world's biggest banks are closing client accounts which they consider too risky – either under anti-money laundering rules or from other regulatory requirements. Their actions also includes them withdrawing from countries they consider as not having sufficiently robust anti-money laundering and counterfinancing terrorism regulatory frameworks.

National Treasury has taken particular note of this as JP Morgan, Barclays and Deutsche Bank collectively account for about a third (31%), when other US and EU banks are included CitiBank, that number is as much as 50% of government debt auctions[2]. Therefore as much as half of the debt the government issued this year to support a variety of the social programmes of government requires

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fall outside the direct influence of domestic regulators and is maintained only through the 'mutual trust' of domestic regulatory arrangements.

5. Why would a bank close down the accounts of a client?

It should be noted that banks routinely close some accounts every year, where such a client has either not complied with domestic regulatory standards, or simply not adhered to contractual requirements. Hence the closure of accounts does not set a precedent, but can be regarded as an enforcement measure of last resort. Government policy on banking includes does financial inclusion, market conduct and financial integrity objectives to ensure no community or individual is financially excluded, but this does not apply to non-complying customers.

Banks have also signed up to a Code of Banking Practice. Clauses 7.1, 7.2 and 7.3 cover the process banks have agreed to when closing accounts. These commitments include reasonable prior notice; The responsibilities of the client, including the need for clients to inform banks of changes to the contact details and to their financial affairs; and the circumstances under which banks may close accounts, including if they are compelled to do so under law or international best practice, if the account has not been used for a significant period of time, or if there are reasons to believe the account is being used for illegal purposes.

6. What can affected customers do?

Customers[3] do have recourse when affected adversely by banks, via the ombuds system and the courts. Howver, such recourse needs to take into account the following:

- Relationships between banks and their clients are private and confidential.
- Government therefore has limited scope to intervene on behalf of specific clients, but must rather ensure that the regulatory framework governing these relationships is in accordance with the existing legal framework.
- Company clients however may approach the courts to provide relief over elements of the contractual terms of the relationship between themselves, their institution and the banks. Small businesses and individual customers can also approach the banking ombud.

In addition, it should be noted :

A. **Customers that are affected by such a closure can approach the courts, and seek for damages from their bank.** There is an established case law that provides for the circumstances under which the closure of accounts is not allowed.

B. The courts would be best suited to make an impartial judgement on the actions of the bank in relation to its customer.

[3] Corrected for typo in original Aide Memoire provided to Mr N. Howa (24 May 2016) as reflected in REPLY to Parliamentary Question: 1664. Original text read "Custumers"

C. To the best of our knowledge, Oakbay has not waived its customer rights to confidentiality to enable banks to report to their regulator on their reasons for closing their accounts.

D. If there is the willingness to make disclosure and provide full access to transactions, the banks and regulators might be able to respond more clearly and openly to the issues at hand.

E. In the circumstances, an approach to the courts remains an option. Any aggrieved customer or company has nothing to fear from such action, as long as it has adhered to the laws of the country.