national treasury
Department:
National Treasury
REPUBLIC OF SOUTH AFRICA

FSB

MINISTERIAL REGULATIONS AND NOTICES COMMENT MATRIX

July 2016

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MINISTERIAL REGULATIONS

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GENERAL COMMENTS			
Barclays Africa	Policy document- phase in stages	**G20 Commitments** Although we fully support the need to meet South Africa's G20 commitments and appreciate that, in terms of implementation. South Africa is lagging behind most other jurisdictions. We are not supportive of a big-bang implementation approach. To provide certainty of application and to avoid market disruption, we recommend a phased- in implementation approach, as follows — **Phase 1**: Authorisation of OTC derivatives providers (ODPs) over a six to 12 month period with distinction between types of ODPs and the priority for market participants to be authorised as ODPs. For example, affected banks and affected non-bank market participants should be required to apply for authorisation within six months and 12 months, respectively, of the commencement of the Regulations and the Board Notices - Criteria for Authorisation as an Over-The-Counter Derivatives Provider and Code of Conduct. This phase-in approach will enable and ensure efficient and timely processing of applications by the FSB; **Phase 2**: Mandate reporting after six months of the commencement of the Regulations and the authorisation/ recognition of Trade Repository, for a period of 12 to 18 months, including phasing by asset class, product type and the back-loading process. The intelligence gathered from the data reported and a quantitative impact study (QIS), advocated below would provide the national authorities with the information required to determine how and when clearing should be mandated and how and when the margining for non-centrally cleared OTC derivatives requirements should be implemented.	In general we agree with a phased in approach. Please refer to the explanatory statement to give an indication of the proposed implementation. The following should be noted: • Clearing is not mandated in the current Regulation, but the intention is to mandate at some point. • We do not agree with different periods for different providers as such the Regulations and Notices have at least a phase-in period of 12 months from effective date for all should be sufficient. The registrar has exemption powers for specific cases. • The requirement to report must be put into place but period will be extended to allow for this. • We disagree that ODPs need to be

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		Phase 3: Mandate clearing for ODPs and systemically important counterparties (covered entities), including phasing by asset class, product type and the back-loading process, after at least six months of reported transaction data has been collated and the outcome of the Q15 has been assessed. Banks are incentivized, through capital requirements, to clear OTC derivatives through a licensed or recognised central counterparty and both banks and certain counterparties may have clearing requirements imposed on them when trading with foreign counterparties, due to jurisdictional requirements of the foreign counterparties. By mandating clearing at this juncture, national authorities will demonstrate a measured and proportional approach to clearing in the South African market. **Phase 4**: Implement the margining requirements for non-centrally cleared OTC derivatives, (applicable to covered entities only) fully aligned with the BCBS-IOSCO principles and harmonized with the rules of South Africa's most important trading partners i.e. UK and EU. This phase could be implemented in parallel to Phase 3.	further distinguished. Whoever qualifies as an ODP or meets the definition of ODP must be authorised or cease operations in OTC derivatives. • The margin requirements will be phased in when Regulations are effective. The timelines will also be determined by the Authorities.
JSE	Changes in the draft Regulations	Compared with the first Draft Regulations (released on 4 July 2014), significant in-principle changes have been made to the Draft Regulations without any valid explanation being given as to why these changes have been adopted (for example, the exclusion of associated clearing house from the definition of central counterparty (CCP)). Some aspects of the draft Regulations are in the strong opinion of the JSE, unlawful, because they purport to amend the principles and policies stipulated in the Financial Markets Act (FMA), for example, the exclusion of associated clearing house from the definition of CCP and the proposed recognition regime. The significant policy changes have been made unilaterally with no prior warning or consultation with the affected	JSE objections have been noted and carefully considered. The process for the promulgation of Regulations is prescribed in section 107 of the FMA, which generally empowers the Minister to make any Regulations with respect to matters that are required or permitted by the Act. Consultation is critical in making Regulations, and Treasury has provided stakeholders ample opportunity to submit representations and comments. Above all,

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		parties, namely JSE Clear and its clearing members and moreover, the introduction of these new principles have been made very late in the process; and in light of the above, the consultation period of 30 days does not enable us to engage appropriately and could create the perverse outcome of creating regulations that have not been fully considered with unintended consequences.	Treasury encourages further engagement over the review process. This is necessary to ensure adequate transparency and public participation in the regulation-making process, and is sufficient and in line with the requirements of the Act, and the Constitution. Treasury agreed to make amendments to the FMA after commenters, including the JSE, had highlighted the challenge of having certain provisions contained in the Regulations which should be in the primary legislation. It was subsequently decided that amendments to the FMA be brought through the Financial Sector Regulation (FSR) Bill. State law adviser and senior counsel opinion has been obtained as to the constitutionality and legal permissibility of proposed amendments affirm this stance, and on that basis Treasury has proposed that certain provisions are recorded in the superordinate FMA. The Regulations (which were first published on 4 July 2014, and again in June 2015) are aimed at supporting the objectives of the Act and to ensuring South Africa

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			honours international commitments made to implement regulatory and legislative reforms to make financial markets safer and to align with international standards and best practice. Over and above international recognition, the reforms are intended to safeguard the financial system and ensure that financial markets are safe and efficient, contribute to economic growth and promote the competitiveness of the South African financial markets. The framework has been developed jointly by National Treasury, the Financial Services Board and the South African Reserve Bank
JSE	Minister power to adopt Regulation	As part of our submission on the first Draft Regulations, the JSE provided National Treasury (NT) with our detailed arguments in respect of the ambit of the Minister's powers to adopt Regulations and the purpose, function and validity of the Draft Regulations as delegated or subordinate legislation. It is clear from the contents of the Draft Regulations that these concerns have not been addressed. On the contrary, the latest Draft Regulations have purported to exclude an associated clearing house, such as JSE Clear, from the definition of a CCP. This represents a fundamental shift from policy that has been in existence since 1988 and that has been consistently provided for in all the empowering statutes that preceded the Financial Markets Act (FMA). We find it worrying that the JSE Clear and the JSE have been presented with a fait accompli policy absent of prior consultation or warning and we believe that it would not	The process for the promulgation of Regulations is prescribed in section 107 of the FMA, which generally empowers the Minister to make any Regulations with respect to matters that are required or permitted by the Act. Under the South African legal system, the legislature is permitted to, and does, rely on subordinate legislation to implement and regulate laws, and this has been repeatedly acknowledged by the Constitutional Court.

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		have been NT's intention not to provide us with an appropriate opportunity to respond. In summary, the purpose of the Draft Regulations is to deal with the detailed implementation of the matters of policy provided for in the provisions of the superordinate statute, the FMA. It is a well-established and universally acceptable principle in all constitutional democracies, such as South Africa, that only the elected parliament can make law and that the elected parliament cannot surrender its law making function to the executive. A clear distinction is drawn in law between the empowering statute, such as the FMA, that records the principles and policies of the legislator and subordinate legislation, such as the Draft Regulations, that enable the executive to implement these principles and policies. The adoption of the Draft Regulations falls within the definition of administrative action as defined in the Constitution of South Africa and the Promotion of Administrative Justice Act and it is a requirement of valid administrative action that it must be exercised within the scope and ambit of the empowering statute, the FMA. The Draft Regulations however, in numerous examples, purport to amend the principles and policies stipulated in the FMA and/or purport to introduce new policies and principles. This has the effect that these provisions of the Draft Regulations are unlawful and invalid. Refer to case law – (*Bato Star Fishing v Minister of Environment Affairs and Tourism, 2004 CCT 27/03 CC; Pharmaceutical Manufacturers Association of South Africa & Another v In re President of RSA; Minister of Health and another v New Clicks South Africa (Pty) Ltd 59/04 CC).* Given the fact that this new adoption of policy seeks to remove pre-existing rights and given the nature and scale of the change proposed, it cannot be correct that the procedure adopted is sufficient. We would therefore appreciate an urgent opportunity to discuss our in-principle concerns about the legality of the Draft Regulations with senior representatives of NT and we would also recommend that the Draft Regulations	Consultation is critical to ensure adequate transparency and public participation in the Regulation-making process. The process prescribe in section 107 is sufficient and in line with the requirements of the Constitution and PAJA. The Regulations (first published on 4 July 2014, and again in June 2015) and the consequential amendments to the FMA (published in December 2014 and again in October 2015) are aimed at supporting the objectives of the Act of ensuring the safety, efficiency and integrity of financial markets, reducing vulnerabilities and increasing transparency. These reforms are necessary to ensure South Africa honours its international commitments to making regulatory and legislative reforms aligned with relevant international standards. It should furthermore be noted that while the FMA (and its predecessors) neither specified a definition for "central counterparty" nor prescribed any requirement in relation to licensing and ongoing regulation that specifically attach to the systemic functions performed by a

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		be released for a third round of public consultation. We would also urge NT to conduct rigorous regulatory impact assessments to better understand their full impact on SA financial markets.	CCP, the inclusion of an independent clearing house in the FMA reflects the well-documented and explicit policy stance to establish a legal framework to accommodate a CCP structure to promote central clearing through an independent clearing house, especially given the G20 requirement to mandate central clearing. This policy approach was approved by Parliament and Cabinet when it adopted the FMA. Treasury is proposing to introduce a new definition of "central counterparty" into the Act, and to establish a framework through which a CCP can be licensed, given the systemic functions that it performs. The requirement that a CCP must be an independent clearing house is permissible under the law. Treasury agreed to make amendments to the FMA after commenters, including the JSE, highlighted the challenge of having certain provisions contained in the Regulations which should be in the primary legislation. Treasury agrees with commenters that it is important to clarify the legal status of a CCP within the regulatory regime that is applicable in South Africa in

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			order to ensure that financial markets continue to operate within the policy objectives of maintaining stable financial markets and reducing systemic risk. CCPs are systemic institutions (super-SIFIs) as a failure of CCP could trigger a financial crisis. Globally regulators are applying the strictest standards of regulation, particularly in relation to the governance and risk management of CCPs. In this regard Treasury has had to make policy decisions that place a high priority on objectives that support financial stability and other public interest considerations. State law adviser and senior counsel legal opinions obtained as to the constitutionality and legal validity of the Regulations and proposed amendments to the FMA confirm this position, and on that basis Treasury is proposing that amendments to the FMA which require that a CCP must be an independent clearing house within a sufficient transitional period to accommodate the *status quo*. Please refer to Schedule 4 of the FSR Bill.

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JSE	Hierarchy of legislation	**The hierarchy of legislation** The national legislature, the Parliament of the Republic of South Africa, has the highest legislative power over the whole of the Republic of South Africa as well as in all state affairs with the exception of those specifically allocated to other legislatures. The Financial Markets Act is an original or superordinate piece of legislation promulgated by the national legislature, the Parliament of South Africa. The Constitution of South Africa specifically provides and recognises the powers of delegation. Section 238 *(a)* states that an executive organ of state in any sphere of government may delegate any power or function that is to be exercised or performed in terms of legislation to any other executive organ of state. Provided the delegation is consistent with the legislation in terms of which the power is exercised or the function is performed. Section 239 of the Constitution includes subordinate legislation in the definition of national legislation. The Draft Regulations published by the Minister of Finance will, when finalised, be promulgated and published in the Government Gazette and will have the status of delegated or subordinated legislation. **The Draft Regulations and their status as delegated or subordinate legislation** An essential aspect of the promulgation of the Draft Regulations and their classification as delegated legislation is the devolution of power from the national legislature, Parliament, to the executive authorities of South Africa, such as, in this case, the Minister of Finance. The Minister of Finance has published the Draft Regulations in accordance with the powers delegated to him by virtue of the provisions of section 107 of the FMA. By performing legislative acts, the executive authorities such as the Minister of Finance in this instance, create binding legal rules and, substantively, general	The drafting of the Regulations has taken into account this hierarchy. As stated above, the South African legislature does rely on subordinate legislation to implement and regulate laws, and this has repeatedly been acknowledged by the Constitutional Court. Section 107 empowers the Minister to make any Regulations with respect to matters that are required or permitted by the Act. The process for the promulgation of Regulations as prescribed by section 107 of the FMA is in line with the Constitution and PAJA. The Regulations and the consequential amendments to the FMA are aimed at supporting the objectives of the Act of ensuring the safety, efficiency and integrity of financial markets, reduce vulnerabilities and increase transparency and to ensuring South Africa honours its international commitments to making regulatory and legislative reforms that align with relevant international standards. Beyond international recognition, the reforms are intended to safeguard the financial system,

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		relationships are created, varied or terminated. Private law relationships may also be created or determined by delegated legislation. It is therefore of critical importance that the Draft Regulations are consonant with all the requirements of delegated legislations such as, for example, legality, that these Regulations are consistent with the provisions of the statute in terms of which it is adopted and that the Draft Regulations are appropriate and effective in respect of the matters that the Draft Regulations intend to regulate. The making of delegated legislation by members of the executive is an essential part of public administration. It gives effect to the policies adopted by the legislature and provides the detailed infrastructure according to which these policies will be implemented and enforced. **The promulgation by the Minister of Finance of Regulations in terms of the FMA amounts to a legislative act that creates general rules and therefore has a wide, general effect.** The purpose of these Regulations is to implement the policies of Parliament, the highest authority of South Africa, as set out in the FMA. It would be unlawful to attempt to amend the underlying policy considerations recorded in the FMA by promulgating subordinate legislation in the form of Regulations that are inconsistent with the empowering statute. Legislative acts such as the promulgation of subordinate legislation in the form of Regulations must fall within the scope of the executive authority in question, may not conflict with an act of Parliament or curtail the provisions of any statute and may not be vague. In this instance, section 107(1) of the FMA specifically accords the Minister of Finance with the power to promulgate Regulations that are not inconsistent with the provisions of the FMA.	and ensure that financial markets are safe and efficient, contribute to economic growth and promote the domestic and international competitiveness of the South African financial markets. It should furthermore be noted that the inclusion of a legal framework in relation to an independent clearing house in the FMA reflects the well-documented and explicit policy stance to accommodate a CCP structure and this policy approach that was approved by Parliament and Cabinet when it adopted the FMA. The requirement that a CCP must be an independent clearing house is permissible under the Act, and section 107 empowers the Minister to make any Regulations with respect to matters that are required or permitted by the law. State law adviser and senior counsel legal opinion obtained as to the constitutionality and legal validity of provisions proposed in the FMA and the draft Regulations, confirm consistency with the Act and the Constitution, and reflect the importance of achieving objectives that support financial stability and other public interest

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		The aim and purpose of delegated legislation such as the Draft Regulations proposed by the Minister of Finance Generally speaking, the primary aim of delegated (or subordinate) legislation is the detailed regulation of matters provided for by original legislation in an outline form. In this instance, the aim and purpose of the Draft Regulations are the implementation and enforcement of the policies of Parliament, the legislative authority of South Africa, that are recorded in the FMA. Various circumstances may necessitate this, for example the specialised and/or technical nature of the matters with which the original legislation deals, the fact that original legislative bodies are not in continuous session and do not have the time to pass all legislation called for, the peculiarity of local matters, and so forth. The existence of delegated legislations bears testimony to a devolution of power from legislative to executive authorities, in accordance with considerations of jurisdictional subsidiarity. Not all legislative matters have to be disposed of by Parliament, organs of the executive are often in a better position to deal with certain matters once the parameters within which it is competent to do so have been set be empowering, original legislation. The National Road Traffic Act is a good example of the manner in which delegated legislation functions. Section 58(1) stipulates compliance with road traffic signs. This Act does not in any manner describe or refer to road traffic signs but delegates this power to the Minister of Transport to prescribe precisely, by way of delegated legislation what road traffic signs are, how they must look and how they are to be erected. In this example there has been a delegation of powers from the legislature to the executive (Minister of Transport) to deal with the matters stated in section 56	considerations.

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		through delegated legislation. The distinctive feature of delegated legislation is that it has to be authorised by, and is accordingly enacted in terms of, original legislation. A delegated enactment, in other words, owes both its existence and its authority to an empowering original law. The Draft Regulations therefore have to be consistent with the FMA as empowering statute in terms of it has been promulgated and may not be used to attempt to amend or alter the provisions of its empowering statute. The Minister of Finance, as functionary that is promulgating subordinate legislation in the form of the Draft Regulations, may only act within the framework of the authority bestowed on him in terms of the provisions of the FMA. Consequently, the Draft Regulations, as subordinate legislation, may not be in conflict with original legislation, the FMA nor may it purport to effect amendments to the provisions of the FMA. In terms of section 17 of the Interpretation Act, 33 of 1957, a list of proclamations, government notices and provincial notices under which rules and regulations made by the President, a minister or premier or a member of the executive council of a province have been published, must be submitted to Parliament or the provincial legislature concerned within 14 days after the publication of the rules or regulations in the Government Gazette. The purpose of this provision is to keep original legislatures informed of executive measures so as to enable them to exercise some measure of control over such action. These peremptory procedures further illustrate a fundamental principle underlying the promulgation of delegated legislation such as the Draft Regulations it being that the Regulations always are subject to and subordinate to the enabling statute and Parliament as the highest authority of South Africa. It must be noted that most of the traditional, common law “tests” for the validity of delegated legislation are not explicitly mentioned in the Constitution. We will briefly	

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		mention some of these requirements that have specific application to the assessment of the Draft Regulations published by the Minister. The rule that delegated legislation may not be in conflict with original legislation because the former is subordinate legislation, also comes from the common law and is not immediately apparent from the Constitution. Similarly, the intra vires requirement derives wholly from the common law: the Constitution is similarly silent on the (scope of the) powers of and for delegated legislatures. The common law prohibits delegated legislation that is unreasonable, unfair or applies in a discriminatory manner.	
JSE	The peremptory provisions of the FMA	The FMA replaced the Securities Services Act and primarily focuses on the regulation of financial MIs (such as exchanges and clearing houses) and the regulation of the securities' industry. The proper enforcement of the provisions of the FMA is essential to ensure that the integrity of the regulatory framework of the South African financial markets is maintained. The provisions of the FMA embody and record the legislature's policy in respect of matters of national importance, such as the regulation of exchanges and clearing houses. The provisions of the FMA reflect the policy priorities and proposals highlighted in NT's "*A Safer Financial Sector to Serve South Africa Better*" policy document of February 2011, various international recommendations by, amongst others, the International Organisation of Securities Commissions (IOSCO), such as the recommendations contained in the latter's final report on "*Regulatory Issues Raised by Changes in Market Structure*" (December 2013). The FMA was also drafted mindful of the negative impact experienced internationally as a result of fragmentation on the integrity and efficiency of securities markets. Some of the important policy considerations underpinning the FMA are financial stability (via, inter alia, the strengthening of the regulatory framework) and the protection of consumers of financial services (which implies investors). In order to	Agreed. As stated above provisions are proposed to be made to the Act. The definition of "market infrastructure" has been amended to include a central counterparty, and the amendments provide for licensing and regulatory requirements that attach to the CCP. Treasury has obtained senior counsel opinion as to the constitutionality and legal validity of these provisions, and on the basis has subsequently proposed that the *intra vires* empowering provisions be contained in the FMA. Please refer to Schedule 4 of the FSR Bill. Section 107 of the FMA empowers the Minister to make any Regulations with respect to matters that are required or permitted by the law. The Regulations in

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		ensure financial stability, it has been recognised that system-wide risk has to be managed through a macro-prudential regulatory approach, which effectively requires an extended perimeter of regulation to cover previously unregulated activities. An increase in the scope of regulation is indeed one of the proposals put forward by NT in the document dated February 2011. Extended regulation, in turn, includes the proper licensing of service providers and market structures. In the February 2011 document, NT points out that "regulations should be of universal applicability and comprehensive in scope in order to reduce regulatory arbitrage". In consonance with these important matters of policy, the FMA deals extensively with the peremptory requirements applicable to all exchanges, clearing houses and other MIs, as defined in the FMA. These provisions are the embodiment of the policy of the highest authority of the Republic of South Africa and are cast in peremptory terms. Contraventions of these provisions are unlawful and, in some matters of particular importance (such as that all exchanges, clearing houses and CSDs have to be licensed) also visited with criminal prosecution and criminal sanctions such as a large fine and/or imprisonment. It is within this context that the Draft Regulations proposed by the Minister of Finance have to be assessed. Section 47(1) of the FMA stipulates that a clearing house must be licensed in terms of section 49. Section 9 of the FMA provides that the Registrar may grant a clearing house a licence to perform the functions of a clearing house set out in section 50 of the FMA if the applicant complies with the requirements as set out in the FMA and if the objects of the FMA will be furthered by the granting of the licence. Section 50 of the FMA stipulates the functions that have to fulfilled by a clearing house. Some of these functions are cast in peremptory terms: it must provide an infrastructure, it must manage the clearing of securities which it accepts for clearing and so forth.	their current form are consistent with the Act, and prescribe the requirements as empowered by the Act in section 48(1)*(a)* of the Act. The Regulations are aimed at supporting the objectives of the Act of ensuring the safety, efficiency and integrity of financial markets, reduce vulnerabilities and increase transparency and to ensuring South Africa meets its international commitments to making regulatory and legislative reforms to be in alignment with international standards. The framework has been developed jointly by National Treasury, the Financial Services Board and the South African Reserve Bank

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		Section 6(2), in peremptory terms, imposes a duty on the Registrar, as regulatory authority established by virtue of the provisions of the FMA, to enforce all the provisions of the FMA on an equal basis. Chapter V, with specific reference to Section 47 of the FMA, stipulates that all clearing houses "**must** be licensed under section 49" (our emphasis) and section 109 (c) of the FMA states that a person who fails to comply with the provisions of section 47(1) of the FMA commits a criminal offence and is liable on conviction to a fine of R 10 million or to imprisonment for a period of five years, or both. These sections, in peremptory terms, impose an unequivocal and positive duty on the Registrar to ensure that all clearing houses fulfil the functions and duties of a clearing house in South Africa comply with the requirements as set out in the FMA and also imposes a duty on the Registrar to take action against any person that contravenes these provisions by taking the necessary steps to ensure the cessation of such illegal activities. It also imposes an obligation on the Registrar to approach the National Prosecuting Authority to proffer criminal charges against these offenders.	
IDBF	Role of Intermediaries	The IDBF responded to the first draft documentation released on 4 July 2014 and responses required by 3 September 2014. The IDBF was acknowledged in the table of commentators referenced in the second draft of the OTC Policy document. In summary, the IDBF response referred to the inclusion of a definition for "**inter-dealer brokers**" in chapter 1 of the FMA. The definition makes reference to ..."as a person who acts as **an intermediary** between..." The IDBF also made reference to the inclusion of the definition of "**intermediary**" (chapter 1, page 7 of the 1" draft of the Ministerial Regulations). The IDBF in no form or manner made a comment around the non-acceptability or the exclusion of this definition or recommended changes to the definition what-so-ever. The definition as proposed was and is totally acceptable to the IDBF. The conclusion of the IDBF	Comments have been acknowledged and are being further considered. Treasury reiterates its response provided in subsequent engagements with the IDBF representatives on the scope and intention of Regulations to capture the systemic activity of ODPs in the market. Although the role of inter-dealer brokers is recognised, the aim of the Regulations at this stage is to introduce a licensing and regulatory regime for the *providers* of OTC derivatives (that is

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		response was questions around clarification of the processes for authorisation and the relevant requirements for authorisation. **Financial Market Bill: Public Consultations** During the process of market consultation, the IDBF had tremendous challenges in convincing National Treasury and the Financial Services Board of the role of the IDBs in the Financial Markets, and the contribution that it makes in terms of liquidity and to its client base, locally and abroad. The result of all these interactive sessions resulted into the Policy Makers, Regulators and the broader industry stakeholders approving the inclusion of IDBs in the regulatory framework (FMA). "**Inter-dealer broker**" means a person who acts as an intermediary between two authorised users or between an authorised user and another person in relation to the purchase and sale of securities. **Regulations for OTC Derivative Markets in SA** The IDBF reviewed all the 2nd Round published documentation and have some serious concerns around the, potential exclusion of intermediaries such as the IDBs from the proposed Ministerial Regulations and in our view to some extent also in contradiction with the NT Policy document for OTC Regulation, and also the FMA. In reviewing the Comments and Response document released by National Treasury on 5 July 2015, we discovered that the comments made by the IDBF as mentioned above, resulted in the definition of intermediary being removed from the Regulatory document in its entirety, without any explanation at all. **The FMA and Bonds (as a Security)** The current Bond trading model is off-exchange traded (OTC) and on-exchange reported. The IDBF presented its volume and value matrix to the FSB in 2011/12 which confirmed a 35 % contribution to the total liquidity pool, specifically Government	originating, issuing, dealing/ selling or making a market in, and transacting as principal to, OTC derivatives) and to prescribe requirements pertaining to the providers. The "authorised user" exemption under Financial Intermediary and Services (FAIS) Act relates to activity in the listed market, that is, IDBs are regulated as "authorised users" by the exchange. To the extent that IDBs are not regulated under the FMA in relation to the intermediary function in the OTC market, does not mean that they cannot continue to provide the services as long as all requirements in other legislation such the FAIS Act are adhered to. Please consult with legal advisers. Phase 2 of Twin Peaks will provide for comprehensive regulation of all role players in the financial markets.

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		Bonds traded through Primary Dealers and the introduction of foreign flows into the SA Bond market. The general consensus of the broad industry, including the Regulator was that IDBs are integral to the efficient functioning of the financial markets in SA. **Guiding Principles as per the Policy Document** *Principle 3: Alignment with Existing Legislation* The IDBF is of the view that the proposed Policy Document for OTC Derivative Market Regulations and the Ministerial Regulations should be in alignment with the FMA. The FMA (in section 17(2) *(dd)*, *(ee)* acknowledges the current Bond Trading model by putting additional obligations on an Exchange to include an IDB as a categorised authorised user acting purely as an inter—dealer broker, in its Rules. The JSE as the Regulatory Authority for Bonds, adhere to these FMA requirements with the inclusion of section 3.35 in its Interest Rate and Currency Rules (20 February 2015), reading as follows: **Specific requirements applicable to inter-dealer brokers** The listed requirements were broadly consulted and agreed upon by the relevant stakeholders with the JSE Surveillance performing the regulatory oversight function. *Principle 5: Minimising Market Disruption* In the current flow of OTC derivative trading it is common knowledge that almost all interbank Swaps and FRA's are facilitated by IDBs for their clients, who are mainly local and International Banks. This is not a new practice of trading and should this process be interfered with as currently presented within the Ministerial Regulations by not recognising the IDBs as	

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		some category of Authorised OTC Derivatives Provider, it will without doubt have a consequential effect on the liquidity of the SA Derivative markets. The IDB's as previously mentioned in this response, facilitate the OTC derivative transactions between banks on a "Name give-up" basis, meaning then when the two trading parties accepted the trade as introduced by the IDB broker, the broker then disclosed to the banks who they have traded with. The current definition of an OTC Derivatives Provider excludes the lDBs and as an IDB Forum we request an URGENT sitting with National Treasury and the FSB to discuss and resolve our concerns in this regard. We would prefer a joint sitting of all the parties as soon as possible, to ensure full understanding of the lDBs role and importance in the OTC Derivative Markets and recommendations for Round 3 changes.	
PROPOSED CHANGES TO THE INSOLVENCY ACT			
Barclays	Policy document – Amendment of the Insolvency Act	We are of the view that the required amendments to the Insolvency Act, to provide for insolvency protection to external market infrastructures, must be made as soon as possible and not included in the FSR Bill, if the promulgation of the FSR Bill is likely to be delayed for some time after the commencement of the Regulations.	Agreed. The FSRB proposes consequential amendments to the Insolvency Act to include licensed domestic and external central counterparties. The intention is for Schedule 4 (consequential amendments) and the Regulations to be effective simultaneously.
JSE	Insolvency Act amendments	**The extension of the insolvency act to recognised market infrastructure** The point must be made that it would be entirely inappropriate, unlawful and impermissible to attempt to amend the provisions of the Insolvency Act, a statute promulgated by Parliament as the highest authority of South Africa, by virtue of the	Agreed. The FSR Bill proposes consequential amendments to the Insolvency Act to include licensed domestic

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		adoption of delegated legislation in the form of Regulations issued in terms of a completely different statute, the FMA. Such consequential amendments can only be effected by amendments to the FMA coupled with a consequential amendment to the Insolvency Act. It is unheard of that subordinate legislation such as the Draft Regulations could be used to amend the provisions of another statute such as the Act. **JSE recommendation:** Given that section 35A of the Insolvency Act will afford protection to all licensed MI, including external MI, we would urge NT to adopt a similar graduated licensing regime to Australia, where external MI are required to have some local presence. This would ensure that during a default scenario, our local regulators would have direct and immediate access to CCP management.	and external central counterparties in the definition of a market infrastructure – see Schedule 4. In terms of the proposed amendments to the Act in order to be licensed as an external central counterparty, an applicant must either be a company as defined in section 1(1) of the Companies Act; or an external company as defined in section 1(1) of the Companies Act that is registered as required by section 23. Accordingly the external central counterparty will have to have some local presence as suggested.
CHAPTER I: INTERPRETATIONS AND DEFINITIONS			
BASA	Definitions: General	We note that certain definition of terms that were provided for in the previously proposed Regulations have not been included in this proposed version. The following terms are used in the Board Notices and should be included in the Regulations: **"confirmation"**, **"fully offsetting"**, **"intermediary"**, **"material terms"**, **"portfolio compression"**, **"portfolio reconciliation"**	Disagree, the terms that are used only the Notices (and not the Regulations) will be defined in the Notices. A definition of "offsetting" has now been included in the Regulations.
Nedbank	**"otc derivative provider"**	Please provide clarity in regard to "*regular feature of its business*". This is necessary in order to determine the applicability of thresholds for capital requirements for non-centrally cleared OTC derivatives as envisaged by the policy document and draft FSB notices. *(Please refer to comment relating to the FSB notice for thresholds for non-centrally	This phrase is commonly used in legislation and the interpretation thereof will depend on the factual circumstances. The intention is to capture activities performed regularly and as a business. Generally a single isolated transaction will not constitute a

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		cleared OTC derivatives).	regular feature.
Old Mutual Investment group	**"otc derivative provider"**	The draft Regulations defines an OTC derivative provider as: "*a person who as a regular feature of its business and transacting as principal-* *(a) originates, issues or sells OTC derivatives; or* *(b) makes a market in OTC derivatives*." There are situations where transactions are concluded internally within the Old Mutual South Africa Group. These are typically "interest rate swaps" and are often reciprocal. The swaps are not issued or sold in the sense the draft Regulations seems intended for and are not entered into with counterparties outside of the Old Mutual South Africa Group. There seems to be no room for an exemption in this type of scenario and we would propose that an exemption process is provided for in the draft Regulations.	Concerns have been noted. An appropriate regime will be put in place that takes into consideration intragroup transactions whereby an OPD only has to comply with requirements appropriate to it. The intention these transactions should be captured for reporting purposes, however exemptions may apply with respect to certain requirements if the Authorities consider it appropriate.
ACTSA/ SABmiller	**"otc derivative provider"** and definition of **"group"**	Add definition to section 1: ***"group"*** *means, if applicable to an entity, the group of entities with which such entity is consolidated for purposes of the international accounting standard to which the group adheres;* Amend definition in section 1: **"*OTC derivative provider"*** *means a person who as a regular feature of its business and transacting as principal-* *(a) originates, issues or sells OTC derivatives to parties other than entities within its group; or* *(b) makes a market in OTC derivatives;"* A corporate that as a regular feature of its business originates, issues or sells OTC derivatives only to entities within its group should not be subject to the central clearing	We do not agree that the definition should be amended as advised. As stated above only appropriate requirements will be imposed on intragroup transactions.

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		and/or margining requirements contained in the Regulations and the Notice. Such OTC derivatives are used to consolidate within a single group entity or hedge or mitigate commercial risk, rather than for speculative, investment or trading purposes. Such transactions are therefore not systemically risky. • Group transactions that reduce risk in relation to the commercial activity of the group do not count towards clearing thresholds under EMIR and entities can apply for group exemptions from the central clearing requirement if they meet certain requirements (see HL Summary page 10-11). • Non-financial corporates are only subject to the central clearing requirement under EMIR if their transactions exceed certain thresholds (eg approximately EUR 3 billion gross notional in respect of interest rate derivatives or commodity derivatives, taken separately) (see HL Summary page 4). • Transactions that hedge or mitigate commercial risk of non-financial corporates are not subject to the central clearing requirement under Dodd-Frank (see HL Summary page 10).	
ACTSA/ SABmiller	**"OTC derivative"**	Amend definition in section 1: "*OTC derivative" means an unlisted derivative instrument, excluding-* *(a) foreign exchange spot contracts; and* *(b) physically settled or physically deliverable commodity contracts; and* *(c) any other unlisted derivative instrument concluded with a client who is using the instrument to hedge or mitigate commercial risk.*" The Parties were pleased to see the exclusion of FX Spot, FX Swap, FX Forward, FX Forward NDF, FX option deliverable, FX option NDOs and physically settled	The proposal is not agreed with. Such exclusion would exclude the vast majority of derivative instruments, and would defeat the objectives of the Regulations of the OTC derivatives markets.

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		commodity derivatives from the definition of OTC derivatives. The Parties propose that other types of transactions are similarly used by non-financial corporates to hedge or mitigate commercial risk, rather than for speculative or investment purposes. For example, interest rate and cash settled commodity derivatives are such types. • Non-financial corporates are only subject to the central clearing requirement under EMIR if their transactions exceed certain thresholds (e.g. EUR 3 billion gross notional in respect of interest rate derivatives or commodity derivatives, taken separately) (see HL Summary page 4). • Transactions that hedge or mitigate commercial risk of non-financial corporates are not subject to the central clearing requirement under Dodd Frank (see HL Summary page 10).	
Nedbank	**"controlling body"**	The term is used in the regulations but remains undefined. Does this refer to the executive committee (EXCO) or the Board of the CCP? This term is also not defined in the FMA.	The term applies as described in the FMA.
Strate	"**central counterparty**" and transitional arrangements	Definition of "central counter party", we note the deletion of "associated or". What is the intention? It is not clear from the Regulations whether the "associated clearing house" has been ruled out, especially because the FMA makes provision for the "associated clearing house". If a new structure is foreseen for clearing houses, the transitional period of 12 months may be problematic.	Treasury is proposing that amendments to the FMA which require a CCP to be an independent clearing house within a sufficient transitional period to accommodate the *status quo*. Please refer to Schedule 4 of the FSR Bill. The Regulations and the consequential amendments to the FMA are aimed at supporting the objectives of ensuring the safety, efficiency and integrity of financial markets, reduce vulnerabilities and

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			increase transparency and to ensuring South Africa honours its international commitments to making regulatory and legislative reforms that align with relevant international standards. The requirement that a CCP must be an independent clearing house reflects the well-documented and explicit policy position to establish a legal framework to accommodate a CCP structure to promote central clearing through an independent clearing house, and is permissible under the Act. State law adviser and senior counsel legal opinions obtained as to the constitutionality and legal validity of the Regulations and proposed amendments to the FMA confirm this position.
BASA	**"central counterparty"**	The policy decision to exclude an associated clearing house from the definition of central counterparty may have a negative impact on the assessment by ESMA of JSE Clear Limited as a qualifying central counterparty. In assessing the equivalence of the South African regulatory and supervisory environment a question may be raised as to why, in its own jurisdiction, JSE Clear Limited is not considered a central counterparty, despite the FSB's assessment of JSE Clear as a QCCP.	These provisions have been moved to the FMA through consequential amendments made under the FSR Bill. A CCP must be an independent clearing house within a sufficient transitional period to accommodate the *status quo*. Please refer to Schedule 4 of the FSR Bill and the Treasury response document published on 27 October 2015 on the proposed

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			consequential amendments to the FMA. The recognition of the proposed regulatory framework of South Africa for CCPs as equivalent by ESMA is testament that the financial sector regulatory reforms that are being proposed and implemented are consistent with international standards and best practice.
Barclays	**"central counterparty"**	We note that the definition of a central counterparty, provided for in the Regulations differs from the definition provided for in the Financial Services Regulation Bill (FSR Bill). We have assumed that the definition in the FSR Bill will be aligned to the definition in the Regulations and we have interpreted the change to mean that *Chapter VI - Assets and Resources and the Requirements and Functions of a Clearing House that is a Central Counterparty* of the Regulations will not apply to an external central counterparty and JSE Clear Limited. We would be grateful if you could confirm our interpretation.	Agreed. The definitions will be aligned. A CCP must be an independent clearing house within a sufficient transitional period to accommodate the *status quo*. In addition, a framework for the licensing of external market infrastructures (CCPs and TRs) is introduced. Please refer to Schedule 4 of the FSR Bill and the Treasury response document published on 27 October 2015 on the proposed consequential amendments to the FMA.
JSE	"**central counterparty**" as an independent clearing house	A CCP is defined in Chapter 1 of the Draft Regulations as "*an independent clearing house that* *(a) interposes itself between parties to transactions traded in one or more financial markets becoming the buyer to every seller and the seller to every buyer and thereby ensuring the performance of open contracts; and* *(b) becomes a counterparty to trades with market participants parties through open offer system or through a legally binding agreement*."	Agreed, the definition of a central counterparty to refers to a clearing house, with the requirement that a CCP must be an independent clearing house within a sufficient transitional period to accommodate the *status quo*. Treasury had agreed to insert a definition of "central

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		The definition of a CCP in the Draft Regulations therefore excludes an associated clearing house, such as JSE Clear, that clears transactions on behalf of the JSE in accordance with the rules of the JSE. In the consequential amendments to the FMA via the second draft of the Financial Sector Regulation Bill (FSR Bill), a CCP is defined as "a clearing house, whether associated or independent-" While the JSE understands that NT intends to propose to the legislature at some point in the near future that the associated clearing house category within the FMA be removed, an issue of critical concern is the fact that by limiting the definition of a CCP in Chapter 1 of the Draft Regulations to only an independent clearing house, it severely limits the ability of an associated clearing house such as JSE Clear to fulfil its licensed functions properly as it will deny an associated clearing house its CCP status. This is a serious concern for the following reasons: • The Draft Regulations are in conflict with and inconsistent with the (superordinate) provisions of the FMA, which explicitly allows for a clearing house to be an associated clearing house, and therefore for an associated clearing house to be a CCP. This results in the invalidity and unenforceability of the Draft Regulations; • The definition of a CCP is arbitrary and incorrect because it cannot be argued that an associated clearing house that acts as a CCP should be excluded from the definition of a CCP, merely due to the fact that it interposes itself as a CCP in accordance with an exchange's (and not its own) rules. The question as to whether a clearing house also performs the functions of a CCP in relation to the transactions that it clears is neither conditional nor dependent on the clearing house's status as independent or associated clearing house. The enquiry should	counterparty", as well as licensing and specific regulatory requirements pertaining to it, in the Act through consequential amendments after the JSE had highlighted the challenge that certain provisions contained in the Regulations should be in primary legislation. These amendments to the FMA are being made through the FSR Bill. The proposal that a CCP should be an independent clearing house is not intended to undermine the status of the JSE Clear as an associated clearing house; however it is necessary to design a framework that looks beyond the prevailing circumstances. The proposed amendments to Chapter V of the Act (and to the Act generally) show that there is a distinction between a clearing house and a CCP, and introduces a CCP as an additional category of market infrastructure. Although a CCP is a particular category of clearing house, the amendments to section 48 (the proposed subsection (1A)) will indicate that further requirements are applicable to a CCP, and the amendments to section 50 will confirm that a CCP has additional functions to

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		focus on whether the clearing house in question acts as a CCP. Whether the clearing house acts as a CCP in accordance with an exchange's rules or in accordance with its own rules is irrelevant. • Related to the point above, the statement (page 7) in the second draft policy document Regulating Over-the-Counter Derivatives Markets in South Africa that "*removing the reference to "associated" from the central counterparty definition...will help to create a level playing field for those clearing houses that perform central counterparty functions which must be regulated extensively given their systemic importance*" is misleading and incorrect. The extent to which a CCP is regulated is not dependent on the clearing house's status as an independent or associated clearing house, but simply whether it performs the functions of a CCP. The definition explicitly and deliberately excludes an already licensed clearing house (JSE Clear) that acts as a CCP for exchange-traded derivatives (as distinct from over-the counter (OTC) derivatives) from the definition of a CCP. It would therefore seem that the Draft Regulations appear to be contemplating only the entry of new CCPs into the SA market. Furthermore, JSE Clear has been granted qualifying CCP (QCCP) status by the Financial Services Board (FSB) in accordance with the CPMI-IOSCO Requirements and therefore the exclusion of JSE Clear from the definition of CCP will be disastrous for the SA financial markets as banks will not be able to claim capital relief in terms of Basel III CVA capital charges. The transitional arrangements in the Draft Regulations apply only to a clearing house transitioning to a CCP. They do not take into account the transitional arrangements required for an associated clearing house to transition to an independent clearing house. In any event, JSE Clear will not fall within the ambit of the definition of a CCP and until and unless it meets these requirements, regardless of the time frame of the	those prescribed to a clearing house (section (3A)).The concern is managing risks separately from other business interests, which is possible in an independent structure but problematic in relation to an associated structure from both a governance and operational perspective. The inclusion of an independent clearing house in the FMA reflects the well-documented policy stance to establish a legal framework to accommodate a CCP structure to promote central clearing through an independent clearing house, given the G20 requirement to mandate central clearing of standardised OTC derivatives. This policy approach that was approved by Parliament and Cabinet when it adopted the Financial Markets Act. The introduction of licensing and other requirements for CCPs is pursuant to international developments and obligations and the requirements set out in these Regulations are based on the CPSS-IOSCO *Principles for financial market infrastructures* and are intended to align the

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		transitional arrangements, it will not qualify as a CCP in a South African or an international context. The requirements stipulated in Chapter VI of the Draft Regulations are drafted in a manner that strongly implies that only one type of clearing house (an independent clearing house) and specific type of CCP will be licensed and permitted in South Africa, as the functions of a clearing house in s50 of the FMA to which Chapter VI refers are those typically performed by any clearing house (associated or independent) and yet Chapter VI only applies them to an independent clearing house. The absence of any meaningful requirements in the Draft Regulations in relation to the functions of an associated clearing house in contrast to the extensive requirements for an independent clearing house in Chapter VI appears to suggest either that the functions of an associated clearing house have significantly less impact than those of an independent clearing house acting as a CCP or that the material inconsistency in the approach to the requirements imposed on the two categories of clearing houses will be avoided in practice by not licensing any associated clearing houses. We are of the view that the Draft Regulations are, in these aspects, not consistent with the peremptory provisions of the FMA. More specifically, it appears that the Draft Regulations are being used to effectively amend the principles in certain sections of the FMA by introducing vastly different requirements between independent clearing houses and associated clearing houses which, in terms of the FMA, perform similar functions. In terms of section 50 of the FMA, the licensed function of clearing is no different between an associated clearing house and an independent clearing house. The manner in which section 50 contemplates that an associated clearing house or an independent clearing house manages their risks, associated with clearing, is the same. The only difference between the two types of clearing houses in terms of	South African market to international standards and best practice. Beyond international recognition, the reforms are intended to safeguard the financial system, and ensure that financial markets are safe and efficient, contribute to economic growth and promote the domestic and international competitiveness of the South African financial markets. State Law adviser and senior counsel opinion obtained affirms the constitutionality and legal validity of these provisions, and on that basis has proposed that these are contained in the superordinate FMA.

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		section 50 relates to the regulatory function, whereby an independent clearing house makes its own rules and regulates its own clearing members. Despite this, the Draft Regulations grant a completely different status to an independent clearing house by limiting the definition of a CCP to an independent clearing house and impose completely different requirements on the clearing function of the two types of clearing houses by only applying Chapter VI to independent clearing houses. The draft Regulations are therefore inconsistent with the principles established in section 50 of the FMA. As stated in our previous comments on the first draft of the FMA Regulations, the duties and functions of licensed MI's are stipulated in the empowering and superordinate statute, the FMA. The Draft Regulations, as delegated or subordinate legislation, may only deal with the practical implementation of these duties and functions and it is unlawful to attempt to expand on, amend or in any way alter these public duties and functions by the promulgation of the Draft Regulations. Please refer to our more detailed arguments in paragraphs 16 to 19 below.	
JSE	**"central counterparty"** associated clearing house	It is further important to record that the statutory regime is not a determining factor in assessing whether a clearing house also acts as a CCP. SAFCOM/JSE Clear is and always has been a CCP whether its empowering statute was the Financial Markets Control Act of 1989, the Securities Services Act of 2004 and/or the Financial Markets Act of 2012. JSE Clear has been assessed by the Regulatory Authority established in terms of the Financial Markets Act, the Registrar of Securities Services and has been certified as a qualifying CCP in accordance with the CPMI-IOSCO Requirements for qualifying central counterparties. A foundational cornerstone of this certification as qualifying CCP is the fact that JSE Clear must be a CCP in terms of South African law. This legal status as CCP then forms the basis of an enquiry as to whether JSE Clear also meets	Comments have been noted. The proposed transitional arrangements in section 110 of the Act (see Schedule 4 of the FSR Bill) are intended to allow for sufficient time for phasing in of the new requirements. Please refer to the Treasury response document published on 27 October 2015 on the proposed consequential amendments to the FMA. It should also be noted that the inclusion of an independent clearing house in the FMA reflects the well-

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		the international standards and criteria for qualifying CCPs. If JSE Clear does not fall within the definition of a CCP as currently stated in the Draft Regulations, it will not be able to meet the first and most important requirement of a CCP and any international recognition as such will be impossible to achieve. As a result of JSE Clear's certification as a qualifying CCP, all market participants that conclude transactions in securities cleared by JSE Clear currently qualify for capital relief in accordance with the Basel III principles. The proposed definition of a CCP will have the effect that these market participants' capital relief will fall away with immediate effect, it will result in significant disruption to the South African markets, it will result in potential systemic risk to the entire South African economy and it will negatively impact on the integrity of the South African financial markets. It is therefore of critical importance that the definition of CCP in the Draft Regulations be amended to include an associated clearing house such as JSE Clear that is a qualifying CCP in accordance with the CPMI-IOSCO requirements. It would be helpful to remember that the associated clearing house regulatory model of Safex and SAFCOM and JSE Clear and the JSE was necessitated by the provisions of the Securities Services Act and its predecessor, the Financial Markets Control Act that excluded clearing houses from being classified as self-regulatory organisations2. This had the effect that SAFCOM (as JSE Clear was previously known) was not empowered to promulgate clearing house rules and the contractual arrangements through which SAFCOM managed its affairs were not afforded the protection of section 35A of the Insolvency Act. Safex and the JSE were therefore obliged to promulgate exchange rules to ensure that all transactions concluded on the exchange and cleared through SAFCOM were subject to the protection afforded by the provisions of section 35A of the Insolvency Act.	documented policy stance to establish a legal framework to accommodate a CCP structure to promote central clearing through an independent clearing house. This policy position has been supported and approved by Parliament and Cabinet when it adopted the FMA. The proposed framework will ensure that the structural, regulatory and organisational disparity between an independent clearing house and an associated clearing house does not impact on the efficiency and integrity of a CCP. The introduction of licensing and other requirements for central counterparty is pursuant to international developments and obligations and the requirements set out in these Regulations are based on the CPSS-IOSCO *Principles for financial market infrastructures* and are intended to align the South African market to international standards. State Law adviser and senior counsel opinion obtained affirms the constitutionality and legal validity of these provisions.

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		The associated clearing house model is specifically permitted and contemplated in terms of the provisions of the FMA and JSE Clear is a licensed clearing house and CPMI-IOSCO compliant and qualifying CCP. SAFCOM/JSE Clear has cleared transactions since 1988 in accordance with the rules of Safex and now the rules of the JSE. The FMA (and its predecessors) is, in essence, enabling legislation that permits the licensing of many divergent types of clearing houses. The provisions of the FMA do not prescribe only one type of clearing house that is permitted to fulfil the functions and duties of a licensed clearing house nor do the provisions of the FMA prescribe that only an independent clearing house may act as a CCP. JSE Clear is an associated clearing house and acts as a CCP in accordance with the JSE's Rules and the clearing agreements concluded between JSE Clear and the clearing members of the JSE. This regulatory model has been used since the inception of the futures market in 1988 and is lawful and permissible in terms of the provisions of the FMA. It would be ultra vires the powers of the Minister to attempt to amend the provisions of the FMA by excluding JSE Clear from the definition of a CCP through the adoption of subordinate legislation. This is in conflict with the enabling provisions of the FMA that expressly allow many types of clearing houses and that also expressly allow clearing houses to fulfil divergent types of clearing and/or settlement functions. In this regard we refer you to the definitions of "associated clearing house"; "clear"; "clearing house"; "clearing house rules"; "clearing member"; "clearing services"; "independent clearing house"; and "licensed clearing house" in section 1 of the FMA; the provisions of section 10(2)(i)(ii) of the FMA that permits an exchange to appoint an associated clearing house in terms of its rules and sections 47(3)(iv), 48 and 50(1) and (2) of the FMA. These sections allow and permit the licensing of an associated clearing house, such as JSE Clear, and clearly stipulate the underlying policy	

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		considerations that apply to an associated clearing house. JSE Clear has been licensed as an associated clearing house and acts as a CCP in accordance with the JSE's Rules and it is outside of the ambit of delegated legislation to attempt to exclude JSE Clear from the definition of a CCP or to purport to impose further peremptory statutory requirements or functions on JSE Clear.	
Barclays	Recognition Framework	We understand that a potential mismatch of timing of the implementation of the FSR Bill and commencement of the proposed Regulations necessitates the inclusion, in the Regulations, of provisions that allow the registrar to recognise an external central counterparty, external central securities depository or external trade repository, however we are concerned that when the FSR Bill is promulgated, the joint standards developed by the FSCA and the Prudential Authority are substantially different to the recognition approach applied by the registrar, thus moving the goal posts. In addition, the second draft Policy Document is silent on the approach to determining equivalence; we advocate that the approach should be an outcomes-based approach and not a rules-based approach.	Agreed. A comprehensive equivalence recognition framework is proposed to be introduced in the Act by the insertion of sections 6A-C. The intention is that the amendments to the Act and the Regulations will be effective simultaneously.
JSE	Recognition Framework	Draft Regulations that deal with the "equivalence" or "recognition" of certain foreign MI are inconsistent and in conflict with the peremptory provisions of the FMA because the Regulations appear to state that external MI will be able to fulfil functions and duties in South Africa without being licensed to do so. This will result in the invalidity and unenforceability of these Draft Regulations. The JSE did express these concerns during the previous round of comments but it would seem that some of these concerns have not been addressed and so we will repeat them again here. The manner in which "equivalence" or "recognition" has been proposed in the Draft Regulations (and for that matter, in the consequential amendments to the FMA via the FSR Bill) talks only to the recognition of the foreign jurisdiction's regulatory regime.	Agreed. The proposed amendments to the Act (see Schedule 4 of the FSR Bill) will empower the Authority to recognise a foreign country as equivalent to the South African regulatory framework (proposed s6A). In addition to this a framework for the licensing of external market infrastructures (CCPs and TRs) is introduced.

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		In fact, the policy document states on page 18 that "In terms of the assessment of equivalence, the registrar will take into account the requirements in the Financial Markets Act for external market participants relative to those requirements imposed in the foreign jurisdiction and determine whether they are sufficient. While assessing the foreign regulatory regime for equivalence is absolutely necessary before allowing external MI to operate in South Africa, it is simply not sufficient on its own. The "recognition regime" must also require that external MI, just as local MI, be assessed and licensed against the provisions of the FMA. If external MIs operate within the borders of the Republic but are not subjected to all the requirements imposed on local MIs, that have to be licensed in terms of the FMA, the opportunity for regulatory arbitrage and a very unequal playing field is created. The effect would be that these foreign MIs will not be subject to the regulatory oversight of the local regulatory authorities and that their South African business will only be regulated by its regulator in the foreign jurisdiction. These "recognised" MIs will not be constrained to conduct business in accordance with the public duties and responsibilities imposed on entities licensed in terms of the FMA.	
JSE	Recognition Framework	The South African legislation in respect of MI has, since 1948 with the promulgation of the Stock Exchanges Control Act, consisted of licensing legislation. All these statutes fall nicely in the general pattern of South African legislation enacted to control a large variety of financial institutions such as banks, pension funds, insurance companies and so forth. The fundamental principle that MI such as stock exchanges and clearing houses that conduct business as such in South Africa have to be licensed has consistently been applied and enforced since 1948 through the various statutes that have been promulgated to regulate the securities' industry in South Africa. All these statutes also contained prohibitions against conducting the business of these infrastructures without being licensed to do so.	Agreed. The proposed amendments to the Act (see Schedule 4 of the FSR Bill) will empower the Authority to recognise a foreign country as equivalent to the South African regulatory framework (proposed s6A). In addition to this a framework for the licensing of external market infrastructures (CCPs and TRs) is introduced.

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		The contents of the Draft Regulations are in direct conflict with the provisions of the FMA (and all its predecessors) in purporting to allow an external CCP, trade repository or CSD to conduct business as such within the borders of South Africa without a licence to do so, as required by the FMA. This in itself has the effect that the Draft Regulations are invalid and unenforceable as it purports to amend peremptory provisions in the FMA, the superordinate statute in terms of which these Regulations have been proposed. In addition hereto, the provisions of sections 7, 8 and 9 of the Draft Regulations deal with an "external central counterparty" and provide for "recognition" by the Registrar of the external CCP. The FMA does not define nor deal with an external CCP nor does it invest the Registrar with any powers to discard the peremptory provisions of the FMA in respect of licensing and to "recognise" such an entity thus enabling the external CCP to conduct business as a clearing house in South Africa without a licence. It is a well-established principle in our law that a body, such as the Registrar or the Minister of Finance, whose powers are derived from the provisions of an Act of Parliament, cannot exercise any powers beyond those conferred by the legislation concerned, be it expressly or by implication. In this context the provisions of sections 2, 3, 4, 6, 47 – 53 and 109 of the FMA are pivotal. Any entity that does business as a clearing house (whether a local or external CCP) in South Africa and/or that fulfils the duties and functions of a clearing house has to be licensed as a clearing house as stipulated in the FMA and has to comply with all the other peremptory requirements applicable to clearing houses that intend to do business as such in South Africa. The FMA does not invest the Registrar with the authority to exempt entities that intend to conduct business as MIs from the peremptory licensing requirements of the FMA by "recognising" these entities as, for example, an external CCP. External MI are indeed defined in the FMA but are not dealt with in the body of the FMA itself, apart from the	

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		reference to the Minister's powers to prescribe regulations in respect of the functions that may be exercised by external FMIs. Section 1 of the FMA merely defines these entities as being authorised to perform functions in terms of the laws of a foreign jurisdiction. The FMA does not provide that these entities may perform these services in South Africa without applying for a licence nor does it state that these entities may fulfil the duties and functions of a clearing house without meeting the peremptory requirements of the FMA. Concomitant with these peremptory requirements is the Registrar's duty and powers to assume any of the licensed regulatory duties and functions of a MI if the Registrar considers it necessary in order to achieve the objects of the FMA.4 Section 9 of the Regulations merely affords the power to the Registrar to "recognise" the external CCP and does not impose an obligation on the Registrar to assume any of the functions or duties of this external MI. In addition to the fact that such an arrangement is unlawful and impermissible in terms of the FMA, it also creates unequal and ineffective regulatory oversight in respect of the external MI. Neither the Registrar nor the Minister of Finance (by proposing to promulgate the Draft Regulations) has the authority to exempt any clearing house from complying with the peremptory provisions of the FMA (such as section 47 (1)) and any determination in this regard, whether by "recognising" the CCP or otherwise will, in our view, be *ultra vires* and void. The Draft Regulations are subordinate legislation and have to be consistent with the provisions of its empowering statute, the FMA. It would be unlawful and impermissible to attempt to amend the peremptory provisions of the FMA through the promulgation of delegated legislation in the form of the Draft Regulations. The position adopted in the Draft Regulations is one to the effect that an external clearing house that does business as a clearing house and that fulfils the functions and duties of a clearing house in South Africa, is exempt from licensing under section	

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		49. This view is wide of the mark and unsustainable in the face of the peremptory and unambiguous provisions of the FMA. An external clearing house is defined in the FMA as a foreign person authorised to perform the duties and functions of a clearing house in another jurisdiction. It is indeed so that the Minister may prescribe additional requirements that may be applicable to an external clearing house if it wishes to fulfil the functions of a clearing house in South Africa (refer to the following section on the Australian licensing regime for foreign CCPs). These requirements would be additional requirements that may be stipulated by the Minister over and above the other peremptory requirements that these entities have to meet (such as licensing). The intention of the legislator was therefore clear and unambiguous, it being that such an entity has to meet all the requirements for licensing and also have to comply with the additional requirements as stipulated by the Minister before it would be able to fulfil the function of a clearing house in South Africa. In these circumstances we are of the view that the Draft Regulations applicable to external clearing houses should be amended to clearly state that these requirements impose additional duties and obligations, over and above the peremptory requirements stipulated in the FMA, on entities that wish to do business as a clearing house in South Africa. If the purpose of the Draft Regulations is, for example, to stipulate in which instances local entities would obtain capital relief if it clears foreign transactions through an external clearing house, the Draft Regulations should be amended to clearly record this fact. As stated above, the JSE recognises the need for an appropriate regulatory framework that allows external MI to operate within the Republic. This section makes suggestions (based on the Australian licensing regime for external CCPs) as to the minimum criteria that the regulatory framework should include, that would still be consistent with the provisions of the FMA.	

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		JSE Recommendations: (1) The South African authorities should adopt a similar equivalence, licensing and supervision regime for external MI to that adopted in Australia. (2) The adoption of such a regime will require that the FSR Bill is amended to grant the Prudential Authority (PA) and the Financial Services Conduct Authority (FSCA) the powers to conduct the required equivalence assessments of foreign jurisdictions; to conclude the necessary cooperative oversight agreements; to license external MIs against the provisions of the FMA and to conduct on-going supervision of licensed external MI (3) The FMA should be amended to explicitly provide for an "external licence" for external MI to eliminate the confusion that external MI do not need to be licensed (4) The FMA should also be amended to explicitly provide for the on-going supervision of licensed external MIs and to allow the Registrar the flexibility to determine the manner in which the Registrar will conduct on-going supervision of the licensed external MIs, proportionate to the risks that they pose to the South African market. (5) The FMA will need to appropriately address the SRO responsibilities of external MI, such as their rule making obligations and their authorisation and supervisory responsibilities in relation to their regulated participants, as these functions are typically overseen by the home regulator of the external MI but the FMA currently contemplates these functions being subject to direct oversight of the registrar. The degree to which the registrar needs to exercise his powers and duties in this regard needs to be considered and catered for in the FMA. (6) An external CCP licensed in terms of the FMA should be subject to the same Ministerial regulations as a local CCP if it performs the same licensed functions.	

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JSE	Licensed MIs	Another issue of concern is that a CCP is neither defined nor mentioned in the FMA. The only entities that may fulfil statutory duties and functions are the defined MIs, being licensed CSDs, licensed clearing houses, licensed exchanges or licensed trade repositories (see section 1 of the FMA). A CCP will only be able to fulfil the duties and functions of a MI if the provisions of the FMA are amended to this effect. It is *ultra vires* the powers of the Minister to attempt to amend the provisions of the FMA by the adoption of the Draft Regulations. **JSE Recommendation:** (1) The FMA should be amended to refer to specifically to a CCP as a sub-category of clearing house, whether associated or independent. (2) Regulation 7 should be deleted and Chapter VI should be made applicable to any CCP, whether associated or independent clearing house, unless the specific regulation in Chapter VI is only applicable to an independent clearing house. Any policy intention to remove the category of associated clearing house should be done via amendments to the FMA following appropriate consultation with affected parties, including JSE Clear and market participants. Any amendments to the FMA will have to be accompanied by appropriate transitional arrangements that recognise the scale of the change required in terms of inter alia rulebook and IT systems changes.	Agreed. Commenters have highlighted that definition of CCP and the requirements applicable to it had never been recorded in any legislation applicable to the regulation of CCPs. Treasury has agreed that a definition of "central counterparty", as well as requirements pertaining to licensing and regulation, should be introduced in the Act through consequential amendments. The definition of a central counterparty to refer to a clearing house, with the requirement that a CCP must be an independent clearing house within a sufficient transitional period. The licensing and other requirements and obligations set out in these Regulations are based on the CPSS-IOSCO *Principles for financial market infrastructures* and are intended to align the South African market to international standards and best practice.
JSE	Policy document - central counterparty clearing	It is apparent that the CCP clearing solutions discussed in the policy document unnecessarily complicate the policy considerations because they (a) imply that 'recognition' exempts the external MI from obtaining a licence in terms of the FMA,	Agreed. As stated above, the proposed amendments will require that an external central counterparty located in an 'equivalent jurisdiction' (as defined in the Act). The proposed amendments to section

COMMENTATOR	SECTION	COMMENTS	RESPONSES
	solutions	(b) suggest that 'local presence' confers additional benefits on an external CCP instead of viewing it as an additional licensing requirement under certain conditions (e.g. systemic considerations), and (c) confuse the location of the licensed entity with the location where the clearing transactions are executed or the collateral is held. For example, under **Option 1**, the policy document (page 15) states that "the international central counterparty will be licensed and supervised by foreign authorities; this makes it difficult for domestic authorities to have sufficient oversight over foreign central counterparties, as no local regulation would apply". This is incorrect, as external MI must be licensed in terms of the FMA and therefore local regulation must apply. Furthermore, as envisioned by the FSR Bill, local regulators would have to conclude effective cooperative oversight arrangements with the foreign regulators of external MI to ensure that local regulators have appropriate oversight over foreign CCPs. Furthermore, Options 2 and 5 confuse 'local presence requirements' with licensing and supervision requirements. To emphasise again, whether the external MI has local presence or performs its functions in relation to South African market participants completely from a foreign jurisdiction is irrelevant to the licensing requirement. All external MI must be licensed and subject to the oversight of local regulators. As noted above in section B, requiring local presence could be an additional licensing requirement, but this should not be a choice granted to external MI as a means to get away from the requirements to be licensed or subjected to the provisions of the FMA. **Option 2** also confuses local presence requirements with additional requirements concerning capital and collateral. More worryingly is the confusion between options 1 and 5. Option 5 explicitly refers to	49 will introduce a new s49A which will provide that an external central counterparty must be licensed to exercise functions or duties, or provide services as unless it is exempt from the requirement to be licensed. The external central counterparty will be required to have a form of local presence (refer the proposed section 49A).

COMMENTATOR	SECTION	COMMENTS	RESPONSES
		the equivalence framework and 'legal recognition' while option 1 does not. This would suggest that external MI could perform clearing functions in South Africa via option 1 without even equivalence being applied? The distinction between option 5 and option 1 appears only to get around the perceived problem of insolvency protection, but based on section B comments above, this perceived problem is moot (refer to section D below). To conclude, **all external MI operating in South Africa must be licensed in terms of the FMA.**	
CHAPTER II: OTC DERIVATIVES			
Regulation 2: Requirement to be authorised			
JSE	2 – Requirement to be authorised	The JSE understands that NT is considering whether to extend the Draft Regulations to external OTC Derivative Providers (ODPs). The current definition would seem to apply to all ODPs, regardless of their geographical location or where the transaction is executed, but the policy document (page 18) appears to exclude external ODPs. In order to maintain level playing fields and to ensure that the regulators have proper sight of the entire OTC derivative market, we would urge NT to explicitly extend the Draft Regulations to external ODPs. The framework could specify thresholds over which external ODPs must be authorised (similar to the Swaps Dealer requirements in the USA).	The intention is that the prohibition in Regulation 2, as it stands, will apply to any person acting, or advertising or holding itself out, as an OPD in the Republic wherever that person may be located. However the intention at this stage is only to allow for the authorisation of local OPDs as evidenced in the *Criteria for authorisation* of OPDs (published by the registrar). The extension of the Regulations to external OPDs will be considered in the next phase.
Regulation 3: Reporting obligations			

COMMENTATOR	SECTION	COMMENTS	RESPONSES
Nedbank	3 – Reporting obligations	In terms of this provision ODP's are required to discharge their reporting obligations to the TR, clarity is required regarding the extent of the reporting in the event that the client of the ODP is an agent (as per the FMA definition) acting on behalf of underlying clients. Will the ODP be required to report the respective underlying client transactions or the main transaction with the agent? Alternatively, will the provisions contained in clause 9 of the ODP Code (i.e. Portfolio reconciliation) be applicable in the instant? In terms of the policy decisions adopted it was not the intention that the client / end user would be brought within the scope of the regulations.	Agree as per the definition of "client" in the FMA it will depend on the contractual relationship between the parties). Legal responsibility for reporting is placed on the ODP – who can report on behalf of the agent/client The OTC transactions between counterparties, each individually and separately, need to be reported. If there is no OTC transaction between the ODP and its client then there is no requirement, in terms of these regulations, to report the agreement with the client. If, however, there is an underlying OTC transaction with the client then reporting is required.
CHAPTER IV: SECURITIES SERVICES TO BE PROVIDED BY AN EXTERNAL CENTRAL SECURITIES DEPOSITORY AND THE FUNCTIONS AND DUTIES THAT MAY BE EXERCISED BY AN EXTERNAL CENTRAL COUNTERPARTY OR EXTERNAL TRADE REPOSITORY			
Regulation 6: Securities services that may be provided by an external central securities depository			
Granite	6 – External central securities depository	The heading in chapter IV of the regulations states "securities services to be provided by an external central securities depository" as per s 5(1)*(c)* of the FMA. The referred section including s5(2) distinguishes very clearly between and external CSD and external Participant, and so do the definitions. The referenced sections above also refer to "securities services" that may be provided and the functions and duties that may be exercised by the external participant or external CSD as prescribed by the Minister".	Disagree. Section 35(4)*(b)* of the Act provides for the approval of an external CSD as a participant. Please also refer to the definition of "external participant" in the Act. Section 35(4)*(a)* specifically include the approval of external CSDs as participants. Such approval is subject to the Ministerial Regulation prescribed in terms of section

COMMENTATOR	SECTION	COMMENTS	RESPONSES
		The overall concern is that there is no evidence found in the Regulations that addresses the framework and requirements for an external CSD or external Participant to perform securities services in the South African financial markets. Referring to page 104 of the comments matrix – we agree that the wording in the FMA in section 35 (4)*(b)*(ii) is incorrect, and should exclude "as a participant" and Granite would support this position. We disagree that there is a requirement to establish a special CSD-to-CSD category, as the definitions for both "external CSD" and "link" clearly confirms the bilateral contractual and operational relationship and arrangements to establish a link between a local CSD and an external CSD. The commentator also makes reference that the special CSD to CSD links category is not a normal "participant" in the CSD. We found this argument to be ambiguous, specifically when the comments are made that the "external CSD" will operate in the infrastructure like a "normal participant" in the local CSD environment, it will not be regulated and supervised like a normal "participant". There are greater concerns for un-level playing fields given the recommendation that external participants/external CSDs will effectively become clients of the local CSD, and as such divert the securities services that the local participant (CSDPs) are authorised to offer within the South African securities market to external participants/external CSDs and effectively allow local CSD to divert revenue away from local CSDPs to its own account.	5(1)*(c)* and (2). Regulations 6 and 7 apply for the purposes of approving an external CSD as a special category of participant, provided that the external CSD is from an equivalent jurisdiction in terms of section 6A. Under a link arrangement, an external CSD will settle for its own clients rather than going through a local CSDP. The framework does not aim to create a licensing regime for external CSDs to provide functions to the domestic market.
Strate	6	Align with regulation 47 by amending as follows: "*A licensed central securities depository may*, *for the purpose of establishing a link*	Agreed. Please see revisions.

COMMENTATOR	SECTION	COMMENTS	RESPONSES
		with an external central securities depository, authorise an external central securities depository that has been recognised in accordance with Regulation 9, as a special category of participant to perform-…"	
Strate	6 and 9	In the previous draft the external CSD has been "*recognised by the registrar*". The wording was interpreted as a form of "licencing/recognition/authorisation/approval" by the FSB. In the current draft, the reference to the registrar is omitted in 6, but included in a new provision 9. Please clarify what is the order of the process where "a licensed [CSD] may **authorise** an external [CSD]" that has been **recognised** by FSB in Regulation 9? Is there not a duplication of the "licensing process"? Is the intention that the CSD will "licence" ("authorise" – similar as s 31 FMA where Participant is licensed) the external CSD and then, additionally, the FSB will "licence" ("authorise") the external CSD directly (independently, notwithstanding "authorisation" by local CSD) to perform certain functions and duties as set out in the FMA or Regulation 6? We need to understand what role the Registrar is playing in this regard. Is the external CSD a "regulated person" under the FMA or not? Also, please clarify what will happen first - "authorisation" or "recognition". This is important for process. Also, note in 47 that the word "approval" is used in heading which differs from both Regulations 6 and 9.	Agreed. Please see revised Regulations 6 and 7. The wording of the provision have been amended to refer to a CSD from an "**equivalent jurisdiction "** in terms of section 6A of the Act – see Schedule 4 of the FSR Bill.
Regulation 7: Functions and duties that may be exercised by a central counterparty			
Strate	7	Insert *external* central counterparty	This Regulation has been deleted.

COMMENTATOR	SECTION	COMMENTS	RESPONSES
JSE	7	The JSE would argue that this Regulation is not required and should be deleted: (1) An external CCP has no obligations in terms of the FMA. An external CCP that performs functions in South Africa and is therefore licensed in South Africa however has obligations in terms of the FMA. (2) Please note our arguments on licensing of external FMI above and therefore Regulation 7*(a)* is not required and should be deleted. (3) An external CCP must meet all of the requirements of the FMA applicable to a clearing house and all of the requirements under Chapters V and VI of the Draft Ministerial Regulations.	This Regulation has been deleted. In accordance with the consequential amendments of the Act, an external CCP will be required to be licensed and to meet requirements in the Act.
JSE	7*(b)* and 11	In this regard, part of the purpose of Chapter VI would seem to be a purported amendment of the provisions of section 50 of the FMA that record the statutory duties and functions of clearing houses. More specifically, Regulation 7*(b)* states that an external CCP must, in addition to the functions in section 50, also exercise the functions set out in Regulation 11. This implies that there are additional functions in Regulation 11 that are not within the ambit of section 50. It is not clear which functions in Regulation 11 are additional to those in section 50 but the Regulations may not extend the functions in section 50, they may only deal with the implementation and administration of those functions. The additional functions in Regulation 11 contemplated in Regulation 7*(b)* are arguably those in Regulation 11(1)*(a)* "*interpose itself between counterparties…*" (this is not part of any of the functions of s50) and 11(2)(g) "provide the necessary infrastructure, resources and governance to facilitate its post trade management functions" (this is an expansion of the function in s50(2)*(a)*).	Regulations (previous 7 and 11) have been deleted. The proposed amendments to the Act provide for the additional functions applicable to a CCP.

COMMENTATOR	SECTION	COMMENTS	RESPONSES
Regulation 9: Functions and duties that may be exercised by an external trade repository			
Strate	9	The "*form and manner prescribed by the registrar*" has not yet been released for comment. It is not clear from the wording in 9 how the external CSD must prove to the Registrar that (a) its legal and supervisory arrangements are sufficient; (b) there is effective supervision and enforcement in foreign country on an on-going basis; (c) legal framework of foreign country allows for a link; (d) authorisation as CSD in foreign country, effective supervision, compliance with business continuity and prudential requirements (e) equivalent systems for money laundering, anti-terrorist systems; (f) cooperation agreements between regulators. Also, the provisions overlap in certain instances with what the local CSD must check in Regulation 47 before it can "authorise" the external CSD. Will this process happen independently from the local CSD between the external CSD and FSB? Again, who will do the actual checking? Was the intention perhaps that Regulation 9 forms the "entry criteria" and Regulation 47 the ongoing participation criteria? If this is the case, the wording in the stem of Regulation 47 only refers to "*when establishing a link*". Was this the intention?	Regulation has been deleted.
JSE	9	The JSE would argue that this regulation should be deleted and that the FMA should be amended to reflect an appropriate licensing regime for external MI (refer to comments above in section B). Notwithstanding this broad comment, there is a duplication of the word "external" in Regulation 9*(e)*.	Agreed. Regulation has been deleted and the framework for external market infrastructures is proposed in the Act by insertion of sections 6A-C.

COMMENTATOR	SECTION	COMMENTS	RESPONSES
CHAPTER V: ASSETS AND RESOURCES ASSETS AND RESOURCES REQUIREMENTS APPLICABLE TO MARKET INFRASTRUCTURES			
Regulation 10: Assets and resources			
Granite	10	Granite is satisfied with the proposed methodology and the reporting requirements in this regard	Noted
CHAPTER VI: ASSETS AND RESOURCES AND THE REQUIREMENTS AND FUNCTIONS OF A CLEARING HOUSE THAT IS A CENTRAL COUNTERPARTY			
Regulation 11: Functions of a central counterparty			
Strate	11	Delete ~~*functions*~~ replace with *requirements* (cf text itself)	This Regulation has been deleted and is proposed to be incorporated in new section 49(3A) of the Act.
Strate	11(1)*(b)*	What is covered by the term '*post trade management functions*'?	This is now proposed by be contained in s49 (3A) of the Act. It would be all the functions required to be performed by the central counterparty post trade such as clearing, settlement and custody etc.
JSE	11(2)*(b)*	In response to comments by other commentators on the first draft, NT agreed to remove the reference to client collateral because they agreed that a CCP only has a principal to principal structure, which is not correct. It is acceptable to have a CCP model where the client has the principal obligation but it is guaranteed by the clearing member rather than the client has an obligation to the clearer and the clearer has an obligation to the clearing house. Regulation 11(2)*(b)* only refers to the so-called principal model.	This provision is now proposed to be in section 48(1A)*(b)* of the Act and has been amended to include the clients of clearing members.

COMMENTATOR	SECTION	COMMENTS	RESPONSES
Regulation 12: Legal basis			
Strate	12(1)*(f)*	Insert: *are binding on third parties and* enforceable	Agreed.
Strate	12(4)*(b)* – *(c)* insertions	Insert: *foreign legal* requirements in 12(4)*(b)*; *foreign legal* provisions in 12(4)*(c)*; applicable *South African* legislation in 12(4)*(c)*; uncertainty *regarding the enforceability of a central counterparty's choice of law in a jurisdiction*	Agreed, where appropriate.
Regulation 13: Access and participation			
Nedbank	13*(g)* – Access and Participation	It is proposed that there is a requirement for clearing members to obtain consent to disclose information pertaining to indirect clearing clients, unless central counterparties intend on applying for an exemption from the Information Regulator (per POPIA). Alternatively please confirm if the provision around privacy requirements would be adequately regulated by consent provisions in the legal agreements.	The legal agreement should provide for the necessary consent for the processing of information.
Strate	13(1)(c)	Two separate requirements are included here. Consider splitting "*and be publicly disclosed*" to separate section.	Agreed.
JSE	13(2)*(c)*	This section is already sufficiently covered in the FMA under section 53*(c).*	The provision has been deleted.
JSE	13(2)*(d)*	Clarity is sought on the intent of this provision and the difference between the ongoing monitoring of compliance in (c) and the annual review of compliance in *(d).*	The provision has also been deleted.
JSE	13(2)*(i)*	The words "central counterparty must" are superfluous.	Agreed and corrected (now 10(2)*(g)*)
Regulation 14: Governance			
Nedbank	14 (3)	Clarity is requested around the term "sufficiently independent". Does NT intend that a central counterparty and a controlling body may not share common functional areas	Independence is aligned to applicable corporate governance standards, including

COMMENTATOR	SECTION	COMMENTS	RESPONSES
	Governance	and/or resources?	the King Code of Conduct and the CPSS-IOSCO *Principles for financial market infrastructures*. Governance arrangements are what define the structure under which the controlling body of the CCP and senior management operate and should provide for the roles, responsibilities, term and composition of the controlling body, senior management and any committees of the controlling body or other committees of relevance to the CCP enables it to perform its functions in a continuous and orderly manner. See Regulation 11
Strate	14(1)(a)	Insert: *any committees of the controlling body or other committees of relevance of the central counterparty*	Agreed, now 11(1)*(c)*
Regulation 15: Risk Committee			
Strate	15(1) *(f)* – *(h)* & 15(2)	These provisions belong better to 15(2), since it deals with governance and mandate matters.	Noted
Regulation 16: Risk Management Framework			
Strate	16(5)	Strate has no problem with the annual review but would just express some concern regarding the scope of the "independent audit assessments" – it is not clear whether this is intended to be of all information technology systems and the information security framework? If so, it is not feasible. Internal audit is usually done on a "risk-based" approach focussing on elements of the environment which could mean that certain aspects may only be reviewed once every 3-5 years. Covering the full universe	We are of the view that audits on the information technology systems and information security framework should be done annually but the scope could be determined using a risk based approach therefor only focusing on the high risk

COMMENTATOR	SECTION	COMMENTS	RESPONSES
		annually will introduce massive cost to the parties concerned with questionable benefit.	areas.
Regulation 20: Efficiency, disclosure and transparency			
Strate	20 to 22 - "crisis"/ "emergency"/ "crisis event"	Check for consistency throughout Regulations – eg 20(4); 22(1)(i); 22(6)*(a)*; 22(6)*(c)*; etc.	Agreed, the description **"systemic event"** is now used where appropriate.
Strate	20(3)	Requirement for an "annual" completion and disclosure may not be practical and could be very onerous. This is not applicable to all forms of FMIs.	Agreed. The *Principles* require that disclosure be made very two years. The Regulation has been amended accordingly.
Regulation 23: Custody, settlement and physical deliveries			
Strate	23(2)*(e)*	Use of the term "custodian bank". This term is not defined and it differs from the FMA's terminology re central securities depository participant. Please include a definition that includes reference to the FMA's definition of "participant".	We do not agree that custodian bank in this context intends to refer to a participant. However the term **"custodian"** has now been defined
Strate	23(5)*(g)* – *(n)*	Insert: *physical* delivery everywhere where omitted	Agreed
Strate	23(7)	Insert: storage and *physical* delivery process	Agreed
JSE	23 and 36	We propose that the FMA regulations should allow for different models of clearing. For instance JSE Clear follows a 'clearing down to client level model' which enables the clearing house to hold clients' assets separately. Regulation 23 currently only refers to clearing members' assets and not assets belonging to clients of clearing members or their clients.	Disagreed, in a central counterparty model it will not be necessary.

COMMENTATOR	SECTION	COMMENTS	RESPONSES
Regulation 24: Qualifying capital			
LCH	24(2)*(c)* to *(m)*	Qualifying capital (a) The deductions in relation to those items listed in sub-Regulations *(c)* to *(m)* are not necessary as capital is already limited by financial resources not invested in cash or highly liquid securities as specified in sub-Regulation (2)*(a)*. Including the deductions in sub-regulations *(c)* to *(m)* would therefore result in double counting. As such, we recommend that sub-regulation *(c)* to *(m)* are deleted. (b) It would make sense to include in sub-regulation (2) own resources as a deduction (not limited to own resources used to contribute to default fund) with cross reference to Regulation 41(2)*(a)*.	Sub-Regulation (2)*(a)* has been deleted.
Regulation 25: General capital requirements			
JSE	25 – Capital requirements for CCPs	Regulation 25(1)*(a)* requires a CCP to have permanent and available initial capital of at least R100 million. It would appear that this capital has been set at an international level taking into account current ZAR-EU exchange-rates. The JSE would argue strongly that this is arbitrary and not appropriate for the South African market. Large international market players can easily meet a EUR7,5 million threshold, as the average regulatory capital burden will be passed through to many more market players than are available in the smaller South African market. For example, LCH Ltd has 163 clearing members with much larger balance sheets and exposures than the average clearing member in South Africa. We would strongly urge NT to reconsider the initial capital amount of R100 million. Based on the FMA regulations, JSE has calculated its capital requirement based on exposures, as set out in the FMA regulations, and the amount would be significantly less than the R100 million.	The comments have been noted and the amount has been reduced to R50 million. See sub-Regulation 22(1)*(a)*.

COMMENTATOR	SECTION	COMMENTS	RESPONSES
Regulation 27: Specific capital requirements for business risk and for winding down or restructuring			
JSE	27(2)*(b)* – Capital requirements for business risk	The new Regulation 27(2)*(b)* requires that the capital requirement for business risk must be at a minimum equal to "six months of operating expenses". This is a significant change from the old Regulation 38(2)*(b)* in the first Draft Regulations (released July 2014) which required that the capital requirement for business risk be subject to "a floor equal to 25% of its annual gross operational expenses". The change to Regulation 27(2)*(b)* will now require that a CCP hold capital for business risk equivalent to about 50% of its annual gross operational expenditures which is double the original proposal, is extremely onerous and does not align with international requirements for the same risk, in particular the EMIR regulations also require a floor of only 25%.	Agreed, the period has been amended to three months.
LCH	27 (1) and (2)	**Specific capital requirements for business risk and for winding down or restructuring** (a) Sub-regulation (1) requires a central counterparty to submit to the registrar of securities services (Registrar) for approval its estimate of the capital necessary to cover losses resulting from business risk. A foreign central counterparty regulated by existing regulatory frameworks such as EMIR is already required to submit business risk models and wind down plane to its local regulator and as such this seems to be an unnecessary duplication for a foreign central counterparty. As such we would prefer this requirement to be removed for a foreign central counterparty where such foreign central counterparty is already required to submit business risk models and wind down plans to its regulator. (b) Sub-regulation 2 requires a minimum amount capital requirement for business risk of 6 months operating expenses. In terms of many existing regulatory frameworks this requirement is only 3 months operating expenses. We request that this capital	An external CCP will be subject to the proposed equivalence framework set out in the Act. These requirements are applicable to local central counterparties only. Agree, sub-regulation (2) has been amended to 3 months in line with global

COMMENTATOR	SECTION	COMMENTS	RESPONSES
		requirement is brought into line with the capital requirements for foreign central counterparties as imposed by their home regulator as this would otherwise have a very significant impact on foreign central counterparties.	standards.
Regulation 28: Capital calculation requirements for operational risk			
Strate	28.2 (10)*(e)*(iii)*(bb)*	Delete: ~~*set-off*~~, replace with *close-out netting* of collateral upon an event of default. This is important because you can only use "set-off" where obligations are already due and payable, which does not cater for this situation where on the trigger event (e g insolvency) you bring obligations forward and close them out, notwithstanding the fact that the obligations may not be due and payable.	Agreed
Regulation 30: Capital calculation requirements for counterparty credit risk			
Strate	30.2(1)(b)(iii)	Please include reference to "a licensed central securities depository".	Agreed
JSE	section 50(1)(2) and (3) of the FMA	**Functions and duties of a clearing house** The functions and duties of licensed MIs are recorded in the FMA as the empowering statute and superordinate piece of legislation. The functions and duties of clearing houses are recorded in sections 50(1), (2) and (3) of the FMA. If the legislature has in fact decided to impose further statutory duties and functions on a licensed clearing house that is also a CCP, these duties and functions have to be recorded in the FMA by an amendment to section 50. The Draft Regulations, as delegated legislation, may only deal with the practical implementation of these statutory duties and functions and it is unlawful to attempt to extend or amend these statutory duties and functions through the adoption of the Draft Regulations.	Agreed - the proposed amendments to the Act include the requirements.

COMMENTATOR	SECTION	COMMENTS	RESPONSES
Regulation 35: Consolidated supervision requirements			
LCH	35 – consolidated supervision requirements	We note the response of NT to our previous comments in the first submission in relation to regulation 45 of the first draft (consolidated supervision requirements). We note that there is no definition of "controlling company" in either the regulation or the FMA. As such, whilst we accept that the immediate controlling company of the central counterparty should be included in any consolidated supervision, such consolidated supervision should not extend to the shareholders of the immediate controlling company of a central counterparty who themselves are not subject to consolidated supervision for regulatory capital purpose. It would be helpful if clarity is given in this regard.	The provision has been deleted as this is provided for in the FSR Bill in Chapter 12 dealing with financial conglomerates.
Regulation 36: Segregation and portability			
LCH	36 – segregation and portability	(1) In our comment in the first submission relating to Regulation 47I1)(a) in the first draft, we noted that a central counterparty is only able to provide the protection envisaged therein to the extent that the identity of the client of a clearing member is known to the central counterparty. This comment was noted in the Treasury response and was agreed. However, no consequent amendment has been made to Regulation 36(1)(a) that this obligation on the central counterparty will only apply where the central counterparty knows the identity of the client of the clearing member. (2) Sub-regulation (1)*(e)*, (1)*(f)* and 3*(a)*, respectively, place an obligation on the central counterparty to ensure that: i. A clearing member discloses to its clients whether client collateral is protected on an individual or omnibus basis;	The provision has been amended to require the CCP to have rules to ensure those obligations; the obligation will therefore be that of a clearing member. Now 32

COMMENTATOR	SECTION	COMMENTS	RESPONSES
		ii. A clearing member discloses to its clients any constraints such as legal or operational constraints, that may impair its ability to segregate or port the clients positions and related collateral; and iii. Clearing members offer their clients, at least the choice between omnibus client segregation and individual client segregation and inform them of the costs and level of protection associated with each option. Whilst the existing regulatory frameworks make it a requirement for central counterparties to be able to offer the omnibus client segregation and individual client segregation models, the obligation is on the clearing member to offer this to the clearing clients with whom they have the relationship. It would be very difficult to offer for a central counterparty to monitor and enforce this obligation which is placed on the clearing members and this has been recognised under these existing regulatory frameworks. Accordingly, we request that the obligations on the central counterparty in sub-Regulation (1)*(e)*, (1)*(f)* and 3*(a)* are removed.	
Regulation 37: Margin requirements			
LCH	37(2)*(g)*	There is a requirement for the margin model to be reviews at least annually by the independent third party. Under EMIR and other regulatory frameworks the margin model must be reviewed annually and after material changes by an independent third party. There is no requirement for this party to be a third party as long as there is independence. As such we would prefer the requirements for the independent party to be a third party to be removed.	The reference should have been 37.2(3)*(g)* (now 33.2) Agreed. The provision now provides that the review must be performed by a qualified independent person.

COMMENTATOR	SECTION	COMMENTS	RESPONSES
Regulation 38: Default procedures			
LCH	38(1)*(f)*	The sub-regulation requires the procedure to be set out in the event that a default by a clearing member is not declared by the central counterparty. We would be grateful if clarity can be provided on what sort of events these procedures are intended to cover and the types of procedure which is envisioned here.	Default can only be 'declared' by the central counterparty of which the member in question is a clearing member. The provision has been deleted.
JSE	Defaulting clearing members	**Inconsistent treatment of the cover for defaulting clearing members** The Draft Regulations require a CCP to maintain additional financial resources or a prefunded default fund to protect against the default of its clearing members. However, the coverage is inconsistent in that it refers to three different approaches: • the use of the IOSCO principle of Cover 1 to cover the default of the largest clearing member (Regulation 30.1(1))(w)), where the CCP is not involved in activities with a more complex risk profile; • Cover 1 or Cover (2+3), if the combined exposure to the second and third largest clearing members is larger than the largest clearing member's exposure (Regulation 39(a)), for any type of CCP; • Cover 2, to cover the default of the two largest clearing members (Regulation 40(2)) and Regulation 30.1(1)(v), but only where the CCP is involved in activities with a more complex risk profile. Cover 2 is inappropriate and onerous within the South African context, where there are a limited number of market players and clearing members. When adequately calculated, Cover 1 for the default fund (as in 39(a)) already represents a heavy drain on the liquidity of clearing members and to substantially increase this would lead to unintended market distortions where OTC derivative transactions are not cleared due to the costs.	Agreed, see revisions to Regulation 35, Regulation 36(2) and Regulation 27.1.

COMMENTATOR	SECTION	COMMENTS	RESPONSES
Regulation 40: Other financial resources			
JSE	40	Regulations 40(2) and 40(5)*(f)*(i), by requiring that a CCP include periods of extreme market movements over the past 30 years that "*would have exposed the CCP to the greatest financial risk" and to withstand the default of at least the two clearing members to which it has the largest exposure*" is inconsistent with Regulations 30.1(1)*(w)* and *(v)*, where the type of CCP (by risk profile) is taken into consideration. Regulation 40 is extremely onerous and conservative and will result in the contributions to the default fund (including existing contributions by JSE Clear clearing members) more than doubling. This could have the unintended consequence of disincentivising market participants from becoming clearing members thereby increasing concentration of clearing members and thereby the risk to financial stability, rather than achieving the Draft Regulations aims, namely to enhance financial stability.	Agreed. See revisions to Regulation 36(2)
Regulation 42: Collateral requirements			
LCH	42(2)	In our first submission we recommended that the types of securities and currencies which would be acceptable collateral are not specifically defined, but that criteria are specified in a similar way to the EMIR technical standards. We note that whilst our comment has been acknowledged in the Treasury response, this has not resulted in a consequent amendment in regulation 42 of the second draft. As such, we recommend that regulation 42(2) of the second draft, it is made clear that whilst a central counterparty may accept the instruments listed as collateral, a central counterparty is not restricted to only accepting those assets which are listed therein.	Agree. See new 38(2)*(g)*. This provision provides that the CCP *may* accept the listed instruments as collateral, and in addition the Authority is empowered to approve other instruments.

COMMENTATOR	SECTION	COMMENTS	RESPONSES
LCH	42.3 – Re-use of collateral as initial margin	In our comments in first submission on regulation 54.3 of the first draft, we suggested that it is made clear that this regulation does not apply to cash collateral but only to securities provided as collateral. Our comment was noted in the treasury response and amended wording was referred to. However, it is not clear from Regulations 42.3 of the second draft that the re-use provision only refers to collateral securities. We suggest that cash is specifically carved out from Regulation 42.3 on the basis that in terms of the South African common law a transfer of cash results in a transfer of ownership of such cash and accordingly no consent should be required of the client.	Agree, wording has been amended: Refer to 38(3)*(a)*: "*(a) may, for collateral other than cash, only once re-use the collateral collected as initial margin with the consent of the client; and ...*"
Regulation 44: Stress Testing			
LCH	44.5 (3)*(e)* – *(h)*	This requires that central counterparties to ensure: (a) Stress testing (and back testing) results and analysis are made available to all clearing members and when known to the central counterparty, clients; (b) That for all other clients (i.e. those not known to the central counterparty) the stress testing results and analysis must be made available by the clearing members; (c) Information is aggregated and does not breach confidentiality; (d) That the clearing member and clients only have access to detailed results and analysis for their own portfolios. In terms of many existing regulatory frameworks, there is only a requirement to provide a high level summary of stress test results and the corrective actions taken. As such it is important that this requirement is retained for foreign central counterparties to ensure consistent regulation of foreign counterparties. In particular and in respect of sub-regulation 3*(e)* we request that it is made clear that the disclosure obligation where the clients are not known to the central counterparty is on the clearing member and no obligation is on the central counterparty to enforce this obligation.	External CCPs will not be subject to these requirements.

COMMENTATOR	SECTION	COMMENTS	RESPONSES
Regulation 46: Transaction records			
LCH	46.2(2)*(i)*	In terms of this sub-regulation in relation to every transaction received for clearing of a central counterparty must immediately upon receiving the relevant information, make and keep updated a record of the following details: "*(i) the date and time of settlement or of buy-in of the transaction and to the extent they are applicable, on the following details:* (i) *the day and the time at which the contract was originally concluded;*" Under EMIR it is accepted that the time when a contract is concluded is the time when the trade is cleared. Please confirm this understanding.	Reference should have been 46.2(2) (now 42). The understanding is correct.
CHAPTER VII: REQUIREMENTS WITH WHICH CENTRAL SECURITIES DEPOSITORY MUST COMPLY FOR APPROVAL OF AN EXTERNAL CSD AS A SPECIAL CATEGORY OF PARTICIPATION			
Strate	Chapter heading	Amend heading, "CATE~~R~~GORY" to "CATEGORY"	Agreed.
Regulation 47: Requirements with which a central securities depository must comply for approval of an external securities depository as a participant			
Granite	47	There is concern with the terminology in section 47 when read with Regulation 6, which indicates that a CSD can only approve an external CSD (when establishing a link) as a special type of participant. This appears to be contradictory and has the potential for misunderstanding and ambiguity. We submit that the reference to an external CSD as only being a "Special type of Participant" is incorrect. Chapter VII is a total contradiction of what the FMA and the Regulations represent and should be reviewed so as not to create unnecessary confusion.	Comments are noted. See definition of **"link"**. It should be noted that the Regulation relates specifically to a domestic CSD approving an "external CSD" to be a special type of participant to serve its own clients that is subject to section 5(1)*(c)* and (2) of the Act. It does not prevent a domestic CSD from establishing links with another domestic FMI. The Registrar can

COMMENTATOR	SECTION	COMMENTS	RESPONSES
			prescribe requirements for such arrangements. See also Regulation 41 on interoperability. This is consistent with the wording in the Act.
Strate	47	Insert *special category of* participant (note: typo in spelling of "category" in heading of chapter itself.)	This is now Regulation 6. Noted and corrected.
Strate	47*(e)*	Delete ~~*business risk*~~. We note the response given to our comment in the first draft, but remain of the view that the local CSD will not have the processes or insight to identify and assess the business risk for the external CSD with regard to the link. It will be impossible to comply with this requirement. The external CSD is already fully regulated by its own regulator, including its business risk, and this should be acceptable to the South African regulator as part of the recognition process. Any specific known business risk could rather be reported by the local CSD to the South African regulator.	Agreed. See Regulation 7*(b)*. A local CSD may only approve an external CSD that is from an equivalent jurisdiction in terms of new section 6A of the Act.
Strate	47*(f)*	Strate commented on this Regulation (then 59*(g)* of the first draft). We pointed out that general protection is already addressed in section 30(1) of the FMA and that it is further aligned with the objectives in section 2 of the FMA. The wording is this clause is limited to the "operation" of the proposed link. It is not clear whether the protection requirement is to be interpreted in the same way as section 30(1) or not. Strate is still of the view that 47*(f)* must be deleted to prevent conflicting interpretations. What is meant by "*provide for the protection of regulated persons, etc*" – specific guidance would be required if the regulation is to remain. How will this be enforced?	Agreed, the provision has been deleted.
Strate	47*(i)*	Insert: *reasonable* custody, default and liquidity risks	Agreed. See Regulation 7*(e)*.

COMMENTATOR	SECTION	COMMENTS	RESPONSES
Strate	47 and 9 – Approval	Amend heading to align with heading directly above as follows: *"Requirements with which a central securities depository must comply for approval of an external central securities depository as a special category of participant."*	See revised heading Regulation 7
Regulation 49: Commencement and short title			
BASA	Timing and implementation	A mismatch in the timing of the implementation of the Financial Sector Regulation Bill (FSR Bill) and the commencement of these Regulations, specifically if the FSR Bill is implemented before these Regulations will result in the contradiction to the guiding principle: regarding the avoidance of duplicative regulatory requirements and licensing. The unintended consequence will be a requirement for market participants, who act as principles in the OTC derivatives market, to be registered as a Financial Services Provider in terms of FAIS, due to the consequential amendment of the definition of "intermediary services" provided for in the FSR Bill. The supporting exemptive amendment to section 45 of FAIS will be ineffectual, unless these Regulations are in force.	The intention is for the FSR Bill and the Regulations to become effective almost simultaneously. However, it should be noted that the Regulations do provide for transitional period for ODPs to become authorised. Consideration will be given to exempt ODPs from the FAIS Act for the time being.

Respondents	Section	Comments	Responses
GENERAL			
Old Mutual Investment Group	Transitional Period for Notices	All of the draft Notices appear to come into effect on date of publication, with no transitional period having been stipulated. Please provide clarity that there will be sufficient time to transition – a 12 month transitional period is proposed in the draft Regulations and we would propose that 12 months be allowed to comply with any Notices.	Agreed, this has been corrected. The Board Notices implementation timeline will be aligned to the Regulations.
REQUIREMENTS AND DUTIES OF A TRADE REPOSITORY			
DTCC	General comments	**Establishment of equivalent reporting regimes** With reference to the requirements and duties of a trade repository set out in the Trade Repository Requirements Schedule, DTCC recognizes that they are largely similar with those of other jurisdictions and are in line with the CPMI-IOSCO guidelines for financial market infrastructures. This is good basis to enable trade repositories that are operating in other jurisdictions to support South African reporting obligations. In order to further facilitate the process of recognizing external trade repositories, we would propose that the National Treasury discuss with other foreign regulators who love a live trade reporting regime to establish list of equivalent regimes that meet both your supervisory and trade reporting requirements. **Proposal for supporting South African reporting regime** DTCC has established the technology and required governance for reporting of derivatives trades in the following jurisdictions: • US — Reporting started October20l2 • Japan—Reporting started April 2013	The comments are noted, with thanks.

Respondents	Section	Comments	Responses
		• Australia—Reporting started 0ctober 2013 • Singapore — Reporting started November 2013 • Hong Kong — Reporting started December 2013 • Europe — Reporting started February 2014 • Canada — Reporting (Ontario, Quebec and Manitoba) started October 2014 However, even with this global network of trade repositories in place, there remain challenges to the implementation of the original G20 mandate due to fundamental differences in reporting processes and reportable content. • **Reporting process:** There is no common scope across jurisdictions for the processes supporting the reporting e. g. OTC and/or Exchange Traded D, T+1 or 'real time' reporting, or reporting by one or both counterparties. • **Reporting content:** There is limited common agreement across jurisdictions on the data fields to be reported or sometimes the format in which the fields should be reported Where possible, DTCC recognizes internationally agreed open standards such as ISO for legal Entity Identifiers, currencies etc. As a result of this disaggregation of data and difference in process, as well as the significant costs to the industry of trade repository development and support, and in order to further the original goal of the G20, DTCC's intent with regard to offering Trade Repository solutions in new jurisdictions is as follows: (1) **Location of data center and associated Trade Repository**: DTCC operates 3 global data centers, one in the Americas (US), one in Europe (NL) and one in Asia (Singapore). Using these data centers, we can operate 2 models. • A **'hub and spoke' model** such as that for Australia (hubbed from Singapore) and Canada (hubbed from the US) where services are provided for the market from a TR associated with one of those data centers and located outside of the	

Respondents	Section	Comments	Responses
		local jurisdiction Notwithstanding issues of data confidentiality, future DTCC TR services will only be developed from one of these 3 global hubs. This may require specific local reporting regulations and revisions of laws to allow data to be stored off-shore (jurisdictions can decide on their primary and secondary site locations). • An **'agency' model** such as that in place for Hong Kong where the global DTCC service can be used to capture relevant transactions that are then fed into the locally built and operated TR (2) **Reportable data fields**: DTCC will provide a single standard reporting template from the currently supported jurisdictions. This template will reflect the experience and best practices for trade reporting that have evolved since inception. Adoption of a standardized template will encourage the process of harmonization of reporting across jurisdictions. (3) **Reportable data standards**: Data submission validation would be conducted to ensure a high standard of data is ingested by the TR and reflected on the standard reports templates provided to the new jurisdiction regulator. (4) **Data sharing**: Whilst not a prerequisite, we would encourage all regulatory authorities to consider the establishment of data sharing agreements such as that between MAS in Singapore and ASIC in Australia. As a matter of course, such agreements should be made with the regulator of the jurisdiction in which their selected 'hub' operates. (5) **TR approval via 'Passporting'**: We refer here to the activity of passporting as recently defined by the IOSCO cross border working group. As all 3 hub locations are within the regulatory jurisdiction of a member of the OTC Derivatives Regulators' Forum (ODRF) and the OTC Derivatives Regulators Group (ODRG),	

Respondents	Section	Comments	Responses
		we suggest that TR services already authorized in these jurisdictions should be considered to meet 'international' standards for operation and as such can be passported into other jurisdictions that are members of the same regulators' groups or aspire to join these groups. (6) **Recognized Agents**: Where an agency model is implemented, the TR entities operating in the 3 hubs would be recognized by the new jurisdiction as reporting "agents" for those firms that wish to centralize their OTC reporting processes in that region. From a user perspective, commonality of process and data standards will also facilitate a more effective and cost efficient compliance with local regulatory requirements using common technology solutions globally. In this manner, we would hope to encourage the global community of counterparties and regulators to move towards an increasingly common core set of reporting standards and processes in facilitation of ultimately meeting the transparency and systemic risk goal of the G20. This should logically also make implementation of reporting in new jurisdictions a more standardized process that is easier to execute. DTCC believes the "**hub and spoke" model** is most appropriate for South Africa. In this model, we would propose to support South African reporting compliance as an external trade repository. As mentioned above, we would recommend that the National Treasury establish a list of equivalent regimes that meet your supervisory and trade reporting requirements. Upon the establishment of equivalent reporting regimes, DTCC believes that we would be able to support South African reporting compliance using our global network of TRs. All of our TRs globally are licensed and regulated by G20 regulators and we follow the CPMI-IOSCO principles for financial market infrastructures. Alternatively, should a local TR be appointed in South Africa, we would propose a	

Respondents	Section	Comments	Responses
		mutually beneficial "Agency" relationship with that local TR operator such that international firms already reporting to a DTCC TR could leverage their existing investment to meet South African obligations. Under this arrangement, trades submitted through a DTCC TR would be validated against an existing industry standard template and would reflect international best practices on formats and content. This information would be delivered via a standard and automated interface to the local TR operator. The South African authorities would interact directly with the local operator from whom agency-reported and direct reported data would be presented in an integrated report. We would be happy to work with you to find the most appropriate model for your regime.	
10. Safeguarding and recording			
BASA	*10*(d) Section 55(2) *(c)* and 57 (3) of the FMA	**Transparency** We do not believe that it is, given the size and relative illiquidity of the South African financial market, in the best interest of market participants to introduce real time trade reporting and/or full transparency to the public and its users. This provision should be amended as follows: "*set a service-level target to record to its central registry, transaction data it receives from users ~~in real time, and~~ , at a minimum, within one business day;*"	Agreed to amend paragraph has been amended 11*(d)* to provide for reporting within one business day. Please note that provisions prescribe *appropriate* disclosure to the public. Market transparency supports investor protection, and is consistent with Principle 24 for the CPSS-IOSCO *Principles for financial market infrastructures*.
11. Disclosure of transaction data by trade repositories			

Respondents	Section	Comments	Responses
BASA	11*(a)*	This provision should be amended as follows: *"have objectives, policies and procedures that support the effective and appropriate disclosure of transaction data to the registrar~~,~~ and other supervisory authorities, as required ~~the public and its users~~;"*	Disagree, provision prescribes *appropriate* disclosure. Market transparency supports investor protection, and is consistent with Principle 24 for the CPSS-IOSCO *Principles for financial market infrastructures.*
CRITERIA FOR AUTHORISATION AS AN OVER-THE-COUNTER DERIVATIVES PROVIDER			
BASA	Section 6(8) *(a)* of the FMA	**General comments** In respect of the proposed FMA Regulations, a recommendation has been made for the provision of a 12 month transitional period in which to enable affected market participants to apply for authorisation as an OTC derivatives provider (ODP) to avoid ODPs being in technical breach of the authorisation requirement when the regulations take effect. Consideration should also be given to phasing the transition period for different categories of affected market participant (e.g. banks, non-bank financial counterparties and non-financial counterparties), to ensure efficient and timely processing of applications by the FSB.	Regulation 43 provides that a person conducting the business of an OTC Derivative Provider must, within 6 months from the commencement date of Regulation 2, lodge with the Authority an application for registration as an OTC derivative provider in the manner prescribed by the Authority. We disagree with a Phased in approach for authorisation however.
4.1 Prudential requirements			
BASA	4.1.	As banks are prudentially supervised by the SARB, it is recommended that the provisions of this paragraph are not applicable to providers that are banks. Specifically the requirement to provide the Registrar with a quarterly report in terms of paragraph 4.1(2) *(a)*, creates unnecessary administration for banks. We propose the following amendment – "***4.1 Prudential requirements***	Disagree, the provisions should apply equally to all OPDs. It should not be difficult for banks to comply with these requirements, as they are not more prescriptive than the current prudential requirements applicable to banks. Banks

Respondents	Section	Comments	Responses
		(1) A provider, other than a bank, must- …"	could potentially be excluded, on application to the Authorities, from the ODP prudential requirements.
4.6 Record keeping and data retention			
BASA	4.6*(e)*	Incorrect cross-references – "*A provider -* *(e) must keep a record referred to in-* *(i) paragraph ~~4.3(9)(c)(i)~~ 4.6(b)(i) for a period of at least six months after the instruction has been given;* *(ii) paragraph ~~4.3(9)(c)(ii)~~ 4.6(b)(ii) for a period of at least five years after the contractual relationship has been terminated.*"	Agreed.
5. Suspension and termination of authorisation			
BASA	5.1(5) Involuntary termination	Grammatical suggestion – *"(5) Despite the provisions of sub-paragraph (2), the registrar may under urgent circumstances, where the registrar is satisfied on reasonable grounds that substantial prejudice to clients or the general public may occur, provisionally suspend or terminate the authorisation of a provider~~,~~ and inform the provider of-"*	Agreed.
BASA	Annexure 1 to Form FM 6. Question 9.	We have assumed that the intension of the drafter was to include counterparties in this provision. Proposed amendment – "9. *The range of clients and counterparties, both local and foreign, expected to transact with the provider.*"	Agreed.

Respondents	Section	Comments	Responses
BASA	Annexure 2 to Form FM 6.	The term "**controlling body**" is not defined in the Act, the proposed Regulations and this proposed Board Notice.	The term applies as described in the FMA
BASA	Fit and Proper. Annexure B.	We recommend that the requirement, that Annexure B is completed in respect of directors and senior managers of a provider, be limited to those directors and senior managers involved in and/or responsible for OTC derivative trading and those who are in a position of influence over OTC derivatives trading strategies. In a large organisation, such as a bank, it is unreasonable to expect that each director and senior manager should complete the form and provide the information required therein.	It is preferable to leave the requirement broad. If it is impractical an exemption may be considered.
CODE OF CONDUCT			
BASA	Section 6(8)*(b)*	**General comments** Although this proposed Board Notice is named "Code of Conduct", save for paragraphs 3, 5 and 6, all the provisions relate to risk mitigation standards in respect of non-centrally cleared OTC derivatives and not "conduct standards". Given that the SARB has published, for comment, the Code of Conduct for the South African Over-the-Counter (OTC) Markets, and to avoid confusion it is recommended that this "code" is incorporated in this proposed "Code of Conduct" and the risk mitigation standards are provided for in a separate Board Notice - Risk Mitigation Standards for Non-centrally cleared OTC derivatives, in terms of section 6(8)*(c)*, which provides for "standards" to be prescribed by the Registrar.	The Code of Conduct published by the SARB will be aligned with these standards which are specifically applicable to authorised ODPs.

Respondents	Section	Comments	Responses
BASA	Transitional arrangements	While we are cognisant that an ODP will be required to comply with the provisions of this Board Notice once it has been authorised, we recommend that specific transition provisions are provided for to allow an authorised ODP to fully comply with all the requirements. We propose the following provision: "***19. Transitional Arrangements*** *A provider must comply with the provisions of this Notice within six months of its authorisation by the Registrar*."	Agreed.
BASA	3. General principles	Correction of typo - "*3. General principles* *A provider must –* *(a)…* *(e) conduct itself in such a manner that does not ~~to~~ impede the objects of the Act*"	Agreed.
5. Appropriateness			
BASA	5(8)	Undefined term " *(8) The provision of warnings required in sub-paragraphs (5) and (6) does not constitute the provision of advice for the purposes of the ~~FAIS Act~~ Financial Advisory and Intermediary Services Act, 2002 (Act No. 37 of 2002)*"	Agreed.
7.Client and counterparty agreements			
BASA	7	Sufficient lead-in time (i.e. six months) for agreements to be in place should be provided for in a transition provision.	Agreed - see transitional provision.

Respondents	Section	Comments	Responses
BASA	7(2)*(b)*(iii)	We note that this provision is not aligned to the proposed Board Notice – Margin for non-centrally cleared OTC derivative transactions, however we strongly advocate the alignment with the IOSCO Principles	The provision is qualified by the phrase 'if any'. If no such arrangements are in place, there would be no necessity to include same in the agreement.
BASA	7(2)*(d)*	Proposed amendment to clarify that this provision in an agreement is only required in the circumstances where a client elects to be categorised as a counterparty "*Despite the minimum requirements provided in sub-paragraph (1) the agreement must make provision for –* *…* *(d) where applicable, an attestation that the client meets the requirements to be categorised as a counterparty;*"	Agreed.
BASA	7(2)*(e)*	Proposed amendment to ensure clarity of the requirement – "*Despite the minimum requirements provided in sub-paragraph (1) the agreement must make provision for –* *…* *(e) the requirement for notification by the counterparty if it ceases to meet the requirements to be categorised as a counterparty;*"	Agreed.
BASA	7(3)	Incorrect cross-reference – "*(3) In order to comply with sub-paragraph (2)~~(f)~~ (g) a provider…*"	Agreed.
8. Timely confirmations			
BASA	8(2)	It is not clear what the term "confirmation" means as it is not defined in the Act (including the proposed consequential amendments to the Act by the FSR Bill), the proposed Regulations and this proposed Board Notice.	Agreed. Please see the revised wording.

Respondents	Section	Comments	Responses
		If it is the drafter's intention that the term "confirmation" has the same meaning as the internationally accepted term and the term defined in the first draft of the Regulations (means the consummation, in writing, of legally binding documentation that records the agreement of the parties to all of the terms of an OTC derivative transaction and occurs when a record, in writing, of all of the terms of an OTC derivative transaction is signed manually, electronically or by some other legally equivalent means by the OTC derivative provider and client or counterparty then we submit that the requirement for a provider to "ensure" confirmation within the short timelines provided for in Annexure is unreasonable. We strongly recommend that the following amendment "***8. Timely confirmations*** *(1) …* *(2) A provider must use best efforts to ensure that the details of the transactions are confirmed– …"* In addition, to avoid market disruption, we propose that provision is made for a negative affirmation process to be agreed, in writing, prior to execution of a transaction. A negative affirmation process would allow ODPs to continue a trading relationship with its clients and counterparties who are unable to assist ODPs in meeting these short confirmation timeline requirements.	
9. Portfolio reconciliation			
BASA	9	We propose that the requirement that an ODP be responsible for the performance of portfolio reconciliations with counterparties and clients is impractical and not aligned to market practice.	Agreed. Please see revised wording.

Respondents	Section	Comments	Responses
		Interbank or inter-provider portfolio reconciliation could typically be achieved automatically via platforms such as TriResolve. However, in respect of non-bank entities the reconciliation will typically be a manual process. The ODP provides the data to its client/counterparty, who then has the ability within a certain period of time to raise discrepancies. The discrepancies are then subject to the requirement for dispute resolution within a certain period of having been raised. Consequently, we propose the following amendment: "***9. Portfolio reconciliation*** (1) *In order to identify at an early stage any discrepancy in a material term of a non-cleared open OTC derivative transaction, including its valuation, a provider must establish, maintain and implement written policies and procedures reasonably designed ~~to ensure that it performs a portfolio reconciliation~~ in order to reconcile its portfolio*…"	
18. Legal certainty			
BASA	18(a)	Correction of typo – "***18. Legal certainty*** *Non-compliance with a provision of this Code of Conduct will not- affect the validity of an OTC derivative contract ~~or~~; or*..."	Agreed.