national treasury

Department:
National Treasury
REPUBLIC OF SOUTH AFRICA

FINANCIAL SECTOR REGULATION BILL

NATIONAL TREASURY'S RESPONSES TO COMMENTS BY THE STANDING COMMITTEE ON FINANCE AND STAKEHOLDERS ON THE VERSION OF THE FSR BILL PUBLISHED ON 21 JULY 2016; AND ADDITIONAL COMMENTS RECEIVED DURING STANDING COMMITTEE'S DELIBERATIONS IN AUGUST 2016

DRAFT FOR DISCUSSION PURPOSES ONLY

OCTOBER 2016

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LIST OF COMMENTATORS

	Agency/ Organisation	Contact Person
1.	Association for Savings and investment South Africa (ASISA)	Rosemary Lightbody
2.	Banking Association of South Africa	Cas Coovadia
3.	JSE	Anne Clayton
4.	Standing Committee on Finance (SCoF)	SCoF
5.	South African Insurance Association (SAIA)	Aatika Kaldine
6.	Voluntary Ombudsman Schemes	Nicky Lala-Mohan
7.	Oasis Group Holding	Amir Abubaker
8.	The Unlimited	Wayne Mann

RESPONSES TO THE COMMENTS ON THE FSR BILL

FINANCIAL SECTOR REGULATION BILL			
Reviewer	**Section**	**Issue**	**Response**
SCOF	**Long title**	Include CALS comment on reference to Constitutional rights	***Reference to the Constitution in the long title made.***
The Unlimited	**General**	We support what is contained in the Preamble to the Bill, including the intention to ensure the stability of the financial system and the protection of financial customers. We submit, however, that Treasury also has an obligation to ensure that the industry remains accessible to aspirant entrants. We also note that Treasury has often stated that financial inclusion is a key objective. Within this context the raft of new regulation being introduced under the ambit of the financial sector reform programme will ultimately translate into additional complexity in an industry that is already heavily regulated. Ultimately, increasing regulation will drive (compliance) costs for financial sector participants - including for the purposes of maintaining prudential soundness. Those costs are likely to be pushed through to customers. The proposals contained in the Bill need to be reviewed within the context of a national economy in desperate need of stimulation, including crippling youth unemployment. These socio-economic factors have the potential to destabilise society. In the circumstances all role players have an obligation to promote an environment that encourages local and foreign investment, including job creation and entrepreneurship. We trust that Treasury will have these considerations front of mind during the process	***Noted.***

		of finalising the Bill. We respectfully submit that the already heavily regulated financial industry will be complicated even further once the Bill is enacted. We accordingly urge Treasury to consider how its impact can be minimised within the context of needing to remove entry barriers, improve accessibility to financial services and ultimately stimulate the economy. The financial sector weathered the 2008 financial crisis successfully. With that in mind one must question the need for additional regulation.	
Oasis Group	**General**	NT's response to certain comments previously raised and submitted simply that "*This is not agreed with*" or "*This will not be necessary*" or the like. NT is requested to kindly provide the reasons for these responses so that we can properly assess NT's point of view on the issue and appropriately comment thereon, where necessary.	***Noted***
CHAPTER 1: INTERPRETATION, OBJECT AND ADMINISTRATION OF ACT			
Voluntary Ombudsman Schemes Association	**"chief ombud"**	Reconsider the title "Chief Ombud" as the so called Chief Ombud will not perform any function which is normally performed by an Ombudsman – title confusing and inappropriate. It is suggested that title be changed to "*Ombud Council Director*".	***Concerns noted, however the title is retained at the advice of the SCOF. The purpose of the office of the Chief Ombud and the role of the Ombud Council in their current structures, are contained in chapter 14. The framework is the subject of an ongoing policy development to rationalise the Ombud process in South Africa.***
Voluntary Ombudsman Schemes Association	**"governing body"**	The governing body of an ombud scheme presumably refers to the body to which the ombud is accountable, in other words, the governance body. Such a body does not "manage the affairs" of an ombud scheme. On the contrary, the governing body should not be involved in the management of the ombud scheme. As the International Network for	***Agreed. It is proposed that paragraph (b) be amended as follows:*** ***"(b) in relation to an ombud scheme, the ~~person or~~ body of persons that ~~manages~~ oversees the affairs of the ombud scheme;"***

		Financial Service Ombud Schemes document: "***Effective approaches to fundamental principles***" states in paragraph 2.24: "*Any governance body is not involved in:* • *deciding cases; nor* • *the day-to-day management of the financial ombudsman scheme.*" We suggest that the current paragraph *(b)* be replaced to reflect this position by removing the words "~~*manages the affairs*~~" of the ombud scheme. A possible replacement could be "*that oversees the affairs/operations*....." or "...*is responsible for the governance and oversight of the ombud scheme*" or "*monitors and oversees the operation of the Ombud scheme*" This reflects what is required in terms of Chapter 14 (section 197 (3)*(b)*(v)) of the Bill. The words "~~*the person*~~" should possibly be removed. It would not achieve the object of such a body if it consisted of one person.	
JSE	**"financial customer"**	The definition of a financial customer in relation to a market infrastructure refers to "services" provided by an MI. Which functions of a market infrastructure are regarded as "services"? Clarity is required as this will determine who the financial customers of a market infrastructure are and in respect of which functions conduct standards can be issued.	***The definition of "a service provided by a market infrastructure" has been included, to capture functions and duties and services, additional business (not "securities services") provided by market infrastructures. For the purposes of the FSR Bill, these are not a financial service unless designated by Regulation in terms of cl. 3(3). This should clarify who the financial customers of the MI are and in respect of what***

SCOF	**"financial instrument"**	"financial instrument" should be redrafted	***Definition redrafted to explicitly exclude "credit agreement".***
Drafting refinement	***"levy body"***	Given the revisions to Chapter 16, we have a process now specified in the FSRB for determining fees and imposing levies. So instead of "levy body", we were going to now refer to "fee and levy body". Essentially, the new Chapter meant that it was not really appropriate to use the term "levy body" any longer.	***Insertion of a new definition of "financial sector body" to replace "levy body"***.
SCOF	**"financial service"**	Financial services. New clause 3(3)(iii) expanding the scope of 'financial service' which may be regulated. Simplify new clause 3(3)(iii).	***Clause simplified and new definitions of "benchmark, "index", "service provided by a market infrastructure" and "provision of benchmark" in the draft Bill.***
JSE	**"financial service"** 3(2) & (3)*(b)*(i)	**Services provided by market infrastructures** Section 3 of the FSRB provides for services provided by MIs that are not already regulated under the FMA to be designated as financial services regulated under the FSRB. What types of services are contemplated, given that all of the functions of a market infrastructure are already regulated under the FMA? Although in terms of section 3(2) of the FSRB, services provided and functions performed by market infrastructures are not "financial services", section 3(3)*(b)*(i) of the revised FSRB makes provision for a service provided by a market infrastructure to be designated as a financial service in Regulations. This issue was discussed with National Treasury on 10 August 2016. The JSE requested clarity in respect of the type of services that are contemplated, given that all of the functions of market infrastructures are already regulated under the FMA. Based on the discussion with National Treasury, the JSE understands that the services	***This has been revised to clarify that what is intended as services provided by a market infrastructure (not securities services). What market infrastructures do as part of their licensed functions we are not intending to capture as a financial service. However the intention is that these could be designated by Regulation as a financial service. See proposed wording.***

		contemplated, as potentially being designated as financial services and therefore subject to regulation, relate to ancillary services provided by a market infrastructure which are not part of the market infrastructure's defined functions and duties in the FMA but which flow from or are associated with their defined functions and duties as a market infrastructure.	
ASISA	**"financial instrument"**	Par *(c)* of the definition of "**financial instrument**" should perhaps be made clear to exclude a credit agreement. ASISA suggests the following: ***"financial instrument"** means—* … *(c) a debt instrument such as a debenture or a bond but not a credit agreement;…"*	***Agree***
JSE	**"market infrastructure"**	This proposed definition of "**market infrastructure**" in the FSRB is only suitable if the intention of the drafter was to include unlicensed market infrastructures within the ambit of the FSRB, as the definition of "market infrastructure" in the FMA refers to "licensed" (e.g. "a licensed exchange", "a licensed clearing house etc.). However, if this was not the drafter's intention then it is preferable to amend the definition in the FSRB as follows: ***"market infrastructure"** has the same meaning ascribed to it in terms of section 1 of the Financial Markets Act;*	***The definition is deliberately drafted this way***
JSE	**"systemic event"**	The definition of "systemic event" does not properly incorporate functions of market infrastructures, as although market infrastructures are financial institutions they do not provide financial products or services. We recommend that the definition of "systemic event" should be amended as follows:	***Not necessary, already captured as operators of financial markets***

		"systemic event" *means an event or circumstance, including one that occurs or arises outside the Republic, that may reasonably be expected to have a substantial adverse effect on the financial system or on economic activity in the Republic, including an event or circumstance that leads to a loss of confidence that operators of, or participants in, payment systems, settlement systems or financial markets, or financial institutions, are able to continue to provide financial products or financial services or, in the case of market infrastructures, continue to perform market infrastructure functions;*	
Drafting refinement	**"qualifying stake"**	***Substantial changes were made to the chapters on significant owners and financial conglomerates, in order to better clarify provisions in those chapters. To improve cross-references and readability, a definition of what constitutes a qualifying stake would be useful.***	***Insertion of a new definition of "qualifying stake"***
JSE	4	**Financial Stability** The definition of financial stability does not properly incorporate functions of market infrastructures because although MIs are financial institutions they do not provide financial products or services.	***Agreed. See proposed alternative wording to incorporate market infrastructures performing their functions and duties in terms of financial sector laws***
SCOF	7	**Object of Act** Inclusion of '**transformation'**	***"Transformation" included in the Objects of the Act. Definition of "transformation" also inserted into the draft Bill.***

CHAPTER 2: FINANCIAL STABILITY

Reviewer	Ref - 21 July version	Ref- October Version	Issue	Response
SCOF	13	13	**Financial stability review**	***Provision for tabling the Financial Stability***

			Clause 13(3) limits information in the review. Subclause (4) provides for publication of review. Reconsider inclusion of this subclause "Review must also be tabled in Parliament".	***Review to Parliament added.***
SCOF	14	14	Determination of systemic events – Minister determines in writing. 'Determine in writing' requires further consideration.	***Clause amended, determination does not have to be in writing.***
SCOF	22	22	Membership of the Financial Stability Oversight Committee (FSOC) should be capped.	***Additional membership to the FSOC capped to 3.***
SCOF	24	24	Meetings and procedures of FSOC – at least twice a year. Change to every six months.	***Frequency of meetings changed to every 6 months.***
SCOF	25	25	Financial Sector Contingency Forum – meet at least twice a year. Change to every six months.	***Frequency of meetings changed to every 6 months.***
JSE	25(3)	25(3)	**Role of MI designated as SIFIs** MIs designated as SIFIs are important role players and decision makers during a systemic event but are not represented on the ***Financial Sector Contingency Forum*** because the composition in section 25 does not provide for it. MIs are not part of industry bodies.	***MIs are not excluded, as the Chairperson of the Financial Sector Contingency Forum may determine "...any other relevant bodies" as a member. For clarity, it is proposed that sub-paragraph (d) be amended to include "... any other relevant ~~body~~ person"***
Oasis Group	31	31	We agree with ASISA's comments previously raised in that the provisions of this clause – that in order to, for example, institute winding up proceedings against an institution that is deemed to be systemically important, the concurrence of the Reserve Bank is required – does or could affect existing rights to the extent that the concurrence of the Reserve Bank, as contemplated by this clause is not obtained.	***Comments are noted***

JSE	31	31	**Concurrence of the SARB on licence cancellations** If a SIFI is authorised by an MI and it no longer meets the authorisation criteria or its authorisation is to be withdrawn as a result of enforcement action, its ongoing participation should not be subject to the concurrence of a party that is not the licensing authority, as contemplated in section 31 of the FSRB. The SARB could be consulted on licence cancellations affecting a SIFI given the SARB's interest in financial stability but the decision in terms of authorisation criteria set under the FMA should be based on the objectives in the FMA of market integrity and investor protection. An entity authorised by an MI that is no longer able to meet those objectives because it no longer meets the authorisation criteria cannot be permitted to continue to operate as an authorised entity under any circumstances including those in which the SARB may have reasons for wishing it to remain authorised. The JSE recognises the SARB's interest in financial stability and the reduction of systemic risk, which would include an interest in any action taken in relation to a systemically important financial institution or a systemically important financial institution within a financial conglomerate ("SIFI") regarding suspending, varying, amending or cancelling a licence issued to that financial institution. However, the JSE remains concerned that the application of the provision in the FSRB which gives effect to the Reserve Bank's interest in licence matters may be contrary to the achievement of other important objects of the FMA which a market infrastructure such as the JSE is obliged to promote at all times. Section 31 of the FSRB states that the SARB must concur before any party can give effect to a decision to, inter alia, suspend, vary amend or cancel a licence issued to a	***Objections have been noted, and the matter has been discussed and it is disagreed. The Reserve Bank, in carrying out its mandate of maintaining the stability of the financial system in South Africa, must take all reasonable steps to prevent, mitigate and manage systemic events and resultant effects on financial stability. If a SIFI is authorised by a MI and it no longer meets the authorisation criteria or its authorisation is to be withdrawn, the concurrence of the Reserve Bank is necessary and in Treasury's considered view appropriate, particularly in this context given the interdependencies between SIFIs and other members of the MI (be they authorised users of the exchange, clearing members or participants), and between SIFIs (which fulfill various roles in the financial markets value chain from execution, clearing for clients, liquidity providers, as well as custody and settlement) and the MI themselves. These interdependencies point to a source of vulnerability, and increase the risk of contagion across the financial sector associated with a systemic event. The Reserve Bank must be empowered to take macroprudential considerations and any systemic implications, in the interest of containing risks across the financial system as a whole.***

			financial institution that is a SIFI. This implies, for example, that if an exchange or a clearing house has authorized a SIFI to perform certain securities services and the SIFI no longer meets the authorisation criteria, the exchange or clearing house may not take any action in relation to the SIFI's authorisation status unless the SARB concurs with such action. The JSE raised its concern regarding this provision in our comments on a draft version of the FSRB and suggested that the provision should instead require consultation with the SARB but the provision in the current version of the FSRB still requires concurrence. The JSE is the licensing authority for its authorised users which includes its trading members and clearing members, some of whom will be regarded as SIFIs. A situation could arise in which an authorised user which is a SIFI no longer meets the JSE's authorisation criteria due to financial difficulties or serious conduct breaches. The rules of the JSE, in support of the objects of the FMA, require the JSE to act in such instances to protect investors and the integrity of the market. Such action may require the JSE to suspend, vary, amend or cancel the authorization of the relevant authorised user and the JSE would find itself in an untenable situation if it is obliged to take such action to protect investors and the integrity of the market but it is unable to do so because the SARB does not concur with the JSE's decision. The JSE believes that this issue requires further consideration in order to achieve the important financial stability objectives of the SARB and the FSRB whilst also achieving the other important objectives of the FMA in relation to investor protection and market integrity. National Treasury and the SARB have advised that if the JSE wishes to pursue discussions on this issue we should raise our concerns with the Governor. We have not yet had an	

			opportunity to initiate any discussions on the issue with the Governor but we intend to do so shortly. The outcome of those discussions will determine whether our concerns regarding the application of section 31 of the FSRB can be allayed or whether we require the Committee to consider the appropriateness of the current provision.	
CHAPTER 3: PRUDENTIAL AUTHORITY				
Reviewer	**Ref - 21 July version**	**Ref- October Version**	**Issue**	**Response**
JSE	42 & 60	42 & 60	The Prudential Committee is not granted specific licensing powers in section 42 of the FSRB whereas the Executive Committee of the FSCA is in section 60. Is this because the Prudential Committee will not be responsible for granting licences? Reason for difference in powers between the two authorities is not clear.	***Comments are noted. These clauses have been drafted deliberately this way, given different governance structures of the FSCA and the PA***
SCOF	43	43	Meetings of Prudential Committee – Chairperson and acting Chairperson. Clause 43(4) - Deputy Governor chairs in absence of Governor – but not the CEO.	***Committee's proposed change incorporated.***
SCOF	47	47	In 47(2)(b)(ii) – remove 'to'	***Committee's proposed change incorporated***
SCOF	48	48	48(4) - Delegations from Prudential Committee to Financial Sector Conduct Authority (FSCA) must be in accordance with a framework.	***Further detail has been provided regarding how the PA may delegate powers and duties to the FSCA. Specifies that it is in terms of an MoU, within a devised framework and system for delegation, and must be done in a way that does not constrain abilities of regulators to meet their objectives***
		49(7)	It was not clear what the consequences would be for failing to disclose material interests as required by law. It was felt	***Insertion of a new clause to specify the consequences for failure to disclose material***

Drafting refinement		(new)	that it would be best to specify the consequences in the same section that the requirement to disclose is imposed	***interests by PA staff and executives.***
CHAPTER 4: FINANCIAL SECTOR CONDUCT AUTHORITY				
Reviewer	**Ref - 21 July version**	**Ref- October Version**	**Issue**	**Response**
SCOF	56	56	Establishment of FSCA – NT had proposed a change to make the FSCA the accounting authority. Change rejected – Commissioner must be the accounting authority for purposes of PFMA.	***Committee's proposed change incorporated. The Commissioner is now the Accounting Officer.***
SCOF	58	58	58(1)(a) – subject to this Act precedes clause. 'subject to this Act' must be at end of clause.	***Committee's proposed change incorporated.***
ASISA	58(2)	58(2)	The reference in clause 58(2) to "*provision of financial services in relation to the provision of credit*" is unnecessary and confusing, and should be deleted. It creates a potential problem because it provides powers to the FSCA going beyond clause 108. It refers in addition to regulation and supervision of financial services in relation to the provision of credit which will include (in terms of clause (3)(1)*(a)*) the offering, promoting, marketing or distribution of loans, the provision of advice, recommendations or guidance in the respect of loan products and the "*operating or management*" of a loan as well as the provision of administration services. This seems to be in conflict with clause 106(5)*(a)* which makes it clear that the FSCA can only make conduct standards in respect of matters in clause108.	***The provision has been redrafted to clarify the scope of FSCA's powers to regulate and supervise the financial institution extends to the conduct in relation to the provision of credit under a credit agreement as contemplated in 108. This better aligns cl 108. See proposed wording***
SCOF	71	71	Delegations from Executive Committee of FSCA to Commissioner – subclause (1)(b) amended to allow	***Committee's proposed change incorporated. Delegation powers to the Administrative Action***

			Commissioner to delegate. Amendment rejected.	***Committee moved back to the Executive Committee.***
SCOF	71(5)	71(5)	Similar change necessary as a result of changes made to mirroring clause for PA [clause 48(4)]. Comment was that: Delegations from Prudential Committee to Financial Sector Conduct Authority (FSCA) must be in accordance with a framework.	***As in Chapter 3, further detail has been provided regarding how the FSCA may delegate powers and duties to the PA. Specifies that it is in terms of an MoU, within a devised framework and system for delegation, and must be done in a way that does not constrain abilities of regulators to meet their objectives.***
CHAPTER 5: CO-OPERATION AND COLLABORATION				
Reviewer	**Ref - 21 July version**	**Ref- October Version**	**Issue**	**Response**
SCOF	80	80	At the end of subclause (5) – replace Financial System Council of Regulators with ‘it’.	***Committee’s proposed change incorporated.***
SCOF	84	84	At the end of subclause (6) – replace Financial Sector Inter-ministerial Council with ‘it’.	***Committee’s proposed change incorporated.***
SCOF	86	86	Independent evaluation of effectiveness or co-operation and collaboration – the Inter-Ministerial Council may require independent evaluation of co-operation between regulators, the SARB, FIC, CMS and CC. Trigger mechanism or facts required for exercise of discretion.	***Committee’s proposed change incorporated. Trigger mechanism incorporated. See proposed changes.***
CHAPTER 6: ADMINISTRATIVE ACTIONS				
Reviewer	**Ref - 21 July version**	**Ref- October Version**	**Issue**	**Response**
SCOF	87	87	Establishment of an administrative action committee – subclause (2)(a)(ii) must include at least one advocate or	***Committee’s proposed change incorporated.***

			attorney with at least 10 years' experience in practising law. Clause not accepted. Consideration should be given to "relevant experience".	
ASISA	87(2)	87(2)	We repeat our previous comment: Save for clause 87(2), the required number of members of the committee are not prescribed. In view of the responsibility being bestowed on the administrative action committee, this part should provide for a minimum number of members and include a requirement that any such member must meet prescribed fit and proper requirements, which requirements must be formulated with due regard to their responsibility. NT has responded that this is not necessary. We respectfully disagree and submit that similar wording as used in clause 221(2) be used.	***Treasury disagrees with ASISA's comment and reiterates that the membership of the administrative action committee is deliberately couched in the manner it is to provide for flexibility, given that the Authorities are not absolutely compelled to establish any particular administrative committee, and also taking into consideration that people who are disqualified may not be appointed, or remain as members of the committee.***
Oasis Group	87(3)*(a)*(ii)	87(3)*(a)*(ii)	We concur with ASISA's comments previously raised, and in order to ensure that the administrative action committee has the necessary expertise and credibility to ensure the efficiency of this committee, it should be prescribed that any advocate or attorney appointed to this committee should have the relevant experience in administrative and other laws relevant to the functions to be performed by the committee.	***Disagree, membership of the administrative action committee is deliberately couched in the manner it is to provide for flexibility, given that the Authorities are not absolutely compelled to establish any particular administrative committee, and also taking into consideration that people who are disqualified may not be appointed, or remain as members of the committee.***
ASISA	93(2)	93(2)	We repeat our previous comment: As currently worded, the regulator will be at liberty to introduce substantially different procedures from those that have been referred to the public for comment, and that have been submitted to the Director General. We propose that the clause be amended as indicated. NT has responded that they do not agree with this comment.	***Agree, see proposed revision*** ***"(2) If a financial sector regulator intends to make a procedure or amendment in a materially different form from the draft procedure or amendment published in terms of paragraph (a), the regulator must, before making the procedure or amendment, repeat the process referred to in***

			We respectfully submit that the clause be amended as proposed. This will also ensure consistency with the process set out in clause 99. **ASISA suggests the following amendments to clause 93(2)** "*93(2) If a financial sector regulator changes a proposed procedure or amendment after expiry of the comment period, in a manner that is not material, it is not obliged to publish the change before publishing the final version of the procedure or amendment.*"	***paragraph (a).*"**
ASISA	95	95	The term "*cancellation*" is usually used in connection with contracts. In administrative law, the terms "*revoke*" or "*rescind*" are ordinarily used. It is therefore suggested that where "*cancel*" or "*cancellation*" is used, that either of the suggested alternative terms be used instead.	***Agree, it is proposed the terms "Revocation", and "revoke" are used.***
SCOF	97	97	Subsection (2) provides for 30 days in which to make submissions on regulatory instruments. Period to be extended to 6 weeks.	***Committee's proposed change incorporated***
ASISA	98(2)	98(2)	We note that the period allowed for making submissions has been shortened from two months to 30 days. In the light of the fact that: • it is the same team of resources who, already inundated with daily delivery related work, work on responses to, inter alia, draft regulatory instruments and all other legislative amendments; • there are usually a high number of these instruments coming through; • there is a large amount of work involved in analyzing and determining impacts and collating comments,	***Noted. See proposed drafting to provide a minimum period of six weeks for making submissions***

			especially in larger organizations; and • industry body deadlines for comment usually shorten the comment period for industry in order to collate, discuss and finalize before submitting. We request that, in order to properly consider draft regulatory instruments and their impacts, and to provide meaningful comment, the original timeframe of two months be retained.	
CHAPTER 7: REGULATORY INSTRUMENTS				
Reviewer	**Ref - 21 July version**	**Ref- October Version**	**Issue**	**Response**
SAIA	99	99	Although we acknowledge at times it is necessary to act promptly, we submit that the 7 day period is insufficient to solicit and submit comments from members. We would recommend that consideration be given to a 21 day period.	***Disagree; there are checks and balances to ensure that the ability to issue urgent instruments is not misused by the regulator***
JSE	105 – 108	105-108	**Standards issued by financial sector regulators vs SRO rules** Regulators can set standards on any prudential or conduct matter for entities regulated by SROs. This can lead to duplicate or differing requirements on the same matters, duplication of oversight and separate enforcement processes. Regulator standards should only be for matters not covered by SRO rules. Providing a copy of a proposed standard to SROs during consultation process does not address the structural issue The current provisions in the FSRB relating to standards still affords the Authorities the power to issue standards on	***Disagree. The FSR Bill provides that the PA and FSCA can regulate and supervise market infrastructure and financial institutions that provide "securities services". The rules of MI are in any case subject to the approval of the Authorities. The power of the Authorities to make appropriate standards should not be curtailed by the SRO's powers to make rules. This matter has been extensively debated, and will be further clarified in the regulatory strategies to be developed by the Authorities.***

			the same matters that are regulated by the self-regulatory organisations (SROs) and this could lead to duplicate or differing requirements on the same matters, arbitrage opportunities, duplication of oversight and separate enforcement processes. The JSE is of the view that the Authorities' standards should only be made for matters not covered by SRO rules. This issue was discussed with National Treasury on 10 August 2016 and based on the discussion, the JSE understands that the intention was not to duplicate requirements in the standards prescribed by the authorities and the rules of the SRO, and that National Treasury would revise the wording in the FSRB to give effect to this.	
The Unlimited	106	106	We submit that the powers granted to the Financial Sector Conduct Authority ("FSCA") in terms of this section are excessive and provide the FCSA with extensive discretion. We note that this view has been raised by previous commentators, including BASA and ASISA. We are concerned that the exercise by the FSCA of the powers granted to it by this section could result in unnecessary interference in how financial services companies respond to market forces, and discourage innovation and ultimately competition. We submit that existing legislation, including FAIS and its subordinate regulation, is sufficient to enable the FCSA to ensure the fair treatment of customers. We assume that sub-section (3) should in fact read: "*Without limiting subsection ~~(1)~~ (2), a conduct standard* …".	***The Bill provides a balance between the powers conferred to the Regulators (to enable them perform their regulatory and supervisory functions and fulfil their mandate) while also ensuring that there are checks and balances to the exercising of this power through the Financial Services Tribunal. Existing legislation is not sufficient to allow the FSCA to fulfil its mandate – for example there are limited conduct provisions in existing banking legislation***
Drafting refinement		106(2)(c) (new sub-clause)	The FSCA would have a mandate to promote financial education, however it was not clear what tools it could use to fulfill this mandate. It was felt that the ability to set	***Specified that the FSCA may set conduct standards aimed at ensuring financial education programmes or activities promoting financial***

			standards to this end should be specified. Similar changes made in 144 – allowing the FSCA to set directives related to financial education	***literacy, are appropriate.***
Drafting refinement		106(3)(c)(v) (new sub-clause)	Discussions drew attention to the fact that customers may benefit from being made aware of reasons why they may be refused a particular financial product or service (e.g. an insurance policy or home loan). This new clause would allow the FSCA to set standards regarding the processes a financial institution must follow should they refuse a customer a product or service	***New clause specifying that a conduct standard could be made for fair customer treatment including in relation to the withdrawal or closure of a financial product of financial services by a financial institution from financial customers***
Drafting refinement		106(3)(d) (new sub-clause)	The FSCA would have a mandate to promote financial education, however it was not clear what tools it could use to fulfill this mandate. It was felt that the ability to set standards to this end should be specified.	***New clause specifying that conduct standards may be set regarding the design, suitability, implementation, monitoring and evaluation of financial education programmes and other financial literacy measures.***
Drafting refinement	106(5)	106(5)	Need for keeping with changes made to clause 108 and 58(2), to better clarify the role of the FSCA vis a vis the NCR.	***Clarified the setting of conduct standards in relation to credit providers. The FSCA must consult with the NCR when setting conduct standards on credit agreements or services provided in relation to credit agreements***
CHAPTER 8: LICENSING				
Reviewer	**Ref - 21 July version**	**Ref- October Version**	**Issue**	**Response**
Drafting refinement		111(3) (new sub-clause)	It was flagged that there may be instances where services are provided in terms of a contract agreement, where the contractor does not have to be licensed by the regulator directly. However standards must specify clearly instances where contractors may still have to be directly licensed by	***New clause inserted specifying that contractors are only required to be licensed if a responsible authority sets a standard to that effect***

			the responsible authority	
Drafting refinement	111(7)	Clause deleted	Reference to frameworks has been deleted in clause 286 to which this clause cross references.	***Clause deleted***
SCOF	116	116	Subclause (1)(b) provides for notification of refusal to grant a licence. Time period for notification required.	***Committee's proposed change incorporated. Time period for notification provided.***
ASISA	116(3)*(a)*	116(3)(a)	NT's view is that the regulator must determine an application within a specific time period, and that determining includes both an approval and refusal, either of which will be communicated to the applicant. NT stated that "*Should no determination be made in the required amount of time, this is taken as a decision on the part of the regulator to refuse the application. Such a decision may be taken to the Tribunal. The clause is intended to provide certainty that a determination will be made in an appropriate amount of time*." We respectfully submit that it is unreasonable that the regulator can by simply failing to revert to the applicant decline the application. The applicant has a right to procedurally fair administrative action in terms of clause 3(2) of the Promotion of Administrative Justice Act, 2000. However, in the absence of reasons for a decision, an administrative review will not be possible. We respectfully submit that reasons must be provided when administrative decisions are made and such reasons should accompany the decision made. In the absence of a decision, questions might arise about whether the Regulator actually applied its mind to the application at all.	***Agree to rephrase. The Authority must notify the applicant within 3 months after the application is made***
Oasis Group	116(3)*(a)*	116(3)*(a)*	In light of the provisions of this clause, should the	***Agree – see revised wording***

			responsible authority fail to respond to an application within the 3 month period the application is deemed to be refused. However, in such instance no reasons for this refusal (or deemed refusal) is provided to the applicant and could accordingly be argued to be administratively unfair. It is recommended that this clause be deleted or revised to provide for administrative fairness.	
JSE	126	126	**Concurrence of other regulator on licensing decisions** Section 126 requires the concurrence of the other regulator on all licensing matters regardless of whether they have a regulatory interest in the entity. Concurrence should be limited to entities or matters of common regulatory interest to avoid unnecessary administrative processes. FSRB makes no provision for the regulators deciding otherwise.	***Disagree. The Authorities are required to develop regulatory strategies which will further clarify amongst other things, how they will perform their respective regulatory and supervisory functions, matters Authorities must have regard to in performing those functions, as well as the Authorities' approach to administrative actions.***
CHAPTER 9: INFORMATION GATHERING, SUPERVISORY ON-SITE INSPECTIONS AND INVESTIGATIONS				
Reviewer	**Ref - 21 July version**	**Ref- October Version**	**Issue**	**Response**
Drafting refinement		129(2) (new sub-clause)	The Chapter replaces the Inspections Act which is used by the Council for Medical Schemes. A clause was needed specifying that the CMS could exercise its powers in terms of Chapter 9 or the FSR Bill rather than in terms of the Inspections Act	***Inserted a new clause specifying that the Council for Medical Schemes may exercise powers in terms of this Chapter***
Oasis Group	134	134	Reference to any person is too wide. Any person appointed to assist in an investigation must be independent of the financial services industry. Further, any investigators should be obliged to maintain confidentiality such that details of an investigation may only be disclosed where required and in the manner contemplated by the Bill.	***Agree – see revised section. A person appointed as an inspector must not have any conflict of interest in respect of the investigation; and must have the appropriate skills and expertise. Furthermore, an investigator is required to exercise powers with strict regard to decency, and good order, including a person's right to dignity, freedom and personal***

				privacy – see 137(3)
SCOF	136	136	Subclause (1)(d)(ii) provides for the retention of documents, the return thereof and the confiscation, in certain circumstances; viz. in the opinion of the responsible authority. 'Opinion' is too subjective. Consider replacing with objective standard such as reasonableness.	***Clause amended to incorporate the Committee's proposal.***
SCOF	137	137	Subclause (6)(d)(ii) provides for the retention of documents, the return thereof and the confiscation, in certain circumstances; viz. in the opinion of the responsible authority. 'Opinion' is too subjective. Consider replacing with objective standard such as reasonableness.	***Clause amended to incorporate the Committee's proposal.***
SCOF	138	138	Any judge or magistrate may issue a warrant. Question whether magistrate with jurisdiction is more correct.	***Committee's proposed change incorporated.***
SCOF	140	140	Provides for protection against self-incriminating answers. Right to object to being required to answer questions should be clear. Legal professional privilege removed from tabled version?	***Committee's proposed change incorporated.***
ASISA	140(1)*(c)*	140(1)*(c)*	We repeat our earlier concerns in respect of the scope of the protection afforded in this clause. The indemnity has been further limited by the amended wording and now expressly only applies to criminal proceedings. This means that incriminating information or documentation provided by a person could be used in civil proceedings or proceedings that may result in administrative sanctions. The protection is also not extended to any further incriminating information or documentation uncovered as a result of the initial incriminating disclosure. NT did not agree with our comments on this provision	***Disagree. There are numerous examples in South African law where state organs and other administrative bodies are empowered to compel answers during investigations or hearings even if the answer may be self-incriminating, e.g. the Judicial Service Commission Act No 9 of 1994, the Transport Appeal Tribunal Act No 39 of 1998, the Competition Act No 89 of 1998 and Customs Control Act No. 31 of 2014. There are instances where it may be in the interests of financial customers to compel an answer for example to***

			which was in the previous clause 139 – page 43 of 180 of NT responses.	***trace assets. The compelled self-incriminating answer may not be used against the person in criminal proceedings. The view is that the provision is constitutionally sound as any self-incriminating answer is excluded from being used against a person in criminal proceedings.***
Oasis Group	140(2)	140(2)	This section is to be amended in line with ASISA's previous comments. While the provision of information or documentation may not be unconstitutional in light of the indemnity, the concern is that any information subsequently obtained by virtue of or pursuant to the disclosed information is not similarly protected.	***Disagree, see comments above***
CHAPTER 10: ENFORCEMENT				
Reviewer	**Ref - 21 July version**	**Ref- October Version**	**Issue**	**Response**
Oasis Group	142(5)	142(5)	Section 142(5) – previously section 141(5) reads: "*The responsible authority that issues an interpretation ruling may amend or revoke the interpretation ruling if it is necessary to do so because of a judicial decision or a change in law.*" As currently worded the responsible authority has discretion to amend or revoke the relevant interpretation ruling. In the event a judicial decision or change in law the responsible authority should have no discretion and it is suggested that this clause be amended to read: "*The responsible authority that issues an interpretation ruling ~~may~~ must amend or revoke the interpretation ruling if it is necessary to do so because of a judicial decision or a change in law.*"	***Disagree, misreading. It does not make sense to compel the responsible authority to modify an interpretation ruling when it is not appropriate to do so i.e. if the court modifies it because the court has final say in interpreting the law, or the law on which the interpretation ruling is based is repealed***

Oasis Group	142(8)	142(8)	As currently drafted, section 142(8) provides that the responsible authority is not obliged to comply with subsection 7 in all instances. This should in our view be limited only to the instance where the provisions of section 142(5) – see further our comments above – finds application.	***Disagree, the responsible authority is bound by interpretation ruling, and may amend or revoke the relevant interpretation ruling if it is necessary to do so because of a judicial decision or a change in law. See comments above***
SCOF	145	145	"key" must be deleted.	***Committee's proposed change incorporated.***
Oasis Group	151(4)	151(4)	It is suggested that the provisions of this clause be amended such that the suspension or withdrawal of license only be effected in the event that there is a breach of a material term of an enforceable undertaking.	***Disagree. The authority chooses to accept the written undertaking from the financial institution that agrees to comply with its terms, as an alternative to taking another form of administrative action, such as suspending or withdrawing a licence, for contraventions of the law. Breach of an enforceable undertaking is grounds for suspension or withdrawal of the licence***
SCOF	152	152	Inclusion of 'must' before 'do' and 'not'.	***Committee's proposal has been incorporated.***
Oasis Group	152(2)*(a)*	152(2)*(a)*	We would recommend that this clause be amended to include a requirement that the contravention is material (as previously raised by BASA). While we concur that the court would determine what would constitute a material contravention, the current wording of the clause does not require the courts to have regard to materiality.	***Disagree***
SCOF	153	153	References to 'person' should be consistent throughout to 'natural person'.	***Committee's proposal has been incorporated.***
SCOF	155	155	Clause to be reviewed to include reference to making a reasonable enquiry to locate the person prior to <u>delivering</u> the order at the address. Should also make provision for non-physical delivery if required – i.e. delivering	***Committee's proposal has been incorporated. Have also allowed for communication to be delivered electronically***

			electronically	
CHAPTER 11: SIGNIFICANT OWNERS				
Reviewer	**Ref - 21 July version**	**Ref- October Version**	**Issue**	**Response**
ASISA	157(1) & (2)	157(1) & (2)	Regarding the concept of "*influence*" and "*control*" which is proposed as a barometer of significant ownership, we repeat our contention that there is a significant distinction between control on the one hand, and influence on the other hand, and that these principles should not and cannot be conflated i.e. view that the ability to "*influence*" should not be included as a criteria for significant ownership. The ability to influence does not equate to control. It is only those persons who can subject others to their influence and who are also in a position to make decisions who can be said to have control. Furthermore, the concept of "*influence*" is highly subjective, and could even include junior and entry level employees as significant owners, as well as institutional investors such as investment managers whose clients may, for example, hold a relatively small stake in a financial institution but by virtue of the investment manager engaging from time to time with the management of the financial institution, the clients or investment manager could be held to have the ability to influence and thus be significant owners. Please also note our comment below under clause 159(7) which we believe further supports the proposal that "*influence*" should not be a factor. Please also note our previous submission in this regard in which we further substantiated our position. **ASISA's proposal: We believe that the ability to**	***Comments are noted. Reference to 'influence' should remain a factor, however it is proposed that clause 157(2)(a) be amended to refer to appointing 15% of the members of the governing body.***

			influence the business of the financial institution should not result in a person being deemed to be a significant owner, and this aspect of the clause should therefore be deleted as indicated. We are disappointed that no change was made to clause 157(2)*(a)* regarding a person being deemed to be a significant owner where that person has the power to appoint one person to be a member of the governing body. We reiterate our comments in this regard and support the comments made by BASA. We remain of the view that the ability of a person to appoint a single board member does not of itself result in that person having a level of material control over the business of that financial institution and certainly not to the level that should require that person to be subject to the same requirements applicable to a significant owner who controls the majority of a board. **ASISA's proposal: We believe this clause should be amended, as proposed, to provide that a person is only taken to have the ability to control materially the business or strategy of the financial institution if that person can appoint the majority of members of the financial institution's governing body.** Although clause 157(2)*(b)* has been amended to provide that consent is needed for the appointment of 15% of the members of the governing body it appears that the amendment only improves the situation from the prior wording where a governing board comprises 14 members or more. By and large, therefore, the amendment does not improve the situation. In respect of both clauses 157(2)*(a)* & *(b)*, we submit that the requirement should relate to a majority i.e. it does not correlate to 15% shareholding. **ASISA's proposal: Clauses 157(2)*(a)* and *(b)* should both**	

			be amended to provide for a higher threshold of the majority of the members of the governing body, or at worst, at least 25% of the members of the governing body. **ASISA also proposes the following amendments to the clause:** "*157. (1) Subject to subsections (3) and (4), a person is a significant owner of a financial institution if the person, directly or indirectly, alone or together with a related or interrelated person, has the ability to control ~~or influence~~ materially the business or strategy of the financial institution.* *(2) Without limiting subsection (1), a person, must be taken to have the ability referred to in that subsection if—* *(a) the person, directly or indirectly, alone or together with a related or interrelated person, has the power to appoint the majority of ~~a persons to be a~~ the members of the governing body of the financial institution;* *(b) the person's consent (alone or together with a related or interrelated person) is required for the appointment ~~of 15%~~ of the majority of members of a governing body of the financial institution; or* *(c) the person, directly or indirectly, alone or together with a related or interrelated person holds a qualifying stake in the financial institution.*"	
BASA	157(2)*(c)*	157(2)*(c)*	It is suggested that, in the interest of legal certainty, clause 157(2)*(c)* be amended to make it clear that a qualifying stake refers to a qualifying stake as contemplated in section 158. It is suggested that, in the interest of legal certainty, a	***Agreed, it is proposed that "qualifying stake" be defined in Chapter 1. No other amendment to the clause is necessary.***

			qualifying stake be defined in Chapter 1 as follows: A qualifying stake has the same meaning ascribed to it in terms of section 157(1) of this Act. **BASA suggests the following: Rephrase clause 157(2)*(c)* as follows:** "157(2) …*(c) the person, directly or indirectly, alone or together with a related or interrelated person holds a qualifying stake, as contemplated in section 158, in the financial institution.*"	
ASISA	157(4)*(b)*	157(4)*(b)*	It is unclear what "*will not prejudice the achievement of its objective*" means and this wording would seem to hinder what otherwise appears to be an improved provision regarding Declarations. **ASISA's proposal: In order to avoid legal and investor uncertainty, this part of the clause should be deleted as indicated, alternatively, made clearer as to what objective is being referenced.** "*157(4)* … *(b) A financial sector regulator may not declare a person not to be a significant owner of a specific financial institution, and may not give its concurrence in terms of paragraph (a) to such a declaration, unless the financial sector regulator is satisfied that the ~~declaration will not prejudice the achievement of its objective and that it~~ is not necessary to apply the requirements of this Chapter to the person.* *(c) A financial sector regulator may, with the concurrence of the other financial sector regulator,*	***We disagree that this is ambiguous but can clarify that it is the objective of the financial sector regulators as set out in clause 33 and 57***

			revoke a declaration that it made in terms of paragraph (a).”	
The Unlimited	157 – 160	157-159	**Significant Owners** It is not clear on what basis Treasury contends that these provisions will enable Regulators to more effectively achieve the objectives of the Bill – and taking into account that Regulators are already empowered under existing legislation to monitor financial institutions and take steps to prevent systemic risk. We refer in this regard, amongst others, to: a. the assessment conducted by the insurance regulators into proposed shareholders in an application for an insurance license; and b. the obligation on financial services providers to submit regular statutory returns. We propose that any issues which a financial sector regulator has concerning a financial institution's ownership structures be referred to the underlying regulator responsible for the institution, for example the insurance regulator and that any issues be addressed in accordance with existing laws, including FAIS. With specific reference to section 160(3), we understand this to be read with sub-section (2), i.e. that a Regulator may only require that a significant owner divest itself of its ownership interest in a financial institution in circumstances where the financial institution has contravened a financial sector law. If this is not the case, under what circumstances does Treasury envisage that a Regulator could issue such a directive? In this regard we are concerned that if left unfettered, the exercise of such discretion by the Regulator could be disproportionate to the risk. The mere fact that the	***Comments have been noted. The drafting of the section has been considered by Treasury, the reserve bank and the financial services board, and have been the subject of extensive consultation with industry. As such the provisions have been significantly revised from the July version, to ensure that the provisions reflect intention of policy, taking into account concerns around clarity of law and effectiveness of the provisions.***

			Regulator has such a discretion creates uncertainty. Furthermore, and within the context of proactively monitoring and managing systemic risk, we strongly submit that the definition should only extend to those financial institutions set out in section 159, namely: an eligible financial institution; a manager of a collective investment scheme; (as well as those prescribed by Regulation). In this regard we respectfully submit that by bringing a financial institution like The Unlimited (an intermediary in the insurance industry) within the ambit of significant owner, is not what was intended by Treasury. This much appears from the ASISA comment at page 61 of Treasury's "*Responses To Issues Raised During The Public Consultation Period On The Tabled Draft FSR Bill*", in which ASISA quotes Treasury's response to a BASA submission. We submit in this regard that a one size fits all approach is not appropriate and should be dealt with in financial sector specific legislation. Ultimately these provisions could discourage (foreign) investment in financial institutions given the uncertainty associated with how these provisions will be implemented.	
ASISA	158	Clause deleted	We wish to further clarify some of the potential practical problems we foresee these provisions may cause some of our members, particularly investment managers. Clause 158 determines that a person holds a qualifying stake in a financial institution where such a person "*has the ability to exercise*" at least 15% of the voting rights. Investment managers in terms of mandates usually have the "*ability to exercise*" voting rights on behalf of their clients. Considering the wording, this would mean that if an investment manager is able to exercise more than 15% of the voting rights in a company, even though it is on behalf	***This is not agreed with, and has been discussed with ASISA.***

			of clients (retirement funds and/or unit trusts) who are in no way related or interrelated entities, the provisions of clause 159 could become applicable, potentially requiring approval in circumstances where the intention of the investment manager is clearly not to obtain a significant interest in the financial institution on behalf of its clients. The same holds true in the light of the new clause 158*(a)*(iii) in the revised draft regarding rights of acquisition and disposal. Considering further that the clients of an investment manager may terminate its mandate at any point in time, it is also unclear how the investment manager is practically going to handle a situation where it is no longer able to exercise more than 15% of the voting rights (as a result of the mandate termination), or no longer has the ability to dispose of or control the disposals of 15% of the securities, but also (in the case of a SIFI) first having to obtain approval for the decrease in the ability to vote less than 15% of the voting rights. Investment managers stand in a fiduciary relationship with their clients and as such owe their clients a duty of care not to involve clients in concert party arrangements without the clients' specific approval. The fact that the investment manager has a large number of clients who collectively and in aggregate beneficially own more than 15% of the shares in a financial institution, could be interpreted to mean that the investment manager has the "*ability*" to exercise more than 15% of the voting rights. However that ability is as a result of a mandate granted to the investment manager, which requires the investment manager to act prudently. The exercise of the voting rights by the investment manager is foremost not done in order to gain control of a financial institution, but simply as an active shareholder.	

			We feel strongly that these provisions should not inhibit the ability of a shareholder to actively participate in the voting process at General Meetings of financial institutions simply because of fear of falling foul of these clauses. **ASISA's proposal: We are sure these unforeseen practicalities are not intended and would therefore urge NT to consider an amendment to specifically exclude investment managers acting on behalf of clients from this clause.** Especially in the light of the proposed new clause158*(a)*(iii), we are concerned with the scenario where a person has the ability to dispose of or control the disposal of 14% of the financial institution's securities, and does not otherwise fall within the ambit of clause157(1) but where an eligible financial institution such as a bank decides, in a situation of "crisis", to embark on some corporate action such as a share buy-back, that results in the said person inadvertently crossing the 15% threshold. This would not only require the person to obtain approval but importantly, it would also make that person subject to the requirements applicable to significant owners (some of which will only come to the fore when the Bill is passed, such as becoming a shareholder of reference for an bank or insurer). **ASISA's proposal: This provision (and where relevant, provisions in clause159) should be amended to carve out a situation such as this i.e. where circumstances beyond the control of the person result in that person falling within the ambit of clause 157(1) and, in particular, clause157 (1)*(c)*.**	
Oasis Group	158	Clause deleted	We suggest that the provisions of this section be amended to provide for a higher threshold than 15% insofar as it relates to private companies. In a private company, a 15% shareholder would more than likely to be seen to be a	***This is not agreed with, however it should be noted that the drafting of the section has been reconsidered by Treasury, and have been the***

			minority shareholder with limited ability to influence or control (save possibly nor negative control in certain defined instances) the company.	***subject of extensive consultation with industry.***
SCOF	159		Drafting of sub-clauses (4)(a) and (b) requires review. Subclause (7) reviewed in third version.	***Clause has been reviewed and revised. See proposed changes.***
BASA	159(2)	158(2)	This clause is problematic and will, in its current form, give rise to legal uncertainty. An arrangement is not defined. The statement of "*an arrangement that results or would result*", suggest that an arrangement may, in this context, also refer to any type of discussion or preliminary agreements, in the normal course of business, which is normal and business custom in cases of large investments, mergers, take overs etcetera, which may or will result in a person becoming a significant owner. It is suggested that any potential uncertainty be eliminated and that this clause be amended. **BASA suggests the following: Rephrase clause 159(2) as follows:** "*159(2) A person may not acquire a qualifying stake ~~enter into an arrangement~~ in ~~respect of~~ a financial institution, ~~being an arrangement that results, or would result, in the person, alone or together with a related or interrelated person, becoming a significant owner of the financial institution~~ without the prior written approval of the responsible authority for the financial sector law in terms of which the financial institution is required to be licensed.*"	***Agreed to clarify drafting as proposed***
BASA	159(3)	158(3)	This clause is unnecessarily cumbersome and should, in the interest if legal certainty, be rephrased to simply state what the legislature's intention is, as per the suggested	***Agreed to clarify drafting as proposed***

			amendment. Please note that, with reference to subsections 159(3)*(a)* and *(b)*, it is clear that it refers to significant owners of both systemically and non- systemically financial institutions contemplated in sub clause 159(1). It is suggested that any potential uncertainty be eliminated and that this clause be amended. **BASA suggests rephrasing the clause 159(3) as follows:** "*159(3) A significant owner of a financial institution –* *(a) which has been designated as a systemically important financial institution, may not, without having obtained the prior written approval of the responsible authority for the financial sector law in terms of which the financial institution is required to be licensed, effect any arrangement that will result, in the person, alone or together with a related or interrelated person, ceasing to be a significant owner of the financial institution.* *(b) which has not been designated as a systemically important financial institution, may not, without prior notification to the responsible authority for the financial sector law in terms of which the financial institution is required to be licensed, effect any arrangement that will result, in the person, alone or together with a related or interrelated person, ceasing to be a significant owner of the financial institution.*"	
ASISA	159	158	<u>159(4):</u> **ASISA's proposal: This provision should contain the materiality threshold as provided for in clause 157(1), especially for consistency.** Failing such an amendment, not only will there be uncertainty but the ambit of this clause will be unduly wide,	***We agree to correct the errors in drafting in 159(8)(a) and (b), how do not agree with the proposed insertion at the end of clause 159(8)***

			which we believe cannot be the intention. We further propose that 'or influence' be deleted here for the same reasons advanced in our comments made earlier on clause 157(1). <u>159(7):</u> We remain very concerned with this subclause. For example: The regulator believes that a certain arrangement falls within the ambit of clause 157(1), but the person did not hold that view. The person acquired 4% of the shares in a financial institution. Eight months later, the regulator believes that that acquisition has now resulted in the person having the ability to control or influence materially the business or strategy of the financial institution, and the person then applies for approval as required in clause 159(2). Should that approval not be granted, clause 159(7) deems that acquisition to be void. We refer to our March 2016 submission regarding this principle. <u>159(8):</u> The requirement that clause 159(8)*(b)* applies to clause159(3) (ceasing to be a significant owner) & clause 159(4) (insofar as decreasing) is concerned, seems to be incorrect. If a person is ceasing to be a significant owner, that person should not have to still meet applicable fit and proper requirements. Similarly, clause 159(8)*(a)* regarding a person "*becoming a significant owner*", cannot apply to clause159(3) (ceasing to be a significant owner) and clause159(4) (insofar as decreasing ability to control or influence). **ASISA's proposal: Clauses 159(8)(a) and (b) should be amended to expressly exclude the application thereof to the ceasing and decreasing aspects of clauses 159(3) &**	

			(4) respectively. **See our proposed amendments in this regard.** We also believe that this clause needs to include express provision for maximum turn-around times of two days at most for the requisite regulatory approvals on disposals and acquisitions (to the extent that our other submissions against approvals being needed are not accepted), as the inability to dispose of listed shares will unduly impact on investors who, as we have noted previously, are often ultimately pension fund members. In fact, such provisions could well scare off investors. **ASISA proposes the following amendments to clause 159:** "*159 (4) A person may not enter into an arrangement in respect of a financial institution, being an arrangement that results or would result in an increase or decrease in the extent of the ability of the person, alone or together with a related or interrelated person, to control ~~or influence~~ materially the business or strategy of the financial institution, –* *(a) without the prior approval of the responsible authority, if the responsible authority on granting of an approval referred to in subsection(2), required its prior approval of any such increase or de-crease; or* *(b) without the prior notification to the responsible authority, if the responsible authority on granting of an approval referred to in subsection(2), did not require its prior approval of any such increase or decrease.* *….* *(7) If a person enters into an arrangement in contravention of subsection (2) or (3), the arrangement, in so far as it has*	

			an effect mentioned in the relevant subsection, is void. *(8) An approval in terms of subsection(2), (3) or (4) may not be given unless the responsible authority is satisfied that the person —* *(a) ~~the responsible authority is satisfied that the person~~ becoming a significant owner, or the arrangement, will not prejudicially affect or is likely to affect the prudent management and the financial soundness of the financial institution; and* *(b) ~~the responsible authority is satisfied that the person~~ meets and is reasonably likely to continue to meet applicable fit and proper person requirements, provided that this subsection(8) shall not apply in regard to a person ceasing to be a significant owner as contemplated in subsection(3) or an arrangement that results in a decrease in the extent or ability of a person to control the business as contemplated in subsection(4).*	
BASA	159(4)	158(4)	BASA suggests that, in the interest of legal certainty, clause 159(4) be amended as follows: *"159(4) A person may not effect any ~~enter into an~~ arrangement in respect of a qualifying stake in a financial institution, which will ~~being an arrangement that results or would~~ result in an increase or a decrease in the extent of the ability of the person, alone or together with a related or interrelated person, to control or influence the business or strategy of the financial institution, -* *(a) without having obtained the prior written approval of the responsible authority for the financial sector law in terms of which the financial institution is required to be licensed, if the responsible authority on granting of an approval referred to in subsection (2), required its prior*	***Agreed to clarify drafting as proposed***

			written approval of any such increase or decrease; or *(b) without the prior notification to the responsible authority for the financial sector law in terms of which the financial institution is required to be licensed, if the responsible authority on granting of an approval referred to in subsection (2), did not require its prior written approval of any such increase or decrease.*"	
BASA	159(6)	158(6)	This clause does not make legal sense in the way in which it is currently phrased. In view of the proposed penalties in relation to a contravention, it is important that legal certainty be established. By way of example: • Sub clause (2) is applicable to a person becoming a significant owner, sub clause (3) is applicable to a person ceasing to be a significant owner, • Sub clause (4) is applicable to an increase or a decrease of the ability of a person, alone or together with a related or interrelated person, to control or influence the business of the financial institution. • It follows that a person who was, for whichever reason, at a specific time, declared not be a significant owner, may become or deemed a significant owner in cases where, by way of example, the person substantially increases its effective interest, voting rights, influence or control. It is therefore suggested that subsections (2) and (4) should also apply to a person who was, for whichever reason, at a specific time, declared not be a significant owner of a particular financial institution. **BASA suggests the following amendments:** "*159(6) Subsections (2)~~, (3)~~ and (4) ~~do not~~ apply to a*	***Clause should be deleted***

			person who ~~is~~was previously declared, in terms of section 157, not to be a significant owner of the financial institution concerned."	
BASA/JSE	159(8)	158(8)	**BASA proposes the following amendments to clause 159(8):** "*159(8) An approval in terms of subsection (2), (3) or (4) may not be given unless the responsible authority is satisfied that —* *(a) ~~the responsible authority is satisfied that~~ the person becoming a significant owner, or the arrangement, will not prejudicially affect or is likely to affect the prudent management and the financial soundness of the financial institution; and* *(b) ~~the responsible authority is satisfied that~~ the person meets and is reasonably likely to continue to meet applicable fit and proper person requirements.*"	***Agree to remove duplication***
ASISA	160	159	NT's comments in the NT Responses Document dated 21 July 2016 at page 60 state that "*Revised provisions [in the Bill] will cater for the following: … Standards will specify what constitutes a material increase… Standards will specify what constitutes an immaterial change and material decrease*". However, the revised provisions do not expressly provide for standards to be made in this regard. The new clause160 gives the power but does not oblige the regulator to create standards in this regard, and therefore such certainty may never be achieved. **ASISA's proposal:** Clause160 should be amended to expressly provide for standards that must be issued with regards to the issue of materiality both in regard to what constitutes a "*material*	***We agree to add in a clause obliging the regulator to set standards setting out what constitutes a material increase or decrease***

			increase…" and in regard to the "*ability to control or influence materially the business or strategy of the financial institution*". This should, amongst other things, prevent an unduly broad *a*pplication of the relevant provisions, such as clauses 157(1) & 159(4). We also believe that here should be an obligation to create standards that provide for efficient mechanisms regarding approvals in order to prevent material adverse effects on investors.	
SCOF	160	159	Subclause (1)(a) provides authority to make standards relating to 'personal character qualities of honesty and integrity'. Question whether this can be regulated.	***Personal character and qualities such as "honesty" and integrity" can be regulated and reviewed under the "fit and proper" requirements that the financial sector regulators are empowered to make standards on.***
SCOF	163	162	Consider 'enter into binding agreements' to replace 'impose biding corporate rules'.	***Committee's proposal has been incorporated.***
SCOF	166	165	Consider changing 'issue a directive' to softer language	***This is the power to issue directives like other directives referred to in the Act. It is appropriate to use that terminology***
CHAPTER 12: FINANCIAL CONGLOMERATES				
Reviewer	**Ref - 21 July version**	**Ref- October Version**	**Issue**	**Response**
ASISA	163(5)	162(5)	The intention behind the use of the term "*binding corporate rules*" is not clear. "Binding corporate rules" is a defined concept in the Protection of Personal Information Act ("PPI"), and is used in the context of transfers of personal information outside of SA. *Section 72(2) of the PPI Act:*	***Agreed to include reference to binding corporate rules and binging corporate agreements***

			(2) For the purpose of this section— *(a) "binding corporate rules" means personal information processing policies, within a group of undertakings, which are adhered to by a responsible party or operator within that group of undertakings when transferring personal information to a responsible party or operator within that same group of undertakings in a foreign country; and* *(b) "group of undertakings" means a controlling undertaking and its controlled undertakings.* It is not clear whether it is this same concept that is referred to in clause 163(5)*(b)*. If this is so, and it is intended only to pertain to situations where the holding company and members of the conglomerate are in different countries from each other, then we urge that international norms be adhered to. internationally, for cross-border transfers of information, where the company in a group from which data is required is situated in a country that does not have adequate data protection legislation, then two methodologies are permitted for the requesting company from that group. These are either "*binding corporate rules*" or "*model contractual clauses*". We submit that there is no need for the FSR Act to restrict the methodology options to only one, being binding corporate rules. Binding corporate rules can be expensive and time consuming to implement. (Of course, no methodology can override a blanket legislative prohibition by a country on the transfer of data outside of that country.) In respect of transfers of data between companies within a group where those companies are both within South Africa, it is submitted that the PPI Act adequately deals with the situation and there is no need for a provision in the FSR Act. Please refer to section 72(1) of PPI which provides for	

			three instances where responsible parties may transfer personal information to a third party located in SA, being where the third party to whom the information is transferred is subject to • a law, • binding corporate rules or • binding agreement which provide an adequate level of protection.	
		CHAPTER 13: ADMINISTRATIVE PENALTIES		
Reviewer	**Ref - 21 July version**	**Ref- October Version**	**Issue**	**Response**
The Unlimited	175	174	We understand that the effect of such a prohibition to be, *inter alia*, that financial institutions may not be able to insure themselves against administrative penalties, or be indemnified by third parties with whom they contract. Assuming that the institution is liable under the relevant underlying legislation for the penalty, we fail to see on what basis interfering with the principle of privity of contract is justified. Please can this be clarified.	***Joint standards to clarify which types of indemnity may be permissible.***
		CHAPTER 14: OMBUDS		
Reviewer	**Ref - 21 July version**	**Ref- October Version**	**Issue**	**Response**
Voluntary Ombudsman Schemes Association	177	176	The objective of the Ombud Council in relation to conduct of financial institutions is very broad. It is suggested that the words "~~*and the conduct of financial institutions in relation to financial customers in general*~~" be deleted.	***Agree to delete the words as proposed***

			To the extent that these words are retained: • The use of the term "*conduct*" should be defined to state what conduct is being monitored. At present, the extent to which Ombuds have jurisdiction over "*conduct*" is limited. If "*conduct*" is retained, thought must be given to the sanction that is to imposed for instances where a financial customer complains about the "*conduct*" of a financial institution. • The phrase should refer to the conduct of "*a financial institution*" rather than "~~*financial institutions*~~" • The use of the word "*financial customers*" can be limited instead to include "*a financial customer*". • The phrase "*in general*" is very broad and lacks clear definition.	
The Unlimited	177	176	There are currently several Ombud schemes in the financial services industry. It is not clear how the proposed Council is going to simplify the ability for financial customers to easily access cost effective dispute resolution mechanisms. We are not aware of any empirical evidence to suggest that there are currently obstacles which prevent customers from accessing the existing Ombud schemes. In fact, recent annual reports released by the insurance Ombuds indicate an improvement in terms of their ability to deliver cost effective and efficient alternate dispute resolution mechanisms.	***Comments are noted. The Ombud Council is required to simplify access to the ombuds system, including through establishing a single point of entry. There is research available (e.g. FinMark Trust report) on the functioning of the ombuds system.***
SAIA	178(1)*(c)*	177(1)(c)	A comma is to be inserted after "*of*"	***Disagree***
SAIA	178(1)*(g)*	177(1)(g)	We recommend that "*jurisdictional*" is inserted before "*coverage*" for purposes of clarity.	***Agree***

SAIA	178(1)*(i)*	177(1)(i)	Clarity is sought as to what "*promote financial inclusion*" means in an Ombud context and how must Ombuds do this, bearing in mind that the primary objective is the affordable, effective, fair resolution of complaints? It is our understanding that financial inclusion is a financial sector industry business objective; hence clarity is sought as to the Ombud function in achieving this objective.	***Noted. Refer instead to supporting financial inclusion***
SAIA	181(4)*(f)*(i)	180(4)(f)(i)	Clarity is sought as to how the Ombud Council Board is to know whether a particular Ombud is functioning appropriately in relation to the industry sub-sector if there are no people on the Board from the industry.	***Appears to be a misunderstanding – this refers to the Board of the Ombud Council, and not the board of the ombud schemes. This was clarified with SAIA***
SCOF	185	184	Question whether it is correct to say that the Board acts for the Council. Consider redrafting.	***This clause has been redrafted, no reference to 'acts for'***
SAIA	185*(b)*	184(b)	It is our respectful submission that it is inappropriate for a board to act for the organisation that it "governs" as it is an instrument of governance. We recommend that this be reviewed accordingly.	***Agreed; no longer refer to 'act for'***
Drafting refinement	185	184(d-e)	To strengthen the consumer protection framework, it is important that the Ombud Council Board shares information it has related to consumer complaints and financial institution conduct, with the relevant bodies, including the Minister of Finance as well as the regulators. This ensures that problems are speedily identified and brought to the attention of those that can resolve it. The Ombud Council must also be able to report on the performance of the ombuds it oversees.	***Inserted new clause requiring the Ombud Council board to keep the Minister informed of compliance of ombud schemes to laws, the complaints being dealt with and the conduct of institutions giving rise to complaints.*** ***Ombud Council Board is also required to keep regulators informed of the conduct of financial institutions giving rise to complaints.***
SAIA	185*(b)*(iv)	184(f)	We note that there is a verb missing at the beginning of the phrase: what goes before "*any other matter…*"? We would recommend that maybe "*addressing*" or "*resolving*" be	***Agreed***

			inserted.	
SAIA	189(3)*(b)*	188(3)(b)	We recommend that this be more accurately phrased to reflect that he/she would have the responsibility for organisational implementation as it is our respectful submission that the Chief Ombud, who is one person, will not be able "*perform the functions of the Ombud Regulatory Council*".	***Disagree; similar to drafting in relation to the Commissioner of the FSCA performing its functions.***
SCOF	190	189	Is 'improper' a necessary adjective? Is detriment not always improper?	***This clause has been revised.***
SCOF	193	192	Is 'improper' a necessary adjective? Is detriment not always improper?	***This clause has been revised.***
SAIA	193(1)*(b)* & *(c)*	192(1)*(b)* & *(c)*	Clarity is sought as what "*improper*" means? We submit that the "*detriment*", which is already descriptive and objectively determinable, is sufficient. "*Improper*" is a subjective term that is not necessary in this context and should be circumscribed by objective criteria.	***The clause has been refined where appropriate to remove reference to 'improper' where it may have created ambiguity***
SCOF	195	194	Subclause (2)(b)(ii) provides for a 'list of financial institutions that are or shall be' recognised as members of the industry ombud scheme. Drafting should be improved.	***This clause has been revised to improve drafting.***
SAIA	197(2)	196(2)	We recommend that "*and notifying the applicant accordingly*" should apply to both subsections *(a)* and *(b)* of this section – whether the application is granted or refused.	***Drafting will clarify this***
SAIA	197(3)*(b)*(v)	196(3)*(b)*(v)	The clause currently reads as follows : Require each member of the industry ombuds scheme to comply with , and give effect to, any determination of the ombud made in terms of the industry ombud scheme: "*(v) make adequate provision for monitoring and oversight of the operation of the industry ombud scheme,* ***including adequate provision for oversight of***". We recommend that "~~*including adequate provision for*~~	***Agreed***

			~~*oversight of*~~" be deleted as it currently reads as duplication.	
SAIA	197(4)*(a)*	196(4)(a)	In keeping with good administrative law and/or fair administrative process we would recommend that this clause be reconsidered as it may be detrimental to assume that a non-response must be taken to be a refusal as a failure to respond may arise in the event that an official is ill or on extended leave, in the event of a strike, system and/or power failure or some other explanation for a non-response. It is our submission that there must be a positive obligation on the Ombud Council to respond to the applications.	***Agree to draft in the positive as is the case for the FSCA***
SCOF	199	198	Subclause (4) provides that the suspension of recognition of an ombud scheme does not affect its obligations in terms of a financial sector law, 'such as an obligation to report a matter to the Ombud Council.' Consider drafting to say 'including an obligation to report … '	***Committee's proposal has been incorporated.***
SAIA	199(1)*(c)*	198(1)(c)	We note that mention is made of more than one ombud for an industry ombud scheme. It is our understanding that there is only one per industry (the life insurance industry is separate from the short-term industry, for example). We would thus recommend that "*a significant number of the ombuds for the industry ombud scheme*" be clarified. What does "*significant*" mean in relation the number of financial institutions that are members of a particular industry ombud scheme? Two thirds? The majority? 90%? There should be a more objectively quantifiable amount. In the event that our understanding that there is only one Ombud per industry is agreed upon, that this phrase should be deleted.	***Noted and agree to remove reference to 'significant number of ombuds'***
SAIA	199(1)*(g)*	198(1)(g)	We would recommend that the words "*after it is due*" be added after the words "*30 days*".	***Agreed***
SAIA	199(4)	198(4)	We would recommend that "*, for example,*" be added in after "*such as*" in the brackets.	***Redrafted to remove brackets***

Drafting refinement	201(5)	200(5)	While the Ombud Council must seek to promote consistency in approaches among ombud schemes and promote cooperation and coordination, this must be done in a way this is mindful of relevant differences in the nature of the schemes themselves.	***Clause has been expanded to clarify considerations for the Ombud Council when setting rules, including being cognisant of the differences between schemes.***
SAIA	202(1)	201(1)	It is our submission that "*complaints about financial institutions*" is broad, vague and open to abuse. We respectfully submit that the role of an industry ombud is in relation to complaints in relation to claims (in the case of insurance industry ombuds) and not any issue whatsoever that a consumer may have against a financial institution. It is for this reason that we request that the complaints be specified.	***Agree to mirror objectives clause 177***
Voluntary Ombudsman Schemes Association	202(2)*(e)*	201(2)(e)	This section is being repeated by the current Bill but it may require reconsideration. The Council is empowered to make rules, inter alia, in respect of "*dispute resolution processes*". We had previously mentioned that the reason for the request that subsection *(e)* be deleted in its current form is because, in our view, this rule interferes with the independence of the ombud in dealing with complaints. We are also concerned that it will hamstring the ombuds offices in applying the most efficient and effective mechanisms for dispute resolution. The advantage of a non-statutory arrangement is that it is able to adapt, to innovate and to adopt international best practice without "red tape". If there are rigid rules laid down by the Council it will no longer be possible to do so by, for example, trying out new ways of resolving disputes. We mentioned the example of the LTIO trying out, by way of a pilot project, a different conciliation process in order to try and expedite complicated complaints.	***Disagreed; this will be an important function of the Ombud Council and limiting its ability to set rules on dispute resolution could hamstring its ability to fulfill its mandate. There is explicit provision that the Ombud Council may not interfere with the independence of ombud schemes***

			Our suggestion is that subsection *(e)* be deleted, or, if this is not acceptable that it should be replaced with the following: “*(e) the principles to be adhered to in dispute resolution processes by the ombud schemes*”	
Drafting refinement		201(7) New-clause	Ombud Council rules should not be so restrictive as to prevent ombud schemes from innovating to improve the way they meet a required outcome. This allows the Ombud Council to use its discretion in seeing how the outcomes of rules may be met in different ways	***New clause inserted allowing the Ombud Council to exempt an ombud scheme from a rule if satisfied that the intended outcome of the rule may still be met. Exemptions can be subject to conditions.***
SCOF	203	202	Subclause (3)(a) – contravention of a provision of a financial sector law or a standard relating to ombud schemes, or an Ombud Council Rule. Subclause (5) provides a procedure when a directive of the Ombud Council requires a person’s removal from the ‘person’s position or function’. Delete ‘or a standard relating to ombud schemes’ Consistency required with reference to ‘position or function’ as elsewhere in the clause reference is made to ‘position or role’.	***Committee’s proposal has been incorporated. The phrase “or a standard relating to ombud schemes” has been deleted.***
SAIA	203(4)*(a)* & (5)*(a)*	202(4)*(a)* & (5)*(a)*	Grammar: “*the reasons why it is proposed to issue it*”. We suggest that this should be “*why the Ombud Council proposes issuing*…”	***Agreed to consider drafting***
SAIA	203(8)*(c)*	202(8)*(c)*	Grammar: This clause currently reads: “*The Ombud must consider the submissions, and notify the person, as soon as practicable, whether the Ombud Council proposes to revoke the directive.*”	***Agreed to consider drafting***

			We recommend that the word "~~*if*~~" be substituted for "*whether*".	
SCOF	205	204	Subclause (1)(a) provides for proceedings in the High Court for an order to do, or not do a specified thing. Inclusion of 'must' before 'do' and 'not'.	***Committee's proposal has been incorporated.***
SAIA	205(1)*(a)*	204(1)*(a)*	Grammar: "~~*do*~~" should be "*does*"	***Agreed to consider drafting***
SCOF	206	205	Subclause (5) 'whether or not to make debarment order…' Insert 'a' before 'debarment'.	***Committee's proposal has been incorporated.***
Voluntary Ombudsman Schemes Association	207(2)	206(2)	It is recommended that reference to a staff member in section 207(2) be deleted as the ombud can deal with an errant staff member through its own disciplinary procedures.	***Agreed***
Voluntary Ombudsman Schemes Association	211	210	It is proposed that sub-sections (1) and (2) be swapped.	***Agreed***
JSE	211	210	Industry ombud schemes are recognised, not licensed, in terms of section 195. We recommend that sections 211(3) and (4) are amended as follows: "*(3) An ombud scheme may not describe or hold itself out as being recognised as an industry ombud scheme in terms of this Part unless it is so ~~licensed~~ recognised*. *(4) An ombud scheme may not permit another person to identify it as recognised as an industry ombud scheme in terms of this Part unless it is so ~~licensed~~ recognised*."	***Agree. These provisions have been revised***
SAIA	211(2)	210(1)	"*Ombud scheme*" at the end should be in inverted commas. We would further recommend that the following also be inserted thereafter, "*or the person so charged with this*	***Agree to insert reference to ombud and ombudsman***

			function as an ombud" or "*ombudsman*".	
Voluntary Ombudsman Schemes Association	211(3)	Clause deleted	Reference to "*as being recognised as an industry ombud scheme*" should be rephrased to state a "*as being ~~an industry~~ a recognised industry ombud scheme*".	***Agreed***
Voluntary Ombudsman Schemes Association	212	211	Both sub-section (3) and (4) convey the same requirement and it is suggested that sub-section (3) be deleted as it is superfluous	***Agreed – subsection (3) has been deleted.***
Drafting refinement		214 New-clause	The clause had indicated what provisions applied to an ombud scheme when its governing rules where amended, however there was a lack of clarity on what was required for the governing rules of an ombud scheme once it is established (where there are no amendments but rather a new scheme with its first set of governing rules).	***New drafting inserted specifying the process that the Ombud Council must follow both when it recognizes an industry ombud scheme and when that scheme amends its governing rules.***
Drafting refinement	218	217(3)(b) New sub-clause	The Ombud Council should report to the regulator not only on breaches of the law but also on poor practices by financial institutions that is likely to affect more than one customer	***Inserted a new sub clause specifying that the Ombud Council may report to a regulator activities or actions by a financial institution that may affect customers other than the complainant.***
Drafting refinement	218	217(4) New sub-clause	To avoid doubt it should be specified in legislation that the Ombud Council can provide the Minister of Finance and National Treasury with requested information.	***New clause inserted requiring the Ombud Council to provide the Minister of Finance and National Treasury with requested information.***
SAIA	218 (2)	217	We propose that for better reading, that line 2 delete "*~~may at any time~~*" and add in "*in its discretion*". Clause 2*(a)*: lower case t: instead of ~~T~~he Ombud Council.	***Agreed to consider drafting***
CHAPTER 15: FINANCIAL SERVICES TRIBUNAL				
Reviewer	**Ref - 21 July version**	**Ref- October Version**	**Issue**	**Response**

SCOF	220	219	Must be clear that a decision of a panel is the decision of the Tribunal, without the decision being endorsed by the Tribunal.	***Committee's proposal has been incorporated.***
SCOF	224	223	Is 'improper' a necessary adjective? Is detriment not always improper?	***This clause has been revised.***
SCOF	225	224	Panel list – subclause (4) the Minister must ensure that the panel members serve on an equitable basis. This task should be the responsibility of the Chairperson of the Tribunal.	***Committee's proposal has been incorporated.***
SCOF	226	225	Subclause (2) provides for the panel members. One panel member must be a lawyer.	***Committee's proposal has been incorporated.***
SCOF	227	226	Consider whether to include a general duty to disclose.	***Committee's proposal has been incorporated.***
SCOF	231	230	Subclause (2)(b) provides for time period of 60 days to within which to bring an application. Include here 'or longer period as allowed'.	***Committee's proposal has been incorporated.***
SCOF	232	231	Operation of decision not suspended by an application for reconsideration. Remove 'the operation of'.	***Committee's proposal has been incorporated.***
SCOF	233	232	Sub-clauses (3) and (6) contains clumsy drafting. Consider redrafting.	***Clause has been redrafted.***
SCOF	236	235	Remove specific reference to subsections 6(2) and (3) of Promotion of Administrative Justice Act.	***Committee's proposal has been incorporated.***
CHAPTER 16: FEES				
Reviewer	**Ref - 21 July version**	**Ref- October Version**	**Issue**	**Response**
SCOF	238-240	237-249	Whole section to be reworked in light of Levies Bill	***The whole section has been re-worked.***
CHAPTER 17: MISCELLANEOUS				
Reviewer	**Ref - 21 July version**	**Ref- October Version**	**Issue**	**Response**

Drafting refinement	242	251(5) New-clause	Given the sensitive nature of information sharing powers, it is important to ensure that there are proper checks and balances in place so that these powers are not misused.	***New clause inserted specifying in further detail how information may be shared and disclosed by the regulators and people employed by the regulators. Ensure it is consistent with the PoPI Act***
Oasis Group	257 – 260 & 262 – 269	265-268 & 269-276	We reiterate our comment above that we would recommend that this clause be amended to include a requirement that the contravention is material (as previously raised by other commentators). While we concur that the court would determine what would constitute a material contravention, the current wording of the clause does not require the courts to have regards to materiality.	***Comments are noted. Proposals to include materiality clauses in all instances have been considered and SC opinion obtained on the appropriateness of inclusion in legislation, so as not to impede the interpretation and operation of the law. Treasury reiterates its view that the court would determine what would constitute a material contravention, and as such it is considered inappropriate to include requirements for material contravention of the law***
BASA	260	Clause deleted	Consider making the penalty a percentage of the taxable income of the person who is making the acquisition, rather than a percentage of the taxable income of the financial institution being acquired. This will cater for instances where the financial institution being acquired is in financial difficulties and has a negative turnover	***The offence should only carry an administrative penalty rather than being an offence as currently stated. The clause was deleted – the offences referred to were more suited to administrative penalties than criminal offences.***
SAIA	261	Clause deleted	This clause reads as follows: "*261.(1)An eligible financial institution that contravenes section 162(1) commits an offence and is liable on conviction to a fine not exceeding 1% of the eligible financial institution's taxable income during the eligible financial institution's financial year immediately preceding the date of the offence.* Clause 162(1) : Notification by eligible financial institution reads as follows: "*An eligible financial institution must, within 14 days of becoming a part of a group of companies, notify the Prudential Authority of that event.*"	***Will no longer refer to an offence but instead an administrative penalty. The clause was deleted – the offences referred to were more suited to administrative penalties than criminal offences.***

			Clarity is sought as to the reason for the amendment as it is our respectful submission that the proposed fine is disproportionately high in relation to the offence, and in light hereof recommends that this penalty be reviewed.	
Drafting refinement	265	272	Clarity needed in terms of which laws the regulator can use to grant exemptions from provisions in financial sector laws – exemptions may be granted in existing laws, in addition to exemption powers provided for in the FSR Bill.	***New clause inserted to link to the new clause 251(5), specifying consequences for contravening the newly inserted clause related to information sharing and disclosure requirements.***
BASA	269	276	Consider making the penalty a percentage of individual taxable income	***Disagree, it remains an amount not exceeding the penalty applicable to the financial institution***
Oasis Group	269(1)*(b)*	276	We suggest that clause 269(1)*(b)* be amended to read as follows: "*a member of the governing body of the financial institution <u>who knew (or ought reasonably to have known) of the commission or potential commission of an offence</u> but failed to take all reasonably practicable steps to prevent the commission of the offence*"	***Disagree***
Drafting refinement	274	281(2) & (3)	The clauses apply to the granting of exemptions in terms of a financial sector law. This to clarify, where there are existing exemption provisions in financial sector laws, how those clauses will operate in relation to the FSR Bill. The provisions in the FSR Bill should be applied in addition to what is provided for in the sectoral laws. This is necessary to allow an appropriate interpretation and application of the various provisions.	***New clauses inserted clarifying the process which the regulators must follow when providing exemptions from provisions in certain laws.***
JSE	274	281	**Exemptions from complying with sectoral laws** Is it contemplated in section 274 of the FSRB that a financial service provider could be exempted from having to obtain a licence or would that be in contravention of the	***Comments are noted. Public interest considerations are a minimum standard. The Authorities will develop regulatory strategies which will set out the guiding principles for the***

			sectoral law and therefore not permitted? If a licence exemption is contemplated there should be stricter criteria than merely whether it will not be contrary to the public interest. This issue was raised with National Treasury but not discussed, on 10 August 2016.	***Authorities on how they will perform their respective regulatory and supervisory functions, and the Authorities' approach to administrative actions.***
SCOF	276	283	Question whether 'prospective financial customers' is too wide a phrase.	***Reference to "prospective financial customers" maintained. Treasury to motivate the retention of the term.***
SCOF	281	288	Subclause (4)(b) provides for regulations to be submitted to Parliament for scrutiny. Subclause (5) provides for period of 30 days for submissions. Not necessary to include scrutiny. Might even be problematic if regulations are challenged if Parliament do not show proof of scrutiny. Period should be 6 weeks.	***Committee's proposal has been incorporated.***
ASISA	281(4)*(b)*(i)	288(4)*(b)*(i)	The notice mentioned in paragraph *(a)*(iv) should also be provided to Parliament. *281(4)(b)(i) the documents mentioned in paragraph (a)(i) to ~~(iii)~~ (iv)* …	***Agreed***
SAIA	281(5)*(a)*	288(5)*(a)*	We note with concern that the period for submission of comments has been reduced from two months, to thirty days. We submit that the two months would be more appropriate to allow for consultation by our members with external parties in order to provide insightful feedback. Clarity is sought as to what informed the decision to reduce the time period.	***Noted however there will be a 30 day parliamentary period and the regulator will be required to apply its mind to the nature and complexity of the standard when deciding on a consultation period***
SAIA	284	291	Given the propensity of the CMS to make rules on matters which affect insurers and their intermediaries, clarity is sought as to how clause 4*(b)* "*it's concurrence is*	***This will be set out in an MoU***

			unnecessary." will be interpreted as this is unclear.	
SCOF	286	Clause deleted	Development and implementation of policy frameworks during transition period. 'Declare principles developed' sounds too strong. The requirement to comply with policy frameworks during the transitional period was vague and unclear. Clause must be redrafted.	***Committee's proposal has been incorporated. Clause 286 deleted.***
SCOF	287	293	Transfer of assets of Financial Service Board – when the Part comes into effect. See sub-clauses (1) and (4). Substitute 'Part' for 'section'.	***Committee's proposal has been incorporated.***
SCOF	295	301	Retention of existing approvals, licences, etc. Must be clear that existing licences remain.	***Committee's proposal has been incorporated.***
SCOF	296	302	Redraft clause.	***This Clause has been redrafted.***
Drafting refinement		304 New clause	Regulations must be provided for so that the transition toward the Twin Peaks model is managed smoothly and with minimal disruptions.	***New clause inserted allowing the Minister of Finance to make regulations providing for transitional arrangements related to the establishment of the authorities, the coming into operation of provisions in the Act, and repeals of provisions.***

SCHEDULE 4: AMENDMENTS AND REPEALS

NOTE:

This document sets out the National Treasury's formal response in respect of comments submitted by stakeholders and oral submissions/comments made during public hearings to the Standing Committee on Finance, for the comment period November 2015 – May 2016. On instruction by the Committee, Treasury published a tracked change version of the FSR Bill on the 21st of July 2016 that sought to address concerns that were raised to the SCOF on the tabled version of the Bill. Additional comments submitted by stakeholders on the version of the Bill that was published on 21 July 2016 have been incorporated into the document (shaded in grey for ease of reference).

SCHEDULE 4: AMENDMENTS AND REPEALS			
INSOLVENCY ACT			
Reviewer	**Section**	**Issue**	**Response**
JSE	35(A)	**35(A) Transactions on exchange** The heading of Section 35(A) of the Insolvency Act – "*Transactions on exchange*", is misleading, as the protection afforded in terms of this provision extends to transactions in unlisted securities (e.g. OTC derivatives) that may be cleared by a clearing house, a central counterparty or a licenced external central counterparty. We recommend that the heading of Section 35(A) be amended to "*Market infrastructure transactions*"	***To note for Omnibus Bill***
FINANCIAL ADVISORY AND INTERMEDIARY SERVICES ACT, 2002			
Reviewer	**Section**	**Issue**	**Response**
ASISA	General comment on Section 10	There are thousands of licensed financial services providers ("FSP"s) and it is generally known that they have been inconsistent in terms of their approach to debarment	***This is not agreed with; however it is proposed that the internal appeal mechanism in relation to debarments under FAIS be revised to align with the revised***

	Debarment of representatives FAIS s14 Pages 151-154	investigations, the quality of evidence gathered and the processes followed in the consideration and imposition of debarment of representatives. These inconsistencies have led to a number of court judgements and appeals. In this context it is appreciated that the regulator wishes to amend these provisions with a view to addressing some of the problems with the existing wording and interpretation of the debarment provisions in FAIS, but the proposed changes in the Bill will, in our view, not address these inconsistences; taking into account the comments made by National Treasury in response to submissions on the previous draft. We believe that the lack of legal certainty will result in a number of unintended consequences and impracticalities as amplified in our comments below. First, however, and while it is agreed that debarment is necessary in order to protect the public from unscrupulous individuals, the fundamental question is not how FSPs should proceed in terms of debarments or whether FSPs should also debar representatives who resign prior to debarment hearings but rather whether FSPs are best positioned and capable to impose debarments. "Debarment" has serious consequences for the individual concerned i.e. it constitutes an infringement of the rights set out in section 22 of the Constitution (freedom of trade, occupation and profession). National Treasury's response in this regard is that the appeals process created will address this concern. However, the underlying problem will, in our view, not be addressed within the proposed new regime given the fact that FSPs will simply not be in a position to follow "due" process. In this regard, FSPs investigative capabilities are severely limited and constrained unlike the FSB's powers of investigation and gathering of evidence referred to in subsection 3 of the Commissions Act, 8 of 1947, which powers are bestowed on the FSB in terms of	***Tribunal provisions in the FSR Bill. See proposed changes***

		subsection 12(1) of the Financial Services Board Act, 97 of 1990. The Bill gives extensive investigative powers to the Authority. It is submitted that the Authority is therefore in a much better position to conduct such investigations and to impose all debarments under s145 of the Bill. Apart from the practical difficulties alluded to under the specific comments provided below, we believe that in principle, the objectives of debarring individuals would be better served if considered and imposed by the Authority from the outset and in all instances. **Proposal: Section 14 of the FAIS act should be deleted in its entirety.**	
ASISA	FAIS Debarment section 14(2)	We previously expressed concerns regarding an FSP's inability to meet the notification requirements contemplated under subparagraphs 14(3)*(a)*(i) and 14(3)*(b)* in those instances where the location or whereabouts of the representative is unknown. In such cases the FSP will not be able to "effect" the debarment as required under subclause 14(2). NT's response acknowledged this as a valid concern and advised that this aspect will be addressed in the revised proposals. Whilst this aspect has been addressed in the revised proposals, it has been limited to debarments imposed by the Authority i.e. by way of adding a new clause155. We propose that the wording of clause155 be amended to align with the proposed changes to subclause 14(2) as underlined. "*(a) Before effecting a debarment in terms of subsection (1), the provider must ensure that the debarment process is lawful, reasonable and procedurally fair.* *(b) If a provider is unable to locate a person to be given a document or information under subsection (3), sending this document or information to any of the person's last known e-mail, physical, postal or domicilium address(es),*	***Agree that it makes sense for similar provisions to apply to the provider when it comes to debarment.*** ***Agree to insert drafting as proposed***

		will be sufficient."	
ASISA	Schedule 4 Page 147 s1(h) "**intermediary services**"	The comments of two large ASISA members are quoted verbatim in the attached Annexure. The current definition of "*intermediary services*" in the Act makes it clear that intermediary services are services that are performed by a person other than a "*client*" or a "*product supplier*". This accords with the definitions of "*client*", "*product supplier*" and "*financial services provider*" in FAIS and it is clear from the relevant provisions in FAIS (including but not limited to sub-section 1(3)(b)) that the Legislature clearly distinguishes between a "*product supplier*" and a "*financial services provider*". We would like to refer to the matter of Tristar Investments (Pty) Ltd v The Chemical Industries National Provident Fund (Case number: 455/12) where the Supreme Court of Appeal has held as follow: (For your convenience we quote part of the judgment here below (the emphasis is ours) and have also highlighted the proposed deletions to the definition in terms of the proposed amendments, in the current definition quoted in the judgement below.) *[5] It is not controversial that a substantial portion of the services TriStar undertook to provide constitutes the furnishing of 'advice'. It is also clear from the agreement that some of the services it undertook to provide did not constitute furnishing advice. The court below found that because TriStar was licensed only to 'furnish advice' it was prohibited from rendering those other services, and the agreement was consequently invalid.* *[6] That approach to the matter was not correct. The Act does not prohibit TriStar from performing any service other than 'furnishing advice' (which it is licensed to do). It prohibits it only from providing an 'intermediary service' in*	***The issue sought to be addressed by the proposed amendment to the definition of 'intermediary services', inter alia, is to make it clear that the provisions of the FAIS Act apply to product suppliers, their employees and agents when selling their own products to clients.*** ***The activity of "selling" without advice is currently defined as an intermediary service. However, product suppliers have taken the view, increasingly so, that when they (through their employees or agents) sell a financial product to a client without advice, they are not subject to the FAIS Act mainly because of the following:*** • ***The definition of intermediary services requires a tripartite arrangement between a client, product supplier and intermediary – where a product supplier sells its own products there is no tripartite arrangement ; and*** • ***The exclusion granted to product suppliers from the FAIS Act when rendering intermediary services as contemplated in section 1(3)(b)(ii) of that Act.*** ***Since the inception of the FAIS Act there has been an increase in the number of call centres operated by employees of product suppliers. The reason for that seems to be, inter alia, because those employees do not have to meet the FAIS fit and proper requirements and they do not have to comply with the conduct requirements as set out in the FAIS Act because of the views referred to in paragraph above (and supported by the commentators).*** ***However, it is clearly the activity performed by a person that should determine whether it is subject to specific provisions, in keeping with the need to ensure level playing fields and minimizing arbitrage. It is for that very reason that the amendment to the definition is proposed.***

		the absence of a licence to do so. ***The correct question, then, is not whether the services in issue*** *constitute something other than 'furnishing advice' (which they are), but instead whether they* ***constitute an 'intermediary service'.*** *[7]* ***In ordinary language an 'intermediary' is one who 'acts between others; a go-between' and the word has a corresponding meaning when used as an adjective. The Act assigns its own meaning to the term that retains that characteristic. The definition contemplates a person who is interposed between a 'client' (or a group of clients), on the one hand, and a 'product supplier' on the other hand.*** *It is as well to have clarity on what is meant by those terms – which are also defined – before turning in more detail to the definition of an 'intermediary service'.* *[8] A 'product supplier' is a person who issues a 'financial product'. The Act contains a comprehensive list of 'financial products', which include shares, debentures, money-market instruments, insurance contracts, investment instruments, and the like. A 'client' means (to paraphrase that definition) a specific person or group of persons to whom a financial service is provided'.* *[9] With those definitions in mind an 'intermediary service' is defined to mean (with a reservation that is not now relevant) 'any act other than the furnishing of advice, performed by a person for or on behalf of a client or product supplier –* *a) the result of which is that a client may enter into, offers to enter into or enters into any transaction in respect of a financial product with a product supplier; or* *(b) with a view to –* *(i) buying, selling or otherwise dealing in (whether on a discretionary or nondiscretionary basis), managing, administering, keeping in safe custody, maintaining or*	***Currently all persons, other than the employees of a product supplier, who sells a financial product without advice are subject to the FAIS Act in that those persons are rendering an intermediary service. Where that activity is performed by a person on behalf of a FSP, the person must be appointed as representatives because the activity does not fall under the exclusions provided for in the definition of 'representative'. The intention of the proposed amendment is to ensure that all persons performing the same activity should be subject to the same requirements.*** ***It is not agreed that 'hard selling' will by definition result in the furnishing of advice. Although call centre operators may sell their product suppliers' products without giving advice they are all trained to sell products employing "hard selling" techniques and methods that include techniques to overcome client objections and to ensure a sale.*** ***It is further important to note that the FAIS Act does not only regulate advice. It also regulates the rendering of intermediary services that includes the activity of selling a financial product without advice.*** ***It is unclear how the proposed amendment will detract from consumer protection. As stated before, a consumer who buys a financial product, without advice, directly from a product supplier does not have the same the protection and recourse as a person who buys the exact same product but through an intermediary. The purpose of the amendment and the advantage for consumers should the amendment be adopted is clear.*** ***The following must be noted as regards the unintended***

		servicing a financial product purchased by a client from a product supplier or in which the client has invested; *(ii) collecting or accounting for premiums or other moneys payable by the client to a product supplier in respect of a financial product; or* *(iii) receiving, submitting or processing the claims of a client against a product supplier in respect of a financial product……"* *[13] Sub-clause (a) of the definition of an intermediary service, properly construed, contemplates acts that directly result in the consequences referred to.* ***To construe it as including any act that indirectly has that result would lead to absurdities****. It contemplates a person who stands with a client (or clients) on the one side, and a supplier of financial products on the other side, acting as the 'go-between' to effect the relevant transactions. Quintessentially, that person is the asset manager, who is mandated to act on behalf of the Fund. As for sub-clause (b), it contemplates a person who manages or administers the relevant financial products.* *[14] None of the services TriStar undertook to provide falls foul of those provisions. Initially they were to compile and convey the appropriate mandates and instructions to the asset managers, and thereafter to take steps to ensure compliance with their mandates. It was not to bring about the relevant transactions – those would be brought about by the asset managers – nor was it to manage or administer the financial products. So far as it was to manage or administer anything at all, it was to manage and administer no more than the mandates of the asset managers.* *[15] In my view none of those constitutes 'intermediary services' on the ordinary meaning of the language of the definition. I can also see no reason – and none could be suggested – why the legislature would have thought it*	***consequences listed by the commentators:*** ***1. Most product suppliers are already authorised as FSPs;*** ***2. Not all persons will have to be appointed as representatives as some of the activities eg, those activities relating to administering, servicing, etc. might be rendered by persons who do not qualify as representatives as defined in the FAIS Act;*** ***3. An analysis of the 'particular law' under which a product supplier operates are presently required if the product supplier wishes to rely on the current exclusion in section 1(3)(b)(ii) of the FAIS Act – there is thus no additional burden;*** ***4. Only third parties that render financial services as defined in the FAIS Act will be subject to the Act - third parties who perform other services on behalf of product suppliers fall outside the ambit of the Act;*** ***5. Binder holders are currently subject to the FAIS Act as they are rendering intermediary services; and*** ***6. The intention is that all persons who render financial services must be subject to the FAIS Act in order to protect consumers and ensure no unequal treatment of persons performing the same activities.*** ***It is correct that the proposed amendment to the definition of intermediary services 'runs counter' to the ordinary meaning of "intermediary" as recorded in the Tristar matter. As previously stated, the proposed amendment changes the normal meaning of "intermediate" and assigns a specific meaning to the terminology. This will not lead to absurdities as the examples referred to in the Tristar matter was based on the interpretation of that***

		necessary for services of that kind to be regulated. In those circumstances TriStar was not required to be licensed to provide them, and the objection raised by the Fund ought to have been dismissed. The proposed amendment seeks to remove the words "…for or on behalf of a client or a product supplier…" in the introductory part of the definition, as well as the references to "product supplier" in paragraphs (a) and (b) thereof. This runs counter to the ordinary meaning of 'intermediary', as recorded in the Tristar matter. NT responded to this comment by stating that "the amendment changes the normal meaning of "intermediate". That, however, is not problematic as the Act assigns specific meaning to the terminology." In our view this approach will lead to absurdities. As pointed out by the SCA in the TriStar matter the current definition accords with the ordinary meaning of "intermediary" and was intended to regulate activities performed in respect of a financial product by someone who stands between the product supplier and the client, acting on either's behalf, and whose actions directly result in the consequences referred to in the definition. As pointed out by the Court an interpretation that it includes any action which may indirectly result in such consequences will lead to absurdities. Take for example, the situation where a taxi driver who regularly drives potential customers to the offices of a product supplier. In terms of the current definition such a person will not be rendering "intermediary services" because such a person is not interposing between the product supplier and the customer with regard to a financial product and the taxi driver's action will not directly result in the consequences envisaged. In terms of the proposed amendment, such person may well be regarded as rendering "intermediary services", as his/her "act" of driving the client to the offices of the product supplier may result in a situation that the client "may	***definition in its current form and more specifically whether "any act" performed by a person that may result in a client entering into a transaction could be interpreted to include any action which may indirectly result in a client entering into a transaction. The proposed amendment does not alter the requirement that there must be a direct nexus between the act and the result as contemplated in the definition. It merely removes the requirement that the act must be performed on behalf of a person.***

		enter into, offers to enter into or enters into any transaction in respect of a financial product…”. We also wish to point out that neither a client nor a product supplier can render intermediary services on behalf of itself. When a product supplier contracts with clients, it acts in its capacity as product supplier and is therefore not rendering intermediary services on its own behalf. As such it cannot be regarded as rendering intermediary services on behalf of itself nor on behalf of the client, because the client is the counterparty. To illustrate, if a customer purchases goods from the retailer, a transaction is concluded between the retailer and the customer. The retailer is acting as itself and not on behalf of itself. It is also not acting on behalf of the customer, because the customer is acting in its own capacity. Upon our reading of the proposed amendment of the definition it is intended that the retailer must be regarded as rendering intermediary services on behalf of itself when it contracts with clients, which is, with respect, absurd. It is submitted that it was never the intention of FAIS to regulate product suppliers when acting in its capacity as product suppliers.	
ASISA	Schedule 4 FAIS Paragraph 1*(h)*	National Treasury (“NT”) has released a response document to comments received. We remain concerned that their response does not adequately address the concerns raised in our comments. It is crucial that customers, to whom financial services are rendered, enjoy the protection offered by FAIS and we appreciate the urgency in addressing loopholes in the current definitions. However, we remain concerned about the implications of unintended consequences, and we don’t think that the proposed amendments will bring about the intended result. As per our previous comments, unintended consequences	***Comment noted, however our previous response on this issue remains.***

		may significantly impact on the industry without affording a corresponding benefit to customers. For example, all product suppliers will have to register as FSP's. The reason we say this is because all the activities listed in the proposed definition of intermediary services (managing, administering, keeping in safe custody, maintaining or servicing, collecting of or accounting for premiums, and receiving, submitting, processing or settling of claims) are inherent or incidental to their business as a product supplier. The new section 45(1A) will only assist product suppliers insofar as they collect or account for premiums or deal with claims that are regulated by other legislation. The rest of the activities will now fall within the definition of intermediary services. NT made the comment that most product suppliers are already authorized as FSP's. That may well be the case, but there are many instances where product suppliers are not performing financial services and hence are not authorized FSP's, nor does it mean that ALL product suppliers should be subject to FAIS. It will have major cost implications to those product suppliers who are not currently FSP's, for example license fees, and additional resources to be appointed as registered FAIS compliance officers and key individuals. Although the proposed amendment to the definition of intermediary services will bring the activities of the employees of product suppliers in scope, they may very well not have to be fit and proper because they fall outside the definition of "representative". Put differently, for purposes of this discussion, only representatives have to meet prescribed fit and proper criteria. The statement by NT that the call centre agent / employee will be representatives because the activity does not fall under the exclusions provided for in the definition of a representative, can only hold true to the extent that the	

		activities are of a clerical, technical, administrative, legal, accounting or other service in a subsidiary or subordinate capacity, which service does not require judgment on the part of the latter person; or does not lead a client to any specific transaction in respect of a financial product in response to general enquiries. Each instance of "hard selling" will have to be judged on its own merits and will depend on the circumstances involved. Hence the removal of the words "on behalf of a product supplier or client" will not necessarily result in employees of product suppliers being regulated.	
ASISA	General: Consumer protection	**Consumer Protection** Whilst we fully support the protection of financial customers and also fully agree that all persons who render financial services to consumers must be adequately regulated, we do not agree that product suppliers, when selling their products to clients without the intermediation of an FSP, are currently excluded from FAIS. One of the examples provided by NT in support of their contention that the definition needs to be amended in order to protect consumers, is that of call centers operated by employees of product suppliers who are "hard selling" products. NT stated in their response that these employees presently do not have to comply with the requirements of FAIS, which includes, inter alia, requirements relating to honesty and integrity, competency, conflicts of interest and conduct. It is also stated that clients, when dealing directly with product suppliers, are not afforded the protection of FAIS, as would have been the case if they had interacted through an intermediary. For the reasons set out below we do not agree with these statements. FAIS provides that "...any recommendation, guidance or proposal of a financial nature furnished , by any means or	***See above***

		medium….” constitutes “advice” , which is subject to the provisions of FAIS, irrespective of whether the activity is performed by persons employed or mandated by a product supplier, or by a Financial Services Provider (FSP). Put differently, if a product supplier elects to market and sell its products directly to customers through call center consultants employed or mandated by it and such selling involves a recommendation, guidance or proposal, it will be regarded as “advice” and the consultant concerned will therefore have to be registered as a “representative” and comply with the fit and proper requirements. Call center consultants are often employed by product suppliers in order to provide consumers with “factual advice”, which is expressly excluded from the ambit of “advice” by subsection 1(3)(a) of FAIS. (Please refer to sub-section 1(3)(a) of FAIS where it is stated that “advice” expressly excludes “factual advice “ given in respect of “…the procedure for entering into a transaction ;…description of a financial product;…answer to routine administrative queries…;.objective information about a particular financial product…”.) It is submitted that such “factual advice” clearly does not amount to ‘hard selling’. However, rendering the services envisaged in section 1(3), i.e. activities excluded from advice, does by its very nature entail that the person doing so on behalf of the product supplier, will have to provide factually correct information and should the person fail to do so, the consumer concerned will have all the common law remedies available to the victim of a misrepresentation, including the right to resile from any agreement concluded by him/her as a result of such misrepresentation. We respectfully submit that there is therefore no need for any specific fit and proper regulations to be imposed on	

		employees who are simply providing factual information and is not providing advice. It is furthermore submitted that "hard selling" must by definition involve some recommendation, guidance or proposal with regard to the financial product being marketed and does therefore constitute "advice" as defined in FAIS. A product supplier which employs or mandates persons in its call center to "hard sell" its products to consumers is therefore presently already subject to FAIS and will have to register such persons as representatives (with all the entailing fit & proper, honesty and integrity, and other requirements that goes with that). In their response NT refers to the unequal treatment of persons performing the same activity, e.g. an independent intermediary must comply with FAIS and meet competency requirements when selling financial products, while employees of product suppliers performing the same activity do not have to meet such requirements. We also do not agree with this statement. It is the activity concerned that dictates whether the fit and proper requirements prescribed by FAIS applies or not. Should a product supplier employ the services of a third party to render "financial services" on its behalf, such third party will either have to be licensed as a FSP or appointed as a representative and will therefore also be subject to the same provisions of FAIS with regard to representatives. It is to be noted that whilst the key individual of an external FSP / call center must, inter alia, meet fit and proper requirements, the call center agents will only have to meet the fit and proper requirements if they qualify as representatives of the FSP. They are therefore in exactly the same position as employees of product suppliers who are not regarded as representatives	

		in terms of the relevant definition. They also do not have to be fit and proper if they are only providing factual information. As such, it is unclear on which basis the allegations are made that external center agents are subject to fit and proper regulation, while their internal product supplier employee counterparts are not. NT also referred to the situation where complicated derivative instruments are being sold to clients "without the protection of FAIS", as these products are mainly being sold by the issuers of the instruments. They state that the growth and proliferation of the Internet has caused an increase of derivative instruments being offered and sold to retail clients and that issuers increasingly reach potential clients from all walks of life through the internet. We point out that FAIS does not provide that any person who wish to purchase or invest in a financial product may not do so before he/she/it has obtained "advice". It only stipulates who may provide "advice" in respect of such product and how such "advice" must be furnished. It is furthermore clear that FAIS does not prohibit product suppliers from advertising their products and from providing "factual information" in respect thereof. In our view, should a product supplier sell derivatives to a customer electing not to obtain advice, the persons employed to provide such a customer with "factual information" about the product in question ought not to be subjected to fit and proper requirements. In addition, it is submitted that the proposed changes under the FSB Retail Distribution Review limiting the type of products which may be sold on an execution only basis should in any event address these concerns. The proposed amendment is therefore not going to add to the protection currently afforded to consumers in terms of FAIS and it is accordingly not clear how the proposed amendments will be in the interest of clients.	

		Unintended consequences In our view the proposed amendment will have a whole number of consequences (several possibly unforeseen), which will have a significant impact on the financial services industry without, for the reasons set out above, a corresponding (or any material) benefit to clients. 1.All product suppliers will have to register as an FSP One of the consequences of the proposed amendment is that every product supplier will have to be registered as an FSP under FAIS by virtue of the fact that by performing functions which are inherent or incidental to their business as a product supplier, they will now be seen to be rendering intermediary services (under the new proposed definition). According to NT the proposed amendment aims to clarify that where a product supplier performs an activity set out under the definition of "intermediary services" through its employees, such product supplier must be licensed under FAIS and its employees must be registered as "representatives" unless the exclusion referred to in the proposed amendment to section 45 applies (our emphasis). It must be noted that it is being proposed that sub-section 1(3)(b) of the FAIS (which provides for the exclusion of certain activities from the definition - more specifically an intermediary service rendered by a product supplier who is authorised under a particular law to conduct business as a financial institution and where the rendering of such service is regulated by such law) be deleted and that section 45 be amended by the insertion of the following subsection after sub-section 1: *''(1A) The provisions of this Act do not apply to the—* *(a) performing of the activities referred to in paragraph (b)(ii) and (iii) of the definition of ''intermediary service'' by*	

		a product supplier— *(i) who is authorised under a particular law to conduct business as a financial institution; and* *(ii) where the rendering of such service is regulated under such law; and* *(b) rendering of financial services by a manager as defined in section 1 of the Collective Investment Schemes Control Act, 2002, to the extent that the rendering of financial services is regulated under that Act.* *(1B) The exemption referred to in—* *(a) subsection (1A)(a) does not apply to a person to whom the product supplier has delegated or outsourced the activity, or any part of the activity, contemplated in paragraph (a) and where the person is not an employee of the product supplier; and* *(b) subsection (1A)(b) does not apply to an authorised agent as defined in section 1 of the Collective Investment Schemes Control Act, 2002.''.* This means that the activities in sub-paragraph (b)(i) of the current definition of intermediary services will therefore no longer be excluded. These include: "*(i) buying, selling or otherwise dealing in (whether on a discretionary or nondiscretionary basis), <u>managing, administering, keeping in safe custody, maintaining or servicing a financial product purchased by a client</u> from a product supplier or in which the client has invested;*" The majority of these activities are activities which are incidental to the day to day activities of a product supplier and the proposed amendments will therefore result in a situation that every product supplier will also have to apply to for a FAIS license and will have to appoint a key individual(s) (who will have to meet the fit and proper	

		requirements prescribed in respect of the relevant financial product/s) in order to conduct its business as a product supplier. Put differently, in terms of the proposed amendment any product supplier who contracts with a client, receives money from the client in respect of the relevant financial product (which it has to do in order to give effect to the agreement), manages and administers its own financial product (which it is bound to do in accordance with the various financial sector laws applicable to product suppliers), will now also have to be licensed in terms of FAIS, Furthermore, as regards the activities listed in sub-paragraphs (ii) and (iii) , there will first have to be a proper analysis of the provisions of the particular law under which a product supplier operates before it can be concluded that the product supplier has been rendering a financial service. The costs incidental to such a licence as well as those incidental to complying with the relevant provisions of FAIS, will eventually be passed on to the consumer. We do not believe that it was ever the intention to subject all product suppliers to the provisions of FAIS. 2.<u>Third parties to register as FSP's</u> A further concern is that any third party rendering a service on behalf of an FSP, such as the so-called "Independent contractors" who refer clients to the FSP for purposes of obtaining financial advice (e.g. attorneys dealing in Road Accident Fund cases), will now apparently also have to be licenced and comply with the fit and proper requirements. It is our view that such a dispensation, which is bound to lead to a cessation of such referral, can never be in the interest of clients.	

		Another potential conundrum is the situation where product suppliers advertise their products in newspapers, magazines, chain stores or on TV and clients who wish to purchase same can either send in the relevant form provided or phone a call center. Whilst such activities will most probably not be regarded as constituting "advice", by virtue of the provisions of sub-section 1(3)(a) of FAIS (activities expressly excluded from the ambit of advice), and will presently also not constitute intermediary service by virtue of the provisions of sub-section 1(3)(b) thereof, the questions *inter alia* posed in terms of the proposed amendments is whether the newspaper, magazine, etc. concerned will now also have to be licensed (as the publishing of such an advertisement may result in a client entering into a transaction in respect of a financial product). This in turn begs the question as to which of the employees of the third party concerned (newspaper, etc.) or the product supplier concerned will have to be registered as a representative (because it can be argued that their action will "lead the client into a specific transaction in respect of a financial product")? 3. <u>Binder holders to be licensed as FSP's</u> In view of the wording of sub-paragraphs (b) (i)(ii) and (iii), read with the provisions of section 49A of the LTIA, many "binder holders" will now also have to be licensed as FSP's and appoint a key individual, unless they are a product supplier as defined in FAIS. 4. <u>Services rendered on behalf of discretionary and administrative FSP's</u> Persons or institutions rendering any of the services covered under the definition of intermediary services on behalf of a discretionary and administrative FSP's will now also have to	

		be licensed, as the limitation incidental to the words "for or on behalf of a client or product supplier" will no longer have application.	
ASISA	Schedule 4 FAIS Debarment section 14(4)*(d)*	As regards subclause 14(4)*(d)* we have previously recommended that the time period within which to notify the Authority be changed from five days to fifteen days which will align to the time period under the current regime. In this regard our previous submissions provided context of the debarment processes within large organizations where there are various role players involved and that the same complexities were relevant even after the imposition of a debarment. The activities and time involved after a decision to debar has been made is of such nature that it requires a reasonable period within which to finally submit the notification to the regulator in the form and manner prescribed. It follows that it is not the submission itself that takes time but the process involving the preparation of the documentation and information in order to meet the "*form and manner*" in which this must be submitted i.e. as prescribed by the regulator for example, the minutes of the hearing, forensic report, employment contract and, amongst others, the completion of the prescribed form that contains a number of information fields that must internally be sourced from various stakeholders in order to complete these forms. Apart from the FSPs various internal departments and role players that may be involved in providing the required information and documentation, other time consuming activities include the collation, extrapolation of information and the completion of various documents which include the form currently prescribed by the FSB. Accordingly, we believe that the proposed reduction of the notice period from 15 to 5 days will result in FSPs not being able to meet the notification deadline in many instances and may further result in the piecemeal transmission of information and	***Propose including a 5 day period for the provider to notify the regulator of a debarment, with a 15 day period for submission of supporting information required by the regulator regarding the debarment***

		documentation to the regulator which, in turn, will cause unnecessary administration on the part of both the regulator and the FSP concerned. Whilst we fully agree that it would be ideal for all debarment notifications to reach the regulator without delay, the reality is that sufficient and reasonable time is required to prepare all the information documentation necessary for the notification. Experience has shown that the submission of notifications, even within the current 15 day period, has been an issue which has resulted in the publication by the FSB of FAIS Circular 8/2011 wherein concerns were expressed that debarment notifications were being submitted late. To significantly reduce the notification period further, will most likely result in many more FSPs not being able to submit their debarment notifications timeously. In the light of the above we respectfully request that serious consideration be given to maintaining the current period of 15 days within which FSPs must inform the Authority of debarments.	
ASISA	s10 FAIS s14(3)	Where a decision is made not to debar, It would also serve no purpose to inform such person of the appeal procedures. Refer to proposed rewording of the relevant provisions under s14(3)*(b)* and *(c)*(i). It is clear from s14(3)*(a)*(i) that written notification of the intention to debar and a notification of the decision to debar in terms of s14(3)*(c)*, is required. Clarification is required as to the exact nature or evidence needed to meet the notification requirement. In reality, and due to circumstances beyond the control of the FSP (for example where the FSP is unable to establish the whereabouts of the representative), there will be many instances where it will not be possible to notify the representative.	***This comment is noted. The proposed revision submitted would not address the concern. Notice of the decision should be provided, whether the decision is to debar or not. In practice, if a decision is made not to debar a person, such a decision would not be challenged, even if there happened to be a failure to advise of a right to appeal in that instance.*** ***Consideration has been given to the concern of notification of a representative whose whereabouts is not able to be determined, and revisions are proposed to address this concern.***

		In these instances, and given the pre-emptory nature of 14(3) i.e. "a financial services provider **must**", the FSP will ostensibly remain in breach in perpetuity and until such time as the whereabouts of the representative has been established and notification has taken place. It is this impasse that also highlights a significant gap in the process where such a representative could join another FSP without the knowledge of the FSP or the FSB. This situation will clearly undermine the objectives of the debarment provisions. Perhaps this impasse could be addressed by adding a provision whereby FSPs will be obliged to notify the FSB of its inability to comply with the notification requirements after unsuccessful attempts to either locate the whereabouts of the representative and/or to effect service of the notification. See suggested changes to the introductory clause and the addition of subparagraph *(d)* which is to be read with the suggested changes under s14(5). In the current s14A regime where the FSB is unable to serve their notice of intention to debar, they "record list" the representative which means that the representative will not be able to be registered as a representative of any other FSP until the pending investigation/debarment proceedings have been resolved. We submit that the FSB employ the same practice upon notification by a FSP as per the suggestions made above i.e. insertion of subparagraph *(d)*. In this regard the FSB may also want to consider provisions which will clearly set out what will be expected of FSPs in terms of the process and what role the Authority will play in such cases e.g. take over the matter and consider debarment in terms of s145. As regards the further changes being made to s14(3)*(c)*(iii), (iv) and (v) pertaining to appeals/reviews, it is not clear what the duties and powers of the "internal appeal proceedings" would entail and what the formal requirements will be. For	

		example, whether such powers of the internal appeal mechanism established by the Authority include reviewing both the merits and procedures followed by the debarring FSP and/or involve a complete and separate investigation and/or whether such powers include the setting aside of the debarment imposed by the FSP. It is not clear what the implications of upholding an appeal would be and how this would relate or impact the previously terminated underlying contractual relationship (employment or mandate contract) between the debarring FSP and the debarred representative. In this regard there could potentially also be legal arbitrage between these provisions and labour law i.e. CCMA proceedings where a representative was dismissed and debarred by its FSP employer. Further clarity is sought as to the scope and powers of such an appeal mechanism.	***The provision is being revised such that there would not be an internal appeal mechanism, appeals would be considered by the Tribunal.***
ASISA	s10 FAIS s14(4)	As regards s14(1)*(d)* we have previously recommended that the time period within which to notify the Authority be changed from five days to fifteen days. In some larger FSPs, the debarment process forms part of the industrial relations hearing which may take place at a decentralised level (in branches across the country) and which process may involve various role-players at the hearing such as the forensic team, management representatives, or the Chair at such hearing as well as local branch staff including secretaries that may perform certain administrative functions related to the industrial relations and debarment proceedings. The mere collation of all the evidence used in such hearings, the time taken to transcribe minutes of the hearing and also making copies of the entire record, all takes time; not to mention the time required to post or courier documentation (often voluminous evidence packs) to other departments and staff members in different locations where these staff	***Disagree, the period referred to does not refer to the hearing and consideration of the matter must take place within a specified matter. The period referred to is the period, after the decision has been taken, in which the Authority must be notified of the decision that has been taken to debar. It is essential that the Authority is very timeously notified of the debarment.***

		members may be tasked with preparing the documents, completing the form prescribed by the Authority and dispatching the final and complete set of documents to the Authority. In light of the above we believe it would be unreasonable to expect notification to be made within five days of the debarment and recommend that a fifteen day period should be allowed	
ASISA	s10 FAIS s14(5)	The provisions relating to the three month period remain ambiguous. For ease of reference National Treasury's response is quoted below: "*A three month period within which to begin a process of debarment is considered sufficient, once the reason for debarment becomes known.* *In those instances where it is impossible due to no fault of the provider to complete the investigation within the three month period, the matter can be referred to the regulator once the investigation has been finalised, for consideration of debarment by the regulator.*" With reference to the first paragraph, the three month period is used in the context of an obligation on the FSP to "**begin** a process" as opposed to the second paragraph where it is used in the context that the FSP must "**complete**" the investigation within the three month period and inform the FSB where they are unable to complete their investigation. Experience has shown that while a financial services provider ("FSP") may suspect the existence of reasons for a person to be debarred, the available evidence may be inadequate or insufficient for a debarment procedure to be commenced without undue delay. Hence the need for forensic investigations to be pursued, often with ex-representatives being either obstructive or totally un-cooperative. Forensic investigations often take longer than	***The period referred to means that a process to debar must be commenced not longer than three months after the FSP became aware that there were reasons for the person potentially to be debarred. Three months is a sufficient period to allow for the process to be commenced. There needs to be an onus on an FSP to promptly investigate a matter when there may be a reason to debar a representative. It does not require that the process of determining whether or not the person should be debarred must be completed within that three month period.***

		three months for sufficient information to be obtained before debarment proceedings can be commenced, given that one is dealing with representatives who are no longer attached to the FSP. The fact remains that it will be impossible to complete all investigations within the three months period and to suggest that the Authority will consider debarment in cases where it is "impossible" for the FSP to complete an investigation is confusing and not aligned or in accordance with the proposed provisions as they stand. A distinction is also to be made between instances where the FSP is unable to fully investigate the matter within the three month period or unable to effect the debarment due to, for example, the inability to serve the notice of debarment. In any event, we believe it would be unreasonable to expect or prescribe a standard three month time period within which to complete the entire process; irrespective whether the representative had left the employ of the FSP or not. It is simply an unrealistic expectation to prescribe a specific period considering the following aspects: • Nature, scale, complexity and circumstance of each case differ. In this regard it must also be kept in mind that s14(3)*(a)*(i) provides that the FSP is required to provide "adequate notice" to the representative of the FSP's intention to debar. • Gathering of evidence is dependent on numerous factors such as the availability and co-operation of various witnesses including handwriting experts. Also see comments under the "General" section above regarding the lack of investigative powers of FSPs who are unable to compel individuals to provide or produce information/documentation. • Often the residential, postal or contact details of the	

		resigned representatives are unknown and difficult to establish. In the context of the notification provisions under ss14(3)*(a)*(i) and *(c)*, the process will inevitably be delayed where the whereabouts of the representative is not known and where such notifications cannot be served. The FSB is well aware of these difficulties where they are unable to effect a debarment under the current s14A provisions i.e. where they were unable to serve their intention to debar an individual. Unintended consequences of these provisions as currently formulated may lead to situations where FSPs, in order to avoid possible non-conformance of not being able to fully complete an investigation and effecting the debarment within the prescribed three month period, will simply review the whatever evidence is available at that stage, however incomplete, which in turn, may result in a decision not to impose debarment for lack of evidence where the decision may have been different had there been more evidence available after the investigation could be properly completed. It is therefore strongly recommended that consideration be given to amend the provision as per the proposed wording: "***14*** *(5) A debarment in terms of subsection (1) that is proposed to be undertaken ~~in respect of a person who no longer is a representative of the financial services provider,~~ must be commenced without undue delay from the date of the financial services provider becoming aware of the reasons for debarment, and must, within three months from such date request the Authority to consider debarment under section 145, where the provider is unable to complete its investigation and or effect the debarment as contemplated under section14(3). ~~not longer than three months from that date.~~*" Also refer to comments relating to "effecting" the debarment where notification is not possible; either in terms of	

		s14(3)*(a)*(i) or *(c)*. Alternatively, at least consider extending the period from three months to six months.	

FINANCIAL MARKETS ACT, 2012

Reviewer	Section	Issue	Response
BASA	**"central counterparty"** and **"clearing house"**	We are supportive of the distinction between a central counterparty and a clearing house, however the distinction raises questions of application of the law in respect of the functions and the licencing requirements of the two types of market infrastructures: The functions of a central counterparty are not specifically defined; however this can be inferred from the definitions of "**clear**" and "**central counterparty**". It is clear that a central counterparty must be an independent clearing house, but it does not necessarily follow that a clearing house may not perform all the functions of a central counterparty. Consequently, a reference to a clearing house in the FMA cannot be read as a reference to a central counterparty. The consequential amendments to Section 47(3)*(c)*(v) and 47(4)*(b)*(ii) of the FMA imply that a juristic person that performs the functions of a central counterparty does not necessarily need to be licensed as both an independent clearing house and a central counterparty, i.e. it can be licenced as a central counterparty only. Consistent consequential amendments have not been made to relevant provisions in Sections 47, 48 and 50. (See specific comments below).	***Comments have been noted. The functions of a central counterparty are specified in sections 50(3) and (3A), and are in addition to what is required of an independent clearing house. A central counterparty is a category of a clearing house and must fulfil all the requirements pertaining to a clearing house, including being licensed as such. The CCP licence would be an extension of the independent clearing house licence.*** ***What is envisaged going forward is that a CCP must be an independent clearing house and for clarity, Treasury proposes that amendments specify that a central counterparty must be licensed as both an independent clearing house and a central counterparty by 1 January 2022, to allow for a sufficient transitional period to accommodate the status quo. Please refer to Schedule 4 of the FSR Bill.***
JSE	**"registrar"**	The definition "**registrar**" should be deleted, as "**Authority**" is defined; retaining the definition would cause confusion as	

		the wholesale amendment replacing the term "registrar" with Authority would result in two definitions for "Authority".	
JSE	Licensing of CCPs	**Licensing of CCPs under the Bill** JSE Clear (previously known as Safex Clearing Company or SAFCOM) has (since its inception in September 1998) been a clearing house for the South African Futures Exchange ("**Safex**"). In 2001, Safex was purchased by the JSE and has been operating as an "*associated clearing house*" since then. It is an associated clearing house because it acts as a clearing house in accordance with the JSE's Rules and in terms of the clearing agreements concluded between JSE Clear and the clearing members of the JSE. SAFCOM also historically performed the function of a central counterparty for Safex. A central counterparty is a clearing house that is positioned between counterparties to contracts traded in one or more financial markets. This structure insulates market counterparties from one another's default. This is evidenced as far back as 1988 when rule 8.3.2 of Safex's original rule book stated that: "*upon a trade being cleared, by novation the clearing house shall replace the buyer and become the counterparty to the seller and it shall replace the seller and become the counterparty to the buyer.*" The above wording remains unchanged and is the wording currently used in section 8.30.2 of the latest version of the JSE's Derivatives Rules. The current version of the Financial Markets Act, 19 of 2012 (the "**FM Act**") defines a "*clearing house*" as: "*a person who constitutes, maintains and provides an infrastructure to clear transactions in securities.*" The current FM Act also defines an "*associated clearing house*" as:	***Transitional concerns have been noted and Treasury had always proposed to allow for a five-year phase in period in order to minimise disruption to the markets.*** ***For clarity, Treasury is proposing to amend the definition of "central counterparty" and to strengthen wording in section 47 of the Act to allow for a sufficient transitional period to accommodate the status quo. This means that until 31 December 2021, a licensed associated clearing house that is performing the functions of a central counterparty may be allowed to continue to operate as such in terms of the licence obligations applicable to it at the time of commencement for a transitional period. See proposed revisions in the Bill.*** ***It should also 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 attach to the specific systemic functions of a 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 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 law, and on this matter Treasury has had to make policy decisions that place a high priority on objectives that support financial stability and other public interest considerations. CCPs are systemic***

		"*a clearing house that clears transactions in securities on behalf of one or more exchanges in accordance with the rules of the relevant exchange and that does not approve or regulate clearing members*" The current FM Act recognises "*independent clearing houses*" that clear transactions in securities on behalf of any person, and authorises and supervises its clearing members in accordance with its clearing house rules. JSE Clear does not qualify as an independent clearing house under the current Act because it does not authorise or supervise its clearing members in accordance with its own clearing house rules. The associated clearing house model used by Safex and SAFCOM, and subsequently, JSE Clear and the JSE was necessitated by the provisions of the Securities Services Act, 36 of 2004 and its predecessor, the Financial Markets Control Act, 55 of 1989 which excluded clearing houses from being classified as self-regulatory organisations. The Securities Services Act defined a "*self-regulatory organisation*" as "*an exchange or a central securities depository*". This classification 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, 24 of 1936 (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 JSE Clear were subject to the protection afforded by the provisions of section 35A of the Insolvency Act. The associated clearing house model is therefore recognised and permitted under the provisions of the current FM Act and JSE Clear has the status of a licensed associated clearing	***institutions (super-SIFIs) given interconnectedness with other SIFIs, and because 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. Over and above international recognition, the reforms are intended to safeguard the financial system, and ensure that financial markets are safe and efficient, and contribute to economic growth and promote the competitiveness of the South African financial markets.***

		house under the current regime. **Central counterparties under the FSR Bill** The FSR Bill proposes numerous amendments to the FM Act. Although it retains the definition of, and references to, an "*associated clearing house*", it introduces a new definition of "*central counterparty*" that excludes "*associated clearing houses*". Under the Bill, a "*central counterparty*" is defined as: " *an independent clearing house that-* *(a) interposes itself between counterparties to transactions in securities, 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 through novation, an open offer system or through a legally binding agreement*." An "*independent clearing house*" is defined as: "*a clearing house that clears transactions in securities on behalf of any person in accordance with its clearing house rules, and authorises and supervises its clearing members in accordance with its clearing house rules.*" As set out above, JSE Clear does not currently qualify as an "*independent clearing house*" because it does not authorise or supervise its clearing members in accordance with its own clearing house rules. As a result of the manner in which a central counterparty has been defined in the Bill, JSE Clear will also not qualify as a central counterparty because it does not qualify as an independent clearing house. This has serious ramifications for JSE Clear. If JSE Clear no longer qualifies as a central counterparty under the FM Act,	

		and hence South African law, it will not be able to meet the first requirement for international recognition as a central counterparty. Moreover, because of JSE Clear's current status as a qualifying central counterparty, all market participants that conclude transactions in securities cleared by JSE Clear qualify for capital relief in accordance with the Basel III principles. If JSE Clear no longer qualifies as a central counterparty because of the particular way in which that term has been defined in the proposed amendments to the FM Act these market participants' capital relief will fall away and with it there will be significant disruption to South African markets with the potential result of systemic risk to the South African economy. In addition if JSE Clear ceases to qualify as a central counterparty as a consequence of the FM Act being amended as is currently envisaged, it may lose its status as a central counterparty recognised and accredited by the Committee on Payment and Settlement Systems ("**CPSS**") of the International Organisation of Securities Commissions Organisation ("**IOSCO**") and many market participants will have no choice but to withdraw from the South African derivatives market. This will invariably result in a massive loss of liquidity in this markets which will again impact negatively on and compromise the integrity of the South African financial markets as a whole. Chapter V of the FM Act deals with clearing houses. Under the current FM Act, all clearing houses, both independent and associated, have to be licenced under section 49. Under section 50 of the current Act the functions of licenced clearing houses are set out. The Bill proposes far reaching amendments to this chapter of the Act. It provides not only that clearing houses must be licenced but also that central counterparties must be licensed. It also defines the functions that a central counterparty may	

		perform. These will be introduced in the new section 50(3A). Under this new subsection, a licensed central counterparty, in addition to other functions set out in the section, must: 1. interpose itself between counterparties to transactions in securities through the process of novation, legally binding agreement or open offer system; 2. manage and process the transactions between the execution and fulfilment of legal obligations between counterparties and clients; and 3. facilitate its post-trade management functions. JSE Clear (through the provisions of the JSE's Derivatives Rules) currently performs all of these functions as an associated clearing house and central counterparty. It will therefore face an intractable problem if the Bill is enacted in its current form. Simply put, JSE Clear, as an associated clearing house, does not qualify as an independent clearing house. However, the Bill seeks to define a central counterparty in terms that recognise only independent clearing houses as central counterparties. Thus, despite the fact that JSE Clear currently performs the functions of a central counterparty, when the Bill takes effect, it will be precluded from performing the functions of a central counterparty because it will not fall within the new statutory definition of a central counterparty. This problem arises from the particular manner in which the Bill proposes to define a central counterparty. The JSE has previously made representations on earlier versions of the Bill and the Proposed Regulations that preceded it to explain that it does not make sense to define a central counterparty in terms that recognise only independent clearing houses performing the functions of a central counterparty. The definition of a central counterparty should be neutral as between types of clearing houses.	

		If the definition of a central clearing house is therefore amended to be neutral as between associated clearing houses and independent clearing houses, the problems faced by JSE Clear would be avoided. Alternatively, if the definition proposed in the Bill is to be retained then it will be necessary for JSE Clear to meet all of the criteria to be licensed as a central counterparty. In order to be licensed as a central counterparty, JSE Clear will need to transform itself into an independent clearing house and then apply for a licence as a central counterparty. To apply for this licence, JSE Clear will need to comply with the following requirements: 1. provide proposed clearing house rules – section 47(3)*(c)*(v) of the FM Act (as amended by the FSR Bill) 2. implement a margin system that establishes margin levels commensurate with the risks and particular attributes of each product, portfolio and market it serves – section 48(1A)*(a)* of the FM Act (as amended by the FSR Bill) 3. collect and manage collateral held for the due performance of the obligations of clearing members or clients of clearing members – section 48(1A)*(b)* of the FM Act (as amended by the FSR Bill); 4. establish and maintain a default fund to mitigate the risk should there be a default by a clearing member and to ensure, where possible, that the obligations of that clearing member continues to be fulfilled – section 48(1A)*(c)* of the FM Act (as amended by the FSR Bill) 5. supply initial capital as prescribed, including the appropriate buffer – section 48(1A)*(d)* of the FM Act (as amended by the FSR Bill) 6. have a clearly defined waterfall where the obligations of the defaulting clearing member, other clearing members and the central counterparty are legally and clearly	

		managed – section 48(1A)*(e)* of the FM Act (as amended by the FSR Bill); 7. provide for portability in the case of default of a clearing members – section 48(1A)*(f)* of the FM Act (as amended by the FSR Bill); and 8. provide the necessary infrastructure, resources and governance to facilitate its post trade management function, and in the event of one or more of the clearing members: 8.1. ensure sufficient risk policies, procedures and processes; and 8.2. have sound internal controls for robust transaction processing and management – section 48(1A)*(g)* of the FM Act (as amended by the FSR Bill). Complying with these requirements will require various structures to be put in place, documentation to be drafted and/or amended, and other transitional arrangements (including capital arrangements) to be made. JSE Clear cannot do so overnight and therefore requires a reasonable period of time within which to put these structures and arrangements in place. It appears that the Bill contemplates the need for a delayed implementation of the licencing for central counterparties. It proposes to introduce a new subsection in section 110. The new subsection (6) reads as follows: "*With effect from a date prescribed by the Minister, a licensed clearing house performing the functions of a central counterparty must be licensed as a central counterparty under section 49 and comply with the requirements set out in this Act*". The provision appears to speak to the situation in which JSE Clear will find itself when the Bill is enacted. It will be performing the functions of a central counterparty but will not be able to be licensed as such until it can comply with the	

		new requirements. Section 110(6) therefore appears to contemplate a delayed implementation of this licensing requirement to permit the Minister to designate a future date by which parties performing the functions of a central counterparty must be licensed to do so. This delayed implementation of to the licensing obligation is not, however, reflected in section 47 of the FM Act itself where the obligation to be licensed is contained in the Act. It would therefore be preferable for a cross reference to section 110(6) to be inserted into section 47(1A). The current wording of that new section in the Bill reads as follows: "*Subject to the regulations prescribed by the Minister, a central counterparty must be licensed under section 49*" It is unclear what regulations the proviso is referring to. It would be preferable for this section to be worded as follows: "*Subject to section 110(6), a licensed clearing house performing the functions ~~of~~ ~~regulations prescribed by the Minister,~~ a central counterparty must be licensed as a central counterparty under section 49*." In order to make it clear that a licensed clearing house may continue lawfully to perform the functions of a central counterparty despite not being licensed as such, the JSE respectfully submits that it would be prudent to add a further subsection to section 110 to the effect that: "*notwithstanding any other provision of this Act, until the date prescribed by the Minister under subsection (6), a licensed clearing house may continue to perform the functions of a central counterparty despite not being licensed to do so.*" **Summary of the comment** For historical reasons, JSE Clear functions as an associated clearing house. In order to permit it to continue to perform its	

		important function as a central counterparty under the FM Act, either: • The definition of "*central counterparty*" should be amended to be neutral as between types of clearing houses; **OR** • Sections 57(1A) and 110 should be amended to make it clear that until a date prescribed by the Minister; an existing licensed clearing house may lawfully perform the functions of a central counterparty without being licensed as such.	
BASA	"**central counterparty**"	We are supportive of the policy that a central counterparty should be an independent clearing house and we welcome National Treasury's proposal for a period of five years, to minimise disruption to the financial system, for the existing licensed associated clearing house (JSE Clear) to transition to an independent clearing house. However, we are of the opinion that this amendment should explicitly provide for the five-year transition period.	***Agree, it is proposed that the wording in section 47 and 110 be strengthened, to provide that a clearing house performing the functions of a CCP may continue to do so, and allow for a sufficient transitional period to accommodate the status quo. See proposed revisions in the Bill.***
JSE	"**external central counterparty**"	**External central counterparties** The Bill also introduces a new definition of an "*external central counterparty*". This is: "*a foreign person who is authorised by a supervisory authority to perform a function or functions similar to one or more of the functions of a central counterparty as set out in this Act and who is subject to the laws of a country other than the Republic, which laws (a) establish a regulatory framework equivalent to that established by this Act; and (b) are supervised by a supervisory authority*". A supervisory authority is defined in the FM Act as "*a body designated in national legislation to supervise, regulate or enforce legislation or a similar body designated*	***Objections are noted. Clause 49B has been deleted, however the proposed framework is not intended to subject external market infrastructures to lesser regulatory standards. It is possible to defer to the other jurisdictions regulatory regimes without giving the global CCPs a regulatory advantage over local CCPs due to lower standards. It is important to recognise that global CCPs are already subject to extensive regulatory and supervisory oversight in the home jurisdictions.*** ***The vast majority of the South African OTC derivatives transactions are cross-border and inter-bank dominated, and most domestic banks are already clients of international banks who are clearing members of global CCPs and whose inter-bank transactions are***

		in the laws of a country other than the Republic to supervise, regulate or enforce legislation of that country". Chapter V of the FM Act will be amended by the Bill to introduce the concept of, and requirements for, the licensing of external counterparties. The proposed amendments will make it a requirement for external counterparties to be licensed under section 49A of the FM Act, unless they are exempted from having to be licensed under section 49B. Under section 49B, external counterparties may apply to the Authority to be exempted from the requirement to be licensed under section 49A. The Authority is then empowered (provided it has the concurrence of the Prudential Authority and the South African Reserve Bank) to grant such an exemption if four requirements are met: (a) The applicant is recognised under section 6A; (b) The applicant is subject to an appropriate regulatory and oversight regime in the foreign country by the relevant supervisory authorities; (c) The applicants agrees to co-operate and share certain information; and (d) The granting of the exemption will not compromise the objects of the Act. The objects of the FM Act are set out in section 2. They include ensuring that the South African financial markets are fair, efficient and transparent (section 2*(a)*) and reducing systemic risk (section 2*(d)*). The JSE respectfully submits that permitting an exemption from the requirements of licensing is in conflict with these objectives.	***subject to European and US clearing mandates. Treasury has always supported the view that the cross-border nature of financial markets necessitates an appropriate regulatory framework that promotes the efficiency and competitiveness of the South African financial markets without significantly undermining stability. Regulatory constraints however could severely undermine the ability of, and even disincentive, these global entities from providing clearing services to South Africa, and at the same time limit the ability of the market to manage and hedge out risk, given that domestic market participants are significantly exposed to global markets. Furthermore, South African market participants would be deprived of a significant source of liquidity.*** ***The proposed regime for equivalence, licensing and supervision of external CCPs is consistent with international jurisdictions to adopt cross-border frameworks, including Canada and Australia (see below).*** ***Licensing of external CCPs is dependent on a number of factors including that such market infrastructure are subject to equivalent regulatory standards in the home jurisdiction, and that appropriate regulatory and co-operation arrangements with foreign Authorities have been entered into by the South African Authorities. Authorities are required to assess the foreign regulatory framework, including the foreign jurisdiction's licensing requirements, rules, regulations and supervision, and must take into account international standards such as the CPSS-IOSCO Principles for Financial Market Infrastructures. The outcome of the applicable regulatory framework should be equivalent to that established by the relevant South***

		An exemption for external central counterparties introduces unfairness into the South African financial markets because it permits certain providers to be exempt from licensing requirements while they provide the same services as their local counterparts who are required to be licensed. It also has the potential to undermine financial stability and introduce systemic risk. It has been recognised in South Africa and abroad that in order to ensure financial stability system-wide risk needs to be managed through a macro-prudential regulatory approach. The regulatory approach needs to be of universal application in order to reduce the risk of regulatory arbitrage. If external central counterparties are exempted from the oversight of South African authorities, their regulation is effectively outsourced to foreign regulators. This denudes any oversight and or regulatory role that the South African authorities may wish to fulfil in respect of entities. In the event of an economic crisis, such as the one experienced in 2008, the consequences arising from this deficiency could be severe. South Africa was largely insulated from the recent financial crises as a result of the robust risk management policies of JSE Clear and the fact that, in terms of the JSE's rules, collateral and assets are segregated to client level. This in turn precludes the so called "re-hypothecation" of collateral and the co-mingling of assets of market participants. For example, client A has concluded a client agreement with authorised user (trading member) M. A posts R 100 000 margin to JSE Clear as collateral for the due performance of its obligations on the derivatives market. Member M is insolvent as a result of large trading losses but all its clients' margin and assets do not fall within its insolvent estate as a result of the segregation of client assets provided for in the	***African laws in respect of the regulatory objectives that they achieve.*** ***THE AUSTRIALIAN APPROACH*** ***Part 7.3 of the Australian Corporations Act of 2001 deals with the licensing of CS facilities (i.e. CCPs) in Australia. A CCP operating in Australia must be licensed in Australia, unless it has exempted from Part 7.3 of the Corporations Act from holding a CS facility licence in terms of section 820C. An overseas CCP operator may still be subject to ongoing obligations even after an exemption has been granted.*** *"820C Exemptions* *(1) The Minister may, by publishing a notice in the Gazette, exempt from the operation of this Part a particular clearing and settlement facility or type of clearing and settlement facility.* *(2) The Minister may, at any time, by publishing a notice in the Gazette:* *(a) impose conditions, or additional conditions, on an exemption; or* *(b) vary or revoke the conditions on an exemption; or* *(c) revoke an exemption.* *(3) However, the Minister may only take action under subsection (2) after:* *(a) giving notice, and an opportunity to make submissions on the proposed action, to the operator of each clearing and settlement facility known by the Minister to be covered by the exemption; and* *(b) if the exemption covers a type of clearing*

		JSE Rules. All the clients of M will be ported to another trading member, M's positions will be closed out but its clients' positions, assets and collateral will be unaffected. In addition hereto, all the collateral held is held in South Africa and JSE Clear will have immediate access to margin posted to ensure due performance of a defaulter's obligations. This will however not be the case in many international jurisdictions where "re-hypothecation" of collateral is permissible and where assets and collateral are not segregated down to client level. In these jurisdictions it is permissible that M may use A's R 100 000 as collateral for its own obligations (the R 100 000 will be "re-hypothecated"). M's default will also result in A's default and clients will not be protected and insulated from the default of trading member M. This will expose the South African financial markets to unknown and unlimited risks from jurisdictions over which the South African regulatory authorities have no control. It is therefore of critical importance that the South African authorities have direct and effective regulatory oversight over all central counterparties that conduct business in South Africa. The JSE recognises that the cross border nature of financial markets requires an appropriate supervisory and cooperative regulatory framework should external central counterparties wish to perform functions within South Africa. However removing the requirement of licensing is in the JSE's considered opinion not the appropriate way to achieve this co-operation. If external central counterparties are to fulfil the same duties and functions as local ones, fairness and the stability of the South African financial system requires that the South African authorities themselves regulate the business of these external entities and not abdicate that responsibility to foreign authorities. Regulatory oversight of all market infrastructures operating in South Africa is key to ensuring the stability of the South African financial system.	*and settlement facility—causing a notice to be published in a newspaper or newspapers circulating generally in each State and internal Territory allowing a reasonable time within which the operator of each facility covered by the exemption may make submissions on the proposed action.* *This subsection does not apply to the Minister imposing conditions when an exemption is made.*" ***These proposals are important to ensure level playing fields for global and domestic CCPs, minimise duplication and uncertainty, and reduce opportunities for regulatory arbitrage that would have severe consequences for financial stability and adversely impact the competitiveness of the South African financial markets. The proposed framework enables Authorities to consider applications on a case-by-case basis. For consistency and certainty, Treasury is proposing to amend the exemption provisions under section 6(3)(m).***

		It is a condition of the licences of local central counterparties that they fulfil certain duties prescribed under the FM Act (see sections 59(2) and (3)). Under the current FM Act, if a local central counterparty fails to fulfil its duties and responsibilities, the Registrar may directly assume responsibility for one or more of these functions and duties (see section 50(4) of the FM Act). Under the proposed amendment to the FM Act there will be no equivalent oversight role for the Registrar in relation to external central counterparties nor will the Registrar have the power to directly assume responsibility for the fulfilment of these important duties and functions. It may well be that an external central counterparty is subject to a similar regulatory regime in an international jurisdiction but if it is exempted under section 49B, the South African authorities will have no control over the external central counterparty's risk management methodologies. The authorities will not be able to prescribe the type of collateral and manner in which collateral is held nor will they be able to have immediate access to margin and other collateral held in a foreign jurisdiction in which the external central counterparty is domiciled. It is also unavoidable that assets and collateral that were earmarked to fulfil obligations in the South African markets will be tied up or used to fulfil other obligations as a result of an international crisis. Because such exemptions are inconsistent with two of the primary objects of the FM Act, it would, in the JSE's opinion, never be lawful for the Authority to grant an exemption under section 49B(3)*(d)*. On its own terms, that section requires an exemption to be granted only if it would not compromise the objects of the Act. However, permitting an exemption at all is inconsistent with the objects of fairness and ensuring financial stability. The introduction of an exemption regime that is inconsistent with the objects of the	

		FM Act and that could accordingly never permit a lawful exemption to be issued would be irrational. If the exemption provisions of section 49B are introduced into the FM Act they would be liable to challenge on the basis of irrationality. The JSE therefore submits that they should be deleted. Over and above the exemption provisions for external central counterparties, there is also an inconsistency introduced into the FM Act between the treatment of local and external central counterparties. In terms of the provisions of the FM Act, financial market infrastructures ("**FMIs**") fulfil licensed duties and functions (Section 10 – exchanges, section 30 CSDs and section 50 clearing houses). FMIs authorise users, clearing members and participants to provide securities services, as defined, in terms of the rules of the FMI and an integral part of the FMI's licensed duties and functions is the supervision and regulation of the securities services provided by these authorised participants. In terms of the general regulatory framework envisaged under the FM Act, it is not permissible for FMIs to provide securities services themselves, *inter alia* as a result of the insoluble conflicts of interests that it will cause if they do so. The proposed new section 49A(1) however states that an external central counterparty "*may provide securities services*". This is inconsistent with the provisions applicable to local FMIs.	
ASISA	s1*(d)* and *(j)* p.165	The definitions proposed in the Bill are also included in the draft Financial Markets Act Regulations published for comment by National Treasury on 5 June 2015. Having definitions for the same terms in both the Act and Regulations could lead to confusion. Since ASISA has commented on the definitions in the draft	***Noted and agree***

		Regulations, we propose those definitions are used and our comments in respect of those draft Regulations be taken into account. **Proposal:** The definitions are either contained in the Financial Markets Act or the Regulations, but not both.	
BASA	1A(9)*(a)*	Incorrect cross-reference and use of term "*code of conduct*" as amended in Section 74 (1): "*(9) For the purposes of the Financial Sector Regulation Act, the following are regulatory instruments:* *(a) Directives issued by the Authority under section* ~~6(4)(b)(i)~~6(4)(a)***;*** *and* *(b)* ~~*a code of*~~ *conduct standards in terms of section 74;*"	***Noted and agree***
BASA	4(1)*(e)*	With reference to the amendments to Section 4(1)*(e)*, it is unclear whether a person is permitted to act as a clearing member of a licensed external central counterparty and we propose the following amendment: "*(e) act as a clearing member unless authorised by a licensed exchange, a licensed independent clearing house, [or] a licensed* *central counterparty or a licensed external central* *counterparty, as the case may be;*"	***Noted and agree***
JSE	4(1)*(f)* & 76	**Approval of nominees** All nominees are approved under section 76 of the FMA so it is unclear why section 4(1)*(f)* of the FMA provides for an alternative means of approval under standards set by the regulators	***Noted and agreed.***
JSE	5(1)*(b)*	**Provision for the prescription by the Minister for the a market infrastructure as regulated person** Clarity is required regarding the intention of the amendment	***The intention is to allow for the Minister to be able to prescribe a type of market infrastructure not currently regulated under the Act. The provision is not to alter***

		to S5(1)(b): "*(b) a category of regulated persons, other than those specifically regulated under this Act, if the securities services <u>provided, and the functions and duties exercised</u>, whether in relation to listed or unlisted securities,* ***[provided]*** *by persons in such category, are not already regulated under this Act, and if, in the opinion of the Minister, it would further the objects of the Act in section 2 to regulate persons in such categories;* " In respect of section 5(1)*(b)* of the FMA, the JSE was concerned that the revised provision could be applied in practice to provide for the creation of new types of market infrastructures that are merely variations of the existing types of market infrastructures, but differently defined, with different functions and duties, and that this could be achieved through subordinate legislation rather than through establishing new policy in the principal legislation. For example, the Minister could in accordance with this section prescribe that a multilateral trading facility (MTF), which does not perform the same functions as an exchange, should be a regulated person. It is the view of the JSE that if such a proposal in respect of an MTF were to be advanced, rather than the prescription of the Minister, the establishment of a new policy and the following of the full legislative process would be necessary. This concern was discussed with National Treasury on 10 August 2016 and based on the discussion, the JSE understands that the revision to the provision was introduced to specifically provide for flexibility in regulating any market infrastructure currently not captured or contemplated under the FMA but whose activities could impact on the objects of the FMA, and would not apply to the functions and duties of existing market infrastructures such as exchanges, central securities depositories, clearing houses and trade repositories.	***the functions of existing market infrastructures, but to allow for flexibility for the Minister (as the policy maker) to deal with innovation in the financial markets.***

JSE	5(1)*(c)*	In respect of section 5(1)*(c)* of the FMA, the JSE notes that the inclusion of the phrase "*if such securities services, or functions and duties have not been prescribed by this Act*" completely changes the intention of the original provision in that it removes the power of the Minister to determine which services or functions provided for in the FMA an external person could be entitled to perform. This determination provided the licencing authority with the parameters within which it could grant licences to an external person as regards the securities services or functions and duties that the external person could perform. The JSE does not believe that it was the intention of the amendment to remove this determination. As a result of the proposed amendment, the Minister would only be entitled to prescribe those services or functions outside of those already prescribed in the Act which are performed by an external person and which would become subject to regulation. Consequently this amendment also renders section 5(2) meaningless as section 5(2) cross references section 5(1)*(c)* and it implies that an external authorised user, external exchange, external participant, external central securities depository, external clearing house, external central counterparty, external clearing member or external trade repository may **only** provide those securities services or exercise functions or duties that are not already provided for in the FMA but which are prescribed by the Minister.	
BASA	5(2)	Proposed amendment to align with the amendments to 5(1)*(c)* and ensure consistency of language, amend 5(2) as follows: "*5(2) An external authorised user, external exchange, external participant, external securities depository, external clearing house, external central counterparty, external*	***Agree. See proposed revisions in the Bill.***

		clearing member of external trade repository may only provide those securities services or exercise functions or duties, as the case may be, prescribed by the Minister in terms of subsection (1)(c)."	
Strate	6	See heading of section 6, *The Authority of Securities Services*	***Disagree. The Authority is not the Authority of Securities Services***
JSE	6	**Powers of FSCA** If the FSR Bill is enacted, it will amend section 6(3)*(k)* of the FM Act to provide that the FSCA may issue "**guidance notes**" and "**binding interpretations**" on the application and interpretation of the Act. The FSCA is an administrative body; it is not a court of law. And yet, section 6(3)*(k)* purports to give any interpretation of the FM Act that it issues, the status of a court order because the section provides that its determinations will be binding. This is inconsistent with section 165(2) of the Constitution which entrenches the independence of the courts. Section 165(2) provides that the courts are subject only to the Constitution and the law. However, the proposed new section of the FM Act purports to give the FSCA the power to issue binding determinations on the proper interpretation of the FM Act and thereby make the courts subject to the determinations of this administrative body. This is incompatible with the independence of the courts. The JSE respectfully submits that, if enacted, this section would be unconstitutional.	***Comments are noted. Treasury has considered the comments and has obtained Senior Counsel opinion on the Constitutionality of the provisions. It is Treasury's view, and supported by SC opinion, that the FSR Bill provisions do not offend the independence of the Courts as binding interpretations can still be challenged in a Court of Law. The approach adopted is also consistent with the process set out in the Tax Administration Act.*** ***References to "binding rulings" have nevertheless been removed and the FSR Bill now refers to "interpretation rulings" for the purpose clarified in the FSR Bill. The Courts have final say on the interpretation of the Act.***
BASA	6(3)	Proposed amendment to ensure consistency of language: "*(c) must take steps ~~he or she~~ it considers necessary to*	***Noted, but not necessary.***

		protect investors in their dealings in relation to securities services or regulated persons; *(e) may, despite the provisions of any law, furnish information acquired by ~~him or her~~ it under this Act to any person charged with the performance of a function under any law, including a supervisory authority;* *(l) may take any measures ~~he or she~~ it considers necessary for the proper performance and exercise of ~~his or her~~ its functions, or for the implementation of this Act;*"	
BASA	6(3)*(k)*	We note that the FMA is the only financial sector law that was amended to include "**binding interpretation**" Aligned to our general comment that Section 141 should be deleted from the FSR Bill, the reference to binding interpretation in Section 6(3)*(k)* should also be deleted.	***Comments are noted. Treasury has considered the comments and has obtained Senior Counsel opinion on the Constitutionality of the provisions. It is Treasury's view, and supported by SC opinion, that the FSR Bill provisions do not offend the independence of the Courts as binding interpretations can still be challenged in a Court of Law. The approach adopted is also consistent with the process set out in the Tax Administration Act.*** ***References to "binding rulings" have nevertheless been removed and the FSR Bill now refers to "interpretation rulings" for the purpose clarified in the FSR Bill. The Courts have final say on the interpretation of the Act***
Strate	6(3)*(m)*, 11(2)*(c)*, 27(4)*(a)*, 47(2), 63(2)*(e)*, 64(5)*(a)*, 71(3)*(c)*, 110(5)	All references to registrar haven't been consistently amended to Authority.	***Noted. See item 78 of Schedule***
Strate	6(3)*(m)* and Regulation 6 of	The amended definition of **"external market infrastructure"** includes "*an external central securities*	***Noted, for FMA Regulations***

	the FMA Regulations	*depository*". Amended s 6(3)*(m)* refers to the fact that the Authority may exempt certain persons or categories from the provisions of certain sections of the FMA. Paragraph (iii) then continues to deal directly with the "external market infrastructure" in *(aa)* to *(cc)*. The phrase "external CSD" can cover both a "normal" foreign CSD who wants to start a separate CSD business in South Africa in competition with other South African licensed CSDs and a "link" foreign CSD who does not want to start a separate CSD business in South Africa, but only wants to form a link with a South African licensed CSD. The basis for the exemption for the "link" external CSD is different from that of "normal" external CSD. The process for the "link" external CSD is a simplified process. Hence the Ministerial Regulation 6 and see your Notices Comment Matrix of July 2016 pages 41-42. The CSD rules will provide the how for the approval of the special category of participant in the CSD. I agree that s 5(1)*(c)* and (2) of the FMA and future conduct standards or joint standards may further prescribe matters as set out in amended s 35(4)*(a)*. It is submitted that s 6(3)*(m)* be amended to make it clear that the Regulation 6 "link" external CSD deals with this issue as a "special category of participant". The concern is that legislation overrides regulations and Regulation 6 is not cross-referencing to FMA s 6(3)*(m)*. Without this clarity, the legislation will create confusion whether s 6A-6C are now again applicable (as incorporated) in the same manner for all external CSDs. This unintended consequence must be addressed.	
JSE	6(3)*(m)* & 49A(1)	**Exemption of an external market infrastructure and specifically an external CCP** We would like to understand the policy intention and the how that translates to the specific provisions in sections 3*(m)*	***Comments are noted. As stated in previous comments, the proposed framework is not intended to subject external market infrastructures to lesser regulatory standards. It is possible to defer to the other jurisdictions standards without giving the global CCPs***

		and 49A(1) of FMA, as we remain concerned with the approach to exempting an external CCP.	***a regulatory advantage over local CCPs due to lower standards. Licensing (and exemption) of external CCPs is dependent on a number of factors including that such market infrastructure are subject to equivalent regulatory standards in the home jurisdiction, and that appropriate regulatory and co-operation arrangements with foreign Authorities have been entered into by the South African Authorities. Authorities can consider applications on a case-by-case basis, and are required to assess the foreign regulatory framework, including the foreign jurisdiction's licensing requirements, rules, regulations and supervision, and must take into account relevant international standards such as the CPSS-IOSCO Principles for Financial Market Infrastructures. The outcome of the applicable regulatory framework should be equivalent to that established by the relevant South African laws in respect of the regulatory objectives that they achieve. The proposed approach is consistent with international standards, and the Australian 'graduated' licensing approach that is proposed by the commenters.***
JSE	6(3)*(m)*	This issue was discussed with National Treasury on 10 August 2016. The JSE remains concerned that the Authority and Prudential Authority, together with the SARB, will have the ability to exempt an external market infrastructure from the licensing provisions of the FMA, despite such power itself being contrary to the purpose of the FMA and its licensing provisions, and detrimental to the objects of both the FMA and the FSRB. Our legal view on this issue is attached to this submission as Annexure B. The FMA provides, in section 6(3)*(m)*, for the exemption of any person or category of persons from the provisions of a section of the FMA, which could include the requirement to	***Disagree. This issue has been a subject of extensive debate between Treasury, SARB and the FSB, and the JSE.***

		be licensed, and proposed section 49A(1) read with amended section 6(3)*(m)* expressly provides for the exemption of an external central counterparty from the requirement to be licensed. However, the policy rationale or the necessity for the provision of an exemption from the need to licence a market infrastructure and for the criteria for assessing whether a market infrastructure should be either licensed or exempted from licensing has not been incorporated in the FMA. Whilst the JSE remains strongly of the view that exemptions from licensing for market infrastructures operating in South Africa should not be permitted as a matter of policy, for the reasons set out in Annexure B, if the Committee deems it necessary to provide for such exemptions in the FMA as a matter of policy, we believe that exemptions should only be enabled within a sound policy framework which is established from the outset and to which reference is made in the FMA. We submit that the granting of an exemption from licensing for market infrastructures will not meet the criteria for exemptions set out in section 6(3)*(m)*(i) of the FMA in relation to the public interest and the objects of the Act and we do not believe that the additional specific criteria for exemption from licensing for external market infrastructure set out in new proposed section 6(3)*(m)*(iii) adequately reflects the most important policy considerations to be taken into account if exemptions from licensing are to be considered. The most important policy considerations should be the extent of the impact of the activities of the external market infrastructure on the South African financial system and whether there is no reason for there to be any regulation of the external market infrastructure by the South African regulators.	
BASA	6(6)*(a)*(ii)	Proposed amendment to ensure consistency of language:	***Section 6(6) was repealed by section258 of Act 45 of***

		"*(ii) negotiate agreements with any supervisory authority to coordinate and harmonise the reporting and other obligations of a regulated person, an external exchange, an external clearing house, an external central counterparty, an external central securities depository or its subsidiary or holding company including, but not limited to, circumstances which may indicate systemic risk;*"	***2013.***
BASA	6(6)*(b)*(i), (ii) and (iii)	"*(i) a provision that the ~~registrar~~ Authority may conduct ~~an~~ a supervisory on-site ~~examination or an~~ inspection or investigation of a regulated person, on the request of a supervisory authority, and that the supervisory authority may assist the registrar in such on-site ~~examination or an~~ inspection or investigation;* *(ii) a provision that the ~~registrar~~ Authority and supervisory authority may share information relating to the financial condition and conduct of a regulated person, an external exchange, an external authorised user, an external clearing house, an external central counterparty, an external clearing member, an external central securities depository or an external participant or its subsidiary or holding company including, but not limited to, circumstances which may indicate systemic risk;* *(iii) a provision that the ~~registrar~~ Authority or supervisory authority—* *(aa) be informed of adverse assessments of qualitative aspects of the operations of a regulated person, an external exchange, an external authorised user, an external clearing house, an external central counterparty, an external clearing member, an external central securities depository, an external participant or its subsidiary or holding company including, but not limited to, circumstances which may indicate systemic risk; or* *(bb) may provide information regarding significant problems*	***Section 6(6) was repealed by section258 of Act 45 of 2013.***

		that are being experienced within a regulated person, an external exchange, a trade repository, an external authorised user, an external clearing house, an external central counterparty, an external clearing member, an external central securities depository, an external participant or its subsidiary or holding company including, but not limited to, circumstances which may indicate systemic risk;"	
JSE	6(8)	This provision has not been aligned with the amendment to section 5(1)*(b)* to enable the Authority to make standards relating to functions and duties exercised by a regulated person.	***Noted, proposing to include "functions and duties"***
BASA	6A(1)*(b)*, *(d)* and *(e)*	The term "*external*" should be inserted before the words "*market infrastructure*".	***Noted and agree***
BASA	6A(2)*(b)*	It is not clear whether the intention of this subsection is to refer to the international standards provided for in subsection (1)*(a)* or the joint standards provided for in subsection (1). We propose the following amendment: "*(b) assessing the external market infrastructure against the ~~joint~~ international standards referred to in subsection (1)(a);*" **OR** "*(b) assessing the external market infrastructure against the joint standards referred to in subsection (1)~~(a)~~;*"	***The intention was to refer to joint standards as provided for in subsection (1), however section has been refined***
BASA	6A(4)	Section 6A does not provide for "conditions", consequently, we propose the following amendment: *(4) In addition to the requirements in terms of section 6C, the Authority and the Prudential Authority must regularly assess ~~the~~ whether a recognised external market infrastructure ~~with the conditions~~ meets the criteria set out in section 6A.*	***Agree***

BASA	6B	Section 6A does not provide for "conditions", consequently, we propose the following amendment: *The Authority and the Prudential Authority may withdraw recognition of an external market infrastructure where the external market infrastructure no longer meets the criteria ~~conditions~~ set out in section 6A ~~are no longer met~~.*	***Sections have been revised to clarify that recognition in terms of this section applies to the Authorities recognising a foreign country as an equivalent jurisdiction.***
BASA	6C(2)*(c)* and *(e)*	The term "*regulated entity*" is not defined in the FSRB or the consequential amendments and the term is not appropriate in this context, as a recognised external market infrastructure is not "regulated" by the Authority. The term "*on-site visit*" is also not defined in the FSRB or the consequential amendments. We propose the following amendments: "*(c) the procedures concerning the coordination of supervisory activities including, where appropriate, for collaboration regarding the timing, scope and role of the authorities with respect to any cross-border on-site ~~visits~~ inspections of a ~~regulated entity~~ recognised external market infrastructure;* ... *(e) procedures for cooperation, including, where applicable, for discussion of relevant examination reports, for assistance in analysing documents or obtaining information from a ~~regulated entity~~ recognised external market infrastructure and its directors or senior management; and*"	***Agree, see revised sections***
BASA	6C(3)*(d)* and *(g)*	The term "*regulated entities*" is not defined in the FSRB or the consequential amendments and the term is not appropriate in this context, as a recognised external market infrastructure is not "regulated" by the Authority. The terms "*internationally-active*" and "*globally-active*" are introduced and although it is not necessary to define these terms, one term should be used consistently. We propose the following	***Agree***

		amendments: "*(d) cooperate in the day-to-day and routine oversight of ~~internationally-active regulated entities~~ globally-active recognised external market infrastructures;* ... *(g) undertake ongoing and ad hoc staff communications regarding globally-active ~~regulated entities~~ recognised external market infrastructures as well as more formal periodic meetings, particularly as new or complex regulatory issues arise.*"	
ASISA	s7*(c)* p.172	The Authority should not have the power to make legislation without following the parliamentary process. **Proposal: Delete the word "binding".**	***References to "binding rulings" in the FMA have been removed and the FSR Bill now refers to "interpretation rulings"***
ASISA	s8; s6A(3) p.174	We submit that the current wording allows the regulators to inform the applicant of a decision within six months but does not oblige the regulators to conclude the application within six months. This could lead to a drawn out application process, which is not ideal. **Proposal: To ensure that applications are concluded finally within six months, the following wording is proposed:** "*(3) The Authority must conclude the application for recognition by notifying ~~notify~~ the external market infrastructure that has applied for recognition of their ~~its~~ decision, within six months of receiving the application.*"	***See revised sections***
Strate	17(2A)	"*…contained in the exchange rules.*"	***Agree***
Strate	27(4)	"*(4)(a) The ~~registrar~~ Authority must publish a notice of an application for a central depository licence in two national newspapers, at the expense of the applicant, and on the Authority's website.*"	***Agree, where appropriate***

		(b) The notice must state- *(i) the name of the applicant;* *(ii) ~~where~~ that the proposed depository rules ~~may be inspected~~ are available on the website of the Authority for comments from the public; and* *(iii) the period within the process by which objections to the application or rules may be lodged with the ~~registrar~~ Authority* *(c) The Authority must publish the proposed depository rules referred to in paragraph (b)(ii) on the Authority's website.*"	
BASA	33(1) p.180	We note that the numbering of subparagraph is numerical not alphabetical. The proposed amendment should read: "*17. The substitution, in section 33(1), for the words preceding* *paragraph ~~(a)~~ (i), of–*"	***Agree***
STRATE	33(1)	The proposed amendment of section 33(1) is intended to clarify that certificated securities may be converted to uncertificated securities at the election of either the issuer or the holder of the securities. The proposed wording should therefore be further amended as shown, so as to provide sufficient clarity. This clarification is important to address the industry need for efficient and cost effective bulk dematerialisation of share certificates. The need for bulk dematerialisation of numerous share certificates has arisen as a result of the Financial Services Board's policy drive for the protection of investors e.g. holders of BEE securities in issuers BEE schemes, through the requirement that such shares should be traded on licensed exchanges. The bulk dematerialisation (of e.g. about 100 000 share certificates for some issuers) is required to facilitate	***Agree***

		efficient and cost effective compliance with the requirements of the Financial Services Board, the central securities depository, and the applicable exchange. Delete proposed inserted wording below: "~~*An issuer may convert certificated securities to uncertificated securities*~~*, and may, subject to subsection (2), issue uncertificated securities despite any contrary provision in* –" Amend existing wording of section 33(1) as per below: "*Certificated securities may be converted to uncertificated securities by an issuer, at the election of the issuer or the holder of certificated securities, and an issuer may, subject to issue uncertificated securities despite any contrary provision in* –"	
Strate	35(2A)	"*…contained in the depository rules.*"	***Agree***
Strate	39(3)	Please correct wording in s 39(3) to align with the rest of s 39. Section 39(1)(a) refers to "*uncertificated securities or an interest in uncertificated securities held by a central securities depository, participant . . . in the central securities account or the securities account, as the case may be ….*" In comparison, the phrase "*central securities account*" has erroneously been omitted in s 39(3). Please insert : "*. . . in relation to a central securities account or the securities account, where such an interest extends to all uncertificated securities standing to the credit of the relevant central securities account or securities account at the time the pledge is effected.*" As a result of this omission, s 39(3) can't be utilised in this format (wheelbarrow pledge) if securities are entered in a central securities account like the Segregated Depository Account (SDA) or a SOR account.	***Noted, however this is a new matter, which Authorities will need to considered and possibly addressed through Omnibus Bill if appropriate.***

BASA	47(2), (3) and 4*(a)*	With reference to our general comment 2 above, we are of the opinion that the consequential amendments regarding the introduction of a central counterparty have not been consistently applied. We propose the following amendments, in addition to the consequential amendments: "***CHAPTER V*** ***CLEARING HOUSE AND CENTRAL COUNTERPARTY*** ***Licensing of clearing house and central counterparty*** ***Application for clearing house licence and central counterparty licence*** ***47*** *(1) A clearing house must be licensed under section 49.* *…* *(2) A juristic person may apply to the ~~registrar~~ Authority for a clearing house licence or a central counterparty licence.* *(3) An application for a clearing house licence or a central counterparty licence must—* *…* *(4) (a) The registrar must publish a notice of an application for a clearing house licence or a central counterparty licence in two national newspapers at the expense of the applicant and on the official website.*"	***Agree***
BASA	48(1)*(b), (e), (f)*, and *(g)* 48(2)*(a)* and *(b)*	With reference to our general comment 2 above, we are of the opinion that the consequential amendments regarding the introduction of a central counterparty have not been consistently applied. We propose the following amendments, in addition to the consequential amendments: "***Requirements applicable to applicant for clearing house licence and licensed clearing house and an applicant for a central counterparty licence and a licensed central counterparty*** *48. (1)An applicant for a clearing house licence and a*	***Agree***

		licensed clearing house and an applicant for a central counterparty licence and a licensed central counterparty must— *…* *(b) governance arrangements that are clear and transparent, promote the safety and efficiency of the clearing house or central counterparty, and support the stability of the broader financial system, other relevant public interest considerations, and the objectives of relevant stakeholders;* *…* *(e) implement an effective and reliable infrastructure to facilitate the clearing of securities cleared by the clearing house or central counterparty;* *(f) implement effective arrangements to manage the material risks associated with the operation of a clearing house or central counterparty;* *(g) have made arrangements for security and back-up procedures to ensure the integrity of the records of transactions cleared, settled or cleared and settled through the clearing house or central counterparty; and* *…* *(2) The registrar may—* *(a) require an applicant, ~~or~~ a licensed clearing house or a licensed central counterparty to furnish such additional information, or require such information to be verified, as the registrar may deem necessary;* *(b) take into consideration any other information regarding the applicant, ~~or~~ a licensed clearing house ~~or~~ a licensed central counterparty, derived from whatever source, including any other supervisory authority, if such information is disclosed to the applicant or a licensed clearing house and the latter is given a reasonable*	

		opportunity to respond thereto; and”	
JSE	49(A)(1) & (10)	**Licensing of external central counterparty** Following on from our comments in respect of sections 5(1)*(c)* and 5(2), it is implicit in section 49A, as a result of the proposed amendment to section 5(1)*(c)*, that a licenced external central counterparty may only exercise functions and duties and provides services not already provided for in the FMA but which have been prescribed by the Minister. We submit that this was not the intention of the drafter of the consequential amendments to the FMA. In terms of the provisions of the FMA, MIs fulfil licensed duties and functions (Section 10 – exchanges, section 30 - CSDs and section 50 - clearing houses) and these MIs authorise their users, clearing members and participants to provide securities services, as defined, in terms of the rules of the MI. It is an integral part of the MI's licensed duties and functions, as set out in the FMA, to supervise and regulate the securities services provided by these authorised participants. In terms of the regulatory framework presently in place under the FMA, it is not permissible for MIs themselves to provide securities services, primarily as a result of the insoluble conflict of interests that could result if they were to do so. The proposed amended sections 5(1)*(c)* and 5(2) are intended to refer to market infrastructures when they refer to “*functions and duties*” and to securities services providers when they refer to “*securities services*” by the use of the phrase “as the case may be”. However, given that section 49A(1) states, inter alia, that an external central counterparty must be licensed to provide “services” as prescribed in section 5(1)*(c)* and (2), it is implied that an external central counterparty may provide “securities services” and the JSE believes that were an external MI permitted to provide securities services as is proposed and would be prescribed by	***Disagree. This matter has been discussed and debated exhaustively between Treasury, SARB and FSB, with the JSE. The policy position has been made known to the stakeholders. Treasury will be guided by the Committee.***

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		the Minister in terms of these sections, such would be inconsistent with the provisions applicable to local MIs and would result in unfairness to licenced domestic MIs by virtue of the creation of an anti-competitive environment and as such be prejudicial to the interests of the public. Neither the FSRB nor the FMA contain any licensing requirements in respect of external MIs other than external CCPs and trade repositories. This may be just an oversight, as it is unlikely to be the intention that these external MIs may operate in the South African market without being licensed to do so. The JSE is respectfully of the view that the operation of external MIs is an important matter of public policy that should be dealt with specifically in the FMA, as the superordinate statute. The implementation of the public policy encapsulated in the FMA, such as the detailed regulation of the duties and functions performed by these external MIs, should be dealt with in the Regulations adopted by the Minister.	
LCH.Clearnet Ltd	49B	We note that the proposed amendments to section 49B of the Financial Markets Act (FMA) envisage that an external central counterparty will able to apply for an exemption from the requirement to be licensed under Section 49A of the FMA in order to be able to offer clearing services in South Africa. In addition, although not the subject of the current consultation, we also note that there are existing exemption provisions available to the registrar within the Financial Markets Act 19 2012 (Section 6(3)*(m)*). LCH.C Ltd is considering applying for a license following the enactment of Section 49A (although, for the avoidance of doubt, any such application remains subject to a full internal review and the completion of all necessary governance processes. However, the prospect of obtaining an exemption ahead of the completion of any license application process is of	***Comments are noted. The policy proposal was to intentionally not extend the insolvency protections to an external CCP that is exempt from having to be licensed. Section 49B has been deleted, however the Authority may in terms of section 6(3)(m) of the Act exempt an external CCP from certain provisions of the FMA.*** ***As the issues raised are subject to ongoing discussions with the Regulators, Treasury would encourage LCH.C Ltd to continue to engage with the South African Regulators regarding its consideration of applying for a license in terms of section 49A.***

		considerable interest as it may allow LCH.C Ltd to begin offering direct clearing services to within South Africa to South Africa based banks sooner. However, the proposed amendments to the definition of “market infrastructure” in section 35A(1) of the Insolvency Act 1936 (lA) will mean the protections of the lA will only be extended to licensed external central counterparties and not an external central counterparty or other entity who has been granted an exemption. An important element of a CCP’s ability to offer clearing services in any particular jurisdiction is the protections granted to it that prevent actions it may take, particularly in the operation of its’ default rules, from being set aside under otherwise applicable insolvency laws. LCH.C Ltd is unable to operate in a jurisdiction where such protections are not granted. The fact that an external central counterparty granted an exemption would not benefit from the protections which are otherwise afforded to licensed clearing houses would therefore prevent LCH.C Ltd from seeking to operate on this basis. LCH.C Ltd would expect the absence of protection to act as a disincentive for other CCPs to seek to obtain authorisation in this manner. LCH.C Ltd would therefore ask that consideration be given to including external central counterparties who are granted an exemption under Section 49B (or Section 6(3)*(m)* of the current Act) in the definition of market infrastructure in section 35A(1) of the lA. We consider that this amendment is necessary in order to make an exemption under Section 49B (or Section 6(3)*(m)*) something that LCH.C Ltd as an external central counterparty could consider operating under in South Africa. In addition, LCH.C Ltd believes that being able to operate under an exemption ahead of the completion of a formal license application would accelerate their ability, as an external central counterparty, to offer direct clearing	

		services within South Africa to South Africa based banks which would help facilitate the implementation of the regulatory reforms for the OTC derivatives market.	
JSE	50(3A)*(b)*	**Functions of a CCP** Clarity is required in respect of the proposed language in s50(3A) *(b)* of FMA "*(3A) A central counterparty, in addition to the functions referred to in subsections (1), (2) and (3), must—* *(a) interpose itself between counterparties to transactions in securities through the process of novation, legally binding agreement or open offer system;* *(b) manage and process the transactions between the execution and fulfilment of legal obligations between counterparties and clients; and* *(c) facilitate its post-trade management functions.*" Section 50(3A)*(b)* does not accurately describe the functions of a CCP, as a CCP does not manage and process transactions . • from the time of execution. A CCP manages and processes transactions from the time that the transaction is accepted by the CCP for clearing; and • between counterparties and clients. A CCP manages and processes transactions between counterparties. This issue was discussed with National Treasury on 10 August 2016 and based on the discussion, the JSE understands that the reference to clients will be removed from the provision and provision 50(3A)*(b)* would be revised.	***JSE comments in ensuing discussion have been noted that the CCP has an interest in making sure obligations are met, but it does not manage the transactions between execution and fulfilment of legal obligations, and that the law should not be too prescriptive on the specific functions that must be performed by the CCP.*** ***Treasury respectfully disagrees as the section does not prescribe a particular clearing model but provides for the functions that are performed by CCP s in the normal course of business. Managing and processing transactions between the execution (i.e. trade execution) and fulfilment of legal obligations (i.e. trade settlement) is standard "clearing" and may be provided bilaterally or centralised at the CCP through novation. The focus of this section is to provide for clearing functions that are performed by a CCP (without being prescriptive on the clearing model), which may include margining, netting arrangements, risk management, default management, etc. and may even overlap with what is provided for in section 50(1) and (2). However, not all clearing houses perform the functions or act as a CCP. Regulations and Standards will determine requirements for CCPs in relation to the functions performed.*** ***For clarity, Treasury is also proposing to refer to clearing members:*** "*(b) manage and process the transactions between the execution and fulfilment of legal obligations between ~~counterparties~~ clearing members and clients; and*"
BASA	50(4)(b)	With reference to our general comment 2 above, we are of	***Agree***

		the opinion that the consequential amendments regarding the introduction of a central counterparty have not been consistently applied. We propose the following amendments, in addition to the consequential amendments: "*(4) (a) The registrar may assume responsibility for one or more of the regulatory and supervisory functions referred to in subsections (2) and (3) if the registrar considers it necessary in order to achieve the objects of this Act referred to in section 2.* *(b) The registrar must, before assuming responsibility as contemplated in paragraph (a)—* *(i) inform the clearing house or central counterparty of the registrar's intention to assume responsibility;* *(ii) give the clearing house or central counterparty the reasons for the intended assumption; and* *(iii) call upon the clearing house or central counterparty to show cause within a period specified by the registrar why responsibility should not be assumed by the registrar.*"	
JSE	s51: Repealing of section 85 of the FMA discontinuing the Directorate of Market Abuse	**Repeal of Section 85 dealing with the Directorate of Market Abuse** One of the significant (and highly problematic) proposed amendments to the FM Act is the discontinuation (and dissolution) of the Directorate of Market Abuse ("**DMA**") through the repeal of section 85 of that Act. This raises concerns for the JSE in our role as a market regulator, market operator and a stakeholder in the fight against market abuse. We previously raised these concerns in our comments on the draft FSR Bill published in December 2014 but they have unfortunately not been taken on board. The rationale for the repeal of section 85 appears to be reflected in National	***Agreed. Concerns regarding the disparity between the current DMA that is not an administrative body vis-à-vis an administrative action committee, in terms of exercising its powers have been noted. It is proposed that the DMA is retained, subject to amendments necessary to align to the FSR Bill, and including the process of appointment which the Authority shall be responsible for, rather than the Minister.***

		Treasury's response to the JSE's previous comments as follows: "*In the interests of harmonisation and rationalization of administrative processes and procedures across the financial sector, the DMA has been replaced by the FSCA directly. The FSR Bill does allow however for the FSCA to create administrative action committees. Such administrative action committee/s will allow for a more flexible approach that provides the same set of powers for all administrative actions by the FSCA, and not just those that relate to the FMA. A specialist DMA type panel can therefore be established in the new regime. It does not need to be specifically named as such.*" From the above comment it appears that National Treasury is supportive of the establishment of the equivalent of the DMA by the Financial Sector Conduct Authority ("**FSCA**") but that the establishment of such a committee would be in terms of the administrative action committee provisions in the FSR Bill. It is common cause that South Africa is highly regarded for the regulation of its securities markets. Market abuse is probably the most visible form of market misconduct in terms of the impact that it has on investors' perceptions of the integrity of a market. Investor confidence is built on a combination of factors but local and international investors' perceptions of the extent of market abuse in a market and the effectiveness of anti-market abuse regulation and enforcement is one of the key pillars in building that confidence. The effectiveness of the regulatory structures in South Africa in combatting market abuse is one of the big success stories in financial sector regulation in this country. The DMA has contributed significantly to that success as it brings together individuals with valuable skills and knowledge from a variety of relevant disciplines to provide	

		input on important decisions during the enforcement process. In exercising certain powers of the FSB under the FM Act, the DMA is not an administrative body and it does not make enforcement decisions. It considers matters that have been brought to the attention of the FSB's Department of Market Abuse and the results of the work undertaken by that department in relation to those matters, and through the collective knowledge and experience of its members, it determines whether a matter merits further investigation, provides guidance on aspects of the investigation and ultimately determines whether a matter should be referred for enforcement action, either administrative or criminal. Under the FSR Bill, the FSCA will have extensive enforcement powers, including the power to investigate market abuse. The necessary powers to conduct investigations and prosecute market abuse will therefore continue to exist. However, the DMA currently plays an important and valuable role that supports the investigative process and essentially sits between the investigation and the enforcement action and it is that role that will be lost if section 85 of the FM Act is repealed. A market conduct regulator typically has a good understanding of the market abuse provisions that it is enforcing and possesses effective investigative skills. However, it would not necessarily possess the insight into the trading strategies and business activities of the entities from which market abuse may originate. Furthermore, whilst a market conduct regulator will naturally possess legal skills it can often benefit from the insights of legal professionals who are steeped in some of the legal complexities associated with the prosecution of offences such as market abuse and who can provide useful input into the scope and focus of investigations and the decisions on whether or not to initiate enforcement action. The DMA has brought together these	

		skills and insights in a very effective manner over the past 15 years. This combination of skills has enabled it to make a significant contribution to the effectiveness of the enforcement structures in South Africa and the fight against market abuse. This unique role will not be able to be fulfilled through the administrative action committee provisions in the FSR Bill. National Treasury's comment above appears to propose that a specialist DMA-type committee can be established in terms of the broad administrative action provisions of the FSR Bill but that the legislation does not have to specifically name (implying "create") such a committee. However, it is clear from the provisions of section 87 of the Bill dealing with the functions and composition of an administrative action committee that a committee established in terms of that section is intended to be an administrative body either recommending specific administrative action to be taken by the FSCA or, through delegated powers, taking administrative enforcement action on behalf of the FSCA. These administrative action committees are therefore essentially enforcement committees. In order to either recommend what administrative action should be taken or to take such action itself, an administrative action committee would need to consider both the administrative and legal issues to make a finding. It is for this reason that the composition of an administrative action committee must, in terms of section 87(3) of the Bill, include a retired judge or an advocate or an attorney with at least ten years' experience. The DMA has never fulfilled this function and therefore the provisions of section 87 of the Bill will not enable the establishment of a specialist committee equivalent to the DMA. Market abuse is a unique issue that requires and has	

		benefited from a unique approach. It is not a subject that pertains to a particular regulated industry as is the case with other financial services legislation. It is an issue of conduct that spans the activities of issuers of securities and investors from various industries as well as investors who are not regulated by any other legislation in relation to their investment activities (such as retail investors). Unlike most other financial sector legislation it is not about the services or the protection provided by a regulated entity to its customers or investors; it is about the impact that the actions of participants in a market can have on each other and on the confidence that market participants (both local and foreign) have in the integrity of the South African financial markets. It is for this reason that an approach that simply seeks to "*harmonise and rationalise processes*" across the entire financial sector is not suited to the unique challenges that we face in combatting market abuse. The skills, experience and knowledge of individuals who collectively have insight into, and an understanding of, the activities and objectives of the numerous issuers and investors participating in the financial markets and who understand the legal complexities of applying market abuse legislation has proven to be extremely valuable for the past 15 years in promoting the objectives of the FM Act and supporting the good work of the FSB. Harnessing the valuable contribution that those individuals can make during the enforcement process requires the law to specifically recognise the function that a committee made up of those individuals should perform. This cannot be achieved through legislation that makes broad provision for administrative action structures that can be applied uniformly to all matters that fall within the regulatory jurisdiction of the FSCA. If the intention behind the creation of the administrative action committees is to retain the existing structures (or the	

		equivalent thereof) that have proven to be successful in combatting market abuse but to provide the FSCA with greater flexibility in achieving the objectives of those structures then this can be achieved through appropriate amendments to the FM Act that provide for the establishment and operation of a market abuse committee with the appropriate functions but which provide greater flexibility to the FSCA in relation to matters such as the composition and activities of the committee. These operational matters can be left to the FSCA to manage. The JSE would support such an approach. Harmonising and rationalising existing processes by discontinuing the DMA should not come at the expense of weakening the structures that have proven to be effective in the fight against market abuse. The JSE therefore submits that the FM Act should continue to make provision for the establishment of a specialist committee such as the DMA but that the FSCA be granted the powers to determine the composition and procedures of the committee.	
Strate	52*(b)*	"…*or a central counterparty* ~~, as the case may be,~~…"	***Agree***
Strate	53(2A)	"…*contained in the clearing rules*."	***Agree***
Strate	55(1)*(c)*	"….*prescribed in the* ~~*relevant*~~ *joint standards are met by the applicant*…"	***Disagree***
JSE	55	It is unclear why the following powers of the Authority have been deleted only in respect of a trade repository: • require an applicant to furnish such additional information, or require such information to be verified, as the registrar may deem necessary; and • prescribe any of the requirements referred to in subsection (1) in greater detail.	***Not necessary as Authorities may***
JSE	56(A)	**Licensing of external trade repository**	

		Following on from our comments in respect of sections 5(1)*(c)* and 5(2), it is implicit in section 56A, as a result of the proposed amendment to section 5(1)*(c)*, that a licenced external trade repository may only exercise functions and duties and provides services not already provided for in the FMA but which have been prescribed by the Minister. We submit that this was not the intention of the drafter of the consequential amendments to the FMA	
BASA	74(2)	Proposed amendment to ensure consistency with the amendments to 74(1) "*(2)A ~~code of conduct~~ conduct standard is binding on authorised users, participants or clearing members of independent clearing houses or central counterparties or any other regulated person in respect of whom the ~~code of conduct~~ conduct standard was prescribed, as the case may be, and on their officers and employees and clients.*"	***Agree***
BASA	75(1), (2) and (3)	Proposed amendment to ensure consistency with the amendments to 74(1) "*75.(1) A ~~code of conduct~~ conduct standard for authorised users, participants or clearing members of independent clearing houses or central counterparties must be based on the principle that—* *(a) an authorised user, participant or clearing member of an independent clearing house or central counterparty must—* … *(2) A ~~code of conduct~~ conduct standard for regulated persons, other than the regulated persons mentioned in subsection (1), must be based on the principle that the regulated person must—* … *(3) A ~~code of conduct~~ conduct standard may provide for—*"	***Agree***

Strate	77	**Definition of "insider"** "*(a)*(i)*….or an issuer of derivative instruments related to such security…*"	***Agree***
JSE	84	**Additional powers of Authority** "*84. The Authority may –* *(a) after consultation with the relevant regulated markets in the Republic,* *(i) make conduct standards, or* *(ii) give regulator's directives for the implementation of such systems as are necessary for the effective monitoring and identification of possible contraventions of this Chapter; and* *(b) make conduct standards for the disclosure of inside information."* We believe that sub-paragraph *(b)* should be deleted as the requirements in respect of the disclosure of price sensitive information should be provided for in the listing requirements of an exchange. The provision of these requirements by the Authority in a standard could lead to duplicate or differing requirements, duplication of oversight and separate enforcement processes. In addition, "*inside information*" by definition is information that has not been disclosed therefore it is a contradiction in terms to refer to the disclosure of inside information. Disclosure requirements relate to price sensitive information rather than inside information.	***Disagree. The discussion on the standing of standards made by the Authorities in relation to listings requirements and rules of market infrastructure has been debated extensively, and the position of Treasury, FSB and the SARB stands.***
JSE	90*(b)*	**Accounting records and audit** We suggest replacing "joint standards" with "conduct standards, or where appropriate, joint standards" in this section, as the Prudential Authority will not have an	***Disagree***

		interest in the accounting records of **all** regulated persons: "*A regulated person must –* *(a) maintain on a continual basis the accounting records determined in conduct or, where appropriate, joint standards and prepare annual financial statements that conform with the financial reporting standards prescribed under the Companies Act and contain the information that may be determined in joint standards;* *(b) cause such accounting records and annual financial statements to be audited by an auditor appointed under section 89, within a period determined in conduct or, where appropriate, joint standards or such later date as the Authority may allow on application by a regulated person;*"	
Strate	94	The proposed amendment to the heading above section 94 should be amended and read as follows: "*Powers of ~~registrar~~ Authority and court*"	***Agree***
Strate	105(1)*(a)*	It is not clear where the proposed deletion starts as there is a closed bracket at the end of *(j)* but there is no open bracket.	***Disagree, misreading***
Strate	109	Reference to paragraph ~~(5)~~ should be changed to *(c).*	***Agree***
JSE	110(4)	Section 110(4) requires an amendment to refer the correct chapter or section in the FSRB.	***Noted***
JSE	110(6)	**CCP transition provision in FMA S110(6)** "*(6) Despite any other provision of this Act, a clearing house performing the functions of a central counterparty must comply with any requirements imposed by regulations or standards, and must –* *(a) until 31 December 2021, be licensed as either an associated clearing house or an independent clearing*	***Comments are noted. The following amendments have been proposed:*** "*(6) Despite any other provision of this Act, a clearing house performing the functions of a central counterparty must comply with any requirements imposed by regulations or standards, and must –* *(a) until 31 December 2021, be licensed as either an*

		house, <u>and be approved by the Authority, the South African Reserve Bank and the Prudential Authority</u>; *(b) as of 1 January 2022, be licensed as both an independent clearing house and a central counterparty*" Although we are comfortable that the amendment provides for an approximate 5 year transition period for JSE Clear to be licensed as both an independent clearing and central counterparty, we have concerns regarding the intention of the provision: • The provision does not explicitly exempt JSE Clear from being required to comply with S4(2) and S47 (1) of the FMA • The language provides for an additional approval from the Authority and approval from SARB and the Prudential Authority. Is the approval required in respect of the licensing of either an associated clearing house or an independent clearing house? Or is approval required to perform the functions of a central counterparty? • In respect of "approval", the provision is not aligned to the language of transitional provision in the draft Regulations. • What are the criteria for "approval"? What is the process for "approval"? How is "approval" granted i.e. in terms of which regulatory instrument? • 12 months to comply with regulations but 5 years to apply for licenses	*associated clearing house or an independent clearing house, and be approved by the Authority, the South African Reserve Bank and the Prudential Authority, <u>in the manner and form prescribed by the Authority, to perform the functions of a central counterparty</u>;* *(b) as of 1 January 2022, be licensed as both an independent clearing house and a central counterparty.*" ***It is not necessary to explicitly exempt JSE Clear from being required to comply with section 4(2) and section 47 (1) of the FMA as the provision specifies "despite any other provision in the Act", and would therefore override sections 4(2) and 47(1).*** ***The requirement for 5 years to comply with licensing requirements of a CCP and 12 months of approval provided (discussed above to perform the functions of a central counterparty) to comply with the Regulations will be discussed with stakeholders in the reviewing Regulations. It should also be noted that if a 'new' CCP is licensed after the consequential amendments and Regulations have come into operation that CCP is required to comply with the Regulations immediately upon licensing. It is not an issue then of an existing market infrastructure requiring time to be able to comply with new requirements but a new entrant that should be able to comply from day one. These matters will be discussed in FMA Regulations deliberations***
BASA	General: OTC Provisions	We are supportive of the policy that provisions relating to the OTC derivative framework are provided for in primary legislation rather than subordinate legislation.	***Noted and agree***

FRIENDLY SOCIETIES ACT			
Reviewer	**Section**	**Issue**	**Response**
ASISA	Schedule 4 Paragraph 7	The reference to (6A) appears to be incorrect. Should it not be (bA)?	***Agreed***