national treasury
Department:
National Treasury
REPUBLIC OF SOUTH AFRICA

FINANCIAL SECTOR LAWS AMENDMENT BILL, 2020[1]

COMMENTS MATRIX

JUNE 2020

[1] Please note that the comments and responses are in relation to the 2018 version of the Bill which has been subsequently amended.

LIST OF COMMENTATOR(S)

Name	Contact Person
Allan Gray	Pierre de Klerk
Coronation Fund Managers	Mauro Longano
Free Market Foundation	Martin van Staden
CFI Gauteng	Simangele Mphela
The Banking Association South Africa (BASA)	N. Mlandu
National Association for Co-operative Financial Institutions of South Africa (NACFISA)	Zweli Thoba
Old Mutual	Annemi Slabbert
Co-operative Banks Development Agency	Nomakhosi Shabangu
Jason Riley	Jason Riley
Payments Association of South Africa (PASA)	Walter Volker
Professor Robert W. Vivian (Finance and Insurance – Wits University)	Prof R.W Vivian

Financial Sector Amendment Bill, 2018			
General Comments			
Commentator	**Section/Clause**	**Comment/s**	**Response**
CBDA	General	The Co-operative Banks Development Agency (CBDA) has a mandate to promote and develop co-operative banking, including deposit-taking co-operatives; promoting the establishment of representative bodies and support organizations; facilitating and promoting education, training and awareness in connection with, and research into, any matter affecting the effective, efficient and sustainable functioning of the Co-operative Banking sector. The Bill proposes to establish a framework for the orderly resolution of banks, systemically important non-bank financial institutions and holding companies of banks or systemically important non-bank financial institutions that are designated by the Governor of the Reserve Bank as systemically important.	National Treasury appreciates the points raised by the Co-operative Banks Development Agency and notes the concerns raised on not including CFIs into the current resolution framework. CFIs play a key role in promoting financial inclusion and access to affordable financial services products for low income earners thus ensuring that the financial sector caters for all types of customers. In order to ensure that maximum benefit is derived from a comprehensive deposit

			insurance scheme that protects all depositors who deposit their funds with every deposit taking financial institution including CFIs, more work must be done on how their depositors will be protected and their deposits insured should a CFI fail, this will require research on the most appropriate design of a deposit insurance scheme which, if absent, will have negative consequences for the scheme, CFIs in general and depositors. An additional consideration is that the inclusion of CFIs in the DIS will make it difficult to also include them in the definition of covered depositors, which will create other risks and potential losses for their clients. The definition of covered depositors is being changed to specifically include CFIs. More research, data collection and a comprehensive socio-economic impact analysis has to be conducted on CFIs including costs of DIS on these institutions to determine amongst others affordability.
CBDA	General	The CBDA's view and that of the Cooperative Banking Sector, is that Chapter VIIA (sections 40A – 40F) of the Cooperative Banks Act, 40 of 2007, be repealed so as to ensure that Cooperative Financial Institutions (CFIs) are included in the Bank Resolution Framework. Chapter VIIA makes provision for the registration of CFIs as if they are different from Cooperative Banks, yet there is absolutely no difference between the two. Whilst the proposed repealing of sections 24, 25, 26 and 30 from the Cooperative Banks Act, ensures inclusion of Cooperative Banks, Chapter VIIA ensures the exclusion of CFIs, which will have serious repercussions for the depositors of these institutions. The CBDA and the Cooperative Banking Sector therefore propose that, all member based deposit-taking institutions be referred to as Cooperative Banks in a tiered	See response above.

		fashion from small, medium to large and/or well developed, that is CB tier 1, tier 2, and tier 3, based on their asset base and operations.	
CBDA	General	The exclusion of CFIs in the Deposit Insurance Fund (DIF) is not clearly justified, and we are opposed to it based on the following reasons: **Cooperative Banking Model** There is absolutely no difference between CFIs and Co-operative Banks: a) conduct the same business; b) are all member deposit taking institutions; c) all based on the common bond; d) all governed by the same cooperative principles; e) all incorporated as a Cooperative, in terms of their legal structure – meaning they are democratically run, member-owned institutions, where each member has equal voting rights, and only serve their members; f) all operated for the purpose of maximising economic benefit for all their members by providing financial services at competitive and fair rates, putting member needs first; g) all driven by the concern for the communities within which they operate.	See response above
CBDA	General	The term Cooperative Financial Institution has no legal basis in law as a differentiator between a Cooperative Bank and other member owned deposit taking institutions. Cuevas, C.E (2006) defines, the term CFI as inclusive of an array of member-owned financial intermediaries referred to as Credit Unions, Financial Cooperatives, Savings and Credit Cooperatives and Cooperative Banks. This is an umbrella term for all member-owned deposit taking institutions. In the case of South Africa; both these institutions are regulated by the South African Reserve Bank's Prudential Authority.	See response above
CBDA	General	Cooperative banking is already the lowest level of entry into the banking sector for previously disadvantaged communities who want to get into mainstream banking, therefore making a distinction between the two, CFI and Cooperative Bank, is just	See response above

		adding another barrier to entry, in a sector that is already very difficult to penetrate by new entrants; Including CFIs in the DIF, will instill confidence in the depositors and protect depositors' funds, resulting in the growth of the cooperative banking sector.	
CBDA	General	Cooperative Banking, by their very nature are more broad based, as the requirements for registration, are 200 members and R100 000 in share capital, thus enabling more of those that come from the lower end of the spectrum, participation in the mainstream economy of this country. The broad based membership, if enabled to grow, it will result in a stronger cooperative banking sector, which will contribute towards the dilution of the ownership structure of the banking sector in the country; The inclusion of CFIs in the DIF would eliminate all possibilities of reputational and contagion risks, thus creating an enabling environment for these new entrants into the banking space, that is, if the policy-makers and legislators alike are serious about the transformation agenda of the financial services sector and it is not just a tick box exercise as it is already perceived to be.	See response above
CBDA	General	Cooperative Financial Institutions and Cooperative Banks alike are formed organically by the communities who have identified the need for financial services. In the main these institutions are scattered throughout South Africa, in rural, townships, peri-urban and most recently urban areas with the majority being black people. There are 25 registered cooperative banking institutions in the country with a total of 25 400 members, 3 being cooperative banks and 22 being CFIs, therefore the inclusion of 3 cooperative banks with a mere membership of 3156, whilst excluding 22 institutions with a total membership of 22 244 does not make sense at all. In the advent of the VBS scandal, you would think that policy-makers would be more sensitive towards the most vulnerable of depositors in the country, as CFI members are the very same target market as that of VBS.	See response above

CBDA	General	A majority (over 90%) of CFIs in South Africa prefer to be known as Cooperative Banks, this is informed by the recent survey conducted by the CBDA. The survey sought to understand the CFIs' view on the name Co-operative Financial Institution.	See response above
CBDA	General	The term CFI is not associated with the banking sector most people (and the CFIs' target market) see it as an informal institution like stokvels or pyramid schemes hence it is difficult for CFIs' to market themselves and the concept is not well known in our country. The Co-operative Bank is a universally accepted and known term worldwide, as opposed to CFI. Current legislation requires CFIs to apply to be called a Co-operative Bank when they reach R5 million in member deposits. Although some CFIs have reached this milestone (others even bigger than the currently registered Co-operative Banks) and applied, they are still not registered as a Co-operative Bank because of not meeting some prudential requirements. This means that utilisation of the term CFI has some financial implications particularly when the CFI graduates into a Cooperative Bank i.e. Branding which include domain, brand identity, logo, letterhead etc. all have financial implications. The term CFI undervalues and does not do justice to what the institution actually provides. The entrance of new participants in this Co-operative Banking space can be stimulated by the proposed change as general owners' perceptions can be changed as many still perceive the CFI model as inferior to that of a bank while the operations and financial exposures are similar. The implementation of such a proposal will also assist the National Development Plan (NDP) in championing financial inclusion through reduced banking costs and accessible banking. The upside to this proposal is that the members will own the financial institution (BANK) that enjoys the full protection from the Prudential Authority and growth support from the CBDA.	See response above

CBDA	General	Was the Cooperative Banking Sector invited to the workshop on the Bank Resolution Bill that was held on the 6th of November in Cape Town? If not, why?	See response above
CBDA	General	How are the Cooperative Banking Institutions (CBI) going to be brought up to speed with the contents of the bill?	See response above
CBDA	General	Was the medium of communication, as part of the public consultation adequate and/or fair, on the Bank Resolution Bill, considering that the majority of CBI members (mainly from rural areas) do not have access to internet, government gazette, and the Parliamentary Monitoring Group website, as these were the channels used to communicate this very critical and important aspect that affects the cooperative banking sector.	See response above
NACFISA	General	The National Association of Co-operative Financial Institutions of South Africa (NACFISA) represents the entire co-operative banking sector in South Africa, and wish to register its concern, that the proposed legislation seeks to exclude "co-operative financial institutions". The Bill proposes to establish a framework for the orderly resolution of banks, systemically important non-bank financial institutions and holding companies of banks or systemically important non-bank financial institutions that are designated by the Governor of the Reserve Bank as systemically important.	See response above
NACFISA	General	NCASA view is that Chapter VIIA (sections 40A – 40F) of the Cooperative Banks Act, 40 of 2007, be repealed so as to ensure that Co-operative Financial Institutions (CFIs) are included in the Bank Resolution Framework. Chapter VII A makes provision for the registration of CFIs as if they are different from Cooperative Banks, yet there is absolutely no difference between the two. Whilst the proposed repealing of sections 24, 25, 26 and 30 from the Cooperative Banks Act, ensures inclusion of Cooperative Banks, Chapter VII A ensures the exclusion of CFIs, which will have serious repercussions for the depositors of these institutions.	See response above

NACFISA	General	The CBDA and the Cooperative Banking Sector therefore propose that, all member based deposit-taking institutions be referred to as Cooperative Banks in a tiered fashion from small, medium to large and/or well developed, that is CB tier 1, tier 2, and tier 3, based on their asset base and operations. This distorts a co-operative banking model as there is absolutely no difference between CFIs and Co-operative Banks since they conduct the same business; are all member deposit taking institutions; all based on the common bond and all governed by the same cooperative principles.	See response above
Old Mutual	General	Annual publication of recovery and resolution plans: It's not clear whether the Point Of Non Viability (PONV) occurs before or simultaneously with Point Of Resolution (POR). If state of 'non-viability' is intended to be a separate regime as provided for under Basel III and the PONV occurs before POR, Tier 2 and Additional Tier 1 investors run the risk of their claims being written off without the benefit of, for example, the new intended "no-creditor-worse-off" provisions. We would appreciate clarity in this regard. In light of the above, we request the publication of annual recovery and resolution plans (i.e. living wills) by domestically systemically important South African banks. The publication of living wills will assist with relative comparatives across banking groups and in determining where PONV is. If the publication of living wills are not possible, at a minimum an improvement/standardization in the current level of disclosure is required. We also suggest that "publish" be clearly defined to indicate where and how publication must take place. This will ensure access to information and transparency enabling parties at risk to be adequately informed.	The concerns raised on the relationship between the PONV framework in the Banks Act regulations and the point of resolution provided for in this framework have been considered and as a result the amendments in the FSLAB will be revised to include an additional amendment to section 31 of the FSRA to provide for the concurrence of the SARB, as resolution authority, before the Prudential Authority can take a PONV action as provided for in the regulatory framework.

Old Mutual	General	Refer comment: We would appreciate confirmation that none of the amendments to the Financial Sector Laws Amendment Bill ("FSLAB") will now allow for the introduction of Covered Bonds.	The amendments in the Bill do not provide for the introduction of covered bonds.
CFI Gauteng	General	SIT foundation is concerned with the definition of bank. A bank is well defined in Bank Act, Mutual Bank in Mutual Bank Act and Cooperative Bank as in Cooperatives Bank Act. There is no mention of CFI, this is a key thing where CFI needs to be defined explicitly as a Bank rather than an afterthought of the Cooperative Banks Act. We need an act that covers CFI's as well. We also have additional item we would like to see in the Financial Services Act. In addition to having Too Big To Fail, Too Important To Fail, and systematically important non-banking institutions we believe that a separate category called Structurally Important Financial Institutions should be added to cover the transformation and black empowerment aspect. This would cover institutions like VBS to make sure that we do not lose the foundations and equity build by these institutions from avoidable scandals like mismanagement and corruption. The policy should protect the long term strategy of transformation.	See response above
BASA	General	It is difficult to give detailed comments without having had sight of the draft standards and frameworks that are to be read in conjunction with the Act. Our request is that proposed implementation dates, draft standards and other draft legislation e.g. the Deposit Insurance Levy Act, be circulated as soon as possible so as to afford us with the opportunity to fully assess the impact of the Act on Designated Resolution Institutions (Designated Resolution Institution) and comment accordingly.	It is standard legislative practice to first introduce primary legislation before issuing regulations or other regulatory instruments. The regulations or regulatory instruments will also require public consultation, including industry engagement, during which period there will be opportunities to raise concerns, if any, on those instruments. That said, authorities will aim to consult on any possible regulatory standards as soon as practicably possible.
BASA	General	The Bill does not stipulate any timelines in which strategies and resolution plans must be put in place, whether these will be published and how often these must be revised and assessed. It is submitted that direction should be provided on these issues.	These are not matters for primary legislation. In terms of the provisions of the Bill it is an obligation on the resolution authority to develop resolution plans and these elements are part of resolution plans and thus can only be determined during that process.

Free Market Foundation	General	The National Treasury has published, for public comment by 7 Nov 2018, a draft Financial Sector Laws Amendment Bill which has been approved by the Cabinet. The Treasury states that the Bill gives effect to proposals in its 2015 discussion document *Strengthening South Africa's Resolution Framework for Financial Institutions*. The amendments will, it is said, strengthen the ability of the Reserve Bank to manage the orderly "resolution" or winding down of a failing financial institution, with minimum disruption to the broader economy. The Treasury, Reserve Bank and Financial Sector Conduct Authority will be convening meetings and workshops about the Bill.	Noted.
Free Market Foundation	General	The draft Bill contains 65 clauses. Of those, 27 clauses (cls 37–63) would amend the Financial Sector Regulation Act, 2017 ("the Act"). One of the 27 clauses (cl 54) proposes inserting in that Act a new chapter (Chap 12A —Resolution of designated institutions) in eight parts comprising 59 sections. The other 26 of those clauses would make mainly consequential amendments to the Act. (As to the rest of the Bill, the Bill's first 36 clauses and cl 64 would, pursuant to the proposed amending of the Act, make mainly consequential amendments to other statutes.) This submission deals with the new chapter (Chap 12A—Resolution of designated institutions) that the Bill proposes inserting in the Financial Sector Regulation Act, and in particular with the chapter's first four parts, dealing specifically with resolution. (This submission does not deal with the draft Bill's provisions about bail-in, first loss after capital, preference in insolvency, or deposit insurance. We reserve the opportunity to address those matters separately if deemed necessary.)	Noted.

Free Market Foundation	General	*Ministerial discretion.* The draft Bill would give the Minister discretion to put a bank in resolution, which gives scope for subjectivity and arbitrariness, against the Rule of Law.	This is in line with the current process for curatorship of certain financial institutions as provided for in financial sector legislation and the legality thereof is supported by both statutory and common law.
Free Market Foundation	General	*Bill does not properly define "resolution".* The Bill proposes to define resolution merely as management of the bank's affairs as provided in the new chapter. The Rule of Law requires laws to be more accessible and clearer than that. *"Maintain" stability? or just "assist" in that? or only "as far as practicable"?* One clause states the Reserve Bank must act in a way that "*maintains*" financial stability, another states the Bank's objective is just to "*assist in maintaining*" stability, and a third that it must aim at stability "*as far as practicable*". This lack of consistency violates the Rule of Law.	It is not a requirement that a process created by a statute be defined by that statute, i.e. the Insolvency Act 24 of 1936 does not define sequestration. The new Resolution Chapter provides for resolution together with all the provisions relating to resolution and thus resolution is a framework that consists of all the provisions provided for. The references to financial stability need to be read both in the context of the Bill and the context of the provisions where they appear.
Free Market Foundation	General	*"Protect" depositors, or only "assist "in protecting them?* Different clauses say different things. This should be clarified for certainty and the Rule of Law.	Not clear which 'assist' the comment refers to. The resolution authority has the objective to conduct an orderly resolution which amongst others aims to protect depositors whereas regulators have the objective to assist.
Free Market Foundation	General	*Unclear if depositors get more protection more than other creditors.* A clause states the Reserve Bank must not take a resolution action if the value of a creditor's claim would be reduced. A bank's depositors are creditors of the bank.	The FSLAB introduces changes to the creditor hierarchy in the Insolvency Act to give preference to the claims of covered depositors above other unsecured claims. Covered depositors will also be covered by the Deposit Insurance Fund whereas other creditors will not be covered by the Fund.
Free Market Foundation	General	*Clauses that creditor must not receive less than in winding-up are unworkable.* The amount can only be an estimate. Assured amounts are only possible on liquidation after recovery of any impeachable dispositions and realisation of assets.	An institution may be put in resolution before financial insolvency, at which point it should have more value than it would have had in liquidation.

			Based on the above, and combined with other elements, the no-creditor-worse-off rule is feasible.
Free Market Foundation	General	*Bill allows Bank unilaterally to reduce contract payments*. The Bill would permit the Reserve Bank, if it determines it to be necessary for orderly resolution of an institution, to reduce any amount payable by contract by the institution to another party. This violates the Rule of Law, by permitting an institution's liabilities to be determined by the Bank instead of by law, and by authorising unequal treatment of creditors without objective justification.	It is not clearly stated why this is not in line with the 'Rule of Law'. In the aftermath of the 2008 global financial crisis it became clear that financial markets regulators were under-equipped in dealing with the failure of financial institutions and required more powers especially in deferring losses to shareholders and creditors of those institutions to the protection of tax payers who often fund such failures. This approach is in line with other international jurisdictions and the international standard for the resolution of banks and certain financial institutions.
Free Market Foundation	General	*Provisions in Bill are repetitive (or unclear if they apply to different circumstances).* One clause states that, if the Reserve Bank determines it necessary for orderly resolution of an institution, it may cancel an agreement to which the institution is party and which came into effect before the institution was put in resolution. Another states that, if the Bank determines it necessary for orderly resolution of an institution, it may cancel an agreement to which the institution is party. This may be mere duplication. Or the former clause may be intended to apply only to agreements which (as it states) came into effect before the institution was put in resolution, and the latter (yet not expressed) to agreements that came into effect after it was put in resolution. The clauses violate the Rule of Law in being unclear and vague.	Provisions of the Bill, as with other legislation, have to be read in context and with the other relevant provisions e.g. Clause 166R and 166S refer to different actions. Clause 166S(8) has to be read with 166S(7) and 166S(8) only refers to 166S(7)(b) and not 166S(7)(a).

Free Market Foundation	General	*Bill unclear if rights under cancelled contracts continue to be enforceable.* The Bill states the Bank's action reducing an amount payable by agreement by an institution to a party, or cancelling the agreement, will not by itself give a right to the affected party. It also says cancelling the agreement does not affect rights of the parties accrued before cancellation. The latter clause may imply that a party could claim the shortfall from the institution, but this is unclear (usually a contracting party cannot claim performance from the other party before the date performance is due.) This should be clarified in the interest of the Rule of Law.	See comment above.
Free Market Foundation	General	*Bill contradictory about whether value of creditors' claims may be reduced.* The Bill, though stating that the Reserve Bank may reduce the amount payable by an institution to a party under an agreement, also states the Bank must not take action if it appears the result would be that the value of a claim of a creditor of an institution would be reduced. These two contradictory clauses violate the Rule of Law by rendering the Bill unclear.	See comment above. Clause 166S provides for, subject to all the safeguards, relevant processes and read with other relevant clauses, the value of claims to be reduced.
Free Market Foundation	General	*Requiring "*pari passu*" treatment of claims of creditors of same class unclear.* The Reserve Bank in taking resolution action must treat claims of the designated institution's creditors who would have the same ranking in insolvency *in pari passu*. It may add clarity to add "and in proportion to the amount of each such claim" if that is the intention.	The safeguards in the Bill have to be read together. The NCWOL and creditor hierarchy provisions apply simultaneously. Read contextually, creditors within the same class have to be treated *parri passu*. The resolution authority may only deviate from that rule under exceptional circumstances only e.g. where the *parri passu* treatment will impact on financial stability, and then the deviation must still respect both the creditor hierarchy and the NCWOL. In the rare event that creditors within the same class have to be treated differently to ensure financial stability, these creditors are still better

			off than they would have been in the event of a liquidation.
Free Market Foundation	General	*Requiring "*pari passu*" treatment could require Bank to treat all creditors the same.* The requirement that the Bank must treat claims of an institution's creditors who would have the same insolvency ranking *in pari passu* could mean that it must treat all creditors equally in every respect: As mentioned, if the Bank determines it necessary for orderly resolution of an institution, it may cancel an agreement to which the institution is party. The *pari passu* requirement could mean the Bank cannot cancel such an agreement, unless it cancels all the other agreements to which the institution is party, so that all its creditors are treated the same way. But this is unclear. The Rule of Law requires statutes to be clear.	The Bill specifically refers to *pari passu* treatment within the same class and not amongst all classes of creditors.
Free Market Foundation	General	*Reserve Bank discretion to determine that "*pari passu*" does not apply.* The *pari passu* requirement does not apply if the Bank determines that it is necessary to treat creditors' claims differently for orderly resolution of the institution. This violates the Rule of Law by authorising unequal treatment without identifying objective differences to justify it, by allowing equal treatment to be dispensed with merely if the Bank determines this is necessary, and by not identifying objective criteria for determining when it is necessary.	See comments above. The comment does not clearly state how this violates Constitutional rights. It is an inherent feature of insolvency law that classes of creditors rank differently and thus are afforded different treatment in accordance with their ranking, the Bill does not authorize a deviation from this legal principle, clause 166U(4)(c) still requires creditor claims to be treated differently only for the purposes of an orderly resolution, this safeguard is enough as an orderly resolution entails the maintenance of financial stability, the protection of depositors where a bank is concerned and the continued performance of the critical functions of a designated institution in resolution.
Part 1 of the Bill			
BASA	Clause 1	We suggest that this subsection be amended for the reasons set out below:	General: It is not clear which clauses are referred to.

		Deletion of reference to section 27 (Ante nuptial contracts): Section 27 deals with ante nuptial contracts which are not applicable to designated institutions in resolution. Deletion of reference to section 28: Section 28 has been repealed previously. Reference to section 26 (Disposition without value): Although this is unlikely that the Reserve Bank will make a disposition without value, it makes sense to exclude the ambit of this section too when the Reserve Bank exercises its resolution functions. Reference to a creditor as contemplated by section 32(1)(b): A creditor has a right to institute proceedings to recover in relation to the mentioned sections if a trustee fails to do so. Same principle must apply.	Agree with the proposed amendments relating to section 26, 27 and 28. Bill to be amended accordingly. Do not agree with the proposed reference, Bill affords the necessary protection and right of recourse for the creditor in the event of the creditor receiving less e.g. clauses 166V(4) - (6)
BASA	Clause 6	Delete 103B and replace with 102 in 4. Section 103 of the Insolvency Act…"Any balance of the free residue after making provision for the expenditure mentioned in sections [ninety-six to one hundred and two] 96 to 103B inclusive, shall be applied—".	Comment not clear on why 103B should be deleted.
BASA	Clause 6	Regulatory capital, as per financial sector law, includes equity that qualifies for regulatory purposes. How will the NCWO rule be applied to book equity vs regulatory equity? Furthermore, how will capital instruments that no longer qualify be classified e.g. Tier 2 that has less than 1 year left to maturity?	Noted. The relevant clauses will be revised to make it clear that it only refers to debt instruments which qualify as regulatory capital.
BASA	Clause 1-7	**Creditor Hierarchy** Based on the amendments to the Insolvency Act, The creditor hierarchy is therefore the following: 95 Secured 96 Funeral and Death-bed expenses 97 Cost of sequestration 98 Cost of execution 98A Salaries or wages of former employees of insolvent 98AA Cost of resolution of designated institutions	See above comment. The Bill does not introduce any changes to the treatment of secured creditors. Please refer any questions about which instruments qualify as regulatory capital to the relevant regulator. The distinction between the different classes of regulatory capital can be found in the relevant

		99 Preference in regard to certain statutory obligations 100 … 101 Preference in regard to taxes on persons or the incomes or profits of persons 102 Preference under a general bond 102A Preference in terms of covered deposits 103 Non-preferent claims 103A Flac instruments 103B Regulatory Capital 104 Late Proof of Claims The following aspects in terms of the creditor hierarchy under resolution or insolvency requires confirmation: **<u>Secured Creditors</u>:** To confirm section 95 of the Insolvency Act includes all secured creditors Regulatory Capital: The treatment of old style preference shares for Banks seems to be subordinated to equity given that the Insolvency Act refers to regulatory capital, yet preference shares' eligibility is contingent on the implementation of a statutory resolution framework (which this will be). 166S (6) allows for the write-off of shares. To confirm that old style Preference Share Capital which do not currently qualify as regulatory capital is therefore ranked lowest on the insolvency Creditor Hierarchy. To confirm that Shareholders Equity and sub-debt (AT1 and Tier 2) are not ranked pari passu? The Banks Act does not specify seniority in insolvency. The amendment inserts "Regulatory capital" after section 103A, but does not specify different rank ordering that needs to be applied to different classes of "capital instruments" in liquidation. The rank ordering (starting from the most subordinated capital instruments) should be:	regulatory framework and reference to regulatory capital in the Bill includes those distinctions which are introduced in the proposed creditor hierarchy in as far as they relate to debt instruments..

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<tr><th>Regulatory description</th><th>Key features</th></tr>
<tr><td>Common Equity Tier 1 capital (CET1)</td><td>Ordinary shareholders equity i.e. share capital and reserves.
IFRS accounting - equity</td></tr>
<tr><td>Additional Tier 1 (AT1) or
Tier 1 capital</td><td>Perpetual debt securities with optional issuer call dates after a minimum of five years. IFRS accounting – debt or equity based on issuer preference</td></tr>
<tr><td>Tier 2 capital</td><td>Dated debt securities. IFRS accounting - debt</td></tr>
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Distinction between the different classes of “Regulatory capital” is also required by the Basel Committee on Banking Supervision and the Prudential Authority rules applicable to Banks in South Africa. In this regard refer to Regulation 38(11), 38(13) and 38(14). It is further an imperative that the Insolvency Act specifies the rank ordering within “Regulatory Capital” to provide certainty to the holders of these instruments with respect to rank ordering in liquidation (and through the “no creditor worst off rule” in resolution).
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<td>BASA</td>
<td>Clause 7</td>
<td>98AA. After the resolution of a designated institution as defined in the Financial Sector Regulation Act, 2017 (Act No. 9 of 2017), any balance of the free residue shall be applied in defraying costs reasonably and properly incurred by the South African Reserve Bank in performing the resolution functions in relation to the designated institution.". "Reasonable" costs may be open to interpretation. Suggest simply referring to "properly incurred" costs.</td>
<td>Noted. Will amend in line with current legislation.</td>
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<td colspan="4">Part 2 of the Bill</td>
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<td>BASA</td>
<td>Clause 8</td>
<td>Following on from the proposed amendment to section 10(d), a similar amendment should be made to section 10(f)(i) to include reference to a newly formed company.</td>
<td>Not clear which clause of the FSLAB is referred to in the comment.</td>
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<td colspan="4">Part 3 of the Bill</td>
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BASA	Clause 10	Section 54 of the Banks Act, 1990, is hereby amended by the insertion before subsection (1) of the following subsection: "(1A) This section does not apply to a bank in resolution.". **Issue** Incorrect numbering of inserted subsection which will provide that section 54 does not apply to a bank in resolution. Section 54(1A) already exists and states as follows: "(1A) Subsection (1)(b) shall not be applicable to the transfer of assets effected in accordance with a duly approved securitisation scheme". **Proposal**: Either renumber the current sections (1A) and (1B) or renumber the proposed "(1A)"	Noted. However, it is important to distinguish between resolution and curatorship as they are different concepts and the application of certain policy provisions in the Banks Act cannot be applied directly to resolution.
BASA	Clause 10	We suggest that similar provisions contained in section 54(8A) of the Banks Act, 1990 be included in the Bill exempting a transaction involving a designated institution in resolution from transfer duty, registration fees etc.	Agree. Bill will be revised accordingly.
BASA	Clause 12	Subsection (2) provides for an investigation to continue if it is pending at the date on which the draft Bill comes into force and effect. What is the position if a bank has been placed in curatorship prior to the commencement of the Bill? Similarly, what is the position if a bank is in the process of being wind-up? This comment equally applies to the corresponding provisions of the Mutual Banks Act, 1993 and the Co-operative Banks Act, 2007.	Noted. Will revise relevant clauses.
Part 6 of the Bill			
BASA	Clause 23	We suggest that section 5A (Statutory management) also be included in the ambit of this section on the basis that if a designated entity is in resolution, the registrar should not be entitled to appoint a statutory manager.	Noted. Will revise amendments to section 31.
Allan Gray	Clause 23	A general comment in terms of this insertion: Would this apply to institutions that are in the process of being placed in resolution?	Designated institutions will be either in or out of resolution, there is no in between state. Where clauses in the Bill makes reference to a financial institution in resolution, those clauses only

			apply when the designated institution is in resolution.
Part 7 of the Bill			
BASA	Clause 27	Please consider whether section 40F (Winding-up or judicial management of co-operative financial institution) should also be amended to the extent that such financial institution is a designated institution. We submit that sections 27(2) (Prohibited transactions) and 29 (Amalgamation or division of or transfer by co-operative bank) should be amended to provide that these sections do not apply when a designated co-operative bank is in resolution. We suggest that the ambit of section 85 (Indemnity) be widened to extend the indemnity provisions to the Reserve Bank acting as resolution authority.	Disagree. Section 40F needs to remain to provide a process for CFIs to be managed when they are in financial distress or no longer solvent and need to be wound up. Agree. Revisions to amendments will be made accordingly. Indemnities are provided for in resolution chapter.
Part 8 of the Bill			
BASA		Please consider adding a new subsection to section 79 (Winding –up of solvent companies) providing that the provisions of sections 79, 80 and 81 and Chapter 6 are subject to the provisions of the Financial Sector Regulation Act insofar as the winding up or business rescue relate to a designated institution (as defined therein).	Section 31 of the FSRA as amended by this FSLAB will require concurrence of the Reserve Bank before such actions are taken.
Old Mutual	Clause 30	Section 166S appears to allow the unilateral and all-encompassing action of the Reserve Bank in cases where designated entities are in resolution. We suggest that this should be placed in the hands of the Court as it is with all other actions of a similar nature such as business rescue.	Section 166S is critical for the Reserve Bank as the resolution authority to give proper effect to its objective under clause 166B, without the power to restructure a financial institution and bail in certain instruments, resolution of financial institutions would be redundant and pointless. Resolution is not akin to business rescue proceedings. In note of the above, please refer to the following:

			National Treasury Discussion Paper: *Strengthening South Africa's Resolution framework for financial institution*- *http://www.treasury.gov.za/twinpeaks/Strengthening%20South%20Africa%E2%80%99s%20Resolution%20Framework%20for%20Financial%20Institutions.pdf* Financial Stability Board Key Attributes for Effective Resolution Regimes (rev2014) - http://www.fsb.org/what-we-do/policy-development/effective-resolution-regimes-and-policies/key-attributes-of-effective-resolution-regimes-for-financial-institutions/
Part 10 of the Bill			
Old Mutual	Clause 38 Section 1 Financial Sector Regulation Act 2017	Recovery definition to be included in definition of resolution: It's not clear whether the Point Of Non Viability (PONV) occurs before or simultaneously with Point Of Resolution (POR). If state of 'non-viability' is intended to be a separate regime as provided for under Basel III and the PONV occurs before POR, Tier 2 and Additional Tier 1 investors run the risk of their claims being written off without the benefit of, for example, the new intended "no-creditor-worse-off" provisions. We would appreciate clarity in this regard. Further, the definition of POR is fully within the regulator's discretion. There are no terms of reference for investors to test/interrogate the decision. Without a fixed definition, investors are also unable to assess the risk (i.e. Investors can't assess for themselves how close to PONV/POR a bank currently is).	Noted. See above comments on revisions to the amendment of section 31 of the FSRA. Recovery is provided for in relevant financial sector legislation.
Old Mutual	Clause 38 (Amendment of s1 of Act 9 of 2017)	The FSLAB doesn't explicitly define what will constitute FLAC. The exact definition of FLAC and the eventual hierarchy as to be amended and included in	Noted. See above comments on legislative process.

		the Insolvency Act should be confirmed so that there is certainty on the exact extent of the amendment to be made to the Insolvency Act.	The amendments to the hierarchy included in this FSLAB clearly provides the Creditor Hierarchy.
BASA	S29A	Systemically Important Financial Institutions (SIFI) What criteria will be used to determine which institutions constitute SIFIs for purposes of the Act? In this Act, 'designated institution' means each of the following: e) subject to any determination in terms of subsection (2), if a bank or a systemically important financial institution is a member of a financial conglomerate in terms of section 160, each of the other members of the financial conglomerate. Does this section imply that if a designated institution is part of a financial conglomerate each of the entities in its structure will have to meet all the prudential requirements applicable to designated institutions including, S46(b) (a) to (i)? We recommend rewording e) to "Entities in a financial conglomerate may be designated by the Governor to be designated entities".	See the current section 29 of the FSRA. The methodologies for designating systemically important financial institutions will be published in due course. The question is not clear. Being a DI does not bring you into the prudential regulatory framework insofar as other regulatory standards, not provided for in the resolution provisions, are concerned. When a standard for designated institutions is issued, it will state to which designated institutions it applies.
BASA	S29A	Please consider providing for the ability of a person or body that falls within the ambit of subsection (1)(e) to apply to the Governor to be excluded as a designated institution.	Noted.
BASA	S29A	Under section 29A the definition of designated institution includes a bank and a systemically important financial institution (SINBFI) amongst others. However, the long title distinguishes between Banks, SINBFI and designated institutions. Is the express reference to banks and SINBFI intended to exclude all the other institutions mentioned under s29A, rather than using the defined term 'designated institutions' which would include both, as well as payment system operators and participants; and holding company of a bank?	Noted, the relevant amendments will be revised.

		Clarity is requested on the definition of "designated institution "to ensure consistent use of terms in line with the objectives of the legislation. In addition, it is unclear as to what extent the framework will apply to designated institutions based on the discrepancy in the long title and the definition under s29A.	
BASA	Amendment to long title read with insertion of section 29A(1)(e)	Proposed to insert: "to provide for the establishment of a framework for the resolution of banks and systemically important non-bank financial institutions to ensure that the impacts and potential impacts of a failure of a bank or systemically important financial institution on financial stability are managed appropriately; And to make provision for designated institutions in connection with resolution matters; **Issue:** Inconsistencies between stated objective, namely to establish a framework for the resolution of banks and systemically important non-bank financial institutions and other provisions such as section 29A(1)(e). This inconsistency will potentially have severe implications and unintended consequences. By way of example: In terms of section 29A(1)(e), 'designated institution' means each of the following: "subject to any determination in terms of subsection (2), if a bank or a systemically important financial institution is a member of a financial conglomerate in terms of section 160, each of the other members of the financial conglomerate. **Considerations** 1.The framework and objective for resolution is primarily aimed at banks and systemically important non-bank financial institutions 2.Provision for designated institutions are being made in connection with resolution matters 3.Resolution is primarily aimed at banks and systemically important non-bank financial institutions 4.This is inconsistent with the newly proposed section 29A, which reads as follows: 'designated institution' means a designated institution as defined in section 29A	Noted, the long title will be revised.

		Section 29A is phrased as follows: 29A. (1) In this Act, 'designated institution' means each of the following: (a) A bank; (b) a systemically important financial institution; (c) the payment system operator and participants of a systemically important payment system; (d) a company that is a holding company of a bank, a systemically important financial institution, or a payment system operator of a systemically important payment system; and (e) subject to any determination in terms of subsection (2), if a bank or a systemically important financial institution is a member of a financial conglomerate in terms of section 160, each of the other members of the financial conglomerate. (2) The Governor may, by written notice to a person or body that is a designated institution because of subsection (1)(e), determine that the person or body is not a designated institution. **Reasons** It is not practical to provide that, unless the Governor determines otherwise on a case by case basis (institution/entity basis), that all members of a financial conglomerate of which a systemically important bank is a member, irrespective of the nature or size of such members' business activities, are automatically designated institutions. Having regard to: The Prudential Authority's Financial Conglomerate Supervisory framework and the purpose of financial conglomerate supervision. The fact that the resolution framework and related objectives for resolution is primarily aimed at financial stability (banks and systemically important non-bank financial institutions) It should be noted that a large number of group subsidiaries included in the designation will be offshore entities (both regulated and unregulated) How will this be treated in relation to an automatic inclusion?)	

		It is unclear what the rationale is for providing that the large number of small and non-financial and/or non-regulated subsidiaries, which will potentially form part of the designated financial conglomerate, automatically (without due consideration) be designated institutions. There is distinction in the "long title" between banks and systemically important non-bank financial institutions and designated institutions, which also includes the payment system operator and participants of a systemically important payment system? To what extent is the framework applying to designated institutions? Consider the above against all other proposed provisions pertaining to designated institutions and the matters expressed below. Amendment of long title explicitly states: to provide for the establishment of a framework for the resolution of banks and systemically important non-bank financial institutions to ensure that the impacts and potential impacts of a failure of a bank or systemically important financial institution on financial stability are managed appropriately; to make provision for designated institutions in connection with resolution matters. **Proposal**: Rephrase section 29A(1)(e) to prevent that each of the other members of the financial conglomerate is automatically designated institutions Section 29A(1)(e), must be rephrased to provide that the Governor may, after consultation with the Prudential Authority, by written notice to members of a financial conglomerate of which a systemically important bank is a member, determine (specifically and on a case by case basis, with good reasons/motivations), which members of the financial conglomerates are designated institutions. In such instances, the Governor must invite either the holding company of the financial conglomerate and/or the impacted non-bank non-systemically important members, to make submissions on the matter, and give them reasonable periods within which to do so.	

BASA	S29B	29B (1) (a) The Governor may, by written notice to the payment system operator of a payment system, designate the payment system as a systemically important payment system **Consideration** Consider rephrasing to provide for a consultation with affected participants of the payments system operator. **Proposal**: 29B(1)(a) The Governor may, after consultation with the participants, by written notice to the payment system operator of a payment system, designate the payment system as a systemically important payment; (2) Before designating a payment system in terms of subsection (1) as a systemically important payment system, the Governor must— (a) give the Financial Stability Oversight Committee notice of the proposed designation and a statement of the reasons why the designation is proposed, and invite the Committee to provide advice on the proposal within a specified reasonable period; and (b) if, after considering the Financial Stability Oversight Committee's advice, the Governor proposes to designate the payment system in terms of subsection (1), invite the payment system operator of the payment system to make submissions on the matter, and give it a reasonable period to do so. **Consideration** Consider including an invitation to the payments system participants to provide submissions on the matter. **Reason** The effect of the designation on the participants may have unintended consequences and the participants as such should be given an opportunity to make submissions in this regard.	Noted.
BASA	Clause 38	"critical function", in relation to a designated institution, means a function that is— (a) essential to, or that contributes substantially to, financial stability and is performed by the designated institution; and	Noted.

		(b) provided to, and essential to the continued operation of, the designated institution; **Proposal**: Amend to read and/or to cater for all practicalities Consideration It is our view that the intention should not be to limit critical function in relation to a designated institution to performing both subsections but rather either as well.	
BASA	Clause 38	Flac instrument Is flac the name of the instrument set or is it an acronym? If an acronym, what does it stand for?	Please refer to the definition of flac instruments in the Bill.
BASA	Clause 38	"Orderly resolution of a designated institution" means the management of the affairs of the designated institution as provided in Chapter 12A in a way that— (a) maintains financial stability; and (b) in the case of a bank, protects the interests of depositors, including by ensuring that the critical functions performed by the designated institution continue to be performed; It is our view that ensuring the performance of critical functions should not be limited to banks Proposal: **Amend to read:** "orderly resolution of a designated institution" means the management of the affairs of the designated institution as provided in Chapter 12A in a way that— (a) maintains financial stability; and (b) in the case of a bank, protects the interests of depositors, (c) ensures that the critical functions performed by the designated institution continue to be performed; It is suggested that the definition of an orderly resolution be amended to include the caveat of seeking to minimize resolution costs and avoid destruction of value unless deemed unavoidable.	Noted

BASA	Clause 41	Pursuant to this section, "financial sector regulators" as defined, i.e. the Prudential Authority and the Financial Sector Conduct Authority, are obliged to assist the Reserve Bank in relation to its resolution function. Please consider whether this obligation should also be placed on other regulators overseeing the business of designated institutions.	Section 78 of the FSRA, amongst others, contains the necessary obligations for cooperation and assistance.
BASA	Clause 41/42	In line with the comment for paragraph 41. There is currently no requirement for the Reserve Bank to enter into a memorandum of understanding with any other regulator overseeing the business of designated institutions other than the "financial sector regulators" as defined. Consider widening the ambit of either subsection (1A) or (3A).	Not clear which regulators are referred to. The provisions sufficiently provide for cooperation where a conflict may arise see section 19 of the FSRA for when the Governor has designated a systemic event and section 78 of the FSRA
BASA	Clause 46	Harmonization of proposed changes to the Financial Sector Laws Amendment Bill (and related bills) and prudential standards Section 46 of the proposed Financial Sector Laws Amendment Bill affords the right to delegate the setting of prudential standards with respect to characteristics of Flac instruments and calibration of minimum requirements to the Prudential Authority. The standards will therefore contain significantly more detail on the characteristics and calibration of minimum requirements for this new asset class. To fully comment on the draft Financial Sector Laws Amendment Bill and to ensure that the resolution framework as embodied in the legislation and the standards conform to international best practice, we request that the Standards be made available for comment as soon as possible, and before finalisation of the proposed Financial Sector Laws Amendment Bill (to allow for further comments).	Noted. See above comments on legislative process and regulatory instruments.
BASA	Clause 46	Please amend reference to "systematically important financial institutions" in section 30(1) to "designated institutions".	Disagree. The intention is not to change the standards in relation to SIFIs to standards for DIs, but to add standards for DIs. The amendment will thus introduce standards for DIs over and above the standards for SIFIs and not replace the standards for SIFIs.

BASA	Clause 46 (b) (1B) (c)	In the amendment to (b)(1B)(c) delete the word "the" in "if the designated institution does not hold flac instruments to the at least the value proposed".	Agreed, the amendment will be revised.
BASA	Clause 51	We suggest that the ambit of this Chapter be widened to extend to the Reserve Bank and any person appointed to assist the investigator mentioned in subsection (b),	Agreed, the amendment will be revised.
BASA	Clause 52	Does the Reserve Bank have investigative powers prior to a designated institution being placed in resolution? This is not entirely clear. The section seems to limit the Reserve Bank's power, only allowing it to appoint an investigator once a designated institution is in resolution?	In terms of the performance of its resolution functions the Reserve Bank only has investigative powers during the resolution of a designated institution.
Insertion of Chapter 12A in Act 9 of 2017 – Clause 54 of the Bill			
BASA	Clause 54	Reference to a "statutory manager" in subsection 166D(d) is omitted.	Noted, please see revised draft.
BASA	S166C Reserve Banks Resolution functions (3) The Reserve Bank may, in relation to the resolution …consider the possible impact that its action may have on the financial stability of a foreign jurisdiction…	How will the Reserve Bank ensure as far as practically possible that it will consider the possible impact that the action may have on the financial stability of foreign jurisdiction where the designated institution is registered based on the jurisdiction and laws? What factors will be considered?	See above responses on the legislative process and regulatory instruments. Guidance will be issued on the detail of cooperation between resolution authorities, this will be published in due course. Also see the Financial Stability Board's standards and guidance on cross border cooperation in resolution.

BASA	S166D Winding up and similar steps in respect of designated institution	We believe that it would be useful to include an additional point to the list of steps that cannot be taken in relation to a designated institution without the concurrence of the Reserve Bank i.e. "Materially change regulations that affect the financial viability or ability to continue as a going concern of the entity in question" **Suspension Rights** It seems the intention of this provision is to ensure that termination rights, security enforcement rights and liquidation rights found in contracts are temporarily "stayed" or suspended. Kindly provide clarity as to the length of time that such stays will operate? Also, in respect of which agreements exactly? What about derivative transactions? Can parties still exercise their ordinary netting, close-out and set-off rights as per the requisite Master Agreements? If yes, then a carve-out in this section [similar to the one contained in 166S (9)] is required. The wind up actions under 166D may be implemented incorrectly and not meet 166C (2) as a result Point (f) indicates that a resolution to begin business rescue proceedings and place the designated institution under supervision is not allowed without the concurrence of the Reserve Bank. Does this include Point of Non-viability which can be triggered by the Prudential Authority?	Regulations must meet standard requirements such as consultation. The Reserve Bank may be one of many stakeholders that are consulted and provide input during the consultation process, but it is not within the mandate of the Reserve Bank to approve regulations. Legislative processes are a Ministerial and Parliamentary prerogative. Resolution is not liquidation and not a default event. If the designated institution defaults when no moratorium or notice has been issued, then it would trigger standard default clauses.
BASA	S166E Resolution Planning - The Reserve Bank must, on the basis of risk analyses conducted in consultation with the financial sector regulators, take adequate and appropriate steps…	Is this referring to ongoing supervision risk analyses by financial sector regulators or will this be an additional analysis? What would be the role of the financial institutions in the risk analysis? It appears the word should be analysis and not analyses.	It will depend on which elements are analysed. In some cases additional analysis will be required due to the differences in supervision and resolution. Noted. Revised to the singular.
BASA	S166F Bridge Companies	"…any person" in the following needs to be further clarified to ensure that the transfer is not allowed to go to anyone, as opposed to an institution of good standing for example	Disagree. Not clear why these inclusions are necessary. Institutions, and their shareholders, have to meet various requirements. Not clear from the comment how they would meet these requirements if they are not in good standing.

		2) The Reserve Bank may, for the purposes of facilitating the orderly resolution of a designated institution in resolution, transfer some or all of the shares that it holds in a bridge company to any person. **(4) Bridge Company Staff Exemption** The exemption listed in 166F(4) should only be upheld if the actions are taken in good faith in line with the immunities granted in Section 285.	Disagree. The comment does not make it clear from what the staff would need exemption over and above standard indemnities.
BASA	S166G Act of, evidence of, insolvency	Should reference to "An action taken by the Reserve Bank, or by a designated institution in terms of this Act" not be limited to a reference under "this Chapter"?	Disagree. Not clear what actions taken by the Reserve Bank in terms of other provisions in the Act the commentator believes should be subject to this consideration.
BASA	S166H Liquidation	To address instances where some part of the designated institutions has been transferred to a bridge entity, we recommend adding "or part thereof" to the following sentence i.e. the Reserve Bank may apply to a competent court in terms of the Companies Act for the winding-up of a designated institution "or part thereof" on the grounds that the institution has been placed in resolution and there are no reasonable prospects that the institution will cease to be in resolution; and…	Disagree. It is not clear from the comment in terms of which legal process only parts of a company can be placed in liquidation. Establishing a bridge company creates two separate companies e.g. good bank v bad bank, one of which may be liquidated as a whole entity and not parts of it.
BASA	S166J (1) Determination by Minister to place designated institution in resolution	**Definition or criteria specification** How will the "opinion" in the following be determined? We recommend the criteria to be specified. There are no objective tests referred to under 166J. The requirement of objectively observable criteria or test before placing a designated institution in Resolution is included in the EU's BRRD Article 32. We suggest that subsection 1, 3 and 4 be read as suggestions for inclusion here or for inclusion in a standard with provision made in the bill for a future standard. **Definition of an obligation** In particular, the institution can be placed in resolution when it does not meet its obligations. However, obligations are not referenced in the bill. It is suggested that	Disagree. See comments above: 166J is in line with current practice which is both supported by statutory and common law e.g. the curatorship provisions of the Banks Act, however the FSLAB goes further in that the recommendation from the Reserve Bank to the Minister is based on three requirements – (1) that such recommendation must be for purposes of ensuring an orderly resolution of the designated institution; (2) that such resolution must be in necessary for maintaining financial stability; and

		obligations be omitted and replaced with abovementioned criteria. If obligations continue to be referenced then a materiality threshold is suggested for consideration. **Timing** No timelines have been imposed. It is proposed that specific turnaround times be included so that certainty of process is generated quickly if a designated entity enters resolution. • How long will the Minister have to make a decision to place a designated institution in resolution? • How soon after the determination must the Managing Director of the designation institution be informed of the decision? • How soon after the decision has been made to place a designated institution in resolution must the decision be published? When does the decision take effect? When the Minister makes the decision/communicates the decision to the Reserve Bank/when the Reserve Bank informs the Managing Director/publish the decision?	(3) that in the case of a bank it must be to protect depositors Resolution frameworks operate as a whole, the sum of all parts. The BRRD has to be read in a manner that views it in this manner. The BRRD also provide for MREL and a resolution fund (over and above deposit insurance) funded by the institutions which supports the proposed element. The decision of the Minister takes effect when the written determination is made.
BASA	Section 166J (2): Determination by Minister to place designated institution in resolution	(2) The Minister may, after considering a recommendation in terms of subsection (1) and if he or she considers that— (a) the designated institution is or will probably be unable to meet its obligations, whether or not the designated institution is insolvent; and (b) it is necessary to ensure the orderly resolution of the designated institution to— (i) maintain financial stability; or (ii) in the case of a bank or a member of a group of companies of which a bank is a member, to protect depositors of the bank, make a written determination, addressed to the Governor, placing the designated institution in resolution. **Question**: How will non-financial institutions be placed in resolution? No consultation with boards of directors of non-financial institutions?	The Bill applies to all banks and systemically important non-bank financial institutions. Please see section 29 of the FSRA that provides for the process in terms of which the designation of a SIFI must take place.

		Taking away powers, duties and responsibilities of such juristic persons to make decisions and manage the non-financial entities? How will this achieve any financial stability? REMEMBER: The framework and objective for resolution is primarily aimed at banks and systemically important non-bank financial institutions. **Consideration** The SARB (and Regulators) has effectively EXCEPTIONALLY WIDE POWERS - they can do what they need (or think) they must do in order to maintain and/or restore financial stability. Given these wide powers, designating a juristic person as a "designated institution" being subject to these wide powers must follow due process and cannot automatically be as a consequence of being part of a particular group, irrespective of size, nature of business, etc.	
BASA	S166J (3) Determination by Minister to place designated institution in resolution	The Basel accord and Prudential Authority rules applicable to Banks in South Africa provide for the disapplication of contractual loss absorption requirements on Additional Tier 1 and Tier 2 capital instruments issued by banks in favour of statutory loss absorption provisions that cover the Basel (and Prudential Authority's) concept of "Point of non-viability". The application of statutory loss absorption frameworks to "Point of non-viability" has become industry standard in most international jurisdictions and protects investors in these instruments from risk of inappropriate subordination that could otherwise arise. This is therefore a key consideration to ensure continued access to international (and local) capital markets for South African Banks (terms and conditions of current AT1 and Tier 2 issuances by South African banks typically allow for an issuer option to not apply contractual loss absorption language in favour of statutory loss absorption should the planned resolution framework covers "Point of non-viability"). It is unclear whether it is the intention of section 166J (3) read with sections 166J (1) (a) and (b) and section 166J (2) to make the resolution framework applicable to "point of non-viability". If the intention is to provide for the application of the resolution framework to "Point of non-viability" we recommend that this be made	See above responses on PONV and POR, including envisaged revisions to 166D (current section 31 of FSRA).

		clearer as it is a critical consideration for bank capital markets. In addition, further clarification is required with respect to the powers of the Minister and the Reserve Bank vis-a-vis resolution and Point of non-viability under the statutory framework where, for example, the Minister may disagree with a recommendation from the Reserve bank that a designated institution be placed in resolution.	
BASA	S166K When a designated institution ceases to be in resolution	**Exiting Resolution** Please specify what qualitative and quantitative criteria will be used in order to assess that a Designated Resolution Institution is eligible to exit resolution?	Please see above comments on legislative process and regulatory instruments. Guidance on specific elements of the resolution framework introduced by the FSLAB will be issued in due course after the Reserve Bank has been enabled to do so.
BASA	S166P. (1) A share of a designated institution in resolution may not be traded without the approval of the Reserve Bank	The choice of the word "traded" in subsection (1) of the amendment proposed is unusual and may be limiting and we recommend replacing this with "transferred" (which is wider in ambit and would cover transfers such as donations and inheritances, where no consideration is paid (and therefore there is no "trade"), as such circumstances are clearly contemplated by the proposed section.	In previous drafts the word "transferred" was used and commentators proposed that the preferable term should be "traded" hence it currently appears in this version. Clause 166P(1) does not seek to prohibit donations and inheritances (see clause 166P(2)).
BASA	S166Q Valuation	We understand the importance placed upon valuation in the process of resolution and the necessity therefore. However, we note that given the infrequency of resolution situations and the highly specialised nature of bank asset valuations, there is a risk that there will be a very limited number of service providers to take on this role, and that will impose a practical limitation on the effectiveness of the role of valuators. In larger jurisdictions, with more of a mixture of small, medium and large institutions, there would be a greater chance of there being a viable skills pool of bank valuators being maintained. In a smaller market such as ours, this will be difficult. The Financial Stability Board (FSB) guidance refers to 3 valuations, however section S166Q only refers to 2. Ideally the SA resolution framework should be aligned to international standard to ensure consistency, especially for multi-jurisdictional banking groups. Approach recommended by the FSB from the paper	Noted. Refer to response on BRRD and further guidance which will be issued. The regulatory instruments will set out the detail on valuations and depending on the nature of the valuations the first valuation could cater for both the requirements of valuation 1 and 2 in the Key Attributes.

		titled, “Principles on Bail-in Resolution”. “Several different valuations or other loss estimate analyses are likely to be necessary to plan and execute a bail-in transaction. In particular, valuations are likely to be required to: Prior to resolution - estimate losses, which may inform the resolution strategy and actions to be taken in resolution and/or the determination of whether the conditions for resolution or the conditions for the contractual write-down and/or conversion into equity of regulatory capital instruments are met (‘pre-resolution valuation’ or ‘loss estimate’). This evaluation should therefore not be a valuation under a winding-up perspective but rather a valuation assuming a going concern. During resolution - determine the write-down and conversion rates, e.g. the value of the securities that creditors will receive in exchange for their claims (‘bail-in valuation’). Depending on the approach to bail-in this could involve: a valuation of assets and liabilities to inform the extent of losses (and hence the extent of bail in) and a valuation to determine the market value of the new equity to inform the rates of conversion into equity or other instruments of ownership and any allocation(s) to bailed-in creditors and shareholders (for example, in an open bank bail-in). a valuation of assets and business lines in order to finalise the financial statements of a successor entity/ entities to the bridge institution, and an enterprise valuation of the new financial company or companies to serve as the basis for distributions to bailed-in creditors (for example, in a closed bank bail-in). The third valuation (a valuation for differences in treatment) appears to be missing completely. After Resolution - assess for purposes of the application of the NCWO safeguard the value that creditors and shareholders would recover in a counterfactual insolvency as compared to the value received by creditors and shareholders (e.g., the securities together with any other distributions) in resolution (‘counterfactual valuation’). In the BRRD, the requirements for valuation 1 and 2 are set out in Article 36, while Article 74 specifies the requirements for valuation 3, i.e. the valuation of	

		difference in treatment. The EBA has issued three regulatory technical standards (RTS) related to valuations. These are: - EBA/RTS/2015/073 - Final draft RTS on independent valuers - EBA/RTS/2017/054 - Final draft RTS on valuation before resolution - EBA/RTS/2017/06 - Final draft RTS on valuation after resolution (this is actually combined with EBA/RTS/2017/05 in the same document). While the first of these standards has been published by the EU as a delegated regulation, the remaining two standards have not yet been published in the official journal of the EU and as such are not yet binding regulation. Subsection (3) mandates the Reserve Bank to specify the assumptions for the valuation. This entails that a valuator cannot act independently. However, since requirements for valuators have been delegated to a prudential standard, it is not entirely clear to what extent the valuer has to act independently. In the EU, the BRRD contains the requirement for an independent valuation and the prudential standard (developed by EBA) merely details the criteria for what constitutes independence. We expect to see three valuations described in section 166Q. - The first valuation being undertaken to determine whether the conditions for resolution are met. This evaluation should therefore not be a valuation under a winding-up perspective but rather a valuation assuming a going concern. - The second valuation would then establish whether the proposed resolution actions are likely to preserve more value than would be obtained in a liquidation / insolvency scenario. - The third valuation (a valuation for differences in treatment) appears to be missing completely. This last valuation would be an 'after the fact' assessment of the NCWO condition, i.e. a determination whether creditors were worse off after resolution than they would have been in liquidation.	

BASA	S166R Powers	**Definition or Criteria Specification** 166 R 2(b) – "unreasonably onerous" is not defined not explained in terms of materiality nor referenced. This section and subsequent sections set out the obligations of the Reserve Bank vis-à-vis a designated institution but does not direct the designated institutions generally to provide such assistance as may be required for the Reserve Bank to exercise these powers. Subsection (1)(a) must be made subject to subsection (2) and (3) – currently only subject to subsection (3). **Proposal**: Subject to subsections (2) and (3), by notice to the other parties to an agreement to which the designated institution is a party, being an agreement that came into effect before the designated institution was put in resolution, cancel the agreement with effect from the date stated in the notice, which date must be after the date of the notice.	It is not necessary to define 'unreasonably onerous', it would be on a case by case judgement and the Reserve Bank, in exercising its powers and functions would have to act within the prescribed legal parameters. The second part of the comment is not understood, a designated institution in resolution does not have to be directed to assist the Reserve Bank as its management and functions would have been taken over by the Reserve Bank.
BASA	S166S Resolution action (including restructuring and bail-in)	**Bail-In –** **Point of Non-Viability (PONV) and Point of Resolution (POR)** This section provides for a determination as to the point of resolution (POR) by the Reserve Bank (as the resolution authority). However the Bill is silent as to the point of non-viability (PONV). Regulations 38(11) and 38(12) of the Regulations Relating to Banks (the Regulations) make reference to "duly enforceable legislation" being in place that provides for the write off of or conversion of capital instruments upon the occurrence of a trigger event. It is submitted that as currently drafted the Bill does not provide such "duly enforceable legislation". The distinction between the point of non-viability and point of resolution is not clear. Please can you clarify that there are two points and what the distinction between these two points is? The EUs BRRD (Article 59 and 60) does reference both points as well as specify that the NCWO safeguard will apply at both points, giving comfort and stability to financial markets. Please specify what qualitative and quantitative criteria will be used in order to assess PONV and POR in relation to a Designated Resolution Institution?	Noted. See above responses on revisions to 166D.

		If conversions and reduced value are contemplated as a tool for use in Recovery, what happens when the Designated Resolution Institution has in fact recovered e.g. will the affected creditors and shareholders be able to claim against the recovered Designated Resolution Institution for "write-ups"? **Creditor Hierarchy** □ 166S(8) - Is this protection also available when assets are being transferred to a "good bank" as described in 166F(2)? □ Please define 166S(9)(a) "An unsettled exchange traded transaction" . □ An umbrella carve out similar that at 166S (9) is required across the entire Act and should be aligned to the Insolvency Act. □ Under 166S(9)(c) the deposit holder being the Corporation is covered. What happens to covered deposits, where the Corporation has not stepped in? □ The proposed bill is at odds with the policy statements made in the document '*Strengthening South Africa's Resolution Framework for Financial Institutions*', which states on page 49: The bail-in tool in the revised resolution framework should contain the following mandatory exclusions (which was followed by three motivating factors): • secured creditors • qualifying deposits, and • preferred creditors in the current insolvency framework. **Additional Tier 1 and Tier 2 Capital Instruments** The reasons for not allowing for any discretionary exclusions in the legislative proposal, in particular as the policy objective appears to have been to provide the Resolution Authority with the power for such discretionary exclusions from the scope of the bail-in tool. In the EU, the BRRD Article 44(3) provides the opportunity for discretionary exclusions. Rather than specifying categories of liabilities that might be excluded, the BRRD focusses on the criteria for such exclusions.	**Creditor Hierarchy** □ 166S(8) - Is this protection also available when assets are being transferred to a "good bank" as described in 166F(2)? Question is not clear. 166(8) refers to agreements that were entered into prior to resolution and not agreements entered into while the entity is in resolution. □ Please define 166S(9)(a) "An unsettled exchange traded transaction". Disagree. It is a clear description as ordinarily used and understood. □ An umbrella carve out similar that at 166S (9) is required across the entire Act and should be aligned to the Insolvency Act. This comment is not clear. These instruments are excluded from bail-in and it is not clear how you would exclude them from resolution in totality. □ Under 166S(9)(c) the deposit holder being the Corporation is covered. What happens to covered deposits, where the Corporation has not stepped in? The comment seems to confuse the Corporation for Public Deposits

		There is concern that the current framework will not trigger the language required in local AT1 and Tier 2 issuances as prescribed in Guidance Note 6/2017, Section 6 which references "Statutory Legislation" as replacing contractual terms. Regulation 38 references compensation in the most subordinated form of equity. 166V is silent on this and limits the claim to the designated institution and not a potential bridge company or the Reserve Bank. If the FSLAB replaces regulation 38 it may be that current rights are adversely impacted. **Re-capitilisation** The provisions only allow for the write-down or cancellation of debt but not a conversion. While this is in line with the current provisions of AT1 and T2 instruments that only allow a write-down for the purposes of absorbing losses, this raises issues with respect to Bail-in, which should not just be used for loss absorption but also – potentially – to recapitalise an institution. Please provide an example of how bail in and re-capitalisation is proposed to work, including flac.	with the Corporation for Deposit Insurance created in this Bill. The proposed bill is at odds with the policy statements made in the document *'Strengthening South Africa's Resolution Framework for Financial Institutions'*, which states on page 49: The bail-in tool in the revised resolution framework should contain the following mandatory exclusions (which was followed by three motivating factors): • secured creditors • qualifying deposits, and • preferred creditors in the current insolvency framework. Disagree, in the crafting of legislation a policy document provides for the general policy intent underlying the proposed draft Bill, the latter does not have to incorporate everything from the former due to, amongst other things consultations with the public. **Additional Tier 1 and Tier 2 Capital Instruments** See responses on revisions to 166D above and responses on BRRD.

			Re-capitilisation Disagree. There is no requirement to provide examples in primary legislation and it is also not practice to do so.
BASA	S166F, 166P, 166R and 166S	**Transfer of Shares** This clause indicates that there is a restriction on the transfer of shares of a Designated Resolution Institution once in resolution (166P) however 166S (9)(a) preserves the continuation of "unsettled exchange traded transactions" on a licensed exchange. The two sections seemingly contradict one another. On the one hand, Designated Resolution Institution shares cannot be transferred following resolution but on the other hand unsettled exchange traded transactions are preserved. Also what constitutes "unsettled exchange traded transactions"? Does that include all other instruments of the Designated Resolution Institution that might be registered with an exchange (for example the JSE)? If yes, please confirm that this means "trading" of such listed instruments can continue post resolution. 166R (3) Cancellation of contracts by the Reserve Bank in terms of (1)(a) will not affect the rights of the parties accrued before the date the cancellation takes place. What about other instances throughout the bill where the RA or Reserve Bank exercises its rights of cancellation? Is the intention for the exercise of those other powers (in other sections) to have retrospective effect on contracts?	See comment above. Please see response above.
BASA	S166U & Part 1 Amendments to the Insolvency Act, 1936	**Creditor Hierarchy** 166U. (1) – Is this section attempting to cross refer to the "no creditor worse off" principle? If this is the case, can this please be made clearer? Where will instruments that no longer qualify as regulatory capital feature in the creditor hierarchy e.g. through maturity no longer meeting the relevant requirements for AT1 or Tier 2?	See comments above on section 166D and the regulatory framework. NCWO is applicable to all resolution actions taken by the resolution authority in resolution.

		166U needs to be consistent with the treatment in 166S that contains the main bail-in clauses. Therefore, please read these comments together with those made of 166S. In the provisions in section 166Z, covering the requirements for the Corporation to ensure bank depositors have access to their covered deposits. It is not clear whether the covered depositors would be indemnified for any losses through them being bailed-in. Clarification would be appreciated. 166U((4)(c) should reference that where such an action is taken that restitution as described in 166V(5) and 166(6) still applies thereby ensuring that the NCWO principle is upheld in the overall process.	
BASA	S166V No creditor worse off rule	We appreciate the spirit of this general rule being proposed. It is a desirable feature of effective resolutions that no creditor is worse off. However, as a decision regarding resolution would be taken in a certain set of circumstances and with a particular view on key variables (e.g. exchange rates, commodity prices, etc.) and these may change. As one course of action will be selected and pursued, it will never be possible to prove that the creditor is worse or better off than if the alternative path had been pursued as that factual alternative will not exist anymore (as variables will have changed and there are always uncertainties as to how a particular set of actions will play out in the real world). This is not to undermine the principle, which is a correct one and should govern the decision at the time it is taken and under the assumptions to which it is subject, but we believe that this section creates a situation where a test is proposed which is simply not feasible in the real world. **No Creditor Worse-Off Rule (NCWO Rule)** Will the NCWO Rule apply in both Recovery and Resolution? Currently the safeguard is only referenced in the Resolution framework? Assuming the NCWO safeguard is triggered (i.e. it is found that creditors will be worse off following Resolution action) then what steps will be taken by the Resolution Authority? Will it be curatorship? Management? Or insolvency? Given the stated intention to replace the existing curatorship/management provisions of	Noted. Disagree. It is not clear from the comment why NCWOL will need to be applicable in recovery. See comment above on examples in legislation.

		the Bank's Act with this Act, in terms of what legal process will such a winding-up occur? Practically how will NCWO work? Will the Resolution Authority have the capacity to assess each individual creditor's status (on an individualised basis) and whether they will be worse off?	
BASA	S166W Registration of transactions	In line with our earlier suggestion, we suggest that similar provisions contained in section 54(8A) of the Banks Act, 1990 be included in the Bill exempting a transaction involving a designated institution in resolution from transfer duty, registration fees etc.	Noted. See above response.
BASA	S166X Costs of resolution	What would happen if the recovered amount does not cover the costs incurred as specified in the following i.e. if there is a shortfall? The Reserve Bank may recover from a designated institution in resolution, or from a designated institution after it ceases to be in resolution, amounts that the Reserve Bank reasonably and properly incurs in exercising and performing its resolution functions in relation to the designated institution while in resolution.	This comment not clear, the provisions in the Bill provide for the recovered amount to be equal to the costs 'reasonably and properly incurred'.
BASA	S166Y Administrative process for actions taken by the Reserve Bank in terms of this Chapter	166Y (4) should also result in compensation.	Disagree.
BASA	S166AA Limit of cover for covered deposits	**Limit of cover for covered deposits** What is the definition of an account holder? Is it the name of the people that control the account? Or is it the beneficiaries of the account? What about the coverage of joint or pooled assets (such as stokvels and other associations)? How will the coverage limit be determined in such instances? Should this not rather be covered in a future standard?	The Corporation for Deposit Insurance will, once established, issue detailed guidance, in consultation with industry, on the treatment on the pooled accounts. This does not affect the reference to an account holder in primary legislation.

		Do covered amounts include gross credits or net credits held by the depositor? In other words will the covered amount take into account any liabilities owed by the depositor?	The standards that will be issued will set out the detail on what covered amounts consist of.
BASA	S166AB Payments made in error or as a result of fraud	Will the designated institution in resolution be entitled to recover a corresponding amount from the depositor if paid to the depositor in error or due to fraud? If so, please provide for this right accordingly.	The comment is not clear. S166AB clearly states that the Corporation can recover these amounts.
BASA	166AE Functions of the Corporate for Deposit Insurance	We recommend inserting "invest" in the following: The functions of the Corporation are— (a) to establish, maintain, "invest" and administer the Fund in accordance with this Chapter in the interest of holders of covered deposits.	Disagree.Investing forms part of administration, and all the funds may not be invested at all times, for operational reasons.
BASA	S166AF Membership	Subsection (3) only obliges a bank to provide information when applying for a bank licence or registration – we submit that this should be an on-going obligation placed on banks. Will membership extend to branches of foreign banks? If the answer is yes, then does this answer change if the branch does not conduct deposit taking business in South Africa?	Disagree. This clause only relates to membership. There are other clauses for on-going information provision. Membership will extend to branches of foreign banks, but if such a branch does not have covered deposits, the base on which funding is levied is zero and it will only have to pay the annual membership fee.
BASA	S166AH Board	**Roles and Responsibilities of the Corporations Board** What is the difference between the Chief Executive Officer and the Managing Director and what are the duties of the Chief Executive Officer? It is unclear what the duties of the Commissioner are. It is unclear how the Chief Executive Officer and Commissioner are appointed and removed from the board 166AH(2)(g) what criteria most the nominated individual meet i.e. what are the fit and proper criteria needed to make a candidate eligible? 166AH(10) Persons nominated as alternates should also meet the "fit and proper" requirement described for a 1ggAH(2)(g) director as a minimum.	The Chief Executive Officer referred to in this clause is the CEO of the PA. Because these are amendments to the FSRA the definitions of the FSRA applies. The same response applies to the Commissioner of the FSCA.

BASA	S166AJ Meetings of Board and decisions	Section 166AJ(7) provides for a quorum to be three directors, which must include inter alia the Deputy-Governor. No provision is made for the Deputy-Governor's alternate as is the case with the person appointed in terms of section 166AH(2)(a). Is this the intention? If not, please amend accordingly. Alternatively, if the Deputy-Governor is not entitled to appoint an alternate, please clarify this position in section 166AH(9)(a).	Agree. Will revise clauses accordingly.
BASA	S166AP Disclosure of interests	The Bill is silent on the consequences of non-disclosure. Will a decision so taken be void? Can non-disclosure be ratified? Please consider clarifying these issues.	These are amendments to the FSRA and the general provisions of the FSRA apply.
BASA	S166AQ Share capital	The shareholder is referenced as either being the Reserve Bank or the Republic 166AQ(2), yet in the following paragraph liability is only limited to the Reserve Bank. Given the landscape of regulation, our expectation is that the shareholding would sit with the Reserve Bank only. Please can you clarify?	The Reserve Bank will be the shareholder of the Corporation however it may also be the government.
BASA	S166AX	**Deposit Insurance Corporation (DIC)** Section 166AX (1) makes reference to "resources". It is not clear whether this would be considered an undertaking to provide financial support, but it could have an impact on the accounting treatment for the DIC and the SARB.	Noted. Please note it is the Corporation for Deposit Insurance and not the Deposit Insurance Corporation.
BASA	S166BA Memoranda of understanding	Does it make sense in this context (see below) for the Depositor Insurance Corporation of one country to have a memorandum of understanding with Depositor Insurance Corporation of another? Would it not be the responsibility of the local Depositor Insurance Corporation to handle all payouts in its jurisdiction including to foreign depositors should these have been covered by legislation? (1) The Corporation may enter into memoranda of understanding with— (c) a body in a foreign country that has powers or functions corresponding to its powers or functions.	Disagree. The memorandum of understanding provisions make sense, especially considering the differences between various deposit insurance frameworks.
BASA	S166BC	**Deposit Insurance Fund** 166BC(6) should also allow for funds to be applied as follows:	Disagree. The liquidity facility will be set out in an agreement and as such will be repaid in terms of

		1) Allow for funds associated with a specific member to be repaid if that membership ceases; 2) Allow for the funds to be repaid to the member, if a surplus arises relative to the requirement stipulated.	that agreement, including when the bank ceases to be a member. The levy is for operational costs and will not be paid back when membership ceases. The premium is for the benefit of coverage and not repayable. Additional details will be set out in a standard.
BASA	Ss166BB, 166BD, 166BG, & 166BF	**Deposit Insurance Scheme – General** Each of the funding mechanisms will have financial reporting implications for the Corporation's members and the final conclusion regarding the accounting treatment is dependent on the specific rights afforded to the fund, the Corporation, as well as its members. These rights, and any obligations which may be attached, will have to be assessed taking into account the legislation which creates such rights, or obligations, as well any contractual arrangements entered into.	Noted.
	S166BG & 166BF	**Deposit Insurance Scheme Levies and Premiums** The payment of deposit insurance levies and deposit insurance premiums will, from an accounting perspective, be expensed as incurred. This timing may not be aligned to the period in which such expense is paid, or the date upon which the proposed levies/premiums are published. This will however need to be assessed based on the manner in which such payments are ultimately legislated. A key question is whether the amount of levies, or premiums will be published as a fixed amount, and whether the amount so charged will be published on a basis that allows the total quantum to be charged in a future reporting period, to be determined today. Further indicators that an expense is, from an accounting perspective, incurred over time include: 1) Where levies/ premiums are charged upfront as a prepayment for a particular designated period (e.g. a calendar year), these are refunded to the extent that a member revokes its banking license before the full period has passed.	Noted. The formulas will be specified in the appropriate Levies Bill.

		2) To the extent that a member receives its banking license mid-way through a particular 'leviable' period, whether the amount so payable is prorated.	
BASA	S166BD (3)	**Fund Investment** How will the Investment strategy be established and should the Banks/industry not be part of the determination of that Investment strategy?	Disagree. The administering the fund will be the responsibility of the Corporation whom has the obligation to ensure that covered depositors are protected. This is not a privately owned fund. The Corporation will, however, seek advice from relevant persons as and when required.
BASA	166BG Funding Liquidity	What will the interest be paid on i.e. the levy and/or premium? What is the minimum amount in the account for, the premium or levy? The depositor premium and levy are defined upfront in S38(b) but it is not always clear in the rest of the document which aspect is being referred to. **Obligation to provide a minimum level of liquidity** The definition of a financial asset includes the contractual right to receive an amount of cash in the future. Whilst all facts and circumstances need to be carefully assessed before reaching a final conclusion, some of the important factors to consider are set out below: (i) Whether the rights and obligations originate through contractual arrangements, or through legislation? Based on the current drafting of the proposals, we don't believe that the substantive terms have been agreed, although the final drafting of the standard will need to be considered, including the terms of repayment. (ii) If there is a minimum amount required to be invested by the member, whether the member will have any right of use of this cash (at least on a temporary basis), similar to the Cash Reserve Requirement. (iii) To the extent that the initial liquidity provided is for the purposes of funding that is employed to set up the fund itself, or whether it is used as an initial endowment of the Corporation (that is, to finance operating expenses), it will be more difficult to argue that such amount will be repaid.	These terms should always be read in line with the definitions and the relevant provisions that provide for them. No interest will be paid on the levy and premium, only on the loans provided by banks to the CoDI, which interest rates will be contractually agreed. The rest of the comment is noted, this will be specified further in the Levies Bill and standards/regulations.

BASA	Amendment of Schedule 3 to Act 9 of 2017	It is suggested that the following documents must be added to the list of items to be published in the Register: - Notice referred to in section 166R(1)(e) (notice prohibiting the commencement of specified legal proceedings or arbitration proceedings against the designated institution). - Deposit insurance levies imposed pursuant to section 166BB(2). - Premiums collected by the Corporation pursuant to section 166BF(2).	Noted.
BASA	Substitution of section 285 of Act 9 of 2017	**Immunities** Will the Designated Resolution Institution as well as its staff, acting in terms of law / the Act be afforded a similar immunity in law? In other words, will the Designated Resolution Entity and its staff be immune if acting on direction of the SARB? Or is the requirement that we bilaterally contract with our customers and investors to create such immunity? "A Board member" – is this meant to refer to all of the Boards referenced in the Financial Sector Regulation Act 2017 or just the "Board of the Corporate"?	No. See standard indemnities for employees of a company.
BASA	Directives / Standards Items 29A	Systemically Important Financial Institutions Will there be future Guidance Note(s) with resolvability criteria and/or principles that will be published as a guide for SIFIs? Objective criteria are required / to be referenced to designate an institution as a SIFI.	Necessary regulatory instruments for SIFIs and DIs will be issued in due course.
BASA	Directives / Standards Items 38	**Flac** Depending on how Flac is defined and what bail-in triggers are referenced, Flac may be subject to the same risk as AT1 and T2 in relation to not meeting the NCWO safeguard considering Guidance Note 6/2017 and Regulation 38. Clarity is still required as to the eligible instruments, the amounts to be held etc. If there is a new instrument type, it is suggested that a quantitative impact assessment be conducted to assess the viability of such an instrument. The internationally referenced "senior non-preferred" language is suggested if there is a new instrument.	Disagree. The comment does not take into account the applicable provisions in FSLAB.

		Will instruments be recognised retrospectively?	
BASA		**Single Point of Entry vs Multiple Point of Entry** The Bill is silent on whether resolution strategies will be at a single-point-of entry (SPE) basis or a multiple-point-of-entry (MPE) basis. The policy paper entitled "*Strengthening South Africa's Resolution Framework for Financial Institutions*" published in 2015 contemplated both SPE and MPE but this is not mentioned in the Bill. It is submitted that direction should be provided in the Bill that SPE and MPE are both accepted in relation to resolution strategies and planning.	See above comments on regulatory instruments and resolution planning.
BASA	S166BC	When is the anticipated implementation date of this DIS?	The Minister will make the determination and provide for the implementation of the Bill in a schedule.
Allan Gray	S166R(1)(a)	Subject to subsections (2) and (3)	Noted.
Allan Gray	S166R(1)(b)	Subject to subsections (4) and (6)	Noted.
Allan Gray	S166R(1)(d)	Subject to subsections (4) and (6)	Noted.
Allan Gray	S166R(1)(e)	Subject to subsections (2) and (6)	Noted.
Coronation Fund Managers	S166J(1)	There is no obligation to either complete an investigation or consult with the designated institution before giving a recommendation to the Minister. When does the Reserve Bank inform the designated institution of its decision to put it in resolution?	The provisions to place a DI in resolution are in line with current legislation and practice. The Reserve Bank does not place the designated institution in resolution, this is done by the Minister in a written determination.

Coronation Fund Managers	S166Q(1)(a)	Should there not be a limit on the amount of time it would take the Reserve Bank to assess/complete the valuation? A systemically important financial institution cannot wait indefinitely before resolution action is taken. If creditors' rights are prejudiced by material misstatements under this valuation, then these creditors should maintain some right to have their claims reassessed.	Disagree. The provisions of FSLAB makes the resolution functions of the Reserve Bank subject to the prescribed objectives and conditions, furthermore there are sufficient protections and safeguards in the Bill for creditor protection e.g. 166Q(5) provides that creditors and shareholders must be informed of the valuations.
Coronation Fund Managers	S166S(7)(a)	No reference is made to how this discretion will be exercised by the Reserve Bank in relation to the creditor hierarchy that applies under the particular agreement. As an example, senior debt holders under a debt programme memorandum cannot have interest suspended before subordinated debt holders.	Agreements are subject to legislation and provisions of agreements must be in compliance with legislation.
Coronation Fund Managers	S166U (2)(b)	1) At what point does the Reserve bank come to this conclusion? Is this based on the valuation process which is described in 166(Q)? What if subsequent to the resolution process being concluded, it is found that there was sufficient value to satisfy these claims? 2) It should be clear that this relates to creditors rights which have been reduced to zero post the entity being placed in resolution i.e. creditors written off to zero prior to the resolution process maintain their claim in the creditor hierarchy.	The reduction of claims will occur during the resolution as the Reserve Bank is exercising its powers and functions including bail in. These comments provide no reasons for these proposals and as such it is difficult to consider them as they also speak to a process prior to resolution whereas the Bill speaks to designated institutions in resolution only.
Coronation Fund Managers	S166U(4)(c)	The Reserve Bank cannot have the power to disrupt normal creditor hierarchy of payments i.e. if this were the case, being a secured creditor would mean nothing. It therefore needs to be very clear under what circumstances the Reserve Bank would envisage applying its discretion under 166U(4)(c) to at least have some level of accountability.	The actions of the resolution authority will be subject to the creditor hierarchy in liquidation.
Coronation Fund Managers	S166Y(b)(4)	All debt holders should be notified of any resolution action under all circumstances and be bound by confidentiality.	See the administrative provisions provided for in Part 4 from clause 166Y.

Coronation Fund Managers	S166AC	Why does the Corporation get these rights? If the purpose of this section is to recapitalize the fund, then the Section must make it clear that any amount recovered is, and can only be used, for the benefit of the fund and will be paid into the fund.	Noted. This clause provides for subrogation.
Coronation Fund Managers	S166AW(e)	The Act should restrict the kind of insurance based on the same provisions found in the Companies Act in relation to insurance taken for directors of the Company (e.g. making it clear that insurance may not be taken out to cover any personal claims against an individual arising from the individual's fraud while fulfilling their role).	No clear reasons is provided for the proposal.
Free Market Foundation	Clause 54 S166J	The draft Bill states that the Reserve Bank may, if in "its opinion" a bank is or will "likely" be unable to meet its obligations, and it is necessary to ensure its orderly resolution to maintain financial stability or protect its depositors, recommend to the Minister that the bank be placed in resolution. The Minister, after considering the recommendation, may, if he "considers" that the bank is or will "probably" be unable to meet its obligations, and that it is necessary to ensure the orderly resolution of the bank to maintain financial stability or protect its depositors, make a written determination to the Governor placing it in resolution. It is submitted that this gives wording allows the Minister some discretion whether or not to place a bank in resolution. The broader and more loosely textured a discretion is, whether conferred on an official or a judge, the greater the scope for subjectivity and hence for arbitrariness, which is the antithesis of the Rule of Law. South Africa is founded on the Rule of Law.	See comments above on placing a DI in resolution.
Free Market Foundation	Clause 38/54 S166	The Bill proposes inserting in the Act a definition of "resolution" which however does not fully define resolution. It merely states that resolution of a bank means "management" of its affairs as provided in the Chapter to be inserted. The Reserve Bank is the resolution authority and has "resolution functions". The definition of "resolution function" does not help, being merely stated to be a	See response above.

		function or power conferred on the Bank for the purpose of resolution. This is circular. And the proposed provision about "resolution objectives" states that the Bank's objective in performing its resolution functions is to assist in maintaining financial stability and protecting bank depositors' interests, through "orderly resolution" of designated institutions that are in resolution. This is similarly circular. It would be preferable to refer to "orderly management" of designated institutions that are in resolution. A "resolution function" is defined as also including a function or power conferred or "performed" (it would be preferable to say conferred or "exercised") for the purpose of reducing the risk that a designated institution "may need to be placed in resolution". This implies that the exercise of a "resolution function" does not entail always placing an institution in resolution. It may assist if this were made more explicit. It is a principle of the Rule of Law that the law should be accessible and clear.	
Free Market Foundation	Clauses 38/54	"**Maintain" stability? or just "assist" in that? or only "as far as practicable"?** The proposed definition "orderly resolution of a designated institution" is stated to mean the management of the affairs of the institution in a way that "maintains" financial stability. Yet the section about resolution objectives states that the Reserve Bank's objective in performing resolution functions is merely to "assist in maintaining" financial stability. And still yet, the proposed section about the Bank's resolution functions states that, to achieve that objective, the Bank must ensure that the affairs of a designated institution in resolution are managed so as to maintain financial stability "as far as practicable". This lack of clarity would violate the Rule of Law. It is a principle of the Rule of Law that the law must be intelligible and clear.	See response above

Free Market Foundation	Clauses 38/54 S166B	**"Protect" depositors, or only "assist" in protecting them?** The proposed definition "orderly resolution of a designated institution" refers to the management of the affairs of a bank in a way that "protects" the interests of depositors. But the section about resolution objectives states merely that the Bank's objective in performing resolution functions is to "assist in protecting" the interests of depositors. This anomaly should also be clarified for the sake of certainty and the Rule of Law.	See response above
Free Market Foundation	Clause 54 S166U	**Unclear if depositors get more protection more than other creditors** It is unclear if the Bill protects depositors of a bank in resolution more than its other creditors. As mentioned, "orderly resolution of a designated institution" is defined as management of a bank's affairs in a way that "protects" the interests of depositors. This seems to be reinforced by the proposed section which states that the Bank "must not take a resolution action" if it appears to it that the result would be that the value of a claim of a "creditor" of the institution "would be reduced". This implies that the value of depositors' claims should not be reduced. (A bank's depositors are in law mere creditors of the bank. (The basic relationship between a bank and its depositors is one of debtor and creditor. Though a bank customer is said to "deposit" money with the bank, the transaction is one of loan and the customer is a creditor with a claim against the bank.)	See response above
Free Market Foundation	Clause 54 S166V	**Clauses that creditor must not receive less than in winding-up are unworkable.** The Bill states that the Reserve Bank "must not" take resolution action i.r.t. a designated institution in resolution that "would result" in a creditor of the institution receiving less than the creditor "would have received if the institution had been wound up". Before the Reserve Bank takes a "resolution action" (i.e., any particular transaction that the Bank determines is necessary for orderly resolution of the institution), it must obtain "a valuation" of the liabilities involved, which must	See response above.

		state the amount that "in the valuator's opinion, would be payable" on the liability, in a winding-up of the institution. As soon as the Bank receives this valuation, it must "consider having regard to the valuation" whether a creditor of the institution received i.r.o. resolution action less than it "would have received if the designated institution had been wound up", and "if it considers" that the creditor indeed received less than if the institution had been wound up, determine the amount of the shortfall, which the creditor is "entitled to recover" from the institution. Yet all these provisions, to the effect that a creditor must not receive less than he "would have received" if the institution had been wound up, are unworkable in practice: The provisions can only aim at a mere estimate, which might well not be capable of being arrived at with any degree of accuracy, and can never be a calculation of an assured amount, for the simple reason that this is only possible with a finalised liquidation and distribution account after liquidation: It may, for example, be impossible to establish if any impeachable dispositions have taken place and, if so, the extent of the liability and likelihood of success in litigation, let alone the dividend which might be realised on execution of any judgment. And estimates of the value of assets may not be realised on insolvency. These factors impair an expert's ability to make an accurate determination.	
Free Market Foundation	Clause 54 S166S	**Bill allows Bank unilaterally to reduce contract payments or cancel contracts** The draft Bill (in its proposed section on resolution action) states that, "if the Reserve Bank determines that it is necessary" for the orderly resolution of a designated institution, it may "reduce the amount that is or may become payable" by the institution to another party under an agreement between them, or cancel the agreement. This would allow the Reserve Bank to reduce the amount that a designated institution has contracted to pay the other party to the contract, or to cancel the contract.	See response above.

		The Bill states that this action by the Bank will not "by itself" give rise to any right by the affected party. This implies that the affected party will have no right to claim the shortfall from the designated institution. Such a provision violates the Rule of Law, by in effect providing that the extent of the legal liabilities of a designated institution will be determined by the Reserve Bank in its discretion, instead of by application of law. It also violates the Rule of Law by authorising unequal treatment of creditors, without identifying objective differences to justify the differentiation. (It is also inconsistent with the Bill's provision, discussed above, that the Reserve Bank must not take a resolution action if it appears to it that the result would be that the value of a claim of a creditor of the designated institution would be reduced.)	
Free Market Foundation	Clause 54 S166	**Provisions in Bill are repetitive (or unclear if they apply to different circumstances)** In one provision the Bill states that, if the Reserve Bank determines that it is necessary to do so for the orderly resolution of a designated institution in resolution, the Bank may, by notice to the other parties to an agreement to which the institution is party, and that came into effect before the institution was put in resolution, "cancel the agreement". The cancellation does not affect parties' rights which accrued before cancellation. In another provision the Bill states (similarly) that, if the Reserve Bank determines that it is necessary for the orderly resolution of a designated institution, it may i.r.t. an agreement to which the institution is party "cancel the agreement". The cancellation (likewise) does not affect rights of the parties which accrued before the date of cancellation. It is not clear if this is mere duplication due to draftsman's oversight. Or it may be (although this is not clear) that the two sets of provisions deal with different circumstances. In particular, it may be that the former applies to agreements which (as the provision states) came into effect before the institution was put in resolution, and that the latter is intended to apply (although this is not expressed) to agreements that came into effect only after the	See response above.

		institution was put in resolution. To this extent the Bill violates the Rule of Law in being unclear and vague.	
Free Market Foundation	Clause 54 S166S	**Bill unclear if rights under cancelled contracts continue to be enforceable** As mentioned, the Bill states that an action by the Reserve Bank reducing the amount payable by a designated institution to a party under an agreement, or cancelling the agreement) will not "by itself" give rise to any right by the affected party. But it also says that cancellation of the agreement "does not affect the rights of the parties" that "accrued before the date the cancellation takes effect". This could imply that a contracting party affected by the Reserve Bank's reduction of the amount due to him could indeed still claim the shortfall from the institution in resolution. But this is unclear. (As a rule, a contracting party cannot claim performance from another contracting party before the date on which performance is due.) This doubt should be clarified in the interest of the Rule of Law.	See response above.
Free Market Foundation	Clause 54 S166S	**Bill contradictory about whether value of creditors' claims may be reduced.** The Bill, though stating in its provision on resolution action that the Reserve Bank may "reduce the amount that is or may become payable" by a designated institution to a party under an agreement, also states (contradictorily) that the Bank must "not take" a resolution action if it appears to it that the result would be that the value of a claim of a creditor of a designated institution "would be reduced". The latter clause (that the Bank must not take action the apparent result of which would be that the value of a claim of a creditor of a designated institution would be reduced) is inconsistent with the first-mentioned one (that the Bank may reduce the amount payable by the institution to a party under an agreement). This inconsistency violates the Rule of Law, by rendering the draft Bill unclear and contradictory.	See response above.
Free Market Foundation	Clause 54 S166U	**Requiring "*pari passu*" treatment of claims of creditors of same class unclear** The Bill states that the Reserve Bank, in taking resolution action i.r.t. a designated institution in resolution, must treat claims of the institution's creditors and	See response above.

		shareholders who would have the same ranking in insolvency "in ***pari passu***". It may add clarity to add "and in proportion to the amount of each such claim", if that is the intention.	
Free Market Foundation	Clause 54 S166	**Requiring "pari passu" treatment could require Bank to treat all creditors the same** This bald requirement, that the Reserve Bank must treat claims of creditors who would have the same ranking in insolvency "in pari passu", could mean that the Bank must treat all creditors equally in every respect: For example and as mentioned, the Bill states that, if the Reserve Bank determines it necessary for orderly resolution of a designated institution, it may cancel an agreement to which the institution is party. The "in pari passu" requirement could mean that the Bank cannot cancel such an agreement, unless it cancels all the other agreements to which the designated institution is party, so that all its creditors are treated the same way. But it is not clear if this is the intention. The Bill should clarify this doubt. The Rule of Law requires that statutes be clear and unambiguous.	See response above.
Free Market Foundation	Clause 54 S166	**Reserve Bank discretion to determine that "pari passu" does not apply** The Bill states that the "in *pari passu*" requirement does not apply "if the Reserve Bank determines that it is necessary to treat the claims differently" to effect the orderly resolution of the designated institution. This violates the Rule of Law, by authorising unequal treatment, without identifying objective differences to justify the differentiation between creditors. It also violates the Rule of Law, by providing that the need for equal treatment can be dispensed with on the mere ground the Bank determines it is "necessary" to treat claims differently to effect the "orderly" resolution of the institution, and without identifying objective criteria within which the Bank may exercise this discretion. A discretion should ordinarily be narrowly defined and its exercise capable of reasoned justification.	See response above.

Jason Riley	Clause 54 Chapter 12A, Section 166 AH (2)	I propose adding a point that no appointment to the Deposit Insurance Fund Corporation Board may take the form of cadre deployment or similar concepts by any political party.	Noted.
Old Mutual	Section 166J	We are concerned that by conferring the power to place an entity in resolution to the Minister, causes potential abuse of power. In this regard we propose that provision should be made to ensure there are adequate protections to review a decision of the Minister. The inference that the designated institution will "probably" be unable to meet obligations creates an aspect of uncertainty and we respectfully request that further qualification be provided. In addition, we respectfully propose that the wording be amended as suggested in red. PROPOSED WORDING: Amendment of the FSR Act- Determination by the Minister to place a designated institution in resolutions. 166J (2)- The Minister may, after considering a recommendation in terms of subsection (1) and if he or she considers that— (a) the designated institution is or will ~~probably~~ on a balance of probabilities be unable to meet its obligations, whether or not the designated institution is insolvent;	Noted. See comments above on placing an entity in resolution. On the issue of their being an abuse of power the Minister, in exercising the powers contained in the Bill is subject to the Constitution and the Promotion of Administrative Justice Act including the protections afforded to affected parties in the FSRA and the FSLAB. The proposal for the insertion of "on a balance of probabilities" is not useful in the exercise of administrative action, this refers to a judicial process in civil law when a judge is adjudicating for purposes of determining the burden of proof and the weight of evidence presented by parties in civil legal proceedings.
Old Mutual	Section 166U	Subsection (c) essentially invalidates subsections (a) and (b). Investors can't place any reliance on the creditor hierarchy if it is the Reserve Bank's discretion to change it.	See comments above on creditor hierarchy.
Old Mutual	Section 166X	It is not clear where the costs of resolution rank in the creditor hierarchy.	See proposed amendments to creditor hierarchy in the Insolvency Act.
Old Mutual	Section 166Z	We would appreciate clarity on the following:	

		The wording of this clause doesn't give investors a lot of clarity around the exact nature of the depositor insurance, and how it will operate. Are we reading this correctly that the Corporation may issue a Secured Loan to satisfy their obligation to make good on the covered deposits? If so: 1. What would be offered as security? 2. Under what circumstances would this be appropriate? Given that the banks are paying premiums to have the Deposit Insurance in place, is the intention for banks to have access to secured loans in addition to insurance?	Disagree that the clauses are not clear. It is standard international practice for deposit insurance funds to support resolution in lieu of direct payment to depositors.
Old Mutual	Section 166AC	We would appreciate clarification as to how the insurance will be structured and the insurer's right to claim in turn after satisfying deposit claims should be stated. If the insurer has the right to recoup the covered deposits from the bank in Resolution, we would like the Bill to clearly state where this claim will feature in the new suggested Hierarchy to be introduced into the Insolvency Act.	Disagree. Request is not clear. S166AC clearly states where a covered depositor receives payment from the Fund its claim will be subrogated to the Corporation and the Corporation will then take its place in the estate. This should further be read with the proposed amendments to the creditor hierarchy in the Insolvency Act.
Old Mutual	Section 166BF	We would appreciate clarity on the accounting for deposit insurance premiums by the banks, and whether this will be an expense or be seen as an investment in an asset of some sort.	The treatment will have to be in line with IFRS requirements and therefore this clarity should be sought from the accounting industry.
PASA	General	The Payments Association of South Africa (PASA) thanks the National Treasury for the opportunity to review and provide comment on this very important document, the Financial Sector Laws Amendment Bill of the 2018 ('the Bill'). PASA's comments herein are focused on matters that touch or have an effect on the National Payments System and the activities found therein.	Noted.

		PASA was duly constituted on 15 August 1996 as an association recognised by the South African Reserve Bank as payment system management body as contemplated in section 3(1) of the National Payment System Act. No person may participate in the South African Reserve Bank settlement system and/or be allowed to clear unless such a person is a member of the payment system management body recognised by the Reserve Bank, being PASA. PASA is a designated authority in terms of s 250(j) of the Financial Sector Regulation Act. No person may participate in the South African Reserve Bank settlement system and/or be allowed to clear unless such a person is a member of the payment system management body recognised by the Reserve Bank, being PASA. PASA is a designated authority in terms of s 250(j) of the Financial Sector Regulation Act.	
PASA	Clause 45/ Section 29A of Act 9 of 2017	**DESIGNATION INSTITUTIONS AND SYSTEMICALLY IMPORTANT PAYMENT SYSTEM** Any discussion in relation to systemically important payment systems must be had with due consideration to the Principles for the financial market infrastructures, CPMI and IOSCO, April 2012 ("PFMI"). The PFMI stipulate that the term Financial Market Infrastructure (FMI) refers to systemically important payment systems. An FMI (or systemically important payment system) is defined as a: 'multilateral system among participating institutions, including the operator of the system, used for the purposes of clearing, settling, or recording payments" In turn, one must apply the PFMI's definition of a payment system. A 'payment system' is a:	Noted.

		'set of instruments, procedures, and rules for the transfer of funds between or among participants; the system includes the participants and the entity operating the arrangement. Payment systems are typically based on an agreement between or among participants and the operator of the arrangement, and the transfer of the funds is effected using and agreed upon operational infrastructure'. It is clear therefore that the PFMI, in relation to a systemically important payment system, apply to the multilateral system, participants, and the entity operating it. The PFMI do not apply to a single entity in the payment system only. A payment system is generally categorized as either a retail payment system or a large-value payment system. A retail payment system is a funds transfer system that typically handles a large volume of relatively low-value payments in such forms as cheques, electronic funds transfers, debit orders, and card payment transactions. In contrast to retail systems, most large-value payment systems are operated by central banks, using a Real Time Gross Settlement System. In most cases, it is only the large-value payment system that is designated as a payment system FMI. PASA is happy to see that the PFMI sentiment is carried through in the proposed section 29A (1) (c) of the Bill, which provides that a designated institution means the payment system operator and the participants of a systemically important payment system.	
PASA	Clause 45 Section 29B of Act 9 of 2017	**DESIGNATION OF SYSTEMICALLY IMPORTANT PAYMENT SYSTEMS:THE PAYMENT SYSTEM MANAGEMENT BODY (PASA), PAYMENT SYSTEM PARTICIPANTS, AS WELL AS PAYMENT SYSTEM OPERATORS SHOULD BE CONSULTED AND NOTIFIED** PASA agrees that the ability to designate a certain payment system as systemically important in order to provide for the required oversight of such payment system	Noted. Please see response below.

		from a resolution perspective, as expressly provided for in the Financial Sector Regulation Act (FSR Act). However, for such designation and possible resolution to be effective, PASA is of the view that not only the payment system operator be invited to provide submissions on a proposed designation, and only the payment system operator be provided with notice of such designation. This is the current proposed reading of s 29B of the Bill. The concern PASA has in this regard is that, should only the payment system operator be consulted and notified, merely a single view of the payment system to be designated will be provided. This may result in a one-sided view of such payment system. By casting the net wider to include the participants, and the PSMB, will provide the Governor with far more accurate and encompassing data on the payment system assessed. In addition, by involving the PSMB in these matters alignment with the requirement of s251 of the FSR Act in relation to information sharing will be achieved. Such approach will also align with the proposed definition of a designated institution as it relates to a systemically important payment system, as including the payment system operator and participants. The participants should include all banks, system operators and other "payment service providers" involved in the end-to-end payments value chain.	
PASA	Clause 45 Section 29B of Act 9 of 2017	PASA therefore proposes that s 298 be reworded as follows: *"(1) (a) The Governor may, by written notice to the payment system operator, the participants and the payment system management body, designate a payment system as a systemically payment system.* *(2) Before designating a payment system in terms of subsection (1) as a systemically important payment system, the Governor must-* *(a)...*	Disagree – The SARB has published a Position Paper on PFMIs clearly identifying systemically important payment systems. It is in line with best international practice to designate the payment system and as such written notice should be provided to the operator of the system. This is in harmony with the FSRA provisions relating to designation of financial institutions which include market infrastructures, i.e. the institution is provided written notice, not its participants nor its licensing or its licensing authority.

		(b) if after considering the Financial Stability Oversight Committee's advice, the Governor proposes to designate the payment system in terms of subsection (1), invite the payment system operator, the participants and the payment system management body of the payment system to make submissions on the matter, and give it a reasonable period to do so. *(3) In deciding whether to designate a payment system in terms of subsection (1), the Governor must take into account at least the fallowing:* *(a)... (b)... (c)•.. (d)...* *(e) submissions of the payment system operator, the participants and the payment system management body; and* *(/)..,* PASA remains committed to assisting the National Treasury in developing an appropriate regulatory framework for the financial sector as a whole and the National Payment System in particular.	
Prof Vivian	Clause 54 Chapter 12A	On the 25th September 2018 National Treasury invited comments from the public on the Financial Sector Laws Amendment Bill 2018 which recently had been made public. The comments contained herein are in response to that invitation. The Draft Bill – 2018 comprises 100 pages, containing 65 Clauses. The Draft Bill – 2018 envisages amending 12 Acts of parliament. It is clear that the amendments are, once again, far-ranging and complex. Accordingly, I will not comment on all of the proposed amendments. My comments will be confined largely to Chapter 12A. I will comment in particular on the proposed establishment of Corporation of Deposit Insurance and the Deposit Insurance Fund, jointly referred to as the Deposit Insurance Scheme.	Noted.
Prof Vivian	Section 166AD	I will firstly comment on the principle and desirability of establishing a Deposit Insurance Scheme. Deposit Insurance is well-known. In the US the Federal	Noted.

		Deposit Insurance Corporation (FDIC) was established in 1933. New Zealand it was recently announced it plans to introduce a Deposit Insurance Scheme (New Zealand Herald Nov 1, 2018) in line, it stated with virtually all other OECD countries. This announcement comes after years of agitation for such a scheme. The South African Reserve Bank has been considering a deposit insurance scheme for decades. It is a reasonable inference that the current proposal has gained momentum as a result of the VBS Great Bank Heist (Motau SC, 2018). There are however at least three reasons why a Deposit Insurance Scheme should not be implemented at this stage, indeed why its introduction should be resisted by banks and society as a whole:	
Prof Vivian	Section 166AD	**Reasons to oppose the introduction of the Deposit Insurance Scheme** **1. Moral Hazard** A Deposit Insurance Scheme is essentially an insurance scheme. Kenneth Arrow (1921-2017) received the Nobel Prize (together with Gerard Debreu (1821-2004) for his work on incomplete markets. He observed that there were instances where there was considerable demand for insurance (notably health insurance) but no suppliers. Markets were incomplete. This troubled him, since in his view if demand existed, supply should spontaneously arise. In the case of insurance this had not happened. He and Gerard Debreu (1921-2004) proved mathematically, at least, that complete markets should exist. This created a practical problem for him, why factually was the scope insurance so limited? He concluded the major reason was moral hazard (Arrow, 1971). There findings can be applied to Deposit Insurance Schemes; So for example why, in South Africa, has not a private deposit insurance company spontaneously arisen? Why is it now proposed to establish a Deposit Insurer by statute – by government intervention? Arrow would have argued the moral hazard associated with this insurance class of is simply too great. The usual form of moral hazard which is of concern in this class of insurance is negligence on the part of banks. Deposit Insurance would result in banks acting	Noted, please see the Deposit Insurance Paper of the South African Reserve Bank for the underlying policy intent for establishing a deposit insurance scheme in South Africa. http://www.treasury.gov.za/twinpeaks/Designing%20a%20deposit%20insurance%20scheme%20for%20South%20Africa.pdf

		recklessly causing enormous losses. When mooted in 1933 even President Roosevelt who signed the legislation which created FDIC, into law, had reservations based on moral hazard. Moral Hazard in South Africa is infinitely greater than in other countries and the source of moral hazard is vastly different and in addition to the moral hazard found in developed countries. The aggravating dimension, which should now be clear, from the collapse of the VBS Mutual Bank is corruption and capture of state institutions. It is already being widely postulated that no-prosecutions will follow the collapse of VBS, and virtually no money will be recovered arising out of the VBS Great Bank Heist. According to reports the bank was simply looted by insiders. In other words it is possible for insiders and others to simply loot a bank with complete impunity, loot it to the tune of billions of rands. Government institution tasked with the obligation to prevent this, the numerous police departments and regulators will do nothing about this, granting the immunity. If banks are now insured against the looting, paid for by the public, not the government, the looting will be absolutely uncontrollable. Bank looting will be seen as a victimless crime. The government will have no incentive to prevent the looting. The deposit insurer will become a black hole into which private sector banks will be forced to pour money into, to fund the looting. The Deposit Insurance Scheme should be put on hold until it is demonstrated bank looting results in prosecutions and recovery of the money. The moral hazard associated with corruption and the capture of state institutions in South Africa at this point of time precludes the formation of a deposit insurance scheme.	
Prof Vivian	Section 166AD	**2. Incompetence of regulators** Experience has indicated that regulators (internationally and specifically in South Africa) are too incompetent, besides that discussed above, to permit the formation a deposit insurance scheme. Banks face essentially two main risks, the solvency risk and the liquidity risk. The regulators do not understand this and cannot tell the difference. It is important to understand the difference between these two and	Noted

		more importantly to recognise which is involved in any practical situation. The liquidity risk cannot be dealt with via deposit insurance. Since 1802 it has been understood that a liquidity crisis must be dealt with via the lender of last resort (Thornton, 1802). Deposit insurance is suited to the solvency risk. The solvency risk can be ameliorated by deposit insurance but the liquidity risk cannot. To attempt to deal with the liquidity risk via a deposit scheme is once again to pour money down the proverbial black hole. This risk cannot be plugged using deposit insurance. As Sir Mervyn King the former Governor of the Bank of England correctly pointed out the 2008 financial crisis was a banking crisis, and essentially a liquidity crisis (King, 2016). One would normally regard the Bank of England as being highly competent but in dealing with the 2008 crisis it was not; something as explained below was not altogether of its own making. The banking crisis of 2008 in the UK was ushered in by the problems of the Northern Rock bank. As was well known to the Bank of England through the periodical stability reports it had received from the Northern Rock (and from other banks) that Norther Rock was funded via the securitisation mechanism. The closure of securitisation funds in France exposed the Northern Rock to a liquidity shortfall of £90 bn. By my reckoning at the time that was several magnitudes greater than the total capital of Barclays Bank. It should have been quite clear to anyone that that short-fall could not be managed by Northern Rock itself and certainly at that stage of the crisis not via deposit insurance. Even at a later stage in the crisis that would not have been possible. What would have happened if this was tried is beyond the scope of this comment. The only known method to deal with this (and liquidity crises in general) is as explained by Henry Thornton was via the central bank acting as lender of last resort. The rules applicable to act as a lender of last resort were formulated by Henry Thornton in 1802 and amplified by Walter Bagehot fifty or so years later (Horner, 1802; Thornton, 1802). The rules of the lender of last resort require the central bank to publicly lend the shortfall without delay. The Bank of England should have lent Northern Rock £90 without	

		any hesitation at all, against security of the bank's assets, the moment it was advised of the closure of the securitisation fund. This signalled the collapse of the securitisation market worldwide. That is the only way to maintain confidence in the banking system. What in fact happened was, months after it was advised that Northern Rock faced a liquidity problem, (I emphasise the delay because in terms of the rules applicable to acting as lender of last resort, the lending should be without delay and without limit) the Governor of the Bank of England announced that the Bank of England would not be assisting Northern Rock, at all, because to do so would create a moral hazard risk! A few days later the same Governor then had to reappear to announce the Bank of England would act as lender of last resort by lending money to Northern Rock (Danedshkku, 2007)! The public could only conclude the Bank of England was clueless. By then it was too late. In the end via the quantitative easing programme the Bank of England pumped £350 bn into the banking system to provide liquidity. It would have been far better had the Bank of England simply applied Henry Thornton's rules of lender of last resort and advance the £90 bn (King, 2016). Sir Mervyn tried to explain the Bank's bizarre of announcing it would not assist Northern Rock and then announcing it would, as a consequence of being hampered by the then legislation which was in place. If this is correct the problem thus was not of the Bank's making but the failure of the single peak regulatory system, which had been introduced in 2000. He voiced is frustration at the legislative position which then prevailed. The regulation of the banks had been removed from the Bank of England and handed over the then newly formed single peak regulator the Financial Services Authority (FSA) at the time under the chairmanship of Lord Turner. Lord Turner freely admitted the FSA had not done a good job of regulating banks and was out of its depth. To his credit after the crisis Lord Turner has spent a great deal of time and effort trying to understand banks and has subsequently published a book on the operation of banks. To rectify the failed single peak	

		regulatory system, the twin peaks system was introduced in the UK. Prudential regulation of banks had to be returned to the Bank of England, and was. The real cause of the failure is not confined to the UK it is to be found in Switzerland with the Basel Committee. It could be argued the crisis should have been managed via the Basel system. Shortly before the Norther Rock crisis, it announced it was Basel compliant. The crisis should not have happened despite the single peak system which prevailed at the time, since the regulatory rules were adhered to. The regulatory rules themselves had failed. The real problem thus rested with the de facto regulator in Switzerland, the unelected Basel Regulator. This system was shown to be a failure. Despite the liquidity risk being the greatest risk facing banks, until after the 2008 financial crisis the Basel II rules did not cater for the liquidity risk, as Professor Moosa (RMIT Australia) pointed out, '… for the first 20 years of its life [before the crisis], the Basel Committee could not care less about liquidity. It took the global financial crisis to convince the BCBS [Basel Committee on Banking Supervision] that liquidity does matter (Moosa, 2013)." This state of affairs is alarming. Clearly the Basel system is seriously flawed yet subsequent to the crisis it was subjected to virtually no criticism for the manifest failure which became clear as a consequence of the 2008 crisis, instead the private sector was blamed. To the credit of the South African Reserve Bank it quickly understood the root of the banking crisis was the collapse of the securitisation market and quickly conducted its own assessment of exposure of the South African banking system to securitisation and then commissioned an independent assessment. Both concluded the exposure was small (Annual Report - Bank Supervision Department, 2007). However, the South African regulators have shown no indication that they understand the liquidity risk banks are exposed to. Since the Basel Committee did not (and probably still does not) this is not surprising. The danger is if a deposit insurance scheme is established this will be used when banks face a liquidity risk,	

		or the regulators lulled into a false sense of security. In fact there is every reason to believe this will be the case. In recent years South Africa has faced two banking "failures" African Bank and VBS. Both cases, on the face of it, look like liquidity problems which as indicated above should be dealt with by the Central Bank acting as lender of last resort. This happened in neither case. The share price of African Bank collapsed after the publication a SENS announcement. We all know the price of shares react to information, after-all Professor Eugene Fama was awarded the Nobel Prize for his research on this point (Fama, 1970). African Bank was at the time very solvent. A R6 bn bank could have been bought for about R300 m had the Central Bank not intervened. The problem of African Bank, at the time of the SENS announcement was not solvency but liquidity. It was funded via bonds (similar to Northern Rock which was funded via securitisation). The liquidity problem facing African Bank would have been realised when the bonds fell due, six months or so later. At this point it was unlikely these could be rolled over. This is the same problem which faced Northern Rock. With the collapse of the securitisation market the securitized financial instruments which fell due could not be rolled over. In the discussions dealing with African Bank it seems, by far, the central problem facing African Bank was a liquidity problem. I have yet to see a coherent process put forward by The South African Reserve Bank to deal with the liquidity risk. Like the absence of a defined process to deal with the liquidity risk in the Basel II rules, as far as I can tell it is absent within the SARB. I was unable to find a coherent method of dealing with the liquidity risk discussed in the report into the problems of the African Bank (Myburgh, 2015). There is no mention of the lender of last resort in the report despite liquidity problems being mentioned in the report. A similar observation can be made about the initial statements which appeared I the press about VBS. It is common cause that VBS had received substantial deposits (liabilities to VBS) from municipalities which were not permitted to deposit funds with mutual banks. The instruction was then given that theses deposits had to be repaid. In the normal course of events these deposits would	

		have been matched by advances (assets). Clearly repaying these would then create a liquidity problem which as in the case of African Bank would cause its collapse. VBS would not have the liquid assets to use to repay these deposits. VBS would have sufficient assets to cover the liabilities but not liquid assets. It would have a problem even if the assets had not been looted. The looting of the assets would result in a solvency problem which cannot be solved with the central bank acting as lender of last resort. Again I am unable to find any coherent system the SARB would follow to deal with a bank which faces a liquidity risk which would be created by the instruction given to repay the municipal loans. The liquidity risk is over and above the looting of the bank. The report opines that the liquidity risk facing VBS was caused by the looting; this may well be so (Motau SC, 2018). When the instruction to VBS was given to repay the municipal deposit it should have been clear this would create a liquidity problem and it is important that this problem be addressed. From the public information available it is not clear the liquidity problem was addressed when the instruction was given. The liquidity issue is mentioned on numerous occasions in the Great Bank Heist Report (Motau SC, 2018). As an aside I will add that the economics of banking is poorly understood in general and does not appear to be taught in a coherent fashion at universities. I can only recommend that a chair of money and banking be established at one or two universities in South Africa where money and banking be taught at a post-graduate level. From the very outset of the 2008 financial crisis I pointed out that the financial crisis was a money and banking crisis (Vivian, 2009). The public cannot have any confidence that the regulator in fact understands the difference between solvency risk and the liquidity risk and how to deal with the two different risk. The problem and danger then becomes the deposit insurance scheme will be drawn into funding a liquidity problem with disastrous outcomes for the funders of the scheme – the private sector banks. This creates yet another dimension to the moral hazard problem. The Draft Bill – 2018 does not deal with this. The drafters of the Bill appear to be ignorant of the problem.	

Prof Vivian	Section 166AD	**3. Another quango** There is a third reason to oppose the formation of the Corporation and its fund. In recent times the government has been establishing quangos hand over fist. These impose vast additional costs on to public outside of the tax system. The twin peaks system established two quangos, the market conduct regulator and the prudential regulator. These it was estimated will cost the public R6 bn/pa (National-Treasury, 2016). The ink is hardly dry on that Act when it is to be amended to create another quango, Corporation for Deposit Insurance. There is no end to the number of quangos which will be established funded as a direct cost on the private sector unless the public opposes the establishment of these. There has been a world-wide reaction and opposition to the formation of additional quangos. South Africa should join the worldwide trend and oppose the formation of this additional quango. This new proposed quango is to run and insurance scheme. The government has demonstrated it is has very little ability to run insurance companies. Over 30 years ago I warned the road accident fund was heading for problems (Vivian, 1984). It has long since become insolvent, currently to the extent of 200 bn. Despite the passing of 34 years and at least two commissions of enquiry the government has been unable to address the problem of the road accident fund. There is no reason to believe it can run an insurance scheme.	Noted
Prof Vivian	Section 166D	"(1) Despite any other law, none of the following steps may be taken in relation to a designated institution without the **concurrence of** the Reserve Bank" Concurrence of should be changed to notification of. If the Reserve Bank is notified it can take what it considers to be the appropriate action including obtaining an appropriate court order. So for example if an institution incurring losses it may apply for voluntary liquidation. To delay this waiting for the Reserve Bank to make a decision is undesirable.	The requirement for the Reserve Bank's concurrence is due to the fact that the institutions referred to are systemically important financial institutions, in terms of the FSRA, maintenance of financial stability is the mandate of the Reserve Bank. Notification would subvert the Reserve Bank's ability to carry out this important mandate.

Prof Vivian	Section 166F	"(2) The Reserve Bank may, for the purposes of facilitating the orderly resolution of a designated institution in resolution, transfer some or all of the shares that it holds in a bridge company **to any person**" "to any person" to too broad and needs to be qualified.	See response above.
Prof Vivian	Section 166J	This part is important since it triggers the event which causes the institution to placed in resolution. "**166J**. (1) If in the opinion of the Reserve Bank— (a) a designated institution is or will likely be unable to meet its obligations (**whether or not the designated institution is [technically] insolvent**); and (b) it is necessary to ensure the orderly resolution of the designated institution to— (i) maintain financial stability; or (ii) in the case of a bank or a member of a group of companies of which a bank is a member, to protect depositors of the bank, the Reserve Bank may recommend to the Minister that the designated institution be placed in resolution. An institution could thus be placed into resolution even if it is technically solvent. It is technically solvent the problem faces a liquidity problem not a solvency problem. If the bank is technically solvent the depositors are not exposed to a loss of their deposits providing a way of dealing with the liquidity problem is found. As indicated above the deposit insurance scheme will be called upon to deal with both a solvency and liquidity risk. The cost of the liquidity problem with then be shifted onto the private sector which has no say as to how the liquidity problem is to be regulated or managed. So to take the recent UK experience. If this system existed the £350 bn injected by the Bank of England to provide liquidity could have been imposed as a cost to the banks via the insurance scheme. As indicated above the discussion of what will then happen falls outside the scope of this comment but that it will happen is clear from par 166Z which reads:	Resolution precedes liquidation, the determination of whether or not an institution should be placed in liquidation is contained in clause 166H(1)(a), these are two completely different and separate processes.

		"166Z. (1) Where a bank is in resolution, the Corporation must apply the Fund in one or more of the following ways to ensure that depositors of the bank have access to their covered deposits: (a) To reimburse the bank in resolution for payments" A liquidity problem will trigger the Corporation of deposit insurers paying depositors. The function of the SARB as the lender of last resort will be transferred to the Corporation of Deposit Insurance. The amounts advanced as quantitative easing is then transferred to the private sector banks without their consent. This entire matter needs to be re-thought. As indicated by Prof Moosa during the first 20 years of existence of the Basel Committee it appeared to be obvious of the liquidity problem. It now appears to be accidently transferred to the proposed Corporation of Deposit Insurers.	
Prof Vivian	Section 166BG	(1) Members of the Corporation that hold covered deposits must maintain a minimum amount in the account of the Fund as specified by the Corporation in a standard.	Noted.
Prof Vivian	Section 166AH	**Board** The board of the corporation will consist almost exclusively of inhouse regulatory bureaucrats; persons employed by the Reserve Bank or National Treasury – this is nothing but an inhouse committee. Provision exists for the Governor to appoint two other persons. No requirements are laid down with respect to these two persons so the could also be inhouse employees. This is vastly different to the position of the US Federal Deposit Insurance Corporation. As pointed out above one of the risks is the incompetence of regulators. The private sector via the Corporation will be paying for this incompetence, eg funding losses due to corruption, and employees of the regulator will constitute the board which will decide on these things! – This is hardly acceptable.	Noted.

		The board should have at least two members of the corporation in attendance at board meeting (Melamet-I, 1986). As constituted only the Managing Director is mentioned. I will predict the board as set out in the Bill will quickly prove itself to be "unfunctionalable". The nature of this type of risk is over many years there may be no claims at all. It is not clear all the persons set out in clause 166AH will be needed during this stage, only during times of problems. Other structures exist for these to be consulted. A different board structure is better suited for the day to day operation of the fund. I will suggest the workable board should consist of: 1. The Group Financial Officer of the Reserve Bank – who will unless a good reason exists be the chairman of the board. 2. A nominee from National Treasury 3. The Managing Director of the Corporation (a seconded employee for SARB) 4. Independent non-executive director, with insurance accounting and insurance experience (Chairman of the audit committee) 5. Independent non-executive director, with insurance experience (Chairman of the risk management committee) Most of the oversight work will be done via the audit and risk management committees. The Corporation will function in terms of service agreement with the Reserve Bank. There will be no need to second any staff. The Corporation itself need not have any employees.	
Prof Vivian	Section 166AI	**Deposit Insurance Levy Act, 2018**. I am unable to find any other reference to this Act.	Noted.

Prof Vivian	Section 166AN	"(2) The Board must, at least, establish an investment committee to review the investment portfolio of the Fund, which committee must make recommendations to the Board regarding the investment of the Fund." It is usual to have an audit committee which can consider investment matters i.e. it carry out the function of an investment committee. It is strange to have an investment committee but no audit committee. It is also common to have a risk management committee.	Noted. The Board will have the discretion to establish other committees in addition to the investment committee.
Prof Vivian	Section 166AS	All funds received should be credit to the fund and all expenses paid from the fund. The balance will constitute the surplus.	The Corporation will collect levies to fund its operational costs. If there is surplus funds after deducting expenses and provisions, this would be credited to the fund which could be used in a manner specified in section 166Z.
Prof Vivian	Section 166BF	Earlier the Bill referred to a levy it now refers to a premium, which is it? It is not clear why charges are to be levied in terms of legislation and this Act. Why two sources of obligations?	The funding mechanism will involve three layers: 1) A liquidity facility between the members and the Corporation. 2) The levy is for operational costs. 3) The premium is for the benefit of coverage and not repayable. Additional details of the funding mechanism will be set out in a standard. Levies and premiums are seen as a tax. In terms of South African legislative practices,

			these types of taxes need to be covered in a Levies Bill.
Prof Vivian	Section 166BG	"(1) Members of the Corporation that hold covered deposits must maintain a minimum amount in the account of the Fund as specified by the Corporation in a standard" It is not clear what this is about. It is recommended the deposit insurance scheme not be proceeded with. If it is, clearly, considerable work is still required in particular as to how the liquidity risk is to be dealt with.	The funding mechanism will involve three layers: 1) A liquidity facility between the members and the Corporation. 2) The levy is for operational costs. 3) The premium is for the benefit of coverage and not repayable. Section 166BG(1) refers to the liquidity facility between members and the Corporation. Additional details of the funding mechanism will be set out in a standard.