

**Financial Institutions (Protection of Funds) Act: Matrix**

KEY TO CLASSIFICATION OF AMENDMENTS:

Regulatory gap: Policyholder protection and amendments to enhance clarity & certainty

Amendments proposed to **principal** Act not in Tabled Bill.

| Clause | Section in tabled bill  | Commentator | Summary of concern/<br>comment  | Proposed response  |
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| 158    | <p><b>CLAUSE 158</b></p> <p><b>SECTION 1</b></p> <p>Section 1 of the Financial Institutions (Protection of Funds) Act, 2001, is hereby amended—</p> <p>(c) by the substitution in paragraph (b) of the definition of “law” for the words preceding subparagraph (i) of the following subparagraph:</p> <p>“sections 6A to 6I, means the Financial Intelligence Centre Act, 2001 (Act No. 38 of 2001), and the Acts referred to in paragraph (a)—”</p> | FSB         | The amendment to the definition of “law” is necessary due to the deletion to FICA legislation discussed hereunder under Clause 165. | <p><b>CLAUSE 158</b></p> <p>Section 1 of the Financial Institutions (Protection of Funds) Act, 2001, is hereby amended—</p> <p>(c) by the substitution in paragraph (b) of the definition of “law” for the words preceding subparagraph (i) of the following subparagraph:</p> <p>“sections 6A to 6I, means <b>[the Financial Intelligence Centre Act, 2001 (Act No. 38 of 2001), and]</b> the Acts referred to in paragraph (a)—” and</p> |
|        |   | FSB         | Consequential amendment necessitated by consolidation of on-site powers in this Act   | <p><b>CLAUSE 158</b></p> <p>(d) by the insertion after paragraph (b) in the definition of “law” of the following paragraph:</p> <p>(c) <u>‘Chapter 1A means -</u></p> <p>(i) <u>a law referred to in paragraph of the definition of ‘financial institution’ in section 1 of the Financial Services</u></p>   |


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|   |  |            |   | <p><u>Board Act, 1990 (Act No. 97 of 1990); and</u><br/> (ii) <u>this Act,</u><br/> including any subordinate legislation, and enactment or measure made under those laws;</p>   |
| <p><b>35,<br/>72,<br/>114,<br/>177,<br/>212</b></p> |  | <p>FSB</p> | <p>Consolidation of on-site powers due to Committee comments and commentators</p> | <p>The following chapter is hereby inserted in the principal Act after Chapter 1:</p> <p><b>CHAPTER 1A</b></p> <p><b>4A ON-SITE VISITS</b></p> <p>(1) In this Chapter-</p> <p>“<b>business document</b>” means a document that-</p> <p>(a) relates to the carrying on of a regulated activity; or</p> <p>(b) may reasonably be required for purposes of an on-site visit;</p> <p>“<b>business premises</b>” means a building or part of a building that is used in connection with the carrying on of a regulated activity;</p> <p>“<b>document</b>” includes books, records, securities or accounts and any information, including information stored, transmitted or recorded electronically, digitally, photographically,</p> |


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|  |  |  |  | <p>magnetically, optically or in any other intangible form;</p> <p><b>“on-site visit”</b> means a visit at the business premises of a regulated person-</p> <p>(a) to determine compliance with a law; or</p> <p>(b) aimed at the overarching supervision of a regulated activity or regulated persons;</p> <p><b>“outsource”</b> means an arrangement of any form between persons referred to in the definition of a “regulated person” in terms of which a person referred to in paragraph (b) of the definition of regulated person performs a regulated activity which would otherwise be performed by a person referred to in paragraph (a) of the definition of regulated person itself;</p> <p><b>“regulated activity”</b> means any activity or a part of that activity regulated under a law; and</p> <p><b>“regulated person”</b> means –</p> <p>(a) a person that is authorised, licensed, registered, appointed, or</p> |
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|  |  |  |  | <p>otherwise approved to perform any activity regulated under a law;</p> <p>(b) a person to whom a person referred to in paragraph (a) has outsourced the performance of a regulated activity.</p> <p>(2) The Registrar may conduct an on-site visit and such visit must be conducted with strict regard to decency and good order.</p> <p>(3) The Registrar when conducting an on-site visit in terms of subsection (2) has a right of access to any business document and may-</p> <p>(a) at any time during business hours-</p> <p>(i) enter a regulated person's business premises and such person must, upon request, provide any business document;</p> <p>(ii) examine, make extracts from and copy any business document;</p> <p>(iii) question any person the registrar believes may have information relevant to the on-</p> |
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|  |  |  |  | <p>site visit;</p> <p>(iv) where a contravention of a law has been detected-</p> <p>(aa) issue an instruction prohibiting the removal or destruction of any business document; or</p> <p>(bb) against the issue of a receipt, remove any business document to prevent its concealment, removal, dissipation or destruction until the completion of any proceedings or regulatory action;</p> <p>(b) instruct the regulated person to produce at a specified time and place and in the manner determined by the registrar-</p> <p>(i) any specified business document or a business document of a specified description in the possession or under the control of the regulated person; or</p> |
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|  |  |  |  | <p>(ii) furnish the registrar with information in respect of that business document; and</p> <p>(c) instruct any person that is in possession or has under his or her or its control any business document relating to the business of the regulated person to-</p> <p>(i) produce that business document; or</p> <p>(ii) furnish the registrar with information in respect of that business document, at a specified time, place and in the manner determined by the registrar.</p> <p>(4) A regulated person may, during normal office hours and under the supervision of the registrar, examine and make extracts from any document removed under subsection (3)(a)(iv).</p> <p>(5) Subsection (3) shall not be construed so as to infringe upon the common law right to professional privilege between an attorney and his or her client in respect of information</p> |
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|     |   |                                       |   | communicated to the attorney, whether in writing or verbally, so as to enable him or her to provide advice, or render other legal assistance to or defend the client in connection with an offence under any law with which he or she is charged, in respect of which he or she has been arrested or summoned to appear in court or in respect of which an investigation with a view to instituting criminal proceedings is being conducted against him or her.   |
| 162 |   | NT                                    | Although section 5(6) already provides that a curator must act under the control of the registrar, the control will be further enhanced if the registrar prescribes guidelines which the curator must comply with and the registrar can measure the actions of the curator against. |  <p>‘(e) by the substitution for subsection (6) of the following subsection:<br/> “(6) The curator acts under the control of the registrar who made the application under subsection (1) <u>and in accordance with guidelines prescribed by the registrar by notice in the Gazette</u>, and <u>the curator</u> may apply to that registrar for instructions with regard to any matter arising out of, or in connection with, the control and management of the business of the institution.”</p> |
| 163 | The following section is hereby inserted in the principal Act after section 5:<br><br><b>“Statutory management</b><br><br><b>5A. (1) (a)</b> <u>Despite any other law, the High</u> | ASISA<br>(18.02.2013)<br>(18.04.2013) | It is uncertain why the Registrar requires an additional remedy given that the appointment of a statutory manager closely resembles the remedy available through  | The FSB supports a suggestion that the application for statutory management should be on a voluntary basis and that in order to encourage the use of this model, the statutory management model should not be similar to that of a Curatorship. Further that the  |

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| <p><u>Court may on application approve the appointment of a statutory manager for a financial institution.</u></p> <p><u>(b) The application may only be made by the registrar or by the financial institution with the registrar's consent.</u></p> <p><u>(c) The registrar must approve the person appointed as statutory manager.</u></p> <p><u>(2) The High Court may approve the appointment of the person contemplated in subsection (1)(c) if it appears that—</u></p> <p><u>(a) the financial institution—</u></p> <p><u>(i) has in a material respect failed to comply with a law;</u></p> <p><u>(ii) is likely to be in an unsound financial position; or</u></p> <p><u>(iii) is maladministered; and</u></p> <p><u>(b) the High Court considers it in the interests of the clients or other beneficiaries of the institution or the financial system to make the appointment.</u></p> <p><u>(3) The registrar may at the request of a financial institution approve the appointment of a person to be the statutory manager of that institution if it appears to the registrar that the institution—</u></p> <p><u>(a) has in a material respect failed to comply with a law;</u></p> <p><u>(b) is likely to be in an unsound financial position; or</u></p> <p><u>(c) is maladministered, and that it is advisable to appoint a statutory manager urgently in order to protect—</u></p> <p><u>(i) the interests of the clients of the institution;</u></p> <p><u>(ii) the safety and soundness of financial institutions in general; or</u></p> |  | <p>curatorship. The Explanatory Memorandum indicates that the remedy is likely to be used where more drastic enforcement measures such as liquidation or curatorship may be inappropriate and harmful to the institution's reputation. It will be appreciated if the National Treasury can elaborate on the circumstances that would likely lead to statutory management as opposed to curatorship. It is also believed that the statutory manager should not be indemnified against his/her own negligence.</p> <p>If provisions regarding a statutory manager are to remain, then far more detail is required in the Act, for example, provisions regarding accountability of the manager, and how the manager's appointment will affect the responsibilities of the board members of a company.</p> | <p>statutory manager and executive management should take joint control of the business – with the necessary elevation of the statutory manager's powers to a level similar to veto power. The following wording is therefore proposed:</p> <p> <b>CLAUSE 162</b></p> <p><b><u>5A (1) Despite any other law, the registrar may, by agreement with a financial institution and without the intervention of a court, appoint a statutory manager for that financial institution, if it appears that—</u></b></p> <p><b><u>(a) the financial institution-</u></b></p> <p><b><u>(i) has in a material respect failed to comply with a law;</u></b></p> <p><b><u>(ii) is likely to be in an unsound financial position; or</u></b></p> <p><b><u>(iii) is mal administered; and</u></b></p> <p><b><u>(b) it is advisable to appoint a statutory manager in order to protect—</u></b></p> <p><b><u>(i) the interests of the clients of the financial institution;</u></b></p> <p><b><u>(ii) the safety and soundness of financial institutions in general; or</u></b></p> <p><b><u>(iii) the stability, fairness, efficiency and orderliness of the financial system.</u></b></p> <p><b><u>(2) An appointment under subsection (1) takes effect immediately, but the registrar must, as soon as practicable, after the appointment and in any event within 30 days</u></b></p> |
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| <p><u>(iii) the stability, fairness, efficiency and orderliness of the financial system.</u></p> <p><u>(4) An appointment under subsection (3) takes effect immediately, but the registrar must, as soon as practicable after the appointment and in any event within 30 days after the appointment, apply to the court for an order confirming the appointment.</u></p> <p><u>(5) On hearing the application in terms of subsection (4), the court must confirm the appointment, unless satisfied that the grounds for making the appointment no longer exist.</u></p> <p><u>(6) The statutory manager of a financial institution—</u></p> <p><u>(a) must be allowed full access to the accounting records, financial statements and other information relating to the affairs of the institution;</u></p> <p><u>(b) must control the management of the affairs of the institution to the exclusion of its executive directors or managers; and</u></p> <p><u>(c) is entitled to receive such remuneration from the institution as the court may order.</u></p> <p><u>(7) (a) The statutory manager of an institution must manage the affairs of the institution with the greatest economy possible compatible with efficiency and, as soon as practicable, report to the registrar and indicate what steps should be taken to ensure that the institution—</u></p> <p><u>(i) complies with the law;</u></p> <p><u>(ii) becomes financially sound; and</u></p> <p><u>(iii) is properly administered.</u></p> <p><u>(b) If the statutory manager considers that it is not practicable to take steps in terms of paragraph (a), he or she must report to</u></p> |  | <p><u>after the appointment, apply to the High Court for an order confirming the appointment.</u></p> <p><u>(3) On hearing the application in terms of subsection (2), the court must confirm the appointment, unless satisfied that the grounds for making the appointment no longer exist.</u></p> <p><u>(4) The statutory manager of a financial institution—</u></p> <p><u>(a) must be allowed full access to the accounting records, financial statements and other information relating to the affairs of the financial institution;</u></p> <p><u>(b) must participate in the management of the affairs of the financial institution with its executive directors or managers. Provided that where there is disagreement between the statutory manager and the executive directors of the financial institution, the statutory manager shall take the final decision; and</u></p> <p><u>(c) is entitled to receive such remuneration from the institution as the Court may order.</u></p> <p><u>(5) (a) The statutory manager of a financial institution and the financial institution must manage the affairs of the institution with the greatest economy possible compatible with efficiency and, as soon as practicable, report to the registrar and indicate what steps should be taken to ensure that the financial institution—</u></p> <p><u>(i) complies with the law;</u></p> <p><u>(ii) becomes financially sound; and</u></p> |
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|  | <p><u>the registrar and must indicate—</u></p> <p><u>(i) whether steps should be taken to transfer the business of the institution to an appropriate person and, if so, on what terms; or</u></p> <p><u>(ii) whether the institution should be wound up or placed under curatorship.</u></p> <p><u>(8) The statutory manager of a financial institution must comply with directives issued by the registrar from time to time in relation to the statutory manager's functions and report to the registrar should the statutory manager be hindered in giving effect to any such directives.</u></p> <p><u>(9) The statutory manager of a financial institution may, after giving notice to the registrar, at any time apply to the court for directions.</u></p> <p><u>(10) The registrar may at any time apply to the court to remove a statutory manager from office and, subject to subsection (4), to confirm the appointment of a replacement.</u></p> <p><u>(11) The statutory manager of a financial institution is not liable for loss suffered by the institution unless it is established that the loss was caused by the statutory manager's fraud, dishonesty or wilful failure to comply with the law.</u></p> <p><u>(12) The provisions of this section must not be construed as limiting any of the powers of the registrar under section 5."</u></p> |  |  | <p><u>(iii) is properly administered.</u></p> <p><u>(b) If the statutory manager considers that it is not practicable to take steps in terms of paragraph (a), he or she must report to the registrar and must indicate—</u></p> <p><u>(i) whether steps should be taken to transfer the financial services business or a part thereof of the financial institution to an appropriate person and, if so, on what terms; or</u></p> <p><u>(ii) whether the financial institution should be wound up or placed under curatorship.</u></p> <p><u>(6) The statutory manager of a financial institution and the financial institution must comply with directives issued by the registrar from time to time in relation to the statutory manager's functions and report to the registrar should the statutory manager be hindered in giving effect to any such directives.</u></p> <p><u>(7) The statutory manager of a financial institution and the financial institution may, after giving notice to the registrar, at any time apply to the court for directions.</u></p> <p><u>(8) The registrar may at any time apply to the court to—</u></p> <p><u>(a) terminate the statutory management; or</u></p> <p><u>(b) remove a statutory manager from office and, subject to subsection (2), to confirm the appointment of a replacement.</u></p> <p><u>(9) The statutory manager of a financial institution is not liable for loss suffered by the financial institution unless it is established that the loss was caused by the statutory</u></p> |
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|     |          |      |   | <p><u>manager's fraud, dishonesty or wilful failure to comply with the law.</u></p> <p><u>(10) The provisions of this section must not be construed as limiting any of the powers of the registrar under section 5.</u></p>  |
| 163 | As above | BASA | <p>Clause 163 of the Bill introduces the concept of a statutory manger into our law through an insertion of section 5A in the Financial Institutions (Protection of Funds) Act (FIPFA). The purpose of the statutory manager would be to control the management of the affairs of the institution to the exclusion of its executive directors or managers. The appointment of a statutory manager must be done with the approval of the Registrar and be approved by the High Court. The High Court will appoint a statutory manger where an institution has in a material respect failed to comply with a law; is likely to be in an unsound financial position or is maladministered; and the High Court considers it in the interest of the clients of the institution or the financial system to make the appointment.</p> <p>The statutory manager once appointed must report to the Registrar and must indicate what steps should be taken to</p> | <p>Please see above. Regarding the transfer of business in subsection 5(b) the intention is for the statutory manager to make a recommendation to the registrar whether it is feasible to transfer the financial services business, which would include clients to whom financial services are rendered to another regulated person.</p> |

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|  |  | <p>ensure that the institution complies with the law, becomes financially sound and is properly administered. In regards to section 5A(8) the section states should the statutory manager consider that it is not practicable to take steps to manage the institution or try make it financially sound again he must indicate to the Registrar 'whether steps should be taken to transfer the business of the institution to appropriate person and if so on what terms or whether the institution should be wound up or put under curatorship'. It is unclear whether the section when referring to the transfer of the business means a sale of business, where the business of the institution will be sold on to another entity. Further the section states that the statutory manager can advise that the institution be placed under curatorship. It is unclear what the difference between curatorship and statutory management is. By making specific reference to curatorship it means the drafters intended statutory management to be something totally different from curatorship. Whereas it would seem the two processes are similar. The statutory manager</p> |  |
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|     |   |  | <p>must comply with directives issued by the Registrar from time to time in relation to his or her functions. Further section 5A(12) provides that a statutory manager is not liable for loss suffered by the institution unless it is established that the loss was caused by the statutory manager's fraud, dishonesty or wilful failure to comply with the law. The clause introduces a very invasive mechanism to deal with an institution which is failing in its protection of funds. The section should be reviewed. Business input is required on whether this section is necessary. The most alarming thing about this section is that once appointed the statutory manager runs the institution to the exclusion of the executive directors and managers.</p> |   |
| 164 | <p><b>Section 6</b> of the principal Act is hereby amended—<br/> (a) by the substitution in subsection (1) for paragraphs (b), (c) and (d) of the following paragraphs, respectively:<br/> "(b) compel any institution <u>or other person</u> to comply with any law or to cease contravening a law;<br/> (c) compel any institution <u>or other person</u> to comply with a lawful request, directive or instruction made, issued or given by the registrar under a law; <b>[or]</b></p> | <p>ASISA<br/> (18.02.2013)<br/> (18.04.2013)</p> | <p>As the Explanatory Memorandum contains no explanation as to the inclusion of another person, it is assumed that the reference is intended to be to —unregistered persons as the reference to —other person is too wide. The Registrars can only act in relation to the respective Acts under its administration and</p>  | <p>Agreed to delete "other person" but inclusion of unregistered person is not necessary as it is captured by the definition of "institution."</p> <p> <b>Section 6</b> of the principal Act is hereby amended—<br/> (a) by the substitution in subsection (1) for paragraphs (b), (c) and (d) of the following paragraphs, respectively:<br/> "(b) compel any institution comply with any law or to cease contravening a law;</p> |

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| <p>(d) obtain a declaratory order <b>[on any point of law]</b> relating to any law or the business of an institution[.] <u>or other person</u>:";</p> <p>(b) by the addition to subsection (1) of the following paragraphs:<br/> <u>"(e) prevent the concealment, removal, dissipation or destruction of assets or evidence thereof by any institution or other person;</u><br/> <u>(f) seize and remove the assets of an institution or other person for safe custody pending the exercising of such other legal remedy as may be available to the registrar."</u>;</p> <p>(c) by the substitution for subsection (2) of the following subsection:<br/> "(2) For the purpose of ensuring compliance with a law, or if the registrar has reason to believe that an institution <u>or other person</u> is contravening or failing to comply with, or has contravened or failed to comply with, any provision of a law, the registrar may—<br/> (a) by notice direct that institution <u>or other person</u> to—<br/> (i) furnish the registrar within a specified period with any specified information or documents in the possession or under the control of that institution <u>or person</u> and which relate to the matter of such contravention or failure;<br/> (ii) appear before the registrar at a specified time and place for questioning by the registrar in connection with such matter; <b>[or]</b><br/> (iii) make arrangements to the satisfaction of the registrar for the discharge of all or any part of that</p> | <p>—unregistered personll is defined as a person not registered, approved or otherwise authorised to carry on the business of a financial institution, but who or which carries on the such business or a business corresponding to a business normally carried on by a financial institution.</p> <p>The references to —other personll in section 6(2) should also be replaced with references to —unregistered personll.</p> | <p>(c) compel any institution to comply with a lawful request, directive or instruction made, issued or given by the registrar under a law; <b>[or]</b><br/> (d) obtain a declaratory order <b>[on any point of law]</b> relating to any law or the business of an institution[.]";<br/> (b) by the addition to subsection (1) of the following paragraphs:<br/> <u>"(e) prevent the concealment, removal, dissipation or destruction of assets or evidence thereof by any institution;</u><br/> <u>(f) seize and remove the assets of an institution for safe custody pending the exercising of such other legal remedy as may be available to the registrar."</u>;</p> <p>(c) by the substitution for subsection (2) of the following subsection:<br/> "(2) For the purpose of ensuring compliance with a law, or if the registrar has reason to believe that an institution is contravening or failing to comply with, or has contravened or failed to comply with, any provision of a law, the registrar may—<br/> (a) by notice direct that institution to—<br/> (i) furnish the registrar within a specified period with any specified information or documents in the possession or under the control of that institution and which relate to the matter of such contravention or failure;<br/> (ii) appear before the registrar at a specified time and place for questioning by the registrar in connection with such matter; <b>[or]</b><br/> (iii) make arrangements to the satisfaction of the registrar for the discharge of all or any part of that institution's obligations in terms of such law; <u>or</u><br/> (b) if it appears that prejudice has</p> |
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|     | <p>institution's <u>or person's</u> obligations in terms of such law; <u>or</u><br/> <b>(b)</b> if it appears that prejudice has occurred or might occur as a result of such contravention or failure to comply, <b>[apply to a court having jurisdiction for an order restraining]</b> <u>by notice prohibit</u> such institution <u>or person</u> from continuing business or dealing with trust property pending an application to court by the registrar as contemplated in section 5, or pending the exercising of such other legal remedy as may be available to the registrar.”;</p>  |     |   | <p>occurred or might occur as a result of such contravention or failure to comply, <b>[apply to a court having jurisdiction for an order restraining]</b> <u>by notice prohibit</u> such institution from continuing business or dealing with trust property pending an application to court by the registrar as contemplated in section 5, or pending the exercising of such other legal remedy as may be available to the registrar.”;</p> |
| 165 | <p><b>SECTION 6A(b)</b></p> <p><b>(b)</b> (i) A registrar authorised to impose sanctions under the Financial Intelligence Centre Act, 2001 (Act No. 38 of 2001), may impose any sanction under that Act, other than a financial penalty referred to in section 45C(3) (e) of that Act.</p> <p>(ii) If the registrar, in determining an appropriate administrative sanction under that Act, is of the opinion that a financial penalty referred to in section 45C(3)(e) of that Act may be an appropriate administrative <u>sanction</u>, <u>the registrar</u> must refer <b>[an alleged]</b> <u>the</u> contravention <b>[under the Financial Intelligence Centre Act, 2001,]</b> to the enforcement committee <u>for a determination under section 6D</u></p> | FSB | <p>1. Presently, all contraventions of FSB legislation, in instances where the registrar may not impose a penalty himself, may be referred to the Enforcement Committee (EC). The only exception is breaches of the FICA. Notwithstanding the fact that FICA provides for our registrars to impose penalties themselves, the FI Act dictates that such breaches must also be referred to the EC. This was done to ensure uniformity in the treatment of respondents that contravene our legislation.</p> <p>2. However, it created the dilemma that in terms of the</p> | <p>It is proposed that the subsection (b) is deleted.</p>  |

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|  | <p><u>of that Act.</u></p> <p>(iii) A referral to the enforcement committee under subparagraph (ii) does not detract from the registrar's power to impose any other administrative sanction referred to in section 45C(3) of that Act, in addition to any financial penalty that the enforcement committee may impose.</p> | <p>FICA, the FSB registrars may impose sanctions other than penalties (a caution, a reprimand, a directive and a restriction or suspension of certain specified business activities). The EC has no such powers.</p> <p>3. In an effort to solve the problem, the FSB proposed the amendment to the effect that the registrar must consider what will be an appropriate sanction (penalty or the other FIC options), and then decide whether he is going to impose the FIC sanctions or refer the matter to the EC for a penalty. In reconsideration, the FSB does not believe that this is a workable solution for the following reasons:</p> <p>3.1 It would be difficult for the registrars to make a call on the appropriate sanction before there is a full ventilation of the facts (i.o.w. before the respondent files his answering affidavit, etc.);</p> <p>3.2 In law it is likely to be a reviewable decision of the registrar, which means that our</p> |  |
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|     |   |     | <p>process can be tied up in an unnecessary legal battle; and</p> <p>3.3 It creates uneven enforcement remedies, that would seem arbitrary if one looks only at the FI Act.</p> <p>3.4. In addition, an appeal against an EC decision on a contravention of FSB legislation lies to the High Court, but an appeal against a contravention of FIC legislation, lies to the FIC Appeal Board. This creates the problem that there are different appeal structures whilst there is no sound reason to differentiate. More importantly however, the respondent would be in an absurd position if he was charged with FIC and FSB legislative contraventions. He will then have to lodge two different appeals to different bodies.</p> |   |
| 166 | <p><b>CLAUSE 166</b></p> <p><b>166.</b> Section 6B of the principal Act is hereby amended—</p> <p>(a) by the substitution in subsection (1) for</p> | FSB | <p>A succession planning shortcoming was identified. If we should lose our Chairperson unexpectedly, the deputy chairperson cannot</p>   | <p> (b) by the substitution in subsection (7) for paragraph (b) of the following paragraph:</p> <p>“(b) The agreement must be filed with the</p> |

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|     | <p>paragraph (a) of the following paragraph:<br/> “(a) a notice setting out the details and nature of the alleged contravention <b>[and the administrative sanction that, in the opinion of the applicant, should be imposed]</b>; and”; and</p> <p>(b) by the addition of the following subsection:<br/> <u>“(8) (a) The chairperson of the panel designated by the enforcement committee to hear a matter contemplated in subsection (2) may, on the written request of a party and on good cause shown, extend the time period to file such affidavit.</u></p> <p><u>(b) A written request contemplated in paragraph (a) must be filed with the chairperson on or before the expiry date within which to file the relevant affidavit.</u></p> <p><u>(c) A party seeking an extension of time must first approach the other party and the written request must indicate whether the parties have agreed to an extension.”.</u></p> |     | <p>fulfil his functions.</p>  | <p>chairperson <u>or deputy chairperson</u> of the enforcement committee to be made an order of the enforcement committee, as contemplated in section 6D (2).”</p> |
| 170 | <p><b>SECTION 6F</b></p> <p>(1) Subject to <b>[the appeal proceedings under the Financial Intelligence Centre Act, 2001, and]</b> subsection (2), a determination of the enforcement committee may be taken on appeal to the High Court as if the determination were a</p>   | FSB | <p>Requested by the FIC. The amendment will preserve the powers and functions of the appeal board under the FICA.</p> | <p>To remove the proposed deletion in subsection (1).</p>  |

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|   | decision of a magistrate in a civil matter.  |                                       |   |  |
| <b>(THIS SECTION IS NOT CURRENTLY INCLUDED IN THE BILL)</b> | <p><b>SECTION 6H. Utilisation of administrative sanction.—</b></p> <p>(1) Any payment received by the board pursuant to an administrative sanction imposed under section 6D(2)(a) must, subject to subsection (2), exclusively be utilised for purposes of consumer education or the protection of the public.</p>   | FSB                                   | As the law stands at the moment, it is unclear whether the FSB may use penalties to reimburse the FSB for the costs of enforcement. Even in an uncontested case, the FSB might spend some money on courier fees, remuneration of the panel members, etc. This will be recoverable immediately from the penalty. In contested cases the recoverable costs will include transcription costs, travel costs, external opinions or external lawyers, remuneration of the panel members, expert witnesses' fees, etc. | <p><b>NEW CLAUSE</b></p> <p> Section 6H of the principle Act is hereby amended by the substitution for subsection (1) of the following subsection:</p> <p>“(1) Any payment received by the board pursuant to an administrative sanction imposed under section 6D(2)(a) must, <u>after recovering costs</u>, and subject to subsection (2), exclusively be utilised for purposes of consumer education or the protection of the public.”</p> |
| 171   | <p><b>Amendment of Section 7</b></p> <p>Section 7 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection:</p> <p>"(1) <u>(a)</u> The registrar may, by notice in the <i>Gazette</i>, declare a specific practice or method of conducting business an 'irregular or undesirable practice' or an 'undesirable method of conducting business' for a specific category or categories of financial institutions, or for all such institutions.</p> <p><u>(b) In determining whether or not a</u></p> | ASISA<br>(18.02.2013)<br>(18.04.2013) | <p>The reference to subsection (1) should be replaced with a reference to section (1)(a) to align with the amendment proposed by this clause.</p> <p>It is also suggested that the definition of “law” be expanded to also define “law” for the purposes of this section 7 as it is currently defined for the</p>   | <p>Agreed</p> <p> <u>(b) In determining whether or not a declaration contemplated in subsection (1)(a) should be made, the registrar must be guided by whether the practice concerned has or is likely to have the effect of—</u></p> <p>ASISA to reconsider in light of the explanation that the term “law” as defined in section 1 relates to the powers of the registrar and the enforcement committee provisions only.</p>             |

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|     | <p><u>declaration contemplated in subsection (1) should be made, the registrar must be guided by whether the practice concerned has or is likely to have the effect of—</u></p> <p><u>(i) harming the relations between financial institutions or any category of financial institutions, or any financial institution and clients or the general public;</u></p> <p><u>(ii) unreasonably prejudicing any client;</u></p> <p><u>(iii) deceiving or misleading any client; or</u></p> <p><u>(iv) unfairly affecting any client,</u></p> <p><u>and whether, if the practice is allowed to continue, one of more objects of the law in question will, or are likely to be defeated.”.</u></p> |                               | <p>purposes of sections 5, 6 and 6A.</p>   |   |
| 173 | <p>The following section is hereby inserted in the principal Act after section 9:</p> <p><b>"Verification of information</b></p> <p><b><u>9A.</u></b> <u>Before making a determination in accordance with any law as to whether or not a person is fit and proper to hold office or continue to hold office in a financial institution, the registrar may request for the verification of information or may verify information at the registrar’s disposal by making enquiries to any state department, credit bureau or other source of relevant information concerning that person.”.</u></p>   | <p>ASISA<br/>(18.02.2013)</p> | <p>It is suggested that the definition of “law” be expanded to also define “law” for the purposes of this section 9A. The term is currently defined for the purposes of section 5A only.</p> | <p>The term “law” as defined in section 1 relates to the powers of the registrar and the enforcement committee provisions only.</p> |

## SUMMARY OF REGULATORY GAPS

### OVERARCHING AMENDMENT PROPOSED IN RESPECT OF ALL SECTOR SPECIFIC ACTS

#### Section 1 - Insertion of a new definition:

1. To insert a definition of “official web site” to allow for publication of administrative actions on the FSB web site, instead of the *Gazette*. This is consistent with the Interpretation Act, will result in significant cost savings and will result in more effective communication and publication.

#### Section 10:

2. To increase outdated criminal sanctions.

### ALIGNMENT WITH OTHER LEGISLATION

#### Companies Act

#### Section 1 - Insertion of a new definition:

3. To insert a definition of “Companies Act”.

#### Section 1 – amend a definition:

4. To amend the definition of “nominee company” to rectify a reference to the Companies Act, 2008.

#### Section 3(2):

5. Insertion of new subsection: To amend the duty to declare interests to align with the Companies Act, 2008.

#### Section 4(3):

6. To amend the duty to declare interests to align with the Companies Act, 2008.

#### Section 5(10):

7. To align this section to the Banks Act by allowing the registrar to place a consenting financial institution under curatorship without having to apply to court.

**Section 6(6):**

8. To provide for alternative means of notification (other than the Gazette) that certain actions were taken by the registrar.

**Section 6A:**

9. To ensure that the FSB has the same power as other supervisory authorities to impose sanctions under the Financial Intelligence Centre Act, while preserving the exclusive jurisdiction of the enforcement committee to impose financial penalties.

**REGULATORY GAP****Section 1:**

10. To extend the definitions of “law” due to the insertion of a new section 5A (statutory management).
11. To rectify a reference to the Financial Intelligence Centre Act.

**Section 2:**

12. To extend the duties relating to dealing with funds or trust property controlled by a financial institution to the financial institution itself. The current provision is incorrectly limited to natural persons.
13. Subsection (c): To clarify the provision.

**Section 4:**

14. To extend the duties relating to investing trust property controlled by a financial institution to the financial institution itself. The current provision is incorrectly limited to natural persons and to align with the Companies Act, 2008.

**Section 5:**

15. To provide for clarity with regard to the appointment of a curator by Court.

**Section 5A:**

16. New section. To provide for the appointment of a statutory manager in respect of a financial institution by the court on application of the registrar or with the registrar's consent. A statutory manager serves in place of the financial institution's management, primarily to achieve financial soundness and compliance with the law. The remedy is likely to be used by the registrar in a situation where more drastic enforcement measures such as liquidation or curatorship may be inappropriate and harmful to the financial institution's reputation. This measure differs from business rescue under the Companies Act, 2008, as it is an enforcement tool under the exclusive control of the registrar.

#### **Section 6:**

17. To empower the registrar in the interest of improved investor protection to apply for a court order to prevent the concealment, removal, dissipation or destruction of assets or evidence thereof by any institution.

18. To provide for seizure and removal of the assets of an institution for safe custody pending the exercise of such other legal remedy as may be available to the registrar.

19. Swift action by the FSB may be necessary to prohibit a financial institution from continuing business in case of prejudice as a result of contravention of the law, pending court action or the exercise of other legal remedies available to the FSB.

20. To provide for enforceable undertakings. An enforceable undertaking is an undertaking given by a financial institution to the FSB that the institution will do something or refrain from doing something. If the institution fails to comply with the undertaking, the FSB may apply to the court for the enforcement of the undertaking. The advantage of this remedy is that, in the event of breach, all that has to be proved to the court by the FSB is that the breach of the undertaking has occurred.

#### **Section 6B**

21. To provide for a mechanism for ensuring compliance with timeframes set for the exchange and filing of pleadings in enforcement committee matter.

#### **Section 6C**

22. To provide for oral evidence to be called in exceptional circumstances.

#### **Section 6D**

23. To clarify the burden of proof that must be met in a matter before the enforcement committee and to enable its chairperson to determine the

reasonableness of the costs of a matter before the committee.

24. Subsection (5)(b): To empower the enforcement committee to charge interest in cases where a person or institution delay in paying costs and fines.

**Section 6E**

25. To provide for delivery of document by fax and email to align with the court rules.

**Section 6F**

26. To provide for the stay of execution of a determination in case of an appeal.

**Section 7:**

27. To empower the registrar to declare a practice or business undesirable. The principles that must inform such a declaration are also provided.

**Section 8:**

28. The obligation for the registrar to consult with an exchange before exercising enforcement remedies is removed.

**Insertion of a new Section 9A after section 9:**

29. To provide for the verification of information by the registrar to ensure that a determination on whether a person is fit and proper is well-founded.