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REPUBLIC OF SOUTH AFRICA

FINANCIAL SECTOR REGULATION BILL

COMMENTS RECEIVED ON THE FIRST DRAFT BILL PUBLISHED BY NATIONAL TREASURY FOR COMMENTS IN DECEMBER 2013

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24	World Bank	Gunhild Berg

COMMENTS ON THE FINANCIAL SECTOR REGULATION BILL

Reviewer	Section	Issue	Decision
SAICA	**Arrangement of Sections**	**General Housekeeping**: No introduction of the Bill has been provided. There are various media statements from National Treasury summarising events leading up to the proposed draft Bill which are available. In addition, there is a comprehensive background to the Bill at the end of the document from pages 114 to 118. We propose including an introduction section encompassing all developments in the Bill. We believe this will enhance the overall readability and quality of the document.	***A preamble is not necessary for a Bill such as this, as a preamble is most suitable for Bills that seek to enforce the rights enshrined in the Constitution. The long title has however been amended to accurately capture what is intended to be covered by the Bill.***

CHAPTER 1: Interpretation, Administration and Purpose of Act

Reviewer	Section	Issue	Decision
1. Interpretation			
SAIA	**Definitions**	**Definitions set in Chapter 1** Substantial clarification is required with regards to certain definitions in the Bill, such as the definitions of "**financial crisis**", "**financial stability**" and "**systemic**"; including clearing up of ambiguity of certain concepts and definitions. It is our submission that there is a need for alignment consistency in definitions from existing legislation to create legal certainty, more specifically that the definitions set in Chapter 1 of the Bill should be consistent with existing definitions in the Short-term Insurance (STI) Act, 1998 and the Financial Advisory and Intermediary Services (FAIS) Act, 2002 and other financial sector legislation;	***The necessary revisions, including the insertion of the new "systemic event" and "systemic risk" definitions, have been incorporated to ensure consistency in the application of concepts throughout the rest of the Bill, and in particular to align these definitions with "financial stability" as it is defined under cl.4 and dealt with under Chapter 2. The amended definition of financial stability is a necessary and fundamental component in the Bill in order to give clarity to the role of the Reserve Bank in maintaining, promoting and enhancing financial stability.***
BASA	**"appellant"**	**"appellant"** *means a person who has lodged an appeal to the Financial Services Tribunal in terms of Part* ***3*** *of Chapter 6 against a decision of a regulatory authority;*	***Upon review, it was decided to omit this definition from the revised FSR Bill as it is unnecessary.***

SAIA	**"appellant**	It is proposed that after "*an appeal*", "… *to the Financial Services Tribunal*…" is added. This definition should then read: "**appellant**" *means a person who has lodged an appeal to the Financial Services Tribunal in terms of Part 3 of Chapter 6 against a decision of a regulatory authority*.";	
Promontory	**"authorisation"**	Given issue with "*activities*", suggest: "**authorisation**" *means a license or registration or any other type of approval, permission or authorisation issued in terms of a regulatory law to conduct a business providing financial services or products;~~carry out a regulated activity~~*	***The concept of "authorisation" has been incorporated into the proposed definition of "licence".***
ASISA	**"application" and "entitlement"**	This definition refers to the definition of "**entitlement**". In our view this is unnecessarily cumbersome and the definition can be simplified as follows: *"**application**", in relation to a financial sector ~~regulatory~~ law, means any ~~an~~ application brought in terms of a financial sector ~~regulatory~~ law.~~—~~* ~~*(a) for the granting of an entitlement;*~~ ~~*(b) for the amendment or renewal of an entitlement;*~~ ~~*(c) for the amendment or withdrawal of any condition attached or other encumbrance applicable to an entitlement; or*~~ ~~*(d) in connection with any other matter provided for in a regulatory law*~~;" The definition of entitlement can then also be deleted.	***Both definitions have been deleted.***
SAICA	**"application"**	"**application**", *in relation to a regulatory law, means an application in terms of…(d) in connection with any other matter provided for in a regulatory law*;" The definition of "**application**" in terms of a regulatory law is mainly relevant to entitlements. Point (d) then overrides entitlements and broadens the definition to "*any other matter*". The definition appears to be contradictory and can extend to any matter in other regulatory laws that may not be in line with this Act. We request clarity on the phase "*any other matter*" to avoid any unintended consequences.	
ASISA	**"decision"**	Given that ss32 (3) contemplates that an unauthorised staff member can take a decision which could have far reaching consequences for those affected, we are of the view that not every exercise (or purported exercise) of public power may necessarily constitute administrative action, and yet may affect the rights of persons – thus, for example, a clerical decision could still have direct effect on an individual and yet not constitute administrative action. In *Nedbank Ltd. V Medelow 2013(6) SA 130 SCA* the court distinguished between "*…administrative acts in the course of their statutory duties, where they have no*	***Agreed. However, in order to avoid ambiguity and misunderstanding, the definition has been omitted and rather the definition of "administrative action" has been aligned to the definition contained in the Promotion of Administrative Justice Act.***

		decision-making function but perform acts that are purely clerical and which they are required to do in terms of the statute that so empowers them, they are not performing administrative acts within the definition of PAJA or even under the common law". We propose that this definition be amended as follows: **"decision"***, in relation to an ~~administrative~~ action, means a decision taken in relation to a specific person affecting the rights of that person;*"	
BASA	**"decision"**	**"decision"**, *~~in relation to an administrative action,~~ means ~~a~~ any decision of the administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision, including decisions related to- ~~taken in relation to a specific person affecting the rights of that person;~~* *a)making, suspending, revoking or refusing to make an order, award or determination;* *b) giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;* *c) issuing, suspending, revoking or refusing to issue a license, authority or other instrument;* *d) imposing a condition or restriction;* *e) making a declaration, demand or requirement;* *f) retaining, or refusing to deliver up, an article; or* *g) doing or refusing to do any other act or thing of an administrative nature, and a reference to a failure to take a decision must be construed accordingly.*	***Please see comments as above and proposed definition of "administrative action" in the revised FSR Bill.***
SAIA	**"decision"**	It is suggested the definition if revised to align it with the Promotion of Administrative Justice Act. "**decision**" *means any decision of ~~", in relation to~~ an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision, including ~~action, means~~ a decision relating~~taken in relation~~ to:* *a) making, suspending, revoking or refusing to make an order, award or determination;* *b) giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;* *c) issuing, suspending, revoking or refusing to issue a license, authority or other instrument;* *d) imposing a condition or restriction;* *e) making a declaration, demand or requirement;* *f) retaining, or refusing to deliver up, an article; or*	

		g) doing or refusing to do any other act or thing of an administrative nature, and a reference to a failure to take a decision must be construed accordingly ~~specific person affecting the rights of that person~~;"	
Promontory	**" dual-regulated activity"**	[We] have difficulty with the logic of the terminology introduced here. It is not so much activities that are dual-regulated as entities. [We] make this point both in terms of what this draft actually says (see Schedule 2) and what is logically correct. The entities are regulated by both the PA and MCA – but each regulates different activities. No activity should ever be regulated by both. That would be duplicative and potentially conflicting. [We] would prefer to refer to these as dual-regulated "*entities*" – i.e. the definition could read: "**dual -regulated entity ~~activity~~**" *means any entity ~~business~~ of the nature contemplated by ~~in~~ Part 2 of Schedule 2;*"	***Agreed. The definition has been omitted, given the confusion around the concept of dual-regulation that was not necessarily clarified in the first draft. This and other terminology have been revised to give better clarity to dual-regulation that is a recurring theme of the Bill, and the cornerstone of the Twin Peaks framework. Please refer to the Policy document for further discussion on this.***
Promontory	**"entitlement"**	[We] find the use of the term "**entitlement**" unusual since it means something to which one automatically has a right. In fact, licences are not an entitlement – they must be earned and can be taken away. [We] assume this is a term that is particular to SA legislation? If there is no better word, you could drop this all together as it doesn't really go anywhere	***See comments above and new definition of licence inserted.***
ASISA	**"financial crisis"**	In light of the definition of "**systemically important financial institution**" we assume the word "*systemic*" in the definition of "**financial crisis**" applies to risk, weakness or disruption. Accordingly we suggest the definition read as follows to make this clear: "**financial crisis**" *means a crisis in the financial system caused by a ~~systemic~~ risk, weakness or disruption ~~in the financial system~~ of a systemic nature*;	***The definition of "financial crisis" as contemplated in the previous draft has been omitted from the Bill. The revised version rather defines "systemic event" and "systemic risk" for better clarity, and Chapter 2 gives effect to the Reserve Bank's powers and responsibilities in managing systemic risk and systemic events.***
Resolution WG	**"financial crisis"**	A few issues arise in relation to this definition which might benefit from further consideration: • The definition does not focus on what a financial crisis is, but rather, on what caused the crisis. It may be better to focus the definition on what constitutes a financial crisis. For example, there could be value in defining it a little more specifically along the following lines: "*the failure or inability of a financial institution, financial system or financial market to perform significant financial services*". • The definition of financial crisis defines such a crisis by reference to the cause of the crisis and lists the possible causes. It reads as if those are the only causes that would	***See inserted definitions of "systemic event", "systemic risk" and "Financial stability" under cl 4.***

		constitute an event being recognised as a financial crisis. It is silent on other possible causes, such as the failure of a specific financial institution (which could be idiosyncratic in nature and not necessarily based on a systemic risk). Equally, it is silent on other possible causes, such as the failure of a foreign parent entity or major economic shocks affecting the South African economy. It might be prudent to incorporate more flexibility into the definition, such that it focuses on what "**financial crisis**" means (as in the above bullet point), and leaving open the possible causes of the crisis. The latter could be achieved by adopting a definition along the lines set out in the preceding bullet point, with no reference to the cause of the crisis. • The definition of financial crisis is silent as to the systemic magnitude of the crisis – ie there is no reference to the impact of the crisis in terms of the threat to the stability of the financial system. That is appropriate if the intention is to use the term "**financial crisis**" to include the distress or failure of any financial institution, etc regardless of whether it has systemic impact. However, if the intention is to distinguish between the failure or distress of a financial institution (of any kind) and the failure or distress of a financial institution which poses a threat to the stability of the financial system, then a reference to systemic impact may be helpful.	
SAIA	**"financial crisis"**	The definition set out indicates that a "**financial crisis**" *means a crisis in the financial system caused by a systemic risk, weakness or disruption in the financial system*;" The comment is raised that the word "**crisis**" is not defined and thus left open for interpretation. There is also a suggestion that "**financial crisis**" should be aligned with the capital requirements of financial services providers to the extent that a financial crisis will be deemed when the capital requirements are not satisfied as per the respective legislation.	***See responses above and the inserted definitions of "systemic event" and "systemic risk". Part 5 and 6 empowers the Reserve Bank to take steps to manage systemic risk, and this includes the ability to impose certain macroprudential tools, such as capital requirements, for systemically important financial institutions***
Standard Bank	**"financial crisis"** and **"systemic"**	Standard Bank has some concerns about the translation of what are essentially economic and financial concepts into statute in a way that strikes the appropriate balance between legal certainty and practical flexibility. Standard Bank firstly proposes that this definition should rather be "**systemic risk**" rather than "**systemic**." The following concepts are used in the definition of systemic but are not defined which may lead to interpretational challenges and confusion: • "*marketing by financial institutions of tainted or dubious financial instruments*"; and • "*excessive speculation on financial or other markets*."	***See comments above and the inserted definitions of "systemic event" and "systemic risk".***

		Systemic risk is defined in the National Payment System Act 1998 as follows: "*the risk that failure of one or more settlement system participants, for whatever reason, to meet their payment obligations, including the payment obligations of clearing system participants, or their settlement system participants being unable to meet their respective payment or settlement obligations*". There needs to be consistent approach across the Financial Sector Regulation Bill and the National Payments System Act.	
Strate	**"financial crisis"**	We submit that the scope of the definition of "**financial crisis**" be extended with reference to its effect by including the words "*and which occurrence harms or threatens to harm the financial system*."	***See comments above and the inserted definitions of "systemic event" and "systemic risk".***
ASISA	**"financial customer"**	The word "predominantly" is problematic. The distinction between retail and wholesale users needs to be clarified and defined. We suggest the definition be amended to read: "***financial customer***" *means any user of a financial service, ~~and includes retail users, predominantly individuals and small businesses, and wholesale users, predominantly corporates and other financial institutions;~~* **or** "**financial customer**" *means any person to whom a financial service is provided*	***Agreed. See revised definition***
BASA	**"financial customer"**	It is our view that wholesale customers should be excluded from the definition of a "**financial customer**" for the following reasons – At present, financial institutions are exempted from complying with the FAIS Act when providing financial services to certain clients (such as another financial institution / insurer /certain asset managers /corporates with particular net asset values, etc), since such clients (referred to as "*Professional Clients*") are acknowledged as having sufficient know-how and expertise when contracting with financial institutions. While retail consumer protection legislation has found traction, it has been broadly recognised that transactions with market participants and professional clients ought to be subject to different levels of protection. Over the past few years our members have made an effort to ensure that a standard definition of wholesale client is applied across Market Conduct Legislation and that the professional clients are afforded protection which is appropriate to their needs. The FAIS Merchant Bank Exemption currently contains a definition of professional clients. The proposal is that the proposed amended definition attached should be applied across all market conduct legislation. Alternatively, the definition should be aligned with other current consumer protection	***Comment noted, however we disagree with this interpretation. The definition is meant to cover all customers of financial services and financial products.***

		legislation such as the National Credit Act and the Consumer Protection Act which restricts protection to small enterprises. Banking Industry – proposed definition of a "**professional client**" ***"professional client"*** *means –* *(a) a financial institution;* *(b) an authorised user;* *(c) a person who is registered, licensed, recognised, approved or otherwise authorised by -(i) the Registrar of Long-term Insurance to conduct long-term insurance business;* *(ii) the Registrar of Short-term Insurance to conduct short-term insurance business;* *(iii) the Registrar of Financial Services Providers to provide a financial service in relevant securities;* *(d) a person outside the Republic who –* *(i) as a regular feature of the person's business, renders a service similar to a 'financial service' as defined in section 1(1) of the Act; and* *(ii) is registered, licensed, recognised, approved or otherwise authorised to render services or conduct the business of a financial institution or a business referred to in paragraph (c) by a foreign regulator with functions similar to those of the Registrar, the Registrar of Financial institutions, the Registrar of Financial Services Providers or the Registrar of Long-Term or Short-Term Insurance;* *(e) a central financial institution or other national monetary authority of any country, state or territory;* *(f) a private equity fund or a private equity fund of funds;* *(g) a hedge fund or a hedge fund of funds;* *(h) any other person who elects, in writing, to be categorised as a professional client and who is not–* *(i) a natural person;* *(ii) a pension fund organisation as defined in section 1(1) of the Pension Funds Act, 1956 (Act No. 24 of 1956);* *(iii) a friendly society referred to in the Friendly Societies Act, 1956 (Act No. 25 of 1956);* *(iv) a medical scheme or the board of trustees of such scheme as defined in section 1(1) of the Medical Schemes Act, 1998 (Act No.131 of 1998); and* *(i) any other person declared by the Registrar to be a professional client;*"	

Melbourne	**"financial customer"**	Definition of "**financial customer**": we query whether the word "*other*" before "*financial institutions*" is necessary as this could be construed as (1) limiting "corporates" to financial institutions; or (2) referring to another financial institution that is not expressly identified in the definition.	***Agreed. See revised definition***
SAIA	**"financial customer"**	SAIA members raised a concerned that the draft definition may inadvertently exclude the following categories of people who have rights and/ interests in financial sector outcomes but who may not be considered financial customers directly: • an executor or beneficiary of a trust or estate in respect of which a financial service has been provided; or • the nominated beneficiary of the financial product which is the subject of the relevant complaint; or • a person for whose benefit a contract on insurance was taken out or was intended to be taken out; or • the true owner or the person entitled to the immediate possession of a cheque or the funds that it represents, collected by a bank for someone else's account; or the provider of a suretyship or security for a mortgage or loan; or • a person whose information is the subject of a dispute relating to confidentiality.	***Agreed. See revised definition***
Standard Bank	**"financial customer"**	Standard Bank agrees that all customers and clients should be treated fairly and therefore does not believe that the proposed definition of financial customer is problematic in principle. However, we believe that it is important that appropriate standards of fairness and protection are applied to different *types* of customers and clients. *Retail* customers require a higher degree of consumer protection than more sophisticated and *professional* clients. This principle should be embedded in the regulatory framework, particularly in the mandate of the Market Conduct Authority.	***Given the role and importance of the financial sector, our view is that financial institutions should be held to higher standards, and that financial sector regulation should consider the protection of all financial customers, whether retail or wholesale. The framework can certainly be expanded to consider this principle in formulating the regulatory framework of the two authorities; however it is not appropriate for the purpose of the FSR draft.***
Strate	**"financial customer"**	It is submitted that if this definition is intended to include both natural persons and juristic persons (regardless of size), it should state so and not use terminology such as "*small businesses*" and "*wholesale users*" which are not defined in the Bill.	***Agreed. See revised definition***
ASSA	**"financial institution"**	The definition of "**financial institution**" in Clause 1 and par 2.3 of the Memorandum on the Objects of the Bill suggest that this legislation will apply to medical schemes and micro-lenders. The Actuarial Society would like to urge the legislators to provide explicitly for this.	***The definition has been amended to include all providers of financial services and financial products.*** ***The definition of financial products includes benefits provided by medical schemes and pension funds. Though***

		The Society is concerned at what appears to be opportunities for regulatory arbitrage, as these could weaken the regulatory system considerable. An asset manager owned by a life insurer would, for example, fall under the prudential regulator, while a direct asset manager would fall under the market conduct regulator. Similarly, a pension fund would fall under market conduct supervision, unless provided via an insurance policy, in which case it would fall under the prudential regulator. In this regard, the Society also believes that leaving pensions entirely with the market conduct regulator may suggest an underestimation of the technical complexity and sheer scale of retirement entities, as well as the potential consequences a pension fund failure may have for the rest of the financial services sector	***these institutions that provide these products fall within the ambit of the Prudential Authority, it is proposed that for a period, the Prudential Authority's functions and duties in relation to collective investment schemes, pooled funds and pension funds be assigned to the Financial Sector Conduct Authority – see cl.231(1), and in relation to medical schemes , be assigned to the council of Medical schemes – see cl.231(2).*** ***It should also be clarified that the fact that there is a single licensing authority envisaged for this phase of the transition to full Twin Peaks, this does not preclude the other "non-licensing" regulator from exercising oversight over financial institutions. Conduct standards and prudential standards may be applied by each regulator in performing their functions over their respective mandates in terms of the FSR Bill. Given the extensive consultation and coordination requirements between the Regulators (including the NCR and the Council of Medical Schemes), the Bill aims to ensure a much more effective and efficient approach to regulating the system that leaves little to no room for regulatory arbitrage.*** ***See Policy document for full explanation of financial product and service provider to give effect to dual-regulation definitions.***
BASA	**"financial institution"**	This definition introduces a reference to "*institution*". This term is not defined. "*person*" however should be defined, as indicated above. It is recommended that for clarity in drafting or in line with the definition of "*person*", our view is that "*institution*", wherever it is used, should refer to "*financial institution*" or "*financial institutions*" and in consequence – • paragraph (b) of the definition of "**financial stability**" where "*financial*" should be inserted before "*institution*"; • "*small group of institutions*" in the definition of "**systemic**" should read "*small group of financial institutions*"; • "*spreading to other institutions*" in paragraph (b) of the definition of "**systemic**"	***Agreed. Please note the revised definition. Suggestions have also been incorporated where appropriate.***

		should read "*spreading to other financial institutions*"; • "~~*an institution*~~" in clause 3(2)(a) should read "*a person*"; • in clause 68(1)(d) "*to such institution, category of institutions*" should read "*to such financial institution, category of financial institutions*"; • in clause 101, in paragraph (b)(i) of the definition of "**market conduct regulation**" and in paragraph (b) of the definition of "**prudential regulation**" - "*financial*" should be inserted before "*institutions*"; • in Part 1 of Schedule 2 in the introduction by the deletion of "~~*institutions or*~~" and in Part 2 of Schedule 2 by the deletion of "~~*institutions or*~~". • In addition, the defined terms of "*mono-regulated activity*" and "*dual-regulated activity*" should be used in the definition. It is recommended that the definition of "**financial institution**" should read – ***"financial institution"*** *means a ~~an institution or~~ person carrying out a mono-~~ or dual~~ regulated activity or a dual-regulated activity*;"	
Promontory	**"financial institution"**	"**financial institution**" *means an entity authorised under this Act to conduct a business providing financial services~~institution~~ or products~~person carrying out a mono- or dual regulated activity~~*;"	***Terminology and usage of the word financial institutions has been revised to encompass institutions beyond financial product providers and financial service providers. Please see revised definition***
ASISA	**"financial organ of state"**	In our view the concept is misleading and the definition is too wide as it appears to encompass the entire government, e.g. SAP, Dept of Waterworks, or any other state department. If the intent is to limit the definition to the financial sector, the definition as it stands does not achieve that. We submit that the concept should be reconsidered and the definition re-drafted. **"financial organ of state"** *means—* *(a) an organ of state responsible for the supervision or enforcement of financial legislation /regulatory laws;* *(b) a body similar to an organ of state referred to in paragraph (a), designated in the laws of a country other than the Republic to supervise or enforce financial legislation /regulatory laws of that country;* *(c) a market infrastructure that is responsible for the supervision of persons authorised by such infrastructure under the Financial Markets Act, 2012 (Act No. 19 of 2012); or* *(d) an Ombud established under a regulatory law or a recognised Scheme under the Financial Services Ombud Schemes Act, 2004 (Act No. 37 of 2004);*	***This definition has been removed from the revised FSR Bill. We have proposed the definition of "designated authority" for the purposes of Part 1 of Chapter 17***
BASA	**"financial**	By virtue of the definition of "**organ of state**" with reference to section 239 of the	

	organ of state"	Constitution and especially paragraph (a) of the definition of "*organ of state*", every department of state or administration in the national, provincial or local sphere of government is captured by this definition and is a financial organ of state. This then has importance when it is coupled with the definition of "**other financial regulator**". This latter definition provides that any such department is only an "*other financial regulator*" if such department "*has powers or duties relating to, or materially affecting, a financial institution or a financial service*". It becomes difficult in every instance to delineate which fall within and which fall without. For certainty and clarity in understanding, it is recommended that the legislation, in the definition of "**other financial regulator**" should spell out who these regulators are in a schedule, giving the Minister the power to add to and remove from the list in the schedule much as he or she has the power to do with regard to Schedule 2. It is recommended that – "**other financial regulator**" be defined as all regulatory bodies or offices set out in an appropriate schedule to the Bill, which may be updated by the Minister from time to time as provided for in an expansion of clause 99 or the insertion of another, similar clause.	
JSE	**"financial organ of state"**	The FSRB has introduced a new concept in its definition of a "**financial organ of state**". It would seem that this term is an expansion of the term "**organ of state**" that is defined in section 239 of the Constitution of South Africa (1996). Section 239 of the Constitution defines an organ of state as " *(a) any department of state or administration in the national, provincial or local sphere of government; or* *(b) any other functionary or institution –* *(i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or* *(ii) exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer;*" The question of whether a financial market infrastructure that exercises certain public duties and functions in terms of an empowering statute is (or should be) an "**organ of state**" was discussed and debated in great detail during the various meetings and consultations during the drafting of the FMA. Pursuant to these discussions, it was accepted that FMIs are not organs of state although they are regulated and licensed entities and that certain actions and decisions of FMIs may be the subject of judicial review.	***We disagree with this interpretation. It is our view that Financial market infrastructure that are fulfilling the role of SROs in terms of the Financial Markets Act are in fact exercising public duties and functions and are indeed captured in the definition in section 239 of the Constitution which provides as follows:*** *"**organ of state**" means—* *(a) any department of state or administration in the national, provincial or local sphere of government; or* *(b) any other functionary or institution—* *(i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or* *(ii) exercising a public power or performing a public function in terms of any legislation,* *but does not include a court or a judicial officer;"* ***In any event, this definition is no longer necessary as the***

		It may be helpful to pause and reflect on the meaning of an "**organ of state**" as defined in section 239 of the Constitution. The JSE (and any other FMI) is not part of the legislative or executive authorities of South Africa nor is it part of any governmental organisation or structure. In addition hereto, it does not exercise powers or perform functions as a result of powers accorded to it by virtue of the provisions of the Constitution (or a provincial constitution). It therefore has to be considered whether FMIs exercise a public power or perform a public function in terms of legislation in terms of section 239 (b)(ii) of the Constitution. If an FMI is indeed an organ of state as stated in section 239 of the Constitution, it has to meet both these requirements i.e. the FMI must act in terms of legislation and it must exercise a public power or perform a public function. (*See, in general, Constitutional Law, 2009, I M Rautenbach and EFJ Malherbe, pp 76 – 77.*) It is a well-established principle in South African law that the FMA and its predecessors fall squarely within the ambit of licensing legislation. An applicant for an exchange licence is only licensed if it is in the public interest and the rules and listings requirements are required to safeguard and further the public interest. The JSE therefore has to act in accordance with the provisions of legislation but it does not act in terms of legislation. An organ of state exercises a public duty or function in respect of the functional areas allocated to the state in terms of the Constitution and acts in terms of empowering legislation. The JSE is a public, listed company with shareholders and does not fall under the control of the State. The JSE (and other FMIs) has a public duty to enforce its rules and listings requirements in accordance with the provisions of the FMA but it does not exercise any power or perform any function which has been allocated to the State in terms of the Constitution. Clause 1 of the FSRB has introduced a new and unfamiliar concept to South African law by classifying certain financial entities and FMIs to be "**financial organ(s) of state**". A financial organ of state is defined as "*(a) an organ of state responsible for the supervision or enforcement of legislation;* *(b) a body similar to an organ of state referred to in paragraph (a), designated in the laws of a country other than the Republic to supervise or enforce legislation of that country;* *(c) a market infrastructure that is responsible for the supervision of persons authorised by such infrastructure under the Financial Markets Act, 2012 (Act No. 19 of 2012); or* *(d) an Ombud established under a regulatory law or a recognised Scheme under the*	***term is not applied in the revised FSR Bill***

		Financial Services Ombud Schemes Act, 2004 (Act No. 37 of 2004);" It would seem that the underlying rationale for the introduction of the category of "**financial organ of state**" was to differentiate between an "**organ of state**" and a "**financial organ of state**". The definition contained in sub-paragraph (a) refers to an organ of state as defined in section 239 of the Constitution and the categories referred to in sub-paragraphs (b), (c) and (d) are entities that are defined as "**financial organs of state**". We are of the view that the expansion of the definition of an "**organ of state**" by defining entities that are "**financial organs of state**" is unnecessary and unhelpful. The only references in the FSRB to a financial organ of state are found in sections 35(e) and 95. Section 35 (e) deals with the disqualification of personnel from certain positions with the Market Conduct Authority and the Prudential Authority and disqualifies a person if that person "…*has at any time been sanctioned by a financial organ of state for contravening a law relating to the regulation or supervision of financial institutions or the rendering of financial services*." FMIs such is the JSE are not empowered to enforce statutes and are only able, and indeed obliged to supervise compliance of such laws and to report any transgressions to the organ of state or regulatory authority that is responsible for the enforcement of the statute in question. For example, the JSE reports transgressions of the FMA to the Registrar of Financial Markets but it is not (nor should it be) accorded with the authority to enforce these statutory provisions as this is within the remit of the regulatory powers of the Registrar of Financial Markets, the Regulatory Authority established by virtue of the provisions of the FMA. The provisions of section 1 and section 35 (e) are in conflict as the definition of a "**financial organ of state**" and refers to the responsibility of a market infrastructure to supervise persons authorised by it in terms of the provisions of the FMA. This may include an FMI's responsibility to supervise compliance by authorised users with its rules and its responsibility to supervise compliance with the provisions of the FMA but it does not state that an FMI has the authority or responsibility to enforce, prosecute and sanction any contravention of the provisions of the FMA. Section 35 (e) of the FSRB refers to a sanction imposed by a financial organ of state such as an FMI as a result of a contravention of a statutory provision. The JSE (and any other entity licensed in terms of the FMA) does not have the power to enforce statutory	

		provisions nor does it have the authority to impose any sanction as a result of any breaches of such provisions. In any event, it would be unconstitutional to accord a private body such as the JSE with the authority to enforce provisions of a statute and/or prosecute and sanction persons that have acted contrary to such provisions. Section 95 of the FSRB deals with the disclosure of information by, *inter alia*, financial organs of state. The use of the term "**financial organ of state**" for the purposes of this section does not take the matter any further and it would make no difference if this term is substituted in this section with, for example "*financial market infrastructure, organ of state, financial institution or any other person that has obtained information in the performance of any power or function under this Act*". We are therefore of the view that the definition and use of the term "~~**financial organ of state**~~" should be deleted and removed from the FSRB.	
Strate	**"financial organ of state"**	The Bill contains a definition of a "**financial organ of state**", (which is defined in relation to an "**organ of state**" as defined in the Constitution) which includes market infrastructures as defined in the FMA. This definition is likely to result in unintended consequences for the market infrastructures and foreign regulatory bodies, including regulatory and administrative burdens. The market infrastructures perform "public functions" in terms of the FMA when they exercise the regulatory and supervisory functions, but do not fall and/or meet the criteria of an "**organ of state**". In order to address any possible uncertainty, it is our submission that the term "**financial organ of state**" should be replaced with terms such as "**financial sector body**" or "**financial sector regulatory body**" or "**designated financial sector regulatory body**". Further, the definition should be amended as follows: "*designated financial sector regulatory body~~organ of state~~" means—* *(a) a financial sector regulatory body~~an organ of state~~ responsible for the supervision or enforcement of any of the* legislation *listed in Schedule 1;* *(b) a body similar to a financial sector regulatory body~~an organ of state~~ referred to in paragraph (a), designated in the laws of a country other than the Republic to supervise or enforce legislation of that country;* *(c) a market infrastructure that is responsible for the supervision of persons authorised by such infrastructure under the Financial Markets Act, 2012 (Act No. 19 of 2012); or* *(d) an Ombud established under a regulatory law or a recognised Scheme under the Financial Services Ombud Schemes Act, 2004 (Act No. 37 of 2004);*"	***This definition no longer applied in revised FSR Bill.***

ASISA	**"financial service"**	This definition is unnecessarily cumbersome. ASISA suggests the definition be amended to read: **"financial service"** *means any service or product provided in terms of financial sector law. ~~by a financial institution in performing a regulated activity, and includes any service or product corresponding to a service or product normally provided by a financial institution;~~* Clarity is requested on what the legislature contemplates as falling within the phrase "*…and includes any service or product corresponding to a service or product normally provided by a financial institution*". This phrase could be interpreted very widely and lead to uncertainty: for example, would this extend the definition of financial products referred to in section 1 of FAIS?	***The definition was reconsidered and suggestions were incorporated where appropriate. The revised FSR Bill also proposes an expanded definition of "financial service" (cl. 3) and "financial product" (cl.2). This definition of financial service, which includes a list of financial services that will be supervised and regulated from a conduct perspective, is intended to provide a clearer role for the FSCA in regulating financial institutions. Any additions to the list of financial products overseen by the PA can easily be incorporated into the scope of regulation of the FSCA as it supervises services related to those products. Please refer to the accompanying Policy document for further explanation***
BASA	**"financial service"**	The inclusion of the words "*includes any service or product corresponding to a service or product normally provided by a financial institution*" in the definition is confusing and superfluous. It is recommended that the definition is amended by the deletion of the words: **"financial service"** *means any service or product provided by a financial institution in performing a regulated activity.~~, and includes any service or product corresponding to a service or product normally provided by a financial institution;~~*"	
Promontory	**"financial service"**	This definition is a bit circular and we wonder where it is intended to lead. In particular, it is unclear what a "*regulated activity is*". It is defined below as "any *mono- or dual-regulated activity*". But there are no such "*activities*" defined anywhere. Schedule 2 refers to "*activities*" in its title, but then lists entities – NOT activities. For example, Part 2 (a) of the Schedule refers to "*banks*". What is the "*activity*" that defines a bank? Is it deposit taking, credit extension, investments, trading, making markets, securitizing assets, or any one of a long list of possibilities? In the event that you want to move to the single licensed entity model for conduct (as in Australia) [Treasury] will need to reserve the concept of services to a list of activities suitable to conduct regulation. The current definition almost precludes that model. At this stage, the best compromise might be to reword to something along the following lines: **"financial service**" *means any financial service or product delivered ~~provided by a financial institution~~ in South Africa that is covered ~~performing a regulated activity, and~~*	

		~~*includes any service or product corresponding to a service or product normally provided*~~ *by a financial regulatory law* ~~*institution*~~;" (note: see comment below on definition of "**regulatory law**"); This would leave more flexibility for when the eventual full overhaul of the legal framework takes place.	
SAIA	**"financial service"**	The Financial Advisory and Intermediary Services (FAIS) Act, 2002 contains an existing definition of "**financial services**". There is a need for alignment and consistency between definitions from existing legislation to create legal certainty, and it is suggested that the existing definition of "**financial services**" should be considered in order to align the definition in the Bill with the existing definitions;	***Noted and agree with the need for alignment between definitions in existing law and definitions in revised FSR Bill. To the extent practicable for the purposes of the FSR Bill, the FAIS definition was incorporated for consistency and clarity***
SAICA	**"financial service"**	The definition of "**financial service**" includes any service or product corresponding to a service or product *normally* provided by a financial institution. The reference to "*normally*" is too broad. Note: We propose enhancing the definition by referencing to specific activities. We believe this will clarify the context in which financial service is used in relation to this Act as well as in so far as it relates to the definition in other pieces of legislation, such as the Financial Advisory and Intermediary Services Act, 2002 (Act No. 37 of 2002).	***Comment toted. See expanded definition of financial service in the revised FSR Bill.***
ASISA	**"financial stability"**	It is unclear what is meant by a "*key financial institution*" and "*respective roles in the economy*".	***Please see proposed definition in cl. 4 of the revised FSR Bill***
BASA	**"financial stability"**	The definition of "**financial stability**" refers to "*key financial institutions*". Given that problems in any financial institution can potentially have contagion effects throughout the financial system and thereby present a risk to financial stability, it is recommended that the word "~~*key*~~" is deleted from this definition.	
Melbourne	**"financial stability"**	Definition of "**financial stability**": we query whether the word "*key*" before "*financial institutions*" is necessary as the concept of a "*key financial institution*" is not defined in the Bill (we note that the term "**systematically important financial institution**" is defined) and this might introduce an element of uncertainty into the definition. Perhaps the intention is that the reference should be to "*financial institutions as a whole*" or that "*key*" should be replaced with "*systematically important*"? In addition, we suggest amending the last line to read "*shocks in the economy, both endogenous and exogenous*". This will enable the regulatory authority to extend its	

		authority over financial institutions in respect of issues external to the Republic and in the process better avert crises and manage contagion	
Resolution WG	**"financial stability"**	Financial stability refers only to financial institutions and financial markets. It makes no mention of financial systems – e.g. payments and settlement systems. I suggest that the definition be amended to include reference to payment and settlement systems, given that these are key elements of the financial sector and are essential aspects of financial stability	***Agreed. Please see proposed definition in cl. 4 of the revised FSR Bill***
SAIA	**"financial stability"**	The definition of "**financial stability**" refers to "*key financial institutions*". The concept of a "*key financial institution*" is not defined in the Bill and it is not clear whether such an institution would have the same meaning as a systemically-important financial institution. It is suggested that "*key financial institution*" needs to be defined and clear criteria must be set in order to identify "*key financial institutions*". The definition also refers to "*disruptive occurrences*" and "*shocks*" which are also not defined. Confidence in the ability to absorb shocks should be understood in the context of normal business conditions and related risks.	
SAICA	**"financial stability"**	The definition of "**financial stability**" refers to the effectiveness of key financial institutions and markets. We propose further enhancements to the definition by making specific references to the financial stability definition/ objectives as stipulated on the SARB's website: http://www.resbank.co.za/Financial%20Stability/Pages/FinancialStability-Home.aspx	
Promontory	**"joint rule"**	See comments below – need a definition of "**lead regulator**" or "**co-regulator**".	***The Bill rather makes reference to a financial sector regulator that is designated in Schedule 2 as the licensing authority for a financial sector law. That regulator is responsible for granting, issuing, imposing conditions on, varying, suspending or cancelling a licence in terms of the relevant financial sector law. It is therefore not necessary to define the concept of a "lead regulator" or "co-regulator" in the Bill. Joint rules have also been replaced by joint standards. Please see explanation in Policy document***
SAICA	**"Minister" and "Governor"**	The definitions of "**Minister**" and "**Governor**" reference to the Minister of Finance and Governor of the Reserve Bank. We propose enhancing the definitions by referencing them to the specific legislations under which they are established.	***Agreed. "Governor" can be defined in terms of the Reserve Act.*** ***We do however disagree on the proposal for the definition***

			of "Minister" given that it is not common practice to define "Minister" in such a way, as a Minister is not established in terms an Act.
ASISA	**"mono-regulated activity"**	**"mono-regulated activity"** *means any activity regulated in terms of a financial sector law recorded ~~business of the nature contemplated~~ in Part 1 of Schedule 2;*	***Given the limitations of this approach, the concept of "mono-regulated activity" and "dual-regulated activity" no longer applies in revised FSR Bill. All financial institutions will be subject to dual regulation. Please see Policy document for full explanation.***
FIA	**"mono-regulated activity"**	**FIA's interpretation of mono-regulated activities** According to the draft document mono-regulated activities such as advisory and intermediary services will fall under a stand-alone Market Conduct Authority. As such the financial intermediaries who have been regulated by the Financial Advisory and Intermediary Services (FAIS) Act of 2002 will be impacted to a lesser extent than those institutions that fall under the oversight of both the Prudential and Market Conduct Regulator.	
Promontory	**"mono-regulated activity"**	In line with my theme on entities and activities, [we suggest] reword[ing] this as: "**mono-regulated entity~~activity~~**" *means any entity~~business~~ of the nature contemplated in Part 1 of Schedule 2*"	
SAICA	**"National Treasury"**	The definition of "**National Treasury**" means the National Treasury established in terms of the Public Finance Management Act. We recommend specific reference be made to the Act, (No.1 of 1999 as amended by Act 29 of 1999).	***This is not necessary as the Public Finance Management Act is defined in the FSR Bill***
Strate	**"organ of state"**	In light of our paragraph 7.3 [comment on definition of "**financial organ of state**"] above, we submit that the definition of an "*~~organ of state~~*" be deleted. Further, all references to "*~~organ of state~~*" in the Bill should be deleted.	***Given the confusion/uncertainty expressed by commenters on the extent of the application of who is intended to be captured by the "financial organ of state" definition, this issue has been addressed by removing that definition from the Bill. It is therefore not necessary to remove this definition of "organ of state".***
ASISA	**"other financial regulator"**	It is not clear who would be an "**other financial regulator**". We suggest the reference to "*~~financial~~*" should be removed, and that reference is simply made to "*other regulator*".	***Agreed that this was not a clear definition. The definition has been deleted, and the revised FSR Bill refers instead to specific regulators in the context.***
BASA	**"other financial**	It is suggested that the term "*materially affecting a financial institution or a financial service*" is clarified.	

	regulator”		
Competition Commission	**“other financial regulator”**	**Ambiguity in the definition of “other financial regulator”** The phrase “**other financial regulator**” provides a certain level of definition ambiguity which has a material impact on how the Bill may influence the work of other regulators including the Commission. The Bill defines “**other financial regulator**” as: **“ other financial regulator”** *means an organ of state referred to in paragraph (a) of the definition of “financial organ of state”, other than a regulatory authority as defined in terms of this Act, which has powers or duties relating to, or materially affecting, a financial institution or a financial service*” Now paragraph (a) in the definition of “**financial organ of state**” is said to mean “*an organ of state responsible for the supervision or enforcement of legislation*” From the above definitions, one could easily assume that the Commission (among other regulators) would be included as one of these “**financial organs of state**” or “**other financial regulator**” as the Commission has powers and duties relating to financial institutions and is responsible for the enforcement of legislation that materially affects a financial institution. This interpretation would suggest a broad definition with potentially any government institution with a legislated mandate falling into such categories. While the Commission is an economy wide regulatory authority, reference to “**other financial regulator**” and “**financial organ of state**” in this Bill has potential to disqualify regulators that are not solely responsible for the financial services sector but whose actions may have an effect on financial stability. **Proposed Amendment** The Commission suggest that it might be prudent to replace “~~**financial organ of state**~~” and “~~**other financial regulators**~~” with “**regulatory authority**”. The definition of “**regulatory authority**” will be defined as “*an entity established in terms of national or provincial legislation responsible for regulating an industry, or sector of an industry*”[1]. This definition will encompass all regulators including those that might materially affect the financial services sector. The existing definition of regulatory authority in the Bill will become “financial	***The definition in the revised FSR Bill of “financial sector regulator” is specific to the Prudential Authority, FSCA and the NCR in the context. The definition of “organ of state” which is the same as the definition in the Constitution captures other regulators appropriately. Additionally, we have proposed to add the definition of “designated authority” to capture other regulators of financial institutions for the purposes of Part 1 of Chapter 17 on information sharing, complaints and reporting.***

[1] Definition of regulatory authority in the Competition Act

		regulator" and only refer to the MCA and the Prudential Authority ("PA")	
SAIA	**"other financial regulator"**	It is suggested that the term "*materially affecting a financial institution or a financial service*" is clarified.	***Definition and term removed from revised FSR Bill***
Standard Bank	**"other financial regulator"**	It is proposed that a list of other financial regulators is included in the Bill to provide more certainty regarding the application of the Bill. It is not clear from the definition who would determine whether or not an organ of state has powers and duties relating to, or materially affecting, a financial institution or a financial service. For example, the POPI Act establishes a new Information Regulator which has powers that may materially affect a financial institution or a financial service: would the Information Regulator be considered as a financial regulator under this Bill? Other examples could potentially include the Office of Disclosure in the Department of Human Settlements established by the Home Loans and Mortgage Disclosure Act. The need for certainty is important to be able to better understand the application of Section 55 which requires other financial regulators to consult with the Prudential Authority or Market Conduct Authority before taking any action affecting the interests of any specific financial institution. In the event of a disagreement as to whether or not a particular regulator's powers and duties materially affect the interests of a financial institution or financial service it is not clear who makes the determination or the process to be followed in this regard. Without this clarity, there will be a risk that actions by other financial regulators are not subject to ex-ante consultation with the Twin Peaks regulatory authorities, which would undermine the goals of cooperation and coordination to reduce fragmentation.	***We agree that clarity is needed. The definition of "other financial regulator" has been removed from revised FSR Bill.*** ***We proposed to include the definition of "designated authority" for the purposes of Part 1 of Chapter 17 on information sharing, complaints and reporting. We are also proposing that specific regulators are mentioned by name where reference applies to them specifically, such as the Council for Medical Schemes. Consultation and co-operation processes between the financial sector regulators in terms of the FSR bill and other regulators have also been clarified.***
ASISA	**"regulated activity"**	ASISA suggest this definition be amended to read: **"regulated activity"** *means* ~~*any mono- or dual-regulated activity*~~ *any activity regulated by a financial sector law.*"	***Agreed. Please see proposed definition***
Promontory	**"regulated activity"**	This may be pedantic but there are many regulated activities that lie outside this law. For accuracy [Treasury] may want to use the term "**regulated financial activity**" to distinguish it from the vast array of regulated non-financial activities. More importantly, in line with the argument above about activities and entities, the definition would be more accurate if it were worded: "**regulated activity**" *means any financial service offered by a mono- or dual-regulated*	***Please see proposed definition***

		entity ~~*activity*~~;”	
BASA	**“regulation”**	It is recommended that the definition is changed to read “**regulations**” and that consequential amendments are made changing “~~*regulation*~~” to “*regulations*” in clauses 51(1), 68(1)(b) and 61(2) and 104(3). The definition will then read – “**regulations**~~**regulation**~~” *means regulations* ~~*a regulation*~~ *made by the Minister in terms of section 92;*” The term “*regulation*” is used in different contexts within the text of the Bill, such as “*prudential regulation*” and “*regulation and supervision*”. By amending the definition as recommended this should obviate any potential for confusion.	***Please see proposed definition of “legislative instrument”***
BASA/ SAIA	**“regulatory authority”**	The Bill defines a “**regulatory authority**” as either the Market Conduct Authority or the Prudential Authority. There are many regulatory authorities within South Africa, and there is a potential for confusion by limiting the definition of “**regulatory authority**” in this Bill to the new Twin Peaks authorities. There is existing legislation that defines “**regulatory authority**” in more generic terms: the Competition Act and the Companies Act both define regulatory authorities as “*an entity established in terms of national or provincial legislation responsible for regulating an industry, or sector of an industry*”. We recommend that this definition is revised to provide for the Market Conduct Authority and the Prudential Authority to be defined as ~~***“regulatory authority”***~~ “**financial sector regulatory authorities**”, as this would be more meaningful and appropriate. It is noted that the concept of “**lead authority**” is referred to in the Bill but is not defined. It is proposed that “**lead authority**” be defined in the Bill as follows: “*The Prudential Regulator is the lead authority of dual-regulated activities; it must consult the Market Conduct Regulator when regulating these activities. The Market Conduct Authority is the lead authority for mono-regulated activities.*”	***Agreed that clarity is needed. Please see proposed definition of “financial sector regulator” in revised FSR Bill*** ***The revised FSR Bill no longer makes reference to the concept of “lead authority”. An authority designated in terms of Schedule 2 as the licensing authority for a financial sector law is responsible for granting, issuing, imposing conditions on, varying, suspending or cancelling a licence in terms of the financial sector law.***
ASISA	**“regulatory law”**	The Acts listed in Schedule 1 are not regulatory laws, but financial sector laws. We therefore suggest that the term “~~**regulatory law**~~” be substituted with “**financial sector law**”.	***Agreed. Please see proposed definition of “financial sector law” in revised FSR Bill***
BASA/ SAIA	**“regulatory law”**	We recommend that this definition is replaced with a more descriptive term such as “**financial sector regulatory law**”.	***See definition of “financial sector law” in revised FSR Bill***

Promontory	**“regulatory law”**	The definition [needs to be tightened] to explicitly limit this to finance by using the definition: “**financial** **regulatory law**” *means a law listed in Schedule 1;*”	***See definition of “financial sector law” in revised FSR Bill***
ASISA	**“regulatory strategy”**	This definition is unnecessary and suggests that it be deleted.	***Agreed, definition deleted***
BASA /SAIA	**“resolution authority**	It is noted that this is not defined in the Bill and suggest that a definition is included, and that the SARB is specified as the resolution authority.	***Noted – the Resolution Authority be referred to in the new Bill, however we have catered for the role of the reserve Bank in the resolution of systemically important financial institutions – see chapter 5***
ASISA	**“resolution power”**	The term “**resolution power**” is in our opinion not descriptive of what is being defined, being any power provided for in a law to wind up a financial institution. If the intent is to limit the definition to only pertain to the winding up or business rescue application following on a resolution adopted by a financial institution (as appears to be the case in view of the provisions of section 66), then the definition should be amended to say so.	***Definition and term no longer used in revised FSR Bill***
BASA	**“respondent”**	“**respondent**” seems to have been included in clause 1 with Part 3 of Chapter 6 in mind. However, its use in the body of the Bill seems to be limited to clause 70, with the context of the term in clause 70 being that it refers to a “*financial institution*” which has found itself to be the subject of an administrative penalty imposed. Clause 70(2) deals with factors which a regulatory authority must take into account in setting the penalty. In consequence, it seems to us that the definition of the term in Clause 1 is wholly inappropriate and this should be removed.	***Definition deleted***
ASISA	**“rule”**	This definition does not tie in with section 104(3). Please also refer to our general comments on section 104(3). The definition of rules should not include regulations issued by a Minister and we suggest the definition be amended to read: **“rule”** *means ~~—~~* *~~(a)~~ any directive, ~~subordinate legislative instrument, such as a~~ notice, board notice or rule issued~~made~~ by a regulatory authority in terms of a power granted in a financial sector~~regulatory~~ law; ~~or~~* *~~(b) a rule made by a regulatory authority in terms of section 104;~~”*	***The principle is agreed with. The term “rules” is no longer used. In the revised FSR Bill financial sector authorities may issue standards. See chapter 7 part 2 of revised FSR Bill Financial sector regulators may issue these independently of the Minister***
ASISA	**“submit”**	Why require transmission by secure electronic means? Most emails are not necessarily encrypted.	***Definition and specific use of the term has been removed from the revised FSR Bill***

		Please note: Typographical error – ~~(d)~~ should in fact be (c): **"submit"**, *in relation to proceedings of the Financial Services Tribunal, means—* *(a) deliver by hand;* *(b) send by registered post; or* *~~(d)~~(c) transmit by secure electronic means;*"	
BASA	**"submit"**	"**submit**" is a term which is used continuously throughout the Bill, whilst the context in which it appears in clause 1 only relates to its use in Part 3 of Chapter 6. Consequently, it is our view that it should be contained in this part only. Additionally, "**submit**" contains a reference to "*secure electronic means*". This concept is not envisaged anywhere in law. The Electronic Communications and Transactions Act, 2002 envisages use of "*advanced electronic signatures*" but does not define what is envisaged by "*secure electronic means*". In our view, if the intention is to use some form of encryption or other security mechanism, "*means*" should be dealt with in regulations. It is recommended that this paragraph be amended.	***Definition and specific use of the term as initially proposed has been removed from the revised FSR Bill***
SAIA	**"submit"**	The definition of "**submit**" includes "*transmit by secure electronic means*." It is recommended that reference is made to the provisions of the Electronic Communications and Transactions Act 25 of 2002, particularly those provisions which make reference to the factors to be considered when determining the admissibility and evidential weight of data messages.	***Definition and specific use of the term as initially proposed has been removed in the revised FSR Bill***
ASISA	**"systemic"**	On the face of it, the terms "… *tainted or dubious financial instruments*" and "*excessive speculation*" are open to wide and extensive interpretation and as such, this could not only lead to uncertainty, but also impact prejudicially on the operations and business of financial institutions. We propose that regulations be made to provide guidance and clarity in respect of these matters. We further propose that the word "*materially*" be inserted where indicated. "**systemic**", *in relation to a risk, weakness or disruption in the financial system, means a situation where the risk, weakness or disruption materially affects the financial system, either as a whole or in part, as opposed to a situation where the effects of the risk, weakness or disruption are confined to either a single financial institution or a small group of institutions without threatening to spread more widely, and includes a situation where the risk, weakness or disruption arises from the—* **…** *(d) marketing by financial institutions of tainted or dubious financial instruments; and*	***Noted. To provide clarity, the revised FSR Bill proposes definitions of "systemic event" and "systemic risk". The definition of "systemic" has been removed***

		(e) excessive speculation on financial or other markets;”	
Melbourne	**“systemic”**	Definition of “**systemic**”, paragraphs (d) and (e): in light of the experience gained from the Global Financial Crisis, we are of the view that these are highly pertinent and their inclusion is a sensible step on the part of the South African authorities	***Noted. See definitions of “systemic event” and “systemic risk” in revised FSR Bill***
SAIA	**“systemic”**	The definition of “**systemic**” is broad. It is proposed that this concept should rather be “**systemic risk**”. There is an inconsistency in terms of how contagion is dealt with in the definition of “**systemic**.” The definition notes that “…..*systemic risk in relation to a risk, weakness or disruption in the financial system, means a situation where the risk, weakness or disruption affects the financial system, either as a whole or in part, as opposed to a situation where the effects of the risk, weakness or disruption are confined to either a single financial institution or a small group of institutions without threatening to spread more widely …*” However (b) notes that: “*and includes a situation where the risk, weakness or disruption arises from … financial difficulties in a financial institution, including the inability of a financial institution to meet its obligations, spreading to other institutions in the financial system.*” Further to this point, “**systemic**,” makes reference to the “*financial system*” which is not defined and there is no clarity if this references the financial system within South Africa or the financial system generally. It is recommended that this section is reworded to address this inconsistency. The following concepts are used in the definition of “**systemic**”, and should also be reworded so as to prevent confusion: • “*marketing by financial institutions of tainted or dubious financial instruments*”; • The terms, “*weakness and disruption*”; and • “*excessive speculation on financial or other markets*.” It may be useful to refer to UK’s Twin Peaks for guidance on how to define some of these concepts. The Financial Services Act 2013 defines systemic risk as: *“Those systemic risks include, in particular—* *(a) systemic risks attributable to structural features of financial markets, such as connections between financial institutions,* *(b) systemic risks attributable to the distribution of risk within the financial sector, and*	***See definitions of “systemic event” and “systemic risk” in revised FSR Bill***

		(c) unsustainable levels of leverage, debt or credit growth. *In this Part "systemic risk" means a risk to the stability of the UK financial system as a whole or of a significant part of that system.* • *It is immaterial whether the risk arises in the United Kingdom or elsewhere.* • *"credit growth" means the growth in lending by the financial sector to individuals in the United Kingdom and businesses carried on in the United Kingdom;* • *"debt" means debt owed to the financial sector by individuals in the United Kingdom and businesses carried on in the United Kingdom;* • *"leverage" means the leverage of the financial sector in the United Kingdom"* In addition systemic risk is already defined in the National Payment System Act 1998 as follows: "*the risk that failure of one or more settlement system participants, for whatever reason, to meet their payment obligations, including the payment obligations of clearing system participants, or their settlement system participants being unable to meet their respective payment or settlement obligations*". There needs to be consistent approach across the Financial Sector Regulation Bill and the National Payments System Act.	
Strate	**new definition – "systemic risk"**	New definition of "**systemic risk**" "**Systemic risk**" is a key concept of this Bill and a mere definition may be inadequate. It is submitted that the concept be defined and described in a separate clause in the Bill in relation to the objectives of the Bill.	***Agreed. Please see definitions of "systemic event" and "systemic risk" in revised FSR Bill***
SAIA	**"systemically important financial institution"**	A concern was raised that the provisions in the Bill do not provide the qualification criteria for a local "SIFI" and that the current definition only focuses on certain aspects, not capturing the purpose of this designation. In addition, the question is raised that if once a financial institution has been declared a SIFI how long such a designation will last, and whether it will remain in place indefinitely. In addition clarity is sought on what the implications will be if a financial institution is declared a SIFI. More work is required on the definition and criteria;	***Noted. See in revised FSR Bill for further clarity on the designation of systemically important financial institutions***
SAICA	**"systemically important financial institution"**	The link between a "**systemically important financial institution**" (SIFI) in this Act and the Banks Act, 1990 (Act No. 94 of 1990) need to be strengthened. We propose aligning the Banks Act definition of a SIFI. We request further guidance and consideration from the Prudential Authority on the basis that once an institution has been identified as a SIFI, the Banks Act requires a possible additional capital ratio add-on.	***See in revised FSR Bill for further clarity on the designation of systemically important financial institutions***
FIC	**"this Act"**	The definition of "**this Act**" includes a provision that in the event of an inconsistency	***Noted, this will be carefully examined in light of the***

		between a provision of this Act and a provision of a regulatory law, the provision of this Act prevails. A provision of this nature creates a legal uncertainty as to the interpretation of existing provisions in other pieces of legislation. In particular, it raises questions regarding the supervisory functions provided for in the FIC Act which will have to be read together with the FSR Bill and the resultant conflicts that may arise. The consequence of such a provision will impact on the ability of supervisory bodies to perform their functions in relation to compliance with the FIC Act, the sharing of information with the Centre and with each other, and other specific provisions in the FIC Act that may be considered to be inconsistent with the FSR Bill. This provision also appears to be in conflict with the purpose of the FSR Bill (clause 3) which is to provide a supervisory and regulatory framework in conjunction with the regulatory laws. It is not clear what is envisaged, for the practical application of clause 31, which provides for the developing of a decision making policy on the FSR Bill as well as the regulatory laws. There appears to be no clear indication for the matters that will fall within the scope of the decision making policy nor is there provision for any consultation with other financial regulators on the decision making policy in so far as it may impact the implementation of regulatory laws.	***implication with the FIC Act.***
SAIA	**"this Act"**	The definition makes reference to a subsection (1) which is not found in the definition. This may have been an error and needs to either be removed or the missing subsection (1) inserted as it potentially impacts the interpretation of the Bill.	***Disagree, there is subsection 1***
SAICA	**"this Act"**	Reference to "**this Act**" is at the end of the definition list. The first definition reference to "**this Act**". We believe referencing to "**this Act**" fits better in the beginning of Section 1. The definition may also be enhanced by making specific reference to for example "*the Financial Sector Bill relating to the Republic of South Africa as approved on xx date*."	***Disagree***
ASISA	**1(3)**	Please refer our general comment regarding the purpose of the FSRB, which is to create the Market Conduct Authority (MCA) and Prudential Authority (PA). The FSRB should not be used to create additional powers for the Regulators. In terms of the FSRB the Regulators can issue regulations and rules. The effect of this section is that the MCA or PA can, by issuing a regulation or a rule, override any financial sector law, which will result in the unacceptable situation where a regulation trumps an Act of Parliament.	***It would be unconstitutional for subordinate legislation to trump/override primary law. However under the Twin Peaks framework, additional powers are intended to complement existing powers under financial sector law as defined.***

Standard Bank	**Application to cross-border activities**	It is assumed that the Bill does not have extra-territorial application. An area on which we would appreciate further discussion in the subsequent phases of implementing Twin Peaks is the implications of consolidated conglomerate supervision for cross-border activities.	***The Bill might have cross-border impact depending on the group structure. Please see Policy document for full explanation on the proposed Group supervision.***

2. Administration of Act			
3. Purpose of Act			
ASISA	**3(1)**	Provision should be made to balance the interests of financial customers against those of financial institutions. Although the reference to "*support(ing) balanced and sustainable economic growth in the Republic*" could be said to imply that the interests of financial institutions will be taken into account, we believe this should be explicit given the broad range of powers afforded to these regulatory authorities. Please note the suggested changes to the definition. Subpar (b) should be amended to limit the safety and soundness to "*financial*" safety and soundness. An alternative suggested amendment to section 3(1) is: " *The purpose of this Act is to promote a financial system that ~~works in the interests of financial customers, and~~ supports balance~~balanced~~ and sustainable economic growth and is in the interests of customers~~Republic~~, by establishing~~, in conjunction with the regulatory laws,~~ a supervisory and regulatory framework that promotes—* *(a) financial stability;* *(b) the financial safety and soundness of financial institutions;* *(c) the fair treatment and protection of financial customers;* *(d) confidence in the financial system;* *(e) financial inclusion; and* *(f) the integrity of the financial system and the prevention of financial crime.*"	***Comments noted, however we disagree with this sentiment, as cl. 6 of the revised FSR Bill captures accurately the proposed objects of the Act.***
Resolution WG	**3(1)**	It may be desirable to include reference to the promotion of the *efficiency* of the financial system in section 3(1) of the draft Bill. This is an important element in the objectives of financial sector regulation and supervision. Efficiency (including allocative efficiency, dynamic efficiency and cost/productive efficiency) is an important component of how well or poorly a financial system meets the needs of users and contributes to desired economic outcomes. A possible formulation could be something like: "*the promotion of a stable, resilient and efficient financial system*". It would also seem appropriate to include in section 3(1) a reference to protecting depositors and policyholders (and potentially investors in financial markets and financial products) if	***Agreed. Object of the Act revised to include the concept of "efficiency" of the financial system – See revisions to cl. 6.*** ***The scope of the definition of financial customers is intended to be wide to also capture depositors and policyholders. The fair treatment and protection of financial customers is an explicit objective of the Bill and***

		this is either an implicit or explicit objective of financial sector regulation.	***recurring theme throughout the Bill. It is one that is further reinforced by requiring the Reserve Bank and the Financial Sector Regulators to have regard to in exercising their powers, duties and functions in terms if this Act and the sectoral law.***
Melbourne	**3(1)(b)**	We would suggest that subsection (b) be amended to read: "*the safety, efficiency and soundness of financial institutions;*" The reference to "*efficiency*" would introduce the elements of cost-effectiveness and competitiveness into the purpose of the Act, which we believe are important elements of a properly functioning financial system. We note that the concept of "*efficiency*" appears in section 14(2)(b).	***Agreed. The "efficiency and integrity of the financial system" has been incorporated into the Object of the Act. See cl.6***
Melbourne	**3(1)(b)**	We recommend that consideration be given to defining "**financial inclusion**". We assume that it refers to the inclusion of disadvantaged persons who previously did not enjoy access to the financial system or its basic consumer products.	***Agreed. Definition of "financial inclusion" has been included in the revised FSR Bill.***
Resolution WG	**3(1)(e)**	In section 3(1)(e), "*financial inclusion*" is possibly a little too vague as an objective of financial sector regulation. It is open to many different interpretations. It may be better expressed in more specific terms so that it can be used as a meaningful objective for guiding regulation and supervision. For example, instead of using the words "*financial inclusion*", an alternative formulation could be: "*promoting cost-effective access to financial products and services for all South Africans*".	***We agree that by defining "financial inclusion" as a term in the Bill and retaining it as a specific object of the Act that it allows for more meaningful guidance in terms of the application regulation and supervision. Please see the proposed definition.***
Deloitte	**3(1)(f)**	Financial crime is highlighted as a key area of focus within the Bill. The remainder of the Bill does not specifically address which regulatory authority will be accountable for this area of focus. It furthermore does not address the role that the current Financial Intelligence Centre (FIC) will play within the supervisory framework. Clarity should be included in the Bill on this important area.	***Agreed. Financial crime is a defined term in the revised FSR Bill, and the scope of the regulatory and supervisory framework in relation to it has been expanded to go beyond what was initially proposed. The Financial Sector Regulators have a responsibility, and extensive powers conferred on them by this and other financial sector laws that may be exercised for purposes of preventing and combating financial crime. These include powers in terms of gathering information, carrying out inspections and investigations, as well as issuing directives to financial institutions. In addition, each of the financial sector regulators has a duty to co-operate with, and assist the Financial Intelligence Centre.***
ASISA	**3(2)**	Our understanding of this FSRB is that it aims to establish a twin peak regulatory system in	***Agreed that these provisions were misplaced in the***

		order to properly regulate the financial system. Hence it is our view that subsection 2 is unnecessary and we suggest that it be deleted. If this is not accepted, please note the comments below: **s3(2)(a)** "**authorisation**" is already defined as *"a license or registration or any other type of approval, permission or authorisation issued in terms of a regulatory law to carry out a regulated activity*." Therefore we propose **s3(2)(a)** be amended as follows: "*(a) an institution can only operate as a financial institution with an appropriate valid ~~license, permission or~~ authorisation*;" **s3(2)(b)** The term "*significant responsibility*" is not defined and it is therefore not clear who determines which persons are deemed to be in positions of significant responsibility or what the term means. Clarity is required. The parameters for "*fit and proper*" are also not defined. We understand that this may be elaborated on in regulations, but care must be taken to be consistent with other legislation such as The Financial Advisory and Intermediary Services Act (FAIS) and the Insurance Laws Amendment Bill (ILAB), where this concept is also used. Fit and proper is an acknowledged term under FAIS which is now being used without the support of any legislation such as FAIS and it is not clear if this is different from or exactly the same as the FAIS requirements. Also, the requirement for fit and proper as set out in this sub-section is already largely covered elsewhere, e.g. by FAIS, the Companies Act, ILAB and other financial sector laws.	***"Objects" section of the initial draft and have been deleted. However we refer the readers to chapter 8 of the revised FSR Bill that addresses licensing. The concept of "authorisation" is now incorporated in the definition of a "licence". See revised definition of a "licence".*** ***Agreed. We have proposed a definition of "key person" to be included in the Bill.*** ***The Financial Sector Regulators may make standards in respect of "fit and proper person requirements" for financial institutions and key persons. See cl 94 and 95 of the revised FSR Bill.***
Promontory	**3(2)**	Same point about "*financial*". More importantly, this is a great set of objectives but the current disjointed laws under which the PA and MCA will operate will not support this objective (at the moment) – e.g. pension funds are not currently subject to authorisation. Nor are all financial services subject to regulation. Some Acts do not contemplate a fit and proper test, and so on. This may be the long-term objective, after the big overhaul, [it would not be ideal] to have the PA or MCA held accountable to this when they don't have the power to implement fully (though see point below about powers). It may only be minor, but, unless powers are strengthened and clarified as suggest below, [we suggest] reword[ing] as follows: "*(2) The supervisory and regulatory framework established in terms of this Act and the*	***Section deleted. The revised FSR Bill gives the financial sector regulators sufficient powers to regulate licensed financial institutions and provides adequate powers to deal with unlicensed entities offering financial services and products.*** ***For consistency, the definition of a "licence" in the revised FSR Bill includes; authorisations, registration, approval, permission, authority, consent etc. See new definition of a licence.***

		financial regulatory laws *are intended to develop a financial system in which* ~~*must ensure that*~~ —”	
NHFC	**3(2)(a)**	3(2)(a) states that “*an institution can only operate as a financial institution with an appropriate valid license, permission or authorisation.;*” Our view is that when Unifer, Saambou collapsed and a number of small banks voluntary surrendered their trading licences to the SARB, we soon witnessed a mushrooming of small unregulated micro-lenders operating and violating the prescripts of the applicable statutory regulations. It is unclear on how this Bill intends to confront this phenomenon. It appears as though the Bill is silent on monitoring and supervising the unregistered lenders whose non-compliance and unbecoming conduct and operations is relatively known in the financial services sector.	***As well as being dealt with under the sectoral laws, cl. 203 address offences related to licensing, such as criminalising carrying on the business of providing a financial product, financial service, market infrastructure or payment system without being licensed. Please see Policy document for full explanation on the approach to licencing envisaged for phase 1 of the Twin Peaks process.***
Promontory	**3(2)(a)**	This will require a change of law to implement a single licensed entity type of model in which no financial service can be offered without authorisation from the MCA.	***Agreed. The revised FSR Bill goes a long way to address that objective. Please refer to cl.109 that prescribes the concurrence requirements a financial sector regulator must comply with before issuing, renewing varying or even cancelling, etc. a licence.***
Deloitte	**3(2)(b)**	How will the “*fit and proper persons*” requirements be maintained and managed? Which regulatory authority will provide oversight of these requirements?	***The financial sector regulators are empowered to make and supervise standards in a number of areas, including that of fit and proper requirements for financial institutions and key persons. See cl. 94 and 95.***
NHFC	**3(2)(b)**	3(2)(b) states that “*persons in positions of significant responsibility in a financial institution, or interacting with financial customers, must be fit and proper persons;*”. This is one of the most critical sections of this Bill in particular in the banking sector. This directly relates to issues of capacity building of the banking staff. This was one the cornerstones during our FSC negotiations in 2005-2006 under the Workstream-“*Borrower /Consumer Education and Related Capacity*”. We (government team) have agreed (Misty Hills FSC Agreement 2006) with the banking sector that issues of capacity building directly correlates to negative perceptions of the banking sector interactions with customers. As per the Bill proposal, this directly relates to re-training of the banking sector staff in making them aware and to understand that customers are coming from a diverse background and comprises various profiles and segments of the population, all such profiles should be accommodated and treated equally. When operationalizing the Bill, sustainable awareness campaigns are supreme in this regard.	***Comment acknowledged.***

SAIA	**3(2)(b)**	3(2)(b) makes reference to the fitness and propriety of senior management responsible for financial institutions. It is unclear if this creates a further framework for "*fit and proper*" over and above that already contained in current legislation and/or proposed SAM related legislation. We propose that it be made clear that "*fit and proper*" in this case must be aligned with the concept as described in the draft SAM framework to ensure clarity and consistency in interpretation.	***The intention is to empower financial sector regulators to be able to make and supervise standards in a number of areas, including that of fit and proper requirements for financial institutions and key persons. See cl.94 and 95 and the Policy document for an explanation on the standards making powers of the regulators.***

CHAPTER 2: Reserve Bank and Financial Stability Oversight Committee

Part 1 **Reserve Bank's Responsibility for Financial Stability**			
Promontory	**General**	This Part establishing the SARB's responsibilities for systemic stability is inadequate in that it does not define exactly what the regulatory responsibilities for stability amount to. In fact the SARB (as the financial stability regulator) is the third regulatory pillar along with the PA and MCA. Without this, and without clarity that the SARB's stability function is a third regulatory function, there is serious confusion over the dual-regulation model. It is correct to describe the model as dual-regulation - but there is more than one "*dual*" combination – i.e. PA/MCA and SARB/MCA (e.g. FMIs). [We] have not tried to rewrite fully to accommodate this, but there is a need for a serious rewrite if [Treasury] accepts this logic. See comments below on Schedule 2 Part 2.	***Agreed. The revised FSR Bill goes a long way to clarify the Reserve Bank's responsibilities for maintaining, protecting and enhancing financial stability. The Governor is empowered to designate a financial institution to be a systemically important financial institution (SIFI), giving the Reserve Bank authority to impose additional requirements on SIFIs through the PA in exercising its function of maintaining its responsibility for financial stability. The relevant financial sector regulator must exercise their powers to impose and enforce those requirements.*** ***Furthermore, the Reserve Bank is responsible for market infrastructure and payment systems in that it must regularly assess South Africa's observance of principles developed by international standard setting bodies such as BIS, CPSS and IOSCO – see cl.10*** ***See the Policy document for a full explanation about the proposed role of the Reserve Bank under the Twin Peaks framework.***

Standard Bank	**Chapter 2 &** **Chapter 5**	Standard Bank understands that a separate Resolution Bill is being prepared, and suggests that it may be better to remove these two chapters from the Financial Sector Regulation Bill and to rather locate them within the Resolution Bill. The Financial Sector Regulation Bill would then be more focused on Twin Peaks. Should that not be feasible, we think that it is important to ensure that there is proper cross-referencing between the two statutes, especially regarding the maintenance of financial stability and the mechanisms that the Reserve Bank may use to mitigate systemic risk; and the resolution powers of the Reserve Bank in relation to individual financial institutions.	***The revised FSR Bill seeks to clarify the role and powers provided to the Reserve Bank in maintaining financial stability, as well as mitigating systemic risk; and the role of the financial sector regulators (PA and FSCA) in relation to making standards for financial institutions. Furthermore, while we agree that the FSR Bill and the envisaged Resolution Bill will need to be appropriately harmonised, we do not agree with the proposal to remove these two chapters, and these have consequently been retained, albeit more refined.***
4. Reserve Bank's responsibility for Financial Stability			
ASISA	**4(1) & (2)**	It is our submission that section 4(1) is stating the obvious and hence it should be removed. We also believe that it is more appropriate to include section 4(2)(a) & (b) in the Reserve Bank Act, and amend ss(2)(a) as indicated . s4(2)(b) on the face of it, it would appear that the word "*any*" in the phrase "…*to any extent*…" confers an unfettered and unlimited discretion on the Reserve Bank. We propose that consideration be given to amending the phrase to read "...*to ~~any~~ the extent*" It would be preferable if the entire section is amended to read: "*4. (1) The Reserve Bank, for purposes of giving effect to its ~~has primary~~ responsibility for promoting financial stability in terms of section 3 of the Reserve Bank Act,~~.~~* *~~(2) In fulfilling this responsibility for promoting and, in the event of a financial crisis, implementing steps towards restoring, financial stability, the Bank –~~* *~~(a)~~ must- ~~act within a policy framework agreed between the Minister and the Governor;~~* *(a)~~(b) may utilise any power vested in it as the Republic's central bank or conferred on it in terms of this Act or any other legislation, to any extent that the exercise of that power may be conducive to promoting or restoring financial stability~~* *~~(c) must~~ establish and administratively manage the Financial Stability Oversight Committee, ensuring that it is provided with sufficient resources to carry out its responsibilities effectively; and* *(b)~~(d) must~~ have due regard to –* *(i) the powers and duties of other organs of state regulating aspects of the South*	***Comment noted, however we disagree. Section 3 of the South African Reserve Bank Act will need to be amended in order to explicitly confer this function of maintaining, protecting and enhancing financial stability in South Africa to the Reserve Bank – see proposed consequential amendments to cl.3 of that Act*** ***Noted. This entire section has generally been revised – see chapter 2 of revised FSR Bill.*** ***Disagree. See revised wording in cl.8 of the revised FSR Bill.***

		African economy; and *(ii) the need to balance the requirements of financial stability against other factors relevant to the maintenance of balanced and sustainable economic growth in the Republic.* *(2~~3~~) All other organs of state must have due regard to the financial stability implications of their actions and assist the Reserve Bank in fulfilling its responsibility for maintaining, and in the event of a financial crisis, restoring financial stability.*"	
Resolution WG	**4(1)**	Section 4(1) of the draft Bill states that the South African Reserve Bank (SARB) has primary responsibility for promoting financial stability. It is silent on the financial system stability responsibilities of the Market Conduct Authority (MCA) and Prudential Authority (PA). Given that the MCA and PA will also have responsibilities in this area, might it be appropriate to include reference to this in section 4 or in some other section of the draft Bill?	***Agreed. This section of the Bill has generally been refined and does cater, on a number of instances, for the responsibilities of the financial sector regulators in this area. For instance, the regulators are required to co-operate with and to provide assistance to the Reserve Bank in the performance of its functions with respect to financial stability. Additionally, the regulators and the Reserve Bank must also enter into memoranda of understanding determining and regulating their respective roles and duties in co-operating and collaborating with each other in relation to financial stability – see Chapter 2 of the revised FSR Bill***
Resolution WG	**4(2)(a)**	Section 4(2)(a) refers to the obligation on the SARB to "*act within a policy framework agreed between the Minister and the Governor*". I suggest that consideration be given to an elaboration in the Bill on the nature of what the policy framework to be agreed between the Minister and the Governor must cover. For example, the Bill could include a provision that: • explains what is meant by the term "*policy framework*"; • sets out the means by which, and frequency with which, the Minister and the Governor agree on a policy framework; • specify the matters which must be covered by the policy framework (e.g. whether this must take the form of requiring periodically agreed policy targets, etc); and • sets out appropriate transparency arrangements for agreement between the Minister and the Governor on a policy framework – e.g. that the policy framework must be tabled in Parliament within a specified period of the framework being agreed, and then publicly disclosed. It may also be appropriate to place an obligation on the Minister and Governor to consult stakeholders on a draft policy framework before it is finalised and published.	***The Minister and the Governor are required in terms of cl.8(3) to agree on a policy framework within which the Reserve Bank must act when fulfilling its financial stability function . In addition, the composition of the FSOC includes the Reserve Bank, the PA and FSCA, the NCR as well as National Treasury. One of the Committee's key roles is to facilitate co-operation, collaboration and co-ordination of action in relation to matters relating to financial stability. The revised FSR Bill introduces a concept of regulatory strategy, which is a general guide, to promote accountability through transparency.***

		As regards the content of the policy framework, consideration could be given to what might be the appropriate range of matters and specificity to be covered by the policy framework. My assumption is that it would not get into details of the policies that the SARB might pursue to achieve financial stability outcomes, given that this could compromise the operational independence of the SARB. However, it might appropriately cover such matters as: • a definition of what is meant by "*financial stability*"; • possibly the specification of Key Performance Indicators (KPIs) and an obligation of the SARB to publish regular information in relation to its performance against the KPIs; • information on the kinds of policies which the SARB and the regulatory authorities will apply seek to ensure that regulated entities under their respective jurisdictions establish and maintain the capacity to identify, measure, monitor and manage their risks prudently; • a statement of the need for the SARB to seek to ensure, to the extent practicable, that it conducts monetary, macro-prudential and exchange rate policies with a view to minimising the risks of financial instability and possibly an indication of the policies in question; • information on the kinds of policies which the SARB and regulatory authorities will establish and maintain in order to respond promptly and effectively to any event that poses a threat to the stability of the financial system, including the ability to respond to financial distress or failure events, or market disruptions, in a manner consistent with minimising the impact of the distress or disruption on the financial system. If a policy framework on financial stability is to be agreed between the Minister and the Governor, it might also appropriately include the CEOs of the MCA and PA, given their important functions in promoting financial stability. In that regard, I suggest that consideration be given to amending the Bill so that it refers to either a multilateral policy framework agreement to be entered into (and periodically revised) between the Minister, the Governor of the SARB, the CEO of the MCA and the CEO of the PA, or where bilateral policy framework agreements are entered into.	
Promontory	**4(2)(b)**	Could make an explicit reference here to Lender of Last Resort facility?	***This will be considered for the Resolution Bill***
Promontory	**4(3)**	[We] suggest the systemic regulatory role of the SARB should be spelled out here,	***Agreed. Revisions have been made in the Bill, including giving the Reserve Bank power to impose prudential standards in***

		including: • Regulating the payments system; • Identifying and recommending to the FSOC which institutions should be classified as SIFIs; and • Setting "*additional*" systemically-relevant prudential regulatory requirements for different categories of SIFIs including systemically-important financial market infrastructure (see comments about list in Schedule 2 part 2 below).	***relation to a SIFI or a class of financial institutions that is systemically important, specifying additional requirements. The supervision and enforcement of such additional standards will be done through the financial sector regulators. The authority to identify and designate SIFIs is vested with the Governor; with the FSOC performing an advisory role on such designations – see cl. 73 & 74 under Chapter 5***
Part 2 **Financial Stability Oversight Committee**			
5. Establishment, Objective and Functions of Financial Stability Oversight Committee			
Resolution WG	5	Section 5 establishes the Financial Stability Oversight Committee (FSOC) and sets out its purposes. I endorse the notion of having the FSOC, given that it would provide an effective means by which the agencies represented on it (the SARB, MCA, PA and the National Treasury (NT)) coordinate their actions in the pursuit of financial sector objectives. However, as drafted, there appears to be the potential for ambiguity as to whether the powers and responsibilities in relation to financial stability lie with the FSOC or with its respective members. With committees of this nature, it is usually the case that the powers to take particular actions lie with the respective member entities, rather than the committee itself. Similarly, the accountability for actions taken and powers exercised usually rest with the entities in question, rather than being ascribed to a committee. In most parts of the Bill, appropriate powers (e.g. regulatory, supervisory, crisis resolution powers, etc) are vested in the respective entities according to their spheres of responsibility, whereas in other parts of the Bill, such as section 5, it could be interpreted as if the powers are vested in the FSOC. I suggest that this be clarified so that it is clear where the powers lie and who has accountability for the exercise of the powers. In that context, I think that a suitable structure would be for: • the relevant powers to be vested in the respective agencies (e.g. regulatory and supervisory powers with the MCA and PA; crisis management powers with the MCA and PA, except where systemic stability is concerned, when they would be vested in the SARB); • the FSOC to be a body charged with coordinating actions and sharing information between the SARB, MCA, PA and NT, in relation to matters relevant to financial	***Comment noted and suggestions have been incorporated where appropriate. The powers and responsibilities are vested with the member entities where appropriate, with the Reserve Bank responsible maintaining, protecting and enhancing financial stability. The Reserve Bank has the function of maintaining, protecting and enhancing financial stability in South Africa. Furthermore, the FSOC no longer has the 'comply or explain' powers in respect of other regulators; however, the financial sector regulators do have a responsibility to assist the Reserve Bank in the maintenance of financial stability – see Chapter 2, part 3 of the revised FSR Bill as well as the Policy document for further explanation on the amendments to the FSOC.***

		stability, but where the powers to act do not lie within the FSOC itself; and • the FSOC to publish regular financial stability assessments (as per section 9 of the Bill). I suggest further consideration be given to this matter, with a view to establishing a clear delineation of responsibilities and powers between the respective agencies.	
Deloitte	**5(1)**	The wording, "*The Financial Stability Oversight Committee (FSOC) is established to assist the Reserve Bank …*", introduces some doubt as to whether the FSOC is responsible for financial stability in its own right or whether its role is to support the SARB. We believe that this should be clarified in order to avoid confusion surrounding roles and responsibilities.	***Agreed. Financial stability is a responsibility of the Reserve Bank while FSOC is an advisory body tasked with, among others, the responsibility of supporting the Reserve Bank and advising the Governor and Minister on matters of financial stability. See cl.17 &18***
Strate	**5(2)**	It is noted that SARB must establish a Financial Stability Oversight Committee (FSOC) to assist it in this role and to specifically monitor and deal with systemic issues. The review will cover FSOC's assessment of the stability of the financial system, steps taken, recommendations, and a summary of the decisions made by the Minister. The FSOC may delay the publication of information that may cause panic in the market. The FSOC may make recommendations to the Market Conduct Regulator, the Prudential Authority, and any financial regulator. It is not clear if the CSD is included as a "*financial regulator*". It is essential that the self-regulatory market infrastructures be included in this process. It is understood that in the event of a crisis situation, the decisions of SARB or the FSOC shall prevail over those of Strate, the JSE or a clearing house, unless the Minister determines otherwise. It is also understood that the Minister will be solely responsible for taking decisions relating to crises affecting public finances, including the issuance of emergency regulations. In other instances, SARB will be responsible, with the co-operation of the MCR and PA. Strate is of the view that the technical capabilities, knowledge of the custodial and operational business, regulatory and supervisory skills and general practical know-how of the self-regulatory market infrastructures should be optimally utilised and that the overall process can only benefit from such participation. It is submitted that the necessary clarity be given in the wording of the Bill.	***The Bill does make ample provision and opportunity for representation in forums such as the FSOC and the Financial Sector Contingency Forum and to call upon the expertise of FMIs such as Strate. The Chair of FSOC may invite any person, including a representative of an organ of state to attend meetings of FSOC. Furthermore, the Governor is required in terms of cl.23to establish a Financial Sector Contingency forum, in which may consist, among other, representatives from relevant organs of state as determined by the Governor. Each organ of state also has a role to perform in in relation to financial stability and must have due regard to the implications of its activities for financial stability and provide reasonable assistance to the Reserve Bank in performing the Reserve Bank's functions with respect to financial stability – See cl.26***
Promontory	**5(2)(a)**	[It is not clear] how the FSOC can possibly meet this "*must*" requirement of "*continuous monitoring*". It has no resources of its own and only meets quarterly. Surely SARB, PA and MCA are responsible for the continuous monitoring. The FSOC is responsible for assessing the information that comes from the 3 agencies and for making judgements based on that assessment. [We] suggest rewording to	***Agreed. It is the Reserve Bank as the responsible authority for financial stability. The FSOC must at least every six months make and publish an assessment of the stability of the financial system, and the Reserve Bank must provide administrative support, and other resources, including financial resources, for***

		something like: "*(a) assess information provided by~~continuously monitor~~ the Reserve Bank and regulatory authorities on the state of financial system ~~for~~ risks, weaknesses, disruptions, or developments that threaten to harm or are harming financial stability;~~, whether those risks, weaknesses or disruptions arise from structural imbalances, cyclical occurrences, failing financial institutions, contagion or any other factor;~~*"	***the effective functioning of the FSOC See cl.17 – 22 and the Policy document for a detailed explanation on FSOC's revised responsibility to financial stability.***
ASISA	**5(2)(b)(i)**	The FSOC has been conferred with a subjective discretion to make this determination. We are of the view that given the wide definition of "**financial stability**" in the Bill, objective criteria should inform any determination contemplated in ss5(2)(b)(i) We propose that the Act, or alternatively the Minister, by way of regulations, set out objective criteria which the FSOC may use and consider in making such a determination.	***It is proposed the Governor now be responsible for making such a determination in writing, after having consulted with the Minister, as financial stability is an explicit responsibility of the Reserve Bank – see cl.11 and 12. The role of FSOC is to support the Reserve Bank in performing its function in respect of financial stability. See cl. 17 – 22***
ASISA	**5(2)(b)(ii)**	The grammatical and ordinary meaning of the word "*potential*" could also be interpreted as "*possible, but not yet actual*". Accordingly, we are of the view that a determination under this section could have the unintended consequence of creating the erroneous global and local perception of financial instability given the potential for a premature determination, thereby defeating the very purpose of the Bill. We propose that the word "~~*potential*~~" be replaced by the phrase "…*material likelihood*" as used in section 63 of the Bill. To ensure consistency we propose this amendment be effected in all sections of the Bill where reference is made to a "*potential…financial crisis...*" – see ss65(1); 66(1); 66(4); 66(5);67; 67(b)(ii)	***The wording to this section has been revised. We have proposed to use "imminent". The Governor may make a determination, whether or not the event or circumstance, or combination of events or circumstances, has already occurred or arisen, and must furthermore regularly review such a determination.*** ***In order to ensure consistency and provide clarity, a distinction is provided between "systemic event" and "systemic risk" in the Bill, when previously the term "financial crisis" had been used to refer to both systemic event and risk.***
ASISA	**5(2)(c) with 61, 66(3) & (4)**	The phrase "*any action necessary*" is very broad and it is our view that this needs to be defined or narrowed down in order to avoid the situation where the FSOC has unfettered power and the industry is not aware of the actions that could be taken in these instances. Transparency and accountability are important elements that should also be considered in this context. Please refer to our comments regarding sections 61 and 66(3) and (4) where we propose a preferable process of approaching the Courts.	***Agreed. In light of the stability function that is entrusted to the Reserve Bank, it is the Bank that must take all reasonable steps to prevent, mitigate or manage a systemic event and its effects, and in doing so must have regard to, among other things, the need to protect financial customers, protect and maintain financial stability as well as containing costs to the Republic. Furthermore, the Governor may establish a management committee consisting of senior representatives of the Bank, the financial sector regulators and other relevant organs of state, to assist with coordinating activities to manage a systemic event –***

			see cl.12
Deloitte	**5(2)(c)**	"*… in a manner that does not unduly adversely impact the ability of the financial system …*". This is relatively high-level test which is difficult to measure and assess. We would recommend that more clearly defined objectives are established against which to assess the functioning of the Financial Stability Oversight Committee (FSOC). This should help provide more predictability in the way the FSOC will react to a given set of circumstances.	***The clause had been meant to provide a limitation on the principle, and the actual powers are not yet provided. In the revised FSR Bill we have proposed changes to the responsibilities of the FSOC, as an advisory body on matters of financial stability. It is the Governor and the Reserve Bank that must act, within certain parameter as provided for in cl.12***
		In terms of this sub-regulation the Minister designates Systemically Important Financial Institutions. Based on similar regimes in other countries, this would normally be the responsibility of the regulatory authorities. It would be helpful to clarify why this authority has been granted to the Minister.	***Upon review, we have proposed that designation of SIFIs will be the responsibility of the Governor as the Reserve Bank has the function, in addition to its primary objective as set out in section 224 of the Constitution, of maintaining, promoting and enhancing financial stability in the Republic – see cl. 73***
Promontory	**5(2)(c)**	Does FSOC initiate? This implies that FSOC directs the SARB before the SARB can act. [We] suggest something more like: "*(c) Review the appropriateness of actions being proposed by the Reserve Bank and the regulatory authorities~~initiate, in accordance with this Act, any action necessary~~ to mitigate or remedy a risk, weakness or disruption detected and, where these actions are considered insufficient or inappropriate, initiate action in accordance with section 60 or section 61~~, having due regard to the need to pursue its objective in a manner that does not unduly adversely impact the ability of the financial system to provide favourable conditions for balanced and sustainable economic growth in the Republic~~;*"	***We have revised these provisions, and it is proposed that financial stability is a responsibility of the Reserve Bank while the FSOC provides support to the Reserve Bank in performing its function in respect of financial stability. See substantive revisions made in Chapter 2 of the revised FSR Bill as well as the Policy document.***
SAICA	**5(2) (read with 14 (c))**	Sub sections (a),(b) and (c) of Section 5 conflicts with sub section (c) of Section 14(c) which states "*…support the Reserve Bank in promoting, and in the event of a financial crisis, implementing steps towards restoring, financial stability*". We propose aligning the references if the intention is that the FSOC and the Reserve Bank are one and the same in this instance. This section stipulates the FSOC's responsibility in pursuing its objective includes advising the Minister of any potential systemic event. It is unclear to what extent a financial institution (responsible for the potential systemic risk event) be informed or engaged (and by whom) throughout the process. We propose that the FSOC through consultation with the Minister notify the financial	***See the revisions made in Chapter 2 of the revised FSR Bill to clarify the role of the Reserve Bank as well as that of the FSOC in respect to financial stability. See also the Policy document for a detailed explanation.***

		institution of any potential systemic risk event to avoid further misconduct by the financial institution.	
ASISA	**5(2)(e)**	We assume that the consequences of being designated as a "*systemically important financial institution"* will be set out in the regulations. However, clarity on what will constitute a "*systemically important financial institution*" and also the impact of this provision is required.	***The revised FSR Bill has a separate chapter (ch. 5) which empowers the Governor** to **designate a financial institution or a financial conglomerate as a systemically important financial institution, and outlines the process and criteria for designation of a SIFI as well as Reserve Bank's powers in respect to SIFIs. See for instance cl. 74 and 75***
SAIA	**5, 6 and 7**	**Wide powers of intervention conferred to the Financial Stability Oversight Committee (FSOC) – Clauses 5, 6 and 7** These clauses, amongst other require that the FSOC must initiate, in accordance with the Act, *any action necessary* to mitigate or remedy a risk, weakness or disruption detected. Allowing the FSOC to initiate any action necessary without prior consultation maybe affording the FSOC more powers than necessary. There may be a need to place parameters on how far these powers extend. SAIA members propose there should be a requirement for consultation with the Minister and with the relevant financial institution before the FSOC initiate any necessary action.	***The revised FSR Bill seeks to clarify the role of the Reserve Bank, as well of the FSOC as an advisory body, in respect to financial stability. Furthermore, the revised FSR Bill makes provision for Financial Sector Contingency Forum to facilitate consultation and coordination on financial stability matters. See the Policy Document for a detailed explanation on the composition, powers and responsibilities of the FSOC and the Reserve Bank in respect to financial stability.***
6. Composition of Financial Stability Oversight Committee			
ASISA	**6 (1)**	It is submitted that consideration should be given to including representatives of the financial services sector in the composition of the FSOC, albeit with non-voting rights – this submission is premised on a combined and co-operative approach to promoting and enhancing financial stability and addressing systemic risk, without impinging on the powers of the organs of State. While we accept that the ultimate and primary responsibility for the maintenance, protection and enhancement of financial stability must be directed by the organs of state, we are nevertheless of the view that the financial sector is equally responsible for the achievement of those objectives. In this regard, we note that the Minister has a discretion to invite any person to meetings of the FSOC, (which we assume includes persons from the financial sector), we submit however that peremptory involvement and participation of representatives from the financial sector will achieve the objectives holistically. The fact that the Bill allows for participation without any voting powers for invitees is a sufficient mechanism to ensure that the organs of State	***A separate platform called the Financial Sector Contingency Forum is established in order to assist the FSOC in performing its crisis management and preparedness functions and to facilitate consultation, information sharing and coordination between the FSOC and the regulated entities on financial stability matters. This forum may be composed of representatives from relevant industry bodies, the financial sector regulators and any relevant organ of state, entity or body – see cl 23***

		determine the decisions and actions of the FSOC. We propose that the section be amended to make peremptory (and not discretionary), but non-voting, inclusion of representatives of the financial services sector in the composition of the FSOC.	
Resolution WG	**6(1)(b)**	In section 6(1)(b), I draw your attention to the reference to "*the Chief Executive Officer … of the Reserve Ban*k". I assume this should read: "*the Chief Executive Officer of the Prudential Authority and the other Deputy Governors of the Reserve Bank*".	***The section has been revised and "Chief Executive Officer" is now defined in the revised FSR Bill.***
		Given that the PA is intended to be a separate regulatory body under the control of the SARB, it might be more appropriate to provide for a distinct reference to the CEO of the PA, rather than merely listing that person as being one of the SARB Deputy Governors. Moreover, given that the MCA is to be represented on the FSOC by the Commissioner and at least two Deputy Commissioners (which seems appropriate), I would suggest that a parallel arrangement should apply to the PA – i.e. that the PA should be represented by the Chief Executive Officer and at least one Deputy Chief Executive Officer (and maybe two).	***Please note that this section has been revised. Composition of the FSOC will include the Deputy Governor responsible for financial stability matters, as well as the CEO, who is also a deputy Governor – See revisions to cl.19. It is furthermore not contemplated that there be a position of a Deputy Chief Executive to be created as this will have ramifications in terms of the institutional governance of the PA as well as the SARB. In terms of cl.34 the Governor may appoint a senior staff member of the PA or a Deputy Governor to act as CEO when the CEO is absent from office, or is otherwise unable to perform the functions of office.***
		The broader issue here is the organisational status and governance arrangements of the PA. As I see it, the Bill should structure the regulatory arrangements on the basis that the PA is a distinct regulatory authority with its own statutory powers, mandate, responsibilities and accountability, but overseen by the SARB, rather than being merely an administrative division of the SARB. At present, the Bill seems to create a kind of hybrid, in which the PA is treated in some parts of the Bill as a regulatory authority in its own right (e.g. where the Bill refers to it as a juristic entity and vests particular responsibilities in it), while in other parts of the Bill the PA seems to be treated as merely a department within the SARB. I suggest a consistent approach be taken throughout the Bill, with a view to establishing the PA as a distinct and separate entity from the SARB, with its own statutory responsibilities, governance structure, powers and accountabilities, but where it is a subsidiary of the SARB. This would be similar to the arrangement in the UK as regards the UK Prudential Regulation Authority and the Bank of England.	***Agree with the principle, but the PA cannot be a subsidiary. The Bill has gone further in terms of clarifying the legal status of the PA as well as the relationship with the SARB; the PA is a juristic person under the administration of the SARB (i.e. providing funding, accommodation and other services and resources. See revisions made to Chapter 3, parts 1-3 and the Policy document for a detailed explanation.***

Resolution WG	**6(1)(d)**	In section 6(1)(d), it may be better to include at least one Deputy Director-General of the NT as a member of the FSOC, in addition to the Director-General.	***Disagree***
BASA	**6(2) read with 7(6)**	The clause does not consider the consequences if the Governor is not present. As the chairperson and having a casting vote, the meeting could be rendered unable to complete its business. The South African Reserve Bank Act deals with a "*casual vacancy*" (in this context, that the Governor has left that position) of the Governor but does not seem to deal with temporary absence and the appointment of an acting Governor for the period of absence of the incumbent Governor. On the assumption that the "*Senior Deputy Governor*" (see section 4(1)(a) of the South African Reserve Bank Act) acts in place of the Governor in the event of a temporary absence, provision should be made for an acting chairperson in the Bill, using either this official or another Deputy Governor. It is recommended that clause 6(2) should read – "*The Governor, or in his or her absence, the official designated to act as Governor, is the chairpersonChairperson of the Financial Stability Oversight Committee.*"	***This section has been revised, and the FSOC is no longer a decision making body but an advisory committee. cl. 21(3)(b) provides for the deputy Governor responsible for financial stability matters to be the Chair in the event the Governor is not present at a meeting.***
7. Meetings of Financial Stability Oversight Committee			
Resolution WG	**7**	This section of the draft Bill states that the Director-General of the NT may not vote at meetings of the FSOC. Given that financial system stability issues have significant ramifications for fiscal outcomes and can involve the use of government funding or guarantees as part of a crisis resolution, I think it would be appropriate for the NT representative to have the same voting rights as other members of the FSOC. Again, however, I suggest that the draft Bill be amended to make it clear that the FSOC is an advisory and coordination body on financial stability issues, rather than the body with responsibility for exercising financial stability related powers.	***Agree with the suggestion for the FSOC to be an advisory and coordination body rather than a body responsible for exercising financial stability powers. See revisions to in Chapter 2 (part 3) as well as a detailed explanation of the role of FSOC and the Reserve Bank in financial stability issues.***
SAICA	**7(1)**	The Financial Stability Oversight Committee must meet at least once every quarter. We propose making specific reference at the end of the sentence to "*or on a more regular basis as determined by the Governor in the event of a specific matter that may potentially give rise to a systemic risk*"	***Agreed. It is specified that at a minimum the committee must meet at least once every 3 years, the Governor may also convene a meeting the Committee at any time – see cl.21(2) in relation to meetings and procedure of the FSOC***
ASISA	**7(2)**	It is not clear what type of majority is required, for example, a simple majority or a two thirds majority. This should be clarified. The same applies to s26(2) in relation to the management oversight committee.	***This section has been revised. It is up to the Committee to determine its procedures, including quorum requirements – see cl.21(5)***

ASISA	**7(4) read with 6, 7(3)**	Mention is made in section 6 to the Director- General of National Treasury, whereas in section 7(4) reference is made to the National Treasury representative and not the Director-General. Because section 7(3) allows alternates, this is confusing and also there is no indication why he cannot vote. The same applies in relation to the Commissioner. Sections 6 and 7 are confusing.	***See revised cl. 21***
		The inability to vote means that the National Treasury representative can be counted for quorum purposes, but cannot cast any vote, which does not make sense. A quorum usually implies the minimum number of members of a committee to enable it to function and make decisions, but here the member who makes up the quorum cannot in fact contribute to any decisions. We suggest an amendment by either adding another member requirement, or allowing the National Treasury representative to cast a vote.	***See revised Chapter 2 (part 3) of the revised FSR Bill and the Policy document for a full explanation on the changes to the composition, functions and role of the FSOC, particularly that the FSCO is not a decision-making committee but an advisory body.***
Promontory	**7(4)**	Treasury should be a full voting member and should have a veto, or at least a referral to the Minister, on any action that could have implications for the public purse. [We] suspect this would happen as a practical matter so why not make it explicit. The current structure make Treasury look weak. As much as the agencies in Australia fight with Treasury, that conflict is healthy and strengthens the robustness of the model.	***The FSOC is not a decision –making body and it is therefore not necessary to specify a voting structure – See new Chapter 2, (part 3) of the revised FSR Bill and the Policy document for a full explanation on the changes to the composition, functions and role of the FSOC.***
Promontory	**7(5) and(6)**	Sections (5) and (6), along with the structure of the FSOC, gives SARB effective control of the FSOC. Given the potentially adversarial nature of section 60 this could be seen as creating an imbalance between the SARB and the MCA. In making that comment [we are] assuming, of course, that the PA would support the SARB in the event of a conflict between the SARB and the MCA. That need not necessarily be the case.	***Noted. See new Chapter 2, (part 3) of the revised FSR Bill and the Policy document for a full explanation on the changes to the composition, functions and role of the FSOC.***
Promontory	**7(7)**	"*procedure*" should be plural.	***Agreed.***
ASISA, BASA, Promontory	**7(8)**	This appears to be an incorrect reference and should in fact be to "*…a person invited in terms of section 8*." The reference to "section ~~7~~" should be a reference to "section 8" and the sub-clause amended accordingly.	***Subsection has been deleted. See revised FSR Bill.***

8. Non-voting attendees

9. Financial stability review			
ASISA	**9(1)**	It is not clear on what information this review will be based. This is important, especially in terms of the frequency of the review. For example if this review were to be based on additional reporting that would be required from institutions, twice a year may be too often for this review to take place.	***Noted, cl. 22(2) sets out a guideline in respect of issues that must be set out by the financial stability review.***
		The word "*publish*" is not defined. We believe that this should be either in the Government gazette or published for example on a website.	***The word 'publish' has a general meaning and this will be at the discretion of the FSOC.***
SAIA	**9 and 10**	**Right of the FSOC to withhold information - Clauses 9 and 10** In terms of the provisions of the Bill the FSOC is required to publish a financial stability review twice a year. SAIA members support the publication of a financial stability review as this will ensure and increase confidence in the financial sector of South Africa. It is however suggested that the necessary safeguards should be put in to place to prevent direct references to Insurers and SIFIs as uninformed readers might misinterpret the contents of these reviews. The FSOC is also empowered to delay the publication of the report if it considers that publishing the report may pose a risk to financial stability. The section implies that relevant stakeholders will not be privy to information regarding financial instability or information that might pose a risk to financial stability. This appears self-defeating as it is unclear how the withholding of information that poses a risk to financial stability may prevent financial instability. One SAIA member suggested that it may be more damaging to publish the information after the fact as a delay may likely result in a failure to implement possible remedial action to mitigate identified risks	***Noted. See cl.22 of the revised FSR Bill.***
10. Publication of information potentially prejudicial to financial stability			
ASISA	**10(1)**	Given that the review is already "looking back" at events that have already happened, how can disclosure of those events pose more of a risk by publishing them, than they might have already posed when they occurred? Also, is the FSOC the right body to decide on whether or not certain information poses a threat to financial stability, given that the role of the FSOC is to assist the SARB to maintain financial stability? It is suggested that the decision therefore to	***Comment note, however given the FSOC's role which has been modified to an advisory one, and that its functions include advising the Minister and Governor on financial stability matters, our view is that the FSOC is the appropriate body to make and publish an assessment of the stability of the financial system. This subsection has also been revised and incorporated***

		suppress any such information envisaged in s10 should not lie with the FSOC itself, but rather the SARB or even the Minister. We do have concerns about the limitation on publication in this section. We would prefer this to be removed. There should be a reasonability requirement, as to who determines the risk and how long publication can be delayed. There should be some published mandate or policy around how this will operate. For example, section 57(2)(b) is more explicit about publication.	***into cl. 22(3) which states that the financial stability review may not contain information, which if published would pose an unjustifiable risk to financial stability.***
Promontory	**10(2)**	Some decisions may never be suitable for release. Therefore suggest rewording to: "*(2) If the Financial Stability Oversight Committee identifies a potential risk to financial stability in terms of subsection (1), it may decide not to publish or delay publication of the relevant information until such time as it no longer considers publication to pose a risk to financial stability.*"	***Noted. Subsection has been revised – see cl.22(3)***
SAICA	**9 and 10**	Section 10 deals with the publication of information potentially prejudicial to financial stability. From reading the text, the FSOC may delay the publication of the information until such time as it no longer considers publication to pose a risk to financial stability. The UK regime for example makes provision that the committee need to fix a date as the earliest date on which the information may be published, and if it does not fix a date, it must keep under consideration the question whether publication of the information would still be against the public interest. We are of the belief that the inclusion of the provision to fix a date adds to the operational effectiveness of the publication process. We further stress that the FSOC consider that if they need to publish 2 reports a year, the market may interpret not publishing within a reasonable timeframe that the economy is in a state of financial distress/ instability.	

CHAPTER 3: Regulatory Authorities

Part 1 **Establishment, objectives and functions of regulatory authorities**			
Competition Commission	**General**	**Banking Enquiry Recommendations** We note that some of the findings of the Banking Enquiry seem to form part of the motivation for the creation of the Market Conduct Authority ("MCA"). The discussion document "**A safer financial sector to serve South Africa better**" which sets out the reasoning behind the move to a Twin Peaks regime, discusses the various findings of the Banking Enquiry panel in some detail. It states: "*The Banking Enquiry identified a major gap in the market conduct regulatory regime: there is no regulator that oversees the market conduct practices of the retail transactional banking sector. While the National Credit Regulator oversees the credit business of banks, it is clear that regulatory oversight needs to be extended to cover the entire banking sector, including retail banking*." It goes on to partly attribute the motivation for the creation of the MCA to the banking enquiry: "*National Treasury strongly supported the sterling efforts of the Competition Commission in highlighting the weakness and opacity in market conduct practices, and is therefore proposing that as part of the shift to a twin-peak model of regulation, the market conduct role of the Financial Services Board (FSB) will be expanded by creating a dedicated banking services market conduct regulator within the FSB, which will work closely with the National Credit Regulator*." This suggests that some of the Banking Enquiry's work and recommendations might have been taken on board by the National Treasury in the development of the proposed regulatory regime.	***Comment is acknowledged. National Treasury found the work of the Enquiry very useful in informing the policy direction in the proposed Twin Peaks regime.***
Promontory	**General**	**Establishment, objectives and functions of regulatory authorities** The allocation of regulatory responsibilities here is confused by the failure to include the SARB in its role as systemic stability regulator. For example, the list in Schedule 2 Part 2 includes some oddities. These need to be addressed before allocating lead regulator responsibilities. [We] suggest rewriting Part 2 into two Parts – Part 2 and	***While we acknowledge that the text had created some confusion around the allocation of regulatory responsibilities, the concept of "lead regulator", along with "dual-" vs. "mono-" regulated activities have been revised and are no longer applied in the revised FSR Bill. An authority designated in terms of Schedule 2***

		Part 3: Part 2: **Dual regulated entities** – regulated by PA and MCA • (a) – (e) as currently listed Part 3: **Dual regulated entities** – regulated by SARB and MCA • (f) ** but please delete authorised users, stock brokers and participants, nominees etc – should just be FMIs NB: in addition to the deletions from (f), the payments system should belong entirely to the SARB and CIS should belong entirely to the MCA.	***as the licensing authority for a financial sector law is responsible for granting, issuing, imposing conditions on, varying, suspending or cancelling a licence in terms of the financial sector law. It is therefore not necessary to allocate "lead regulator" responsibilities here, as regulators will be empowered to impose standards on financial institutions to achieve prudential and conduct supervision objectives. The revised FSR Bill has gone further in establishing the role of the Reserve Bank in maintaining financial stability, and articulating the responsibilities of the financial sector regulators (including the PA, FSCA and NCR) in assisting the Reserve Bank to carry out that mandate. Please see also the Policy Document for a full explanation on the role of the Reserve Bank, the FSOC and the different regulators in respect to financial stability.***
SAIA	**General**	**Regulatory Authorities** Clarity is required on the rationale behind differentiation between the governance structures of the two Regulatory Authorities. Why does the PA have a corporate type of formation considering it has a Chief Executive Officer (CEO), and the MCA has a Commissioner?	***The differences emanate from the need to cater for the structural differences of the existing Reserve Bank, as the PA is intended to be a juristic person operating within the administration of the Reserve Bank***
Standard Bank	**General**	**Objectives and scope of responsibilities of regulatory authorities** Standard Bank has some concerns regarding the power of the regulatory authorities to set product standards. We would prefer a more *principles-based approach* towards product standards along the lines of the approach that is embodied in *Treating Customers Fairly*. Standard Bank's concern is that competition and innovation may be inhibited by a *rules-based approach* to product standards, and this is not in the interests of a strong financial system that delivers positive outcomes for financial customers.	***Comments noted. The key objective of the FSR Bill is to put in place the architecture of the Twin Peaks regulatory system for the financial sector that aims to be consistent with international best practice and agreed principles in terms of regulatory independence, accountability and effectiveness. Towards that end, National Treasury has proposed a combination of principles and standards in the sense that the regulators will have powers to make and impose standards (see cl.95 – 97). The advantage of standards is that they can be written as a combination of principles- and rules-based documents as appropriate, and support the approach that these are a minimum benchmark. The regulators will also be more proactive and intrusive in their supervision, and more principles-based in taking action where necessary. Please see the Policy document for detailed explanation on the policy stance.***

		Lead regulatory authority Given that the Bill refers to a "*lead regulatory authority*" it is proposed the concept is defined in the Bill. The specific functions, responsibilities and accountabilities of a "*lead regulator*" can then be specified in the Memorandum of Understanding between the two regulatory authorities, including the lead regulatory authority's power in relation to the other regulatory authority and also in relation to other financial regulators.	***The concept of "lead regulator", as with "dual-" vs. "mono-" regulated activity, is no longer applied in the revised FSR Bill. An authority designated in terms of Schedule 2 as the licensing authority for a financial sector law is responsible for granting, issuing, imposing conditions on, varying, suspending or cancelling a licence in terms of the financial sector law. See the Policy document for detailed explanation on the change.***
Strate	**General – Scope and roles of Regulators**	The Bill establishes the twin peaks of regulation, but is very vague on the exact functions and roles of the two "*Regulators*" (Market Conduct Regulator (MCR) and Prudential Authority (PA)), especially with regard to the CSD and other market infrastructures as self-regulatory organisations. Although the CSD itself will fall under "*dual regulation*", the Bill does not deal with the detail, possible overlap of regulation, or give any clarity on which regulator will deal with what aspect under the Financial Markets Act (FMA), CSD rules and CSD directives. For example, even though the "*licensing criteria*" for the CSD may be prescribed by the PA, it is not clear from the Bill whether or not the MCR will perform the actual "*licensing*" function. Besides the CSD itself, and with reference to above paragraph, it is also not clear how and by which Regulator the Bill would be applied with regard to those CSD participants that the CSD must regulate and supervise. The same concern applies with regard to nominees and clients as defined in the FMA and which are operating at a lower tier in the holding chain. It is not clear how the intended cooperation between the Regulators would prevent a possible gap in the overall application.	***Comment noted. The revised FSR Bill has gone much further to clarify regulation of market infrastructure and participants in the market infrastructures.*** ***In phase one of the Twin Peaks process, all FMI under the FMA shall be the licensed by the FSCA and will be subject to the licensing requirements specified in the legislation. Furthermore, all market infrastructure shall be subject to the oversight of the Reserve bank from a stability perspective and regularly assessing South Africa's observance of principles developed by international standard setting bodies – see cl.10*** ***Both the FSCA and the PA can make and enforce standards – the PA to prudential standards with respect to the safety and soundness of financial institutions. Going forward with the transition to Twin peaks, it is anticipated that all financial institutions will require licensing by both regulators in respect of conduct and prudence.***
11. Establishment of regulatory authorities			
12. Objectives and scope of responsibilities of Market Conduct Authority			

Melbourne	**12(1)(a)**	We would suggest that subsection (1)(a) be amended to read as follows: "*The objective of the Market Conduct Authority is (1) to strengthen the protection of financial customers by promoting their fair treatment by financial institutions, the performance and integrity of the financial system, and financial awareness and literacy; and (2) generally to promote the purpose of this Act as referred to in section 3.*" We believe that the insertion of "*performance*" would enhance the objectives of the MCA. In addition, the second insertion would make it clear that the objectives of the MCA are not limited to the protection of financial customers but extend to promoting the purpose of the Act generally. We would make the same suggestion in relation to section 13 (1) – **Objectives and scope of responsibilities of Prudential Authority**	***The respective objectives of the two regulators have been amended – See cl.28 with respect to the PA, and cl.52 with respect to FSCA of the revised FSR Bill.***
NHFC	**12(1)(a)**	12 (1)(a) relates to the objectives of the "*Financial Stability Oversight*" aimed to strengthen the protection of financial customers by promoting their fair treatment by financial institutions, the integrity of the financial system, and financial awareness and literacy. This will complement the NCR founding principles but most importantly compensate the NCR identified shortcomings on issues of credit transactions and borrower protection standards plus appropriate applicable measures. It is an established validation that deregulation of financial markets enable lenders to take advantage of uninformed borrowers by allowing excessive borrowing and risky investments whose impact can be devastating to the stability of the nation's financial markets and the economy. As witnessed recently through the Financial Crisis Inquiry Commission (FCIC) 2011 report on the causes of the 2008 financial meltdown, confirming that the key findings was due to widespread failures in financial regulation and supervision proved devastating to the stability of the nation's financial markets.	***Noted. Agreed. The reforms are aimed at addressing some of the weaknesses identified in our financial regulatory framework. See Treasury's policy document: "A safer financial sector to serve South Africa better" published by Treasury in 2011.***
Resolution WG	**12(1)(a)**	In section 12(1)(a) of the draft Bill, I suggest that consideration be given to including reference to the **promotion of the soundness and efficiency** of financial markets in the list of objectives for the MCA. This is a fairly conventional objective for regulatory bodies like the MCA.	***We have proposed including "efficiency and integrity"; however we object to the use of "soundness". See cl.52 of the revised FSR Bill.***

		Consideration might also be given to including reference to the **promotion of financial stability**, given that this is often an objective of market conduct regulators – e.g. via the promotion of investor confidence, reliable and efficient financial markets, and the resolution of crises affecting financial markets. As with other parts of the Bill, it would be desirable to use the IOSCO Objectives and Principles of Securities Regulation as a reference point for the objectives, responsibilities, functions and powers of the MCA. Similarly, the BCBS Core Principles for Effective Banking Supervision and the IAIS equivalent are appropriate reference points for the objectives, responsibilities, functions and powers of the PA.	***Noted. One of the objects of the FSR Bill is to establish a regulatory and supervisory framework that promotes financial stability which the financial sector regulators, in pursuing their respective objectives and exercising their powers, must have due regard for and have a duty to assist in maintaining. See cl.6 of the revised FSR Bill.***
Melbourne	**12(1)(b)(i)**	We query whether section 12(1)(b)(i) should be amended to read "*of all financial institutions and persons carrying our mono-regulated activities…*" to align with the wording in the introductory paragraph to Schedule 2 and to reflect the reality that the regulatory remit of the Market Conduct Authority will extend beyond simply regulating "*financial institutions*." We note that the Market Conduct Authority appears to have a much narrower regulatory ambit than its counterpart in other jurisdictions such as Australia.	***This section has been deleted. The concept of "dual-" and "mono-" regulated activities is no longer used in the revised FSR Bill. An authority designated in terms of Schedule 2 as the licensing authority for a financial sector law is responsible for granting, issuing, imposing conditions on, varying, suspending or cancelling a licence in terms of the financial sector law. Irrespective of the licensing authority, all financial institutions will be subject to dual regulation as the PA will be responsible for prudence while FSCA will be responsible for conduct. Furthermore, the law will allow delegation of responsibilities between the regulators. See the Policy document for a detailed explanation on the delegation mechanism.***
Resolution WG	**12(1)(b)(i)**	In section 12(1)(b)(i), the Bill states that the MCA is responsible for the regulation and supervision of all mono-regulated entities, including with respect to their "*safety and soundness*". This seems to go beyond the normal responsibilities of market conduct regulators, as it implies that the MCA would assume responsibility for prudential regulation and supervision of mono-regulated entities. This would place a considerable burden on the MCA and require it to develop systems, skills and resources that are rarely expected of market conduct regulators. It would also carry with it substantial compliance costs for mono-regulated entities. Moreover, it would raise expectations and moral hazard risks, such as regards the level of investor protection provided to investors, which would not easily be managed. This issue may warrant further consideration.	

Promontory	**12(1)(b)(i) and (ii)**	As per discussion on activities vs entities we suggest rewording as: "*(i) of all ~~financial institutions carrying out~~ mono-regulated entities~~activities~~, including with respect to their safety and soundness; and*" And, again: "*(ii) in conjunction with the Prudential Authority and the South African Reserve Bank, of all ~~financial institutions carrying out~~ dual-regulated entities~~activities~~, solely with respect to its objective referred to in paragraph (a).*"	
ASISA	**12(2) – with 13(3), (c) of part 1 and (h) of part 2 of Schedule 2**	Clarity is needed on whether collective investment schemes are mono- or dual-regulated; and which organ of state is the lead regulator.	***The "lead regulator" concept is no longer used in the revised FSR Bill. An authority designated in terms of Schedule 2 as the licensing authority for a financial sector law is responsible for granting, issuing, imposing conditions on, varying, suspending or cancelling a licence in terms of the financial sector law. Irrespective of the licensing authority, CISs will be subject to dual regulation in the sense that both the FSCA and the PA may make and enforce standards in pursuit of their respective mandates. See Policy document for more details on delegations in respect to delegation of powers and duties between regulators.***
Promontory	**12(2)**	The concept of "*lead regulator*" is confusing. The only role appears to be in respect of s55 – which is nothing more than a consultative role. Given the potential for confusion (especially given that, in the case of FMIs the MCA will be the responsible regulator/supervisor for 80% of the issues), [we] suggest a more neutral term – e.g. this clause, and its counterparts, could be deleted, and s55 could refer to "*co-regulators*", which would then need to be defined in relation to dual-regulation. On the other hand, if something more was intended for "***leads***" (e.g. final responsibility) then that needs to be spelled out in s55. Note: [we] prefer co-regulator to lead regulator.	***Agreed. Section has been deleted. The concept of a 'lead regulator' is no longer used in the revised FSR Bill. An authority designated in terms of Schedule 2 as the licensing authority for a financial sector law is responsible for granting, issuing, imposing conditions on, varying, suspending or cancelling a licence in terms of the financial sector law.***

FIC	**12 and 13 read with 55**	The effect of these provisions is that before any other financial regulator in terms of a law administered by that regulator takes any action affecting the interests of any specific financial institution; it must consult the PA or MCA depending on whether the institution is mono-regulated or dual-regulated. The ambit of an "*action affecting the interest of any specific financial institution*" should be clarified. Such a provision, depending the interpretation given to this phrase, implies that the Centre, in performing its functions under the FIC Act such as the issuing of guidance or directives relating to compliance matters, requesting information in the course of performing analysis etc. must always consult with either the PA or MCA in respect of financial institutions that fall under the FSR Bill and are accountable institutions in terms of the FIC Act. The implications are that the day to day functioning of the Centre will be called into question. It should also be noted that such requirements are not provided in the FIC Act so there will be an inconsistency in the way that the various regulators interact with each other in respect of the implementation of the same regulatory law.	***Comments are noted. Cl. 26 does provide for the role of other organs of state in relation to financial stability, and cl. 78 specifies that an organ of state that has regulatory or supervisory functions in respect of a financial institution must consult the financial sector regulators in relation to the exercise of those powers in respect of the financial institution. However, there are also strong co-operation and collaboration mechanisms built into the FSR Bill. For instance, there is established a Council of Financial Sector Regulators. The purpose is to facilitate co-ordination, co-operation, collaboration, consultation and consistency between its constituent institutions.*** ***In respect of the FIC Act, the revised FSR Bill imposes a duty on the regulators to co-operate with the FIC and otherwise assist in preventing and combating financial crime. Furthermore, the financial sector regulators and the FIC must enter into an agreement in respect to how they will co-ordinate the performance of their functions in terms of the FIC Act - See cl.77***
World Bank	**12(1)(a)**	The objective of the Market Conduct Authority is stated to be: "*... to strengthen the protection of financial customers by promoting their fair treatment by financial institutions, the integrity of the financial system, and financial awareness and literacy*" **(Art 12(1)(a))**. Consideration might be given to expanding the objective as of the MCA by referring to: • Promoting the stability and resilience of the financial system; • The protection of investors as well as consumers (this would make clearer an objective in relation to the participation of investors in the capital markets); • The confident and informed participation of both consumers and investors in the financial system (this could be in addition to the reference to their fair treatment by financial institutions and is intended to make clearer a financial inclusion objective i.e. beyond the general monitoring power described in **Art 14(2)(b)**; and • An objective relating to the efficient performance of the financial system and overall economic growth and development (such an objective would indirectly	***Comment noted. Agree to an extent and wording to the objectives of the respective regulators have been amended to reflect the principles of conduct regulation – see cl.52***

		emphasize the need for a proportionate regulatory system which takes into account the risks to be covered and the costs of compliance as well as more broadly encouraging economic systems which facilitate growth and development); and • Monitoring the specified matters as well as promoting them. The objectives of Australia's market conduct regulator (the Australian Securities and Investment (ASIC) may be a useful reference. ASIC's objectives are described as being to: " *a. maintain, facilitate and improve the performance of the financial system and the entities within that system in the interests of commercial certainty, reducing business costs, and the efficiency and development of the economy; and* *b. promote the confident and informed participation of investors and consumers in the financial system; and* *c. administer the laws that confer functions and powers on it effectively and with a minimum of procedural requirements; and* *d. receive, process and store, efficiently and quickly, the information given to ASIC under the laws that confer functions and powers on it; and* *e. ensure that information is available as soon as practicable for access by the public; and* *f. take whatever action it can take, and is necessary, in order to enforce and give effect to the laws of the Commonwealth that confer functions and powers on it.*" Section 1(2) of the Australian Securities and Investments Commission Act 2001 ASIC also has specified functions in relation to "*monitoring and promoting market integrity and consumer protection in relation to the Australian financial system*" as well as other functions specified in the Australian and Securities Investment Commission Act 2001 and other legislation. Sections 11 and 12A(2) It is also suggested that there be express provisions to the effect that MCA (and the PA) have functions and powers that are specified in other legislation or conferred on it by a provincial authority.	
13. Objectives and scope of responsibilities of Prudential Authority			
Promontory	**13(1)**	A couple of adjustments are needed (assuming the draft includes the SARB as above): "*13. (1) The objective of the Prudential Authority is to promote and enhance the safety and soundness of ~~financial institutions carrying~~ out dual-regulated entities*	***Disagree. See amendments to the objectives of PA in cl.28 of the revised FSR Bill.***

		listed in Schedule 2 Part 2 ~~*activities*~~."	
Resolution WG	**13(1)**	Section 13(1) states that: "*the objective of the Prudential Authority is to promote and enhance the safety and soundness of financial institutions carrying out dual-regulated activities*". There is no reference to other objectives that the PA might usefully have, such as: • protecting depositors and policyholders; • promoting the stability, resilience and efficiency of the financial system; and • seeking to minimise adverse impacts on financial stability that may arise from the distress or failure of a regulated entity (ie the crisis management function – at least for non-systemic entities). These objectives would provide a more balanced approach than solely focusing on safety and soundness	***Agreed with the principles, we have expanded the objective of PA to reflect the protection of financial customers as well as to assist in maintaining financial stability. See cl.28 of the revised FSR Bill.***
World Bank	**13(1)**	In **Art 13(1)** the Prudential Authority (PA)'s objectives are stated to be to "*to promote and enhance the safety and soundness of financial institutions carrying out dual–regulated activities*". Consideration might be given to making it clear that the PA has obligations to promote financial stability, competitiveness and resilience in the overall financial system in South Africa. This would be similar, for instance, to the objectives of the Australian Prudential Regulation Authority (APRA). APRA is required "*to balance the objectives of financial safety and efficiency, competition, contestability and competitive neutrality and, in balancing these objectives, is to promote financial system stability in Australia.*" (Section 8(2) of the Australian Prudential Regulatory Authority Act 1998)	***Agreed with the principles. See amendments to cl.28 of the revised FSR Bill. In addition, the PA must support sustainable competition in the provision of financial products through co-operating and collaborating with the Competition Commission – see cl.29(1)(f)***
ASISA	**13(2)**	The dual nature of all of the regulators' activities will impact on many financial services providers. We are concerned about exactly how the "*in conjunction*" references will in fact operate in practice if dual regulators have differing views. There is a real possibility that contradictory regulatory provisions could be issued by different regulators, and/or a "*deadlock*" situation could arise between regulators, as well as the potential of the two regulators having different approaches or interpretations. The process needs to be clarified in more detail, eg. regulator 1 makes a recommendation to regulator 2, the affected institution has a right of response, and then regulator 2 responds to regulator 1. Then, either regulator 1 or 2 makes the final decision.	***Subsection deleted. Sufficient provisions for cooperation between regulators have been built into the revised FSR Bill. See for instance the Council of Financial Regulators, as well as the memoranda of understanding (e.g. cl.25 and cl.77)***

Promontory	**13(2)**	Apart from the activity/entity change, the "*in conjunction with*" [is] ambiguous, since the wording could be taken to imply that both PA and MCA are jointly responsible for safety and soundness. [We] suggest: "*(2) The Prudential Authority is responsible for the regulation and supervision~~, in conjunction with the Market Conduct Authority,~~ of all ~~financial institutions carrying out~~ dual-regulated entities listed in Schedule 2 Part 2~~activities~~, solely with respect to their safety and soundness.*"	***Agree with the principle. The objective of the PA has been revised – see cl.28***
Promontory	**13(3) and insert new 13(4)**	As above (prefer deleting the lead regulator concept) but, if it is retained: "*(3) The Prudential Authority is the lead regulatory authority as described in section 55 in relation to ~~financial institutions carrying out~~ dual-regulated entities specified in Schedule 2, Part 2 ~~activities~~.* " As above: "*(4) The Reserve Bank is the lead regulatory authority as described in section 55 in relation to dual-regulated entities specified in Schedule 2, Part 3*."	***The Reserve Bank is not a financial sector regulator in terms of the FSR Bill. In any event this section has been deleted from the revised FSR Bill and the concept of 'lead regulator is no longer used. An authority designated in terms of Schedule 2 as the licensing authority for a financial sector law is responsible for granting, issuing, imposing conditions on, varying, suspending or cancelling a licence in terms of the financial sector law.***
14. Powers and duties of regulatory authorities			
Promontory	**General**	This Part does not, in [our] opinion, provide the MCA with anywhere near sufficient powers to meet its objectives. In particular, it will not inherit any conduct powers with respect to banks or insurance companies. Clauses such as those in s14 sound good but, in practice, do not provide any real powers. In the absence of specific guidance, courts usually interpret them as constrained by explicit powers in the sectoral laws. [We] assume that is the case in South Africa. What is needed is some explicit powers for MCA with respect to conduct regulation, e.g. powers to: **Reporting obligations and information gathering** - the power to require mono- and dual-regulated entity to provide whatever information the MCA requires in whatever form it judges to be appropriate. This should include both regular reporting and specific reporting in non-routine situations. **Monitoring and surveillance** - including powers to: • require the production of documents and the giving of information; • inspect and copy documents; and • test a mono- or dual-regulated entity's compliance with conduct rules and regulations. These powers should be able to be exercised without the MCA having to demonstrate that there is any suspicion of wrongdoing; they are purely routine information	***Agreed. Additional powers have been provided for in the revised FSR Bill to enable the regulators to meet their objectives including powers to issue and enforce conduct and prudential standards. See cl.95 - 97*** ***While the powers in the existing sectoral laws will remain in existence, the FSR Bill provides for additional powers to plug any gaps in the existing sectoral laws. See the Policy document for a detailed explanation of the powers that will be available to the regulators through the FSRB.***

		gathering powers. **Directions** – the power to direct any mono- or dual-regulated entity to do something specific, or to cease doing something specific, for the purposes of ensuring compliance with a financial sector law, rule or regulation in relation to conduct. In relation to mono-regulated entities directions powers should include the power to issue directions to: • appoint an auditor to audit the records of a mono-regulated entity; • prevent a specified director or employee of a mono-regulated entity from taking part in the management or conduct of the business of the entity; • appoint a specified person or persons to a specified office of a mono-regulated entity; • remove an auditor of a mono-regulated entity; • to take any other action that the MCA considers necessary or desirable in the interests of the mono-regulated entity, its creditors, or the financial system. In the case of both mono-and dual-regulated entities to: • comply with the whole or a specified part of a financial services law, rule or regulation over which the MCA has jurisdiction. **Investigating breaches** - where the MCA has reason to suspect a breach of a financial sector law in respect of a conduct issue it should have comprehensive powers to investigate the suspected breach. **Responding to breaches** – effective responses to breaches of financial sector laws require a combination of the powers to: • revoke registration; • suspend the operations of a mono-regulated entity; • remove directors of a mono-regulated entity; • require a mono-regulated entity to appoint new auditors and/or actuaries; • levy administrative fines – the MCA should be able to penalise non-criminal breaches appropriately with administrative penalties. • freeze assets of or under the control of a mono- or dual-regulated entity where the MCA suspects that the interests of the customers of the entity may be at risk; • require a mono- or dual-regulated entity to publish corrective material; • require a mono- or dual-regulated entity to terminate or unwind specific transactions; and • accept enforceable undertakings from mono- or dual-regulated entity and their officers who are in breach of financial sector laws, rules or regulations. While [we] have focused on the MCA here (assuming that the PA will inherit	

		sufficient powers from the Registrar) it may be useful to set out similar powers here for the PA. Where the MCA exercises the more intrusive powers, it should do so in consultation with the PA.	
Resolution WG	**14**	As a broad statement of powers and duties, this section is satisfactory. However, what is missing from here (and from the Bill as a whole) is a clear specification of the specific statutory powers of the MCA and PA, respectively, in relation to things like: • information gathering; • licensing and de-licensing; • attaching conditions to a license, and amending or removing conditions; • specifying prudential or market conduct standards; • enforcing compliance with standards and with license conditions; • investigating regulated entities or appointing persons to conduct investigations; • issuing binding directions to regulated entities; • assuming control of regulated entities or appointing persons to assume control in a crisis situation or where the entity in question has failed to comply with directions from the regulatory authority; • implementing business restructuring; and • facilitating or directing business transfers; etc. Presumably these powers will be set out either in a later version of the Bill or in other (existing or new) legislation, and with appropriate specificity. From the perspective of the crisis resolution project, it is especially important that there is a clear statutory framework for the allocation of responsibility for crisis resolution, the crisis resolution powers available, the triggers for their use, the checks and balances for their use, etc. In this regard, one approach would be to specify the crisis resolution powers available to the PA and MCA respectively, and to make it clear which of these powers are available to the SARB in a situation where the crisis resolution has financial stability implication (and hence when the SARB would presumably act as the resolution authority). My assumption is that the PA and MCA would be responsible for taking resolution actions in respect of dual-regulated and mono-regulated entities, respectively, where the entity in question poses no threat to the stability of the financial system. Given that section 14(1) applies to both the MCA and the PA, with no distinction between them, I suggest that some provisions in this subsection be reviewed to ensure that they apply appropriately to each regulator. In places, it might be necessary to differentiate between the two regulators. For example, subsection 14(1)(e) seems to	***Agreed. While it has been clarified that the powers in the existing sectoral laws are retained, the FSR Bill does provide for additional powers as an overlay to enable the regulators to issue and enforce conduct and prudential standards to plug any gaps in the existing sectoral laws. The revised FSR Bill has gone a step further to specify additional statutory powers in relation to some of the matters listed, see for instance chapter 8 on Licensing, chapter 9 on Information gathering, On-site Inspections and Investigations; etc.*** ***On the crisis resolution powers, the Bill does specify the Reserve Bank's role for systemically important financial institutions – see cl.75 – without pre-empting the separate Resolution Bill process. The Bill also requires the regulators to coordinate their effort with the Reserve Bank as far as is appropriate and practicable in relation to action affecting the recovery and resolution of financial institutions. Powers of the Reserve Bank in respect of financial stability have been provided in the revised FSR Bill.*** ***Suggestion to clearly distinguish the responsibilities and powers of the Reserve Bank, FSCA and the PA have been incorporated in the revised FSR Bill to provide more clarity.***

		be more pertinent to the MCA than it does to the PA.	
PMG Subscriber	**General**	**Powers and duties of regulatory authorities** Financial regulation (or any regulation for that matter) is not just about promulgating laws. It is also about monitoring and enforcing those laws. It is not possible to do this without ongoing assessment of operational data from the regulated entities. Data is fundamental to financial regulation. This Bill is silent about the power of the regulatory authorities to collect data. Given the price stability mandate of the Prudential regulator and taking into account the consideration in one above, the Bill should expressly state that the regulators have the power to collect economic data from any entity in this country. The broadness of 14(3) in Chapter two is noted, but it is not clear whether this is meant to cover data collection as well. The Bill should consider stating expressly that regulators have the power to collect data for purposes of fulfilling their mandates.	***Agreed. Both the PA and the FSCA have express power in the revised FSR Bill to collect information and data. The regulators can issue standards on information provision by the financial institutions.***
SAIA	**14**	**Powers of the Regulatory Authorities and Limitation of Liability** Clause 14 of the Bill provides for almost “unfettered” powers of the Regulatory Authorities in performing their functions and immunity from liability for bona fide negligent errors and omissions are provided for in Clause 98. A regulatory authority may do anything necessary or expedient to perform its functions, including powers “*auxiliary*” to those conferred by the legislation as it deems necessary. This is considered an overly broad “catch all” provision and appears to confer Regulators the unfettered ability to act in any manner (without Ministerial intervention or without following due process) as they deem fit to carry out their functions. We propose that this could have unnecessarily onerous implications for financial institutions that are subject to Regulatory intervention without being subject to the rules required for fair administrative action. There seems to be an imbalance as the Bill does not provide for additional responsibility to balance the broad range of powers granted to Regulatory Authorities in the Bill, and it is submitted that extensive further development is required regarding oversight over the Regulatory Authorities’ process of developing regulatory strategies, and the processes around deviation from these strategies. As it currently stands the Bill does not make any provision for criteria for deviation from the regulatory strategy, but as suggested in Clause 15 (3) regulatory authorities have extensive powers to deviate. If there is deviation from a strategy, it is suggested that it should follow due process	***Agreed. The section has been deleted. The revised FSR Bill outlines a transparent process and procedures in respect of a number of matters, including making of legislative instruments and administrative actions that are to be aligned to Promotion of Administrative Justice Act – see cl.147 for example***
Deloitte	**14(1)**	Could you please clarify what is meant by the term “*product standards*”? Is the	***The term ‘product standard’ is not applied in the revised FSR***

		Market Conduct Authority (MCA) going to put in place a (new) product approval process or will there be *de-minimis* regulatory requirements regarding new product approval?	***Bill. However, the FSCA will have powers to make market conduct standards in relation for financial products or financial services, including in relation to the design, pricing and valuation, and applied methodologies. See for example cl.95(2)(j)***
Promontory	**14 (1)(b)**	Their objectives are in s12 and s13 – not 43?	***Noted***
Promontory	**14 (1)(c)**	Add reference to SARB's role as financial stability regulator (and shift first and delete last comma): "*(c) support the Reserve Bank in its role as financial stability regulator in promoting, and, in the event of a financial crisis, implementing steps towards restoring, financial stability;*"	***The subsection has been re-worded in the revised FSR Bill to reflect the Reserve Banks financial stability mandate, and the financial sector regulators' responsibility to cooperate and assist the Reserve Bank in its role of financial stability oversight***
BASA	**14(1)(e)**	Financial institutions need the ability to create their own innovative products and differentiate their value-offering. This is required for healthy markets to survive. It is recommended that "*support the promotion of transparent and fair access to appropriate financial services for financial customers, including by developing and implementing a targeted regulatory regime for these financial services, and through the setting of principles in respect of product standards;*" Clause 14(1)(e) provides a Regulatory Authority with the power to support the promotion of transparent and fair access to appropriate financial services for financial customers through the setting of product standards. One must ensure that in the quest to promote transparent and fair access to product standards, the setting of product standards by regulatory authorities may have the alternative effect of stifling legitimate product innovation in the industry and this must be looked at in conjunction with the developments of the standards committed to in the Financial Sector Code. We support the Treating Customers Fairly (TCF) principles and believe that implementing TCF is mutually beneficial for financial institutions and their customers. We therefore believe that when it comes to product design, it would be in the industry's best interest to ensure that products comply with TCF principles around fairness, transparency and appropriateness. Important matters to consider relate to, inter alia, the extent to which the regulator should intervene in the design of financial products. In this regard, it is proposed that supervision and regulatory guidance should be based on principles and not necessarily on product specifics on a case-by-case basis. The latter could potentially be impractical and impact negatively on, among	***The FSCA will have powers to make the kind of conduct standards aimed at ensuring that financial products provided or offered to financial customers are suitable to their circumstances even at product kevel. These may be standards for financial products or financial services, in relation to the design, pricing and valuation, and the applied methodologies.***

		other things, innovation, competitive advantages, confidentiality requirements, and undue delays. Moreover, clarity should be provided on matters such as which regulators (credit, market conduct and/or prudential) should be approached for product discussion. We also support a risk-based approach, and if a financial institution has not committed any material market conduct transgressions there should be no need for regulatory product pre-approval. The regulator would likely be overwhelmed by the volume of work associated with product approvals given the number of financial firms and the number of new products released into the market. Further consideration should be given to the practicalities around approval, so for example if two financial institutions have similar products and both of them are waiting for pre-approval from the regulator, the decision could unfairly determine which financial institution gained a competitive advantage over another, since the one which gets approval first will be first to the market. In addition the pre-approval of products will likely stifle innovation, especially if this is a lengthy process. The financial industry is also concerned about the risk of moral hazard that may arise from regulatory pre-approval of products. Regulators may provide less intrusive supervision of products which had been pre-approved. A corollary to that is that liability could be attributed to a regulator in the event of approval of a product that does not meet market expectation. In any consideration of product suitability proper cognisance must be taken of the different risks posed by different financial products to consumers. Thus, for example, a straightforward savings account does not represent the same degree of risk to a customer as a unit trust does, and as such should not be subjected to the same degree of regulatory scrutiny.	
Promontory	**14(1)(e)**	Does a "*targeted regulatory regime*" equate to a "softer" regime to enable greater access? E.g. such as the steps that were taken to enable sub-prime borrowers to access housing loans in the US pre-2008?	***The clause is no longer used in the revised FSR Bill. Both the PA and the FSCA have an explicit responsibility to support 'financial inclusion'.***
SAICA	**14(1)(e)**	The section states "*support the promotion of transparent and fair access to appropriate financial services for financial customers, including by developing and implementing a targeted regulatory regime for these financial services, and through the setting of product standards*" The powers of the regulatory authority insofar as product setting of product standards is concerned are rather intrusive and are likely to result in inefficiencies. Product	***The concept of setting of 'product standards' is no longer applied in the revised FSR Bill. However, the FSCA will have powers to make standards under the revised FSR Bill in respect of a number of issues, including ensuring that financial customers are treated fairly and that financial products provided or offered to financial customers are suitable to their***

		standards are likely to disincentive market participants from innovating and coming up with products which might differ from the proposed standards but which yield efficiencies and result in benefits for customers. Market participants are already regulated with respect to product standards by inter alia, the Advertising Authority of South Africa, the Consumer Protection Act, The Nation Credit Act, and the Competition Act. Economic literature is likely to indicate that the setting of product standards in any market is likely to result in market participants, by default, seeking to only do the bear minimum that the standard requires and thus results in no benefit for consumers. Furthermore, the setting of standards is likely to be a challenge from a competition law point of view as it is likely to result in inefficient competition and might provide a conducive environment for firms to engage in complex monopolies. We are of the view that the current legislative regime is more than sufficient to deal with product standards without being too intrusive. We propose that the powers to set products standards be removed from the regulatory authorities.	***circumstances.***
ASISA	**14(1)(g)**	We believe that the provisions of ss(g) are already included in ss(f) and hence can be deleted.	***Noted***
Promontory	**14(1)(h)**	Remove first comma (Grammatical/editorial)	***Noted***
Deloitte	**14(2)**	Given the very broad definition of "**financial customer**" (See Chapter 1), this sub-regulation seems to have implications that extend well beyond retail customers. Is this the intention of the sub-regulation and what would these implications be?	***Yes. See cl.54 of the revised FSR Bill***
ASISA	**14(2)**	We have concerns about the potential additional cost to financial institutions.	***Concerns are acknowledged***
Melbourne	**14(2)(a), 14(2)(b)(i) and (b)(ii)**	We note the absence of a similar provision in Australia, and commend the South African authorities on the inclusion of such a sensible and timely provision.	***Noted***
ASISA	**14(2)(b)**	On the face of it, the word "*contestability*" appears to be an error. If this word has been used deliberatively, clarity is requested on what the legislature intends by it.	***The word was used deliberately; however, the word is no longer used in the revised FSR Bill.***
ASISA	**14(2)(b)(i)**	We are of the view that when the phrase "*value for money and affordability of financial services*" is juxtaposed with the requirement of "*supporting financial inclusion*", this will lead to ambiguity as this is open to different and differing	***Agreed. See the revised used of the word under cl.53(1)(k) of the revised FSR Bill.***

		interpretation (e.g. if one considers that that there is a limit to the degree with which charges can be reduced for very small regular contributions then, if "*value for money*" is measured relatively, i.e. as an alternative to leaving cash in the bank, it is a less onerous hurdle. However, if the requirement is to provide inflation beating returns, this becomes impossible for very small amounts.) We request that clarity be provided on what is intended by the phrase "*value for money*" in this context.	
BASA	**14(2)(b)(i)**	Clause 14(2)(b)(i) – the role of the Market Conduct Authority allows it to continuously monitor the extent that the financial system is providing value for money and affordable financial services, thereby conducting a research trend research has the potential to have a huge reputational impact on a financial institution, especially being presented from a regulator. Our recommendation is that before publication of these research trends, this research should be thoroughly assessed with relevant stakeholders and the correct representatives within financial institutions and a decision taken at the appropriate levels of the regulatory authority as an incorrect assessment would resulting in a negative publication and would have a severe consequence for a financial institution. It should also be noted in the context of the definition "**consumer**" that the concepts "*value for money and affordable financial services*" have no regulatory relevance in the wholesale sector.	***The revised FSR Bill compels regulators to specify in their 'supervisory strategies' how they will perform their supervisory and regulatory functions consistent with the principles of transparency, openness to consultation, and accountability***
Deloitte	**14(2)(b)**	In relation to 14(2)(b), it's not clear what powers the Market Conduct Authority has to intervene if its continuous monitoring identifies a concern. We would recommend that sub-regulation (3) clarify these powers or that additional guidance be issued in this regard.	***The powers will be in terms of powers granted in this Act and the other sectoral laws.***
ASISA	**14(3)**	Section 14(3) enables a regulatory authority (as defined) to do anything necessary or expedient to perform its functions. On the face of it, this appears very wide. Whilst section 16(1) would appear to provide some limitation e.g. transparency and consistency etc., section 16(2) would seem to negate these limitations. There needs to be mandatory industry consultation in this process.	***Agreed. A consultation processes are provided for in terms of making legislative instruments of the revised FSR Bill – see Chapter 7.***
Resolution WG	**14(3)**	Subsection 14(3) seems to be rather unfettered in its expression of the powers available to the regulators, particularly when it states that: "*A regulatory authority may do anything necessary or expedient to perform its functions, and has for this purpose … such auxiliary powers as are necessary to exercise the powers and duties … [assigned to it in terms of this Act or a regulatory law]*".	***Noted. Subsection deleted from the revised FSR Bill.***

		Market participants are often apprehensive about such sweeping and unspecified powers, particularly given the absence of any specification of the grounds on which the powers in question may be exercised, the process to be followed in exercising the powers, the rights of appeal (if any), the checks and balances applicable, etc. In the absence of specificity on these matters, it is possible that the market could react adversely, especially in periods of higher market risk. I therefore suggest that consideration be given to a substantial tightening of the language used in the Bill in respect of the powers of the regulators (and the SARB), with a view to all powers being clearly specified, including: • the grounds on which each power may be exercised; • the process required to be followed in each case; • the appeal rights (if any); and • the checks and balances applicable.	
SAICA	**14(3)(a) and (b)**	The section states "*A regulatory authority may do anything necessary or expedient to perform its functions, and has for this purpose—* *(a) the powers and duties assigned to it in terms of this Act or a regulatory law; and* *(b) such auxiliary powers as are necessary to exercise the powers and duties referred to in paragraph (a) effectively*". It is unclear what is meant by "*auxiliary powers*" as this Act or regulatory law already specifies the mandate in which these authorities can operate. It appears that (b) is a duplication and we propose that it be removed.	***Agreed. Subsection deleted from the revised FSR Bill.***
ASISA	**14(3)(b)**	The FSRB should not bestow powers upon the regulatory authorities to create law, but should only create powers for the Regulators to regulate law. The regulatory authorities should not be able to make policy decisions and subordinate legislation. Please refer to the comment in our covering letter. Subordinate legislative powers should be specifically provided for in this FSRB or other financial sector laws only, and not in any auxiliary powers. Allowing for these auxiliary powers would amount to an abdication of powers by parliament. We suggest that section 14(3)(b) be deleted.	***The FSCA and the PA will have powers to make and supervise conduct and prudential standards respectively. See the Policy document for a further clarification on the proposed standard making powers granted to the regulators.***
World Bank	**14**	The Bill makes only limited provisions for the operational powers of the Market Conduct Authority. For example, there might be a general provision to the effect that the Authorities have all the powers required to fulfil their functions and also have specific powers relating to inspection of book, audits, investigations, the conduct of	***Agreed. The suggestions have been incorporated to the extent possible in of the revised FSR Bill, in addition to powers contained in sectoral law - see chapter 8 on Licensing, chapter 9 on Inspections and Investigations***

		hearings and enforcement and the licensing of regulated entities. It is suggested that consideration be given to including such provisions (unless of course they are to be contained in other legislation). See, for example, s.12A and Part 3 of the Australian Securities and Investments Commission Act: http://www.comlaw.gov.au/Details/C2013C00438/Html/Text#_Toc364688225	
15. Regulatory strategies			
Promontory	**15**	This section contravenes international norms, including core principles, in terms of regulatory independence – especially the role of the Minister and Treasury.	***This section has been amended.***
Resolution WG	**15**	It may be useful to include in the Bill some guidance as to what the regulatory strategy documents must contain. The current draft of section 15 leaves this rather vague. For example, it may be desirable if the Bill could set out some minimum requirements for the matters to be covered in the regulatory strategy, such as: • a statement of how the regulatory authority proposes to meet its statutory objectives, including regulatory requirements it may seek to impose on regulated entities, its approach to the monitoring and supervision of regulated entities, its approach to enforcement of regulatory requirements, its policies for crisis resolution, etc; • the principles to which the regulatory authority will have regard in meeting its statutory objectives; • the proposed KPIs it will seek to meet in order to fulfil its statutory objectives; and • matters relating to how it will observe principles of transparency, openness to consultation with affected parties, accountability, etc. It is not clear what role the Minister plays in regard to regulatory strategies. Section 15(1)(a) enables the Minister to provide published policy guidance, but it is not clear whether the guidance is binding (I assume not) or whether the Minister has any role in approving the regulatory strategy of the authority. I suggest further clarity on these matters. In this context, I suggest that reference be made to the relevant international principles (i.e. those promulgated by IOSCO, BCBS, IAIS, the IMF *Code of Transparency*, etc) with respect to the operational independence, transparency and accountability expected of a regulatory authority.	***Agree with the principle. The Minister will not have a role in approving the supervisory strategies of the regulators in the revised FSR Bill. However, the regulators will be required to consult Treasury and other financial sector regulators, including the NCR on their draft supervisory strategy.***

		Given that it is envisaged that the SARB will have powers relating to financial stability, including powers of crisis resolution (at least in situations where financial stability is threatened), might it be appropriate to extend section 15 to the SARB? This would be in accord with international principles relating to transparency and accountability – e.g. the relevant parts of the FSB Key Attributes and the IMF Code of Transparency.	
World Bank	**15**	**Art 15** states that the PA and the MCA are to prepare a regulatory strategy every three years, or more often when instructed by the Treasury. It would be useful to also allow the regulatory authorities to initiate an update of their strategies.	***Agreed. See cl.43(4) and 69(4).***
BASA	**15 and 16**	We understand the regulatory strategies can be considered as performance agreements between the regulatory authorities and the Minister of Finance. We support this approach and propose that these strategies should be made public. It is noted that deviations can occur from the regulatory strategy (Clause 15(3)) and it is recommended that circumstances which would allow deviation, should be listed in the Bill. It is also recommended that a timeline be set within which the first strategy must be in place after this Act comes into effect. Clause 16 sets out the principles which regulatory authorities must take into account when performing their duties, which may include the drafting of subordinate legislation to the Act. However Clause 16(3) provides that the Minister may make regulations expanding upon these principles, including the addition of new principles. This is potentially *ultra vires*, as the addition of new principles must be done by way of an amendment to the Act.	***Disagree, performance agreements are dealt with as a separate matter – under cl.31(2) for the CEO, and cl.57(8) for the Commissioner and Deputy Commissioners. The Authorities are required to adopt a supervisory strategy within six months after the effective date of the respective Chapters, and amendments to the strategy must be published in the Financial Sector Information Register established in terms of cl.223 of the revised FSR Bill.*** ***Section 16 has been deleted from the revised FSR Bill.***
SAIA	**15 and 16**	The proposal of regulatory strategies can be understood as a sort of performance agreement between the regulatory authorities and the Minister of Finance. This approach is supported, and it is proposed that these strategies should be made public. These provisions however does not build in any limits within which the deviation from strategy may be allowed, which implies an unfettered discretion on the part of the Regulator to re-focus its priorities and approach to supervision without Ministerial intervention. It is recommended that circumstances which would allow deviation should be listed in the Bill, and that due process should be followed in case of deviation of the strategy. It is also recommended that a timeline be set within which the first strategy must be in place after coming into force of this Act. Clause 16 sets out the principles which regulatory authorities must take into account	***Disagree, performance agreements are dealt with as a separate matter – under cl.31(2) for the CEO, and cl.57(8) for the Commissioner and Deputy Commissioners.*** ***Section 16 has been deleted from the revised FSR Bill.***

		when performing their duties, which may include the drafting of subordinate legislation to the Act. However Clause 16(3) provides that the Minister may make regulations expanding upon these principles, including the addition of new principles. It is agreed that regulations should be prescribed by the Minister in expanding on existing principles set out in this clause, but that any amendments or additions to existing legislation should only be introduced by way of an amendment to the Act. With regards to the establishment of the regulatory strategies, the Bill refers to the responsibilities of the MCA in formulating a regulatory strategy, and the responsibility of the PA in approving a regulatory strategy. Clarity is required on why a differentiation is made between the responsibilities of the Regulatory Authorities, and what the intention is with this differentiation.	***Each regulator (FSCA and PA) has a responsibility to formulate their own supervisory strategy, and must provide a copy to the other financial sector regulator for comment.***
Standard Bank	**15 and 16**	The concept of the "*regulatory strategy*" is supported and welcomed. Standard Bank believes that these strategies will provide an important, and much-needed, bridge between the financial sector policies set by National Treasury and the supervision and enforcement of the corresponding regulation by the regulatory authorities. This will foster greater alignment between government's policy intent and regulatory action. We propose that the regulatory strategies make provision for regular use of regulatory impact assessments to test the efficacy of legislation in achieving the desired policy outcomes; as well as greater use of cost-benefit analysis of new regulation before implementation to check the efficiency of the regulatory system. Standard Bank sees the regulatory strategies as performance agreement between the regulatory authorities and the Minister of Finance. We support this approach and propose that these strategies – or at least significant portions thereof - should be made public.	***Noted. Agreed. A financial sector regulator is required to consider all of the submissions made, and the expected impact of the instrument when deciding whether to make the legislative instrument – see cl.90 of the revised FSR Bill.*** ***Performance agreements will be a separate matter.***
ASISA	**15(1)(a) and (e)**	We submit that these strategies should be made available to the public. This section should be re-worded because it is not clear. Should the strategy be reviewed at least once every three years after consideration of any published policy guidance, or should it be done at least once every three years irrespective of any published policy guidance? May the Minister at any time request review, or may the Minister only request review after consideration of any published guidance? What if no policy guidance has been published? Does that mean that the strategy does not have to be reviewed once every three years?	***The strategy, and amendments to the strategy, will be published in the Financial Sector Information Register established in terms of cl.223.*** ***The section has been re-worded in the revised FSR Bill for clarity. See cl.43 and cl.69.***

Deloitte	**15(1)(a)**	The sub-regulation states that the regulatory authorities need to prepare regulatory strategies but it is silent about publication of these strategies. Is it the intention that these strategies should be published? If so, should publication be made explicit within the sub-regulations?	***The strategy, and amendments to the strategy, will be published in the Financial Sector Information Register established in terms of cl.223.***
ASISA	**15(3)**	This section can be simplified by merging it with section 15(1)(a) and we suggest that section 15(1)(a) be amended to read as follow, and that section 15(3) be deleted: "*15. (1) A regulatory authority must for purposes of section 14—* *(a) prepare a regulatory strategy as a general guide allowing such flexibility and deviation as may be reasonable~~, and review its strategy at least once every three years~~ or appropriate in~~at~~ the circumstances~~Minister's request, after consideration~~ of a particular case, and review~~any published policy guidance provided by the Minister;~~…*" Page 3 of the Media Statement provides that: "***2. Balancing operational independence and accountability of regulators*** *The Bill seeks to strengthen the operational independence of regulators, within a policy framework approved by government, while at the same time strengthening their accountability.*" Unfortunately we do not believe that the accountability of MCA is strengthened. In fact, it is diminished if compared to the current oversight of the FSB. Certainly the Bill makes provision for various committees but our concern is that there is no real oversight. For example, in the determination of strategy the MCA is only required to "*consider*" comments received from other regulatory bodies and Treasury. It is not clear whether the final strategy needs approval by the Minister. Currently the FSB is subject to a Board, but this will be done away with from the effective date of the FSRB. The phrase "*may not be interpreted as strict binding legal norms*" is not understood, and should be removed as we have proposed.	***Subsection has been deleted. See cl.43 and cl.69of the revised FSR Bill.***
SAICA	**15(3) read with 16 and 45**	**Regulatory Strategy** The text suggests that "*the strategy may not be interpreted as strict binding legal norms, but rather as a general guide allowing such flexibility and deviation as may be reasonable or appropriate in the circumstances of a particular case.*" We recommend	***Subsection has been deleted. See cl.43 and cl.69of the revised FSR Bill.***

		the strategy be split between those that are mandatory and those that act as a general guide in the event of a crisis. We believe this will strengthen the credibility and inter-agency coordination and eliminate potential disputes as result of sections that are not clear/ open for interpretation. We believe this section is not aligned and may potentially be in conflict with section 45 **Rules and joint rules made by regulatory authorities**. The reality is that legal forms don't necessarily cater for flexibility and deviation and are rather prescriptive. We are of the opinion Strategies should be principle-based which is in alignment with section 16 **Guiding principles** as well as the Financial Regulatory Reform Steering Committee's (FRRSC's) summary on Implementing a twin peaks model of financial regulation in South Africa, issued in 2013. In addition to the current regulatory strategy, we propose the need for a consolidated view of each supervised institution within each regulatory authority.	
16. Guiding principles			
ASISA	**16(1)**	In light of the word "*must*" in the first part of the sentence, we submit that these are not merely "*guiding principles*" as stated in the heading and hence suggest that the heading be changed to "*Regulatory~~Guiding~~ Principles*". The overall guiding principle should be to perform duties to ensure compliance with financial sector laws. We furthermore suggest that section 16(1) and subparagraph (d) be amended to read as follow: *"16. (1) When exercising its duties in terms of this Act or any financial sector law, a regulatory authority must take into account the need for –* … *(d) achieving outcomes-based results through the application of such powers; and*" We note that ss16(1) makes the provisions of this sub-section peremptory while ss16(2) could be interpreted to mean that ss16(1) is directory. We are concerned that if ss16(2) prevails, (i.e. that these are not binding legal norms) this could have the unintended consequence of impinging on the need for transparency, in particular in respect of the public consultative process in the making and promulgation of subordinate legislation. Clarity is needed on the binding nature of these provisions – as well as confirmation that the consultative process contemplated in the FSLGAA	***Subsection has been deleted. See revised FSR Bill.***

		will not be attenuated by this provision of the Bill. We base our views herein on the document drafted by the FSB and made public by National Treasury in September 2013: "*CONSULTATION PRINCIPLES TO BE INCORPORATED IN CODE OF NORMS AND STANDARDS OF CONSULTATION FOR THE BOARD AND REGISTRARS AS REFERRED IN FINANCIAL SERVICES BOARD LEGISLATION*" The FSLAA now compels the Minister to issue such a Code of consultation.	
Resolution WG	**16**	It may be desirable to add to section 16 a reference to principles relating to: • the need for the regulatory authority to consult affected parties, have regard to their views and provide a response to submissions made to it before finalising any regulations or other requirements; • the need to undertake effective cost/benefit analysis of any regulatory proposals and to publish this as part of the consultation process; • the need to seek to minimise compliance costs and adverse impacts on efficiency outcomes, consistent with meeting statutory objectives; • the desirability of establishing KPIs in relation to the regulatory authority's performance of its functions and to release information on a regular basis to enable interested parties to assess its performance against the KPIs (on the basis that KPIs should be set by the Minister, rather than the regulatory authority itself); and • the importance of adopting a competitive neutrality approach to regulation and supervision where practicable. Consistent with the principles of transparency and accountability, it may be appropriate to require the regulatory authority to publish (and keep under review) a statement of its guiding principles, following consultation with affected parties. As with section 15, it may be appropriate to apply section 16 to the SARB in relation to its financial stability functions (e.g. crisis resolution, macro-prudential supervision, lender of last resort, etc).	***Agreed. The proposed principles have been incorporated under the difference relevant sections of the Bill.***
Melbourne	**16(1)(c)**	We note a minor conflict in tenses, and suggest that the provision be re-worded as follows: "*the adoption of~~adopting~~ a risk-based approach to supervision*" (Grammar/editorial)	***Comment noted. Subsection has been deleted and principles fused into the functions of the regulators.***

ASISA	**16(2)**	Section 16(2) should be deleted as section 16(1) provides sufficient flexibility. A regulatory authority should always "*take into account*" as guiding principles, the items listed in 16(1) (and additional principles made under section 16(3)), when exercising its powers and performing its duties. The provisions of s16(2) violate the rule of law requiring legal certainty. It must be clear to those regulated by this Bill what law is to be applied.	***Subsection has been deleted.***
ASISA	**16(3)**	The phrase "~~*expanding upon*~~" is too broad in this section and in fact bestows legislative powers on the Minister without parliamentary oversight. We submit that it should be replaced by the phrase "*setting out the parameters of*" or "*setting out*", and that the words "~~*including adding new principles*~~" should be deleted.	***Subsection has been deleted.***
Part 2 **Market Conduct Authority**			
Standard Bank	**General**	**Market Conduct Authority** Standard Bank welcomes the establishment of the Market Conduct Authority and believes this is an important step in addressing the current fragmented regulatory system. As outlined above, we agree that all customers and clients should be treated fairly and therefore support the inclusion of all financial customers within the ambit of the Market Conduct Authority. However, we believe that it is important that appropriate standards of fairness and protection are applied to different types of customers and clients, and that this principle should be embedded in the mandate of the Market Conduct Authority.	***Noted. The FSCA will have the powers to make market conduct standards that include ensuring that financial products provided or offered to financial customers are suitable to their circumstances.***
17. Management and administration of Market Conduct Authority			
ASISA	**17(2)(b)**	As the Commissioner and Deputy Commissioners are the only members of the Executive Committee, with no provision being made for any other members, we suggest that section 17(2)(b) be amended to make it clear that the Commissioner and Deputy Commissioner indeed constitute the Executive Committee. Section 17(2)(b) should subsequently be amended to read: "*…(2)(b) constitute the ~~are~~ members of an Executive Committee of the Market Conduct Authority, of which the Commissioner is the Chairperson.*"	***Agreed. Section has been revised. See cl.57(2) and (4)***

BASA	**17 and 18**	There is no provision in clauses 17 and 18 specifically constituting the Executive Committee of the Market Conduct Authority. If it is intended that the Commissioner and the Deputy Commissioners will be the only members of the Executive Committee (i.e. there will be no other members), then the provision should state this. It is recommended that Clause 17(2)(b) be amended to read – "*constitute the* ~~*are*~~ *members of an Executive Committee of the Market Conduct Authority, of which the Commissioner is the Chairperson.*"	***Agreed. Section has been revised. See cl.56 as well as cl.57(2) and (4)***
18. Roles of Commissioner and Executive Committee			
Deloitte	**18, 19, 20 and 35**	These sub-regulations contain some very detailed provisions about internal administrative and governance matters within the regulatory authorities. We would normally expect this level of detail to be contained/ addressed within each authority's governance framework. We believe that this may limit the authorities' flexibility to an unnecessary degree. We would recommend that this detail be removed from the sub-regulations and included in the internal documentation of each regulatory authority. The latter can be made available to the public in the interests of transparency and supervisory governance.	***In order to provide more clarity, the revised FSR Bill separates the functions of the FSCA from the governance issues. The revised FSR Bill also allows the Commissioner to delegate any power or duty of the Authority that the Commissioner may exercise or perform in terms of a financial sector law to a member of the staff of the Authority - See cl.70(5)***
Promontory	**18(1)(b)(i)**	[We] can live with this structure but wonder whether it is not cleaner for all powers and responsibilities to reside in the Commission. The Chair would then have responsibility for managing the day-to-day operations of the Commission – but all delegations would come from the Commission. There would then be no need for most of the clauses in s18(2). This would then be a closer parallel with the PA, where the Oversight Committee has the powers.	***Agree with the principle. See revised FSR Bill.***
ASISA	**18(2) read with 20(2)**	Section 18(2), on the face of it, makes the Executive Committee "*responsible*" while section 20(2), on the face of it, appears to grant the Commissioner or acting Commissioner, a power which in effect has the consequence that the Executive cannot take any decision contrary to that of the Commissioner or acting Commissioner. This section appears to impose responsibility on the Executive Committee without any corresponding power. The power and accountability vests in the executive organ, not in the individuals who make up the committee. The veto right impinges on the independence of this administrative function, and renders the Commissioner vulnerable to possible political pressure.	***The revised FSR Bill provides for all powers and responsibilities of the FSCA to be exercised and performed by the Executive Committee. The Executive Committee is allowed to delegate certain powers to a member of the Executive committee. The proposal is that the Commissioner would then have responsibility for managing the day-to-day operations of the Commission – cl.61 – and may delegate any power or duty of the Authority that the Commissioner may exercise or perform in terms of a financial sector law to a member of the staff of the Authority in terms of cl.70(5)***

		The rationale for this apparent anomaly would be appreciated.	
19. Meetings of Executive Committee			
ASISA	**19(1) and 26(1)**	There should be a minimum requirement for "*regular*" meetings e.g. once per quarter.	***The Executive Committee must meet as often as is necessary for the performance of its functions – see revisions to cl.63***
ASISA	**19(4)**	Given that the decisions of the MCA could also impact on financial stability and systemic risk, we submit that participation of an advisory nature of financial sector representatives, albeit in a non-voting capacity, in the decisions of the MCA will be beneficial to the achievement of the objects of the Bill. To that extent, we propose that consideration be given to amending the Bill by requiring the peremptory, but non-voting, participation of financial sector representatives in the decisions of the MCA on matters involving or related to financial stability and systemic risk.	***Agree with principle for consultation, the Chair of the Executive Committee can invite any person (which includes financial institutions), to the meetings of the Executive Committee. Furthermore, the revised FSR Bill provides for the Financial Sector Contingency Forum as a platform for coordination and cooperation in respect of financial stability issues***
SAICA	**19(4) and 8(1)**	This section states : "*The chairperson may invite any other person to attend a specific meeting of the executive committee*" Section 8(1) refers to the meetings of the FSOC and makes the provision that "*the Chairperson may invite any person, including any representative from any other financial regulator*" to attend a specific meeting. We would like further clarity regarding who is designated as the "*other person*". In section 19(4) as the FSOC meetings (in addition to any person) also makes provision for other financial regulators to attend if invited. We are of the opinion that the inclusion of other financial regulators at the executive meetings of the Market Conduct Authority, especially if a mono-entity is regulated by "*other financial regulator*", may be necessary to represent all angles of the market.	***The Commissioner or the person presiding at a meeting of the Committee has the power and discretion to invite to the meetings of the Executive Committee, any other person, as and when this may be necessary but a person who is invited has no right to vote at the meeting – see cl.63***
World Bank	**19(4)**	The Bill allows the Chairperson of the MCA's Executive Committee to invite outsiders for specific meetings, but it does not specify on what grounds (e.g. expertise in a specialist topic) or in what capacity (i.e. with or without voting rights).	***Outside members invited will not have any vote. Invitations of non-FSCA members will just be for consultation. – see cl.63***
20. Decisions of Executive Committee			
BASA	**20(2), (3)**	Clauses 20(2) and (3) – decisions of the Executive Committee will only be a decision if the Commissioner or acting Commissioner support the decision. The Commissioner or acting Commissioner *may* give reasons for refusal or support of the decision. If the	***Subsection deleted.***

		Commissioner has voting rights in the Executive Committee, then the decision could be swayed. If the Commissioner does not have voting rights, then his/her subsequent "*support*" of the decision negates the function of the Executive Committee. It should be mandatory for the Commissioner/acting Commissioner to provide reasons for support for or a refusal to support a decision.	
Promontory	**20(2)**	This gives the Chair a veto power. What is the point of giving responsibilities explicitly to the Executive Committee (under s18) then giving the Chair power to veto them? This is a curious governance structure that would not pass muster if proposed by a regulated entity. What is the objective of centralising so much power in the Chair?	***Subsection deleted.***
21. Appointment of Commissioner and Deputy Commissioners			
ASISA	**21(1)**	The words "*~~an initial~~*" in subsection (1) should be deleted and replaced with "*a*". This subsection should apply to all appointments and re-appointments. The words "*~~, and on expiry of that term, may appoint that person for one more term~~*" should be deleted from this subsection because re-appointments and appointments in the case of a vacancy are dealt with in section 23: "*21. (1) The Minister must appoint a person as Commissioner or a Deputy Commissioner of the Market Conduct Authority for a~~an initial~~ term of office no longer than five years as the Minister may determine~~, and on expiry of that term, may appoint that person for one more term~~.*" The current wording of this subsection could be interpreted as limiting any appointee to a maximum of two terms of office. Is this the intention? The position requires clarification. The initial term of appointment of a Commissioner or the CEO is set at 5 years, but the Minister or Governor may appoint the incumbent for "*one more term*". There is no indication on the length of this second term, which could be longer or shorter than 5 years. We suggest that the second term should be limited to no more than 3 years, to prevent complacency and entrenched behaviour by incumbents.	***The wording to the section has been amended. The terms of office of the Commissioner and other Executive Committee members are specified in cl.58. The intention is to cap the term of office for a Commissioner and Deputy Commissioners to two 5-year terms.***
Resolution WG	**21**	Section 21 might usefully include reference to the qualifications (e.g. experience, skills, knowledge, etc) required for consideration for appointment as Commissioner or Deputy Commissioner.	***The Minister must appoint a person who has appropriate expertise in the financial sector as the Commissioner of the FSCA – see cl.57(1)***
ASISA	**21(2)**	Typographical correction - "*~~this~~*" should be "*his*", and the words "*~~for an initial term~~*" should also be deleted from subsection 21(2) to ensure consistency with section	***Noted***

		21(1): "*(2) The Minister must inform a person appointed ~~for an initial term~~ as Commissioner or Deputy Commissioner whether he or she will be reappointed at least 90 days before the expiry of ~~this~~ his or her term as Commissioner or Deputy Commissioner.*"	
22. Vacation of office			
ASISA	**22(2)and (3)**	These sections should be re-drafted to make it clear who will be conducting the enquiry and submitting the report on the finding.	***The process is clarified in terms of cl.59 of the revised FSR Bill.***
ASISA	**22 and 23, 28-30**	Given that the Financial Services Laws General Amendment Act requires positions in financial services institutions to be filled within 30 days, should there not be an equivalent time applicable to the regulators for the various positions required in the Bill?	***The revised FSR Bill provides that the Minister must inform a member, at least 90 days before the end of his or her term, whether it is proposed that he or she be re-appointed. See cl.58***
Melbourne	**22(2)(a) and 29(2)**	We query whether the Minister should have the power to remove the Commissioner or Deputy Commissioner of the MCA on the ground of "*poor performance*". We believe that this concept is vague and could detract from the actual or perceived operational independence of the regulatory authority, even with the requirement under section 22(2)(b) for an independent enquiry to make a finding to this effect beforehand. We also note this in relation to section 29(2) as it applies to the Chief Executive Officer of the Prudential Authority.	***Disagree. The process for removal of a Commissioner or Deputy Commissioner is adequate and transparent. See in cl.59 the role of an independent enquiry and National Assembly in the process.***
Resolution WG	**22(2)(a)**	Section 22(2)(a) refers to "*poor performance*" as one of the grounds on which a Commissioner or Deputy Commissioner may be removed from office. It may be desirable to include reference to the criteria by which poor performance is to be assessed – e.g. by reference to KPIs prescribed by the Minister or agreed between the Minister and the Commissioner.	***Agreed. See cl.57(8) of the revised FSR Bill that requires the Minister and the Commissioner to agree on the performance measures that will be used to assess performance as Commissioner, as well as the performance measures that will be used to assess the performance of a Deputy Commissioner that is to be agreed between the Commissioner and the person appointed as Deputy Commissioner***

World Bank	**22 (read with 41, 80, 56(2), schedule 2**	While we understand the need for accountability, we feel that certain sections of the Bill could raise supervisory independence issues. Our concerns relate amongst others to **Art 22** that specifies the grounds for vacation of office of the MCA's (Deputy) Commissioner, where accusations of misconduct, incapacity or poor performance alone are sufficient grounds for the Minister to suspend the (Deputy) Commissioner from office. Similar issues apply to the members of the Financial Services Tribunal **(Art 80)**.	***Agreed. See revisions to cl.59 of the revised FSR Bill, as well as cl. 157(4) that applies to members of the Financial Services Tribunal***
		In addition, the Bill does not explicitly provide legal protection to the senior management and staff of the PA and the MCA for acts undertaken in good faith (although this may be covered in other pieces of legislation).	***This has been provided for under the Immunities section in cl.221***
		Also, the Treasury decides about the membership of the Council of Financial Regulators **(Art 56(2))**, which essentially is a forum for cooperation and coordination between regulators, and as per Section **41** it appoints the members of the MCA's governance committees. The authority to amend **schedule 2** is given to Minister. From a supervisory independence point of view it would be preferable to give this power to the FSOC. The question also arises how the independence of monetary policy can be ensured, when the PA resides within the central bank. The UK twin peaks model provides a reference point, where the prudential authority is established as a subsidiary of the BOE, with its own governing body, although the members of the governing body are appointed by the court of directors of the BOE. This helps ensure that the conduct and oversight of prudential functions is separate from the monetary function of the BOE. Consideration could be given to this issue in the draft bill.	***Disagree. The FOSC is not a decision-making body – see changes to the composition, powers and function of the FSOC in of the revised FSR Bill.*** ***See the Policy document for a full explanation about the governance structure of the PA as well as its relationship with the Reserve Bank.***
23. Filling of vacancies			
ASISA	**23**	It should be made clear in this section that all appointments are for a maximum term of five years. It should be stated that subsection (2) is subject to subsection (3).	***Agreed.***
Part 3 **Prudential Authority**			

BASA/SAIA/ Standard Bank	**Prudential Authority**	SAIA and its members welcome the intention to shift from a purely institutional focus to include a more systemic prudential focus. It is highlighted the MOU between the MCA and the PA should contain clear provisions on prudential monitoring for all entities in the system to ensure functions are not duplicated and that roles are clarified.	***Noted.***
		In terms of the Bill, financial conglomerates are only mentioned in the *Memorandum* in respect of the objects of the Bill, whereas in the *Implementing a Twin Peaks Model of Financial Regulation in South Africa* policy document, explicit reference was made to the establishment of a conglomerate supervisor. As the supervision of financial conglomerates is a complex feature of the regulatory framework, it is of utmost importance to the financial groups of South Africa that clarity on how this will be achieved is provided. In particular, since Insurance will now be a dual regulated activity, it is important to provide clarity on how SAM requirements will be regulated by the PA. In addition, clarity must be provided on whether this specific function will fall within the PA, the Reserve Bank or FSOC.	***Noted. The revised FSR Bill now makes provisions for group supervision. Chapter 11 sets out the framework for supervision of financial conglomerates.***
24. Management and Administration of Prudential Authority			
ASISA	**24**	It must be clear from the FSRB that the PA consists of, inter alia, a Management Oversight Committee (MOC). Is the management oversight committee part of the Prudential Authority (PA), or does it oversee it from inside Reserve Bank? In other words, where does the management oversight committee reside?	***Noted. The management oversight committee is part of the PA and its members (other than the Chief Executive Officer) serve in a non-executive capacity. See Part 2 of Chapter 3 that sets out the governance structure of the PA***
Melbourne	**24**	We note that in Australia the prudential regulator is separate from the Reserve Bank. In the United Kingdom, on the other hand, the Prudential Regulation Authority is part of the Bank of England. Accordingly, there is no standardised approach to this question internationally. There is, however, research to the effect that a stand-alone regulator is preferable, and we would welcome an opportunity to provide any further input into this question.	
Resolution WG	**24**	Given the importance of the PA's functions and the fact that the Act creates it as a separate juristic body, it may be appropriate for this to be reflected in the arrangements for the appointment of the CEO – e.g. by making provision for the CEO to be appointed by the Minister on the recommendation of the Governor. This would provide a form of "double veto", such that the *Governor has the power to recommend but not appoint the CEO*, and the *Minister has the power to appoint the CEO but only*	***Noted. See Part 2 of Chapter 3 that sets out the governance structure of the PA***

		on the recommendation of the Governor. (Note that, in the UK, the CEO of the PRA is appointed by the Government, not the Governor of the Bank of England.) Similarly, the Bill could provide for the CEO to be removed from office, on appropriate grounds specified in the Bill, by the Minister on the recommendation of the Governor, rather than by the Governor alone (29(2)). The approach taken in this respect much depends on whether the PA is to be a quasi-autonomous body with its own responsibilities, powers, transparency obligations and accountability (which seems appropriate for such a body, and in keeping with international standards), or is to be a mere department of the SARB. Further consideration of this would be useful.	
		Section 24 makes no provision for one or more Deputy CEO(s) to be appointed to the PA. I suggest that consideration be given to the inclusion of such a provision; it is important that the PA has a formalised management structure, with persons able to assume responsibility for the management of the PA in the absence of the CEO – just as has been provided for with respect to the MCA. It would be desirable for the Bill to make provision for appointment qualifications for the CEO and Deputy CEOs of the PA, as is customary in many other countries.	***The revised FSR Bill makes provision for an acting CEO to act as the CEO when the CEO is absent from office or otherwise unable to perform his or her office, however an appointment of a Deputy CEO would be inconsistent with the SARB structure.*** ***The revised FSR Bill provides for appointment of a Deputy Governor of tested financial services experience as the CEO of the PA. Appointment will be as per the procedure of the SARB Act.***
Promontory	**24(2)**	Management Oversight Committee is not a very appealing label. Why not call it what it is – i.e. the PA Board.	***Preference is to call it the Oversight Committee.***
Resolution WG	**24(4)**	In section 24(4), it may be appropriate to make provision for the Management Oversight Committee to comprise the CEO and Deputy CEOs of the PA. I would question whether it is appropriate for the Governor to chair the Management Oversight Committee. Again, it much depends on whether the PA is to be a quasi-autonomous regulatory authority with its own statutory responsibilities, objectives, powers, etc or merely a department of the SARB.	***See the revisions made to this section in Part 2 of Chapter 3 that sets out the governance structure of the PA.***

		I suggest that further consideration be given to this issue, including as to the role and composition of the Management Oversight Committee. In this context, I would also question whether it is appropriate for all the SARB Deputy Governors to sit on the PA Management Oversight Committee. For example, does it make sense for the Deputy Governors responsible for monetary policy, currency or banking functions of the SARB to sit on the Management Oversight Committee of the PA? It might make more sense for the Management Oversight Committee to comprise the CEO of the PA (who would chair the Committee); two Deputy CEOs of the PA; the Deputy Governor with responsibility for financial stability; and one or two persons appointed by the Minister on the recommendation of the Governor (who should not be employees of the SARB) to bring some external (non-SARB) thinking and perspectives to the PA. On this latter point, I think it is important for the PA to have the benefit of external (non-SARB) persons to assist in the governance of the PA, given that they will be able to bring different sets of experience and perspective, and thereby reduce the risk of the SARB "mindset" overly dominating the PA.	***The different Deputy Governors will bring different expertise to the work of the Oversight Committee. Treasury agrees with the proposal for participation of non-SARB persons in the work of the Oversight Committee, and in this respect, the revised FSR Bill provides for the Chair to invite any person to participate in the meetings of the oversight committee.***
World Bank	**24** ref. 6, 11, 13, 17-23, 24-30, 33	Although the Bill provides for the PA to be a separate juristic entity with its own objectives, there are a number of provisions which suggest that the PA is to operate as a mere administrative unit of the SARB rather than a separate regulatory authority with its own mandate, powers, responsibilities, funding arrangements, and staff (Art 11 and 13). For example: • **The PA is not directly represented on the Financial Stability** Oversight Committee (FSOC). The members of the important FSOC consist of the Governor, the CEO and other Deputy Governors, the Commissioner and at least 2 Deputy Commissioners of the MCA and the Director General of the Treasury. However there is not a reference to the PA having separate representation on the FSOC (Art 6). • **The PA does not have its own separate Commissioners**. The Market Conduct Authority (MCA) has its own Commissioner and between 2 and 4 Deputy Commissioners, and form the related Executive Committee (Art 17-23). In contrast, the SARB is responsible for the oversight, functioning and administration of the PA, with a Deputy Governor of the SARB being appointed as the Chief Executive Officer. A Management Committee consisting of the Governor of the SARB, the CEO and Deputy Governors of the SARB is responsible for the PA's strategy, decisions and the exercise of its powers (Art 24-30).	***See revisions made to the objectives, powers, duties and governance of PA and FSCA section as well as the Policy document for a detailed explanation on the proposed governance structure of the PA and the FSCA. In addition, see revisions are made to the composition, powers and duties of the FSOC.***

		• **The PA must rely on the SARB for staff, accommodation and administrative support.** In contrast the MCA has responsibility for its own staffing and resources (Art 33). Consideration could be given to further providing for the independence of the PA. This could be achieved by adopting a similar approach to that provided for the MCA in respect of matters such as their objectives, governance arrangements, administrative powers and membership of the FSOC.	
25. Roles of Management Oversight Committee and Chief Executive Officer			
ASISA	**25(1)(d)**	In view of (d), we fail to see the point of giving the PA any powers since the Management Oversight committee is going to exercise them. In light of this we suggest that section 25(1)(d) be amended to read "*(d) exercising its~~the Prudential Authority's~~ powers and performing its~~the Prudential Authority's~~ duties in relation to—…*" The creation of the prudential authority as a separate body under the Governor, with a Management Oversight Committee does not, on the face of it, appear to be efficient Clarity on the rationale for the creation of the prudential authority as a separate body under the Governor, with a Management Oversight Committee is requested. Because of the MOC's role, it is not clear what the PA's functionality will be in that it appears that the PA is no more than a virtual entity.	***Noted. All the powers will rest with the PA but will be exercised by the MOC and the CEO. See the explanation on the proposed governance structure of the PA.***
26. Meetings of Management Oversight Committee			
	26(3)	It is recommended that the phrase "*in advance*" be inserted after "*determined*" to ensure consistency with 19(3).	***This is not necessary***
27. Decisions of Management Oversight Committee			

Resolution WG	**27**	This section states that the decisions of the Management Oversight Committee are binding only if the decisions are supported by the Governor. Again, I would question the appropriateness of this arrangement. It effectively means that the PA is a department of the SARB, with the Governor as the decision-maker. If that is the intended outcome, it might be cleaner to simply locate the supervisory function in the SARB as a department, and have it subject to the SARB's management arrangements. However, if the objective is to establish the PA as a quasi-autonomous regulatory entity, with its own responsibilities and powers, then the more appropriate arrangement may be the one I referred to above, such that the Governor does not sit on the Management Oversight Committee.	***Section amended to provide for a deliberative vote and if necessary a casting vote. See cl.39(2)***
		If the above suggestion is adopted, it would still be possible to have an arrangement under which the Governor has a veto right over matters relating to financial stability. For example, the Bill could provide for the Governor to have an override power on matters where the Governor forms the view, on reasonable grounds, that the actions of the PA may have significant implications for financial stability.	***The Reserve Bank has a responsibility for financial stability and can impose additional standards in respect of SIFIs through the PA. See Policy document for a detailed explanation of the role and powers of the Reserve Bank and the Governor in respect of financial stability.***
		Moreover, the Bill could empower the Governor to recommend to the Minister to remove the CEO (and Deputy CEO(s)) of the PA if the Governor was satisfied, on reasonable grounds, that the CEO or Deputy CEO(s) were not performing their responsibilities effectively (based on established KPIs, etc) or in a manner consistent with desired financial stability outcomes.	***The revised FSR Bill provides for the Governor, in consultation with the Minister to remove the Chief Executive Officer from office following an adverse finding by an independent inquiry. See cl. 33(3)***
ASISA	**27(2)**	*Mutatis mutandis*, we repeat the comment in respect of section 18(2) read with section 20(2) above in respect of the veto powers of the Governor. Is there a good policy reason for the Governor of the Reserve Bank to have a veto right as provided for in this section? In the absence of a good policy reason for such a veto right, this section should be deleted. What if the Governor is part of the minority vote?	***The revised FSR Bill makes provision for a deliberative vote and if necessary, a casting vote. See cl.39(2)***
Promontory	**27(2)**	This gives the Chair a veto power. As with MCA, What is the objective of centralising so much power in the Chair? It is not consistent with good governance principles.	
ASISA	**27(4)**	In our opinion this is superfluous and should be deleted.	***Disagree. The clause is meant to protect the decisions of the Committee.***
28. Designation of Chief Executive Officer			

Resolution WG	**28**	If the arguments set out above are accepted, then it would be appropriate to amend section 28 to make provision for the Minister to appoint the CEO of the PA on the recommendation of the Governor for a term not exceeding 5 years and to enable a reappointment for one more term not exceeding 5 years, rather than for the Governor to make the appointment. The section might also usefully be amended to make provision for a Deputy CEO of the PA to be appointed to assume office of the CEO in the absence of the CEO.	***Disagree as this is inconsistent with SARB structure. Appointment will be as per the procedure of the SARB Act.***
		I suggest that consideration be given to including in the Bill a reference to the qualifications/experience that a person must possess in order to be appointed CEO or Deputy CEO of the PA.	***The revised FSR Bill provides for appointment of a Deputy who has appropriate expertise in the financial sector as the CEO of the PA. See cl.31***
ASISA	**28(1)**	This does not read easily, and we suggest it be reformulated to read: "*The person designated in terms of section 24(3) as Chief Executive Officer holds office as Chief Executive Officer for a term of office no longer than five years or such lesser period as the Governor may determine, and on expiry of that term, may designate that person for one more term.*" The words "~~and on expiry of that term, may designate that person for one more term~~" should be deleted from this subsection because re-designations and designations in the case of a vacancy are dealt with in section 30(1). If there is to be a limit on the number of terms to be served, this should be made clear. The initial term of appointment of a Commissioner or the CEO is set at 5 years in s21(1), but the Minister or Governor may appoint the incumbent for "*one more term*". There is no indication on the length of this second term, which could be longer or shorter than 5 years. We suggest limiting the second term to no more than 3 years, to prevent complacency and entrenched behaviour by incumbents.	***The wording to the section has been amended. See cl.32 of the revised FSR Bill. The intention is to limit the term of office for the CEO of the PA to two 5-year terms.***
29. Vacation of office			
Resolution WG	**29(2)**	I suggest that consideration be given to amending section 29(2) to make provision for the CEO (and Deputy CEO(s)) to be removed by the Minister (rather than the Governor) on the recommendation of the Governor. As with the MCA, I suggest that consideration be given to including in the Bill the factors to which the Minister/Governor must have regard when determining the grounds for removal of the CEO (and Deputy CEO if the Bill is amended to include this) as regards inadequate performance – e.g. on the basis of a failure to meet KPIs	***Disagree. The process for removal of a CEO of the PA is adequate and transparent. See the role of an independent enquiry and Parliament in the process in cl.33***

		agreed between the CEO and the Governor/Minister.	
30. Filling of vacancy			
Resolution WG	**30**	I suggest that consideration be given to amending this section to make provision for the appointment or re-appointment of the CEO (and Deputy CEO(s)) to be made by the Minister on the recommendation of the Governor.	***Disagree. Appointment will be as per the procedure of the SARB Act.***
Part 4 **Functioning of regulatory authorities**			
31. Decision-making policy			
ASISA	**31**	Section 31 requires the PA to develop its own decision-making policy, which must include, *inter alia*, a system of delegation. This policy only needs to be given to NT for comment before being implemented. In other words, the PA "*authorises*" itself in terms of its own delegation powers. It is suggested that since a delegated power should ideally only be derived from a higher authority, the PA should not be able to set its own rules relating to such delegation powers, but rather that these should derive from regulations which the RA must follow. The decision-making policy should be published.	***Delegations are dealt with under cl.44 for the PA, and cl.70 for the FSCA***
	32	Delegation to "…*any staff member*…" in the case of the Prudential Authority is appears to be very wide when compared with that of the Market Conduct Authority. Given that one is dealing with delegation and sub-delegation, we are of the view that restricting the persons to whom delegation may be made, via regulation, may be the most desirable route to pursue. We propose that consideration be similarly given to restricting the persons to whom delegation may be made in the case of the Prudential Authority. Having set its own delegation-making policy in S31, the RA must then act within its own policy when it sets about delegating its powers further down the line. Usually, a delegated power may not itself be further sub-delegated, but s32 makes provision for the RA to delegate its powers (with certain exceptions) from the Commissioner to senior staff in the RA structure, but in terms of s31(e), and then further allows the delegatee to delegate down to another staff member, with no indication as to seniority	***Agree in principle. See cl.44 and 70 of the revised FSR Bill of the how delegation will happen within the respective authorities***

		or rank. In other words, there can be three levels of delegation starting with the Commissioner. It is submitted that the power to issue subordinate legislation should not be delegated. Alternatively, such delegation should be limited to one level below the Commissioner of Chief Executive Officer.	
32. Delegations			
SAIA	**32**	**Ratification of unauthorised decisions made by staff members - Clause 32** The provision allows for the validity of unauthorised decisions made by or action taken by staff members of the Regulatory authorities provided this is subsequently ratified by the Commissioner/CEO of the authority. There is no time period set within which the ratification of the decision may occur. This could lead to financial institutions being subject to unauthorised and possibly unwarranted supervisory decisions for prolonged periods of times without review from senior regulatory officials. It is proposed that a time period of at least 60 days for ratification be expressly included in the provision.	***See cl.44 and 70 of the revised FSR Bill and the Policy document for a detailed explanation of the how delegation will happen within the authorities***
Resolution WG	**32(1)(b)**	I suggest that consideration be given to amending section 32(1)(b) so that delegations are made to staff of the PA, rather than staff of the SARB. Again, this largely comes down to the issue raised above of whether the PA is a distinct regulatory entity which has its own staff (albeit many drawn from the SARB, but some presumably recruited externally) or is a department of the SARB.	
ASISA	**32(3)(a) and (b)**	We fail to understand how something can be part of a staff member's ordinary duties if it hasn't been delegated to them in the first place? We suggest that this section be deleted. We are concerned that ss32(3)(a) and (b) negates the principles of delegation and sub-delegation. To confer continuing validity, subject to the provisos in (a) and (b) could have the unintended consequence of prejudicial and deleterious effects on persons affected by that decision. Proposal: We request that in line with the principles of delegation and sub-delegation contemplated in section 32, and to avoid harsh and prejudicial consequences, the decision be regarded as having no force and effect until the provisos set out in (a) and (b) are met. Accordingly we propose the following amendment: "(*3) If a staff member takes a decision or any action that would have been valid had the power or duty authorising that decision or action been delegated to that staff*	

		member in terms of subsection (1), that decision or action has no force and effect unless it~~is valid despite the absence of such delegation if the decision or action~~ *(a) was taken in the course of that staff member's ordinary duties; and* *(b) is ratified by the Commissioner or Chief Executive Officer, as appropriate.*"	
World Bank	**32**	Both the national and the provincial governments of South Africa have concurrent jurisdiction with respect to "Consumer Law" (see South Africa Constitution sections 44 and 104 and Schedule 4). It is understood, however, that the only provincial consumer protection legislation is the Western Cape Act (which in broad terms relates to "*unfair business practices*" which are broadly defined and therefore likely to include financial services). However, the South African Government has established Provincial Consumer Affairs Offices throughout South Africa to provide consumers with complaint resolution, information and advice services. Consideration should be given to giving the MCA power to delegate certain functions and powers to provincial governments in certain cases. For example, this may be appropriate in respect of the regulation of small burial societies and stokvels operating in the provinces.	***Disagree.*** ***See cl.44 and 70 of the revised FSR Bill regarding delegation within the authorities, as well as***
Part 5 **Administrative matters**			
Part 5 Heading - Add the phrase "*of Market Conduct Authority*" after "*Administrative matters*".(Grammatical/editorial)			***Renamed the Financial Sector Conduct Authority***
33. General administrative powers			
ASISA	**33(1)(e)**	The rationale for this ss33(1)(e) would be appreciated. Furthermore, what checks and balances will be put in place to ensure that the establishment or participation in the operations of non-profit companies, partnerships, trusts or unincorporated joint ventures does not result in the unintended consequence of the abdication by the MCA of its powers or the exercise thereof by unauthorised entities? We are concerned that entities not subject to this Act will hereby be empowered, through the involvement of the MCA, to exercise powers which have been conferred only on the MCA, and will acquire indirect jurisdiction over financial institutions. Should this not be qualified with reference to specific purposes, for example consumer education, market research?	***Agreed. Sections deleted in the revised FSR Bill.***
Resolution WG	**33(2)**	Section 33(2) makes provision for the SARB to provide the PA with staffing, funding and resources. In contrast, the Bill provides for the MCA to have responsibility for its own staffing and resources.	***Comment noted. The PA must determine the personnel, accommodation, facilities, the use of assets, and other services and resources that it requires for its effective functioning. See***

		If the PA is intended to be a department of the SARB (i.e. legally indistinct from the SARB), then this arrangement is satisfactory. However, if the PA is to be a juristic entity in its own right (as provided for in the Bill), and with its own powers and responsibilities, then this might suggest that the PA should have responsibility for recruiting its own staff (albeit some staff from within the SARB) and managing its own resources (possibly in an accommodation with the SARB to derive efficiencies where administrative resources can be shared). The latter model would be more conducive to the PA developing the skills and resources it needs to do its job, including to recruit staff and contractors from outside the SARB where appropriate, rather than being dependent on the SARB. The latter approach would also reduce the risk of the PA becoming a clone of the SARB, with the risk that it does not develop the depth and breadth of skill and knowledge required to perform its functions, and to develop a "DNA" appropriate to that of a supervisor, as opposed to merely drawing from the "gene pool" of the central bank. This recognises that central banking and prudential supervision, while drawing on some overlap in skill, experience and knowledge, have different functions, different resource needs and a somewhat different cultural DNA.	***revisions made to Chapter 3, part 3 on the staffing and resourcing arrangements of the PA.***
ASISA	**33(2)(a)**	It appears that the PA is a virtual entity and that the SARB is the actual entity doing everything.	***See revisions made to Chapter 3, part 3 and the Policy document for a detailed explanation on the governance structure and resourcing arrangements of the PA.***
Promontory	**33(2)(b)**	First, if SARB is responsible for PA, should SARB not take out the insurance? More importantly, it is not clear what is being insured here. There is an indemnity below in s98 so are we talking here about loss of property, personal indemnity from accidents, etc?	***The PA may insure itself against any losses or liabilities – See cl.45(2)(d). Immunities (cl.221) are in respect of losses arising from decisions taken or actions performed in good faith in the exercise of a function, power or duty***
34. Staff of Market Conduct Authority			
Promontory	**34**	This part is where the staff indemnity in s98 should appear	***Disagree, liability clause to be kept general to cover both the FSCA and PA – see cl. 221***
Resolution WG	**34 and 35**	Depending on where the authorities get to on the fundamental question of whether the PA should be a quasi-autonomous entity or a department of the SARB, the Bill might need to be amended to include provisions similar to sections 34 and 35 to apply to the PA in much the same way as these sections apply to the MCA.	***See revisions made to Chapter 3, part 3 and the Policy document for a detailed explanation on the governance structure and resourcing arrangements of the PA.***
BASA	**34(2)**	There is no paragraph ~~*(i)*~~ in clause 34(1)(b). It is recommended that "*subsection*	***See revised FSR Bill.***

		(1)(b)~~(i)~~" be deleted and replaced by "*subsection (1)(b)*".	
35. Personnel disqualifications			
SAICA	**35(h)**	**Personnel disqualifications** No person may be appointed as a staff member in a regulatory authority if that person is of "*unsound mind*". It is unclear what constitutes an "*unsound mind*" and who may determine the disqualification of that person.	***Disagree. The term is a generally accepted and understood term. See inserted definition of 'disqualified persons' in the definitions section of the revised FSR Bill.***
Part 6 **Finances of regulatory authorities**			
36. Funds of regulatory authorities			
ASSA	**36**	**Cost of Regulation** In its submission on the Twin Peaks proposals, the Actuarial Society suggested that the cost of additional regulation, as well as Treating Customers Fairly, could result in additional costs that might be passed on to consumers. We once again draw attention to the difficult balancing act between a level of regulation, which rightly protects users of financial services, and an excessive burden of regulation, which drives up costs for the same users.	***Noted***
CCC	**36 and 37**	**Oversight and Accountability** It is our view, with respect, that the accountability of the Regulators and related provisions, need to go further and are not considered adequate accountability mechanisms for the Regulator. The appointment, and composition of, the executive management team by the Minister of Finance ("the Minister") does, in our view create the potential for a conflict of interest. It is our view that the lack of independence represents a source of systemic risk, which risk should be addressed and mitigated. An independent forum constituted to appoint the management team would be preferred.	***Noted. See revisions made to Chapter 3 and 4 on the governance of the PA and the FSCA.***

		It is our view that further clarity and information is required to confirm the nature and extent of the powers granted to the Financial Stability Oversight Committee ("FSOC"), as well as more detail regarding the circumstances in which such powers may be exercised. In its current form, it is not clear whether the FSOC merely advises the Minister, or whether the Minister is bound to follow the recommendations put forward by the FSOC. The extent to which the Minister has the ability to overrule FSOC decisions is also not clear at present. Clarity regarding the Ministers role and powers in relation to both Regulators as well as the FSOC is called for. Accountability of the Minister must also be given further attention. We have a concern around the composition of the FSOC. At present, the intention is that the FSOC is made up of representatives within the Regulators themselves and Treasury. It is our view that the FSOC should also include members that are not part of the Government structures. If the FSOC's primary purpose is to assist the South African Reserve Bank ("SARB") in maintaining financial stability, the inclusion of members that are not part of the Government structures would support the FSOC's objectives and its ensure independence and credibility.	***See membership, functions, powers and responsibilities of the FSOC in cl.19 of the revised FSR Bill and the Policy document for further details on the FSOC.***
		It is our view, with respect, that the Bill in its current form has furnished most of the power in the hands of the Regulator. Equally of concern is the apparent lack of a true consultation process. Where the Regulator is afforded the opportunity to act outside the formal regulatory process, the absence of a consultation process creates the experience that industry is being excluded, instead of being included in key processes, particularly where the outcome of the decision impacts industry. We will welcome further opportunities to engage and contribute towards the consultation process. In light of the fact that the decision of the MCA could also impact on financial stability and systemic risk, the absence of representatives from industry (even in an advisory capacity) is of concern. We would argue that industry participation in the decision making of the MCA on matters involving or related to financial stability and systemic risk will support the MCA achieving its objectives as set out in the Bill.	***The revised FSR Bill provides for the Financial Sector Contingency Forum as a platform for coordination and cooperation in respect of financial stability issues. The Forum will consist of representatives from relevant industry bodies, the financial sector regulators and other relevant 'organs of state', as determined by the Governor.***
		The Cape Chamber is concerned about the potential impact of costs. Additional information would be necessary to understand and evaluate the impact of the suggested "shift of resources". Any additional costs would have an impact on the amount available to consumers to save. Further to that, we have a concern that the design of the proposed model will lead to an increase in the current cost of regulation. The proposed levy structure has the potential to see the cost becoming untenable.	***Noted. See the Policy document for a detailed explanation on the funding, resources and governance arrangements of the PA and the FSCA***

Resolution WG	**36**	Section 36 makes provision for the MCA to be funded by a combination of sources, including fees or levies, while the PA would be funded solely via the SARB. Again, this goes to the issue of the status of whether the PA is a separate regulatory body (but under the ultimate control of the SARB in respect of matters relating to financial stability) or a department of the SARB. If the latter approach is adopted, then the proposed funding structure (ie where the SARB funds the PA) might be appropriate, although it does raise the question of whether, even under that model, the PA should have the power to defray some of its expenses via levies imposed on regulated entities. If the former approach is adopted, whereby the PA is quasi-autonomous, then the proposed funding model is probably not appropriate. In that case, a better funding model might be one in which the PA is funded through a combination of levies imposed on regulated entities (on a cost recovery basis), with the balance of funding either being via the SARB or the Government. The UK PRA funding model provides an example of this approach	***See the Policy document for a detailed explanation on the funding, resources and governance arrangements of the PA and the FSCA***
Standard Bank	**36**	Standard Bank's position is that the implementation of the Twin Peaks system should not result in an increase in the contribution of banks towards funding the regulatory authorities, **particularly given the current treatment of cash reserves by the Reserve Bank.** We have note that in the UK the Financial Conduct Authority (FCA) is funded entirely by the firms that it regulates, The Prudential Regulatory Authority released a consultation paper in April 2013, entitled, "*Prudential Regulation Authority Regulated fees and levies: rates proposals 2013/14*." It is recommended that a similar consultation exercise is conducted in South Africa regarding the appropriate funding model for Twin Peaks.	***Noted. See the Policy document for a detailed explanation on how the funding of the regulators will be achieved***
World Bank	**36**	The funding arrangements for the Authorities are not clear. For an Authority to be effective in fulfilling its objectives, it is obviously necessary that it have adequate funding. In this regard, Art 36 of the Bill is to the effect that the funds of the "*may consist of*" specified amounts including money raised as fees and related interest on overdue fees. It is not clear from where the power to levy the abovementioned fees arises or whether the fees can be imposed both on a "*fee for service*" basis and as a levy on a regulated institution. Ideally these issues would be clarified.	

<table>
<tr><td>ASISA</td><td>36(1)(a)</td><td>Please refer to our comments on section 70(4).
We are concerned that this empowerment could result in the unintended consequence that the temptation exists that penalties could be imposed for funding purposes. To guard against such temptation, we propose that consideration be given to obtaining funding by an allocation by the fiscus i.e. a budget approved by National Treasury. Furthermore, and in line with this submission, we are of the view that consideration should be given to the administrative penalties being deposited in the general fiscus.
Specific functions in respect of which fees may be charged should be defined.</td><td rowspan="4">Noted. The revised Bill does provide for the Authorities to making determinations of fees and charges in terms of the Levies Act (i.e. Financial Sector Levies, Fees and Charges Act, 2015). See the Policy document for clarification around the treatment of funds raised through penalties.</td></tr>
<tr><td>Promontory</td><td>36(1)(a)</td><td>It is poor governance for an authority to keep penalties – these should be paid into consolidated revenue. Otherwise it establishes perverse incentives.</td></tr>
<tr><td>Deloitte</td><td>36(1)(a) read with 70(4)</td><td>This sub-regulation allows the authorities to retain the proceeds of administrative penalties or sanctions while sub-regulation 70(4) restricts how the authorities can utilise these proceeds. However one of the uses to which these proceeds can be put, viz. consumer protection, is very broad and may lead to an element of subjectivity. Are there sufficient mechanisms in place to ensure appropriate transparency and governance with regards the use of these funds as well as the most appropriate use of the penalties? If so, could we please obtain additional guidance with regards these mechanisms? For example, administrative penalties levied for financial crime regulatory breaches could be channelled to fighting financial crime.</td></tr>
<tr><td>ASISA</td><td>36(2)</td><td>Section 70(4) specifies for what purposes administrative penalties may be used. If our submissions above in relation to penalties being deposited in the general fiscus are not accepted, this section should be subject to section 70(4) and we suggest that section 36(2) be amended to read: “<u>Subject to section 70(4),</u> a regulatory authority must utilise its funds for the defrayal of expenses incurred by the regulatory authority in the implementation of this Act and the regulatory laws.”</td></tr>
<tr><td colspan="4">37. Financial accountability of Market Conduct Authority</td></tr>
<tr><td>Promontory</td><td>37(1)</td><td>Can [there be] one exclusion here? As [we] understand it, the PFMA imposes certain reporting lines (e.g. the CFO must report directly to the CEO) which restrict how the MCA may be organised. [we suggest} - earlier (e.g. in s18(1) that the Commissioner is responsible for:</td><td>Disagree. See cl.51(3) states that the FSCA is a national public entity for the purposes of the Public Finance Management Act, and the Commissioner is the accounting officer of the Authority for the purposes of that Act</td></tr>
</table>

		"*(c) the organisational structure and effectiveness of the Commission;*" then here could say: "*(1) The Market Conduct Authority is a national public entity for purposes of the Public Finance Management Act, and, other than provided for in s18, must comply with the provisions of that Act applicable to national public entities.*"	
SAICA	**37(2) read with 36(1)(e)**	**Financial Accountability of Market Conduct Authority** The text states "that: *The Commissioner of the Market Conduct Authority is the accounting officer of the Market Conduct Authority for purposes of the Public Finance Management Act*". **Funds of regulatory authorities** Funds in the case of the Market Conduct Authority may include fees transferred from the FSB. We are concerned with the limitations in independence and objectivity as it can be possible for the Commissioner to also be the accounting officer and to what extent does that not limit his independence to the Market Conduct Authority? Is the expectation not that the FSB will be dismantled and transformed into the Market Conduct Authority?	***Agreed. The current FSB will be dismantled and replaced by the new institution.***
38. Financial accountability of Prudential Authority			
Part 7 **Governance and reporting**			
FIA	**General**	**Balancing operational independence and specifically accountability of regulators** The lack of accountability is probably the one issue the FIA has challenged in the current dispensation. If we look at the mission and vision of the FSB in its current format it should be nothing else but absolute accountability. NO institution has reason for existence and or any credibility without any form of accountability.	***Noted and agree. The revised Bill does more to emphasise the principles of accountability***
39. Reporting			
Resolution WG	**39**	Consideration could be given to including a provision in section 39 or elsewhere in the Bill to empower the Minister to commission a report to be provided by a party appointed by the Minister to evaluate the performance of the MCA or PA – i.e. to provide scope for periodic performance audits of the regulators. This would help to	***Agreed. The revised FSR Bill provides for the CEO of the PA and the Commissioner and Deputy Commissioners of the FSCA to sign performance agreements with the Governor and the Minister respectively. Failure to meet their agreed performance***

		strengthen the accountability and ultimately the performance of the regulators. If such a provision is included, it might be appropriate to extend the concept to the SARB, such that the Minister could appoint a person to evaluate the performance of the SARB in relation to its financial stability functions.	***levels as per the performance agreement can be a reason for removal following such a finding by an independent inquiry.***
FIC	**39(2)**	The impact of clause 39(2) should be considered. This clause provides that the Minister may request a regulatory authority, at any time, to provide information on – (a) The performance by the regulatory authority of any of the powers and duties assigned to it in terms of this Act or a regulatory law; (b) The implementation and enforcement of this Act or any regulatory law; or (c) Any such matter concerning financial services, financial markets or financial institutions, subject to section 95. This raises the possibility of dual reporting where a regulatory law also makes provision for reports to be submitted to the Minister on the implementation of that regulatory law.	***The accountability of regulators is strengthened. For instance cl. 76 requires that the financial sector regulators and the Reserve Bank to at least annually as part of their annual reports, or upon request, report to the Minister, the Cabinet member responsible for trade and industry and Parliament, on steps taken to co-ordinate, co-operate, collaborate and consult with each other.***
40. Governance committees for Market Conduct Authority			
Deloitte	**40**	In accordance with this sub-regulation, the Director General of the National Treasury is required to appoint three governance committees for the Market Conduct Authority. In contrast to the level of detail provided with regards the internal administrative and governance matters in respect of the Prudential Authority and the Market Conduct Authority, there is limited guidance about these governance committees , for example on their ability to affect the day-to-day operations of the Market Conduct Authority. Given the important role that will be played by these committees we would recommend that further clarification be given regarding the roles and responsibilities of these committees to allow greater transparency with regards the independent operations of the Market Conduct Authority.	***Disagree, the legislation is clear. These committees are only appointed as governance committees and are not intended to provide strategic guidance or direction to the FSCA.***
Melbourne	**40**	We note the establishment of these governance committees with approval, and commend the South African authorities for their far-sightedness in establishing them, especially the committee as contemplated by s40(1)(b), which, if operated effectively, could provide far-ranging insights into current trends and research internationally.	***Noted.***
Resolution WG	**40**	Depending on the decision reached as to the broader question of whether the PA should be a quasi-autonomous juristic entity, it may be appropriate to extend the governance committee arrangement set out in section 40 (in relation to the MCA) to the PA, with	***Noted. The governance committees in the case of the Reserve Bank will be considered taking into account the existing governance structures in order to minimise unnecessary cost***

		appropriate modifications, rather than adopt the provisions in section 42. Section 42 does not make provision for any external scrutiny of the governance of the PA; such scrutiny lies solely with the board of the SARB. I suggest that consideration be given to including provision for some form of external scrutiny. A similar question might arise in relation to the SARB itself, at least in respect of its financial stability functions.	***and duplication.***
Promontory	**40(1)**	This [seems] quite intrusive and 3 committees seems like [too much]. At a minimum [we] suggest these be brought together into a single Governance Committee.	***Noted. See revised cl.67 of the revised FSR Bill that provides for the DG to appoint one or more committees***
41. Composition and operation of governance committees of Market Conduct Authority			
42. Governance of Prudential Authority			

CHAPTER 4: Co-operation and Coordination

ASSA	**General**	**Extent of Regulation** As stated in its submission on the proposals that preceded the publication of the draft Bill, the Actuarial Society believes that clearly defined roles and areas of jurisdiction are required to avoid confusion and delays. The Actuarial Society wishes to point out, however, that the numerous requirements for consultation between the Market Conduct and Prudential Authorities, with the intervention of the Minister in some cases, could have the unintended consequence of a lack of responsiveness to a rapidly evolving industry, as well as delays in the implementation of key regulatory initiatives.	***Comment noted. The general co-operation provisions have been enhanced – see chapter 6. The revised Bill also seeks to ensure there is adequate industry consultation through participation in forums such as t the Financial Sector Contingency Forum that is to be established by the Governor. Furthermore, the Bill has strengthened the provisions relating to how Regulators must co-operate and collaborate with each other in relation to performing their functions.***
FIA	**General**	**Enhancing coordination and cooperation between regulators** The FIA welcomes the objective to optimise coordination between regulators, which also includes the Council for Medical Schemes (CMS). One of the FIA's concerns is that because intermediaries will fall under the Market Conduct Regulator the Prudential Regulator might not always be in touch with the role of intermediation. The same concern holds with regards the Prudential Regulator's understanding / consideration of the impact of its decisions on the intermediary environment. We therefore believe it is important to establish appropriate channels between the two regulators to consider such issues before implementing changes.	***Please see comment above.***
Promontory	**General**	It would be helpful to have a general informational sharing power here among MCA, PA and SARB – with reference to s95	***Comment noted. Cl 76 of the revised FSR Bill proposes that the respective regulators enter into MOUs that need to outline how they will comply with their duties to co-operate and collaborate with each other with respect to, among other things, information sharing.***
Strate	**General**	**Coordination with FMI, such as the CSD, in resolution and recovery processes** At a practical level, market infrastructures play a critical role in resolving crises involving their participants or their respective markets. The market infrastructures do not adequately feature in the resolution and recovery structures provided by the Bill. In the absence of the intended separate Resolution and Recovery Act, this Bill would in a financial crisis need to recognise the structures and processes of the market infrastructures, as it would otherwise not be optimally functional in these circumstances. Notably, section 36(2)(x) of the Financial Markets Act gives a CSD	***While the revised FSR Bill provides powers for the Prudential Authority to make standards with respect to licensed financial institutions (including market infrastructure) at a high-level, the scope of these standards does includes recovery and resolution plans in respect of financial product providers. The intention of the Bill is not to pre-empt what will be contained in the Resolution and Recovery framework that is a concurrent process.***

		power to make CSD rules regarding the administration of securities and related matters in respect of an insolvency proceeding of a participant. Strate submits that the Bill should give cognisance to the role of market infrastructures in crisis resolution, as well as their established procedures (e.g. CSD rules and directives) when dealing with certain crisis scenarios in their respective market environments. It should also provide for a co-operative mechanism amongst all financial regulators, not only the two Regulators.	
SAIA/ Standard Bank	**General**	**Co-operation and coordination** SAIA and its members support National Treasury's objective to enhance coordination and co-operation between financial sector regulators. International experience suggests that the success of the twin peaks model will depend on the achievement of this objective. In the FSAP of the South African financial sector, the IMF (*Financial System Stability Assessment*, 2008) recommended that South Africa take steps to enhance coordination and information exchange between regulatory agencies. The importance of coordination and cooperation between financial sector regulators can therefore not be overstated. We understand that government has looked at the experience of other countries that have introduced Twin Peaks, and has taken note of the appropriate lessons particularly the importance of strong coordination mechanisms between the various financial regulators. We welcome the proposed Council of Financial Regulators and also support the provision for Memoranda of Understanding between the Prudential Authority and Market Conduct Authority; as well as the concept of joint rules.	***Comment acknowledged***
43. Co-operation between regulatory authorities			
Resolution WG	**43**	I suggest that consideration be given to extending section 43 to include the SARB in relation to its financial stability responsibilities and powers – including its powers in relation to payment systems, crisis resolution powers, powers to determine when an entity is to be considered systemically important, provision of lender of last resort assistance to a particular entity, etc. It is presumably as important for the SARB itself to be subject to appropriate cooperation obligations in respect of these matters as it is for the PA and MCA	***Agreed. The revised Bill assigns responsibility to the Reserve Bank over matters relating to financial stability, can impose additional prudential standards to achieve macroprudential outcomes or mitigate systemic risk. The Governor may also give direction to the financial sector regulators if a systemic event has occurred or is imminent and the regulators must comply. cl 25 specifies the requirements for the memoranda of understanding between financial sector regulators and Reserve Bank relating to financial stability***

World Bank	**43**	**Cooperation arrangements** Effective consolidated supervision would also presume the presence of well-established cooperation and information exchange arrangements between the various supervisory agencies. While we expect the technical details to be part of the inter-agency Memorandum of Understanding (MoU) that is to be drafted, it would be advisable to make **Art 43** that deals with these aspects more specific. E.g., it is not fully clear what is meant by "*generally assist and support each other*"; "*matters of common interest*". Similarly, the draft Bill could be more explicit on several practical aspects pertaining to groupwide supervision and interagency cooperation. As an illustration, the draft Bill does not make reference to any joint inspection work to be undertaken by the PA and the MCA. Similarly, it does not reference the coordination of inspection plans between both agencies, nor does it establish a routine exchange of inspection reports between the two agencies. It would also be good to elaborate on licensing and re-licensing (i.e. for financial institutions that are to initiate a new business line as a result of which they will also be regulated by the other supervisory authority). **Art 43** and related provisions contain strict requirements relating to the need for the Authorities to cooperate with each other. The obligations have the potential to limit the independence of the Authorities, which is a concern given the possibility of a conflict of interest between the interests of a market conduct regulator and a prudential regulator. For example, the consequences of sanctioning a financial institution for noncompliance with consumer protection provisions could have an impact on the soundness (or perception of soundness) of a financial institution. In such a situation the PA may not wish the MCA to impose the sanction. Alternatively, it may be the case that there is high political or public pressure for the MCA to deal with consumer issues (such as in relation to bank fees or interest rates on consumer loans) and the PA does not agree with the proposed course of action. A possible alternative approach would be to have some flexibility as to how the cooperation arrangements would work in practice. For example, a MoU might make provision for: • Consultation in relation to proposed policy or regulatory changes which are likely to impact both Authorities; • Mutual assistance and cooperation in relation to areas of mutual interest including coordinating collection of information, supervisory action, joint task forces and collection of statistical information;	***Comment noted. The revised FSR Bill makes it clear that the financial sector regulators, the Reserve Bank and the National Credit Regulator must co-operate and collaborate with each other in performing their functions in terms of the Act and the other financial sector laws. The requirement is to coordinate action to the extent that is appropriate and practicable, while also minimising duplication of effort and expense. Furthermore they are required to enter into, the MoUs that should also outline how they will comply with their duties and collaborate with each other, including on matters relating to making standards, licensing, inspections and investigations, and any regulatory and supervisory action.***

		• Sharing of information which is relevant to the responsibilities of both Authorities (subject to any legal constraint); and • Joint representation at international conferences but if only one Authority can be represented, there could be an obligation to consult. This approach would be similar to the approach taken under the MoU between Australia's "Twin Peaks" – ASIC and APRA– see http://www.apra.gov.au/AboutAPRA/Documents/ASICMoU.pdf	
Melbourne	**43(1)**	We query whether an absolute obligation to co-operate ("*must co-operate with each other*") is appropriate and whether it might be better – and more realistic – to amend the subsection as set out below. This would also be consistent with the drafting of section 14(1). "*(1) When exercising their respective powers and performing their respective duties in terms of this Act and the regulatory laws, the regulatory authorities must take all reasonable steps within the means at their disposal to co-operate with each other in accordance with subsection (2) and any other requirements of this Act.* *(2) For purposes of complying with subsection (1), the regulatory authorities must strive to do the following—*"	***Disagree. It is the intention that the regulatory authorities must co-operate and collaborate with each other.***
Melbourne	**43(2)(c)**	We query whether it would be clearer to amend this to read as follows: "*consult each other when required by this Act to do so as a formal requirement ~~before a specific decision is taken~~;*". Otherwise, it would not appear to be clear when consultation is required "*as a formal requirement*".	***Comment acknowledged. The entire section has been revised.***
44. Memorandum of understanding			
FIC	**44 read with 46, 47 and 48**	The Bill does not specifically spell out how the responsibility for supervision and enforcement of compliance with the FIC Act is to be organised between the MCA and the PA. In respect of mono regulated activities, it is assumed that supervision and enforcement of compliance with the FIC Act will be the responsibility of the MCA. In respect of providers of dual regulated activities, it is assumed that supervision and enforcement of compliance with the FIC Act will be addressed in the memorandum of understanding between the MCA and the PA. With respect to the latter, it is of concern that the Bill is silent on the issue of any form of consultation or co-ordination with other regulatory authorities in so far as the matters to be dealt with in the memorandum of understanding affect the implementation of	***Comment noted. The revised draft proposes, as a specific function of each of the financial sector regulators, co-operation with the Financial Intelligence Centre in preventing and combating financial crime. The cl.77 MoU between the financial sector regulators should also specify how they will co-ordinate, co-operate, collaborate and consult with each other in relation to the performance of their functions in terms of the Financial Intelligence Centre Act.***

		regulatory laws that are the responsibility of the other regulatory authorities. The same concern is extended to the content of **clauses 46, 47 and 48** which deal with the making of rules by the regulatory authorities, particularly the rules relating to the MOU. It is also questioned whether it is sufficient to leave matters such as the demarcation of the scope of supervisory responsibilities between the MCA and the PA (e.g. the responsibility of compliance with the FIC Act) only to be determined by a memorandum of understanding between the MCA and the PA. Consideration should be given to provide a clear indication of how these responsibilities are to be organised in the Bill itself.	
Resolution WG	**44**	Again, I suggest that consideration be given to extending section 44 (with modifications as appropriate) to the SARB, such that there is an obligation on the SARB, the PA and the MCA to enter into, and to publish, MOUs (bilateral and/or multilateral) in relation to all matters relevant to financial stability and financial sector regulation.	***Agreed. Please see cl. 25 of the revised FSR Bill that specifies that financial sector regulators and Reserve Bank must enter into a memorandum of understanding with respect to how they will comply with their duties to co-operate and collaborate with each other in relation to financial stability, as well as an MoU with each other under cl. 77.***
BASA/ SAIA	**44(1) read with 14 and 55**	**MOU between the Prudential Authority and the Market Conduct Authority - Clauses 14; 44 and 55** In terms of Clause 44(1) where the PA and MCA are required to enter into a MOU, it is recommended that the MOU should address the following: • It is proposed that the role of a lead regulator is defined in the MOU in terms of the lead regulator's responsibility and accountability in relation to the entities that is assumes lead regulatory responsibility for, as well as the regulator's power in relation to the other regulatory authority. Clause 55(1)(a) is not clear on the process to be followed in instances where a lead regulator (after being consulted by another regulator) does not agree with the proposed action to be taken against a financial institution. This should be addressed in the MOU. • In terms of overlapping mandates, the Bill does not clearly articulate which regulatory authority is responsible for setting product standards for dual-regulated activities. In terms of Clause 14(e) the PA and MCA are both required to set product standards, whilst clause 14(2)(b)(i) requires the MCA to ensure that the financial system meets the needs of financial customers in terms of appropriateness, value for money and affordability. It is recommended that the responsibility for	***The MOU between the authorities has been revised to give better clarity regarding matters the regulators should be collaborating and coordinating on at a minimum. The concepts of a "lead–", "mono–" and "dual–" regulated no longer apply. An authority designated in terms of Schedule 2 as the licensing authority for a financial sector law is responsible for granting, issuing, imposing conditions on, varying, suspending or cancelling a licence in terms of the financial sector law. However the revised draft Bill proposes standards that may be applied by either regulator to give effect to dual supervision. Please see Policy document for further explanation.***

		setting product standards is addressed in the MOU. In addition, dual-regulated entities must seek the approval of both regulatory authorities on various matters, coordination between the PA and MCA is thus crucial to ensure efficiency and to avoid preventable delays • The MOU should also address the processes for authorization (as defined), especially for dual regulated activities. • Timelines, in terms of when the MOU must be entered into between the regulators. SAIA members have assumed that the role of the National Payments System Department ("NPSD") within the Reserve Bank will remain unchanged, at least for the first phase of Twin Peaks. Given that the oversight and management of the National Payments System has both prudential and market conduct elements, it is proposed that the Bill also requires that an MOU is entered into between the PA, MCA, and the NPSD.	
Part 2 **Co-operation in rule-making**			
45. Rules and joint rules made by regulatory authorities			
ASISA	**45-52**	We would appreciate clarity and confirmation in respect of the public notice and comment opportunity in line with PAJA - is this also contemplated and included in section 49(1)?	***Chapter 7 sets out a process of making legislative instruments.***
BASA	**45-52**	The power to make "*rules*" lies within the purview of each piece of legislation and we do not believe that it is legally competent to create the power to make rules under one piece of legislation in terms of another. We also believe that the rule making process should be restricted generally in the same way that it is restricted specifically in clause 104. It is recommended that: • the power to make "*rules*" should be more fully prescribed in the Bill (i.e. what situations will permit the making of rules) and that the power should be spelt out (i.e. which circumstances permit rules to be made as is the case in other legislation – see for example, section 171 of the National Credit Act). • Reference to "section ~~*105*~~" in clause 45(1)(a) should read "section *104*".	***The revised FSR Bill no longer refers to the concept of "rules" or "joint rules" but proposes that each of the authorities be empowered to make standards with respect to licensed financial institutions. Furthermore a category of standard has been introduced that is a "joint standard" that may be issued through collective agreement by the authorities.*** ***It is also proposed that standards are subject to much more stringent consultation processes. The Authorities must issue a consultation process within a specified period – Chapter 7 sets out a process of making legislative instruments.***

		• A sub-clause 45(3) be added which states – "(3) A regulatory authority may only make a rule in terms of this Act if it considers that it does not have the power for it to make such a rule in terms of a financial sector regulatory law." • All joint rules, regulations and codes of good practice should be published for public comment and where possible, there should be public hearings.	***The anchor powers for each of the Authorities will be contained in this legislation and are more an overlay than duplication. It is Treasury's view that authorities accessing powers in terms of different pieces of legislation is in any event current practice, and it is not likely that there would be conflict. Sectoral law will continue to exist, and the Twin Peaks legislation is intending to give the authorities an overlay of powers in terms of issuing standards, both in terms of this proposed legislation, and in terms of powers contained in Sectoral law. Please see Policy document for further explanation.***
JSE	**45 – 50 and 54**	It is of obvious importance that the regulatory authorities established by virtue of the provisions of the FSRB are able to promulgate and enforce "*rules*" but we are concerned that the use of this term may lead to some confusion. Market infrastructures such as the JSE and STRATE adopt and enforce rules and listings requirements that form the basis of the agreement in terms of which, for example, issuers are able to list their securities on the JSE. These rules have to be approved by the Registrar of Financial Markets and the JSE is responsible for the enforcement thereof. The Registrar of Financial Markets and the Minister of Finance, have, in terms of the provisions of the FMA, authority to promulgate and enforce delegated legislation in the form of regulations. There is therefore an existing and well established hierarchy of peremptory requirements that form the basis of the regulatory structure in the financial markets, firstly the original or superordinate legislation, the FMA, then the delegated legislation such as Regulations promulgated by the Minister or the Registrar of Financial Markets and then the rules and listings requirements of the JSE. We assume that the "*rules*" mentioned in these sections will have the status of delegated legislation and it would, in our view, be more appropriate to use the term "*regulations*" in these sections.	***Disagree. The anchor powers for each of the Authorities will be contained in this legislation and are more an overlay than duplication. It is Treasury's view that authorities accessing powers in terms of different pieces of legislation is in any event current practice, and it is not likely that there would be conflict. Please see comments above.***
Resolution WG	**45 – 48**	I suggest that consideration be given to extending these sections (with modifications as appropriate) to the SARB in relation to any responsibilities the SARB has for making rules, setting requirements, etc in relation to such matters as payment system regulation, rules relating to lender of last resort, and crisis resolution-related rules and requirements (including crisis resolution pre-positioning requirements for regulated entities).	***Comment noted. Chapter 7 provides for making legislative instruments.***
SAIA	**45 – 52, and**	**Joint-rulemaking - clauses 45 – 52 and Regulations and codes of good practice**	***Comments noted. All legislative instruments are required to be***

	92	**clause 92** It is recommended that all joint rules, regulations and codes of good practice should be published for public comment, and substantial consultation should take place with industry.	***published in the Financial Sector Information Register***
Standard Bank	**45**	Standard Bank understands that all subordinate legislation under this Bill will be referred to as "*rules*" including regulations, code of conduct and good practice, notices and circulars. It is recommended that the Bill should specify which authority is empowered to issue which types of rules; for example, the Minister of Finance can make "*regulations*" whereas the regulatory authorities can issue "*notices*" and "*circulars*". It is also recommended that all "*rules*" should be made available for comment by affected parties	***Comment noted. Chapter 7 provides for making legislative instruments and the authorities responsible for making and issuing them***
Promontory	**45(1)**	[We suggest dropping] joint rules (see comments below)	***Disagree. The Authorities may issue joint standards under cl.96 on matters they have a collective agreement and they consider convenient and appropriate to do so.***
ASISA/ Melbourne	**45(1)(a)**	The reference to section ~~*105*~~ appears incorrect and should presumably be to section *104*.(Grammatical/editorial)	***Comment noted***
46. Co-operation in making of rules relating to mono-regulated activities			
Deloitte	**46**	It is not clear why the Market Conduct Authority has to notify the Prudential Authority before making rules for mono-regulated firms and provide it a chance to comment. Could you please provide some clarity as to why this is being proposed?	***The revised FSR Bill no longer makes reference to "mono–", "dual–" or "lead–" regulation. An authority designated in terms of Schedule 2 as the licensing authority for a financial sector law is responsible for granting, issuing, imposing conditions on, varying, suspending or cancelling a licence in terms of the financial sector law. However, Chapter 5 provides for making legislative instruments and the authorities responsible for making and issuing them, and the cl. 77 MoU may include how the regulators will collaborate and cooperate with each other in making legislative instrument***
Promontory	**46**	This could be much simpler – i.e. before either the MCA or PA makes a rule it should notify the other, provide a draft, and give consideration to any comments. This consultation process should include the industry ([we] assume this would be covered by s49) although there should be provision for emergency rules where national interest or	***Chapter 7 provides for making legislative instruments and the authorities responsible for making and issuing them, and the cl. 77 MoU may include how the regulators will collaborate and***

		safety for customers requires urgent action. In any case, ~~activity~~ should be entity.	***cooperate with each other in making legislative instrument .***
47. Co-operation in making of rules relating to dual-regulated activities			
Melbourne	**47(2)**	Consistent with our comments in paragraph above [**14(2)(a), 14(2)(b)(i) and (b)(ii)**], we query whether this subsection should be prescriptive about the need for the MOU to include "*detailed procedures for co-operation in the making of rules*…" Although it would be good for the regulatory authorities to agree on the detailed procedures, we are concerned that an overly prescriptive approach in the MOU might reduce the flexibility that is necessary to enable the regulatory authorities to achieve appropriate co-operation on a case-by-case basis and whether this might lead to a sub-optimal result in specific cases.We raise the same query in relation to subsections **48(3)** and **53(1)**.	***Although the concept of "mono–", "dual–" or "lead–" regulation has been revised, it is the intention that the regulatory authorities must co-operate and collaborate with each, and that the MoUs should specify how, in practice, they will comply with their duties to co-operate and collaborate with each other.***
Promontory	**47(1)**	Same again on ~~activity~~/entity	***Noted***
48. Joint rules by regulatory authorities			
Promontory	**48**	Not at all clear what joint rules are supposed to cover (the clauses seem to have an element of circularity in them). In practice, there should be no need for joint rules and [we] suspect they would not be used.	***Comment noted. . The Authorities may issue joint standards under cl.96 on matters they have a collective agreement and they consider convenient and appropriate to do so. Please see comments above and the Policy document for further explanation.***
Promontory	**48(1)**	Usually the MOU is sufficient. It would be very unusual to need a rule to make part of an MOU effective.	
49. Consultation processes before promulgation of rules and joint rules			
ASISA	**49(1)**	Section 49 does not specify with whom the consultation is to take place. It needs to be made clear that consultation with industry and affected parties is mandatory. It would also be appreciated if it could be explained how the draft code on consultation presented during the Financial Services Laws General Amendment Bill Parliamentary process fits into these requirements. This code on consultation itself should be subject to a consultation process with the public and interested parties and not just after consultation with the Commissioner of the Market Conduct Authority and the Chief Executive of the Prudential Authority. Generally, our comments made to National Treasury on the Financial Services Laws General Amendment Bill apply regarding the various references to consultation.	***Comment noted. This section has been revised. Chapter 7 sets out a process of making legislative instruments that the regulators must follow.***

BASA	**49(1)**	It is recommended that after the word "*Act*" the following words be added, "*<u>and which process includes the opportunity for consultation by any financial institution impacted by such rules or joint rules</u>*". Clause 49(1) refers to a "*code*". However, clause 49(1) does not provide that the Minister must "*prescribe a <u>code</u>*"; it states he or she must "*prescribe a process*". It is recommended that clause 49(1) is amended to read, "*The Minister must prescribe a <u>code to contain</u> the process for consultation on rules and joint rules by the regulatory authorities, which code must be consistent with the Promotion of Administrative Justice Act.*"	
ASISA	**49(3)**	It would appear that there is no obligation to consult when making a rule or joint rule, but only prior to promulgation of rules or joint rules that have already been made. Confirmation is needed that the consultative process contemplated in the FSLGAA will apply and will be based on the draft document drafted by the FSB and made public by National Treasury in September 2013 headed: "*CONSULTATION PRINCIPLES TO BE INCORPORATED IN CODE OF NORMS AND STANDARDS OF CONSULTATION FOR THE BOARD AND REGISTRARS AS REFERRED IN FINANCIAL SERVICES BOARD LEGISLATION*"	***Comment noted. This section has been revised. Chapter 7 sets out a process of making legislative instruments that the regulators and we draw your attention to cl. 90 that specifies a consultation process that must followed by a financial sector regulator.***
Promontory	**49**	This could be read as contravening the international norms for regulatory independence. Consultation is critical, but there is no reason to single Treasury out – consultation should be with all regulatory agencies, industry and the public.	

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<td>Resolution WG</td>
<td>49</td>
<td>It may be appropriate to set out public consultation obligations in the Bill itself, rather than leaving these to be determined by the Minister. For example, it is common in many countries for legislation relating to financial regulatory authorities to include provisions that require the regulatory authorities to:
• consult affected parties in the process of making rules, requirements, etc;
• have regard to the comments received in the consultation process;
• publish a response to the comments received.
This is all part of the need for appropriate transparency and accountability by regulators.
There is also a question as to whether consultation obligations of this nature should be imposed on the SARB, under statute, in relation to the promulgation by the SARB of rules or requirements relating to financial stability – e.g. macro-prudential requirements, crisis resolution pre-positioning requirements, payments system regulation, etc.</td>
<td rowspan="2">Comment noted. This section has been revised. Chapter 7 sets out a process of making legislative instruments that the regulators and we draw your attention to cl. 90 that specifies a consultation process that must followed by a financial sector regulator.</td>
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<tr>
<td>SAIA</td>
<td>49</td>
<td>Consultation by Regulatory Authorities with industry stakeholders
As suggested under section 1.3 above, this Bill does not make provision for meaningful consultation with industry stakeholders. Clause 49 provides that the Minister must prescribe a process for consultation on rules and joint rules by the regulatory authorities, but the Bill does not make provision for any consultation on broader issues for example recommendations by the FSOC and the regulatory strategies by the Regulatory Authorities. It is reiterated that the lack of a formal process for consultation with industry is a major concern for SAIA and its members.
The SAIA recommends that Section 18 of the FSB Act, 1990 (as amended by the Financial Services Laws General Amendment Act, 2013) be retained, and that the Minister should prescribe a code of norms and standards as set out in the Act, as an enabling Code of Consultation will alleviate much of the legal uncertainty in respect of the consultation process as it currently stands.</td>
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<td colspan="4">50. Consultation with National Treasury and promulgation</td>
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Deloitte	**50**	The involvement of the National Treasury in the consultation and promulgation of regulatory rules seems to diverge from the limited role played by other treasuries in the global regulatory and supervisory frameworks. **Example:** In the United Kingdom, the Prudential Regulatory Authority (PRA) and) and the Financial Conduct Authority (FCA) have a duty to consult the Treasury, and the Bank of England, only for a specific sub-set of the types of rules that they are empowered to make. The latter would include recovery and resolution plans (duty to consult) or remuneration (where Treasury can direct the PRA to assess whether the rules comply with other policies and rules). Could you please clarify what the motivation is to include National Treasury in these processes and how the independence of the regulatory authorities will be maintained throughout these regulatory processes?	***Agreed. The National Treasury will not have a role in approving the standards set by of the regulators in the revised FSR Bill, however each financial sector regulator must provide a copy of the draft of the instrument to each financial sector regulator, the Reserve Bank and the Director-General. Please refer to revised Chapter 7 of draft Bill.***
ASISA	**50(2)**	"~~May~~" should be replaced with "*must*". This will mean that there is certainty that National Treasury will in fact look at the draft/joint rules within the 30 day period. If they then choose not to make any comment, then that is their prerogative, but they must then communicate this fact. By retaining "*may*", the regulatory authority will not know whether National Treasury has decided to consider the rules or not.	***Please refer to revised Chapter 7of draft Bill***
Melbourne	**50(2)**	We commend the South African authorities on the wording of this section, and note with approval the flexibility it provides in the event of a crisis.	***Comment is acknowledged***
ASISA	**50(3)**	It's not clear whether the regulatory authority must abide by NT's input or just consider it. We believe promulgation should be done in consultation with NT, and not only after consultation with NT. If NT, for example, does not agree with the regulatory authority, can the regulatory authority continue with promulgation regardless? It should be made clear who has the final say.	***Please refer to revised Chapter 7 of draft Bill that sets out a process of making legislative instruments***
51. Inconsistencies between regulations, joint rules and rules			
MMI	**51**	Section 51 provides the following: "*(1) In the event of any inconsistency between a regulation made in terms of section 92(1) and a rule or joint rule, the regulation prevails.* *(2) In the event of any inconsistency between a rule and a joint rule, the joint rule prevails.*"	***This section has been removed***

		In the case of conflict or lack of clarity between the joint rule and the act, we propose that the lead regulator should issue action letters/non action/non-enforcement letter to the industry as a whole with regard to its decision. We accordingly propose the insertion of the following text as subsection (3) of Section 51: *"(3) The lead regulator may issue an action letter or non-action letter or an enforcement guideline letter, as the case may be, to give clarity to any inconsistency and/or conflict between the rules and the act."*	
ASISA	**51(1)**	In our view Regulations should always prevail. Furthermore, legal certainty requires that regulations issued in terms of another Act should prevail over rules made in terms of this FSRB. If the regulatory authority wishes to change an existing regulation, whether issued under the FSRB or other legislation, such desired changes should be achieved by amending the regulation in question. We suggest that section 51(1) be amended to read: "*51(1) In the event of any inconsistency between a regulation ~~made in terms of section 92(1)~~ and a rule or joint rule, the regulation prevails.*"	***Agree. However this section has been removed.***
52. Minor or technical changes			
ASISA	**52 (1)**	It is not clear what constitutes a "*technical change*". Clarity is required. It is not clear what is meant by "*… to clarify or improve the intention*". It is submitted that the intention of the rule should be apparent from the wording thereof. If the regulatory authority believes the intention is different from the wording of the rule the regulatory authority should submit it for consultation again. We are concerned that the current wording is too broad and that there may be different opinions as to what constitutes a "*minor*" change. We therefore propose the following wording: "*52. (1) A regulatory authority may make minor or technical changes to a rule or joint rule without following the procedures in this Part solely for the purpose of correcting patent errors; provided that~~if~~ the National Treasury agrees that the changes proposed ~~are intended~~ solely result in the achievement of such purpose to clarify or improve the intention of the rule or joint rule..*" One ASISA member is of the view that the interpretation of legislative and regulatory provision is a function of the court and not that of the Regulatory Authority. The manner in which a legislative/regulatory provision is formulated may have significant	***These clauses have been removed from the Bill. Please see Chapter 7 that sets out a process of making legislative instruments***

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<tr><td></td><td></td><td>impact on the way it is interpreted by those subject thereto (as many reported court cases will show) and they therefore submit that any proposed changes to subordinate legislation must be made in accordance with the same rules and processes that have application in respect of the initial legislation/regulation.</td><td></td></tr>
<tr><td>SAIA</td><td>52 (1)</td><td>Changes to rules without proper consultation - Clause 52
The provision allows the regulatory authority to "make minor or technical changes" to rules without industry or public consultation, if the changes proposed "are solely to clarify or improve the intention of the rule or joint rule"
There is no explanation as to what would constitute a "minor" change and it is proposed that a definition or considerable clarification be included to clarify the term "minor" in order to ensure consistency in approach, alternatively that the word "minor" be deleted from the clause.
Technical changes, on the other hand, are likely to alter the substance of the legislation. Unless a clear definition is included of what would constitute a non-significant "technical" change, it is proposed that any technical change to rules be subject to the normal public consultation process.</td><td>Chapter 7 sets out a process of making legislative instruments</td></tr>
<tr><td colspan="4">Part 3
Co-operation in relation to entitlements and applications in terms of regulatory laws</td></tr>
<tr><td colspan="4">53. Coverage in the memorandum of understanding</td></tr>
<tr><td colspan="4">54. Joint rules relating to applications and entitlements</td></tr>
<tr><td>SAIA</td><td>53 and 54</td><td>Licensing and re-licensing
Clarity is requested on whether insurers will be required formally to reapply for licences from both the Market Conduct and Prudential Authorities ("Regulators"), and whether the envisaged re-licensing will be a transitional administrative process or whether Regulators will use it as an opportunity to set new licensing requirements. The Bill introduces new concepts around licencing including "entitlement" as defined, as well as "application" and "authorisation". Clauses 53 and 54 provides for a dual key approach, by way of joint rules, but it is not clear whether in the case of mono regulated entities if the Prudential Authority ("PA") will still need to authorise licensing.</td><td>The proposal is to allow one authority "virtual powers" in terms of the other, i.e. licensing will be by one authority while opening up for the other non-licensing authority to impose an overlay of new standards for the licensed entities. Therefore the license will not be the tool that will give effect to the supervision but rather the standards (similar to Health and Safety Regulations). No changes to current licensing on day zero are envisaged as anything that is licensed in term of Sectoral law shall remain so, and only the issuing authority can withdraw a license but not</td></tr>
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		A concern is also raised with regard to the envisaged processes and timelines in the event that both regulatory authorities and FSOC needs to approve a license and the potential impact that these processes may have on innovation and license fees, and ultimately consumers' access to financial services. These developments will call for stringent change management processes at the Regulatory Authorities including recruitment, training and staffing issues, which links to the timing concerns and the cumulate effect that the implementation of these changes may have on the momentum of business as well as holding a potential prejudice to consumers.	***without consultation with the other authority.*** ***It is therefore not contemplated that insurers will be required to reapply for licenses in phase 1 as licensing will remain with the Prudential Authority; however they will have additional standards imposed upon them by the Conduct Authority for which they will be supervised. Issues related to licensing, standards and joint standards are addressed in greater detail in the accompanying Policy document.***
ASISA	**54(1)**	These rules need to be published in the Government Gazette. The current financial regulations as contained in "*regulatory laws*" as defined, already determine the regulation/procedures around application/ withdrawal of authorisation of financial institutions. This Bill should not make additional rules relating to such powers – rather, these should remain in the current financial sector laws, or alternatively, provision should be contained in this Bill to assume this authority.	***On the first point, the revised draft proposes the establishment of a Financial Sector Information Register that comprises a database of documents that are to be published, including legislative instruments made in terms of financial sector law. Under Chapter 7 that sets out a process of making legislative instruments , the regulator making the legislative instruments must publish those on the Financial Sector Information Register and, if it is required, in the Gazette.***
Deloitte	**54(1)**	The joint rule-making process is capable of providing quite an efficient approach. However, there are no constraints on an authority's ability to withhold consent or approval. Based on other similar legislation, we would expect to see something in the sub-regulations which limit the withholding of approval to circumstances in which the authority judges its objectives to be under threat, or something along similar lines.	***The joint rule-making provisions have been revised and the new draft proposes that the financial sector regulators may make standards jointly, if they consider it convenient and appropriate to do so. Please refer Chapter 7 sets out a process of making legislative instruments and to the Policy document for further clarity.***
Promontory	**54(1)(a)**	There should be no dual regulated ~~activities~~ – only entities	***Noted***
Promontory	**54(1)(b)**	What does this mean? It seems to imply that, if a bank wants, for example, to make a market in OTC derivatives, the MCA and PA have to make a joint rule about something – if so, what?	***Issues related to "mono-" vs "dual-" regulated activities are addressed in the accompanying Policy document. Please see comments above.***
Promontory	**54(1)(c)**	This requires close consultation, but not clear to me that it needs a rule.	***Please see comments above.***
ASISA	**54(2)(c)**	Does this mean that entities currently authorised to carry out both mono-regulated and dual-regulated activities cannot do so until after the Prudential Authority and the Financial Stability Oversight Committee have knowledge thereof?	***Chapter 7 sets out a process of making legislative instruments. The concept of "mono–", "dual–" or "lead–" regulation has been revised, it is the intention that the regulatory authorities***

		Clarity is requested on what is contemplated by section 54(2)(c).	***must co-operate and collaborate with each, and that the MoUs should specify how, in practice, they will comply with their duties to co-operate and collaborate with each other.***
Part 4 **Co-operation between regulatory authorities and other financial regulators**			
55. Other financial regulators to consult regulatory authorities			
MMI	**55**	The lead regulator may not be bound by the view held by another financial regulator with respect to a particular affected interest or the lead regulator may hold a different view altogether. This will prevent the abuse of power and resources by the financial regulators who may have an incentive to pursue narrow regulatory agendas. In the case of a disagreement between the lead regulator and the other financial regulator, the lead regulator should issue a Non action/Non enforcement Letter to the industry as a whole with regard to its decision. We therefore propose the insertion of the following as subsection 3 of Section 55: "*(3) In the event that there is a wide disagreement between a financial regulator and the lead regulator with respect to a specific action contemplated in Subsection (1) to be taken against a particular institution, the lead regulator shall issue an approval and/or non –action/non-enforcement letter, as the case may be.*"	***The co-ordination, co-operation and collaboration provisions have been revised. The concept of "mono–", "dual–" or "lead–" regulation has been revised, it is the intention that the regulatory authorities must co-operate and collaborate with each, and that the MoUs should specify how, in practice, they will comply with their duties to co-operate and collaborate with each other. Please refer to the Policy document for further explanation.***
ASISA	**55(1)**	We believe that the word "~~*affecting*~~" should be replaced with "*which may negatively impact on*".	***Section has been revised***
Competition Commission	**55(1)**	Paragraph 55 (1) states that: "*Before any other financial regulator in terms of a law administrated by that regulator takes any action affecting the interests of any specific financial institution, it must…*" "*…, only take action after consultation*" has taken place with either the Prudential Authority or Market Conduct Authority (depending on the whether the matter at hand is a function of dual or mono regulation). The implication of this provision is that any action taken by any regulator (including the Commission) with regards to the financial services sector requires consultation with either the PA or MCA. The use of the phrase "*any action* implies" a broad scope of	***Agreed. Section has been revised. Each of the regulators may enter into MoUs with the Competition Commission in order to co-operate and collaborate to promote sustainable competition in the provision of financial products and financial services.***

		investigative processes, activities, decisions and recommendations that any regulator such as the Commission might want to take against the specified financial institution. This would potentially imply that before the Commission and/or regulator can take any action (whether it is an investigative process, activity or a decision) on any matter related to the financial sector, the regulator would need to consult (this could be construed as a requirement to be granted some form of *consent* or go ahead) prior to implementation of the action. This would include the following ten specific sub-sectors within the financial services industry: Banking, long-term insurance, short-term insurance, collective investment schemes and management companies, financial advisory and intermediary services, exchanges, national payment systems, other financial market infrastructure (central counterparties, clearing houses, central securities depository and trade repositories), credit rating agencies and pension funds. Currently, section 18(2) of the Competition Act prevents the Commission and the Competition Tribunal to make decisions in mergers which constitute: i. An acquisition of shares for which permission is required in terms of section 37 of the Banks Act, 1990 (Act No. 94 of 1990)[2]; or ii. An transaction for which consent is required in terms of section 54[3] of the Banks Act, 1990 (Act No. 94 of 1990) Section 37(2)(b) of the Banks Act provides for consultation between the Registrar of Banks or Minister of Finance and the Commission in the mergers involving banks. This provision has potential to impede the Commission from fulfilling its mandated obligations within legislated timeframes not only with respect to mergers (not identified in section 18(2) of the Competition Act) but also with respect to the Commission's ability to investigate, control and evaluate restrictive practices, abuse of dominant position and market inquiries in the financial services sector. This would also apply to other regulators that have to work within tight legislated timeframes. **Proposed Amendment**	

[2] The Banks Act provides for the regulation and supervision of the business of public companies taking deposits from the public; and to provide for matters connected therewith.

[3] Section 54 relates to a) amalgamation which involves a bank as one of the principal parties to the relevant transaction; and (b) an arrangement for the transfer of more than 25 per cent of the assets, liabilities or assets and liabilities of a bank to another person.

		The Commission appreciates the importance of coordinating and harmonizing the exercise of concurrent jurisdiction with other regulators. The Commission suggests that rather than requiring *mandatory* consultation on any action, this provision should be amended to allow the MCA and/or PA to be responsible for negotiating agreements with other regulatory authorities in order to co-ordinate and harmonize the exercise of concurrent jurisdiction within the financial services sector. This provision should be amended to require the MCA and/or PA to participate in the proceedings of any regulatory authority and to advise, and receive advice from, any regulatory authority. The Commission is mandated to enter into agreements with any sector specific regulatory authority to coordinate and harmonize the exercise of jurisdiction over competition matters.	
BASA	**55(1)(a) and (b)**	It is recommended that "~~*lead regulator*~~", wherever it occurs, is deleted and replaced by "*lead financial regulatory authority*".	***This section has been revised. An authority designated in terms of Schedule 2 as the licensing authority for a financial sector law is responsible for granting, issuing, imposing conditions on, varying, suspending or cancelling a licence in terms of the financial sector law.***
Deloitte	**55(2)**	The regulatory authorities may request other financial regulators to provide them with information. From this sub-regulation it is not clear as to whether the other financial regulators are obliged to supply the information requested? Could you please clarify this and also indicate what course of action is available to the regulatory authorities should the other financial regulators not provide them with the necessary information?	***This section has been revised. A financial sector regulator may request information from an organ of state that has regulatory or supervisory functions in respect of a financial institution and that organ of state is obliged to give the information if it is reasonably practicable to do so. See cl. 78***
56. Council of Financial Regulators			
ASISA	**56**	Who decides who will serve as a representative on the Council of Financial Regulators and what a representative's term of office will be?	***The members of the Council of Financial Regulators, as established in terms of cl. 79, are appointed by the Minister, and each member of the Council shall hold office for the period, and on the terms, determined by the Minister – see cl.82 on membership***
BASA	**56**	We support the decision to give the Council of Financial Sector Regulators a statutory basis. It is recommended that the membership of the Council is included in the Bill. It is suggested that this provision could be drafted in such a manner as to allow for a degree	***Part Chapter 6 of the revised FSR Bill deals with the co-ordination, co-operation, collaboration, consultation and consistency requirements to ensure that***

		of flexibility in the membership. It is also strongly suggested that the mandate of the Council includes a regular review of the regulatory framework of financial services in South Africa to promote alignment and harmonisation, and to minimise duplicate reporting requirements.	***The functions of the Council of Financial Regulators is set out within and includes to facilitate consultation, cooperation and coordination by constituent institutions to discuss and inform themselves about matters of common interest.***
Competition Commission	**56**	**Potential Participation of the Competition Commission on the Council of Financial Regulators** Section 56 of the Bill provides a platform for the Commission to be involved in a consultative and coordination forum for matters of common interest.[4] The Council of Financial Regulators ("CFR") will coordinate regulators on issues of financial stability, legislation, enforcement and market outcomes. The Commission views this as a positive development and it reinforces some of the Commission's responsibilities as highlighted in sections 21(1) (i) and (j) of the Competition Act which mandates the Commission to participate in the proceedings of any regulatory authority and to advise, and receive advice from, any regulatory authority. The formalisation of such a structure in the Bill will enhance coordination in dealing with market conduct issues within the financial services sector.	***Comment noted. The Minister may invite the head of any organ of state that the Minister determines***
Resolution WG	**56**	It may be desirable to specify with greater clarity the purposes and responsibilities of the Council of Financial Regulators. As I see it, the role of the Council would be to: • facilitate information-sharing between all the agencies with responsibility for matters pertinent to financial system soundness and efficiency; • provide advice, as required, to the Minister in relation to financial sector policy; • facilitate cooperation and coordination between the financial sector agencies in relation to policies, rules, requirements, etc; • facilitate a coordinated approach to developing and implementing legislative changes where relevant to the financial system; and • provide a means by which a joint-agency position can be conveyed to international bodies in relation to South Africa's financial system. In addition, I suggest that the membership of the Council be firmed up, such that it is clear which agencies are to be members of the Council and what level of seniority is	***Comment noted and incorporated to the extent practicable. Please see revised cl. 79 - 83***

[4] The Bill follows two policy papers that respond to lessons learnt in the 2008 global financial crisis: "*A Safer Financial Sector to Serve South Africa Better*" released with the 2011 Budget and a "*Roadmap for Implementing Twin Peaks Reforms*", released on 1 February 2013.

		expected. Rather than setting this out in the Bill, it may be better for the Bill to provide for the Minister to specify these requirements, after consultation with all relevant regulatory bodies, the SARB and the NT.	
Deloitte	**56**	We would welcome further guidance in further defining a clear purpose and objectives for the Council of Financial Regulators. We believe that the current sub-regulations do not provide sufficient clarity.	***The role of the Council Financial Regulators has been revised to make it clear that it is an advisory body with a defined mandate. Please see cl.79 in the Bill***
SAIA/ Standard Bank	**56 read with 57(2)**	**Council of Financial Sector Regulators - clause 56** SAIA supports the decision to give the Council of Financial Sector Regulators a statutory basis. It is recommended that the membership of the Council is included in the Bill. It is suggested that this provision could be drafted in such a manner as to allow for a degree of flexibility in the membership. It is also strongly suggested that the mandate of the Council includes a regular review of the regulatory framework of financial services in South Africa to promote alignment and harmonisation, and to minimise duplicate reporting requirements. Clause 57(2) of the Bill states that decisions at the meetings of the Council of Financial Regulators will be made on basis of consensus. However the Bill does not provide for instances where no consensus can be reached. It is suggested that procedure should be developed to deal with such instances In regard to the need for cooperation and collaboration in respect of the National Payments System, it is recommended that while ever the National Payment System Department of the Reserve Bank retains its current role it should be represented on the Council separately from the Prudential Authority.	***Comment noted, please see revised cl. 79 – 83 in the Bill.***
Strate	**56**	It is noted that the Council of Financial Regulators (CFR) may consist of representatives from regulatory authorities, government departments, and financial regulators, market infrastructures (e.g. Strate, JSE and the clearing houses), and other organisations as determined by the Minister. Again, representation by the self-regulatory market infrastructures is essential. It is doubtful whether the CFR, as compared to the FSOC, would have any meaningful role to play in systemic risk matters or financial crises. Strate questions whether the intended consultations and co-ordination on matters of common interest would have the necessary impact and effect in relation to the main focus of this Bill.	***The FSOC role has been revised to be an advisory body with a defined mandate to assist and advise the Governor and Minister on systemic risk matters or financial crises. The role of the Council Financial Regulators is to facilitate co-ordination, co-operation, collaboration, consultation and consistency by allowing senior officers of its constituent institutions to discuss and inform themselves about matters of common interest***

Deloitte	**56(1) read with 57(2)**	There is reference to the Council of Financial Regulators being a consultative and co-ordinating forum. However, sub regulation 57(2) refers to "*decisions*" which suggests that the Council of Financial Regulators is an executive body. Could you clarify what role the council is playing? This should be included in the purpose and objective – see comment above.	***The role of the Council Financial Regulators is to facilitate co-ordination, co-operation, collaboration, consultation and consistency by allowing senior officers of its constituent institutions to discuss and inform themselves about matters of common interest***
Promontory	**56(2)**	This could mean, as defined, JSE may sit in on discussions that could be commercially sensitive?	***Membership may include any other organisation that the Minister determines.***
57. Meetings of Council of Financial Regulators			
58. Subcommittees of Council of Financial Regulators			
Promontory	**58**	The regulators will already have MOUs that will bring them together on relevant issues.	***Disagree. The Council must establish separate working groups and subcommittees in respect of matters the Director-General considers should be dealt with by a working group or subcommittee.***

CHAPTER 5: Maintenance of Financial Stability

Promontory	**General**	Consider moving chapter up font with the FSOC material	***Agreed***
Part 1 **Role of regulatory authorities and other financial regulators in maintenance of financial stability**			
59. Assistance to Financial Stability Oversight Committee			
ASISA	**59-68**	There is no indication that the Financial Stability Oversight Committee or any regulator has any obligation to obtain input from affected parties, such as financial institutions, when making recommendations and implementing action relating to financial stability or financial crisis. They do have to take regard of ensuring continuity of systemically important financial institutions (section 65(2)(c)) but they do not need to consult with SIFIs, for example. It is of concern that section 68(1) does provide far-reaching emergency powers to the Minister "*for managing and mitigating an impending or actual financial crisis*", and the only checks on this process are "*consulting*" with the relevant Cabinet member (section 65(2)(a)) and submission to the National Assembly (section 65(3)) and will lapse unless replaced by legislation after one year (section 65(4)). We are concerned with the extent of the Minister's powers and submit that the Minister's powers should be subject to oversight by the High Court i.e. that the Minister should be obliged to submit any proposed emergency measures, together with a full motivation, to the High Court for sanctioning before issuing same. In order to ensure expediency the Act may stipulate that such an application may be brought on an urgent basis and without notification but subject to such directives as regards notification as the court may order.	***The revised section includes establishment of the Financial Sector Contingency Forum that will assist the Financial Stability Oversight Committee in performing its functions. The Forum is to consist of representatives from relevant industry bodies, the financial sector regulators and other relevant organs of state, as the Governor determines.*** ***In relation to emergency power, the powers of the Minister have been limited. We propose in the event of a crisis the Governor must ensure that the Minister is kept informed at all times and consulted before any action is taken to manage a systemic event, especially if that there will be a material impact on public finances. The Reserve Bank should be able to take action and issue through prudential standards issued by the PA additional requirements for managing the effects of a systemic event; however those powers must be exercised within the boundary of the Constitution.*** ***cl.91 also provides regulators making urgent legislative instruments urgently and without full complying with cl.90, if it is necessary , and puts a time limit on the application of those instruments and requires the regulator rectify this by through a consultation process as outlined in cl.91(4).***

Resolution WG	**59, 60 and 61**	In relation to these sections, I suggest that consideration be given to the following matters: • whether the obligations imposed on the regulatory authorities should also apply to the SARB and to the NT in respect of their functions relating to financial stability that fall within their respective areas of responsibility; • whether the Bill should specify the factors to which the Minister must have regard when resolving any difference of view between members of the FSOC and in issuing directions in relation to such matters; • whether the transparency of the FSOC should be enhanced through a requirement that it publish an annual report of its activities; and • whether the FSOC should be required to publish (and keep up to date) a policy framework document which sets out how it seeks to promote financial stability, the responsibilities of each member of the FSOC in that regard, and the means by which the members of the FSOC intend to coordinate to meet their financial stability objectives.	***Comments noted and incorporated where appreciate, for instance, the Bill to make it clear that the Reserve Bank is responsible for maintaining and restoring financial stability, and the financial sector regulators and other organs of state have a duty to assist and cooperate with the Reserve Bank in maintaining financial stability.***
Melbourne	**59(b)**	We suggest that this provision ("*promptly report to the Financial Stability Oversight Committee any relevant matters detected in the financial system, whether of a specific or systemic nature*") is vague and therefore creates compliance difficulties for the regulatory authorities. Perhaps it was intended that this should be linked to (a) as set out below? "*(b) promptly report to the Financial Stability Oversight Committee any relevant matters detected in the financial system in terms of subsection (a), whether of a specific or systemic nature;…*"	***Given the role of the FSOC that has been revised from a decision making committee to an advisory body to the Reserve Bank and the Governor, the provisions have been altered to impose a duty on the financial sector regulators to promptly report to the Reserve Bank, as the any matters may pose a risk to financial stability – see cl.24***
60. Recommendations by Financial Stability Oversight Committee to regulatory authorities			
Promontory	**60**	[We] understand that some countries use this approach but it is very confrontational and does not send a good message to industry or the agencies about the level of cooperation between agencies. In almost every conceivable situation where systemic risk is concerned, agencies will act cooperatively. Where the issue is marginal it should be the responsibility of the concerned agency to convince the others of the threat and the need for action.	***Comment noted***

ASISA	**60 and 61**	It is our view that the processes described in these sections are very one-sided. There is no indication that the institution/s involved will be informed or consulted about these proposed processes or practices.	***Comment noted, please see revised FSR Bill***
World Bank	**60 and 61**	We strongly welcome the establishment of the FSOC, and we feel it is particularly positive that it has powers to issue recommendations on a "*comply-or-explain*" basis (**Art. 60**). However, its powers to issue recommendations are limited to the PA and the MCA and to other financial regulators (**Art. 60 and 61**). For the effective conduct of macroprudential policies, it may be worthwhile to reconsider the perimeter of FSOC's powers, by extending its powers to provide recommendations to non-financial regulatory agencies. As an illustration, the housing booms that many European countries experienced in the upturn of the financial crisis were to a significant degree caused by structural rigidities that prevent the supply of residential real estate to keep up with demand – see for instance the experiences of the UK and the Netherlands where strict zoning requirements led to a structural shortage of real estate. Resolving this problem would require the involvement of non-financial regulators. We feel that the FSOC's powers to identify systemically important financial institutions (SIFIs) should be strengthened. **Art 5** limits the Committee's power to submitting a recommendation to categorize a financial institution as a systemically important financial institution. It is suggested to establish the FSOC as the sole authority responsible for identifying domestic systemically important financial institutions.	***The Reserve Bank is responsible for maintaining and restoring financial stability. Please see proposal in revised FSR Bill***
ASISA	**60(1)**	The Memorandum on the Objects of the Draft Bill • Asserts the operational independence of the regulators • Ensures the accountability of regulators • Confirms their independence to perform their duties impartially On the face of it, this section would appear to negate the above by having the unintended consequence of elevating a recommendation to a rule as well as empowering the Minister to truncate the independence and powers of the regulator. It is submitted that this may well constitute an unacceptable degree	***The role of the Reserve Bank that is responsible for maintaining and restoring financial stability has been strengthened. Please see proposal in revised FSR Bill.***

		of political oversight. Clarity on this anomaly, in apparent conflict with the stated independence, accountability and impartiality of the regulators, is requested.	
Deloitte	**60(1)**	The Financial Stability Oversight Committee appears to be able to make recommendations in relation to individual financial institutions. This is contrary to other similar global legislation. The legislation in the United Kingdom prohibits the Financial Policy Council (equivalent of the Financial Stability Oversight Committee) from making recommendations in relation to individual institutions, on the grounds that this is tantamount to micro-prudential regulation. It is explicitly stated in the UK Financial Services Act that "*the direction [of the FPC] may relate to all regulated persons or to regulated persons of a specified description, but may not relate to a specified regulated person*". Could you please provide an explanation as to why it is proposed that the Financial Stability Oversight Committee is able to make recommendations in relation to an individual financial institution?	***Please see proposal in revised FSR Bill.***
SAICA	**60(1) and 61(1)**	Reference to "…*material risk to financial stability*" We request clarity be provided as to what constitutes a "*material risk to financial stability*"	***Please see revised FSR Bill.***
Deloitte	**60(3) and 61(4)**	From this sub-regulation it would appear that the Minister is the final arbiter of a situation in which the Financial Stability Oversight Committee and a regulatory authority cannot agree on a particular Financial Stability Oversight Committee recommendation [60(3)]. The same is true in the case of disagreements between the Financial Stability Oversight Committee and other financial regulators [61(4)]. It is not clear how much of this arbitration take place in public and how much in private. Transparency around this arbitration process would alleviate some of the perceived concerns about undue political influence within the regulatory process. Could you please provide additional guidance as to how this arbitration is likely to be governed?	***The proposal in the revised FSR Bill is not the "comply-or explain" model previously envisaged, however as it is the Reserve Bank that is responsible for maintaining and restoring financial stability, if a systemic event were to occur, the Governor is empowered to give directions to a financial sector regulator as to the exercise of its powers, which the regulator must comply with. Furthermore, the Governor may establish a management committee that will assist with coordinating activities to manage a systemic event – see cl. 12. Please refer to revised FSR Bill and the accompanying Policy document for further explanation.***
Melbourne	**60(3)(a)**	We query whether the drafting of this provision is appropriate, given that the section does not expressly require agreement between the Financial Stability Oversight Committee and a regulatory authority and does not make it clear when these bodies will be deemed to "*fail to agree on the implementation of*	

		a recommendation". Is it when the Financial Stability Oversight Committee responds to a written explanation from the regulatory authority under subsection (2)(b) to confirm that it disagrees, or is it on some other basis? This is likely to be more of an issue for the MCA than the Prudential Authority as the other is part of the Reserve Bank and, presumably, its decisions can be internally overridden. We also raise this query in relation to section **61(4)(a)**.	
Promontory	**60(3)(c)**	For accountability, the Minister should disclose this to the Parliament.	***Please see proposal in revised FSR Bill***
61. Recommendations by Financial Stability Oversight Committee to other financial regulators			
ASISA	**61 and 66(3),(4)**	Mutatis mutandis, we repeat the comment immediately above. Given that the "*other financial regulator*" may be required to • Take a decision or act in terms of a recommendation of the FSOC; or • Act in term of the Minister's decision, issues which arise in this context include: - Is a decision of "*another financial regulator*" subject to an administrative appeal referred to in s71 as it is not a decision of a regulatory authority as defined in the Bill? - Can it be said to be a decision of that "*other regulatory authority*" if the matter is decided upon by the Minister? - Is the Minister's decision* subject to the s71 administrative appeal as it is not a decision of a regulatory authority as defined in the Bill? *In *MEC for Environmental Affairs and Development Planning v Clairson's CC 2013(6) SA 235 SCA* the court noted the following in the case of a decision taken by a Minister "…*It is a reconsideration by the political head of a department of a decision made by his officials. Baxter observes that "Since the primary function of a minister is a political one, this form of appeal is only obviously appropriate where it is considered that policy and administrative considerations are paramount and that disputes involving such considerations require his personal settlement. The minister can hardly be expected to adopt a detached posture, acting as an independent arbitrator…*"	***This section has been refined to accommodate the role of the Reserve Bank in maintaining financial stability. The FSOC is an advisory committee, and powers to direct other financial regulators are vested with the SARB – see cl. 14.*** ***The Governor is tasked with making a determination under cl.2 that a specified event or circumstance is a systemic event in consultation with the Minister, and has a duty to keep the Minister informed. Such a determination is conclusive and may not be reviewed by or appealed to the Tribunal.*** ***Furthermore, in the event of a crisis, the Reserve Bank must exercise its powers as the Republic's central bank. Other organs of state may not exercise powers with respect to the financial system without the approval of the Minister, acting in consultation with the Cabinet member responsible for that organ of state. And exercising their powers must be in a way that will be not be inconsistent with a decision or action taken by the Governor or the Reserve Bank to manage that systemic event or the effects of that systemic event – see cl.16***

		We therefore recommend that consideration be given to the issues of law we have raised in this context. Please also refer to our comments on the definition of "*other financial regulator*". We firmly believe that the impact of a decision by the Minister under this section could have far-reaching and potentially devastating effect. It is, with respect, not appropriate that such power should vest in the Minister. (see *Helen Suzman Foundation v President of the Republic of South Africa and Others* and *Glenister v President of the Republic of South Africa and Others* Western Cape High Court, case numbers 23874/2012 and 23933/2012 respectively). While we appreciate that the matter may be urgent and of such a nature that extraordinary measure are required, then in such an instance the Minister should be required to approach the Courts for an order declaring the matter to be urgent in nature, and circumscribing the extent of the additional, extraordinary powers that the Minister should be granted, and for what period.	
Competition Commission	**61(1) and 61(2)**	Paragraph 61 (1) states that: "*In performing its functions in terms of section 5(2), when it has identified a material risk to financial stability, the FSOC may make recommendations to any other financial regulator exercising regulatory or other functions in relation to financial institutions*." Paragraph 61(2) states that: "*Such recommendations may cover actions that the other financial regulator should, or should not take in exercising its functions in relation to financial institutions*." The above provisions outline the possible supremacy of the Bill to any other legislation administered by other organs of state such as the Competition Act. It therefore implies that if FSOC put forward a recommendation to other regulators, the only point of recourse according to the Bill for the Commission would be to take any disagreement to the Minister of Finance. However, the Director General of the National Treasury is a member of the FSOC and hence the Minister of Finance is likely to be fully aware of any recommendations the FSOC may make to another regulator such as the	***Comments are noted. Please see proposal in revised FSR Bill for this section which has been refined to accommodate the role of the Reserve Bank in maintaining financial stability. The FSOC is an advisory committee, and powers to direct other financial regulators are vested with the SARB – see cl. 14.*** ***The Governor is tasked with making a determination under cl.2 that a specified event or circumstance is a systemic event in consultation with the Minister, and has a duty to keep the Minister informed. Such a determination is conclusive and may not be reviewed by or appealed to the Tribunal.*** ***Furthermore, in the event of a crisis, the Reserve Bank must exercise its powers as the Republic's central bank. Other organs of state may not exercise powers with respect to the financial system without the approval of the Minister, acting in consultation with the Cabinet member responsible for that organ of state. And exercising their***

		Commission. The Minister of Finance will then have to consult with the responsible Cabinet member in taking a decision on the matter. The Commission is worried about the mixed signals that this provision could potentially send to the financial institutions. Financial institutions could get a signal that "*other financial regulators*" are less important as this Bill and the FSOC in particular might direct a particular regulator not to take action if it is perceived to affect financial stability. **Proposed Amendment** The composition of FSOC needs to include at least some members of other regulators as invitees (if a particular meeting will discuss issues that might impact another regulator); or allow other regulators to make formal submissions or recommendations on matters within the specific regulators' jurisdiction. Another suggestion would be to provide invited regulators with voting rights. This will limit the perception that FSOC might just make recommendations to other regulators without prior engagements.	***powers must be in a way that will be not be inconsistent with a decision or action taken by the Governor or the Reserve Bank to manage that systemic event or the effects of that systemic event – see cl.16***
Promontory	**61(4)(a)**	For accountability, the Minister should disclose this to the Parliament.	***Please see proposal in revised FSR Bill***
Part 2 **Management and mitigation of financial crisis**			
FIA	**Crisis management and resolution**	**Establishing a crisis management and resolution framework** The global financial crisis highlighted the need for proactive and focussed preventative crisis management in those sectors where needed. It is encouraging to see that steps have already been taken in the legislation to address Ponzi schemes and other unregulated / fraudulent behaviour in various sectors of the market. The FIA believes that it is important to prevent such activities before the consumer suffers financial hardship. It is therefore also necessary to tighten up on enforcement actions to ensure that the perpetrators of such transgressions are held responsible / accountable for their transgressions and prosecuted accordingly.	***Comment noted. The enforcement powers have been enhanced and the financial sector regulators and the Reserve Bank must co-ordinate, co-operate, collaborate and consult with each other in relation to performing their functions in terms of this Act and the other financial sector laws.***
62. Effect of application of this part on powers of other organs of state			

BASA	**62-67**	We have some concerns about the translation of essentially economic and financial concepts into statute in a way that strikes the appropriate balance between legal certainty and practical flexibility. The definition of "**systemic**" is broad. It is proposed that this concept should rather be "**systemic risk**". Further to this point, "*systemic*," makes reference to the "*financial system*" which is not defined and there is no clarity if this references the financial system within South Africa or the financial system generally. It is recommended that this clause is reworded to address this inconsistency. The following concepts are used in the definition of systemic, and should also be better defined so as to prevent confusion: • "*marketing by financial institutions of tainted or dubious financial instruments*"; • The terms, "*weakness and disruption*"; and • "*excessive speculation on financial or other markets*." It may be useful to refer to UK's Twin Peaks for guidance on how to define some of these concepts. The Financial Services Act 2013 defines systemic risk as: "*Those systemic risks include, in particular—* *a) systemic risks attributable to structural features of financial markets, such as connections between financial institutions,* *b) systemic risks attributable to the distribution of risk within the financial sector, and* *c) unsustainable levels of leverage, debt or credit growth.* *In this Part "systemic risk" means a risk to the stability of the UK financial system as a whole or of a significant part of that system.* *a) it is immaterial whether the risk arises in the United Kingdom or elsewhere.* *b) "credit growth" means the growth in lending by the financial sector to individuals in the United Kingdom and businesses carried on in the United Kingdom;* *c) "debt" means debt owed to the financial sector by individuals in the United Kingdom and businesses carried on in the United Kingdom;* *d) "leverage" means the leverage of the financial sector in the United Kingdom.*" In addition systemic risk is already defined in the National Payment System	***Please see proposed definition of "systemic event" and "systemic risk", read in conjunction with cl.4 on "Financial Stability"***

		Act 1998 as follows: "*the risk that failure of one or more settlement system participants, for whatever reason, to meet their payment obligations, including the payment obligations of clearing system participants, or their settlement system participants being unable to meet their respective payment or settlement obligations*". There needs to be consistent approach across the Financial Sector Regulation Bill and the National Payments System Act.	
Promontory	**62(2)**	For accountability, the Minister should disclose this to the Parliament.	***This section has been revised. In the event of a crisis, the Reserve Bank must exercise its powers as the Republic's central bank. Other organs of state may not exercise powers with respect to the financial system without the approval of the Minister, acting in consultation with the Cabinet member responsible for that organ of state. And exercising their powers must be in a way that will be not be inconsistent with a decision or action taken by the Governor or the Reserve Bank to manage that systemic event or the effects of that systemic event – see cl.16***
SAICA	**62(2)**	The section states "*In the event of an inconsistency between the exercise of a power by an organ of state referred to in subsection (1) and a decision of the Reserve Bank or the Financial Stability Oversight Committee for purposes of resolving the crisis, the decision of the Reserve Bank or the Financial Stability Oversight Committee prevails, unless otherwise determined by the Minister*". We propose that in terms of proper governance/ checks and balances, the Financial Stability Oversight Committee's view ought to prevail instead of the Ministers.	
63. Procedure for identification of financial crisis			
BASA/SAIA/ Standard Bank	**63 read with 64, 65 and 68**	Clause 63 of the Bill is entitled "***Procedure for identification of financial crisis,***" however no actual procedure for the identification of a financial crisis is set out in this section. Instead this section details with procedures that would occur after a financial crisis has been identified. This lacuna is related to the problematic definition of "**financial crisis**." It is also recommended that Clause 64 "***Crisis management responsibilities of Minister***" and Clause 68 "***Emergency powers***" must include a direct and explicit reference to Clause 63 and the identification of a financial crisis. Excluding such a direct link to Clause 63 would mean that the Minister would be legally empowered to issues regulations using his or her emergency powers without there being a formal declaration of an actual or impending financial crisis. In addition Clause 65 "***Crisis management responsibilities of the Reserve Bank***" does makes reference to Clause 63 and only once a financial crisis is determined as per Clause 63, then only can the Reserve Bank manage and	***Comment noted. The entire financial crisis section has been refined in the FSR Bill to make it clear that it is the Reserve Bank that is responsible for maintaining and restoring financial stability, and that in the event of a crisis, it must exercise its powers as the Republic's central bank. The provisions are also intended to more clearly articulate the responsibilities and functions of the Reserve bank in relation the financial sector regulators and other organs of state in systemic event management.*** ***For instance it is proposed that the Governor that makes the determination that a specified event or circumstance is a systemic event in consultation with the Minister, and has a duty to keep the Minister informed. The Governor must also regularly review a determination made and may at any time amend or terminate that determination. This after***

		mitigate the crisis. To ensure consistency and to ensure processes are followed by all authorities, Clause 63 should be referenced in Clause 64 and Clause 68 of the Bill. It is also recommended that there be a procedure for declaring the end of a financial crisis, so that there is a time frame in which the SARB and the Minister can exercise the powers given to them under a financial crisis.	***consulting with the Minister – See from cl.11***
Resolution WG	**63**	I suggest that consideration be given to including in the Bill a provision that requires the SARB, in consultation with the FSOC, to develop a framework for detecting threats to financial stability and for determining when a particular event might pose a risk of becoming a financial crisis. Some transparency and structure around these matters would be desirable. It would be desirable to make it clear that this section (and the following sections) relate only to financial crises of a nature which pose a threat to the stability of the financial system, as opposed to any distress or failure event affecting a financial institution. The definition of "**financial crisis**" earlier in the Bill does not make this clear. That definition draws a relationship between a crisis and its cause; it does not state that a financial crisis is an event that poses a threat to the stability of the financial system. As a more general observation, I suggest there be greater clarity as to who has responsibility for resolving an institutional distress or failure event when it does pose a threat to the stability of the financial system (i.e. the SARB or the FSOC?) and when it does not pose a threat to the stability of the financial system (i.e. the relevant regulatory authority?). More clarity would be helpful. In this regard, my suggested approach is that: • the SARB has responsibility for leading and coordinating crisis resolution in relation to events that pose a threat to the stability of the financial system, such that the SARB can either directly exercise the relevant crisis resolution powers in such circumstances or can issue directions to the PA or MCA, as applicable, to exercise the powers vested in them in the manner specified by the SARB; • the PA has responsibility for crisis resolution for dual-regulated entities (ie entities it supervises) where these do not pose a threat to the stability	***Comment noted and incorporated where it was considered appropriate. Please see proposed definition of "systemic event" and "systemic risk", read in conjunction with cl.4 on "Financial Stability". The financial crisis sections have also been revised. Please see Policy document for further explanation. In carrying out its function of maintaining, promoting and enhancing financial stability in the Republic, cl.9 provides that the Reserve Bank to monitor and keep under review threats to the financial system. Part 2 of chapter 3 clarifies the responsibilities of the Reserve bank the financial sector regulators and other organs of state in relation to managing systemic risks and systemic events***

		of the financial system or, where they do pose such a threat, where the SARB passes responsibility to the PA; • the MCA has responsibility for crisis resolution for mono-regulated entities (ie entities which it regulates alone) where these do not pose a threat to the stability of the financial system or, where they do pose such a threat, where the SARB passes responsibility to the MCA; and • the NT has responsibility for advising the Minister on any resolution actions which may involving public funding or create or increase fiscal risks for the Government. The FSOC would be the forum through which: • decisions are made as to whether the situation in question poses a threat to the stability of the financial system (and hence where the SARB takes the lead role in resolving the situation); • advice to the Minister is coordinated; and • crisis resolution decisions and actions are coordinated.	
World Bank	**63 read with 7, 64, 65**	We have several concerns regarding crisis management. (1) Our principal concern with regard to crisis management is that the role and responsibilities of the FSOC are not clearly defined. While the current draft hints at a role for the FSOC **(Art 63)** in the detection of financial crises, it is silent on the issue of interagency cooperation and coordination. Note that the Bill specifies the individual responsibilities of the Minister **(Art. 64)** and the Reserve Bank **(Art 65)** but not how coordination between these agencies and the MCA is to take place in times of crises. We feel that the FSOC, given its responsibilities in normal times for the monitoring and timely mitigation of systemic risk, would be the natural vehicle for managing financial crises, and this could be addressed more explicitly in the Bill. (2) Also the deposit insurer (once established) should be represented on the FSOC and be appropriately anchored in the institutional structure for crisis management. (3) The procedure for announcing a systemic crisis, as elaborated in **Art 63**, seems too rigid. It states that in the event of a likely systemic threat, the	***Comment noted and incorporated where it was considered appropriate. The financial crisis section has been revised. The Reserve Bank is responsible for managing a systemic event or crisis and the FSOC is an advisory body. Part 2 of chapter 2 clarifies the responsibilities of the Reserve bank the financial sector regulators and other organs of state in relation to managing systemic risks and systemic events Please see Policy document for further explanation.***

		Governor needs to advise the Minister through the FSOC. We would strongly suggest that the three parties represented in the FSOC be provided with powers to flag systemic concerns, and to call for an ad hoc meeting of the FSOC (currently the Bill only stipulates the minimum meeting frequency; **Art 7**). (4) Continuing on the previous point, it is also important that the parties represented in the FSOC, particularly the Reserve Bank, develop the appropriate analytical tools and methods on the basis of which the level of systemic threat emanating from a particular triggering event can be determined. The challenges in doing so can be considerable in times of crisis, when time is short and information scarce, so it would be very helpful if such analytical instruments be developed in normal times. It would also be good to reference this explicitly in the Bill.	
SAICA	**63(b) and (c)**	The section states *"...promptly advise the Minister;* *(b) determine, in consultation with the Minister, whether the situation constitutes an actual or potential financial crisis; and* *(c) keep the determination made in terms of paragraph (b) under regular review*". We propose the interval within which the regular review must occur needs to be clearly defined i.e. every three months.	***It is proposed that the Governor that makes the determination that a specified event or circumstance is a systemic event in consultation with the Minister, and has a duty to keep the Minister informed – see cl. 11***
64. Crisis management responsibilities of Minister			
BASA/SAIA/ Standard Bank	**64**	**Systemically Important Financial Institutions ("SIFI")** In terms of Clause 64, the Minister may designate a financial institution as SIFI. It is recommended that in order to ensure alignment with international norms and standards the Financial Stability Board and Bank for International Settlements ("BIS") and International Association of Insurance Supervisors ("IAIS") criteria set for designating systemically important financial institutions should be used. The BIS, for example, has defined the assessment methodologies for the identification of institutions as Global-Systemically Important Banks and has subsequently adjusted this model and published the approach for the identification of Domestic-Systemically Important Banks. The document that should be referenced is: "*A framework for dealing with*	***Please see revised Chapter 5. The FSOC has to advise the Governor on the designation of systemically important financial institutions; however it is the Governor that designates a financial institution as a SIFI and cl.73 provides the process and procedures that must be adhered to in doing so.***

		domestic systemically important banks" (October 2012). The IAIS has similarly released standards for the identification of systemically important insurers in its paper on "*Global Systemically Important Insurers: Initial Assessment Methodology*" (July 2013). **ANNEXURE A**	

Financial crisis management SA (Financial Sector Regulation Bill)	UK (Financial Services Act)
• Whether a situation constitutes an actual or potential financial crisis is determined by Financial Stability Oversight Committee in consultation with the Minister.	
• In a crisis, the Minister has sole responsibility for taking decisions which may have an impact on public finances, including on the ability of the Government to raise money in debt markets.	• The Chancellor and the Treasury also have sole responsibility for any decision involving public funds, but this is defined more narrowly to the need to provide financial assistance or incur costs through exercising powers under the UK's Special Resolution Regime for banks.
• The SARB gains power of direction over the regulator to exercise resolution powers of to use regulatory action for preventive or remedial purposes. • The Minister may, however, make any regulations	• The Chancellor can assume power of direction only if Treasury has been notified of a material risk related to public funds and the Chancellor has established that direction is the necessary response or financial assistance has already been given.

		necessary for managing and mitigating an impending or actual financial crisis, such as regulating the use of any powers. • The power of direction can only apply in circumstances where public funds are concerned. • Overall, financial crisis management is defined with significantly more details in a Memorandum of Understanding between the Treasury and the Bank of England. If these global standards are adopted, it would mean that entities can be appropriately categorized prior to any financial crisis rather than during a crisis. Furthermore, these institutions' increased capital buffer requirements, closer supervision and other additional regulatory requirements (such as the development of recovery and resolution plans), will enable the authorities to pro-actively mitigate and manage the potential systemic implications of these entities during systemic stress events.	
Deloitte	**64**	The circumstances in which the Minister can intervene to take control over a financial crisis are very broad. In comparison to similar global regulatory regimes, the circumstances in which the Minister is empowered to take crisis management decisions are much more narrowly defined. Please refer to **Annexure A** below which sets out a comparison of the proposed South African regulations and those contained in the UK Financial Services Act 2012.	***Comment noted. See revised Chapter 2***
ASISA	**64(2)**	See comment in relation to section 5(2)(e)	***Comment noted***
Resolution WG	**64(2)**	I suggest that consideration be given to amending section 64(2) to make provision for: • the Minister to consult the FSOC before he or she determines that an entity is systemically important. (Indeed it may be appropriate for such a determination to be made by the Minister only on the recommendation of the FSOC.); • the criteria to which the Minister (and/or FSOC) must have regard before	***Please see revised Chapter 5. The FSOC has to advise the Governor on the designation of systemically important financial institutions; however it is the Governor that designates a financial institution as a SIFI and cl.73 provides the process and procedures that must be adhered to in doing so.***

		making such a determination; • the Minister or FSOC to publish a policy framework (after consultation with interested parties) for determining when a financial institution may be determined to be systemically important; and • an obligation on the Minister and/or FSOC - where time permits - to consult and have regard to the views of the institution in question before any determination is made. A question arises as to whether an entity which is determined to be systemically important should be able to seek to have the decision reviewed by a judicial process – i.e. either judicial review or merits review. In several OECD countries, parties have the right to appeal to the courts for review of such matters or similar matters (e.g. licensing decisions). This raises the broader question of the extent to which judicial review and merits review should apply to regulatory and crisis resolution decisions more generally.	
65. Crisis management responsibilities of Reserve Bank			
Resolution WG	**65**	This section refers to the role of the SARB in responding to a financial crisis. Reference is made in this and later sections to the SARB being able to exercise crisis resolution powers in a situation where section 63 applies. However, the Bill is largely silent on the precise powers available to the SARB to manage a crisis. I assume the powers will either be included in the Bill or in another Bill. In either case, there needs to be clarity as to precisely which powers are available to the SARB and in which circumstances. In particular, this Bill or another Bill will need to make provision for powers that include the ability to: • investigate the affairs of a regulated entity and its related parties; • issue binding directions to a regulated entity and its related parties, including the ability to: o remove and replace directors and management; o curtail or cease to conduct specified business; o continue to provide specified services and business functions; o undertake specified actions required to facilitate the resolution – e.g. implement pre-positioning for transfer of business, bail-in or group restructuring; o undertake specified actions required to facilitate recapitalisation; • initiate the deposit insurance arrangements, including to withdraw the entity from all payment systems and calculate eligible deposit balances, and facilitate	***Comments noted and incorporated where appropriate. Please see revised Chapter 2 on the Reserve Bank's functions and powers in relation to maintaining, promoting and enhancing financial stability. The Reserve Bank in exercising its functions in managing a crisis may give direction to a financial sector regulator as to the exercise of its powers.*** ***Chapter 5 relates to the designation of systemically important financial institutions by the Governor, as well outline the additional powers in relation to SIFIs in part 2 of chapter 5***

		pay-outs to depositors; • establish a bridge entity and capitalise it; • transfer specified business to another regulated entity, a bridge entity or an asset management vehicle; • implement bail-in (e.g. by converting tranches of debt to equity or writing down tranches of debt); and • appoint a statutory manager to assume control of the entity and its related parties for the purpose of implementing the required resolution. I assume that legislation setting out crisis resolution powers will be drafted as part of the crisis resolution project. In doing so, I suggest that consideration be given to which agency may exercise the crisis resolution powers and in which circumstances. My suggested approach would be along the lines referred to earlier in this note (i.e. in the discussion under section 63). In section 65(2), I suggest that further consideration be given to whether the objectives stated in that subsection (as matters to which the SARB must have regard) ought to rank equally or whether a ranking of objectives might more appropriately apply. For example, it could be argued that paragraph (a) – "*maintaining and protecting financial stability*" – might appropriately rank higher as an objective than paragraph (b) – "*managing and mitigating the crisis with the lowest possible public cost*". However, I acknowledge that that is an arguable point. In section 65 and elsewhere in the Bill, further thought may be needed as to how disagreements between the SARB, PA, MCA and NT on the preferred actions to resolve a financial crisis can best be resolved. Section 65 suggests that the decision rests with the SARB. Some elaboration in the Bill may be required to deal with a situation where the FSOC does not reach a clear view on the nature of the actions to be taken.	
BASA/ SAIA/ Standard Bank	**65**	**Powers of the South African Reserve Bank as a Resolution Authority** In terms of the crisis management responsibilities of the SARB, under Clause 65(3) the Governor has been given the mandate to also establish a crisis management committee. Clarity is requested regarding the role and interaction of the FSOC and the crisis management committee during a crisis. National Treasury has indicated its intention to draft a separate Resolution Bill to address the issue of the recovery and resolution of financial institutions, and as such resolution will not be covered in the Financial Sector Regulation Bill. Nevertheless, SAIA and its members highlight the need for the following issues to be properly	***Comment noted. Please see that Chapter 5 relates to the designation of systemically important financial institutions by the Governor, as well outline the additional powers in relation to SIFIs in part 2 of chapter 5***

		cross-referenced in this Bill to the forthcoming Resolution Bill: • The mechanisms that the SARB may use to mitigate systemic risk; and • The resolution powers of the SARB in relation to financial institutions. Alternatively there should be cross referencing to Chapters 2 and 5 of this Bill.	
ASISA	**65(1)**	We suggest the words "~~*including in its capacity as resolution authority*~~" must be deleted.	***Comment noted***
Melbourne	**65(2)(b) and (c)**	We note the potential for conflict between these two sections, especially as concerns mitigating the costs of a crisis versus continuation of a systemically important bank. We point out that the costs of a crisis could be lower in the event that a systemically important bank is deemed to have failed and should exit. We point out that a bank exit policy may therefore conflict with mitigating the costs of a crisis where that bank is deemed systemically important, and therefore under 65(2)(c) is required to be recapitalised. In such an event it would be preferable to include a provision determining which section should prevail over the other in the event of a conflict.	***Comment noted. Please see that Chapter 5 relates to the designation of systemically important financial institutions by the Governor, as well outline the additional powers in relation to SIFIs in part 2 of chapter 5***
66. Powers of direction for Reserve Bank			
SAICA	**66(4)**	The section states "*In exercising powers under this section, the Governor must consider whether an action is likely to have an actual or potential impact on public finances as contemplated in section ~~65~~*". The referencing should be corrected to section *64*.	***Comment noted***
ASISA	**66(5)**	We are of the view that the word "*believes*" could be interpreted to mean that this requirement would be met if the Governor merely has the belief, without the need to demonstrate the basis of that belief. We therefore propose that this be amended as indicated. "*(5) If the Governor ~~believes~~ has reason to believe that an action or inaction may…*" As regards sub-section 66(5)(d), which effectively grants the Minister omnipotent powers regarding public finances – see our comments in respect of section 61 and sub-sections 66(3) and (4) above.	***Comment noted***
67. Crisis management responsibilities of the regulatory authorities			

68. Emergency regulations			
BASA	**68**	**Emergency regulations** This clause provides one of the greatest concerns for us within the Bill. As inconvenient for Government as it may be, the use of emergency powers in the South African Constitutional Human Rights-based Democracy is very strictly dealt with in the Constitution. Clearly, the abuse of such powers, as has been the experience of many countries throughout the world, is where the greatest threats to human rights exist. The Constitution does acknowledge the imposition of states of emergency. Generally, these would be invoked when "*the life of the nation is threatened by war, invasion, general insurrection, disorder [or] natural disaster*" (section 37 (1) (a)). However, the section continues to refer to "*or other public emergency*". Short of such a threat, it is not possible to create any legislation which by-passes the usual governance principles for passing laws as prescribed by the Constitution without such legislation falling foul of the Constitution. In the event of a state of emergency, however, subject to very strict criteria and procedures, the Constitution permits Parliament to act. In principle, therefore, it is our view that certain of the kinds of extraordinary measures envisaged in clause 68 of the Bill could only be invoked if the country was placed into a state of emergency, which could only occur if Parliament (as prescribed by section 37 of the Constitution) declared it by means of an Act of Parliament. We take each of the powers expressed in clause 68 in turn and express our view as to whether they would pass "*Constitutional muster*". • **Clause 68 (1) (a)** Provided the Minister acted within powers already granted in terms of this Bill or some other law, it is our view that he or she would have the power to act in terms of this provision. • **Clause 68 (1) (b)** The reach of this paragraph is not, in our view, altogether clear, but provided the Minister acted within powers already granted in terms of this Bill or some other	***The Emergency Regulation provisions have been removed***

		law, it is our view that he or she would have the power to act in terms of this provision. • **Clause 68 (1) (c)** In our view, this paragraph would simply not pass Constitutional muster and if it was desired to use such powers these would have to be invoked by Parliament, in terms of an Act of Parliament, enacted to declare and deal with a state of emergency. • **Clause 68 (1) (d)** Provided this power called upon the provisions of existing legislation, it would be acceptable for the Minister to Act. If, however, the paragraph envisages the creation of "temporary" legislation, the paragraph would not pass Constitutional muster. Such powers would have to be invoked by Parliament, in terms of an Act of Parliament, enacted to declare and deal with a state of emergency. • **Clause 68 (1) (e)** Insofar as this paragraph seems to envisage the creation of legislation, the paragraph would not pass Constitutional muster. Such powers would have to be invoked by Parliament, in terms of an Act of Parliament, enacted to declare and deal with a state of emergency. • **Clause 68 (1) (f)** The power to create criminal conduct, even if that conduct is itself described in regulation, must be contained within an enabling statute. Consequently, the provision would be acceptable provided an enabling statute empowered the Minister to make regulations setting out conduct which was criminalised by that enabling statute. However, the power simply to designate conduct as "*criminal*" would, in our view, usurp the function of Parliament and would be unconstitutional. It is recommended that all these provisions should be carefully aligned with section 37 of the Constitution if the situation is sufficiently extreme to warrant the declaration of a state of emergency. However, it is submitted that many crises will fall short of this necessity and consequently powers of the minister should be maintained in a different part of the Bill but only where these exist in terms of current legislation or can be prescribed under this Bill to the extent that they will not offend the Constitution.	

		Unfortunately, it is our view that the provisions of clause 68 in their totality require a substantial rework which should, we recommend, be overseen by a skilled constitutional lawyer. Consequently we are unable to provide a meaningful alternative.	
Resolution	**68**	This section empowers the Minister to make regulations required to manage a financial crisis. While I acknowledge that it may be necessary for a power of this nature, it would generally be preferable to set out specific powers in statute so that market participants are aware of the potential actions which could be taken in a crisis. It is generally not desirable to equip a government with emergency powers of an unspecified and relatively unconstrained nature, given that this creates uncertainty as to what powers might be created in a crisis, how they may be used and what implications their use may have for affected parties. Such uncertainty can exacerbate destabilising behaviour by market participants in the lead-up to a crisis, to the detriment of the financial system and economy. I therefore advise caution on the proposed provision in section 68 and suggest that, instead, the Bill should set out all the specific powers needed, the grounds on which they may be used, and the checks and balances in each case.	***The Emergency Regulation provisions have been removed***
SAIA	**68**	**Emergency Regulations** SAIA and its members support the intention behind Clause 68 of the Bill, as it is agreed that there may be times when the Minister of Finance needs to take extraordinary measures to manage a financial crisis, and that such measures may need to be taken very quickly if they are to be effective. A ‘Lehman’s Brothers’ or ‘Northern Rock’ scenario comes to mind in this regard. SAIA members agree that any crisis must be dealt with urgency, but have expressed the view that that any action taken by the Minister must be subject to a certain level of consultation especially to identify potential unintended consequences. A further concern has to be raised that the current formulation of Clause 68 goes too far and seemingly grants the Minister of Finance unfettered powers to amend legislation and take far-reaching administrative action without adequate checks and balances being in place. In terms of Clause 68(1) (b) the Minister “*may regulate the use of any powers relevant to the management and mitigation of the crisis*.” The powers of the Minister contemplated in Clause 68(1) seem to *inter alia* constitute a divestment of the inherent legislative powers of Parliament as enshrined in Chapter 4 of the	***The Emergency Regulation provisions have been removed***

		Constitution. The Constitution, Section 44(1) (a) (iii), provides that Parliament may assign any of its legislative powers, except the power to amend the Constitution, to any legislative body in another sphere of government. It is unclear whether Clause 68 of the Bill constitutes an assignment of such powers and whether the Minister of Finance constitutes a "*legislative body*" in terms of the Constitution. ('Legislative body' does not appear to be defined in the Constitution but a plain language reading would suggest it is meant to refer to the legislatures in the provinces and to municipal councils). The UK has approached this problem in respect to financial crisis management by confining the powers of the Chancellor and the Treasury to taking emergency action only in relation to the use of public funds to provide financial assistance to individual financial institutions. The UK's Financial Services Act 2012 has reference in this regard.	
Standard Bank	**68**	**Emergency regulations (Section 68)** Standard Bank's primary concern with the Financial Sector Regulation Bill relates to Section 68 and the proposed powers granted to the Minister of Finance in respect of emergency regulations. Standard Bank understands the intention behind Section 68 of the Bill: there may be times when the Minister of Finance needs to take extraordinary measures to manage a financial crisis; and that such measures may need to be taken very quickly if they are to be effective. A "Lehman's Brothers" or "Northern Rock" scenario comes to mind in this regard. Although, it is noted that the Saambou situation was managed without the need for additional powers beyond what is currently contained in the Banks Act. The UK has approached this problem in respect to financial crisis management by confining the powers of Chancellor and the Treasury to taking emergency action only in relation to the use of public funds to provide financial assistance to individual financial institutions. The Financial Services Act 2012 has reference in this regard. Standard Bank is very concerned that the current formulation of Section 68 goes too far and seemingly grants the Minister of Finance extensive powers to amend legislation and take far-reaching administrative action without adequate checks and balances being in place. Section 68(1)(c) "*Suspending, modifying or qualifying the application for purposes*	***The Emergency Regulation provisions have been removed***

		of resolving the crisis of any legislation specific in the regulations …" is of particular concern and is considered problematic in that it appears to allow the Minister of Finance to amend any legislation without requiring recourse to Parliament is problematic. Standard Bank's view is that the extension of the Minister's powers in the manner envisaged in these provisions may not be constitutional. Even if this power is limited to "*financial sector legislation*" rather than "*any legislation*", we believe it would be still not be constitutional, as the constitution does not allow Parliament to delegate its legislative powers in the manner contemplated by this sub-section of the Bill. Any powers granted to the Minister of Finance, or the Governor of the Reserve Bank, or any other persons, to make emergency regulations can only be supported if such powers are set out in statute in a manner that is: • Fully aligned with Section 37 of the Constitution (State of Emergency); and • Subject to appropriate checks and balances. Furthermore, we believe that such powers should only be available when a financial crisis has been properly identified in accordance with the Bill. The current drafting of section 68 does not link the exercising of the power to make emergency regulations to a specific trigger event. As such it can be interpreted that the Minister of Finance may exercise the powers to make emergency regulations at any time.	
Deloitte	**68**	The emergency regulation powers seem very broad. Will there be further comprehensive regulatory guidance provided surrounding these powers and how they will be invoked and how these actions with be governed?	***The Emergency Regulation provisions have been removed***
Promontory	**68**	[We are] alright with this set of powers but industry may quibble that it gives the Minister too much power. The reality is that, in a crisis, these powers are needed.	
SAICA	**68**	The Minister's emergency powers are quite overreaching and could result in chilling effects if no proper checks and balances are created with respect to the exercise of such powers. We propose that in terms of proper governance, the Minister must only be able to exercise such powers acting conjunctively with the Financial Stability Oversight Committee.	
ASISA	**68(1)(c), (d) and**	This section gives the Minister sweeping powers to make regulations in the event of a financial crisis, including against individual persons and institutions, as well as to provide for criminal sanctions to be applied for breaching such regulations. Given	

	68(2),(3)	the circumstances when such powers are likely to be needed by the Minister, i.e. a truly serious economic crisis, it is suggested that these powers are too wide to be exercised only by the Minister, and should possibly be considered by the cabinet as a whole, and then exercised by the Presidency. We understand that time is of the essence in an emergency financial crisis, but we do not agree that the Minister alone, without a duty to consult, should have the power to issue regulations that override national legislation. It is submitted that any delegation of legislative powers should be subject to the principles enunciated by the Constitutional Court in the matter of *Executive Council, Western Cape Legislature, and others v President of the Republic of South Africa and others, 1995(4) SA 877(CC)*. Otherwise, such a delegation is bound to be held unconstitutional. We request that consideration be given to the constitutionality of the powers being granted to the Minister in terms of this section. It is unclear what National Assembly is supposed to do once they have received the report referred to in s68(3). National Assembly should be given the right to review the draft regulations and approve or reject them. The provision in s68(1)(f) for a criminal sanction to be provided in regulations for the failure to comply with the regulations is also too wide. The power to create criminal offences and their respective sanctions should be provided in the Act itself, and not in regulation.	
Strate	**68**	The power of the Minister to issue emergency regulations in crisis situations is noted. Strate would like to highlight that certain financial crises, particularly the ones affecting the financial markets, would in most probability require immediate interventions, leaving no or little room for the issuance of such regulations. Given the time periods required to issue emergency regulations, Strate submits that the Minister's subordinate legislative intervention in financial crisis situations should not be limited to the issuance of regulations only. Other mechanisms such as emergency notices, emergency directives, etc. backed up by an expeditious and flexible issuing process should also be considered and incorporated.	***The Emergency Regulation provisions have been removed***

national treasury
Department: National Treasury REPUBLIC OF SOUTH AFRICA

CHAPTER 6: Administrative Action and Appeals

Part 1 **Administrative actions and enforcement powers**			
69. Statement of procedure for decisions			
ASISA	**69(1) and (2)**	This section provides for the preparation of a statement of decision-making procedures but there is no approval process of such statement. It is suggested that the section be amended as indicated. *"69. (1) A regulatory authority must ~~prepare a statement of~~ adopt a decision-making process ~~procedures~~ to regulate the adoption of any decision ~~decision-making~~ by the regulatory authority affecting the rights of a person.* *(2) The ~~statement of~~ decision-making process ~~procedures~~ must—* *(a) set out the procedures of the regulatory authority designed to ensure that administrative actions are taken in a manner consistent with the Promotion of Administrative Justice Act;"* Section 69(2)(b) mentions external members, but no clarity is provided as to who these may be.	***The chapter on administrative action has been revised. Each financial sector regulator must put in place and maintain effective arrangements for taking administrative action that are consistent with this Act, the Promotion of Administrative Justice Act, and the requirements of the other financial sector laws. This may include establishing an administrative action advisory committee that will consider and report to the regulator on administrative actions, and proposed administrative actions, referred to it by the regulator. See Chapter 13 of the revised Bill.***
SAICA	**69**	There is no provision for parties to be legally represented. We propose that the right for a party to be legally represented must be included under this section.	***Each financial sector regulator must put in place and maintain effective arrangements for taking administrative action that are consistent with this Act, the Promotion of Administrative Justice Act, and the requirements of the other financial sector laws.***
70. Imposition of administrative penalties			
BASA	**70**	It is a general principle of law that a person can only be punished once in respect of the same offence. Additionally, the Constitution envisages the right to just administrative action (section 33) and access to courts (section 34). In apparent conflict to these principles, the provisions set out in clause 70(1) state–	***Comment noted. Significant changes have been made to these sections. See Chapter 12-15 of the revised Bill.***

		"*In addition to any remedial, corrective or preventative actions and sanctions specified in a regulatory law with respect to specific contraventions, a regulatory authority may impose an administrative penalty on a financial institution should it find that the financial institution has failed to comply with a provision of a regulatory law or a rule issued under a regulatory law.*" The laws which govern the conduct of financial institutions (including we assume what the market conduct legislation will contain) all contain remedial, corrective and preventive actions and sanctions in respect of aberrant conduct. It is under these respective laws that such actions should be taken and such sanctions should be imposed. Furthermore no maximum amount of administrative penalty is provided. If the intention of this legislation is to introduce administrative penalties, the Bill correctly lists relevant factors to be taken into account when determining an appropriate penalty. The concern is that there are no maximum amounts set onto these administrative penalties therefore leaving unquantifiable amounts vague and uncertain. Furthermore in the context of economic crises, unlimited administrative penalties can have a possibility of high penalties being imposed and raise the possibility of institutions being unable to pay these high fines or rendered less competitive. **It is recommended that –** If the powers under clause 70 are to be retained, they should be restricted strictly to dealing with conduct which does not constitute a contravention of another regulatory law. However, in our view this is not necessary as the specific "*regulatory laws*" already deal sufficiently with penalties which may be imposed. If they do not, it is those laws which should be amended to prohibit conduct and/or to create appropriate sanctions in respect of such conduct. Clause 70(3) be amended to provide that for a penalty to be effective as a judgment of the High Court it must be placed before the High Court, together with the reasons behind its imposition, for the Court to apply its mind to the imposition before it is made an order of court by the Court. Only thereafter may it be enforced as part of the court processes. A sub-clause should be included dealing with the level of penalty which may be imposed, which should not be greater than any penalty which may be imposed under any one of the other regulatory laws (i.e. if these constitute disparate	

		amounts, the penalty in the Bill may be no greater than the highest one of all of these).	
FIC	**70**	Clause 70 provides that in addition to any remedial, corrective or preventative actions and sanctions specified in a regulatory law, a regulatory authority may impose an administrative penalty on a financial institution should it find that the financial institution has failed to comply with a provision of a regulatory law. The implication of this provision is that, in addition to any action taken in terms of the FIC Act, for example, the regulatory authority can impose an additional penalty for the same compliance failure. It may be helpful if the drafters of the Bill could indicate the specific contraventions they envisage would attract this type of penalty as this clause will create a duplication of legislative provisions providing for the power to impose administrative penalties relating to the same set of facts.	***The penalty and administrative action sections of the revised FSR Bill are clearer on the restriction of a regulatory authority imposing additional penalties for the same contravention. Significant changes have been made to these sections. See Chapter 12-15 of the revised Bill.***
Promontory	**70**	This is extremely powerful for the PA and MCA. Their fines have the force of law (High Court) yet there is no limit to the size of fine. But industry may push back. The compromise might be to specify limits on fines for certain types of transgressions.	***Comment noted. A maximum for a penalty will be been inserted into the Bill.***
ASISA	**70(1)**	It appears as if this subsection allows for the further imposition of an administrative penalty by a regulatory authority notwithstanding the fact that a financial institution may already have been sanctioned for a specific action or failure to act. Clarity is needed on the potential for multiple sanctions for a single transgression and the application of the principle of "*ne bis in idem*". It is not clear whether these envisaged administrative penalties are in addition to the current enforcement powers of the FSB, or whether they are replacing them. If the former, then they provide scope for an RA to penalise a contravening financial institution a second time over and above what they might have been subjected to in terms of another regulatory law. If the latter, then these powers should be contained in the financial sector laws to which the financial institutions are subject. No regulator should be entitled to impose two different sanctions or penalties in terms of more than one piece of legislation in respect of the same issue. Secondly, the criteria in section 70(2) do not serve to clarify why there is a requirement for this additional administrative penalty. There are already sanctions or penalties imposed in each piece of legislation and it seems that by permitting an additional administrative penalty that the principle of one penalty for one crime is being	***These sections have been refined. Please see chapter 24 relating to Administrative penalties and related orders.***

		breached.	
NHFC	**70(1)**	Section 70(1) states "*In addition to any remedial, corrective or preventative actions and sanctions specified in a regulatory law with respect to specific contraventions, a regulatory authority may impose an administrative penalty on a financial institution should it find that the financial institution has failed to comply with a provision of a regulatory law or a rule issued under a regulatory law*." This section corresponds and correlates accordingly with Financial Stability Oversight Committee, the Market Conduct Authority the establishment of the Financial Services Tribunal. This institutional arrangement should be provided with all the necessary tools to implement regulations effectively and to ensure that lenders fulfil their roles, responsibilities and obligations, taking suitable enforcement action against lenders who have contravened the rules is of fundamental importance. History of Tribunals however in the financial sector reflects an institutional set-up that is important in hearing consumer complaints but very limited in its adjudicating capacity, with restricted powers and issuance of judgements that are not compelling and widely respected as they are regarded as un-equivalent to court rulings. We thus hope that such is not the case as this have a significant imperative in applying the Bill effectively.	***Please see proposed structure and enforcement powers of the Tribunal under chapter 15 (part 1and 2) in the revised FSR Bill, and the accompanying Policy document for further explanation.***
SAIA	**70(1) read with 36(2) and 70(4)**	**Funds of regulatory authority** Clause 36(2) states that a regulatory authority must utilise its funds for the "*defrayal of expenses incurred by the regulatory authority in the implementation of this Act and the regulatory laws*." However, in Chapter 6 under Clause 70(4) it states that any payment received by a regulatory authority pursuant to an administrative penalty "*imposed under sub-clause 70(1) must exclusively be utilised for purposes of consumer education or the protection of financial customers*". It is recommended that monies collected for administrative fines, should be used for consumer education and the protection of financial customers, and should not fund the regulatory authorities. This aligns with the current approach used by the FSB and seems especially appropriate for the MCA.	***See the Policy document for a detailed explanation on the funding, resources and governance arrangements of the PA and the FSCA***
SAICA	**70(1)**	The section states "*In addition to any remedial, corrective or preventative actions and sanctions specified in a regulatory law with respect to specific contraventions, a regulatory authority may impose an administrative penalty on a financial*	***A maximum for a penalty will be been inserted into the Bill.***

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<tr><td></td><td></td><td>institution should it find that the financial institution has failed to comply with a provision of a regulatory law or a rule issued under a regulatory law".

We propose a maximum value or percentage with respect to administrative penalties.</td><td></td></tr>
<tr><td>ASISA</td><td>70(2)</td><td>We submit that the FSRB should prescribe, or as a minimum limit, the administrative penalties that can be issued.</td><td>A maximum for a penalty will be been inserted into the Bill.</td></tr>
<tr><td>ASISA</td><td>70(3)</td><td>We submit that this provision is not in line with administrative law in that it affords the regulatory authority the power of a court, but does not seem to afford the respondent the same rights and recourse that is afforded to them in civil proceedings. This essentially allows the regulatory authority to circumvent due legal process and restricts access to administrative justice.

We also submit that this section confers powers that are excessive taking the context into account. Currently the FSB have the power to impose fines and this in our view is sufficient.

We would therefore suggest that section 70(3) be deleted.</td><td rowspan="3">Each financial sector regulator must put in place and maintain effective arrangements for taking administrative action that are consistent with this Act, the Promotion of Administrative Justice Act, and the requirements of the other financial sector laws. A person who is aggrieved by a decision of a decision-maker may appeal against that decision to the Tribunal. Financial sector regulators or a party to an appeal may review the Tribunal's decision in the Division of the High Court. Please refer to Policy document for further explanation of the proposed role of the Tribunal.</td></tr>
<tr><td>BASA/SAIA</td><td>70(3)</td><td>Audi alterim partem

In terms of Clause 70(3) a regulatory authority may file a copy of its decision with the High Court in order to ensure enforcement. Upon filing of the decision, take on the legal force of a civil judgment and may be enforced accordingly.

It is recommended that the principle of audi alterim partem should be applied in such case, so that the respondent has an opportunity to put forward a case before the Court who will then make a decision whether to uphold the regulatory authority's decision.</td></tr>
<tr><td>SAICA</td><td>70(3)</td><td>The section states "A decision by the regulatory authority to impose a penalty has legal force as if made by the High Court, and if the respondent fails to comply with the decision, the regulatory authority may forthwith file with the registrar of a competent court a certified copy of the decision, and the decision thereupon has the effect of a civil judgment and may be enforced as if lawfully given in that court in favour of the regulatory authority".

This can only be acceptable if parties are allowed legal representation during proceedings. Currently, only the Appeals' sections (i.e. section 85(b) and section</td></tr>
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		85(8)) specifically make provision for legal representation. Any party subject to a hearing before a regulatory authority must be allowed legal representation. We propose inclusion of this under the provisions of the Act.	
ASISA	**70(4)**	The current wording is too wide because the words "*or the protection of financial customers*" would include almost any function or activity performed by the market conduct regulator and there should not be an inherent incentive on the part of a regulatory body to bolster its finances through administrative penalties. Hence we suggest that the words "~~*or the protection of financial customers*~~" be removed. Please refer to our comments under s36(1)(a).	***Comment noted***
Part 2 **Establishment of Financial Services Tribunal**			
71. Establishment of Financial Services Tribunal			
BASA	**71-93**	In terms of Clause 77 a member of the tribunal must withdraw from proceedings in which she or he has any financial, business or personal interest unless the Tribunal decides that the interest is too trivial. We recommend that an appellant be given the right to make representations in this regard. Furthermore, clause 36(1)(a)-(f) is in itself contradictory to Clause 70(4) of the same Bill. Clause 70 clearly limits the uses of "*administrative penalties*" whereas the former increases the ambit of the uses. Another issue that is created by this type of regulatory structure is quite obviously the potential overlap in duties. While Clause 14, 53, 54 and 55 may set forth the powers of the regulators and govern their relationship in so far as it relates to one another it is primarily based on the memorandum of understanding that is to be established. Since this memorandum has not been constituted the obvious impact of such cannot be determined (yet financial institutions will be bound by the interconnectedness contained therein). Furthermore, while the Prudential Regulator will be the lead regulator as it pertains to dual regulated activities, the Bill also states that a Regulator may merely, pay due "consideration" to any representation made by a regulator when making a rule. The problem then arises where a rule is, for example, made for capital markets. While the prudential regulator may lead the decision making process the Market Conduct	***Comments noted. The Financial Services Tribunal sections have been refined. Please see Chapter 15 (part 1 and 2) on the establishment and proceeding before a Tribunal***

		Authority is mandated to care for consumer protection and related issues. An overlap is clearly created and each regulator equally mandated to deal with the particular issue. Since the memorandum of understanding and underlying principles have not been outlined there may be potential for the "*financial customers*" protection to be put over the interest of financial institutions.	
BASA/ SAIA/ Standard Bank	**General**	**Coordination with other Tribunals** The Tribunal will have to coordinate its activities with other tribunals which operate in the financial sector notably the National Consumer Tribunal and the Competition Tribunal. The Competition Tribunal has jurisdiction over the Competition Act (matters fall into two main areas: merger control and prohibited practices in terms of the Act). The overlaps of mandate between the Competition Tribunal and the Financial Services Tribunal are likely to occur in the sphere of "*prohibited practices*" where some restrictive practices and abuses of dominance (e.g. pricing) in terms of the Competition Act may also constitute market conduct violations within the ambit of the MCA. There are also overlaps in the mandate of the Financial Services Tribunal and the National Consumer Tribunal in respect of consumer credit and reckless lending. It is recommended that these issues form part of the work of the Council of Financial Regulators, and that MOUs between the relevant bodies are considered.	***The proposal is for the establishment of a Financial Services Tribunal that will exercise its functions in accordance with this Act and the other financial sector laws.***
Standard Bank	**71 – 77 Establishment of Financial Services Tribunal**	The creation of a Financial Services Tribunal is welcomed. Access to an independent, effective, and efficient adjudicative forum is an important pillar of the Twin Peaks regulatory system. Standard Bank suggests that the independence of the proposed tribunal could be strengthened by requiring the Minister of Finance to make a public call for nominations of members. This approach is followed for other adjudicative bodies such as the Competition Tribunal for example. We also recommend that the tribunal would be able to function with greater independence if its budget was ring-fenced from that of the Prudential Authority and Market Conduct Authority. The independence of the tribunal is jeopardized if it must depend for resources (as contemplated in Section 81 of the Bill) on the two regulatory authorities whose decisions it is meant to review. Rather a budget should be provided for within the budget of National Treasury.	***It is proposed that the Tribunal is to consist of members appointed by the Minister whom the Minister considers, have appropriate experience and expertise in law and expert knowledge of financial products or financial services. Funding to be dealt with under the upcoming Financial Sector Levies, Fees and Charges Act, 2015***
FIA	**71**	**Financial Services Tribunal and strengthening enforcement**	***Each of the financial sector Regulators must co-operate with the Financial Intelligence Centre and otherwise assist in preventing***

		The FIA has always been in favour of effective enforcement. The FIA and its members support professionalism and have embraced the General Code of the FAIS Act, going so far as to implement our own FIA Code of Conduct which is aligned with the General Code. The FIA's view is that the regulation should better communicate the role that the organisation should play in the financial services environment as well as what is expected of us – as the voice for the financial services intermediary – under the new dispensation. As we expand on the regulation, thought should be given to how organisations such as the FIA can assist the Market Conduct Regulator. Is it not time for the regulator to consider making it mandatory for intermediaries to belong to an intermediary body? This requirement could be included under the Market Conduct provisions currently being considered. We are of the opinion that the FIA can play an important supportive role to the Market Conduct Regulator, specifically with regards conduct among South Africa's risk and financial intermediaries. (The FIA represents intermediaries from all disciplines including long term, short term, employee benefits and healthcare intermediaries). Apart from our influence on the conduct and behaviour of our members we are also in a position to assist the regulator by screening new entrants to the intermediary market as well as with Continuous Professional Development (CPD). When CPD becomes a reality the FIA can facilitate CPD activity through our structures to ensure a positive outcome for all stakeholders, for example.	***and combating financial crime, and must furthermore enter into a memorandum of understanding with each other and the NCR about how each will co-ordinate the performance of their functions in terms of the Financial Intelligence Centre Act.***
FIC	**71**	The FIC Act provides for an Appeal Board to consider appeals against administrative sanctions arising from failures to comply with the Act. The appeal structure proposed in the Bill will create overlapping functions between the Financial Services Tribunal and the Appeal Board. It will be necessary for the Centre to understand the intent of the drafters of the Bill with regards to the existing provisions in the regulatory laws relating to appeals and the proposed structure in the Bill before the Centre is able to comment on the implications of the provisions of the Bill on the FIC Act.	***Comment noted***
JSE	**71**	The Financial Services Tribunal will decide administrative appeals by persons aggrieved by decisions of any regulatory authority in terms of the FSRB. There is	***Comments noted. Each financial sector regulator must put in place and maintain effective arrangements for taking***

		an existing appeal procedure established in terms of the FMA and a person aggrieved by certain types of decisions taken by the Registrar of Financial Markets may appeal against the decision to the Appeal Board of the FSB. This section and section 105 of the FMA have to be aligned to ensure that a person aggrieved by a decision of the MCA is not accorded two opportunities (and two appeals) to challenge such a decision.	***administrative action that are consistent with this Act, the Promotion of Administrative Justice Act, and the requirements of the other financial sector laws. A person who is aggrieved by a decision of a decision-maker may appeal against that decision to the Tribunal. Financial sector regulators or a party to an appeal may review the Tribunal's decision in the Division of the High Court. Please refer to Policy document for further explanation of the proposed role of the Tribunal.***
World Bank	**71**	The Bill provides for the set-up of the Financial Services Tribunal. A number of issues emerge from this including the following: • Why is the Tribunal established and is it a continuation of an existing mechanism? • Is there a particular reason for including procedural details in the law that will make it difficult to change later? While basic principles can be included in the law, the remainder could be relegated to a regulation to be made by the Minister. • An appeal can be made against a decision of the regulatory bodies within 30 days- there is mention that the chairman can stay the regulatory action. There are no criteria to guide the chairman when a regulatory action can be stayed- for instance, irreparable harm or public interest. • The Tribunal ought to be guided to ensure that they do not question the judgment of the regulators and awards are only in the form of compensation. In fact the sole question before the Tribunal should be whether - a. the regulator exceeded its legal authority; b. the procedures followed by the regulator in making its decision were materially inconsistent with the procedures prescribed by the relevant law; c. the notification, or publication of the rules and regulation of the regulator fails to meet a material requirement of the law under which it is made; and d. the decision of the regulator is manifestly inconsistent with the provisions of this Act or the relevant law.	***The Financial Services Tribunal sections have been refined. Please see Chapter 15 (part 1 and 2) on the establishment and proceedings before the Tribunal***
72. Composition of Financial Services Tribunal			

BASA/SAIA	**72**	**Independence of the Tribunal** In order to increase the independence of the Tribunal, it is suggested that the process of nomination of its members be made subject to a public call for nominations. This is similar to how the members of the Competition Tribunal are nominated. (In that case, the President nominates members on recommendation of the Minister of Trade and Industry.)	***Comment noted, however the member of the Tribunal shall be appointed by the Minister.***
ASISA	**72 (1)**	In light of the provisions of section 87(1) which require that the ad hoc panel must consist of at least 3 members from the Financial Services Tribunal, we respectively submit that the reference to "*sufficient*" number should incorporate a minimum number, for example 6.	***Disagree. The Tribunal shall consist of as many members appointed by the Minister, as the Minister considers necessary – see cl.155***
BASA/ SAIA	**72(3)(c)**	The wording of clause 72(3)(c) gives the Minister the power to re-appoint a member of the tribunal, however in terms of clause 72(3)(b) the only provision is that a term must not exceed a period of three years. It is recommended that a limitation be placed on the number of terms a member of the Financial Services Tribunal may serve. SAIA suggests an alignment with membership to the National Consumer Tribunal and Competition Tribunal, which is set that a member may only serve a maximum of two five-year terms.	***Comment noted. The appointment and terms of office of members of the Tribunal are address under cl. 157***
73. Persons not qualified for appointment as members			
BASA/ SAIA	**73(1)**	**Membership** Although clause 35 applies to eligibility to become a member of the Tribunal, it is recommended that in order to ensure independence of the Tribunal, a provision be added that specifies that no members or staff of the regulatory authorities may be appointed to the Tribunal.	***It is proposed that members of the Tribunal be appointed by the Minister.***
74. Terms and conditions of appointment			
75. Chairperson and Deputy Chairperson for Financial Services Tribunal			
76. Meetings of Financial Services Tribunal			
77. Disclosure of interests			

BASA/ SAIA	**77**	**Conflicts of interests** In terms of Clause 77 a member of the tribunal must withdraw from proceedings in which she or he has any financial, business or personal interest unless the Tribunal decides that the interest is too trivial. It is recommended that an appellant be afforded the right to make representations to the tribunal in this regard.	***This section has been refined – see cl.158 on the procedures for disclosure of interest***
Strate	**77 and 91**	Strate notes the requirement to disclose "… *any financial, business or personal interest* …" by the members of the Financial Services Tribunal and the ad hoc panel. We submit that this requirement should also be extended to the members of the regulatory authorities (PA and MCR) established in terms of this Bill. Further, the Bill should require all regulatory authorities (PA and MCR) established in terms of this Bill to implement measures to avoid, deal with and/or manage conflicts of interests. For example, see also section 81 ("**Logistical support**"), which reads: "*The regulatory authorities must by agreement provide such administrative, staff, funding and other logistical support to the Financial Services Tribunal and to any ad hoc panel of the Financial Services Tribunal, as may be necessary for the proper functioning of the Financial Services Tribunal or panel*". In the absence of any measures to deal with conflicts of interests, this section 81 may also raise a perception of conflicts of interests, given that some of the decisions appealed against could possibly be those taken by the very same regulatory authorities (PA and MCR) they get support from (see section 82(1) dealing with appeals). In light of this, we support the inclusion of a legislative requirement to address conflicts of interests.	***Agreed. Please see the Disclosure of Interest requirements in cl. 38 and 49***
78. Procedure and decisions of Financial Services Tribunal			
ASISA	**78(1)**	There should be a requirement that all procedures are in writing and published by the Financial Services Tribunal.	***Proceedings of the Tribunal are addressed under part 2 of chapter 15. Decisions of the Tribunal must be made public***
79. Vacation of office			
80. Termination of membership of Financial Services Tribunal			
81. Logistical support			

SAIA	**81**	Clause 81 provides that regulatory Authorities must provide administrative staff, funding and other logistical support to the Financial Services Tribunal as may be necessary. It is proposed that the requirement of support (including funding) may create a potential conflict of interest between the regulatory authority and the Tribunal, which could be seen as a hindrance to the ability of the Tribunal to act independently and objectively when reviewing decisions made by the regulatory authority. It is suggested that the independence of the Financial Services Tribunal should be promoted by ensuring that there are no overlaps in funding or functions between the Financial Services Tribunal and regulatory authorities.	***The proposal is that the FSCA and PA will provide secretarial support to the Tribunal – see cl.159. Funding to be dealt with under the upcoming Financial Sector Levies, Fees and Charges Act, 2015***
Part 3 **Hearing of appeals by Financial Services Tribunal**			
Melbourne	**Part 3 – general**	We would be interested to know whether it is possible to appeal from a decision of the Financial Services Tribunal and, if so, whether this should be expressly stated.	***Yes. A person who is aggrieved by a decision of a decision-maker may appeal against that decision to the Tribunal. Financial sector regulators or a party to an appeal may review the Tribunal's decision in the Division of the High Court. Please refer to Policy document for further explanation of the proposed role of the Tribunal.***
82. Appeals by aggrieved persons			
BASA/SAIA	**82(2)**	In terms of Clause 82(2) where an appeal must be lodged within 30 days, this should specify 30 court or business days.	***Noted - cl. 160 provide that the Chair of the Tribunal may make rules that are not inconsistent with the Act regarding the manner in which an appeal must be lodged and the conduct of appeals by the Tribunal.***
BASA/ SAIA	**82(3)(b)(i)**	Before the appellant receives any case records (Clause 82(3)(b)(i)), it is recommended that the appellant should be given reasons as to why a decision was taken. This will allow the appellant to respond more meaningfully.	***Cl.161 provides for the procedures of making applications for appeal to the Tribunal***
ASISA	**82(3)(b)(ii)**	We submit that 10 days does not allow sufficient time to prepare and submit a motivation that sets out the grounds for an appeal. We suggest that at least 20 business days be provided. It is submitted that what is important at the end of the day is that the appeal panel	

		reach the correct decision, based on all the available and relevant facts. It is to be noted that an administrative action or decision is not, as is the case with a civil or criminal case, reached after a proper ventilation of all the relevant facts by reason of pleadings, discovery and the evidence adduced at a trial. As such it is submitted that the "*appeal*" should be an appeal "in the wide sense of the word"; i.e. a de novo hearing of the relevant issue. We however agree that it may make a lot of sense to suspend the appeal and refer any new documentation, written or electronic evidence to the relevant regulatory authority before the appeal is heard, so that the regulatory authority can alter its decision, should it consider it prudent to do so, in view of such evidence. We therefore believe that the appellant should also be allowed to amplify the case record in the event of any omission to include all relevant documentation and hence suggest the following wording replace the current ss(b)(ii): "*(ii) an opportunity to amplify the case record, in the event of any omission, and to submit a motivation setting out the grounds for the appeal within a period of 30~~10~~ days.*" We suggest that a new section 82(3)(c) be added to provide that the regulatory authority may, in view of such new documentation and/or evidence, withdraw or amend its original decision. (Any prejudice that may be suffered as a result of a failure to submit relevant information in time can be addressed by imposing an appropriate cost order.)	
BASA/ SAIA	**82(3)(b)(ii)**	The time period given in Clause 82(3)(b)(ii) for submitting a motivation for the grounds for appeal should be extended. Generally 20 court days are provided in a case where a "*plea*" is filed, which is more reasonable.	
ASISA	**82(4)**	It should not suspend a decision appealed against other than the payment of a penalty levied in terms of section 70. While the payment of a fine could have a major impact on a regulated entity, the payment of such a penalty after the dismissal of an appeal will not be similarly detrimental to the regulatory authority.	***Noted***
BASA/SAIA	**82(4)**	In terms of Clause 82(4), an appeal does not suspend the decision appealed against. This is a concern, as a favourable outcome to the appellant would require the decision of the Tribunal to be set aside. It is proposed that an appeal should suspend the decision of the Tribunal pending the outcome of the appeal process.	***Disagree – clause has been retained.***

83. Assignment of appeals to ad hoc panels			
ASISA	**83(1)**	Typically a panel is a list of names from which people are picked in order to perform a certain function, which in the issue in question will be the members of the Financial Services Tribunal referred to in subsections 72(1) and 87(1). In the current context it might be more appropriate to refer to an "*ad hoc appeal committee*".	***Reference to" Ad hoc" panels in the revised FSR Bill have been removed. The Chair or Deputy Chair of the Tribunal is responsible for managing the caseload of the Tribunal and must assign each appeal to a panel – see cl.162 on Panel of appeal and Policy document for further explanation on the proposed Financial Services Tribunal.***
BASA	**83(1), (3)**	Clause 83(1) provides that the Chairperson of the Financial Services Tribunal must assign each appeal to an ad hoc panel in accordance with Part 4. There is no timeframe specified for this to take place. Clause 83(3) states that the presiding member of the ad hoc panel must within 30 days of assignment of the appeal to the panel, inform the appellant and the regulatory authority who took the decision appealed against, of the date, time and place determined for hearing. Our concern is that a timeframe is not put in place to regulate when the chairperson of the Financial Services Tribunal allocates the appeal to an ad hoc panel from the time when the chairperson receives a request for an appeal. This could be prejudicial to the appellant and ultimately drag on the proceedings longer than necessary. It is recommended that a time frame of 30 calendar days be set for the chairperson to allocate the appeal to an ad hoc panel.	***Noted - cl. 160 provide that the Chair of the Tribunal may make rules that are not inconsistent with the Act regarding the manner in which an appeal must be lodged and the conduct of appeals by the Tribunal.***
BASA/ SAIA	**83(3)**	With regard to Clause 83(3) the purpose of a hearing is queried since oral evidence is not going to be led in every case. Clarity can be provided by stating that the purpose of the hearing will be for the appellant to make oral submissions in line with its motivation and for the respondent to make oral submissions in line with its reasons for the penalty/ruling. Or that the reason for the hearing is for the panel to ask either the appellant or respondent to answer direct questions from the panel.	***Noted - cl. 163 provides for the proceedings of the Tribunal***
84. Assessors			
ASISA	**84(1)**	Clarity and confirmation is requested that the exclusion contemplated in section 35(a) in respect of persons engaged in the business of a financial institution, or who	***Comment noted. Please see proposed cl.158 on the disclosure of interests by members of the Tribunal, including appointed***

		have a direct interest in such an institution, is not applicable in the case of assessors.	***assessors***
85. Appeal proceedings			
ASISA	**85(1)**	We suggest the following wording replace this subsection: *"An appeal must be decided on the case record and any motivation submitted by the appellant setting out the grounds of appeal, and subject to section 82(3)(b) (ii), no other documentation, written or electronic evidence or other factual information relating to the decision appealed against may be submitted to the panel by any party to the appeal."*	***Please see proposed cl. 163 that provides for the proceedings of the Tribunal***
BASA/SAIA	**85(3)**	In terms of Clause 85(3) it is recommended that the word "~~summon~~" be replaced by "subpoena". The cost of attendance should also be specified.	
ASISA	**85(4)**	The regulatory authority's original decision is already their final decision. We suggest that the wording be amended to read: *"(4) If the presiding member of the panel allows oral evidence or further documentation, written or electronic evidence or other factual information in terms of subsection (3), on application by an appellant, the matter must revert to the regulatory authority for reconsideration, and the appeal is deferred pending a reconsideration of the original~~final~~ decision of the regulatory authority"*	
Deloitte	**85(7)**	The Financial Services Tribunal Panels must meet, hear evidence and deliberate in public. Does this safeguard confidentiality and the legitimate interests of both the regulators and the appellants?	***Yes, cl.164 provides for person giving evidence or information, or producing documents, in relation to an appeal or review in the Tribunal***
BASA/ SAIA	**85(7)**	In Clause 85(7) provision should be made for the appellant to make representations on whether the hearing is public and on whether there can be exclusions.	***Please see proposed cl. 163 that provides for the proceedings of the Tribunal***
86. Orders of ad hoc panels			
ASISA	**86(1)(a)-(c)**	We note that it is only a decision of the Market Conduct Authority that can be varied or set aside. If the Financial Services Tribunal cannot set aside or vary a decision of other regulatory authorities, we raise the issue of the purpose of taking a decision on appeal, in particular where the outcome is a foregone conclusion that the decision will not be altered or varied. Furthermore, in the event of regulatory authorities, other than the MCA, not altering its decision after being re-considered,	***Please see response above, and also to the Policy document for further explanation on the proposed structure of the Tribunal***

		requiring an applicant to then seek remedy from the courts is, we submit, not only harsh but also unfair, costly and inefficient. We request that the rationale for limiting the power of the Tribunal in this manner with regard to decisions of the PA, be explained. Another anomaly is that it appears that if the MCA makes a decision as contemplated in sections 60 and/or 66, that decision can be altered or varied by the panel even though it may have been made by the Minister or the Governor. It is therefore suggested that the words "~~*in the case of the Market Conduct Authority*~~" in (c) be deleted.	
BASA/ SAIA	**86(1)**	Clause 86(1) states that an appeal must be decided within 30 days should be amended to state that the appeal must be decided within 30 days of the conclusion of the hearing. The effect of Clause 86(1)(c) is that the PA decision may not be varied or set aside. The powers and function of the Financial Services Tribunal are very limited in this regard. In addition this will mean that decisions made by the PA can never be appealed by an ad hoc panel but only sent back to it for reconsideration.	
Standard Bank	**86(1)(c)**	It seems that Section 86 regarding the orders of ad hoc panels limits the scope of the Financial Services Tribunal's powers in respect of the Prudential Authority. Section 86(1)(c) appears to limit the tribunal's power to vary or set aside decisions to only the decisions of the Market Conduct Authority. This suggests that the decisions of the Prudential Authority may not be varied or set aside by the tribunal. The Bill is silent on what options are then available apart from approaching the courts, which is not always desirable on these kinds of matters. Our interpretation is that decisions of the Prudential Authority are therefore not actually subject to appeal and this limits the role of the tribunal.	
Deloitte	**86(1)(c)**	The Tribunal is able to vary or set aside decisions made by the Market Conduct Authority. Does this mean that a Panel cannot vary or set aside decisions made by the Prudential Authority? If so, it would be useful to understand the reasons for this the asymmetry.	
BASA/ SAIA	**86(3)**	In terms of Clause 86(3), there is no mention of where or how decisions of the Financial Services Tribunal will be published. This could unfairly negatively impact on the reputation or confidential business information of the impacted parties.	***cl. 166(4) specifies that decisions of the Tribunal must be published and are listed in Schedule 3 of documents to be published in the Register***

BASA/ SAIA	**86(4)(b)**	Clause 86 (4)(b) has legal force and may be enforced as if it were issued in civil proceedings in a division of the High Court. If the final order has the effect of legal force as in civil proceedings in terms of clause 86(4)(b), it is proposed that the appeals process should take place as per the rules of court for example rules regarding timing for submission of documents, tariff as to costs etc.	***Please see Policy document for further explanation on the proposed structure of the Tribunal***
Part 4 **Ad hoc panels**			
87. Composition of ad hoc panels			
88. Sessions of ad hoc panels			
89. Panel procedures and decisions			
BASA/ SAIA	**89**	In terms of Clause 89, ad hoc panel procedures must be in line not only with regulatory law but also all applicable law. A reference only to regulatory laws may not sufficiently provide for procedures or standards to be recognized by independent appeals structures.	***Please see Policy document for further explanation on the proposed structure of the Tribunal***
90. Vacation of office			
91. Disclosure of interests			
ASISA	**91(2)(a)**	The words "*ad hoc*" should be inserted before the word "*panel*" in subsection 91(2)(a).	***Comment noted – revised Bill refers to panel of appeal – see cl. 162***

CHAPTER 7: Miscellaneous Matters

Part 1 *Regulations and norms and standards*			
92. Ministerial regulations and codes of good practice			
FIC	**92**	Clause 92 of the Bill, which deals with regulations and codes of good practice, will result in overlapping provisions relating to money laundering and terror financing being created by the FIC Act and the FSR Bill. It is unclear how codes of good practice in respect of anti-money laundering will purport to regulate matters that are already provided for in primary and secondary legislation i.e. the FIC Act and the Money Laundering and Terrorist Financing Control Regulations made under the Act.	***This section has been revised substantially. The role of Ministerial regulations in the financial sector will be streamlined over time. See Chapter 17 (Part 3) of the revised Bill as well as the Policy Document for further details.***
ASISA	**92(1)**	The Minister should not be empowered to change this Act by means of regulation and hence we suggest the following wording "*The Minister may make regulations, subject to ~~facilitate~~ the provisions~~implementation~~ of this Act, including regulations—...*"	***The section has been revised. See cl.215 of the revised Bill and the process for making 'legislative instruments' (that include Regulations) in Chapter 7.***
ASISA	**92(1)(b)**	This sub-section (b) seems out of place in this Bill. Nowhere in the entire Bill is the United Nations Security Council or targeted financial sanctions, or any derivatives of this phrase, mentioned. It is not clear how the United Nations Security Council approved financial sanctions would play a part in maintaining financial stability, or add to the objectives of this Bill. If this is the intention, then this power to make such regulations needs to be based on another substantive power granted in this or some other regulatory law, otherwise this power is being introduced via the "backdoor" and not through the correct legislation.	***The sub-section has been deleted. See cl.215 of the revised Bill.***
FIC	**92(1)(b)**	The implementation by financial institutions of targeted financial sanctions arising from Resolutions of the United Nations Security Council will have far-reaching implications for the customers of financial institutions. Therefore the mechanisms for the implementation of such sanctions should be contained in primary legislation, rather than in regulations and codes of good practice. The legislation providing for the implementation of such targeted financial sanctions should be developed and applied in conjunction with provisions to give effect to other forms of	

		sanctions emanating from the United Nations Security Council.	
ASISA	**92(2)**	The codes of good practices foreseen include a number of areas already regulated by other laws in respect of credit, protection of funds and financial crime. It is not clear if the scope of these codes will be limited to "*facilitate the implementation of this Act*" as is foreseen in subsection (1) in respect of regulations. It is also not clear how the envisaged codes will interact with other directives, codes or guidance issued in terms of other regulatory laws or laws. The scope and application of the envisaged codes of practices should be clarified and also if such codes would constitute subordinate legislation. What is the process to be followed in respect to prescribing codes of good practice? Only regulations are dealt with in sections 93 and 94. We would prefer that any codes be issued under the Act, alternatively that proper consultation procedures are prescribed before issuing a code.	***The sub-section has been deleted. See cl.215 of the revised Bill. The regulators (FSCA and PA) will have powers to make and supervise conduct and prudential standards (see cl.94 and 95). Consultation process for such standards is outlined in Chapter 7 of the revised Bill.***
World Bank	**92(2)**	There is provision for the Minister to prescribe codes of good practice. This could include codes with respect to market conduct good practices to protect households from over-indebtedness and to protect deposits held in trust or fidelity funds for any reason (**Art 92(2)**). There are a number of uncertainties in relation to the proposed Codes of Practice provision: • Who will be responsible for enforcing a Code? Will it be an industry body, or one of the Authorities? In either case how will compliance be supervised and enforced and what will be the penalties for a failure to comply? • Will there be a consultative process before the prescribing of a Code? We note in this regard that **Art 94** requires the Minister to seek public comment on draft regulations. Consideration might be given to requiring a similar process for draft Codes. This will be particularly important if any aspect of a prescribed Code is to be mandatory. • How will a new Code relate with an existing Code? For example, there are in existence comprehensive codes of practice in the banking and short-term insurance industry and numerous codes of conduct, standards and guidelines for the long-term insurance industry. There are also statutory Codes of Practice such as the binding Financial Advisory and Intermediary Services (FAIS) Code and the binding Codes of Conduct for Administrative and Discretionary Financial Services Providers (FSPs). • How the new provision will interact with Art 82 of the Consumer Protection Act 2009. This	

		provision also gives the Minister responsible for consumer protection a broad power to prescribe industry codes of conduct. An alternative approach for consideration would be to give the Minister (or an Authority) power to approve (rather than prescribe) industry codes of practice which are consistent with the law and are enforceable by the relevant body. This is the approach in Australia where the market conduct regulator has power to approve codes of conduct for financial services licensees, their authorized representatives and financial services issues (see Section 1011A of the Corporations Act 2001 and see ASIC Regulatory Guide 183: http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rg183-published-1-March-2013.pdf/$file/rg183- published-1-March-2013.pdf) Further, it is recommended that, if the Minister is to have power to approve (or prescribe) codes then those powers extend to any relevant industry code of practice i.e. not just in relation to the examples given in **Art 92 (2)** of the Bill.	
JSE	**92(2)**	The FSRB is, in our view, not the appropriate statute for the Minister to prescribe codes of good practice in relation to compliance with internationally accepted standards on anti-money laundering and corruption. The Financial Intelligence Centre Act deals with anti-money laundering and remains the empowering statute to adopt measures to combat, prevent and prosecute unlawful conduct in the form of money laundering and corruption. The purpose and objects of the FSRB are to establish a comprehensive framework for the regulation of the financial sector. The Bill does not contain any provisions proscribing activities such as money laundering.	
Standard Bank	**92(2)**	Section 92(2)(a) empowers the Minister of Finance to prescribe code of good practice for market conduct practices to protect households from over-indebtedness. This is a matter that is currently within the jurisdiction of the Minister of Trade and Industry in terms of the National Credit Act (and the amendments thereto currently being deliberated in the NCOP). To promote alignment between any measures proposed in such a code of conduct prescribed under this statute, and any similar measures prescribed under the NCA, as amended, it is proposed that this provision is revised as follows: "*The Minister may prescribe codes of good practice, including codes of good practice, in consultation with the Minister of Trade and Industry, for market conduct practices to protect households from over-indebtedness.*"	

93. Commencement of regulations

ASISA	**93(1)**	Subsection (1): there should be a reasonable period provided for compliance with/implementation of new regulations and regulations should not come into effect from date of publication.	***Comment noted, however section has been deleted from the revised Bill.***
ASISA	**93(2)**	The commencement date of any regulation should always be after date of publication (see comments on subsection (1)). Section 94(2) provides that if amendments are made to draft regulations following the comment period, these do not need to be published. The content of final regulations will therefore not be known until publication – hence the need for a reasonable implementation period. Under no circumstance should provision be made for a commencement date specified in a regulation to be a date before date of publication (i.e. regulations should not be retrospective). As currently worded this section allows for regulations to be made retrospectively. This may impact on vested rights and also give rise to legal uncertainty. We suggest that the words "~~*before, on or*~~" be deleted: "*(2) The commencement date specified in any regulations may be a date ~~before, on or~~ after the date of publication of those regulations*."	***The sub-section has been deleted. See cl.215 of the revised Bill.***
94. Consultative processes before promulgation of regulations			
ASISA	**94(1)**	What will determine whether a draft regulation is published in the Gazette or on Treasury's website? There should be consistency in how draft regulations are published and if website publication is permitted, this must be in one clearly designated place on the website that is used for this purpose. A prescribed consultation process (as per section 49) should apply (to both regulations and codes of good practice). Not everybody in this country has access to the internet and it is therefore suggested that draft regulations must be published in the Government Gazette as well as on the website. This will also ensure legal certainty. We therefore suggest that the word "~~*or*~~" be replaced with "*and*".	***The revised Bill provides for a Financial Sector Information Register that comprises a database of documents that are to be published, including legislative instruments made in terms of financial sector law (see Schedule 3). Chapter 7 of the revised Bill details the consultation requirements for 'legislative instruments'.***

BASA	**94**	We see the emergence of Codes of Good Practice, in addition to rules as becoming entrenched in the law. Clause 92(a), (b) and (c) are an overlap with established regulatory authorities domain such as the National Credit Regulator. So in the development of the Codes, cognisance must be taken of the legislation currently in operation to ensure that financial institutions governed by both do not encounter contradictions and confusion which leads to uncertainty. Also clause 94(2) allows the Minister to alter the draft regulations as a result of the comment and allows for the Minister to immediately create the regulations based on the comment received without publishing and enduring consultation again. Whilst we understand the need to create efficiencies and that the Regulatory process is cumbersome, we are concerned that the power to promulgate regulations without providing stakeholders the opportunity to comment on the amended regulations in some instance may have a minimal impact but in others may lead to unforeseen consequences to the amendment and hence publication and hence the regulator should be open to publishing and stakeholder engagement at this level. We suggest a minimum 30-day consultation period.	***Comment noted. The consultation process that applies to making of regulations and other legislative instruments is detailed in Chapter 7 of the revised Bill.***
		Whilst the Government Gazette may not be the most convenient place to communicate with the "common man", for financial institutions, it is the one certain place where information relating to legislation can be sourced and it is acknowledged in law as the appropriate repository of all law for promulgation.	***Agreed. The revised Bill provides for a Financial Sector Information Register that comprises a database of documents that are to be published, including legislative instruments made in terms of financial sector law. See Schedule 3 of the revised Bill.***
		Consequently, though there would be no concern about early drafts being placed on website of the National Treasury for initial analysis and comment (and, in our view, the change suggested below does not impact on this process), before final publication and where final comment is being sought, it is our view that draft regulations should be published in the Government Gazette.It is recommended that "~~*or on the website of the National Treasury*~~" be deleted from clause 94 (1).	***The revised Bill requires the National Treasury to maintain a public Register of all current laws, standards and other regulatory documents.***
ASISA	**94(2)**	Ss(1) requires the Minister to publish draft regulations for public comment, but ss(2) expressly states that if the Minister alters the draft regulations as a result of any comment received, it is not necessary for the alterations to be published before the regulations are made. It is submitted that subsection (2), as presently worded, in effect empowers the Minister to introduce new provisions into the regulations by way of amendment, which may impact on the rights of persons including financial institutions. This will make a mockery of the consultation process and it is suggested that it either be deleted or be amended by the addition of the words "*provided that such amendments do*	***Comment noted. The consultation process that applies to making of regulations and other legislative instruments is detailed in Chapter 7 of the revised Bill.***

		not introduce new obligations and/or impact on existing rights”	
Part 2 ***General matters, offences and penalties***			
95. Utilisation and disclosure of information			
ASISA	**95**	This section deals with the utilization and disclosure of information, which includes, inter alia, personal information as defined in the Protection of Personal Information Act, 4 of 2013 (PPI). In section 11 of PPI the grounds for processing, which includes the utilisation or disclosure of information, are set out. All the grounds for processing set out in section 95(2) of this bill is already covered by the PPI processing rounds and hence we submit that it is unnecessary to list them in here. We suggest that section 95(2) be deleted. Furthermore, PPI is the overarching legislation that regulates the processing of personal information. The application of PPI should not be limited in this Bill.	***The sections have been revised to specify, clarify and ensure that there are not any ambiguities in legislation that could cause uncertainties and unanticipated consequences for the regulators in carrying out their statutory mandates. See cl.197 of the revised Bill.***
BASA	**95**	The definition of “**information”** as proposed in this Bill is more narrow that the definition in the Protection of Personal Information Act 2013. While we prefer the definition in the FSRB, we are concerned about the potential confusion that may arise from conflicting definitions. Clause 95(2)(a)(ii) makes reference to the information being used for legal proceedings and other proceedings; it is recommended that “**other proceedings**” should be defined for clarity. Furthermore, Clause 95(2)(a)(iv)(bb) notes that information can be disclosed if it informs financial customers of “*actions*” taken against a financial institution. If so intended “*action*” should make reference specifically to legal and administrative action. In terms of Clause 95(3)(v) the Commissioner, Deputy Commissioner, or Chief Executive Officer may negotiate and enter into multilateral co-operation agreements with other financial organs of state situated in subsidiary countries in order to inter alia harmonise reporting obligations, for the purposes of providing information regarding “*problems*” that are being experienced within a financial institution. It is recommended that the word “~~*problems*~~” is too broad and should be replaced with “*material concerns*”. Clause 95 also allows for disclosure of information to warn financial customers against conducting business with a financial institution; actions taken against financial institutions; and against activities carried out by financial institutions. This provision can potentially pose substantial reputational risk for the financial institution	***‘Information’ is no longer defined in the revised Bill and reference is now being made to the Protection of Personal Information Act. See cl.197 and Chapter 7 (Part 1) of the revised Bill that deals with information sharing arrangements.***

		involved, and if not managed well, and in extreme situations could lead to a situation such as the one with Northern Rock in the UK where there was a total run on the financial institution. Given the possible risks, it is recommended that the process of public disclosure should also involve consultation with the affected institution to refute claims against it and to mitigate any possible risks. Confidence is a vital, but intangible, element of the financial system. Furthermore clarity is required on the reporting requirements of parent companies and their subsidiaries, as it appears that this clause allows parent companies to be indirectly supervised by the regulators/supervisors of their subsidiary companies. This creates legal uncertainty for parent companies in terms of the level and extent of regulatory scrutiny into the affairs of the parent company itself by regulators other than those located in its primary jurisdiction of operation. In order to ensure that companies are not accountable to a multitude of regulators/supervisors it is essential that that this Bill either contains provisions surrounding the powers conferred on foreign regulators in terms of these co-operation agreements and/or contains extensive and specific regulations in this regard. The Bill does not make reference to existing due process such as that contained in the International Co-Operation in Criminal Matters Act that requires due legal process to be followed when information is requested and exchanged between regulators and other organs of state usually by way of a subpoena. It is therefore recommended that the existing provisions are referenced to ensure alignment across legislation.	
ASISA	**95(1)**	This section appears to allow the entities stated in section 95(1) to disclose proprietary information when it is "*in the public interest*" to do so (sec 95(2)(dd)). There should be a reasonable opportunity for the proprietor concerned to dispute such disclosure or, at the very least, adequate notice given of the intended disclosure. [See 95(2)(b) which is an express carve out for information obtained pursuant to FICA, which can only be utilized or disclosed in accordance with FICA] If section 95(2) remains, we suggest that the words "~~*utilised or disclosed*~~" be replaced with "*processed*". In light of the fact that PPI contains a comprehensive definition of "*processing*" which will cover all the activities around dealing with information, we suggest that the words "~~*utilised or disclosed to any person*~~" be replaced with the word "*processing*" and that a definition of "*processing*" be added to read: "*Processing has the same meaning ascribed thereto in the Protection of Personal Information Act, 4 of 2013*". Processing will include the utilisation and disclosure of information, and therefore this amendment	***The sections have substantially been revised. See Chapter 7 (Part 1) of the revised Bill.***

		should be made wherever the words "~~*utilised or disclosed*~~" appears.	
SAIA	**95**	**Concepts and definitions** It seems that the definition of "*information*" in this Bill is more narrow than the definition in the Protection of Personal Information Act 2013. While some SAIA members have expressed a preference for the definition in the Bill, a concerned is raised about the potential confusion that may arise from conflicting definitions.	***See cl.197 of the revised Bill.***
		Disclosure of information Clause 95 allows for disclosure of information to warn financial customers against conducting business with a financial institution; actions taken against financial institutions; and against activities carried out by financial institutions. This provision can potentially pose substantial reputational risk for the financial institution involved, and if not managed well, and in extreme situations could lead to a similar situation to that of the failure of Northern Rock in the UK. Given the possible risks, it is recommended that the process of public disclosure should also involve consultation with the affected institution to refute claims against it and to mitigate any possible risks. Confidence is a vital, but intangible, element of the banking system.	***The sections have substantially been revised. See Chapter 7 (Part 1) of the revised Bill.***
		Reporting requirements More clarity is required on the reporting requirements of parent companies and their subsidiaries, as it appears that this section allows parent companies to be indirectly supervised by the regulators/supervisors of their subsidiary companies. This creates legal uncertainty for parent companies in terms of the level and extent of regulatory scrutiny into the affairs of the parent company itself by regulators other than those located in its primary jurisdiction of operation. In order to ensure that companies are not accountable to a multitude of regulators/supervisors it is essential that that this Bill either contains provisions surrounding the powers conferred on foreign regulators in terms of these co-operation agreements and/or contains extensive and specific regulations in this regard.	***The sections have substantially been revised. See Chapter 7 (Part 1) of the revised Bill.***

		Exchange of information The Bill does not make reference to existing due process such as that contained in the International Corporation Criminal Act 2008 that requires due legal process to be followed when information is requested and exchanged between regulators and other organs of state usually by way of a subpoena. It is therefore recommended that the existing provisions are referenced to ensure alignment across legislation.	
ASISA	**95(2)**	Please refer our comments on section 95(1) above. If section 95(2) remains, we suggest that the words "~~*utilised or disclosed*~~" be replaced with "*processed*".	
JSE	**95(2)(a)**	Section 73 of the FMA deals with confidential information which is defined as personal information that belongs to a person and that is not known or generally available to others[5]. The FSRB does not define the term "*confidential information*" nor does it specifically define the types of information that are subject to the provisions of the FSRB and we presume that any reference to "*information*" includes a definition to confidential information. It is only in section 95(2)(a) that information is defined as information that includes information as defined in the Protection of Personal Information Act, 2013 ("POPI"). It is therefore unclear which information is referred to in this section and we are of the view that the term "**information**" should be defined on similar lines as in the FMA and should include information that are in the public domain.	***Comment noted. The meaning of 'personal information' is now linked to its meaning in the Protection of Personal Information Act.***
ASISA	**95(2)(a)(i)**	Please refer general comment above. The processing envisaged in this subsection is already covered by section 11(1)(c) of PPI which states the personal information may be processed if "*processing complies with an obligation imposed by law on the responsible party*". This bill seems to acknowledge this in section 95(2)(c) when it states "*when information is used or disclosed for the purposes referred to in paragraphs (a) and (b), such utilization or disclosure constitutes compliance with an obligation imposed by law for purposes of sections 11(1)(c)…*"	***The sections have been revised to specify, clarify and ensure that there are not any ambiguities in legislation that could cause uncertainties and unanticipated consequences for the regulators in carrying out their statutory mandates.***
ASISA	**95(2)(a)(ii) & (iii)**	Please refer general comment above. It is not clear what "*other proceedings*" are and clarity is required. PPI does not apply to the processing of personal information relating to the judicial functions of a	***The sections have substantially been revised. See Chapter 7 (Part 1) of the revised Bill.***

[5] *Section 1 read with section 73 of the Financial Markets Act*

		court as referred to in section 166 of the Constitution (ref PPI section 6(1)(e)). It is not clear why these processing grounds need to be specifically stated.	
SAIA	**95(2)(a)(ii)**	Clause 95(2)(a)(ii) makes reference to the information being used for legal proceedings and other proceedings; it is recommended that "**other proceedings**" should be defined for clarity.	
SAIA	**95(2)(a)(ii)(bb)**	Clause 95(2)(a)(ii)(bb) notes that information can be disclosed if it informs financial customers of "*actions*" taken against a financial institution. If so intended "*action*" should make reference specifically to legal and administrative action.	***The sections have been revised to specify, clarify and ensure that there are not any ambiguities in legislation that could cause uncertainties and unanticipated consequences for the regulators in carrying out their statutory mandates.***
ASISA	**95(2)(a)(iv)**	All these purposes listed is already covered and allowed for under PPI, section 11(1)(f), i.e. that the processing, which includes utilisation and disclosure, is necessary for pursuing the legitimate interests of the responsible party. The whole reason for existence of the regulatory authorities is to, inter alia, protect financial customers and hence all processing related to the protection of financial customers will be allowed under PPI.	***The sections have substantially been revised. See Chapter 7 (Part 1) of the revised Bill.***
BASA	**95(2)(a)(iv)(aa) & (cc)**	No recourse exists against a regulatory authority who wishes to publish the fact that the authority believes a person is contravening the Act carrying out an activity which it is believed constitutes a potential risk. This publication is indicated as being for the purposes of warning consumers but would have obvious reputational risks attached if it were not appropriate. Consequently, we believe that, if it is possible, the regulatory authority must engage with the financial institution before invoking this power. It is recommended that a proviso be placed at the end of paragraph (iv) – "*provided that the Commissioner, Deputy Commissioner or Chief Executive Officer, as the case may be, shall, if exercising a power in terms of subparagraph (aa) or (cc) first undertake all reasonable steps to advise the financial institution concerned of the intention to invoke this power.*"	***See cl.144(5)(b) of the revised Bill.***
ASISA	**95(2)(a)(iv)(dd)**	PPI specifies under which circumstances personal information may be processed. This Bill should not expand the processing grounds. Chapter 4 of PPI already allows for certain processing to be exempted from the application of PPI if the Information Regulator (established under PPI) should decide that such processing warrants to be exempted. Section 37(1) of PPI reads as follows: "*37.(1) The Regulator may, by notice in the Gazette, grant an exemption to a responsible party to process personal information, even if that processing is in breach of a condition for the processing of such information, or any measure that gives effect to such condition, if the Regulator is satisfied*	***See revisions that have been made in Chapter 17 (Part 1).***

		that, in the circumstances of the case— *(a) the public interest in the processing outweighs, to a substantial degree, any interference with the privacy of the data subject that could result from such processing; or* *(b) the processing involves a clear benefit to the data subject or a third party that outweighs, to a substantial degree, any interference with the privacy of the data subject or third party that could result from such processing.*" If the intention is to allow processing which is not covered under any of the existing PPI processing grounds as set out in section 11(1), but should be allowed because such processing will be in the public interest, then the regulatory authorities should apply for exemption to the Information Regulator.	
ASISA	**95(2)(a)(iv)(ee), (ff)**	PPI already allows for the processing of personal information that is necessary for pursuing the legitimate interests of third parties to whom personal information is provided – refer section 11(1)(f) of PPI. It is our submission that the purposes set out in this section falls under section 11(1)(f) of PPI and hence this subsection is unnecessary.	
ASISA	**95(2)(a)(iv)(gg)**	It is not clear when personal information should ever be used in the developing and implementation of policies, etc. Furthermore, the processing activities envisaged in this section is covered under section 11(1)(f) of PPI as necessary for pursuing the legitimate interests of the parties in question.	
ASISA	**95(2)(a)(iv)(hh) and 95(2)(b)**	These grounds for processing is already covered in PPI under section 11(1)(c). i.e. that the processing complies with an obligation imposed by law on the parties in question.	***Comment noted. See section cl.197 of the revised Bill.***
ASISA	**95(2)(c)**	It appears that what is being attempted is to bring all processing activities specified in (a) and (b) under the PPI sections referred to in the subsection as an obligation imposed by law, i.e. this FSRB. We respectfully submit that many of the activities listed in section 95(2) can be justified under other PPI processing grounds. Furthermore, this Bill should not be used to regulate the processing of personal information, as PPI already does that comprehensively and in line with international data protection legislation.	
JSE	**95(3)(a)**	It is unclear what section 95(3)(a) seeks to achieve. It states that the MCA may take certain actions "*in pursuing the purposes referred to in subsection (2)(a)*" and subsection (2)(a) states the purposes for which information obtained under certain Acts may be utilised or disclosed. Is it intended that the reason why the actions may be taken in terms of subsection (3)(a) is to obtain information which may then be utilised or disclosed for the purposes listed in subsection (2)(a)? If so this should	***Comment noted. See revisions that have been made in Chapter 17 (Part 1).***

		be clearly stated. However, if the actions that may be taken in terms of subsection (3)(a) are not intended to only be in pursuit of obtaining information then this subsection should not reference subsection (2)(a).	
SAIA	**95(3)(a)(v)**	In terms of Clause 95(3)(a)(v) the Commissioner, Deputy Commissioner, or Chief Executive Officer may negotiate and enter into multilateral co-operation agreements with other financial organs of state situated in subsidiary countries in order to inter alia harmonise reporting obligations, for the purposes of providing information regarding "*problems*" that are being experienced within a financial institution. It is recommended that the word "~~*problems*~~" is too broad and should be replaced with "*material concerns*".	***Comment noted. See section cl.197 of the revised Bill.***
ASISA	**95(3)(a)(v)(bb)**	Insofar as these agreements involve the sending of personal information outside of the RSA, these agreements must be subject to and comply with section 72 of PPI. We submit that this must be made clear in this section. Refer additional comments on section 95(3)(b) below.	
JSE	**95(3)(a)(v)(cc)**	Section 95(3)(a)(v)(cc) contemplates the MCA entering into an MOU with an institution such as the JSE for the purpose of coordinating supervisory activities to facilitate the monitoring of financial institutions or issuers as defined in the FMA. This seems to suggest that the MCA has supervisory responsibilities in relation to the entities regulated by the JSE, which is not the case. The MCA already has inspection powers in terms of other legislation so it is unnecessary to seek to obtain such powers through MOUs and requests for assistance from the frontline regulator of the relevant entities. Furthermore, the correct place to deal with the powers of the MCA insofar as entities regulated under the FMA are concerned is in the FMA itself and not in this Bill. The provisions of section 95 have to be consistent with the provisions of POPI and section 73 of the FMA to ensure a consistent application and enforcement of the principles enshrined in these statutes. It is, in our view, imperative that the legislator aligns the provisions of the FSRB with the provisions of POPI and the FMA.	
ASISA	**95(3)(b)**	We do not agree that the statement in the FSRB to the effect that the envisaged agreement complies with section 72 of PPI automatically means that the agreement indeed complies. It is not stated in section 95(3)(a)(v)(bb) that the agreement must comply with section 72 of PPI, so we do not understand how the mere statement in section 95(3)(b) will now make the agreement compliant. We submit that the agreement should be tested against the section 72 PPI requirements before it can be stated that the agreement complies. We submit that this section should be deleted.	***Comment noted. See revised Bill***

ASISA	**95(4)(a) and (b)**	With regards to the requirement to have appropriate safeguards in place to protect information, we submit that the same wording as set out in Condition 7 of PPI should be used in section 95(4)(a) & (b) as Condition 7 of PPI deals comprehensively with the security requirement. We suggest that this section be amended to read as follows: "*Information may only be disclosed to a financial organ of state if, prior to providing information, it is established that the financial organ of state that will receive the information has appropriate safeguards in place to protect~~will comply with Condition 7 of~~ the information, which safeguards must be similar to~~Protection of Personal Information Act, 2013 and~~ those ~~safeguards~~ provided for in this section.*"	***Agreed. See the revisions that have been made in cl.197 of the revised Bill.***
ASISA	**95(4)(b)**	It is not clear who this "*person*" is that is referred to in subsection (1) and clarity is required.	***See revised Bill. The term 'person' used has a general meaning.***
Strate	**95(4)(a) and (b)**	We note subsection (4)(a) and (b) which reads as follows: "*(a) Information may only be disclosed to a financial organ of state if, prior to providing information, it is established that the financial organ of state that will receive the information has appropriate safeguards in place to protect the information, which safeguards must be similar to those provided for in this section.*" "*(b) A person referred to in subsection (1) may only consent to information provided to a financial organ of state being made available to third parties if that person is satisfied that the third parties have appropriate safeguards in place to protect the information received, which safeguards must be similar to those provided for in this section.*" It is our view that this may amount to a duplication of regulatory efforts, given that the requirement to protect information applies to every person or entity in terms of the Protection of Personal Information Act. It is our view that the subject of information security should be left to the Protection of Personal Information Act and its regulators. Further, imposing this restrictive condition on the disclosure of information to a certain category of financial regulatory authorities such as market infrastructures would further frustrate and undermine the authority vested on these bodies in terms of other legislation. It will also slowdown the regulatory activities that these bodies are mandated to fulfil in terms of the legislation. The unrestricted ability to gather and use information is key to the effective functioning of any regulatory body, and further, to the efficient regulation of a particular sector. Given that the requirement to protect information is already governed in the Protection of Personal Information Bill, with a dedicated regulator, we submit that subsections (4)(a) and (b) should be	***Comment noted. See section cl.197 of the revised Bill.***

		deleted.	
ASISA	**95(4)(c)**	Section 11(1)(c) of PPI already allows for this and hence we suggest that this section be deleted.	
ASISA	**95(5)(a)**	PPI uses the term "*de-identified*" data which provides for a broader exclusion than just "*aggregate statistical data*". We submit that the PPI definition of "*de-identified*" be included in this Bill and that section 95(5)(a) be amended to read: "*(5) For the purposes of this section, information does not include—* *(a) de-identified~~aggregate statistical~~ data;*" Statistical aggregate data will fall under the PPI definition of de-identified data.	***Comment noted. See cl.197 of the revised Bill.***
Strate	**95(5)**	Sub-clause (5) provides for certain exclusions to the "*information*" that may or may not be disclosed by various regulatory authorities, including market infrastructures. It is our view that the scope of these exclusions should be extended to include information that is used by financial customers on a regular basis. We submit that the scope of the exclusion should be extended as follows: "*(5) For the purposes of this section, information does not include—* *(a) aggregate statistical data;* *(b) securities register and beneficial holder information;* *(c~~(b~~) information and analysis about the financial condition or business conduct practises of a financial services sector or a part thereof.*".	***Disagree. The financial sector regulators will have power to request any information and the revised Bill has provisions that guard against the abuse of such information.***
Strate	**95** – new definition	Clause 95 makes reference to the term "*information*" which has not been defined in the Bill. To avoid uncertainties in the interpretation and application of this clause, we propose that the term "*information*" be defined either in clause 95 or in clause 1. In submission, we therefore propose the following definition of 'information': **"Information"** *means information obtained in the performance of any power or function under this Act or a regulatory law, including personal information as defined in the Protection of Personal Information Act, 2013, but excludes –* *(a) information that has been made public;* *(b) information that is derived from information that has been made public;*	***Comment noted. Definition for 'information' is not necessary.***

		(c) aggregate statistical data; *(d) securities register and beneficial holder information; and* *(e) information and analyses about the financial conditions or business conduct practises of a financial services sector or a part thereof.*"	
96. Restriction on use of name or description implying connection with regulatory authority			
97. Offences and penalties			
98. Liability for damage, loss or expenses			
ASISA	**98**	There is no good reason why the State, other regulators or their representatives should be exempted from liability. Especially in the absence of any sound reasoning behind such a proposal, we are opposed to this clause. Whilst it is debatable whether somebody can be said to be bona fide while acting in a grossly negligent manner, it is inconceivable that officials of the Regulator who cause damage/losses by acting in a grossly negligent manner should be afforded protection against claims in respect of such damage/losses suffered. While it is true that international standards, and more specifically those of the International Association of Insurance Supervisors (IAIS), do not refer to the words "*grossly negligent*", we submit that specific reference to accountability for gross negligence is not necessary because ICP 2 of IAIS, more specifically 2.12, already requires that "*the supervisor and its staff act with integrity and observe the highest professional standards, including observing conflict of interest rules*." As nobody can "*...observe the highest professional standards ...*" whilst acting in a grossly negligent manner, this means that if they act grossly negligent, they will be in breach of ICP2 of IAIS. As there is no such requirement to observe the highest professional standards in this Bill, we submit that a reference to gross negligence should be included in this Bill. It is submitted that powers afforded to persons should be exercised responsibly and that persons exercising powers bestowed on them in terms of the Bill should be held liable when acting grossly negligent or illegally, especially when the powers bestowed in terms of the Bill encroach on the constitutional rights of individuals and institutions. We fail to see how it can be in the interests of consumers to not hold the state or the regulatory authorities liable for damages suffered by consumers due to an ill-conceived or misdirected decision simply because the person taking the decision was not mala fide.	***See cl.221 which requires that such decisions should have been taken or actions performed in good faith.***

		Furthermore, section 95 allows the disclosure of, inter alia, Personal Information as defined in PPI. Should the people in question breach section 95, they will be accountable under PPI, as they should be. However, in terms of this section 98 they will not be accountable as long as they have acted in good faith. This limitation of liability does not appear in PPI and hence this section is in conflict with PPI. As PPI is the primary legislation that regulates the processing of Personal Information, this Bill should be subject to the provisions of PPI. We therefore suggest that section 98 be further amended to make it clear that the people in question will remain liable under PPI if they are found to have breached PPI.	
Promontory	**98**	Does "*official of the State*" include all staff of PA and MCA? If not, they should be included. I also prefer the stronger form of the indemnity, namely: " …. *loss or expenses suffered or incurred by any person arising from any decisions taken or actions performed ~~in good faith~~ in the exercise of a function, power or duty assigned or delegated to the Minister, the Reserve Bank, a regulatory authority or such an official in terms of this Act or any regulatory law, unless that decision or action can be established to have been made in bad faith*"	***The revised Bill now covers officials of financial sector regulators (FSCA and PA). See cl.221.***
SAIA	**98**	Clause 98 is stated in the Bill as follows: " *The State, the Minister, the Reserve Bank, the Governor and Deputy Governors, a regulatory authority, or an official of the State~~, the Reserve Bank or a regulatory authority~~ is not liable for or in respect of any damage, loss or expenses suffered or incurred by any person arising from any decisions taken or actions performed in good faith in the exercise of a function, power or duty assigned or delegated to the Minister, the Reserve Bank, a regulatory authority or such an official in terms of this Act or any regulatory law.*" The terms "*the Reserve Bank*" and "*a Regulatory Authority*" is repeated in sighting to whom this clause relates. This is likely a typing error and is highlighted as such. In addition the issue of the limitation of liability speaks to the rights of insurers (and consumers alike) to recover damages and the extent to which the State and Regulators will be protected in the event of recklessness. Generally it is considered that with an increase in power there should be an increase in responsibilities of how such powers are utilised. There seems to be an imbalance as the Bill does not provide for additional responsibility to balance the broad range of powers granted to Regulatory Authorities and the Minister in the Bill (for example in Clause 14 and 15 and Clause 68 of the Bill), and it is the submission of SAIA and its members that Government in all its spheres and structures should be appropriately responsible and	***Comment noted. See revised Bill.***

		accountable in exercising the extensive powers granted to it by the legislation it administers.	
99. Amendment of Schedule 2			
Promontory	**99(a)**	Entity for the moment – after final reforms activities or services may be more relevant	***Comment noted. The revised Bill provides that the Minister may, designate in Regulations, a "financial product" and a 'financial service' that is not already regulated in terms of a financial sector law or cannot be designated in Regulations in terms of another financial sector law. See cl.2(2) and 3(2). See revised Bill and Policy Document for further details.***
ASISA	**99**	Whilst the various types of financial institutions have been categorized (Mono vs Dual) in accordance with Schedule 2 of the Bill, this section empowers the Minister, by notice in the Gazette, to re-classify. There should be a detailed process for the Minister to follow that includes, for example, consultation, especially given the impact this could have on the entities concerned. The section effectively allows the Minister to amend the Act without consultation, which may not only have a significant impact on the regulated entities, but could be unconstitutional. Note our comments re section 68.	***The revised Bill provides that the Minister may, designate in Regulations, a "financial product" and a 'financial service' that is not already regulated in terms of a financial sector law or cannot be designated in Regulations in terms of another financial sector law. See cl.2(2) and 3(2). Such designation is done in accordance with the consultation process detailed in Chapter 7 of the revised Bill.***

100. Laws repealed or amended			
Part 3 ***Transitional provisions***			
FIC		While the transitional provisions assign the responsibility of implementing the provisions of a regulatory law that previously referred to the FSB or SARB to either the PA or MCA, Schedule 2 of the FIC Act will require amendments that reflect the new regulatory authorities. This will be particularly relevant in instances where the financial institution which were previously regulated by the FSB but are now regulated by the PA as such instances do not appear to be covered	***Agreed. Consequential amendments will be made to Schedule 2 of the FIC Act to reflect the PA and the MCA.***

		by the transitional provisions.	
101. Transitional definitions			
Promontory	**101**	Transition is undefined? How long? This has no sunset. Importantly, many of the sections in there are NOT transitional and should be put up front	***Comment noted. See Chapter 17 (Part 6) of the revised Bill.***
Promontory	**"market conduct regulation"**	This implies that market conduct regulation is only a transition concept. It should be in the definitions up front.	***Market conduct regulation is one of the key pillars of the twin peaks approach to financial regulation. The concept has been removed from the transitional section of the Bill. See revised Bill as well as the Policy Document for further details.***
Promontory	**"market conduct regulation" – paragraph (a)**	This definition is not market conduct regulation. There is a need to separate what MC regulation is, from what you regulate, who you regulate and what tools are used. Clause (a) is about regulatory tools. I suggest something along the lines of: "*(a) in relation to both mono- and dual-regulated entities~~activities~~, means ~~regulation including~~ the setting, monitoring and enforcing~~activities~~ of rules and regulations designed to ensure that entities that offer~~licensing, rule-making, supervision, and enforcement in terms of any regulatory systems prescribed by a regulatory law for~~ financial services or products do so in a way that is consistent with the objective of the Market Conduct Regulator as set~~institutions that are carrying~~ out in section 12(1)(a).~~mono-regulated activities for purposes of this Act; and~~*"	***The revised Bill no longer makes use of "mono-" and "dual-" regulated activities. The scope of oversight of the two authorities is clearly set out in terms of their respective objectives. The Prudential Authority will be responsible for supervising the safety and soundness of financial institutions that provide financial products, and the FSCA will supervise the conduct of business of all financial institutions.***
Promontory	**" prudential regulation"**	Suggest: " *in relation to dual-regulated activities, means ~~regulation including~~ the setting, monitoring ~~activities of licensing, rule-making, supervision,~~ and enforcing of rules and regulations designed to ensure that such entities conduct their affairs ~~enforcement~~ in a way that is consistent with the objective ~~terms~~ of the Prudential Authority as set out in section 13(1).~~regulatory systems prescribed by a regulatory law —~~* *~~(a) for financial institutions that are carrying out dual-regulated activities for purposes of this Act; and~~* *~~(b) that are specifically aimed at ensuring the safety and soundness of these institutions and their ability to meet their financial obligations;~~*"	***The revised Bill no longer makes use of "mono-" and "dual-" regulated activities. The scope of oversight of the two authorities is clearly set out in terms of their respective objectives. The Prudential Authority will be responsible for supervising the safety and soundness of financial institutions that provide financial products, and the FSCA will supervise the conduct of business of all financial institutions.***
Promontory	**"registrar"**	This definition is OK as a transitional clause	***Comment noted.***

102 Implementation of regulatory laws as from effective date			
Promontory	**102(1)(a) (ii)**	This is not bad but – the question is: is there sufficient conduct coverage in say the banking Act to enable the MCA to a) enter b) investigate c) impose directions d) fine e) impose enforceable undertakings etc? In any case, same again on ~~activity~~/entity	***The revised Bill gives sufficient powers to FSCA and the PA. Chapter 9 covers powers for information gathering, inspection and investigation; Chapter 12 details enforcement powers; Chapter 13 covers administrative actions while Chapter 14 deals with administrative penalties and related orders.***
Promontory	**102(3)**	This and (4) below are uncomfortable but, provided they just deal with transition, they are fine	***Comment noted.***
103. Interpretation of regulatory laws			
104. Transitional provisions relating to regulations, rules, directives, notices and other subordinate legislation			
ASISA	**104**	This is included as a transitional provision, but the point at which this provision ceases to apply is not specified. Presumably it should only apply until the second phase of the twin peaks regime has been completed (see paragraph 2.11 of the Explanatory Memorandum on page 117). Clear confirmation of this fact in the Bill is required. It is submitted that, as stated in our general comments, the purpose of the Bill is to establish a "Twin Peaks" regulatory system which will be responsible for regulating the financial institutions listed regulated in terms of the respective financial sector laws listed in Schedule 1. Section 104 will effectively empower the regulatory authority, in consultation with NT and the Minister, to amend national legislation without any involvement by Parliament. As such and for the reasons stated, it is submitted that the provisions are unconstitutional and that sections 104(1)&(2) should be deleted	***The section is deleted from the revised Bill. The revised Bill now recognises all subordinate legislations made in terms of a financial sector law. See the definition of 'legislative instrument' in the definition section and the process of making such legislative instruments (including the consultation process and requirements) in Chapter 7 of the revised Bill. Both the FSCA and PA will have powers to make and supervise conduct and prudential standards. See cl.94 and 95.***
Promontory	**104**	Why is this transitional? If you are going to give MCA and PA rule-making powers, do it and be done with it. Otherwise the implication is that, when this section lapses (if ever?) all those rules made in the interim will be void.	***The section is deleted from the revised Bill. The revised Bill now recognises all subordinate legislations made in terms of a financial sector law. In addition, both the FSCA and PA will have powers to make and supervise conduct and prudential standards. See cl.94, 95 and Chapter 7 of the revised Bill on the process of making 'legislative instruments'.***

Promontory	**104(1)**	This clause is so broad that it is unworkable thereby conferring, in practice, no power.	***The section is deleted from the revised Bill. However, the FSCA and PA will have powers to make and supervise conduct and prudential standards. See cl.94and 95.***
Promontory	**104(2)**	In our experience it is important to put some substance around rules. In particular, the MCA will be given responsibility for conduct but with very little assistance from the sectoral laws at this stage. Thus, it would be helpful to set out that MCA rules may address certain subjects, e.g.: "*(3) Without limiting the power of the MCA to issue rules, MCA rules may make provision with respect to any of the following—* *(a) fit and proper person requirements for controlling parties and managers of mono-regulated entities;* *(b) the governance of mono-regulated entities;* *(c) capital and liquidity requirements for mono-regulated entities;* *(d) valuation requirements and methods for mono- and dual-regulated entities;* *(e) standards of business conduct for mono- and dual-regulated entities;* *(f) requirements (including requirements to provide information) imposed on controlling parties of mono-regulated entities;* *(g) the use of financial instruments (including derivatives) by mono-regulated entities;* *(h) outsourcing by mono-regulated entities;* *(i) record keeping mono- and dual-regulated entities;* *(j) financial audit reports in relation to mono-regulated entities;* *(k) disclosure of information to customers of mono- and dual-regulated entities;* *(l) provision of information about mono- and dual-regulated entities to the MCA;* *(m) the appropriateness of advertising by mono- and dual-regulated entities;* *(n) the suitability of products offered to clients by mono- and dual-regulated entities;* *(o) the financial position of mono-regulated entities;* *(p) the adequacy of resources (including human resources, technical resources, and financial resources) of, or available to, mono-regulated entities;* *(q) funding and solvency of mono-regulated entities;*" If PA plans to use rules, a similar list will be needed, although the content will vary.	***Agreed. The FSCA and PA will have powers to make and supervise conduct and prudential standards. The conduct standards cover a number of issues including those proposed and listed by Promontory. See cl.94 and 95 of the revised Bill as well as the Policy Document for further details.***
SAIA	**104(3)**	**Transitional provisions regarding rule-making - clause 104** Clause 104 (3) provides that as of the effective date of the Bill, all existing rules of the FSB and SARB will apply to financial institutions. A concern is raised that there may be certain rules, especially in the SARB that insurers aren't aware of. SAIA members has called for a process of	***Comment noted. The section has been deleted from the revised Bill. All subordinate legislations made in terms of a financial sector law will continue to apply to financial institutions. In addition, the FSCA and***

		proper engagement as part of transitional requirements in order for all financial institutions to understand exactly what rules and subordinate legislation they will be required to adhere to.	***PA will have powers to make and supervise conduct and prudential standards. See cl.94 and 95.***
105. Transitional provisions relating to Financial Services Board			
ASISA	**105**	There cannot be a gap between the dissolution of the FSB and the appointments needed in order for the Market Conduct authority to operate. National Treasury will need to ensure that there is no such gap.	***Comment noted. See revised Bill.***
106. Short title and commencement			

SCHEDULE 1: REGULATORY LAWS

ASISA	**Schedule 1**	Please note our general comments with regards to the inclusion of the NCA and NCR. We submit that the NCA should be included in Schedule 1.	***Agreed. See Schedule 1 of the revised FSR Bill.***
Promontory	**Title**	Insert: FINANCIAL REGULATORY LAWS (Grammatical/editorial)	***Changed to 'Financial Sector Laws'. See Schedule 1.***

SCHEDULE 2: REGULATED ACTIVITIES

JSE	**Part 2 (f)**	We are concerned that the FSRB does not provide any criteria or guidance as to why a particular type of activity is categorised as a mono-regulated or dual-regulated activity. If it is intended that the determination is based on the importance of the safety and soundness of an entity to the financial system then this should be stated in the Bill and the categorisation of the relevant entities should follow this principle, which it does not appear to do in respect of all of the entities listed in the Schedule. Schedule 2 – Part 2 (f) – There is no obvious rationale for why all of the entities listed in this subsection need to be subject to the lead regulation of the PA. Many of these entities have little impact on the safety of the financial system as whole. • An *exchange* merely provides a market to bring together buyers and sellers of listed securities. • An *authorised user* merely executes transactions on behalf of clients and for its own account. • A *stockbroker* is an individual who is a member of the South African Institute of Stockbrokers and is not even a regulated person in terms of the FMA. • A *nominee* is merely a legal entity that acts as the registered holder of securities on behalf of other persons. The impact that other regulated persons that may be prescribed as such in terms of section 5 of the FMA may have on the financial system can only be determined once they have been identified and the nature of their business has been considered. It should also be noted that a clearing member, whose activities may well be significant in terms of the potential impact on the financial system, have not been mentioned at all in Schedule 2.	***The concept and need to distinguish "mono-" and "dual-" regulated activities is no longer used in the revised FSR Bill hence the Schedule of 'Regulated Activities' has been deleted from the revised FSR Bill. An authority designated in terms of Schedule 2 as the licensing authority for a financial sector law is responsible for granting, issuing, imposing conditions on, varying, suspending or cancelling a licence in terms of the financial sector law. See the Policy document for a detailed explanation on the regulatory approach adopted***

ASISA	**Parts 1 and 2**	We do not in all instances understand the rationale for including certain activities as mono-regulated and others as dual-regulated. It is not clear to us that pension funds and the managers, trustees and other parties listed in respect to CISs (that do not provide guarantees) should be mono-regulated rather than dual-regulated. Why would a linked long-term insurer be dual-regulated and the entities involved in a collective investment scheme (that does not provide guarantees) be mono-regulated? Pension funds hold assets to fund member benefits on balance sheet and, in the case of defined benefit pensions funds and pension funds that pay guaranteed annuities, provide guaranteed benefits to members. A linked insurer may hold fewer assets on its balance sheet than a large pension fund. We therefore do not understand why these entities would not be dual-regulated. Alternatively, linked insurers should be mono-regulated, which would be consistent with CISs that do not offer guaranteed products, In fact ASISA linked insurer members firmly believe that mono-regulation is the appropriate system for them. Essentially, ASISA members would like to understand the principles being applied to differentiate into dual- and mono-regulated status. It does not appear to relate to the assets being held on the balance sheet of the organisation in that pension funds are not dual-regulated. It is difficult to comment on this in that the rationale is not understood. The Discussion paper of 1 February 2013 does not throw much light on this. Of particular concern is where the expertise with regard to prudential oversight is to be concentrated. Logically, it will be with the prudential regulator at the Reserve Bank. We are therefore concerned about what level of competency and expertise will remain with and in future be attracted to, the Market Conduct Regulator. We are also of the view that Medical Schemes should be included in the ambit of this Act, there are prudential regulations applicable to them which would require oversight and regulation, as is the case with pension funds, which have been included. The lead regulator distinction remains unclear. If an insurer has as its lead regulator the Prudential Authority, but the Market Conduct Authority is the lead regulator where the insurer is an authorised financial services provider under FAIS. This means that there is a different lead regulator for mono-regulated activities versus dual-regulated activities. Does this not make it difficult for the Market Conduct Authority? Does this mean that for every activity of an insurer, we would have to get dual permission on every occasion? In light of our comments on the definition of "*dual-regulated activity*", where we stated "*We suggest the definition to be amended to read as follow: "dual-regulated activity" means any activity regulated in terms of a financial sector act recorded in part 2 of Schedule 2*", we suggest that Schedule 2, parts 1 and 2 must be amended accordingly to start as follow: "*Any business regulated in terms ~~of a regulatory law specified below and conducted by~~ any of the*	***The concept and need to distinguish "mono-" and "dual-" regulated activities is no longer applied in the revised FSR Bill hence the Schedule for 'Regulated Activities' has been deleted from the revised FSR Bill. An authority designated in terms of Schedule 2 as the licensing authority for a financial sector law is responsible for granting, issuing, imposing conditions on, varying, suspending or cancelling a licence in terms of the financial sector law. See the Policy document for a detailed explanation on the regulatory approach adopted for the twin peaks.***

		following financial sector laws~~institutions or persons is a mono [dual] regulated activity~~:" and then these financial sector laws must be listed. We note that for CISs, a distinction is made between those that provide an explicit or implicit guarantee of the investor's capital and those that do not. For those that provide guarantees, the scheme will be regulated by both the Prudential Authority and the Market Conduct Authority; for those that do not provide guarantees, the scheme will be regulated by the Market Conduct Authority only. We believe that the same distinction should be drawn insofar as long-term insurers are concerned i.e. those that provide guaranteed policies and those that do not provide guaranteed policies. We are not aware of collective investments schemes in South Africa that provide guarantees, but this may be theoretically possible. In any event, we do not understand what is meant by an "*implicit guarantee of the capital of the investor*", and would appreciate clarity and consultation on this issue.	
PMG subscriber	**Parts 1 and 2**	**Regulated activities** The demarcation of regulated activities as mono-regulated activities and dual-regulated activities is irrelevant and unnecessarily limiting. It presupposes that only a certain category of entities is capable of causing prudential problems to the financial system. This is only true if the only systemic problem contemplated in the Bill is a direct impact to the system. The impact to the financial system could be indirect. The fact that it is unlikely for a pension fund to fail does not mean that it can never fail. The consequences of such a failure on households, the bond market and share market could be enormous. The Bill should consider broadening the regulatory scope for prudential purposes to avoid time-consuming parliamentary process when this has to be done at a later stage.	***The schedule for 'Regulated Activities' has been deleted from the revised FSR Bill given that the concept and need to distinguish "mono-" vs "dual-" regulated activities is no longer applicable in the revised FSR Bill. See the Policy document for a detailed explanation on the regulatory approach adopted for the twin peaks.***
BASA	**Parts 1 and 2**	**Dual regulated and mono regulated activities (Schedule 2)** In terms of the debate between the categorization of "*activities*" and "*entities*," activities are preferred. Most of the post-financial crisis regulatory reform makes the distinction between activities and entities, and thus it is preferable to regulate activities, instead of entities. By categorising the "*activity*", the Bill will capture all entities that provide a financial activity, which in some instances may be an entity which does not necessarily fall under the auspices of a financial regulatory authority e.g. medical aid schemes. If a particular entity provides an activity as defined in the Bill, that entity will be captured within the regulatory framework of the Twin Peaks system, which would provide for better regulation of the financial sector. It is also recommended that Systemically Important Financial Institutions (SIFIs) are dual-	***Schedule for 'Regulated Activities' has been deleted from the revised FSR Bill. The concept and need to distinguish "mono-" vs "dual-" regulated activities is no longer applied in the revised FSR Bill. See the Policy document for a detailed explanation on the regulatory approach adopted for the twin peaks.***

		regulated. Mono-regulated activities which could be systemically important (like large pension funds) should also be dual-regulated. In terms of the list of regulated activities, medical aid schemes should be included in this schedule as they are often underwritten by financial institutions.	
JSE	**Part 1 and 2**	**Mono-regulation and Dual-regulation** Our primary principle concern with the proposed legislation as drafted, relates to the proposed classification of entities as dual- or mono-regulated and the consequences of such classification. It is our understanding that in a Twin Peaks system the PA is tasked with lead regulating entities that pose a specific threat to financial stability, while the MCA is responsible for market integrity and disclosure regulation of financial products and financial services providers. In its current form, we feel that the draft Bill does not adequately separate these two functions. In addition, we do not believe that the PA should be the lead regulator in all dual-regulated activities, regardless of the nature of the activity that is being regulated. The draft Bill distinguishes between **mono-regulated** and **dual-regulated activities**, and on this basis outlines which entities will be lead regulated by the PA and which by the MCA. The JSE, its authorized users, stock-brokers, clearing houses (including associated clearing houses), central securities depository participants and nominees are classified as dual-regulated businesses (Schedule 2, Part 2 (f)) which are consequently lead regulated by the PA. We do not feel that this demarcation properly determines or assesses the nature of such financial institution's business and/or the risk that this business may pose to the financial system. The proposed approach as articulated also seems to be a deviation from Twin Peaks as generally applied. For instance, under the Twin Peaks regulatory regime in force in Australia, the Australian Prudential Regulation Authority ("APRA") is tasked with the prudential regulation of all institutions making promises in the areas of deposit taking, insurance and superannuation, while the Australian Securities and Investments Commission ("ASIC") is tasked with the regulation of market integrity and consumer protection. As such, the Australian Securities Exchange ("ASX") falls under the primary regulatory ambit of the ASIC, as do all trading venues and also clearing and settlement facilities. Clearing and settlement facilities in Australia are also subject to oversight by the Reserve Bank of Australia ("RBA"), which is responsible for the stability of the Australian financial system. That said, within the Australian context, the RBA is not responsible for either the licensing of market infrastructures or the lead regulation of even clearing and settlement facilities. The RBA fulfils its obligations to ensure the stability of the Australian financial system by setting the appropriate standards for clearing and settlement facilities (financial stability standards) and conducting a	***Schedule for 'Regulated Activities' has been deleted from the revised FSR Bill. The concept and need to distinguish "mono-" vs "dual-" regulated activities is no longer applied in the revised FSR Bill. An authority designated in terms of Schedule 2 as the licensing authority for a financial sector law is responsible for granting, issuing, imposing conditions on, varying, suspending or cancelling a licence in terms of the financial sector law. See the Policy document for a detailed explanation on the regulatory approach adopted for the twin peaks.***

		(annual) review of licensed entities against such standards. ASIC however remains responsible for the general supervision of market infrastructures and so forth. Essentially, ASIC acts as lead regulator for all financial market infrastructures by coordinating license applications, assessing compliance with license requirements and acting as the primary point of contact for financial market infrastructures. Our understanding is that the UK approach is similar. The JSE proposes that the approach adopted in South Africa should be consistent with these well established and accepted international approaches. Prudential regulation has as its cornerstone the financial safety and soundness of entities such as banks and insurance companies that may pose, by the very nature of these types of businesses, systemic risk to the entire financial system. For example, banks accept deposits in terms of a loan of consumption and depositors only have a personal right for the repayment of the capital amount plus interest and banks then lend the amounts so received to other entities. Insurers accept premiums and underwrite risks that may amount to many multiples of the premiums that have been paid to underwrite these risks. It is therefore of vital importance that these entities have sufficient assets to meet their obligations. The failure of these types of financial institutions was also the major cause of the 2008 financial crisis and it is an undeniable fact that the effective prudential regulation of these entities is essential to ensure the integrity of the South African financial system. The JSE would however argue that it is neither appropriate nor in line with international practice for exchanges and a clearing house such as SAFCOM (an associated clearing house) and all categories of authorised users to be classified as financial institutions undertaking dual-regulated activities that need to be lead-regulated by the PA. In support of this argument we will briefly highlight some examples to illustrate our views. We are obviously available to discuss these matters with you in more detail or expand on this submission, if so required. The JSE is an exchange licensed by the Registrar of Financial Markets in accordance with the peremptory provisions of the Financial Markets Act, 19 of 2012 (“FMA”). It is not a deposit taking institution, nor does it carry any balance sheet risk similar to that of a bank. Indeed the bulk of the regulatory oversight of an exchange and its authorised users arguably relates to issues of market integrity and investor protection. It therefore does not make sense that it should be lead-regulated by the SARB. Similarly, SAFCOM is an associated clearing house and conducts its business as clearing house and central counterparty in accordance with the JSE’s Rules and under the direct supervision and regulation of the Registrar of Financial Markets. SAFCOM does not incur any principal risk in the markets for which it clears and should therefore arguably not be subject to the same type of prudential oversight as a clearing house that assumes principal risk as a central counterparty. The clearing members that are also banks are already regulated by the SARB and the SARB is therefore	

		responsible for the prudential oversight and regulation of these entities. This model is appropriate and should remain. It is also important to recognise that the prudential requirements imposed on financial market intermediaries do not have the sole objective of promoting the soundness of the financial system. An obvious example to illustrate our point is the capital adequacy requirements of authorised users of the JSE. These requirements are essential to promote the integrity and efficiency of the JSE's market by ensuring continuity of service to the authorised users' clients and the protection of client assets and thus should fall within the primary jurisdiction of the MCA. The rules recording these requirements are subject to the approval of the Registrar of Financial Markets. The Registrar of Financial Markets is the regulatory authority established by virtue of the provisions of the FMA and is tasked with the enforcement of the provisions of the FMA such as approving the rules of the JSE, ensuring that the JSE fulfils its regulatory duties and responsibilities and, in general, regulating financial markets and market infrastructures. In addition hereto, both the Registrar of Financial Markets and any other regulated persons are obliged to alert the relevant authorities in the event of any issue that may result in systemic risk. It is our understanding from the information published by National Treasury that the PA will be established within the SARB and that it would be responsible for the "…*oversight and soundness of banks, insurers and financial conglomerates.*" Neither the JSE nor SAFCOM falls within the ambit of the definition of these entities. The MCA, on the other hand, "…*will be responsible for ensuring the integrity and efficiency of financial markets*…" and, in our view, should be the lead regulator responsible for the regulation of all existing market infrastructures, including the JSE and SAFCOM. We are mindful of the fact that certain issues that may arise within the ambit of the jurisdiction of a market infrastructure and/or the Registrar of Financial Markets may impact on financial stability and/or pose systemic risk for the economy and that there are elements of prudential regulation that are therefore applicable to market infrastructures. We would suggest that the solution to this is not to duplicate the regulation of market infrastructures, but to implement a framework whereby the lead regulatory authority (the Registrar of Financial Markets in the current context and the MCA under the FSRB) will liaise with the PA to determine appropriate prudential requirements and that an obligation is imposed on the market infrastructure and the MCA to report any issues to the PA. In addition hereto, the FSRB accords extensive powers to the Financial Stability Oversight	

		Committee ("FSOC") to maintain, protect and enhance financial stability in South Africa. The FSRB contains extensive provisions regulating and recording the regulatory authorities' respective duties and obligations.[6] Section 14 of the FSRB already provides for co-operation and support between the PA and MCA and it would entirely be within the ambit of these regulatory responsibilities for the MCA to consult and agree with the PA in respect of the requisite capital adequacy requirements of authorised users and all other matters that may, or will impact on the financial soundness of market infrastructures and or its authorised users. This will also not detract from the MCA's obligation to enforce these requirements and will also eliminate the incorrect imposition of requirements of "*financial soundness and safety*" on institutions that are fundamentally different from banks, insurers and financial conglomerates. We would propose that establishing appropriate consultation and co-operation arrangements between the PA and the MCA would be preferable to attempting to identify those structures and arrangements implemented by a market infrastructure or an authorised user that promote financial soundness and those that promote integrity and efficiency of the financial markets, and splitting the regulatory responsibility for overseeing those structures and arrangements between the PA and the MCA, as the Bill currently proposes.	
Standard Bank	**Part 1 and 2**	**Dual regulated and mono regulated activities** (Schedule 2) It is recommended that all SIFIs are dual-regulated. Mono-regulated actives which could be systemically important (like large pension funds) should also be dual-regulated. Ideally, we would support the inclusion of Pension Funds and Medical Aid Schemes are dual-regulated under this legislation as we are of the view that many Pension Funds and Medical Schemes are systemically important institutions. We understand that this is a matter that may only be considered in the subsequent phases of the implementation of Twin Peaks.	***Schedule for 'Regulated Activities' has been deleted from the revised FSR Bill. The concept and need to distinguish "mono-" vs "dual-" regulated activities is no longer used in the revised FSR Bill. See the Policy document for a detailed explanation on the regulatory approach adopted for the twin peaks.***
JSE	**General**	**Regulation of authorised users of a MI and financial service providers** Another matter that we feel it is worth highlighting is the incongruity of the proposed regulation of authorised users of a market infrastructure and financial service providers ("*FSPs*"). The FSRB defines mono-regulated activities as comprising, amongst others, authorised FSPs as defined in the Financial Advisory and Intermediary Services Act, 2002 (No. 37 of 2002). The draft Bill proposes that FSPs will be lead-regulated by the newly formed MCA and will furthermore only be mono-	***Schedule for 'Regulated Activities' has been deleted from the revised FSR Bill. The concept and need to distinguish "mono-" vs "dual-" regulated activities is no longer used in the revised FSR Bill. An authority designated in terms of Schedule 2 as the licensing authority for a financial sector law is responsible for granting, issuing, imposing conditions on, varying,***

[6] See Chapter 3 of the FSRB with specific reference to sections 11 – 16.

		regulated, in contrast to the authorised users of an exchange which (it is proposed) will be dual-regulated under the Twin Peaks regime. There is no real difference between the activities of many authorised users of an exchange and FSPs as both provide financial services to their clients and consequently, they should be treated equally from a regulatory perspective. In terms of the FSRB the authorised users will be subject to the regulatory authority of the MCA and the PA and they would therefore be subject to additional prudential (safety and soundness) requirements that are not applicable to FSPs. This will result in an unequal playing field and will also create the opportunity for regulatory arbitrage. In addition hereto and as a further illustration of the necessity of accurately reflecting the appropriate prudential regulation and oversight, it is important to clearly distinguish between *non-bank trading members* (authorised users) of the JSE and *members that are banks*. Banks are already subject to the primary regulation of the SARB as a result of the systemic risk that will result should a bank fail. Authorised users that are not banks, on the other hand, pose less of a systemic risk (if at all), are not allowed to accept deposits, are obliged to segregate their assets from those of its clients and should therefore not be subject to the same lead regulatory oversight as banks. The JSE is of the view that it is preferable to consider and assess the exact nature of the activities performed by these entities and their impact on the South African financial system. Financial market infrastructures such as exchanges, clearing houses and authorised users, whilst they should undoubtedly be subject to some levels of prudential regulation and oversight, do not have comparable business models to entities such as banks, nor do these entities pose the types of risks that banks and insurance companies may pose to the financial system. Consequently, we would argue for the adoption of a model that is more aligned to the Australian or UK models in relation to the regulation and oversight of these entities.	***suspending or cancelling a licence in terms of the financial sector law. See the Policy document for a detailed explanation on the regulatory approach adopted for the twin peaks.***
SAIA	**Schedule 2**	It is unclear from the Schedule whether micro insurance will be a mono or a dual regulated activity. Binder holders and Non-Mandated intermediaries ("NMIs") are also not specified in the Schedule, but reference is made to authorised financial service providers or representatives as defined in eh FAIS Act. Clarity is required on where Binder Holder as agents of the insurers fit in.	***Schedule for 'Regulated Activities' has been deleted from the revised FSR Bill. The concept and need to distinguish "mono-" vs "dual-" regulated activities is no longer applied in the revised FSR Bill. See the Policy document for a detailed explanation on the regulatory approach adopted for the twin peaks.***
Part 1 ***Mono-regulated activities (regulated by Market Conduct Authority only)***			
Promontory	**Title**	It is recommended that this paragraph be amended as follows:	***Schedule for 'Regulated Activities' has been deleted from the revised FSR Bill. The concept and need to***

		"*Part 1* ***Mono-regulated entities ~~activities~~ (regulated by Market Conduct Authority only)*** *Any business regulated in terms of a regulatory law specified below and conducted by any of the following institutions or persons is a mono-regulated entity ~~activity~~*:"	***distinguish "mono-" vs "dual-" regulated activities is no longer used in the revised FSR Bill. The revised FSR Bill provides for dual regulation on all financial institutions. See the Policy document for a detailed explanation on the regulatory approach adopted for the twin peaks.***
BASA	**Part 1(a)**	**Pension Funds** We note that Schedule 2, Part 1 on page 103 refers to pension fund organisations registered in terms of the Pension Funds Act as forming part of the designated mono-regulated entity. Our concern is that pension funds have prudential aspects which leads to inconsistency should it be regulated by the market conduct authority whose mandate excludes the prudential aspects.	***Schedule for 'Regulated Activities' has been deleted from the revised FSR Bill. The concept and need to distinguish "mono-" vs "dual-" regulated activities is no longer used in the revised FSR Bill. An authority designated in terms of Schedule 2 as the licensing authority for a financial sector law is responsible for granting, issuing, imposing conditions on, varying, suspending or cancelling a licence in terms of the financial sector law. The revised FSR Bill provides for dual regulation of all financial institutions irrespective of the licensing authority. See the Policy document for a detailed explanation on the regulatory approach adopted for the twin peaks.***
Promontory	**Part 1(c)**	"*(c) a collective investment scheme as defined in section 1 of the Collective Investment Schemes Control Act, (Act No. 45 of 2002), and a manager, trustee, custodian or nominee company registered or approved in terms of that Act, and an authorised agent of such a manager; ~~, except collective investment schemes that provide an explicit or implicit guarantee of the capital of the investor;~~* " I see no value in splitting the CIS industry in this way – I am not aware of any other country that does it.	***Schedule for 'Regulated Activities' has been deleted from the revised FSR Bill. The concept and need to distinguish "mono-" vs "dual-" regulated activities is no longer used in the revised FSR Bill. The revised FSR Bill provides for dual regulation on all financial institutions. See the Policy document for a detailed explanation on the regulatory approach adopted for the twin peaks.***
Promontory	**Part 1(e) insert new (e)**	"*(e) an authorised user, stock-broker, participant, or nominee as defined in section 1 or a regulated person as prescribed in terms of section 5 of the Financial Markets Act, 2012 (Act No.19 of 2012);* Note: I haven't checked the definition of regulated persons in s5 of the FMA but can't see how there could be any justification for including individuals under dual-regulation. *(f)* becomes *(g)* to *(i)*	***Agree. Schedule for 'Regulated Activities' has been deleted from the revised FSR Bill.***

Melbourne	**Part 1(h)**	We query whether the reference to "*(a) to (f)*" in paragraph (h) should instead read "*(a) to (g)*".	***Agree. Sub-section however deleted.***
World Bank	**Schedule 2**	There are some potential gaps in the description of the mono- and dual-regulated institutions and activities listed in Schedule 2: for example, there does not appear to be any provision for: • Institutions providing consumer credit services which are currently regulated by the National Credit Regulator (NCR) under the Ministry of Trade and Industry (MTI); • Co-operatives which are regulated by the Co-operative Development Agency under the MTI; • Stokvels which are currently regulated by the National Consumer Commission under the MTI; • Burial associations which are not regulated (for example, they are not required to register as a friendly society or a cooperative because of their low asset base); • Securities industry issuers (although their authorised intermediaries would appear to be covered by the reference to "*an authorised financial services provider or representative as defined in section 1(1) of the Financial Advisory and Intermediary Services Act, 2002 (Act No. 37 of 2002)*"; **Paragraph 1(d) of Part 1 of Schedule 2** • Pension fund issuers and managers; • Providers of non – bank e-money services (although they would be covered if they come within the repayment services covered by clause (g) of Part 2 of Schedule 2); and • Unauthorized representatives (agents and third parties) of the institutions listed and representatives of any unregulated institution. It may of course be that such persons are intended to be covered by the reference to "*any person who performs an activity regulated in terms of a law referred to in paragraph (a) to [(f) for Part 1 and (i) for Part 2].*" **Paragraph 1(h) and Part 2(j) of Schedule 2** – However these references would not appear to cover unregulated activities or intermediaries. This would mean that the MCA would not have any power to regulate the market conduct of such entities. An alternative approach could be to give the Authorities the power to regulate entities which carry out prescribed types of activities and regardless of whether the entities themselves or the activities are regulated. This would mean that the MCA would be able to cover in a consistent manner consumer protection issues relevant to all financial services and products. Further, the approach would alleviate the potential for inconsistent approaches to consumer protection which arise from the current fragmented regulatory system. It is appreciated, however, that such an approach may not be feasible in the short term. At a minimum, the following steps are proposed: • There could be provision for regulations to be made which can prescribe new types of	***Schedule for 'Regulated Activities' has been deleted from the revised FSR Bill. The concept and need to distinguish "mono-" vs "dual-" regulated activities is no longer used in the revised FSR Bill. The revised FSR Bill provides for dual regulation on all financial institutions with provisions for delegation of functions between the financial sector regulators, where appropriate. See the Policy document for a detailed explanation on the regulatory approach adopted for the twin peaks.***

		activities as mono or dual regulated activities; and • It could be made clear in the Bill itself, that the proposed Council of Financial Regulators (**clause 56**) should include representatives of the NCR, the Co-operative Development Agency and the Consumer Affairs Commission, as well as the MCA; and Consideration should also be given to removing the reference to the MCA being responsible for the "*safety and soundness*" of mono-regulated activities. This statement suggests that the MCA has responsibility for the prudential supervision of these entities, which is probably not intended.	
Part 2 ***Dual-regulated activities (regulated by both Market Conduct and Prudential Authorities)***			
Promontory	**Title**	"***Dual-regulated entities ~~activities~~ (regulated by both Market Conduct and Prudential Authorities)***" Same again on ~~activity~~/entity	***Comments noted however, schedule for 'Regulated Activities' has been deleted from the revised FSR Bill.***
Promontory	**Part 2 (f)**	FMIs are dual-regulated by MAC and SARB. Suggest moving this to a new Part 3 see below. In any case, it is far too extensive. See cut down suggestions in Part 3 below. "*an exchange, authorised user, stock-broker, clearing house, associated clearing house, central securities depository*,"	***Schedule for 'Regulated Activities' has been deleted from the revised FSR Bill. The concept and need to distinguish mono and dual regulated activities is no longer used in the revised FSR Bill.***
Promontory	**Part 2 (g)**	Not regulated by either PA or MCA – this should be the sole responsibility of the SARB.	***Schedule for 'Regulated Activities' has been deleted from the revised FSR Bill. The concept and need to distinguish "mono-" vs "dual-" regulated activities is no longer used in the revised FSR Bill. The revised FSR Bill provides for dual regulation on all financial institutions with provisions for delegation of functions between the financial sector regulators, where appropriate.***
BASA	**Part 2 (g)**	**National Payments System (NPS)** In respect of supervision and regulation of the National Payments System, we believe that the Bill is not sufficiently clear with regards to the allocation of roles and responsibilities, in particular the role of the National Payments System Department (NPSD) within the Reserve Bank does not appear to have been adequately taken into account in the drafting of this Bill.	***The first draft of the FSR Bill did not make mention of the National Payment System Act. However, it has been acknowledged that the provision of payment services through the national payments system requires stronger oversight in South Africa. This is***

		Our understanding of the regulation of payments under this Bill is based on the inclusion of payments in Schedule 2 as a "*dual-regulated activity regulated by both the Prudential and Market Conduct Authorities*". It is assumed that this does not alter the current responsibilities of the NPSD, as set out in the National Payments System Act 1998 (NPS Act), in respect of supervising the National Payments System as a whole, including system-wide issues such as inter-operability and the modernization of the payments system. We believe that for this situation to function effectively, and for regulatory arbitrage to be minimized, there will need to be revisions to the Bill to clarify the respective roles of the regulatory bodies responsible for payments supervision and regulation, as well as explicit coordination mechanisms between them. We assume that the Payments Association of South Africa (PASA) will retain its current role. In other words, PASA will remain as the payments system management body as per Section 3(1) of the NPS Act and that its role in rulemaking will continue. In regard to the financial soundness of the National Payments System and of payments system operators, it is our view that this refers specifically to settlement systems, which clearly have prudential implications. Most importantly in our view, is that the Bill is not clear about the future role and location of the NPSD, as envisaged in Section 2 of the National Payments System Act. We are concerned that the Bill is silent on this matter, and we would prefer that the issue of the supervision and regulation of payments is addressed directly in the Bill. In particular, we would appreciate clarity as to whether or not it is intended that the NPSD will fall under the auspices of the Prudential Authority. Many of our concerns regarding how payments are dealt with under the Twin Peaks model could be addressed once there is clarity on this specific point. Given the specialized and technical nature of the National Payments System, we support the retention of the NPSD within the Reserve Bank as a standalone department separate to the Prudential Authority. The NPSD should continue to perform its current functions as per the NPS Act including the management of the clearing system and clearing system rules, as well as oversight of the payments system management body (PASA). The current structure and regulatory framework for the National Payments System is effective. The FSRB can be cross-referenced to the NPS Act to ensure alignment. In addition, we suggest that the proposed Management Oversight Committee (Clause 25) established to provide oversight of the Prudential Authority could serve as a mechanism for coordination between the Prudential Authority and the NPSD on matters pertaining to the payments.	***both from a prudential and conduct perspective. The revised draft of the FSR Bill empowers the PA and the FSCA to be able to apply prudential and conduct standards on participants in the national payments system. The responsibility for oversight of the Act and licensing of participants still remains with the Reserve Bank and in acknowledgement of the crucial role of the national payments system to stability of the financial system, neither the PA nor the FSCA will be able to apply standards relating to the payment system or its users without the approval of the Reserve Bank. See revised FSR Bill and the Policy document for further information.***

Standard Bank	Part 2 (g)	**National Payments System (NPS)** One of the principles that Standard Bank has used to assess the Bill is the extent to which the respective roles and responsibilities of different regulators are clearly outlined. In respect of supervision and regulation of the National Payment System, Standard Bank believes that the Bill is not sufficiently clear with regards to the allocation of roles and responsibilities, in particular the role of the National Payment System Department (NPSD) within the SARB does not appear to have been adequately taken into account in the drafting of this Bill. Standard Bank's understanding of the regulation of payments under this Bill is based on the inclusion of payments in Schedule 2 as a "*dual-regulated activity regulated by both the Prudential and Market Conduct Authorities*". It is understood that matters related to financial soundness of payments are supervised by the Prudential Authority and that matters related to consumer protection and fair treatment of financial customers within the payments system are supervised by the Market Conduct Authority. Standard Bank assumes that this does not alter the current responsibilities of the NPSD, as set out in the National Payment System Act (NPS Act), in respect of supervising the National Payment System as a whole. The NPSD should remain responsible for system-wide issues such as inter-operability and the modernization of the payments system, as well as for the oversight of the SAMOS settlement system. The Bill is not clear about the future role and location of the NPSD. Standard Bank is concerned that the Bill is silent on this matter, and we would prefer that the issue of the supervision and regulation of payments is addressed directly in the Bill. In particular, Standard Bank would appreciate clarity as to whether or not it is intended that the NPSD will fall under the auspices of the Prudential Authority. Many of Standard Bank's concerns regarding how payments is dealt with under the Twin Peaks model could be addressed once there is clarity on this specific point. Given the specialized and technical nature of the National Payment System, Standard Bank supports the retention of the NPSD within the SARB as a standalone department separate to the Prudential Authority. The NPSD should continue to perform its current functions as per the NPS Act including the management of the clearing system and clearing system rules, as well as oversight of the payments system management body, the Payments Association of South Africa (PASA). The current structure and regulatory framework for the National Payment System is effective. The Bill can be cross-referenced to the NPS Act to ensure alignment. Standard Bank further assumes that PASA will retain its current role. In other words, PASA will remain as the payments system management body as per Section 3(1) of the NPS Act and that its role in rule-making will continue.	***The revised draft of the FSR Bill empowers the PA and the FSCA to apply prudential and conduct standards on participants in the national payments system. The responsibility for oversight of the Act and licensing of participants still remains with the Reserve Bank and in acknowledgement of the crucial role of the national payments system to stability of the financial system, neither the PA nor the FSCA will be able to apply standards relating to the payment system or its users without the approval of the Reserve Bank. See revised FSR Bill and the Policy document for further information.***

		It is noted that Schedule 2 of the Bill includes a "*payments system management body*" as a dual-regulated activity. Standard Bank believes that there are no prudential issues related to the functioning of the payments system management body (PASA). Prudential issues related to the financial soundness of payment system operators, and related financial markets infrastructure, in the National Payment System are currently the responsibility of the NPSD within the SARB, and not directly that of PASA. Thus, we do not support the inclusion of a "*payments system management body*" as a dual-regulated activity and subject to the supervision of the Prudential Authority. In regard to the financial soundness of the National Payment System and of payment system operators, it is Standard Bank's view that this refers to specifically to settlement systems – and these clearly have prudential implications. Standard Bank therefore proposes that "**settlement system**" is explicitly defined in the Bill and that the definition of such in the NPS Act is carried across into the Bill. Standard Bank believes that in relation to Schedule 2 of the Bill, that Part 2 (h) should be revised to include a "**settlement system**" in the list of dual-regulated activities given the systemic importance of a settlement system within the financial system, and thus the need for the financial soundness of a settlement system to be supervised by the Prudential Authority. There is a risk that the supervision and regulation of payments under the Twin Peaks model – as currently represented in the draft Bill - will become more complex and more ambiguous and that this is undesirable. It is our understanding based on the current version of the Bill that in addition to the current roles and responsibilities of the NPSD and PASA, there will be roles and responsibilities allocated to the Prudential Authority and Market Conduct Authority with respect to the National Payment System. Standard Bank believes that for this situation to function effectively, and for regulatory arbitrage to be minimized, there will need to be revisions to the Bill to clarify the respective roles of the regulatory bodies responsible for payments supervision and regulation, as well explicit coordination mechanisms between them. Standard Bank would like to confirm that it has correctly interpreted the allocation of roles and responsibilities for payments supervision and regulation under the Twin Peaks model as we have set out in the table below. We believe that the delineation of powers and functions is especially critical in the event of a financial crisis; even more so given the systemic importance of the National Payment System. **Coordination between Prudential Authority and NPSD** We suggest that the proposed Management Oversight Committee (sections 24-27 of the Bill) established to provide oversight of the Prudential Authority could serve as a mechanism for coordination between the Prudential Authority and the NPSD on matters pertaining to payments. It	

		is recommended that the Bill explicitly make provision for cooperation and coordination between the NPSD and the Prudential Authority, including those matters on which joint rules, and consultation, are required. **Scope of responsibilities of the Market Conduct Authority in relation to payments** Section 12(1)(a) of the Bill refers to the objective of the Market Conduct Authority as including "*the integrity of the financial system*". It is not clear if the reference to "*financial system*" includes the National Payment System in this regard. Further if it does include the integrity of the National Payment System, then further clarity would be appreciated regarding the implications for the current roles and responsibilities of the NPSD. It is also not clear what powers the Market Conduct Authority will have in respect to PASA and how will these be exercised. **Coordination with the Market Conduct Authority** It is recommended that in respect of payments, the Bill explicitly requires a Memorandum of Understanding between the Prudential Authority, the South African Reserve Bank (NPSD) and the Market Conduct Authority to address powers and functions in relation to the supervision and regulation of payments. **Scope of the Financial Services Tribunal** It is recommended that decisions taken by the NPSD are also subject to appeal to the Financial Services Tribunal. **Financial system** Standard Bank does not believe that the definition of "*financial system*" in the Bill is clear as to whether or not financial system also includes a payment system and a settlement system as defined in the NPS Act. It is recommended that the Bill is revised to include a payments system and a settlements system in the definition of "*financial system*". **Payment system and Settlement system** Standard Bank proposes that the definition of "**payment system**" in the Bill is revised to cater for all current and future payment systems. Standard Bank recommends that "**settlement system**" is defined in the Bill as per the definition in the NPS Act, Section 1(xviii): "**settlement system**" *means a system established and operated by the Reserve Bank for the discharge of payment and settlement obligations between system participants.*"	
Melbourne	**Part 2(i)**	We query whether the referent to "*(a) to (i)*" in paragraph (i) should instead read "*(a) to (h)*"	***Schedule for 'Regulated Activities' has been deleted from the revised FSR Bill. The concept and need to***

			distinguish "mono-" vs "dual-" regulated activities is no longer used in the revised FSR Bill.
SAIA	**Part 2(j)**	Part 2 of the Schedule under sub-clause (j) refers to "*any person who performs an activity regulated in terms of a law referred to in paragraphs (a) to (i)*." There is no sub-clause *(i)* and it is suggested that sub-clause ~~*(j)*~~ should be changed to *(i)*, and that this might be a minor typing error to be corrected. (Grammatical/editorial)	***The revised FSR Bill no longer makes use of "mono-" vs "dual-" regulated activities. The scope of oversight of the two authorities is clearly set out in terms of their respective objectives. The Prudential Authority will be responsible for supervising the safety and soundness of financial institutions that provide financial products, and the FSCA will supervise the conduct of business of all financial institutions.***
Promontory	**Insert new Part 3**	"***Part 3*** ***Dual-regulated entities (regulated by both Market Conduct and the Reserve Bank)*** *Any business regulated in terms of a regulatory law specified below and conducted by any of the following institutions or persons is a dual-regulated entity:* *(a) an exchange, clearing house, associated clearing house, CCP, central securities depository, as defined in the Financial Markets Act, 2012 (Act No.19 of 2012);*"	***The revised FSR Bill no longer makes use of "mono-" vs "dual-" regulated activities. The scope of oversight of the two authorities is clearly set out in terms of their respective objectives. The Prudential Authority will be responsible for supervising the safety and soundness of financial institutions that provide financial products, and the FSCA will supervise the conduct of business of all financial institutions.***
Promontory	**General**	**Note on Payments System** There are two options for dealing with payments systems. First, assuming you accept the argument that the SARB should have sole responsibility, they could be either: • a single class (e.g. a new Part 1(b)) of mono-regulated entity (regulated by the SARB); or • they could simply be defined in s13-14 as part of SARB's systemic regulatory responsibilities and ignored down the back (my preferred way) If, on the other hand, there is some overwhelming case in South Africa to have the MCA involved, they could be included in Part 3 above.	***The revised draft of the FSR Bill empowers the PA and the FSCA to apply prudential and conduct standards on participants in the national payments system. The responsibility for oversight of the Act and licensing of participants still remains with the Reserve Bank and in acknowledgement of the crucial role of the national payments system to stability of the financial system, neither the PA nor the FSCA will be able to apply standards relating to the payment system or its users without the approval of the Reserve Bank. See revised FSR Bill and the Policy document for further information.***

		Note on terminology If it is regarded as confusing to have two types of dual-regulated entities one option would be to designate them as: • Dual-regulated prudential entities and • Dual-regulated systemic entities	***The concept and need to distinguish "mono-" vs "dual-" regulated activities is no longer applicable in the revised FSR Bill. See the Policy document for a detailed explanation on the new approach to licensing, supervision and regulation, adopted for the twin peaks.***

SCHEDULE 3: LAWS REPEALED OR AMENDED

ASSA	**Schedule 3**	**Ombuds** The Actuarial Society welcomes proposed amendments to the Financial Services Ombud Schemes Act and other measures to strengthen the ombud system and to enhance public awareness of this system.	
BASA	**Schedule 3**	**Ombuds System** In Schedule 3, changes are proposed to the Financial Services Ombuds Schemes Act, 2004. In general, we are concerned that the current fragmentation of adjudicative bodies to resolve the complaints of financial customers is not adequately addressed in this Bill. It is assumed that this is a matter for the second phase of Twin Peaks once the Market Conduct Authority is operational. Clarity is required on whether "*Adjudicator*" refers to the Pension Funds Adjudicator; and if the "*statutory ombud*" refers to the Ombud for Financial Services Providers ("FAIS Ombud.") To ensure consistency, it is also recommended that "*financial ~~user~~*" make reference to "*financial customer*" (as per the definition in the Bill). Paragraph 3 of the Schedule provides for the insertion of a new subsection (1A). It is recommended that "*~~may~~*" must change to "*must*." The word "*may*" could be interpreted to mean that the Council is not compelled to create a centralised helpline and that the creation of this helpline is discretionary. In the insertion of subsection (1B)(b) the independence of the Ombud schemes is ensured by an independent board of directors and there is a concern here that the Council will be expected to fulfil the same mandate as this board. Further to this, with the insertions of Section 8A(2) and (3) by paragraph 5 of the Schedule, these provisions deal with the Council creating independent advisory boards for all schemes and statutory Ombuds, and that these advisory boards can make recommendations to the Council on the appointment of an Ombud. With the exception of making recommendations on	***The Financial Services Ombuds Schemes Act will be repealed and integrated in the FSR Bill in a manner that will give stronger powers to the FSOS Council to consolidate and streamline ombuds arrangements more effectively. All existing ombuds will remain in place and continue functioning. See Chapter 16 of the revised FSR Bill and the Policy document for further details.***

		Ombuds that should be appointed, more clarity is required on what would be the other duties of the advisory board. In addition, independent schemes have their ombud's appointed by the board of directors, so there might be conflict if the Council's advisory board and the board of directors disagree on whom the Ombud should be. We support the proposal that the current Ombud system should be retained with oversight by the Financial Services Ombud Scheme Council. We do not believe that any significant changes to the current system are warranted. We believe that oversight should focus on ensuring a uniform approach to Ombuds. This could include the introduction of a code of conduct which aligns best practice for all statutory and voluntary schemes, and would address the following: • Clarifying the jurisdiction of each Ombud. This will prevent a situation where different Ombuds have overlapping mandates and create consumer confusion; • Specifying the processes and steps that should be adhered to from the time a complaint is received to its final resolution. This will ease some of the administrative inefficiencies and inconsistencies between the different schemes; • Specifying the appeals process and the composition of an independent board of directors. This will address any concerns around the independence of industry funded voluntary schemes; and • Ensuring that all Ombuds regularly publish case statistics, analyzing amongst others, the number of complaints received and resolved, the number of complaints escalated through the appeals process, complaint categories, and findings for and against the industry participant, demographic data, turnaround times and trend identification. We believe that if such an approach is adopted, there will be a level playing field for all Ombuds, irrespective of whether they are statutory or voluntary schemes. In addition, in order to deal with consumer confusion around the various Ombuds, it is suggested that there is a single website or call centre created whereby all financial related complaints can be routed, and which would then direct consumers to the Ombud with jurisdiction in a particular matter. This will address some of the concerns around consumer confusion and forum shopping. Finally we are of the view that the various Ombuds are most appropriately funded by their applicable sub-sector, and preferably on the basis of the number of complaints brought against an industry participant as well as the industry participant's market share. Ombuds should be resolutely focused on dispute resolution.	
FIA	**Schedule**	**Strengthening Ombud schemes**	***The FSOS Act will be repealed and have its***

	3	The broadening of the mandate and role of FSOS Council is good; but it needs to be within the legal framework currently applicable. We do not believe that the FSOS role should be expanded beyond that which is currently defined in the legal framework. The FAIS Ombud (in its current form) has been fair to consumers as a redress mechanism in the event of poor financial advice; but the FIA is on record with regards outcomes for its members particularly with regards legal interpretation, consistency of determinations and length of time taken to resolve complaints. The FIA understands the role of the Ombud in the broader regulatory environment with the provision that this mechanism should be both independent and able to apply the law (our emphasis) fairly and consistently. The FIA would like to see quicker turnaround times when matters are brought before the various Ombud schemes. It is also important that the industry is clearly informed of the Ombud interpretations as they apply to the various determinations made… A clear understanding of the Ombud's determinations will address the consistency issue and also assist in benchmarking acceptable activities and behaviours on an on-going basis. It is unclear from the current draft Bill what is meant by "*requiring all financial institutions to be members of an Ombud Scheme*" as set out in the definition of financial institutions. The FIA interprets this to mean "*only firms providing products / solutions and covering risks*" and we would therefore seek clarity on what this means to the intermediary.	***provisions integrated in the revised FSR Bill. See Chapter 16 and Schedule 4 of the revised FSR Bill as well as the Policy document for further details on the proposed changes and enhancements to the ombud schemes regime.***
SAIA	**Schedule 3**	**Repeal of the Financial Services Board Act, 97 of 1990 ("FSB Act")** This Schedule repeals the FSB Act, 1990 as a whole except for Section 28 which is retained and it states that "*Other provisions from the Act will also need to be retained*". Details are required on which "*other provisions*" of the FSB Act will be retained, and further consultation will be required on the retention of these provisions once identified. It is imperative for legal certainty that details of these provisions be communicated to the industry as soon as possible and that public comment be allowed on thereon as part of the consultation process on this Bill.	***The whole FSB Act will be repealed. See Schedule 4 of the revised FSR Bill.***

		Amendments to the Financial Services Ombud Schemes Act, 37 of 2004 ("FSOS Act") In general, SAIA and its members are concerned that the current fragmentation of adjudicative bodies to resolve the complaints of financial customers is not adequately addressed in this Bill. It is assumed that this is a matter for the second phase of Twin Peaks once the MCA is operational. Clarity is required on whether "*Adjudicator*" refers to the Pension Funds Adjudicator; and if the "*statutory ombud*" refers to the Ombud for Financial Services Providers ("FAIS Ombud.") To ensure consistency, it is also recommended that "*financial user*" make reference to "*financial customer*" (as per the definition in the Bill). In terms of Clause 3(1A) it is recommend that "~~*may*~~" must change to "*must*." The word "*may*" could be interpreted to mean that the Council is not compelled to create a centralised helpline and that the creation of this helpline is discretionary. In terms of Clause 3(1B)(b)the independence of the Ombud schemes is ensured by an independent board of directors and there is a concern here that the Council will be expected to fulfil the same mandate as this board. Further to this, Clause 8(A)(2) and (3) deals with the Council creating independent advisory boards for all schemes and statutory Ombuds, and that these advisory boards can make recommendations to the Council on the appointment of an Ombud. With the exception of making recommendations on Ombudsmen that should be appointed, more clarity is required on what would be the other duties of the advisory board. In addition, independent schemes have their Ombudsmen appointed by the board of directors, so there might be conflict if the Council's advisory board and the board of directors disagree on whom the Ombud should be. Clarity is requested on why these amendments are being addressed as part of development of the Twin Peaks regulatory framework. SAIA members suggest that a separate and extensive process of consultation should be undertaken on the suggested changes to the FSOS Act and the current Ombud Schemes.	***Treasury proposes to enhance the functions and powers of the Financial Services Ombud Schemes Council. The FSOS Act will be repealed and have its provisions integrated in the revised FSR Bill. See Chapter 16 of the revised FSR Bill as well as the Policy document for further details on the proposed changes and enhancements to the ombud schemes regime.***
Standard Bank	**Schedule 3**	In Schedule 3, reference is made to the Financial Services Ombuds Schemes Act, 2004. In general, Standard Bank is concerned that the current fragmentation of adjudicative bodies to resolve the complaints of financial customers is not adequately addressed in this Bill. We assume that this is a matter for the second phase of Twin Peaks once the Market Conduct Authority is operational. However, we would like to take this opportunity to provide National treasury with Standard Bank's suggestions regarding the ombuds system. There is a multiplicity of adjudicative bodies operating in the financial sector which leads to confusion for customers (as well as administrative burdens for banks). This multiplicity of oversight	***It is proposed that the FSOS Act be repealed and have its provisions integrated into the revised FSR Bill. See Chapter 16 and Schedule 4 of the revised FSR Bill as well as the Policy document for further details on the proposed changes and enhancements to the ombud schemes regime.***

		bodies introduces the risks of: • Forum-shopping and regulatory arbitrage; • Confusion for customers; • Increased costs (both to government which must fund this multiplicity of regulators and to financial institutions); • Increased uncertainty of decision-making; and • Communication and coordination failures. Many financial products and services are increasingly bundled together which makes the current silo structure of the ombuds system less than optimal for consumers. It would appear that a single Financial Services Ombud might be a more optimal approach to consider for the future. In the interim, the current situation should be retained with perhaps some steps taken to strengthen coordination and cooperation between the various bodies. It is proposed that one of the functions of the Market Conduct Authority is to supervise the work of the ombuds – even if this extends in the initial phase only to those currently operating within the National Treasury family plus the Banking Ombud. It is also proposed that Memoranda of Understanding are signed between the various ombuds. It is further recommended that there should be a formalised agreement between the Market Conduct Authority and the regulators and ombuds established under the auspices of other departments, including the Department of Trade and Industry and Department of Economic Development. These MoUs should stipulate how these other consumer protection bodies will interact with entities that are regulated under Twin Peaks. In addition it is recommended that the Market Conduct Authority should focus on ensuring that there is a uniform approach to Ombuds in terms of how complaints and appeals are handled; including the required turnaround time for resolution and procedures and processes that all Ombuds should adhere to. This will help strengthen the efficacy of different Ombuds.	
VOS	**Schedule 3**	The proposed amendments to the Financial Services Ombud Schemes Act, 37 of 2004 ("the FSOS Act"), are set out in sections 1 – 6 of Schedule 3 to the Bill. **Section 8(1)(eA) : Scheme Recognition** In terms of this new section the **Financial Services Ombud Schemes Council ("the FSOS Council")** must "*recognise schemes in accordance with this Act*". In terms of section 8(1)(b) of the FSOS Act, the FSOS Council "*must monitor compliance with this Act by a recognised scheme*". It is compatible with the framework and tenor of the FSOS Act that the FSOS Council should ensure	***Comments noted. Treasury proposes to enhance the functions and powers of the Financial Services Ombud Schemes Council. The proposed amendments will be aimed at ensuring that, among other objectives, the Council promotes and direct co-operation and co-ordination of the activities of the schemes to achieve an overarching and unified complaint resolution service for consumers as well as putting in place***

		compliance with the terms of the FSOS Act "*by a recognised scheme*" and that it should, therefore, have the power (bestowed by the proposed amendment) to recognise a scheme. There can be no objection in principle to the proposed amendment. **Section 8(1)(eB) : Appointment and removal of Ombudsman** The section is silent on a number of important issues, regarding the practical implementation thereof, but it is assumed that these issues will be suitably addressed in Regulations to be framed under the FSOS Act. It may be that there are inconsistencies in the Bill in its references to "*scheme*" and to "*recognised scheme*". The FSOS Act distinguishes between a "**scheme**" and a "**recognised scheme**" – see the definitions in section 1 thereof. Section 1 of the Bill introduces the definition of "**statutory schemes**". The Bill contains a number of references to "*schemes*" and it is not clear whether it is intended to refer to "*schemes*" generally (i.e. recognised, unrecognised and statutory) or to recognised and unrecognised schemes or only to recognised schemes. In considering the proposed amendment, one should not lose sight of section 10(1)(b)(i) of the FSOS Act, which prescribes that any recognised ombudsman scheme must have "*a body which is not controlled by participants in the scheme and to which the ombud is accountable (and it) must appoint the ombud, settle the remuneration and monitor the performance and independence of the ombud*". It can safely be accepted that such a body will (or, at least, should have) have the power to remove an ombudsman from his/her position on adequate grounds. If such a body wishes to remove an ombudsman on such grounds or if it removes an ombudsman on such grounds, the intended removal or the removal, as the case may be, will, by virtue of the proposed amendment, be subject to the approval of the FSOS Council. It will make no difference to the outcome in the example used, whether the prior or subsequent approval of the FSOS Council is required. If the FSOS Council withholds its approval of the removal, the said body will be saddled with an ombudsman who it no longer wants. It is submitted that, given the safeguards provided for in section 10(1)(b) of the FSOS Act, the proposed new sub-section is unnecessary and that the status quo should remain unchanged. In the alternative, it is submitted that appropriate and effective recognition can be given to the important oversight role which the FSOS Council plays in the administration of the FSOS Act, by conferring upon it a consultative role in the process of the appointment or removal of an ombudsman by the "body", envisaged in section 10(1)(b) of the FSOS Act, when that body appoints or removes an ombudsman. For the purpose of conferring the necessary consultative power on the FSOS Council, this section could then read like this: "*act in consultation with the body envisaged in section 10(1)(b) when that body appoints or*	***measures to enhance public awareness to schemes by consumers. The FSOS Act will be repealed and have its provisions integrated in the revised FSR Bill. See Chapter 16 and Schedule 4 of the revised FSR Bill as well as the Policy document for further details on the proposed changes and enhancements to the ombud schemes regime.***

		removes an ombud". If the proposed alternative is followed, an amendment to section 10(1)(b) of the FSOS Act will be desirable to spell out (possibly in a new section 10(1)(b)(iii)) that the said "body" will also have the power to remove an ombudsman. **Section 8(1)(eC) : FSOS Council to monitor compliance** The new section 8(1)(eC) enjoins the FSOS Council to "*monitor compliance of* ***ombuds*** *and* ***schemes*** *with the requirements imposed under this Act*" (emphasis supplied). Does the proposed power relate to any scheme? In this regard, attention must be drawn to the provisions of section 8(1)(b) of the FSOS Act, in terms of which the FSOS Council must "*monitor compliance with this Act by a recognised scheme*". The proposed power, at least insofar as it relates to recognised schemes, may also be unnecessary. This is so for two reasons: Firstly, the existing power in section 8(1)(b) of the FSOS Act appears to be wide enough to embrace any act performed by an ombudsman in his/her capacity as such and there appears to be no need for a further power to be given to the FSOS Council to "*monitor compliance of ombuds ... with requirements imposed under this Act*". Secondly, section 10(1)(b)(ii) of the FSOS Act requires the relevant body to "*monitor the continued compliance by the scheme with its constitution, the provisions of the scheme and this Act and to report any non-compliance to the (FSOS) Council*". **Section 8(1)(eD) and (eF)** There is a clear distinction between "*schemes and statutory schemes*". Do "*schemes*" include "*recognised schemes*" and "*schemes*" which (per definition in the FSOS Act) are unrecognised? **Section 8(1B)(a) and (b) : norms and standards - independence** The amendment refers to section 10(1)(i) of the FSOS Act, in terms of which a recognised scheme must comply with "*any other requirements that may be prescribed and that are not in conflict with the objects of this Act*". The "*norms and standards*" are not defined or described and it is, accordingly, not possible to comment meaningfully thereon at this stage. However, those norms and standards must, in terms of sub-paragraph (b), "*ensure that any ombud scheme is independent at all times*". Given the express purpose of the norms and standards, they are to be welcomed. Is it the intention of the Legislature that the proposed new power of the FSOS Council should	

		extend to any scheme? **Section 8A(1) : Accountability** The proposed new section provides that "*all ombud schemes are accountable to the (FSOS) Council*". The proposed amendment may be unnecessary and appears to be irreconcilable with the provisions of section 10(1)(b) of the FSOS Act, in terms of which "*the ombud is accountable*" to the body envisaged in that section, namely the body which appoints the ombudsman and which must "*monitor the performance and independence of the ombud*". Is it the intention of the Legislature that the ombudsman, who is the head of his/her office, must be accountable to the said body (in terms of section 10(1)(b) of the FSOS Act) while, at the same time, the relevant ombud scheme is accountable to the FSOS Council (in terms of section 8A(1))? It is submitted that the proposed new section amounts to an unnecessary duplication of the adequate accountability provisions contained in section 10(1)(b) of the FSOS Act and that it should not find its way into that Act. Again, we question whether the intention of the Legislature is that the proposed new power of the FSOS Council should extend to **any** scheme? **Section 8A(2)** There can be no objection in principle to the proposed amendment. **Section 8A(3) : powers of advisory board** This section seems to be inconsistent with the new section 8(1)(eB), in terms of which the FSOS Council has the power to approve the appointment and the removal of an ombudsman. The section should, therefore, provide that the advisory board may make recommendations to the FSOS Council on the approval of the appointment of an ombudsman and not, as it now reads, on the actual appointment of an ombudsman. The section will be compatible with the approval power of the FSOS Council, if it includes the following words, after the word "*on*": "*its approval of*". We should, however, emphasise that our comments regarding this proposed section do not, in any manner, detract from the views expressed in paragraph 3 above [**Section 8(1)(eB) : appointment and removal of ombudsman**], namely that section 8(1)(eB) should not find its way into the statute book, alternatively that it should provide for a consultative process. If section 8(1)(eB) is done away with, section 8A(3) will be redundant. If section 8(1)(eB) is changed to provide for the said process, section 8A(3) appears to be in order, save for the amendment referred to under this rubric. This is so, because it will be clear, if the 2 new sections are read together, that the advisory board may make recommendations to the FSOS Council on the consultative process relating to the appointment of an ombudsman by the body referred to in section 10(1)(b) of the FSOS Act.	

MEMORANDUM ON THE OBJECTS OF THE DRAFT FINANCIAL SECTOR REGULATION BILL (2013)

Promontory	**Para 1.4**	*"... with jurisdiction over financial institutions; and an enhanced and harmonised system for ~~administration~~ administrative action, including..."*	***Agreed. The revised FSR Bill makes reference to administrative actions in chapter 5.***
Promontory	**Para 2.3, line 6**	*"...and other financial regulators, for example when a ~~regualtory~~ regulatory action is taken by another regulator."*	***Agreed.***

GENERAL

ASISA	**General**	**Reference to financial sector legislation** This bill is named the Financial Sector Regulation Bill and creates two regulators, who are tasked to regulate the financial sector in accordance with the bill and the various financial sector acts/statutes recorded in Schedule 1. In our view it would therefore be more appropriate to refer to financial sector laws as opposed to regulatory laws, where ever it appears in the Bill.	***Agreed. The revised FSR Bill makes reference to 'financial sector law' which is defined in cl.1 and listed in Schedule 1.***
		Financial Conglomerates The Bill does not expressly deal with the issue of financial conglomerates, but it does deal with a "*systemically important financial institution*" (s64(2)). The regulators will have express powers to protect the interests of the various stakeholders of such entities in times of a potential or actual financial crisis in the financial system. The Bill's memorandum notes one of the Bill's broad objectives as being to "*Strengthen prudential regulation*" (see Section 2.6 of the Memorandum on the Objects of the Draft Bill). This section of the Memorandum refers to the concept of "*financial conglomerate*", indicating that "*prudential risk should be evaluated at the group as well as the individual institution level. The new system will provide for this revised approach to prudential regulation*". However, the draft Bill does not introduce this term nor does it seem to cover this issue. As such, we are not able to understand the regulator's intention around this. Whilst it might hopefully become clearer during Phase 2 (if not earlier) as to what constitutes a financial conglomerate, the practical implications of this are not clear. It would be preferable to understand the implications of this up-front. There are complexities in SA, particularly amongst	***Group supervision is comprehensively covered under Chapter 11 of the revised FSR Bill.***

		the corporate banks and insurers, where more clarity is needed as to where a financial conglomerate begins and ends. One of our key concerns, relates to how a group will be identified as being a financial conglomerate i.e. will there be objective criteria? What would these objective criteria be? The nature of those criteria could be contentious in themselves when it comes to the requirements that may be applicable e.g. additional reporting requirements, disclosure requirements (which would need to align with the Companies Act), capital adequacy requirements, restructuring e.g. possibly having to have a new holding company. In the most recent Draft Insurance Laws Amendment Bill, not only is provision made for exceptions as to what entities would be deemed financial conglomerates, there is also provision to apply for exemption, which we believe should also be provided for in this Act. Given the nature of co-ordination and co-operation envisaged between the authorities, we do not believe that it should be a given (albeit that this may be a false assumption) that where a group has entities/subsidiaries that conduct business under more than one license/authority e.g. FAIS and CIS, that it should automatically be viewed as a financial conglomerate. This might also render the proposed split between a PRA and MCA redundant i.e. if all groups end up being dual regulated by the PRA and the MCA. Hence the need for a clear understanding on this concept.	
		Powers of the Regulators, accountability & lack of consultation process The purpose of the FSRB is to create two regulators under the "twin peaks" model as envisaged in the NT Policy document "***A Safer Financial Sector to Serve South Africa Better***". The Red Book includes "*principles behind reforming the financial regulatory system*". Page 25 includes a principle 4, being that "*policy and legislation are set by government and the legislature, providing the operational framework for regulators*." Certain provisions of the Bill are in conflict with this principle. • **Section 14(1)(e)** - *In order to achieve their objectives, the regulatory authorities must take all reasonable steps to -* *… (e) support the promotion of transparent and fair access to appropriate financial services for financial customers, including by developing and implementing a targeted regulatory regime for these financial services, and through the setting of product standards;* The regulators' function is to regulate financial institutions in terms of the Act. Developing a "*targeted regulatory regime*" appears to go further than that.	***The revised FSR Bill provides for financial sector regulators to have arrangements in place for consulting representatives of financial institutions and financial customers (cl.87). See also revisions made in cl.94 and 95 of the revised FSR Bill as well as the process and consultation requirements for making legislative instruments in part 1 of Chapter 7.***

		• **Section 14(3) -** *A regulatory authority may do anything necessary or expedient to perform its functions, and has for this purpose—* *(a) the powers and duties assigned to it in terms of this Act or a regulatory law; and* *(b) such auxiliary powers as are necessary to exercise the powers and duties referred to in paragraph (a) effectively.* The FSRB should not bestow powers upon the regulatory authorities to create law, but should only create powers for the Regulators to regulate law. The regulatory authorities should not be able to make policy decisions and subordinate legislation. Allowing for these auxiliary powers would amount to a usurping of the powers of Parliament.	***Subsection deleted from the revised FSR Bill. However the revised FSR Bill gives the FSCA and the PA powers to make and supervise conduct and prudential standards respectively. See cl.94 and cl.95 and the Policy document for a detailed explanation on the proposed standard making powers that will be granted to the regulators.***
		• **Section 52(1) -** *A regulatory authority may make minor or technical changes to a rule or joint rule without following the procedures in this Part if the National Treasury agrees that the changes proposed are intended solely to clarify or improve the intention of the rule or joint rule.* This section bestows too much discretion with the regulators.	***Please see revised Chapter 7 (Part 1) of draft Bill.***
		• **Section 68(1)(c)** – empowers the Minister to make any regulations that s/he deems necessary to manage a financial crisis, which will suspend the application to one or more financial institutions of any of the sixteen Acts of Parliament listed in Schedule 1 to the Bill. This is a clear usurpation of the powers of Parliament, and is unconstitutional.	***See Chapter 2 of the revised FSR Bill dealing with the process for managing of systemic risks and systemic events.***
		The Bill is lacking in a concrete industry consultation process. Although section 49 refers to consultation, it is not clear with whom this consultation must take place; whether it is to be between the various regulators or with industry and other interested parties. The Financial Services General Laws Amendment Act provides for a process of industry consultation to be inserted into the Financial Services Board Act. However, the FSRB repeals the Financial Services Board Act, retaining only one section, which does not relate to consultation. Section 94(2) provides for publication of draft regulations by the Minister for public comment, but section 94(2) goes on to compromise this by providing that should the Minister make any changes to the draft as a result of any comment received, then re-publication is not necessary. This is not acceptable – changes made may give rise to considerable concerns which were not prevalent in respect of the original draft.	***The revised FSR Bill provides for financial sector regulators to have arrangements in place for consulting representatives of financial institutions and financial customers (cl.87). Cl. 90 and 23 also provide a specific consultation process in the making of legislative instruments and financial stability matters respectively.***

		• **Section 104 (1) -** *A regulatory authority may make a rule in terms of this Act if—* *(a) it has agreed with the National Treasury that the rule is necessary, in pursuit of its objectives, for the exercise of its powers or the performance of its duties in terms of this Act; and* *(b) it considers that it does not have the power to make such a rule in terms of a regulatory law.* This section will effectively empower the regulatory authority, in consultation with NT and the Minister, to amend national legislation without any involvement by Parliament. As such the provisions are unconstitutional. The Bill gives untrammelled discretion to the regulators. There is little mention of objective criteria or standards that will be applied in making determinations under the proposed Bill. Examples of this are the lack of objective criteria in determining what constitutes a "*financial crisis*" and what would constitute a "*systemically important financial institution*". The lack of objective criteria together with increased regulatory discretion, results in regulatory/legislative uncertainty, and in view of the principles enunciated by the Constitutional Court as regards the delegation of legislative powers, the relevant provisions may well be found to be unconstitutional.	***The revised FSR Bill (cl.94 and 95) gives the PA and the FSCA power to make and supervise standards. The process for making such standards is set out in Chapter 7 (Part 1) of the revised FSR Bill.*** ***With respect to SIFIs, objective criteria, process for designation of a SIFI is set out in Chapter 5 of the revised FSR Bill.***
		It is also important that the Bill should explicitly provide that the provisions of the Promotion of Administrative Justice Act (PAJA) apply to the application by the authorities of this Bill and all of their actions/omissions under this Bill. This will avoid the doubt and uncertainty that has arisen in the past when Financial Services Board officials have expressed the opinion that actions taken in terms of subordinate legislation falls outside the ambit of PAJA.	***Agree. The revised FSR Bill contains an explicit clause to provide for the application of the Promotion of Administrative Justice Act to any administrative action taken by a financial sector regulator in terms of this Act or a financial sector law. See cl.147 of the revised FSR Bill.***
		Section 98 of the Bill seeks to not only exonerate employees and officials of the regulatory authorities from liability for their actions, but the regulatory bodies, the Minister and the State as well. The Supreme Court of Appeal quoted various authorities in the matter of President of the Republic of South Africa and others v M & G Media Ltd 2011 (2)SA 1 when it held that "*The Constitution…is premised on a legal culture of accountability and transparency… If it is ineffective in requiring governors to account to people governed by their decisions, the remainder of the Constitution is unlikely to be very successful.*"	***Comment noted***

		Appeal procedure While we appreciate and support the process set out in Part 3 of Chapter 6 of the Bill, ASISA members submit that the Bill should state that should a party be dissatisfied with the outcome of this process, they will be entitled to approach the appropriate Court for relief by way of an appeal review. Express provisions, similar to those of section 30P of the Pension Funds Act, which indicate that the powers of the Courts have not been usurped, are required.	***See Chapter 15 of the revised FSR Bill and also the Policy document for an explanation on the appeal mechanism and the role of the Tribunal.***
		Costs We are concerned about the overall cost of implementation and the potential impact on the financial services industry of the proposed funding model. At the National Treasury workshops mentioned above, it was stated by National Treasury that a cost impact exercise had been undertaken and that there would be no cost impact. ASISA members would appreciate having sight of this work in order to understand the assertion that it will involve no additional cost, which is difficult for them to comprehend. Funding for the Market Conduct Authority is expected to be sourced from two areas, fees and fines against the industry. Appropriate budgets need to be drawn up by the MCA on an annual basis. These budgets need to be approved by an independent body (together with industry's views). This will protect against the MCA significantly increasing fees annually as well as protect against the issuing of unnecessary fines in an attempt to raise funds. Any additional funding required should be derived from the Fiscus.	***See Policy document for a detailed explanation of the funding arrangements of the authorities.***
		Product standards Section 14(1(e) provides for the setting of product standards by the MCA. In the light of the extremely wide powers given generally and the lack of provision for industry consultation, this power to regulate products is of great concern.	***The revised FSR Bill provides for financial sector regulators to have arrangements in place for consulting representatives of financial institutions and financial customers (cl.87). Consultation mechanisms with the industry in respect to the making of prudential and conduct standards have been built into the revised FSR Bill. See Chapter 7 (Part 1) of the revised FSR Bill.***
		Pension Funds and linked insurers It is not understood why pension funds fall under the MCR only. It is submitted that dual regulation is appropriate. Pension funds hold assets on their balance sheets to fund member benefits and, in the case of defined benefit pensions funds and pension funds that pay guaranteed annuities provide guaranteed benefits to members. A linked insurer, which it is	***All financial institutions will be dual regulated, by the PA that will be responsible for prudence and the FSCA that will be responsible for conduct. However, for a transition period of 3 years, the functions, and the associated powers and duties of the PA in relation***

		proposed will be dual-regulated, may hold fewer assets on its balance sheet than a large pension fund. We therefore do not understand why pension funds would not be dual-regulated, or conversely, why linked insurers would not be mono-regulated like CISs that do not offer guarantees. We would appreciate being informed of the rationale behind the distinction between dual- and mono-regulated status, as it is not understood.	***to collective investment schemes, pooled funds, pension funds and friendly societies, are assigned to the FSCA. See cl.231 of the revised FSR Bill and the Policy document for further details.***
		National Credit Regulator To ensure coherence and level playing fields in the regulation of market conduct in the credit and banking industry, the MCA should regulate the market conduct of all institutions operating in the financial sector, including credit providers. However, the NCR does not fall within the Bill so that there will be two separate regulators (the MCA and the NCR) covering different aspects of market conduct in the retail banking sector and the insurance sector to the extent that insurance policies are issued in relation to credit. One of the key lessons learned from the financial crisis is the risk of regulatory arbitrage where more than one regulator operates over market conduct or prudential conduct objectives. We submit that mere "*co-operation*" between the MCA and NCR as proposed in connection with "*other financial regulators*" in the bill will not suffice to address the issue. We understand from the workshops arranged by National Treasury on the Bill that the inclusion of the NCA will be considered in Phase 2 of the implementation of the Twin Peaks system. With respect, the time to include the NCR is now, in Phase 1 and in this Bill.	***The revised FSR Bill provides a role for the National Credit Regulator as one of the key financial sector regulators under the Twin Peaks framework. The NCR will be a member of the Financial Stability Oversight Committee (cl.19) as well as a member of Council Financial Regulators (cl.79). Sufficient mechanisms for cooperation, co-ordination, collaboration and consultation have been provided for in the revised FSR Bill. See Chapter 6 of the revised FSR Bill as well as the Policy document for further details.***
		Co-operation between regulators ASISA would appreciate receiving an outline of how co-operation between regulators will take place in practice, and how the implementation of the two structures (Market Conduct and Prudential) will be carried out. The operational efficiency of these bodies and the impact of unintended consequences of the transition are of concern to industry. The actual and opportunity cost to business of unnecessary and unreasonable delays should not be underestimated.	***Chapter 6 of the revised FSR Bill deals extensively with the issues around cooperation, collaboration, consultation and coordination between financial sector regulators (including the NCR), the Reserve Bank and other organs of State.***
		Repeal of the Financial Services Board Act It is not possible to comment on the repeal of the Financial Services Board Act, 1990 as provided in Schedule 3 without first being informed of the sections of that Act that are to be retained. Currently only one section is left standing, with a comment to the effect that "*other provisions*" will need to be retained, but these are not listed.	***The entire Financial Services Board Act will be repealed. See Schedule 4 of the revised FSR Bill.***

ASSA	**General**	**Collaboration with Professions** The various regulatory and supervisory authorities need access to the relevant skills and experience in order to discharge their duties efficiently. Lack of staff periodically causes backlogs building up at some regulators. The Actuarial Society appreciates attempts to keep the public sector manageable in terms of both numbers and salaries. It is of the opinion that a collaborative effort between the regulators and relevant professions should be explored. Such an agreement could see limited internships being made available, or arrangements to do a specified quantity of work on a pro bono basis or at reduced rates.	
BAKGATLA		I am informed (from reading the summary of the draft financial sector policy document entitled: "**A safer financial sector to serve South Africa better**") that the reform priorities are centered in four policy areas: financial stability, consumer protection & market conduct, access to financial services, and combating financial crime. Was there consideration given to incorporate the work of Harvard Business School Prof David Moss and Harvard University of Government Prof Daniel Carpenter entitled: "Preventing Regulatory Capture: Special Interest Influence and How to Limit It", from which the following is a summary thereof: "*When regulations (or lack thereof) seem to detract from the common good, critics often point to regulatory capture as a culprit. In some academic and policy circles it seems to have assumed the status of an immutable law. Yet for all the ink spilled describing and decrying capture, the concept remains difficult to nail down in practice. Is capture truly as powerful and unpreventable as the informed consensus seems to suggest? This edited volume brings together seventeen scholars from across the social sciences to address this question. Their work shows that capture is often misdiagnosed, and may in fact, be preventable and manageable. Focusing on the goal of prevention, the volume advances a more rigorous and empirical standard for diagnosing and measuring capture, paving the way for new lines of academic inquiry and more precise and nuanced reform*"?	***Comment and reference to research work on 'regulatory capture' has been noted. See the Policy document for further details.***

		On the issue of financial stability: was there consideration given to the relevance within the South African context of assessing whether there are lessons to be learned from the IMF Working Paper by Jaromir Benes and Michael Kumhof entitled: "*The Chicago Plan Revisited*". The following is an abstract of the IMF Working Paper: "*At the height of the Great Depression a number of leading U.S. economists advanced a proposal for monetary reform that became known as the Chicago Plan. It envisaged the separation of the monetary and credit functions of the banking system, by requiring 100% reserve backing for deposits. Irving Fisher (1936) claimed the following advantages for this plan: (1) Much better control of a major source of business cycle fluctuations, sudden increases and contractions of bank credit and of the supply of bank-created money. (2) Complete elimination of bank runs. (3) Dramatic reduction of the (net) public debt. (4) Dramatic reduction of private debt, as money creation no longer requires simultaneous debt creation. We study these claims by embedding a comprehensive and carefully calibrated model of the banking system in a DSGE model of the U.S. economy. We find support for all four of Fisher's claims. Furthermore, output gains approach 10 percent, and steady state inflation can drop to zero without posing problems for the conduct of monetary policy.*"	***Comment and reference to IMF research work on 'financial stability' has been noted. See the Policy document for more details on the approach that was taken on financial stability in the revised FSR Bill.***
Competition Commission	**General**	**Potential Overlapping Activities** The MCA, the National Consumer Commission as well as the Commission all have a similar role towards the protection of consumers and consumer welfare. As such it is important that the areas of jurisdiction be clearly identified and included in the Bill in order to avoid overlap. The jurisdiction in this regard should also be clearly indicated in the Bill to ensure that the MCA, in performing its role of improving the way in which financial firms conduct their business, does not interfere with the conduct of firms where competition is concerned. There are, however, some activities (licensing being a prime example) which have a bearing on competition, but which are rightly part of the regulator's mandate. Although the Bill makes provision for a legal framework for the coordination and co-operation between the MCA, the PA and other regulatory authorities; it is not necessary for the Commission to have concurrent jurisdiction with any new legislation. It is, however, important that each piece of legislation or policy developed clearly outlines responsibilities in a manner that avoids duplication or overlaps. It should be noted that the draft Bill does not contain a lot of detail in terms of the mandate of the market conduct regulator, as much of this will be determined by the amendments to and replacement of existing sectoral legislation which will take place in Phase Two of the implementation of Twin Peaks. For this reason, it is difficult at present to identify precisely what, if any, overlaps exist with the Competition Act and the mandate of the Commission. In this regard,	***The revised FSR Bill gives the PA and FSCA a function to promote, to the extent consistent with achieving their objectives, support sustainable competition in the provision of financial products through co-operating and collaborating with the Competition Commission. See cl.29(f) and 53(g) of the revised FSR Bill and the Policy document for further details on the key changes to the first draft of the Bill.***

		the Commission will review such amendments to the legislation as they are drafted and provide further comments where necessary. **Proposed Amendment** The Bill must clearly articulate that the MCA and/or PA should to be responsible for negotiating agreements with other regulatory authorities in order to co-ordinate and harmonize the exercise of concurrent jurisdiction within the financial services sector. **The Role of the Competition Commission** The Commission is an economy-wide regulator established in terms of section 19 of the Competition Act to investigate, control and evaluate restrictive practices, abuse of dominant position and mergers, with the overall objective of promoting and maintaining competition. The Competition Act applies to all economic activity within, or having an effect within South Africa. Section 3(1A) of the Competition Act provides that, if the Act applies to an industry (or sector of an industry) that is subject to the jurisdiction of another regulatory authority and that authority has jurisdiction in respect of conduct regulated in terms of Chapter 2 or 3 of the Competition Act, the Competition Act must be construed as establishing concurrent jurisdiction in respect of that conduct. "**Regulatory authority**" in the Competition Act is defined as an entity established in terms of national or provincial legislation responsible for regulating an industry, or sector of an industry. Section 21(1)(h) of the Competition Act provides that the Commission is responsible for the negotiation of agreements with any regulatory authority to co-ordinate and harmonize the exercise of jurisdiction over competition matters within the relevant industry or sector, and to ensure the consistent application of the principles of the Competition Act. The manner in which the concurrent jurisdiction established in terms of section 3(1A) is exercised must be managed in accordance with these agreements. Sections 21(1)(i) and (j) provide that the Commission's functions include the responsibility to participate in the proceedings of any regulatory authority and to advise, and receive advice from, any regulatory authority. Section 82(1) provides that a regulatory authority which has jurisdiction over conduct regulated in terms of Chapter 2 or 3 within a particular sector, in terms of any public regulation, must negotiate agreements with the Commission as anticipated in section 21(1)(h) and exercise its jurisdiction in terms thereof. The same applies to the Commission in terms of Section 82(2). **Other Issues** The discussion document by Treasury identified one of the areas of focus of the MCA as "…..*FSB*	

		responsibilities will be expanded to include overseeing the market conduct of banks, including developing principles on how banks should set their fees, how these fees should be reported and what constitutes fair and unfair behaviour".[7] The Commission should be involved or provide comments in the development of guidelines for setting fees as this might facilitate collusion or limit competition within the financial institutions.	
Deloitte	**General**	We believe that the Bill sets out a reasonably clear and comprehensive framework within which the new regulatory system – the *Financial Stability Oversight Committee* (FSOC), the *Prudential Authority* (PA), the *Market Conduct Authority* (MCA) and the *Council of Financial Regulators* (CFR) – should operate. Two key emerging themes within the Bill are: i. Lack of sufficient clarity as to the circumstance within which both the Minister of Finance and National Treasury can exercise certain powers over the FSOC, PA and MCA. Uncertainty in this regard could perceived as raising some doubts about the objectivity and independence of these regulatory authorities; and ii. Lack of consistency in the level of detail that the Bill provides.	***See revisions made to the FSOC, its powers and composition in Chapter 2 (part 3); the Prudential Authority (Chapter 3); the Financial Sector Conduct Authority (Chapter 4); as well as the Council of Financial Regulators (in part 2 of Chapter 6). See Policy document for more information on the key changes to the first draft of the Bill.***
		What status does the Prudential Authority (PA) have within the South African Reserve Bank? It does not seem to be a subsidiary (as the Prudential Regulation Authority (PRA) is within the United Kingdom), but it does seem to have some form of separate identity within the SARB. Would it be possible to clarify this within the Bill or through the provision of additional guidance?	***See proposed status and governance arrangement of the PA in Chapter 3 of the revised FSR Bill. The Policy document also provides detailed explanation on the relationship between the PA and the Reserve Bank.***
Melbourne	**General**	We note the extensive academic and professional literature that points strongly to the need to indemnify financial regulators personally in the pursuance of their work, and we note that such provisions are absent from the Bill. We strongly recommend that indemnity for regulators be included in the Draft Bill.	***Agreed. See cl.221 of the revised FSR Bill.***
		We note that in Australia the costs of maintaining and operating a prudential authority are covered by a levy on financial institutions, and we recommend that a similar arrangement be considered in South Africa.	***Agreed. See revised FSR Bill and the Policy document for a detailed response on the funding arrangements of the Twin Peaks authorities.***
MicroFinance	**General**	The "*Implementing a Twin Peaks model of financial regulation in South Africa*" document has	***The revised FSR Bill provides sufficient mechanisms***

[7] A Safer Financial Sector to Serve South Africa Better" released with the 2011 Budget; page 46.

SA		created the impression from a MFSA perspective, that the National Credit Regulator has been side-lined leaving organisations such as MFSA in a rather precarious position, spending valuable resources on second guessing the future whilst other matters are being neglected. It is therefore crucial that whilst this matter is being deliberated, minimum uncertainty is created. MFSA and our members have over many years earned our stripes and have made it our business to develop and guide our members to work with all authorises and agencies including the South African Reserve Bank, the Payments Associating of South Africa, the National Credit Regulator, the BANKSETA, the Department of Trade and Industry and the National Treasury. We are willing and capable to continue in this vein, in order to ensure an effective, relevant and respected oversight regime. MFSA supports a dispensation which will in particular provide a level playing field for especially the smaller players and will continue to bring these sentiments to the table. The integration of an institutional oversight is long overdue. We are in particular concerned that the future the National Credit Regulator will simply be in a new home, but the required performance and leadership is not provided. In particular we are of the opinion that all Credit Providers should report and be accountable to a single point. Having said the aforementioned, the need to respect the issues pertaining to small business and the “un-bankable” (in terms of the South African perspective) remains a thorny issue. This however can be solved if we are able to sit around a table and demystify the challenges of enforcement and compliance. In order to achieve the desired and highly noble aspirations of the implementation of a Twin Peaks model of financial regulation in South Africa, we urge the responsible parties to from the outset, be fully inclusive and transparent. There are current inefficiencies which should not be repeated in any future model. Vested interest will naturally come into play, but in the interest of true transformation and consumer protection we are of the view, based on many positive engagements, that this can be overcome in order to create a sustainable, viable, competitive and fair dispensation. Consumer credit is deeply engrained and embedded in the psyche of South Africa. The challenge is to within the constraints of the South African society constantly renew and develop the credit space. Political will, collaboration and solution based engagement are key ingredients and to this end MFSA is committed. **Pre-requisites for success of Twin Peaks model** From a MFSA perspective, over and above the fact that sound academic international best practice and free market principles need to be applied, the following in our humble view needs to be factored into the already complex equation. The separation of Prudential and Market conduct matters do make sense. This can however not be taken to an absolute level, given the fact that the South African dilemma of two economies within	***for cooperation and coordination between the financial sector regulators (including the NCR), the Reserve Bank and other organs of state. See Chapter 6 of the revised FSR Bill as well as the Policy document in respect of the role of the NCR in the twin peaks regulatory reform.***

		one country distorts the natural and comfortable link between good policy and strategy if the micro elements of a generally large lower market is ignored. Despite good policy and legislation, market conduct can undo all the good intentions, unfortunately only to be noticed once the horse has bolted. In practice the Public Relations machinery can deceive the public, politicians and regulators. Consumer choice and protection are two sides of the same coin; complex bureaucracies tend to discriminate against vulnerable consumers and smaller business. All Credit Providers, regardless of size and affiliation, needs to be subjected to an accountable single authority. Credit specifically and more so consumer credit is competitive, risky and therefor attracts businesses that are set-up accordingly. MFSA is of the opinion that the banking fraternity is currently finding themselves in a position which gives them a distinct and unfair advantage, especially when dealing with lower and some middle market consumers. The growth in unsecured lending and certain ATM loans, have unnecessarily set- off alarm bells. Should the Department of Trade and Industry, National Treasury and the National Credit Regulator have been better harmonized and capacitated, a pro-active and comprehensive engagement process would have benefitted all stakeholders and specifically consumers at the lower end of the market. **Enforcement Needs Professional Action** MFSA members experience competition from underground and illegal operators. These underground operators choose to stay off the radar, do not pay their taxes and compliance dues and have absolute no regard for consumer protection. Consumers end up with illegal operators for a host of reasons. MFSA is on record that our members are experiencing ‘selective enforcement’ and in all such cases MFSA members were the ‘losers’ whilst, high street institutions were initially able to make short term market gains. As a country we are seeing ratings going sour and consumers are forced onto either products or providers which only perpetuate the already tense social, economic and political situation. Current experiences are that there is a lack of capacity to enforce to a level where market conduct and consumer behaviour is systemically improved. **Complex oversight mechanisms** The complexity of Credit oversight is illustrated below: • Credit Bureaus are complex and dynamic organisations driven and supported by “big money” and powerful IT. • Debt counselling on the other hand is perceived as an “easy to enter discipline”, but not close to as effective as required or as initially intended. To achieve the required scale for success once	

		again lifts the barrier to entrance and ultimately not serving those who are most deserving. • Credit Providers have been by necessity equipping themselves to master and integrate a host of disciplines including but not limited to Credit, Credit Life Insurance, Payments Systems, Debt Collection, Information Technology, Customer Relations Management and Compliance. It is clear that the agency accountable for enforcement work will need to be skilled and of high integrity. Subject to the final structure which may be accepted, the ability to harmonise between stakeholders (including Credit Bureaus, Debt Counsellors and Credit Providers), policy makers and enforcement agencies, including the South African Police and Department of Justice, will need to be part and parcel of the skill set of the leadership and management in the respective organisation. The current lack of harmonisation has proven to be harmful to the enforcement agencies and consumers alike. **Oversight: Inclusivity and authenticity** Globally regulators are under scrutiny and are required to up their game. Political interference beyond the levels of sound policy development becomes a reality and does create risks which work against the objectives of economic growth and financial inclusivity. MFSA have without exception found that platforms and mechanisms which are created to broaden the spectrum for creation of solutions and foster mutual understanding of goals and objectives are awkward, but the effort engagement outweighs the negative consequences of “go it alone” strategies. Based on current experiences particular attention should be given to the creation of effective ‘whistle blowing’ and or escalation processes. Our current experiences are that issues of dysfunction, corruption, discrimination and market concerns and general low levels of service require disproportional effort to be escalated. The harsh reality is that ultimately it does get done one way or another, but at the cost of trust, co-operation, good governance, reputation and financial efficiency. **A bank account is key** It needs to furthermore be agreed that in order for a consumer to participate and enjoy the benefits of a modern and well-functioning banking system, he or she will eventually have a bank account. We are, based on historical experiences, convinced that for financial inclusion to work, banks need to accept responsibility for costs associated with creating and maintaining the institutional infrastructure and ultimately be treated as Credit Providers when dealing with matters of credit and not as a “special class” of Credit Providers. The current approach with regards to unsecured credit has proven to force all Credit Providers as well as regulators and enforcement agencies to the same table, but the process has been highly	

		ineffective and has caused damage to many parties. **Development Finance** The ability of South Africa to create meaningful work to citizens remains an economic challenge and a social danger zone. The National Credit Act emanated from the consumer protection area within the Department of Trade and Industry, but the majority of daily issues are of a financial market nature. Microfinance as known globally leverages of areas of economic development and often poverty elevation. Categories of lending which fall outside of the ambit of standard issues of both market conduct and consumer protection requires a special dispensation and focus. It is therefore respectfully submitted that at policy, strategy, capacity and enforcement level this matter is highlighted and as such become separated from the world of consumer credit. This should prevent the issue of poverty eradication to be swamped by the daily "hurley-burley" of consumer credit. It is therefore recommended that this category of financing remains with the Dti.	
Promontory	**General**	**Overall Comments** I have two big-picture comments that are not picked up in the detailed comments above. Given the time delay now until Parliament considers this Bill I encourage you to think about the following two points. Both would require reasonably extensive rewriting but would, in my opinion, add materially to the quality of the framework: 1. **Single licenced entity concept** - There is a theme that runs through my comments below that relates to the difference between regulated entities and regulated activities. I will not re-iterate that here since those comments are spelled-out in my comments. A related problem is that the MCA has, in my opinion, potentially serious weaknesses in the powers it will need to meet its objectives. Both problems could be addressed by introducing the single licensed entity model in this Act. While a lot of work and legal drafting will be needed to give effect to this framework, it would be a major step forward and was arguably the most important step in the Australian reforms. I believe it could be done in a way that would introduce the concept (a SAFSL) but with transitional relief while the MCA establishes the details of the framework through rules and regulations and goes through the major task of licensing every provider of financial services (fortunately, a lot of the smaller ones are already picked up under FAIS).	***Comments noted and agree in principle. See Chapter 8 and Schedule 2 of the revised FSR Bill and Policy document for a detailed explanation on the licensing framework in phase one of the regulatory reform process.***

		2. **Allocation of prudential and conduct responsibilities** – In the discussions a year or two back I was very impressed that South Africa was heading down the path of setting up a system under which: a) The MCA would be responsible for conduct regulation for every provider of financial services; b) The PA would be responsible for prudential regulation for every provider of financial services; but c) The PA would have the right to decide where it stopped providing prudential regulation/supervision on a cost benefit basis – in some cases it might delegate simple prudential rules and oversight to the MCA (e.g. broker/dealers) and in others the cost/benefit analysis might leave them free of prudential requirements (other than basic solvency). This framework would have added a uniquely South African twist to the Twin Peaks framework. This framework has flexibility in that the PA can easily pick up emerging players in the shadow banking area, without having to go back to the Parliament. It also removes the need for a list, such as that in Schedule 2 (note that the single licence approach suggested above removes the need for Part 1 of that list and the allocation model removes the need for Part 2). It would also remove the need for most of the mono/dual-regulated clauses in the Act. I was disappointed to see that this elegant and flexible framework had been abandoned in favour of a list approach (as we had done in Australia). If I could change anything in our Australian model it would be this.	***The concept of "dual-" and "mono-"regulated activities is no longer applied in the revised FSR Bill. An authority designated in terms of Schedule 2 as the licensing authority for a financial sector law is responsible for granting, issuing, imposing conditions on, varying, suspending or cancelling a licence in terms of the financial sector law. PA will be responsible for prudence while FSCA will be responsible for conduct supervision of financial institutions. However, the law will allow delegation of responsibilities between the regulators. See the revised FSR Bill and the Policy document for a detailed explanation on the responsibilities and delegation mechanisms available to the regulators.***
SAIA	**General**	SAIA and its members support the introduction of the Twin Peaks system of financial sector regulation in South Africa, and support the policy objectives outlined by the National Treasury in the Explanatory Memorandum to the Bill. It is the view of the SAIA that this Bill as part of the first phase of implementing a Twin Peaks model of regulation will hold significant costs implications and requires that substantial changes to the current regulatory system. Although the Bill contains broad information on the proposed governance changes in the regulatory structures of the two Regulatory Authorities to be established, it is recommended before the Bill is taken through the parliamentary process, that an economic impact study be conducted to establish the impact of the changes on the financial services industry and the South African economy as a whole. In addition, it is of utmost importance that sufficient time be allowed for the phased implementation	

		of the changes, and a vigorous process of alignment of existing legislation to the proposals in this Bill be undertaken taking into account the broader developments throughout the financial services sector, to avoid possible unintended and negative consequences. The SAIA appreciates the opportunity to comment on the Bill and trust that the concerns and suggestions raised herein will be seriously considered by National Treasury. It is reiterated that extensive further consultation on the provisions of the Bill may be required, and SAIA and its members confirms its availability for further engagement and consultations in this regard.	
Strate	**General**	**Focus of the Bill and governance, administrative or in-house matters** The Bill contains a lot of detail on a number of matters such as quorums and meetings (e.g. clauses 7, 8, 19, 20, etc.) normally incorporated under Terms of References, Memoranda of Understanding or other applicable frameworks. These clauses make the Bill unnecessarily long and tend to blur the focus of establishing a legal and regulatory framework for dealing with financial crises and systemic risk.	***See revised FSR Bill.***
World Bank	**General**	**National Credit Regulator** The Consumer Protection Financial Literacy Diagnostic conducted by the World Bank in July 2011 (CPFL Diagnostic) recommended a strong role for the proposed market conduct regulator. At a minimum, it was suggested that the market conduct regulator should monitor business conduct by all financial institutions. In particular, it was suggested that it would be helpful if a single market conduct regulator could be established, consolidating the FSB and the NCR into one institution. It was further noted in the report that such institutional consolidation would ensure that consistent approaches are undertaken by a single market conduct regulator, as well as eliminating or minimizing the systemic risk of contradictory financial sector policy objectives which might in turn undermine the stability of the financial sector, thereby negatively affecting the well-being of South Africans. An added benefit of a single market conduct regulator would be that it would have the benefit of NCR's experienced leadership and capacity. The MCA's functions do not cover consumer credit products and services currently regulated by the NCR and the draft Bill does not envisage a consolidation between the FSB and the NCR. As this in the contrast to our earlier recommendation we would encourage that this decision be revisited.	***The revised FSR Bill provides a role for the National Credit Regulator as one of the key financial sector regulators under the Twin Peaks framework. The NCR will be a member of the Financial Stability Oversight Committee (cl.19) as well as a member of Council Financial Regulators (cl.79). Sufficient mechanisms for cooperation, co-ordination, collaboration and consultation have been provided for in the revised FSR Bill. See Chapter 6 of the revised FSR Bill as well as the Policy document for further details.***
		Legal basis for consolidated supervision One of the key advantages of a well-designed Twin Peaks model is that it better allows for a group-wide approach to prudential supervision. Given the prevalence of financial conglomerates in South Africa, this is a key motivation for moving towards a Twin Peaks regulatory structure. However, for	***Comments noted, see Chapter 11 of the revised FSR Bill as well as the Policy document for further details.***

		these advantages to materialize, it would be important to establish a robust legal basis for consolidated supervision, empowering supervisors to exercise comprehensive groupwide supervision of financial conglomerates. Such a reference is currently missing in the draft Bill, and we would argue strongly in favour of including it.	
		Competition Issues The draft Bill does not make any provision for the MCA to have functions in relation to competition in the financial sector. This is in contrast to the position in relation to the United Kingdom's Financial Conduct Authority which has as an explicit objective promoting "*effective competition in the interests of consumers*" in relevant markets.(see Section 1E of the Financial Services Act 2012) In light of the high level of concentration in South Africa's financial sector, it may be helpful if the MCA were to have a role in relation to competition in the financial services market. At a minimum, this might include monitoring the levels of the competition in the financial services market, making recommendations on measures to further increase competition among financial institutions and co-operating with the Competition Commission.	***The revised FSR Bill gives the PA and FSCA a function to promote, to the extent consistent with achieving their objectives, support sustainable competition in the provision of financial products through co-operating and collaborating with the Competition Commission. See cl.29(f) and 53(g) of the revised FSR Bill and the Policy document for further details on the key changes to the first draft of the Bill.***
		Ombudsmen Scheme Provisions The Bill provides for the Financial Services Ombud Schemes Council (FSOS) to have increased powers in relation to the multiple industry and statutory ombuds schemes in South Africa. The new powers include to monitor compliance with the requirements of the Financial Services Ombuds Schemes Act (Ombuds Act), to approve the appointment and removal of an ombud of a scheme, to promote and direct cooperation and coordination between the various schemes, to facilitate the delineation of jurisdictional boundaries between the schemes and to put in place measures to enhance public awareness of the various schemes. Although the proposed new Council powers, if actively exercised, will be very helpful in helping to resolve the current difficulties associated with the multiple ombuds schemes in South Africa, there remain outstanding issues. They include: • The need to address differences in the operational rules of the different schemes (for example, disclosure rules) (it is also not entirely clear that the Council will have the power to actually change the rules of either voluntary or statutory schemes); • The fact that there is potential for overlap between the schemes (for example, a bank assurance product could be within the jurisdiction of both the Long Term Insurance Industry Ombud and the Banking Industry Ombud). There is also potential for both customer confusion and forum	***The FSOS Act will be repealed and provisions made in the FSR Bill for the oversight of ombuds schemes. The provisions in the FSR Bill will also give stronger powers to the FSOS Council to consolidate and streamline ombuds arrangements more effective. All existing ombuds will remain in place and continue functioning. See Chapter 16 of the revised FSR Bill and the Policy document for further details*.**

		shopping where there is overlap; and • Having several ombuds schemes creates delays when a complaint is to be handed to another ombud after an investigation was conducted by the first ombud that was approached. Against this background, consideration might be given to a second reform stage in which a study would be conducted to see how to merge all the ombuds in the future, possibly into one statutory body. However whichever process is selected, consideration should be given to the best of international experience with financial ombuds schemes (See World Bank: ***Resolving disputes between consumers and financial businesses: Principles for a financial ombudsman, A practical guide based on experience in western Europe***) International experience might also be accessed through the International Network of Financial Services Ombudsman Schemes (INFO).	
SAIA	**General**	**Regulatory Cost of implementing of the Twin Peaks model of regulation** A major concern to the industry is the high direct and indirect costs of an ever increasing regulatory framework, which costs are ultimately passed on to policyholders which impacts the sustainability of the insurance industry and may preclude entry to the insurance market and will stifle the industry objective of financial inclusion. In the policy document published on 1 February 2013 by the Financial Regulatory Reform Steering Committee titled "*Implementing a twin peaks model of financial regulation in South Africa*", section 1.3 sets out an Assessment of Costs and Benefits referring to the benefit of an economic impact assessment as "*a tool for evaluating the effect of a policy on the economy*". It also highlights that an economic impact assessment "*may take place before approval of an intervention to identify its effect during and after implementation to enable corrective actions and inform future programmes*." The policy document goes further to state that: "*In preliminary estimates, the overall cost implications were projected to be relatively modest because they essentially involve a shift of resources from one institution to another*", and "*The economic costs of implementing a twin peaks model will be relatively minimal*." None of these statements made in the forerunner document to the Twin Peaks Bill, 2013 has been actioned or qualified, and SAIA and its members therefore recommend an economic/industry cost impact assessment be conducted before implementation action is taken.	

		Effective consultation with industry The Twin Peaks Bill provides for the repeal of most sections of the Financial Services Board ("FSB") Act, 1990 including Section 18, which provides for the Minister to prescribe a Code of norms and standards for consultation with industry. Even though the Twin Peaks Bill provides in Clause 49 for the Minister to prescribe a "*process for consultation on rules and joint rules*", there are no clear provisions for a code or process of meaningful consultation with industry on broader issues, as was the case with the repealed Section 18. The lack of a formal process for consultation with industry was raised as a major concern by SAIA members. The SAIA recommends that Section 18 of the FSB Act, 1990 (as amended by the Financial Services Laws General Amendment Act, 2013) be retained and the code of norms and standards be developed as prescribed in this section.	***Consultation mechanism with the industry has been built into the revised FSR Bill (cl.87). See cl.90 and cl.23 in respect of consultation on the making of legislative instruments and financial stability matters respectively. The Bill also requires the regulators to describe, in their regulatory strategy, how they will perform their supervisory and regulatory functions consistently with the principles of transparency (see cl.43 and 69). See revised FSR Bill.***
FMF		The articles below were written to explain the causes of the distinctive financial crises in the United States and Europe respectively: • Article A: Governments, free markets, and the financial crisis by Eustace Davie • Article B: Free Market Triumph Over Subprime Folly by Leon Louw • Article C: Protest by Johan van Zyl, Chief Executive of one of South Africa's leading financial institutions report by Gillian Jones, Business Day, 5 September 2013Debasement of the rand and dollar • Article D: Debasement of the rand and dollar by Eustace Davie Contrary to inexplicably popular, tenacious and flawed mythology: 1. There is and has been no "*global*" financial crisis or "*meltdown*". All but a handful of countries maintained positive growth rates consistent with pre- and post-crisis norms at all relevant times, and most African counties enjoyed accelerated growth rates. 2. Not only was there no "*global*" crisis, or a single "*crisis*", but there were two distinctive crises, neither of which has been ended by extreme government intervention, and has more probably been perpetuated and exacerbated by it. 3. The two major localised crises were and are (a) the subprime mortgage derivative crisis emanating from the USA and affecting primarily large-scale investors in government-created, government-promoted and government-backed derivatives, and (b) the Southern European sovereign debt crisis, which is not only caused by but which specifically is a manifestation of excessive government spending. In other words, both crises, rather than being caused by	***Comments and references to research work to explain the causes of the financial crises in the United States and Europe are acknowledged.***

		delinquent banks or market failure, coincided extreme government intervention and were, in all material respects, manifestations of government failure, not market failure. Nothing emanating from markets was a sufficient or necessary condition for either crisis, or government interventions in both cases were both sufficient and necessary conditions. **Specifics in the Bill** For reasons given [contained in the articles] above, we address the bill conceptually, rather than in its minutiae. It is a long Bill, and it is unlikely that many submissions will address every substantive aspect. We are concerned about many details: their constitutionality, their conflict with sound jurisprudence even where constitutional, and potentially negative impacts. We resist the temptation to elaborate, because addressing detail creates a misleading impression that the measure as a whole is conceptually sound. We attach, by way of illustration, a Portfolio Committee submission by the Law Review Project; it exposes flaws in just two sections of the Bill under consideration. A detailed analysis of the entire Bill would require more text than in the Bill itself. Needless to say, we are familiar with the default assumption that proposed measures are cast in stone, and that the best anyone can achieve is fine-tuning trivia. We believe that to imply that the Bill is conceptually sound would be a disservice to our country. Furthermore, we are a democracy in which proposals should never be thought of as inevitable. Even when adopted, they are subject to revision or repeal, which should be considered for existing and conspicuously failed measures, especially FAIS. Lest there be doubt about the failure of FAIS, we point out that, unlike the present Bill, it was preceded – as all Bills should be – by concrete predictions of costs and benefits. When presenting parliamentary evidence, the Financial Services Board (FSB) disclosed 16,977 intermediaries (not counting staff) had been expelled from the industry and from serving consumers, especially low-income consumers most in need of financial services and job opportunities on the industry, since 2004. That, shamefully, is 40% more than the 11,083 who cling to their jobs and who serve mostly privileged consumers. Black brokers accurately predicted "*carnage*" in their 2001 parliamentary evidence against the introduction of FAIS. The FSB's cost-benefit analysis predicted R1,15 billion annual benefits including 20% more policy "*persistency*". The "*benefit to consumers will arise from reduced miss-selling and over-selling (by) more professional intermediaries*". The opposite happened. Incredibly, Parliament was told that it is "*not appropriate*" to ask whether predictions materialised "*as various factors could contribute*." However, most "*factors*" have always existed and could hardly explain life insurance policy lapses in the first year of FAIS soaring 50% and nearly doubling over-all. Promised consumer gains became disastrous losses, to which must be added massive compliance and policing costs, and	 ***The policy rationale for a shift to a Twin peaks model of financial regulation is documented in the policy document titled, "A safer financial sector to serve South Africa better" which was released with the 2011 Budget. The impact assessment of the shift to a twin peaks is dealt with in another document titled, "Implementing a twin peaks model of financial regulation in South Africa" that published on 1 February 2013. All these documents are available on the Treasury website. See also the amendments that have been made to the revised FSR Bill, as well as, the Policy document for detailed explanation on key changes to the Bill.***

		denial of the benefits of competition by most service providers having been expelled or “debarred”. One of the features of the present Bill is “twin peaks” regulation which we respectfully submit is a seductive term crudely imported from the UK. It is devoid of substance because it is based fallacious assumptions about the nature and causes of real and imagined problems in financial markets, on one hand, and the arrogant assumption of regulators that they have or will miraculously acquire elusive omniscience; that they will by some miracle suddenly understand and predicts markets, and prevent the kinds of crises they have caused or never been able to prevent hitherto. The twin peaks model envisages more of what has already failed dismally and unambiguously. The standard recourse of failed regulators is the proposition that things would have been worse without them. By that logic no matter what damage over-regulation inflicts, it is always true that catastrophes could be more catastrophic. Governments can avoid damage inflicted on themselves and their countries by such sophistry if they: • Insist on aspirant regulators who propose extended regulation such as this Bill in general and twin peaks in particular producing quantified predictions of costs and benefits, • Repeal measures and dissolve bureaucracies where predicted outcomes do not materialise. Had these two simple expedients been observed, cutting back on financial regulation would now be under consideration instead building new bureaucratic empires and smothering the economy beneath increased costs and controls. “Twin peaks” could better be understood as twin troughs or twin pits. There is no reason whatsoever to believe that two overlapping regulators will be any less likely to fail than their predecessors. What the government should do instead is undertake a paradigm shift that reflects a more sophisticated understanding of how markets function, especially their propensity for spontaneous and expeditious self-correction. It should critically examine, and reform or repeal measures that frustrate market processes, and should discontinue measures that distort markets. Above all, it should stop fuelling the disastrous myth that regulators, given enough power, will miraculously acquire a god-like ability to predict the future, and to prescribe a one-size-fits-all straitjacket that suits all consumer needs, and allows for competition and innovation. Policy-makers should not forget that our most disastrous debacles – Masterbond, Fidensure, Tannenbaum etc – were fully provided for under the common law of contract and fraud, leaving no need for additional regulation. The proof of the pudding is, so to speak, in the eating. Not only had the people and enterprises concerned been officially and deceptively certified “fit and proper” by the regulators who now want more power, but when the day of reckoning arrived, prosecutions occurred under old-fashioned common law rather than under statutes that were supposed to protect consumers. In order to protect regulators from such travesties, they have to granted immunity under	

		the laws that presume them to be capable of regulatory miracles. It is known with absolute certainty that regulations and regulators cannot and will not generate market stability, improve rates of return for consumers, or anticipate and avoid real or imagined crises. Despite presiding over the most heavily regulated sector of the economy, they have failed repeatedly by their own admission. They were incapable of predicting any of the crises they say they could prevent if given ever-more power. Instead of delivering on their promises, they misleadingly, if not fraudulently, engender a false sense of security amongst consumers and investors leading them inevitably like innocent lambs to the slaughter into the next crisis. By asserting, as they do with every new wave of control, that they can and will protect consumers and stabilise markets, they lull all concerned, including the government, into perilous complacency. In the circumstances, we urge the government to withdraw this Bill and go back to the proverbial drawing boards with a view to formulating market friendly reforms that will enable our financial sector to build on its reputation for being efficient, dynamic and innovative	
SAICA	**International research on best practices in implementing Twin-Peaks**	**OBSERVATIONS** **International concerns related to the quality of European Regulation and the risk of a 'ticking-the-box'-mentality:** http://www.afm.nl/~/media/Files/lezingen/2013/harman-icma.ashx The large numbers of new and complex European rules were created under severe time pressure, which leaves limited time for reflection, adequate consultation and calibration when drafting and implementing these rules. The increasing number and complexity of European rules make compliance with these rules more difficult and costly. Smaller firms may find it hard to comply with the large amount of new and complex rules and reporting requirements, which come on top of higher capital requirements. As an unintended consequence, this may lead to more market concentration and less competition, as a consequence limiting consumer and investor choice.	***Comment and reference noted. See revised FSR Bill and the Policy document for further details.***
		Relevancy in the RSA context / additional considerations Possible Economic impact study on the South African financial market may create awareness amongst institutions of the challenges and costs ahead. Responses to NT in this regard may further strengthen considerations and proposals into the next phases of implementation.	***Comment and reference noted. The impact assessment of the shift to a twin peaks is dealt with in another document titled, 'Implementing a twin peaks model of***

		Economic Impact Assessment http://www.gov.za/documents/index.php?term=Twin+peaks&dfrom=1+Feb+2013&dto=&yr=2013&subjs%5B%5D=0 The text states that economic impact assessments may take place before approval of an intention to during and after the implementation to enable corrective action or inform future programmes. In addition, on page 27 the statement is made that ongoing monitoring of the costs and the benefits of individual regulatory measures on institutions is necessary to ensure appropriate regulation ***Relevancy in the RSA context / additional considerations*** We would appreciate more formal communication in this regard and suggest the impact study form part of the early stages of phase 2 of implementation. An impact studies in SA would follow international practices before twin peak implementation (for example the (UK). This type of formal engagement would ensure more specific considerations (linked to the original eight overarching principles) by institutions rather than general considerations that may not be that relevant when actually implemented.	***financial regulation in South Africa' that was published on 1 February 2013.***
		Any regime must be structured to ensure that depositors funds can be accessed promptly http://www.group30.org/images/PDF/The%20Structure%20of%20Financial%20Supervision.pdf These "lessons learned" are highly instructive in fashioning a successful deposit insurance scheme. Any regime must be structured to ensure that depositors' funds can be accessed promptly. Among other things, insured deposits should be segregated to reassure depositors that their funds are both safe and accessible. In the absence of confidence that they will have ready access to their funds, depositors will have a strong incentive to join a bank run and withdraw their deposits. The most successful deposit protection schemes are those that are as simple and transparent as possible. This means providing clear explanations of how depositors can maximize their protection. To provide the optimal financial stability benefits, the details of the scheme must be well advertised and readily accessible. Depositors also expect that a deposit insurance scheme will be adequately funded in order to meet any potential obligations. Failure to provide this assurance likewise fails to meet the objective of financial stability.	***Comment and reference noted. See revised FSR Bill and the Policy document for further details.***

		Relevancy in the RSA context / additional considerations This will be relevant for Phase 2 and 3. Deposit insurance in RSA is still work in progress. Regulators need to consider structuring a simple and transparent scheme that will create further investor/ public confidence and overall financial stability.	
		Cross-Border Coordination Issues http://www.group30.org/images/PDF/The%20Structure%20of%20Financial%20Supervision.pdf International studies have highlighted the need to be a member of international groups (for example BCBS, FSF, IOSCO) in furthering cross border cooperation and information sharing. There is significant debate, however, concerning whether these efforts are enough or whether greater coordination efforts need to be in place, particularly in crisis situations. Cross border information sharing may also be achieved through: • Bilateral MOU's to facilitate communication between home and host supervisors in normal times to prepare for lines of communication in times of systemic crises • Real-time access to information through formal mechanisms • Colleges for supervisors to supplement international groups	***Comment and reference noted. The revised FSR Bill imposes a duty on the financial sector regulators to participate in relevant international regulatory, supervisory, financial stability and standard setting bodies..***
		To avoid Regulatory Arbitrage, the perimeter of regulation will need to be extended to enhance the surveillance of shadow banking activities. https://www.imf.org/external/pubs/ft/scr/2011/cr11208.pdf Stricter capital requirements and regulations for banks could invite off-balance-sheet regulatory arbitrage (e.g., loan securitization). Therefore, rigorous regulation and supervision should also apply to the shadow banking system and to cover off-balance sheet entities. Key would be to assign the prudential authority the role to closely monitor the activities of non-banks such as hedge funds and insurance companies, apply uniform regulations to prevent regulatory arbitrage between banks and non-banks, and to coordinate closely with other regulators to minimize cross-border regulatory arbitrage.	***Comment and reference noted. The revised FSR Bill empowers financial sector regulators to issue and supervise market conduct and prudential standards in respect of financial services and products provided by financial institutions. The revised FSR Bill also prohibits the provision of financial products, financial services, market infrastructures or payment systems unless if that person is licensed in terms of a financial sector law (cl.98).***

		The "twin-peaks" model provides scope to redeploy resources to the part of the financial sector that is judged most susceptible to systemic risk. https://www.imf.org/external/pubs/ft/scr/2011/cr11208.pdf In that regard, the resources devoted to banking supervision require further attention. The frequency of visits to individual banks has been determined according to available resources and risk analysis. The relatively fewer resources devoted to banking supervision seems to have had an influence on the extent of DNB's pre-crisis oversight of the activities of the overseas subsidiaries of some large Dutch banks. The extent of their activities would have justified a greater commitment of resources to their monitoring than was actually the case. The allocation of supervisory resources thus needs to be evaluated according to the potential systemic impact of regulated firms.	***Comment and reference noted.***
		European Commission is considering adopting proposals for the regulation of financial benchmarks. http://www.afm.nl/~/media/Files/lezingen/2013/harman-icma.ashx Financial benchmarks include for example the Libor or Jibar rate that is crucial for pricing of financial instruments such as derivatives. International experiences have shown the significant harm inadequate behaviour can cause to financial firms as well as distrust in the financial sector in general. ***Relevancy in the RSA context / additional considerations*** This type of regulation may be useful in the SA context under the ambit of the market conduct authority and can be proactively aligned with international adoption in 2016.	***Comment and reference noted. See standard making powers by the market conduct authority and scope of such standards in cl.95.***

Standard Bank	**General**	Standard Bank believes that the introduction of the Twin Peaks system is an extremely important development in the reform of the financial sector regulatory framework – perhaps one of the most significant reforms to the banking industry since 1994. We support the policy objectives that underpin the move to the Twin Peaks system and believe that it will further strengthen the South African financial system. Standard Bank believes that the implementation of Twin Peaks is an opportunity to streamline and strengthen the regulatory framework for financial services. This initiative is also an important opportunity to reduce the current complexity of financial sector regulation by allowing two separate regulators to focus on two separate, but equally important, risks in the financial system: risks to financial stability from poor prudential management and risks to individual consumers and investors from poor market conduct. Standard Bank supports the greater emphasis that will be placed on consumer protection with the establishment of the Market Conduct Authority. Further enhancements in consumer protection will encourage more South Africans to participate fully in the financial sector allowing them to enjoy the benefits of financial products and services; and this will be a positive outcome for our country's growth and development. The statutory framework for Twin Peaks should ideally provide clarity on the specific roles and responsibilities of different regulatory authorities and government during a financial crisis. This was one of the main lessons of the Global Financial Crisis: to be able to respond quickly there needs to be a clear and common understanding of what each financial regulatory body is responsible for. An effective regulatory system must be founded on very clearly demarcated mandates, roles and responsibilities for each of the financial regulators. It is essential that the legislative framework for Twin Peaks provides this foundation. Standard Bank's comments on the Financial Sector Regulation Bill are informed by this requirement. Standard Bank supports the phased approach towards implementing the Twin Peaks system and understands that the Financial Sector Regulation Bill is the first – albeit very important - step in the process. At the end of the process we would like to see a regulatory framework and system that is: • Appropriate to the needs of South Africa while generally aligned with global standards; • Clear, certain and predictable while still retaining a degree of flexibility in response to changing circumstances; • Coherent and "joined-up"; • Transparent, user-friendly, and informed by public participation;	***See revised FSR Bill and the Policy document for further information.***

		• Targeted to the policy problems that it seeks to remedy, and proportionate to the costs, benefits, and risks involved; and • Evidence-based and subjected to appropriate regulatory impact assessment to avoid and minimise unintended consequences. While we support the phased approach and understand that certain matters will be addressed in subsequent phases. However, the absence of clarity and detail in some areas does hinder our ability to comment on the proposed Twin Peaks model. While it is appreciated that it is not always appropriate or useful to include detailed operational information in what is essentially framework legislation, there are some cases, where we believe it would be preferable to have greater certainty in this first phase, including the regulation of the National Payments System in the Twin Peaks model.	

	ALIGNMENT WITH THE FRRSC SUMMARY AND TWIN PEAKS POLICY DOCUMENT		
	Regulatory and supervisory principles	**Considerations/ Observations**	**Decision/Response**
SAICA **14**	• **Appropriate, intensive and intrusive:** The regulator will proactively identify areas of concern and act to prevent negative consumer outcomes, rather than reacting to complaints or existing prejudice. This approach will cover both emerging risks within financial institutions or groups as well as concerns at an industry, market, sector or business model-level.	• Chapter 3 appears to capture principle three under section 14.	
	• **Pre-emptive and proactive:** The market conduct regulator will need to pre-emptively intervene to prevent or limit material damage that might result in negative customer outcomes. This remedial intervention could be at an institutional, industry or sector level, depending on the risks involved.	• Although the Bill is not succinct with respect to the pre-emptive and proactive measures which must be taken by the Market Conduct Authority to prevent or limit damage that might result in negative customer outcomes, section 14 does provide a glimpse of the measures that might be taken by the Market Conduct Authority. However, for purposes of certainty it is proposed that section 14 must specifically spell out the pre-emptive and proactive measures envisaged in principle 6 such that any ambiguity and uncertainty is removed with	***See cl.29(4) and 53(4) of the revised FSR Bill that requires financial sector regulators to adopt a primarily pre-emptive, outcomes focused and risk-based approach in performing their regulatory functions.***

		regards to what measures the Market Conduct Authority will take.	
	• Aligned with applicable international standards: The market conduct regulator will ensure that its frameworks and practices comply, where appropriate, with relevant international standards as established by the international standards to which South Africa subscribes	• The international standards to which South Africa subscribes will need to be identified for purposes of certainty. This is more of a challenge than ever given the impact of globalisation. Indeed, IOSCO says that, as a result of the increasing internationalisation of financial activities, the information required for market supervision can be beyond the reach of national regulatory authorities in particular jurisdictions. Thus, international cooperation between regulators internationally is necessary for the effective regulation of domestic markets. Much of Australia's market conduct and disclosure regulation is affected by international issues, ranging from the activities of global financial institutions in our markets, enforcement matters involving offshore transactions, complex cross-border ownership structures and policy issues involving international regulatory standards.	***The revised FSR Bill imposes a duty on the financial sector regulators to participate in relevant international regulatory, supervisory, financial stability and standard setting bodies. See cl.29(2)(b) and 53(2)(b) of the revised FSR Bill.***
	• Regulations will not list all types of permissible activities. Any activities or financial products that are consistent with the prescribed principles can be assumed permissible until the regulator specifies otherwise.	• Applies to both MCA and PA. Although broad in the Bill, it is evident that the aim is to achieve standardisation of financial products.	***See the definition of "financial product" and "financial services" in the revised FSR Bill as well as the Policy document.***
SAICA **16**	• **Outcomes-based** - Consumer protection regulation will be primarily outcomes based, requiring financial institutions to comply with both principles – and rules-based regulations, both of which will be legally binding and enforceable.	• Contrary to guiding principle number 4, the Bill specifically states that the guiding principles are not legally binding. On this basis alone, the drive to implement an outcomes based approach to market conduct might fall short owing to the fact that rules are considered legally binding whilst principles are considered as mere guiding norms. The principles ought to	***See cl.29(4) and 53(4) of the revised FSR Bill that requires financial sector regulators to adopt a primarily pre-emptive, outcomes focused and risk-based approach in performing their regulatory functions.***

		be accorded the same status as the norms in the legal packing order.	
16(1)(a) read with s69	• Regulations will be largely based on principles, rather than rules, with the rationale for prudential regulation being fully transparent. Transparency will be achieved through the oversight, reporting, governance and stakeholder structures discussed in Chapter 2.	• The Bill requires the regulatory authority to take into account the need for "*an appropriate degree of transparency in its decision-making processes*". The Bill is silent on "**how**" this will be achieved. We assume that this is left to the Prudential Authority's discretion when performing its duties. At first glance, it appears that the Bill does not define the steps that must be taken by the Market Conduct in order to achieve transparency. It merely restates the point that the Market Conduct authority must be guided by transparency in its decision making process. As to how this will be achieved is left to the Market Conduct Regulator when it drafts its decision making process. The Bill ought to mention transparency as one of the pillar stones when the Market Conduct Authority drafts its statement of decision making policy. Further, it is concerning that the principles are not legally binding. It would be more appropriate to codify the principles and make them legally binding such that there is no confusion with respect to the obligation placed on a Regulatory Authority to comply with the principles. Part 4 of Chapter 3 to the Bill, falls short as it does not mention that the Market Authority must consider Transparency when drafting its decision making policy. However, section 69 elaborates in addressing the above shortcomings. On that basis, it may be argued	***Section 88 of the revised FSR Bill provides for financial sector regulators to have arrangements in place for consulting representatives of financial institutions and financial customers. See also cl.90 and cl.23 in respect of consultation on the making of legislative instruments and financial stability matters respectively. The Bill also requires the regulators to describe, in their regulatory strategy, how they will perform their supervisory and regulatory functions consistently with the principles of transparency (see cl.43 and 69). See revised FSR Bill and also the Policy document for a detailed explanation on the governance of the regulators and their interaction with each other.***

		that the Bill does address the first principle of transparency.	
16(1)(b)	• The criteria must be consistent with prevailing legislation and supervisory practice.	• The Bill in general, aims to promote a consistent and harmonised approach by the regulators for all regulatory decisions.	***The Bill has strengthened the provisions relating to how Regulators must co-operate and collaborate with each other in relation to performing their functions, including coordination and co-operation with the Reserve Bank. See Chapter 6 of the revised FSR Bill.***
16(1)(d)	• **Comprehensive and consistent:** The market conduct regulator's regulatory and supervisory framework will seek to balance principles- and rules-based components. Principles-based components – such as the obligation to deliver "treating customers fairly" (TCF) outcomes – will apply universally to the conduct of all regulated financial institutions. Rules will be implemented as needed, and consistently between comparable activities.	• It does not appear that a balance has been struck between principles and rules based approach. The Bill is quite driven by rules as opposed to principles. Furthermore, rules appear to have legislative power and thus legally binding whilst principles are specifically stated not to amount to any binding legal norms. Although TCF will apply to both mono and dual regulated institutions. It seems that the rules based approach is preferred in large parts of the Bill as opposed to the principles based approach.	***See revised FSR Bill.***
16(1)(e)	• Regulations will be aligned with international best practice and standards, as appropriate for South Africa.	• The Bill refers to "*compliance, as appropriate, with international standards and best practice*." The international standards to which South Africa subscribes will need to be identified for purposes of certainty.	***There is no need to be that specific. See cl.29(2)(b) and 53(2)(b) of the revised FSR Bill.***
SAICA **59 (a) – (d)**	• Regulations will be designed to proactively identify possible market imperfections and address them at minimal cost and with minimal disruption to financial institutions.	• Applies to both MCA and PA. The Bill requires the authorities to assist monitor financial system for risk and then report to the FSOC.	***The revised FSR Bill requires both the PA and the FSCA to assist and cooperate towards the maintenance of financial stability***

SAICA **70(1)**	• The prudential regulator will have the authority to institute timely corrective actions, including deregistering an institution or withdrawing its license, to force it to cease activities. These actions will be subject to the necessary consultations.	• Applicable to both authorities. It would appear that the principle is captured in the Bill by the various enforcement mechanisms envisaged therein.	***See Chapter 12 of the revised FSR Bill.***
Page 114	• Risk-based and proportional: In a risk-based supervisory framework, financial institutions that consistently comply with market conduct obligations and deliver TCF outcomes – as monitored by supervisory tools – will attract less market conduct regulatory scrutiny than those who show less regard to fair customer treatment. This principle will require a review of how appropriate the FSB's current risk-based models are identifying and managing market conduct risk, as opposed to prudential of financial risk.	• Aside from what is indicated under the Memorandum section of the Bill at page 177, there is no indication that a review of the FSB's current risk-based models for identifying market conduct risk has taken place. Proportionality criteria for regulating mono-entities may be in conflict with the scope of the prudential authority especially where an institution is regarded as a dual entity. Also too much Minister power over affordability criteria for customers may limit / change product development, adding additional costs to the consumer. The principles on which the market conduct authority will be based do not signpost to incentivise good institution behaviour	***See revised FSR Bill.***
SAICA **General**	• Regulations will generally apply to financial institutions and their activities to impose sanctions, mitigate risk or resolve institutions in distress. • Registration, approval or licensing will be required before any person or institution may carry out regulated activities. Effective action against unregulated entities known to be conducting such business is an essential part of regulation. • The prudential regulator will have the authority and independence to set criteria for approval, registration or licensing, and to reject applications that do not meet these standards or other legislative requirements. • At the minimum, registration or approval will require	• The Bill seeks to achieve close alignment necessary between regulating the financial soundness of an individual institution and that of the stability of the financial system as a whole. • The Bill only refers to an enhanced co-ordination and co-operation between the regulators when exercising duties relating to licensing activities • The Bill refers to the necessary operational powers and independence of regulators to perform their duties impartially. The Bill does not outline or provide guidance on how this	***See Policy document and revised FSR Bill on the co-ordination and cooperation; and governance of the authorities.***

	assessment of an institution or group's ownership and governance. This includes assessing the fitness and propriety of board members and senior management, the institution's strategic and operational plan, its internal controls and risk management, and its projected financial condition (including its capital base).	will be achieved. • The Bill only deals with governance of the Prudential Authority, and not how the authority assesses an institution. It is recommended that the Bill outline this in order to accommodate the principle.	