FINANCIAL SECTOR REGULATION BILL

COMMENTS RECEIVED ON THE SECOND DRAFT BILL PUBLISHED BY NATIONAL TREASURY FOR COMMENTS ON 11 DECEMBER 2014

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COMMENTS ON THE FINANCIAL SECTOR REGULATION BILL

Long Title

Reviewer	Section	Issue	Decision
BASA	Long title	The provisions of the Bill should be limited to establishing the authority of the Twin Peak financial sector regulators and to provide for any matters which are incidental thereto. Conduct rules (such as fit and proper standards for "**key persons**") and consequences in the event of a breach (for example, the suspension of licenses) should, we submit, more appropriately be promulgated in the future "Conduct of Financial Institutions Act" (CoFI Act). Such an approach would replicate the current status quo in the financial sector where the Financial Services Board (FSB) Act establishes the regulatory authority of the FSB, while varied financial sector laws regulate the provision of financial services, including consequences in the event of breaches.	***Disagree, the way the FSR Bill is drafted allows for transitioning. However what has been considered and proposed is a framework to better present how Authorities may issue standards.***
Voluntary Ombuds Schemes	Long title	In the media statement issued by National Treasury on 11 December 2014 one of the stated objectives of the Bill is to "*strengthen the ombuds system by creating a stronger central co-ordinating role for the Financial Services Ombuds Council*" ("the Council"). It is suggested that the preamble to the Bill should be amended to include a reference to this important objective.	***Noted. The objectives and functions of the Ombud Regulatory Council are articulated to support the broader objectives of the FSR Bill.***
BASA	Arrangements of Sections	As a principle of good drafting and to enhance the readability of what is a lengthy Bill, it is suggested that section (clause) numbers are included in the index and arrangement of sections at the front of the Bill.	***Agreed***
Centre for Applied Legal Studies	Long title	The preamble should be amended to reflect a commitment to Constitutional supremacy by including the following wording: *……to provide for the protection and promotion of human rights as set out in the Constitution in the financial sector;*	***Not necessary. Constitutional supremacy applies regardless***

CHAPTER 1: Interpretation, Object and Administration of Act			
Reviewer	**Section**	**Issue**	**Decision**
ASISA	General	Generally, we are concerned that a single regulator will pursue integration over-enthusiastically thereby failing to make appropriate differentiation between businesses that mainly operate in different sectors or between businesses within the same sector but which have very different customer bases. A single regulator may attempt to impose a 'one size fits all' approach. Some of the provisions lack a clear focus on their objectives and rationale of some of the regulation, which may, instead of facilitating coherence and clarity, result in self-contradiction and confusion.	***Comments are noted. In the performance of their functions, each Authority must take into account the need for a primarily pre-emptive, outcomes-focused and risk-based approach, and ensure that the use of resources prioritise the significance of risks to the achievement of their objectives.***
Part 1: Interpretation			
PPS	**"company"**	We have noted that the definition of a "company" in Section 1 bears the same meaning as the definition in Section 1 of the Companies Act. This definition would then exclude any Trust incorporated in terms of the Trust Property Control Act 57 of 1988. With the introduction of the new Companies Act the PPS Group converted its holding company to a Trust in terms of the Trust Property Control Act 57 of 1988. This conversion took place following in-depth consultation with the FSB and, because of the unique mutual model of the PPS Group of Companies, was agreed by all to be the most appropriate structure for PPS' holding company. It is then a concern for PPS that, on face value, its holding company is not recognised under the current draft of the Financial Sector Regulation Bill. We would therefore like to suggest, if we may, that the definition of a "company" in Section 1 of the bill be expanded to also include juristic entities incorporated in terms of the Trust Property Control Act 57 of 1988.	***Comment noted. It is acknowledged that PPS are a very particular situation and it was considered that it would be inappropriate to specifically cater for this very specific situation in the definition of "company". However, the Authorities may declare in writing that a specified person is or is not a significant owner of a financial institution, and may make standards for significant owners.***
BASA	**"complainant"**	Definition should reflect the work done on this matter in TCF. The definition should be aligned to the evolving thinking in TCF which is more inclusive. It is proposed the word "specific" is deleted from the definition to ensure alignment with the definition in FAIS. *"**complainant**", for the purposes of Chapter 16 means–* *(a) a ~~specific~~ client as defined in section 1(1) of the Financial Advisory and Intermediary Services Act, who submits a complaint to the Ombud for Financial*	***This definition has been deleted***

		Services Providers; *(b) ……*	
Warwick Wealth	**“complainant”**	The Bill indicates that the complainant may be anybody, be they a client, prospective client or member of the public. Such a wide definition is likely to invite the lunatic fringe.	***This definition has been deleted. It should however be noted that customers and potential customers should be able to complain, e.g. on grounds of misselling or misleading the market, even if there is no direct link.***
BASA	**“complaint”**	The inclusion of “expression of dissatisfaction” should not be necessary to define a complaint. Complaints should be based on a clear indication of a substantive or procedural concern. It is suggested that “~~*expression of dissatisfaction*~~” is deleted.	***This definition has been deleted***
SAIA	**“complaint”**	In relation to paragraph (a)(ii) of the definition, the reference to “*substantial inconvenience*” is vague and may leave room for interpretation as to what is “substantial”. The interpretation in its current format implies that it is dependent on the subjective perspective of the complainant. It is suggested that the term be reconsidered. It is also suggested that the use of the word “*distress*” be reconsidered, and be replaced with something more objectively measurable instead of the word “distress” which is a subjectively emotional term. A complaint should always have its basis in fact.	***This definition has been deleted***
ASISA	**“complaint”**	“Complaint” is defined for the purposes of Chapter 16, but references to “complaint” is also included in clauses 95, 118 and 198 of the Bill. Its use in these clauses does not appear to be inconsistent with the definition but it is suggested that the definition be expanded to also provide for the use in the mentioned clauses	***This definition has been deleted***
BASA	**“controlling company”**	The current definition: “*means the non-operating holding company of a financial conglomerate that is subject to Chapter 11*” is extremely problematic. Having regard to the provisions of Chapter 11 and the duties and responsibilities of a controlling company in terms thereof, it suggests that the designation and suitability of a company as a controlling company of a financial conglomerate will require some form of regulatory assessment/approval and/or registration, similar to the current practice relating to a controlling company in respect of a	***This definition has been deleted. Chapter 12 on Financial Conglomerates has been revised and references to “controlling company” have been removed. The Prudential Authority may designate a financial conglomerate, which must necessarily include both an eligible financial institution and its holding company. This is to enable the Authority to facilitate prudential supervision with respect to the***

		bank. Therefore, the definition should be expanded to provide for the formal registration of an entity as a controlling company in this context and to give effect to the relevant duties and responsibilities applicable to a controlling company in terms of Chapter 11, as a result of such formal application and approval processes. BASA proposes the following amendments to the definition: ***"Controlling Company"** means a non-operating ~~holding~~ public company registered in terms of this Act as the controlling company in respect of a financial conglomerate and ~~that is~~ subject to Chapter 11.*	***financial conglomerates, and may extend to requiring the holding company of the financial conglomerate to be licensed.***
ASISA	**"controlling company"**	By definition, a controlling company is a non-operating company. If read with section 123, is the intention that there must be a non-operating holding company in every group of companies which includes eligible financial institutions? It is not clear what the rationale for such a requirement is. Many companies (whose controlling company is an operating company) will have to form new structures in order to comply with the proposed amendment. This will involve, inter alia, substantial extra costs.	***This definition has been deleted. The chapter has been revised and references to "controlling company" have been removed. The Prudential Authority may designate a financial conglomerate for the purpose of facilitating prudential supervision of the eligible financial institution. While it is acknowledged that a holding company of a financial conglomerate may be operating or non-operating, the Prudential Authority may nevertheless require the holding company to be non-operating. The holding company in this context is a financial institution and both the Prudential Authority and the Financial Sector Conduct Authority can exercise powers with respect to the financial conglomerates.***
SAIA	**"credit agreement"**	The definition of "**credit agreement**" in the Bill "includes" "credit agreement" as referred to in the National Credit Act, 2005, but is not limited to such a definition. It is proposed that the words "**but not be limited to such a definition**" be deleted as this unnecessarily broadens the definition and renders it indefinite so that it could include any type of agreement. Alternatively the definition should be re-worded to state what credit agreements are covered.	***The definition has been deleted. Please note the definition of financial product that includes "credit" as it is defined in the NCA and the reference to its provision is limited to the agreement governing that activity as per that Act. The Minister may designate in regulations credit arrangements outside of the NCA as financial products***
Melbourne Law School	**"credit agreement"**	We note that the term "credit agreement" has an open-ended definition and query whether it needs to be more specific. For example, should it be defined by reference to other legislation that regulates credit agreements? In its current	

		form, it might be construed as applying to any arrangement under which goods or services are sold on credit or pursuant to a running account. Is it intended that term capture such arrangements?	
BASA	**"credit agreement"**	Lack of certainty over the extent to which credit agreements outside of the NCA will be covered by this definition and the related definition of a 'Financial Product' including structured finance, project finance, credit facilities, and scrip lending for example. Further, a credit 'agreement' is not itself a financial product or service.	
Transaction Capital	**"credit agreement"**	The definition of "**credit agreement**" should be limited to the definition set out in the National Credit Act 34 of 2005, as amended ("NCA") as those are the only types of credit agreements over which the National Credit Regulator ("NCR") has authority. By introducing a category of "**financial products**" which are not regulated by the NCA in terms of section 2(2) of the Bill, the possibility exists that, in enacting a legislative instrument or interpretation ruling as contemplated in section 131 of the Bill, those rulings may impose restrictions and/or qualifications which are in conflict with section 8 of the NCA. Those administrative acts (or even subordinate legislation) would be unenforceable to the extent that they are in conflict with an Act of Parliament (i.e. the NCA).	
BASA	**"council standard"**	The ability of the Council of Financial Regulators to issue standards has the potential to increase regulatory complexity and uncertainty. Standards must either be set by the relevant Authority or by the relevant Authorities acting in concert, as provided for by the provisions allowing for Joint Standards. This will also provide clearer accountability for enforcing the particular standards. Should the ability of the CoFR to issue standards be retained in the Bill, then at a minimum the Council must be required to follow the same consultation process as outlined in Clause 90.	***This definition has been deleted. These are now rules issued by the Ombud Council, rather than the Council of Financial Regulators.*** ***However, for clarity, the Bill refers to "Ombud Regulatory Council" instead of "Council", and "Ombud Regulatory Council rule" instead of "Council standard"***
BASA	**"decision maker"**	Definition excludes voluntary ombuds. Include voluntary ombuds, (as these need to be licenced.)	***The governing rules of the industry ombud scheme are legally binding on the members of the industry ombud scheme (but not the customer), and enforceable by the governing body of the industry ombud scheme. The decisions of the industry ombud***

			scheme are binding on the financial institutions that commit and take precedence. The "decision –maker" refers to decisions made by decision-makers other than the industry ombud schemes.
SAIA	**"decision maker"**	Clarity is sought on the reason for including only a statutory Ombud in sub section (c). From a discussion that SAIA had with National Treasury on this point, it is understood that this definition relates to the ambit of appeals to the Financial Services Tribunal provided for in Part 2 of Chapter 15 and that it is intended to provide for an appeal process for statutory Ombuds. All other Ombud schemes have their own internal appeal mechanisms and so would not qualify as "**decision-makers**" under the Bill. We recommend that the reasoning behind excluding voluntary Ombuds be made more explicit.	***It is important to note that this definition has been amended, and now does not include either statutory or industry ombud schemes. Processes relating to statutory Ombud Schemes are dealt with through the relevant provisions in the Pension Funds Act and the Financial Advisory and Intermediary Services Act, read with clause 226(1) of the Bill.*** ***It is acknowledged that some (but not all) industry ombud schemes have an internal appeal mechanism; however this is a requirement for an industry ombud scheme that applies for recognition with the Ombud Regulatory Council. The governing rules of the industry ombud scheme are legally binding on the members of the scheme, and enforceable by the governing body of the industry ombud scheme. The decisions of the industry ombud scheme are binding on the financial institutions that commit and take precedence, and would not as such qualify as "decision-makers" under the FSR Bill.***
ASISA	**"decision maker"**	It is our opinion that any person exercising a public power is by the fact itself a decision maker and being a decision-maker should not be dependent on whether the exercise of that power is coupled with a right of appeal. ASISA proposes the following amendments: *"**decision-maker**" means–* *(a) a financial sector regulator;* *(b) any other person who has made a decision in terms of a power conferred or a duty imposed on that person by or in terms of a financial sector law~~, and that financial sector law grants a right of appeal to the Tribunal to any person aggrieved by a decision of that person~~;* *(c) a statutory ombud;*	***The definition has been amended***

Strate	**"designated authority" and "person"** See for examples where term is used: 9*(b)*; 12(3); 21(6); 23(3); 26(1); 79(3)(i); 78	**Organ of state; "designated authority"; "person"** We agree with the deletion of "*financial organ of state*", however the term "*organ of state*" is still used throughout the Bill. Please see comments on Draft 1 and response in Response document on 14-17/233. We respectfully disagree with the response on "*organ of state*" and the view that a MI is an "*organ of state*". In summary, the MI is a non-statutory body; not funded by public money; doesn't fall within the control of a recognised public authority or state control. The MI has a statutory duty to act in the public interest and to perform a public function. The definition refers correctly to s 239 of the Constitution. The application of the term in this specific Bill creates interpretational problems with unintended consequences and additional responsibilities. Please see below. Clause 16(1) refers to the "*Cabinet Minister responsible for that organ of state*". Clearly, no Minister is "responsible" for any MI, e.g. the CSD. The CSD may rather fall under the "auspices" of a specific Minister by virtue of the specific applicable sectoral law. See also "**designated authority**" definition in 1(1): a clear distinction is made between (a) organ of state responsible for enforcement of legislation and (c) a "*market infrastructure*" (MI). It is clear that the MIs are not responsible for enforcing legislation, and must enforce their own rules and directives. The distinction between (a) and (c) is necessary. However, based on the note in the Response Document, it is now uncertain if the CSD will fall under "*organ of state*" clauses in the rest of the Bill. The use of this terminology creates legal uncertainty in the context. It is submitted that the term is replaced with a suitable new phrase/term, otherwise "*person*" must be used. Thus, the use of the term "**organ of state**" creates uncertainty in interpretation about who is being referred to. The section can retain its effectiveness without the confusion if the term "~~*organ of state*~~ *that has regulatory or supervisory functions*" is replaced with "*person that has regulatory or supervisory functions*". Please check Bill throughout for use of "**organ of state**".	***The definition of "designated authority" has been moved to clause 238. In order to ensure certainty and avoid any confusion, it has been made clear, for the purposes of Chapter 17, that SROs are included in the definition of "designated authority" for the purposes of Chapter 17, in particular in relation to information sharing. The SRO functions of the market infrastructure (i.e. authorisation, supervisory functions etc.) required to be performed in terms of the FMA will continue, as provided for in the FMA.***
Melbourne Law School	**"disqualified person"**	We note that there are alternate references to "the Republic" and "South Africa" (see, for example, the definition of "**disqualified person**" and section 10*(a)* and	***The consistent use of the term "Republic" is well understood in legislation as referring to "the Republic***

		(b)). We query whether these references should be consistent and, if "the Republic" is used, whether this term should be defined as the "Republic of South Africa".	***of South Africa", and is defined in the Interpretation Act accordingly. It is, therefore, not necessary to define the term in the Bill.***
Transaction Capital	**"disqualified person"**	The definition should be expanded to include a person who is disqualified from acting as a director of a company in terms of the Companies Act 71 of 2008, as amended ("Companies Act").	***The term has been crafted and defined appropriately for the purposes of this Bill.***
ASISA	**"disqualified person"**	ASISA members are of the opinion that a person who is engaged in the business of a financial institution, or has a direct material financial interest in a financial institution should be a disqualified person whether such person is a financial customer or not. Paragraph *(d)* of the definition refers to an office of trust. Does it mean to refer to a trustee or a statutory office or a non-statutory office, but one of trust vis-à-vis the client? *"**disqualified person**" means a person who–* *(a) is engaged in the business of a financial institution, or has a direct material financial interest in a financial institution~~, except as a financial customer~~;* *(b) is a Member of the Cabinet referred to in section 91 of the Constitution, a Member of the Executive Council of a Province referred to in section 215 of the Constitution, a member of Parliament, a member of a provincial legislature, or a mayor or councillor of a municipal council;* *(c) is an office-bearer of, or is in a remunerated leadership position in, a political party;* *(d) has at any time been removed from an office of trust;*	***Disagree with deletion; however, the governance clauses in the Bill seek to ensure that all material interest must be disclosed. The Minister may issue guidelines for the disclosure of material interests in order to provide guidance to persons who are required to disclose material interests in terms of the FSR Bill.***
BASA	**"director"**	Definition is inconsistent with that in the Companies Act. BASA recommends: *"**director**" ~~means a member or an alternate member of a governing body~~ has the meaning of director as defined in section 1 of the Companies Act*	***This definition has been deleted.***
BASA	**"disqualified person"**	Debarment (used in clause 145) and disbarment (used in the definition of "**disqualified person**" are used interchangeably. BASA recommended that one term be chosen and used consistently. One BASA member recommends that issues such as debarment would be better located in the forthcoming Conduct of Financial Institutions Act, and as such should be	***Noted – amended definition of "disqualified person" so that (e) to refers to "debarment" in terms of a financial sector law rather than disbarment, e.g. from a professional body***

		deleted from the FSRB. *“**disqualified person**” means a person who–* *(a) is engaged in the business of a financial institution, or has a direct material financial interest in a financial institution, except as a financial customer;* *(b) is a Member of the Cabinet referred to in section 91 of the Constitution, a Member of the Executive Council of a Province referred to in section ~~215~~ 132 of the Constitution, a member of Parliament, a member of a provincial legislature, or a mayor or councillor of a municipal council;* *(c)………….*	***With reference to the comment on Conduct of Financial Institutions Act, NT disagrees – this centralised in the FSR Law***
BASA	**“eligible financial institution”**	There is potential confusion about the different meanings of “**eligible financial institution**” in terms of the FSRB and “*Accountable Institution*” and “*Reporting Institution*” in schedule 1 and 2 of FICA. BASA is concerned that the position of the FIC and the supervision of AML/KYC requirements remains ambiguous in the Bill. This is problematic given the material importance and impact of complying with FICA and related legislation, as well as the incorporation of combating financial crime into the mandates of the PA and the FSCA.	***The definition is relevant to Chapter 12 for the purposes of conglomerate supervision. Also, there should not be confusion with the terms referred to in the FICA, which are defined in terms of that legislation.***
Transaction Capital	**“eligible financial institution”**	In the absence of proposed regulations setting out the list of financial institutions contemplated in (d) of the definition of “**eligible financial institution**”, it is unclear which institutions will be bound by the provisions in Chapter 11 affecting financial conglomerates. Once there is greater certainty in this regard, Transaction Capital reserves its rights to submit comments on those provisions in due course	
Melbourne Law School	**“eligible financial institution”**	We note that there are alternate references to “Regulations” and “regulations” (see the definition of “**eligible financial institution**”, “**legislative instrument**” and section 2(2)). We query whether these references should be consistent and whether any terms should be defined.	
BASA	**“financial benchmark”**	This definition is problematic and there is no ‘analysis’ inherent in a “Financial Benchmark”. *“**financial benchmark**” means ~~an analysis~~ a comparison by which the performance of an investment is assessed.*	***Noted and agreed. Definition has been deleted***

SAIPA	**“financial benchmark”**	Very general definition. It should explicitly include the comparison to a similar/identical item, and that it may be carried out for items other than only investments.	
Melbourne Law School	“**financial conglomerate**”	Paragraph (c) of the definition of “**financial conglomerate**” refers to “related persons” and “inter-related persons”. We query whether these should instead be references to “related parties” and “inter-related parties” to ensure consistency with the definition of “**inter-related**” and “**related party**” and also the references to “a related party or inter-related party” in the definition of “**outsourcing**”.	***See revised definition***
SAIA	**“financial conglomerate”**	The definition of “**financial conglomerate**” in the Bill substantially differs from the definition of “financial conglomerate” suggested in the Solvency Assessment and Management (SAM) structures, Discussion Document 1 v8. It is our understanding that the definition of what comprises a financial conglomerate is currently under review by the IAIS, but as a general comment, we submit that definitions of the same concepts in various pieces of legislation should be aligned as far as practicable to ensure legal certainty and consistent application of financial sector laws. The current definition could be interpreted to include non-financial institutions in a Group where the only inter-related connection or shareholding connection is that they have a common non-operating holding company. It is suggested that the definitions be further refined.	***See revised definition. This definition is relevant for purposes of conglomerate supervision to enable the Prudential Authority to exercise its powers with respect to the financial conglomerate, and to facilitate prudential supervision of the eligible financial institution.***
BASA	**“financial conglomerate”**	The definition of “**financial conglomerate**” is problematic, for the following reasons: • Both a holding company and a controlling company are separately defined. A holding company means a company that, in terms of sections 2(2) and (3)(1) of the Companies Act, is a holding company. In turn, a Controlling company is defined as the non-operating holding company of a financial conglomerate that is subject to Chapter 11. • The definition is unnecessarily cumbersome and confusing. A holding company in this context refers purely to a subsidiary of the controlling company, whether direct or indirect. In addition, and with reference to Chapter 11 and the application of the relevant requirements of this “Act” on a Controlling Company, a financial Conglomerate can only have one ultimate	***The definition of “controlling company” has been deleted, and the definition of “financial conglomerate” has been revised.*** ***The definition is relevant for purposes of conglomerate supervision. The Prudential Authority may designate members of a group of companies as a financial conglomerate, which must include both an eligible financial institution and a holding company of the eligible financial institution, but need not include all the members of the group of companies. The purpose of designating a financial conglomerate is to enable the Prudential Authority to exercise its regulatory and supervisory powers with respect to the***

		controlling company that is subject to Chapter 11. • It is important that a financial conglomerate be properly ring fenced in terms of the definition, for purposes of legal certainty and supervision in terms of the framework for the supervision of financial conglomerates, similar to the current consolidated banking supervisory framework where banking groups are defined from the bank controlling company (registered as such), downwards. This will also align to the Basel Committee's Principles for the Supervision of Financial Conglomerates. It follows that legal certainty is required, also from a prudential perspective, i.e. capital adequacy, governance requirements, etc. and in respect of which entity's (controlling company that has to be either registered or formally recognized as such) board of directors is responsible for ensuring compliance with the relevant requirements in respect of the framework (Chapter 11). • In addition, and by way of example, there are currently banking groups (registered and ring fenced as such in terms of the Banks Act, 1990), that are part of larger groups which are predominantly involved in non-financial activities and it would be irrational to classify the entire group as a financial conglomerate. Moreover, the shareholders of the controlling company of a financial conglomerate that is subject to Chapter 11 will be captured under Chapter 10 which provides for separate regulatory oversight specifically for this purpose, in line with internationally accepted core principles in this regard. • The reason is that from a financial stability perspective you do want a "shareholder of reference" that will be able to inject capital into the financial institution during times of stress or when required. If NT wants to regulate a "shareholder of reference" no investor will become a major shareholder in a financial institution which will increase the risk. The "fit and proper" assessments are captured when approval for the shareholding is sought from the regulator. • Lack of clarity on the criteria for the inclusion of trusts within a financial conglomerate. *"**financial conglomerate**" means a group of companies that comprises –* *(a) one or more eligible financial institutions;*	***financial conglomerate, and to facilitate prudential supervision of the eligible financial institution***

		(b) ~~the holding~~ the controlling company of a financial conglomerate that is subject to Chapter 11~~companies~~, ~~including any~~ and all other subsidiaries of such controlling company ~~companies, of an eligible financial institution~~; *(c) their related persons or inter-related persons, including persons located or incorporated outside of the Republic; and* *(d) their associates as identified in the International Financial Reporting Standards issued by the International Accounting Standards Board or a successor body, but excludes any holding company or similar entity that is incorporated outside of the Republic and any company or similar entity holding and ownership interest in the controlling company of a financial conglomerate that is subject to Chapter 11.*	
Cliffe Dekker Hofmeyr Inc	**"financial conglomerate"**	It is questionable as to whether associated companies should form part of a financial conglomerate, as the ultimate controlling company of the financial conglomerate will not control the associated companies.	
SAIPA	**"financial conglomerate"**	Reason for exclusion of any holding company or similar entity that is incorporated outside of the Republic unclear.	
ASISA	**"financial conglomerate"**	Does this definition only include persons that are companies? The definition refers to plural holding companies and controlling companies. If there is more than one non-operating holding company in a group structure, which company will be regarded as the controlling company and on which level of group holding company will financial conglomerates be determined? The breadth of the definition of financial conglomerates and the FSA's wide discretion with regard to the supervision of financial conglomerates provided for in Chapter 11, makes it difficult to pinpointing what falls within the FSA's mandate and reach. Provision must be made that interventions are not so disproportionate in their impact as to place them beyond reasonable limits. Grammatically subsections (c) and (d) do not flow from the main portion of the definition. It is proposed that the definition be amended as suggested. *"**financial conglomerate**" means a group of companies that comprises –* *(a) one or more eligible financial institutions;* *(b) the holding companies, including any controlling companies, of an eligible financial institution;*	***See revised definition. Reference to "controlling company" has been deleted. The Prudential Authority may designate members of a group of companies as a financial conglomerate, which must include both an eligible financial institution and a holding company of the eligible financial institution, but need not include all the members of the group of companies.***

		(c)in respect of the persons referred to in sub-clauses (a) and (b): *(i) their related persons or inter-related persons, including persons located or incorporated outside of the Republic; and* *~~(d)~~ (ii) their associates as identified in the International Financial Reporting Standards issued by the International Accounting Standards Board or a successor body,* *but excludes any holding company or similar entity that is incorporated outside of the Republic;*	
BASA	**"financial crime"**	The draft definition is broad and far-reaching, and appears to criminalise any and all offences under financial sector law thereby significantly expanding what is captured as a financial crime. The definition does not appear to cross-reference to the closed list of "offences" which are listed in clauses 203 to 214 (excluding clause 207). It may conflict with sections of FICA. It is proposed that an "offence" should only be defined as a "financial crime" when it involves unethical conduct and substantive, material market abuse practices which cause instability in the market and systemic risk. Certain offences, such as failure to comply with the duty to retain a copy of a Record of Advice should not be regarded as a financial crime due to it being "an offence in connection with the provision of a financial product". The definition should be aligned to definitions in existing statutes including FICA, POCDATARA, and SA criminal law.	***Noted, see amended definition, which has been appropriately refined.*** ***It is important to clarify and distinguish various types of contraventions. The Bill deals with various types of contraventions, of which only some are offences, and provides scope for the Authorities to act, e.g.in the pursuit of various consequences of offences relating to contraventions vs non-compliance***
Warwick Wealth	**"financial crime"**	The Bill criminalises certain acts such as the failure to report known breaches of financial sector law. As financial sector law is very widely defined, breaches are likely to occur and it is suggested therefore that the criminal sanction should be reserved for specific breaches.	***Noted. The Bill addresses various types of contraventions, which only some are offences, and provides scope of various consequences for offences relating to contraventions vs non-compliance***
ASISA	**"financial crime"**	On the face of it, the definition of financial crime is ambiguous. On a plain reading of the definition, it is simultaneously very wide and too restrictive at the same time. It equates statutory offences in terms of financial sector laws to money laundering, but yet does not extend to corruption or bribery offences or terrorist financing. Clarity is requested on what the intention of the legislature with this definition. It is not understood why paragraphs (b) and (c) of the definition is required	***Noted, see amended definition that specifically refers also to offences under the Prevention of Organised Crime Act and the Protection of Constitutional Democracy against Terrorism and Related Activities Act***

		given that the provision of a financial product or a financial service is regulated in terms of a financial sector law and the handling of the proceeds of crime is regulated in terms of the Financial Intelligence Centre Act. The general references in paragraph (b) and (c) should be deleted. If it is not deleted, it may include offences in other pieces of legislation for example the Protection of Constitutional Democracy against Terrorist and Related Activities Act, the Prevention of Organised Crime Act or the Prevention and Combatting of Corrupt Activities Act which does not appear to be relevant in the context of this Bill. One member suggested that Treasury may consider the inclusion of offences related to the financing of terrorism and the facilitation of corruption as it may impact on the integrity of the financial system. *"**financial crime**" means each of the following:* *(a) an offence in terms of a financial sector law;* ~~*(b) an offence in connection with the provision of a financial product or a financial service;*~~ ~~*(c) an offence related to the handling of the proceeds of crime;*~~ *(d) an offence in terms of the Financial Intelligence Centre Act;*	
SAIA	**"financial customer"**	It is suggested that "policyholder" be included in the definition of financial customer. There are certain types of Short-term insurance business in terms of which the beneficiary is not the policyholder such as guarantee business, thus the terms beneficiary and policyholder are not inter-changeable. Footnote 2 to the definition states that *"A beneficiary in terms of an insurance policy and a member of a pension fund are examples of a financial customer."* It is our suggestion that a policyholder would also be a financial customer.	***Noted. Policyholders are already captured in the definition. The footnote was not intended to be a comprehensive list of who constitutes a financial customer, but to give examples. All footnotes have been removed***
BASA	**"financial customer"**	The current definition does not take into account the exemptions that apply in various financial sector laws including FAIS; CPA; and the NCA. Some BASA members are strongly of the view that the definition of Financial Customer needs to differentiate between different types of customers. This undifferentiated approach impacts on the definitions of "Financial Product" and "Credit Agreements" which do not adequately take into account corporate and wholesale lending activities. The regulatory requirements for different client and customer groups should be adapted accordingly. Furthermore, the definition seems to differ from that being used in the context of TCF.	***While it is noted that there is a need to draw a distinction between "retail" vs "wholesale" customers, customer protection applies to all. The Authorities are required to exercise powers and perform functions in a way that is outcomes focused and to take a risk-based approach in context of the Bill.***

		The beneficiaries of a trust is too broad to be included in the definition-it should be restricted to the trustees of a trust as the trustees are responsible for executing the provisions of the trust deed. BASA members propose that the definition is revised to exclude: Juristic persons, Professional clients and Corporate clients *"**financial customer**" means a person, excluding juristic persons, professional clients and corporate clients, to or for whom a financial product or a financial service is offered or provided, irrespective of the capacity in which the person is offered or receives the product or service, and includes the–* *(a) successor in title of the person; and* *(b) beneficiary of the product or service.*	***See revised definition*** ***Disagree*** ***Disagree***
ASISA	**"financial customer"**	The definition does not make it clear whether any person as defined is limited to natural persons. A financial customer should only include successors or beneficiaries where a financial product/service has been provided	***Disagree with suggested exclusion***
SAVCA	**"financial customer"**	SAVCA respectfully believes that it would be appropriate to draw an explicit distinction between retail and institutional / sophisticated investors or recipients of financial services in the Bill. The Bill should make it clear that the latter category of investor / client may benefit from a "lighter touch" regulatory regime. (see comments in the general section)	***Noted. The Authorities are required to exercise powers and perform functions in a way that is outcomes focused and to take a risk-based approach in context of the Bill.***
BASA	**"financial education"**	***"financial education"** means a process by which members of the general public are ~~aided~~ provided with tools to improve their understanding of financial products, financial services and financial concepts and risks and opportunities and, through instruction and objective information, develop the skills and confidence to become more aware of financial risks and opportunities, to make informed choices, to know where to go for assistance, and to take other effective actions to improve their financial well-being;*	***Disagree with this suggestion – it is not clear what kind of tools would be included for this purpose***
SAIA	**"financial education"**	Clarity is sought on whether "financial education" is intended to be the same as consumer education.	***Noted. The Bill consistently references "financial education"***
SAIPA	**"financial education"**	It is recommended to use "persons" as defined in the Definitions sections in both instances.	***Disagree with suggestion to extend to use of "persons" – this is too wide***
BASA	**"financial**	***"financial inclusion"** means that households, individuals and businesses have*	***See revised definition***

	inclusion"	*transparent and fair access to, and can effectively use, appropriate financial products and financial services, which products and services are provided responsibly and sustainably in a well-regulated environment.*	
SAIPA	**"financial inclusion"**	It is recommended to use "persons" as defined in the Definitions sections in both instances.	***See revised definition***
BASA	**"financial institutions"**	*"**financial institution**" means–* *(a) a financial product provider;* *(b) a financial service provider;* *(c) a market infrastructure;* *(d) a payment system operator, excluding the Reserve Bank;* *(e) a settlement system;* *(f) a controlling company of a financial conglomerate;* *and/or includes any person licensed or required to be licensed in terms of a financial sector law and the National Payment System Act;*	***Disagree***
PASA	**"financial institutions"**	The inclusion of the term "settlement system" would not amount to a financial institution. A "settlement system" is not a juristic person.	***Noted. Definition has been amended***
BASA	**"financial sector law"**	Clarity needs to be provided on the exclusion of the Consumer Protection Act ("CPA") from the definition of "financial sector law" read together with the laws listed in Schedule 1 and the specific section 86 exclusion of the CPA. This may lead to regulatory confusion and we would like to discuss these concerns further.	***The Consumer Protection Act is not a financial sector law for the purposes of the FSR Bill.***
Transaction Capital	**"financial sector regulator"**	It is unnecessary to have a multitude of regulators regulating credit providers. As the Bill is currently drafted, credit providers would be regulated by the Prudential Authority, the Financial Sector Conduct Authority and the NCR. This also leads to the unfortunate result that, at least in the transitional phase, the provisions of the NCA must be read in conjunction with the Bill which will lead to certain anomalies similar, for example, to the proposed amendments to the NCA in the context of prescription which are in conflict with the provisions of the Prescription Act itself. We are accordingly of the view that the Financial Sector Conduct Authority should replace the NCR, particularly in light of the fact that 85% of unsecured lending is currently granted by banks. The Bill also introduces uncertainty with regards to the manner in which all of	***Noted. There are strong cooperation and collaboration mechanisms built into the body of the FSR Bill, see for instance, the Financial Stability Oversight Committee, the cooperation arrangements between the Reserve Bank, the Regulators and the National Credit Regulator, the Financial System Council of Regulators, etc. among others***

		these regulators and particularly the Financial Sector Conduct Authority will co-regulate the same entities and matters, and in particular how disputes between these regulators will be resolved.	
BASA	**"financial sector regulator"**	There are concerns that the Financial Intelligence Centre (FIC) has not been included in the definition of a "Financial Sector Regulator". There is also a concern that this definition creates ambiguity about the status of self-regulatory organisations including the JSE, Strate, and PASA. It is also proposed that the NCR is included as a Financial Sector Regulator in respect of Chapter 16 in order that the Credit Ombud can be brought within the scope of the Financial Services Ombud Schemes. The reason for not listing the SARB as a financial sector regulator – in relation to financial stability and payments - is not understood.	***The FIC is a financial sector regulator for the purposes of the FSR Bill, but only in respect of Parts 2, 3 and 5 of Chapters 2, and Parts 1, 2 and 3 of Chapter 5*** ***The SARB is not a financial sector regulator for the purposes of the FSR Bill.***
JSE	**"financial service provider"**	We are of the view that there is going to be confusion in practice in having two very similar terms in the FSRB and the FAIS Act ("**financial service provider**" and "financial services provider") but with different definitions. As the concept of a financial services provider in the FAIS Act is well established and understood we suggest that a different term be used in the FSRB.	***Noted***
The Unlimited	**"financial service provider"**	It is not clear whether this new definition, as well as the definitions of "**financial service**" and "**financial product**", will replace the existing definitions in FAIS. Please can this be clarified.	***Noted, the definitions contained in this Bill are appropriate for the context of this Bill, as are the definitions contained in the FAIS Act.***
Strate	**"financial system"**	The definition of "**financial system**" refers specifically to the following aspects: (1) products, (2) services, (3) (including) MIs, (4) (including) payment system. However, with reference to all the clauses in the Bill where the term is used, and the Memorandum of the objects of the Bill, the term seems to have a wider and more general meaning which is not reflected in the definition. We are not convinced that the definition captures the wider meaning. Also, is "financial system" restricted to the South African system? Is the cross-border impact part of this?	***Disagree. The definition adequately captures the scope and content of the financial system for purposes of the FSR Bill***
PASA	**"financial system"**	The inconsistent use or deliberate non-use of defined terms (i.e. institution versus financial institution) in this definition makes the term extremely broad despite the reference to financial product or financial service, especially in light of the inclusion of the defined term "payment system". The latter term being defined as a system that enables payments to be effected or facilitates the	***Disagree. The definition adequately captures the scope and content of the financial system for purposes of the FSR Bill***

		circulation of money and includes any instruments and procedures that relate to the system. Consideration should be given to the potential impact of such a broad definition to bank systems and the regulation by the prudential and financial sector conduct authorities in respect thereof.	
BASA	**"fit and proper"**	"**fit and proper requirement**" means a requirement determined under prudential and/or conduct standards ~~made in terms of section 94 or 95~~	***This definition has been deleted***
BASA	**"financial product provider"**	Further clarity is needed as to the meaning of "as part of the business" to avoid including activities that are currently exempt under the FMA and FAIS such as executors. The footnote adds ambiguity. **"financial product provider"** means a person that, as a regular ~~business or as~~ part of ~~a~~ the business, provides a financial product; It is suggested that the footnote is deleted.	***Disagree, definition has been retained***
SAIPA	"**fruitless and wasteful expenditure**"	It is recommended to make reference to the definition in Section 1 of the Public Finance Management Act (PFMA), 1999 (Act No. 1 of 1999) and the application of procedures related thereto.	***Deleted***
BASA	**"governing body"**	It is proposed that the definition be revised to include the offshore equivalents of all the persons listed in (a) to (e) of the definition. It should also include "all trustees", not just "trustees of a trust".	***Disagree***
ASISA	**"governing body"**	*"**governing body**" means one or more persons, ~~whether elected or not, which~~ who manages, controls, formulates the policy and strategy, directs the affairs, or has the authority to exercise the powers and perform any of the functions of a financial institution, and includes, but is not limited to–* *(a) the general partner of an en commandite partnership or ~~any~~ the partners of any other partnership;* *(b) ~~a~~ members of a close corporation;* *(c) ~~a~~ trustees of a trust;* *(d) a board of directors of a company;* *(e) a board of a pension fund referred to in section 7A of the Pension Funds Act;* What is meant by *"…has the authority to … perform any of the functions of a*	***Disagree with the proposal. See revised definition***

		financial institution"? It is submitted that every individual partner in the partnership or trustee of a trust cannot constitute a governing body.	
BASA	**"holding company"**	***"holding company"*** *has the meaning defined in section 1 of* ~~*means a company that, in terms of sections 2(2) and 3(1) of*~~ *the Companies Act*~~*, is a holding company of another company.*~~	***Agree, the definition has been amended***
BASA	**"investigation"**	BASA is concerned that this definition allows for investigations to be initiated at the request of other jurisdictions. Based on the experience with FICA and FIC this may result in a significant escalation in Requests for Information, which has material resource implications for firms.	***Note the concern, see the definition that has been refined***
BASA	**"juristic person"**	Has not been defined in the Bill. The definition of juristic person from the Companies Act should be incorporated in the Bill.	***Agree about the need to include a definition, a definition has been included in the Bill.***
Strate	"**key person**"; key person as "**regulated person**"	Both these definitions are too wide. The person who is licensed is the "**regulated person**" which is correct, but the clause also determines in *(c)* that "*a key person of a person referred to in . . .* [a person who is regulated] is a "regulated person". This means that a compliance officer, for example, would be a "**regulated person**". This can only be true in limited circumstances and should be expressed as such in the Bill. General application would be too wide with unintended consequences. The same argument goes for part *(e)* of the definition referring to a "*person to whom* [the licensed person] *has outsourced the performance of a regulated activity or a part of a regulated activity*." Please amend.	***See definitions of "control function" and "head of a control function", "supervised entity"***
JSE	"**legislative instrument**"	Section 1 of the FSRB states that a legislative instrument is "*…subordinate legislation made in terms of a financial sector law…*" The definition of legislative instruments includes regulations, prudential standards, conduct standards, joint standards and instruments defined as such in sectoral law. The nature and status of legislative instruments are of fundamental importance to the regulatory regime envisaged by the FSRB. In our view, the mere statement that these instruments are subordinate legislation, does not afford them the status of delegated legislation nor would it be helpful or appropriate to attempt to classify all these instruments as delegated legislation.	***Comments are noted. Regulatory instruments exclude rules of the SRO market infrastructure.***

		The hierarchy of legislation Section 2 of the Constitution of South Africa provides that the Constitution is the supreme law of the Republic; law or conduct inconsistent with the Constitution is invalid and the obligations imposed by the Constitution have to be fulfilled. The national legislature, the Parliament of the Republic of South Africa, has the highest legislative power over the whole of the Republic of South Africa as well as in all state affairs with the exception of those specifically allocated to other legislatures. The FMA (and its predecessors) and the FSRB (when promulgated) are original or superordinate pieces of legislation promulgated by the national legislature, the Parliament of South Africa. The Constitution specifically provides for and recognises the powers of delegation. Section 238(a) states that an executive organ of state in any sphere of government may delegate any power or function that is to be exercised or performed in terms of legislation to any other executive organ of state (emphasis added), provided the delegation is consistent with the legislation in terms of which the power is exercised or the function is performed. Section 239 of the Constitution includes subordinate legislation in the definition of national legislation. An essential aspect of the promulgation of delegated legislation is the devolution of power from the national legislature, Parliament, to the executive authorities of South Africa, such as the Minister of Finance. This principle is also entrenched in the Constitution and it would be unlawful to attempt to delegate the power to promulgate subordinate legislation to an entity that is not an executive organ of state, as defined in the Constitution. The National Road Traffic Act is a good example of the manner in which delegated legislation functions. Section 58(1) stipulates compliance with road traffic signs. This Act does not in any manner describe or refer to road traffic signs but delegates this power to the Minister of Transport to prescribe precisely, by way of delegated legislation, what road traffic signs are, how they must look and how they are to be erected: "*Section 56: Minister may prescribe road traffic signs* *(1) The Minister may, subject to this Act and for the purpose of*	

		Text	
		prohibiting, limiting, regulating or controlling traffic in general or any particular class of traffic on a public road or a section thereof or for the purpose of designating any public road or a section thereof as a public road of a particular class, prescribe such signs, signals, markings or other devices (to be known as road traffic signs) as he or she may deem expedient, as well as their significance and the conditions on and circumstances under which any road traffic sign may be displayed on a public road. *(2) The Minister may, subject to such conditions as he or she may deem expedient, authorise any person or body to display on a public road any sign, signal, marking or other device for the purpose of ascertaining the suitability of such sign, signal or device as a road traffic sign.*" In this example there has been a delegation of powers from the legislature to the executive (Minister of Transport) to deal with the matters stated in section 56 through delegated legislation. The distinctive feature of delegated legislation is that it has to be authorised by, and is accordingly enacted in terms of, original legislation. A delegated enactment, in other words, owes both its existence and its authority to an empowering original law. Delegated legislation has therefore traditionally also been subordinate legislation. Ministers of state are often vested with the authority to issue regulations for certain purposes. Regulations are probably the most important form of subordinate legislation. For example, the Minister of Home Affairs can regulate certain aspects of the solemnisation of marriages and the Minister of Finance can regulate the conduct of the business of banks and matters incidental thereto. The most obvious example in the current context is the Minister of Finance's powers to promulgate delegated legislation in the form of Regulations made in terms of section 107 of the FMA. The functionaries promulgating subordinate legislation may only act within the framework of the authority bestowed on them and the subordinate legislation may not be in conflict with original legislation. They may therefore not issue subordinate legislation unless specifically authorised to do so. The power of an executive authority to subdelegate legislative powers is not readily accepted. Subdelegation of legislative powers will be sanctioned only if	

		it is authorised expressly or by necessary implication. The reason for the prohibition against subdelegation of legislative powers is an obvious one: legislative acts create general rules and therefore have a wide, general effect. Viewed as a whole, legislative powers are wide in scope and should not be lightly delegated by one organ to another. Legislative acts such as the promulgation of subordinate legislation must fall within the scope of the executive authority in question, may not conflict with an act of Parliament or curtail the provisions of any statute and may not be vague. ***Aim of delegated legislation*** Generally speaking, the primary aim of delegated (or subordinate) legislation is the detailed regulation of matters provided for by original legislation in an outline form. Various circumstances may necessitate this, for example the specialised and/or technical nature of the matters with which the original legislation deals, the fact that original legislative bodies are not in continuous session and do not have the time to pass all legislation called for, the peculiarity of local matters, and so forth. However, in terms of section 17 of the Interpretation Act, 33 of 1957, a list of proclamations, government notices and provincial notices under which rules and regulations made by the President, a minister or premier or a member of the executive council of a province have been published, must be submitted to Parliament or the provincial legislature concerned within 14 days after the publication of the rules or regulations in the Government Gazette. The purpose of this provision is to keep original legislatures informed of executive measures so as to enable them to exercise some measure of control over such action. ***The powers exercised by the Registrar in terms of the FMA*** The powers exercised by the Registrar of Securities Services in terms of the FMA do not amount to the promulgation of delegated legislation but are, in fact and in law, administrative action exercised as a result of a the powers afforded to and functions imposed on the Registrar, in terms of the provisions of the FMA. The actions of the Registrar cannot be equated to a form of legislation as the Registrar is not a member of the executive. There has not been a delegation of powers to the Registrar to promulgate subordinate legislation and these actions and decisions have not been adopted in accordance with the peremptory provisions applicable to the valid promulgation of delegated legislation. This of	

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		course does not mean that these actions are not valid or enforceable but their validity is derived from the exercise of administrative, and not legislative, powers. It is the JSE's strong contention that the regulatory authority adopting the various legislative instruments defined in the FSRB would do so not in terms of devolution of authority expressly provided for in the statute, but as administrative actions instead. The mere fact that regulatory authorities have been established in accordance with the provisions of the FSRB does not mean that these authorities are executive organs of state. In addition to these concerns, the classification of all types of regulations, standards and instruments as delegated legislation will lead to unnecessary cumbersome and onerous requirements to adopt and implement these measures as legislation instead of administrative action. Standards and instruments in terms of sectoral law will be binding and enforceable as a result of the fact that their adoption and implementation amount to valid administrative action by the relevant regulatory authority. Therefore, their enforceability and efficacy are not dependent on their status as delegated legislation. The classification of exchange rules, listings requirements, directives (and so forth) as legislative instruments as contemplated in section 3A of the consequential amendments to the FMA is similarly incorrect. The licensed FMIs (such as the JSE) that adopt these measures are not executive organs of state. The rules, listings requirements and directives adopted by the JSE constitute the terms of the agreement between the listed companies, the authorised users, clients and the JSE. It would be unlawful to attempt to delegate any powers to promulgate delegated legislation to an entity that is a public, listed company (and not an executive organ of state). Delegated legislation, by its very nature, has to be consistent and may not be in conflict with other subordinate legislation or its empowering statute. The wide ambit of the definition of "***legislative instrument***" will have the result that rules and directives of FMIs are classified as subordinate legislation. Rules and directives, by their very nature, deal with the detailed regulation of issues relevant to that particular FMI. For example, if there are two exchanges, these exchanges may have very different rules, listings requirements and directives and this would be impermissible if these measures are now classified as subordinate legislation. Subordinate legislation is part of the legislative	

		framework of South Africa and the regulation of all the minutiae by FMIs of their authorised users, CSDPs and clearing members and the services that they provide is not and should not be effected through legislation. The JSE is therefore of the view that the FSRB has to clearly distinguish between statutory provisions of the original statute, subordinate legislation promulgated by an executive organ of state to give effect to and implement the policies of the legislature, administrative action taken by the regulatory authorities established in terms of the FSRB and the rules, listings requirements, directives and other measures adopted by FMIs.	
BASA	**"key person"**	Given the focus on positioning market conduct as a business rather than a compliance risk, the inclusion of compliance officers as "key persons" for the purposes of imposing personal liability is not supported as it will not serve as an adequate deterrent, and it may incentivise the delegation of responsibility for conduct to compliance by business. The use of the word ***"monitor"*** in the context of this definition is not defined which could result in inconsistent interpretations of the definition as different firms adopt different strategies. A ***"Significant Owner***" should not be included in the definition of a key person. A key person in this context clearly refers to the oversight and management functions in general, which should be interpreted throughout this Bill in accordance therewith, and not to shareholders who are separately dealt with in Chapter 10. Aligned to international regulatory standards and related literature, including those issued by the Basel Committee on Banking Supervision, key persons are board members, senior managers and key persons in control functions in the various entities (financial institutions) as well as within Financial Conglomerates. These persons should possess, among other, integrity, competence, experience and qualifications to adequately and effectively fulfill their roles and responsibilities and should be able to exercise sound objective judgment. In turn, and in terms of the Bill, the relevant licensing authorities will have the power to set criteria and reject applications for licencing. The licensing process will, with reference to Chapter 10 of the Bill, consist of an assessment/sanctioning of significant shareholders in terms of which all	***Agree. he definition of "key person" has been revised, and see definitions of "control function" and "head of a control function"*** ***Agree***

		proposed significant shareholders (shareholders of reference) will be assessed against criteria such as financial strength and their respective abilities to provide additional financial support, where needed. In addition, and by way of example and with reference to the provisions set out in Chapter 11 of the Bill and sections 77 and 78 of the Companies Act, 2008 and section 60 of the Banks Act, 1990, it should be the board of directors (and not significant shareholders) of the controlling company of a financial conglomerate, to appropriately define the strategy and risk appetite of the financial conglomerate, and to ensure that this strategy is implemented and executed in the various entities, both regulated and unregulated. This includes, for example and with reference to Chapter 11 of the Bill, the board of directors of a controlling company (and not the controlling company's significant shareholders) that will have a statutory duty to ensure that there are appropriate arrangements for capital and liquidity management within the financial conglomerate. It follows that significant owners (non- controlling shareholders/shareholders of reference), as described in part (f) of the definition of a "key person", should be deleted from the definition. Controlling shareholders will not be regarded as significant shareholders but will be regarded as the holding entities/controlling companies of the relevant regulated entities. BASA proposes the following changes to the definition: *"**key person**" means–* *(a) any person responsible for managing or overseeing the activities relating to a financial product or financial service of a financial institution, including a director or senior manager;* *(b) the head of a risk management function and/or an actuarial function;* *(c) the head of internal audit, and/or any person appointed to oversee the financial institution's compliance function and/or to monitor compliance (including the Head of the Compliance Function ~~a compliance officer~~);* *(d) a nominee;* *(e) the auditor and/or the valuer or valuation agent; and* ~~*(f) a significant owner*~~	

Transaction Capital	**“key person”**	The definition of “**key person**” is too wide and should be limited to those individuals who have real control over the day-to-day management of a financial institution. Internal audit heads, compliance officers, auditors and valuers do not necessarily have the necessary powers to influence the actions (or inactions) taken by financial institutions. In addition, significant owners that merely exercise voting rights at annual general meetings of shareholders on annual basis do not have the ability to control the day-to-day management of financial institutions.	***The definition of “key person” has been revised, and ee proposed definitions of “control function” and “head of a control function”***
SAIA	**“key person”**	***“key person”** means–* *(a) any person responsible for managing or overseeing the activities relating to a financial product or financial service of a financial institution, including a director or senior manager;* *(b) the head of a risk management function and an actuarial function;* *(c) the head of internal audit, and any person appointed to oversee the financial institution’s compliance function and to monitor compliance (including a compliance officer);* *(d) a nominee in relation to all of the above;* *(e) the auditor and the valuer or valuation agent; and* *(f) a significant owner;*	
Warwick Wealth	**“key person”**	The Bill substantially expands the definition of “key persons” and we welcome the inclusion of “significant owners” in the definition. We do not welcome the inclusion of senior managers in the definition as such persons mat breach financial sector law when acting on the instruction of their superiors and then be found guilty of negligence, as it may be held that they should have been aware of all financial sector law.	
Compliance Institute Southern Africa	**“key person”**	The Compliance Institute is concerned that the current definition of “**key person**” as it relates to the compliance function is ambiguous and could lead to unintended consequences. The concern focusses on sub –section(c) of the definition i.e. “any person appointed to oversee the financial institution’s compliance function and to monitor compliance (including a compliance officer).”	

		We support the proposition that the person accountable and responsible for the compliance function should be a key person. The wording of the clause however may inadvertently include any person overseeing or monitoring compliance (irrespective of the line of defence – first, second or third) and any person generally referred to as a compliance officer not only compliance officers such as regulated specifically in the current Banks act and FAIS Act. It is common practice and international best practice that business as the first line of defence is required to include self-assessment and monitoring activities as part of their compliance control environment. Staff responsible for this is often referred to as compliance officers but in a general/operational context. It must further be noted that internal audit as third line of defence also monitors compliance to regulatory requirements as part of their scope. As "monitoring" is not defined the unintended consequence of this definition is that business staff and all audit staff could be regarded as key persons with all the requirements related to key persons applicable to them. It is further not clear whether there is an intention to include all Compliance staff and not only the Head of Compliance in the definition of a key person. If so, the objective is unclear as a higher requirement is then applied to compliance staff than audit staff given the narrowly defined "head of internal audit" in the definition. It is suggested that the clause be rephrased to describe the role of the compliance person that should be a key person, for example, the clause may indicate that "the person responsible for managing and overseeing the compliance function of a financial institution/Head of Compliance" will be a key person. Any general reference to monitoring of compliance or compliance officers will inadvertently cause confusion.	
ASISA	**"key person"**	ASISA members understand the intention to be that persons who are ultimately accountable and responsible for certain activities should be identified as key persons. The definition of senior manager‖ should be incorporated in this definition to limit duplication and to simplify interpretation. Whilst there is no disagreement with the intention, the following suggestions for amendment are made: *"**key person**" means–*	***The definition of "key person" has been revised, and ee definitions of "control function" and "head of a control function"***

		(a) a senior manager who is- *(i) the Chief Executive Officer or the person who is in charge of a financial institution;* *(ii) a person who is directly accountable to the Chief Executive Officer or the person who is in charge of a financial institution;* *(iii) a person other than a director who makes or participates in making decisions that–* *(i) affect the whole or a substantial part of the business of a financial institution; or* *(ii) have the capacity to significantly affect the financial institution's financial standing; or* *(iv) a person other than a director who oversees the enforcement of policies and the implementation of strategies approved by the governing body;* *(b)any person responsible for managing ~~or~~ and overseeing the activities relating to a financial product or financial service of a financial institution, including a director ~~or senior manager~~;* *(~~b~~c) ~~the head of~~ a person managing and overseeing a risk management function ~~and an~~ actuarial function~~;~~* *~~(c) the head of~~ internal audit, ~~and any person appointed to oversee the financial institution's~~ or compliance function ~~and to monitor compliance (including a compliance officer)~~;* *(d) a nominee;* *(e) the auditor and the valuer or valuation agent; and* *(f) a significant owner;*	
Transaction Capital	"**legislative instrument**"	The definition of legislative instrument elevates administrative action, policy decisions, and similar administrative acts to the status of subordinate legislation, more particularly it conflates subordinate legislation with matters such as prudential, conduct and joint standards which are not properly classified as subordinate legislation as they do not meet the distinct characteristics of subordinate legislation that distinguishes it from other species of administrative action, namely –	***The definition has been amended to refer to "regulatory instruments", and has also been appropriately refined.***

		• legislative action is general in its application, applying impersonally to society as a whole or groups within it, rather than to individuals; • legislation is concerned with the implementation of policies, rather than the resolution of individual disputes; • legislation tends to operate prospectively and creates legal consequences for the period after it comes into force; • legislation is usually intended to remain in force indefinitely (but may be designed to lapse after a prescribed period); • legislation requires promulgation – usually publication in the Government Gazette – before it acquires the force of law; • often legislation will require further administrative action in order to make it effective, such as the enforcement of a sanction. The Bill does not explain the manner in which prudential, conduct or joint standards are to take effect. Part 4 of Chapter 17 of the Bill makes provision for the creation of a Financial Sector Information Register which is to provide affected parties with access to Financial Sector laws and legislative instruments, but the relevant sections (sections 223 to 226 of the Bill) do not explain when and how those laws or instruments take effect. It is proposed that the contemplated promulgation by the Minister of Finance of appropriate regulations should suffice to facilitate the implementation of the Bill (as contemplated in Section 215 of the Bill).	***Chapter 7 Part 1 clarifies the manner in which regulatory instruments are to be made and when they take effect.***
Melbourne Law School	“**legislative instrument**”	We note that there are alternate references to “Regulations” and “regulations” (see the definition of “**eligible financial institution**”, “**legislative instrument**” and section 2(2)). We query whether these references should be consistent and whether any terms should be defined.	***Consistent references to “Regulations” are used.***
SAIA	**“legislative instrument”**	It is suggested that there should be a clear process around sub clause *(e)* in setting out which instruments governed by financial sector laws should be identifiable as “legislative instruments” and will have the legal force of subordinate legislation. In the current framework there are many forms of regulation for example Guidance Notes, Declarations and Information Letters which are not law but all have the force of law. It is suggested that this delegation of “legislative instrument” be carefully considered and clearly	***The definition has been amended to refer to “regulatory instruments”, and has also been appropriately refined. The designation of “regulatory instruments” in terms of other financial sector laws has been carefully considered. The process for taking and the implications of other types of regulatory actions such as making guidance notes, issuing***

		rationalised in order to create legal certainty.	***directives, etc., are indicated as appropriate.***
BASA	**"legislative instrument"**	This definition introduces a new lexicology and it is not clear which instruments, in relation to each other, will take precedence. In the current regime, there is greater certainty about the legal status of Regulations versus Board Notices for example. Another concern related to this new naming convention is that the name "**legislative instruments**" implies instruments that are the product of a legislative process, rather than instruments that are developed subordinate to legislation. It is recommended that the relative status of these instruments is clarified.	***The definition has been amended to refer to "regulatory instruments", and has also been appropriately refined.***
SAIA	**"Levies Act"**	The Bill sets out the changes to the model of regulation of the South African financial services sector, including many changes to current and existing financial services legislation. The Bill provides for the CEO in the case of the PA and the EXCO in the case of the FSCA to determine "*fees and charges in terms of the Levies Act"* but information is limited and unclear on how the changes proposed in the Bill and the new authorities will be funded. The Response and Explanatory Document published with the Bill confirms on Page 46 that the funding mechanism for the two authorities is to be included in the upcoming Financial Sector Levies, Fees and Charges Bill, 2015 (referred to in the Bill as the "*Levies Act*"). This places the industry in the challenging position of having to comment on a structural overhaul of regulation of the industry, without having an understanding of the cost implications thereof on levy paying constituencies. In support of the implementation strategy of the Twin Peaks model of Regulation, the SAIA and its members respectfully call on the authorities to expedite engagement with industry on the economic cost and expected funding of the Twin Peaks model, specifically on the industry and consequential impact on its customers as a critical element of the smooth transition to an effective and efficient new model. In addition, the quantification of costs will allow industry to pre-empt, budget for and consider effective strategic approaches in identifying and managing the risk of any adverse impacts on the cost of doing business and potentially negative customer outcomes. It has been intimated that it is likely	***Comment noted. It is clarified that fees are to be imposed in terms of the FSR Bill. The levy represents a tax and it is a Constitutional requirement that levies are though the money Bill which will be the Levies Bill.*** ***Comments are noted.***

		that the levies will be higher to support the increased monitoring envisaged by the FSRB. For planning and budgetary purposes, it is important that the levels of funding of the two authorities be settled as soon as practical. The SAIA would further like respectfully to enquire whether a Regulatory Impact Assessment ("RIA") or economic impact assessment has been undertaken and the outcome of this process in support of a broader commitment to this to substantial reform.	
BASA	**"Levies Act"**	As this Act does not yet exist the reference should be removed and re-introduced with the new Act.	***Comment noted***
ASISA	**"Levies Act"**	It is to be noted that the referenced act is not yet promulgated. Levy is either an operating levy or a special levy, both of which are defined with reference to the Levies Act, with the result that the differences between the proposed and the current dispensation are not clear. Levy is used in section 36(3)*(b)*(v), 62*(f)*, 108(1)*(b)* and 241. Section 15A of the Financial Services Board Act presently governs levies.	***Comment noted. Definitions of relevant terms have been refined. The levies in terms of the FSB Act will continue for a transitional period until levies will be imposed in terms of the Levies Act.***
SAIA	**"licence"**	The definition does not specifically refer to renewals of licences, but clause 101-103 includes reference to renewal of a licence. It is proposed that the definition of licence be extended to include the renewal of a licence.	***Disagree, the definition is not intending to capture the process of licensing (as is the case in terms of renewal of a licence), but rather describe the (noun) i.e. the instrument required to be a financial institution, or to provide a financial product or financial service, in terms of a financial sector law***
PASA	**"licence"**	Proposed insertion as the section on licensing in the Bill deals with licensing under the NPS Act. ***"licence"*** *means a licence, registration, approval, recognition, permission, authority, consent or other authorisation, by whatever term it may be referred to, to be a financial institution, or to provide a financial product or financial service, in terms of a financial sector law* *or the National Payment System Act* *;*	***Disagree***
BASA	**"market infrastructure"**	The FMA refers to these entities as "licensed". It is suggested that the term "licensed" is inserted to be consistent with the FMA.	***Disagree, the definition is deliberately intended to capture each of the entities as they are defined in the FMA***
PASA	**"market infrastructure"**	Although we appreciate that a "market infrastructure" is specifically defined in the Financial Markets Act (FMA) to include a clearing house, such concept is	***The definition is specific to the FMA, and the clearing house that is defined in that Act. The NPS***

		not a "juristic person" in the NPS Act. It is therefore not regarded as a market infrastructure in the NPS Act. A "payment system operator" on the other hand, is a "market infrastructure". It is suggested that a definition of "market infrastructure operator" and "market infrastructure participant" be added to the Bill, which should clarify that market infrastructures will mean the infrastructures/systems" while the operators will be juristic persons. Consequential amendments to the NPS Act should specify which infrastructures/systems are financial market infrastructures.	***act is not a financial sector law in terms of the FSR Bill It is acknowledged that there are anomalies in terms of how an infrastructure under the NPS Act and a market infrastructure under the FMA are defined and treated. However, the risk with the suggestion is to create a radical change of what is established market convention, both locally and internationally, and in terms of the law. Each entity identified is already defined as the person operating/providing such under the FMA***
BASA	**"member of staff"**	*"**member of the staff**" or "**staff member**", in relation to–* *(a) a financial sector regulator, means an employee or person seconded to the financial sector regulator, and includes contractors, consultants and service providers to the financial sector regulator;* *(b) the Reserve Bank, means an employee of the Reserve Bank and includes contractors, consultants and service providers to the Reserve Bank*	***See revised definition***
ASISA	**"non-compliance"**	The definition of non-compliance appears, on the face of it, to be limited to financial sector laws or subordinate legislation under such laws. However, regard should be had to Board Notice 158 which requires reporting by Heads of Control Functions on any contravention of Insurance Acts or material contraventions of any other act applicable to the insurer. Non-compliance with FICA, POCA, POCDATRA, PRECCA etc. does not appear to fall within the definition of non-compliance. Furthermore, the definition of "non-compliance" specifically excludes criminal offences under financial sector laws, but see definition of "financial crime" above. This is both ambiguous i.e. when is an offence a "criminal offence" under financial sector laws and when only "financial crime"? Clarity is requested.	***Deleted***
Transaction Capital	**"non-compliance"**	The definition should be amended such that the financial sector law, order, determination or directive referred to in the definition must have the authority of law.	***Deleted***
PASA	**"non-**	***"non-compliance"*** *means any act or omission that constitutes a failure to*	***Deleted***

	compliance"	*comply with a provision of a financial sector law or the National Payment System~~s~~ Act or any order, determination, or directive made in terms of a financial sector law or the National Payment Systems Act, and which does not constitute a criminal offence in terms of a financial sector law or the National Payment System~~s~~ Act, and 'fails to comply', 'failure to comply' and 'not complying' have the same meaning;*	
BASA	**"non-operating holding company"**	*"**non-operating holding company**" means a holding company whose only business is the acquiring, holding and managing of another company or other companies, and excludes control of such companies.*	***Deleted***
PPS	**"non-operating holding company"**	We would also like to suggest that the definition of a "non-operating holding company" in Section 1 of the bill be amended to allow for inconsequential business conducted by a holding company which does not constitute the conducting of business in the commercial sense of the word, for example a Trust entity granting membership to participants of the Trust. The definition could possibly be amended as follows "a holding company whose only **principal** business is the acquiring, holding and managing of another company or other companies". The term "principal business" can then be further defined as "a company's primary business activity excluding any inconsequential business activities that are not aimed at, or do not have any direct impact on, commercial gain".	***Deleted***
ASISA	**"non-operating holding company"**	What is the rationale for requiring the holding company to be non-operating? If it is possible to achieve the objective if the holding company is an operating company, financial institutions will not have to bear the costs of creating companies to meet the proposed requirement. The costs associated with creating a non-operating holding company where it is not currently in place should be proportional to the benefit of the requirement to have such a company. An assessment in this respect is difficult without understanding the rationale for the requirement. *"**non-operating holding company**" means a holding company ~~whose only business is the acquiring, holding and managing of~~ that does not carry on a business (other than a business consisting of ownership or control of another company or other companies.*	***Deleted***

BASA	**"nominee"**	This definition is different to the definition in the FMA. The FMA definition should be used for consistency.	***Deleted***
BASA	**"on-site inspection"**	*"**on-site inspection**" means an inspection at the business premises of a regulated person, in the normal course of the supervisor's activity as indicated in the supervisory strategy of the financial sector regulator–* *(a) to determine compliance with a financial sector law; or* *(b) for the purpose of supervising regulated activities;*	***Reference is now made to "supervisory on-site inspection" – See new definition***
SAIA	**"outsourcing"**	The definition of *"Outsourcing"* has been broadened in the Bill as compared to the definition in the Outsourcing Directive 159.A.i (applicable to all insurers) to include "*a function or activity related to any aspect of the business of providing a financial service or a financial product, including any function or activity that enables the financial institution to provide a service or product…*" It is proposed to align the definition of Outsourcing in the FSR Bill with the definition in the Outsourcing Directive and limit the examples to the instances provided for in Directive 159.A.i. Specifically, there is no mention as to the materiality of the function or service in the definition provided for in the Bill, and the reference to "*any function or activity that enables the…*" may lead to unintended consequences. For example, contracting the use of an off-site document storage facility such as Metro file, merely a normal business process, would now be considered an outsourced function with related additional administrative obligations.	***See proposed definition of "outsourcing arrangement",* which has replaced the definition of "outsourcing".**
BASA	**"outsourcing"**	The definition is too broad and does not contain any materiality test. We recommend that the definition contained in the SARB Guidance Note 5/2014 dealing with outsourcing is used instead: ***"outsourcing"** means, an arrangement ~~of any form~~ between a financial institution and a person~~, whether or not that person is a regulated person or is supervised in terms of any law, in terms of which that person performs a function or activity related to any aspect of the business of providing a financial service or a financial product, including any function or activity that enables the financial institution to provide a service or product, whether directly or indirectly,~~ in terms of which such person performs a material business function or activity of the financial institution, which would otherwise be performed by*	***See proposed definition of "outsourcing arrangement" that replaces the definition of "outsourcing".***

		the financial institution itself~~, and includes~~ *~~(a) an arrangement with a related party or inter-related party of the financial institution, and irrespective of that other person being located outside of the Republic; or~~* *~~(b) an arrangement with a person in terms of which that person (irrespective of the capacity in which that person acts) provides a financial product or financial service to a financial customer on behalf of a financial institution~~*	
JSE	"**outsourcing**"	The definition refers only to the provision of a financial product or financial service and does not contemplate the outsourcing by market infrastructure of any of its functions that it is required to perform in terms of the FMA. We would argue that the definition be expanded to refer to market infrastructure and their functions.	***Agree. See proposed definition of "outsourcing arrangement"***
ASISA	**"outsourcing"**	We understand the need to keep the definition as broad and brief as possible. However, the importance of avoiding coverage of tasks that are normally beyond the remit of financial supervisors must be acknowledged. In this regard: ASISA submits that: • Language explaining that the level of materiality to the core business to the financial institution should be considered. • The words "related to" may be used in a wide sense which embraces almost anything, or in a more narrow/restricted sense. On the assumption that it is not the intention to include almost anything that is remotely related to the business of providing a financial service, which a financial institution may outsource, it is suggested that "related to" be re-considered and limited to those aspects that have a close connection to the business of providing a "financial service" or a financial product e.g. something like: Certain activities listed under the definition of financial services, e.g. "intermediary services" will also be caught in the current ambit of the definition. It is submitted that activities which constitute financial services do not constitute outsourcing. *"**outsourcing**" means an arrangement of any form between a financial institution and another person, ~~whether or not that person is a regulated person or is supervised in terms of any law, in terms of which that person performs a function or activity related to any aspect of the business of providing a financial~~*	***See proposed definition of "outsourcing arrangement" that replaces the definition of "outsourcing".***

		~~*service or a financial product, including any function or activity that enables the financial institution to provide a service or product, whether directly or indirectly,*~~ *for the business of a financial institution, or functions related to such business which would otherwise be performed by the financial institution itself, to be carried on by a person other that the financial institution, and includes–* *(a)* ~~*an*~~ *such arrangements with* ~~*a*~~ *related part*~~*y*~~*ies or inter-related part*~~*y*~~*ies of the financial institution, and irrespective of that other person being located outside of the Republic; or* *(b)* ~~*an*~~ *arrangements* ~~*with a person*~~ *in terms of which that person (irrespective of the capacity in which that ……*	
SAIA	**"Oversight Committee"**	It is suggested that the term "*Oversight Committee*" as established in clause 36, be further qualified to be named, for example, the "*Prudential Authority* Oversight Committee" (PAOC), in order to avoid confusion with the "Financial Sector Oversight Committee" (FSOC), established in clause 17 of the Bill.	***Proposed new name is "Prudential Committee"***
BASA	**"participant"**	The term "Participant" is generally associated with CSD or payment system participation. Its use in relation to the Ombud scheme may therefore create confusion. ~~**"participant"**~~ **"member/ contributor"** , in relation to a scheme, means– *(a)* a financial institution which is a member of or takes part in a recognised scheme or its funding, and submits to the authority of the relevant ombud; or *(b)* a financial institution which is subject to the authority of a statutory scheme	***Deleted***
PASA	**"payment system operator"**	We assume that this definition is an all-encompassing definition of all "operators" in the NPS. At this point in time related terms have very specific meanings in the NPS Act. The following terms have been defined in the NPS Act: "system operator", "PCH system operator" and "designated settlement system operator". We therefore assume the NPS Act will be aligned in due course through consequential changes.	***Deleted***
PASA	**"payment system participant"**	A payment system operator (which will potentially include those system operators referred to in the Bill) as included in this definition should not nor ever be on the same level as the SARB, to grant or authorise access to a participant in a payment system. It is submitted that the inclusion of the term "payment system operator" be substituted with "designated authority" as defined in the	***Deleted***

		Bill. Furthermore the payment system operator should be licensed (as defined) and would be rendering a financial service or providing a financial product (as the definition currently stands) and hence should be removed from the said definition;	
SAIA	**"person"**	It is suggested that the definition of "**person**" should include an association of underwriters, as set out in the definition of "Lloyd's" in the Short-term Insurance Act, 53 of 1998	***See revised definition***
ASISA	**"pooled fund"**	It is not clear what is contemplated with the following terms/phrases: • a "collective investment undertaking"; • a "compartment constituted in any legal form".. It is not, for example, clear whether a stokvel is included in the context of a "collective investment undertaking" and suggest that the concept be defined. With reference to subsection *(b)* of the definition of financial product, "an interest, subscription, contribution or commitment in a pooled fund", is extremely wide if read with the definition of "pooled fund", and may therefore result in unintended consequences, such that people who participate in stokvels may end up contravening the act. *"**pooled fund**" means a collective investment undertaking, including investment ~~compartments~~ components of a collective investment undertaking, constituted in any legal form, including in terms of a contract, by means of a trust, or in terms of statute, which–* *(a) ……….; and* *(b) ……..;*	***Deleted – see consequential amendment to the FAIS Act***
ASISA	**"regulated activity"**	The open-ended nature of this definition means that a wide range of issues may be addressed in standards: this could potentially include a whole range of activities that one would not normally consider to fall within the ambit of financial sector laws. Clarity is requested on how the financial sector regulator will ensure that the issues addressed via standards are not ultra vires?	***Comment noted and deleted. The National Treasury, in conjunction with the financial sector regulators, will develop principles for further policy frameworks, not inconsistent with the FSR Act, for the regulation and supervision of financial institutions***
SAIA	**"regulated person"**	Sub clause *(e)* refers to "*a person to whom a person….has outsourced the performance of a regulated activity or a part of a regulated activity*" Reference to "*a part of a regulated activity*" may have unintended consequences	***Noted, the definition has been deleted. See proposed definition of "supervised entity" read with redrafted definition of "outsourcing arrangement"***

		as it can be interpreted to include the above example of contracting the use of an off-site document storage facility such as Metro file. As per the comments on the definition of "outsourcing" above, it is suggested that any reference to Outsourcing be aligned to Directive 159.A.i.	
BASA	**"regulated person"**	This definition is too broad. For example "*(b) any person who is part of a financial conglomerate*" implies that all persons employed by a conglomerate are regulated persons. This cannot be the intention. It further creates an un-level playing field. The definition should be limited to employees conducting certain activities only, linked to the regulated financial products and financial services. In relation to the comments about compliance officers in the definition of "Key Persons" clarity is required on whether compliance officers are "regulated persons". ***"regulated person"*** *means–* *(a) a person who is licensed, appointed, or otherwise approved to perform an activity regulated in terms of a financial sector law;* ~~*(b) any person who is part of a financial conglomerate;*~~ ~~*(c) a key person of a person referred to in paragraphs (a)or (b);*~~ ~~*(d) a financial institution representative;*~~ ~~*(e)*~~ *(b) a person to whom a person referred to in paragraphs (a)* ~~*and (b)*~~ *has outsourced the performance of a regulated activity or a part of a regulated activity*	***Noted, the definition has been deleted. See revised definition of "supervised entity"***
PASA	**"regulated person"**	***"regulated person"*** *means–* *(a) a person who is licensed, appointed, or otherwise approved to perform an activity regulated in terms of a financial sector law and National Payment System Act;*	***The definition has been deleted***
ASISA	**"regulated person"**	"licensed" is already defined as a "licence, registration, approval, recognition, permission, authority, consent or other authorisation, by whatever term it may be referred to, to be a financial institution, or to provide a financial product or financial service, in terms of a financial sector law." The words "appointed, or otherwise approved" are accordingly superfluous. (a) When will a person be "appointed" to perform an activity in terms of a	***The definition has been deleted. See revised definition of "supervised entity"***

		financial sector law? Or does this refer to a person appointed by a financial institution? (b) Has consideration been given to the fact that this will include persons and entities that **are not** financial institutions themselves? (c) Has consideration been given to the fact that this includes key persons of non-financial institutions in a financial conglomerate?	
BASA	**"scheme"**	**"recognised scheme"** means– *(a)* any ombud scheme or arrangement established by or for a financial institution, or a group of financial institutions, in order to resolve financial customer complaints by an ombud– (i) ……..	***The definition has been deleted. See definitions of "industry ombud scheme" , "statutory ombud scheme" , "ombud scheme" and "recognised industry ombud scheme"***
BASA	**"securities"**	Definition differs from that in the FMA. Alignment with the FMA definition is proposed. Alternatively, a distinction should be made between *"securities"* and *"securities* regulated in terms of the FMA."	***The definition has been deleted, and the definition of "securities services" in the FMA has been included.***
Transaction Capital	**"senior manager"**	Subsection *(b)* of the definition should be deleted as it does not necessarily follow that a person who reports into the CEO of a financial institution is responsible for or has decision-making power in respect of a financial product and/or financial services. Subsection *(d)* of the definition should be amended such that the enforcement of policies and/or the implementation of strategies relates to a financial product and/or financial services.	***Deleted***
BASA	**"senior manager"**	There is a potential for confusion in the use of "Chief Executive Officer" in this definition, and in respect of the Prudential Authority. ***"senior manager"*** *means–* *(a) the Chief Executive Officer of the financial institution or the person who is in charge of a financial institution;* *(b) a person who is directly accountable to the Chief Executive Officer of the financial institution or the person who is in charge of a financial institution;* *(c) ………*	***Deleted***
SAIA	**"senior**	*"**senior manager**" means–*	***Deleted***

	manager”	*(a) the Chief Executive Officer or the person who is in charge of a financial institution;* *(b) a person who is directly accountable to the Chief Executive Officer or the person who is in charge of a financial institution;* *(c) a person other than a director who makes or participates in making decisions that–* *(i) affect the whole or a substantial part of the business of a financial institution; or* *(ii) have the capacity to significantly affect the financial institution's financial standing; or* *(d) a person other than a director who oversees the enforcement of policies and the implementation of strategies approved by the governing body;* *(e) a nominee in relation to all of the above*	
ASISA	**“senior manager”**	Please refer to the comment on the definition of “key person”. If the definition of “key person” is amended as proposed, the definition of “senior manager” may be deleted. ~~*“**senior manager**” means*~~ ~~*(a) the Chief Executive Officer or the person who is in charge of a financial institution;*~~ ~~*(b) a person who is directly accountable to the Chief Executive Officer or the person who is in charge of a financial institution;*~~ ~~*(c) a person other than a director who makes or participates in making decisions that–*~~ ~~*(i) affect the whole or a substantial part of the business of a financial institution; or*~~ ~~*(ii) have the capacity to significantly affect the financial institution's financial standing; or*~~ ~~*(d) a person other than a director who oversees the enforcement of policies and the implementation of strategies approved by the governing body;*~~	***Deleted***
SAIPA	**“senior**	The definition given for a senior manager is too broad and could lead to conflicts	***Deleted***

	manager”		
Strate	**“settlement system”**	“**Settlement system**” is only defined with reference to the NPS Act and not with regard to securities or the CSD performing settlement as settlement system under the FMA. Is this correct and intended? Please see functions of PA in 29(1)*(b).* Please clarify.	***Deleted***
Strate	“**significant owner**”	The definition of a financial conglomerate refers to a related person. The term related person has not been defined. This needs a clear definition.	***The term “related party” is now used, and is defined***
BASA	**“statutory ombud”**	There are various councils referred to in the Bill ***“statutory ombud”*** *means the ombud determined by the Ombud Scheme Council to deal with a specific complaint in the circumstances contemplated in section 191.*	***Noted. See redrafted definition***
BASA	**“systemic event”**	It is not clear how a “general failure” will be measured or determined.	***See redrafted definition***
ASISA	**“systemic event”**	The term “systemic event” refers inter alia to “a financial institution … cannot provide financial products…” To “provide” a financial product could be interpreted as the mere issuing or “selling” of a product e.g. an investment contract. What must be identified is the inability of a financial institution to perform the obligations undertaken in the product. It is therefore proposed that the definition be amended to read as indicated. Please also refer to the comment on clause 12(2)(b). *“**systemic event**” means an event or circumstance where–* *(a) a financial institution, or a group of financial institutions, cannot ~~provide financial~~ perform the obligations undertaken in terms of financial products or cannot perform financial services ~~that they have contractually~~ as undertaken ~~to provide~~; or* *(b) there is a general failure in confidence of financial customers in the ability of one or more financial institutions to continue to ~~provide~~ perform the obligations in terms of financial products or to perform financial services;* *to an extent that may reasonably be expected to have a substantial adverse effect on the financial system and the economic activity in the Republic, irrespective of*	***See redrafted definition***

		the event or circumstance occurring or ~~arising inside or~~ outside the Republic;	
Standard Bank	**"systemic event"/ "systemic risk"**	We would like to propose that the definition of "systemic event" is revisited as the definition in the FSRB is quite broad. One way to narrow the definition would be to consider defining what is meant by a "financial system failure" along the following lines: "***systemic risk*** *means the vulnerability to events which may result in a catastrophic aggregate outcome such as the failure of the financial system of a country.*" It may also be useful to define types of risks to the system such as those listed in footnote 8. This would go some way to indicating the types of events and risks that the Reserve Bank would consider when reviewing the "strengths and weaknesses" of the system as per sub-clause 9*(a)*(1). Further, it is suggested that that the Governor may also consult with the FSOC prior to making a determination that an event or set of circumstances is a systemic event, given the purpose of FSOC outlined in clause 17.	***See redrafted definition of "systemic event".*** ***The Reserve Bank must monitor and keep under review the strengths and weaknesses of the financial system; and any risks to financial stability, and the nature and extent of those risks, including systemic risks and any other risks contemplated in matters raised by members of the Financial Stability Oversight Committee or reported to the Reserve Bank by a financial sector regulator.***
BASA	**"systemic risk"**	**"systemic risk"** means the risk posed to the financial system by ~~that~~ a systemic event ~~will occur.~~	***Definition has been omitted***
ASISA	**"this Act"**	Legislative instruments are clearly defined as being "subordinate legislation". The proposed definition of "this Act" however, elevates such (subordinate) legislative instruments to primary legislation. In so far as subordinate legislation has to be issued in accordance with and subject to the provision of the relevant act, it cannot be equated to the act and in the premises it is submitted that legislative instruments be deleted from the definition of "this Act". ***"this Act"*** *includes the Schedules ~~to, and the legislative instruments~~ made in terms of, this Act;*	***Disagree***
Strate	1(1) 105 See 151-152 on determining an Administrative penalty, 199,203(2), 212	**Licensees' obligations; offences; criminalisation; "contravention"; "non-compliance"** The actual non-compliance with financial sector law may be an offence in terms of specific legislation. This must be distinguished from the reporting action on non-compliance. In 105, the immediate "*without delay*" reporting of a financial sector law contravention ("*has contravened, is contravening or is likely to contravene*") is linked to the offences in 203(2) which criminalise such an omission to report.	***The definition of "contravention" and non-compliance" have been omitted***

	–213	We are of the view that the consequences for the Financial Institution are disproportionately heavy and should be reconsidered and reworded. No element of materiality is built into the wording. Please insert. Also, there is no reference to the actual awareness of the contravention or perceived contravention. Please insert wording "*as soon as it becomes aware thereof*". The "*financial sector law*" is not confined to one piece of legislation and the criminalisation is too drastic. On analysis of 152(2), it is also clear that the regulator should have some discretion in this regard to make a call on the seriousness of this contravention (for 105 purposes). Please compare the above with the report by auditors and others to the financial sector regulators in 199. In this case, the reporting duty is fully described, which is different from clause 105.Clauses 203(2), 212 and 213 are exceptionally harsh in comparison with the other clauses where imprisonment is prescribed. In these cases there is no previous element of contempt, a debarment, summons, wilful refusal to comply. Please delete conviction of imprisonment. With regard to "*non-compliance*" the words "*and which does not constitute a criminal offence*" refer. Please explain the intention of the legislator in this regard. If there is an "*on-site inspection*" (1(1)) to "*determine compliance with a financial sector law*", does it now mean that "*an act or omission that constitutes a failure to comply with a provision of a financial sector law*" will exclude criminal offences? Please clarify and simplify all the above. Please remove the non-discretional "criminalisation element" from non-reporting.	***Agree, cl. 254(2) limits conviction for breach of the reporting obligation under cl.117 to a fine***
ASISA	1(3)	The definition of "**this Act**" stipulates that it includes "legislative instruments" made in terms of this Act. In view thereof, the effect of section 1(3) is that the Authorities will be able to issue legislative instruments, e.g. standards, which will trump the provision of national legislation approved by Parliament, despite the fact that such standards have never been debated by Parliament. We refer to our General comments in this regard.	***Disagree with this interpretation, legislative instruments, as delegated legislation, could never trump a provision of primary legislation.***
SAIPA	1(3)	There are other pieces of legislation directly linked to this Act where clarity is required as to which Act prevails in the event of inconsistencies e.g. Banks Act, Consumer Protection Act, Companies Act etc.	***See Part 3 of Chapter 1 on the application of other legislation in relation to the FSR Act***

2. Financial products			
BASA	2	There are several concerns with this proposed definition: Some BASA members are concerned that the definition of "**financial product**" reflects an inappropriate application of generic retail market conduct standards to transactions that occur in the corporate and wholesale market, especially those related to lending in this market. (See also the comments on the definition of "Financial Customer"). Payments The Minister should not designate a facility, arrangement or a system a financial product in terms of this definition. Financial Planning This does not appear to have been taken into account of in the definition. Managing financial risk Clause 2(6) requires further clarity regarding whether this extends to hedge funds. Securities It is not clear why "securities" is not included in the definition of financial product. Credit Agreement As per the comment above, a "credit agreement" is not a financial product or service. The term "credit" should be used and not "credit agreement".	***Agree*** ***Financial planning falls within the ambit of providing professional advice that is a financial service.*** ***Managers of hedge funds are providing a financial service*** ***Services related to providing securities are a "financial service" – see definition of "securities services"*** ***Agree***
SAIA	2	The suggestion that the power to designate a "**financial product**" be vested in the Minister and not in the PA or FSCA themselves is welcomed. It is suggested that further technical work in consultation with industry be undertaken on the application of the definition of "*financial product*" in relation to motor warrantees, maintenance plans and related non-insurance products. A specific request has been made by some SAIA members for legislative clarity on "*insurance guarantees*" in relation to the definition of "*financial products*". Even though the term "*guarantee policy*" is specifically defined in the Short-term Insurance Act (STIA) and provided for as a specific segmentation class in	***Agree - see clause 2(1)(h)***

		terms of SAM Discussion Document 29, the Bill specifically provides for other financial products, such as deposits, but is silent on guarantees in terms of the Banks Act. Accordingly, there is an underlying risk in specifically listing some financial products by name – that others are excluded (the so-called *exclusio unius est exclusio alterius* rule of interpretation). In the interest of regulatory clarity and certainty, it is proposed that insurance guarantees be specifically provided for. A question is raised whether consideration has been given to designating "*microinsurance*" activities or products as a designated "*financial product*", as it has been mooted that a separate microinsurance licence may be required under phase two of the implementation of "Twin Peaks". In addition, with regard to the application of the Bill to Banks, clarity is sought on the reasoning for the specific focus in sub clause *(e)* on deposits as defined in the Banks Act, without specific reference to other banking products, such as bank guarantees and construction bonds.	***To the extent that micro insurance falls within a facility or arrangement, it potentially can be designated as a financial product*** ***Noted. Taking deposits from the public is fundamental to bank activity. However, guarantees have been included – see clause 2(1)(h)***
Transaction Capital	2	The Minister should not be entitled to designate products as financial products such that the Regulations only endure for 1 year from the effective date of the Regulations if Parliament does not ratify the Regulations by an Act of Parliament as is required in terms of section 215(4) of the Bill. The infrastructure required and the costs involved in complying with legislation for a maximum period of 1 year outweigh the benefits of such compliance.	***Agree, the designation now no longer has a fixed term.***
Melbourne Law School	2(2)	We note that there are alternate references to "Regulations" and "regulations" (see the definition of "**eligible financial institution**", "**legislative instrument**" and section 2(2)). We query whether these references should be consistent and whether any terms should be defined.	***Noted. Consistently refer to "Regulations"***
Transaction Capital	2(2)	Section 2(2) contemplates a category of "**financial products**" which, for example, are not already regulated by the provisions of the NCA. In the result, the possibility exists that, in enacting a legislative instrument or interpretation ruling as contemplated in section 131 of the Bill, those rulings may impose restrictions and/or qualifications which are in conflict with section 8 of the NCA. Those administrative acts (or even subordinate legislation) would be unenforceable to the extent that they are in conflict with an Act of Parliament (i.e. the NCA).	***The Bill has gone a long way to foster a culture of cooperation and collaboration between and among Regulators (NCR included) regarding the performance of their respective functions in terms of financial sector laws and the NCA. The Authorities are empowered to make standards that are additional to, rather than in conflict with, requirements set under the NCA and after consultation with the NCA.***

SAIPA	2(2)	The term investor is not defined. It is unclear in as far as the term differs from the term "**person**" (as defined in the Bill).	***It is not necessary to define the term "investor" as the meaning is implied by the context and is used in its ordinary meaning***
ASISA	2(3)*(b)*	It is not clear what is meant by "*through which, or through the acquisition of which*"? It is submitted that the Minister should only designate something as a financial product where the envisaged conduct constitutes a regular feature of the business of any such a person.	***Disagree, the Minister may designate a "financial product" if it would further the object of the Act to regulate the category or type of facility, arrangement or system***
Transaction Capital	2(4)	The definition of "**lending**" in section 2(4) is too broad and encompasses activities that do not traditionally constitute lending.	***The definition has been omitted***
Melbourne Law School	2(4)	We note that the term "**lending**" is defined broadly in section 2, particularly in view of the reference to "utilisation" and the inclusion of subsection (4)*(b)*, which could be interpreted as capturing any investment activity, whether or not it involves a loan. We query whether the definition should be amended to read as follows: *2 (4) "Lending" as referred to in subsection (3)(b)(i), means the ~~utilisation~~ loan of money or securities, or of the interest, fees or other income earned on money or securities–* *(a) for the granting by any person, acting as a lender in the person's own name or through the medium of a trust or a nominee, of ~~loans~~ financial accommodation to other persons;* *(b) for the investment by any person, acting as an investor in the person's own name or through the medium of a trust or a nominee; or*	***The definition has been omitted***
ASISA	2(5)	*2(5) "**Making a financial investment**", as referred to in subsection (3)(b)(ii), takes place when–* *(a) an investor ~~gives a contribution, in~~ provides money or money's worth, to another person and any of the following apply:* *(i) …….;* *(ii) ……;* *(iii) …..*	***Disagree***
Transaction Capital	2(5)	The definition of "**making a financial investment**" is also too broad for the following reasons –	***Disagree***

		• the definition could encompass a shareholder's contribution in the form of shareholders loans and/or a subscription for shares pursuant to a rights offer. Matters relating to investments in companies are more appropriately dealt with in the Companies Act; • subparagraphs 2(5)*(a)*(i) and (ii) should be deleted and replaced with one subparagraph which refers to the parties common intention (and not only one parties' intention). It is a basic principle of contractual law that the parties to the contract must be at idem on the material terms of the agreement (i.e. in this case an investment mandate which would nonetheless be required in terms of the Financial Advisory and Intermediary Services Act 37 of 2002, as amended ("FAIS").	
ASISA	2(6)	As presently worded it is not apparent what exactly will be covered and hence we cannot provide further comment. We suggest that the section be redrafted.	***Noted***
Transaction Capital	2(7)	The definition of "**effecting a financial transaction**" is also too broad for the following reason: effecting payments is a daily commercial transaction which every consumer engages in. The act of effecting a payment should be limited to those instances where payments are made for and on behalf of third parties via an electronic system by those controlling that system.	***Definition has been omitted***
ASISA	2(7)	Effecting a financial transaction should be limited to the conclusion, variation or termination of any agreement in respect of a financial product or service.	***Definition has been omitted***
PASA	2(7)	*2(7) "~~Effecting a financial transaction~~ issues a payment instruction", as referred to in subsection (3)(b)(iv), takes place when a person:"*	
3. Financial service			
BASA	3	There are a number of concerns related to this definition: Credit agreements, and legal services The inclusion of legal services is considered problematic. The nature of the services included here is ambiguous. Given that legal services are the subject of supervision and regulation under legislation emanating from the Department of Justice this may be challenging to enforce. The inclusion of legal services should either be deleted entirely or should list in more detail those specific legal services related to credit agreements, such as:	***Agree***

		emolument attachment orders, debt collection, and bond origination. Government retail bonds There is a need for clarity as to whether the sale of these products is included in this definition. Buying and selling of foreign exchange This service is currently regulated by the Currency and Exchanges Act. This Act should be included in the list of Financial Sector Laws. Footnote 11 – Intermediary services in FAIS The footnote seems to conflict with the proposed amendments to FAIS in Schedule 4 of the Bill. Advice It is not clear if "advice" is intended to have the same meaning in this Bill as it has in FAIS. The meaning of "advice" should be clarified. Financial Planning This does not appear to have been taken into account of in the definition. Given the RDR proposals, it is suggested that "financial planning" is included in the definition of a financial service. Making a market The meaning of "isolated transaction" is not clear. "Dealing or making a market" should be defined in clause 3(5). Securities This definition is not as comprehensive as the definition in the FMA. The FMA definition of securities should be used.	***Government bonds are financial instruments and services in relation to them is subject to regulatory oversight*** ***The intention is to enable the FSCA to regulate the conduct of buying and selling of foreign exchange*** ***Footnotes have been deleted*** ***Noted, however the intention is to capture the provision of advice in relation to a financial product, a foreign financial product or financial instrument in terms of a financial sector law (however described)*** ***Agree, exception has been deleted*** ***Agree*** ***"Securities" is now not defined in the Bill, "securities services" is defined in accordance with the definition in the FMA.***
Transaction Capital	3	The Minister should not be entitled to designate certain services as financial services such that the Regulations only endure for 1 year from the effective date of the Regulations (due to the fact that Parliament has not ratified the Regulations by an Act of Parliament).	***Noted and agreed, the designation is now not subject to a definite term.***
Strate	3(1)*(a)* & *(c)*	Clause 3(1)*(a)* includes a list of financial services that will be supervised from a "*conduct perspective*" and the MI is specifically mentioned. Yet, (i) – (vi) do not seem to cater for CSDs as MIs. Clause *(c)* refers to regulated persons but is	***Noted and agreed, see revised provision and proposed treatment of MI***

		confined to the term "*securities services*" which is excluding the CSD; the CSD performs a "*function*" in terms of the FMA and not "*securities services*".	
ASISA	3(1)	Sub-section (iv), it is respectfully submitted that any activity performed by a product supplier or provider on its own behalf or in respect of its own day-to-day internal business administration should be excluded from the ambit of financial services. Sub-section (v): Given that a credit agreement is a financial product as defined in the FSRB, the sentence currently reads that a financial service is, in relation to a financial product (credit agreement)…., services provided in connection with a credit agreement. We assume that the intention is not to include all services relating to credit agreements as constituting financial services. The definition is confusing. A credit agreement is a financial product as defined in the Bill. The definition basically states that a financial service in relation to the credit agreement means services provided in relation to credit agreements, including legal services. The subparagraph does not clearly indicate the scope of services that should be included. We assume that the "legal services" in relation to a credit agreement contemplates debt collection type services. To the extent that legal services are regulated by other legislation (e.g. the Magistrates Court Act, and even the National Credit Act), and is subject to judiciary oversight, it should not be part of the FSRB. It is not clear why a distinction is made between section 3(1)*(a)*(ii) and section 3(1)*(b)*, as both of these activities are "financial services" as defined in FAIS.	***The intention is to capture services in relation to a financial product, a foreign financial product or a financial instrument that are regulated or required to be regulated in terms financial sector law.*** ***Noted, see revised definition of "financial product" that rather captures "credit" as a financial product. The Financial Sector Conduct Authority may not regulate and supervise credit agreements except with the concurrence of the National Credit Regulator, but may regulate and supervise financial services provided in relation to a credit agreement.*** ***Noted, the intention is to capture debt collection services in relation to the provision of financial products, foreign financial products, financial services or financial instruments that are regulated or required to be regulated in terms financial sector law. Reference to legal services in this context has been removed*** ***In relation to payment services, such services are provided to financial customers by entities subject to other sectoral law, such as the National Payment Systems Act and may not be subject to conduct oversight***
SAIA	3(1)*(a)*(iv)	In addition, clarity is sought on the inclusion of "administration services" as set in sub clause 3(1)*(a)*(iv), and what types of services this includes, specifically whether the intention is to include outsourced services in the definition of "*financial services*".	***The intention is to capture services in relation to a financial product, a foreign financial product or a financial instrument that are regulated or required to be regulated in terms financial sector law. Outsourcing arrangements are also dealt with***
Transaction Capital	3(1)*(a)*(iv)	The term "administration services" in subsection 3(1)*(a)*(iv) should be defined.	***Disagree***

SAIA	3(1)*(a)*(v)	As a result of the very broad definition of "**credit agreement**" in the Bill, it is submitted that sub clause 3(1)*(a)*(v) is unnecessarily broad, specifically in light of the inclusion of legal services, which could now be interpreted to include legal services on almost any type of agreement. As an alternative it is suggested that the specific types of agreements targeted to fall within this definition be prescribed rather than including *all possible* agreements, which may have unintended consequences of having all legal agreements falling within the ambit of financial services.	***Noted, subclause has been omitted. See also revised definition of "financial product" that rather captures "credit" as a financial product.***
The Unlimited	3(1)*(a)*(v)	Is the reference to "legal services" only in relation to such services being rendered within the context of credit agreements?	***Subclause has been omitted***
Melbourne Law School	3(1)*(a)*(v)	We note that subsection (1)*(a)*(v) provides that the definition of "financial service" includes "services provided in relation to credit agreements, including legal services." Although there may be circumstances in which legal services should be included in the definition of "**financial service**" (e.g. where a lawyer provides financial advice in addition to legal advice), we query whether the implications of this have been fully considered. For example, do lawyers need to obtain licences in order to provide legal services in relation to "credit agreements", which appears to be defined broadly to include corporate loans as well as consumer loans, or will they be exempted (see section 98)? Does this have any implications in terms of capturing or regulating legal services under other pieces of legislation?	***Sub clause has been omitted. The intention is for the Financial Sector Conduct Authority to also regulate and supervise financial services provided in relation to a credit agreement.***
Melbourne Law School	3(4)	We query whether the definition of "**dealing**" in subsection (4) should also include "applying for and acquiring a financial product" and "issuing a financial product" as in the Australian *Corporations Law*.	***Disagree, the proposal would be inappropriate for the purposes of the definition and what is understood in the South African context***
ASISA, Transaction Capital	3(4)	It is not clear how the "varying of a term of a financial product", which in effect constitute an agreement between a client and a product supplier, can constitute a financial service? The reference to subsection (1)*(c)* should be amended to subsection 1*(a)*(iii). *3(4) For the purposes of subsection (1)~~(c)~~(a)(iii), each of the following, whether done as a principal or as an agent, constitutes "dealing" in a financial product:* *(a) in relation to securities, or participatory interests in a collective investment scheme as defined in section 1 of the Collective Investments Schemes Control Act, 2002 (Act No. 45 of 2002), underwriting the securities or interests;*	***Agree, the reference has been corrected***

ASISA, Melbourne Law School, Transaction Capital,	3(5)	The reference to subsection (1)*(c)* should be amended to subsection (1)*(a)*(iii). *3(5) For the purposes of subsection (1)~~(c)~~(a)(iii), "making a market" in a financial product takes place when–*	***Agree, the reference has been corrected***
Melbourne Law School	3(5)*(b)*	We note that subsection (5) provides that "this subsection does not apply to an isolated transaction". We suggest that a definition of "isolated transaction" be inserted to avoid any ambiguity in the interpretation of this term. For example: *3(5)(b) other persons reasonably expect that they can enter into a transaction for those products at those prices,* *but this subsection does not apply to an isolated transaction. For the purposes of this subsection, an "isolated transaction" is a transaction that occurs on a one-off basis and is not part of another transaction or a series of transactions.*	***The exception has been deleted***
Geof Mortlock	4(1)	It might be desirable to qualify this definition by reference to the notion of materiality or significance, i.e. where there is no material or significant impediment to the delivery of financial products or services by the financial system. As drafted, it could be interpreted that any discontinuity of a financial product or service by any financial institution could constitute financial instability, regardless of its materiality (both in terms of the size of the institution relative to the system and the duration of discontinuity).	***See amended definition. While there is no specific reference to materiality, the circumstances have been qualified***
SAIPA	4(1)*(b)*	It should be specified by whom, and under what circumstances there would be confidence in their ability to do so.	***Disagree***
Part 2: Object, Administration and Application of Act			
6. Object of the Act			
SAIPA	6	Considering the prominence of this issue, the promotion of ethical decision-making and actions should be included in this list (which may in turn also necessitate a mechanism for whistle-blowing).	***Disagree***
Centre for Applied Legal	6	*6. The object of this Act is to achieve a financial system that works in the interests of financial customers, is aligned to the spirit and purport of the*	***Disagree; it is not necessary to refer to the Constitution and the Bill of Rights, as the***

Studies		*Constitution, and supports balanced and sustainable economic growth in the Republic, by establishing, in conjunction with the other financial sector laws, a regulatory and supervisory framework that promotes–* *(a)compliance with the Bill of Rights as provided for in the Constitution, in the financial sector;* *(a)financial stability;* *(b) the safety and soundness of financial institutions;* *(c) the fair treatment and protection of financial customers;* *(d) the efficiency and integrity of the financial system;* *(e) the prevention of financial crime;* *(f) financial inclusion; and* *(g) confidence in the financial system.*	***Constitution and the Bill of rights necessarily must be complied with.***
Geof Mortlock	6(b)	"Safety" and "soundness" seem to me to be much the same. Might it be simpler to use "soundness"? The advantage of "soundness" is that it does not have quite the same connotation of immunity from failure and immunity from loss as does "safety".	***To keep as is***

CHAPTER 2: Financial Stability

Reviewer	Section	Issue	Decision
Deloitte	General-Chapter 2	From reading this chapter it appears as though the Financial Stability Oversight Committee (FSOC) only plays an advisory role in relation to financial stability and that the accountability for financial stability will reside in a separate department within the Reserve Bank. In the UK the FSOC has the ability to instruct and not just advise.	***Noted. The Reserve Bank will have a responsibility for financial stability. The primary objectives of the FSOC are to; support the Reserve Bank when performing its functions in relation to financial stability, and facilitate cooperation and coordination of action among the financial sector regulator on matters relating to financial stability.***
		Would it be possible to clarify where exactly in the Reserve Bank this accountability will reside and whether the FSOC has the powers to instruct the Reserve Bank (i.e. the Financial Stability department) to take certain steps or whether it merely provides recommendations to the Reserve Bank.	***The financial stability mandate is being given to the Reserve Bank and not a particular department of the Reserve Bank. It is up to the Reserve Bank to organise itself in a manner that will ensure that it delivers on this mandate.***
		Given the lack of clarity around the form of juristic persona that the Prudential Authority will adopt and that it operates within the administration of the Reserve Bank, and given the multiple mandates that the Reserve Bank fulfils (Monetary Policy, Financial Stability), how would potential conflicts of interest across these mandates be managed and governed?	***The PA as a juristic person with a different mandate from that of the Reserve Bank, Treasury does not see any conflict arising between the mandates of the two entities. In addition, the different committees within the Reserve Bank (Monetary Policy Committee, Financial Stability Oversight Committee) made up of different membership to support different mandates will assist in addressing any potential conflicts of interest between the different mandates.***
SAIA	General-Chapter 2	We are supportive of the changes to how financial stability is managed and supervised reflected in this revised Bill: it is greatly improved. This is one part of the FSRB that, more than any other part, must be unequivocally clear in its meaning. There should be no ambiguity about roles and responsibilities, powers and functions, processes and procedures, in the midst of trying to stave off or manage a systemic event or financial crisis.	***Comment noted and Treasury agrees.***
Part 1: Reserve Bank's Functions and Powers			
8. Reserve Bank's functions in relation to financial stability			
World Bank	8	Consideration may be given to expand the Reserve Bank's and the PA's	***Noted. One of the functions of the PA is to support***

		objectives to include the promotion of competition and/ or an efficient financial system, acknowledging however that these objectives should not interfere with the overall objective as defined in the respective clauses. See for example the Australian Prudential Regulation Authority.	***sustainable competition in the provision of financial products and services through collaboration with the Competition Commission which has a mandate for competition issues. The efficiency of the financial system is incorporated under the "Object and administration of this Act".***
Melbourne Law School	8	***8***(1) 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.* *(2) The Reserve Bank must exercise its powers as the Republic's central bank and its other powers conferred in terms of legislation in a way that will best–* *(a)comply with the Constitution of the Republic of South Africa;* *(b)maintain, protect and enhance financial stability in the Republic; and* *(~~b~~ c) if a systemic event has occurred or is imminent, restore or maintain financial stability in the Republic.* *(3) When fulfilling its financial stability function referred to in subsection (1), the Reserve Bank must act within a policy framework agreed between the Minister and the Governor and in compliance with the Constitution.* *(4) When acting in terms of subsection (2), the Reserve Bank must act with due regard to, among other matters –* *(a) the roles of other organs of state exercising powers with respect to aspects of the South African economy; and* *(b) the desirability of balanced and sustainable economic growth in the Republic.* *(5) In the event of any inconsistency between subsection (2) and any other legislation, subsection (2) prevails, to the extent that it is not in conflict with the Constitution.*	***The Constitution as the supreme law applies and it might not be good drafting style to make reference to it.***
Geof Mortlock	8(1)	I agree that financial stability should be the primary objective of the SARB. That said, might it be appropriate to balance this with the objective of promoting an efficient financial system as well? I note that this has become an issue in the recent Financial System Inquiry in Australia, where the Inquiry report has recommended that competition and efficiency become public policy objectives, alongside financial stability.	***Noted. The efficiency of the financial system is incorporated under the "Object and administration of this Act". In South Africa, Competition Commission has a mandate for competition issues. However, the revised Bill confers responsibility to the PA to support sustainable competition in the provision of financial products and services through collaboration with the Competition Commission.***

JSE	8(3)	We would recommend that the policy framework be required to be reviewed every 3 years and a new policy framework be agreed within a specified time period (for example, 3 months) after the appointment of a new governor or new Minister. We would also recommend that the policy framework be made public.	***Noted. It could be damaging to publish this framework on account of the potential for misreading of "signaling" by the market of potential instability, as well as for the potential for moral hazard by financial institutions.***
Geof Mortlock	8(3)	It is reasonable that the policy framework (such as the specification of policy goals) is subject to agreement between the SARB and Minister, but this would hopefully not compromise the operational independence of the SARB in terms of the implementation of policy - eg the use of its powers in meeting defined objectives. I suggest that the Bill be reviewed to ensure that the SARB has an appropriate degree of operational independence.	***Agree with the principle. It is not Treasury's intention to compromise the operational independence of the Reserve Bank. See revised Bill.***
ASISA	8(3)	This seems "loose" and doesn't provide certainty about the framework – no consultation or Parliamentary oversight/approval is required. Refer General comments.	***Noted. The National Treasury is balancing between the need to ensure Reserve Bank's operational independence and the need for some level of accountability on financial stability issues.***
ASISA	8(5)	Subsection (2) refers to the Reserve Bank's duty to exercise its powers in a way that will best further financial stability, so the provision seems harmless, based on the interpretation that it does not prevail over the Promotion of Administrative Justice Act. We suggest it be amended to make this clear.	***Noted. The clause is deleted from this section. See the new "Application of other legislation" section in the revised Bill.***
9. Reserve Bank to monitor and mitigate risks			
Geof Mortlock	9(a)(ii)	And financial system efficiency?	***The efficiency of the financial system is incorporated under the "Interpretation, object and administration of this Act".***
Melbourne Law School	9(a)(ii)	*9(a)(ii) any risks to financial stability, and the nature and extent of those risks, including any risks contemplated in matters raised by members of the Financial Stability Oversight Committee or reported to the Reserve Bank by a financial sector regulator in terms of section 24(1)(c);*	***Noted.***
Deloitte	9(b)	What powers will this department have over the other financial regulators? It is not clear how the Reserve Bank will direct the financial sector regulators to take such steps and what powers of command the Reserve Bank will have over such other regulators. We recommend that this be tightened up in the bill.	***Noted. The revised Bill places an obligation on the financial sector regulators to comply with Reserve Bank's directives. In the event of any unresolved issues between the Reserve Bank and the NCR, the Bill provides for the involvement of the relevant Ministers and Cabinet.***

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JSE	9(b)	This section implies broad ranging powers where the Reserve bank can take any steps to mitigate all risks, no matter the nature and extent of those risks, or to the reasonableness of those steps. We would suggest inserting wording that the steps be "reasonable" where "reasonableness" depends on whether the risks pose an imminent threat to financial stability – refer "reasonable steps" in s12(1).	***Agree in principle. The revised Bill provides for the Reserve Bank to take reasonable steps to manage the systemic event and its effects.***
10. Reserve Bank responsible for oversight of market infrastructure and payment systems			
BASA	10	The current formulation of cl 10(a) appears to restrict the SARB's oversight role to only that of adherence to international standards. This seems to be an overly narrow statement of the SARB's responsibilities in respect of FMI and payments systems.	***Noted. The role of the Reserve Bank is to regularly assess adherence to international standards and report its findings to the financial sector regulators and the Minister.***
		The use of "*participant"* in cl 10(d) may be confusing given that it has two usages in the Bill (the other in relation to participation in Ombuds schemes.	***The clause has been deleted from the revised Bill.***
Strate	10*(b)*	**Financial Crisis** Please see reference to "***financial crises***" in 10*(b)*: the term is no longer defined and should be deleted and replaced by "***systemic risk***" and/or "***systemic event***" as defined.	***The term is no longer used in the revised Bill.***
PASA	10(b)	We are not certain that the reference to participants in this section is correct, in light of the definition of "participants".	***The term is no longer used in the referenced clause.***
Standard Bank	10(b)	Standard Bank welcomes the clarity that has been provided on the role of the Reserve Bank in the oversight of market infrastructure and the payments system in relation to financial stability. We especially appreciate that the FSRB requires in sub-clause 10(b) that the Reserve Bank take "into account South Africa's own circumstances" in developing a supervisory framework for FMI and the NPS.	***Noted.***
Part 2: Managing Systemic Risks and Systemic Events			
Melbourne Law School	General	We suggest that there is some ambiguity in terms of how sections 11-16 are to operate and what it is that engages sections 13-15. By way of explanation, section 16 makes it clear that the section is engaged "If the Governor has, in terms of section 11, determined that a systemic event has occurred or is imminent". However, sections 13-15 appear to be engaged simply "If a systemic event has occurred or is imminent", with or without a determination by the Governor. We query whether these sections should be amended so that they are consistent with section 16.	***Comment noted. The sections have been refined to provide more clarity. See revised Bill.***

JSE	**General**	**Role of the JSE during a systemic event** "***Financial system***" includes the operation of a market infrastructure. Furthermore, based on s73(2)*(c)* and *(d)* the JSE is likely to be designated by the Governor as a systemically important financial institution (SIFI). However, the definition of "***systemic event***" refers only to financial institutions that provide products or services to financial customers. As noted above, market infrastructures are required to perform functions in terms of the FMA and do not have financial customers as defined in the FSRB. Similarly, the definition of "***financial stability***" does not contemplate an interruption in the provision of market infrastructure functions. Therefore, sections 11 to 16 are currently not applicable in the case of market infrastructures. We would question whether this was the drafters intent and recommend that sections 11 to 16 be amended to specifically refer to market infrastructures and an interruption in the performance of their functions. Assuming that the drafters did intend to have the designation of a systemic event capture market infrastructure, we would be concerned with the broad powers granted to the Governor in s14(2)(ii). For example, this suggests that the Governor could direct the FSCA to direct the JSE to close the market during a systemic event. The JSE would also like to clarify the role of the JSE (as front-line regulator and market operator) and other SROs designated as SIFIs during a systemic event. To the extent that the definition of "***systemic event***" contemplates the interconnectedness of SIFIs and that the failure of one SIFI will have a substantial adverse effect on the financial system, all SROs will always have to be involved as important role-players and decision-makers during a systemic event. Specifically in terms of the JSE, the role of the JSE extends beyond the decision just to keep the market open but extends to all clearing and settlement activities. Therefore, the JSE would like to recommend a more formalised relationship between SRO SIFI's and the Financial Sector Contingency Forum	***Comment noted. The definition of systemic event has been revised to capture FMIs. See the revised definition of "systemic event".*** ***Disagree. The definition of "financial institution" which is used in the definition of "financial stability" includes a market infrastructure.*** ***The powers given to the Governor are necessary in the event that a systemic event has occurred or is imminent. The revised Bill provides for the Reserve Bank to take reasonable steps in preventing or managing a systemic event. When excising its powers, the Reserve Bank is required to have regard to minimising adverse effects on financial stability and economic activity.*** ***The Financial Sector Contingency Forum shall consist of representatives of other organs of state that the Chairperson may determine as well as the representatives of the financial sector industry bodies.***

		(FSCF) to ensure that systemic risks can be identified in time, appropriately managed and that a systemic event can be handled in the most appropriate manner.	
11. Identifying systemic events			
IMF-MCM	11	**Declaration of "systemic"**: The FSR needs to clarify the roles and mandates for declaring an event or institution as systemic. While section 11 empowers the Governor to determine an event or circumstance to be systemic in consultation with the Minister, section 73 gives the Governor the power to designate a financial institution as systemic without an explicit requirement for prior consultation with the Minister.	***Noted. Treasury does not see the role of the Minister in the designation of a SIFI. One the responsibilities of the FSOC (and Treasury is represented) is to advise the Governor on the designation of systemically important financial institutions.***
ASISA	11(1)	ASISA members propose that provision be made in the Bill for the publication of the determination of a systemic event. Financial institutions may be directly or indirectly affected and should be able to easily access the determination. As currently worded, the Governor can decide, on his own, what constitutes a systemic event, even if the Minister does not agree with him. Bearing in mind the proposed consequences of a declaration of a systemic event, it is proposed that provision should be made for *"checks and balances"* and suggest the section be amended as proposed. ***11*** *(1) The Governor may, after having consulted with the Oversight Committee and in consultation with the Minister, determine in writing that a specific event or circumstance, or a specific combination of events or circumstances, is a systemic event.* Clarity is needed on what "in writing" means as it is not defined in this Act. Section 3 of the Interpretation of Statutes Act provides: *"In every law expressions relating to writing shall, unless the contrary intention appears, be construed as including also references to typewriting, lithography, photography and all other modes of representing or reproducing words in visible form."* Following the *eiusdem generis* rule one might argue that electronic data transmission is not included. However, the meaning of "in writing" in the ECTA	***Agree. The Governor may consult the Financial Stability Oversight Committee before making a determination on a systemic event. The revised Bill provides for the publication of a determination by the Governor that a specified event or circumstance, or a specified combination of events or circumstances, is a systemic event.***

		is given in s12 as follows: *"A requirement in law that a document or information must be in writing is met if the document or information is:* *(a) in the form of a data message; and* *(b) accessible in a manner usable for subsequent reference."* If the ECTA interpretation prevails or a strict interpretation of the *eiusdem generis* rule is not applied, an ordinary SMS could possibly satisfy the requirement. Also, is there a publication/notification requirement?	
Melbourne Law School	11(1)	***11*** *(1) The Governor may, after having consulted the Minister, determine in writing that a specific event or circumstance, or a specific combination of events or circumstances, is a systemic event and, accordingly, that a systemic event has occurred or is imminent.*	***See revised Bill.***
SAIA	11(1)	It is suggested that, in addition to the requirement of consulting with the Minister as set in clause 11.(1), it also be specified that the Governor may consult with the Financial Stability Oversight Committee (FSOC) prior to making a determination that a specific event or circumstances is a systemic event. This should be considered in light of the primary objective of the FSOC as set out in clause 17.	***Agree. The Governor may consult the Financial Stability Oversight Committee before making a determination on a systemic event.***
SAIPA	11(2)	In line with the definitions in the Bill, the determination referred to in subsection (2) should be described as the *'identification of a systematic risk'*, as long as it has not occurred or arisen (in which case it would be a *'systematic event'*).	***See the revised definition of 'systemic event' and how it has been used in the Bill.***
BASA	11(5)	Some BASA members are concerned about the absence of any checks and balances whereby the determination of a systemic event can be reviewed. Given the significant implications of such a determination being made, this is problematic. *11(5) For the purposes of this Part, a determination made or amended in terms of this section in writing is conclusive, and the determination ~~may not be reviewed by or appealed to the Tribunal~~ may be reviewed by, but not appealed to, the Tribunal.*	***The clause and principle has been deleted from the revised Bill. The revised Bill provides for the Governor to make a determination on a systemic event after having consulted the Minister. In addition, the Governor may also consult the FSOC.***
12. Reserve Bank's functions in relation to systemic events			
Melbourne Law	12	As noted in the *Response and Explanatory Document*, "systemic events and	***Regulators have a responsibility to assist in***

School		imminent systemic events…empower the Reserve Bank to give directions to other authorities (PA, FSCA and NCR).” Whilst we do not query the need for the Reserve Bank to assume a leading role in managing systemic risks and systemic events or its power to issue directives, with which a financial sector regulator must comply, we query whether such a prescriptive approach might lead to a situation in which the financial sector regulators become responsive to the directives of the Reserve Bank instead of performing a proactive role in assisting the Reserve Bank to manage and mitigate systemic risks. In other words, the concern is that this might lead to a situation in which the regulators do not take pre-emptive action themselves in order to mitigate such risks, but instead wait for a directive from the Reserve Bank before taking appropriate action, by which time the situation might have worsened.	***maintaining financial stability. The revised Bill goes on further to stipulate that when performing their functions, the Financial Sector Regulators must take into account the need for a primarily pre-emptive, outcomes focused and risk-based approach, and prioritise the use of their resources in accordance with the significance of risks to the achievement of their respective objectives.***
SAIPA	12	Section 12 mentions that *“The Reserve Bank must take all reasonable steps– (a) to prevent systemic events from occurring; and (b) if a systemic event has occurred or is imminent (i) mitigate as soon as practicable the adverse effects of the event on financial stability; and (ii) manage the systemic event and its effects”*. However, it is unclear how far these steps would go, for example if it would go as far as an actual bail-out of a systemically important financial institution, which may be necessary in certain circumstances, but also brings with it the phenomenon of ‘moral hazard’, which can cause negative or undesirable behaviour.	***The Bill provides that the Governor may not, except with the Minister’s approval take any step that will or is likely to bind the National Revenue Fund to any expenditure or create a financial commitment or contingent liability for the fund.***
Geof Mortlock	12(2)(a)	Again, it might be useful to incorporate the notion of financial system efficiency here. For example, measures could be taken to promote financial stability that, if taken too far, have the potential to compromise the efficiency of the financial system to the detriment of consumers of financial services and the wider economy.	***The efficiency of the financial system is incorporated under the “Object and administration of this Act”.***
ASISA	12(2)(b)	*12(2) (b) ensure that financial products and financial services that are necessary to maintain financial stability continue to be provided and that obligations undertaken in terms of financial products and financial services are performed;*	***The section has slightly been revised. See revised Bill.***
BASA	12(2)(c)	There is no need to include “including depositors, policyholders and investors” as these are already covered by the definition of financial product and service. *12(2) When acting in terms of subsection (1), the Reserve Bank must have due*	***Agree with the principle.***

		regard to the need to– *(a) ………* *(b) ………* *(c) protect, as appropriate, financial customers, ~~including depositors, policyholders and investors~~; and* *(d) ……..*	
Melbourne Law School	12(2)(c)	We note that other than the provision contained in s 12(2)(*c*), no mention is made of a depositor protection scheme. We query whether this has been neglected intentionally, perhaps because more specific provisions for the protection of depositors are envisaged? If not, we would point out respectfully that depositor protection is an essential component of financial stability and, our research indicates, is always provided in times of financial distress – whether expressly provided for, or indeed whether expressly foresworn. We would advise therefore that the South African authorities give some thought to how, when, under what circumstances, and by whom, depositor protection will be provided? What claw-back provisions should be included in order to seek redress and compensation from those parties that may be found to have precipitated or exacerbated financial distress, and under what time-frame depositors can expect to be reimbursed.	***Noted. South Africa does not have a Deposit Insurance Scheme.***
BASA	12(3)	It is suggested that the Bill allows for other relevant persons and institutions to be included in the Management Committee that may be established by the Governor – for example, a curator appointed by the SARB to manage a bank as in the case of ABIL.	***The clause and principle has been deleted from the revised Bill.***
13. Governor to consult with Minister			
Melbourne Law School	13(2)	Subsection (2) provides that the Governor must consult with the Minister before any action is taken. Subsection (3) provides that action contemplated by subsection (2)*(a)* or *(b)* may only be taken "*(a)* with the Minister's approval…" These provisions are potentially inconsistent as it suggests that there may be circumstances in which action may be taken simply upon consultation. We query whether the provision should be amended as follows:	***Agree. See revised wording in the revised Bill.***

		13*(2) The Governor must consult the Minister ~~before any action is taken~~ <u>in respect of any action that is proposed to be taken</u> to manage a systemic event or its effects if the Minister or the Governor considers that the action–*	
Geof Mortlock	13(2)(b)	I suggest you qualify this by making it clear that the commitment or liability in question relates to the government - i.e. a public sector commitment or liability.	***Agree. See revised Bill.***
ASISA	13(2) & (3)	It would seem that the duty to consult exists when: (a) the Governor considers any potential action to have a certain impact; or (b) the Minister considers the potential action to have such impact. How will the Minister be able "to consider the action" if he was not consulted in the first place because the Governor did not consider the action to have the impacts listed?	***Agree. The clause has been revised to capture the principle raised. See revised Bill.***
BASA	13(3)	Action is not contemplated in ss (2)(a)or (b), only the effects of the action is considered. The action is proposed in ss (1). *13(3) Action contemplated in subsection (~~2~~ <u>1</u>)~~(a) or (b)~~ may only be taken –* *(a) with the Minister's approval; and* *(b) in accordance with any condition subject to which the Minister has given approval.*	***The section has slightly been revised. See revised Bill***
14. Reserve Bank directives to financial sector regulators			
SAIPA	14(1)	This clause should be extended to include directives that serve to *manage systemic risks* that have been identified, and should not only apply once the systemic *event* is very likely or about to occur. In many cases, it will be too late to prevent an event, as provided for in subsection (i), if the event is already imminent.	***During normal times, the regulatory authorities have a duty to assist the Reserve Bank in the maintenance of financial stability. The powers to issue directives accorded to the Reserve Bank are meant for managing systemic events. There is need to balance between the independence of the regulators and the role of the Reserve Bank for financial stability and how the two interact with each other.***
ASISA	14(1)	*14(1) If a systemic event has occurred or is imminent, the Governor may direct a financial sector regulator <u>in writing</u> to–* It is suggested that a direction from the Governor to the financial sector	***Agree. See revised Bill.***

		regulator should be in writing.	
BASA	14(1)(a)	*14(1) If a systemic event has occurred or is imminent, the Governor may direct a financial sector regulator to–* *(a) provide the Reserve Bank with information in the financial sector regulator's possession that is specified in the directive; or* *(b) act in accordance with the directive in the exercise by the financial sector regulator of its powers, to the extent that the exercise of those powers is necessary or appropriate–*	***Agree. See revised Bill.***
Strate	14(1)*(a)* & *(b)*	The term "*Reserve Bank directive*" is not defined.	***Noted.***
Melbourne Law School	14(1)(b)	*14(1)(b) act in accordance with the directive in the exercise by the regulator of its powers, to the extent that the Governor considers that the exercise of those powers is necessary or appropriate–*	***The role of the Governor is to determine that a systemic event has occurred or is imminent and direct the financial sector regulators to assist the Reserve Bank and exercise their powers as directed to achieve financial stability.***
ASISA	14	It is not clear how this direction must be given. The rest of the section uses the term "directive" in this regard suggesting some formality but perhaps clarity is needed.	***More clarity has been provided. See revised Bill.***
NCR	14(2)	Section 14 of the FSRB empowers the SARB to issue directives to financial sector regulators such as the NCR when a systemic event has occurred or is imminent and to request information from the NCR. The purposes of this directive are set out in section 14(2) in very broad terms. The directive will be binding on the NCR. This section unlawfully encroaches on the independence of the NCR which is protected in section 12(1) of the NCA. It basically empowers the SARB to, for example, direct the NCR to stop an investigation or a Tribunal or court case against a bank or retailer. The NCR will be obliged to comply with the directive. This represents the material conflict of interest between consumer protection and prudential supervision. The FSRB makes consumer protection subservient to prudential supervision under its section 14.	***The powers provided here will only be used in exceptional circumstances when a systemic event has occurred or is imminent. The NCR will only need to comply with the directive issued by the Reserve Bank after the Governor has consulted with the Minister of Finance and the Minister responsible for consumer credit matters. See revised Bill.***
Geof Mortlock	14(2)	Are such directives to be publicly disclosed? I suggest that they should be, though not necessarily at the time they are given - maybe after the event. This	***Noted.***

		would assist in the transparency and accountability of the actions taken.	
Geof Mortlock	14(2)(i)	Suggest reference be made to 'resolution' of a financial institution here - eg "supporting the restructuring, resolution or winding up of any financial institutions".	***Agree. See revised Bill.***
Geof Mortlock	14(3)	I assume that the legislation or general principles of law will make it clear that the governing body of the regulator in question are relieved of any liability as a result of complying with such a direction - eg if the direction conflicted with their own regulatory objectives or obligations to consult affected parties.	***Noted.***
Melbourne Law School	14(3)	*(3) A financial sector regulator must comply with a directive issued to it in terms of subsection (1). For the avoidance of doubt, a financial sector regulator must otherwise continue to meet its objectives and perform its functions as provided by this Act.*	***Disagree. There is no need to provide this clarity.***
15. Financial sector regulators' responsibilities			
BASA	15(b)	***15.*** *If a systemic event has occurred or is imminent, a financial sector regulator must–* *(a) ………* *(b) consult the Governor before exercising any of its ~~powers~~ responsibilities in a way that may affect measures that are being or are proposed to be taken to manage the systemic event or the effects of the systemic event.*	***Disagree.***
Part 3: Financial Stability Oversight Committee			
ASISA	General	We get the impression that this body performs more of an Advisory Committee than an oversight committee – no real powers? It might be prudent to rather refer to this body as the *"Financial Stability ~~Oversight~~ Advisory Committee".* Changing the name would also prevent confusion with the Oversight Committee of the Prudential Authority	***Agree that Oversight committee does create some confusion – have rather renamed the Prudential Authority Oversight Committee as the Prudential Committee***
NCR	General	The theme of sections 17 to 21 of the FSRB is the establishment of the Financial Stability Oversight Committee focusing on financial stability. The NCR will become a member of this committee that focuses on financial stability. The NCR is a consumer protection regulator that must always act in a manner that promotes consumer protection. By getting involved in this committee, the NCR will be forced to consider its enforcement actions in the light of financial	***Financial stability is an objective that is also in the best interest of financial customers. A failing financial system cannot serve financial customers better. There is need for better coordination between all financial sector regulators and one of the Committee's key roles is to facilitate co-operation, collaboration and co-ordination of action in relation***

		stability which is contrary to its mandate.	***to matters relating to financial stability.***
18. Functions of Financial Stability Oversight Committee			
Geof Mortlock	18	Might it be appropriate for the FSOC to also have responsibility for advising the Governor on actions to be taken to promote financial stability (and efficiency?) and in relation to systemic events?	***One of the key roles of the FSOC is to support the Reserve Bank in performing its functions in relation to financial stability. See revised Bill.***
Strate	18(d)	**Role of FSOC** This is an advisory body. Yet, it is empowered to "*make recommendations to relevant organs of state regarding actions that are appropriate for them to take*". Please note that clauses 17 *ff* do not make provision for any representation of the MI on FSCOC or any direct consultation process with the MI. Who will represent the organ of state's view before such recommendation is made?	***The FSOC is an advisory body whose key mandate is to support the Reserve Bank in performing its functions in relation to financial stability. The Governor can invite anyone to participate in the FSOC as and when required and this also covers the MIs.***
		Also, once these recommendations have been made, who will take these recommendations further? It is not clear whether it will be the Reserve Bank or "*financial sector regulators*" that must/may/can take steps to enforce these recommendations on the relevant MI. Please clarify.	***The financial sector regulators will need to use their powers to enforce Reserve Bank's directives in the event that a systemic event has occurred or is imminent. The FSOC and the Financial Sector Contingency Forum are mechanisms for ensuring coordination of appropriate plans and mechanisms to mitigate potential risks.***
Melbourne Law School	18	We note that the primary objectives and functions of the Financial Stability Oversight Committee are closely tied to financial stability. This committee is required to meet at least once every three months. By contrast, the Council of Financial Regulators is established to allow its "constituent institutions to discuss and inform themselves about matters of common interest, including strategic directions to be adopted, and understanding and meeting international and domestic regulatory challenges" (see section 79). The Council of Financial Regulators is required to meet "at least twice a year, or more frequently as may be determined by the Director-General" (see section 80(1)). We make the following comments: Given that the membership of the Financial Stability Oversight Committee is limited to representatives of the Reserve Bank, the PA, the FSCA, the NCR and the National Treasury, this body appears to correspond more closely to the	***The focus of the FSOC should be financial stability. The proposed wording seems to be extending the objective of the FSOC too widely. See revised Bill.***

		Council of Financial Regulators in Australia in terms of providing a forum for the financial sector regulators, the Reserve Bank and the National Treasury to discuss financial stability and financial regulation. Accordingly, we would suggest that its functions be expanded as follows: ***18.*** *The Financial Stability Oversight Committee has the following functions:* *(a) to serve as a forum for the senior representatives of the Reserve Bank and of each of the financial sector regulators to be informed, and to exchange views, about the respective activities of the Reserve Bank and the regulators relating to financial stability;* *(b) to advise the Governor on the designation of systemically important financial institutions;* *(c) to advise the Minister on matters relating to financial stability;* *(d) to make recommendations to relevant organs of state regarding actions that are appropriate for them to take to assist in managing or preventing risks to financial stability;* ~~*and*~~ *(e) to discuss and inform themselves about matters of common interest, including matters relating to financial regulation and the financial system; and* *(f) any other function conferred on it in terms of legislation.*	
19. Membership of Financial Stability Oversight Committee			
Standard Bank	19	The FSRB makes it clear that it is the Reserve Bank that is responsible to maintaining, promoting, and enhancing financial stability. It is not clear as to which department within the SARB will perform these functions. It is assumed that this will be the role of the Financial Stability Department. If so, we recommend that the Deputy Governor responsible for Financial Stability is included as a member of the Council of Financial Sector Regulators; and that the Head of the Financial Stability Department is appointed as a member of the Financial Stability Oversight Committee.	***The Deputy Governor responsible for financial stability is a member of the FSOC and also the Financial System Council of Regulators. See revised Bill.***
BASA	19	General concern about confidentiality and the protection of information. All members as well as all persons attending the meetings of the FSOC must be subject to the provisos in clauses 47 and 68. Cl 21(6) should contain a similar proviso to “any person” who may be invited.	***Noted.***
BASA	19(2)	*19(2) A member of the Financial Stability Oversight Committee appointed in terms of subsection (1)(g) holds office for the period, and on the terms, determined by the Governor.*	***Agree.***

BASA	20(2)	*20(2) The Reserve Bank must–* *(a) ensure that written minutes of each meeting of the Financial Stability Oversight Committee are kept; and*	***Agree.***
22. Financial stability review			
Deloitte	22	The Financial Stability Oversight Committee must make and publish an assessment of the stability of the financial system. With regards to reporting of systemic risks. How transparent will the reporting of systemic risks by the Financial Sector Oversight Committee members and the results of the Reserve Bank's investigation of them be? More generally, will the minutes of meetings be published?	***The clause has been redrafted to provide for the Reserve Bank to at least every six months, make an assessment of the stability of the financial system and publish the review after submitting a copy of such a review to the Minister and the FSOC. The revised Bill does not provide for the publication of the FSOC's meeting minutes.***
Geof Mortlock	22(2)	Again, an issue arises as to whether the report might also appropriately cover wider issues relating to the performance of the financial system, such as the efficiency of the financial system.	***The efficiency of the financial system is incorporated under the "Interpretation, object and administration of this Act". Where necessary, there is nothing that precludes the issue being covered in the "Financial Stability Review".***
BASA	22(2)	*22(2) A financial stability review must set out–* *(a) the Financial Stability Oversight Committee's assessment of financial stability in the period under review;* *(b) the Financial Stability Oversight Committee's identification of, and assessment of, the risks to financial stability in at least the next 12 months;* *(c) ……..; and* *(d) an overview of recommendations made by the Financial Stability Oversight Committee during the period under review and progress made in implementing those recommendations.*	***Agree with the principle. The section has slightly been redrafted.***
SAIA	22(3)	In addition to the restriction on publication of information that may "*pose an unjustifiable risk to financial stability"* as set out in clause 22(3), there is a concern that the Financial Stability Review may contain proprietary information belonging to a specific financial institution that may place that institution at risk if published. It is suggested that it be explicitly stated that no proprietary information of any individual financial institution may be published in the Financial Stability	***Noted. The principle is that the financial stability review may not include publication of information that would pose an unjustifiable risk to financial stability.***

		Review.	
Part 4: Financial Sector Contingency Forum			
Melbourne Law School	23	We commend the South African National Treasury on the inclusion of this section, and note with approval its similarity to the Financial Policy Committee which is an adjunct to the Court of the Bank of England, and to the Financial Regulator Assessment Board, which is recommendation # 27, of the Australian Financial System Inquiry, Final Report. We would, however, recommend to the South African authorities that they contemplate extending the ambit of this Forum to include the power to assess, at least *ex post*, the efficacy of the PA and the MCA, as has been suggested in Australia. We make this suggestion based upon perceived deficiencies in the manner in which the Australian MCA has been performing, and the consequential calls for a board with the ability to assess how well the two regulators are addressing their responsibilities.	***There are checks and balances in the revised Bill to ensure that the Regulators are achieving their mandates, including the regulatory strategy and performance measures that will be used in assessing their performance against the agreed measures.***
Deloitte	23	It is not clear what the separation of roles is between the Financial Sector Contingency Forum and the Reserve Bank (i.e. the Financial Stability department). We are concerned that accountability will be lost along the way and recommend that this gets tightened up in the bill.	***The Reserve Bank is responsible for financial stability. The Financial Sector Contingency Forum is a mechanism for coordinating regulators, other organs of state and the representatives of financial institutions on financial stability matters. Its role is to assist the FSOC in performing the Committee's crisis management and preparedness function.***
SAIA	23(1)	Given the positive obligation that is placed on the Governor to establish a Financial Sector Contingency Forum (FSCF), it is suggested that the procedure and frequency of meetings for the FSCF also be set, similar to that set out for the FSOC in Clause 21. Such procedure should include a minimum number of meetings per year to ensure effective performance and safeguard the objectives of the FSCF. It is also suggested that the FSCF formally engage with the FSOC in order to meet its objectives as set out in the Bill.	***The FSCF must convene and must function in accordance with the procedures determined by the Governor. The revised Bill gives the discretion for determining the frequency of the meetings and procedures to the Governor.***
BASA	23(1)	***23.*** *(1) The Governor must establish the Financial Sector Contingency Forum, to assist the Financial Stability Oversight Committee in performing the*	***Agree. See revised Bill.***

		Financial Stability Oversight Committee's crisis management and preparedness functions.	
SAIPA	23(4)	The need for the establishment of a separate forum, which is similar in its composition to the Financial Stability Oversight Committee (FSOC), is questionable. As this forum only has an assisting function (section 23(4)), it may increase efficiency to include its two objectives in the scope of the FSOC.	***The membership of the FSCF is slightly different from that of the FSOC. See the composition of these forums in the revised Bill.***
Deloitte	24(c) &(d)	These sub-regulations imply that the financial sector regulators must set up a department to identify financial stability risks. If this is the case, we recommend that this mandate be made explicit in the bill as we do not believe that it will be sufficient or adequate to cover this objective in a memorandum of understanding between the regulators.	***One of the objectives of Financial Sector Regulators is to assist the Reserve Bank in maintaining financial stability.***
Part 5: Roles of Financial Sector Regulators and other Organs of State in Maintaining Financial Stability			
25. Memoranda of understanding between financial sector regulators and Reserve Bank relating to financial stability			
SAIPA	25	This section is rather vague, and the content not clearly defined.	***See revised Bill.***
BASA	25	BASA has a general concern about minimising duplication, and the resultant operational costs to regulated institutions. It is also proposed that the MoUs between regulators in relation to managing financial stability is published to provide clarity about the division of responsibilities and oversight.	***Treasury agrees with BASA's comment on the need to minimise duplication and the resultant operational costs of regulation and the twin peaks regulatory approach seeks to achieve this. The financial sector regulators, the National Credit Regulator and the Reserve Bank are required to publish MoUs regarding cooperation when performing their functions. See the "Cooperation and Collaboration" chapter of the revised Bill.***
		It is proposed that the funding of the new model, including the new regulatory authorities, the FSOC, Council of the Financial Regulators, and the FST, is the subject of consultation between NT and industry as soon as possible. It is imperative that costs are kept low, and levies do not add to the cost base of regulated institutions, and ultimately financial customers.	***Noted.***

Geof Mortlock	25(3)	I suggest that the Bill also require the Memorandum of Understanding to be publicly disclosed - eg on SARB and regulator websites.	***The financial sector regulators, the National Credit Regulator and the Reserve Bank are required to publish MoUs regarding cooperation when performing their functions. See the "Cooperation and Collaboration" chapter of the revised Bill.***
Deloitte	26(1(a)	This sub-regulation imposes an obligation of financial stability on "other organs of state". Please could you clarify how this will be mandated and whether this imposes an obligation on the other organs of state to set up a financial stability function?	***It is up to the other organs of state to determine how they would set up their structures and ensure that they have regard to the implications of their actions on financial stability.***

CHAPTER 3: Prudential Authority

Reviewer	Section	Issue	Decision
SAIA	General	It is proposed that obligations of the PA and the FSCA be aligned. For example: The Bill prescribes in clause 29(1)(d) that the PA must *"co-operate with the Council for Medical Schemes in the handling of matters of mutual interest"* and in clause 53 (1) (d) it requires the FSCA to *"co-operate with the Council for Medical Schemes."* Similarly clause 53.(1) (l) sets out that the FSCA must- *"perform any other function assigned or delegated to the Financial Sector Conduct Authority in terms of any other provision of this Act, a financial Sector law or other legislation"* but there is not a counter obligation placed on the PA. Clarity is required why there isn't such an obligation on the PA.	***Comment noted. The revised Bill provides better alignment and harmonisation between the functions of both the Prudential Authority and the Financial Sector Conduct Authority.***
		In addition there is a concern that Clause 27(3) exempts the PA from the Public Finance Management Act and the requirements thereof. From discussions with the NT it is understood that the reasoning behind the PA not being a public entity in terms of the PFMA is to enable it to operate within the administration of the Reserve Bank. We highlight that the exemption from the PFMA holds consequences and suggest that the Bill should adequately provide for transparency, accountability and sound financial management of the PA equal to the obligations that the PFMA places on public entities.	***Treasury considers transparency, accountability as well as sound financial management to be important in the proper functioning of both the Prudential Authority (PA) and the Financial Sector Conduct Authority (FSCA). The revised Bill adequately provides for transparency, accountability and sound financial management for both the PA and the FSCA, taking into consideration the fact that the PA will be operating under the administration of the Reserve Bank. See revised Bill.***
Part 1: Establishment, Objectives and Functions			
Deloitte	27(2)	Sub-regulation states that the Prudential Authority is a juristic person but does not go any further than this. We do not believe that this adequately addresses the status (subsidiary or otherwise) of the Prudential Authority in the Reserve Bank. Given that there is no clarity on how the Prudential Authority will be structured this could place the equivalency of the two authorities in jeopardy.	***The PA as a juristic person can act in its own name, enter into contractual agreements, sue or be sued separately from the Reserve Bank. While the PA will operate within the administration of the Reserve Bank, these are two distinct entities with separate legal identities in law and have different mandates***

		Furthermore, it is not clear what governance arrangements will be put in place to prevent any conflicts of interest arising between the Reserve Bank's primary objective of price stability and the explicit mandate of financial stability as conferred upon the Reserve Bank by this bill. We recommend that this gets clarified in the bill.	***and objectives.*** ***The mandate of the Reserve Bank for financial stability will be supported by the Financial Stability Oversight Committee while the Reserve Bank mandate for price stability will be supported by the Monetary Policy Committee. These are two distinct committees with different compositions.***
28. Objective of Prudential Authority			
Strate	28*(a)*	Insert "*investors*" in 28*(a)* (see similar wording in 12(2)*(c)*).	***Disagree. Persons making a financial investment are covered under the definition of a "financial customer". See the revised Bill.***
BASA	28(a)	BASA proposes the following revisions: *28.(a) protect financial customers ~~, including depositors and policyholders,~~ against the risk that those financial institutions may fail to meet their obligations;*	***Agree. See the revised Bill.***
PASA	28(a)	There is no need to include "including depositors, policyholders and investors" after 'financial customers', as we believe such aspects are contained in the definition of "financial product" and "financial service" (which is incorporated in the definition of financial customer); *28.(a) protect financial customers ~~, including depositors and policyholders,~~ against the risk that those financial institutions may fail to meet their obligations;*	***Agree. See the revised Bill.***
JSE	28 & 29	While the objectives and functions of the PA extend explicitly to market infrastructures, they do not appear to extend to clearing members, authorised users or participants as defined in the FMA, as the objectives and functions refer to financial institutions that "*provide financial products*" and those particular financial institutions do not provide financial products, they provide financial services. However, s94(1)*(b)* refers to prudential standards made by the PA to ensure that "*members of market infrastructures*" will be able to comply with their obligations to each other and financial customers. As "*members of market*	***Agree. The revised Bill has been amended to provide for the PA to issue prudential standards to financial institutions that provide "securities services". In addition, the definition of "financial service" clarifies that "securities services" provided (i.e. by users, members, participants, issuers, nominees, etc.) The revised Bill gives the discretion to the PA to make standards in respect of financial institutions that provide financial products or securities services etc.***

		infrastructures" is undefined in both the FSRB and the FMA, the intention of the drafters in relation to authorised users, clearing members and participants is unclear. If "*members of market infrastructures*" is intended to refer to authorised users, clearing members and participants then the objectives and functions of the PA, as currently drafted, would not permit the PA to issue prudential standards in relation to those particular financial institutions. Given the systemic risk posed by clearing members, the JSE would support the authority of the PA extending to clearing members (but refer to our commentary – "**Standards in relation to the SRO model**"). The JSE would however argue that it is neither appropriate nor in line with international practice for all categories of authorised users to be classified as financial institutions undertaking activities that need to be regulated by the PA. Should "*members of market infrastructures*" be interpreted to include all authorised users, this would lead to an incongruous outcome where authorised users are subject to oversight by the PA, but other financial service providers, performing similar activities to the authorised users, are not subject to supervision by the PA. For example, an execution-only broker would not require prudential oversight, and including them within the ambit of the PA would be inconsistent with s3(1)*(a)*(ii) where "*dealing*" and 3(1)*(b)* where "*intermediary service*" are deliberately captured as financial services and therefore not within the ambit of the PA. In terms of the FSRB the execution-only brokers will be subject to the regulatory authority of the FSCA and the PA, with additional prudential (safety and soundness) requirements that are not applicable to other financial service providers performing similar activities. This will result in an unequal playing field and will also create the opportunity for regulatory arbitrage. The JSE therefore recommends that s28 of the FSRB be amended to refer also to the "*safety and soundness of financial institutions that provide clearing services*" or to the "*safety and soundness of clearing members*" but for the reasons mentioned above, it would not be appropriate to extend it more broadly to other "*members of market infrastructures*".	

Geof Mortlock	28	Again, is there a clear distinction between 'safety' and 'soundness', or might 'soundness' be sufficient?	***Disagree. The use of "safety and soundness" is consistent with Principle 1 of Basel's Core Principles for Effective Banking Supervision.***
World Bank	28	Consideration may be given to expand the Reserve Bank's and the PA's objectives to include the promotion of competition and/ or an efficient financial system, acknowledging however that these objectives should not interfere with the overall objective as defined in the respective clauses. See for example the Australian Prudential Regulation Authority.	***Noted. One of the functions of the PA is to support sustainable competition in the provision of financial products and services through collaboration with the Competition Commission which has a mandate for competition issues. The efficiency of the financial system is incorporated under the "Interpretation, object and administration of this Act".***
29. Functions of Prudential Authority			
BASA	29	General concerns about confidentiality, POPI, and the exchange of information with other jurisdictions. This should be aligned with the applicable sections of the POPI Act in respect of MoUs with foreign regulators and the sections dealing with cross-border information flows.	***Comment noted. See the section dealing with information sharing arrangements in the revised Bill.***
JSE	29	Many of the functions of the PA overlap with the functions of the FSCA. However, the wording in the two sections can differ considerably and the reason for this is not obvious. For example, s53(1)(c) and (d) are similar to but worded differently to s29(1)(c) and (d). We would recommend harmonising the wording where appropriate to do so.	***Comment noted. The revised Bill provides better alignment and harmonisation between the functions of both the PA and the FSCA.***
PASA	29	This section should include *"… all financial institutions that provide financial products, financial services, or are … ".* The current clause does not include financial institutions (such as banks) that participate in the payment system. Alternatively, it could include reference to "payment system participants".	***Financial institutions such as banks that provide financial products fall under the scope the referenced clause hence the PA has jurisdiction for regulation and supervision. The PA will not have jurisdiction on the 'payment system participants' by virtue of their participation in the payment system but to the extent that the 'payment system participant' are financial institutions that provide products, the PA will have jurisdiction over them, for regulation and supervision. See revised Bill.***
Transaction Capital	29	Credit providers should be excluded from the definition of "financial product providers" for purposes of chapters 3, 5 and 7 (Part 2). The Prudential Authority	***Disagree. Banks account for the majority of the credit market and given the interconnectedness of the***

		should not regulate and supervise credit providers from a prudential perspective as it is unlikely that credit providers will cause systemic risk.	***financial system, it is prudent to have the PA having jurisdiction over the credit providers.***
BASA	29(1)(d)	BASA proposes the following revisions: *29(1)(d) co-operate with the Council for Medical Schemes and other government departments in the handling of matters of mutual interest;*	***The revised Bill establishes the Financial System Council of Regulators as a mechanism to facilitate co-operation and collaboration between the financial sector regulators and other government departments that have a role/interest in the financial services sector.***
BASA	29(1)(e)	One of the functions of the PA is to co-operate with and assist the FIC in preventing and combating financial crime. Will the Reserve Bank's current monitoring of and overseeing AML and financial crime pass to the PA or would it pass to the FSCA?	***The PA is required to co-operate with and assist the Financial Intelligence Centre. Both the PA and the FSCA may make standards aimed at reducing the risk that the financial institutions and key persons engage in conduct that is or contributes to financial crime.***
Standard Bank	29(1)(e)	It is proposed that the Prudential Authority (PA) and the Financial Conduct Sector Authority (FSCA) are required to enter into cooperation agreements or MoUs with the FIC and the Reserve Bank's Financial Surveillance Department; specifically in relation to the requirement in sub-clauses 29(1)(e) and 53(1)(e) to "*co-operate with and assist the Financial Intelligence Centre in preventing and combating financial crime.*"	
Geof Mortlock	29(1)(f)	I suggest inclusion in this list of a further objective - to promote the efficiency of the financial system.	***Noted. The efficiency of the financial system is incorporated under the "Interpretation, object and administration of this Act".***
BASA	29(1)(f)	Competition Commission should also be defined for consistency, as the Competition Commission established in terms of section 19 of the Competition Act.	***Agree. See the definition section of the revised Bill.***
Melbourne Law School	29(1)(g)	We commend the South African authorities on the inclusion of "financial inclusion".	***The compliment is welcomed.***
BASA	29(1)(h)	The term "financial sector regulation" is not defined in the Bill. *29(1)(h) regularly review the perimeter and scope of financial sector law ~~financial sector regulation~~, in particular with respect to section 2(1)~~(a)~~, and*	***The term 'financial sector regulation' has a general meaning and there is no need to define it in the Bill.***

		take steps to regulate risks identified that could undermine the achievement of its objective and functions.	
ASISA	29(1)(h)	*29(1)(h) regularly review the perimeter and scope of financial sector regulation, in particular with respect to section 2(1)~~(a)~~, and take steps to regulate risks identified that could undermine the achievement of its objective and functions;*	***Noted.***
Deloitte	29(1)(h)	Sub-regulation contains a reference to sub-regulation 2(1)(a). Sub-regulation 2(1)(a) defines a financial product as "a participatory interest in a collective investment scheme". We do not believe that the reference to sub-regulation 2(1)(a) is correct in this section.	***Noted.***
ASISA	29(2)	It is submitted that reasonability should be incorporated in this clause. The Prudential Authority should not be able to do anything else, the provision is too wide. It should be limited to anything reasonably necessary to achieve its objectives. *29(2) The Prudential Authority may do anything ~~else~~ reasonable necessary to achieve its objectives, including–* *(a) co-operating with its counterparts in other jurisdictions; and* *(b) participating in relevant international regulatory, supervisory, financial stability and standard setting bodies.*	***Agree. See revised Bill.***
Melbourne Law School	29(3)	*29(3) When performing its functions, the Prudential Authority must, to the extent that is practicable, have regard to international regulatory and supervisory standards set by bodies referred to in subsection (2)(b), while bearing in mind South African circumstances, or any obligations that attach to South Africa as a High Contracting Party to any International Treaty Agreements .*	***Noted. There is no need to specify the obligations under International Treaty Agreements.***
Melbourne Law School	29(4)	We note the reference to "risk-based approach" in subsection (4). We would suggest that this be reviewed in light of the rejection of a principle of risk based regulatory approach now in vogue in the United Kingdom, and the severe failures that a principles of risk based approach caused in the United Kingdom. At the very least we suggest amending this section to include as follows:	***Disagree. See revised Bill.***

		"Prudential Authority must have a primarily pre-emptive, outcomes focused and risk- based approach, in combination with a standards-based approach, where appropriate".	
ASISA, Melbourne Law School	29(4)	ASISA members propose that clause 29(4) should apply to clause 29(1) as a whole and not only clause 29(1)(a). There is no apparent rationale for limited application. *29(4) When performing its regulatory functions referred to in subsection (1)~~(a)~~, the Prudential Authority must have a primarily pre-emptive, outcomes focused and risk-based approach, in terms of which it focuses its resources in areas that pose significant risks to the achievement of its objective.*	***Noted. The cross-referencing is deleted from the revised Bill.***
Melbourne Law School	29(5)	We note that subsection (5) requires the Prudential Authority to perform its functions without fear, favour or prejudice. We commend the South African authorities for this section, but query whether this ought to be reinforced by provisions that expressly indemnify regulators against personal liability for any actions they take in pursuance of their legitimate goals?	***Noted.***
Part 2: Governance			
World Bank	30	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 FSCA in respect of matters such as their objectives, governance arrangements, administrative powers and membership of the FSOC. This would be similar to the approach taken in Australia in relation to the Australian Prudential Regulation Authority (APRA). It is also recommended to review the proposed structure against the Basel Committee Principles on Banking Supervision (see especially Principle 2 and also Principle 1).	***The PA will be an independent juristic person with a clear mandate and objective. However, this entity will operate within the administration of the Reserve Bank. South Africa has adopted a slightly different model from the Australian model. See revised Bill.***
Deloitte	30	We are of the view that this sub-regulation is insufficiently prescriptive and that any governance arrangements would be dependent on the juristic persona of the Prudential Authority and the governance arrangements within the Reserve Bank to prevent conflicts of interest arising between the Reserve Bank's primary objective of price stability and the explicit mandate of financial stability. See our earlier point in this regard. We recommend that the status of the Prudential Authority be clarified in the bill and that appropriate governance arrangements	***Comment is noted. See Treasury's response to your earlier comment on this matter.***

		be clarified depending on the ultimate status of the Prudential Authority in the Reserve Bank.	
31. Chief Executive Officer			
Geof Mortlock	31	As drafted, this suggests that the CEO of the PA must be a DG of the SARB. I defer to those who have worked on this issue, but I am unsure whether this provides an optimal model for appointing a CEO. In this regard: - Is it sensible to constrain the selection of the CEO to a persons who are DGs of the SARB? Might this have the effect of preventing the selection of the best person for the job at the time? One would normally go through a robust selection process via advertising nationally and internationally and/or a targeted executive search process to find the best candidate for the job. The current wording would preclude that process, given that the CEO must already be a DG of the SARB. - I would question the appropriateness of the CEO of the PA also holding office as a DG of the SARB. This seems to me to have the potential to compromise the ability of the CEO to focus solely on the task of running the PA, given that he/she would also have responsibilities as a DG of the SARB. It would also raise issues of operational independence and the ability to manage conflicts or tensions of interest. I therefore suggest that further consideration be given to the process for appointing the CEO. One option would be for the CEO to be appointed by the Governor, after consultation with the Minister, and where the person appointed must have the requisite skills, experience and expertise to perform the functions of CEO, but need not be an executive of the SARB. Once appointed as CEO, I would have thought it appropriate that he/she would not also hold office as an executive the of SARB.	***Noted. The revised Bill provides for the Governor with the concurrence of the Minister to appoint a Deputy Governor who has appropriate expertise in the financial sector as the Chief Executive Officer of the Prudential Authority. The appointment of a Deputy Governor will be as per the procedure of the SARB Act. The CEO is responsible for the day-to-day management and administration of the PA.***
		I also suggest that consideration be given to the establishment of a Deputy CEO position or possibly a three-member executive comprising one CEO and two Deputy CEOs. This would lessen the risk of excessive dominance by one person - i.e. a 'single decision-maker' arrangement.	***Disagree. The revised Bill provides for the appointment of a senior staff member of the PA or a Deputy Governor to act as the CEO when the CEO is absent from the office or is unable to perform the functions of office.***

		Might it be appropriate for the Bill to establish the criteria/qualifications that a person must meet in order to be appointed as CEO - eg requisite experience, expertise, etc?	***Agree. The revised Bill provides for the appointment of a Deputy Governor who has appropriate expertise in the financial sector as the CEO of the PA.***
SAIA	31(3)	Clause 31 (3) provides that a disqualified person may not be appointed to hold office as the CEO of the PA. Clause 57 (1) provides for the limitation on persons who may not be appointed to hold office as Commissioner or Deputy Commissioner of the FSCA in that such a person may not be appointed *"if the person–* *(a) is a disqualified person; or* *(b) is not permanently resident in the Republic."* Clarity is requested on the requirement of the Commissioner and Deputy Commissioner of the FSCA to be permanently resident in the Republic, but there is not a similar obligation on the CEO of the PA. It is proposed that these provisions be aligned to be applicable to both the FSCA and the CEO of the PA.	***The criteria for disqualification of persons suitable for appointment as the CEO of the PA and Commissioner or Deputy Commissioner of the FSCA are aligned in the revised Bill.***
32. Term of office of Chief Executive Officer			
Geof Mortlock	32(1)(ii)	Again, I suggest further consideration of the appropriateness of the CEO being a DG of the SARB.	***Disagree. A policy decision has been made for the CEO of the PA to be a Deputy Governor of the Reserve Bank who has appropriate expertise in the financial sector.***
Melbourne Law School	33(2)(d)	Section 33 – Removal from office: in relation to subsection 33(2)*(d)*, we query whether "misconduct" has a statutory definition and, if so, whether a reference to the relevant statute should be inserted. We make the same query in relation to subsections 59(2)*(d)* and 171(1)*(b)* .	***The reference to 'misconduct' has been deleted from the revised Bill. See revised Bill.***
ASISA	33(2)	It is not clear when a person will be considered to have "committed misconduct". Is this any type of misconduct or should there be some level of materiality? See also 59(2)(d) where the FSCA Executive Committee is concerned.	

36. Oversight Committee			
SAIA	36(1)	As proposed under the definition of *"Oversight Committee"* above, it is suggested that the name of the *"Oversight Committee"* be further qualified to avoid confusion with the *"Financial Sector Oversight Committee"* (FSOC). A suggested name to be considered is the *"Prudential Authority Oversight Committee"* (PAOC).	***Agree. The revised Bill now references "Prudential Committee".***
SAIPA	36 (2) &(3)	The independence and objectivity of this committee may be jeopardised if the Chief Executive Officer is a member of the committee who will – among other things – oversee the management and administration of the Prudential Authority headed by the Chief Executive Officer.	***Noted. The "Prudential Committee" is part of the PA and its members (other than the Chief Executive Officer) serve in a non-executive capacity. The CEO is responsible for the day-to-day management of the PA and implements the policies and strategies adopted by the PC.***
BASA	36(2)	In terms of the structure of the PA, the CEO of the PA is also a member of the Oversight Committee. Is it intended that this person holds both an executive and non-executive role? It is also suggested that given the importance of this Oversight Committee, a minimum number of meetings per year should be specified in the Bill.	***Noted. The CEO of the PA is the only member of the "Prudential Committee" that serve in an executive role, the remainder of the members serve on the PC in a non-executive role. The CEO is responsible for the day-to-day management of the PA and implements the policies and strategies adopted by the PC. The revised Bill provides for the PC to meet as often as necessary for the performance of its functions.***
JSE	36(2)	Many of the powers and duties for the Executive Committee of the FSCA and the Oversight Committee of the PA overlap but the wording is different. For example, in terms of s62(j), the Executive Committee of FSCA must exercise powers in relation to the granting, issuing or varying of a license but no similar powers are given to the Oversight Committee of the PA. Furthermore, while powers are granted to the Executive Committee under s62(c) and (d), no similar powers are granted to the Oversight Committee of the PA. We would recommend harmonising the wording where appropriate to do so.	***The governance structures of the PA and FSCA are slightly different. The Prudential Committee is made up of executive (the CEO) and the non-executive members (the rest of the members). The Executive Committee of the FSCA is made up of all executive members. This is the basis of the difference observed in their responsibilities and powers. However, the revised Bill aligns the wording between the two structures, where appropriate.***
Geof Mortlock	36(2)	I suggest that consideration be given to appointing one or more external persons to the Oversight Committee – e.g. persons outside the SARB and PA, who have no conflicts of interest - eg retired bankers, financial academics, etc. This would help to strengthen the governance of the PA and its accountability.	***Disagree. The PA is a juristic entity with a different mandate from that of the Reserve Bank. The Governor and the other Deputy Governors should be seen as external persons to the PA. In addition, they are not involved in the day-to-day running of the PA***

		I also question whether it is appropriate for the Governor and all DGs to sit on the Oversight Committee. If the PA is intended to be operationally independent of the SARB on a day-to-day basis, then arguably the Oversight Committee should comprise a majority of persons who are not employees or officers of the SARB. On matters where the SARB needs to be in control of specific outcomes or actions, such as in relation to SIFIs and systemic events, the Bill appropriately provides the SARB with specific authority over these matters. I therefore suggest that consideration be given to a PA Oversight Committee with some SARB representatives, but where either a majority or a substantial minority of Oversight Committee members are appointed from outside the SARB (eg former bankers, insurers, academics, etc) and a where only one or two of the SARB DGs sit on the Oversight Committee, and where the Governor is not on it.	***and this provides a degree of separation from the PA.***
37. Meetings of Oversight Committee			
Geof Mortlock	37(2)	Again, if the PA is intended to be operationally independent of the SARB on day to day matters, is it appropriate for the Governor to chair the Oversight Committee? Might it be better if the Governor appointed (in consultation with the Minister) an external person to chair the Oversight Committee or for the CEO to chair it?	***Noted. The Governor chairs the Prudential Committee in a non-executive role. See revised Bill.***
Deloitte	37(4)(b)	It is not clear in the bill whether this is a Deputy Governor other than the Deputy Governor who is the Chief Executive Officer of the Prudential Authority. We recommend that this be clarified in the bill in order to comply with good governance principles.	***The point is noted. This has been left to the Governor to decide and it's an issue that can be specified in the procedures that will be determined by the Governor.***
Strate	37(5)	**Alignment of strategies with government's strategy** Please note the intention of the legislator in 76(2)*(f)* with regard to "*interaction with each other in relation to strategic directions*". Therefore, it is submitted that where strategy is adopted, the both Authorities should be invited to attend – change in clause 37(5) "~~*may*~~ *invite*" to "*must invite*".	***Disagree. The word "may" has been used in order to provide discretion to the Chair of the meeting to invite other persons who are not members of the Prudential Committee. There are other means of ensuring cooperation and coordination between the authorities. See revised Bill.***

		Please indicate how these strategies would be linked to the government's strategy or policy decisions. Although the independence of the Authorities is essential, it seems as if the connecting factor is missing in the drafting. It is not clear if only a reporting avenue is created in the Bill (see 76(3)). Should this link be established through the Financial Sector Inter-Ministerial Council? (84(2)*(a)*).	***The revised Bill provides for the PA and FSCA to formulate and adopt regulatory strategies to give general guidance to the Authorities in the achievement of their objectives and the performance of its regulatory function. Before such regulatory strategies are adopted, the Authorities must invite comments from the Minister and the other regulators. It is through this process that Government's strategy or policy decisions can be fed or aligned with the Authorities' Strategies.***
Strate	38(1) – (5)	**Disclosure of interest; duties of staff members** Drafting style: consider whether these clauses have general application and could be moved to a separate part applicable to all to avoid repetition.	***Agree. See revised Bill.***
ASISA	38(1)	It is suggested that the provisions in respect of disclosure of interests as applicable to members of the Oversight Committee also be made applicable to persons invited or allowed to attend meetings of the Committee in terms of clause 37(5). ***38*** *(1) A member of the Oversight Committee must disclose, at a meeting of the Committee and a person contemplated in section 37(5) or in writing to each other member, any interest that–* *(a) …….; or* *(b) ……*	***Noted. Treasury considers this to be onerous as well as inappropriate to require disclosure of interests by invitees, especially since invitees do not have any voting power in the FSOC.***
Deloitte	38(1)	This sub-regulation makes provision for a member of the Oversight Committee to declare conflicts of interest. We are of the view that this section should be amended to include attendees as well.	
ASISA	38(6)	*38(6) The Chief Executive Officer must take all reasonable steps to ensure that members of the Prudential Authority's staff and other persons performing ~~or~~ its functions or exercising its powers make timely, proper ……..*	***Noted.***
41. Governance and other committees for Prudential Authority			
SAIPA	41	Minimum criteria for membership of the committees should be included, e.g. in terms of qualification and experience.	***Disagree. There is no need to specify the qualifications and experience of membership of the***

			committees. The revised Bill pronounces on the objective of the committee(s).
Strate	41(1)*(a)* & *(b)*	Change in 41(1)*(a)* and 41(1)*(b)* upper cap to lower cap in "*committee*".	***Disagree. However the 'Oversight Committee' has been renamed to 'Prudential Committee' in the revised Bill.***
BASA	41(1)(a) and (b)	*41(1) The Oversight Committee must establish committees with the following functions:* *(a) reviewing, monitoring and advising the Oversight Committee on the risks faced by the Authority and its plans for managing those risks;* *(b) advising the Oversight Committee on measures that must be taken to ensure that the Authority complies with its obligations in relation to auditing and financial management.*	***Agree with the principle. However the 'Oversight Committee' has been renamed to 'Prudential Committee' in the revised Bill.***
Geof Mortlock	41(3)	Does this compromise the operational independence of the PA?	***Treasury doubts that the operational independence of the PA will be compromised. This is in view of the fact that majority of the committee members may not be members of staff of the PA or the Reserve Bank.***
Deloitte	41(3)	In respect of the governance arrangements for the Prudential Authority, sub-regulation 41(3) allows for the Reserve Bank risk and audit committees to act as the risk and audit committee of the Prudential Authority. We do not believe that this provides the Prudential Authority with the requisite level of operational independence from the Reserve Bank. We recommend that the Prudential Authority set up its own risk and audit committees.	***Noted. The PA is not obliged to use the Reserve Bank committees, but may do so. Furthermore, the revised Bill provides for such committees to be constituted by a majority of committee members who are not members of staff of the PA or the Reserve Bank.***
BASA	41(4)	*41(4) A committee's membership is determined by the Oversight Committee, which may include a member of the Prudential Authority's staff, and persons who are not members of the Prudential Authority or its staff.*	***Agree with the principle. See revised Bill.***
Deloitte	41(6)	Sub-regulation 41(6) dictates that the audit and risk committees should be chaired by a person other than the Governor, a Deputy Governor, the Chief Executive Officer or a staff member of the Prudential Authority". It is not clear whether these committees could therefore be chaired by anyone from the Reserve Bank or National Treasury. We recommend that the independence	***Noted and agree on need for independence of the governance committees. Clauses crafted to make committees as neutral as possible so that they may serve for the required oversight.***

		requirements be clarified in this section.	
ASISA	41(10)	Disclosures of interests should also apply to sub-committee members ***41**(10) Section 38 applies to members of committees established by the Oversight Committee in the same manner that it applies to members of the Oversight Committee.*	***Agree. See revised "Disclosure of interest" section of the revised Bill.***
ASISA	42(1)	It is suggested that the provisions in respect of duties as applicable to members of the Oversight Committee also be made applicable to persons invited or allowed to attend meetings of the Committee in terms of clause 37(5). ***42**(1) Each member of the Oversight Committee and a person contemplated in section 37(5) has the following duties, in addition to the member's other duties:* *(a) to act honestly in all matters related to the Prudential Authority;* *(b) to exercise powers, and discharge duties–* *(i) in good faith;* *(ii) for a proper purpose; and* *(iii) with the degree of care and diligence that a reasonable person in the member's position would exercise.* *(2) A person who–* *(a) is a member of the Oversight Committee; ~~or~~* *(b) obtains information because the person is or has been a member of the Oversight Committee; or* *(c)is a person as contemplated in section 37(5);* *must not ~~use~~ abuse that position or information to–* *(i) ……..;* *(ii) ……; or* *(iii) ……..* *(3) ………*	***Noted. This will not be inappropriate and unnecessary especially given that the invitees do not have any voting power in the FSOC.***
43. Supervisory strategy			
SAIPA	43(1)	The Financial Sector Conduct Authority, the National Credit Regulator and the Minister can only comment on the strategy. Given the key importance of the supervisory strategy for the efficient and effective operation of the Prudential Authority, it is recommended that the Minister formally approve the strategy.	***There is no need for the Minister to formally approve the regulatory strategy. The PA should be able to formulate its regulatory strategy and achieve its objectives.***

Geof Mortlock	43(2(d)(iii)	Might it be appropriate to require the Oversight Committee to set out Key Performance Indicators (KPIs) in relation to its functions, and to oblige the Committee to provide reports, at least annually, to Parliament or the Minister, and publicly released, setting out its performance against these KPIs?	***The revised Bill provides that the Governor and the Deputy Governor appointed as the Chief Executive Officer must agree, in writing, on the performance measures that will be used to assess the Deputy Governor's performance as the Chief Executive Officer and the level of performance to be achieved against those performance measures.*** ***The Chief Executive Officer must submit an annual report on the activities of the PA, the financial statements for that financial year and the report of the auditors on the financial statements to the Minister within five months after the end of each financial year, for tabling in the National Assembly.***
Deloitte	43(3)	Sub-regulation 43(3) makes provision for the supervisory strategy to be reviewed by the Oversight Committee at least once every three years. We recommend that this be changed to every year in view of the rapid rate of regulatory change and the need to ensure that regulatory practices remain relevant and current and that they keep pace with the level of change in the financial services sector.	***Agree. See revised Bill.***
44. Delegations			
SAIA	44(3)(a)	This clause empowers the CEO in writing to delegate *"any power or duty that the CEO may exercise or perform in terms of a financial sector law, except this power of delegation, to–* *(a) a member of the staff of the Prudential Authority"* This is set to include contractors and secondees. A concern is raised that these powers of delegation may be too wide and impractical to monitor or control, especially when delegated to contractors and secondees who are not under the direct management of the CEO or the PA.	***Noted. However, delegation does not absolve the CEO from the responsibility of the delegated powers. The CEO should use his/her discretion when delegating such powers.***
Geof Mortlock	44(3)(b)	Wouldn't delegation of powers or duties to the Reserve Bank run counter to the notion that the PA is operationally independent of the SARB?	***The CEO may delegate and the Bill gives the CEO the discretion to do so and reasonableness will be applied when making such delegations.***

Part 3: Staff and Resources			
45. staff and resources			
SAIPA	45(1)	This clause is very vague and may give the Prudential Authority excessive power.	***Determination of resources is a fundamental requirement for the independence of the PA.***
Geof Mortlock	45(2)(b)	What about engaging persons as staff? Presumably the PA will not be reliant solely on the SARB for its staffing, especially beyond an initial start-up phase.	***The Reserve Bank must provide the PA with the personnel, and other resources. The revised Bill provides for the PA to engage persons on contract otherwise than as employees.***
ASISA	45(3)	Clause 71 obliges the FSCA to agree performance measures in writing. It should apply similarly to the PA. *45(3) The Prudential Authority must ~~may~~, when accepting a secondment of a person or engaging a person as a contractor, agree in writing with the person the performance measures that will be used to assess the person's performance, and the level of performance that must be achieved against those measures.*	***Agree. The relevant section has been amended to capture the principle. See the "staff and resources" section of the revised Bill.***
SAIPA	46	The section should clarify whether the Reserve Bank will provide these resources at no cost or for a fee, and if so how that fees is determined (unless this is what is referred to in 48(1)(a).	***The PA is being established under the administration of the Reserve Bank. However, the PA as a juristic person will have the power to defray its operational costs from the fees and levies that it will raise and separately account to the Minister and Parliament. The issue around how the Reserve Bank will recover its costs to the PA is something that will be dealt with between the Reserve Bank and the PA as two juristic entities.***
Strate	47(1)	**Disclosure of interest; duties of staff members** Drafting style: consider whether these clauses have general application and could be moved to a separate part applicable to all to avoid repetition.	***Noted. See revised Bill.***
ASISA	47(1)(b)	***47***(1) A person who– (a) is a member of the staff of the Prudential Authority; or (b) obtains information because the person is or has been a member of the staff of the Prudential Authority;	***Disagree. See revised Bill.***

		must not ~~use~~ abuse that position or information to–	
48. Duties of Chief executive Officer in relation to financial affairs of Prudential Authority			
Geof Mortlock	48(1)(a)	Might it be appropriate for the CEO to recommend the levies and charges to the Oversight Committee for their determination, rather than the CEO making that determination? And might it be appropriate for the determination of levies and charges to be subject to some form of external review or approval - eg from the Minister? Also, should there be an obligation to consult stakeholders on proposed fees and charges before they are determined?	***Agree. See revised Bill.***
Deloitte	48(1)(a)	In respect of the funding arrangements for the Prudential Authority, we are of the view that sub-regulation 48(1)(a) does not adequately clarify the funding mechanisms particularly when one takes into account the fact that non-bank financial product providers will also be funding the Prudential Authority which represents a departure from the status quo. We are of the view that additional clarity on the funding arrangements should be provided in the bill.	***Noted. See the "Finances, Levies and Fees" chapter in the revised Bill. Further clarity will be provided in the proposed Levies Act (Financial Sector Levies Act).***
SAIA	48(1)(a)	This section provides for the CEO to– *"(a) determine fees and charges for prudential supervision in terms of the Levies Act;"* No further mention is made in the Bill as to who will administer the collection of levies and the distribution of amounts received in respect of levies. Clarity is sought on how levies on behalf of the PA will be collected and distributed, as the CEO is only afforded powers to *determine* fees and charges. In addition, the question is raised as to why there is a difference in the authority to determine fees and charges between the PA and the FSCA.	
		Why in the instance of the PA is it the CEO who holds the authority to determine fees and levies, and not the Oversight Committee, whereas in the instance of the FSCA, in clause 62 (g), the obligation lies with the Executive Committee of the FSCA and not the Commissioner?	***Agree. The revised Bill provides for the CEO to recommend fees and levies for prudential supervision to the Prudential Committee. See revised Bill.***
		The SAIA and its members request the authorities to engage with industry on this aspect to clarify matters around the funding of an effective and efficient new model.	***Noted. The "Finances, Levies and Fees" chapter in the revised Bill and the proposed Levies Act (Financial Sector Levies Act) provide the required clarity.***

Strate	48(1)*(c)*	Delete ~~[fidelity]~~ to align with standard sectoral law terminology.	***Disagree.***
Strate	49	How will the independence of the Prudential Authority be protected if it must report to National Treasury? There is reporting to the Oversight Committee which is an independent body. Please clarify.	***Please note that the chapter establishes the PA as an independent entity and the functions it is able to perform without approval from the Executive. There are some accountability mechanisms that have been put in place that include an annual report to the Minister and Parliament. Treasury is not convinced that this compromises the PA's independence.***
50. Annual reports and financial statements			
SAIA	50(1)	This clause places a broad obligation on the PA to have its financial statements audited and submitted to the NT, and for the CEO to submit the PA's annual report and financial statements to the Minister for tabling in Parliament. There is no similar obligation on the FSCA or any obligation on the FSCA at all to issue an annual report or audit its financial statements. The SAIA proposes that a similar obligation be imposed on the FSCA. In addition, Schedule 4 to the Bill dealing with Laws repealed or amended provides for section 5 of the STIA to be repealed. Section 5 currently places an obligation on the Registrar to submit an annual report to the Minister, which is also to be tabled in Parliament. The repeal of section 5 is not supported if a corresponding obligation is not placed on the FSCA for purposes of producing an Annual report and financial statements as required of the PA. We respectfully submit that an annual report and financial statement constitute important governance information regarding the operational and financial viability of the FSCA.	***While the FSCA is a PFMA entity and is therefore expected to comply with the PFMA requirements, the PA in not hence the need for the provisions to require the provision of financial statements and annual report to Treasury and the Minister for tabling in Parliament.***
Geof Mortlock	50(2)	I suggest that there also be provision for an obligation to report against KPIs and for these to be subject to external audit. It would also be worth considering empowering the National Treasury to commission periodic performance audits of the PA.	***Agree. See revised Bill.***

CHAPTER 4: Financial Sector Conduct Authority

Reviewer	Section	Issue	Decision
Deloitte	General-Chapter 4	Throughout the Bill it is evident that the Financial Sector Conduct Authority and the National Credit Regulator will work together/co-operate in terms of memorandums of understanding, yet will remain two separate regulatory authorities. We have noted that this was also the practice until recently (1 April 2014) in the United Kingdom. At this point the Financial Conduct Authority (FCA) took over the regulation of consumer credit from the now defunct Office of Fair Trading (OFT). Some of the reasons cited for this transfer were: • To bring conduct of business regulation under a single financial regulator; • End confusion for consumers; • Remove duplication for many firms; • Ensure a single strategic regulatory view across retail financial services. It was argued that the FCA would be more effective since it would use its judgment to intervene earlier through its various tools. Given some of these global credit and conduct related developments and rationale provided, could you please provide reasons as to why these two regulatory authorities will remain separate entities and how some of the reasons cited for transfer above, will be addressed in the proposed structure.	***Noted. The MoU provisions are intended to cover some of the areas listed, and attempt to limit duplication to the extent practical. The NCR remains a regulator under the jurisdiction of a separate government department.***
SAIA	General-Chapter 4	There is a risk that the two authorities may yet operate in "silos", which could give rise to confusion where there is an overlap of authority, particularly in respect of aspects of Financial Stability. The provisions on entering MOUs and requiring co-operation and co-ordination requirements are welcomed, but there is a concern that the requirements may not be adequate to address the risk of overlap and regulatory arbitrage. One of the critical factors for the successful implementation of the Twin Peaks model is the quality of co-ordination and co-operation between the two authorities.	***Noted and agreed. Multiple platforms for cooperation and coordination have been provided, including the Financial Stability Oversight Committee on matters of financial stability.***
Part 1: Establishment, Objectives and Functions			
51. Establishment of Financial Sector Conduct Authority			
BASA	51(3)	*51(3) The Financial Sector Conduct Authority is a national public entity for the*	***See revised Bill.***

		purposes of the Public Finance Management Act, and the Commissioner is the accounting officer of the Financial Sector Conduct Authority for the purposes of that Act.	
52. Objective of the Financial Sector Conduct Authority			
BASA	52	There remains concern that the NCR remains outside the FSCA.	***Noted. The focus of the FSR Act is to ensure that strong cooperation and coordination requirements provided for between all regulators. The NCR will be a financial sector regulator for the purposes of Parts 2, 3 and 5 of Chapter 2, and Parts 1, 2 and 3 of Chapter 5 of the revised Bill.***
JSE	52	The objectives of each of the authorities, as currently stated, do not adequately address the role of market infrastructures in the South African financial markets; in particular the functions that licensed market infrastructures are required to perform in terms of the FMA, and their role as front-line regulator in relation to their authorised users, clearing members or participants ("users"). **Objectives of the FSCA** Specifically, the objective of the FSCA (s52) is to protect "*financial customers*" who are defined as persons "*to or for whom a financial product or a financial service is offered…*" where the definition of "***financial service***" includes "*securities services*" provided by a regulated person as defined in the FMA. Market infrastructures offer neither "*financial products*" nor "*financial services*" in relation to their users, and therefore, it is the JSE's view that s52, as currently drafted, would not be applicable to market infrastructures. Similarly, s95(1)*(c)* states that the FSCA may make conduct standards with respect to the conduct of market infrastructures, "*provided that conduct has a material impact on a financial customer*". Again, authorised users, clearing members and participants are not "*financial customers*" of a market infrastructure. Even where a market infrastructure does offer a "*financial service*" as defined, for example, the calculation of a financial benchmark, it is the JSE's contention that this would be provided as part of its licensed functions in terms of the FMA,	***The definition of financial service clarifies that securities services provided (i.e. by users, members, participants, issuers, nominees, etc.) are a financial service, while functions (i.e. authorisation, supervisory functions etc.) required to be performed by the market infrastructure in terms of the FMA are not a financial service. However, members of and issuers on market infrastructure fall within the definition of financial customers, and conduct standards can therefore be set in this regard.*** ***The definition of financial customer has been amended to include users of market infrastructure. The objectives of FSCA extend to financial institutions (including market infrastructures) and the FSCA can make conduct standards in respect of those institutions including the conduct of MI in relation to their members, and to support market integrity.*** ***While not named explicitly as a financial service, its is intended that the calculation of a financial benchmark may be designated as a financial service by the Minister.***

		and not as a "*financial service*" offered to a "*financial customer*". We would suggest that the clear delineation in the FMA between the "*functions*" that a market infrastructure is required to perform and the "*financial services*" provided by users of market infrastructure be captured in the FSRB to avoid confusion and to ensure that the FSCA's objectives extend to market infrastructures.	
Geof Mortlock	52(a)&(b)	With objectives (a) and (b), it may be more realistic to express these in terms of "seeking to ensure ..." and "seeking to enhance ..."	***No longer refer to 'ensure'***
Geof Mortlock	52(c)	Need to ensure that the FSCA has the necessary powers to meet these objectives.	***Agreed. It is intended that this objective be achieved in at least four ways: coordinating relevant stakeholders in a coherent education strategy, testing effective education methods, directly running education campaigns, and considering the extent that disclosure can educate and inform. Supporting powers include those related to data collection, the setting of standards, and monitoring and enforcement.***
Strate	52*(c)*	**Financial education programs** The role of the FSCA to provide not only "*financial customers*", but also "*potential financial customers*" and "*general public*" with financial education is very wide and far-reaching. The question is (i) who should take the responsibility – the government, regulators or industry; and (ii) who should pay? If this task is solely placed on the shoulders of the FSCA, the necessary funding should be made available. However, if the FSCA is to receive the money from the government, it would no longer be an independent regulator. If the money must come from the levies, accountability would become a huge concern. This objective will be costly and the full costing impact has not been shared with the industry. There is not enough clarification on the implementation plan. If government, regulators and industry must all contribute, clarification is required. The wording in the Bill is too vague.	***The draft market conduct policy framework published along with the FSR Bill does elaborate on the objective of the conduct regulator in relation to financial education. There are currently structures in place including government, industry and the regulator, aimed at driving financial education. These will continue and be further developed, in broad consultation with relevant stakeholders.***

ASISA	52(c)	*52(c) providing ~~financial customers and potential financial customers with~~financial education programs, and otherwise promoting financial literacy and financial capability.* It is suggested that the words "financial customers and potential financial customers with" be deleted. Purely for reference purposes, note that the Financial Services Board Act, in section 3 thereof, provides that the functions of the Board include "providing, promoting or otherwise supporting financial education, awareness and confidence regarding financial products, institutions and services". In other words, the FSB Act is not limited to "providing" but also extends to promoting or otherwise supporting. One of the aims of the FSCA should be to ensure that there is a sound and sustainable financial services industry.	***Noted. Disagree with deletion as should be clear for whom financial education is intended, especially to clarify that it is for potential customers as well as existing customers.*** ***Objective does include 'otherwise promoting' so is not limited to providing. As an objective, it remains as stated.***
Deloitte	52 & 53	The Financial Sector Conduct Authority does not have an objective to assist in maintaining financial stability. This is unusual especially in light of its responsibilities for the licencing of Central Counter Party Clearing Houses etc.	***Agree; included as an objective***
World Bank	52	The FSCA's objectives could usefully include promoting the stability and resilience of the financial system (for example, through the standards relating to over-indebtedness). This would be in addition to the current function of cooperating with the Reserve Bank and the FSOC). The FSCA's objectives could also usefully include promoting effective and sustainable competition in the interests of financial customers. Although promoting sustainable competition is currently enumerated as a function of both the FSCA and the PA, it should probably be an objective, leaving cooperation with the Competition Commission as a "function" (although note later comments querying the necessity of the cooperation and collaboration functions of the FSCA given the specific obligations in Chapter 6). Promoting competition could also be added as an objective of the Act in clause 6;	***Agree; included as an objective*** ***The Competition Commission has primary responsibility for competition matters in South Africa. The FSCA should therefore support the Competition Commission in this regard, and promote competition in the exercise of its responsibilities, especially in order to improve financial customer outcomes.***
53. Functions of Financial Sector Conduct Authority			
JSE	53	Many of the functions of the PA overlap with the functions of the FSCA. However, the wording in the two sections can differ considerably and the reason	***Agreed and refined accordingly***

		for this is not obvious. For example, s53(1)(c) and (d) are similar to but worded differently to s29(1)(c) and (d). We would recommend harmonising the wording where appropriate to do so.	
World Bank	52	Both the FSCA and the PA have functions relating to the regulation and supervision of financial institutions under financial sector laws. Although the obligations are expressed slightly differently, and the regulators have different objectives, this approach is likely to cause some confusion as to who is the responsible agency and be burdensome for the financial institutions concerned. This issue is also reflected in the fact that both the FSCA and the PA appear to have overlapping powers to issue directives to a financial institution in respect of the conduct in relation to financial products. Is the intent that both agencies will be able to supervise the same institutions in respect of the same financial conduct laws? More specifically, is the PA to have regulatory and supervisory responsibilities in respect of financial institutions regardless of whether they pose a prudential risk?	***The functions of the PA and FSCA have been refined to align language where appropriate.*** ***The regulators are intended to each have scope of jurisdiction over the whole financial system, but for different purposes – safety and soundness versus fair conduct. The law is deliberately flexible to provide for ensure a full suite of powers to both regulators, and acknowledging that there may be overlap in these powers (even if there is not overlap in mandate), provide for joint standards.*** ***In relation to the current sector laws, the PA will have responsibility for prudential aspects, and the FSCA for conduct aspects. The PA is intended to apply a risk-based approach to determining which financial institutions bring prudential risk to the system, and the extent of that risk. It is able to delegate the front-line supervision of prudential risk to the FSCA (as may be sensible in the instance of financial advisors and administrators).***
PASA	53(1)(a)	This section refers to “financial institutions in accordance with financial sector laws”. The definition of “financial institutions” includes persons licensed in terms of the NPS Act. Should the words “and the National Payment System Act” not be included after the words “financial sector laws” in this section? In essence, it is suggested that the FSCA should supervise retail conduct (i.e. conduct that materially impacts on consumers) and therefore the FSCA’s role in respect of the NPS Act should thus be limited to retail conduct. Alternatively,	***References to the payments system and NPS Act have been streamlined consistently throughout the Bill.*** ***The definition of financial service includes payment service; financial institutions therefore include payment service providers. The definition of payment service relates to payments between financial customers.*** ***The FSCA can set standards relating to payment services with the agreement of the Reserve Bank***

		Section 29(1)(a) makes it explicit that it is the function of the PA to 'regulate and supervise…all financial institutions that are market infrastructures and payment system operators.' It is suggested that a substantively similar clause is inserted into sub-clause 53(1)(a) dealing with the functions of the FSCA, but again limited to retail conduct. ***53****(1) In order to achieve its objective, the Financial Sector Conduct Authority must–* *(a) regulate and supervise the conduct of financial institutions in accordance with the financial sector laws and the National Payment System Act , to achieve the objective of the Authority;*	***The NPS Act has been removed as a financial sector law, given that it remains the responsibility of the SARB***
ASISA	53(1)(i)	*53(1)* *(a)* *(b)* *……….* *(h)* *(i) regularly review the perimeter and scope of financial sector regulation, in particular with respect to sections 2(1)~~(a)~~ and section 3(1), and take steps to regulate risks identified that could undermine the achievement of its objective and functions;*	***Clause has been amended***
Deloitte	53(1)(i)	Sub-regulation 53(1)(i) contains a reference to sub-regulation 2(1)(a). Sub-regulation 2(1)(a) defines a financial product as *"a participatory interest in a collective investment scheme"*. We do not believe that the reference to sub-regulation 2(1)(a) is correct in this section.	***Clause has been amended***
Geof Mortlock	53(1)(f) & (l)	What if these functions are inconsistent with the statutory functions of the FSCA or create conflicts of interest or of priority?	***Delegations will have limiting parameters; delegation cannot include matters inconsistent with statutory functions of the FSCA***
ASISA	53(1)(f) & (l)	Subparagraphs (1)(f) and (l) appears to be duplicated. On our reading, subparagraph (1)(l) incorporates subparagraph (1)(f) and it is therefore suggested that the subparagraph be deleted. *53(1)*	***Both have been removed; see new 58(3)***

		~~*(f) perform functions that are delegated to the Financial Sector Conduct Authority;*~~ *…….* *(l) perform any other function assigned or delegated to the Financial Sector Conduct Authority in terms of any other provision of this Act, a financial sector law or other legislation.*	
ASISA	53(1)(h)	It is not clear what "support" means in this context.	***Amended; now refers to 'promote'***
BASA	53(1)(i)	*53(1)* *(i) regularly review the perimeter and scope of financial sector regulation, in particular with respect to sections 2(1)~~(a)~~ and section 3, and take steps to regulate risks identified that could undermine the achievement of its objective and functions;* *(j)………*	***Clause has been amended***
ASISA	53(1)(j)	It is noted that "levy" is defined as an "operating levy" or a "special levy", both terms meaning levies defined in the Financial Sector Levies, Fees and Charges Act, 2015. We have not been able to get hold of this "Act" and consequently the implications of this provision are not clear. It is not clear whether the "distribution of amounts" is also meant to be governed by the Levies Act.	***The intention is to pass a Levies Act which will set out levy provisions. This will be consulted upon***
ASISA	53(1)	Whilst sub-section 53(1) expressly tasks the Financial Sector Conduct Authority to *"regulate and supervise the conduct of financial institutions in accordance with the Financial Sector Laws…"*, the FSRB assigns plenary legislative powers to the Authorities , which will enable them to not only regulate "Financial sector laws", but to in fact **make** "Financial sector laws.	***Disagree. The FSRB does not assign plenary legislative powers. The authorities can however make, monitor compliance with and enforce, subordinate regulation in the form of prudential and conduct standards, within clearly defined parameters.***
Standard Bank	53(1)	It is proposed that the Prudential Authority (PA) and the Financial Conduct Sector Authority (FSCA) are required to enter into cooperation agreements or MoUs with the FIC and the Reserve Bank's Financial Surveillance Department; specifically in relation to the requirement in sub-clauses 29(1)(e) and 53(1)(e) to "*co-operate with and assist the Financial Intelligence Centre in preventing and*	***Agreed. The FIC is included as a financial sector regulator for relevant coordination chapters, and the SARB is similarly specified in those chapters.*** ***In addition each regulator and the SARB sits on the Financial System Council of Regulators. A sub-***

		combating financial crime."	***committee of this Council will deal with issues of enforcement and financial crime.***
ASISA	53(2)	It is submitted that reasonability should be incorporated in this clause. The Financial Sector Conduct Authority should not be able to do anything else, the provision is too wide. It should be limited to anything reasonably necessary to achieve its objectives. *53(2) The Financial Sector Conduct Authority may do anything ~~else~~ reasonably necessary to achieve its objectives, including –* *(a) co-operating with its counterparts in other jurisdictions; and* *(b) participating in relevant international regulatory, supervisory, financial stability and standard setting bodies.*	***Agree in principle. See the revised Bill.***
ASISA	53(4)	*53(4) When performing its regulatory functions referred to in subsection (1)~~(a)~~, the Financial Sector Conduct Authority must have a primarily pre-emptive, outcomes focused and risk-based approach, in terms of which it focuses its ….*	***Amended***
World Bank	53 and 52	The distinction between: (i) the clause 52 "*objectives*" and the clause 53(1) "*functions*" of the FSCA; and (ii) the FSCA specific obligations in other parts of the FSR Bill, is not entirely clear. For example, the functions relating to collaboration with the Reserve Bank and the Financial Stability Oversight Committee are probably not necessary given the obligations in Chapter 6, and the financial inclusion function should probably be an objective.[36] Further, the FSCA is stated to have both an objective and a function in relation to financial education. An alternative approach could be to have: (i) the "objectives" of each of the FSCA and the PA include broad concepts mirroring, as appropriate, those that are set out as objects of the FSR Bill in clause 6 (including promoting competition), as well as cooperation with other regulatory agencies; and (ii) the "functions" of each of the FSCA and the PA include the specific categories of responsibility that each regulator must perform in order to achieve those objectives (such as regulation and supervision of financial institutions, and performance of the functions conferred on each regulator under the FSR Bill); and (iii) a "catch-all" provision conferring powers on each of the FSCA and the PA to "do anything else necessary to achieve its functions" (similar to clauses 29(2) and 29(3)).	***Noted. The objectives and functions provisions for both the PA and the FSCA have been refined. Cooperation and coordination with other regulators are still included as a function***

		This would be similar to the Australian and UK approaches; See also the comments in above section 2 regarding the FSCA's financial education functions	
Part 2: Governance			
57. Commissioners and Deputy Commissioners			
Geof Mortlock	57	Might it be appropriate for the Bill to specify the criteria (eg qualifications, experience, etc) required for appointment?	***Disagree with specifying criteria, as this may be overly limiting.***
ASISA	59(2)	It is not clear why the word ***"may"*** and not ***"must"*** is used.	***The Minister retains the final decision on when to remove a Commissioner from office.***
ASISA	60	Given that a person is appointed and contractually agrees to certain terms and conditions, this clause makes no sense in law and the thinking behind it is not clear. Noted that the section does not contain provisions regarding remuneration, leave and other benefits.	***Amended to specify terms and conditions stipulated by the Minister.***
Strate	61(1)*(b)*	**Power delegated to FSCA** Please insert by whom this power will be delegated or cross-reference.	***Amended; no longer makes reference to delegations.***
ASISA	61(1)(b)	*61(1)(b) may exercise the powers and perform the functions of the Authority, including exercising a power delegated to the Financial Sector Conduct Authority as envisaged in section 53(1)(l).*	***Amended; see amended provisions on delegations (clause 71).***
62. Role of executive Committee			
BASA	62(a)	*62The following powers and duties of the Financial Sector Conduct Authority must be exercised and performed by the Executive Committee and may not be delegated:* *(a) the general oversight, management and administration of the Financial Sector Conduct Authority, to ensure that it is efficient and effective;* *(b) entering into the section 25 memoranda of understanding, and amendments to the memoranda;*	***Reference to the Authority consistently used throughout chapter.***

		(c) delegating powers of the Financial Sector ConductAuthority to the Prudential Authority or the National Credit Regulator in terms of section 70(4); *(d) ………* *(e) adopting the supervisory strategy of the Financial Sector ConductAuthority, and amendments to it;* *(f) ……..;* *(g) ……..;* *(h) adopting the administrative action procedures of the Financial Sector ConductAuthority, and amendments to them;* *(i) …….;*	
JSE	62	Many of the powers and duties for the Executive Committee of the FSCA and the Oversight Committee of the PA overlap but the wording is different. For example, in terms of s62(j), the Executive Committee of FSCA must exercise powers in relation to the granting, issuing or varying of a license but no similar powers are given to the Oversight Committee of the PA. Furthermore, while powers are granted to the Executive Committee under s62(c) and (d), no similar powers are granted to the Oversight Committee of the PA. We would recommend harmonising the wording where appropriate to do so.	***Agreed and refined accordingly.***
ASISA	62	Is it really the intention for the Executive Committee to (personally) attend to all licensing issues?	***Removed from role of executive committee.***
Geof Mortlock	62(c)	Subject to the avoidance of conflicts of interest and obtaining the prior agreement of the party to whom powers are delegated, presumably.	***Agreed, delegation provisions provide parameters, and are subject to MoU requirements.***
SAIA	62(c), (d), (g) and (j)	It is proposed that the powers of the Oversight Committee in the PA and the Executive Committee in the FSCA be aligned, for example: Clause 62 provides for the following powers for the FSCA, for which there are no corresponding powers for the PA in clause 36: *"(c) delegating powers of the Authority to the Prudential Authority or the National Credit Regulator in terms of section 70(4);* *(d) making conduct standards, and amendments to them;* *(g) making determinations of fees and charges in terms of the Levies Act;* *(j) granting, issuing, varying, suspending or cancelling a licence;"* Clarity is sought on why these powers are specifically afforded to the FSCA	***Role of PA oversight committee and FSCA Executive Committee are aligned to some extent, taking into account that the Oversight Committee (now named the Prudential Committee) is established as a non-executive committee, whereas the Executive Committee has an executive role.***

		Exco but not to the Oversight Committee of the PA.	
Geof Mortlock	62(g)	Should the determination of fees and charges be subject to external review or consent - eg by the Minister? Plus an obligation to consult stakeholders before any such determination of fees and charges?	***The intention is to pass a Levies Act which will set out levy provisions. This will be consulted upon***
ASISA	63(1)(a)	Given the content of section 62, it is suggested that a minimum requirement must be built in ***63****(1) (a) The Executive Committee must meet as often as is necessary for the performance of its functions, but not less than;*	***Disagree. This is considered an unnecessary benchmark and may inappropriately anchor the meetings around this prescription.***
Strate	64	**Disclosure of interest; duties of staff members** Drafting style: consider whether these clauses have general application and could be moved to a separate part applicable to all to avoid repetition.	***Retained as separate, as the slight structural differences between the authorities means that these sections are not always fully aligned, and deliberately so.***
ASISA	64(1)	It is suggested that the provisions in respect of disclosure of interests as applicable to members of the Executive Committee also be made applicable to persons invited or allowed to attend meetings of the Committee in terms of clause 63(5). ***64****(1) Each member of the Executive Committee and a person contemplated in section 63(5)must disclose, at a meeting of the Committee or in writing, to each other member any interest that–* *(a) the member; or* *(b)…..*	***Noted, however such a person has no voting rights when attending.***
SAIA	64	Clause 64 places an obligation on the Exco and committees of the FSCA to disclose interests that may conflict with the performance of any of its functions. It is suggested that this requirement be expanded by not only requiring disclosure of interests, but also to place a positive obligation on the members of the Exco and committees of the FSCA to avoid possible conflicts and where not possible to take action to mitigate such conflicts.	***See 69(1)(a) requiring members to act honestly in all matters relating to FSCA.***
ASISA	64(5)	Section 64(5) does not read well. *"if the member had the interest"* is not clear and the question arises at what point?	***Redrafted.***

ASISA	65(2)	The meaning of "deliberative vote" is not clear.	***Deliberative meaning a vote in the normal course of deliberations on a matter.***
66. Decisions without meetings			
BASA	66	***66.*** *(1) If–* *(a) at a meeting, the Executive Committee has resolved that resolutions of the Committee may be passed in accordance with this section; and* ~~*(b) either -*~~ ~~*(i) all of the members were informed in writing of the terms of a proposed resolution; or*~~ ~~*(ii) reasonable efforts were made to inform them in writing of the terms of a proposed resolution; and*~~ *(c)without meeting, a majority of the members indicate agreement with the proposed resolution and communicate that to the Commissioner by letter, fax or other electronic transmission, the resolution is passed on the date on which the last member indicates agreement with the resolution.*	***See redrafted section on executive committee decisions.***
67. Governance and other committees for Financial Sector Conduct Authorities			
BASA	67(1)	*67(1) (b) reviewing, monitoring and advising the Commissioner and the Executive Committee on the risks faced by the Financial Sector Conduct Authority and plans for managing those risks;*	***Agreed.***
ASISA	67(1)(a)	Note that the Minister appoints the Commissioner and the Deputy Commissioners. Should this committee not also advise the Minister on the remuneration of the Executive Committee?	***No; committee is established by DG for purpose of advising and overseeing the Executive Committee.***
Geof Mortlock	67(1), (2) & (3)	Should the reference to 'Director-General' instead refer to 'Commissioner'? If the reference to the Director-General is to the Head of the NT, is this appropriate? Wouldn't it compromise the operational independence of the FSCA?	***Reference to DG is correct; committees to provide independent oversight***
BASA	67(3)	*67(3) A committee's membership is determined by the Director-General, which may include a member of the Financial Sector Conduct Authority's staff, and persons who are not members of the Financial Sector Conduct Authority or its staff.*	***See revised clauses.***

SAIPA	67(4)	The term of office should be limited, the same way that it is for members of the Executive Committee.	***Period determined when person is appointed; flexibility of appointment period is preferred given the specialized skills required for this task.***
Deloitte	67(5)	Sub-regulation 67(5) dictates that the remuneration, audit and risk committees should be chaired by a person who is not the Commissioner, a Deputy Commissioner or a staff member of the Financial Sector Conduct Authority. It is not clear whether these committees could therefore be chaired by anyone from National Treasury. We recommend that the independence requirements be clarified in this section.	***Noted and agree on need for independence of committees. Clauses crafted to make committee requirements as neutral as possible so they may serve as the PFMA required oversight committees for more than one PFMA entity***
ASISA	67(10)	*67(10) Sections 64 and 68 apply to a member of a committee established in terms of this section and to a person invited or allowed to attend the meetings of the committees established in terms of this section.* ASISA members are of the opinion that clauses 64 and 68 should also apply to the committees established in terms of clause 67 and also to persons invited or allowed to attend the meetings of these committees.	***See revised section 69.***
ASISA	68	It is suggested that the provisions in respect of disclosure of interests as applicable to members of the Executive Committee also be made applicable to persons invited or allowed to attend meetings of the Committee in terms of clause 63(5). *68(1) Each member of the Executive Committee and a person contemplated in section 63(5) has the following duties, in addition to the member's other duties:* *(a) to act honestly in all matters related to the Financial Sector Conduct Authority;* *(b) to exercise powers, and discharge duties–* *(i) in good faith;* *(ii) for a proper purpose; and* *(iii) with the degree of care and diligence that a reasonable person in the member's position would exercise.* *(2) A person who–* *(a) is a member of the Executive Committee; ~~or~~* *(b) obtains information because the person is or has been a member of the Executive Committee; or*	***Person has no voting rights when attending and has no duties, and therefore can apply a different governance hurdle.***

		(c)is a person as contemplated in section 63(5); *must not use that position or information to–* *(i) ……….;* *(ii) ……….; or* *(iii) ……..* *(3) ……….*	
69. Supervisory strategy			
SAIPA	68(1)	The Prudential Authority, the National Credit Regulator and the Minister can only comment on the strategy. Given the key importance of the supervisory strategy, it is recommended that the Minister formally approve the strategy.	***Disagree, in order to protect the operational independence of the authority***
Strate	69(2)*(b)*	**FSCA Supervisory strategy** The wording "*next three years*" refers. What happens thereafter? Insert "*and every third year thereafter*".	***Strategy must be reviewed annually, and may be amended at any time***
Geof Mortlock	69(2)(e)	As per my earlier comment in the context of the PA, might it be appropriate to require the Executive Committee to set out KPIs for each of its functions, subject to consultation with the Minister and other stakeholders?	***Disagree, as KPIs are to be determined between the Minister and each Commissioner/Deputy Commissioner in terms of section 61(7), which can then sensibly align to the regulatory strategy (and vice versa).***
Deloitte	69(3)	Sub-regulation 69(3) makes provision for the supervisory strategy to be reviewed by the Executive Committee at least once every three years. We recommend that this be changed to every year in view of the rapid rate of regulatory change and the need to ensure that regulatory practices remain relevant and current and that they keep pace with the level of change in the financial services sector.	***Agreed***
70. Delegations			
ASISA	70(1)	The reference to subsection (6) appears to be incorrect but we are not sure what the correct reference should be. (6) A delegation in terms of subsection (1) or (5) may be to a specified person or to the person holding a specified position.	***Corrected***
ASISA	70(2)& (3)	To align with definition of "administrative action committee" and use elsewhere in the Bill *70(2) The Executive Committee may, in accordance with the Financial Sector Conduct Authority's administrative action procedures, delegate the power to*	***References aligned appropriately***

		impose those administrative penalties that are specified in the administrative action procedures to an ~~Administrative Action Committee~~ administrative action committee. *(3) The Executive Committee may not delegate the power to impose administrative penalties, other than strict liability penalties which are designated in a legislative instrument and the administrative action procedures, to a person or body other than an ~~Administrative Action Committeee~~ administrative action committee.*	
BASA	70(4)	Cl 62(c) states that the Executive Committee may delegate powers of the FSCA to the PA and the NCR in terms of Section 70(4). Section 70(4) only allows for delegations to the PA, and NOT the NCR.	***Amended. Delegation only to PA in terms of MoU***
ASISA	70(4)	It is not clear whether this is "Subject to section 62" or "Notwithstanding section 62".	***Clause refined***
ASISA	70(5)	Having regard to the fact that section 6 of FAIS provides that *"(1) The Minister may, on such conditions as the Minister may determine (which the Minister may at any time thereafter amend or withdraw), delegate any power conferred upon the Minister by this Act, excluding the power to make regulations under section 35, to the head of the National Treasury, any other official in the National Treasury, or the registrar"*, the position of footnote 35 creates confusion and it is submitted that the footnote be inserted after "staff". Any such delegatee should have the same level of expertise as the Commissioner. *70(5) The Commissioner may, in writing, delegate any power or duty of the Authority that the Commissioner may exercise or perform in terms of a financial sector law, except this power of delegation, to a member of the staff[35] of the Authority or to a person referred to in section 6 of the Financial Advisory and Intermediary Services Act,~~[35]~~ and the Commissioner may, at any time, amend or revoke a delegation.*	***Footnote deleted***
Part 3: Staff and Resources			
Geof Mortlock	71(2)	Somewhere in the Bill I suggest that there be reference to the transparency and accountability arrangements for the FSCA, including reference to annual report obligations, publication of its assessment against KPIs and provision for the Minister to require a periodic external audit of the performance of the FSCA.	***PFMA requirements apply that deal with these matters raised.***

CHAPTER 5: Systemically Important Financial Institutions			
Reviewer	**Section**	**Issue**	**Decision**
Part 1: Designation of Systemically Important Financial Institutions			
73. Designation of systemically important financial institutions			
ASISA	73(1)(a)	As currently worded, the Governor can decide, on his own, who is a SIFI. Bearing in mind the proposed consequences of a declaration of a SIFI, it is proposed that provision should be made for "checks and balances" and suggest the section be amended as proposed. With regards to the reference to "in writing", please refer our comments in this regard in Chapter 2, section 11(1). *73(1) (a) The Governor may, if a financial institution or a group of financial institutions are affected or are reasonably expected to be affected by a systemic event, designate, after having consulted with the Oversight Committee and in consultation with the Minister in writing, and published ~~designate~~ a financial institution or a financial conglomerate as a systemically important financial institution.*	***Noted. The revised Bill provides for a role for the FSOC to make recommendations to the Governor on the designation of a SIFI. In addition, the institution to be designated as a SIFI is given an opportunity to make submissions on the matter within a reasonable period. See revised Bill.***
Geof Mortlock	73(2)	It might be useful to include a fourth paragraph here to the effect that: *73(2)(e) other such matters determined by regulation* This would allow for the possibility of additional factors to be taken into account in the future.	***Agree. See revised Bill.***
SAIA	73(2)	As they currently stand, the criteria listed are not necessarily indicative of potential systemic risk. The criteria in the Bill for an entity to be designated a SIFI include the size of the institution, the complexity of the institution and its business affairs, the interconnectedness and whether there are readily available substitutes for financial products and financial services provided by the institution in question. We recommend that the criteria set for considering whether a financial institution is to be designated as a SIFI should be linked to the institution's ability to cause financial instability or lead to potential systemic risk, as without these added criteria, many insurance groups would be included by default.	***Noted. A set of criteria used for the designation of a SIFI are aligned with the one that was developed by the Financial Stability Board of the G20.***

		For example: Clause 73 (2)(d) referrers to consideration *"(d) whether there are readily available substitutes for the financial products and financial services that the institution provides."* There are many insurers that offer financial products to cover unique risks, but removal of these unique financial products from the market would not necessarily lead to systemic risk.	
PASA	73(4)	*73(4) If a systemic event is occurring or is imminent, the Governor may designate a systemically important financial institution, without complying with the requirements of subsection (3).*	***Agree. See revised Bill.***
Strate	73(4)	Who decides if a systemic event is occurring or is imminent?	***The Governor makes that determination after having consulted with the Minister.***
JSE	73(5)	We would argue that a right of appeal must be recognised in terms of South African law.	***Noted. The clause has been deleted from the revised Bill.***
Strate	73(5)	This unilateral decision may be unfair / unconstitutional?	***Noted. The clause has been deleted from the revised Bill. The revised Bill now provides for the institution to be designated as a SIFI to be given an opportunity to make submissions on the matter within a reasonable period. See revised Bill.***
Geof Mortlock	73(5)	Might it be appropriate for some form of appeal to be provided for? For example, at least judicial review as to whether the Governor has properly exercised these powers and that due process has been properly followed.	***Noted. The clause has been deleted from the revised Bill.***
ASISA	73(5)	We are of the view that this is an administrative action as foreseen in the PAJA. See page 40 of the response document for the following comment: ***"all administrative action is subject to the constitutional protections afforded through the Promotion of Administrative Justice Act (PAJA)"*** Clarity is required on why an appeal will not be allowed if a subject's rights are impinged upon by such a decision.	***Noted. The clause has been deleted from the revised Bill.***

		Furthermore, clarity is requested on why the consultation procedures of the FSR Bill are limited to legislative instruments.	***The revised Bill provides for the institution to be designated as a SIFI to be given an opportunity to make submissions on the matter within a reasonable period. See revised Bill.***
ASISA	73(7)	It is suggested that clause 73 of the Bill should also provide for the withdrawal or cancellation of a designation. Circumstances might change to such an extent that the designation is no longer necessary. *73(7) The Governor may, in writing, withdraw the designation of a financial institution or a financial conglomerate as a systemically important financial institution.*	***Agree. The principle has been captured in the revised Bill.***
Part 2: Powers in Relation to Systemically Important Financial Institutions			
74. Tools to achieve macroprudential outcomes or mitigate systemic risk			
BASA	74(1)	This clause is too wide, particularly in respect of the power to amend existing regulation and legislation on such broad parameters. Further clarity is needed on "organizational structures" within Section 74(1) (d) of the Bill. Sub-clause 74(1)(a) seems to imply that counter-cyclical buffers will not be applied holistically to all financial institutions, but only SIFIs. This is contrary to the intent of Basel III. Further clarity would be appreciated.	***These are additional requirements that would be imposed on the financial institutions after consultation with the PA.***
		It is proposed that these additional prudential standards for SIFIs must be subject to the same thorough consultation process required for other standards as per clause 90 of the Bill as the robust legislation-making process has been dispensed with.	***The PA would be required to exercise its powers to impose these additional requirements on financial institutions through directives or prudential standards both of which have a set procedure for consultation.***
Strate	74	**SIFI; Division of roles and scope of regulation and supervision** The scope of 74 is restricted to macro-prudential outcomes or to mitigate systemic risk. Consultation by the Reserve Bank with the PA is part of this clause (see 109(2)*(d)*(iii)). Sub-clauses 74(1)*(d)* and *(e)* should therefore be better described relating to the effect on the SIFI"s financial or prudential standing. These clauses are now too open-ended. Please re-draft.	***Disagree.***

		It is expected that the MIs will also be designated as SIFIs from the start. Is this correct? On this assumption, the "*licencing regulator*" (FSCA) for Phase 1 is not included in this 74 process and this may cause uncertainty where the designation in 73(1) is permanent. Is the designation a permanent status in the case of 73(1)*(a)* and temporarily in the case of 73(4)? Please clarify. The additional requirements (74(3)) and the effect thereof may be drastic; surely a holistic approach in setting these requirements are required. Please address.	***The Governor may designate MIs as SIFIs after consultation with the FSOC and the institution concerned. FSCA is a member of the FSOC and will be consulted before such designation.*** ***The revised Bill now provides for the Governor to revoke a designation of a financial institution as a SIFI.***
SAIA	74(1)	The impact of designation as a SIFI is that, in order to achieve macro-prudential outcomes or to mitigate systemic risk, the PA may impose different standards for such institutions or conglomerates. We request that sufficient time be afforded to any entity earmarked to be designated as a SIFI to plan accordingly and where necessary raise sufficient resources to meet the possibly higher standards for SIFIs.	***Noted.***
Geof Mortlock	74(1)	I suggest that you consider establishing a provision in the Bill that requires the SARB to consult all affected stakeholders on proposals in relation to these matters, to give them the opportunity for comment, to have regard to their submissions, and to go through an appropriate cost/benefit process in relation to these proposals.	***Agree. The revised Bill provides for the institution to be designated as a SIFI to be given an opportunity to make submissions on the matter within a reasonable period. See revised Bill.***
Geof Mortlock	74(1)(f)	I suggest that the PA also be able to determine prudential standards in relation to recovery and resolution planning, provided that there is no duplication or contradiction of those promulgated by the SARB. For example, recovery and resolution planning for small financial institutions are matters that probably better fall to the PA than to the SARB.	***Noted.***
75. Winding up, business rescue, amalgamations and mergers, and compromise arrangements of systemically important financial institutions			
JSE	75	S75(1) states that a licence granted to a SIFI may not be suspended or cancelled without the approval of the SARB. We understand that the SARB may need to be consulted on the suspension or cancellation of a licence to operate as an authorised user, clearing member or participant if the institution is designated as a SIFI but the authority to suspend or cancel such a licence must vest in the relevant market infrastructure, as contemplated in the FMA. Licensing	***Noted, but the Reserve Bank must approve such cancellations or withdrawals of a licence as an institution that is responsible for financial stability.***

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		decisions are based on criteria in the rules of the relevant market infrastructure, with reference to the objectives of the FMA, and any decision regarding the suspension or cancellation of an authorised user, clearing member or participant licence must be based solely on those criteria and objectives.	
Strate	75(2)	There are two section 75(2)'s – numbering error.	***Noted. Corrected in the revised Bill.***
BASA	75(2)	SIFIs must be afforded an opportunity to make representations on why the SARB should not exercise its powers in terms of cl 75(2). The circumstances under which the SARB may apply for a court order to wind up a SIFI should be set out; preferably in the Bill. The provisions should be similar to those in Section 81 of the Companies Act.	***The section has been deleted from the revised Bill.***
Melbourne Law School	75(2)	*75(2) In the pursuance of its functions and powers under this Act, the ~~The~~ Reserve Bank may take the following actions in relation to a systemically important financial institution, after having consulted the Prudential Authority and the Financial Sector Conduct Authority:*	***The section has been deleted from the revised Bill.***
IMF-MCM	75(2)	Resolution framework: The authorities should use the draft FSR to move closer to a resolution framework for financial institutions that is clear and rules-based. This draft should be used, for instance, to designate the resolution authorities. In the current draft SARB is mandated to take a number of actions including resolving a systemically important financial institution (section 75 (2)) but there is no specific provision designating it as resolution authority. Moreover, if a bank is not systemic, it is unclear who resolves it. The FSAP had recommended that SARB be designated as resolution authority for ALL banks, and systemic NBFIs. Generally, the resolution powers outlined in section 75 (2) are limited, and involve court-based procedures, which the FSAP had advised against. If the authorities still plan to draft a separate resolution law to provide for a detailed resolution framework (as was intimated to the FSAP mission), it is important that the draft FSR Bill lays a proper foundation for that, along the lines of the FSAP recommendations.	***Noted. The section has been deleted from the revised Bill.***
Deloitte	75(2)	Given the severity of the actions, it is our view that sub-regulation 75(2) should also require consultation with the Minister (not only the Prudential Authority and the Financial Sector Conduct Authority) before the Reserve Bank can take any of the actions referred to in this section.	***Noted. The section has been deleted from the revised Bill.***

CHAPTER 6: Co-ordination, Co-operation, Collaboration, Consultation and Consistency

Reviewer	Section	Issue	Decision
General			
World Bank	Chapter 6	The provisions providing for coordination and cooperation between the NCR, other financial sector regulators and the Reserve Bank are to be welcomed. The extension of the role of the PA and the FSCA in relation to financial institutions providing credit agreements would also seem appropriate in the interests of providing a level playing field for all financial products and related services. However this approach creates the potential for overlapping regulatory regimes and again highlights the question as to whether the continuation of a separate credit regulator is desirable. As with our previous submission, we would encourage this issue to be revisited.	***Noted. The NCR will remain a separate regulator established under the National Credit Act. Strong cooperation and coordination requirements have been placed on each of the regulators to minimize the potential for gaps on the one hand and duplication on the other.***
Part 1: Co-ordination, Co-operation, Collaboration, Consultation and Consistency			
76. Co-ordination, co-operation, collaboration and consultation between financial sector regulators and the Reserve Bank			
PASA	76	Should the section not also include the NPS Act?	***This is not necessary because the NPS Act is no longer specified as a financial sector law. Rather, it remains the responsibility of SARB i.e. neither the FSCA or PA will exercise powers in terms of that Act.. FSCA can however set standards on payment services in terms of this Act (notably with SARB concurrence)***
Transaction Capital	76	Whilst we support co-ordination, co-operation, collaboration and consultation between the financial sector regulators, the Bill remains silent on the practical steps to be followed to achieve this. In particular – • the Bill fails to identify the practical measures to be adopted to resolve or decide conflicts or disagreements between regulators and whether a particular regulator's views will supersede the views of another regulator; • the Bill does not specify which regulators' resources will be applied to conducting on-site inspections and investigations and how that regulator's resources will be authorised to conduct such inspections and investigations;	***Too detailed for primary legislation to specify. MoUs are required to set out this detail***

		• the Bill does not limit the number of fines that can be imposed for non-compliance with a financial sector law, resulting in a person being fined under the NCA by the NCR and by the financial sector regulators under the Bill. This would be grossly unfair. We are of the view that these issues should be regulated in the Bill rather than being left to the regulators to determine in accordance with section 77.	
Melbourne Law School	76(1)	We would suggest that section 76 be amended as follows to reflect the need to take the specific circumstances into account and to avoid an overly prescriptive approach: ***76****(1) The financial sector regulators and the Reserve Bank must, to the extent appropriate and in a manner consistent with the objects of this Act, 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.*	***Disagree, as we are not requiring full alignment of actions, rather the co-operating and co-ordination of those actions.***
ASISA	76(2)	See comments on Chapter 7 "Legislative Instruments" and on each of the other chapters relating to section 76 (2) subsections (i) to (xi). It is suggested that section 76(2)(c) should end after "appropriate and practicable". *76(2)* *(a)……* *(b)……* *(c) coordinate their actions to the extent that is appropriate and practicable.~~, in particular in relation to the same person or the same matter affecting different persons or interests, including in relation to–~~* *~~(i) making standards, or other legislative instruments, including those provided for in terms of the National Credit Act;~~* *~~(ii) licensing;~~* *~~(iii) ……..;~~* *~~(iv) ……..;~~* *~~……..~~* *~~(xi)~~*	***Disagree, as believe these component parts should be specified as minimum coordination points.***

Deloitte	76(2)(c)	Sub-regulation 76(2)(c) makes mention of the fact that the financial sector regulators and the Reserve Bank must co-ordinate their actions in relation to certain issues. We recommend that this section be expanded to provide for co-ordination in respect of fit and proper authorisations so as to avoid a duplication of effort under the 'dual-key' system of regulation.	***Fit and proper requirements will likely be set out either in licensing requirements or standards and these are already captured. Singling out "fit and proper' requirements in this instance may also suggest that this is the only area of overlap.***
World Bank	76	The obligation to consistent policy positions "*to the extent appropriate*" may go too far. It is suggested that the obligation be modified so that it is clear that it only applies to the extent to do so would be consistent with the relevant regulators' objectives, functions and powers. For example, there may be a conflict between the PA and the FSCA in relation to a policy proposal concerning how best to regulate over-indebtedness. It is also suggested that the obligation be qualified so that it only applies to the extent that it does not impose an excessive regulatory burden as compared to the benefits of achieving consistent policy positions. It is suggested that clause 76(2) be expanded to include an express obligation on each regulator to consult the other in connection with any proposed exercise of a function that may adversely affect the other regulator's ability to achieve its objectives. Similar provision exists in the UK legislation. Such a proactive, preemptive consultation requirement would complement the requirement to "*inform each other about, and share information about, matters of common interest*" in clause 76(2)(b). It would also complement the requirement in clause 77(1)(d) for the FSCA and PA enter into a MOU with respect to, amongst other things, "*how differences between them are to be resolved*", and indeed may reduce the need to resort to such procedures. Query, as a practical matter, which policy position would prevail in the event that the FSCA and PA conflict? Should further regulatory guidance be issued to elaborate on what is set out in the MOU? Query whether there should be a provision dealing with conflicting policy positions between the FCA and the PA. In the UK legislation, for example, there is provision for the prudential regulator, the PRA, to require the market	***Provisions relating to cooperation and coordination have been refined. Regulators are to strive to adopt consistent regulatory strategies, including addressing regulatory and supervisory challenges; and coordinate, to the extent appropriate, actions in terms of financial sector laws and the National Credit Act*** ***The required MoUs will be published and submitted to each of the Ministers. Regulators will set out details of how in practice they will cooperate and coordinate, including on matters such as resolving differences. In terms of stability matters, there are certain actions which cannot take place without the concurrence of the SARB (e.g. setting standards relating to financial stability)*** ***On clause 76(2), this is covered by the regulators needing to coordinate on a range of their functions that would include actions that may affect another regulator's objectives.*** ***The chapter requires other organs of state with jurisdiction over financial institutions to consult the financial sector regulators and the Reserve Bank when exercising that jurisdiction (clause 78) .***

		conduct regulator, the FCA, to refrain from exercising their powers in a manner which would, in the PRA's opinion, threaten the stability of the UK financial system or result in the failure of a prudentially regulated entity in a manner that would adversely affect the financial system (provided certain other conditions are satisfied). There should perhaps be a provision for consultation with non-financial sector regulators — for example, the telecommunications regulator (the Independent Communications Authority of South Africa) in relation to mobile network operators concerning e-money facilities.	
Geof Mortlock	76(3)	I suggest that some form of public reporting also be required in this regard - eg a report from the respective agencies (possibly a joint report or via their annual reports) that sets out the measures to facilitate cooperation and coordination. I suggest that consideration be given to empowering the Minister to require an independent periodic evaluation of the effectiveness of coordination between the agencies.	***Agreed; the regulators and the SARB are required under clause 76(2) to report to the relevant Ministers, and the National Assembly on coordination measures. MoUs required to be published and must be submitted to the Ministers. Inter-ministerial Council will consider effectiveness of coordination.***
77. Memoranda of understanding between financial sector regulators			
Transaction Capital	77	To the extent that the memoranda to be concluded by the financial sector regulators affect entities regulated under the Bill and/or relevant financial sector laws, those entities should be afforded an opportunity to comment on such memoranda (in the same way as they would be afforded an opportunity comment on proposed legislation). Section 77 does not provide for publication of the memoranda nor does it provide rights of access by regulated persons. The procedure for obtaining access to the memoranda as set out in the Promotion of Access to Information Act is not appropriate in the circumstances. It is not clear to what extent the memoranda will have force of law and who will be bound by the provisions of the memoranda.	***MoUs will be published. Not commented on as these are operational tools for the regulators and are not legally binding in the way legislation is.***
Geof Mortlock	77(1)	Suggest you make it clear that these memoranda can be bilateral or multilateral.	***Regulators can enter into one or more MoUs, the arrangement of which is left open for the regulators to work out which is most effective and practicable.***

ASISA	77(1)	ASISA members propose that the memoranda of understanding or at least a summary thereof should be published in a manner that allows financial institutions to access such memoranda.	***Agreed, see section 77(6)***
Melbourne Law School	77(1)	We would suggest that consideration be given to amending subsection 77 as follows to ensure that the content of the memoranda of understanding is not limited to the matters specifically referred to: *77(1) The financial sector regulators, and, to the extent that is relevant, the Reserve Bank, must, as soon as reasonably practicable, but not later than six months after the effective date of this Chapter, enter into memoranda of understanding with respect to matters concerning co-ordination, co-operation, collaboration and consultation, including the following matters:*	***Redrafted to indicate MoUs are to give effect to obligations to cooperate and collaborate.***
SAIPA	77(1)(b)	The powers and duties of the Prudential Authority and the Financial Sector Conduct Authority should ideally be set out clearly in the Act.	***Agreed, see chapters establishing the PA and FSCA.***
Deloitte	77(1)(b)	Sub-regulation 77(1)(b) refers to the need for a memorandum of understanding to provide guidance in respect of the Prudential Authority and the Financial Sector Conduct Authority, delegations of powers and duties between them. Whilst we can see why delegation might be considered useful in some circumstances, it risks blurring the otherwise clear distinctions that Twin Peaks is intended to introduce. And even though one authority delegates to another, ultimately the authority with the power remains responsible so you have a situation in which one authority is answerable to another. Furthermore, you would need the same types of resources across two regulators whereas, under Twin Peaks, you should really only need them in one. For example, allowing the Prudential Authority to delegate the prudential supervision of small insurers to the Financial Sector Conduct Authority seems to make the position less efficient as instead of one authority needing resources for insurance prudential supervision, both authorities will have to have such resources.	***Disagree. The approach taken in the Bill aims to get the balance between developing common, system-wide conduct and prudential frameworks (so that the FSCA is responsible for responding to all conduct risk and the PA for responding to all prudential risk), and the reality that in some instances one of the regulators will be the majority frontline supervisor (an example being intermediaries and administrators that will mostly "face" the FCSA). In this example, the flexibility allows for the PA to set the requirements consistent with the overarching prudential framework (even though these might be very low) and for the FSCA to supervise compliance. This should support a more efficient allocation of resources for both the regulators and regulated entities (who would otherwise face two rather than a single regulator).***
Deloitte	77(1)(c)	Sub-regulation 77(1)(c) refers to the need for a memorandum of understanding to provide explicit guidance around how the Prudential Authority and the Financial Sector Conduct Authority will co-ordinate the performance of their	***Deleted; the FIC is brought into the bill as a financial sector regulator for the chapters dealing with co-ordination and co-operation. On the issue of the FIC***

		functions in terms of the Financial Intelligence Centre Act. It is our view that, in order to prevent regulatory arbitrage and in keeping with international trends, the responsibility for supervision of the Financial Intelligence Centre Act be given to one authority and that the responsibilities are not shared between the Prudential Authority and the Financial Sector Conduct Authority. In the UK for instance this responsibility is in the remit of the Financial Conduct Authority, the equivalent of the South African Financial Sector Conduct Authority.	***Act, the Bill prefers to give flexibility to regulators in how best to support the other regulators in performing their respective duties and functions.***
Deloitte	77(1)(d)	Sub-regulation 77(1)(d) refers to the need for a memorandum of understanding to provide guidance around mechanisms between the Prudential Authority and the Financial Sector Conduct for dispute resolution but no detail is provided. The dispute resolution mechanism in the UK was very hotly debated. We recommend that more detail is included.	***The detail will be provided in the MoUs. It is not intended that either regulator can dictate a position to the other regulator.***
BASA	77	To ensure regulatory certainty, the effective date of this Chapter should coincide with those giving effect to the PA and FSCA. The MoU, or at least part thereof, should be made public. Further, the legal status of the MoU needs to be clarified. It is recommended that the Director-General is ultimately accountable to ensure that these MoUs are signed and implemented.	***Agreed that effective date should coincide with establishment of PA and FSCA. MoUs will be made public. MoUs are not legally binding. The authorities themselves are accountable and must provide the MoUs to the relevant Ministers.***
Micro-Finance South Africa	77(2)	MFSA requires clarity on the practical interpretation of Section 77(2).	***Regulatory and supervisory powers of each regulator apply, whether or not there is an MoU in place, and whether or not they are exercised in a way consistent or inconsistent with an MoU.***
SAIA	77(2)(d)	It is proposed that the Memoranda of Understanding (MOUs) entered into between authorities be shared with industry and/or made publically available. It is our submission that financial institutions have a direct interest in the required co-operation between authorities, and accordingly, that it is in the best interest of efficient and effective supervision for financial institutions to have sight of the MOUs. As an example, clause 76 (2)(d) provides for focus to be placed by regulators on minimising *"the duplication of effort and expense, including by establishing and using, where appropriate, common or shared databases and other facilities;"*	***MoUs will be published but are not for comment as these are operational matters for the regulators and do not create law.***

		In such instances it would be in the interest of the financial sector that the detail of MOUs be shared with the industry.	
ASISA	77(3)	There appears to be no obligation to publish the content of the MoU's or to make that available to financial institutions. Section 76(3) provides for the annual reports of the authorities to report on MoU's entered into in their annual reports, but this requirement does not seem to extend to the detailed content of such MoU's. We are of the view that consideration be given to making this a requirement as it will be necessary for certainty in respect of regulatory requirements and – approach for FI's to have access to MoU's.	***Agree. MoUs will be published***
Geof Mortlock	77(4)	I suggest that the Bill include a provision that requires the agencies to publish the memoranda of understanding, for the sake of transparency and accountability.	***Agree. MoUs will be published***
78. Other organs of state			
BASA	78(3) & (4)	Clause 78(3) states that an organ of state must give information requested by the financial sector regulators if it is reasonably practicable to do so. Clause 78(4) also states that this section does not require the organ of state to do something that contravenes another law. Clause 78(4) should have a further proviso stating that *"when dealing with a request from a Financial Sector Regulator, organs of state must do so in compliance with any applicable law*".	***Agreed, see clause 78.***
ASISA	78(4)	*78(4) This section does not require the organ of state to do something that ~~contravenes~~ is contrary to another law.*	***Agreed in principle, see clause 78.***
Part 2: Council of Financial Regulators			
Council of Financial Regulators			
Melbourne Law School	79	In view of its functions and membership, we query whether the name of the Council of Financial Regulators should be amended to "Council of Regulators for the Financial System" or "Financial System Council of Regulators".	***Agreed.***

JSE	79	The FSRB establishes many Councils, forums, committees and sub-committees. This will require a lot of resources and may add to complexity of implementation. It also raises the question of how this new regulatory framework will be funded as the costs are likely to increase dramatically.	***Noted. The various committee requirements are provided with sufficient flexibility to leverage off the same resources where appropriate. For example the fact that both the Ombud Council and FSCA require governance committees in place, provides that these can be the same committees serving more than one agency.***
Geof Mortlock	79(3)	I suggest that consideration be given to trimming back the membership to the CEOs (and perhaps their chosen deputies) of just the main agencies - i.e. the SARB, NT, PA, FSCA and NCR. As drafted, it looks rather unwieldy in size, giving rise to a risk of lack of focus on core financial stability, efficiency and related matters. I suggest that the Governor should also be a member of the Council. It may be appropriate for the Governor to be the chair of the Council; this is the case in Australia, for example. In New Zealand, the chair rotates between the Governor of the RBNZ and the CEO of the Financial Markets Authority.	***Disagree. Note focus is not on stability. FSOC will focus on stability and is chaired by the Governor. This Council will be chaired by the DG, and broad membership is necessary to recognize the important balancing roles of the respective agencies.***
BASA, Standard Bank	79(3)	The FIC is not included as a member of the Council. It is essential that the FIC is included as a member of the Council.	***Agreed and included***
Standard Bank	79(3)	It is further suggested that the Head of the FIC is a member of the Council of Financial Regulators.	***Agreed and included***
Geof Mortlock	80(1)	Should this be determined by the SARB rather than the NT?	***No, the SARB is responsible for the FSOC, this forum however deals with a significantly wider mandate.***
Geof Mortlock	80(2)	Again, might it be more appropriate for the Governor of the SARB to chair the meetings?	***No, the Governor should chair the FSOC, this forum however deals with a significantly wider mandate.***
Geof Mortlock	80(5)	I suggest consideration be given to requiring the Council to publish an annual report in relation to its activities.	***Disagree, on the grounds that this body is considered operational in nature.***
81. Working groups and subcommittees of Council			
Deloitte	81	Sub-regulation 81 provides a range of matters on which the Council of Regulators are to establish working groups. In view of the significance of financial stability, we are of the view that there should be a separate working	***FSOC established for this purpose***

		committee on this topic.	
Geof Mortlock	81(1)	Suggest *crisis resolution* as well.	***FSOC established for stability purposes***
SAIPA	81(1)	The requirement to establish ("must establish") separate working groups and subcommittees seems unnecessary. In view of information sharing and co-operation between the financial regulators, it may be more suitable for the Council of Financial Regulators to include the topics listed in section 81 in their agenda. Alternatively, "must" could be replaced by "may".	***These standing items are considered essential matters for the Council to prioritise and give guidance.***
SAIA	81(1)(a) & (d)	The SAIA proposes that working groups and subcommittees of the Council of Financial Regulators be established, which should be linked to the coordination role as provided for in Clause 79(2)	***Noted. The working groups and subcommittees are intended to drive consistent policy and coordination and on the itemized matters.***
83. Support of Council by Financial Sector Conduct Authority			
Geof Mortlock	83(1)	Might it make more sense to require the relevant lead agency to provide administrative support to the Council - i.e. the chairing agency for the Council and for each respective committee?	***Disagree, as this would make the arrangements less certain and more complicated.***
BASA	83(2)	*83(2) The Financial Sector Conduct Authority must–* *(a) ensure that written minutes of each meeting of the Council, and each meeting of the working groups and subcommittees, are made;* *(b) ………*	***Agreed.***
Part 3: Financial Sector Inter-Ministerial Council			
BASA	84	No minimum frequency of meetings is specified. The Council should be required to meet six-monthly at a minimum.	***Disagree; the Council should be able to establish its own procedures and meet as appropriate. A statutory requirement could inappropriately anchor the meeting schedule. It is anticipated that the subcommittees and works groups will meet more frequently.***
JSE	84	The JSE would argue that the objectives and aims of this Council should be better clarified. For example, the Council could develop a coordinated strategy for the attendance of Ministers at international fora, such as the Minister of Finance at the G20 or the Minister of Trade at the WTO, to ensure that matters	***See revised drafting, taking into account that the objective is stated intentionally broad so as not to limit area of work***

		impacting South Africa can be appropriately and timeously addressed and acted upon.	
Geof Mortlock	84	Need to ensure that this Council does not duplicate the functions of the COFR or compromise the operational independence of the agencies.	***Noted and agreed.***
Geof Mortlock	84(3)	Is there a risk of over-kill and/or lack of focus by including all these ministers on the Council? Might it be more workable for the Minister to be under a statutory obligation to report to Cabinet at least annually on the work and issues arising from the COFR, with a view to ensuring appropriate coordination of ministerial responsibilities across cabinet as they relate to financial sector matters, and for the Minister to be able to convene ad hoc committees for that purpose as he considers appropriate?	***Noted, however inter-ministerial council retained as useful platform for high-level decision making, especially important given the responsibilities of the respective departments within the financial system.***
ASISA	85(4)	Compare to section 21(4) on the FSOC where there are the additional requirements that "***A member who is unable to attend***.." and ".. ***after notice to the other members***.." may nominate an alternate. We suggest that the same requirements are inserted here for good order. If not, there is a risk that membership of the Council will be "diluted" over time (AMLAC/MLAC).	***Agreed, see clause 80(4)***
86. Application, consultation, co-ordination, and consistency of financial sector laws and other legislation			
ASISA	86(1)	*86(1)The Consumer Protection Act does not apply to –* *(a) any function, act, transaction, goods, financial products or financial services that is or are subject to the National Payment System Act or a financial sector law, excluding the National Credit Act; or*	***Amended***
Strate	86	**CPA and its application** Although the Consumer Protection Act is in principle excluded, this clause may allow it to become part of the financial system provisions and documentation. The Minister responsible for CPA may request these standards to apply to protect financial customers. Although the principle seems fair, it is believed that the Inter-Ministerial	***The Inter-ministerial Council will not amend instruments but rather make recommendations to the respective department or agency responsible for such instruments. This recognizes that the independence of regulators should be protected within an agreed policy framework.***

		Council may not have the practical expertise to amend legislative instruments in terms of financial sector laws as provided for in the Bill. It is therefore submitted that the clause be amended so that Council rather refers the matter to the ***Council of Financial Regulators*** for amendment and implementation.	
SAIA	86	The carve-out of the financial sector from the ambit of the Consumer Protection Act is acknowledged and welcomed. There is however a request to conduct further technical work around the jurisdictional ambit of the CPA, specifically as regards third party service providers and insurer outsourced activities, for example in the claims space in effecting the indemnity process after a claim has been approved. A further example is the application of the CPA carve out on loss-adjusters. In reading clause 86 (1) loss-adjusters are deemed to fall within the ambit of the CPA. In our reading of this clause in instances where the loss-adjuster performs a binder function for an insurer, the loss-adjuster will then be excluded from the application of the CPA. The SAIA proposes that legislative clarity be provided on whether the exclusion of the National Credit Act in clause 86 (a), includes credit insurance. SAIA welcomes the provision in clause 86 (2)(b):providing for the *"Inter-ministerial Council, after considering a matter referred to it in terms of paragraph (a), may make recommendations regarding how a provision in a financial sector law or a legislative instrument may be appropriately amended*." However, it is suggested that the reference to the words *"or implemented"* following "*amended"* be deleted, as the implementation of a law or legislative instrument should not be prescribed by the Inter-ministerial Council.	***Noted and can be considered*** ***See clause 10, noting that the NCA is no longer specified as a financial sector law.*** ***No longer refer to implementation***
BASA	86	Current exemptions from the CPA and FAIS are not dealt with here. For consistency, proposed amendments in Schedule 4 to deal with the conflicts between the CPA and this Bill. Further, the CPA should be amended to clarify that it does not apply to any transaction subject to the NPS Act or a financial sector law. The CPA remains applicable to goods and services subject to the	***See clause 10 in revised Bill***

		NCA.	
Part 4: Consultation Arrangements			
Geof Mortlock	87	I suggest that there also be a statutory obligation on the SARB and each regulator to undertake comprehensive cost/benefit analysis in relation to any regulatory proposal (eg as with any proposed standard) and to consult affected parties on the cost/benefit analysis at the same time as they consult on the proposed regulation/standard.	***Agreed. Consultation process in chapter 7 on regulatory instruments provides for this***
Transaction Capital	87	The consultation arrangements contemplated in section 87 should, as a minimum, comply with the consultation arrangements contemplated in section 90.	***Section deleted. See 273 requiring consultation arrangements with stakeholders on matters of mutual interest. These are in addition to the consultation process to be followed when issuing a regulatory instrument***
BASA	87	It is suggested that the authorities should be required to conduct a Regulatory Impact Assessment, including an economic assessment, as part of the process of making new legislative instruments.	***Consultation process in chapter 7 on regulatory instruments provides for this***
ASISA	87(1)	Does the reference to "representative of financial institutions" include representatives of industry bodies? We suggest that an express reference to industry bodies be included. It may well be that the requirement to consult possibly extends to MoUs referred to under section 77 (see comment above). However, we merely point that a requirement to consult on matters addressed in a MoU does not automatically translate into an obligation to publish the final MoU. ***87****(1) The financial sector regulators must have arrangements in place for consulting representatives of financial institutions and financial customers on–* *(a) the extent to which the policies and practices of the financial sector regulators are consistent with meeting their respective objectives in terms of the financial sector laws;* *(b) legislative instruments that are proposed to be made by the financial sector regulators.*	***Section deleted. See 273 requiring consultation arrangements with stakeholders on matters of mutual interest.*** ***MoUs are required to be published***

Strate	87(1)*(b)*	Insert word: "*legislative instruments that are proposed to* be *made…*"	***Section deleted. See 273 requiring consultation arrangements with stakeholders on matters of mutual interest.***
BASA	87(2)	*87(2) A financial sector regulator must publish its consultation arrangements on the Financial Sector Regulator's official website.*	***Section deleted. See 273 requiring consultation arrangements with stakeholders on matters of mutual interest.***
Part 5: Consistency with Comparable Regulatory Regimes			
88. Consistency with comparable regulatory regimes			
BASA	88(1)	Some BASA members are concerned with these provisions and the implications for South African companies. More detail is requested on how will this be regulated and how non-compliance with requirements of foreign jurisdictions will be dealt with. Clarity is also requested on the phrase used "meets the objects of the financial sector laws". It is not clear whether the equivalence is for local companies in foreign jurisdictions, or foreign in our jurisdiction. It is not clear whether the intention is to apply equivalence through either IOSCO, or Basel standards.	***Section deleted; see consequential amendments to Financial Markets Act.***
ASISA	88(1)	Whilst it is understandable that regulators should be able to deem foreign regulatory regimes as being equivalent to the requirements imposed in terms of financial sector laws for the purpose of co-operation, it is not clear to what extent this deeming provision will apply to or affects financial institutions. The heading of clause 88 and paragraph 3.6.5 of the Explanatory Memorandum to the Revised Draft Bill note that the purpose of these declarations is to ensure consistency with foreign regulatory regimes. As a general rule, our financial sector laws should only be consistent with foreign regulatory regimes in so far as it is appropriate in the South African context. ASISA members respectfully request clarity on the purpose of the clause.	***Section deleted; see consequential amendments to Financial Markets Act.***
ASISA	88(2)	Note that "regulatory arbitrage" has various meanings, with the result that the intention is not entirely clear.	***Section deleted; see consequential amendments to Financial Markets Act.***
ASISA	88(2)(d)	*88(2)(d) the Prudential Authority and the Financial Sector Conduct Authority must take into account the need to prevent regulatory arbitrage.* ~~*(2)*~~*(3) The Reserve Bank, the Prudential Authority, and the Financial Sector*	***Section deleted; see consequential amendments to Financial Markets Act.***

		Conduct Authority, after the assessments ……	
ASISA	88(4)	*88(4) In order to facilitate –* *(a) …….* *(b) …….; and* *(c) consistency between the regulatory regime established in terms of the financial sector laws and international regulatory standards,* *the financial sector regulators may share information and enter into memoranda of understanding and other agreements as contemplated, and subject to the limitations in section 197.*	***Section deleted; see consequential amendments to Financial Markets Act.***

CHAPTER 7: Legislative Instruments

Reviewer	Section	Issue	Decision
BASA	Chapter 7-General	Regulators are entitled to impose prudential standards, conduct standards and joint standards. Whilst Regulators have always governed financial institutions in the form of directives or guidance in addition to laws and regulations, the power to create standards and regulate by standards are now given a "legislative instrument" status. This applies to laws and regulations that have traditionally been channelled through robust consultation and Parliamentary processes. Whilst we understand the regulators' need to create law quickly and efficiently, the standard setting abilities created by the Bill dispenses with the robust and rigorous consultation processes which were intended to promote transparency, collaboration and a robust approach to the legislation making process and we suggest that a more rigorous process be incorporated. The broadness of matters that may be the subject of standards is concerning as it extends beyond the scope of existing legislation, especially as the standard setting process takes place outside of the legislature. There needs to be robust checks and balances included in the Bill to ensure that regulators do not exceed their powers, do not engage in making 'new law', and that standards are appropriately aligned and subordinate to government's financial sector policy and the principal statutes.	***See redrafted chapter. No longer refer to legislative instruments, but regulatory instruments instead.*** ***Clear consultation requirements are set out before a regulator can publish a regulatory instrument, including publishing a statement of the expected impact. Draft regulatory instruments must also to be submitted to the National Assembly prior to their finalisation and publication.*** ***The Prudential Authority and FSCA may make prudential and conduct standards, respectively, for the purposes set out in sub clause (1) in clauses 105 and 106, and sub clause (2) of clauses 105 and 106, and clause 108 list specific matters in respect of which standards can be made. This provides a clear scope and limit to the powers to issues standards, and the financial sector regulators cannot make standards outside of the purposes for which, and the matters in respect of which, they can make standards. The regulators cannot exceed the appropriate scope of those powers as defined in the Bill. Standards would also need to be consistent with the objectives of the regulators, and the Object of the Bill. The consultation processes required in making standards also provide for scrutiny and a potential check on the unauthorised exercise of standard making powers.*** ***Note also the transitional provisions in Chapter 17 (clause 283) which states that the National Treasury, in conjunction with the financial sector regulators, is to develop principles for further policy frameworks, not inconsistent with this Act, for the regulation and supervision of financial institutions. This will guide***

national treasury
Department:
National Treasury
REPUBLIC OF SOUTH AFRICA

			the work of the regulators, including in setting standards
ASISA	Chapter 7-General	The FSRB will in fact empower the Regulator to make "legislative instruments" regarding, inter alia, "financial products and financial services", which, although not subject to parliamentary approval, will trump Financial Sector Laws made by Parliament in the event of any inconsistency. (Chapter 7 of the FSRB read with the definition of "this Act" and subsection 1(3)). It is respectfully submitted that the proposed assignment of plenary legislative powers does not accord with the provisions of Chapter 4 of the Constitution and are therefore probably unconstitutional (see EXECUTIVE COUNCIL, WESTERN CAPE LEGISLATURE AND OTHERS v PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA 1995(4)SA 877 (CC) , especially paragraph [51] [62] and [63].)	***See redrafted chapter. No longer refer to legislative instruments but regulatory instruments instead.*** ***Regulatory instruments, as delegated legislation, could not trump the provisions of principal legislation (the financial sector laws).*** ***Clear consultation requirements are set out before a regulator can publish a regulatory instrument, including publishing a statement of the expected impact. Regulatory instruments are also to be submitted to the National Assembly*** ***The Prudential Authority and FSCA may make prudential and conduct standards, respectively, for the purposes set out in sub clause (1) in clauses 105 and 106, and sub clause (2) of clauses 105 and 106, and clause 108 list specific matters in respect of which standards can be made. This provides a clear scope and limit to the powers to issues standards, and the financial sector regulators cannot make standards outside of the purposes for which, and the matters in respect of which, they can make standards. The regulators cannot exceed the appropriate scope of those powers as defined in the Bill. Standards would also need to be consistent with the objectives of the regulators, and the Object of the Bill. The consultation processes required in making standards also provide for scrutiny and a potential check on the unauthorised exercise of standard making powers. Note also the transitional provisions in Chapter 17 (clause 283) which states that the National Treasury, in conjunction with the financial sector regulators, is to develop principles for further policy frameworks, not inconsistent with this Act, for the regulation and***

			supervision of financial institutions. This will guide the work of the regulators, including in setting standards ***See also redrafted clause on inconsistencies between existing legislation and the FSR Bill once enacted (clause 9). Regulatory instruments cannot and will not trump existing Acts. However, should regulatory instruments made under the FSR Bill once enacted be inconsistent with existing regulatory instruments made under other financial sector laws, the new regulatory instruments will prevail.***
Standard Bank	Chapter 7-General	Standard Bank's general concern with Chapter Seven is with the powers granted to the PA and FSCA to make subordinate legislation. The standard-setting powers in this chapter, together the power to issue binding interpretations of legislation in Clause 131, are extensive and seem to test the limits of what is constitutionally appropriate for a regulatory body. While there may be legitimate reasons to grant the new authorities these standard-setting powers, it is absolutely essential that the exercise of such powers is subject to a very robust set of checks and balances. The consultation requirements in Clause 90 are an important element in this regard, but are not sufficient. It must be clear that the authorities are not empowered to make new law and are not empowered to make new policy. These are the responsibilities of the legislature and the department respectively. Another concern with this part of the FSRB is the extensive list of matters that the FSCA may issue standards in relation to. This seems to be at odds with the shift to a more outcomes-based approach to supervising market conduct. It grants the FSCA powers to intrude into many of the core commercial processes and decisions of a financial institution: an example is sub-clause 95(2)(j) which permits the FSCA to make "*standards for financial products or financial services, including in relation to the design, pricing and valuation thereof and the applied methodologies*." Standard Bank does not support price regulation, and the setting of maximum charges and fees in legislation. We believe that evidence from many other	***See redrafted chapter. No longer refer to legislative instruments but regulatory instruments instead.*** ***The Prudential Authority and FSCA may make prudential and conduct standards, respectively, for the purposes set out in sub clause (1) in clauses 105 and 106, and sub clause (2) of clauses 105 and 106, and clause 108 list specific matters in respect of which standards can be made. This provides a clear scope and limit to the powers to issues standards, and the financial sector regulators cannot make standards outside of the purposes for which, and the matters in respect of which, they can make standards. The regulators cannot exceed the appropriate scope of those powers as defined in the Bill. Standards would also need to be consistent with the objectives of the regulators, and the Object of the Bill. The consultation processes required in making standards also provide for scrutiny and a potential check on the unauthorised exercise of standard making powers.*** ***Note also the transitional provisions in Chapter 17 (clause 283) which states that the National Treasury, in conjunction with the financial sector regulators, is to develop principles for further policy frameworks,***

		jurisdictions shows that price-fixing leads to distortions and poor outcomes for customers, and the economy. Standard Bank supports a regulatory approach that focuses on whether financial customers are getting good outcomes rather than an approach where the regulatory authority prescribes in detailed how every aspect of the business should be conducted.	***not inconsistent with this Act, for the regulation and supervision of financial institutions. This will guide the work of the regulators, including on setting standards*** ***Clear consultation requirements are set out before a regulator can publish a regulatory instrument, including publishing a statement of the expected impact. Regulatory instruments are also to be submitted to the National Assembly*** ***See also the redrafted clauses on binding interpretations, in the enforcement chapter (chapter 10). The purpose of a binding interpretation is to promote clarity, consistency and certainty in the interpretation and application of financial sector laws. There is a clear consultation process required of regulators when doing so.***
Part 1: Making Legislative Instruments			
ASISA	89	In terms of subsection 89(1), the financial services regulator will be able to issue "legislative instruments" in respect of all financial services laws, notwithstanding the express provisions of such other financial services laws. We refer to our general comments and our commentary on section 1(3) as regards the constitutionality of delegating such plenary legislative powers. We would also like to point out that the proposed dispensation is bound to give rise to confusion and legal uncertainty as people will no longer be able to rely on the express provisions in a financial sector law.	***Regulatory instruments, as delegated legislation, could not trump the provisions of principal legislation (the financial sector laws).*** ***See response to comment above. See also redrafted clause on inconsistencies between existing legislation and the FSR Bill once enacted (clause 9). Regulatory instruments cannot and will not trump existing Acts. However, should regulatory instruments made under the FSR Bill once enacted be inconsistent with existing regulatory instruments made under other financial sector laws, the new regulatory instruments will prevail.***
90. Consultation requirements			
Strate	90(1)	**The issue of legislative instruments and prior notice on impact;**	***See redrafted provisions regarding the consultation process to be followed when making regulatory***

		consultation; regulatory impact analysis (RIA) The Bill gives the Authorities "*additional power to plug any gaps in the existing sectoral laws*" (see **Response document on 58/233**). This may also be done by the Reserve Bank (76(2)*(c)*(i)). The exercise of "*legislative powers*" in 94-96 over regulated persons by an "*administrative regulatory body*" should always be treated with extra caution. Standards are not the same as primary legislation that is debated in Parliament, and the necessary, specially created, controls should be exercised. Clause 87(1)*(b)* on consultation for legislative instruments is noted and good. Clause 90 attempts to address some of the issues with regard to the impact of the proposals and consultation (90 (1) and (3)). It is submitted that clause 90 be further enhanced to clearly set out what the regulated person can expect **upfront** from the regulator in this regard. Clause 90 deals with the position leading up to the issuance of a legislative instrument. As it currently reads, the financial sector regulator will issue a statement explaining 2 factors (90(1)*(a)*(i)) and then it must consider all the submissions and the expected impact (90(3)). It implies that the person's submissions must spell out the impact. Clause 90 reads that besides the 2 factors in 90(1)*(a)*(i), the rest is then left to the person making submissions as part of the consultation arrangements. The onus should not be on the person/regulated party to do the full impact analysis and assessment by way of submission(s). The submissions of the person/relevant regulated persons should already reflect the results of the impact analysis by challenging or accepting specific/all (factual) findings made by the regulator in the statement. It is not clear from the wording whether or not the legislator intends a "partial regulatory impact assessment (RIA)", a full RIA, or no RIA (see 2012 RIA Guidelines document for South Africa). Please clarify. Note also that the report on the consultation process in clause 92 comes after the instrument has been made and only refers to "*a statement of the expected impact of the instrument*". It is not clear what exactly is to be expected, but it cannot inform the decision-making upfront. Please clarify the intention of the extent of the analysis in the statement by amending the wording. Is the "*need for the instrument*" the policy objective?	***instruments. Regulators will have to publish a statement of the expected impact of a regulatory instrument, among other things, as part of the consultation process. The process to be followed when making an instrument has been clarified, including when the instrument comes into effect. The section on processes to be followed when making urgent standards has also been refined***

		Will it include a description of the risk? No mention is made of identifying and assessing alternative options, or who would be affected. Please elaborate. The statement explaining in 90(1)*(a)* must also address the question whether the benefits justify the costs, whether particular sectors are disproportionately affected, unintended consequences, etc. It is important that the Bill contains a clear guideline in this regard against which the legislative instruments could be measured. It is believed that the power of the regulator should be controlled. Therefore, a positive duty should be placed on the regulators to balance the regulatory outcome and to be mindful of the unintended consequences in the over-regulation of Financial Institutions. It is true that there always remains an avenue of an appeal process, but this is surely not the answer in the day-to-day running. It is our view that the mere "*extensive consultation and coordination requirements between the Regulators*" (see **Response document on 12/233**) only deal with certain aspects of Authorities' (PA's and FSCA's) roles. It focuses on the objective not to overlook or miss any possible regulatory risk, but does not express any wording on the fit with existing requirements on the relevant sector and how the business sectors will be affected. It is submitted that the clauses dealing with administrative actions in chapter 13 are very general and do not address the specific abovementioned concerns. The mere reference of administrative actions to the Director-General and other regulator, and consultation period for comments (90; 149(3)), do not warrant fairness to the Financial Institutions. Clause 93 on additional consultation is noted, but this does not provide sufficient control. It is submitted that a full regulatory impact assessment should be done and that this requirement should be set out as a guideline in the Bill. We agree that financial stability issues are regarded in a different light and should be treated differently, as set out in chapter 2; also clause 91.	
BASA	90(1)	***90****(1) Subject to section 91, ~~the~~a financial sector regulator ~~who makes a legislative instrument, prior to making a legislative instrument,~~must, prior to making a legislative instrument–* *(a)………* *(b) adhere to the financial sector~~engage in the~~ regulator's consultation arrangements that are referred to in section 87(1)(b)*	***Clauses on consultation requirements redrafted***

SAIPA	90(1)(b)	Draft legislative requirements should be open for comment to the public, as persons and organisations outside of the 'consultation arrangements' (e.g. academia or professional bodies) may be able to give valuable input on the instrument and its potential impact on the sector and the economy.	***Agreed. Submissions must be invited on the draft instrument from any interested party***
ASISA	90(1)	Whilst the section does provide for a consultative process, it is clear that the Regulator will be the sole arbitrator as to whether or not it should implement the proposed legislative instruments. As mentioned above this does not accord with the "manner and form" provisions envisaged and prescribed in Chapter 4 of the Constitution. ASISA suggest that all such legislative instruments which will be akin to national legislation must go through a parliamentary process before it becomes effective	***See redrafted chapter, and response to comment above***
ASISA	90(1)(b)	We propose that the consultation process specifically and expressly include a reference to industry bodies.	***Unnecessary. There is no limit set on who may make submissions during the consultation process, and comments from industry bodies are certainly welcome and appreciated***
ASISA	90	There is a concern about the prescribed consultation process set out in section 90 of the FSRB. Whilst Section 90 of the FSRB does provide for a consultation process, sub-section 90(3) makes a clear that the Regulator will have carte blanche to decide whether or not to effect the *"legislative instrument"* proposed by it, despite the submissions received. We are concerned about the fact that the authority is given the power to make and issue legislative instruments and override financial sector laws, enforce those legislative instruments and issue penalties and dictate how the instruments must be interpreted.	***See redrafted chapter and response to comment above. Regulatory instruments, as delegated legislation, will not be able to override existing financial sector laws, which are primary legislation. Draft regulatory instruments must be submitted to the National Assembly prior to their finalisation and publication.***
ASISA	90(2)	It is also not clear where the publication of proposed legislative instruments must be effected. It is not clear what the purpose of section 90(2) is. The only other applicable regulatory authority in question appears to be the Prudential Authority, but it is not clear whether the PA must be consulted and must agree with any proposed legislative instruments. What will happen when a proposed conduct standard has major prudential impacts?	***See clause 277 for publication requirements*** ***See redrafted consultation provisions. Each financial sector regulator must consult the other, the SARB, the NCR and the CMS when proposing to issue a standard precisely so that impacts on their area of supervision may be assessed ahead of time. MoUs between the regulators may set out how disputes and***

			disagreements are managed.
Transaction Capital	90(2)(ii)(bb)	Transaction Capital recommends that the period of 60 days set out in section 90(2)(ii)(bb) be amended to 60 business days to afford sufficient time to comment over holiday periods (such as the April and December/January periods). This extended time period will also afford interested parties sufficient time to conduct research to provide more comprehensive commentary.	***Period of at least 2 months to make submissions***
Geof Mortlock	90(3)	This is where you could include an obligation to publish a cost/benefit analysis for consultation.	***Regulators will publish a statement of the expected impact of the instrument***
BASA	90(4)	In respect of clause 90(4) it is felt that as the clause is currently drafted "materially different" is too vague.	***If instrument is materially different in substance to draft, consultation process must be repeated***
ASISA	90(4)	Clarity is requested on when an instrument will be "materially" different?	***If instrument is materially different in substance to draft, consultation process must be repeated***
Transaction Capital	90(4)	Subsection (4) should be deleted in its entirety as minor amendments to proposed legislation could have a dire impact on regulated entities (for example, the changes to the prescription provisions in the National Credit Amendment Act that was signed during 2014 and in respect of which the industry was not engaged). Section 90(4) may lead to endless debate concerning the issue of "materiality". In the event that the financial sector regulator elects to make a legislative instrument (a regulation or a policy consideration) which, in the regulator's view, is not materially different to that consulted on, the subsequently varied legislative instrument could be published (and become effective) without any consultative process. That process would potentially conflict with the express statutory provisions of section 87(1) of the Bill. *~~90(4) If the financial sector regulator proposes, whether or not as a result of the consultation process, to make a legislative instrument that is materially different in substance to the draft instrument that was published in terms of subsection (1), the financial sector regulator must, before making the instrument, again follow the procedure in subsection (1).~~*	***If instrument is materially different in substance to draft, consultation process must be repeated***
ASISA	91	This section empowers the Regulator to issue "legislative instruments", which	***See redrafted provisions for making urgent regulatory***

		will be binding for 12 months, without any prior consultative process if it considers it necessary to do so "*...on reasonable grounds"*. In view of the potential impact of legislative instruments on Financial Institutions and their customers, it is submitted that the Section be deleted and that the Act itself should stipulate what measures may be taken by the Regulator upon the occurrence of a "systemic event". It should also provide, for example, that the regulator must approach the High Court before it effects any such measures, in order to ensure that such measures are reasonable in the circumstances. As presently worded the regulator will be the sole judge as regards whether reasonable grounds exist. Such a dispensation will provide for "checks and balances" and also ensure that the expenditure of unnecessary costs incidental to complying with legislation is prevented and/or substantially reduced. In this regard we point out that the majority of financial products are administered by way of systems, the amendment of which is both time and cost intensive. It is not feasible to expect the financial services sector to adapt all its procedures and systems for a 12 month period only.	***instruments. No reference is now made to a 12 month period. A process that must subsequently be followed similar to that required for regulatory instruments that are not made urgently.***
Transaction Capital	91	The section should be deleted in its entirety as it is unconstitutional for a financial sector regulator to pass legislative instruments without having followed a consultation process. This section does not clearly set out those instances in which legislative instruments are urgently required and leaving this to the discretion of the financial sector regulator concerned would result in an inconsistent application of this section. If urgent action is required, the financial sector regulator concerned has other remedies available in terms of the Bill (namely, issuing directives and declaring practises to be undesirable) and the common law. As stated above, it is our view that the infrastructure required and the costs involved in complying with legislation for a maximum period of 1 year outweigh the benefits of such compliance.	***See redrafted provisions for making urgent regulatory instruments. No reference is now made to a 12 month period. A process that must subsequently be followed similar to that required for regulatory instruments that are not made urgently.***
ASISA	91(1)	***91.*** *(1) Subject to subsections (4)* ~~*and (5),*~~ *if the financial sector regulator who makes a legislative instrument considers on reasonable grounds that it is*	***Provisions redrafted***

		necessary to…..	
BASA	91	The need for an urgency provision is recognised. However, it should also be recognised that significant costs may be incurred by firms to implement new regulatory requirements that may lapse, or be significantly altered, after 12-months. Consideration should be given to a mechanism to stay the effect of an urgent legislative instrument if it is established in the subsequent consultation that the instrument should be remade. Consideration should also be given to codifying what constitutes "reasonable grounds" for urgency; if not in the Bill then in the consultation processes established by the authorities. It is also recommended that provisions setting out the process to be followed by invoking clause 91 are included in the Bill. Further the Bill should provide for a reasonable time period within which an institution must comply with an urgent legislative instrument. Provision should be made for revoking such 'urgent' standards should they no longer be required within the 12-month period. BASA suggest the following revisions: ***91****(1) Subject to subsections (4) and (5), if the financial sector regulator who makes a legislative instrument considers on reasonable grounds that it is necessary to make a legislative instrument urgently, ~~it may do so without having complied, or complied fully, with section 90~~.* *(2) A legislative instrument made in terms of subsection (1) ceases to have effect at the end of 12 months after it comes into operation.* *~~(3) Action taken by a financial sector regulator in terms of a legislative instrument made in terms of subsection (1) while the legislative instrument is in effect is valid, even if the legislative instrument subsequently ceases to have effect in terms of subsection (2).~~* *(4) ………………*	***See redrafted provisions for making urgent regulatory instruments. No reference is now made to a 12 month period. A process that must subsequently be followed similar to that required for regulatory instruments that are not made urgently.***

92. Reports on consultation process			
BASA	92	***92**(1) With each legislative instrument made by a financial sector regulator, the regulator must publish a report of the ~~consultative~~ consultation process undertaken in respect of the instrument.*	***Amended***
Part 2: Standards for Financial Institutions			
SAIA	General-Standards	The powers afforded to the authorities to make prudential and market conduct standards is supported. The suggestion that these standards should apply retrospectively is not supported. Further engagement is invited on the suggestion of developing retrospective standards in order to mitigate potential adverse effects of enacting retrospective legislation or standards.	***Reference to retrospective application has been deleted***
Strate	Prudential and Conduct Standards	**Duplication in Standards** In general, please note that there may be unnecessary duplication in the clauses dealing with the issuing of Standards. The patchwork of prudential regulation and conduct regulation may become an obstacle and regulatory burden to the full development of a competitive financial system in South Africa. It is not clear if this approach has been intended in line with the policy decision of "dual" regulation. However, it contradicts the approach in 76 between financial sector regulators and the Reserve Bank. The concern is that the dual regulation will lead to a regulatory burden on financial institutions which may prove to be costly, lengthy, inefficient and impractical. This is specifically clear from the possible overlap in making of Standards by the "*non-licensing*" regulator over Financial Institutions. For example, Prudential Standards in 94(2)*(b)* on fit and proper requirements and 94(2)*(c)* on governance are duplicated and would fit better on the FSCA Standards as set out in 95. It is submitted that the unnecessary duplication in 94-96 should be deleted upfront in the Bill and not left for a practical solution of co-operation at implementation phase. Please simplify and streamline.	***Noted. To deal with duplication, and to simplify and streamline the provisions, see redrafted provisions on prudential standards, conduct standards, and list of additional matters on which standards may be made.***
Transaction Capital	Prudential and Conduct Standards	The inclusion of prudential standards and conduct standards in the definition of "subordinate legislation" elevates administrative action, policy decisions, and similar administrative acts to the status of subordinate legislation, more	***The Bill refers now to regulatory instruments, with no reference to subordinate legislation in the definition. Standards may be set by the regulators for the***

		particularly it conflates subordinate legislation with matters such as prudential, conduct and joint standards which are not properly classified as subordinate legislation as they do not meet the distinct characteristics of subordinate legislation that distinguishes it from other species of administrative action. Traditionally, properly promulgated regulations would fall within the definition of subordinate legislation whereas matters such as prudentials, conduct and joint standards would not. For example, section 94(4)(c) of the Bill provides that a prudential standard may apply retrospectively (without prescribing the circumstances in which such retrospectivity would become of application). A similar provision applies to conduct standards (namely section 95(4)(d) of the Bill), but not to joint standards. The Bill does not explain the manner in which prudential, conduct or joint standards are to take effect. Part 4 of Chapter 17 of the Bill makes provision for the creation of a Financial Sector Information Register which is to provide affected parties with access to Financial Sector laws and legislative instruments, but the relevant sections (sections 223 to 226 of the Bill) do not explain when and how those laws or instruments take effect. It is proposed that the contemplated promulgation by the Minister of Finance of appropriate regulations should suffice to facilitate the implementation of the Bill (as contemplated in Section 215 of the Bill).	***purposes and within the scope of matters in respect of which standards may be made. .*** ***Explicit provisions now set out when regulatory instruments come into effect.*** ***References to retrospective application have been deleted.***
Strate	Prudential and Conduct Standards	General comment: Unlike a specific licensing condition, these Standards (including amended Standards) cover a very wide range of topics and elements. Most Standards will be applied in a "big brush" way instead of being issued for a specific Financial Institution in specific circumstances or as a result of specific requirements (we are aware of proposed amendment of s 28 in FMA). **It is submitted that a full regulatory impact assessment must accompany the standards and amended standards when issued.** Please insert: 94(1) *"The [PA] may, <u>on the completion of a full regulatory impact assessment,</u>make prudential standards . . . "* Please insert same for 95(1*) "The [FSCA] may, <u>on the completion of a full</u>*	***See redrafted provisions on consultation. Regulators must publish a statement of the expected impact*** ***Standards may also be made in respect of different categories of financial institutions, representatives, significant owners, contractors or key persons; or different circumstances, which will permit appropriately tailored standards to be made.***

		regulatory impact assessment, make conduct standards . . . " Please insert in 96(1) *"The [PA] and the [FSCA] may, on the completion of a full regulatory impact assessment, make standards jointly . . ."*	
JSE	Prudential and Conduct Standards	**Standards in relation to the SRO model** In terms of s94, the PA would have the authority to make prudential standards in relation to "*members of market infrastructures*". In terms of s95, the FSCA would have the authority to make conduct standards in relation to authorised users, clearing members or participants of market infrastructures (as financial service providers). In terms of the FMA, market infrastructures must issue rules in accordance with the provisions of the FMA. The market infrastructure must supervise compliance by its users with those rules and enforce its rules. The market infrastructure must also supervise compliance with the FMA by its users, report any non-compliance to the registrar and assist the registrar in enforcing the Act. While there is no uncertainty as to the functions that market infrastructures must perform in relation to the FMA, the "overlay" of standards in relation to market infrastructures and their authorised users, clearing members or participants is vague and could result in unintended outcomes such as "parallel rulebooks" where users of market infrastructures are subject to the same or similar standards and rules. In this scenario, securities services providers could be regulated by two regulators and be subject to enforcement and on-site visits for the identical or similar standards or rules which would create uncertainty and would be overly burdensome. While standards are appropriate and necessary in industries where the PA or FSCA have direct supervision over the financial institution, this is not necessarily the case where market infrastructures (SROs) are required to issue and enforce rules. Furthermore, while the market infrastructure is better-placed to tailor its rules based on the business model and securities services offered by its users, standards are more likely to have a "one-size fits all" approach (refer	***See redrafted provisions specifically 97(3)(b) which states that if requirements are imposed on providers of securities services, the market infrastructure that licenses those providers must be consulted before the regulatory instrument is made. This will limit the possibility of overlaps.***

		to our commentary above on the current SRO model). It is our understanding that the intent of the FSRB drafters was not to create duplication between standards and rules, but that in the case of market infrastructures the standards would instead instruct the market infrastructure as to what the rules should include. If this is the case, we would suggest that the FSRB be amended to adequately reflect that intent. Standards applicable to authorised users, clearing members or participants should rather be applied through the SRO rules than being issued separately by the FSCA. This approach should be the same for standards for listed companies. In s95(2)(l) of the FSRB, the FSCA can issue standards for prospectuses issued by listed companies. The JSE has extensive requirements in our listings requirements for prospectuses and would be concerned if the FSCA issued their own separate standards. The FSCA should instead, if necessary, require an exchange to include specific requirements in its listing requirements.	
94. Prudential standards			
Geof Mortlock	94	I suggest that this be broadened to include the ability to make prudential standards in relation to the conduct of business, governance and management of risks of a regulated entity and its group.	***Regulators will be able to apply standards at the group level***
PASA	94(1)(b)	Refer to "payment system participants" as defined, instead of "participants in the payment system". The same applies to Section 96(4).	***Clause deleted***
Strate	94(1)*(b)*	The wording "*safety and soundness . . . ensuring . . . market infrastructures, . . . able to comply with their obligations* ***to each other and financial customers, as applicable***" refers: The (bold)wording is confusing and it is not clear whether "*each other*" only refer to the named entities in this clause. Please redraft and consider the wording "*as described in the relevant sectoral law*" instead.	***Clause deleted***
PASA	94(2)	The term "financial instruments" is not defined.	***A definition is now included***
ASISA	94(2)	94(2)(b) - We note that this requirement is in addition to the fit and proper requirements included in BN 158 of 2014 for "responsible persons" defined in	***The standards are not intended to match exactly the requirements of existing board notices. The provisions in the chapter are indicative of the nature***

		the BN. The definitions of "key persons" in the FSR Bill are not completely aligned to the definition of "responsible person" in BN 158 and expand the scope, also for insurers. Clarity is required on whether this misalignment and expansion of scope are intentional or whether it will be aligned. ----- 94(2)(b)(iii): Requirement **not** Included in BN 158 of 2014 for "responsible persons" as defined in the BN. Also see comment on subsection (2)(b). ----- 94(2)(e) We note that there is no definition for "internal control arrangements" and this could be too wide. See for instance BN 158 provisions on internal control. ----- 94(2)(g) Once again very wide without any definition or indication of what is meant here. ----- 94(2)(h) See also section 95(t) and the potential conflict with other existing standards in light of section 94(5) below.	***of standards that the regulators may make.. The standards will be consulted upon before they are made***
Deloitte	94(2)(b)(ii)	We recommend that sub-regulation 94(2)(b)(ii) be expanded to also include "knowledge testing" in order to be consistent with sub-regulation 95(2)(a)(ii).	***The provision has been refined; see clause 108 setting out additional matters on which standards may be made by both the PA and the FSCA***
BASA	94(2)(b)(iii)	BASA members have concerns about how "financial standing" will be determined, and how intrusive this process will be. This requirement should be defined and appropriate criteria set out.	***Noted. Further details will be set out in any standards made to this effect***
BASA	94(2)(c)	The Prudential Authority must take into account other relevant legislation and regulation including the Companies Act, JSE Listing Requirements, and King III.	***Noted***
JSE	94(2)*(d)*	The FSCA can make standards for "risk management and compliance" arrangements. Is there a reason why "and compliance"was omitted for the PA?	***The provision has been refined; see clause 108 setting out additional matters on which standards may be made by both the PA and the FSCA***
SAIA	94(2)(f)	Clarity is sought on what is meant by *"insourcing"*and how this descriptor differs from "outsourcing" and why "insourcing" is included.	***The reference to "Insourcing" has been deleted***

Strate	94(2)*(f)*&*(j)*	These two clauses repeat.	***Noted; the provisions have been refined***
JSE	94(2)*(e)*	The FSCA can make standards for "*internal control arrangements of financial institutions*". Is there a reason why "*of financial institutions*" was omitted for the PA?	***Provision has been refined; see 106 setting out additional matters on which standards may be made by both the PA and the FSCA***
JSE	94((2)*(j)* &*(f)*	Duplication	***Noted, the provisions have been refined***
Geof Mortlock	94(3)	Need to make it clear that standards can apply in respect of the licensed entity, a holding company, and any subsidiaries or other related parties of the regulated entity or holding company.	***Financial institution definition includes a holding company***
Strate	94(3)*(a)*	We note that "*financial services*" are not included. Is this intended? Cf 95(1)*(b)* on the FSCA side.	***See redrafted provisions on prudential standards, 105(1)***
ASISA	94(4)	ASISA members understand that circumstances may necessitate retrospective application of a prudential standard. This clause, however, may raise constitutional concerns as it is drafted broadly. The potential concern will be addressed by redrafting the clause to provide that a prudential standard may impose requirements in respect of its application. Such requirements could never be contrary to the Constitution. *94(4) A prudential standard may –* *(a) impose requirements for the approval of the Prudential Authority in respect of specified matters, including the appointment of key persons;* *(b) impose limitations or prohibitions; or* *(c) ~~apply retrospectively.~~ impose requirements in respect of its application*	***Noted. The provision for retrospective application has been deleted***
BASA, Standard Bank	94(4)(c)	The retrospective application of standards is not supported. Retrospective application is generally considered unlawful or the consequences thereof are very seriously considered in court decisions and this is not in line with transparent practice. This clause should be deleted.	***Retrospective application deleted***
SAIA	94(4)(c)	We respectfully do not agree with the power granted to make prudential standards apply retrospectively. It is a general expectation and requirement of the rule of law that legislation	***Retrospective application deleted***

		should only apply prospectively. Retrospective provisions should only be enacted if they can be fully justified. The prime concerns regarding retrospective legislation are that it removes vested rights or defences and it could make actions or omissions unlawful that were previously lawful. Retrospective legislation could be argued as unconstitutional and could result in unintended reputational damage for financial institutions. It is fundamentally unfair to hold financial institutions to be in contravention of standards when the standards did not exist when the alleged contravention occurred. The most important element in justifying retrospective provisions is to identify the extent (if any) to which the industry and customers will be adversely affected. This information will determine whether or not the provision can be justified. Clarity is sought on why the policy maker is of the view that retrospective standards are necessary; and whether consideration has been given to possible mitigation of the potential adverse effects of enacting retrospective legislation or standards.	
Strate	94(4)*(c)* & 95(4)*(c)*	Please insert in both clauses the basis for this requirement. This clause would only be reasonable if reasons were given for the new or amended standard(s) that must work retrospectively. Please insert wording to this effect. For example, "*The standards may only apply retrospectively if a regulatory impact assessment has been done indicating that it is reasonable*."	***Retrospective application deleted***
SAIPA	94(5)	Professional accountancy organisations and accounting standard setters should be consulted and/or be allowed to comment and give input on proposed accounting standards and requirements.	***Provision has been deleted; note any interested party will be able to make submissions on regulatory instruments during the consultation process***
SAIA	94(5)	Further clarity is required as to what exactly is being referred to in respect of *"accounting standards"*.	***Provision has been deleted***
BASA	94(5)	Clarity is requested as to whether this means that the Prudential Authority can impose IFRS standards, for example.	***Provision has been deleted***

ASISA	94(6)	It is assumed that the same consultation process will be applied when prudential standards are amended. The provision should be amended accordingly for the sake of clarity. *94(6) The Prudential Authority may, subject to section 90 of the Act, amend any prudential standard from time to time, and financial institutions and key persons must comply with the amended prudential standard within the period determined by the Prudential Authority.*	***Agreed***
SAIA	94(6)	Clarity is requested on the inclusion of "*key persons*" specifically to comply with amended prudential standards.	***Provision has been deleted. See 110(2) for amending or revoking standards***
Strate	94(2)*(c)*(v) & (vi) 95(2)*(b)*(v) & (vi) 95(4)*(a)*	The Bill gives the Authorities "*additional power to plug any gaps in the existing sectoral laws. . . . The revised Bill has gone a step further to specify additional statutory powers . . . .*" (**Response document on 60/233**). However, some of the Standards go too far in our opinion, for example those determining "*responsibilities and duties*" of key persons (94(2)*(c)*(v) and 95(2)*(b)*(v)); Standards dealing with remuneration etc. (94(2)*(c)*(vi) and 95(2)*(b)*(vi)); the appointment of key persons (95(4)*(a)*). For example, it is acceptable that a particular financial institution must appoint a key person, namely a compliance officer as per Standard. But, it will be unacceptable if the Standard prescribes the appointment criteria for the compliance officer. We are of the view that these aspects are to be dealt with in the commercial entity itself as part of the Financial Institution's own business model and governance requirements. The setting of Standards in these areas may overstep the line.	***Disagree. Note that such standards must be set with the aim of-*** ***Prudential standards: ensuring the safety and soundness of those financial institutions; reducing the risk that those financial institutions and key persons engage in conduct that is or contributes to financial crime; and assisting in maintaining financial stability*** ***Conduct standards: ensuring the efficiency and integrity of financial markets; ensuring that financial institutions and representatives treat financial customers fairly; reducing the risk that financial institutions, representatives and key persons engage in conduct that is or contributes to financial crime; and assisting in maintaining financial stability.***
95. Conduct standards			
World Bank	95(1)	Clause 95(1) lists specific matters in respect of which conduct standards may be made, but there is no overarching statement to the effect that they may be made for any of the purposes of the FSCA's objectives (without limitation). It is suggested that the opening words of each clause be modified so as to include such a general statement and then to provide the current list by way of a non-	***Provisions relating to conduct standards have been refined and no longer list detailed areas for which conduct standards may be refined. The provisions are intended to be indicative of the nature of conduct standards to be made - the FSCA can set standards***

		exhaustive list of examples of the types of conduct standards that may be made. It is also suggested that the list of matters in respect of which FSCA conduct standards may be made be expanded so that it is clear that they may be made in respect of digital financial services, including those that are provided by non–financial institutions. In this regard it is to be noted that there are a number of consumer protection issues which are specific to the digital environment including (for example): safeguarding client funds in e-wallets; liability for unauthorized transactions; actions of agents; system failures delays in payments; fraud and actions of third parties; and electronic disclosures and contracts. The list of matters in respect of which FSCA conduct standards may be made could also usefully be expanded to specifically refer to standards in relation to unfair terms in contracts. Conduct standards (and prudential standards) may apply retrospectively. It would be helpful if there were clarification as to how this clause is intended to work in practice. The status of conduct standards vis-à-vis other legislative instruments is not specified in the FSR Bill (see, for example, the definition of "legislative instrument" in clause 1, and Part 1 of Chapter 7 of the FSR Bill). It is understood however, that regulations will override standards. In this regard consideration might be given to the interaction between regulations under current financial sector laws and conduct standards made pursuant to the FSR Bill.	***with the aim of-*** • ***ensuring the efficiency and integrity of financial markets*** • ***ensuring that financial institutions and representatives treat financial customers fairly*** • ***reducing the risk that financial institutions, representatives and key persons engage in conduct that is or contributes to financial crime; and*** • ***assisting in maintaining financial stability*** ***Note also the transitional provisions in Chapter 17 (clause 283) which states that the National Treasury, in conjunction with the financial sector regulators, is to develop principles for further policy frameworks, not inconsistent with this Act, for the regulation and supervision of financial institutions. This will guide the work of the regulators, including on setting standards***
Standard Bank	95	The approach to conduct regulation that is reflected in the extensive list of issues in Clause 95 is worrying to Standard Bank as we believe such an approach will stifle innovation and competition. It places an enormous burden on the regulators themselves. We also believe that too many conduct rules and prescriptions will ultimately undermine the sought after cultural shift within financial firms that government is seeking to drive through the Market Conduct Policy Framework.	***Provisions relating to conduct standards have been refined. Note that the provisions are intended to be indicative of the nature of conduct standards, which the FSCA can set with the aim of ensuring the efficiency and integrity of financial markets; ensuring that financial institutions and representatives treat financial customers fairly; reducing the risk that financial institutions, representatives and key persons engage in conduct that is or contributes to financial crime; and assisting in maintaining financial stability.***

Deloitte	95	Sub-regulation 95 lists conduct standards. Whilst this isn't meant to be an exhaustive there is no mention of the Financial Sector Conduct Authority producing Recovery and Resolution Plan rules. Who will do this for Financial Market Infrastructures if the Financial Sector Conduct Authority is the licensing authority?	***Provisions relating to conduct standards have been refined, and include assisting in maintaining financial stability. The SARB, in terms of clause 30, is empowered to direct the Prudential Authority to set prudential standards on SIFIs, to include for recovery and resolution. Standards may be made in respect of market infrastructures by the Prudential Authority, on the direction of the SARB, which would be supervised and enforced by the PA. The Prudential Authority must notify the SARB and the Financial Stability Oversight Committee on steps taken to enforce standards made, and the effects of those standards. These standards could be made in respect of market infrastructures, irrespective of which agency is the licensing authority.***
BASA	95	BASA strongly recommends that, in order to ensure that an effective market conduct culture and programme that is led by business leaders is embedded into the organisation through business operational platform controls, there needs to be an emphasis on principles-based legislation, supported by rules where necessary. BASA accepts that there is a need for some rules, which are necessary to demonstrate evidence that market conduct standards are being adhered to within the financial institution. However, to insert detailed and prescriptive conduct standards into the FSCA regulatory framework, as is proposed in Clause 95 of the Bill, will only serve to shift focus away from leadership, ownership and accountability, thus resulting in fair customer treatment programmes becoming mere compliance tick-box exercises. It is also noteworthy to mention that many of the detailed conduct standards which are proposed under this section of the Bill already exist in financial sector legislation. More prescriptive rules in relation hereto will thus not serve to further mitigate systemic risks or market instability.	***Agreed.*** ***Provisions relating to conduct standards have been refined. Note that the provisions are intended to be indicative of the nature of conduct standards, which the FSCA can set with the aim of ensuring the efficiency and integrity of financial markets; ensuring that financial institutions and representatives treat financial customers fairly; reducing the risk that financial institutions, representatives and key persons engage in conduct that is or contributes to financial crime; and assisting in maintaining financial stability.***
ASISA	95	Section 95 as presently worded effectively empowers the FSCA to legislate the	***See responses to General comments above noting that***

		operation of the entire financial sector (e.g. subsection 95(1)(b) - regard being had to the definition of "financial products" and "financial services"). Subsections 95(2)(b), (e), (j), (p) and (r) are also of particular concern. As pointed out in our commentary on section 1(3) the authorities will in fact be given carte blanche to trump the provisions of financial sector laws issued by Parliament. We believe such a dispensation is clearly unconstitutional and also refer to our General comments. The proposed section therefore does not necessarily provide how the authority should regulate the provision of financial products / services, but also to decide what financial products and services may be rendered. It is submitted that this constitutes "policy decisions" which should be determined by Parliament and be embodied in the relevant financial sector laws. Please also see our General comment.	***standards, as delegated legislation, cannot override Acts passed by Parliament and noting the transitional provisions to provide policy frameworks within which the regulators will operate. See also refined provisions for conduct standards, noting that such standards must be set with the aim of ensuring the efficiency and integrity of financial markets; ensuring that financial institutions and representatives treat financial customers fairly; reducing the risk that financial institutions, representatives and key persons engage in conduct that is or contributes to financial crime; and assisting in maintaining financial stability***
ASISA	95(1)(a)	When read with the definition of a "regulated person", the question arises as to whether a situation could occur where standards could apply to non-financial institutions or persons in such institutions? Clarity is requested in this regard.	***The Bill no longer refers to regulated persons. Key person is defined in relation to a financial institution***
BASA	95(1)(c)(iii)	Standards for financial literacy are not opposed in principle. However the issue of financial literacy and capability extend beyond the domain of financial institutions: it is a macro-level issue. There needs to be a fundamental shift in how financial literacy is addressed at a basic level (commencing from primary school education). Financial institutions can provide awareness regarding their own products and services, but this will not address the very real issue at a macro level.	***Noted. Provision for standards relating to financial literacy requirements has been deleted***
World Bank	95 and 92	Clause 95 (1) (c) provides the FSCA with the power to make conduct standards for "the conduct of a payment system operator or market infrastructure, provided that conduct has a material impact on a financial customer. Clause 95 (2) provides an overview of market conduct activities of the FSCA, in particular clauses 95 (2) (f), (g), (k), (m), (n), (o), (w). The above referenced clauses reveal a significant amount of overlap with the oversight functions over market infrastructures and payment systems of the	***Standards set in relation to the payment system have been significantly refined – the FSCA can only set standards on payment service providers with the concurrence of the SARB. The SARB remains responsible for the NPS Act.*** ***The consultation requirements also provide that if standards are set on security service providers, the***

		PA/SARB. This observation is reinforced by Clause 95(3) which provides for the FSCA to prescribe market conduct regulations for market infrastructures and payment systems. In addition, Clause 96 provides for joint standards to be issued by the PA, FSCA and the SARB. This could lead to considerable ambiguity in the interpretation of powers of the SARB, PA and the FSCA. In line with international best practices, the SARB should continue to be vested with oversight powers and administration of the NPS Act. While the FSR Bill in principle reflects this position, with the PA being within the SARB and headed by a Deputy Governor of the SARB, the powers of the FSCA reveal significant overlap of oversight activities with the PA/SARB. Clause 95(2) is missing a reference to "market infrastructures", as according to section 95(1) the FSCA is also entitled to issue conduct standards for market infrastructures.	***regulators must consult the market infrastructure responsible for licensing those providers***
BASA	95(2)	The Financial Sector Conduct Authority is entitled to create conduct standards for financial products or financial services, including standards in relation to the design, pricing and valuation thereof and applied methodologies. The Bill in its design is not clear how the Regulator will determine these standards. Section 53(1) (g) does talk to co-operation and collaboration with the Competition Commission for enabling sustainable competition in the provision of financial products and services, however whether this would work practically and efficiently still needs to be seen and the Regulators need to ensure that standardization of products do not take away any form of innovation and competitiveness. BASA need to caution against the commoditization of products as this will take away from the competitive aspect. With no competition, the end consumer is likely to suffer as legitimate product innovation may be stifled. We are also concerned that this approach may lead to moral hazard. Clause 95 provides for the FSCA to make standards in relation to credit, including many elements of credit that are currently legislated under the NCA. Banks are concerned about the overlap with the NCA and the potential for a conflict in requirements: which requirements would take precedence in such circumstances? Clarity in this regard is important.	***Noted. While reference to pricing has been removed, note that the FSCA can set standards with the aim of ensuring the efficiency and integrity of financial markets and ensuring that financial institutions and representatives treat financial customers fairly. These will be consulted on and a statement of expected impact published before a standard is made*** ***See provisions made specifically relating to standards set on credit providers which are not to conflict with any provisions of section 104(4) of the National Credit Act***
BASA	95(2)(a)(ii)	There is a concern that the approach taken in respect of regulatory exams in	***Provision has been refined and the provision for***

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		FAIS will be taken in regard to this requirement. ***95***(2) *Without limiting subsection (1), a conduct standard may make provision with respect to any of the following matters, to achieve a purpose set out in subsection (1):* *(a) fit and proper person requirements for financial institutions and key persons, including–* *(i) personal character qualities of honesty and integrity;* *(ii) competence, including –* *(aa) experience;* *(bb) qualifications;* *(cc) knowledge ~~testing~~*	***knowledge testing has been removed***
BASA	95(2)(a)(iii)	BASA members have concerns about how "financial standing" will be determined, and how intrusive this process will be. This requirement should be defined and appropriate criteria set out.	***Noted. Further details will be set out in any standards made to this effect***
The Unlimited	95(2)(j)	Care must be taken to ensure that such standards do not create an environment that would lead to contraventions of the Competition Act, 1998. We note, however, the provisions of sections 29(1)(f) and 53(1)(g) of the Bill.	***Noted. This provision has been deleted as worded. Note that the provisions in the revised chapter are intended to be indicative of the nature of conduct standards, which the FSCA can set with the aim of ensuring the efficiency and integrity of financial markets; ensuring that financial institutions and representatives treat financial customers fairly; reducing the risk that financial institutions, representatives and key persons engage in conduct that is or contributes to financial crime; and assisting in maintaining financial stability***
SAIA	95(2)(j)	The power afforded to set "(j) standards for financial products or financial services, including in relation to the design, pricing and valuation thereof and the applied methodologies" is not supported. SAIA members recognise the TCF principle of fair product design, but setting specific standards around design and pricing casts the powers afforded to the FSCA very wide and will most likely inhibit competition and impede product innovation, which is not in consumers' interests.	***Noted. This provision has been deleted as worded. Note that the provisions in the revised chapter are intended to be indicative of the nature of conduct standards, which the FSCA can set with the aim of ensuring the efficiency and integrity of financial markets; and ensuring that financial institutions and representatives treat financial customers fairly. Transitional provisions provide for guiding policy frameworks developed with the National Treasury***

			within which standards will be set.
Standard Bank	95(2)(o)	The bank is also not in favour of sub-clause 95(2)(o) which provides for the regulator to set standards on remuneration, rewards and incentives. If this matter needs to be regulated then the power to do so should be limited to the Minister of Finance.	***Disagree, as rewards and incentives are an important feature of governance frameworks for both prudence and conduct.***
SAIA	95(2)(o)	The inclusion of sub-clause 95 (2)(o) with regard to standards on remuneration, rewards and incentives is not supported. It is suggested that matters relating to the prescribing of remuneration, rewards and incentives should be dealt with by the Minister in regulations and should not be prescribed in standards set by regulators.	***Disagree, as rewards and incentives are an important feature of governance frameworks for both prudence and conduct.***
SAIA	95(2)(p)	Clarity is required on how the regulator will set standards for the execution of transactions by *"financial customers"*. The intention of including financial customers is unclear and accordingly it is proposed removing the words, *"financial customers"*. The enforcement of standards for financial customers has been highlighted as being problematic.	***Provision has been deleted. The Bill does provide for standards to be set on outsourcing of activities***
SAIA	95(2)(v)	As commented on clause 94(2)(f) above, clarity is sought on what *"insourcing"* standards refer to. It is proposed that insourcing be defined.	***The reference to "Insourcing" has been deleted***
ASISA	95(4)	ASISA members understand that circumstances may necessitate retrospective application of a conduct standard. This clause, however, may raise constitutional concerns as it is drafted broadly. The potential concern will be addressed by redrafting the clause to provide that a conduct standard may impose requirements in respect of its application. Such requirements could never be contrary to the Constitution. *95(4) A conduct standard may –* *(a) …….;* *(b) ……;* *(c) …..; or* *(d) ~~apply retrospectively~~. Impose requirements in respect of its application.*	***Retrospective application has been deleted***
SAIA	95(4)(d)	As commented above on clause 94(4) (c), having conduct standards apply	***Retrospective application deleted***

		retrospectively is not supported. Retrospective provisions should only be enacted if they can be specifically and fully justified. Such a provision may adversely affect the rights of financial institutions, and render unlawful that which was lawfully undertaken and done. The power of having standards apply retrospectively is excessive and should not be enforceable through standards implemented by regulators. Clarity is sought on why policy maker is of the view that retrospective standards are necessary; and whether consideration has been given to possible mitigation of potential adverse effects of enacting retrospective legislation or standards.	
BASA, Standard Bank	95(4)(d)	The retrospective application of standards is not supported. Retrospective application is generally considered unlawful or the consequences thereof are very seriously considered in court decisions and this is not in line with transparent practice. This clause should be deleted.	***Retrospective application deleted***
ASISA	95(5)	It is assumed that the same consultation process will be applied when prudential standards are amended. The provision should be amended accordingly for the sake of clarity. *95(5) The Financial Sector Conduct Authority may, subject to section 90 of the Act amend any conduct standard from time to time and financial institutions and key persons must comply therewith within the period determined by the Financial Sector Conduct Authority.*	***The consultation process would apply in relation to amending standards.***
96. Joint standards			
BASA	96	Joint standards must avoid duplication. Joint standards between the FSCA and the NCR must be subject to the same checks and balances as all other standards contemplated in the Bill. A specific concern relates to the potential ability of the NCR to use the standard-setting process in this Bill to accord various guidelines and non-binding interpretations, the status of 'legislative instruments' without following appropriate legislative processes.	***Noted. Joint standards may only be made by the PA and FSCA. This chapter does not apply to the NCR***

		In addition, this may result in an 'un-level playing field' whereby credit providers regulated under the FSRB must comply with these standards; whereas for those credit providers regulated only under the NCA, these would remain non-binding.	
JSE	96	Since the aim of this section is to avoid duplication and regulatory burden we would suggest that the PA and FSCA be required to issue joint standards where there is significant overlap and where it is appropriate to do so.	***Noted. The regulators will determine when joint standards are appropriate***
Strate	96(1)	Delete "~~convenient and~~" in the clause. "Convenience" should not be the motivating factor.	***Noted. The provision no longer refers to convenience***
ASISA	96(2)	Is the reference to section 2(1)(h) correct? If this reference is correct, it is not clear why section 3(1)(i) is not also referenced.	***The provision has been redrafted, and no longer makes reference to specific clauses***
Deloitte	96(2)	Sub-regulation 96(2) contains a reference to sub-regulation 2(1)(h). Sub-regulation 2(1)(h) defines a financial product as "a facility, arrangement or system that is designated by the Minister in terms of subsection (2) in Regulations as being a "financial product". We do not believe that the reference to sub-regulation 2(1)(h) is correct in this section.	***The provision redrafted, and no longer makes reference to specific clauses***
Strate	96(2)	**Joint Standards; over-regulation and division of roles and scope of regulation and supervision** The wording "*A joint standard may be issued by both . . . even if only one of the authorities is given the power to do so*" refers: it is unclear why this is needed? Although the Bill caters for dual regulation, it is understood that two regulators can regulate and supervise one Financial Institution based on their various roles, scope, powers and focus areas. It should not entail that the Regulators must now duplicate their work and efforts. The approach between financial sector regulators and the Reserve Bank in 76(2) seems different and more acceptable. Surely every Authority (regulator) should stay within scope and power. Roles should be clarified in such a way in the Bill that there is no need for such a "catch all" phrase in the event of doubt. The co-ordination and information	***Noted. The provision related to joint standards has been redrafted***

		sharing should happen internally between the two Authorities (regulators). This clause will bring much uncertainty, especially after phase 1. Please delete.	
PASA	96(4)	Refer to "payment system participants" as defined, instead of "participants in the payment system". Reference to participant in this section is incorrect (being cognizant of the definition of 'participant'. Reference to payment system participant being more correct.	***See provision 109(1) noting conduct standards may be set on payment service providers with the concurrence of the Reserve Bank***
SAIPA	94,95,96	Consequences of non-compliance are not defined.	***See chapter on administrative penalties, an administrative penalty could be imposed in relation to a contravention of a standard. A debarment order potentially could also be made. A directive could also potentially be issued.***

CHAPTER 8: Licensing

Reviewer	Section	Issue	Decision
BASA	General	While the proposals suggest that licensing will be streamlined (institutions will hold one license from the PA and one from the FSCA), there is not enough clarity on the transition phase regarding licensing. However, we welcome the proposed approach whereby regardless of the authority which has issued a specific licence, both authorities will provide oversight and regulation of an entity.	***Noted. Redrafting of chapter and relevant sections to clarify that in this phase of implementation institutions must be licensed in terms of a financial sector law, which means current governing sector laws. Schedule 2 indicates the responsible authority for licenses issued***
The Unlimited	General	It is our understanding that existing licenses issued under other financial sector laws (such as FAIS) will "remain in place" – see page 18 of the Response Document, 'Licensing and supervision in Phase 1'. We understand this to mean that existing FSP's will not be required to apply for a new license, at least until new legislation is promulgated. If so, this is not clear in the Bill. Please can this be clarified.	***Understanding is correct. Redrafting of chapter and relevant sections to clarify that institutions must be licensed in terms of a financial sector law. Schedule 2 indicates the responsible authority for licenses issued***
SAIA	General-Licensing	The supplementary document to the Bill titled "*Twin Peaks in South Africa: Response and Explanatory Document*" confirms that under the final target framework, all financial institutions will be issued with one license from the FCSA for financial services, and may be required to also hold a separate license from the Prudential Authority if they are to be prudentially regulated in terms of the Bill. This would include banks and insurers. The document acknowledges that rebuilding the licensing framework to eventually result in two separate licenses will be a significant exercise with inherent risks that must be managed carefully. SAIA recommends robust consultation with the industry on the process of phased relicensing to thoroughly manage the risks involved therein. Further information and clarification is required in respect of the transitional arrangements to be implemented in this regard. Extensive consultation is requested on the proposed second phase implementation of the 'Twin Peaks' model, the proposed re-licensing and/new licensing that will be required as part of this phase and specific alignment with SAM authorisation classes and definitions of life and non-life insurance.	***Noted and agreed***

		We suggest that the re-licensing of financial institutions be structured in a matter that the process is not overly burdensome on financial institutions and the regulators. A structured licence re-application timetable should be considered to enable planning and preparation of applications. Please refer to the SAIA comments on the definition of licence. In the definition of licence the activity of *"renewal"* is not included, yet in Clauses 101 to 103 there is reference to "renewal" in the requirements around licensing.	***The term license refers to the permissions granted for a particular activity or institution. The term renewal refers instead to the process of maintaining those permissions.***
97. Licensing of financial products, financial services, market infrastructures, payment system operators and payment system participants			
BASA	97(1)	***97****(1) In respect of financial products, financial services, market infrastructures, payment system operators and payment system participants that are regulated in terms of ~~another~~ financial sector law or the National Payment System Act, subject to subsection (3), …….* It is envisaged that those activities that currently fall outside of the NCA and FAIS, based on thresholds for inclusion, will now have to be licensed under the FSRB. Further clarity is requested on who will be regulator of these activities under Twin Peaks.	***See redrafted licensing chapter. Section deleted***
ASISA	97(1)	We submit that the provisions of this subsection are superfluous in that the relevant legislation and requirements referred to therein in any event applies. We suggest it be deleted.	***See redrafted licensing chapter. Section deleted***
JSE	97(2)	**Licencing** In terms of s98(1), no financial service provider may provide a financial service, including securities services, unless licensed to do so in terms of a financial sector law. s97(2) then states that the financial sector regulator designated in Schedule 2 is responsible for granting the licence, which implies that only the PA or FSCA could grant a licence for the provision of securities services. However, in the context of market infrastructures, authorised users, clearing members and participants are authorised under the FMA to provide securities services by the exchange, clearing house or central securities depository respectively. The JSE assumes that it is intended that the market	***Agreed. The market infrastructure will continue to authorize its users, as provided for in the FMA. See redrafting clarifying this.*** ***Existing licenses and licensing provisions will remain in place, at least for phase 1 of implementation ahead of the review of the overarching licensing regime in phase 2 of implementation.***

		infrastructures remain the designated licensing authorities for these financial institutions and therefore we recommend that provision be made for this in s97(2) to align the FSRB with the FMA.	
ASISA	97(4)	*97(4) Sections 99 to 108 only apply in relation to the licensing of financial products and financial services which are designated either as a financial product in terms of section 2(2), or a financial service in terms of section 3(2).*	***See redrafted licensing chapter. Section deleted***
Deloitte	98(1)	Sub-regulation 98(1) contains the word "mark". We do not believe that this word adds anything to this sentence and accordingly we recommend that it be removed.	***Section deleted***
Transaction Capital	98(1)	Section 98(1) of the Bill, as it currently reads, will require persons, for example, who do not have to register in terms of the National Credit Act, to register in terms of some other "financial sector law" or "the National Payment System Act". The current legislative framework read with the Bill does not provide any clarity regarding who or what is to determine within which particular regulatory institution that unregistered person will resort. It is difficult to appreciate what legitimate reason exists for excluding, for example, a small credit provider from the provisions of the NCA, whereas they are incorporated within the provisions of the Bill. Section 98(1) should accordingly be subject to a further caveat that if there is no financial sector law that requires registration, then registration is not required. The underlying confusion arises from the attempt (albeit transitional) to retain the NCR in parallel with the Bill. It would be preferable to include all of the functions of the NCR within either the Prudential Authority or the Financial Sector Conduct Authority.	***See redrafted clause. Credit providers continue to be licensed under the National Credit Act and the intension is that persons expressly excluded from a financial sector law should continue to be so.*** ***With that caveat, it is intended that a person providing a financial product or service outside of the regulatory framework should either be appropriately authorized or stop the business.*** ***Licensing exemption clause 271 provides each regulator with flexibility to adopt a risk-based approach to supervision (as required in clauses 34 and 58), and support a staggered approach towards licensing the system beyond the status quo. Transitional provisions in clause 295 more generally provide for staggered implementation of the Bill to minimize potential for disruption.***
World Bank	98(1)	The trigger for the ability to provide financial products and services etc. is that the relevant person is licensed "in terms of a financial sector law". However, the definition, in particular, of a financial service is so broad that we query whether all persons providing such services are currently required to be licensed under a financial sector law. Consideration might be given to including minimum statutory conditions for a	***Noted, see above response.*** ***Financial products and services that meet the criteria set out in existing financial sector laws will continue to be licensed under the licensing procedures in those laws. For 'new' financial products and services, the licensing chapter makes provision for some of the***

		license, as well as conditions that are considered necessary for a particular license. Examples of such an approach are the Australian Financial Services (AFS) License and the UK authorization process. The statutory conditions that apply to a licensee should reflect the TCF Principles. For example, there could be (in summary) principles-based and specific conditions relating to: • The provision of financial services efficiently, honesty and fairly; • Arrangements for the management of conflicts of interest; • Compliance with financial services laws; • Adequate resources; • Competency to provide financial services; • Adequate training of representatives (such as staff and agents); • Internal and external dispute resolution systems for retail clients (for example, it could be a licensing condition that a financial institution be a member of an ombud scheme recognized by the FSOS Council; • Adequate risk management systems; and • Compensation arrangements for retail clients covering loss and damages resulting from breach of the licensee's obligations.	***matters to be considered when an application for a license is made under the FSR Bill once enacted. The transitional provisions of the FSR Bill also require the regulator and National Treasury to establish a policy framework within which they will operate once they are established; this will provide for further detail on licensing.*** ***Detailed license requirements are not set out in the FSR Bill as it is anticipated that the licensing framework will be restructured with the anticipated Conduct of Financial Institutions Act.***
JSE	98(2)*(a)*	We suggest deleting "~~*market infrastructure*~~" from the exemption clause as we cannot contemplate a situation in which a person performing the functions of a market infrastructure should be exempt from having to obtain a licence. We also suggest that appropriate criteria be specified in the FSRB for the granting of an exemption for the provider of a financial service or financial product from having to obtain a licence	***Section replaced by the exemption clause 271, which is intended to give flexibility to the regulators to manage a changing licensing obligation on financial sector participants and the regulators (see above response for more detail in this regard).***
Strate	98(2)*(a)*	On which grounds will such an exemption decision be made? Please insert wording.	***Section replaced by the exemption clause 271 (see above response for more detail in this regard).***
BASA	98(2)(a)	*98(2)(a) A financial sector regulator may exempt a specified provider of a financial product, a financial service, or a market infrastructure from having to be licensed, where such specified provider or market infrastructure already has a valid licence in terms of any existing financial sector law.* *(b) An exemption referred to in paragraph (a) may be made by –* *(i) in the case of a financial product provider, subject to section 231, ~~mark,~~ the Prudential Authority;* *(ii) in any other case, the Financial Sector Conduct Authority.*	***Section replaced by the exemption clause 271 (see above response for more detail in this regard).***

		BASA understands from engaging with NT that during Phase 1 of Twin Peaks existing license-holders will not be required to apply for new licences and will be able to rely on their existing licences. This should be made clearer in the formulation of cl 98(2). It is recommended that the Bill clearly state under which circumstances an exemption would be considered, as well as the related procedures to review, assess and public an exemption, if granted. A reference is made to a **specified provider**. This term should be defined, if the term "Financial Institution" is not to be used.	
PASA	98(2)(a)	Reference is made to a "specified provider". This term is to be defined if the term "financial institution" was not to be utilised instead.	***Section replaced by the exemption clause 271***
BASA	98(2)(b)(i)	***98****(2)* *(b) An exemption referred to in paragraph (a) may be made by –* *(i) in the case of a financial product provider, subject to section 231, ~~mark,~~the Prudential Authority;* *(ii)………*	***Section replaced by the exemption clause 271***
JSE	98(2)*(b)*(i)	Delete "~~*mark,*~~"	***Section replaced by the exemption clause 271***
Strate	98(2)*(b)*(i)	Delete word: "*…subject to section 23, ~~mark,~~the Prudential Authority;*"	***Section replaced by the exemption clause 271***
World Bank	98(2)	Clause 98(2) reads as if the FSCA may exempt a market infrastructure from having to be licensed, while Clauses 97, 98 and 100 (b) suggest that licensing is within the competence of the SARB. As a result it is not clear which authority is responsible for licensing and oversight.	***Section replaced by the exemption clause 271***
ASISA	99(1)	This requirement to issue standards is in addition to standards that may be issued in terms of Chapter 7, Part 2 (Standards for financial institutions), sections 94 & 95. It also applies to both the PA and the FSCA. For good order this would be better positioned in Part 2 of Chapter 7	***Noted and revised – see Part 2 of Chapter 8.***
JSE	99(1)	Insert commas around "*, in standards,*"	***Noted and revised – see Part 2 of Chapter 8.***

Strate	99(3)*(b)*	"*Financial sector*" has not been defined (Cf "*financial system*") – who specifically is referred to here – financial institutions?	***Noted and revised – see Part 2 of Chapter 8.***
Deloitte	100	It reads as if the Financial Sector Conduct Authority can authorise a licence without consulting the Prudential Authority and vice versa. What happens if the Financial Sector Conduct Authority licenses a company without consultation and the Prudential Authority then decides the company doesn't have enough capital and closes it down. There should be some safeguards, but these are not clear in this sub-regulation.	***The Bill provides for a "dual key" approach to licensing, which means that both the Prudential Authority and the Financial Sector Conduct Authority must approve a licensing action. Clause 126 sets out provisions relating to all licenses, including agreement between regulators before licenses granted, varied, suspended or revoked***
SAIA	100(1)(a)-(c)	It is suggested that the word *"and"* be included after sub clause (b) as it currently reads that either (a) (b) or (c) is required.	***Section deleted***
PASA	100(1)(b)	Although the NPS Act currently provides for licensing to be granted by the payment system management body and not the SARB, such power is derived from powers delegated to PASA by the SARB. This may have to be addressed in consequential changes to the NPS Act to ensure alignment between with the Bill and to prevent any potential confusion.	***Section deleted***
SAIPA	100(2)(a)	Section 100 states that a licence will be issued to a financial institution. However, Section 98 states that "no person may provide… unless that person is licensed". This suggests that a licence can potentially be granted other providers than only formal financial institutions ('person').	***Section deleted***
SAIPA	100(2)(b)	Section 101 mentions the renewal of licences. However, the Bill does not include any duration of the validity of a licence. It follows therefore that licences have individual validities. This requires, however, to include the duration of the validity on the licence. It is suggested to add to Section 100 (2) a subsection as follows: "(c) the validity of the licence"	***Section deleted***
SAIA	101(c)	*101. When considering an application for the issue or renewal of a licence, the matters that a financial sector regulator must consider include–* *(a) the risk of a contravention of a financial sector law;* *(b) any matter specified in a financial sector law and the objectives of a financial sector law;*	***Noted and revised – see Part 2 of Chapter 8***

		(c) any relevant or reliable information derived froma credible ~~whatever~~source.	
102. Licensing application deemed to be refused			
BASA	102	Deemed refusal after the lapsing of 90-days is extremely problematic. There will be greater certainty if the regulator provides a formal notification informing a firm that its licence application is refused. It is also potentially unfair to new entrants. It also removes accountability for properly reviewing a licence application, and doing so in a reasonable time period. It is proposed that the clause is revised to provide for written notification of the outcome of the application. Reasons for refusal should be provided and an appeals process specified.	***Disagree. The responsible authority may extend the time period to a maximum of 9 months. A "deemed refusal" provision is important to give the applicant the opportunity to take the decision on review to the Tribunal. This is to the benefit of the applicant; the alternative could be an unduly lengthy application period that prejudices the applicant.***
SAIPA	102(1)	Slow processing times or failure by the regulator to communicate its decision to the applicant should not negatively affect the business operations of the applicant. In the current version of the Bill, applicants have no recourse if the financial sector regulator does not react timeously to their application. It is suggested to change the clause as follows to put the onus on the regulator "at the end of the a period of 90 days after the application is submitted to the financial sector regulator, or a longer period that may be determined by the financial sector regulator in terms of section 217, the regulator has not given the applicant notice of the regulator's decision regarding the application, *the licence is deemed to have been granted*."	***Disagree, see above response .***
Transaction Capital	102(1)	Section 102(1) is unconstitutional and infringes on the right to just administrative action contemplated in section 33 (and in particular section 33(2)) of the Constitution of the Republic of South Africa, 1196 ("Constitution") for the following reasons - • no reasons for the decision declining the application are afforded to the applicant; and • the applicant is not afforded an opportunity to take the decision on appeal or review.	***Provisions of PAJA still apply, see above response.***

		In addition to the constitutional concerns raised in respect of section 102(1), it is the Transaction Capital Group's experience that the current financial sector regulators are incapable of processing applications within 90 days. In this regard, a member of the Transaction Capital Group awaits a decision regarding its application for registration as a credit provider which was submitted approximately 1 year ago.	
ASISA	102	It is unreasonable to provide that an application is deemed to have been refused if the regulator has not given the applicant notice of the regulator's decision regarding the application at the end of 90 days after the application is submitted. The processing of an application may be at an advanced stage and if no longer period has been determined (which is practically possible), both the regulator and the applicant may have wasted resources in respect of the application. ASISA members suggest that this clause be deleted as its purpose does not seem fair or justifiable. ~~***102** (1) If–*~~ ~~*(a) an application is made to a financial sector regulator for the issue or renewal of a licence ; and*~~ ~~*(b) at the end of the a period of 90 days after the application is submitted to the financial sector regulator, or a longer period that may be determined by the financial sector regulator in terms of section 217,50 the regulator has not given the applicant notice of the regulator's decision regarding the application,*~~ ~~*the application is deemed to have been refused.*~~ ~~*(2) If a financial sector regulator requested additional information in terms of section 99(4), or in terms of a similar provision of the financial sector law in terms of which the application was made, then the period between when the notice requesting the additional information was given to the applicant and when the information sought was provided by the applicant to the financial sector regulator is not considered when determining whether the period referred to in subsection (1)(b) has ended.*~~	***Provisions of PAJA still apply, see above response on page 166.***
Warwick Wealth	102(1)(b)	The Bill indicates that applicants for a licence, still awaiting a positive response to their application after an expiry of 90 days from the application, should deem their application to have been refused. This is highhanded and has no place in a democratic South Africa.	***Provisions of PAJA still apply; see above response on page 166.***

SAIA	102(1)(b)	SAIA members do not support the 'automatic lapse' of an application for a licence after a set period of time as provided for in clause 102(1) (b). In line with the Promotion of Administrative Justice Act (PAJA) and in support of fair principles, it is suggested that a financial sector regulator should provide the applicant with reasons for the refusal of a licence. The automatic lapsing of an application for a licence simply because the required time has lapsed is unjustified and unfair towards the applicant, may lead to additional costs for the industry and drive organisational inefficiencies at the financial regulator level.	***Provisions of PAJA still apply; see above response on page 166.***
The Unlimited	102(1)(b)	We propose that the 90 day period be extended to at least 150 days. Currently the FSB can take up to 6 months to provide feedback on an application for a license. Extending the period as suggested will alleviate the need for an institution to re-apply in circumstances where the relevant authority may have insufficient capacity to promptly respond to an application.	***Agree in principle; the responsible authority can extend the period up to 9 months***
SDK Compliance Consultants	102	This section, if implemented, would create economic uncertainty, especially at the time of a renewal of a licence, if a response was not received, a business would have to decide whether to cease trading and providing client services on the 91st day or to carry on due to not having any indication as to a reason for not having received a response and hope that the response was simply due to a delay in communication. The uncertainty would have an adverse effect on the ultimate stakeholder – the client – in that a business at the time of renewal application would be trading in an ambivalent environment. It is my belief that a reason should most definitely be provided in the interests of a stable industry, the stakeholders and the ultimate client.	***Provisions of PAJA still apply; see above response on page 166.***
Transaction Capital	103	Section 103 should set out a defined list of conditions to which licences may be made subject in order to ensure that the conditions are uniformly applied across the industry. The section should also make provision for an appeal or review process should an applicant wish to dispute the imposition of any particular condition.	***See revised "conditions of licences" clause 270.***

104. Licenses may be varied			
Deloitte	104	Sub-regulation 104 contains sub-regulation (1) and (3). Sub-regulation (3) should be sub-regulation (2) as there is currently no sub-regulation (2).	***See revised clause 119; applies only to licences required in terms of clause 111(2) or 160.***
JSE	104	The JSE would recommend the inclusion of criteria for when this would be allowed.	***See revised clause 119; applies only to licences required in terms of clause 111(2) or 160. Variation allowed if doing so would assist in achieving object of Act***
Transaction Capital	104	Section 104 should similarly make provision for an appeal or review process should an applicant wish to dispute the variation of the licence conditions. The section should also provide for the variation of the licence to be effective from a date which is not less than a specified number of days after notice is sent by the financial sector regulator to the licensee regarding the variation.	***Date of effect of variation will be specified in notice from regulator. See Part 3 of Chapter 15 setting out reconsideration and review of decisions on application by aggrieved persons***
BASA	104	There is no information as to the circumstances under which licences may be varied. This may have significant operational implications if licence conditions are varied. It is proposed that the Bill stipulates the grounds for varying licence conditions. Also, a consultation process needs to be incorporated.	***See revised clause 119; applies only to licences required in terms of clause 111(2) or 160. Variation allowed if doing so would assist in achieving object of Act***
ASISA	104(1)	There seems to be no requirement to consult, afford the licensee an opportunity to respond or to provide reasons for the varying of the license. It is also not a "legislative instrument" and subject to Part 1 of Chapter 7. This paragraph therefore does not provide the licensee with any protection. We submit that a requirement to consult be imposed on the financial sector regulator.	***See revised clause 119; applies only to licences required in terms of clause 111(2) or 160. Provisions of PAJA still apply***
ASISA	104(3)	*104~~(3)~~(2) The regulator must publish the variation of a licence on its official website.*	***See revised clause 119***
105. Licensees' reporting obligations			
ASISA	105	This subsection only applies in relation to the licensing of financial products and financial services which are designated either as financial product in terms of section 2(2), or a financial service in terms of section 3(2). It however creates a reporting obligation in respect of non-compliance with financial sector laws that seems out of place. The reporting duty is not limited to any period of time or to a period relevant to the application for a license. Clarity is requested in this regard.	***See revised clause 117, which applies only to licences required in terms of clause 111(2) or 160. This industry-facing provision is therefore required to support the licensing framework created through the FSR Bill.***

Transaction Capital	105	If regulated entities report contraventions in terms of section 105, they should be granted immunity against prosecution, especially in instances where very few instances of non-compliance have previously been reported by that regulated entity.	***A highly flexible enforcement toolkit provides for this opportunity, but it would be inappropriate to guarantee safe harbor without knowing the surrounding circumstances.***
Geof Mortlock	105	Presumably the relevant regulator can also specify reporting obligations via standards. I suggest that this section be amended to make it clear that the reporting obligations are not confined to the matters set out in this section.	***Agreed. See revised clause 117, and Chapter 9.***
ASISA	105(1)(a)	It is submitted that the section be amended to provide that only material contraventions should be reported.	***Disagree, on the basis that this may create a compliance loophole.***
106. Licences cannot be transferred			
BASA	106	Clarity is requested on how the prohibition on the transfer of licences will work in respect of amalgamations and mergers?	***Licenses are not transferred in a merger/amalgamation. The regulators generally issue a new license for the new entity***
SAIA	107(1)	It is suggested that the use of the term “must” be amended to “may”, as the word “must” places an obligation on the financial sector regulator, and “may” allows for specific circumstances to be taken into account.	***Amended***
Warwick Wealth	107(1)(d)	The Bill requires that the license of dormant provider must be cancelled. This should be modified by inserting a time period for “allowance” dormancy.	***Redrafted to indicate that the licensee has ceased to conduct the licensed business***
ASISA	107(1)(d) & (e)	What is the difference between (d) and (e)?	***Redrafted to indicate that the licensee has ceased to conduct the licensed business***
SAIA	107(1)(e)	107(1)(e) Prescribing a limitation of 12 months may be problematic and not in consumers’ interest, specifically for business in “run off” and for certain types of insurance business such as guarantees, which may require a longer period of time to be finalised.	***Redrafted to indicate that the licensee has ceased to conduct the licensed business***
SAIA	107(4)	In line with the PAJA and in support of fair principles, it is suggested that a financial sector regulator should provide the applicant with reasons for the refusal of the request for cancellation of a licence.	***Provisions of PAJA still apply***
108. Licenses may be suspended or withdrawn			
BASA	108 (1)	The scope and authority of the regulator to suspend or withdraw a licence is cast too widely, and the current formulation of this clause may be contrary to	***Agreed in principle, see revised clauses 119-123. Procedures for varying, suspending and revoking***

		section 3 of PAJA. The *notice* period is inadequate. Failure to remedy any of the issues listed within the time period stipulated shall entitle the regulator to suspend or withdraw the licence. Provision needs to be made for the licensee to make representations before the licence is suspended or withdrawn. BASA proposes the following drafting: ***108.*** *(1) Subject to section 109, the financial sector regulator that issued a licence may, place them on 60 days' notice to remedy any of the following that ~~by notice to the licensee, suspend or withdraw the licence if~~ –* *(a) in the case of a suspension, it appears to the regulator or, in the case of a withdrawal, the regulator is satisfied that –* *(i) the licensee is not satisfactorily carrying out any of the licensed activities;* *(ii) a condition of the licence has not been complied with;* *(iii)…….*	***licenses have been redrafted to allow for a reasonable time period, while also allowing circumstances in which urgent action may be necessary on the part of the regulator. PAJA applies.***
JSE	108	The JSE believes that the licensee should be given the opportunity to correct non-performance or to appeal the decision of the regulator.	***Licensees are provided with a minimum period of one month to make submissions on the matter; decisions made by the responsible authority may be taken on judicial review (clause 231).***
ASISA	108	It is submitted that a reasonable period would be 30 days as opposed to 14 days. Propose amendment of 14 to 30 days.	***Licensees provided with a minimum period of one month to make submissions on the matter***
Transaction Capital	108	Section 108 should provide for a process whereby the licensed financial institution is afforded an opportunity to remedy any non-compliance before the licence is suspended or withdrawn.	***Licensees provided with a minimum period of one month to make submissions on the matter***
JSE	108(1)*(a)*(iv)	Delete comma after "*with~~,~~*"	***Redrafted***
BASA	108(1)(a)(v)	This clause is of concern as it relates to extra-territoriality and the question arises as to whether a local regulator has the jurisdiction to take this action on the basis of breaches of foreign law. The reference to a contravention of a law of foreign country that corresponds to a financial sector law must, at a minimum, be subject to a materiality test.	***The intention of this clause is to ensure that a financial institution may be prevented from continuing to operate in South Africa if it has been proven to have materially contravened a foreign law that reveals the entity is likely to be harming South Africans.***
SAIA	108(1)(b)	It is suggested that the notice to the licensee as referred to in 108(1) should be	***Licensees will be given notice of the intention to***

		linked to a process of specifically informing the Public Officer. In addition it is our submission that 14 days period to pay unpaid fees is too onerous. It is suggested that a more reasonable period of 30 days be set – and that the compliance times regulated in the Bill all be aligned to avoid confusion between the requirements of different sections.	***suspend or revoke a license; unnecessary to specify Public Officer*** ***Disagree, keeping in mind that it is at the discretion of the responsible authority to take the appropriate action.***
Geof Mortlock	108(9) and 109	I suggest that the Bill require the regulator to give notice of an intention to suspend a licence and state the reasons for doing so, with the license holder being given the opportunity to submit its views before a final decision is made. I assume that rights of appeal apply in the case of suspension or cancellation of a licence. The Bill should make it clear that the regulator's powers continue to apply to a regulated entity notwithstanding the suspension of its licence. This is especially important for powers relating to investigations, information gathering, enforcement actions and resolution powers.	***Agreed. The revised Bill provides for each of these suggestions***
Transaction Capital	109	Section 109 should impose an obligation on financial regulators to make a decision or concur with a decision within a certain period of time (particularly in light of section 102(1)). Section 109 should only apply in those circumstances where entities are regulated by both the Prudential Authority and the Financial Sector Conduct Authority. Section 109 should also make provision for a dispute resolution mechanism where the financial sector regulators are unable to agree on a particular matter.	***Disagree. Regulators can determine processes in the published MoUs. MoUs can also specify in which instances action can be taken without prejudicing the objectives of the respective regulators***
JSE	109(2)	S109(2) states that a regulator may not issue, cancel or otherwise make any decision regarding a licence unless the other regulator has concurred. We contend that it is inappropriate and unnecessary for the other regulator to be required to concur on licensing decisions if that regulator has no regulatory interest in a particular financial institution or category of financial institution as expressed through the provisions of any financial sector law which designate responsibility for standard setting or regulatory oversight. For example, if a particular category of financial institution is not subject to any prudential	***Regulators must decide and clarify in MoUs where and when their objectives may not be prejudiced in terms of licensing decisions. Regulators have broad scope of jurisdiction over the financial system and the Bill should not limit areas in which they may or may not have a say***

		standards under the FSRB why should it be necessary for the PA to concur on any licensing decisions regarding those financial institutions? This unnecessary concurrence is not cured through the application of the section 77 MOU referred to in s109(2)(ii) as that sub section still implies that the other regulator has a need to concur and therefore that they have a regulatory interest in the relevant financial institutions, albeit that they may waive their need to concur through an MOU.	
110. Obligation of licensed financial institutions in respect if licence			
Strate	110(1)(b)	Insert "a valid copy of its licence . . .". It is impractical and unnecessary to make the original licence letter available.	***Agreed, see revised clause 127.***
BASA	110(b)	This requirement is problematic depending on the possible interpretations of the requirement. Clarity is needed as to whether this requirement is limited to having the licence available on request.	***Agreed, see revised clause 127.***
ASISA	110	Currently, only the Financial Advisory and Intermediary Services Act imposes the obligation set out in this clause on financial services providers. To the best of our knowledge none of the other financial sector laws contains a similar provision. The intention is understood but ASISA members respectfully request that the implementation of this obligation be postponed for at least 18 months. The longer implementation period will allow financial institutions to phase in compliance (for example only order new letterheads when existing ones are expended) in order to efficiently manage the costs associated with implementing the requirement.	***Noted. The transitional provisions in Chapter 17 provide for sections of the FSR Bill to be implemented in phases; such matters will be consulted upon to afford sufficient time to implement certain requirements***

CHAPTER 9: Information Gathering, On-site Inspections and Investigations

Reviewer	Section	Issue	Decision
ASISA	General	This chapter provides for the invasion of peoples' right to privacy, which is enshrined in section 9 of the Constitution. Whilst the right to privacy may be curtailed by law of general application, any such law must accord with the provisions of section 36 of the Constitution. In the circumstances it is submitted that the provisions of this Chapter must accord with the guidelines provided by the Constitutional Court in the matter of Magajane v Chairperson, North West Gambling Board 2006 (5) SA 250 (CC), ad para 77.	***Agree that the procedures must be Constitutional, and the provisions of the Bill will ensure this is upheld.***
Part 1: Preliminary			
SAIA	111	The SAIA supports the objectives of cooperation and collaboration between financial regulators, however we suggest that the inclusion of the Council for Medical Schemes (CMS) as a financial sector regulator for purposes of this Chapter should be limited to instances where there are suspected contraventions of the Medical Schemes Act, 1998. In principle, there is no concern around the obligation to provide information to financial sector regulators, in this instance including the CMS, in the event that the information requests of the financial regulators are not duplicated, and properly coordinated. The rights of the CMS to do onsite inspections should be further qualified and should not be equivalent to the rights of other financial sector regulators. It is accordingly suggested that the Bill specifically provide for CMS onsite inspections and investigations to be linked to contraventions of the Medical Schemes Act and to be conducted in cooperation with the financial regulators. In addition, in the event that these arrangements are to be provided for in an MOU, it is suggested that these arrangements be made public subject to the principles in clause 90. (Also refer to the comments on Chapter 6 clause 77 above.)	***Noted. The Council of Medical Schemes is the responsible authority for the Medical Schemes Act and for purposes of this Chapter is empowered to assess compliance and investigate contraventions by supervised entities in relation to the Medical Schemes Act. See revised clause 129(2).***
Transaction Capital	111	It is noted that Chapter 9 does not apply to other regulators (such as the NCR) and it is therefore unclear what the relationship is between the powers of, for example, the Financial Sector Conduct Authority to conduct investigations into	***The FSCA is the responsible authority for standards it is empowered to make into the conduct of credit providers, and such conduct standards are additional***

		credit providers in terms of the Act and the powers of the NCR to conduct investigations under the NCA. To the extent that the latter's powers will be retained, the Act should – • limit the extent to which the different financial regulators' powers may overlap in respect of specific types of information requests/inspections; • provide for mechanisms to deal with situations where two difference financial sector regulators investigate the same issues and the manner in which any difference in findings between the regulators are to be dealt with.	***to, rather than in conflict with, requirements set under the NCA and after consultation with the NCA. Additionally, the Bill has gone a long way to foster a culture of cooperation and collaboration between and among Regulators (NCR included) in the performance of their respective functions in terms of financial sector laws and the NCA.***
Part 2: Obligations to Provide Information to Financial Sector Regulators			
112. Information requests			
ASISA	112(1)	***112****(1) (a) In addition to any other power to request information, a financial sector regulator may require a person in writing to furnish the regulator, within a specified period, with specified information or documents, in the form and manner specified by the regulator.* It is suggested that a financial sector regulator's request for information to a person should be in writing. Clause 112(1)(b)(i) will include clients of financial institutions. Requests for information from clients could potentially cause irreparable damage to the reputation of a financial institution especially if the investigation finds nothing untoward. Extreme care should be taken in these circumstances. This provision is too wide and should only allow for information requests that pertain to an investigation to ascertain compliance with financial sector laws or to prevent contravention of these laws.	***Agree. See proposal for responsible authorities to make requests to supervised entities by written notice. The Bill also clarifies that requests for specified information be relevant to the responsible authorities' functions***
Transaction Capital	112	In order to limit arbitrary requests, section 112 should be amended such that a request for information should only be made to achieve a certain purpose listed in the Act. We would recommend that such purposes include: (i) resolution of a complaint; (ii) compliance with financial sector laws; and (iii) other justifiable purposes.	***The Bill clarifies that requests for specified information be relevant to the responsible authorities' functions, including assessing compliance with a financial sector law, and other activities the authorities may undertake in respect of financial products or financial services***
BASA	112	As a general concern, Clause 112 dealing with Information Requests needs to be aligned with the relevant sections of the POPI Act. The MoUs between regulators must specify the extent to which, and under which circumstances,	***Noted. Treasury will ensure the provisions align appropriately with the POPI Act***

		regulators will share information. This will also assist to minimise duplicate requests.	
BASA	112(1)*(a)*	The requirement for information to be provided within a '*specific period*' must be relevant to the investigation, and must be reasonable. It is recommended that this clause is revised to insert these conditions.	***The notice given by the responsible authority to the supervised entity will specify the terms of the request, including any requirements such as timelines that the entity must comply with.***
JSE	112(1)*(a)*	We would recommend inserting the following wording "*the financial sector regulator may reasonably require for the performance of its functions under this Act or any other financial sector law*." Authorities should only be able to exercise powers (request information, conduct an inspection) over the institutions that they regulate through sectoral law or FSRB standards. The wording suggests that either authority can exercise powers over any financial institution even if they do not regulate them. This creates confusion as to who actually regulates a particular institution and may result in costly and duplicated regulation which could interfere with normal business (refer comment on s113(2) below).	***The Bill clarifies that responsible authorities' request for information from supervised entities be relevant to the authorities' functions. It is not necessary to state the reasonableness of the request; it is implied that all requests must be reasonable as the exercise of all public powers must be reasonable.***
Strate	112(1)*(a)* 114(3)*(b)* 114(3)*(c)*	**Information and regulatory burden** Please delete [**in the form and manner specified by the regulator**]. It is important that the regulator receives the specified information or documents as quickly as possible and in the "as is" format. Also, it places an unnecessary regulatory burden on the institution/person to present it in "*a specified form and manner*". For example, if data (in easily readable format) is pulled from the system in a specific format, it will be unnecessary, costly and time-consuming for the institution to change the format according to the regulators specifications. It will also save unnecessary costs if information may be sent /reports given in electronic format instead of paper versions. It should also be clarified in the Bill whether electronic or paper versions of documents must be stored by the regulated persons. Also, in general on statutory information and other documents required for reporting: It is our view that the Bill should provide for electronic secured	***The information request notice given by the responsible authority to the supervised entity will specify the terms of the request.*** ***Standards may be made in relation to recordkeeping and data management by financial institutions and representatives*** ***The Bill has incorporated strong mechanisms for cooperation and collaboration between and among authorities, through which the authorities can***

		circulation of documents between Authorities to avoid many filings and duplication. A "once only reporting principle" should apply. More efficient communication between Authorities would address some of the concerns. Please delete "~~*in the manner determined by the financial sector regulator*~~" and replace with more suitable wording in 114(3)*(b)*; 114(3)*(c)*.	***develop processes and coordinate their efforts on a number of matters in relation to performing their functions, including on information sharing and minimising duplication***
SAIA	112(1)(b)(i)	It is our submission that the furnishing of information is the responsibility of the financial institution that is the accountable institution in this respect. It is therefore suggested that clause 112(1)(b)(i) referencing to persons with whom a financial institution has entered into an agreement, should be deleted, and that information should be sourced from the regulated entity.	***Disagree. The responsible authority should be able to request information and documents from supervised entities (see revised clause 130). This includes persons with whom licensed financial institutions have entered into outsourcing arrangements for control functions, as well as a representative of the institution in terms of the FAIS Act. See definition of "control function", "outsourcing arrangement" and "supervised entity"***
Geof Mortlock	112(1)(b)(ii)	Need to ensure that a regulator can obtain information from a holding company and subsidiaries and associated persons of a licensed entity.	***Agreed***
SAIA	112(1)(c)(i) &(ii)	There is a concern around information requests that include data from external sources, and the obligation placed on financial institutions to collect such information from external sources. The SAIA recommends that the Bill provides clarity and certainty on the so-called "*prospective elements*" to be reported on. In addition, the SAIA proposes amending the word "*elements*" to "*information"* as follows*:* *112(1)(c) Information requested may include–* *(i) qualitative or quantitative ~~elements~~ information;* *(ii) historic, current or prospective ~~elements~~ information;* *(iii) data from internal or external sources; and* *(iv) any appropriate combination of the types of information referred to in subparagraphs (i) to (iii).*	***See revised clause 130. The notice given by the responsible authority to the supervised entity will specify the terms of the request that is relevant to the responsible authority's assessment of compliance or risk.***
BASA	112(1)(c)(ii)	Requests for historic documents outside the required five year retention period will be practically challenging to comply with. It is recommended that a time limit for requests for historical information is considered, and that there is alignment of retention requirements with other relevant legislation. The	***See revised clause 130. The notice given by the responsible authority to the supervised entity will specify the terms of the request that is relevant to the responsible authority's assessment of compliance or***

		definition should be revised.	***risk.***
Strate	112(1)*(c)*(iii)	Please insert "*data from internal, or where reasonably possible, external sources*". This clause may be extremely unreasonable.	***See revised clause 130. The notice given by the responsible authority to the supervised entity will specify the terms of the request that is relevant to the responsible authority's assessment of compliance or risk.***
JSE	113(1)	Refer to comment on s112 above.	***Noted***
BASA	113	This provision is not aligned to FICA which does require notification to be provided. There should be criteria for appointing and sending examiners or auditors at the behest of the regulators, and firms should have reasonable recourse in relation to costs in respect of examinations. Notification requirements and criteria for appointing and sending examiners or auditors should be included. The costs of such examinations should be borne by the regulator.	***The responsible authority may make requests to supervised entities to provide information and documents by written notice, which notices will specify the terms of the request. The Bill also clarifies the powers and duties of the Authorities and the obligations of the supervised entities in respect of supervisory on-site inspections versus the formal investigations that are instituted on suspicion of a contravention of a financial sector law.***
ASISA	113	ASISA members are of the view that reasonable notice should be given when a financial sector regulator requires a regulated person to demonstrate compliance with a financial sector law. Preparation for such a demonstration will undoubtedly require resources and it will be fair and reasonable if reasonable notice is given to a regulated person. ASISA appreciate the intention of this section, but are of the opinion that the regulator should be required to specify which parts of the financial sector laws they require a regulated person to demonstrate compliance with. Complying with a request to demonstrate compliance may be extremely costly and time-consuming and unless a measure of proportionality is provided for, the provision may negatively impact on the financial services sector without a commensurate benefit. ***113****(1) A financial sector regulator may, at any time, upon reasonable notice, require a regulated person to demonstrate compliance with a specific provision(s) of a financial sector law.*	***Noted. The Bill has been revised to clarify the powers of the Authorities in respect of making written requests for information to supervised entities, which written requests will specify the terms. It is not necessary to state the reasonableness of the requests; it is implied that all requests must be reasonable and relevant to the responsible authorities' functions.***
JSE	113(2)	We would recommend that the authorities' powers in this regard be curtailed to	***Authorities must exercise their powers with due***

		ensure that it is not too costly for the regulated person and does not interfere with the day-to-day business operations of the regulated person. The JSE proposes the following wording "*the financial sector regulator may reasonably require for the performance of its functions under this Act or any other financial sector law*." Alternatively the regulated person should be given the option to furnish the financial sector regulator with a report by a public accountant as defined in s1 of the Auditing Professions Act, 2005.	***regard to decency and good order.***
Strate	113(2)	The requirement "*by another auditor identified by the financial sector regulator, at the cost of the regulated person*" refers. In light of the substantial cost, in which circumstances will this be a reasonable step? Please amend the wording to reflect reasonableness.	***The notice will specify the terms of the request, including if Authority requires information to be verified by an auditor***
SAIA	113(2)	It is suggested that the power of a financial regulator in this regard should be further qualified by inserting as follows: ***113****(2) A financial sector regulator may at any time upon reasonable notice direct a regulated person to have its accounts, records or financial statements audited by the auditor of that regulated person, or by another auditor identified by the financial sector regulator, at the cost of the regulated person, and to submit the results of the audit to the financial sector regulator within a specified time, subject to providing the financial institution with a reasonable period of time to reply*.	***The Authorities may make written requests that will specify the terms of the requests. The exercise of these powers must be reasonable and relevant to the authorities' functions.***
BASA	113(2)	More clarity on transitional arrangements is requested regarding outgoing and incoming regulators. *113(2) A financial sector regulator may at any time direct a regulated person to have its ~~accounts, records~~ or financial statements audited by the auditor of that regulated person, or by another auditor identified by the financial sector regulator, at the cost of the regulated person, and to submit the results of the audit to the financial sector regulator within a specified time. Where the financial statements have not been audited, the financial sector regulator may direct such financial statements to be audited.* The regulator must be able to show that they hold concerns with the audited financial statements before an audit is directed. In addition, the regulator cannot	***Agree*** ***Noted. The Authorities can however approve the auditor appointed by the supervised entity for the purposes of verifying information or documents***

		prescribe the person who should audit the records, as this falls within the jurisdiction of the Companies Act	***requested by the authorities.***
SAIPA	113(2)	It is unclear if this has to be an auditor, or if a professional accountant could verify the required information too.	***The provisions have been revised. The responsible authority may require the information or document to be verified as specified in the notice, including by an auditor approved by the authority.***
ASISA	113(2)	A financial sector regulator should not have unfettered power to require an audit. The interests of a regulated person should be balanced with the rights of the regulator. Audits may be extremely costly, even more so if it is requested at times other than when the annual audit is performed. It is therefore proposed that clause 113(2) be aligned with clause 113(3) to only assign this power in the event that a regulator has a reasonable basis to conclude that a financial sector law may have been contravened. The timing of the most recent audit should also be taken into account. *113(2) A financial sector regulator may at any time if the regulator has a reasonable basis to conclude that a financial sector law may have been contravened and the date of completion of the most recent audit has been considered, direct a regulated person to have its accounts, records or financial statements audited by the auditor of that regulated person, or by another auditor identified by the financial sector regulator, at the cost of the regulated person, and to submit the results of the audit to the financial sector regulator ~~within a specified time,~~ provided that the regulated person is not in any event audited on a annual basis in the normal course of business in which case the annual audited financial statements shall be provided to the regulator .* As presently worded this section allows that the authority may at any time call for a financial audit of the regulated person concerned, notwithstanding the fact that the regulated person, in the normal course of business, submitted its audited financial statements to the regulator. In view of the cost incidental to external auditing, it is submitted that the section should be amended to only provide for qualified audits to demonstrate compliance with a specific section or sections of a financial sector law, in order to detect and/or to prevent contravention of such financial sector laws. It is further submitted that the authority should only direct a regulated person to have a financial audit done by	***Noted. However the provisions have been revised and the responsible authority may require the information or document to be verified as specified in the notice, including by an auditor approved by the authority. Such requests must be reasonable and relevant to the authorities' functions***

		"another auditor identified by the financial sector regulator" if the regulator has reasonable grounds to believe that the financial statements audited by the regulated person's auditor are questionable.	
Transaction Capital	113(2) & (3)	In order to limit arbitrary directives and particularly in light of the fact that the regulated person is obliged to pay for the costs thereof, section 113(2) should be amended such that the financial sector regulator should only be able to direct a regulated person to have its books of account and financial statements audited if the regulator has a well-founded concern that a financial sector law may have been contravened. It is unusual for regulated entities to be required to pay the costs of any audits, examinations or verifications (to be conducted pursuant to sections 113(2) and (3)) as this could influence the independence and impartiality of the auditors/ persons conducting the audit, examination or verification. These costs should be borne by the financial sector regulators, unless such audit, examination or verification results in a finding that a financial sector law has been contravened by the regulated entity concerned.	***The provisions have been revised and the responsible authority may require the information or document to be verified as specified in the notice, including by an auditor approved by the authority. Such requests must be reasonable and relevant to the authorities' functions***
Strate	113(3)	Please insert "*may, at any time, if the regulator* has reason to believe **[delete: ~~has a concern~~]** *that a financial sector law may have been contravened . . . .*" (cf the wording in 115(2)*(a)* and 116(1) which is more reasonable).	***The provisions have been revised and the responsible authority's requests must be reasonable and relevant to the authority' functions***
SAIA	113(3)	It is suggested that the term "a concern" in the first line should be replaced with "reason to believe". It is further proposed that this clause be reworded to set out in a clear and simple way the intended powers to be granted to financial sector regulators through this clause. ***113****(3) A financial sector regulator may, at any time, if the regulator has a* *reason to believe* ~~*concern*~~ *that a financial sector law may have been contravened,* ~~*and a matter must be examined or verified,*~~ *direct a regulated person to secure the examination or verification of the matter by a person nominated by the financial sector regulator,* ~~,~~ *such an examination or verification will be at the cost of the regulated person, to be completed by a specified date or within a specific period, and in the form, manner and*	***The provisions have been revised and the responsible authority may require information or documents specified in the notice from the supervised entity. Such requests must be reasonable and relevant to the authorities' functions***

		containing the information required by the financial sector regulator.	
BASA	113(3)	*113(3) A financial sector regulator may, at any time, if the regulator has a concern and reasonable grounds to believe that a financial sector law may have been contravened, and a matter must be examined or verified, direct a regulated person to secure the examination or verification of the matter by a person nominated by the financial sector regulator, at the cost of the regulated person, within a reasonable timeframe ~~by a specified date or within a specific period~~, in the form, manner and containing the information required by the financial sector regulator.*	***The provisions have been revised and the responsible authorities may require information or documents specified in the notice from the supervised entity. Such requests must be reasonable and relevant to the authorities' functions***
ASISA	113(3)	Please refer to the comments on clause 113(2) above. It is accepted that there may be circumstances in which a regulator may take this action, but it is submitted that there must be a reasonable basis for such action. An examination or verification may be a costly exercise and the interests of a regulated person must be balanced with the rights of the regulator. It is therefore suggested that the clause require a regulator to have a reasonable basis to conclude that a financial sector laws may have been contravened and not merely a concern. *113(3) A financial sector regulator may, at any time, if the regulator has a ~~concern~~ reasonable basis to conclude (or concern based on reasonable grounds) that a financial sector law may have been contravened, and a matter must be examined or verified, direct a regulated person to secure the examination or verification of the matter by a person nominated by the financial sector regulator, at the cost of the regulated person, by a specified date or within a specific period, in the form, manner and containing the information required by the financial sector regulator.*	***The provisions have been revised and the responsible authorities powers to request information from the supervised entity must be reasonable and relevant to the authorities' functions***
Deloitte	113(3)	Sub-regulation 113(3) provides for the ability of a financial sector regulator to direct a regulated person to secure the examination or verification of the matter by a person nominated by the financial sector regulator, at the cost of the regulated person, by a specified date or within a specific period. It is our view that the regulated person should have the ability to put this out to tender and that the regulated person should have some input into the costs of such an exercise.	***The provisions have been revised. The Bill clarifies that the responsible authority may require information or documents be verified by an auditor and such request does not prescribe the appointment of an auditor by the authority but may include that the appointed auditor must be approved by the authority. Such requests must be reasonable and relevant to the authorities' functions***

ASISA	113(4)	Once again this provision extends to non-financial institutions that are members of a financial conglomerate.	***See definition of "control function", "outsourcing arrangement" and "supervised entity"***
Part 3: On-site Inspections			
JSE	Parts 3 and 4	The JSE notes that the aim of the FSRB is to centralise all investigative and inspection provisions in one bill, but we would question whether the similar provisions across all the sectoral laws have been appropriately dealt with as a result.	***Noted. Sectoral laws will be aligned appropriately to the FSR Bill***
JSE	114	We would recommend that the FSCA and the PA be required to conduct joint on-site visits where appropriate to limit unnecessary burden on a regulated person that may interfere with the normal operations of the business.	***The Bill incorporates strong co-operation and collaboration mechanisms through which the Authorities can co-ordinate their efforts on a number of matters, including in relation to the performance of their respective functions.***
Transaction Capital	114	All on-site inspections should be conducted on notice for the following reasons – • on-site inspections are disruptive to the conduct of the financial institutions' businesses; • documents required to be produced may be stored off-site and need to be retrieved; • relevant personnel may not be available on the day on which the impromptu on-site inspection is carried out. If there are concerns regarding the destruction of documents, the common law already provides remedies to financial sector regulators (such as an application for an Anton Piller order).	***Disagree. However the provisions clarify the powers of the Authorities in respect of supervisory on-site inspections, including the power to issue a written directive to the supervised entity to produce, at a time and place and in a manner specified, business documents that are relevant to the inspection and in the possession or under the control of the supervised entity. Furthermore, authorities must perform their duties in terms of this part with strict regard to decency and good order.***
SAIA	114	SAIA proposes that the rights afforded to the CMS to conduct on-site investigations and inspections should be restricted to instances where there are suspected contraventions of the Medical Schemes Act, 1998 and for these inspections and investigations not to be conducted in isolation, but <u>in conjunction with</u> the financial sector regulators due to the financial sector authorities' insurance industry expertise. On-site inspections and investigations by the CMS should be restricted to a contravention of the Medical Schemes	***The CMS for purposes of this Chapter is empowered to assess compliance and investigate contraventions in relation to the Medical Schemes Act. The Bill also incorporates strong co-operation and collaboration mechanisms through which the Authorities (including the CMS) can coordinate their efforts in relation to the performance of their respective functions, including in relations to supervisory on-site***

		Act. To ensure efficiency and in line with the objectives of the financial sector regulators, it is suggested that onsite inspections should be co-ordinated.	***inspections and investigations.***
Geof Mortlock	114	Again, I assume that this power applies in relation to not just the regulated entity but also any applicable holding company, subsidiary or associated party.	***Noted***
BASA	114	General concern about the need to ensure POPI requirements are followed during inspections. Concern is also expressed about the appointment of inspectors. Will regulators enter into written agreements with inspectors, similar to those with contractors and secondees, with respect to confidentiality of information? As sanctions positioned in the Bill are both civil and criminal in nature, documents seized must be relevant to the inspection or investigation and the "form" of the request must take cognizance of the requirements of the POPI Act.	***The Bill will ensure that it is appropriately aligned to the POPI Act.*** ***Inspectors and investigators appointed by the authorities are acting under the instructions of the authorities that appointed them and are bound in in the performance of any power or function in terms of this section to act with strict regard to decency, good order and a person's rights, including the rights to human dignity, freedom and security of the person and privacy.***
BASA	114(3)(a)(iv)(bb)	The phrase *"until the completion of any proceedings"* is too open-ended. A more definitive timeframe must be provided for in the Bill.	***Disagree, however the authority will ensure that a business document seized as a result of a suspicion of a contravention is returned to the supervised entity when retention of the document is no longer necessary to achieve the object of a financial sector law.***
Strate	114(3)*(a)*(ii)	Please build in provisions in 114(3)*(a)*(ii) for legally privileged documents similar to 117(8) and 117(7)*(a)*(iii). The current wording refers to "*any business document*" which may include legally privileged documents. Also, please delete "~~*in the manner determined by the financial sector regulator*~~" and replace with more suitable wording in 114(3)*(b)*; 114(3)*(c)*.	***The provisions have been revised. Refer to Part 5 of this Chapter for proposed protections relating to professional legal privilege***
ASISA	114(3)(b)	The timing of the instruction to produce documents or information seems odd. This instruction is normally provided beforehand and often as an alternative to an actual on-site inspection. The FIC Act [sec 45B(2)] contains a similar provision, but without the word "*on-site*" to qualify the word "*inspection*". We propose that this provision be brought in line with the FIC Act, or placed in	***The provisions clarify the powers of the Authorities in respect of supervisory on-site inspections, including the power to issue a written directive to the supervised entity to produce, at a time and place and in a manner specified, business documents that are relevant to the inspection and in the possession or under the control***

		a separate sub-section and introduced by the word "*Before conducting an on-site inspection*". There is also no express requirement to give notice of any on-site inspection, which we propose should be a requirement.	***of the supervised entity***
ASISA	114(4)(b)	It is not clear what type of documents and what circumstances would require a regulator to take such a drastic step, but this seems to be an infringement of the rights of the regulated person. This right given to the regulator should be limited and the specific conditions in which it may be used should be equally be limited. See also section 117(2)(b).	***Noted. The provision has been removed, however interference with the supervisory on-site inspection, including intentionally or negligently interfering with or hindering the conduct of a supervisory on-site inspection, is an offence.***
SAIA	114(4)(b)	There is a concern about the powers imparted to financial sector regulators in terms of this clause to declare a document privileged information. It is suggested that the granting of such power is too extensive. We submit that it would be acceptable for sensitive information not to be shared *prior* to an onsite inspection, but restricting a financial institution to only having access to certain information is unreasonably restrictive, and denies a financial institution of its constitutional rights to put forward an informed defence as part of its right to respond. We submit that financial institutions should have access to copies of all documentation relating to an onsite inspection from a financial regulator.	***Noted. The supervised entity may examine and make extracts from any document removed from its possession, during normal office hours and under the supervision of the authority. Interference with a supervisory on-site inspection is an offence***
Part 4: Investigations			
115. Appointment of investigators and instructing investigations			
BASA	115(1)	*115 (1) A financial sector regulator may appoint investigators from time to time, with relevant skill and knowledge to perform investigations.*	***Disagree, not necessary to specify***
Geof Mortlock	115(2)	Same issue here. I assume that the investigation power could be exercised in relation to a regulated entity (i.e. licensed entity) as well as any applicable holding company, subsidiary or associated party.	***Agree. See definition of "financial institution"***
Geof Mortlock	115(2)(b)	I suggest that the grounds be extended to include the ability to investigate where the regulator has reason to believe that a licensed entity/group of entities	***Agree***

		is conducting its affairs in an unsound manner or contrary to the objects of the Act, or needs to obtain information in order to ascertain whether this is the case.	
BASA	115(3)	*115(3) An investigator may, with the written consent of the financial sector regulator, appoint any person to assist in carrying out an investigation.*	***The provisions have been revised. The authority may appoint a person to assist the investigator in carrying out an investigation***
SAIA	115(3)	*115(3) An investigator may, with the consent of the financial sector regulator, appoint any person with relevant expertise to assist in carrying out an investigation.*	***The provisions have been revised. The authority may appoint a person to assist the investigator in carrying out an investigation***
ASISA	115(4)	ASISA members suggest that the current requirements in sections 2(2) and 2(3) of the Inspection of Financial Institutions Act be retained. It is reasonable that a person being investigated should be able to request confirmation that an investigator was appropriately appointed. *115(4) The regulator must issue an investigator appointed in terms of subsection (1) with a certificate of appointment which must be in the possession of the investigator when an investigator exercises any power or performs any duty in terms of this Act and an investigator must produce the certificate of appointment at the request of any person in respect of whom such power is being exercised.*	***Agree. See revised Bill.***
ASISA	115(5)	ASISA members suggest that the current requirements in section 3(4) of the Inspection of Financial Institutions Act be retained. An investigation may lead to civil or criminal action and thus it is imperative that a regulator makes an assessment of the investigator's ability to report objectively and impartially on the affairs of the person who is the subject of the investigation. *115(5) Before the regulator instructs an investigator to carry out an investigation, the regulator must take all reasonable steps to ensure that the investigator will be able to report objectively and impartially on the affairs of the person who is the subject of the investigation.*	***Disagree. This will be an unnecessary provision.***
116. Powers of investigators regarding examinations			

BASA	116	Powers of investigators regarding ~~examinations~~ investigation	***Sections have been revised***
ASISA	116	Powers of investigators ~~regarding examinations~~	***Sections have been revised***
ASISA	116	There is no provision for any authority other than the investigator to "issue" the summons and there is no provision setting out any procedures to be followed to issue a summons. Section 205(f) however creates an offence when a person was "***duly summoned***". It is not clear when this will be the case, as there is not even a requirement that the summons should be in writing or in any prescribed format. Clarity is requested in this regard. ***116***_(1) When carrying out an investigation, an investigator may summon any person within the financial institution under investigation, whom the investigator has reason to suspect may be able to provide information relating to the investigation, or is in possession of, or has under the person's control, any document relating to the investigation to–_	***See revised sections on powers of investigators to question and require production of documents or things, and to enter and search premises***
SAIA	116(5)	_116(5) A person examined in terms of subsection (1) must answer each question truthfully and to the best of that person's ability~~., but~~_ ~~_(a) the person is not obliged to answer any question on good cause shown, including the right not to answer if the answer is self incriminating; and_~~ ~~_(b) the investigator examining the person must inform the person of the right not to answer a question in the circumstances described in subparagraph (a)._~~	***This section has been revised. A person asked question in terms of an investigation is compelled to answer the question fully and truthfully to the best of their knowledge, and failure to do so is an offence. See also Part 5 in relation to protections***
BASA	116(1)- (6)	_116. (1) When carrying out an investigation, an investigator may ~~summon~~ subpoena any person, whom the investigator has reason to suspect may be able to provide information relating to the investigation, or is in possession of, or has under the person's control, any document relating to the investigation to–_ _(a) appear to be questioned ~~examined~~; or_ _(b) lodge the document with the investigator; or_ _(c) lodge the document with the investigator and be ~~examined~~ questioned;_ _at a time and place specified in the summons._ _(2) An investigator may–_ _(a) administer an oath or affirmation, or otherwise ~~examine~~ question any_	***The sections have been revised.***

		person referred to in subsection (1); and *(b) question ~~examine~~ and copy or, against the issue of a receipt, retain any document referred to in subsection (1) ~~for as long as it may be required~~ until such a time as the investigation is complete.* *(3)An investigator may determine the time and place of any ~~examination~~ investigation in terms of subsection (1), and may determine who may be present at an investigation ~~examination~~.* *(4) Despite subsection (3), a person ~~examined~~ questioned in terms of this section may have a 'legal practitioner' as defined in the Legal Practice Act, 2014 (Act No. 28 of 2014) present as a legal representative.54* *(5) A person ~~examined~~ questioned in terms of subsection (1) must answer each question truthfully and to the best of that person's ability, but–* *(a) the person is not obliged to answer any question on good cause shown, including the right not to answer if the answer is self-incriminating; and* *(b) the investigator ~~examining~~ questioning the person must inform the person of the right not to answer a question in the circumstances described in subparagraph (a).* *~~(6)(a) Despite subsection (5) (a), where an investigator, after consultation with the financial sector regulator, is satisfied that a matter under investigation will not be referred for criminal prosecution and that it will be in the public interest to obtain information, the investigator may oblige a person to answer even if the answer is self-incriminating.~~* This clause may be unconstitutional as only the NPA is empowered to take a decision on whether to prosecute a person. An investigator should not have the power to oblige a person to furnish a self-incriminating response.	
SAIA	116(6)(a)	The inclusion of clause 116(6)(a) is opposed. The power afforded to an investigator to *'oblige a person to answer even if the answer is self-incriminating'* is not supported as it will infringe on the right of that person. No person can be obliged to answer any question and has the right not to answer if the answer is self-incriminating. The granting of such excessive powers to oblige someone to incriminate themselves can never, in our view, be balanced against public interest, and is	***Noted. This section has been revised. A person asked question in terms of an investigation is compelled to answer the question fully and truthfully to the best of their knowledge, and failure to do so is an offence. See also Part 5 in relation to protections for self-incrimination***

		ultra vires.	
ASISA	116(6)(b)	The fact that evidence directly obtained or derived from an answer during examination may not be admissible in criminal proceedings does not protect a person's right against self-incrimination if the information provided by the person is used to unearth or collate other information which would not have been uncovered but for the information provide by answers and used in subsequent criminal proceedings. The amendment is thus proposed to extend the protection to exclude information uncovered as a result of an answer given during examination without excluding derivative evidence that would in any event have been uncovered. *116(6) (b) No self-incriminating answer given or statement made pursuant to subparagraph (a), furnished in the course of an examination, or incriminating evidence that could not have been found or appreciated except as a result of an answer furnished in the course of an examination under paragraph (a), is admissible as evidence against the person who gave the answer or made the statement in any criminal proceedings, except in criminal proceedings for perjury.*	***Noted. See Part 5 in relation to protections for self-incrimination***
117. Powers of investigators regarding searches			
ASISA	117(1)(d)	Data and records retrieved should only relate to the investigation. *117(1)* *(d) use any computer system on the premises, or require the assistance of any person on the premises to use that computer system, to–* *(i) search any data relevant to the investigation, contained in or available to that computer system; or* *(ii) reproduce any record relevant to the investigation from that data;*	***The investigator's right of access to the premises and documents are for purposes of conducting the investigation, and any data and records retrieved are for that purpose. The investigators must act with strict regard to decency, good order and a person's rights in the performance of any power or function in terms of this section, including the rights to human dignity, freedom and security of the person and privacy***
ASISA	117(1)(e)	*117(1) (e) seize any output, relevant to the investigation from that computer for examination and copying;*	***Disagree***
SAIA	117(1)(g)	The provision in clause 117(1)(g) allowing the regulator to retain any seized document for as long as it may be required should be qualified in terms of the Protection of Personal Information Act, 2014 and provide for the de-	***Noted. The investigators must act with strict regard to decency, good order and a person's rights in the performance of any power or function in terms of this section, including the rights to human dignity,***

		identification of personal information in any seized document in order to protect individual policyholder information	***freedom and security of the person and privacy***
Transaction Capital	117(2)	Section 117(2) should make provision for return of original documentation seized by the financial sector regulator where such documentation is required for any litigious or court proceedings or is otherwise required by the person to conduct its business, subject to the financial sector regulator retaining a copy thereof.	***Noted. The investigator must ensure that any document taken by the investigator is returned to the person when retention of the document is no longer necessary for an investigation. Furthermore, the supervised entity or its authorised representative may, during normal office hours and under the supervision of the financial sector regulator, examine, copy and make extracts from the document.***
ASISA	117(3)	*117(3) An investigator may enter premises without the authority of a warrant as contemplated in subsection (1), if–* *(a) the person in control of the premises consents to the search; or* *(b) the investigator on reasonable grounds believes that–* *(i) a warrant will be issued if it is applied for; and* *(ii) that the delay in obtaining the warrant is likely to defeat the purpose of search.*	***Agree***
BASA	117(3)	A warrant can be obtained at very short notice so this provision seems unnecessary. Warrants should be made out in the name of the Key Person.	***Disagree. Provisions have been retained, however refined***
Transaction Capital	117(3)(b)	Section 117(3)(b) affords an investigator far-reaching powers to enter premises without the authority of a warrant and infringes on every person's right to privacy as set out in section 14 of the Constitution. The infringement of this right cannot be justified in terms of section 36 of the Constitution, particularly in light of the fact that investigators have common law remedies available to them (such as obtaining Anton Piller orders and urgent applications).	***Disagree. However the provisions have been refined***
BASA	117(4)(b)(i)	This provision should be expanded to include the specific law/s contravened and the nature of the documents being requested.	***Sections have been revised***
BASA	117(7)(a)	*117(7)(a) When entering any premises to conduct a search, an investigator –* *(a) must inform the person in charge of the premises, if a person is present–* *(i) of his/her identity;*	***Sections have been revised***

		(ii) of the purpose of the entry;	
BASA	117(8)	To provide for a more balanced approach, it is recommended that if a document or portion thereof is declared to fall under legal privilege then the regulator should pay the costs; if not, then the institution should be responsible for the costs.	***Sections have been revised. See proposed protections in relation to legal privilege***
Transaction Capital	117(8)	The process set out in section 117(8) requiring a person claiming privilege in respect of a document seized by an investigator to apply to court to have the document declared as privileged is unduly burdensome, particularly in light of the courts' existing backlogs and current workload. In these circumstances, the investigators should avail themselves of common law remedies to request release of the document, including applications to court. This will also prevent arbitrary requests for documents by the investigators.	***Sections have been revised. See proposed protections in relation to legal privilege***
ASISA	117(8)(a)	We do not agree that it is appropriate to remove the actual document in respect of which privilege is claimed. The section should provide that the investigator is allowed to make a copy of the documents in question and file as proposed. *118 (8) (a) If, during the carrying out of a search, a person alleges the existence of legal professional privilege as contemplated in subsection (7)(a)(iii), the investigator–* *(i) may make a copy of the relevant document in the presence of the person and if so, must seal the relevant document in the presence of the person;* …… *(b) The person that claimed the existence of legal professional privilege must, within ~~seven~~ fourteen (14) days after seizure of the document, apply to the High Court referred to in subsection (4)(a) ………..*	***Sections have been revised. See proposed protections in relation to legal privilege***
Strate	117(8)*(a)*(ii)	The current wording appears to suggest that the document can be removed from the sealed bag after issuing a notice. The following should be inserted: "*may remove the sealed document from the premises after issuing a receipt;*"	***Sections have been revised.***
BASA	117(8)(b)	Seven days is a very short period of time to apply to the High Court. 14 days is more consistent with the general provisions of the Bill in terms of submissions to the regulators, which would require similar levels of preparation.	***Sections have been revised.***

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		117(8)(b) The person that claimed the existence of legal professional privilege must, within ~~seven~~ 14 days after seizure of the document, apply to the High Court referred to in subsection (4)(a) …….	
BASA	117(8)(c)	*117(8)(c) If no application is made within the period referred to in paragraph (b), the Secretary may release the document into the custody of the investigator, who may use the document for the purposes of the investigation unless it is clear from the content or it is evident that the document emanated from the in-house legal advisors or external attorneys, was for the purposes of seeking/ providing legal advice and/or in contemplation of litigation.*	***Sections have been revised.***
Geof Mortlock	117	Same issue as before as regards the persons in relation to whom these powers may be exercised - i.e. the licensed entity, a holding company, a subsidiary and an associated party.	***Agree***
ASISA	118	In order to protect the confidentiality of business information, it is suggested that section 8 of the Inspection of Financial Institutions Act be retained. ASISA proposes insertion of a new clause before 118. "***118. Observance of secrecy*** *118. An investigator appointed in terms of subsection (1) and a person appointed in terms of section 115(3), must preserve or aid in preserving, secrecy with regard to all matters that may come to the knowledge of the investigator or person in the performance of their duties* *under this Act and may not communicate any such matter to any person except the financial sector regulator, or unless a court of law order such communication, or insofar as such communication is necessary to properly carry out the investigation.*"	***Sections have been revised. Inspectors and investigators must act with strict regard to decency, good order and a person's rights.***
118. Cost of investigations			
BASA	118	The request to provide security is problematic; consider deleting clause 118(a). It does not make sense to request security after an investigation; rather it should be requested prior to investigation. This should be in respect of any person who makes a complaint, as one will not be able to determine if a complaint is frivolous at the initiation of the complaint. Clarity is requested as to the criteria which will be used to investigate a complaint and determine if it is frivolous?	***Sections have been revised.***

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		Consideration could be given to the following drafting: ***118*** *All expenses necessarily incurred by and the remuneration of any investigator or assistant appointed in terms of section 115(3) may be recovered from–* "*(a) a person who has lodged the complaint on which the investigation is based, if, considering the results of the investigation, the complaint is frivolous, and* <u>*prior to any investigation*</u>*, the financial sector regulator may require the person to furnish security that the financial sector regulator determines is satisfactory and sufficient to cover the expenses and remuneration; or*"	

CHAPTER 10: Significant Owners

Reviewer	Section	Issue	Decision
BASA	General	This chapter is a new addition to the FSRB and the implications are potentially far-reaching. BASA members have significant concerns with the provisions contained in Chapter Ten and would appreciate an opportunity to discuss these further with NT before the next draft of the FSRB is finalised.	***Noted.***
		It is strongly suggested that *de minimus* thresholds are included in this chapter. Given that, for example, there are more than 10 000 registered FSPs in South Africa, the regulators are taking on a significant administrative burden if a threshold is not introduced and the provisions of Chapter Ten are applied to all firms falling under the ambit of the FSRB. It is suggested that these requirements apply only to systemically important institutions. Comments on this section should be cross-referenced to comments on the relevant definitions above.	***Agree. The scope of the Bill is limited to approvals relating to significant owners of Banks, FMIs, CIS and Insurance Firms. Any additional financial institutions would need to be prescribed through Regulations. See revised Bill.***
SAIA	General-Significant owners	The Bill limits control and certain shareholding by proposed amendments to the Short-term Insurance Act, 1998, which will require regulatory pre-approval to hold 15 per cent or more shares in a financial institution. The current limitation is 25 per cent. In addition the Bill proposes that a person be deemed a significant owner of a financial institution if 15 per cent or more shares are held, with the option of the percentage to be lowered by the Minister in Regulations. SAIA would like to enquire why 15 per cent shareholding is suggested and the alignment with international standards and best practices in this regard. Ordinary trading of shares on the JSE may result in an inadvertent breach of such a low threshold.	***The 15 percent threshold will provide alignment across the different financial institutions that currently have different thresholds. The 15 percent threshold is in line with the international standards.***
The Unlimited	General-Significant Owner	It is not clear what the intent of this Chapter is. Please can this be clarified. Assuming that the intent is to discourage unscrupulous owners from directing the affairs of an institution to the detriment of the institution itself, alternatively its financial customers, we submit that these provisions could discourage investment in financial institutions in circumstances where the regulator could direct an owner to reduce, alternatively dispose of its interest. This concern is amplified by the requirement that dealings in, *inter alia*, the shares of financial institutions are subject to the approval of the regulator where this could impact the significant owner threshold.	***Noted. Similar requirements are already in place under the different sectoral legislations such as the Banks Act and the Long and Short Term Insurance Acts. See further refinements that have been made to this Chapter in the revised Bill.***

		We respectfully submit that the powers afforded to the Regulator appear to be excessive. Regulators are already empowered under existing, underlying laws to mitigate potential risk, including risk in ownership structures. We refer in this regard, amongst others, to: • the assessment conducted by the insurance regulators into the proposed shareholders in an application for an insurance license; and • the obligation on product providers as well as financial services providers to submit regular statutory returns. We propose that any issues which a financial sector regulator has concerning a financial institution's ownership structures be referred to the underlying regulator responsible for the institution, for example the insurance regulator and that any issues be addressed In accordance with existing laws. Furthermore: • how is "*satisfied*" within the context of section 120(5) to be interpreted? What criteria will be used to determine whether prejudice exists? • it is not clear why reference is made in s 120(5)(b)(ii) to a "*financial holding company*" as opposed to a financial institution?	
BASA	119	The threshold in the FSRB differs to the threshold in the Companies Act and the Takeover Regulations Panel, which both require systems that collate holdings information. These systems and thresholds may have to be adapted to cater for new thresholds and reports. It is not clear how beneficial interest notifications and reports in terms of the Companies Act will be impacted by approval requirements in the FSRB.	***Noted. See refinements made to this Chapter in the revised Bill.***
Transaction Capital	119	The definition of "significant owner" should be amended such that it is only those persons who exercise real control of an entity that are classified as significant owners. The ability to appoint a director, shareholding of 15% or the right to acquire a 15% stake in a financial institution would not afford rights of control that entitle a person to materially influence the strategy of a financial institution. In this regard, we recommend that those persons who have the ability to appoint a majority of the board and those persons who hold more than 50% of the shares	***Disagree. See refinements to this Chapter in the revised Bill.***

		in a financial institution are classified as "significant owners" as they would have the ability to control and materially influence the strategy of a financial institution.	
SAIA	119	The SAIA recommends that Significant Owners be defined aligned to the International Accounting Standards Board (IASB)'s International Accounting Standards (IAS) 28 – Investments in Associates and Joint Ventures (2011) The objective of IAS 28 is to prescribe the accounting for investments in associates. An Associate is an entity over which the investor has significant influence. Significant influence means the power to participate in the financial and operating policy decisions of the investee but is not control or joint control of those policies. **Significant influence:** Where an entity holds 20% or more of the voting power (directly or through subsidiaries) on an investee, it is presumed the investor has significant influence unless it can be clearly demonstrated that this is not the case. If the holding is less than 20%, the entity is presumed not to have significant influence unless such influence can be clearly demonstrated. A substantial or majority ownership by another investor does not necessarily preclude an entity from having significant influence. [IAS 28(2011).5] The existence of significant influence by an entity is usually evidenced in one or more of the following ways: [IAS 28(2011).6] ▪ representation on the board of directors or equivalent governing body of the investee; ▪ participation in the policy-making process, including participation in decisions about dividends or other distributions; ▪ material transactions between the entity and the investee; ▪ interchange of managerial personnel; or ▪ provision of essential technical information The existence and effect of potential voting rights that are currently exercisable or convertible, including potential voting rights held by other entities, are considered when assessing whether an entity has significant influence. In	***Comment noted.***

		assessing whether potential voting rights contribute to significant influence, the entity examines all facts and circumstances that affect potential rights [IAS 28(2011).7, IAS 28(2011).8] An entity loses significant influence over an investee when it loses the power to participate in the financial and operating policy decisions of that investee. The loss of significant influence can occur with or without a change in absolute or relative ownership levels. [IAS 28(2011).9] The SAIA recommends that a 20% equity shareholding be used as this aligns with international standards and best practice but at the same time also ensures that a shareholder viewed as a *"Significant Owner*" is truly "influential". **General comment for clarity:** Do the ownership requirements in this Bill override the Financial Sector Charter (FSC) ownership requirements in instances where there are inconsistencies between the FSR Bill and the FSC?	***The threshold in the Bill is a regulatory threshold for risk assessment while the Financial Sector Charter threshold is for determination of empowerment and transformation. The two are not the same.***
Warwick Wealth	119	That "Significant owners" need to be approved by the Authority is questioned. We agree that "significant owners" should be recorded by the Authority but believe that approval is neither necessary nor desirable.	***Disagree. The principle already exist in the sectoral law e.g. Banks Act***
BASA	119(1)(a)	The power to appoint a director does not necessarily amount to significant ownership of that organisation. It will depend on the size of the board, the control that the directors will have over the board and the percentage voting rights of the "significant owner". It is proposed that this clause is reformulated, or deleted.	***Disagree. See revised Bill.***
ASISA	119(1)(a)-(e)	This clause should not provide for the Minister to prescribe a lower percentage holding. A lower percentage may have substantial implications for financial institutions and significant owners. Furthermore, the implications of limits and approvals in respect of significant owners need to be carefully considered. Every financial services provider (currently licensed under FAIS) that operates as a sole proprietor will qualify as	***Noted. Where the shareholding is fragmented, a lower shareholding might be significant relative to the holdings of other shareholders. The clause is aimed at providing flexibility.***

		a significant owner. CISCA does not currently include any limit on shareholding in a collective investment scheme management company. The threshold currently applicable to insurers is 25%. ***119*** *(1) For the purposes of a financial sector law, a person is a significant owner of a financial institution if that person, directly or indirectly, alone or together with a related or inter-related person –* *(a) has the power to appoint a person to be a director of the governing body of the financial institution;* *(b) must consent to the appointment of a person as a director of a governing body of the financial institution;* *(c) in the case of a financial institution that is a company, –* *(ii) holds 15% or more of the issued shares of the financial institution, or a ~~lower~~ higher percentage prescribed by the Minister in Regulations;* *(ii) is able to exercise or control the exercise of 15% or more of the voting rights associated with securities of that financial institution, or a ~~lower~~ higher percentage prescribed by the Minister in Regulations, whether pursuant to a shareholder agreement or otherwise; or* *(iii) holds rights in relation to the financial institution that, if exercised, would result in that person –* *(aa) holding 15% or more of the securities of that financial institution, or a ~~lower~~ higher percentage prescribed by the Minister in Regulations;* *(bb) having the ability to exercise or control 15% or more of the voting rights attached to shares or other securities of the financial institution, or a ~~lower~~ higher percentage prescribed by the Minister in Regulations; or* *(cc) having the ability to dispose or direct the disposing of 15% or more of the financial institution's securities or a lower percentage prescribed by the Minister in Regulations;* *(d) in the case of a financial institution that is a close corporation, owns 15% of the members' interest, or controls directly, or has the right to control, 15% of members' votes in the close corporation, or a ~~lower~~ higher percentage prescribed by the Minister in Regulations;* *(e) in the case of a financial institution that is a trust, controls or has the ability to control 15% of the votes of the trustees, appoint 15% or more of the trustees, or to appoint or change any beneficiaries of the trust, or a ~~lower~~ higher percentage prescribed by the Minister in Regulations;* *~~(f) has the ability to materially influence the strategy of a financial institution in~~*	

		~~*a manner comparable to a person who, in ordinary commercial practice, would be able to exercise a form of control referred to in paragraphs (a) to (e); or……*~~ In ASISA's view this provision is too wide and open ended and, given the fact that the form of control is covered in subparagraphs (a) to (e)	
BASA	119(1)(f)	The ability to *"materially influence strategy"* is a problematic phrase as it can be interpreted in many ways. It could capture many staff members of a financial institution within its ambit. It is proposed that this section is redrafted to be more precise and narrow in its application.	***Noted. See revised Bill.***
Standard Bank	119(1)	Standard Bank is concerned with the proposed definition of "significant owners" in Clause 119(1). The definition proposed in the Bill is extremely wide in scope. It is proposed that the word "indirectly" in opening clause of 119(1) is deleted as its inclusion could give rise to situations whereby a great number of individuals are inadvertently and inappropriately captured in the definition. This is exacerbated by Clause 119(1)(f) as it is not precisely clear what is meant by *"… has the ability to materially influence the strategy of a financial institution …"* and a generous interpretation of this sub-clause would capture a large number of executives in a financial institution. ***119.*** *(1) For the purposes of a financial sector law, a person is a significant owner of a financial institution if that person, directly ~~or indirectly~~, alone or together with a related or inter-related person –* *(a) ……..;* *(b) …….;* *(c) …….*	***Disagree. See the revisions that have been made to this section in the revised Bill.***
ASISA	119(1)(g) & 119(3)	Clause 119(1) sets out the criteria for qualification as a significant owner. One of these qualifications is that a person is declared in terms of subsection (3) as a significant owner. Clause 119(3)(a) stipulates that a financial sector regulator may declare that a specified person is or is not a significant owner. This causes confusion.	

		The regulator should not be able to declare a person a significant owner if such person has not met the criteria. Furthermore, for the sake of consistency, the regulator should not be able to declare a specified person is not a significant owner even if the criteria are met as that may lead to inconsistent application of the provisions of this clause. It will be appreciated if National Treasury clarifies the intention of these provisions. *119(1)(g) ~~is~~ if declared in terms of subsection (3) to be a significant owner of a financial institution.*	***A consultation process where a person can make representation on the matter has also been incorporated into the revised Bill and accordingly, the Bill also needs to provide some discretion to the financial sector regulators to declare a person as a significant owner or not. The decision might be as a result of the representation that would have been made by the person concerned.***
Strate	119(3)*(a)*	The wording "*is or is not a significant owner*" in 119(3)*(a)* refers. Surely the discretion cannot be open without any guidelines? Please specify the grounds for not making this declaration. If the intention is to follow the principles in 120(3)*(a)*, please insert the wording.	
Strate	119(3)*(b)*(i) &(ii)	Does this mean that only the Prudential Authority may declare a specified person as a significant owner of a market infrastructure? Please clarify.	***The "Responsible Authority" makes this determination and in the case of FMIs, the FSCA makes this determination.***
BASA	119(4)(b)	The criteria to be used by other financial sector regulators in determining if "*a person is in a position to control or exert significant influence over the business*" should align with the criteria in clause 119(1)(f).	***Noted.***
BASA	119 and 120	It is suggested that cl 119(1) and the rest of cl 119 are separated, as while cl 119(1) sets out the criteria to automatically qualify persons to become significant owners, the rest of cl 119 and cl 120 set out the approval process for significant owners.	***Noted. See revised Bill.***
Strate	120(1)	What will happen if a person wishes to dispose of an interest in a financial institution, and approval is not granted? Please clarify.	***See revised chapter on reviews. Decisions of regulators can be reviewed.***
JSE	120(1)*(a)*	A significant owner of an authorised user must meet the JSE's fit and proper requirements. Our concern with this section is related to our over-arching concerns with the application of the FSRB to an SRO and we would argue strongly that the decision regarding significant owners of authorised users,	***The scope of the Bill is limited to approvals relating to significant owners related to Banks, FMIs, CIS and Insurance Firms. Any additional financial institutions would need to be prescribed through***

		participants or clearing members should remain with the SROs. In relation to the approval for all financial institutions (not just authorised users), we question whether this is practical given that there are thousands of financial institutions and that the threshold of 15% is so low.	***Regulations. See revised Bill.***
		Finally, only the PA is given the authority to approve significant owners of market infrastructures and not the FSCA. This is contrary to the FMA and the FSCA must have a regulatory interest in ownership of FMIs.	***The "Responsible Authority" makes this determination and in the case of FMIs the FSCA makes this determination.***
Transaction Capital	120	The requirement that disposals or acquisitions of securities in financial institutions be made subject to the approval of the relevant financial sector regulator fails to take into account the following considerations – • where the securities of financial institutions are listed on a stock exchange, the liquidity of those shares would be materially impacted, which in turn results in a lower appetite for investment (and in particular, foreign investment) in financial institutions or groups of companies comprising of, inter alia, financial institutions; • many financial institutions (and in particular, credit providers) rely on the issue of securities to raise debt. If those securities that are issued are not capable of being freely traded, this could result in increased costs of funding which will ultimately be passed on to the consumer; • the basis on which a financial sector regulator could make a decision regarding the likelihood of a significant owner influencing the sound and prudent management and financial soundness of the financial institution is not clearly set out in the Bill, nor does this make sense in the context of shareholder's rights. In particular – - there is no obligation on the significant owner to provide information concerning itself to the relevant financial sector regulator; - shareholders (particularly shareholders of public companies, the shares of which listed on stock exchanges who are usually passive) do not influence	***Comment noted.***

		the day-to-day management of financial institutions; and - there is no obligation on shareholders to fund financial institutions and therefore the ability of a shareholder to ensure the financial soundness of a financial institution is irrelevant.	
BASA	120(1)(b)	The inclusion of approvals for disposals is not supported. The basis for this is not explained and it may present an unjustified restriction of property rights. (This point is elaborated on below on the comments on Chapter 11). Further it amounts to a double application for regulatory approval: by both the seller and the buyer. We believe this is unnecessary.	
Transaction Capital	120(1)(b)	Section 120(1)(b) should be amended such that approval for the disposal of an interest in a financial institution is limited only to the financial institution and is not extended to a related party of the financial institution. The reasons for this assertion are as follows - • it would unfairly prejudice a significant owner if it was unable to dispose of its interest in a group of companies where only one or a few of those companies is a financial institution; • the relevant financial sector regulator's powers would extend to entities that are not financial institutions by virtue solely of those entities being related to a financial institution; and • the ability of a financial sector regulator to prevent a commercial transaction could materially impact the share price of a group of companies where only one or a few of the companies within the group are financial institutions.	***Comment noted. Clarity has been provided in the revised Bill.***
Standard Bank	120(1)(b)	Clause 120 dealing with "*Approvals relating to significant owners"* is of concern to Standard Bank. While it is understood and accepted that the authorities need to exercise intense scrutiny of persons exercising control over financial institutions, it is not our experience that a similar necessity extends to the disposal or divestiture of control, as is contemplated in Clause 120(1)(b). We believe that this proposal would be viewed unfavourably both by existing significant owners in financial institutions and by potential significant owners as it imposes a new and unusual restriction on future divestitures of investments in financial institutions. This is likely to deter future significant investments in the	***Comment noted.***

		financial services sector in the Republic at a time when we should be seeking to reassure investors, both strategic and portfolio investors. The ultimate effect of the over-reach will be to undermine the very confidence and stability in the financial system that the FSRB seeks to strengthen.	
Strate	120(2)*(a)* 120 (3)*(a)* & *(b)*	For the MI, the PA will approve/disapprove the matter relating to the significant owner. The only criteria in 120(3)*(a)*(i) are "*financial soundness*" and "*sound and prudent management*", is this correct? If yes, these concepts should be better described, because it is open to interpretation. It is important that the Financial Institution's own interpretation, facts and view count here. It seems very unbalanced. Also, 120(3)*(a)*(ii) only refers to the "*interest of financial customers or the public interest*". Is the PA the correct entity to make this call? It seems to be more in the space of the licensing FSCA that will have a more holistic picture of the MI. Please re-consider why the licensing regulator would not be better positioned to make the call?	***The "Responsible Authority" makes this determination and in the case of FMIs, the FSCA makes this determination.***
ASISA	120(3)	Clause 120(3)(b) is confusing. It is not understood how an approval may be granted subject to an aggregate value of the interest (as determined by the regulator) without further approval. What further approval is being referred to? ASISA members will appreciate an explanation of what the clause is intended to achieve. Is the intention to provide that a regulator may approve a significant owner's holding up to a maximum percentage (to be determined by the regulator) in order to allow a significant owner to increase its holding to that maximum percentage without requiring further approval from the regulator?	***The sections have been redrafted to provide clarity. See revised Bill.***
Strate	120(3)*(a)*	The reasons for the decision should be similar to s 67(6) and (7) of the FMA.	***The sections have been redrafted to provide clarity. See revised Bill.***
Standard Bank	120(3)	Standard Bank also anticipates that the provisions of Clause 120(3)(a) may give rise to claims against the financial sector regulators in certain cases where significant owners suffer financial harm as a consequence of delays, reasonable	***Noted.***

		or otherwise, arising from the requirement for them to obtain approval to divest, and the potential related consultation processes. A conceptual example follows: *Institutional investor A holds on its own and clients' behalf greater than 15% of financial institution B and is defined / declared as a significant owner (perhaps retrospectively). Noting that equity markets are inflated due to macroeconomic factors (such as monetary easing outside of the Republic), Investor A wishes to reduce its investment in B and makes application to do so. The application process takes several weeks/months, partially due to consultative processes during which time market conditions deteriorate, causing A and its funds to suffer losses, for which it seeks redress from the financial regulator.*	
Transaction Capital	120(3)(b)	The relevant financial sector regulator should not entitled to determine a cap (as contemplated in section 120(3)(b)) on the interest that may be held by a significant owner without the further consent of the financial sector regulator concerned for the following reasons – • section 120(3)(b) of the Bill does not set out the factors to be considered by the relevant financial sector regulator in making such a decision or the grounds on which such a decision may be based; • the granting of such extensive powers to financial sector regulators will result in shares becoming illiquid, a lack of investment in financial institutions and increased debt funding costs which will be passed onto consumers (see paragraphs 8.2.1.1 to 8.2.1.3 above).	***Noted. See revised Bill.***
Transaction Capital	120(4)	Section 120(4) should set out a list of conditions to which any approval granted by the financial sector regulator may be subject to prevent (i) arbitrary decisions that are not of general application to all financial institutions; and (ii) the usurping of the competition authorities' powers.	***Noted.***
Transaction Capital	120(5)	Section 120(5) should be deleted in its entirety for the following reasons – • as stated above, any decision by a financial sector regulator that the retention of a particular significant owner would be prejudicial to the financial institution or the financial customers of that institution would be arbitrary as (i) the financial sector regulator does not have the power to request information regarding the relevant significant owner; (ii) shareholders do not	***The section has been redrafted to provide further clarity. See revised Bill.***

		influence the day-to-day management of financial institutions, nor are they responsible for the financial soundness of financial institutions. Those responsibilities are the responsibilities of the directors and management of the financial institution who fall to be regulated by the provisions relating to "key persons" • the ability of the financial sector regulator to require a significant owner to dispose of its interest in a financial institution or to limit the voting rights that may be exercised by that significant owner is contrary to section 25 of the Constitution which provides that *"[n]o one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property"*.	
BASA	120(5)	More detail is needed to understand what test the regulator will use to determine whether significant ownership is prejudicial to the institution or to the financial system.	***The section has been redrafted to provide further clarity. See revised Bill.***
Standard Bank	120(5)	The provisions of sub-clause 120(5) should be appropriately qualified as to reasonableness (i.e. *"… is reasonably satisfied*") and to allow for the significant owner in question to make representations in this regard to either the Minister, or the courts, before being required to divest of its shareholding.	***The section has been redrafted to provide further clarity. See revised Bill.***
JSE	120(5)	We would question whether this provision is constitutional. More specifically in relation to authorised users, we would argue that as long as the significant owners meet the fit and proper requirements stated in the rules, they cannot be asked to relinquish ownership.	***The section has been redrafted to provide further clarity. See revised Bill.***
Strate	120(5)	Clause 120(5)*(a)* has not specified "*market infrastructures*" (compared to e.g. 119(3)*(b)*(i) and 120(2)*(a)*). Consideration of prejudice to the institution itself should also be extended to market infrastructures.	***The section has been redrafted to provide further clarity. See revised Bill.***
BASA	120(7)(a)	*120(7)(a) Despite any other laws, no person may, in respect of an interest in a financial institution or a related party of a financial institution issued to ~~that person~~ or registered in that person's name contrary to this Act –*	***Noted. The section has been deleted in the revised Bill.***

CHAPTER 11: Framework for Supervision of Financial Conglomerates			
Reviewer	**Section**	**Issue**	**Decision**
BASA	General	This is a new chapter to the FSRB. Supervision on a conglomerate basis is supported in principle, especially if it promotes financial stability and minimises duplication in reporting and oversight. However, certain aspects of Chapter Eleven, taken in conjunction with Chapter Ten, are extremely problematic and are not supported. BASA would appreciate further discussions on these aspects with NT before the next version of the Bill is drafted.	***Comment noted. The respective chapters have been redrafted to provide further clarity following the public stakeholder consultations and also to incorporate the comments that were received during the public consultation period. See revised Bill.***
SAIA	121(1)(a)	The Bill requires that an eligible financial institution must, within 14 days of becoming part of a financial conglomerate, notify the PA of that event. We submit that 14 days is not a reasonable period of time to notify the PA, and it is suggested that the Bill should allow at least 30 days for notification in this regard. Clarity is also required on whether reference to *"days"* is intended to be business days or normal calendar days.	***Disagree. Fourteen days is a reasonable period to allow for notification post-transaction of becoming part of a financial conglomerate. "Days" are calendar days.***
BASA	121(2)	Clause 121(2)(a) read with clause 122(3) … will definitely have a major and global cross-border effect in relation to Return on Equity … we are of the view that these provisions grant the PA extensive powers without adequate checks and balances. We recommend that NT reconsider this section of the Bill.	***The referenced sections have been redrafted to provide more clarity. See revised Bill.***
JSE	121(2)*(a)*	We would question why conglomerate supervision is given only to the PA. There might be valid reasons for the FSCA to also have conglomerate supervision powers.	***Conglomerate supervision is aimed at ensuring that risks are managed more effectively across a group of related companies to ensure the safety and soundness of an eligible financial institution. The revised provides to FSCA to make conduct standards and extend them to the holding companies of financial conglomerates. Furthermore the Bill requires that the PA consults the FSCA in connection with any designation of members of a group of companies as financial conglomerate.***
BASA	121(3)	It is not clear what criteria the PA will apply when considering exemptions. The current wording allows for the conglomerate – as a whole – to be exempted and not for exemption for one of the entities within the conglomerate. Clarification	***The section and chapter has been redrafted to provide clarity. See revised Bill.***

		of this is requested. It is not clear from the Bill or Explanatory Memorandum how existing financial conglomerates will be approached once the FSRB is enacted. More information on this would be welcomed.	
ASISA	121(3)(a)	Clause 121(3)(c) refers to an eligible financial institution that is exempted from the framework in terms of paragraph (a). Clause 121(3)(a) should be amended to refer to the exemption of an financial institution as opposed to the exemption of a financial conglomerate. *121(3)(a) The Prudential Authority, on application from an eligible financial institution that is part of a financial ~~conglomerate~~ institution, may exempt that financial conglomerate from the framework for the supervision of financial conglomerates or a part of the framework, on the conditions determined by the Prudential Authority.*	***The section and chapter has been redrafted to provide clarity. See revised Bill.***
BASA	122	"Group" has not been defined in the Bill and it is assumed that group is meant to mean "financial conglomerate".	***"Group" is used in the definition of "financial Conglomerate". See revised Bill.***
ASISA	122(1)(a)	It is not clear if a financial conglomerate can make representations on this issue to the PA outside of section 121(3)(a). The final wording of that section could provide clarity. Guidance is requested in this regard.	***Noted.***
SAIA	122(3)	It is proposed that the Bill provide for further detail as to what will be included in the *"scope"* of group supervision referred to in this clause. There is no firm indication as to what the meaning of the "scope" is in the context of this Chapter, and what exactly will be included in the supervisory approach to financial conglomerates.	***Matters for which the PA can issue standards for financial conglomerate have been clarified in the revised Bill.***
BASA	123	This clause is inadequate. Having regard to the objective of conglomerate supervision and the important role and responsibilities of a controlling company in this context, also from a prudential standard (i.e. minimum capital and resources, etc.) and other requirements perspective in relation to financial conglomerates as a group. It is suggested that the clause is revised to provide a process together with provisions similar to that prescribed in terms of sections 43, 44 45, 46, 47, 48, and 49 of the Banks Act, 1990, in Chapter 11 in respect of	***Noted. The section and chapter has been redrafted to provide clarity. See revised Bill.***

		controlling companies. It is not clear what the distinction is between a *"holding company"* and a *"controlling company"*. It also seems that "operating holding companies" will be required to convert to controlling companies. Clarity would be appreciated on the following points: What is the impact of "non-operating" - If the holdco is operating to manage the group activities, e.g. capital management, consolidation of financial statements, etc. - will this be regarded as "operating"? If so, some holding companies may not qualify as a "controlling company" and the group will have to add a layer between the holdco and its subsidiaries. The definition of controlling company should be more detailed.	
126. Transparent Group Structure			
BASA	126	Of particular concern is Clause 126 dealing with "Transparent Group Structure". In its current formulation, Clause 126 is not supported. This extension of powers beyond what is currently provided for in the Banks Act will have significant, far-reaching implications for financial institutions from a cost, legal, tax, personnel, customer, and regulatory perspective. Any restrictions of commercial activities should be justified, reasonable, and proportionate. We believe that the measures contained in clause 126 are draconian and may well have a detrimental impact on the South African financial sector. The justification for granting a regulator such intrusive powers is not included in the explanatory documents accompanying the Bill. It is not clear whether conglomerates will be subject to additional requirements such as reporting, disclosure, capital adequacy. The problem is that the bar may be raised as and when new facts emerge, leading to a situation where there is constant uncertainty as to what will satisfy the regulators. Section 4 of the Banks Act allows for a supervisory process by the Registrars who can review reports submitted by a bank, controlling company or banking group. This is however only supervisory and not prescriptive. Section 4(6) specifically allows for consultation with banks. Clause 126 in the FSRB does not specifically allow for consultation with a financial institution before	***Noted. The section and chapter has been redrafted to provide clarity. See revised Bill.***

		determination of the restructure of a conglomerate. Section 55 of the Banks Act determines that a group of companies may not be reconstructed without the Registrar's consent but in the FSRB, the Prudential Authority will play a pro-active rather than a reactive role in the reconstruction. Sections 56 and 57 of the Banks Act allow the Registrar to interfere in the MOI of a bank but not to order the restructuring of a conglomerate.	
JSE	126	This section contains fairly broad-ranging powers in relation to the ability to compel restructuring of the financial conglomerate. Is this constitutional?	***Noted. The section and chapter has been redrafted to provide clarity. See revised Bill.***
Standard Bank	126	Standard Bank is particularly concerned with Clause 126 dealing with "*Transparent group structure*" as the provisions contained in this clause have potentially far-reaching commercial implications for affected financial institutions. It is proposed that these provisions must incorporate appropriate checks and balances, both in respect of the substantive issues regarding the structure as well as the procedure to be followed by the authorities. Standard Bank suggests that sub-clause 126(1)(a) is revised to include the following: • The right for financial conglomerates to make representations regarding the benefits of the group structure; • The right for financial conglomerates to make representations regarding the costs and consequences of changing the group structure; • The duty of the Prudential Authority to demonstrate objectively and provide reasons why the structure of a financial conglomerate impedes the safety and soundness of any eligible financial institution that is part of the conglomerate, and impedes the ability of the Prudential Authority to determine the matters set out in sub-clauses 126(1)(a)(ii)(aa) to (cc); and • A process for financial conglomerates to appeal any decisions by the authorities in regards to structure. Standard Bank notes with concern that the inclusion in the draft Bill of requirements relating to disposals marks an expansion of the existing regulatory ambit. It is not clear to us that there are many examples of situations where	***Noted. The section and chapter has been redrafted to provide clarity. See revised Bill.***

		divestitures by regulated financial institutions gave rise to increased risks and accordingly justifies an expansion of the regulatory ambit to cover disposals as well as acquisitions. Importantly, it is noted that the terms "acquisition" and "disposal" are not defined in the Bill and that this creates substantial uncertainty and vagueness in the draft legislation. It should be made clear that any acquisitions or disposals under reference are acquisitions of controlling interests in the equity of companies or similar interests in other legal entities. If such qualification is not included in the legislation, it would become onerous, vague and impractical as the ordinary usage of the terms "acquisition" and "disposal" is very broad (being defined in the Oxford dictionary as "something acquired" and "getting rid of something" respectively) since even everyday procurement activities on the part of regulated institutions could, inadvertently, we are sure, fall into this definition.	
127. Approval of or prior notification of an acquisition or disposal			
Standard Bank	127	We would welcome greater clarity on the thresholds for materiality that would be proposed in connection with Clause 127 as the recent enhancements to Section 52 of the Banks Act have improved, if not completely addressed, the operation of the existing regulatory requirements in relation to banks.	***The thresholds will be set out through the prudential standards. See revised Bill.***
Strate	127(1)	It is not clear what acquisition or disposal is covered here. There is need for clear guidance on what constitutes a material acquisition or disposal. Such standards should therefore not be optional.	***The section has been revised to provide for greater clarity and the thresholds will be set out through the prudential standards. See revised Bill.***
SAIPA	127(1)	Add "or disposal" at the end of sub-section (b).	***Agree. See revised Bill.***
Deloitte	127(1)	Sub-regulation 127(1) directs that a regulated authority must notify the Prudential Authority prior to making an acquisition or disposal. It is unclear from reading this section whether any materiality would be applied to the acquisition or disposal. We are of the view that additional guidance should be provided in this regard. Furthermore, the word "disposal" has also been omitted from the end of this sentence.	***The section has been revised to provide for greater clarity and the thresholds will be set out through the prudential standards. See revised Bill.***
BASA	127	Clause 127 on *"Approval of or prior notification of an acquisition or disposal"* is also not supported in its current form.	***Comment noted. The section has been revised to provide for greater clarity and the thresholds will be set out through the prudential standards that will be***

		The reason for extending current powers afforded to the Registrar of Banks in the Banks Act to include disposals is not explained in the documents accompanying the FSRB. Banks believe that such a provision may represent an unconstitutional restriction on the disposal of property and may well serve as a strong disincentive to invest in the financial sector, negatively impacting its long-term safety and soundness. Furthermore, it places institutions not regulated by the FSRB at a competitive advantage in relation to any acquisition or disposal as these institutions can act without waiting for regulatory approval. Time is often of the essence in such transactions, and the need for regulatory approval could place the transaction at risk and could impact the price of the transaction too. It is not clear how these new provisions in the FSRB will interact with Sections 52 and 54 of the Banks Act: will the FSRB provisions replace Sections 52 and 54? And if so, should this not be included in Schedule 4 (Acts to be Amended or Repealed)? It is recommended that the reference to disposals is removed from the Bill entirely, or at a minimum there is only a requirement that a notification of a material disposal is necessary. Furthermore, a materiality threshold must be included in the Bill in relation to acquisitions. The current provision requires approval even for a 1% acquisition which does not contribute to the assessment of systemic risk but does add to the administrative burden. Clause 127(4) is not supported and it is proposed that it is replaced by an appropriate fine. This would be preferable to the legal uncertainty that the current approach would introduce.	***issued by the PA. See revised Bill.***
Cliffe Dekker Hofmeyr Inc	128(2)	The power of the Prudential Authority to set prudential standards for financial conglomerates in terms of section 128(2) is too wide and should be curtailed.	***Noted. See revised Bill.***
Cliffe Dekker Hofmeyr Inc	128(3)	Clearer direction should be given in the Bill to the Financial s Sector Conduct Authority (FSCA) as to the conduct standards that it may set for financial conglomerates in terms of section 128(3)	***FSCA will make standards that are consistent with its objectives and mandate. See revised Bill.***

Cliffe Dekker Hofmeyr Inc	129	The provisions of section 129 of the Bill, in terms of which the Prudential Authority and the FSCA are authorised to exercise the powers they have in terms of the financial sector laws in respect of controlling companies and entities that are part of the financial conglomerates, should be clarified.	***Noted. See revised Bill.***
Standard Bank	129	Standard Bank proposes that entities that are not defined as eligible financial institutions in terms of the Bill, and that are not classified as financial service providers or products providers in terms of the Bill, should be included in the ambit of Clause 129. In respect of Clause 129, Standard Bank suggests that the clause is revised to read as follows: ***129*** *The powers of the Prudential Authority and the Financial Sector Conduct Authority in terms of the financial sector laws may be exercised in respect of controlling companies and eligible financial institutions ~~the entities~~ that are part of financial conglomerates.*	***Agree with the principle. See revised Bill.***
BASA	130	There also needs to be a definition of "group supervisor" and "supervisory colleges" which are referred to in clause 130.	***Noted. Terms no longer used in the revised Bill.***
SAIA	130(1)	The requirement placed on the PA in this clause namely it *"must take reasonable measures to establish adequate coordination arrangements with other regulatory authorities in respect of financial conglomerates"* seems vague in comparison with the detailed requirements set out in Chapter 6 on Co-operation, Co-ordination, Collaboration and Consultation. It is suggested that *"co-ordination arrangements*" be clarified and aligned with the rest of the Bill, and require the PA to enter into Memoranda of Understanding with other regulators regarding the supervision of financial conglomerates.	***Comment noted. The section has been deleted from the revised Bill.***
SAIA	130(2)	It is proposed that the Bill specifically provide for instances where the PA and the regulatory authorities referred to in clause 130(2) cannot come to an agreement as to which regulatory authority is the group supervisor. Specifically, it should be provided for the decision making authority to determine in such instance which authority will be afforded the group supervisory status.	***Comment noted. The section has been deleted from the revised Bill.***

		Similarly, it is proposed that the Bill specifically provide for instances where the roles and responsibilities of the group supervisor and the other regulatory authorities cannot be agreed, as provided for in 130(2) (b).	
ASISA	130(2)(a)	The term "group supervisor" is introduced in this clause. The role intended is that of the regulatory authority that is identified during the co-operation between the relevant authorities as the authority that will play the **co-ordination and leading role** as set out in clause 130(2)(d). For the sake of clarity, it is suggested that the reference to "group supervisor" be replaced with a reference to "lead regulator". The references to "group supervisor" in clauses 130(2)(d)(ii) and 130(3) should also be replaced with references to "lead regulator". *130(2) The Prudential Authority in respect of financial conglomerates, must together with the regulatory authorities of any person that is part of a financial conglomerate–* *(a) agree which regulatory authority is the ~~group supervisor~~ lead regulator;*	***Comment noted. The section has been deleted from the revised Bill.***
Standard Bank	130(2)	The principle of group supervision for financial conglomerates is supported in principle. Standard Bank does have some concerns about how this approach will be implemented. For example, it must be absolutely clear that a financial conglomerate will be classified on the basis of the primary activity of its majority shareholder: the Standard Bank Group should be regulated and supervised as a banking group, even though it contains insurance entities. Another issue relates to the role of the "group supervisor" in relation to the supervision of financial conglomerates, as referred to in sub-clauses 130(2)(a) and (b). This concept is not defined in the Bill. We strongly support the requirements for cooperation between financial sector regulators in respect of supervising financial conglomerates as outlined in clause 130. Standard Bank believes that it is imperative that there is legislative and operational clarity and certainty about the respective roles and responsibilities of all relevant financial sector regulators in respect to the supervision of conglomerates. The failure to	***Comment noted.***

		achieve this will render many of the benefits of the Twin Peaks system moot. It is therefore proposed that Clause 130 is strengthened by requiring that the cooperation agreements referred to in sub-clause 130(2)(d) are: • Given the status of Memoranda of Understandings; • Made public or at least shared with the affected financial conglomerates; and • Concluded within six-months of Act coming into effect. In particular, there needs to be more certainty on procedures that will be followed in the event of a failure to reach agreement within the supervisory college about a matter in relation to the regulated financial conglomerate; including which financial sector regulator should be the lead regulator or group supervisor.	

CHAPTER 12: Enforcement Powers

Reviewer	Section	Issue	Decision
BASA	General	The Regulator has wide powers in this section to create rulings on the interpretation of a financial sector law for the purpose of consistent application of the law. Section 131(2) goes further to state that the interpretation ruling is then binding on a financial institution until such time as a court attaches a different interpretation. Whilst we understand and appreciate the intention of the Regulator is to apply the law consistently, the extension of the Regulator's power to interpret legislation and further bind financial institutions to its own interpretation stretches the application of the law too far. The law should clearly set out what is required as this law is in fact the Regulator's creation. It is the prerogative of the courts to issue binding interpretations of legislation. Financial institutions would, if circumstances do arise, challenge the Regulator in a court as to the interpretation of a law. However cognisance must be taken of the fact that court processes take a great length of time to resolve the issue at hand and financial institutions may have invested in huge system or operational changes based on their interpretation of the law prior to the interpretation ruling by a Regulator. This in effect means that the financial institution would have to unwind its changes to apply the interpretation of the Regulator and then apply to court to resolve the interpretation issue. If a court finds in favour of the financial institution, the financial institution would have to abandon the changes created by the interpretation ruling and revert to its initial process. As much as a financial institution would like to abide by the law and the interpretations of the Regulator, to create a binding interpretation is an unnecessary and onerous burden imposed on a financial institution that may have undergone huge changes in order to comply with the initial interpretation. If a financial sector regulator alters a proposed interpretation ruling based on a comment received, the regulator is entitled to issue the interpretation ruling without publication and without giving the financial institution/industry an opportunity to provide input on the amended interpretation. This may have far	***The provisions clarify the purpose binding rulings, and specifically recognise that interpretation by the courts prevails.*** ***See precedent in the Tax Administration Act regarding "practices generally prevailing" and general rulings. Binding rulings must be published***

		reaching consequences on a financial institution. We suggest that if the Regulator goes the route of creating binding interpretation rulings, publication of such amended rulings is a necessity, noting that it needs to be complied with on the date of issue.	
Part 1: Interpretation Rulings			
Transaction Capital	131	The ability of a financial sector regulator to make interpretation rulings as to the meaning of a promulgated regulation (with which a financial institution is obliged to comply until such time as a court sets it aside) results in a regulatory body usurping the functions of the judiciary and allocates inappropriate judicial functions to the regulatory institutions. The interpretation of legal sources is a judicial function which should not be reduced to administrative acts. In addition, a 30 day period within which to comment on proposed interpretation rulings is an insufficient period of time within which to consult relevant stakeholders and legal counsel.	***Disagree with the interpretation. The provisions clarify the purpose binding rulings, and recognise the precedence of judicial decisions.*** ***See Tax Administration Act regarding "practices generally prevailing" and general rulings.***
SAIA	131	Clarity is required as to the reason *"Interpretation rulings"* are not included in the definition of legislative instruments, based on the binding nature of such rulings as set out in Clause 131(2) in that they may only be changed by a court of law. We recommend that all financial sector legislation, regulations and legislative instruments that have general application or are applicable to all regulated persons, be included in the Financial Sector Information Register, including *"Interpretation rulings*" as established in clause 131 and *"Declaration of certain practices as irregular or undesirable"* as established in clause 141. It is suggested that consultation requirements set out in chapter 7, clause 90, should *mutatis mutandis* apply to clause 131, especially in so far as public comments must be considered prior to publication of an interpretation ruling.	***Binding rulings are not regulatory instruments. The provisions clarify the purpose binding rulings, and recognise that interpretation by the courts prevails. The Bill requires the responsible authority to follow a process of consultation before issuing binding rulings, which must be also published.***
ASISA	131	Whilst the purpose of an interpretation ruling is set out in clause 131(1) and National Treasury previously (in its response to comments on the Insurance Laws Amendment Bill 2013) indicated that there is legislative precedent for the issue of rulings in the Tax Administration Act, the view is held that this clause assigns a power to the regulator similar to that of a court. It is submitted that	***Binding rulings are not regulatory instruments. The provisions clarify the purpose binding rulings, and recognise that interpretation by the courts prevails.*** ***The provisions have been revised to clarify that the responsible authority must, follow a process of***

		although there is legislative precedent in the Tax Administration Act, the application thereof in the context of financial sector laws may not be appropriate. The consultation requirements in this clause seem less onerous than the consultation arrangements in respect of legislative instruments (clause 90). At the very least the same consultation requirements should apply to interpretation rulings given that only a court can overturn it.	***consultation before issuing the ruling, and the binding rulings must be published***
Standard Bank	131	Clause 131 gives the regulators the authority to issue binding interpretations of financial sector laws. This amounts to the making of legislative instruments and must be subject to the same stringent consultation process required for the prudential and conduct standards in the FSRB. The interpretations should also be included in the Financial Sector Information Regulator for convenience and completeness. A similar argument can be made in respect of the declaration of certain practices as undesirable in Clause 141.	***Binding rulings are not regulatory instruments for the purposes of the financial sector laws***
ASISA	131(1)	The interpretation of statutes is a function/responsibility of the judiciary and not of the executive. The proposed provisions not only usurp a function of the Courts, but also infringes on the separation of the legislative, executive and judiciary functions which is entrenched in the Constitution. We furthermore submit that the proposed dispensation, in terms of which a financial institution must adhere to an "*interpretation ruling*", until such time "*as a court attaches a different interpretation ...*" will bring about great uncertainty for both financial institutions and customers, as it is by no means clear what the impact of a contrary Court ruling will be on actions taken by financial institutions in accordance with the "*interpretation ruling*". In this regard it is to be noted that it will not always be possible to place the parties in the positions they would have been in, but for the interpretation guideline. In view of section 221, neither Financial Institutions, nor their customers, will have any recourse for damages suffered by reason of abiding an erroneous interpretation. It is submitted that the section be deleted and that Section 144 be amplified to expressly provide that the Regulator may apply to the High Court for a declaratory order as regards the correct interpretation of a Financial Sector Law.	***Disagree with the interpretation; regulatory instruments made by the regulators are not primary legislation. Binding rulings are not regulatory instruments; the provisions follow the precedent in the Tax Administration Act regarding "practices generally prevailing" and general rulings which specifically recognise that interpretation by the Courts prevails.***
The Unlimited	131(2)	We respectfully suggest that a financial institution not be required to comply	***The Bill requires the responsible authority to follow a***

		with an interpretation ruling in circumstances where the institution concerned has instituted, and can demonstrate is actively pursuing, a Court challenge. In this regard complying with a ruling that is the subject of a challenge could have substantial adverse consequences for the institution concerned, particularly if the institution's challenge is successful.	***process of consultation before issuing binding rulings.***
BASA	131(3)*(a)*	Given the binding nature of these interpretations and the manner in which these are made, adequate notice period is essential. ***131****(3)(a) Before a financial sector regulator issues any interpretation ruling in terms of this section, the financial sector regulator must publish a draft of the proposed interpretation ruling on its official website, together with a notice calling for public comment in writing, within a period stated in the notice, of at least ~~30~~ 90 days from the date of publication of the notice.*	***The Bill requires the responsible authority to follow a process of consultation before issuing binding rulings and the 30 day comment notice is the prescribed minimum notice period before publication.***
Part 2: Regulators' Directives			
BASA	132	The powers afforded to the PA are broad with insufficient checks and balances. The process that must be followed to determine that *(a)* to *(d)* is happening is too vague.	***Noted. The provisions have been refined, and directives issued by the authorities must be aimed at achieving their respective objectives, and are subject to consultation requirement.***
Geof Mortlock	132(2)*(a)*	I assume that the directive power applies not just to the regulated entity but also to a holding company and any subsidiary or associated party.	***Agree***
ASISA	132 & 133	The powers granted to the Authorities in terms of these Sections are extremely wide and the proposed directives, which are not subject to any approval by either a Court or the Minister, may be extremely prejudicial to Financial Institutions, its officers/employees and/or clients. Certain of the proposed directives, such as those contemplated in sections 132(2)*(i)* and 133(2)*(k)* in fact seem to not be limited to "*ensure compliance with or to prevent a contravention of the Act*", but will probably impact on the Constitutional and Labour law rights of the relevant persons and it is therefore important that the *audi alterem partem* principle be adhered to. Section 138 merely requires that a draft of the directive be given to the relevant person. This is not sufficient-the person needs to be advised of the facts and circumstances which gave rise to the proposed Directive and be granted the	***Noted, the provisions have been refined.***

		opportunity to respond thereto. If there is indeed a need for urgent intervention, it is submitted that the Regulator should approach a Court for interdictory relief. It is also not clear when and how a financial institution will be regarded to be "*likely to contravene a financial services law*" or "*be involved in a financial crime*". What proof will be required and what is the standard of proof?	
Transaction Capital	133	Directives should only be issued in terms of section 133 if the regulated entity has first been afforded an opportunity to remedy any contravention.	***Before a directive is issued, the financial institution may make submissions to the regulator, who will take all submissions into account in deciding whether or not to issue the directive***
BASA	133	There is a concern about how these provisions will work in relation to financial crime and reporting to the FIC. There is a risk this will hamper efforts at combating financial crime.	***The powers and functions conferred upon the regulators in terms of the FSR Bill do not diminish their functions in terms of the FIC Act***
Transaction Capital	133(2)*(l)*	Section 133(2)*(l)* should be amended such that significant owners are excluded from the definition of "**key person**" for purposes of this section as a significant owner cannot simply be removed from office.	***Noted. See revised definition of "key person", and the proposed approach to the removal of key persons***
BASA	134	It is not clear what criteria the regulator will use to satisfy itself that there is a contravention. Further, reasons must be given for the institution to be able to assess the exact breach/es.	***Noted. See revised provisions that require the regulator to provide a statement of reasons for why it is issuing a directive***
Transaction Capital	135	Section 135 should similarly be amended such that significant owners are excluded from the definition of "**key person**" as (i) significant owners are not regulated entities capable of regulation by financial sector regulators; (ii) significant owners do not exercise day-to-day operational control or management of regulated entities and are accordingly not in a position to effectively implement any directives; and (iii) key persons cannot be removed from office.	***See revised definition of "key person"***
ASISA	135(1)*(c)*	Clause 135(1)*(c)* appears to provide for the regulator to issue a directive to a key person ensuring that such person ceases to be involved in a financial crime. A key person involved in financial crime will no longer meet the requirements of	***Disagree***

		honesty and integrity and it seems out of the ordinary that a regulator should be able to merely direct a key person to cease involvement in a financial crime when such financial crime may be subject to criminal prosecution. It is submitted that subparagraph *(c)* of this clause should be deleted. The regulator in any event has the power in terms of subparagraph *(a)* to issue a directive to a key person to remedy the effects of financial crime. *135 (1) A financial sector regulator may, in order to ensure the implementation and administration of, compliance with, achieving of the objects of or prevention of a contravention of a financial sector law, issue a directive to a key person or a financial institution representative that will assist in–* *(a) remedying the effects of the contravention or financial crime;* *(b) ensuring that contraventions of that kind, and similar contraventions, do not occur again;* ~~*(c) ensuring that the key person ceases to be involved in financial crime.*~~	
BASA	135	It is not clear what process the regulator must follow to make this assessment, except in relation to urgent circumstances.	***See revised provisions***
BASA	136	*136. A regulator's directive may specify ~~the~~a reasonable time by which, or period during which, it must be complied with.* The section should be amended such that the regulated entity is afforded a minimum of 30 days to comply.	***Agree***
Transaction Capital	136	The section should be amended such that it is mandatory (and not elective) for the regulator's directive to include a date by which or period within which it must be complied with.	***Agree***
BASA	137	Reasons for revoking a directive should be provided.	***The reasons for revoking a directive will be specified in the written notice***
Transaction Capital	138	A defined list of instances in which a directive may be issued on an urgent basis without undertaking a consultative process must be listed in the Bill to ensure that these wide powers are not abused. The section should also make provision for a process to be followed to take any	***The regulator is require to provide a statement of reasons for issuing urgent directives***

		of the directives issued by a financial sector regulator on review by a court of competent jurisdiction.	
BASA	138(1)(b)	*138(1)(b) the persons referred to in paragraph (a) have had a reasonable period, of at least ~~14~~ 21 days, to make submissions to the regulator about the matter; and*	***See revised provisions***
SAIA	138(1)(b)	Clause 138 (1)*(b)* provides for a *"reasonable period of at least 14 days, to make submissions"* It is suggested that 14 days is not sufficient time to make a submission and we request that the period be extended to at least 30 days on reasonable notice.	***See revised provisions***
BASA	138(2)	The provisions should clearly state that the financial institution may challenge a directive issued by a regulator in the Tribunal or High Court and that the directive would be suspended while the Tribunal or High Court challenge is pending. It is proposed that when urgency is required, a review process is permitted.	***This is already provided for. Regulator's directives are administrative action and PAJA applies to any administrative action taken by a financial sector regulator in terms to financial sector law. Before a directive is issued the financial institution may make submissions to the regulator who will take all submissions into account in deciding whether or not to issue the directive, and a financial institution that is aggrieved by the decision of a regulator may apply to the regulator for reconsideration of the decisions. The financial institution has a right to apply to the Tribunal for a judicial review on the grounds that the decision was unlawful.***
ASISA	138(2)	It is believed that it is reasonable to provide a key person or financial institution with an opportunity to make submissions in respect of a directive even if the regulator on reasonable grounds decides to give the directive urgently. In urgent circumstances, the period within which the key person or financial institution must make submissions could be reduced to 48 hours. A directive in specific circumstances may have an extreme impact and as such, a very short response period instead of no response period will be more equitable.	***Agree. The regulator must invite the financial institutions or key persons to make submissions, and specify a reasonable period to do so***
ASISA	139	It is submitted that section 139 is superfluous and may deleted ~~*139. (1) A person who is issued with a regulator's directive must comply with*~~	***Disagree, however provisions have been refined***

		~~the directive.~~ ~~(2) Nothing in the memorandum of incorporation or regulations, or other governing rules, or any contract or arrangement, to which a person is a party, prevents a person from complying with a directive.~~ ~~(3) A person must not engage in conduct which hinders or prevents compliance with a regulator's directive.~~ See comments on sections 132 & 133. The regulators' powers are not even subject to the rights of shareholders or contractual counterparties who will be without protection from the regulators' actions.	
BASA	139(1)	No timelines are stipulated. Recommend that a timeframe within which a directive must be complied with be inserted– include a reasonable period.	***The directive must specify a reasonable period for compliance.***
ASISA	140	The clause is understood to effectively amend each of the applicable financial sector laws in respect of regulator's directives. These laws would need an insertion to incorporate the provisions of clauses 136 to 139. The net effect would in our view be to either delete clause 140 or to introduce an additional Schedule to this Bill amending the relevant provisions of the applicable financial sector laws as it may relate to directives. It is not clear what the meaning of and need for section 140 is. ~~**140** Sections 136 to 139 also apply in relation to a directive in terms of a financial sector law that corresponds to, or is similar to, a regulator's directive.~~	***See revised provision***
Part 3: Declaration of Certain Practices as Irregular or Undesirable			
ASISA	141	Section 141 of the FSRB effectively assigns further plenary powers to the Regulator, in that it empowers the Regular to prohibit certain business practices , not because the practice does not accord with or contravenes a Financial Sector Law, but because the Regulator hold the (subjective) belief that the specific practice is "*likely to have the effect*" of "u*nreasonably prejudicing any financial customer*" (which in itself begs the question as regards what constitutes 'reasonable prejudice') or "*unfairly affecting any financial customer*" (which in itself is an indefinite statement) and believes one or more of the objectives of a financial services law will be defeated.	***Part has been deleted***

Standard Bank	141	Clause 141 gives the regulators the authority to issue binding interpretations of financial sector laws. This amounts to the making of legislative instruments and must be subject to the same stringent consultation process required for the prudential and conduct standards in the FSRB. The interpretations should also be included in the Financial Sector Information Regulator for convenience and completeness.	***Part has been deleted***
SAIA	141(2)	A question is raised as to why "*declaration of certain practices as undesirable*" is not included as a legislative instrument under Chapter 7, or issued as a conduct standard so as to simplify the processes around legislation and move away from having too many types of subordinate legislation which can lead to confusion as to their different levels of standing and enforceability, as is the case in the current regulatory framework. Clause 141(2) allows for 21 days to provide comment, and other clauses in the Bill provide for 14 days and 30 days without consistency. We repeat our earlier recommendation that time periods for responding or submissions or compliance all be aligned for consistency. As a general comment it is suggested that the period allowed for response should consistently be set on at least 30 days, to ensure simplified application of the legislation and certainty in the industry.	***Part has been deleted***
BASA	141(3)	The regulator must provide reasons for declaring certain practice undesirable or irregular. Institutions should be afforded an opportunity to make representations. Large financial institutions are complex and it may not be practically possible to stop an activity immediately. Recommend a revision to the effect that : ***141****(3) A financial institution may not, <u>within a reasonable period from</u> ~~on or after~~ the date on which a declaration is issued in terms of subsection (1), and in accordance with subsection (2), carry on the relevant business practice or method of conducting business.*	***Part has been deleted***
Deloitte	141(4)	*141(4) A financial sector regulator may direct a financial institution which carries on the relevant business practice or method of conducting business on or after the date referred to in subsection (3), to rectify or repair to the satisfaction of the financial sector regulator anything which was caused by, or arose out of, that business practice or method ~~or~~ <u>of</u> conducting business.*	***Part has been deleted***

Part 4: Enforceable Undertakings			
ASISA	142	More clarity is required on what conduct is being envisaged in ss142(1). Does it, for example (a) Refer to financial crime – e.g. violating the provisions of FICA? (b) Refer to statutory offences – e.g. tax violations? (c) Refer to common law crimes – e.g. fraud? How would such enforceable undertakings be aligned, for example, with the right a person has not to give self-incriminating evidence? For meaningful comment to be made in respect of ss142 (1) more detail is requested.	***Provisions have been refined. To clarify, an enforceable undertaking is voluntary to remedy the conduct of the person or financial institution that agrees to comply with its terms in relation to a matter regulated by financial sector law. It is not an alternative for criminal sanctions. The authority may choose to accept a written undertaking rather than taking another form of administrative action. The undertaking is a legal instrument and is enforceable by the authority on the financial institution.***
BASA	142	The requirements of the POPI Act need to be taken into account when publishing enforceable undertakings. Enforceable undertakings are understood as an option that a financial institution may use to assure the regulator that action will be taken to remedy a specific matter. It serves as an incentive for faster remedial action. To ensure that it does indeed work as an incentive in this manner, it is suggested that publication of the undertaking is at the discretion of the regulator rather than mandatory.	***The Bill will align with POPI appropriately***
BASA	142(3)*(c)*	The principle of administrative justice needs to be reflected in this process given the potential impact of a suspension or withdrawal of a licence. Failure to remedy any of the issues listed within the time period stipulated shall entitle the regulator to suspend or withdraw the licence. Provision needs to be made for the licensee to make representations before the licence is suspended or withdrawn. It is recommended that clause is revised to read *142(3)(c) the financial sector regulator that issued a licence may place them on 60 days' notice to remedy any of the following that in the case of a licensed financial institution, suspend or withdraw the licence of the financial institution.*	***The enforceable undertaking is a legal instrument to remedy the conduct of the person or financial institution that agrees to comply with its terms in relation to a matter regulated by financial sector law and is enforceable by the authority on the financial institution. The authority may choose to accept a written undertaking rather than taking another form of administrative action, such as suspending or withdrawing a licence. Breach of an enforceable undertaking is grounds for suspension or withdrawal of the licence and the procedures in relation to those actions must be consistent with the principles of PAJA.***
SAIA	142(4)	Clause 142 provides that enforceable undertakings should be "*made public by*	***Noted. Enforceable undertakings must be published***

		the financial sector regulator in a manner that the financial sector regulator determines as appropriate". SAIA suggests that enforceable undertakings should be made public "*by publication on the financial regulator's website*" and "*in any other matter that the regulator determines is appropriate*". This is in order to ensure consistency in the manner that the regulator communicates, and all other information is deemed to be published by publication on the website.	***on the Financial Sector Information Register.***
Part 5: Leniency Agreements			
ASISA	143(1)*(a)*	Clause 143(1)*(a)* appears to effectively enable the regulator to override the powers of the National Prosecuting Authority to institute criminal proceedings. The Memorandum on the Objects of the Bill indicates that regulators are empowered to enter into leniency agreements with a person in exchange for that person's co-operation in an investigation or proceedings. It does not contain details in respect of the proposed power for a regulator to enter into an agreement that prosecution for an offence will not be commenced or maintained. Even though the prosecution is limited to an offence in terms of a financial sector law, we would appreciate an explanation of how this power could be exercised so as not to override the powers of any prosecuting authority. The clause as it is included in the Bill at present should be deleted or appropriately rephrased. Section 179 of the Constitution expressly provides that the "*Prosecuting authority*" shall "*have the power to institute criminal proceedings, on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings*." The decision whether or not to commence or proceed with criminal proceedings therefore rests with the NPA. Section 143(1)*(a)*, if adopted in its present form, will effectively enable the Regulator to either usurp the role of the NPA or to override its powers. Furthermore, such a dispensation may very well result in substantial wasted costs incidental to a criminal investigation and trail, potential "arbitrage" and prejudice to customers-who will be deprived of the possibility of a Section 300 order in terms of the Criminal Procedure Act. Sub-section 143(1)*(a)* also seems to be in conflict with sub-section 143(8)*(c)*.	***Agreed. See revised provision***

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		If the purpose of the section is to enable the Regulator to uncover evidence which it would otherwise not obtain (which is doubtful in view of the provisions of the proposed ss143(8)*(b)* and 143(9) – which are bound to deter most persons from divulging any such information) , it is suggested that the section should at least provide that any such agreement must be established in consultation with the NPA and with its approval. ***143*** *(1) A financial sector regulator may, in exchange for a person's cooperation in an investigation or in proceedings in relation to conduct that contravenes or may contravene a financial sector law, enter into a leniency agreement with the person, which may contain any of the following terms:* ~~*(a) that a prosecution of the person for an offence in terms of a financial sector law in relation to the conduct will not be commenced or maintained;*~~	
SAIA	142(1)*(a)*	We do not have an in principle concern with the Bill establishing enforceable undertakings, but caution that section 143(1)*(a)* has the potential to create the compounding of an offence. Compounding an offence is a criminal act in which a person agrees not to report the occurrence of a crime or not to prosecute a criminal offender in exchange for money or other consideration. We recommend that the clause be carefully considered to avoid association with an unlawful action.	***Noted***
ASISA	143(10)	It is inconceivable that a financial sector regulator should not be liable to pay damages or compensation to a person if such person suffers a loss due to a regulator terminating a leniency agreement which it was not entitled to enter into. If the regulator does not meet the requirements in respect of leniency agreements as set out in this clause, what basis could there be for legislating that the regulator is not liable for damages? The provisions of subsection (10) are not understood, more specifically the inclusion of the phrase ―when it is not entitled to do so‖. The aforementioned phrase means that the regulator have in fact acted unlawfully and in breach of an agreement and it is submitted that in such event the normal common law principles for breach of contract should find application. In the circumstances it is submitted that this subsection be deleted. ~~*143(10) If a financial sector regulator terminates a leniency agreement with a*~~	***Noted. See revised provisions***

		~~*person when it is not entitled to do so, it is not liable to pay damages or compensation to the person in respect of any loss to the person caused by the purported termination, but this subsection does not prevent the Tribunal or a Court from ordering the regulator to pay any costs of the person incurred in bringing proceedings for an order that the termination is of no legal force.*~~	
Part 6: Applications to Court and Court Orders			
BASA	General	For all legal proceedings where costs are incurred, it is appropriate that such costs are qualified as "reasonable" as per the relevant legal tariff guidelines.	***Provisions have been revised***
ASISA	144(1)	Clause 144(1)*(a)* appears to be out of place and may create the impression that a regulator may institute proceedings against itself. It is suggested that paragraph *(a)* should follow directly on the introductory part of clause 144(1). In respect of clause 144(1)*(c)*, if a financial sector law is binding on a financial institution and the latter is obliged in law to comply with the financial sector law, upon pain of an administrative penalty and/or the commission of an offence, it is not understood why a regulator would seek the assistance of a court to compel a financial institution to comply with a law. What is the rationale for the provision? Similarly, if clause 139(1) provides that a directive is binding and clause 208 makes non-compliance with a directive an offence, why is clause 114(1)*(d)* necessary to compel a financial institution to comply with a directive? ***144.*** *(1) A financial sector regulator may institute proceedings in the High Court having jurisdiction in order to*~~–~~ ~~*(a)*~~ *discharge any duty or responsibility imposed on the financial sector regulator in terms of a financial sector law; to-* *(~~b~~a) compel a financial institution to comply with a financial sector law;* *(~~c~~b) compel a financial institution to cease contravening a financial sector law;* *(~~d~~c) compel a financial institution to comply with a lawful request, directive or instruction made, issued or given by the financial sector regulator in terms of a financial sector law;* *(~~e~~d) obtain a declaratory order relating to any financial sector law or the*	***See revised provisions***

		business of a financial institution; *(~~f~~e) prevent the concealment, removal, dissipation or destruction of assets or evidence thereof by a financial institution;* *(~~g~~f) seize and remove the assets of a financial institution for safe custody pending the exercising of any other legal remedy that may be available to the financial sector regulator.*	
BASA/ ASISA	144(1)*(b)*	The failure to comply with a "request", even if a "lawful request" seems to be insufficient grounds to institute High Court proceedings and should be deleted. *144(1)* *(a).....* ~~*(b) compel a financial institution to comply with a financial sector law;*~~	***See revised provisions***
ASISA	144(2)	Please refer to the comments above on the rationale for providing that a court could compel a financial institution to comply with requirements that an institution is already obliged to comply with. If ultimately a criminal prosecution and withdrawal of a license are tools available to address contraventions of a financial sector law, what is the rationale for clause 144(2)?	***See revised provisions***
Transaction Capital	144(2)	Section 144(2) should be amended such that an order compelling an institution to cease contravening a financial sector law should only be granted where the institution intends to contravene the law or an actual contravention is continuing. There is no point to obtaining such an order where the contravention occurred historically and is not of an ongoing nature.	***See revised provisions***
BASA	144(3)	*144(3) An order in terms of subsection (1) may–* *(a) impose requirements, including limitations, conditions and restrictions, regarding the way the financial institution provides particular financial services; ~~and~~ or* *(b) impose requirements–* *(i) ……………; or* *(ii) for the refunding of money paid by financial customers who acquired*	***See revised provisions***

		relevant financial products or financial services because of the conduct; or	
ASISA	144(3)	If an Ombud can make these orders, and a court, in our view already has these powers by virtue of its inherent jurisdiction, clarity is requested on the need and rationale for this paragraph. It is submitted that the sub-section should be aligned with sub-section (1), so that the 'requirements, limitations, conditions and restrictions' which may be imposed are limited to those incorporated in a financial sector law or a 'lawful request, directive or instruction made'. Put differently, the Regulator should not have carte blanche as regards the 'requirements, limitations, conditions and restrictions' it may seek regarding the rendering of financial services by a financial institution, nor as regards the refunding of money paid or a declaratory that an agreement concluded between a financial institution and its customer is void. It should only be void or voidable by virtue of the provisions of the relevant financial sector law. *144(3) An order in terms of subsection (1) may–* *(a) impose requirements, including limitations, conditions and restrictions, regarding the way the financial institution provides particular financial services; and* *(b) impose requirements–* *(i) for the provision of corrective information or other information to the public, or to classes of persons, about relevant financial products or financial services; or* ~~*(ii) for the refunding of money paid by financial customers who acquired relevant financial products or financial services because of the conduct;*~~ *(c) declare an agreement in relation to relevant financial products or financial services to be–* ~~*(i) void;*~~ *(ii) voidable at the election of the financial customer;* *(iii) or to have been terminated with effect from a specified time; or*	***See revised provisions. An order may require that a person do, or not do, a specified thing to ensure compliance with the financial sector law and any ancillary order.***

		~~*(iv) varied as specified by the Court.*~~	
ASISA	144(4)	It is submitted that the sub-section should be deleted and that the issue of legal costs should be dealt with in the normal course of events and in accordance with the Rules of Court.	***See revised provisions***
BASA	144(4)*(b)*	The definition of costs differs from those usually ordered by a court. A revision proposed: *144(4) (b) For the purposes of this section, "costs" include fees, charges, disbursements, expenses and remuneration, which the applicant can specifically claim in any proceedings to the High Court having jurisdiction..*	***See revised provisions***
ASISA	144(5)	The heading of Part 6 indicates that the clauses that form part of Part 6 relate to applications to court and court orders. The heading of clause 144 refers to applications to court and publication by financial sector regulator. Clauses 144(1) to (4) relates to court orders. Clause 144(5) relates to publication but the publication does not seem limited to court orders given that it refers to publication of a statement if a regulator has reason to believe that a person has contravened a law, or has failed to comply with a request etc. It is this suggested that clause 144(5) should not form part of clause 144, it should be a clause on its own with its own heading. It is understood that this clause provides for the regulator to "name and shame". In this case, given the potential negative impact on a business, we are of the opinion that the regulator must at least have found that a person has contravened a law etc, a reasonable belief should not be enough to warrant the action of naming and shaming. *144(5) (a) If a ~~financial sector regulator has reason to believe that a~~ person has been found guilty of contraven~~ed~~ing a financial sector law, or has failed to comply with a request, directive or instruction made, issued or given by the financial sector regulator in terms of a financial sector law, the financial sector regulator may publish a statement to that effect, in the manner that the financial sector regulator considers appropriate.*	***Noted. See revised provisions. Orders obtained in terms of these provisions must be published***
BASA	144(5)*(a)*	This is not a sufficiently strong reason for a 'name and shame' provision. There needs to be a stricter test.	***See revised provisions***

BASA	144(5)*(b)*	It is not clear how much notice should be given.	***See revised provisions***
Part 7: Debarment			
ASISA	145(1)	The reference to an order to be made by the regulator is not clear. What is the nature of the order? Is it a directive, similar in nature to a directive or something else? Does an order require an application to court (as contemplated in section 144) for it to have the force of law? Could it be subordinate legislation if one has regard to the definition of "**legislative instrument**"? Clause 3 defines "**financial services**" very widely. Possible unintended consequences are that where, for example, an insurer outsources certain functions, debarment could impact on entities which do not fall within the scope of financial sector laws and it could also have consequences for contractual rights and obligations. Is it the intention that an entity, to which functions or services have been outsourced, can be debarred? It is accepted that a person can be debarred if they have contravened a law in a foreign country that corresponds to a financial sector law, where they were subjected to and reasonably expected to be aware of such foreign law. But to state generally "failed to comply with a law of a foreign country" may unfairly extend the obligations created by such foreign law to a person who may not necessarily be aware of its obligations under that foreign law. This clause should include a proviso to the effect that the debarment order can only be issued against a person in terms of clause 145(1)*(c)* if the person should reasonably be aware of the foreign law that applies to it.	***A debarment order is an administrative action; it does not constitute the revised definition of "regulatory instrument"*** ***Yes, see definition of "outsourcing arrangement"*** ***Disagree, however the provisions have been revised***
Transaction Capital	145(1)(ii)	Section 145(1)(ii) should be amended such that significant owners are excluded from the definition of "**key person**" as (i) significant owners are not financial institutions that should be subject to regulation by financial sector regulators; (ii) significant owners do not exercise day-to-day operational control or management of regulated entities and are accordingly not in a position to effectively implement any directives; and (iii) key persons cannot be debarred from holding an interest in a regulated entity in which they already hold an interest.	***Agree***

		Financial sector regulators should only be entitled to disbar a person after that person has failed to take the remedial action proposed by the relevant regulator.	
BASA	145(1)*(a)* & *(b)*	The wide discretion of regulators to debar a person must be subject to robust due process requirements, and also need to take into account legal requirements in the Labour Relations Act. 5 days is insufficient to follow due process in this regard. These provisions should be reworked to ensure any debarment decisions are subject to substantive and procedural fairness.	***Noted, see revised provisions***
SAIA	145(1)*(b)*	As previously suggested, it is recommended that a consistent period of at least 30 days be allowed for comments, submissions and the like, and that such a period should be applied consistently throughout the Bill, instead of in certain instances providing 14, 21 or 30 days.	***Noted, see revised provisions***
BASA	145(1)*(c)*	As per comments under cl 108, it is noted that clause 145(1)*(c)* provides for the debarment of the person in certain instances, including where a person "*has contravened or failed to comply with a law of a foreign country that corresponds to a financial sector law*" the regulator may make an order debarring the person for a specified period from providing financial products or services, acting as a key person of a financial institution or being involved in the management of a financial product or service provider. BASA submits that the FSCA has no extra-territorial jurisdiction, particularly in relation to the law of a foreign country and accordingly may not debar any person on the grounds of the contravention mentioned above. Any concerns which the FSCA may have in this regard should be addressed during the formal pre-approval process by the FSCA of any key person, alternatively withdrawal of their approval. It is recommended that the sub clause be deleted. *145(1)* *(a)………* *(b)……..* ~~*(c) contravened or failed to comply with a law of a foreign country that*~~	***Disagree with interpretation, the provisions are not extra-territorial but to prohibit the individual from providing financial services or products in respect of financial sector law***

		~~*corresponds to a financial sector law,*~~	
BASA	145(2)	Due cognizance needs to be taken of labour relations laws and internal HR procedures. This clause needs to be reconsidered.	***See revised provisions***
ASISA	145 & 146	Kindly refer to our comments on the amendments to FAIS in Schedule 4. As regards section 146, it is submitted that the financial sector regulator should also furnish the individual concerned with the information and documentation upon which it has founded the decision to debar, as the individual will not be in a position to make any submissions as regards to the proposed debarment in the absence of such facts and or documentation.	***Agree***
BASA	146	This clause does not provide a process to appeal the decision of the regulator. The Bill should include an appeals process.	***The Bill includes a review process to the Tribunal***
ASISA	146	For the sake of clarity, it is suggested that the reasons for the debarment order should accompany a draft debarment order that will be given to an individual and the other financial sector regulator. ***146*** *A financial sector regulator must not make an order of debarment regarding an individual unless–* *(a) a draft of the order, including the reasons for the order, has been given to the individual, and to the other financial sector regulator; and* *(b) ……….; and* *(c) ……….*	***Agree, see revised provisions***

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CHAPTER 13: Administrative Actions			
Reviewer	**Section**	**Issue**	**Decision**
Part 1: Taking Administrative Action			
JSE	147*(c)*	The reason for needing this carve-out is not obvious and is it legally possible to not be bound by PAJA?	***PAJA allows departure from procedures set out in the Act if it is reasonable and justifiable in the circumstances (see sections 3(4), 4(4), and 5(4) of the PAJA), but the procedures must be consistent with the principles contained in the PAJA.***
ASISA	147*(c)*	Section 3(4) of the Promotion of Administrative Justice Act (PAJA) only provides that an administrator may depart from section 3(2) (procedure) if it is reasonable and justifiable in the circumstances. Section 3(4) of PAJA does not permit deviation from section 3(3) (representation) of PAJA. It is therefore suggested that the reference to section 3(3) be deleted from the clause. *147(c) The procedures set out in section 3(2) ~~and (3)~~ of the Promotion of Administrative Justice Act do not apply to the extent that a financial sector regulator prescribes subject to subsection 3(4)(b) thereof, in terms of paragraph (b) different procedures for any specific administrative action provided that those procedures are fair, reasonable, and justifiable in the circumstances.*	***Agree. See revised provisions (clause 92(2))***
ASISA	148	It is uncertain how a regulator's correction of a decision may influence a decision taken by the Tribunal (clause 166*(c)* and *(d)* based on the original decision before it was corrected. What happens if a Tribunal found on a decision of the regulator and the regulator later corrects that decision? We are of the view that section 148 must be aligned with ss166(1)*(c)* and *(d)* otherwise it will have the unintended consequence of negating the effect of orders made by the Financial Services Tribunal. Furthermore, guidance should be provided on the consequences for a financial institution that has acted on an incorrect decision in terms of any liability that may ensue. *148. A financial sector regulator may, subject to the provisions of sub-section 166(1)(c) and (d), correct any decision purportedly made in terms of a financial*	***Agree. The intention was to allow the regulators to reconsider and correct their own decisions. See revised provisions – clause.94***

		sector law, if – *(a) the decision was procured by fraudulent, dishonest or any other illegal means;*	
JSE	148*(c)*	Further clarity on the reasons for this clause is needed.	***See revised provisions (clause 94, and 215). This clause is to provide for the potential, in appropriate circumstances, for decisions to be reconsidered, and errors to be corrected, without necessarily having to have recourse to the Tribunal or a Court.***
ASISA	149(3)	It is not clear what is meant be "*the other financial sector regulator…*"	***If the Prudential Authority is making the administrative action procedure, the "other financial sector regulator" would be the Financial Sector Conduct Authority. In the case of the Financial Sector Conduct Authority, the "other financial sector regulator" would be the Prudential Authority. This is as a result of "financial sector regulator" being defined as including the Prudential Authority and the Financial Sector Conduct Authority for the purposes of this Chapter.***
Transaction Capital	149(3)*(b)*	Section 149(3)*(b)* should be clarified to include comments on the draft by the public.	***Agree, this has been clarified.***
Part 3: Administrative Action Committees			
SAIPA	150(2)	It is of concern that there are only criteria in terms of qualification and experience for one member of this proposed committee, while there are no criteria for membership of the committee for any other members. The need for an additional committee is questionable.	***Noted. However, it is appropriate, given the volumes of administrative actions, that the financial sector regulators determine the criteria for members of the administrative action committees. The provision is intended to enable the inclusion of all appropriate expertise.***
ASISA	150(2)*(c)*	It is suggested that an advocate or attorney should at least have relevant experience, for example experience with administrative law, and not just any experience. *150 (2) The members of an administrative action committee–*	***Disagree; the regulators should be able to determine what more specific legal expertise may be desirable.***

		(a) ………; *(b) ………;* *(c) must include at least one advocate or attorney with at least 10 years' relevant experience in practising law and sound knowledge of administrative law; and* *(d)……….*	
ASISA	150(5)	As presently worded subsection 150(5) empowers the Regulator to appoint somebody as a Member of the Committee for any period the regulator deems fit. This can surely not be the intention and we submit that a maximum period be stipulated…	***Noted. The maximum period is set at five years. See revised provisions***

CHAPTER 14: Administrative Penalties and Related Orders

Reviewer	Section	Issue	Decision
ASISA	151	Section 151 does not stipulate what process the Regulator should follow in order to be satisfied on a balance of probabilities. It is important to that the process be prescribed in the FSRB and that it provides for due process and the proper application of the *audio alterem partem* principle. It is furthermore submitted that the maximum amount of the penalty that may be levied should be either prescribed in the FSRB or by Regulation issued by the Minister and that the Regulator should not have *carte blanche* to determine the penalty amount and the costs payable.	***The wording has been revised***
Transaction Capital	151	The financial sector regulators should only be entitled to impose administrative penalties as provided for in the financial sector laws – the regulators should not be afforded such wide ranging powers to impose administrative penalties for any contravention or non-compliance.	***The responsible authority for a financial sector law may impose administrative penalties in relation to contraventions of that financial sector law. An responsible authority must, when imposing an administrative penalty, consider the matters listed in clause 165(3), and may also consider the matters listed in clause 165(4). These factors provide substantial guidance for the exercise of the power to impose administrative penalties.***
ASISA	151(1)	Given the presumption of statutory interpretation that where the legislature uses different words, different meanings are intended, how does the word “contravention” differ in meaning from the word “offence”? And if a contravention is not intended to mean an offence, what is the difference in meaning intended between a contravention and a failure to comply with a provision of a financial sector law? If on the other hand, a contravention is to be interpreted as an offence; does it mean that an administrative penalty is an alternative to a fine or imprisonment or in addition to the latter? (Compare, for example, the exclusion of criminal liability in relation to and limited only to clause 151(4)*(c)*)	***A contravention is any non-compliance with a law. An offence is where a provision in a law is where the law specifically states that a particular contravention of a law constitutes an offence, and specifies that a fine or a period of imprisonment, or potentially both, may be imposed where a person is found guilty of the specified offence.***
SAIPA	151(1)	A penalty should only be imposed based on established facts, and not “on a balance of probabilities”.	***The wording has been revised***

BASA	151(2)	The provision does not include the situation where a penalty may have already been levied and paid for the same contravention. *(2) When determining an appropriate administrative penalty, the financial sector regulator must have regard to the need for the penalty to have a deterrent effect, and in addition, may take the following factors into account:* *(a) ……..;* *(b) …….;* *(c)……..;* *(d) ……;* *(e) …. ;* *(f) whether the person has already been levied with an administrative penalty for the same contravention;* *(~~f~~ g) the extent to which the contravention was deliberate or reckless;* *(~~g~~ h) the degree to which the person has co-operated with a regulator in relation to the contravention; and* *(~~h~~ i) any other factor including mitigating factors submitted by the person that the financial sector regulator considers to be relevant.*	***The responsible authority may not impose an administrative penalty on a person if a prosecution of the person for an offence arising out of the same set of facts has been commenced***
Transaction Capital	151(2)	Section 151(2) should be amended such that administrative penalties should be capped at the amounts provided for in the applicable financial sector laws to ensure (i) consistency in determining the amount of the penalty across industries; and (ii) certainty.	***Noted.***
Transaction Capital	151(3)*(b)*	Section 151(3)*(b)* should be amended such that interest should only start accruing after a particular period of time after the order is made in order to afford the relevant person an opportunity to pay. In other words, the person against whom the fine is imposed should be placed in mora (in accordance with common law principles) before interest starts accruing.	***The order accrues interest from the date specified in the order of the payment becoming due***
ASISA	151(4)*(b)* & *(c)*	Subsections 151(4)*(b)* and *(c)*, as presently worded, are non-sensible. It is to be noted that fault is normally a condition for liability under the Common Law and that the recognized grounds for strict liability in our common law does not have	***Provisions have been revised, and the reference to strict liability has been removed***

		application as regards to the rendering of a financial service. It is therefore not clear what is meant be the "*...common law principles of strict liability...*" It is furthermore submitted that 'faultless liability' should not have application in respect of administrative penalties. It is therefore suggested that the subsection be deleted.	
JSE	151(5)	Delete "*~~the~~*" in the first line before "*an*".	***Provisions have been revised***
Transaction Capital	151(5)	Section 151(5) should be deleted in its entirety. The ability of a financial sector regulator to confer the status of a civil judgment on its order by simply filing it with the clerk of the court is a gross violation of the principle of separation of powers and confuses executive and judicial functions. A regulator should not be entitled to usurp the functions or powers of the judiciary.	***Disagree, however provisions have been revised***
ASISA	152(1)	It is to be noted that Section 152(1) is in conflict with the provisions of subsection 143(1)*(a)*, which envisage "*leniency agreements*" in terms of which the Regulator can effectively bring about a *nolli prosequi*.	***Provisions have been revised***

CHAPTER 15: Appeals of Administrative Actions

Reviewer	Section	Issue	Decision
ASISA	General	The FSRB presently provide for a minimum of 6 Tribunal Members. It should be noted that all sub-ordinate legislation issues by the Regulator and that any administration action taken by the vis-à-vis a Financial Institution and its officers and employees will be as a result of a 'decision' taken and will therefore constitute "administrative action". In view of the proposed powers which will be vested in the Regulator and the various administrative actions it will be performing, including the issue Of Directives and the issue of administrative penalties, it can be expected that the Tribunal's workload may indeed prove onerous! In so far as section 162 rightfully requires that a 'Panel of Appeal' must consist of at least three members, it seems that the FSRB will in fact require that the Tribunal to be established will have to be adequately staffed in order to give effect to its mandate! As the persons appointed to the Tribunal will presumably be appointed on a full time basis, the costs incidental to such a system may prove prohibitive. Was a viability impact assessment conducted to determine the costs of the Tribunal and who will fund same?	***Noted. It is agreed that the Tribunal will need to be adequately staffed to manage the review of decisions of financial sector regulators and the Ombud Regulatory Council. The revised Bill provides for a minimum of four members, but does also provide for as many members as the Minister may determine necessary.*** ***The Tribunal will be funded through levies.***
Part 1: Establishment of Financial Services Tribunal			
BASA	General	A question has been posed as to whether there should be a separate entity for Ombuds appeals to ensure the independence of these schemes, rather than the FST?	***The Financial Services Tribunal will be an independent entity***
Warwick Wealth	153	It is a concern that the Financial Services Tribunal, as established in terms of section 153 of the Bill, will be vested with the status of a division of the High Court. The independence of the judiciary is vital in any democracy and the Bill is clearly on dangerous ground here.	***The independence and jurisdiction of the judiciary is not affected or compromised by the establishment of the Financial Services Tribunal. It is not vested with the jurisdiction of the High Court.***
BASA	155(1)(b)	It is also suggested that the four persons with *"expert knowledge of financial products and financial services"* should also have a minimum number of years of relevant experience to be appointed to the FST.	***Disagree***
Strate	155(1)*(b)*	Please insert "*financial products, financial services or market infrastructure*"	***Provisions have been revised***
ASISA	155(6)	In the event that a Tribunal is not properly constituted, its decisions may be regarded as void. What would be the rationale to legislate that anything done	***Deleted***

		remains so done even if the Tribunal was not properly constituted? It is suggested that this clause be deleted. ~~*155(6) Anything done by or in relation to a person acting in terms of an appointment to the Tribunal is not invalid merely because –*~~ ~~*(a) there was a defect or irregularity in connection with the appointment; or*~~ ~~*(b) the appointment had terminated.*~~	
ASISA	156	It is submitted that the terms and conditions must either be prescribed in the Act or in Regulations to be issued by the Minister.	***Term of office of Tribunal members is prescribed. Further terms and conditions will be determined by the Minister***
ASISA	157	If the intention is to appoint members on a permanent basis, we point out a competent advocate or attorney with 10 years' experience may not be willing to give up his/her practice for an appointment limited to three years in duration.	***Noted***
Strate	157(2)	It is not clear from the current wording whether the term of office can be renewed once or many times. Either delete "~~*at a time*~~" from the end of the sentence (if only one renewal is contemplated), or change "~~*a further period*~~" to "*further periods*" (if more than one renewal is contemplated).	***Clause redrafted to indicate that a Tribunal member may be reappointed at the end of a term. More than one renewal is possible***
ASISA	157(4)	Clause 155(2) requires that all members of the Tribunal must be independent. The Minister should be able to terminate an appointment if this criterion is no longer met. *157(4) The Minister may terminate a person's appointment as a member of the Tribunal immediately, if–* *(a) the person becomes a disqualified person;* *(b) the performance of the member is unsatisfactory;* ~~*or*~~ *(c) the member is unable to perform the functions of office effectively;* *(d)the member is no longer independent.*	***Provisions now provide for the Minister to remove a person from office if an independent inquiry has found that the person has acted in a way inconsistent with continuing to hold office. This would include the member's independence being compromised***
ASISA	158(1)	We submit that any potential 'conflict of interest' need be disclosed before appointment as a member of the Tribunal and hence not only by "a member of the Tribunal"	***Redrafted provisions provide for Panels to be constituted to hear each specific application for review. Members to serve on such a Panel must disclose any interests related to the particular review***

			being heard. A register of all disclosures must be kept.
ASISA	158(6)	*158(6) For the purposes of this section, if–* *(a) a related party of a member of the Tribunal or an assessor has an interest; and* *(b) the member or assessor ~~has~~had the interest, ~~that may cause~~it couldconflict ~~of interest~~with the proper performance of the functions of the member or the assessor,* *the member or the assessor is deemed to………*	***Provisions have been redrafted to clarify***
Part 2: Proceedings before Financial Services Tribunal			
ASISA	160	It is submitted that the rules pertaining to the lodging of an appeal should be determined by the Minister or the Regulator, in consultation with the Minister of Justice and should be published in the Government Gazette and on the Authority's website.	***The Chairperson of the Tribunal will make the rules for the Tribunal; these are to be published in accordance with section 277***
BASA	160	The rules should be prescribed and published for comment. The tribunal should be able to hear reviews and appeals. A party should be able to apply for an appeal or review to the High Court.	***The Chairperson of the Tribunal will make the rules for the Tribunal; these are to be published in accordance with section 277. The Tribunal will hear reviews. People aggrieved with the decisions of financial sector regulators may apply to have decisions reconsidered by the decision maker. The right of a person to approach the High Court is not affected by the provisions of this chapter***
BASA	161	***161****(1) A person who is aggrieved by a decision of ~~a decision-maker~~any financial sector regulator or person empowered under this Act may, subject to the provisions of another law, appeal against that decision to the Tribunal, in accordance with the provisions of this Act or the other law.* *(2) An appeal must be lodged–* *(a) within 30 days of the person becoming aware of, or when the person ought reasonablyto have become aware of, a decision; and* *(b) with the payment of the fees prescribed by the Minister from time to time.* *(3) ~~The decision-maker~~Any financial sector regulator or person empowered under this Act must, within 30 days after receipt of a notice of appeal in terms of subsection (2), furnish written reasons for the relevant decision against which*	***Provisions relating to the application for a review of decisions have been redrafted. Tribunal rules will set out further details on procedures to be followed in connection with applications for review. Decisions of the Tribunal must be published in the Financial Sector Register. The Tribunal will not hear appeals***

		an appeal is lodged. *(4) A person who is aggrieved by a decision must, within 30 days after receipt of the reasons referred to in subsection(3), deliver a notice of intention to proceed with the appeal, together with full particulars of the grounds of appeal.* *(5) An appeal lodged in terms of this section does not suspend any decision pending the outcome of an appeal, unless the Chair or a Deputy Chair of the Tribunal, on application by a party, directs otherwise.* In sub-clause 161(5), more details are requested as to when and why the Chair or Deputy Chair of the FST may suspend a decision pending the outcome of an appeal. In sub-clause 161(4), the FST should have the discretion as to whether or not to make a decision public.	
Transaction Capital	161(5)	The process set out in section 161 should be amended such that before lodging an appeal, the relevant financial sector regulator must furnish written reasons for its decision on written request by an aggrieved person. An aggrieved person cannot make a decision as to whether to appeal a decision if it does not know the reasons for the decision. Only after receipt of the reasons for the decision should an aggrieved person lodge an appeal. This will streamline the process and avoid unnecessary costs being incurred. Section 161(5) should be amended such that the lodging of an appeal should suspend the decision of a financial regulator. In particular, no steps to enforce the decision should be taken until the appeal is determined as this would prejudice an aggrieved person.	***In the finalised Bill, an aggrieved person is now clearly provided with a right to request reasons for a decision (clause 229).*** ***It has been recognised by our Courts that there may be instances where the non-suspension of the operation of a decision is "both legitimate and legal, and hence proportional". (Morrison v City of Johannesburg and others [2014] 2 All SA 100 (GNP), Metcash Trading Limited v Commissioner for the South African Revenue Service and another [2001] (1) BCLR 1 (CC))*** ***The aggrieved party is not left remediless, as the provision provides discretion to the Tribunal "to direct otherwise", and the exercise of that discretion is reviewable on administrative law principles.***
ASISA	161(5)	In terms of the Rules of Court a civil appeal suspends a judgment unless the Court otherwise provides. It is submitted that this should also be the position in terms of the FSRB, as this will mitigate the prejudice suffered by the appellant if the administrative action appealed against is set aside.	***The Tribunal will not hear appeals; it will only be able to review decisions***

ASISA	163(1)	In view of Section 34 of the Constitution, it is submitted that the Rules of the Tribunal should be akin to those of the Court, especially as regards the procedure and the law of evidence. These Rules should not be determined by the Tribunal, but by the Minister or the Regulator after consultation with the Minister of Justice and should be published in the Government Gazette and on the Authority's website It is not clear what is meant by "with as little formality and technicality", nor by the phrase that "the Tribunal is not bound by the rules of Evidence." The Tribunal will function as a judicial body. It is therefore important that there are express Rules regulating its functioning and that the laws of evidence and the *audialterampartem* principles be enshrined therein.	***The rules will be determined by the Chairperson of the Tribunal. These will be published. Note that the provisions relating to the proceedings of the Tribunal have been revised. The reference to minimsing formality and technicality remain, and is intended to allow the Tribunal to operate in as efficient a manner as possible within the legal framework. The Tribunal is not to be bound by the rules of evidence because to do so may make the proceedings unnecessarily formal, complex, lengthy, and therefore potentially more costly.*** ***It is intended that the Tribunal will address matters with, "as little formality and technicality, and as expeditiously, as the requirements of the financial sector laws and a proper consideration of the matter permit". The Tribunal is not a judicial body, and decisions of the Tribunal may be reviewed by a court. The Tribunal is intended to be a more efficient and cost-effective mechanism for considering matters than a court. The Tribunal, however, may choose to apply those rules of evidence that the Tribunal determines may be appropriate for considering the matters before it.*** ***The Tribunal would certainly be required to adhere to the audi alteram partem principle, and generally to ensure that the proceedings before it are conducted in a fair manner.***
ASISA	163(4)	See commentary on Subsection 164 below. The proposed prohibition against the introduction of further evidence, save with the leave of the Chair, will only be justifiable if the appellant was granted sufficient opportunity to provide all relevant evidence and documentation prior to the decision being appealed against and failed /neglected to do so	***This section has been deleted.***
ASISA	164(2)(3)	It is submitted that it will make more sense if a party against whom a decision	***This section has been deleted.***

		lies is granted the opportunity to first seek leave from the Regulator to submit further evidence/documentation pertinent to the decision, especially if he/she/it did not have sufficient time, or was unable to do so prior to the decision. Such a party should only be able to approach the Chair for permission to introduce such evidence if the Regulator refuses leave.	

CHAPTER 16: Financial Services Ombud Schemes

Reviewer	Section	Issue	Decision
ASISA	General-FSOS	It is requested that the definition of "scheme" be considered, in conjunction with the use of "scheme", as defined, throughout Chapter 16. For example, it is not clear how the Council can monitor compliance with this Act by a scheme, (as envisaged in section 176 (b)), if such scheme is not a recognised scheme. Furthermore, given the definition of "scheme", it would seem that "recognised schemes" possible fall outside the ambit of sections that use "scheme". The matter is not clear.	***See revised definition for 'ombud scheme,' including revised definitions for "industry ombud scheme" and "statutory ombud scheme"***
Standard Bank	General- FSOS	We concur with National Treasury's assessment that the current framework for adjudication and resolution of customer complaints is less than optimal. As such, we support the proposals to review and strengthen the system. Specifically, Standard Bank believes that the structure which is the easiest for financial customers to understand and use is one where all the financial services ombuds schemes (both statutory and voluntary) are amalgamated into a single ombud. We appreciate this is a large and complex task, and believe the provisions in the revised FSRB are moving the system in this direction. While the FSRB would not be able to ensure this single ombud in the short-term, the Bill should include the mechanisms to allow this consolidation to take place over time. Such mechanisms would include a standardized complaints management process. It is suggested that the Bill includes provisions to create that the complaints management system for ombuds schemes is made consistent. The intention to "co-ordinate the activities of the ombuds of recognized schemes with the activities of the statutory ombud schemes" is welcomed. The FSRB should include a requirement for the various ombud schemes to enter into Memoranda of Understanding with one another. We also recommend that the Credit Ombud needs to be brought into the ambit of the FSRB, and that the Bill is revised accordingly. It is critical that there is also close cooperation between the FSCA, the NCR, and the various ombud schemes (including those established under the auspices of	***Noted and agreed. See revised chapter on Ombuds, providing for establishing an Ombud Regulatory Council (changed from the Financial Services Ombud Schemes Council). The Minister of Finance is now also empowered to appoint a Chief Ombud, who will carry out the duties assigned in the previous draft of the Bill to the chief executive officer of the Financial Services Ombud Schemes Council. The Chief Ombud will carry out the functions of the Ombud Regulatory Council. The Council has the powers to set rules on ombuds which will assist in standardizing complaints management across the ombuds.***

		other government departments). To this end, the Bill should require cooperation agreements to be entered into by the relevant entities. Consideration should also be given to the role of the National Consumer Commission too, and when it is established the new Information Regulator under the POPI Act.	
World Bank	General	It would be helpful if there were clarification as to how the new provisions of Chapter 16 concerning ombud schemes will apply in relation to the various existing voluntary and statutory ombud schemes, and how the new provisions will be enforced (for example, against an industry association). Consideration might also be given to whether the new rules reflect international standards relating to financial ombudsman schemes. It is suggested that it be made clear in the FSR Bill that financial institutions have an obligation to maintain internal complaints handling processes for retail customers and that the FSCA has supervisory responsibilities in this regard.	***The chapter relating to Ombuds has been redrafted. The Ombud Regulatory Council will recognize industry ombuds, and will oversee the operation of both industry and voluntary ombuds under a common set of "best practice" requirements. The Council will be empowered to set rules for all ombuds to follow in their operation. We note the recommendation to consider international standards relating to financial ombud schemes, which the Council may consider in making rules for ombuds to comply with*** ***This chapter deals only with external dispute resolution processes. The FSCA may set standards on financial institutions regarding their internal complaints management processes as part of their supervisory and regulatory functions.***
Part 1: Financial Services Ombud Schemes Council			
Standard Bank	168(2)	Regarding the membership of the council, it is suggested that representation from appropriate customer groups and relevant government departments, is provided for in clause 168(2). This would assist with the identification of customer complaints and trends.	***The structure of the Council has been changed to specify powers within a board and a Chief Ombud Clauses 177 and 186 are sufficiently flexible to accommodate the proposed representation.***
Voluntary Ombuds Schemes	169(2)(b)	We question the seemingly unnecessary use of the word *"actually"* in section 169(2)(b)	***Agreed and deleted.***
World Bank	169	We suggest that clause 169 be amended to provide for representation of the FSCA, PA, and consumer and industry associations on the FSOS Council	***The FSCA Commissioner sits on the Board of the Ombud Regulatory Council. Clauses 177 and 186 are sufficiently flexible to accommodate the proposed representation.***
Voluntary	171(1)(b)	Is the intention in section 171(1)(b) not that a Council member may be	***Clauses redrafted. Provide now for removal of a***

Ombuds Schemes		discharged only after such a member **had been** afforded a reasonable opportunity to be heard?	***board member from office based on the outcomes of an independent inquiry***
Voluntary Ombuds Schemes	174(1)(a)	We suggest that section 174(1)(a) should more closely follow section 9(2) of the Financial Services Ombud Schemes Act, 37 of 2004 ("the FSOS Act"), which provides for a "prescribed tariff", i.e. a tariff prescribed by regulation. Such a prescribed tariff will result in greater certainty and transparency and will enable a scheme to budget for a particular fee.	***Fees and levies provisions have been revised throughout the Bill. See new chapter on finances, levies and fees, which includes the Ombud Regulatory Council as a levy body. Levy raising powers will be provided through a Money Bill, the Financial Sector Levies Bill.***
BASA	174(2)	There is a possible confusion with the title of 'CEO'. BASA recommend a different title such as "Head of Council" or "Director".	***The revised chapter makes reference to a Chief Ombud***
SAIA	176(1)(i)	This clause provides for the Council to, after consultation with the Commissioner, prescribe standards for recognised schemes, which includes voluntary schemes. Currently, the standards for voluntary schemes for example on timeframes, case fees and appeal mechanisms are generally self- imposed. We suggest that standards for voluntary schemes set by the Council should be done both in consultation with the Commissioner and relevant voluntary schemes.	***See chapter on Regulatory Instruments, which sets out a clear process for consultation to be followed when making regulatory instruments. This chapter applies to the Ombud Regulatory Council when making rules***
Voluntary Ombuds Schemes	176(1)(i)	On a practical level, we draw attention to (at least, so it appears to us) a lacuna in the Bill. According to the definition thereof a "council standard" is one made by the Financial Services Ombud Schemes Council ("the FSOS Council") "after having followed a procedure substantially similar to that required in terms of Part 2 of Chapter 7". On our reading of part 2 of Chapter 7 of the Bill it does not set out the requisite "procedure". We appreciate the desirability of uniformity amongst recognised schemes with regard to the matters enunciated in paragraphs (aa) to (mm), but caution against an overly rigid formulation of the proposed standards. The businesses (in the widest sense of the word) of our four recognised voluntary ombudsman schemes differ greatly. We share the commonality of	***See chapter on Regulatory Instruments, which sets out a clear process for consultation to be followed when making regulatory instruments. This chapter applies to the Ombud Regulatory Council when it makes rules, which is important to ensure effective engagement with relevant stakeholders, especially to get the collective experience of the schemes as recommended.*** ***Provisions on Ombud Regulatory Council rules do provide for different rules to be made for different categories of ombud schemes and different circumstances***

		falling within the ambit of paragraph (a)(i) of the definition of "scheme" in the Bill, but we serve in different sections of the financial community and, therefore, the nature of complaints which we handle differs. To put it colloquially – the proposed council standard cannot (and should not attempt to be) of a "one size fits all" nature. We do not consider it necessary to cite multiple examples of the differences between our schemes and the way they function in order to bolster the validity of our concerns of a lack of flexibility in the proposed council standards. A single example will suffice to illustrate the point. Paragraph (mm) envisages a council standard relating to "jurisdictional monetary or other limits". Some of our schemes have "jurisdictional monetary limits" and others have no such limit. The proposed council standards may only be may "after consultation with the Commissioner". In terms of section 169(3) the Commissioner is a member of the FSOS Council and, therefore, it seems to us to be more appropriate for the requirement to be that the standards must be made in consultation with the Commissioner. We respectfully suggest that, in prescribing its standards, the FSOS Council should have the advantage and the benefit of the collective experience of all the recognised schemes. We, therefore, propose that appropriate provision should be made that such a consultative process is a further requirement with which the FSOS Council should comply before it prescribes it standards.	***As a Board member, the Commissioner of the FSCA will participate in making the Ombud Council rules, but the FSCA, as represented by the Executive Committee, will nonetheless have an opportunity for broader input.***
Standard Bank	176(1)	The functions of the Financial Services Ombud Schemes Council outlined in sub-clauses 176(1)(c) and (d) present an opportunity to move towards a consolidated scheme. We suggest strengthening these functions by giving the council the responsibility to – after consultant with the relevant ombuds – develop operational best practices aimed at aligning activities for both operations and complaints resolution. For similar reasons it would be opportune to mandate in sub-clause 176(6) that the council sets up and runs a single access point for customers rather than leaving this to the council's discretion.	***Noted and agreed. The revised chapter provides for both these suggestions***
BASA	176(1)(g)	Given that many complaints are multi-jurisdictional, it is proposed that such	***Noted. In this phase of implementation the Ombud***

		complaints are heard by both Ombuds.	***Regulatory Council will only be able to clarify jurisdictional issues. Consideration will be given to the Council being able to direct hearing of complaints by more than one ombud in the future.***
Voluntary Ombuds Schemes	176(2)(b)	Section 176(2)(b) refers to the publication of "norms and standards and rules made in terms of this section". On our reading thereof, section 176 of the Bill only refers to the "standards" which the FSOS Council may prescribe	***Corrected so that the revised Bill refers only to Ombud Regulatory Council Rules***
ASISA	176(3)(b)	*176(3)(b) in order to ensure the implementation and administration of and compliance with this Act, achieving the objects or to prevent a contravention of this Act, issue a directive, in accordance with the procedure followed for issuing regulator's directives in terms of ~~the~~ Part 2 of Chapter 12, with the changes necessary relating to the context–*	***Clauses have been redrafted***
Voluntary Ombuds Schemes	176(3)(b)	The FSOS Council is authorised to issue a directive in accordance with the procedure prescribed in Part 2 of Chapter 12 with the changes necessary relating to the context. Part 2 of Chapter 12 comprises sections 132 to 140. We think that the words "must be conducted", which appear in section 132 (1) were omitted after the word "institution" in paragraph 133(1).	***Noted; relevant clauses have been redrafted***
Part 2: Statutory Ombuds			
ASISA	179(2)	In this clause, the reference to ombuds will include the Adjudicator, the Ombud for FSPs and a statutory ombud as contemplated in clause 191. The amendment is suggested for the sake of clarity. *179(2) Nothing in subsection (1) detracts from the independence of the ~~O~~ombuds of the statutory schemes in considering and disposing of complaints.*	***For simplicity, provisions dealing with the establishment and operations of Statutory Ombuds remain in the relevant financial sector laws.***
Voluntary Ombuds Schemes	180	We have some concern about the perceived lack of clarity in the provisions of the Bill relating to the jurisdiction of the Adjudicator and the Ombud for Financial Service Providers and the four voluntary ombudsman schemes. In this regard we refer to sections 180 and 190, read with section 78 (g) and (k) of Schedule 4 (on pages 192 and 193) and section 14 of Schedule 4 (on pages 198	***Chapter has been redrafted; statutory ombud schemes remain as established in relevant financial sector laws, with jurisdictions set out therein. The jurisdictions of industry (voluntary) schemes are set out when they are established. The revised chapter***

		and 199).	***makes provisions for dealing with overlaps between ombud schemes. It also provides for the Ombud Regulatory Council to resolve overlaps and to designate an ombud to hear complaints that may not fall under existing jurisdictions.***
World Bank	181	Clause 181 sets out the requirements to be appointed as the Adjudicator and as the Ombud for Financial Services Providers (Ombud), namely that they be a person qualified in law, and that they possess adequate knowledge of pensions law and administration or of financial services (respectively). We suggest that clause 181 include an additional requirement that the person must be sufficiently independent from industry and consumer associations.	***Chapter has been redrafted; statutory ombud schemes remain as established in relevant financial sector laws.***
ASISA	181(1)	When interpreting statutes there is a rule that the singular equals the plural. It is unclear whether there can be more than one deputy for the Adjudicator and the Ombud. Compare with s30C(1)(b) of the PFA. Acting Adjudicator and Acting Ombud: Need to provide for the instance when they will be appointed and what position they act in terms of or what powers they have. Compare with s30C(6)(a) and (b) of the PFA. The mere fact that a person is qualified in law and possesses knowledge of pensions law and administration or the rendering of financial services is not enough. Such a person should also have adequate litigation or dispute resolution experience. We suggest the section be amended as proposed. ***181****(1) The Council must appoint as the Adjudicator and as the Ombud for Financial Services Providers, respectively, a person qualified in law and who possesses adequate knowledge of pensions law and administration or the rendering of financial services, as well as adequate litigation or dispute resolution experience, as the case may be, and may appoint any person with those attributes as Deputy Adjudicator, Acting Adjudicator, Deputy Ombud for Financial Services Providers or Acting Ombud for Financial Services Providers, as may be required by the circumstances.*	***Part on Statutory Ombuds deleted from Chapter; statutory ombud schemes remain as established in relevant financial sector laws.***
ASISA	181(4)	*181(4) A person appointed in terms of subsections (1), ~~(2),~~ and (3) holds office*	***Part on Statutory Ombuds deleted from Chapter;***

		until–	***statutory ombud schemes remain as established in relevant financial sector laws.***
ASISA	182(1)	This section refers to the receipt of funds, but there is no corresponding provision giving the Adjudicator power to invest such funds. Compare with s30R of the PFA. s182(1) and s182(2)(a), and elsewhere in the Chapter: there needs to be consistency with how "office" is referred to. ***182*** *(1) The Adjudicator and the Ombud for Financial Services Providers are the accounting officers in respect of all funds received and all payments made to defray expenses incurred by their respective ~~o~~Offices.* Both section 30R(4) of the Pension Funds Act and section 22(3) of the Financial Advisory and Intermediary Services Act provide that the Adjudicator and the Ombud for Financial Services may invest money which is not required for immediate use. ASISA members are of the opinion that the provision in the existing laws should be retained in this Bill for the sake of clarity.	***Part on Statutory Ombuds deleted from Chapter; statutory ombud schemes remain as established in relevant financial sector laws.***
ASISA	183(d) & (e)	It appears as if an Adjudicator or Ombud for Financial Services Providers may delegate the making of determinations to Deputies and any other employees. It is submitted that determinations cannot be delegated to any employee, as is currently provided in the financial sector law. This clause should be amended accordingly. The clause also does not require the Adjudicator to set the remuneration of employees with the concurrence of the Council (current section 30S(1)(b) of the Pension Funds Act). What was the rationale for the exclusion of this requirement from this Bill??	***Part on Statutory Ombuds deleted from Chapter; statutory ombud schemes remain as established in relevant financial sector laws.***
ASISA	186(1)	This section only empowers the Adjudicator to issue a final determination. In the past interim determinations has proved helpful when dealing with death benefit complaints. Both the Adjudicator and the Ombud for Financial Services Providers should expressly be authorised to make provisional determinations. This practice is employed by the Ombudsman for Long-term Insurance and is useful to avoid incorrect final determinations because the parties have the	***Part on Statutory Ombuds deleted from Chapter; statutory ombud schemes remain as established in relevant financial sector laws.***

		opportunity to submit reasons why the provisional determination should not be the final determination. This greatly reduces the risk that the final determination is wrong on the facts and/or the law, and therefore the need to lodge an appeal.	
BASA	186(1)(b)(ii)	*186(1)(b)* *(i)……..* *(ii) a ~~direction~~directive may be issued that the respondent against whom a determination was made take the steps in relation to the complaint that the Ombud determines;* Sub-clause 186(1) is about both the ombud and adjudicator for FSPs. The entire section should therefore reference both, not only ombuds.	***Part on Statutory Ombuds deleted from Chapter; statutory ombud schemes remain as established in relevant financial sector laws.***
ASISA	186(2)	The FSRB should provide for monetary jurisdictional limits. Compensation should also be limited to actual damages suffered. As regards the proposed awards for inconvenience and administrative penalties, the maximum amounts should be prescribed in the FSRB	***Disagree on monetary jurisdictional limits being prescribed in the Bill.*** ***Amounts for offences in terms of this chapter are set out in the revised Bill***
ASISA	186(5)(b)	The section should make it clear that it is subject to the High Court's power to review.	***Part on Statutory Ombuds deleted from Chapter; statutory ombud schemes continue to function as established in relevant financial sector laws, although the right of appeal to the Tribunal is now a right of review as defined in the FSR Bill.***
ASISA	186(5)	It should also be noted that Sec 186(5) of the FSRB provides that a determination by the Adjudicator is only appealable to the Tribunal with leave of the Adjudicator or if the Adjudicator refuses leave to appeal, with the permission of the Chair of the Tribunal. We suggest that the right to appeal a determination by the Adjudicator not be made subject to the permission of the Adjudicator or any other party as it will result in unnecessary delays and cost implications.	
World Bank	186(5)	Clause 186(5) provides that a determination of the Adjudicator and the Ombud may only be appealable to the Tribunal with the leave of the Ombud or the permission of the Tribunal chair, but does not give a right of appeal to the financial customer making the complaint. We recommend that the provision be modified to allow the financial customer the right of appeal at all times	***Part on Statutory Ombuds deleted from Chapter; statutory ombud schemes continue to function as established in relevant financial sector laws, although the right of appeal to the Tribunal is now a right of review as defined in the FSR Bill.***

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REPUBLIC OF SOUTH AFRICA

Part 3: Voluntary Ombud Schemes			
JSE	187	As no transitional arrangements are specified, the JSE questions how this section impacts the JSE's existing ombuds scheme, especially since the Ombuds Act has been repealed by the FSR Bill. Will all existing ombuds scheme have to re-apply? If so, will they have to wait until the FSRB is effective? What is the manner in which we must apply for recognition of a (existing) scheme?	***Transitional arrangements are provided in section 293; an ombud scheme recognized under the FSOS Act will be taken as recognized in terms of the new law.***
Voluntary Ombuds Schemes	187	We would like to record our understanding that the reference to a "conduct standard" in section 87(1)(e)(iii)(bb) is not to a "council standard", as defined in the Bill. We question the need to specifically mention "pension fund rules" in section 187(1)(e)(iii)(bb). A reference thereto in section 180(b) seems appropriate. Concern has been expressed by some of our schemes that the reference to "what is equitable in all circumstances" in section 187(1)(e)(iii) does not sufficiently recognise our equity jurisdiction. In this regard the following is pointed out: (i)Should the section not, in any event, refer to "all the circumstances"? (ii)By way of comparison, section 10(1)(e)(iv) of the FSOS Act empowers an ombudsman "where appropriate, to apply principles of equity in resolving a complaint". It is suggested that the "enabling provision" in section 187(1)(e)(iv) should be cast wider (or there should be a further provision) which obliges the ombudsman to report "systemic issues" to the Commissioner. We use "systemic issues" in the sense that it refers to an industry – wide and/or recurring issue or problem and/or to an issue or problem which has a wide impact. The kind of issue/problem which we have in mind does not fall within the definitions of "systemic event" or "systemic risk". If this proposal finds favour, we can elaborate on it in a supplementary memorandum and/or in personal consultation/s.	***Clauses setting out requirements for recognition of a industry (voluntary) ombud scheme have been refined.*** ***Chapter now refers to Ombud Regulatory Council rules and no longer refers to standards***
SAIA	187(1)	187. (1) Currently the Board of the Ombudsman for Short-term Insurance (OSTI) includes three industry representatives and a SAIA representative in an *ex officio* capacity.	***Clauses setting out requirements for recognition of an industry (voluntary) ombud scheme have been refined; see clause 194, specifically sub-clause (2)(vi). The Ombud Regulatory Council can set rules relating***

		Clause 187 of the Bill sets out the requirements for recognition of voluntary schemes by the FSOS Council. It includes the provision that a voluntary Ombudsman must have a governing body (presumably the current Board) that consists of representatives *not engaged* in the business of a participant of the scheme, and to which the scheme is accountable. It also requires the FSOS Council to be an "observer" member of the Board which implies that that the Council cannot vote or intervene if the proceedings at a meeting run aground or something being discussed or agreed is patently incorrect. This Bill is however silent of whether industry association representation, such as the SAIA *ex officio* membership of the OSTI Board, will be allowed to continue. It is our recommendation that the SAIA *ex officio* membership on the OSTI Board continue for efficiency purposes and to facilitate co-ordination of requirements of industry participants. In addition, we recommend that an Advisory Committee comprising a few elected experienced industry representatives be established to support the OSTI Board in a consultative capacity only, on matters that require technical industry input or expertise. This proposed OSTI/Voluntary Ombud Advisory Committee would be a consultative body only and not have any influence outcomes and hence no voting rights on any issue to entrench the independence of the OSTI/voluntary Ombud concerned. Currently the FSB has an *ex officio* seat on the OSTI Board. As there is no mention in the Bill of representation of a financial regulator on the Board of a Voluntary Ombud. We request further detail on whether there will be FSCA and/or financial sector regulator representation *ex officio* on the Board of voluntary schemes in the future framework. We furthermore enquire as to how the funding of the various Ombud schemes is to take place and how the fees and funding of schemes will be calculated and distributed. We suggest extensive further consultation with stakeholders on the future framework of the Ombud Schemes to ensure that the independent functioning and proficient work being done by the OSTI is allowed to continue to provide fair outcomes for policy holders and industry alike.	***to the governance of ombud schemes, including in relation to membership of governing bodies – see clause 199(2)(b). Such rules will be consulted on before they are applied***

SAIA	187(1)(e)(iii)(bb)	There is no Voluntary Ombud in the pension funds environment – the PFA which is a statutory scheme is the only Ombud. We therefore suggest that the words, "pension fund rules" be deleted from 187(1)(e)(iii)(bb). *187(1)(e)(iii)(bb) the provisions of any applicable law, conduct standard, codes of conduct, ~~pension fund rules~~and rules of practice;*	***Clauses setting out requirements for recognition of an industry (voluntary) ombud scheme have been refined; see Part 2 of Chapter 14.***
Standard Bank	187(1)(e)(iv)	The provisions in sub-clause 187(1)(e)(iv) which allows voluntary ombuds to report matters of interest to the appropriate financial sector regulator is supported. This will contribute to the identification of customer outcomes and trends which may be used to inform policy development and supervisory strategies. This provision could be strengthened by listing the categories of issues which should be tracked and reported.	***Noted. The revised chapter makes provision for the Ombud Regulatory Council to set rules regarding reporting by a financial institution or representative to a financial sector regulator***
BASA	188	Given the long standing and functioning of the voluntary schemes (Banking Ombud, National Credit Ombud) they should be recognised by the FSRB, and rather have conditions set out for their continued recognition. BASA submits that this is a better approach than the 18-month continuity proposed in terms of cl195(3). The powers in terms of cl189(1)(c) apply regardless, so there is no additional risk to this approach.	***Agreed, see transitional arrangements provided in section 292(5)***
BASA	189	The impact of this clause on matters being heard by existing ombud schemes needs to be considered, and there needs to be some transitional provision. There are unintended consequences of failure to do so, as it will impact on the interests of customers and fairness. Consideration should be given to complaints being transferred.	***Noted; varying, suspending or revoking recognition will only be done after giving the industry ombud notice and allowing it to make submissions. Such submissions must be taken into account by the Ombud Regulatory Council before a decision is made. In the unlikely event that a scheme's recognition is revoked, the Council will need to consider how to address the existing cases.***
Part 4: Jurisdiction and Operation of Schemes			
ASISA	190(2)(a)	*190(2) (a) No ombud of a recognised scheme has jurisdiction to resolve a complaint or settle a matter in respect of which the Adjudicator or the Ombud for Financial Services Providers has jurisdiction, except if the Adjudicator or the Ombud for Financial Services Providers has declined to deal with the matter.*	***See revised clause 209***

SAIA	190(4)	Sub clause 4 provides that *"If two or more respondent parties are involved in one complaint, the relevant ombud or the Council, as the case may be, may decide that the complaint will be heard by more than one ombud who is entitled to exercise jurisdiction."* It is proposed that the Bill provide for instances if the complaint is heard by more than one Ombud and the respective Ombuds disagree in their findings or have conflicting views, that it be clarified whose decision would hold sway. Provision should be made for the complainant and the relevant voluntary Ombud to consent to the jurisdiction of the relevant voluntary Ombud to entertain the complaint so as to avoid delay and allow the Ombud with the industry expertise to handle the matter.	***Part 4 has been deleted; see new provisions regarding overlaps between ombud schemes – clauses 175(1)(h), 199(2)(d), 208 and 209.***
ASISA	190(5)	Section 30(H)(2) of the Pension Funds Act currently provides that the Adjudicator shall not investigate a complaint if, before the lodging of the complaint, proceedings have been instituted in any civil court in respect of a matter which would constitute the subject matter of the investigation. Section 27(3)(b)(i) of the Financial Advisory and Intermediary Services Act contains a similar provision. It is suggested that this provision be retained in the Financial Sector Regulation Bill. *190(5) The Adjudicator and the Ombud for Financial Services Providers shall not investigate a complaint if, before the lodging of the complaint, proceedings have been instituted in any civil court in respect of a matter which would constitute the subject matter of the investigation.*	***Part 4 has been deleted. Provisions in the Pension Funds Act still apply***
SAIA	191(2)(a)	Sub clause (2)(a) states that the Statutory Ombud must deal with a complaint against a financial institution if the financial institution does not participate in a recognised scheme. However, clause 187(3) on Page 119 makes it obligatory for all financial institutions to participate in a recognised scheme. Accordingly, we can assume that clause 191 (2)(a) is redundant.	***Part 4 has been deleted; see new provisions for where there is no applicable ombud scheme (clause 208). The Ombud Regulatory Council can designate an ombud in such instances***
ASISA	192(1)	Propose inserting the word "notwithstanding the provisions of the Prescription Act"	***Part 4 has been deleted***

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		192(1) Notwithstanding the provisions of the Prescription Act, 1969 (Act No. 68 of 1969), official receipt of a complaint by any of the ombud offices suspends any applicable time barring terms, whether in terms of an agreement or any law, or the running of prescription in terms of the Prescription Act, 1969 (Act No. 68 of 1969), for	
Voluntary Ombuds Schemes	194(2)	We have grave reservations about this provision which could lead to abuse, despite the **caveat** of "subject to applicable legislative requirements relating to confidentiality". We question the need for such access to records and wonder what the underlying rationale is for the provision. Section 194 (1) refers to "a scheme's files and records", whereas section 194(2) relates to "a copy of any record". The word "record" is not defined and the import of the expression "any record" is unclear. It could be very wide – which opens the scope for abuse. More importantly, the provision flies in the face of our own confidentiality rules and/or practices. In the context of the provision under discussion, we enquire whether consideration could not be given to a provision which could prevent the issue of a **subpoena ducestecum** (i.e. a summons to produce documents in a court of law) against an ombudsman if, by giving effect thereto, such a confidentiality rule/practice will be breached.	***Provision deleted, see revised clause 212.***
Part 5: Prohibitions, Exemptions and Regulations			
BASA	195(3)	The intention of the 18-month window is not clear and it is recommended that care is taken to ensure continuity.	***Provisions deleted, see transitional clause 292(5)***
BASA	195(4)	This clause is vague as it is not clear when it would be used or what the impact would be.	***Provision deleted***
BASA	195(5)	In the past, financial institutions could not use the term ombud internally – for example in relation to an "internal ombud". Clause 195(5) seems to suggest the same. It would be useful to list the prohibited terminology in order to avoid confusion and non-compliance, especially regarding terms such as ombud, scheme, and adjudicator.	***Provision deleted***

CHAPTER 17: Miscellaneous			
Reviewer	**Section**	**Issue**	**Decision**
Part 1: Information Sharing, Complaints and Reporting			
Standard Bank	Part 1	The definitions of "complainant" and "complaint" are specific to Chapter 16 on Financial Services Ombuds Schemes. It is proposed that these definitions will also be useful on respect of Part 1 of Chapter 17 dealing with information sharing, complaints and reporting. This would facilitate a consistent and more harmonized approach.	***Chapter drafting revised; complaint used specifically and definition not necessary***
ASISA	197(1)(a)	Information obtained as envisaged includes personal information as defined in the Protection of Personal Information Act and in our view the reference to personal information as defined in the Protection of Personal Information Act is unnecessary. We suggest that it be deleted. ***197****(1) (a) Information obtained in the performance of any power or function in terms of a financial sector law or sections 45 and 45B of the Financial Intelligence Centre Act, ~~including personal information as defined in the Protection of Personal Information Act,~~ may be utilised or disclosed by the financial sector regulators or the Reserve Bank only–*	***Disagree***
ASISA	197(1)(a)(iv)	***197****(1) (a) Information obtained in the performance of any power or function in terms of a financial sector law or sections 45 and 45B of the Financial Intelligence Centre Act, including personal information as defined in the Protection of Personal Information Act, may be utilised or disclosed by the financial sector regulators or the Reserve Bank only–* *(i) in the course of performing functions in terms of, or as enabled by the financial sector laws and the Financial Intelligence Centre Act;* *(ii) for the purposes of legal proceedings or other proceedings;* *(iii) when required to do so by a Court; or* *(iv) ~~by the financial sector regulators or the Reserve Bank~~if disclosure is–* *(aa) …….;* *(bb) ……..;* *(cc) …….;*	***Agreed and redrafted***

ASISA	197(1)(a)(iv) ~~(bb)~~ (cc)	If they are of the opinion that customers should not do business with a provider, they should withdraw the license.	***Disagree***
ASISA	197(1)(a)(iv) (ee)(A)	An investor is a financial customer. We suggest the words *"an investor"* be deleted.	***Clause redrafted***
Transaction Capital	197(2)(a)(v)(cc) & (dd)	Sections 197(2)(a)(v)(cc) and 197(2)(a)(v)(dd) should be amended such that the financial sector regulators may only conduct on-site investigations on behalf designated authorities (or allow them to assist) and enforce laws that the designated authority is responsible for supervising in respect of those regulated entities over which the designated authority has jurisdiction.	***Clauses redrafted***
ASISA	197(1)(c)	The collection of information should also be in compliance with the Protection of Personal Information Act, and hence we suggest the words "obtained" or "collected" should be added as indicated. Section 11(1)(c) of the Protection of Personal Information Act reads as follow: *11. (1) Personal information may only be processed if—* … *(c) processing complies with an obligation imposed by law on the responsible party;* *Section 12(2)(d)(ii) of the Protection of Personal Information Act reads as follow: 2) It is not necessary to comply with subsection (1) if—* *(d) collection of the information from another source is necessary—* *(i) …* *(ii) to comply with an obligation imposed by law or to enforce legislation concerning the collection of revenue as defined in section 1 of the South African Revenue Service Act, 1997 (Act No. 34 of 1997);* *Section 15(3)I(ii) of the Protection of Personal Information Act reads as follow:* *(3) The further processing of personal information is not incompatible with the purpose of collection if—* … *further processing is necessary—* *(i) …* *(ii) to comply with an obligation imposed by law or to enforce legislation concerning the collection of revenue as defined in section 1 of the South*	***The provisions have been redrafted.***

		African Revenue Service Act, 1997 (Act No. 34 of 1997); *Section 18(4)(c)(ii) of the Protection of Personal Information Act reads as follow:* *(4) It is not necessary for a responsible party to comply with subsection (1) if—* *…* *non-compliance is necessary—* … *(ii) to comply with an obligation imposed by law or to enforce legislation concerning the collection of revenue as defined in section 1 of the South African Revenue Service Act, 1997 (Act No. 34 of 1997);* One should distinguish between an "obligation" imposed by law and where a law merely "authorizes" a processing activity. The proposed section 197 of the FSRB merely authorizes certain processing activities and does not place an obligation in law on the financial sector Authorities or Reserve Bank to collect, utilize or disclose the information in question. Hence we do not agree that the activities constitute compliance with the relevant sections in the Protection of Personal Information Act. A discretion to utilize or disclosure information can never constitute an obligation to do so. This issue was already argued during the parliamentary hearings on POPI. ASISA proposes the following amendments: *197(1)(c) When information is collectedused or disclosed for the purposes referred to in paragraphs (a) and (b), that collection, utilisation or disclosure of information constitutes compliance with an obligation imposed by law for the purposes of sections 11(1)(c), 12(2)(d)(ii), 15(3)(c)(ii), and 18(4)(c)(ii) of the Protection of Personal Information Act.*	
ASISA	197(2)(b)	We strongly disagree with this statement. Refer previous ASISA comment on the first draft of the FSRB in this regard. NT responded that they have re-drafted the section after taking the comments into account, but the concern remains the same and has not been addressed.	***The provision has been revised.***

		It cannot be stated that an agreement referred to in section 197(2)(a)(v) complies with section 72(1) of the Protection of Personal Information Act if none of the requirements of section 72(1) is met. It is not clear on what basis the statement is being made that a section 197(2)(a)(v) agreement complies with section 72(1). The test of compliance is not that the FSRB states that the agreement complies, but whether the agreement actually complies with the requirements of section 72(1). Section 72(1) of the Protection of Personal Information Act reads as follow: ***72****(1) A responsible party in the Republic may not transfer personal information about a data subject to a third party who is in a foreign country unless—* *(a) the third party who is the recipient of the information is subject to a law, binding corporate rules or binding agreement which provide an adequate level of protection that—* *(ii) effectively upholds principles for reasonable processing of the information that are substantially similar to the conditions for the lawful processing of personal information relating to a data subject who is a natural person and, where applicable, a juristic person; and* *(ii) includes provisions, that are substantially similar to this section, relating to the further transfer of personal information from the recipient to third parties who are in a foreign country;* *(b) the data subject consents to the transfer;* *the transfer is necessary for the performance of a contract between the data subject and the responsible party, or for the implementation of pre-contractual measures taken in response to the data subject's request;* *(d) the transfer is necessary for the conclusion or performance of a contract concluded in the interest of the data subject between the responsible party and a third party; or* *(e) the transfer is for the benefit of the data subject,and—* *(i) it is not reasonably practicable to obtain the consent of the data subject to that transfer; and* *(ii) if it were reasonably practicable to obtain such consent, the data subject would be likely to give it.* *Sections 72(1)(b), (c), (d) or (e) would not apply. With regards to section 72(1)(a), that would only apply if the designated authority is based in a country*	

		with data protection legislation. If the designated authority is in a country without data protection legislation, and —no binding corporate rules or binding agreement which provide an adequate level of protection that— *(ii) effectively upholds principles for reasonable processing of the information that are substantially similar to the conditions for the lawful processing of personal information relating to a data subject who is a natural person and, where applicable, a juristic person; and* *(ii) includes provisions, that are substantially similar to this section, relating to the further transfer of personal information from the recipient to third parties who are in a foreign country"* Unless it can be clearly stated on which of the PPI section 72(1) grounds is being relied upon, we suggest that this clause be deleted.	
ASISA	197(3)(a)	It is not clear what "safeguards" as referred to have been provided for in this section. What is being considered as "appropriate safeguards"?	***Clause redrafted***
ASISA	197(3)(b)	It is not clear what "safeguards" as referred to have been provided for in this section. It is not up to the financial sector Authorities or the Reserve Bank to decide whether the third parties with whom they plan to share information have appropriate safeguards in place. This falls in the domain of the Information Regulator to be appointed in terms of the Protection of Personal Information Act.	***Clause redrafted***
ASISA	197(3)(d)(i)	Section 197(3)(c) states that —Information may only be requested by the financial sector Authorities or the Reserve Bank from a designated authority when performing the functions and exercising powers in terms of the laws referred to in subsection (1). By the same token, if information is requested from or provided by a designated authority, the information should only be used for the purposes listed in subsection (1). We suggest the wording be amended as proposed. *197(3) (d) Any information requested from or provided by a designated*	***Disagree; unnecessary***

		authority– *(i) must only be used for the purpose(s) listed in subsection (1)~~for which it was requested~~;*	
BASA	197(3)	"Appropriate safeguards" is not strong enough. This section deals with the sharing of personal information collected through FICA in detail as well as information shared with designated authorities and third parties in other jurisdictions. Section 38 of PoPI has not been referred to in this section, as well as instances where financial institutions are required to share personal information. NT and the financial sector regulators should ensure that the sharing of information amongst the regulatory structures does not result in "tipping off". There should be a requirement for equivalence with POPI.	***Clause redrafted***
ASISA	198(1)	It seems that the section is aimed at 'whistle blowing', as oppose to complaining. We therefore submit that the word "complaint" is not accurate, and that subsection 1 should be amended as proposed. If accepted all further references to "complaint" in this section should be amended to "report". The FSRB should draw a distinction between a complaint, which is only apposite where a person has suffered damaged or was otherwise prejudiced by a contravention /action or omission and reporting a contravention of a law. Complaint should be limited to where person has suffered financial loss or potentially to suffer financial loss. Where there is contravention of act with no damages suffered – the regulator can look into the alleged contravention, but this does constitute a complaint. If I can demonstrate that advisor has not done CAR, but he placed me in correct fund and investment has doubled, that is not a complaint. ***198** (1) A person may make a ~~complaint~~ report to a financial sector regulator that a person has contravened, is contravening or is about to contravene a provision of a financial sector law.* Note: The FSRB should impose a monetary jurisdiction limit on complaints.	***Relevant section redrafted; "complaint" not used***

Standard Bank	198(2)	Chapter 17, sub-clause 198(2) provides that complaints to a financial sector regulator "*must be in writing or another form approved by or accepted by the regulator*". Currently complaints to the ombuds do not have to meet such requirements. It is suggested that it would be helpful to introduce a similar requirement for complaints to ombuds. This would provide direction to customers on the best ways of complaining and formalize the complaints process. The definition of "complaint" as an "expression of dissatisfaction" is problematic in terms of formalizing the complaints process. It includes a possible scenario where dissatisfaction may be expressed in many forums, such as social media forums, but not to the financial institution, ombud, or regulator. If complaints must be made formally this would facilitate a consistent complaints management system across the sector. The term "distress" is used in the definition of "complaint" in the FSRB. This is problematic. The actions which cause the customer to suffer harm, prejudice and inconvenience would result in distress; but distress is an emotional outcome and should be removed from the definition.	***Relevant section redrafted; "complaint" not used***
ASISA	198(4)	It is reasonable that a person making a complaint should receive feedback in respect of a complaint within a period of time from making the complaint. It is suggested that the financial sector regulator must act on and respond to a complaint within 30 days of receiving such complaint. *198(4) A financial sector regulator must, within 30 days from the receipt of the complaint, act on and respond to a complaint made in terms of subsection (1), and must communicate with the person who made the complaint regarding the status of the complaint, and actions being taken regarding the complaint.*	***Clause deleted***
ASISA	198(5)	In light of our comments above that this section deals with whistle-blowing, we suggest this subsection be deleted.	***Clause deleted***
ASISA	199(1)(a)(ii)&(iii)	Clarity is required whether it is the intention that each and every breach must be reported, irrespective of whether it constitutes a material breach or not. If only material breaches should be reported, we suggest that some sort of scaling be	***Disagree***

		introduced, maybe as per section 19(4) of FAIS which sets out examples of material breaches concerning reporting duties of auditors.	
Transaction Capital	199(1)(a)(ii)& (iii)	Sections 199(1)(a)(ii) and 199(1)(a)(iii) should be deleted as actuaries, valuators and auditors do not have the necessary expertise, skills and knowledge to determine whether a particular financial institution is in contravention of a financial sector law or governance framework requirements.	***Disagree***
BASA	199(1)(a)(iv)	The phrase *"an audit not being completed"* is problematic: it is not clear what this means and whether this may in future amount to a contravention?	***Clause is sufficiently clear***
ASISA	199(1)(a)	***199****(1) Despite any other law, the actuary, valuator or auditor of a financial institution or controlling company (if the appointment of an actuary, valuator or auditor is required under a financial sector law) must -* *(a) without delay, submit a detailed written report to the regulators and the governing body on any matter relating to the business of a financial institution or financial conglomerate, as the case may be, of which the actuary, valuator or auditor becomes aware in the performance of its functions and duties and which, in the opinion of the actuary, valuator or auditor, -*	***Clause redrafted***
Part 2: Offences and Specified Contraventions			
ASISA	General	It is submitted that the maximum period of imprisonment and/or fine should be recorded in the FSRB, or be prescribed by regulation issues by the Minister, i.e. it should not be determined by the Authorities.	***Agreed; the Bill now provides for this***
BASA	201-214	BASA would appreciate clarity on whether the fines referred to in these clauses will be in addition to those provided for in FICA and POCDATARA.	***Yes***
SAIA	203-2014	SAIA will only be able to comment on the periods of imprisonment for the various offences determined in clauses 203 to 214 once the actual periods of imprisonment or values of the proposed fines have been specified. We accordingly reserve our rights to comment thereon once details of the periods and amounts of fines have been determined.	***Noted***

JSE	203(1) – 214	Replace highlighted yellow dots or text with correct period, number or text.	***Noted- provisions have been completed.***
Transaction Capital	203-214	Transaction Capital reserves its rights to submit further comments once the duration of imprisonment and the amount of fines that could be imposed for the commission of an offence is published. Financial sector regulators should not be entitled to impose an administrative penalty in terms of section 151 where imprisonment or a fine is imposed in terms of these sections.	***Noted***
BASA	205(a)	Align with criminal law penalties	***Noted***
SAIA	205(2)	Sub clause (2) provides that *"Regulations may apply differently in different circumstances"* Given the vagueness of this clause it is uncertain as to how regulations would be applied differently in different circumstances. It may in its current format be interpreted that discretion may be used when applying Regulation which in the principle of fairness, is respectfully not supported. Unless how the discretionary application of regulation should be applied is explained, it is suggested that this sub clause should be removed.	***Unsure which sub-clause is being referred to – possibly clause 215, which has been deleted***
ASISA	207	Schedule 1 of the Bill sets out which legislation falls under a financial sector law, each of which has its own provisions relating to offences and the penalties. As currently worded, section 207 provides that a financial institution or a person may be prosecuted under both this Bill and the applicable financial sector law in potential violation of the principle *"ne bis in idem"* (i.e. not twice in respect of the same matter). Clarity is requested in this regard.	***Offences clauses have been redrafted***
ASISA	209(2)	The information provided on debarred persons needs to be accurate, up to date, and relevant to enable persons to comfortably rely on such information. For example, if the FSB register shows that this person is not debarred, and a person engages a debarred person, then that person should not be held liable under this section. We suggest an amendment as proposed. It is not clear what is meant by "contravenes or would contravene the debarment order" and suggest it be deleted.	***Offences clauses have been redrafted***

		The word "engage" is very wide – we suggest it be replaced with "employ or enter into a mandated agreement". Is the term "engage" limited to "engage to render financial services and/or act in management capacity in an FSP" or is it wider?	
BASA	210	Non-compliance with a summons is regulated by the terms and conditions contained in the summons. It is proposed that the clause be revised accordingly.	***Offences clauses have been redrafted***
JSE	212	Insert "*in*" before "*section 197*".	***Offences clauses have been redrafted***
ASISA	212	How will this tie in with contraventions of the Protection of Personal Information Act? ***212.*** *Any person who contravenes requirements relating to the sharing of informationas contemplated in section 197 commits an offence and is liable on conviction to……..*	***Offences clauses have been redrafted***
JSE	214(1)	Delete "~~*the person*~~" after "*false or misleading*".	***Offences clauses have been redrafted***
ASISA	214(1)	The view is held that it is almost impossible to prove that a person believed that he/she was making a materially false or misleading statement. It should be sufficient that the person knew or ought reasonably to have known. ***214.*** *(1) A person who makes a statement, whether orally, in writing, or in any other manner, to a financial sector regulator which statement is materially false or misleading; and the person knows ~~or believes,~~ or ought reasonably to have known that the statement is materially false or misleading, the person commits an offence and is liable on conviction to a fine not exceeding [insert].*	***Disagree***
Part 3: General Matters			
ASISA	215(2)	We respectfully suggest that this subsection be deleted because the Regulation itself will stipulate in what circumstances it will apply. *215* *(1)……* ~~*(2) Regulations may apply differently in different circumstances*~~.	***Deleted***

SAIPA	215(2)	This subsection is somewhat unclear. It goes without saying that different circumstances need to be considered in the application of a law or regulation. However, it is unclear if any other different applications are implicitly referred to in this subsection.	***Deleted***
ASISA	216	We have difficulty understanding when a financial sector regulator will ever suffer a loss and suggest the reference to financial sector regulator be deleted. *216. A person~~, including a financial sector regulator,~~ who suffers loss because of a contravention of a financial sector law by another person may recover the amount of the loss by action in a court of competent jurisdiction against any of–* *(a) the other person; and* *(b) any person who was knowingly involved in the contravention.*	***Disagree***
Transaction Capital	216	If there is a contravention of any financial sector law by an entity, the individuals (including key persons) of that entity should not be liable to any person instituting action in terms of section 216, unless they acted in a fraudulent manner. All claims of this nature should only be capable of being brought against the entity (and not the individuals, unless they acted fraudulently).	***Disagree; note also that person includes a juristic entity***
ASISA	217	A blanket power to extend any time period applicable to a function of the regulator is unreasonable. If there are circumstances that necessitate a period to be extended, it should be dealt with in the financial sector law. An overriding authority without any criteria is inappropriate even more so if the extension can be given more than once and also after the time period for compliance of the prescribed period has passed. We assume the intention is not for the Regulator to be able to override the express provisions of the Act as regards the time periods within which the regulator must perform its duties. If it is indeed the intention, what is the use of prescribing time periods in the Act if the regulator does not have to adhere thereto or can overrule it? This is unreasonable and not conducive to legal certainty. If it is the intention that the regulator can grant exemption to financial institutions, then the section should be re-drafted to reflect this otherwise the clause should be deleted.	***Agreed. Redrafted to indicate that the regulator cannot extend the time period for a provision that the financial sector regulator must comply with***

ASISA	220	Please refer to our comments on section 197(1)(c) on the issue of "authorization" vs "obligation".	***Deleted***
ASISA	221	ASISA commented similarly on the liability provision in the Financial Services Board Act when it was amended by the Financial Services Laws General Amendment Act in 2013. We continue to strongly hold the view that this clause should not only provide for the powers exercised in good faith. It is possible to intend to exercise power in good faith but still do so in a negligent manner. It is inconceivable that officials who cause damage/losses by acting in a grossly negligent manner should be afforded protection against claims in respect of such damage/losses suffered. The regulator should be appropriately responsible and accountable when exercising the extensive powers granted to it. The regulator must at least exercise those powers with due skill, care and diligence. There is no good reason why the State, other Authorities or their representatives should be exempted from liability, especially not the State or the Authorities and it is submitted that a provision exempting an Executive body from damages caused to citizens offends both our Constitutional values and the *boni mores*. We are opposed to this clause. 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 FSRB, we submit that a reference to gross negligence should be included in this FSRB. It is submitted that powers afforded to persons should be exercised responsibly and that persons exercising powers bestowed on them in terms of the FSRB should be held liable when acting grossly negligent or illegally, especially when the powers bestowed in terms of the FSRB encroach on the constitutional rights	***Noted; however persons referred to in this clause already have an obligation to act with due care and diligence placed on them in the relevant chapters establishing the committees etc.. This provision is aligned with provisions in terms of the existing financial sector laws.***

		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. Please also refer general comments on the principle of accountability. Section 197 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 FSRB 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. ***221.*** *The State, the Minister, the Reserve Bank, the Governor and Deputy Governors, a financial sector regulator, or an official of the State, the Reserve Bank or a financial sector regulator~~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 financial sector regulator or an official in terms of this Act or a financial sector law~~.~~provided that the Minister, the Reserve Bank, a financial sector regulator or an official in terms of this Act or a financial sector law takes decisions and performs actions in the exercise of a function in good faith and with due skill, care and diligence.*	
Part 4: Financial Sector Information Register			
JSE	227*(a)*	Insert "*and*" between "*useful*" and "*as practicable*".	***Redrafted***
Part 5: Repeals and Amendments			
Part 6: Transitional Provisions			
JSE	232(1)	Insert "the" before "Board" and also before "FSCA".	***Amended***

BASA	234	The Authority referred to is not specified. Specify the relevant Authority.	***Clauses redrafted***
JSE	234	Replace references to ~~*Security*~~Services Act with *Securities*Services Act. In s234(2)*(b)* insert the word "*in*" before "*section 6B(1)*".	***Corrected***
ASISA	234(1)	***234*** *(1) Any proceedings in respect of matters that are formally before the enforcement committee established in terms of section 97 of the Security Services Act, 2004 (Act No. 36 of 2004), and section 10A of the Financial Services Board Act, 97 of 1990 (Act No.97 of 1990), respectively, immediately before the commencement of this Act, must be continued and concluded by the Prudential Authority or the Financial Sector Conduct Authority as if those laws had not been repealed, …….*	***Clauses redrafted***
ASISA	236(1)	For the sake of consistency we suggest that the same line of drafting be used as in section 235, i.e. rather state that the investigation must continue under the law it was instituted.	***Clauses redrafted***
BASA	236(2)	Transitional arrangements relating to investigation are problematic. The provision is worded in such a way as to create vulnerability if an investigation is initiated after commencement of the Act but in respect of a matter that occurred before the commencement of the Act - has the same impact as a retrospective provision. It needs to be clearer so that circumstances are limited. Furthermore, the retrospective effect is not supported. Retrospective application is generally considered unlawful.	***Clauses redrafted; disagree on retrospective application being enabled***
BASA/ SAIPA	239(6)	There are a number of drafting errors. The numbering is repeated and should be corrected.	***Clauses redrafted***
ASISA	239(5)	*239(5) This Part does not prevent the terms and conditions of employment of an employee mentioned in subsection (1) being varied, after the effective date for this Part in accordance with–* *(a) those terms and conditions; or* *(b) a law or agreement.* ~~*(6) An employee transferred fro*~~ *(6) For the purposes of this section, "vary", in relation to terms and conditions,*	***Clauses redrafted***

		includes– *(a) omitting any of the terms and conditions;* *(b) adding to the terms and conditions; and* *(c) substituting new terms or conditions for any of the terms and conditions.*	
JSE	241	The meaning of "*in which that day falls*" is unclear. Assuming that it refers to the year in which the FSB Act is repealed then we would suggest replacing "~~that day~~" with "*in which the repeal of the FSB Act falls*". Delete "*~~subject to this Act~~*" and insert "*subject to subsection 2*".	***Levy provisions redrafted***
ASISA	241(4)	Section 241 deals with the Financial Service Board Act, while subsection (4) appears to refer to any Act that refers to the Chief Actuary. Hence, it is our submission that this subsection (4) should not sit under section 241, but rather be a general section.	***Levy provisions redrafted***

Schedule 1: Financial Sector Laws			
Reviewer	**Section**	**Issue**	**Decision**
BASA	Schedule 1: Inclusion of the Currency and Exchanges Act	Schedule 1 should be revised to include the Currency and Exchanges Act	***Noted. Consideration will be given to incorporating the Currency and Exchanges Act during the second phase of the twin peaks reforms.***
Standard Bank	Schedule 1: Inclusion of the FIC Act	Schedule 1 of the FSRB does not include the Financial Intelligence Centre Act (FICA) as a financial sector law. Standard Bank proposes that it is included.	***Noted.*** ***The FIC has been included in the Bill as a financial sector regulator (in respect of Parts 2, 3 and 5 of Chapters 2, and Parts 1, 2 and 3 of Chapter 5) and also as a member of the Financial System Council of Regulators. The importance of the FIC in the regulatory framework is recognised.***

Schedule 3: Documents to be published in the register			
Reviewer	**Section**	**Issue**	**Decision**
SAIA	Inclusion of interpretation rulings	As commented under Chapter 12 on Enforcement actions, it is suggested that any legislation, regulation or legislative instrument that has general application or is applicable to all regulated persons be included in the Financial Sector Information Register, including Interpretation rulings, as established in Clause 131 and Declaration of certain practices as irregular or undesirable, as established in Clause 141.	***Agree with the principle. The revised Bill makes reference to "Guidance notices" and "Binding Interpretations" and these will be published in the information register.***

Schedule 4: Laws Repealed or Amended (Consequential Amendments)

Financial Intelligence Centre Act			
Reviewer	**Section**	**Issue**	**Decision**
BASA	FIC Act	While the new Bill extends the scope of financial sector regulation (which we support), the absence of FICA Amendments in this Bill will continue to perpetuate the current unequal compliance obligations on different providers of the same financial products and services, such as credit.	***Noted. A separate process to take through the FIC amendments through the Parliamentary process is being underway.***

Financial Advisory and Intermediary Services Act (FAIS)			
BASA	FAIS- Definition of ***"financial services provider"***	We understand the need for the regulator to bring product providers into the scope of regulation as it relates to activities in the existing *"intermediary services"* definition. We however do not believe that this is the most effective means of achieving this result, and the amendment proposed in the FSRB changes the ordinary meaning of the term *"intermediary"*. We note the removal of the phrase *"for or on behalf of a client or product supplier"* as tabled in clause 78(g). We submit that the consequent broadening of the definition will lead to unintended consequences. For example, an IT service provider providing access to an IT system in a financial product sales transaction may be regarded as rendering *"intermediary services"*. BASA proposes the following amendments to the definition of *"financial services provider"* in FAIS: ***"financial services provider"*** *means any person, other than a representative, who as a regular feature of the business of such person—* *(a)furnishes advice; or* *(b)~~furnishes~~furnishing advice and any service referred to in (c)~~renders any intermediary service~~; or* *(c)~~renders an intermediary service;~~any act other than advice, performed by a person -* *(i) the result of which is that a client may enter into, offers to enter into or enters into any transaction in respect of a financial product; or* *(ii) with a view to -* *(aa) buying, selling or otherwise dealing in (whether on a discretionary or non-discretionary basis), managing, administering, keeping in safe custody, maintaining or servicing a financial product (bb) collecting or accounting for premiums or other moneys payable by the client in respect of a financial product; or* *(cc) receiving, submitting or processing the claims of a client in respect of a financial product.*	***Disagree. The proposed amendment aims to regulate the furnishing of advice and rendering of intermediary services in respect of financial products by all persons irrespective of the capacity in which such persons render the services, for the purposes of furthering customer protection.*** ***The main purpose of the proposed amendment to the definition of 'intermediary service' is to bring about legal certainty, to avoid regulatory arbitrage and to close regulatory gaps.*** ***The exclusion of product suppliers and their employees from the Act, to the extent they are not regulated elsewhere, or certain services rendered in respect of financial products, would defeat the purpose and objective of the amendment.*** ***The amendment to the definition of intermediary services is retained.***
ASISA	10- Amendments to	**Amendment of section ~~38A~~ 36A**	***Noted; section no longer referred to***

	section 36A of FAIS	**10.** Section 36A of the principal Act is amended by substituting for paragraph *(b)* of subsection (1) the following paragraph:	
BASA	78(c)- Amendments to definition of "complainant"	A "complainant" previously included a complaint submitted by a client to the FAIS Ombud. A "complainant" is now defined as a complaint submitted to the financial service provider (and not the Ombud). See in this regard, clause 78(c). Current provisions in the FAIS Act make provision for the above definition of "complainant" to be read with Clause 26(1)(a) of the Act, as well as with Board Notice 81 of 2003, as amended. These provisions specifically address the procedure to be submitted by a complainant to the Office of the FAIS Ombud. While we note that provision is made to repeal sections 20 to 31 of the FAIS Act, the definition of "complainant" in the FAIS Act can accordingly not be amended, without also simultaneously repealing the FAIS Ombud rules as contained in Board Notice 81 of 2003, as amended by Board Notice 100 of 2004. BASA further notes the proposed amendment to the definition of a FAIS "complaint" (see clause 78(d)) to include an "**expression of dissatisfaction**" and reiterate our comments above. In addition, it is submitted that provision should be made for the formal written submission of a complaint, pending implementation of future conduct standards by the FSCA in relation to complaints-handling. Failure to do so will result in practical challenges, for example an "expression of dissatisfaction" on social media without the intention of submitting a formal complaint to the approved financial service provider should not fall under this amended definition. We further note the reference to a "**complaint" including** "**an agreement** with the financial services provider or representative in respect of its financial services, and indicating that the provider or representative has…failed to comply with… an agreement…" (see clause 78(d)) The FAIS Act currently applies to any transaction where either "advice" or "intermediary services" are provided in respect of any transaction pertaining to a "financial product" as is defined in the Act. "An agreement", albeit in relation to a financial service is not defined in the FAIS Act, nor is it mentioned in the definition of a financial product, advice or service. We accordingly submit that this amendment be deleted until such time as the above-mentioned definitions	***Definition of "complainant" in FSR Bill has been removed.*** ***There is no consequential amendment to definition of 'complaint' in revised FSR Bill***

		and ambit of the FAIS Act are extended to regulate agreements.	
ASISA	78(d)- Amendments to definition of "complaint"	As currently worded, it is any expression of dissatisfaction which would constitute a complaint, opening, in our view, the floodgates to vexatious and frivolous complaints – the amendment could be interpreted to relate to any expression of dissatisfaction and could have unreasonable and unfair unintended consequences. The view is held that the dissatisfaction must have a basis and that it should, at the very least, be reasonable. Should the proposed wording remain unchanged, this could also increase the work load of the FAIS Ombud, who may rule that the dissatisfaction is frivolous and vexatious. Given varying definitions of "complaint" and the Financial Services Board's Complaints Management Discussion document on complaints, it is suggested that the definition of complaints in financial sector laws be aligned. The view is held that any changes introduced pursuant to the repeal of sections 20 to 31 of FAIS, should not be of such a nature as to require financial institutions to changed embedded processes and procedures in their complaints handling, unless it is to the benefit of clients. *78 (d) by the substitution for the definition of "complaint" of the following definition:* *""**complaint**" means **[, subject to section 26(1)(a)(iii), a specific complaint]** an expression of reasonable dissatisfaction submitted by a complainant, relating to a financial service offered or rendered by a financial services provider or representative to the complainant on or after the date of commencement of this Act, **[and in which complaint it is alleged that the provider or representative]** or to an agreement with the financial services provider or representative in respect of its services and indicating that*–	***Noted. Definitions of 'complaint' and 'complainant' have not been included in the FSR Bill, and definitions in existing legislation have been retained.***
ASISA	78(g) –"definition of intermediary service"	The word "intermediary" means a party acting as a go-between between either of the two contracting parties to an agreement and the concept that one of the contracting parties, being the product supplier, is rendering an intermediary service is therefore untenable (see Tristar case). We respectfully do not agree with National Treasury's response (dd April 2014) to the comments previously submitted on ILAB on this proposed amendment, and specifically pages 118 -	***Disagree. It is correct that the amendment changes the normal meaning of "intermediate". That, however, is not problematic as the Act assigns specific meaning to the terminology.*** ***The Act's main objective is the protection of***

		122. A product supplier, being a juristic entity, cannot act by itself, and can only act through its organs or employees. The actions performed by employees on behalf of product suppliers constitute actions by the product supplier. The act constituting an "intermediary service" is an act different from the act constituting the "transaction in respect of a financial product"; the latter must be the result of the former. The employee who only issues the financial product does not perform an act which results in a "transaction in respect of a financial product"; he concludes that transaction itself. Such an employee performs no "intermediary service". We strongly disagree with the reasoning in paragraph 10 of the NT response, page 119. Employees are NOT agents of the employer. The situation as set out by NT in paragraph 10 of their response is not in accordance with the current position in SA law. The law that is being quoted is in the context that employees can bind the company. • If a product supplier receives a proposal, can only the Director accept it as the company? • If the product supplier appoints someone (a normal employee) to vet an application, will such an employee be seen as rendering intermediary service? Surely this is not a feasible position, but in term of the proposed amendment it appears as if the employee will effectively be a person performing an act "the result of which is that a client enters into…[a] transaction in respect of a financial product". • Consider the following: Is the client rendering intermediary services when submitting a proposal for LT insurance? If not, why is the product supplier, as the other contracting party, seen to be rendering intermediary services? • If a long-term insurer wants to buy a building to set up offices and one of their general managers who has the authority to buy assets up to a value of R5 million enters into agreement with the seller obo his company - is he acting as the company's agent or is he acting as the company? He is not acting on behalf of himself or as the agent of the company; he is acting as the company.	***financial customers. All persons who render financial services to consumers must be adequately regulated.*** ***The Act, in achieving its objective, has a functional approach, aimed at regulating two types of activities, namely: advice and intermediary services. It is irrelevant in which capacity a person renders the services. For this reason the Act is applicable "in addition" to any other law.*** ***The proposed amendment aims to clarify that where a product supplier performs an activity set out under the definition of "intermediary services" through its employees, such product supplier must be licensed under the Act and its employees must be registered as "representatives" unless the exclusion referred to in the proposed amendment to section 45 applies.*** ***However, industry increasingly contends that it is not necessary for a product supplier who directly, through its employees, markets and sells its own products to obtain authorisation under the Act as such employees cannot be regarded as being separate from the product supplier.*** ***The effect of the above is that the activities performed by a product supplier that constitute the direct selling of its financial products to clients are seen as being excluded from the definition of intermediary services. The result is that product suppliers, when selling their products to clients, are excluded from the Act, irrespective of whether that activity is regulated by any other law. This defeats the purpose of the Act.***

		It is to be noted that in terms of the present provisions of FAIS, any employee of a product supplier who provides a potential client with any "recommendation, guidance or proposal of a financial nature" will be furnishing advice and will have to be registered as a representative. Employees who do not, however, provide such "recommendation, guidance or proposal" are not acting as a go-between, but as the product supplier concluding an agreement. FAIS makes a clear distinction between advice and intermediary services. As far as we are concerned, if that distinction is properly enforced, that will address the mischief that the proposed amendment of intermediary service is trying to address. We don't understand the reference by NT to a tri-partite situation – there are only two parties to the contract.	***Examples based on ASISA's contention:*** • ***Call centres operated by employees of product suppliers "hard selling" products do not have to comply with the requirements of the Act. This, inter alia, include requirements relating to honesty and integrity, competency, conflicts of interest and conduct. Clients, when dealing directly with product suppliers, are not afforded the protection of the Act, as would have been the case if they had interacted through an intermediary.*** • ***Complicated derivative instruments are being sold to clients without the protection of the Act, as these products are mainly being sold by the issuers of the instruments. The growth and proliferation of the Internet has caused an increase of derivative instruments being offered and sold to retail clients. Issuers increasingly reach potential clients from all walks of life through the internet.*** • ***Unequal treatment of persons performing the same activity eg, an independent intermediary must comply with the Act and meet competency requirements when selling financial products, while employees of product suppliers performing the same activity do not have to meet such requirements***
SAIA	78(g)(b)(ii)– "definition of intermediary service"	One of the proposals in the FSB's Retail Distribution Review ("RDR") proposes that conduct standards in respect of outsourced functions will be built on the approach applied in *Directive 159.A.i: Outsourced Arrangements*. Majority of SAIA members expressed the view that *"collection and accounting of premium"* should be regarded and regulated as an outsourced activity and accordingly removed from the definition of *"intermediary services" in the*	***Noted. It is correct that through the RDR process additional standards may be imposed on outsourced activities. However, the standards will be applicable to the person who outsources the activity as is currently the case with Directive 159, and not on the person who is performing the outsourced activity. In order to impose direct***

		FAIS Act referred to in section 78 (g)(b)(ii).	***requirements on the entity to which the service is outsourced that entity must be a regulated entity. This will also allow the Authority to take direct regulatory action against the person who is performing the outsourced function where that function constitutes an intermediary service as defined.***
ASISA	79 Insertion of section 1A in FAIS	Section 104 of the Financial Sector Regulation Act provides for variation of licences but the proposed section 1A(1)(b) indicates that the Authority's power to vary, suspend or withdraw a licence is as set out in this Act (FAIS). It may create confusion if there are two references. It is thus suggested that the reference to section 104 of the Financial Sector Regulation Act be deleted. Section 116 of the Financial Sector Regulation Act provides for powers of investigators and the reference thereto seems unrelated to the proposed section 1(A)(1) which deals with licensing matters. It will be more appropriate to include a reference to section 106 of the Financial Sector Regulation Act which provides that licences cannot be transferred. It is suggested that the reference to guidelines be deleted from the proposed section 1A(5)(d). Guidelines cannot be regarded as legislative instruments. The current Board Notice 127 refers to the criteria for approval. With reference to S1(A)(1)(c), it provides for a reporting obligation under S105 of the FSR FSRB which is extremely wide and open ended e.g. reporting of all instances of non-compliance or the likelihood of non-compliance. In this regard it is suggested that consideration be given to qualify such reporting this with reference to some form of materiality. Moreover, and in light of the existing reporting obligations under S17 and S19 of the FAIS Act, it is not clear how the dual reporting obligations under the FSRB and FAIS will co-exist. *"**Operation of this Act and the Financial Sector (Regulation) Act*** ***1A.** (1) Subject to this section, in relation to licences, as defined in the*	***Please see redrafted provisions regarding the relation of the FAIS Act to the FSR Act. These have been redrafted to take into account possible ambiguities in the relation of the two Acts to each other, including on matters such as licenses, regulatory instruments, and inspections and investigations***

		Financial Sector (Regulation) Act,: *(a) an application for a licence , in terms of this Act must be dealt with in accordance with this Act; and* *(b) the Authority's power to vary, suspend or withdraw a licence is as set out in this Act.* *(c) sections~~104~~, 105 and ~~116~~106, of the Financial Sector Regulation Act apply.* *(2) Subject to subsection (1), a power of the Authority in terms of this Act (for example, a power to issue a directive, or to conduct an inspection or investigation) must be exercised in accordance with the provisions of the Financial Sector (Regulation) Act.* *(3) Subject to subsections (1) and (2), if a provision of this Act makes provision additional to, and not inconsistent with, the Financial Sector (Regulation) Act in relation to a particular matter, the additional provision also applies.* *(4) The financial sector regulators may issue standards in accordance with the Financial Sector Regulation Act in relation to financial institutions and matters regulated in terms of this Act.* *(5) For the purposes of the Financial Sector (Regulation) Act, the following are legislative instruments–* *(a) a regulation;* *(b) a code of conduct;* *(c) a fit and proper requirement; and* *(d) criteria~~and guidelines~~for the approval of compliance officers.*	
ASISA	82 Amendments to Section 13	The stipulated period of 5 days within which to remove the name of a debarred representative or Key Individual from the register of the FSP is too short. It is therefore suggested that the current default period of 15 days (as per the standard license conditions with respect to updating the Representative Register) apply. It is however appreciated that the main objective with regard to debarred individuals is to prevent those individuals from acting as such and in this regard refer to proposed wording which aims to address this particular aspect. Section 13 of the principal Act is amended by substituting for subsection (3) the following subsection:	***Noted; disagree. A 5 day period is considered sufficient to comply with this requirement***

		"(3) An authorised financial services provider must– *(amaintain a register of representatives, and key ~~individnviduals~~ individuals of those representatives, which must be regularly updated and be available to the Authority for reference or inspection purposes; and* *(b) as soon as is reasonably possible, but no longer thanwithin fifteen~~five~~ days after being informed by the Authority of the debarment of a representative or key individual by the Authority, ensure that such person is prohibited from rendering any further financial services for and on behalf of the provider and toremove the names of that representative and key individuals from the register referred to in paragraph (a)…"*	
SAIA	82(3)(a)	Section 82 (3)(a) should read *"individuals"* and not *"individnviduals"*	***Noted***
BASA	83- FAIS-Debarment of ex-employee/ mandated representatives and proposed repeal of Section 14(a)	BASA notes that the institution will be obliged to remove Remove key individuals and representatives from the FAIS register within 5 days, on instruction of the FSCA, going forward. We repeat the comment made in relation to Chapter 12, Part 7 above, in relation to the FSCA to effect debarments. The use of the phrase "or was" in the aforesaid amended requires that the FSP debar persons who may no longer be in the employ of such FSP. An employer may not generally impose a sanction of debarment on a non-employee (although it may be possible in relation to ex-employees where evidence of malfeasance only become apparent after the employee has left). Such attempts may expose the employer to the risk of being faced with significant industrial relations and legal actions. In addition, the proposed amendments pose practical challenges as the FSP may not be able to furnish notice to a person who is no longer employed at such FSP, nor will the FSP be in a position to undertake the debarment procedure which is tabled in the proposed amendment to Section 14(2) of the current Act. Proper due process is therefore important to mitigate these risks. It is noteworthy to mention that Section 14A was inserted into the FAIS Act after its original enactment in 2003, to specifically address the risk of the	***A 5 day period is considered sufficient to comply with the requirement to remove individuals from the register.*** ***The wording provided for in relation to debarment of a non-employee is intended to cater for instances where an employee has left to avoid action being taken against them on evidence of contravention of the requirements of their post. The requirement also states that the reasons for debarment occurred and became known to the provider whilst the person was a representative of the provider.*** ***In order to ensure fairness a thorough procedure is set out in the revised section 14, and includes a process of appeal and review. The FSP will be required to ensure that their authorised representatives act in accordance with regulatory requirements.***

		aforesaid challenges, particularly in those instances where misconduct of an individual comes to light only once the individual has left the employ of the FSP. We accordingly do not support the repeal of Section 14A, for the reasons as mentioned above. It is in the interests of the financial sector at large that adequate mechanisms exist to rid the industry of persons who should be debarred. Further, that attempts to debar should not be frustrated due to insufficient avenues being afforded to FSPs to do so. It is recommended that the 5-day notice period is impractical and recommend that it increased to 15 days.	
ASISA	83- General Comments- Debarment provisions under s14	We do not have any objection with a dispensation where FSPs are obliged to ensure that where representatives are no longer regarded as fit and proper (having followed due process), the individual concerned no longer acts as its representative, is removed from its list of representatives and is obliged to notify the Authority thereof. However, it is our view that insofar as a "debarment" constitutes an infringement of the rights enshrined in section 22 of the Constitution (freedom of trade, occupation and profession), any debarment should ideally only be made by the Authority as contemplated in Section145 of FSRB and that debarment by FSP's in terms of the proposed amendments to Section 14 of the FAIS act should be deleted in toto. Apart from the practical difficulties alluded to under the specific comments provided below, we believe that in principle, the objectives of debarring individuals would be better served if considered and imposed by the Authority in all instances. Since the enactment of FAIS, experience has shown that the application of the existing debarment provisions has led to many inconsistencies as evidenced in various judgments and appeals. We do not believe that the proposed changes to S14 of FAIS will address the issues. As within other industries (e.g. medical and legal professions) they have one mechanism/body that deals with debarments and it is our proposal that, in order to further professionalise our industry, the Authority deals with all debarments and that this will address the current concerns and promote consistency, independence and impartiality in the consideration and imposition of debarments.	***Noted. The revised provisions do enable a debarment to be taken on appeal to the FSCA, ultimately giving the Authority the final decision on such matters. There is also a thorough process set out that all FSPs will have to follow in the case of debarment.***

SAIA	83- Amendments to section 14 of FAIS- debarment	We submit that the FSCA should introduce differentiated debarment processes to distinguish between the reasons stated in sub-sections (i) and (ii) of the proposed section 14(1)(b). The two reasons are substantially different as (i) deals with a failure to meet Regulatory Examination and qualification requirements, and (ii) deals with much more substantial issues. The two processes should not be equated because of the impact on the person debarred, and should be addressed in sub-section (7) of the proposed section 14. Whilst a reinstatement process for debarred persons is provided for, the reputational stigma is not easily removed. Sub-section (6) refers to subsection (3)(c)(iii), but the proposed section 14 has no such sub-section. It appears that the numbering of this sub-section has become distorted as the numbering sequence is as follows: (1), (2), (1), (2), (3), (4), etc. The reference to subsection (3)(c)(iii) appears to be to the "second" subsection (1), which should be (3). We do not agree with the removal of the FSCA's ability to debar a person for the following reasons: • A period of three months after the termination of employment is provided for debarment of the person who left employment before a debarment is undertaken. We submit that this period is too short. Instances of fraud are known to exist where same is discovered many months after a person resigns from his/her employment. A time restriction should therefore not apply, and • the FSCA should be required to review any post-employment debarment; and • Currently only the FSCA can debar a Sole Proprietor. In such instances where a Sole Proprietor has his licence withdrawn for misconduct, nothing prevents that person from taking up a Representative appointment with another FSP unless the FSCA debars the person. It is therefore imperative that the FSCA's authority to debar in terms of section 14A is not removed.	***See revised provisions with errors corrected.*** ***Disagree with a differentiated debarment process. The process allows the regulator, as is currently the case, to disclose the reason for debarment which would address the concern expressed. The regulator's power to debar a person has not been removed but has been consolidated into the provisions of the FSR Bill. The debarment provision that remains in the FAIS Act relates to a debarment by an FSP.***
BASA	83- Amendments to section 14(2) of FAIS- debarment	BASA notes the proposed amendment to Section 14(2) of the FAIS Act which provides for the debarred person to be provided with advance notice of the intention to debar, as well as an opportunity to present submissions in response.	***The procedure set out to debar an individual must be followed in all instances by an FSP, including where there in an agreement with an***

		BASA submits that in instances where an employer has entered into a collective agreement with a duly mandated employee representative body, which confirms that debarment will follow as a consequence of a representative being found guilty of certain offences after due disciplinary procedures have been followed (example: found guilty of being in breach of Section 13(2)(a) of the Act, or failing to comply with the Act in a material manner), then in such instances, the tabled statutory requirements may not supersede the collective agreement. The proposed amendment to report a debarment to the regulator within 5 days conflicts with the FSP license condition that any changes on the representative register (which would include removals from the register due to debarment), be reported to the regulator within 15 days. Any information/ documents which are requested by the regulator in relation to debarments should thus also take cognisance of incoming statutory obligations which will be imposed on the employee and employer by POPI. It is accordingly recommended that the time period to report a debarment be amended accordingly. Insofar as determination by the regulator in relation to the ***"form and manner of debarment***", we recommend that any rules related to this be formalised by use of the legislative instruments which are mentioned in clause 79 (see proposed clause 1A(5). The reason is that documents currently referred to in FSB debarment guidance notes and debarment forms are often confidential and privileged, in terms of the employer/employee contract of employment.	***employee representative body.*** ***The 5 day period is considered sufficient time to comply with the requirement.*** ***The recommendation on the format for informing the regulator of a debarment being formalised in a regulatory instrument is noted.***
ASISA	83 Amendments to section 14(1)(a) of FAIS- debarment	Section 14(1)(a) provides for debarment of a representative or a key individual of such representative. For the sake of clarity, it is suggested that a reference to the key individual of the representative be included at the end of the section. We propose that the imposition of a debarment be limited to only the Honesty & Integrity and material non-compliance activities and that it should therefore	***Agree.*** ***See proposed amendment to section 14(1)(a):*** ***"14. (1) An authorised financial services provider must debar a person who is or was, as the case may be, –***

		not have application with regard to the competency requirements. Simply put, those who do not have/meet the competency requirements are, by virtue of Sections 8 and 13 of FAIS obliged to ensure that the individuals must possess the requisite Competency requirements. The rationale for our proposal to exclude the competency aspect from debarment provisions are stated below. The imposition and connotation pertaining to a debarment, in our view, is aimed at some form of sanction attached to the persons conduct. In a sense it relates to wrongdoing in action rather than failing to obtain a qualification. Moreover, debarment in the context of an individual who was either dishonest or who failed to comply with a law in a material manner finds application holistically in the sense that, irrespective the product categories for which the person was licensed, such person may not render any further financial services at all. This, is unlike the current situation with respect to the competency requirements where a person can be debarred at product category level which not only causes further administrative difficulties in terms of updating the Register of Representatives and how such debarment (at product level) is recorded or reflected, it also currently hampers those debarred individuals to be re-instated upon meeting a particular competency requirement; all because of the administrative delays wrt the Representative Register. **The requirement that "the reasons for debarment occurred and became known to the provider whilst the person was a representative of the provider**. From the above proposed amendment to FAIS, it seems as if the FSP will be required to, with reference to the proposed S14(3), impose a debarment if it the reasons for debarment occurred and become known whilst the person was still representative of the provider. Firstly, no mention is made to a Key individual who is not a representative. We therefore propose that a Key Individual be added to the relevant section. Also refer to comments made wrt the proposed S14(3). ***"Debarment of representatives*** ***14.*** *(1) An authorised financial services provider must debar a person who is or*	***(a) a representative of the provider, or*** ***(b) the key individual of such representative;*** ***from rendering financial services if satisfied on the basis of available facts and information that the person–*** ***(i) does not meet, or no longer complies with, the requirements referred to in section 13(2)(a); or*** ***(ii) has contravened or failed to comply with any provision of this Act in a material manner, and*** ***the reasons for debarment occurred and became known to the provider whilst the person was a representative of the provider or a key individual of such representative."*** ***Disagree that debarment should be limited to the suggested grounds only. A person must on a continuous basis comply with various competency requirements that may only become applicable after a person has been appointed as a representative. The debarment process provides for a mechanism to enforce compliance with those requirements.***

		was, as the case may be, – *(a) a representative of the provider, or* *(b) the key individual of such representative;* *from rendering financial services if satisfied on the basis of available facts and information that the person–* *(i) does not meet, or no longer complies with, the personal character qualities of honesty and integrity requirements referred to in section 13(2)(a); or* *(ii) has contravened or failed to comply with any provision of this Act in a material manner, and* *the reasons for debarment occurred and became known to the provider whilst the person was a representative of the provider or a key individual of such representatives.*	
ASISA	83. Replacement section 14(2) and (3) of FAIS	There is no legal requirement for a provider to have a written policy and procedure governing the debarment process. Generally provisions in respect of debarment form part of contractual arrangements with an employee or representative. Although it may be good practice to have a written policy and procedure, the policy and procedure cannot override existing contractual arrangements; neither can existing contractual arrangements prevent a debarment process from being lawful, reasonable and procedurally fair. It is thus suggested that clause 14(3)(a)(ii) be deleted. With regard to S14(2)(1)(a)(ii) requiring that the individual be informed of any “terms attached to the debarment in relation to unconcluded business” and “any measures stipulated for the protection of the interest of the clients” will be extremely difficult to implement as it assumes the person will be found guilty before the actual hearing/imposition. In this regard many providers are also subject to the terms and conditions of contract with the individual concerned, including labour legislation in the case where the representative is an employee who has a right to earn a living, not to mention the protection afforded by law i.e. presumed innocent until found guilty. The other related provisions may also prove to be impractical (e.g. provide copy of debarment procedures where such documentation may already form part of existing contract of employment/mandate. We therefore recommend that subsections be amended as proposed.	***Noted; disagree. The FSP must follow the process stipulated in effecting a debarment. A 5 day period is considered sufficient to comply with the requirement to notify the Authority***

		14(2) Before effecting a debarment in terms of subsection ~~(1)~~(3), the provider must ensure that the debarment process is lawful, reasonable and procedurally fair by following the process set out in subsection (3). *(1) A provider must–* *(a) before debarring a person–* *(i) give adequate notice in writing to the person of its intention to debar the person and the grounds and reasons therefor ~~and any terms attached to the debarment, including, in relation to unconcluded business, any measures stipulated for the protection of the interests of clients~~;* *~~(ii) provide the person with a copy of the provider's written policy and procedure governing the debarment process;~~and* *(iii) give the person a reasonable opportunity to make a submission in response;* *(b)………* *(c)……….* *(d) in the form and manner determined by the Authority, notify the Authority within fifteen~~five~~ days of the debarment; and*	
ASISA	83- Debarment of representatives 14(3)	Refer also to General Comments above where it is recommended to delete S14 in toto. With regard to the specific comments of this subsection, please also refer to comments made above wrt S14(1) where the new proposals provide that debarment must take place where the reasons for debarment occurred and became known to the provider whilst the person was a representative of the provider. We believe that the application of these provisions are not clear, uncertain and that it will be impractical for the reasons stipulated below. a) What would the position be if the investigation could not be completed within the stipulated 3 months? In this regard many investigations take longer than three months and will depend on the circumstances and complexity of each case. It must also be kept in mind that once an investigation is completed, the application of labour law and Industrial Relations requirements in respect of employees also requires due process which includes further and additional time	***Disagree. The requirement stipulates that the process of debarment be commenced without undue delay from the date of the provider becoming aware of the reasons for debarment, and in any event, not longer than three months from that date.*** ***A three month period within which to begin a process of debarment is considered sufficient, once the reason for debarment becomes known.*** ***In those instances where it is impossible due to no fault of the provider to complete the investigation within the three month period, the matter can be referred to the regulator once the investigation has been finalised, for consideration of debarment by the regulator.***

		periods and standards. b) What happens in the event that the alleged misconduct of a representative only comes to the attention of the FSP long after the resignation/termination of services? c) How would these provisions find application to the so-called one man Sole Proprietor FSP's Below are some scenario's that further illustrate the uncertainties given the current proposals: An FSP discovers that its representative has been charged and convicted of theft in a criminal court. Although the theft is unrelated to the provision of financial services it is nevertheless a breach of the FAIS Honesty and Integrity requirements. What must the FSP do in respect of debarment proceedings in such cases and what would the position be where the representative has only been charged but not convicted. Moreover, in the case of the latter scenarios of either being charged or convicted, what would the position be if the individual resigns.	
BASA	FAIS- Proposed amendments to section 45	We note the proposed insertion of clause 1A(b) which provides that the exemption referred to in paragraph 1A(a) does not apply to a person to whom a product supplier has delegated an outsourced activity or function. We accordingly recommend that the proposed insertion of Section 1A(b) in the FAIS Act be deleted.	***Noted; retained.***

Banks Act			
BASA	Banks Act- Section 37(2)	The proposed amendment still refers to the Registrar. The word Registrar should be omitted and substituted with Prudential Authority.	***Agree. See revised draft consequential amendments to the Banks Act.***

Collective Investment Schemes Control Act			
Reviewer	**Section**	**Issue**	**Decision**
ASISA	1(b)	The application of this definition will create confusion and uncertainty – for example: -does the definition relate to a "designated authority" or does it relate to a Financial Sector Regulator (both defined in Section 1 of the FSRB)? -is the intention to create more "Authorities" in terms of the Financial Sector Regulation Act? Our recommendation is that the proposed definition should relate to "Financial Sector Regulator" as defined in the FSRB and should rather read as follows: **"Financial Sector Regulator"** means the financial sector regulator of that name established by the Financial Sector Regulation Act; This definition should be extrapolated throughout the FSRB and industry sector legislation. This will create certainty in the industry as should another authority be created then it should be included in the definition of "Financial Sector Regulator".	***Amended to refer specifically to the Financial Sector Conduct Authority***
ASISA	2	**This commentary relates to the issuing of licenses** All licenses will from promulgation of the FSRB be issued by a financial sector regulator in terms of section 109 of the FSRB – incorporated by reference through sections 104, 105 of the FSRB. The licensing process prescribed in section 109 requires there to be an agreement between two Financial Sector Authorities (as defined in section 1 of the FSRB). Alternatively, that a memorandum of understanding be concluded between the two Financial Sector Authorities in terms of section 77 of the FSRB. This section does not optimally accomplish the objectives of the Twin Peaks Model in that the "agreement" or the "memorandum of understanding" could be entered into between *any* two Financial Sector Authorities. We recommend that the "agreement" or "memorandum of understanding" should be entered into between the Prudential Authority and one other Financial Sector Regulator that is empowered to issue the license. ***Our***	***Noted. The consequential amendments relating to the relationship of the FSR Bill to other Acts has been refined.*** ***Please see refined licensing chapter, specifically part 3, which sets out how the two regulators will cooperate regarding issuing licenses or suspending/varying license, under existing financial sector laws including CISCA.***

		reading of section 109 read with section 77 is that the intention of the section is to create the Prudential oversight when issuing licenses as contemplated in the Media Statement *(extract included for your ease of reference)* "The ***Prudential Authority will supervise the safety and soundness*** of banks, insurance companies and other financial institutions while the FSCA will supervise how financial services firms conduct their business and treat customers. The Reserve Bank will oversee financial stability within a policy framework agreed with the Minister of Finance." (our emphasis) ------- What transitional arrangements are in place to accommodate new license applications, variations of licenses and other activities contemplated in section 104 through to 108, respectively? The Financial Sector Authorities have a period of 6 months (in terms of Section 77) to conclude a memorandum of understanding. In the absence of this memorandum of understanding activities in terms of 104 to 108 will be subject to agreement on a case by case basis. This may create a bottleneck and delay the issuing, variation, imposing conditions on licenses, etc ASISA proposes the following consequential amendments to CISCA: ***1A.*** *(1) Subject to this section, in relation to licences, as defined in the Financial Sector Regulation Act:* *(3) Subject to subsections (1) and (2), if a provision of this Act makes provision additional to, and not inconsistent with, the Financial Sector Regulation Act in relation to a particular matter, the additional provision also applies.* *(4) Subject to subsections (1) and (2), if a provision of this Act is inconsistent with the Financial Sector Regulation Act in relation to a particular matter, the provision of the Financial Sector Regulation Act applies.* ***109****. (1) The issue, variation, cancellation, suspension and withdrawal of licences in terms of sections 99 to 108, or in terms of another financial sector law, in accordance with section 97(1), are subject to this section, and this*	

		section applies despite any contrary provision in a financial sector law. *(2) A financial sector regulator must not–* *(a) issue, renew or vary a licence;* *(b) cancel, suspend or withdraw a licence, including at the licensed financial institution's request;* *(c) revoke a suspension of a licence; or* *(d) grant an exemption in terms of section 98(2);* *unless–* *(i) the other financial sector regulator and the Prudential Authority has concurred;* *(ii) in accordance with the section 77 memorandum of understanding, it has been agreed between the Prudential Authority and the other financial sector regulator that the Prudential Authority's concurrence may be assumed in respect of matters that do not relate to the objectives of the Prudential Authority; or* *(iii) in the case of a systemically important financial institution, the Reserve Bank has concurred.*	
ASISA	3	This clause is not required, the contents of which are already contained in proposed amendment 1A(2) that reads as follows: *"(2) Subject to subsections (1) and (3) and what may be specified in the Financial Sector Regulation Act regarding the exercise of a specific power, a power of the Authority in terms of this Act must be exercised in accordance with the provisions of the Financial Sector Regulation Act.*" **Recommendation** Either retain in 1A(2) or in Section 7 – not both.	***Noted. Clause removed and only repeal of section 7 mentioned***
ASISA	5	Use the definition "Financial Sector Regulator" as opposed to "Authority"	***Authority defined to make specific reference to Financial Sector Conduct Authority***
ASISA	6	**Amendment of section 24** **6.** Section 24 is amended by substituting for the section of the following section: ***[Board of Appeal]Tribunal***	***Noted. Provided for in insertion of 1A***

		24. *A person aggrieved by a decision of the* ***[registrar under]*** *Authority in terms of a power conferred or a duty imposed upon* ***[him or her]*** *the Authority by or* ***[under]****in terms of this Act, may appeal to the* ***[board of appeal]*** *Tribunal referred to in section* ***[26]***~~*156*~~*153 of the [Financial Services Board Act, 1990 (Act No. 97 of 1990)] Financial Sector Regulation Act, on the terms and conditions determined in that Act.*	

Financial Markets Act			
ASISA	8(c)	The FSRB inserts a definition of "central counterparty" and "external central counterparty". These proposed changes were included in draft Regulations to the Financial Markets Act in 2014 and the Industry has commented on those draft Regulations. However, not all of the sections in the draft Regulations are included in this draft FSRB and it is causing some confusion as to what sections will be included in the draft Regulations. For example, though there is a definition of "central counterparty" in the FSRB, yet there is no definition of "counterparty", which is included in the draft Regulations. We require clarity.	***The definition of "central counterparty" and "external central counterparty" have been added to the FMA consequential amendments***
JSE	8*(c)* Amendment of **section 1** of the Financial Markets Act, 2012 – definitions of **"central counterpart"**	We would suggest that the word "~~*and*~~" between subsections *(a)* and *(b)* in the definition of "***central counterparty***", be replaced with the word "*or*".	***Disagree, the definition is consistent with the CPSS-IOSCO Principles for Market Infrastructure***
JSE	8*(h)* & *(k)* Amendment of **section 1** of the Financial Markets Act, 2012 – definitions of **"market infrastructure"** and **"regulated person"**	We would recommend deleting "~~*a licensed central counterparty*~~" from the definition of "***market infrastructure***" and from the definition of "***regulated person***" because a CCP is by definition a clearing house, associated or independent. A central counterparty is merely a clearing house that clears in a particular way; it is not a separate type of market infrastructure. The inclusion could create confusion as to whether a CCP is a separate market infrastructure or whether it is a clearing house as defined. To exacerbate this uncertainty, the definition of a CCP only deals with the novation/becoming a counterparty to cleared transactions. The ESMA definition is , for example, of a much wider ambit and includes, inter alia, clearing, settlement, custody, netting, risk management, collateral management, delivery versus payment, processing of transactions, counterparty risk calculation and various other matters as part of the definition of a CCP.	***A CCP must be licensed for the function that it performs. For avoidance of doubt, the references have been retained*** ***The definition is consistent with the CPSS-IOSCO Principles for Market Infrastructure***
ASISA	10	Guidelines cannot be regarded as legislative instruments. Guidelines provide guidance, an indication of a course of action, not enforceable directives or	***Agree***

		rules. The principal Act is amended by inserting the following section after section 3: ***Operation of this Act and Financial Sector Regulation Act*** ***3A. ………*** *(5)For the purposes of the Financial Sector (Regulation) Act, the following are legislative instruments–* *(a) Directives;* ~~*[(b) Guidelines;]*~~ *(c) Regulations;* *(d) Exchange Rules;* *(e) Depository Rules;* *(f) Clearing house Rules;* *(g) Exchange directives;* *(h) Depository directives;* *(i) Clearing house directives;* *(j) Listing requirements.*	
JSE	10 Insertion of **section 3A(1)*(a)*** of the Financial Markets Act, 2012	Delete extra comma after "*licence*"	***Noted***
JSE	10 Insertion of **section 3A(5)** of the Financial Markets Act, 2012	Delete market infrastructure rules and directives from the definition of legislative instruments and refer to our commentary on the definition of "***legislative instrument***".	***Agree***
JSE	11 *(a)* Amendment of **section 4(1)*(f)*** of the Financial Markets Act, 2012; read with definition of **"key person"**	**Treatment of Nominees** The FMA currently states in s76 that nominees must either be approved by an exchange, a central securities depository (CSD) or the Financial Services Board (FSB). The FSB approval applies to nominees of entities other than authorised users or participants. In terms of s4(1)*(f)*, a person may not act as a nominee unless approved under s76. Consequential amendments to s76 of the FMA remove the approval of nominees by the FSB from the FMA. The consequential amendment to s4	***Noted. The approval of nominees by the FSCA in terms of section 76 has been retained, however refined. The FSR Bill also defines securities services and Authorities can prescribe standards in respect of financial institutions that provide securities services***

		states that a person may not act as a nominee unless approved under s76 (authorised user or participant nominees) or under standards prescribed by the FSCA. The FSRB is however not clear on how nominees get approved under standards prescribed by the FSCA. Nominees who are not approved in terms of s76 of the FMA do not provide a "**financial service**" as defined so they cannot be approved and regulated as a provider of a financial service in terms of the FSRB. Although nominees are included in the definition of "**key person**", it is not clear whether they are then included in the definition of "**regulated person**". Furthermore, in the context in which "**key person**" is generally used in the Bill it refers to a natural or legal person that has a significant role to play in the functions of a regulated entity and usually refers to an individual. Therefore, the inclusion of nominees in the definition of "**key person**" is confusing and still does not achieve the aim of providing for nominees to be approved under the FSRA. The JSE recommends that nominees be removed from the definition of "**key person**", and that instead custody or administration services provided by a nominee be specified separately as a "**financial service**". The FSRB should also be amended to explicitly provide for the approval of nominees (possibly in the Licensing chapter) with the requirements to obtain the approval being set out in conduct standards (s99(1)).	
JSE	11 *(b)* Amendment of **section 4(2)*(a)*** of the Financial Markets Act, 2012	Delete "~~*or central counterparty*~~" as a CCP is by definition a clearing house.	***Disagree. A CCP must be licensed for the function that it performs.***
JSE	13 Insertion of **section 6A(2)** of the Financial Markets Act, 2012	Numbering of "~~*e*~~", "~~*f*~~" and "~~*g*~~", must instead be "*a*", "*b*" and "*c*". And renumber "~~*b*~~" and "~~*c*~~" to "*3*" and "*4*".	***Noted***
JSE	14*(b)* Amendment of **section 7(4)*(b)*(ii)** of the Financial Markets Act, 2012	Delete "~~*indicating*~~" in 14*(b)*	***Noted***
JSE	15(1)*(a)* Amendment of **section 8(1)*(c)*** of the Financial Markets	In the substitution for sub-section 1*(c)*, delete "~~*by*~~" before [**the registrar**]	***Noted***

	Act, 2012		
JSE	15(1)*(c)* Insertion of **section 8(3)** of the Financial Markets Act, 2012	In the insertion (3), delete the extra word "~~*an*~~" before "*extent*".	***Noted***
JSE	17 Amendment of **section 25(2)** of the Financial Markets Act, 2012	Delete "~~*specifying*~~"	***Revised***
JSE	18 Amendment of **section 26** of the Financial Markets Act, 2012	Should be amendment of section 27 and the numbering of all the amendments should be renumbered as a result.	***Noted***
JSE	20(1)*(b)* Amendment of **section 28(1)*(c)*** of the Financial Markets Act, 2012	In the substitution for sub-section 1*(c)*, delete "~~*by*~~" before [**the registrar**]	
JSE	22*(d)* Insertion of **subsection 35(6)** of the Financial Markets Act, 2012	The JSE would argue that rules cannot be amended or repealed by conduct standards. Instead the authority must direct the SRO to change its rules. The numbering of sub-section (6) appears to be incorrect – it should be (7).	***Provisions have been deleted***
JSE	24 Amendment of **section 47** of the Financial Markets Act, 2012	All reference to Ministerial regulations should be deleted and replaced with standards where appropriate.	***Disagree, the Minister's discretion to make regulations must be retained (i.e. important framework matters). Where it is considered that certain matters would be best provided for in standards (i.e. the detail and day-to-day implementation matters), the Minister could potentially repeal regulations and new requirements may be prescribed by the Authority in joint or conduct standards accordingly.***
JSE	24*(a)* Insertion of **section 47(1A)** of the Financial Markets Act, 2012	A central counterparty is not a separate category of licensed market infrastructure; it is merely a licensed clearing house that clears in a particular way. Therefore, it should not be necessary to refer to the licensing of a central counterparty in s47(1A).	***Disagree, the CCP function is a systemic function and a CCP must be licensed in terms of the Act. The licence must specify the functions that must be performed by the CCP. Through licensing, governance and risk management standards, the***

			framework is designed to preclude entities that are not capable of meeting the high standards required to perform this critical CCP function.
JSE	24*(d)* Substitution in **subsection 47(4)*(b)*(ii)** of the Financial Markets Act, 2012	Delete "~~*indicating*~~" in sub-section *(d)*(ii).	***Revised***
JSE	25 Amendment of **section 48** of the Financial Markets Act, 2012	All reference to Ministerial regulations should be deleted and replaced with standards where appropriate.	***Disagree***
JSE	25(1)*(b)* Amendment of **section 48(1)*(c)*** of the Financial Markets Act, 2012	Should be refer to a clearing house and not a CSD.	***Noted***
JSE	25(1)*(c)* Insertion of **section 48(1A)** of the Financial Markets Act, 2012	The inclusion of such specific requirements in new subsection 48(1A) is contrary to the FMA as principles-based legislation. This raises the question of why CCPs are given such importance relative to other market infrastructure and how specific requirements in the FMA would interact with standards issued in terms of the FSRA.	***The CCP function is a systemic function and the nature of the CCP to assume the counterparty credit risk of counterparties to bilateral transactions means that the CCP is concentrating risk to itself. The CCP must adhere to high standards of risk management and regulation, including additional capital. The risk management standards incorporate the Principles for Financial Market Infrastructure that are relevant to the operation of a CCP, and must be demonstrated for the qualifying CCP standard***
JSE	25(1)*(c)* should be (d)* Insertion of **section 48(4)** of the Financial Markets Act, 2012	We suggest deleting sub-section 4 as it is not necessary.	***Disagree***
JSE	26	References to Ministerial regulations should be deleted and replaced with	***Disagree, a CCP must be licensed for the***

	Insertion of **section 49(1A)** of the Financial Markets Act, 2012	standards where appropriate. This amendment implies that a separate CCP license will be required but it is a category of an independent or associated clearing house.	***function that it performs***
JSE	27(1)*(b)* Insertion of **section 50(3A)*(b)* & *(c)*** of the Financial Markets Act, 2012	s50(3A)*(b)* and *(c)* – the functions described in these sub sections are applicable to all clearing houses not just central counterparties. They are also vague so it is unclear what a central counterparty is expected to do in performing these functions. Therefore we suggest that these sub sections be deleted. We also refer to our comments on the definition of a CCP in that s50(3A)*(a)* would, on its own, be too restrictive.	***Disagree, the systemic CCP function requires that a CCP adhere to high standards of risk management and regulation. The Minister may prescribe these functions in greater detail in regulations***
JSE	28(1)*(a)* Insertion of **section 53(1A)** of the Financial Markets Act, 2012	We suggest deleting sub-section 1A as it is not necessary.	***Noted***
JSE	30*(b)* Substitution in **section 55(1)*(c)*** of the Financial Markets Act, 2012	Should be with reference to a trade repository and not a CSD.	***Noted***
JSE	35 Amendment of **section 60(1)*(b)*** of the Financial Markets Act, 2012	Should be reference to chapter 9 and not chapter 11.	***Noted***
JSE	36*(b)* Insertion of **section 61(3A)** of the Financial Markets Act, 2012	Insertion 3A should reference subsection (3) not sub-section (1).	***Noted***
JSE	36*(b)* Insertion of **section 61(3B)** of the Financial Markets Act, 2012	Insertion 3B is unnecessary because the determination would never be urgent because the market infrastructure cannot conduct the additional business without the Authority's consideration.	***Disagree***
JSE	36*(b)* Insertion of **section 61(4)** of the Financial Markets	Amendment to subsection (4) should reference subsection (3), not subsection (1).	***Noted***

	Act, 2012		
JSE	41*(a)* Amendment of **section 67** of the Financial Markets Act, 2012	Numbering is wrong due to subsection (5) being deleted. We would strongly recommend that the Minister still be required to approve any cross-border mergers and acquisitions that could have a material impact on the economy, for example if an external market infrastructure wished to merge with a local market infrastructure.	***Noted***
JSE	41*(a)* Amendment of **section 67(7)** of the Financial Markets Act, 2012	The distinction between 15% and 49% in subsection (7) is now irrelevant due to the deletions in subsections (4) and (5).	***Noted. The subsections have been retained, with revisions***
JSE	44 Amendment of **section 74** of the Financial Markets Act, 2012	We would suggest deleting the entire section because the FSRB already deals with standards but in recognising our earlier point that standards imposed on authorised users, participants and clearing members should be applied through the rules.	***Noted. The subsections have been retained, with revisions***
JSE	45*(b)* Amendment of **section 76*(b)*** of the Financial Markets Act, 2012	Delete *(b)* as it is incorrectly numbered.	***Noted***
JSE	49 Amendment of **section 90** of the Financial Markets Act, 2012	We suggest replacing "~~*joint standards*~~" with "*conduct standards or joint standards, where appropriate*" because the PA will not have an interest in the accounting records of all regulated persons.	***Disagree***
JSE	50 Amendment of **section 91** of the Financial Markets Act, 2012	Section 50 should reference 2*(b)* and not 3*(b)*.	***Agree***
JSE	53*(b)* Amendment of **section 96(1)** of the Financial Markets Act, 2012	Should refer to Chapter 9 and not Chapter 11.	***Renumbering has been noted***

JSE	55 Amendment of **section 98(5)** of the Financial Markets Act, 2012	Should refer to Chapter 12 and not Chapter 14.	***Renumbering has been noted***
JSE	57 Repeal of **section 105** of the Financial Markets Act, 2012	Since the section is repealed, it is not necessary to amend it, however if the section is not repealed, it should reference Chapter 15 and not Chapter 16.	***Noted***

Pension Funds Act			
ASISA	17- Insertion into 1A of PFA	Sec 17 of the FSRB states that the PFA is amended "*by inserting after sec 2*:" (i.e. inserting sec 1A). This appears to be a typo – sec 1A, which deals with licensing requirements, will follow after sec 1 (not after sec 2). Furthermore, 1A(c) refers to sections "*104, 105 and 116, 117 and 206"* of the FSRA – sections 116 & 117 however do not concern licensing - should the reference to 116 maybe be 106 instead and the reference to 117 be 107 instead? **Insertion of section 1A** **17.** The principal Act is amended by inserting after section ~~2~~ 1:	***Agreed. Inserted after section 1***
ASISA	22-Amendment of section 16 of PFA	**22.** Section 16 of the principal Act is amended by the substitution for subsections (6) and (7) of following subsections: *"(6)* *(a) If the rules of a fund provide that the benefits which may become payable to a category of members are subject to the discretion of the management of the fund, the* ***[registrar]*** *Authority, after having consulted the Prudential Authority shall, on the request of the fund, on good cause shown by any officer of the fund or on the initiative of the* ***[registrar]*** *Authority, determine what amount or scale of benefits is to be taken into consideration for the purpose of the valuation, and* ***[such]*** *the determination by the* ***[registrar]*** *Authority* ~~*Licensing Regulator*~~ *shall be binding upon the fund.*	***Noted. Section 16 no longer amended***
ASISA	23(c) Substitution of subsection 18(5)(a) of the PFA	*(c)* by substituting in subsection (5) for paragraph *(a)* the following paragraph: *"(5)(a) The* ***[registrar]*** *Authority may at any time following an inspection carried out or investigation conducted* ***[under section 25]*** *in terms of Chapter* ~~*11*~~ *9 of the Financial Sector Regulation Act, or for any other reason which the* ***[registrar]*** *Authority may consider necessary in the interests of the members of a fund, direct that an investigation in terms of section 16 or an audit or both an audit and such investigation be conducted into the financial position of a fund generally or with reference to any financial aspect of the fund.".*	***Cross reference to FSR Act no longer included in amendment***
ASISA	25- Amendments to Chapter 26 of the	**25.** Section 26 of the principal Act is amended by the substitution in	***Cross reference to FSR Act no longer included in amendment***

	PFA	subsection (1) for paragraph *(b)* of the following paragraph: *“(b) direct that the rules of the fund, including rules relating to the appointment, powers, remuneration (if any) and removal of the board, be amended if the results of an inspection or* ***[on-site visit]*** *investigation* ***[under section 25]*** *in terms of Chapter ~~11~~ 9 of the Financial Sector Regulation Act necessitates amendment of the rules of the fund or if the* ***[registrar]*** *Authority is of the opinion that the fund–* *(i) is not in a sound financial condition or does not comply with the provisions of this Act or the regulations affecting the financial soundness of the fund;* *(ii) has failed to act in accordance with the provisions of section 18; or* *(iii) is not managed in accordance with this Act or the rules of the fund.”*	

Short-Term Insurance Act			
Reviewer	**Section**	**Issue**	**Decision**
SAIA	35- Repeal of Section 5 of the principal act: Annual Report	As commented on Clause 50 (1) (Page 44) of the FSR Bill, there is no obligation in terms of the Bill on the FSCA to issue an annual report or audit its financial statements, or a corresponding requirement such as the requirement on the PA to issue an Annual report for tabling in Parliament. This ties in with the repeal of Section 5 of the STIA that currently places an obligation on the Registrar to submit an annual report to the Minister, which is also to be tabled in Parliament. We do not agree with the repeal of Section 5 if there is no provision or obligation on the FSCA to produce an Annual report and financial statements as required of the PA.	***Treasury considers transparency, accountability as well as sound financial management to be important in the proper functioning of both the Prudential Authority (PA) and the Financial Sector Conduct Authority (FSCA). FSCA is a PFMA entity and therefore, the PFMA requirements apply.***
SAIA	40- Amendment to Section 26 of the principal act:	In reading the proposed amendment it is clear that the amendment is intended to amend *Section 25* of the principal act that deals with the *"Limitation on control and certain shareholding or other interests in short-term insurers."* It is suggested that the amendment be correctly referenced to Section 25 of the principal act (and not section 26 as it currently reads that deals with the furnishing of information by certain shareholders) The amendment proposes limiting the aggregate nominal value of shares allowed to be held by a person without prior approval by the Regulator to 15 per cent of the total nominal value of all issued shares, where the principal act currently allows for 25 per cent. We do not support the amendment to 15 per cent and recommend that a 20 per cent shareholding be used as this aligns with international standards and best practice and with suggestions made above regarding Significant Owners in Chapter 10 of the Bill. The reduced limit on shareholding may require some larger financial institutions with institutional owners to unbundle and sell shares and this could have unintended consequences for financial soundness and relicensing delay.	***Agree, the correct referencing has been indicated.***

General Comments

Reviewer	Section	Issue	Decision
BASA	General Comments	Certain critical definitions are ambiguous or cast too widely, such as the definition of a "financial conglomerate". It is important that definitions are in line with international principles and standards, such as those issued by the Basel Committee on Banking Supervision and that the meaning thereof facilitates the execution of requirements. This is important for consistent implementation of international financial norms and standards, and cross-jurisdictional comparisons. Ambiguity in respect of the scope of the Bill and the perimeter of the Twin Peaks, including: • Financial Intelligence Centre (FIC) and Anti-Money Laundering (AML)/Know Your Customer (KYC) • National Payment System Department (NPSD) and payments regulation/supervision • Consumer Protection Act (CPA) and National Consumer Commission (NCC) • Cross-jurisdictional issues. The new chapters dealing with Significant Owners and the Framework for Supervision of Financial Conglomerates. The need for alignment with other legislation, including the Protection of Personal Information Act, the Banks Act, the CPA, the National Credit Act (NCA) and the Financial Advisory and Intermediary Services (FAIS) Act. For example, the Bill does not take cognizance of certain "exempt" customers as these Acts do. Certain matters relating to the transitional arrangements in respect of licensing. The powers granted to the Authorities in respect of: • Legislative instruments and especially the proposed retrospective application of standards.	***We have noted the general comment, and in addition have considered all specific comments on legislative clauses in the relevant chapters.*** ***Definitions have been refined and the interaction between the FSR Bill and existing financial sector legislation has been clarified.*** ***The approach to setting standards has also been clarified.*** ***The understanding of the FSR Bill as the first step in phasing in the implementation of Twin Peaks is correct. It is agreed that establishing the appropriate balance of both principles- and rules-based legislation will form an important component of the legislative framework as it is reformed.***

		• Enforcement and the need for appropriate checks and balances in respect of inspections and investigations. Principles vs Detailed Prescriptive Rules. We strongly recommend that, in order to ensure that an effective market conduct culture and programme which is led by business leaders is embedded into the organisation through business operational platform controls, there needs to be an appropriate balance of principles-based legislation, supported by rules where necessary. It is recognized that the Twin Peaks system is being implemented in phases and that this Bill is essentially introducing the legislative framework for the new system, and that much of the detailed regulatory requirements will be included in forthcoming standards and the other legislation (such as the proposed CoFI Act).	
ASISA	General comments	ASISA and its members also wish to acknowledge the extensive work that National Treasury has put into the revised Draft Bill and all the documentation that accompanied the release of the Bill. It is appreciated. We trust that you will view the comments from our members on the FSR Bill in the positive spirit in which they are intended. The Bill creates a relatively complicated organizational structure which will require extensive interaction between regulatory authorities. We recognize that the new regulatory framework will require a paradigm shift both from the perspective of the regulators and the regulated entities. The increased obligations and responsibilities will be a challenge to all. Consistency and certainty in respect of legislation and regulations remain of utmost importance to the industry. Whilst our members support the intended outcome of the FSR Bill, they are concerned about the joint application of the FSR Bill and current financial sector laws and the potential overlaps and inconsistencies it may cause. Legislative change invariably leads to increased costs and the impact of such costs on the industry and their clients should not be underestimated. Also of concern, is the enhanced powers afforded to the regulators and the potential for those powers to be exercised in a manner that could be detrimental to	***The acknowledgement is welcomed.*** ***National Treasury is aware of the risks inherent in the significant reform of financial sector regulation currently underway. This includes the potential for uncertainty. For this reason, reforms are being implemented incrementally to minimize disruption.*** ***The FSR Bill has been refined where necessary to ensure clarity in how this legislation, once enacted, with relate to existing financial sector legislation in place. See for example the definitions of financial products and services, the licensing chapter, and the consequential amendments provided for. The FSR Bill does provide the required tools for the regulators to be able to fulfill their mandated objectives, but does also provide appropriate checks and balances for the regulators in making use of such tools. See for example the sections on consultation when making regulatory instruments, enforcement and administrative actions, and the Financial***

		financial institutions and their clients. The application of new requirements in respect of systemically important financial institutions, significant owners and financial conglomerates also causes uncertainty.	***Services Tribunal*** ***As noted, the reforms will involve significant changes for regulators and the regulated alike. National Treasury has held extensive public and bilateral consultations with stakeholders in developing the legislation and will continue to do so as it is implemented. We welcome continued useful engagement as it progresses.***
PASA	General	At the outset we would like to state that PASA believes that the intent behind introducing the Twin Peaks system of financial sector regulation is in the national good and interest and therefore supports the purpose and spirit of the Bill and are in favour of the approach that has been taken towards the supervision and regulation of the NPS in the Bill. A fair and efficient NPS is a vital element in the delivery of better outcomes for financial customers. There are many issues within the domain of the NPS that have a direct bearing on the mandate of the FSCA, such as Interchange Determination and the Collections Review. To further strengthen cooperation and collaboration it is suggested that the Bill requires that the National Payment System Department (NPSD) of the SARB enters into cooperation agreements with the FSCA and PA respectively. It is also proposed that the Head of the NPSD is included as a member of the Council of Financial regulators. PASA also believes that a harmonised and holistic approach would assist in the efficiency and effectiveness of regulation of Financial Institutions which may promote the Financial Stability in South Africa, the safety and soundness of Financial Institutions and fair conduct to consumers. A lot of solid thinking and collaboration between National Treasury (NT), SARB and Financial Services Board (FSB) has gone into defining a Twin Peaks structure that best serves the interests of South Africa. The proposed reform seems sound and highly defensible. As alluded to above, this does not mean the changes required will be simple or seamless as we believe the	***The support for the policy intention for the Twin Peaks reform is welcomed. The impact of the Twin Peaks reform on the payment system is a matter that has been the subject of much engagement both prior to and since the FSR Bill was published in December 2014.The reforms can carry implications from a stability, prudential and conduct perspective, and the relation between the payments system and market infrastructure has also been noted.*** ***In order to minimize disruptions to this crucial sector during the Twin Peaks reform process, the manner in which the payments system is being addressed in the FSR Bill has been refined. The NPS Act remains a responsibility of the SARB, overseen by the National Payment System Department. Once the Bill is enacted, the FSCA will be able to set conduct standards only on payment service providers. In the interests of ensuring stability, such standards will only be set with the concurrence of the Reserve Bank. This will allow the FSCA to start looking at the fair treatment of customers when they make use of payment services, but in the interests of systemic stability, will not allow for the FSCA to have jurisdiction over the full payment system infrastructure.***

		implementation of the Twin Peaks Model will require significant transformational change to existing South African financial services regulation. A pragmatic and prudent approach is therefore required. **Roles and Responsibilities** Although the current role of the NPSD within the SARB is clear, the revised Bill does not provide great clarity on the NPSD's role (specifically) in future. The links to other financial sector regulators have been strengthened in the revised Bill. The requirement in respect of Joint Standards set out in sub-clause 96 (4) is also welcomed. In respect of supervision and regulation of the NPS, the Bill provides much more clarity in respect of each authority' role and responsibilities. In addition to 1.8 above, the role of PASA (or the payment system management body) within the Twin Peaks system has not been spelt out in the explanatory documents accompanying the Bill. Given the regulatory functions delegated to PASA in terms of the NPS Act; the importance of the NPS to achieving the objects of this statute; and the review of the SRO model mentioned in the Draft Market Conduct Policy Framework, this is a matter that is worth more consideration by National Treasury. Accordingly, it is assumed that PASA will retain its current role as payment system management body under the NPSD of the SARB, whose role will be clarified as part of Phase I.	***The role of the SARB and PASA as it currently stands in relation to the payment system will remain in place.*** ***There is likely to be interaction between the FSCA, NPSD, SARB and PASA as the conduct focus is developed going forward. We welcome the willingness of PASA to engage in the platforms created for cooperation and collaboration in the FSR Bill and will continue engagement with the payment management body through the NPSD***
Warwick Wealth	General	The South African financial sector is resilient, well-structured and efficiently regulated. Accordingly, turning the whole financial sector on its head would appear both unnecessary and inappropriate at the current time when the country is being financially squeezed to raise living standards and provide the necessary infrastructure to facilitate this. Democracy without sufficient schools, medical facilities, electricity generation, efficient and professional policing etc is not democracy. Therefore, placing additional financial strain on the financial sector at this time, could well result in negative consequences outweighing the positives. There has been reference to the IOSCO principle that Authorities should be	***Noted. The financial sector is not being "turned on its head". Regulation of the sector is being improved in order to ensure that the sector continues being well-regulated and that better outcomes are achieved. The Twin Peaks reform will not put undue strain on the financial sector.***

		"independent" by which it is meant that they should be free of any influence. The Bill emphasises the role to be played by the "Deputy Governor" the "Director Generals" etc. Given that such persons are employed in such capacities by virtue of having been appointed by the Government it is questionable as to whether such authorities will be able to act independently.	***Please note the chapters establishing the regulatory authorities as independent entities and the functions they are able to perform without approval from the Executive.***
IMF-MCM	General	Thanks for the opportunity to review the new draft FSR. We understand from the FSAP team that this draft is one more step in South Africa's efforts to transition through a learning-by-doing process into a twin peaks system, and builds on the act that started the move over a year ago. We note that the revised Draft FSR is a marked improvement upon the earlier draft reviewed by the FSAP team in 2014, to the extent that several FSAP recommendations are reflected in the current version. These include more clarity on the SARB's financial stability mandate, streamlining the role of the FSOC to be more advisory, and including the NCR on the FSOC. While acknowledging the authorities' intentions of taking additional steps to fully implement the twin peaks model there are a few points that would bring this act closer to the recommendations left by the FSAP mission last summer. • **Roles of the prudential authority (PA) and the conduct authority (FSCA):** The roles of the PA and FSCA remain blurred and we would urge the authorities to consider clarifying them further in line with FSAP recommendations. • **Working out the interactions between FSR and other pieces of sectoral legislation:** In the same vein as with the resolution framework, the authorities could use the FSR to better define the responsibilities and powers of SARB and FSB as PA and FSCA respectively, harmonizing their roles across types of financial intermediaries. The FSAP had pointed out that the different pieces of specialized legislation needed to be harmonized, so that the same set of general principles could be applied across types of intermediaries. In doing so, the FSR could clarify that there are both prudential and conduct aspects related to "financial products" as well as to "financial services."	***Noted. The final draft of the FSR Bill has been further revised to take into account, among others, the two matters raised below. The roles of the authorities are clear in relation to the financial sector – they will have full scope over the entire sector, but will supervise the sector for different risks (prudential and conduct). The revised Bill also takes steps to more clearly delineate how it will relate to existing pieces of financial sector legislation. In this regard, see the chapter on licensing, schedule 2 noting responsible authorities, and consequential amendments to existing legislation.***

SAVCA	General- Treatment between retail consumers and institutional clients	• While SAVCA is in broad agreement with the contents of the Bill, its objectives and general structure, SAVCA is of the opinion that the Bill could be more explicit about the fact that certain categories of consumers ought, in principle, to benefit from a different regulatory regime when it comes to the application of the Bill. • In particular, SAVCA believes that investors who take up investments in private equity investment vehicles are, in the main, sophisticated and institutional clients who are able to seek expert professional advice and whose decision makers have extensive experience within the private equity and venture capital industries. • It should also be noted in this regard that prior to private equity investors making capital commitments to private equity fund managers, detailed due diligence exercises are carried out on the private equity fund managers. This includes the extent of the experience of investment professionals, their historic track record, review of current investments and performance, review of investment methodology and due diligence on target investments, review of prior investment reports, review of valuation methodology and review of quarterly reporting formats. • In addition to this stringent evaluation process, the terms and conditions of investing in private equity funds are arrived at through a lengthy process of contract negotiation between the fund manager and the larger investors in a fund. In South African funds, many of the investors are either experienced investors from overseas, or alternatively South African investors with experience of investing in international funds. In either case, these investors will generally insist that the latest terms from international best practice are incorporated into the local fund agreements, providing a degree of protection that is both leading edge and appropriate to the unique nature of private equity investing. • This is, with respect, very different from the retail financial services industry, where clients and investors do not necessarily have such capacity and, therefore, require additional legislative protections.	***One of the key pillars of Twin Peaks is to streamline and harmonise regulation consistently across the financial sector, minimizing the opportunity for regulatory gaps and for overlaps. In relation to ensuring the fair treatment of customers across the product life cycle, this is intended to be an objective that the FSCA has across the financial sector in its entirety. It is not limited to customers "who do not have the knowledge and financial means to make informed investment decisions."*** ***However it has been noted, and agreed, that the nature of conduct risk in the financial sector will differ depending on the type of financial products/services and customers involved. The FSCA will therefore take a proportionate and risk-based approach to supervision to take account of such differences. It is not expected that the exact same standards that apply to retail customers will apply to, for example, companies involved as customers in the financial sector, in the same way that the same prudential standards that apply on large institutions would differ to those imposed on small institutions. The supervisory approach and regulatory tools of the regulators will enable them to apply a differentiated approach accordingly. The primary legislation is intended to provide a comprehensive base of supervision over the financial sector in its entirety. Differentiating approaches to regulation would not be appropriate in primary legislation.***

		• While the objectives of the Bill are laudable and the treatment of all consumers on an equitable basis theoretically sound, in practice, not all consumers are equal as they differ greatly in their decision-making ability in respect of investment decisions. Against this background, SAVCA respectfully submits that: • SAVCA members could potentially be prejudiced, both financially and otherwise, if the Bill is applied across the board without an explicit distinction being drawn between retail consumers, on the one hand, and institutional investors, on the other. • Institutional investors in South African private equity funds would also be prejudiced, since the fund manager would inevitably have to pass on the extra cost of inappropriate retail orientated regulation to the fund, resulting in lower returns for its investors. • Neither the public interest nor any protection which the South African public might be perceived to require would be prejudiced if the Bill were to make explicit provision for sophisticated and institutional investors to benefit from a "lighter touch" regulatory regime. If the Bill were to amended in this manner, this would not frustrate the achievement of the basic objectives of the Bill for the following reasons: • the philosophy behind consumer protection, as SAVCA understands it, is to protect clients who do not have the knowledge and financial means to make informed investment decisions; and • in the case of the private equity and venture capital industries, however, this protection (or, at least, the full extent thereof) is not necessary as clients and investors who are active in this industry have sufficient financial know-how and expertise and/or access thereto.	

Deloitte	General	• Resolution – there are very few references clarifying which regulatory body will be the resolution authority. Even if the function is within the Reserve Bank, it will introduce another challenge in co-ordination and co-operation. • Financial crime – there is no mention of financial crime within the draft bill. In the UK, financial crime is the responsibility of the Financial Conduct Authority, the equivalent of the South African Financial Sector Conduct Authority. • Innovation in the provision of financial services – there is currently a lot of debate in the UK/EU about crowd funding, peer-to-peer lending, e-money (in various guises etc.). By and large these fall to the Financial Conduct Authority, the equivalent of the South African Financial Sector Conduct Authority. Is there clarity how these responsibilities will be allocated?	***Resolution is mentioned in relation to the SARB's mandate of overseeing financial stability. Further detail on resolution will be provided separately from the FSR Bill.*** ***Financial crime is mentioned in the FSR Bill including as one of issues on which both prudential and conduct standards may be set. Note that in South Africa a Financial Intelligence Centre is established to oversee the prevention of financial crime.*** ***Innovation in the financial sector is catered for through allowing 'new' financial products and services which may not be currently regulated under existing laws, to be designated under the FSR Bill once enacted. If these products/services bring prudential risk they will be regulated by the Prudential Authority and if they pose conduct risks the FSCA will regulate them.***
Cliffe Dekker Hofmeyr Inc	General	• Practical considerations must be borne in mind in the drafting of the Bill and the new regulatory regime introduced by the Bill should not be unwieldy. • The restrictions to be introduced in terms of the Bill should be viewed in the context of the size of the South African economy. • The inclusion of too many restrictions may affect the share price of companies, as it could affect the ability of shareholders to dispose their shares. Minority shareholders will also be affected if capital raising is more difficult and require regulatory approval. • Should regulatory approval be required for capital raising, this will prolong the capital raising exercise, which could prejudice the company, its business and its stakeholders.	***Noted. The impacts of the Twin Peaks reform process have been carefully considered throughout the multi-year process involved in bringing about the reforms. These include the impacts on institutions, companies and the economy. Note too that the provisions of PAJA will still apply.***

		• The Bill should contain turnaround times for action by Regulators and Regulators should adhere to such time periods, otherwise companies (including listed and public companies) and their businesses could be prejudiced.	
Standard Bank	General	Standard Bank supports the implementation of the Twin Peaks regulatory and supervisory system for the financial sector, and the objects of the FSRB in achieving a financial system that works in the interests of all stakeholders, and supports balanced and sustainable economic growth in our country. The second version of the FSRB reflects the good work that National Treasury has done to substantially build on the first draft and to incorporate many of the suggestions that were submitted on the initial version published in December 2013. Standard Bank welcomes and supports the manner in which the revised FSRB has dealt with the following matters: - Strengthened mechanisms for cooperation and coordination between financial regulators; - Simplification of the approach to what were termed "mono-regulated entities" and "dual-regulated entities" in the first draft of the FSRB; - Procedures in respect of supervising financial stability and for crisis management are much improved; - The incorporation of the BCBS guidelines in respect of the chapter on SIFIs; - Many of the definitions are more precise and less ambiguous; - The robust consultation requirements set out in respect of prudential and conduct standards; and - The steps introduced to consolidate and enhance Financial Services Ombuds Schemes. It is Standard Bank's belief that a number of the provisions in these two chapters severely and unjustifiably restrict shareholders in a financial institution from exercising their property rights in respect of their shareholding. Standard Bank's primary concern relates to the provisions that extend existing conditions on the acquisition of ownership in a financial institution to the disposal of ownership. This will have negative consequences for the long-term commercial viability of the financial sector and will impede	***Comments are noted with thanks. Regarding:*** ***Financial Crime: this has been elaborated on in the revised Bill. The authorities will work with the FIC as current regulators do.*** ***Payment system/PASA: The application of Twin Peaks in relation to the payment system has been clarified. The FSCA can set conduct standards on payment service providers, but only with the concurrence of the SARB. The role of PASA and the SARB (National Payment System Department) remain as is.*** ***Financial education: this has been noted. Further engagement on manners in which to improve financial capability and literacy are expected once the FSCA is established and operationalized*** ***Funding: A Levies Act will be consulted on, providing further detail*** ***Fair administrative action: The FSR Bill provides a number of checks and balances to ensure that the actions of the regulators are exercised fairly and that they can be held accountable. Note also that the provisions of PAJA do still apply.***

		the ability to raise capital in the future as investors (and potential investors) will be reluctant to invest in the sector if they perceive that their ability to exit is too circumscribed. **Regulatory perimeter, architecture, and coordination** The regulatory framework for the financial sector is complex. The introduction of the Twin Peaks system is a welcomed initiative to remove some of the unnecessary complexity and facilitate greater harmonization and consistency across the regulatory framework, as well as to remove opportunities for regulatory arbitrage. For this to be achieved there needs to be a clear regulatory perimeter, clarity in respect of the regulatory architecture, and strong statutory mechanisms for coordination. The second draft of the FSRB goes a long way towards providing this. **Combating Financial Crime** Combating financial crime needs to be brought within the boundaries of the Twin Peaks perimeter – and AML/CTF requirements are a central component of this. Failure to do so will perpetuate the uneven playing field that exists in respect of the extensive regulatory obligations arising from FICA. Standard Bank believes that the FSRB does not sufficiently articulate how the Financial Intelligence Centre (the FIC) and the Financial Surveillance Department fit into the Twin Peaks system. **Supervising the NPS** Standard Bank is generally supportive of the approach that has been taken towards the supervision and regulation of the National Payments System (NPS) in the Bill. The role of the National Payments System Department within the SARB is clear and the links to other financial sector regulators have been strengthened in the revised Bill. The requirement in respect of Joint Standards set out in sub-clause 96(4) is welcomed. **The role of PASA within the Twin Peaks system**	

		The role of PASA within the Twin Peaks system has not been spelt out in the explanatory documents accompanying the Bill. Given the regulatory functions delegated to PASA in terms of the NPS Act; the importance of the NPS to achieving the objects of this statute; and the review of the SRO model mentioned in the Draft Market Conduct Policy Framework, this is a matter that is worth more consideration by National Treasury. **Delivering Financial Education** The need for financial education is not disputed: capable financial customers are a vital ingredient in a well-functioning financial system. Standard Bank is not convinced that it is the FSCA that should be mandated with the actual delivery of financial education. It is suggested that consideration is given to whether it would be better to establish a dedicated agency to deliver financial education. Such an agency could be housed within the FSCA, but ring-fenced and separated from its regulatory and supervisory functions. It may also be worthwhile to explore the linkages between such an agency and a revamped financial services ombuds system. **Funding twin peaks** The regulatory and supervisory structures that will be established by the FSRB will need a substantial amount of resources to be able to deliver on their mandates effectively. This raises the question as to how the new regulatory regime will be funded. Unfortunately the Explanatory Memorandum was silent on this important question except to refer to a forthcoming Money Bill: the Financial Sector Levies, Fees and Charges Bill. Standard Bank would prefer that the question is at least discussed at this stage of the Twin Peaks legislative process and that consultation occurs before a Bill is formally published for comment. Currently, we find ourselves commenting on a new regulatory system without understanding the cost implications for regulated firms. A better understanding of the costs involved will also allow financial institutions to budget accordingly.	

		Various funding models will have differing impacts on regulated firms, especially financial conglomerates. Implementing Twin Peaks should not result in an increase in the contribution of banks towards funding the regulatory authorities, especially given the current treatment of cash reserves by the Reserve Bank (which is not a matter that affects other types of financial institutions). Furthermore, some consideration could be given to at least a portion of the costs of the system being defrayed by the fiscus, as the effective regulation of the financial system is a public good. While there may be good reasons why such an option is not appropriate, we strongly suggest that at a minimum there needs to be proper consultation with the industry on funding options. **Fair and efficient administrative action** The success of the Twin Peaks system in achieving the important financial sector policy objectives written in the Objects of the Act relies a great deal on the capacity of the new regulators to provide fair and efficient administrative action. The chapters of the FSRB dealing with information-gathering, on-site inspections, investigations; licensing; enforcement; and administrative actions, have been looked at from this perspective. Numerous suggestions to strengthen the checks and balances in respect of the powers and procedures set out in these chapters have been included in the BASA response to the Bill, and won't be repeated here. We would like to highlight the need for cooperation between the new Financial Services Tribunal (FST) and the National Consumer Tribunal (NCT) in respect of matters related to consumer credit. It is suggested that coordination between the various adjudicative bodies with remit over the financial sector should form part of the work of the Council of Financial Regulators. Also, it is proposed that the FST and the NCT be required to enter into a Memorandum of Understanding. It is also suggested that the funding of the FST is reconsidered. This may be a function that is more appropriately funded from the fiscus to ensure that it	

		remains independent from the two authorities whose decisions it may review. The decision to proceed with an "internal model" in respect of the tribunal is understood, however we believe a ring-fenced budget for the FST will enhance its independent status.	
Micro-Finance South Africa	General- Role of NCR	**Consumer Credit Organs of State** In the view of the MFSA the ultimate accountable ministry is the National Treasury and categorically not of the Department of Trade and Industry. The historical reasons for vesting the National Credit Act and therefor the NCR within the DTI no longer exists and was in fact an unintended consequence. Perpetuating the current arrangement between the DTI and NCR in our humble opinion will stifle the implementation of Twin Peaks. The current silos between National Treasury and the DTI are deeply entrenched and practical experience has proven to be counterproductive. Despite efforts for harmonisation, as long as the current DTI and NCR arrangement exists an additional layer of bureaucracy will further complicate engagement and interpretation. Culturally National Treasury and DTI approach matters differently sending mixed signals to an already complicated market. Interdepartmental harmonisation when dealing with complex consumer credit matters is complicated for example in dealing with matters around: • Payments; • Data; • Legal Debt Collections; • Alternative Dispute Resolution; • Social Grants; • Cross Border market development. MFSA is of the opinion that in order to bring the required stability to the overall credit value chain, the opportunity should not be missed to, within the context of the work that is currently underway, to make the necessary structural change. ***The recommended structural changes is that the responsibility for consumer credit in all its aspects is placed under the jurisdiction of National Treasury.***	***The National Treasury and DTI have engaged on the Twin Peaks reform process and have agreed that close alignment and better coordination and consistency in regulation for the financial sector will be vital to its success. The FSR Bill provides for strong platforms for better cooperation and coordination among all regulators involved in the financial sector, including the NCR.***

SAIA	General	Generally, SAIA and its members support the introduction of the Twin Peaks system of financial sector regulation in South Africa. The following matters are of concern and may require further consultation: **Fees, Levies and funding of the change in regulatory model** The Bill sets out many changes to the model of regulation of the South African financial services sector, including changes to current and existing financial services legislation. The Bill provides for the Chief Executive Officer in the case of the Prudential Authority (PA) and the Executive Committee in the case of the Financial Sector Conduct Authority (FSCA) to determine fees and charges in terms of the Financial Sector Levies, Fees and Charges Bill (to be enacted) but holds no further information on how the changes proposed in the Bill and the new authorities will be funded. This makes it very difficult for the industry to comment meaningfully on the change in regulation, without having an understanding of the cost implications on the levy paying constituencies. In support of the implementation strategy of the Twin Peaks model of Regulation, the SAIA and its members call on the authorities to fast track and engage with industry on the economic cost and expected funding of the Twin Peaks model. As a critical part of a smooth transition to an effective and efficient new model this initiative should have specific regard to the industry implications and consequential impact on consumers. In addition, the quantification of these extra costs will allow industry to pre-empt, budget for and develop strategic approaches to identifying and managing the risk of any adverse impacts on the cost of doing business and negative consumer outcomes. **The Ombudsman for short-term insurance** The Bill suggests industry representation no longer be allowed on the Boards of Voluntary Ombudsmen. Currently the Board of the Ombudsman for Short-term Insurance (OSTI) includes industry representatives.	***General comments have been noted, in addition to the consideration of comments on the specific chapters. With regard to funding, a Levies Act will be consulted upon. In reference to Ombuds, please see redrafted Ombud chapter and responses to comments submitted. We welcome the opportunity to engage further on the revision of the ombuds system. References to the Council for Medical Schemes have been significantly refined in the FSR Bill.***

		We invite further consultation on the views of the National Treasury on industry association representation on the OSTI Board, and whether the SAIA *ex officio* membership to the OSTI Board will be allowed to continue. We also confirm our availability to engage on the future framework of the Ombud Schemes. **Onsite inspections and investigations powers granted to the Council of Medical Schemes** The SAIA supports the objectives of cooperation and collaboration between financial regulators, however we suggest that the inclusion of the Council for Medical Schemes as a financial sector regulator for purposes of this Chapter should be limited to instances where there are suspected contraventions of the Medical Schemes Act, 1998 and that onsite inspections by the CMS should be conducted in conjunction with the financial sector regulators.	
Strate	General- 8(2) 10 76(2)*(d)* 109(2)*(d)*(iii)	**Blurring of division of roles and scope of regulation/ supervision/ oversight for CSD** 1. International standards Clause 10 determines that the Reserve Bank will assess MI's compliance with international standards (such as IOSCO principles), and develop a supervisory framework in this regard. It seems as if this clause goes wider than just "*financial stability*" aspects which are the responsibility of Reserve Bank (see 8(2)). We understand the need as set out in 10*(b)*, and with regard to "*participant defaults*" in particular, but believe there will be unnecessary and confusing duplication and overlap with Authorities' (PA's and FSCA's) roles with regard to the supervision and application of the other principles to MIs (e.g. Recommendation 1 and 2 of IOSCO deal with legal basis and governance)? It is submitted that the licensing Authority would be in a better position to supervise and check the adherence to some/most of the international standards. The assessment process is intense and time-consuming for both the assessor and assessed. Unnecessary duplication must be avoided, as indicated in 76(2)*(d)*. Please ensure the Reserve Bank's assessment is not in addition to the Authorities' assessments.	***The lack of clarity in the published draft of the Bill related to the roles and responsibilities of the regulators and of SROs in the financial markets had been noted and taken into account. Please see revised references to market infrastructure and the scope of jurisdiction of the FSCA and PA in relation to market infrastructure and securities services. The revisions to the definition of license does also now take into account the authorisations made by SROs.***

		2. <u>SIFI</u> In the case of a CSD which is also designated as a SIFI, the Reserve Bank must concur with regard to the licence (109(2)*(d)*(iii)). The practical implementation of the division of roles and scope is still not clear enough in this draft of the Bill. It is also not clear whether the status as SIFI may be a "permanent" status. For example, if the CSD wants to make a CSD rule to address a gap in the IOSCO Recommendations on a governance issue, is the CSD in its prior consultations and approval process now to deal with representatives from both the Reserve Bank and the FSCA, or also the PA? 3. <u>Oversight</u> In general, please note that the exercising of "*oversight*" by the "*non-licensing*" regulator over financial institutions will often be impractical, may cause uncertainty and will add an additional regulatory burden on the CSD. It is submitted that wording be included in the Bill to address this concern, because "*extensive consultation and coordination requirements between the Regulators*" (see Response document on 12/233) only deal with certain aspects of Authorities' (PA's and FSCA's) roles, but does not, for example include clause 10 with the Reserve Bank.	
JSE	**General**	**The existing SRO model in the context of Twin Peaks** The proposed Twin Peaks system for regulating the financial sector is designed to make the financial sector safer, and to better protect financial customers in South Africa. The JSE acknowledges the merits of a Twin Peaks regulatory system and is supportive of a move towards the establishment of the two regulatory authorities, namely the Prudential Authority (PA) and the Financial Sector Conduct Authority (FSCA) as proposed in the FSRB. The JSE notes that the revised Bill gives additional powers to the new authorities in addition to those provided in the FMA (i.e. an "overlay"). The JSE also recognises that the powers are intended to ensure that the authorities have the required tools to perform effectively in this first phase of their establishment, without being limited by gaps in the existing law.	***The comments are noted; there have since also been engagements with the JSE related to the provisions of the FSR Bill and its application in relation to existing SRO models. Please see responses to the specific clauses commented on by the JSE in relation to this. This includes a number of definitions, the chapter establishing the FSCA, and the chapter on licensing. Existing licenses and licensing provisions will remain in place, at least for phase 1 of implementation ahead of the review of the overarching licensing regime in phase 2 of implementation.***

		However, the "overlay" of prudential and conduct standards in relation to the activities of financial institutions that are subject to the regulatory oversight of market infrastructures appears to go one step further than "plugging" the gaps in existing law. Rather, the manner in which the "overlay" is given effect to in the Bill suggests a significant amendment to the current self-regulatory model of securities regulation in South Africa. That is, certain regulatory powers and functions previously vested in the self-regulatory organisations (SROs) or financial market infrastructures (FMIs) appear to be assumed or duplicated by the new authorities. Although the SROs have not been divested of those powers and functions, the new authorities have been granted similar powers and functions over the same regulated institutions. In addition to establishing the two new authorities, the FSRB is intended to replace the current Financial Services Board Act No. 97 of 1990. The sectoral statutes, such as the FMA, remain in force and effect and, consequently, licensed exchanges, licensed central securities depositories (CSDs) and licensed clearing houses continue to fulfil public duties and functions as set out in the FMA. Regulatory duties and responsibilities, that is, the regulation of the securities services provided by the (exchange) authorised users, (CSD) participants or (clearing house) clearing members through the adoption and enforcement of rules by the FMI, are the foundation of the public duties imposed on licensed FMIs. Although the term "self-regulatory organisation" is not defined in the FMA (it was defined in the Securities Services Act No. 36 of 2004), the term SRO is widely used in South Africa, and internationally, to describe the regulatory model of licensed FMIs. The JSE has conducted business as a stock exchange for more than 120 years and has, since the promulgation of the Stock Exchanges Control Act of 1947, exercised the type of public duties and functions required of an SRO. In terms of the FSRB, the PA and FSCA are tasked with the enforcement of the provisions of the FSRB and the regulation of the matters set out in the FSRB. Secondly, the licensed FMIs exercise public duties and functions as set out in the FMA and are responsible for the supervision and regulation of their authorised users, CSDPs and clearing members. For example, the JSE, as licensed exchange is obliged to ensure a fair, efficient and transparent market for the securities listed on its exchange, has to adopt and enforce rules as	

		stipulated in the FMA and is obliged to fulfil all the functions of a licensed exchange as set out in section 10 of the FMA. The Registrar of Securities Services, the regulatory authority established in terms of the FMA (this will be the FSCA in terms of the FSRB) is tasked with the enforcement of the FMA, oversight and supervision of the licensed FMIs and is empowered to assume responsibility for any of the JSE's regulatory or supervisory functions if the Registrar considers it necessary to achieve the objects of the FMA. The JSE (and other SROs) is therefore invested with the primary responsibility of fulfilling its regulatory responsibilities as set out in the FMA. The Registrar (or any other regulatory authority established by the FSRB) will and should only be empowered to assume responsibility of these public functions if the FMI in question fails to act in accordance with its regulatory and licensed duties and functions. It would create uncertainty in the South African financial markets if the important role played by SROs is not expressly recognised in the body of the FSRB. This type of regulatory uncertainty would be anathema to the integrity of and confidence in the South African financial markets and should be avoided. The provisions of the FSRB do not adequately acknowledge or deal with the critical role played by the exchanges, CSDs or clearing houses, both as SROs and as market infrastructures. The FSRB should be amended to record the regulatory duties and responsibilities of licensed FMIs. It is important to record that licensed FMIs may not provide securities services or products due to the insoluble conflicts of interest that this will create. FMIs fulfil licensed duties and functions and are responsible for the regulation of the securities services provided by its members. It is not clear whether or not the drafters intended to amend the current self-regulatory model by granting powers to the new authorities to issue standards dealing with matters that are already within the scope of rules and listing requirements made by the SROs and enforce those standards directly upon financial institutions regulated by the SROs. The discussion document released with the FSRB: "Treating Customers Fairly in the Financial Sector: A Market Conduct Policy Framework for South Africa" seems to support the	

		idea that amendment of SRO authority was intended as the document discusses the initiative underway to review the SRO model of regulation in South Africa and talks to the consideration being given to the relative "power" of supervision between the statutory regulators and SROs, exploring which powers should be drawn back to the statutory authorities over time. Therefore, without a clear understanding of the FSRB drafters' intent in relation to the existing SRO model, the JSE would like to take this opportunity to express its views on any significant shift in the current SRO regulatory framework. In line with the International Organisation of Securities Commissions Objectives and Principles for Securities Regulation (IOSCO Principles), South Africa's SROs are subject to authorisation by and ongoing oversight from the Registrar of Securities Services (the registrar). The registrar's existing powers, encapsulated in the FMA provide the registrar with a comprehensive set of powers to oversee, monitor, investigate and address matters within the operation of an SRO. The FMA therefore clearly delineates the respective roles of the statutory regulators and the SROs. The JSE, as an exchange licensed under the FMA, operates as an SRO and on the basis that well-regulated markets are key to the provision of fair, efficient and transparent markets which enhance the JSE's brand. It is accountable to the registrar, in terms of its license, for ensuring that the objectives of the FMA are met in its role as an SRO. In fulfilling these SRO obligations, the JSE aligns with, and in all applicable material respects, complies with the IOSCO Principles which are based on 3 objectives: to preserve market integrity (fair, efficient and transparent markets), to preserve financial integrity (reduce systemic risk) and to protect investors. In terms of the FMA, the JSE is required to supervise compliance with its rules and listings requirements by both authorised users and issuers respectively, as well as enforce the rules and listings requirements governing them. The JSE must also supervise compliance with the FMA by its authorised users, report any non-compliance to the registrar and assist the	

		registrar in enforcing the FMA. The JSE is required to possess and maintain adequate resources and infrastructure to do so. It is the JSE's strong contention that the current SRO model is the appropriate model for South Africa and has proven to be both efficient and effective. The delineation of powers between the SROs and the registrar provide an appropriate level of government oversight of SRO activities without encumbering or usurping an SRO's ability to respond quickly and flexibly to changing market conditions and business needs. As front-line regulator, the JSE has intimate knowledge of the market which is essential for creating a self-regulatory framework, which is perceived as appropriate and reasonable by authorised users. This is particularly important in an environment where there is a variety of markets and authorised users (and business models), to which a "one size fits all" regulatory approach may not be appropriate. Furthermore, the involvement of the market in the development of the SRO rules means more efficient rules, wider compliance with and acceptance of those rules, timely adjustment of rules to meet changing conditions, and flexible and effective enforcement of rules. The JSE is of the view (and this stance is also supported in other jurisdictions) that SROs and the market expertise and experience that they offer are, in the current economic climate, more important than ever. The continued and rapid evolution of financial markets and products coupled with their inherent complexities make a compelling argument for an increase in the regulatory role played by licensed FMIs. FMIs have an intimate knowledge and understanding of the markets and the market practices and products that they regulate. The flexibility, efficiency and speed with which FMIs can adjust and enforce rules, listings requirements and/or directives are the best manner to regulate the fast (and ever) changing and complex securities markets' landscape. In addition hereto, SROs are well-funded, technologically advanced, subject to the direct oversight and supervision of the regulatory authorities, accountable by virtue of the peremptory provisions of the FMA, constrained to only act within their regulatory powers and have to be structured to avoid or manage conflicts of interests (see below).	

		Even the most capable of regulatory authorities will not be able to efficiently regulate the financial industry without the specialised knowledge of complex financial products, securities transactions or trading mechanisms that are provided by front line regulators such as the JSE and Strate. In addition hereto, the regulatory authorities cannot be everywhere at once and the FMIs, being at the proverbial coal face, are able to implement the policies of the regulatory authorities in an efficient manner by using their market experience to regulate their members and the securities services that they provide. FMIs are also able to act faster than regulators to new developments in the financial markets. One argument made against the SRO model is around the inherent conflicts of interest that SROs face. SROs globally continue to implement governance and other measures to properly manage conflicts of interest. The FMA, which came into effect in June 2013, places further scrutiny on the management of conflicts of interest. In particular, the Financial Services Board determines certain requirements to be adhered to in relation to the types of arrangements that need to be put in place to ensure that conflicts of interest are handled appropriately. The SRO Oversight Committee was created as a committee of the JSE Board in 2011. The purpose of the committee is to oversee the SRO activities of the JSE. It serves as an independent check on the appropriateness of the JSE's SRO activities and the manner in which conflicts of interest are managed by the JSE. It also creates a reporting line between the SRO focused divisions of the JSE, Issuer Regulation and Market Regulation, and the Board. The committee reports to the JSE Board at least twice a year and it has broad powers to require input from the heads of the regulatory focused divisions and the JSE staff. Members of the committee recuse themselves when a matter being discussed involves information that could give rise to a potential conflict of interest. The Company Secretary confirms that there were no such conflicts during the period. To conclude this section, we would like to caution against any move away from the SRO model. In the sub-sections below, we point to specific aspects of the drafting of the FSRB that are problematic in the context of the SRO model.	
Ramola Naidoo	General- **Bringing**	I am forwarding you an electronic letter from the National Credit Regulator in	***The concern is noted. The newly created***

	Body Corporates Managing Agents under the regulatory environment	response to my submission of a query and complaint relating to bridging finance granted by managing agents at the request of the trustees representing our sectional titles scheme body corporate. The bridging finance/loan is either granted to the body corporate, a juristic person not subject to the Companies Act, directly by a managing agent or by a financial company associated with the managing agent, sometimes independent and sometimes a subsidiary company of the managing agent or where the directors of the managing agent's company or close corporation are the same as the directors of the financial institution. Our body corporate has placed a huge financial burden on individual homeowners by obtaining bridging finance or loans often when trustees unilaterally seek these loans for improvements to common property or even where trustees obtain loans or bridging finance when the members of the body corporate have imposed restrictions on loans. This is a common practice and this is causing huge overindebtedness and forcing homeowners to sell their homes as they cannot afford to pay the escalating levies and special levies. I have already written to your department but have had no response. I saw on parliamentary TV the department's presentation on these regulations and your Twin Peaks policy. I know that this is the last day for comment but request the opportunity to discuss and clarify my comments. The National Credit Regulator has responded to me that they are unable to regulate bridging finance by managing agents as the financial institution has to be "arm's length". Managing agents are a major business activity (within a multibillion rand industry) that is unregulated. Bodies Corporate are also largely unregulated in respect of the trustees spending of money and in respect of the preparation of the annual budget except for vague provisions in the Sectional Titles Act. Our budget for this year is R2.6 million for mainly fruitless expenditure when we pay municipal property rates directly to the City Council. We also pay individual electricity bills. Will the National Treasury be willing to intervene and investigate this widespread practice that is having a huge impact on the national economy and	***Financial Sector Conduct Authority is intended to proactively identify emergent risks to customer outcomes across the financial sector as a whole. The Twin Peaks system is intended to put in place more consistent and harmonised ways of dealing with these risks, including when different regulators may be involved, such as in the property sector.***

		the personal pocket of ordinary working class and middle class South Africans? Will you regulate the sectional titles industry and impose stricter rules to prevent trustees from imposing high monthly levies and special levies?	
Strate	**General** 1(1); 12(3); 17-18; 19(1)(g); 23(3); 26(1)(a); 41(2)(7);41(4),(7); 63(5); 67 (2)(a), (3), (6) and (7); 74(2); 75(1); 78(1); 79(3)(i) and (j); 81(2); 87; 150(4); 155(3)(a); 157(4)(a); 197	**SRO role of the CSD; Role of MI in managing systemic risk and systemic events; Representation of the CSD in the new structures and committees, "*disqualified person*".** The Bill uses various terms under which the CSD may fall. It is clear that a CSD may act as a "***person***", "***regulated person***", "***financial institution***", "***eligible financial institution***", "***market infrastructure***" (MI), "***organ of state***", or "***designated person***", or possibly "***systemically important financial institution***" in terms of the Bill. Therefore the CSD will be "*regulated*", "*prudentially regulated*", "*supervised*" and/or "*overseen*" by the PA, FSCA and Reserve Bank and the various committees, albeit for different roles and different focus areas... Furthermore, the CSD is not only a regulated person like some of the other financial institutions, but a regulator (a self-regulatory organisation (SRO)) with regulatory and supervisory powers over CSD Participants and others in terms of the FMA. The MIs that are SROs are in a unique position. The Bill should therefore recognise this unique status and the important contribution SROs make or could make in their segments. Especially in the systemic event or systemic risk space, the SROs should be regarded as "co-regulators" to get the full picture of the financial system. This structure is inherently complicated. It is therefore crucial that the CSD is well represented in committees to fully understand policy expectations, its own rights and duties, but also to perform its role in the specific segment to contribute to the overall regulation of the financial sector. Consultation mechanisms are created in the Bill, but we don't believe "consultation" is the best solution in this complicated structure. For example, clause 78(1) refers to "*an organ of state that has regulatory or supervisory functions in respect of a financial institution*" (the SRO role) and where consultation is required between the organ of state and financial sector regulators in this regard. The Bill also makes mention of "*arrangements in*	***Please see responses to Strate comments on the specific clauses mentioned.***

		place for consulting representatives of financial institutions" when the financial sector regulators propose to make legislative instruments, etc. (87). We are of the view that besides these kinds of arrangements, full alignment between the regulatory and supervisory objectives of the Bill and the sectoral laws (e.g. FMA) is not possible or practicable without proper representation of the CSD in the various structures and committees of the Bill. See specifically the role of "***organs of state***" in 26(1)*(a)* and the specific SRO role of co-regulation with the financial sector regulator. Clause 74(2) refers: If an authorised user or CSD participant is declared a systemically important institution –where is the alignment to the SROs and its duty to enforce? On 75, please note procedures under FMA and CSD rules in case of an "*insolvency proceeding*", including the appointment of a Failure Manager. It is important to build into the legislation opportunities that encourage open communication and interaction between the Authorities and the MIs. SROs are stakeholders in the existing regulatory framework and this trust should not be lost in a new regulatory framework. However, in ***all*** instances in the Bill, the co-operation and collaboration mechanisms of representation and participation of the CSD in committees will only be discretional upon another person's authorisation. Please address this aspect as submitted below. Please also refer to Strate's previous comment in Response document on 40/233 with regard to a representation opportunity for Strate. We note the response, but the wording in the Bill is still not strong enough to enshrine the principle. In the interest of SA Inc., participation of the MIs in these circumstances must be set out in law and not just be discretionary. The SROs are not included in the definition of as "***financial sector regulators***", yet information can be "o*btained in the performance of its power or function*" in terms of the FMA as a financial sector law. Clause 197(1)*(a)* is then further silent on SROs and it only provides as follows: "*may be utilised or disclosed by the financial sector regulators or the Reserve Bank*". What is the position of the SROs? See specifically:	

		1. Governor's Management Committee It is submitted that for 12(3), the Governor [delete: ~~*may*~~] and replace with the following: "*must, where applicable*" establish a management committee consisting of representatives of the *relevant market infrastructures*…. 2. Financial Sector Contingency Forum It is submitted that in 23(3), "*the* [FSCF] [delete: ~~*may consist*~~] *of representatives from* . . . [as *determined by the chairperson of the* [FSCF]"and replace with the following*:* "*the* [FSCF]*must include**representatives from*..." 3. Financial Stability Oversight Committee This committee's functions are to exchange views about the activities of the Reserve Bank and the regulators relating to financial stability (17(2)*(b)*; 18*(a)*). It may be necessary to include "*other relevant organs of state*" to get the full picture. The SROs, such as the exchanges, clearing houses and CSDs can provide information on the role players throughout the holding chain that they are regulating. However, clause 19(1)*(g)* does not make express provision for any representation of the MI or any direct consultation process with the MI ("*any additional persons appointed by the Governor with the concurrence of the Minister*"). Please make provision for a MI to attend a meeting of the Committee; the right to vote at the meeting can be excluded (see wording in 63(5); 37(5)). The possible conflict of interests can further be addressed (see wording in 38; 42). 4. Executive Committee Please insert in 63(5) "*may invite or allow any other person, including representatives of* ...*other organs of state,**to attend a meeting . . . has no right to vote at the meeting.*" 5. Other committees for the FSCA established by the DG and Executive Committee The DG's committees (67(2)*(a)* and 67(3)) and Executive Committee's committees (67(6) refers: Please ensure representation of the MIs in the Bill in order for it not to be a discretional issue.	

		6. Committees established by the Oversight Committee Clauses 41(2)*(a)*; 41(4); 41(7) refer: Please ensure representation of the MIs in the Bill in order for it not to be a discretional issue. 7. Council of Financial Regulators The SROs should in principle be part of such a Council, since its purpose is to co-operate and exchange views with regard to international and domestic regulatory challenges. As long as the SROs are recognised as such, the representation should not be discretional for the Minister, or even the DG (National Treasury). Please delete in 79(3)*(i). . . of any organ of state [that the Minister determines]* Please delete in 79(3)*(j) . . . of any other organisation [that the Minister determines]* 8. Working groups and subcommittees of council of Financial Regulators The SROs would be able to add a lot of value here. Please ensure that the Council of Financial Regulators include the SROs as part of the membership criteria (s81(2)). 9. "Disqualified person" "*A disqualified person may not be a member of the (PA) committee*": 41(7); also "*A disqualified person may not be a member of the (FSCA) committee*": 67(7). Note that a "disqualified person" means in *(a)* a person who is "*engaged in the business of the financial institution, or has a direct material financial interest*". This implies that a MI representative would always be regarded as a "*disqualified person*" and not allowed to be a member of "*a [any] committee*" of these Authorities. Very often valuable benefit is derived from the insight, experience and skills of people involved in the financial institution where such a person can share information. Such deliberations do not mean that the conflicted person will	

		necessarily influence the decision. The prohibition seems very drastic. The person with a conflict of interest should, and would, recuse himself at the meeting as part of good governance principles when a decision is made where he may be conflicted. Please reconsider. In 150(4); 155(3)*(a)*; 157(4)*(a)*, "justice must be seen to be done" and the disqualification of interested parties are correct and good practice.	
Strate	**General**	**Regulation** Financial Institutions have an increased regulatory burden. **Inconsistencies** Throughout the Bill and consequential changes to the FMA the words co-operation and cooperation have been used interchangeably, please check Bill throughout for use of cooperation and co-operation.	***Noted***
JSE	General	**Recognising an equivalent jurisdiction** It is not apparent what is intended with the concept of "recognition" of external market infrastructures. One possible reading is that external market infrastructures are exempt from licensing under sections 9, 29, 49 and 56 of the FMA. If it is indeed so that the "recognition" of external FMIs would have the effect that these FMIs are exempt from the licensing requirements as set out in the FSRB and the FMA, this would amount to a radical departure from the existing regulatory requirements that stipulate that any entity that conducts business in South Africa as an exchange, clearing house or CSD, must be licenced in terms of the FMA and will be regulated by the regulatory authorities established in terms of statute. External market infrastructures were indeed defined in the FMA but were not dealt with in the body of the FMA itself, apart from the reference to the Minister's powers to prescribe regulations in respect of the functions that may be exercised by external FMIs. Section 1 of the FMA defines these entities as being authorised to perform functions in terms of the laws of a foreign	***Please see the consequential amendments to the FMA***

		jurisdiction. The FMA does not provide that these entities may perform these services in South Africa without applying for a licence nor does it state that these entities may fulfil the duties and functions of a clearing house without meeting the peremptory requirements of the FMA. The Minister may prescribe further requirements that may be applicable to an external clearing house if it wishes to fulfill the functions of a clearing house in South Africa. But these requirements are additional requirements over and above the other peremptory requirements that these entities have to meet (such as licensing). As an example, the provisions of sections 2, 3, 4, 6, 47 – 53 and 109 of the FMA, (read with the consequential amendments) provide that any entity that does business as a clearing house in South Africa and/or that fulfils the duties and functions of a clearing house has to be licensed as a clearing house as stipulated in the FMA and has to comply with all the other peremptory requirements applicable to clearing houses that intend to do business as such in South Africa. Section 47(1) of the FMA stipulates that a clearing house must be licensed in terms of section 49. Section 9 of the FMA provides that the Registrar may grant a clearing house a license to perform the functions of a clearing house set out in section 50 of the FMA if the applicant complies with the requirements as set out in the FMA and if the objects of the FMA will be furthered by the granting of the license. Section 50 of the FMA stipulates the functions that have to be fulfilled by a clearing house. Some of these functions are cast in peremptory terms: it must provide an infrastructure, it must manage the clearing of securities which it accepts for clearing and so forth. The consequential amendments have now introduced a new type of FMI to the FMA, it being an "*external central counterparty*" and provides for the "*recognition of external market infrastructures.*" The consequential amendments to the FMA (see, for example section 6A) may seem to be in conflict with these peremptory requirements as it is unclear whether a "recognised" external FMI has to be licensed in accordance with the peremptory provisions of the FMA that deal with the licensing requirements.	

national treasury
Department:
National Treasury
REPUBLIC OF SOUTH AFRICA

		The provisions of the FSRB and FMA reflect the policy priorities and proposals highlighted in National Treasury's "***A Safer Financial Sector to Serve South Africa Better***" policy document of February 2011, various international recommendations by, amongst others, the International Organisation of Securities Commissions (IOSCO), such as the recommendations contained in the latter's final report on "Regulatory Issues Raised by Changes in Market Structure" (December 2013). The FMA was also drafted mindful of the negative impact experienced internationally as a result of fragmentation on the integrity and efficiency of securities markets. Some of the important policy considerations underpinning the FSRB and FMA are financial stability (via, inter alia, the strengthening of the regulatory framework) and the protection of consumers of financial services (which implies investors). In order to ensure financial stability, it has been recognised that system-wide risk has to be managed through a macroprudential regulatory approach, which effectively requires an extended perimeter of regulation and an increase in the scope of regulation is indeed one of the proposals put forward by National Treasury for the promulgation of the FSRB. Extended regulation, in turn, includes the proper licensing of service providers and market structures. In the February 2011 document, National Treasury points out that "*regulations should be of universal applicability and comprehensive in scope in order to reduce regulatory arbitrage*". In consonance with these important matters of policy, the FSRB and the FMA deal extensively with the peremptory requirements applicable to all exchanges, clearing houses and CSDs. These provisions are the embodiment of the policy of the highest authority of the Republic of South Africa and are cast in peremptory terms. Contraventions of these provisions are unlawful and, in some matters of particular importance (such as that all exchanges, clearing houses and CSDs have to be licensed) also visited with criminal prosecution and criminal sanctions such as a large fine and/or imprisonment. If external FMIs (such as a clearing house) effectively function as such within the borders of the Republic and do not fulfil any other dissimilar function, but	

		are not subjected to all the requirements imposed on FMIs that have to be licensed in terms of the FSRB and/or the FMA, the opportunity for regulatory arbitrage and a generally unequal playing field is created. Investor protection, the mitigation of risk, including systemic risk, should be a uniform concept especially in circumstances where a systemically important FMI, such as a clearing house, intends to do business in the South African markets. The effect of the consequential amendments would be that these foreign FMIs will not be subject to the regulatory oversight of the local regulatory authorities and that their South African business will be regulated by its regulator in the foreign jurisdiction. In addition to these issues of principle, the fact that a foreign FMI may operate as, for example a clearing house, will lead to two tiers of regulation of FMIs that may operate in South Africa. Firstly, the local entities subject to the regulatory oversight of the South African authorities, that have to be licensed to conduct business and, as a result, have to fulfil their duties and functions with due regard to the public interest. Secondly, the foreign, unlicensed entities, "recognised" as FMIs that are not subject to the direct and on-going supervision of the South African regulatory authorities and that are not constrained to conduct business in accordance with the public duties and responsibilities imposed on entities licensed in terms of the South African statutes. This will create an unequal playing field and will result in a different type of regulation for FMIs that conduct business in an identical manner. If foreign FMIs are allowed to conduct business in South Africa without a licence and in the absence of local regulatory oversight, these FMIs may not be compelled to conduct their business in accordance with the onerous public duties imposed on the equivalent South African entities. The foreign entities would not be obliged to conduct its business with due regard to the public interest (nor would a South African regulator be able to compel them to act in this manner). The foreign entities will only be subject to the laws of its jurisdiction and subject to the oversight of its regulator. The JSE recognises that the cross-border nature of financial markets requires	

		an appropriate supervisory and cooperative regulatory framework should external market infrastructures wish to perform functions within South Africa, but given the concerns raised above we would therefore recommend that the FSCA and PA still be required to license external market infrastructures and to attach conditions to that licence. The Australian example refers: "*An Australian clearing and settlement (CS) facility licence may be granted to an overseas CS facility under the Corporations Act 2001 (the Act) at the Minister's discretion, and only where, among other things, the Minister is satisfied that the applicant is subject to requirements and supervision in the foreign country in which its principal place of business is located (its 'home jurisdiction') that are sufficiently equivalent to those in Australia 'in relation to the degree of protection from systemic risk and the level of effectiveness and fairness of services they achieve'. The Minister must also have regard to a range of other matters relating to the relevant entity's authorisation to operate the same facility in the home jurisdiction and supervision by the regulator(s) in the home jurisdiction.*" Currently, the Principles for Cooperation in s6C allow only for the sharing of information and for on-site visits but provide the FSCA or PA with no authority to impose conditions on the granting of "recognition" or on a license. Furthermore, s6C does not impose a duty on the authorities to regularly assess the equivalence of the jurisdiction, nor does it impose requirements on the authorities to supervise the external market infrastructure on an on-going basis.	
JSE	General	**Proposed discontinuation of the directorate of market abuse** One of the significant consequential amendments to the FMA is the discontinuation of the Directorate of Market Abuse (DMA) through the repeal of section 85 of that Act. The Memorandum on the Objects of the FSRB does not provide the rationale for the consequential amendments to the sectoral Acts and therefore it is not clear what the reason is for the proposed discontinuation of the DMA. We recognise that the Financial Sector Conduct Authority will have extensive enforcement powers through the provisions of	***In the interests of harmonisation and rationalization of administrative processes and procedures across the financial sector, the DMA has been replaced by the FSCA directly. The FSR Bill does allow however for the FSCA to create administrative action committees. Such administrative action committee/s will allow for a more flexible approach that provides the same set of powers for all administrative actions by the FSCA, and not just those that relate to the FMA.***

		the FMA and the FSRB and that those powers extend to the investigation of market abuse. However, the DMA (and its predecessors) has played a significant role in the combatting of market abuse over a period of approximately 15 years and has been very effective in that role, and we believe that careful consideration needs to be given to whether it is correct to conclude that the DMA no longer has a role to play. South Africa is well regarded for the regulation of its securities markets. Market abuse is probably the most visible form of market misconduct in terms of the impact that it has on investors' perceptions of the integrity of a market. Investor confidence is built on a combination of factors but local and international investors' perceptions of the extent of market abuse in a market and the effectiveness of anti-market abuse regulation and enforcement is one of the key pillars in building that confidence. The effectiveness of the regulatory structures in combatting market abuse is one of the big success stories of financial sector regulation in South Africa. In addition to the significant roles played by the FSB's Department of Market Abuse and the market surveillance teams of the licensed exchanges, the DMA has contributed significantly to that success as it brings together people with valuable skills and knowledge from a variety of relevant disciplines to contribute to important decisions during the enforcement process. Although the DMA is not intended to act as an administrative body when exercising its powers in terms of the FMA (s85(1)*(d)*), it exercises the important powers of the FSB to – a) Institute any civil proceedings contemplated in the Market Abuse chapter of the FMA; b) Investigate any matter relating to a market abuse offence; and c) Institute any administrative enforcement proceedings contemplated in the Market Abuse chapter of the FMA. The repeal of section 85 of the FMA suggests that these powers will be assumed by the FSCA and that the FSCA will no longer rely on the input of external parties in exercising those powers. It can of course be argued that the	***A specialist DMA type panel can therefore be established in the new regime. It does not need to be specifically named as such.***

		FSCA must take full responsibility for any enforcement action that is required to address perceived breaches of the provisions of the legislation that it is responsible for enforcing, and that it should not need to rely on any external input. However, it has been recognised in our financial markets law for the past 15 years that the fight against market abuse will benefit from a unique approach; one in which input is obtained from market, legal and financial experts in making important decisions on the investigation of potential market abuse and the initiation of enforcement proceedings. Whilst a market conduct regulator would typically have a good understanding of the market abuse provisions that it is enforcing and possess effective investigative skills, it would not necessarily possess the insight into the trading strategies and business activities of the entities from which market abuse may originate. Furthermore, whilst a market conduct regulator will naturally possess legal skills it can often benefit from the insights of legal professionals who are steeped in some of the legal complexities associated with the prosecution of offences such as market abuse and who can provide useful input into the scope and focus of investigations and the decisions on whether or not to initiate enforcement action. The DMA has brought together these skills and insights in a very effective manner over the past 15 years and we are of the view that the DMA has made a significant contribution to the effectiveness of the enforcement structures in South Africa and the fight against market abuse. We believe that the question needs to be asked as to whether there are any specific gains from discontinuing the role of the DMA and whether the FSCA enforcement structures would no longer benefit from the valuable skills and insights of the members of the DMA. If there are concerns regarding the powers, size or composition of the DMA, or whether the DMA is as efficient and effective as it can be, then those concerns should be addressed. However, the discontinuation of the DMA in its entirety would be counterproductive at this stage in South Africa's efforts to combat market abuse.	
Centre for Applied Legal Studies	General	CALS submits that financial institutions and the financial sector more generally, have human rights obligations and recommends that the Draft Bill be amended to reflect this fact in law. In summation, CALS submits that the National Treasury amend the Draft Bill to:	***Noted. Please note that the Constitution always prevails in South African law. The suggestions are therefore not agreed with***

		• Align with international, regional and domestic regulations mandating human rights observations by business entities (including financial institutions); • Align with the Constitution and the Bill of Rights, which imposes obligations on private actors, such as business entities, in accordance with section 8(2) of the Constitution; • Recognise the importance of the protection, promotion, fulfilment of and respect for human rights in the financial sector; • Expressly provide for the protection, promotion, fulfilment of and respect for human rights; and • Expressly provide for the recourse in the event of non-compliance with the human rights protection afforded by the Draft Bill. The Constitutional Court confirmed the principle of constitutional supremacy in case of *Affordable Medicines Trust*.11 Further, regarding the supremacy of the Constitution in light of the duty on the courts to declare invalid any law inconsistent with the Constitution, to the extent of its inconsistency; the Constitutional Court said: *"This commitment to the supremacy of the Constitution and the rule of law means that the exercise of all public power is now subject to constitutional control."* Therefore, firstly law must not be inconsistent with the Constitution. Secondly, law must seek to realise the objectives of the Constitution, and in so doing promote the human rights ideals of the Constitution. It appears therefore, that there are two levels to constitutional supremacy. This is further evidenced by the provisions of the Constitution which call for legislative measures to realise human rights.13 It is with this in mind that we suggest that the Draft Bill be amended to meet the standards of constitutional supremacy. CALS recommends that the Draft Bill be amended to: (i) reflect Constitutional supremacy and the commitment to human rights in	

		the Preamble and Purpose clause; (ii) demand compliance with human rights standards and the Constitution by financial institutions; and (iii) include provisions relating to the monitoring of human rights compliance by financial institutions operating in the financial sector.	