Financial Services Board Act: Matrix				
KEY TO CLASSIFICATION OF AMENDMENTS:				
	Overarching amendment proposed in respect of all sector specific Acts			
	Alignment with Companies and Public Finance Management Acts.			
	Regulatory gap: Policyholder protection and amendments to enhance clarity & certainty			
	Amendments of sections which do not currently form part of the Bill			
Clause	**Section in tabled bill**	**Commentator**	**Summary of concern/ comment**	**Proposed response**
54		ASISA (13.02.2013) (18.04.2013)	Although the Responses to Comments Received document indicates that the clause has been amended, it still provides for services contemplated in the repealed Insurance Act, 1943. It is thus again suggested that a clause be included in the Bill to delete section 1(a)(x) of the Financial Services Board Act.	**Agreed.** **54**. Section 1 of the Financial Services Board Act, 1990 (in this Part referred to as the principal Act), is hereby amended— *(d)* by the deletion in paragraph *(a)* of the definition of "financial institution" of subparagraph (x).
54	**Section 1** of the Financial Services Board Act, 1990 (In this Part referred to as the principal Act), is hereby amended— *(d)* by the insertion after the definition of ''financial institution'' of the following definition: '' **'Financial Services Board legislation'** means any law referred to in paragraph (a) of the definition of 'financial institution';''';	ASISA (13.02.2013) (18.04.2013)	ASISA members suggest that the definition should be in respect of Financial Institution legislation and not Financial Services Board legislation. The view is held that it is more appropriate to refer to Financial Institution legislation as the Acts in question regulate financial institutions. A reference to Financial Services Board legislation may create the impression that the legislation emanates from the FSB and not	The FSB considers it more appropriate to refer to Financial Services Board legislation as it is clear what is meant by this. The previous wording "financial sector legislation' caused confusion. It is however proposed to extend the current provision to also **Proposal:** '' **'**Financial Services Board legislation' means *(a)* any law referred to in paragraph (a) of the definition of 'financial institution'**;** *(b)* the Inspection of Financial Institutions Act,

			Parliament. The references to Financial Services Board legislation in clauses 63, 65, 66, 68 and 201 should be replaced with reference to Financial Institution legislation.	1998, and *(c)* the Financial Institutions (Protection of Funds) Act, 2001'';
54		FSB	Due to the amendment of section 22, it is necessary to define 'regulatory authority".	Section 1 of the Financial Services Board Act, 1990 (In this Part referred to as the principal Act), is hereby amended— *(g)* by the insertion after the definition of ''Public Finance Management Act'' of the following definition: **"regulatory authority"** means – *(a)* any organ of state as defined in section 239 of the Constitution of the Republic of South Africa, 1996, responsible for the supervision or enforcement of legislation, or a similar body designated in the laws of a country other than the Republic to supervise or enforce legislation of that country; or *(b)* a market infrastructure that is responsible for the supervision of persons authorised by such infrastructure under the Financial Markets Act, 2012 (Act No. 19 of 2012); or *(c)* an Ombud established under Financial Services Board legislation or a recognised Scheme under the Financial Services Ombud Schemes Act, 2004 (Act No. 37 of 2004).
56	The following section is hereby substituted for **section 3** of the principal Act: **"Functions of board** **3.** (1) The functions of the board are to— *(a)* **[to]** supervise and enforce compliance	ASISA (13.02.2013) (18.04.2013)		See key issues document. It is proposed to move the provision regarding to the Code of Consultation to section 18. Section 3 must accordingly now only reflect the following: The following section is hereby substituted for **section 3** of the principal Act: **"Functions of board** **3.** (1) The functions of the board are

	with laws regulating financial institutions and the provision of financial services; *(b)* **[to]** advise the Minister on matters concerning financial institutions and financial services, either of its own accord or at the request of the Minister; and *(c)* **[to promote programmes and initiatives by financial institutions and bodies representing the financial services industry to inform and educate users and potential users of]** provide, fund, promote or otherwise support consumer financial education, awareness and confidence regarding consumer rights, financial products **[and services]**, institutions and services." (2) The Minister may prescribe a code of engagement, consultation and communication for the board.''.		ASISA members strongly suggest that a general duty of consultation should be placed on the FSB together with a compulsory process of engagement, consultation and communication to be prescribed by the Minister. This compulsory process should provide for some minimum requirements. There is international precedent for such a general duty to be included in legislation for example the UK Financial Services and Markets Act 2000. Even though this proposal will codify a constitutional right to consultation, it is of utmost importance to alleviate legal uncertainty in respect of the process to be followed and will illustrate the policy-maker and regulator's commitment to a fair and transparent process in this regard. It will also enable the respective Registrars to apply a consistent standard of consultation. ASISA members are of the opinion that these provisions will be proportionate to the powers assigned to the FSB by Financial Institution legislation. ASISA members propose the wording to provide for a general duty to consult and an obligation on the FSB to prescribe a process with	to— *(a)* **[to]** supervise and enforce compliance with laws regulating financial institutions and the provision of financial services; *(b)* **[to]** advise the Minister on matters concerning financial institutions and financial services, either of its own accord or at the request of the Minister; and *(c)* **[to promote programmes and initiatives by financial institutions and bodies representing the financial services industry to inform and educate users and potential users of]** provide, fund, promote or otherwise support consumer financial education, awareness and confidence regarding consumer rights, financial products **[and services]**, institutions and services.".

			certain minimum requirements to be included in the FSB Act. The view is held that it will be more efficient to empower the FSB to prescribe a code for consultation. The Minister should still have the ability to prescribe further requirements. ASISA members further suggest that this provision and the provisions removing the Advisory Committees should become effective only once the code has been prescribed by the FSB.	
57	Section 6 of the principal Act is hereby amended by the addition of the following subsection: ‘‘(3) The Minister, on terminating the membership of any member or alternate member of the board in accordance with subsection (2), must publish the reasons for the termination in appropriate media.’’.	Workshop (13 03 2013)	Mr Mthethwa stated that he was not comfortable with the Bill sating that the Minister has to take the reasons for terminating the functions of the board to the media. Was there not another way to handle it instead of simply taking the matter to the media?	This provision was reconsidered and it was agreed to remove the provision.

58		Workshop (13 03 2013)	Mr Harris asked for the logic behind the amendment in section 10 which proposed that the FSB Board may not rescind or amend a decision of the FSB Enforcement Committee. Was there a case where the Board had amended or rescinded a decision of the Enforcement Committee? Dr Luyenge said he was uncomfortable with the idea that the decisions of the EC could not be rescinded. Who was to rescind such a decision? A decision could be rescinded at the level where it was taken. Did the proposed amendment mean that even the committee itself could not amend or rescind a decision it had made? The legality and implications of such a provision had to be looked into.	Agree. See key issues document for explanation. This amendment has been deferred to the Twin Peaks review, which will also consider the role of enforcement in relation to the new market conduct regulator.

63	**‘‘Consultation with the Minister and Financial Sector Registrars** **18.** (1) *(a)* Section 18(2) and (3) of the Competition Act, 1998 (Act No. 89 of 1998), applies with the changes required by the context to a merger which requires the approval of the Minister or the relevant Registrar referred to in Financial Services Board legislation. *(b)* For the purposes of paragraph (a), ‘merger’ means a merger as defined in section 12 of the Competition Act, 1998 (Act No. 89 of 1998). *(c)* Section 116(4) and (9) of the Companies Act, 2008 (Act No. 71 of 2008), applies with the changes required by the context to an amalgamation or a merger which requires the approval of the Minister or the relevant Registrar referred to in Financial Services Board legislation. *(d)* For the purposes of paragraph (c), ‘amalgamation’ or ‘merger’ means an amalgamation or merger as defined in section 1 of the Companies Act, 2008 (Act No. 71 of 2008). (2) The board and members	FSB	It was considered that the provisions enabling a Code of Consultation are better suited in section 18, which deals with consultation. It was also considered to be more practical if the executive officer prescribes this Code.	‘‘**Consultation** **18**. (1) *(a)* Section 18(2) and (3) of the Competition Act, 1998 (Act No. 89 of 1998), applies with the changes required by the context to a merger which requires the approval of the Minister or the relevant Registrar referred to in Financial Services Board legislation. *(b)* For the purposes of paragraph (a), ‘merger’ means a merger as defined in section 12 of the Competition Act, 1998 (Act No. 89 of 1998). *(c*) Section 116(4) and (9) of the Companies Act, 2008 (Act No. 71 of 2008), applies with the changes required by the context to an amalgamation or a merger which requires the approval of the Minister or the relevant Registrar referred to in Financial Services Board legislation. *(d)* For the purposes of paragraph (c), ‘amalgamation’ or ‘merger’ means an amalgamation or merger as defined in section 1 of the Companies Act, 2008 (Act No. 71 of 2008). (2) The board and members of the executive contemplated in section 9(4)— *(a)* must consult with the Minister on any matter relating to the exercise of such of their powers and the performance of such of their duties under this Act or any other law as the Minister may determine; and *(b)* may consult with the Minister on any other matter which the board or any such member wishes to bring to the attention of the Minister. **(3) The executive officer must prescribe a code of norms and standards for**

	of the executive contemplated in section 9(4)— *(a)* must consult with the Minister on any matter relating to the exercise of such of their powers and the performance of such of their duties under this Act or any other law as the Minister may determine; and *(b)* may consult with the Minister on any other matter which the board or any such member wishes to bring to the attention of the Minister.			**consultation for the board and Registrars as referred in Financial Service Board Legislation, which must–** **(a) incorporate the following principles:** **(i) appropriate stakeholders to be consulted must be identified;** **(ii) the purpose and scope of consultation must be clear;** **(iii) the timing, medium and process of consultation must be appropriate, proportional and transparent;** **(iv) consultation material must be clear; and** **(v) stakeholder input must be considered and feedback provided; and** ***(b)* stipulate requirements and standards relating to publication.''**
64	**Section 20** of the principal Act is hereby amended– *(a)* by the insertion after subsection (3) of the following subsection: "(3A) A deputy executive officer may— *(a)* delegate to an officer or employee of the board any power delegated to the deputy executive officer under this Act or any other law; or *(b)* authorise such officer or employee to perform any duty assigned to the deputy executive officer under this	ASISA (13.02.2013)	It is submitted that the delegation of powers to a deputy executive officer or to an officer or employee should not include the power to make subordinate legislation. ASISA members thus suggest that subsection (3)(a) be amended as proposed to clarify that any legislative powers may not be sub-delegated.	Agreed to proposal to amend subsection (3) by the substitution of the following section: (3) The executive officer may - *(a)* delegate to an officer or employee of the board any power conferred upon the executive officer by or under this Act or any other law, **excluding any legislative powers,** including a power delegated to the executive officer under this Act; or (*b)* authorize such officer or employee to perform any duty assigned to the executive officer by or under this Act or any other law. Not agreed. The obligation to have an appropriate system of delegation must remain.

	Act or any other law.”;	ASISA (18.04.2013)	Although the Bill does not contain a provision to amend section 20(3) of the FSB Act, the insertion of a new subsection (3A) highlighted the possible interpretation that the executive officer or deputy executive officer may be able to delegate the power to make subordinate legislation to an officer or employee of the board. It is submitted that the delegation of powers to an officer or employee should not include the power to make subordinate legislation. ASISA members thus suggest that subsections (3)(a) and (3A)(a) be amended as proposed to clarify that any legislative powers may not be sub-delegated. It is also proposed that subsection (6) be amended as indicated. In this regard, please refer to the comments on clause 10(c).	This provision is consistent with other public entity legislation.

66	**SECTION 22(1)(a)** *(a)* Subject to paragraph (b) and subsection (2), no information obtained in the performance of any function under this Act, Financial Services Board legislation, the Inspection of Financial Institutions Act, 1998 (Act No. 80 of 1998), the Financial Institutions (Protection of Funds) Act, 2001 (Act No. 28 of 2001), or the Financial Intelligence Centre Act, 2001 (Act No. 38 of 2001), may be disclosed to any person, other than to the Minister, the National Treasury and any other organ of state designated by the Minister by notice in the Gazette, by— (i) a member or alternate member, or former member or former alternate member, of the board; (ii) a member or former member of a committee of the board; (iii) a member or former member of the appeal board; or	FSB	See key issues document	**22**. (1) Other than in accordance with this section, no information obtained in the performance of any power or function under this Act, Financial Services Board legislation, the Inspection of Financial Institutions Act, 1998 (Act No. 80 of 1998), or the Financial Institutions (Protection of Funds) Act, 2001 (Act No. 28 of 2001), or the Financial Intelligence Centre Act, 2001 (Act No. 38 of 2001), may be utilised or disclosed to any person by- *(a)* a member or alternate member, or former member or former alternate member, of the board; *(b)* a member or former member of a committee of the board; *(c)* a member or former member of the appeal board or the enforcement committee; or *(d)* a person referred to in section 13 (including any employee or contractor or consultant of or person acting on behalf of the board), while appointed or after such appointment has terminated. (2)*(a)*Information obtained in the performance of any power or function under the Acts referred to in subsection (1), including personal information as defined in the Protection of Personal Information Act, 2013, may be utilised or disclosed- (i) in the course of performing functions

	(iv) a person referred to in section 13 (including any employee or contractor or consultant of or person acting on behalf of the board), while appointed or after such appointment has terminated.			under, or as enabled by the Acts referred to in subsection (1); (ii) for the purposes of legal proceedings or other proceedings; (iii) when required to do so by a court; or (iv) by the executive officer or deputy executive officer if in their opinion, disclosure is appropriate– *(aa)* for purposes of warning the public against conducting business with a financial institution or other person conducting activities in contravention of Financial Services Board legislation; *(bb)* for purposes of informing the public of actions taken against a financial institution under Financial Services Board legislation; *(cc)* for purposes of alerting the public to activities carried out by one or more financial institutions which the board, executive officer or deputy executive officer believes to constitute a potential risk to consumers and in respect of which consumers should take care; or *(dd)* in the public interest; *(ee)* to a regulatory authority, for the purposes - *(AA)* of ensuring that financial sector institutions conduct their

				business in a manner that is consistent with and promotes the objectives of consumer and investor protection, the fair treatment of consumers and investors, efficiency and integrity in financial markets and confidence in the financial system; *(BB)* of ensuring the safety and soundness of financial institutions, in particular the ability of financial institutions to meet the financial commitments and obligations they incur in the course of carrying out their business; *(CC)* of ensuring the stability of the financial system; *(DD)* of coordinating

				the supervision of financial institutions with other regulatory authorities; *(ff)* for the purposes of disclosing to any regulatory authority in accordance with a cooperation agreement referred to in subsection (3)*(a)*(v) or otherwise, information relating to a particular financial or other institution or financial or other service or a particular individual who is or was involved in a particular financial institution or financial service, if that regulatory authority has a material interest in the information; *(gg)* for the purposes of developing and implementing policies and activities to deter, prevent, detect, report and remedy fraud or other criminal activity in relation to financial services; or *(hh)* for the purposes of anti-money laundering and combating the financing of terrorism purposes. *(b)* When information is used or disclosed for the purposes referred to in subparagraph *(a)*, such utilisation or disclosure constitutes compliance with an obligation imposed by law for 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, 2013.

				(3)(a) The executive officer or a deputy executive officer in pursuing the purposes referred to in subsection (2)*(a)*, may, subject to subsection (4), - *(i)* liaise with any regulatory authority on matters of common interest; *(ii)* participate in the proceedings of any regulatory authority; *(iii)* advise or receive advice from any regulatory authority; *(iv)* prior to taking regulatory action which the executive officer or a deputy executive officer deems material against a financial institution, inform any regulatory authorities that the executive officer or a deputy executive officer deems to have a material interest in that financial institution of the pending regulatory action, or where this is not possible, inform the relevant regulatory authorities as soon as possible after taking the regulatory action; and *(v)* negotiate and enter into bilateral or multilateral cooperation agreements, including memoranda of understanding, with regulatory authorities, including regulatory authorities in whose countries a subsidiary or holding company of a financial institution is incorporated or a

				branch is situated, to, amongst others, – *(aa)* co-ordinate and harmonise the reporting and other obligations of financial institutions; *(bb)* provide mechanisms for the exchange of information; and *(cc)* provide procedures for the coordination of supervisory activities to facilitate the monitoring of financial institutions on an on-going basis. *(b)* An agreement referred to in paragraph (a)(v), which complies with the requirements set out in subsection (4), constitutes an agreement that complies with the requirements of section 72(1) of the Protection of Personal Information Act, 2013. (4)*(a)* Information may only be disclosed to another regulatory authority if, prior to providing information, it is established that the regulatory authority that will receive the information has appropriate safeguards in place to protect the information, which safeguards must be similar to those provided for in this section. *(b)* A person referred to in subsection (1) may only consent to information provided to a regulatory authority being made available to third parties if that person is satisfied that

				the third parties have appropriate safeguards in place to protect the information received, which safeguards must be similar to those provided for in this section. *(c)* Information may only be requested from another regulatory authority in performing the powers and functions under the Acts referred to in subsection (1). *(d)* Any information requested from or provided by another regulatory authority - (i) must only be used for the purpose for which it was requested; (ii) must not be made available to third parties without the consent of the regulatory authority that provided the information; (iii) if lawfully compelled to make information provided by a regulatory authority available, - *(aa)* inform that regulatory authority of the event and the circumstances under which the information will be made available; and *(bb)* where possible, use all reasonable means to oppose the disclosure of or protect the information. (5) For the purposes of this section, information does not include - *(a)* aggregate statistical data;

				(b) information and analysis about the financial condition or business conduct practises of a financial services sector or a part thereof.

67	The following section is hereby substituted for **section 23** of the principal Act: "23. No person shall be liable for any loss sustained by, or damage caused to, any other person as a result of anything done or omitted by that person in the bona fide, **[but not grossly negligent,]** exercise of any power or the carrying out of any duty or the performance of any function under or in terms of this Act, the Acts referred to in the definition of "financial institution", the Inspection of Financial Institutions Act, 1998 (Act No. 80 of 1998), or the Financial Institutions (Protection of Funds) Act, 2001 (Act No. 28 of 2001).".	ASISA (13.02.2013)	The Explanatory Memorandum indicates that the clause is intended to align with similar provisions relating to other financial regulators and that it creates an unnecessary burden in litigation matters hence the deletion of the words —but not grossly negligentǁ. It also indicates that the current provision is inconsistent with International Association of Insurance Supervisors (IAIS) Insurance Core Principles (ICP) and the International Organization of Securities Commissions (IOSCO) Objectives and Principles of Securities Regulation that require the supervisory authority to have adequate legal protection to exercise its functions and powers. IAIS ICP2 states among others that the supervisor, in the exercise of its functions and powers must have appropriate legal protection. It however also states that the supervisor must meet high professional standards. The IOSCO Principles relating to the Regulator state among others that the regulator should be accountable in the exercise of its functions and powers, that it should adopt clear and consistent regulatory	See key issues document

			processes and that the staff of the regulator should observe the highest professional standards including appropriate standards of confidentiality. Whilst it is debatable whether somebody can be said to be *bona fide* while acting in a grossly negligent manner, it is inconceivable that officials of the FSB who causes damage/losses by acting in a grossly negligent manner should be afforded protection against claims in respect of such damage/losses suffered. Although it is true that international standards do not refer to the words "grossly negligent", it does however require that —the supervisor and its staff act with integrity and observe the highest professional standards, including observing conflict of interest rules. (ref IAIS ICP 2.12). ASISA members suggest that the clause should be rephrased as proposed to incorporate the international direction and to ensure that the regulator remains appropriately responsible and accountable for exercising the powers assigned to the regulator.	

			The Explanatory Memorandum indicates that the clause is intended to align with similar provisions relating to other financial regulators and that it creates an unnecessary burden in litigation matters hence the deletion of the words “but not grossly negligent”. It also indicates that the current provision is inconsistent with International Association of Insurance Supervisors (IAIS) Insurance Core Principles (ICP) and the International Organization of Securities Commissions (IOSCO) Objectives and Principles of Securities Regulation that require the supervisory authority to have adequate legal protection to exercise its functions and powers. IAIS ICP2 states among others that the supervisor, in the exercise of its functions and powers must have appropriate legal protection and meet high professional standards The IOSCO Objectives and Principles of Securities Regulation relating to the Regulator state among others that the regulator should be accountable in the exercise of its functions and powers, that it should adopt clear and consistent regulatory processes and that the staff of	

			the regulator should observe the highest professional standards. Whilst it is debatable whether somebody can be said to be *bona fide* while acting in a grossly negligent manner, it is inconceivable that an official of the FSB who causes damage/losses by acting in a grossly negligent manner should be afforded protection against claims in respect of such damage/losses suffered. Although it is true that international standards do not refer to the words —grossly negligentll, it does require that hi h professional standards be met or observed.	
		SAIA (23.04.2013)	The SAIA recognises that it is appropriate that the Regulator is empowered in the discharging of its functions to limit its liability in order to ensure critical supervision. This is in line with the International Association of Insurance Supervisors ("IAIS") Insurance Core Principles ("ICP"), to which our Financial Services Board and the SAIA subscribe. ICP number 2.9 provides for: "*The supervisor and its staff have the necessary legal protection against lawsuits for actions taken in good faith while discharging their duties,*	

			provided they have not acted illegally. They are adequately protected against the costs of defending their actions while discharging their duties." Nevertheless, the concern remains that the removal of the words "*but not grossly negligent*" will result in extending FSB immunity from liability further than is reasonable in the circumstances. In the event that the qualification "*but not grossly negligent"* provided for in Clause 67 is retained, it will provide clarity and certainty that the Regulator is required to demonstrate good faith as well as reasonableness in carrying out a duty or performing a function so as to ensure a high standard of care. It is accordingly proposed that the deleted words "*but not grossly negligent*", should be restored. This will result in a more balanced approach in ensuring the quality of supervision and the protection of the reputation of the Regulator, which should not be open to attack through a lack of accountability in fulfilling its public interest mandate. In addition, consumers and insurers alike will be in a position to take recourse when the Regulator acts recklessly without giving consideration to the consequence of its actions or	

			acting with a total disregard of duty. This will be particularly relevant in times of crisis when the consumer looks to the Regulator for responsible actions affecting the livelihoods of so many. This approach will also ensure that the Regulator has the necessary redress available where it may wish to act against its employees or agents who exceed their mandate.	
68	The following section is hereby substituted for section 28 of the principal Act: **"Application of Act <u>and Financial Services Board legislation in relation to other legislation</u>** **28.** <u>(1)</u> The provisions of this Act shall not affect the operation of any bank or mutual bank registered in terms of the Banks Act, 1990 (Act No. 94 of 1990), or the mutual banks Act, 1993 (Act No. 124 of 1993), respectively, in respect of any bank or mutual bank business carried on by such a bank or mutual bank in accordance with the provisions of the said Acts. (2) *(a)* Subject to subsections (1) and (4), the provisions of Financial Services Board legislation	ASISA (13.02.2013)	It is understood that the intention is to provide for Financial Institution legislation to override any other conflicting legislation. However, the proposed wording of subsection (a)(iii) may have the possibly unintended consequence of providing that any action of the registrar will override a conflicting action taken by an organ of state (defined in section 239 of the Constitution for example the Minister of Finance or SARS). Any such overriding power must take the constitutional framework into account. It is also uncertain as to how this proposed dispensation will be implemented and monitored in practice and ASISA members are concerned that it will give rise to legal uncertainty. The following wording may be	Please see response under clause 54 above The current wording is to be retained as the description relates to legislation other than those listed by ASISA such as the National Prosecuting Authority Act.

	prevail over any provision of other legislation that conflicts with or is inconsistent with a provision of Financial Services Board legislation. *(b)* Without derogating from the generality of paragraph *(a)*, the Consumer Protection Act, 2008 (Act No. 68 of 2008), does not apply to— (i) any person, function, act, transaction, goods or services that is or are subject to Financial Services Board legislation; or (ii) the board or a registrar referred to in Financial Services Board legislation. (3) Despite any other law, but subject to subsection (4)— *(a)* if any conduct regulated by Financial Services Board legislation is, partially or fully, also regulated by any other legislation— (i) the Financial Services Board legislation and that other legislation may not be construed as establishing concurrent regulatory jurisdictions in respect of such conduct; (ii) the registrar referred to in the Financial Services Board legislation must be regarded as the lead authority regulating that conduct; and (iii) any action taken by that registrar in terms of the Financial Services Board	ASISA (18.04.2013)	considered to replace subsection (3)(a)(iii): If there is an inconsistency between any provision of this Act and a provision of any other Act - (a) the provisions of both Acts apply concurrently, to the extent that it is possible to apply and comply with one of the inconsistent provisions without contravening the second; and (b) to the extent that paragraph (a) cannot apply, the provisions of this Act apply, subject to the provisions of the Constitution of the Republic of South Africa Act 108 of 1996. ASISA members suggest that the legislation envisaged by subsection (4)(b) be identified for the sake of clarity and to align the wording of this section with sections 28(1) and 28(4)(a) which specifically identify the legislation to which those sections refer. We understand that the legislation in respect of the protection of personal information is not yet finalised, but it currently appears to be highly likely that it will be signed into	

	legislation overrides any conflicting action taken by the organ of state administering that other legislation; *(b)* if any other national legislation confers a power on or imposes a duty upon an organ of state in respect of a matter regulated by Financial Services Board legislation, that power or duty must be exercised or performed in consultation with the registrar referred to in the Financial Services Board legislation, and any decision taken in accordance with that power or duty must be taken with the approval of that registrar. (4) Subsections (2) and (3) do not apply to— *(a)* the Financial Intelligence Centre Act, 2001 (Act No. 38 of 2001); *(b)* legislation relating to the access to information, the protection of information or the administration of justice administered by the Minister of Justice and Constitutional Development; and *(c)* regulators established in terms of the legislation referred to in paragraphs *(a)* and *(b)*.''		law before the finalisation of this Bill and therefore the details of that Act should be inserted as soon as they become available. It is also uncertain as to how this proposed dispensation will be implemented and monitored in practice and ASISA members are concerned that it will give rise to legal uncertainty. NT should publish details of the process in terms of which conflicting actions by regulatory authorities will be identified, managed and monitored and details relating to conflicting actions should be available to the industry to improve legal certainty. The references to "Financial Services Board legislation" is proposed to be replaced with references to "Financial Institution legislation" as indicated in the comment on the definition of "Financial Services Board legislation" in clause 54 of the Bill.	

68		BASA	Clause 68 of the Bill amends Section 28 of the Financial Services Board Act 1990 (FSB Act) to give the Financial Services Board (FSB) absolute regulatory power over the financial institutions which they regulate. Section 28 (2)(b) of the FSB Act excludes the application of the Consumer Protection Act 68 of 2008 (CPA) to financial institutions under its legislative control. Banks currently fall outside the definition of financial institution and at present there is no equivalent exclusion from the CPA for banks as defined in the Banks Act, 1990 (Act No. 94 of 1990) (Banks Act). In the context of the upcoming Twin Peaks regulatory architecture it is anticipated that banks' conduct and products will regulated in a similar manner as proposed by the changes to the FSB Act. Thus, it would seem appropriate at this stage to align the treatment of the bank's conduct and products in a similar manner to other financial institutions. We recommend that banking services, as defined in the Banks Act, and the conduct of banks be excluded from the CPA in the same manner as those of financial institutions defined in the FSB Act. The Bill needs to provide clearer	It is agreed that the reference to person in the provision may have the consequence of excluding certain persons such as banks. Therefore it is agreed to amend the provision as Follows; this will ensure that only functions etc. which are regulated are excluded from the Consumer Protection Act;  (b) Without derogating from the generality of paragraph (a), the Consumer Protection Act, 2008 (Act No. 68 of 2008), does not apply to— (i) any **[person,]** function, act, transaction, goods or services that is or are subject to Financial Services Board legislation; or (ii) the board or a registrar referred to in Financial Services Board legislation.

			definitions for financial sector legislation and non-financial sector legislation. It may be useful to have a schedule which lists the applicable financial sector legislation to avoid confusion.	
General Comments		BASA (17.04.2013)	We stand by our initial comments in respect of the proposal that notices, directives and exemptions to be published on the 'official website' set up by the Financial Services Board ("the FSB").5 The Bill amends the current requirement of the specific Registrar, depending on the statute, publishing notices in the *Government Gazette*. We note the intention to reduce the cost of publication in the *Government Gazette*; however, our concerns are that the current FSB website (http://www.fsb.co.za/) is not user friendly, is not regularly updated and that there is a risk that industry will not be aware when a new notices, directives or exemptions are published. There is currently no obligation in the Bill for the Registrar to maintain the website in an up to date; fully functional, and user friendly fashion. There is a concern that the abovementioned difficulties in	See key issues document

			respect of the website would affect the industry's ability to ascertain which notices and information are law, and which information on the website is for general information. Further it would make it difficult to ascertain which information is current and in force. There needs to be clarity on what information a financial institution must comply with, and this certainly is not only drawn from the content of the document but also through the means of how the relevant document is published. In various instances the Bill does not make provision for a draft notice, directive or exemption first being published for comment. It would seem the Bill allows for the Minister to publish with no comment period. It is unclear whether the Registrar would be required to release notices for comment before publishing them officially on the website. (For example in terms of the amendments to the FAIS Act the Registrar may 'by notice on the official website' publish fit and proper requirements and standards) We recommend that the relevant document should be published in an official and clear manner in order to avoid ambiguity; and that provision be made for industry consultation. We further recommend that a provision be	

			included for the Registrar to be obliged to maintain the website in an up to date; fully functional, and user friendly state.	
General Comments		SAIA (23.04.2013)	**Publish/prescribe** The SAIA considers it appropriate for the Honourable Minister rather than the Registrar to decide on the immediate publication of a Rule *"if circumstances necessitate"* to ensure appropriate checks and balances are in place, in addition to ensuring compliance with the separation of powers principle embedded in our Constitution. We support the enhancement of market conduct practices in the financial sector and enhanced policy holder protection, which principles are entrenched in the National Treasury Policy Document entitled "*A Safer Financial Sector to serve South Africa better*" published in February 2011. At the heart of the principle of separation of powers is a desire to enhance democracy, increase accountability and efficiency and protect the fundamental rights	**See key issues document**

			enshrined in the Constitution from abuse. It is suggested that in the event that circumstances necessitate the immediate publication of a rule, this decision must be made by the Minister. The implementation of Rules without first submitting them for public comment is also not supported. We should ensure that the *audi alteram partem* rule of natural justice is not only followed but also seen to be followed. In addition, the Minister should review the draft rule in light of any submissions made. **Directives, Exemption Notices and Board Notices** The SAIA finds it difficult to support any provisions that depart from the Promotion of Administrative Justice Act, 2000 ("PAJA") in the issuing of Directives, even with a condition that a statement to this effect and the reasons for the departure are included in the Directive (which may be found in clause 201 of the Bill). The SAIA remains of the view that the Registrar must not only follow fair administrative procedure but must also be seen to follow fair administrative procedure, including a right of review or internal appeal.	

			Publication on the FSB's website Although the SAIA appreciates the intention of National Treasury to reduce costs by replacing gazetting with publishing via the official website of the FSB, we believe that the benefits of the gazetting process for all stakeholders outweigh the potential cost saving on the website. In addition, the FSB website as the only communication method may prejudice both insurers and consumers alike. Alternatively, it is suggested that the enactment of the provisions in the Bill affording the right of the Regulator to publish them on the FSB's official website should be delayed in anticipation of the completion of the FSB's project to upgrade its website infrastructure, expected to be completed by September 2013. This will be achievable through clause 259 that provides for the staggered implementation of the Act.	

General Comments		Ms Dlamini-Dubazana	Ms Dlamini-Dubazana asked about the implications of the provisions that, if a regulated person had acted within the law, no person should be liable for any loss (slide 17, bullet 3). How would it affect the general public's protection If one were to remove the words 'but not grossly negligent'? Ms Dlamini-Dubazana said that if that was the case, then the amendments should state that the code of conduct should reflect the issue of publication.	Comment relates to clause 67 which amends section 23 which is addressed in the key issues document This relates to the issue of publication which is also addressed in the key issues document

SUMMARY OF REGULATORY GAPS

OVERARCHING AMENDMENT PROPOSED IN RESPECT OF ALL SECTOR SPECIFIC ACTS:

- To amend the definition of “financial institution” to clarify the references to the Insurance Laws and to clarify the scope of the definition.
- To tighten the definition of a “financial institution” and to ensure that is appropriately worded.
- To insert a definition of “Financial Services Board legislation” to clarify the scope of the FSB’s authority.

ALIGNMENT WITH OTHER LEGISLATION

Companies Act:

- To rectify the reference to, and to align with the Companies Act, 2008 (Act No. 71 of 2008): sections 1 and 18

PFMA

- To clarify that the FSB is subject to the Public Finance Management Act (PFMA):
  - section 2: the FSB is subject to the PFMA,
  - section 12: to ensure that if the FSB were to borrow money, this has to be done in terms of the PFMA),
  - section 16(4) and (5): as the FSB is subject to the PFMA, these subsections have become superfluous.
  - section 17 – this section has become superfluous.

REGULATORY GAP:

- Section 3(1): To extend the legislative mandate of the FSB regarding consumer education. This function is currently limited to *"promote programmes and initiatives by financial institutions and bodies representing the financial services industry to inform and educate users and potential users of financial products and services"*. On a strict interpretation, this mandate may deny the FSB the opportunity to take a pro-active lead in developing and establishing critical consumer education initiatives. Extending this mandate will ensure consistency with international trends and assist the FSB in fulfilling its mandate relating to the supervision and regulation of financial institutions.
- Section 3(2): To empower the Minister to prescribe a code of conduct for the FSB. This will enable to Minister, amongst others, to provide guidance to the FSB on consultation processes and practices to ensure appropriate consultation.
- Section 3(6): To ensure that there is transparency when the Minister terminates any person's membership of Board.
- Section 10(8): To reinforce the authority of the enforcement committee once it is established by the Board.
- Section 13(3): To clarify the powers and functions of the deputy executive officers and to provide for their accountability to the Executive Officer for the performance of their functions.
- Section 18: To provide for necessary consultation with the Minister of Finance and appropriate registrars, in respect of mergers and amalgamations in the financial sector.
- Section 20(3A): new subsection: to provide for a more comprehensive system of delegation by authorising deputy executive officers to on-delegate powers and functions delegated or entrusted to them, and to provide for an appropriate system of delegation to be put in place to maximise administrative and

operational efficiency and provide adequate checks and balances.

- Section 20(4): To appropriately provide for the role of the deputy executive officer, and delegation to other persons.
- Section 20(6): To require the development of a system of delegation.
- Section 22: To improve on the language in order to eliminate any ambiguities.
- Section 23: To align with similar provisions relating to other financial regulators. The current phrasing of the section is unique to the FSB (it does not appear in legislation regulating the liability of other regulators) and creates an unnecessary burden in litigation matters. It is also inconsistent with International Association of Insurance Supervisors (IAIS) Insurance Core Principles (ICP) and the International Organization of Securities Commissions (IOSCO) Objectives and Principles of Securities Regulation that requires the supervisory authority to have adequate legal protection to exercise its functions and powers.
- Section 28: To provide for necessary provisions to appropriately address potential conflicts with other legislation.