



national treasury

Department:
National Treasury
REPUBLIC OF SOUTH AFRICA

EXPLANATORY MEMORANDUM

ON THE

FINANCIAL MARKETS BILL, 2012

April 2012

Table of Contents

A. INTRODUCTION.....	3
B. PURPOSE OF THE REVIEW	4
C. THE REVIEW.....	4
SUMMARY OF THE BILL	6

ANNEXURES

Annexure A: Treasury Comments on Issues Raised During the Consultation Period

Annexure B: Reducing the Risks of Over-the-counter Derivatives in South Africa

Annexure C: An Examination of the South African OTC Derivatives Markets to Recommend Measures for Strengthening their Regulatory Oversight

EXPLANATORY MEMORANDUM ON THE FINANCIAL MARKETS BILL, 2012

A. INTRODUCTION

The Financial Markets Bill, 2012 (the Bill) replaces the Securities Services Act No. 36 of 2004 (SSA) that has governed the regulation of securities services in South Africa since 2005 and primarily focuses on the regulation of securities exchanges, central securities depositories, clearing houses and their respective members. The SSA consolidated the South African regulatory framework relating to capital markets and aligned the regulation and supervision of South African financial markets with the then prevailing international developments and regulatory standards.

The Bill gives effect to the outcomes of a regular review of the SSA, which subsequent to its enactment, had not been subjected to a comprehensive review to assess if it was still sufficiently robust to meet its objectives and the objectives of securities regulation in general. Furthermore, the developments in the local and international financial markets, both pre and post the global financial crisis, as well as other implementation challenges necessitated a rigorous assessment of the SSA to assess the appropriateness and effectiveness of the regulatory approach and framework provided for in the SSA.

The review highlighted a number of critical provisions that must be given effect to in legislation to ensure that-

- ❖ the integrity of the regulatory framework of the South African financial markets is maintained;
- ❖ the regulatory framework continues to meet its objectives and the objectives of financial regulation in general;
- ❖ the regulatory framework is aligned with relevant local and international developments and standards;
- ❖ remains effective in mitigating potential impacts of any possible future financial crisis.

Due to the magnitude and complexity of the amendments to the SSA, it was deemed appropriate, in the interest of simplicity and legal certainty, to replace the SSA, rather than propose a complex amendment Bill.

B. PURPOSE OF THE REVIEW

The purpose of the review was to assess if the SSA:

- ❖ continues to meet its objectives and the objectives of financial regulation in general;
- ❖ is aligned with relevant local and international developments and standards; and
- ❖ continues to be effective in mitigating the impact of the financial crisis.

In addition, the purpose of the review included the identification of implementation difficulties that required clarification and technical amendments necessary to maintain the integrity of the legislative framework (such as updating outdated references).

C. THE REVIEW

The review process took into account:

- ❖ The International Organisation of Securities Commissions' (IOSCO) policy documents aimed at improving and enhancing standards of regulation applicable to the securities markets. These include reports, recommendations, as well as the Objectives and 38 Principles of Securities Regulation (IOSCO Principles);
- ❖ The recommendations of the Financial Sector Assessment Programme (FSAP), an International Monetary Fund and World Bank assessment of, inter alia, IOSCO members' level of compliance with the IOSCO Principles. The South African financial services sector recently underwent the FSAP and the securities market regulation was found to be largely compliant with the IOSCO Principles. The recommendations seek to address the regulatory gaps identified by the assessment and to provide guidance as to the measures that can be implemented to ensure maximum compliance with the IOSCO Principles;
- ❖ The effects of the recent global financial crisis as well as the outcomes and strict timeline-based recommendations of the Group of Twenty Countries (G20), of which South Africa (represented by the Minister of Finance) is a member. The recommendations included the strengthening of regulation and supervision of the financial sector, strengthening of transparency and accountability, the enhancement of sound regulation,

- the promotion of integrity and stability in the financial markets and the reinforcement of international cooperation;
- ❖ Developments in comparable jurisdictions, e.g. the United States, the European Union, Australia, etc., to ascertain how the South African framework compares therewith;
 - ❖ Rules and recommendations of the International Institute for the Unification of Private International Law (UNIDROIT) Convention on Substantive Rules for Intermediated Securities aimed at improving the international legal framework for securities holding, transfer and collateralization. At the UNIDROIT's diplomatic conference held in Geneva in September 2008, South Africa made a commitment to adopt the final draft of the UNIDROIT;
 - ❖ Jurisprudence and other relevant determinations by administrative bodies;
 - ❖ South African legislative developments post the enactment of the SSA, specifically the Consumer Protection Act No.68 of 1998, the Companies Act No. 71 of 2008 (Companies Act), the Competition Amendment Act, No.1 of 2009, the Financial Institutions (Protection of Funds) Act No.28 of 2001, as amended and the Financial Services Board Act No.97 of 1990 (FSB Act).
 - ❖ The regulatory effectiveness of the SSA and the broader regulatory framework that supports the objectives of the SSA. Regulatory effectiveness was ascertained by assessing the extent to which the objectives of the SSA were met in the implementation and application of the SSA, with specific reference to the institutional framework for regulation, accountability of the Self-Regulatory Organisations (SROs) and registrar, proportionality and efficiency of the regulatory framework, flexibility of the regulatory framework, timeliness and responsiveness of the regulatory framework, compliance, enforcement and redress mechanisms.

SUMMARY OF THE BILL

The Bill replaces the SSA by amending, substituting and deleting certain provisions of the SSA. It also introduces new clauses and preserves all the existing sections of the SSA not amended, deleted, substituted or replaced by the Bill. An explanation is provided in respect of the amended, deleted, substituted and replaced sections of the SSA, as well as the new clauses introduced by the Bill. Preserved definitions and sections are not included in this Explanatory memorandum, although they are reflected in the Bill. In respect of the substantive amendments, an explanation of the extent of and rationale for the amendment of an SSA provision is provided. In respect of technical amendments, only the rationale for the amendments is provided.

Note: “section” – refers to the existing sections of the SSA and “clause” refers to the clauses in the Bill.

1. Clause 1: Definitions and Interpretation (amends section 1)

Subclause 1 (1): amends section 1 as follows:

“advice” (amendment)

Current Definition

The SSA regulates advice provided in respect of the buying and selling of listed securities. The Financial Advisory and Intermediary Services Act, 2002 (FAIS Act) regulates advice furnished in respect of other securities services and unlisted securities.

Proposed Amendment

The purpose of the amendment is to extend regulation to advice furnished in respect of all securities (listed or unlisted) and all securities services to the extent that this is not regulated under the FAIS Act. Advice on corporate actions and other similar events affecting the rights or benefits in respect of securities or the exercise or lapse of any right in respect of securities has been added to the definition. The amendment is further aimed at aligning the definition with the G20 recommendations advocating regulation of the over-the-counter (OTC) market (products and entities), and to extend the FSB’s scope of regulation to the OTC market.

“appeal board” (amendment)

Technical amendment seeks to align with the Financial Services Board Act.

“associated clearing house” (new insertion/definition)

The SSA provides for a clearing house that is appointed by an exchange only (referred to herein as an “associated clearing house”). The Bill envisages an extended role for clearing houses and provides for the licensing of two types of clearing houses, i.e. an associated clearing house and an independent clearing house. Associated clearing houses clear transactions in securities on behalf of one or more exchanges in accordance with the rules of the relevant exchange and do not approve or regulate clearing members.

“attachment” (new insertion/definition)

A definition is provided to define the term which is used in the Bill.

“Auditing Professions Act” (new definition/insertion)

Technical amendment to align with the Auditing Professions Act.

“auditor” (amendment)

Technical amendment to align with the Auditing Professions Act.

“authorised user” (amendment)

Current Definition

An authorised user may be authorised by a licensed exchange to perform such “securities services” as the exchange rules may permit.

Proposed Amendment

The purpose of the amendment is to clarify that an authorised user can be authorised to provide one or more securities services. The amendment also provides an enabling provision for authorisation of remote members without physical presence (foreign incorporated and no local office) in the Republic (remote membership). This is aimed at clarifying the regulatory scope in respect of authorised users, and to assist the exchanges in the identification of securities services that will be regulated by the exchange, and those that will be authorised and regulated under other legislation, either local or foreign (e.g. FAIS Act).

“central securities account” (amendment of definition in section 29)

Current Definition

The SSA defines this as an account kept by a CSD for a participant and reflecting the number or nominal value of securities deposited as well as all entries made in respect of such securities.

Proposed Amendment

The amended definition extends the entities for which the CSD may hold securities to include, in addition to participants, external central securities depositories and other persons as determined in the depository rules. This is aimed, inter alia, at facilitating link-up markets between the local CSD and external CSDs, and to enable a securities ownership register (“SOR”). The FSB is investigating the preferred SOR model in consultation with the relevant industry stakeholders.

“central securities depository” (amended definition)

The definition of “central securities depository” has now been clearly defined in the definitions section as meaning a person who constitutes, maintains and provides an infrastructure for holding uncertificated securities which enables the making of entries in respect of uncertificated securities, and which infrastructure includes a securities settlement system.

“certificated securities” (amendment of definition in section 29)

Current Definition

Certificated securities are defined as securities evidenced by a certificate or written instrument.

Proposed Amendment

This definition has been amended to align it to section 49 of the 2008 Companies Act, which defines “certificated” as securities being evidenced by a certificate. The amendment also provides for the securities being evidenced by either a certificate or written instrument where an issuer is not a public company.

“clear” (amendment)

Current Definition

The SSA makes reference to “clearing” which is not defined in the SSA, but interchangeably with the term “clear” which is specifically defined in the SSA.

Proposed Amendment

The proposed amendment clarifies that the two terms have a corresponding meaning, i.e. “clearing” means “clear” and vice versa.

“clearing house” (amendment)

Current Definition

The SSA provides for the licensing of a clearing house that is appointed by an exchange only.

Proposed Amendment

The Bill defines a clearing house as means a person who constitutes, maintains and provides an infrastructure to clear transactions in securities. The Bill provides for the licensing of two types of clearing houses; namely an independent clearing house with its own rules and clearing members, and the associated clearing house appointed by an exchange and regulated by the rules of an exchange currently provided for in the SSA. It is not a requirement for an independent clearing house to be appointed by an exchange. It is envisaged that this will facilitate the clearing of unlisted securities through a Central Counter Party (CCP) in line with the recommendations of the G20 and IOSCO. Essentially, the amendment seeks to expand the regulatory scope of the registrar in respect of the OTC market.

“clearing house directive” (new definition/insertion)

The purpose of the definition is to clearly define the term as used in the Bill as meaning a directive issued by an licensed independent clearing house in accordance with its rules.

“clearing house rules” (new definition/insertion)

The purpose of the definition is to clearly define the term as meaning the rules made by a licensed independent clearing house in accordance with this Act;

The Bill affords the SRO status to the newly created independent clearing houses and to accordingly extend the rule making powers to these clearing houses. In addition, independent clearing houses will be responsible for the supervision and enforcement of their members’ compliance with clearing house rules. The rules must necessarily be consistent with the SSA and any amendments thereto will be subject to the registrar’s approval.

“clearing member” (new definition/insertion)

This new definition seeks to distinguish clearing members so appointed by the exchange, in case of an associated clearing house, from those appointed by independent clearing house. Clearing members of an associated clearing house will remain subject to the approval and regulation in terms of the rules of the exchange that appointed the associated clearing house, while clearing members of an independent clearing house will be authorised and regulated in terms of the rules of that clearing house. Furthermore, clarity is provided in respect of the services to be provided by clearing members, i.e. clearing services and/or settlement services as defined in the Bill. The authorisation by an exchange or an independent clearing house as the case may be, will specify the services by clearing members are authorised to perform.

“clearing services” (new definition/insertion)

The term has been clearly defined as meaning services offered and activities performed by a clearing member in terms of the exchange rules or clearing house rules, as the case may be, to facilitate clearing of transactions in

securities. This definition has been inserted to extend the scope of clearing services to include the provision of clearing services in respect of both listed and unlisted securities.

“clearing house services (deletion)”

This definition has been deleted and replaced with a definition of “clearing services” referred to above.

“client” (amendment)”

Current Definition

The definition of client is restricted to persons utilising the services of an authorised user or a participant of a CSD only.

Proposed Amendment

The purpose of the amendment is to include clients of other regulated persons, i.e. clients of CSDs, nominees and exchanges, to whom securities services are provided or an agent thereof. The intention is to include clients of regulated persons to whom securities services are contractually provided.

“Companies Act” (amendment)”

Technical amendment to align with the Companies Act.

“confidential information” (new definition/insertion)”

The purpose of the definition is to clearly define the term as meaning personal information that belongs to a person and is not generally available to or known by others.

“deposit” (new definition/insertion)”

The purpose of the definition is to clearly define the term as meaning a deposit of securities, including a deposit by means of an entry in a securities account or a central securities account

“depository directive” (new definition/insertion)”

The purpose of the definition is to clearly define the term as meaning a directive issued by a licensed central securities depository in accordance with its rules.

“directive” (new definition/insertion)”

The new definition gives the registrar the power to issue directives for purposes of ensuring effective fulfillment of his regulatory and administrative functions. Directives issued hereunder will serve as a basis upon which the registrar may further regulate a person’s conduct, either positively or negatively.

“enforcement committee” (new definition/insertion)”

Technical insertion to align with the FSB Act. The insertion reinstates the definition of the enforcement committee and includes a reference to the relevant section of the FSB Act establishing the committee. The registrar may still refer any contraventions of the FMA to the enforcement committee.

“entry” (amendment of definition in section 29)

Current Definition

This definition includes an electronic recording of, inter alia, other transactions in respect of securities.

Proposed Amendment

The definition has been amended to remove the uncertainty created by the use of the term “other transaction”. The uncertainty is created by the definition of “transaction” under section 1 of the SSA that relates to buying and selling only. The intention is to include all the other instructions in respect of securities or interests in those securities that may be effected within the CSD environment.

“exchange directive” (new definition/insertion)

The purpose of the definition is to clearly define the term as meaning a directive issued by a licensed exchange in accordance with its rules;

“external authorised user” (new definition/insertion)

The purpose of the definition is to enable authorisation of remote members without physical presence (foreign incorporated and no local office) in the Republic (remote membership). As is currently the case with local authorised users, the criteria for authorisation will be incorporated into the rules of the relevant exchange and be subject to the approval of the registrar after consultation with the public and relevant stakeholders. Such authorized users will be required, however, to have been under the supervision and regulation of a foreign law that is equivalent to the FMA. The intention is to make the local market more accessible to adequately regulated international players and ensure a level playing field between remote members and local market players.

“external central securities depository” (new definition/insertion)

The definition has been inserted to enable a linkage between local CSDs and foreign CSDs. Foreign CSDs will be allowed to perform functions similar to those of the licensed CSD in accordance with the rules of the CSD. This is aimed at ensuring effective and cost efficient settlement of securities for the benefit of local investors wishing to invest in foreign listed companies and vice versa. The CSD will be required to make rules regulating this linkage and such rules will be approved by the registrar after consultation with the public and the relevant stakeholders.

“external clearing house” (new definition/insertion)

The purpose of the definition is to clearly define the term as meaning a person authorised to function as a clearing house in terms of the laws of a country other than the Republic;

“external clearing member” (new definition/insertion)

The insertion provides for authorisation of remote clearing members without physical presence (foreign incorporated and no local office) in the Republic (remote membership). This will bring clarity on the regulatory scope in respect of clearing members, and assist the exchanges or independent clearing houses in the identification of securities services that will be regulated by the exchange or independent clearing house as the case may be, and those that will be authorised and regulated under foreign legislation. As is currently the case with local clearing members, the criteria for authorisation will be incorporated into the rules of the relevant exchange or independent clearing house, as the case may be, and accordingly be approved by the registrar after consultation with the members of the public and relevant stakeholders. Such clearing members should, however, be supervised and regulated under a foreign law that is equivalent to the FMA.

“external participant” (new definition/insertion)

Provision has been made enabling authorisation of remote participants without physical presence (foreign incorporated and no local office) in the Republic (remote membership). The criteria for authorisation will be fully incorporated into the rules of the relevant CSD and approved by the registrar after consultation with the members of the public and relevant stakeholders. The intention is to make the local market more accessible to adequately regulated international players and to ensure a level playing field between remote participants and local market players. The Bill incorporates the equivalence criteria requiring such a member to be subject to an equivalent supervision and regulatory framework to that provided for in the FMA.

“Financial Intelligence Centre Act” (new definition/insertion)

This definition has been inserted as reference to Financial Intelligence Centre Act, 2001 appears more than once in the SSA.

“financial institution” (amendment)

Current Definition

The definition of “financial institution” includes any intermediary rendering services specified under sections 72 (1) (d) of the Long term Insurance Act, 1998 or section (70) (e) of the Short term Insurance Act, 1998, respectively”.

Proposed Amendment

Paragraph (e) of the definition of financial institution under the SSA is deleted to exclude insurance intermediaries from the definition of financial institution, as

such inclusion is inappropriate and disproportionate. This is true in respect of sections 19 and 21 of the SSA. To regard an intermediary, as a financial institution for the purposes of sections 19 and 21 of the SSA may lead to unintended consequences.

“independent clearing house” (new definition/insertion)

This definition introduces an independent clearing house that provides clearing and/or settlement services to any person, including an exchange. An SRO status will be afforded to this clearing house and the clearing house will be responsible for the regulation, authorisation and supervision of its clearing members. The rules of the clearing house will, likewise, be subject to the approval of the registrar. It is envisaged that market participants will utilise the independent clearing house as a CCP to clear unlisted securities in line with the G20 and IOSCO recommendations.

“Insider Trading Act” (deletion)

The definition has been deleted as it is no longer relevant. The amendment also necessitated the amendment and deletion of other cross referenced provisions of the SSA, i.e. sections 82 and 87. The definition is only used once in section 83 and full reference has been included therein.

“insolvency proceeding” (new definition/insertion)

The purpose of the insertion is to provide for a legal process guaranteeing account holders’ protection during insolvency or failure of a participant, authorised user, clearing member or client. An insolvency proceeding includes a court process or administrative proceeding in terms of either local or foreign law, whether interim or final, where the assets and affairs of a person are subject to the control or supervision by a court or an insolvency administrator.

Upon the insolvency of the CSD, a CSD Participant, authorised user, clearing member or client, it is necessary that legal clarity exists on the protection measures in the interest of financial system stability, protection of role-players and consumers and reduction of systemic risk. This is in line with the recommendations of UNIDROIT and IOSCO.

“insolvency administrator” (new definition/insertion)

The definition introduces a concept of an insolvency administrator duly authorised under either a local or foreign legislation to administer and oversee insolvency proceedings.

“issuer” (amended)

Current Definition

The definition makes reference to an issuer of “money market instruments”.

Proposed Amendment

This definition has been amended to correctly refer to money market securities. The aim is to limit the scope of the FMA to money markets securities only.

“licensed clearing house”, “licensed central securities depository”, “licensed exchange” (new definitions/insertions)

These definitions have been inserted to clearly define the respective terms as used in the Bill.

“listing requirements” (amended)

Current Definition

Listing requirements are defined as requirements determined by an exchange that must be met before a security may be traded or may continue to be traded on that exchange.

Proposed Amendments

The purpose of the amendment is to extend the registrar’s powers to include approval of listings requirements in line with the FSAP recommendation for the registrar to approve listing requirements.

“management of securities and funds” (amended)

Current Definition

The definition includes the giving of instructions on behalf of another person to buy and sell securities, the buying and selling of securities on behalf of another person, an agreement to buy or sell securities on behalf of another person, and the handling of another person’s funds intended for purchase of securities on behalf of other persons.

Proposed Amendment

The existing definition has been amended to restrict the management of securities and funds to the exercise of discretion in buying and selling of securities, the safeguarding of securities and funds (intended for the purchase of securities) belonging to other persons. The aim is to include those services that are generally understood to form part of an agreement to manage a client’s portfolio only.

“money market securities” (new definition/insertion)

The purpose of the definition is to clearly define the term as meaning money market instruments that are uncertificated securities reflected in an uncertificated securities register.

“nominal value” (new definition/insertion)

The purpose of this definition is to align the FMA with the Companies Act. The Companies Act has done away with the requirement for shares to have nominal value. For purposes of the FMA and to align with the Companies Act, the nominal value in respect of shares in a public company has been replaced by a fixed value assigned to a share on first issue and used to assess dividend, capital ownership or interest on the value of the shares calculated or determined in accordance with the Companies Act, depending on whether the shares have been issued prior to or after the compulsory conversion provided for under the Companies Act. In respect of securities other than shares in a public company, it is fixed value assigned to that security on first issue and used to assess dividends, capital ownership or interest.

“official web site” (new definition/insertion)

The definition has been inserted to provide alternative or complementary modern and cost efficient means of communication by the registrar or SROs. The definition should be read with the definition of “web site” below.

“participant” (amendment)

Current Definition

A participant is defined as a person accepted by a CSD to hold in custody and administer securities, or an interest in such securities.

Proposed Amendment

The purpose of the amendment is to clarify that participants can be authorised to perform custody and administration functions, as well as settlement services in line with section 35 of the SSA. The amendment also provides an enabling provision for authorisation of remote participants without physical presence (foreign incorporated and no local office) in the Republic (remote membership). This is aimed at clarifying the authorisation process as well as the regulatory scope in respect of participants, and to assist the CSD in the identification of securities services that will be regulated by the CSD, and those that will be authorised and regulated under other legislation, either local or foreign.

“Public Accountants’ and Auditors’ Act” (deletion & replacement)

Technical amendment to align with the Auditing Professions Act.

“Registrar of Banks”(new definition/insertion)

The definition defines the term in line with how it is defined in terms of the Banks Act, 1990 (Act No. 94 of 1990)

“regulated person” (amendment)

Current Definition

A regulated person means a SRO or any other person who provides or previously provided securities services.

Proposed Amendment

This definition has been amended by the inclusion of nominees and trade repositories. Accordingly, obligations placed on the regulated persons will apply to nominees and trade repositories, to the extent possible.

“rules” (new definition/insertion)

This definition has been inserted to provide for a collective meaning of the rules of an exchange, central securities depository and an independent clearing house.

“safeguarding” (new definition/insertion)

This definition has been inserted to describe the service of safeguarding and administration of funds and securities provided by an authorised user. Safeguarding encompasses the holding of securities or funds on behalf of another person where the authorised user does not hold the securities or funds but remains accountable to another person for a third party’s holding of such securities and funds.

“securities” (amendment of definition in section 29)

Current Definition

Save for the types of instruments classified as securities under the SSA, it is not clear as to whether the term refers to listed and unlisted securities. Furthermore, the definition refers to “money market instruments”.

Proposed Amendment

The purpose of the amendment is to clarify that reference to “securities” in the SSA (and the Bill) includes both listed and unlisted securities. Where necessary, specific reference has been made for listed and unlisted securities in the SSA. The amendment further corrects the reference to money market instruments to refer to “money market securities”, which has been defined. This reaffirms the registrar’s ability to regulate unlisted securities in line with the IOSCO and G20 recommendations.

“securities account” (moved from the CSD Chapter)

Current Definition

The definition is provided for under section 29 of the SSA and refers to an account kept by or on behalf of a participant and reflecting the number or nominal value of securities of each kind deposited and all entries made in respect of such securities.

Proposed Amendment

The definition has been moved from section 29 to section 1 and amended to include accounts held by authorised users and nominees. The accounts include both proprietary and client accounts of authorised users, participants and

nominees. The aim is to extend the necessary investor protections to the whole holding chain, i.e. CSDPs, authorised users and nominee holding levels.

“securities of the same kind” (moved from the CSD Chapter)

Current Definition

The definition is provided for under section 29 of the SSA and refers to securities of the same class and issued by the same issuer.

Proposed Amendments

This definition has been moved from section 29 as it is more appropriately placed under section 1, in line with the definition of securities account above.

“securities” (amendment)

Current Definition

The current definition of “securities” makes reference to money market “instruments”.

Proposed Amendment

The definition has been amended to correct an error by replacing the reference to money market instruments with a reference to money market securities. This is aimed at distinguishing money market instruments from money market securities, and to align with the definition of “securities” which expressly excludes money market securities from the definition except for purposes of the custody, administration and settlement chapter of the FMA.

“securities register” (new definition/insertion)

The purpose of the definition is to clearly define the term as meaning any register of securities required by any law to be established by an issuer and, in respect of securities issued in terms of the Companies Act, has the meaning assigned to it in section 1 of that Act.

“securities services” (amendment)

Current Definition

The word “and” under paragraph (d) of securities services definition under the SSA creates legal uncertainty as it suggests that the definition could be read cumulatively. The definition includes the buying and selling of securities, custody and administration of securities, management of securities by an authorised user, and the clearing and settlement of transactions in listed securities.

Proposed Amendment

The purpose of the amendment is to extend the definition to include other securities services. These include the buying and selling of securities for own account or on behalf of clients as a business, the use of the trading system or infrastructure of an exchange to buy and sell listed securities, the furnishing of advice to any person, management of securities, clearing and settlement services and reporting of transactions in securities. The definition also extends the scope of regulation to the unlisted securities, i.e. OTC derivatives, in accordance with the G20 and IOSCO recommendations. It is envisaged that this will facilitate a framework for the clearing, settlement and reporting of unlisted securities. The replacement of “and” with “or” seeks to clarify that securities services could be one or more of the services listed thereunder and to facilitate partial regulation and remote membership.

“self-regulatory organisation” (amendment)

Current Definition

The definition of SRO refers to exchanges and CSDs only.

Proposed Amendment

The definition has been amended to include reference to independent clearing houses that have now been afforded the status of SROs.

“senior management” (new definition/insertion)

The definition provides a description of persons who qualify as senior management required to undergo a fitness and proprietary test. These include the CEO and management directly accountable to the CEO. This is aimed at ensuring that the SROs are governed by appropriately skilled individuals as well as individuals with a high level of integrity.

“settle” (amendment)

Current Definition

Settle is defined as the discharge of obligations arising from transactions in listed securities.

Proposed Amendment

The purpose of the amendment is to clarify the settlement process and the point in time at which settlement takes place, and to facilitate settlement of unlisted securities, e.g. money market securities and other unlisted securities. For listed debt and equities securities, settlement will be effected once the relevant entries have been effected in the register held by the CSD or the relevant participant.

With regards to listed and unlisted derivatives, settlement entails fulfillment of all contractual obligations as provided for in the rules of an exchange, independent clearing house or as prescribed by the registrar, as the case may be. This

extends the registrars' scope of regulation of the OTC market. The definition has also been provided for in respect of settlement of money market securities.

“settlement services” (new definition/insertion)

This definition has been inserted to clarify what constitutes “settlement services”. The definition includes all activities done after trading and clearing but prior to settlement. The idea is to distinguish these services from the actual act of settlement (settle) as specifically defined in the Bill, and to avoid the extension of an act of settlement to entities not authorised by law to provide such a service.

“settling party” (deletion)

This term has been deleted as it is not used in the SSA. This has necessitated a consequential amendment to the Insolvency Act by deletion of its reference therefrom. Consequential amendments to the Insolvency Act have been proposed to give effect to this deletion.

“supervisory authority” (new definition/insertion)

This definition enhances cooperation between the FSB and other local or foreign regulators and facilitates remote membership as well as partial regulation. A supervisory authority includes a local or foreign supervisor, regulator, administrator or law enforcement agency so designated under local or foreign law.

“trade repository” (new definition/insertion)

This definition introduces a trade repository for the maintenance of a centralised electronic database of the records of transaction data. The initial focus will be on the OTC derivatives in line with the G20 recommendations. The aim is to have all transactions in OTC derivatives reported to the trade repository and disclosed to the registrar and other relevant supervisory bodies to enhance transparency in this market, as well as for risk identification/assessment and market surveillance purposes.

“transfer” (new definition/insertion)

Transfer of uncertificated securities is provided for in Chapter 2 of the Companies Act and the amendment is aimed at aligning the SSA with the Companies Act. The Companies Act provides that transfer can only be effected by either a CSD or participant by effecting the necessary entries in the relevant accounts, and the Companies Act overrides the SSA in this respect. The effectiveness of transfer has also been provided for in that the transfer will be effective against third parties, and the necessary protections have been afforded to a “bona fide purchaser”, i.e. who is not party to or have knowledge of any illegality, insolvency or fraud in respect of a transfer. Should the transfer be effected to this purchaser,

the court may remove his name from the register of securities. This is in line with the UNIDROIT.

“uncertificated securities” (moved from the CSD Chapter and amended)

Current Definition

The definition is provided for under section 29 of the SSA and refers to securities not evidenced by certificates or written instrument, and which are transferable by entry without a written instrument.

Proposed Amendment

The purpose of the amendment is to align the definition with the definition of “uncertificated securities” provided for under the Companies Act. The definition has been extended to include immobilised securities held in custody by a CSD or its nominee and which are transferable by entry.

“uncertificated securities register” (new definition/insertion)

Technical amendment to align with the Companies Act.

“unlisted securities” (new definition/insertion)

The amendment clarifies that unlisted securities refer to securities not listed on a South African or external exchange.

“web site” (new definition/insertion)

Technical amendment to align with the Electronic Communications and Transactions Act.

“withdraw” (new definition/insertion)

The purpose of the definition is to clearly define the term as meaning the conversion of uncertificated securities to certificated securities, and that “withdrawal” has a corresponding meaning. This definition should have been provided for in the SSA for the sake of clarity.

Subclause (2) (addition to section 1)

The purpose of this subclause is to prescribe a point in time for the commencement of an insolvency proceeding. The Bill envisages the commencement of insolvency proceeding to be on the commencement of business rescue proceedings in terms of the Companies Act, on the written notification to the registrar or a regulated person of either an application or granting of an interim order whichever comes first or on the filing of a resolution by a company or the appointment of an insolvency administrator. This is aimed at bringing certainty in the market and to give effect to UNIDROIT and IOSCO recommendations.

Subclause (3) (addition to section 1)

Clause 1.3 has been inserted to clarify the meaning of “in consultation”. Where the FMA requires any supervisory authority to take a decision “in consultation with” the registrar, such decision requires the concurrence of the registrar. The aim is to preserve the registrar’s powers and to ensure that the registrar is in agreement with decisions taken by other supervisory bodies in respect of matters falling within the ambit of the FMA.

2. *Clause 3 Application of Act and rules (amends section 3)*

Subclause (1) (amends section 3 (1))

Current Provision

The SSA applies to regulated persons, services provided by regulated persons, issuers, clients and market abuse.

Proposed Amendment

Paragraph (a) provides that the business rescue, winding up and curatorship provisions in sections 102 to 105 of this Act do not apply in relation to the South African Reserve Bank, and sections 102, 103 and 105 do not apply to a regulated person that is a bank, or a person regulated in terms of the National Payment Systems Act, 1998 (Act No. 78 of 1998).

Paragraph (b) provides that sections 102 to 105 must be applied in accordance with the provisions of section 8 of the National Payment System Act, 1998 (Act No. 78 of 1998), and the provisions of section 8 of the National Payment System Act, 1998 (Act No. 78 of 1998) prevail in the event of any inconsistency with any provisions with section 102 to 105 of this Act.

Subclause (3) (addition to section 3)

This subsection has been added to ensure that the FMA prevails in the event of any inconsistency between its provisions of this Act and the provisions of any other national legislation, other than the Financial Intelligence Centre Act, 2001 (Act No. 38 of 2001).

Subclause (4) (addition to section 3)

The purpose of the subclause is to ensure that the provisions of the FMA relating to insolvency proceedings and settlement prevail over any law, legislation other than section 8 of the National Payment System Act, 1998 (Act No. 78 of 1998), agreement, founding document, and that they binds any person, including the insolvency administrator. As mentioned under the definition of insolvency proceeding above, it is imperative that legal clarity exists on the protection measures for account holders and that such protection is guaranteed in insolvency of participant/authorised user in the interest of financial system

stability, protection of market-participants and consumers, and reduction of systemic risk.

Subclause (5) (addition to section 3)

The purpose of this provision is to ensure that the registrar's approval is sought prior to any decision-making by any organ of state exercising any power or duty conferred upon such an organ of state in respect of a matter regulated under the FMA. This is also aimed at enhancing effective coordination in the implementation of the FMA and cooperation between the registrar and regulators with regards to matters regulated by the FMA.

Subclause (6) (addition to section 3)

Concurrent regulatory jurisdiction by the Financial Services Board and Consumer Commission over consumer protection erodes regulatory certainty and may have the unintended consequence of weakening consumer protection. This provision, therefore, protects the integrity of the regulatory framework for financial markets. The National Treasury will continue to work with the Department of Trade and Industry to ensure that entities in the financial markets are held to higher standards than would be applicable in terms of the Consumer Protection Act of 2008.

3. Clause 4 Prohibitions and adherence to authorisation by authorised users, participants and clearing members (amends section 4)

Current Provision

This section prohibits persons from operating or carrying on business as exchanges, clearing houses, authorized users and participants, buying and selling of unlisted securities, and management of securities, without the necessary licence authorization or in contravention with the relevant provisions of the SSA.

Proposed Amendment

The purpose of the amendment is to extend the prohibition to those entities acting as listed companies, trade repositories, clearing members and nominees without the required approval from the registrar, the exchange, the clearing house or CSD, as the case may be. A prohibition against a person holding out that they are a listed company, clearing member, trade repository or nominee when the contrary is true, has also been added.

Provision has also been made for the restriction of activities of authorised users, participants and clearing members to the services for which they have been authorised (partial regulation). The scope of regulation will be detailed in the rules of the exchange, CSD or independent clearing house, respectively and will be subject to the registrar's approval. The amendment also enables remote membership and gives the Registrar the discretion to determine the category of

remote members to be allowed to operate in the South African market and the requirements applicable thereto.

The qualification in the beginning of section (4) (2) of the SSA has been deleted as it does not serve any purpose.

4. Clause 5 Minister, Registrar and Deputy Registrar of Securities Services (amends section 5)

Current Provision

The registrar is required, in performing any of his functions in terms of the SSA, to supervise compliance with the SSA, to act in accordance with the objects of the SSA and to have regard to, amongst others, the international supervisory standards, the doctrine of proportionality, etc. The SSA requires the registrar to provide written reasons for any decision taken and gives the registrar the power to impose licence conditions.

Proposed Amendment

This clause has been amended to clarify the powers and functions of the registrar in a manner consistent with international norms and standards (i.e. G20 and IOSCO), as well as the scope within which those powers should be exercised. Clarity is being provided that, in every respect, the registrar must exercise his powers in accordance with the Promotion of Administrative Justice Act. The amendment provides an enhancement to the Registrar's powers in exercising his functions to ensure compliance with the Act as well as any policy issued by the Minister in terms of the Act. The registrar will now issue guidelines on the application and interpretation of the FMA, as well as directives for implementation and administration of the FMA. This will enable the effective fulfillment of the regulatory and administrative functions by the registrar in ensuring optimum compliance with the FMA as well as provide for the circumstances where the registrar may direct a person to do or refrain from acting in a certain manner. To better protect the integrity of the supervisory system, the registrar must take steps to verify information submitted to him in performing his regulatory functions. The registrar will in future be obliged to communicate any systemic risk matters to the Minister of Finance. Furthermore, a provision has been made for the strengthening of regulatory, supervisory and enforcement cooperation between the registrar and other regulators. This entails entering into agreements, memoranda of understanding, assistance with on-site visits, inspections, sharing of information, etc.

Provisions have also been added to enable the registrar to provide for transitional arrangements and exemptions.

A requirement has been included that an external authorised user, exchange, central securities depository, clearing house, participant or clearing member may only provide services or exercise functions in terms of this Act as prescribed by the Minister.

5. *Clause 6 Application for exchange licence (amends section 8)*

Current Provision

Any person, including an association consisting of 10 or more persons may apply for an exchange licence in respect of one or more types of securities. The application must be in a format prescribed by the registrar and the applicant is required to comply with the applicable general requirements. The application must further be accompanied by the proposed exchange rules, proposed listings requirements, founding document of the applicant, information on the controlling body of the exchange, and the application fee as prescribed by the Minister. Publication of the notice of an application for an exchange licence by the registrar in two national newspapers is also a requirement.

Proposed Amendment

The purpose of the amendment is to align the provision of this section, entitling any person to apply for an exchange licence, with section 8 (3) of the Companies Act allowing and recognizing associations formed "pursuant to another law". This implies that any association of persons licensed as an exchange in terms of the SSA will be afforded the necessary recognition under the Companies Act. The amendment further enables the registrar to prescribe licence application fees. Fees are based on the costs associated with the resources utilised by the registrar in considering an application, and are therefore viewed as an operational matter. This gives effect to the FSAP recommendation that the registrar must prescribe fees as a means to ensuring its independence from the government.

In addition, the registrar publish licence applications at the cost of the applicant in two national newspapers, and on the official web site.

6. *Clause 7 Requirements applicable to applicant for exchange licence and licensed exchange (amends section 9)*

Current Provision

This section requires an applicant for an exchange licence to have the necessary financial resources, management and human resources, make arrangements for the supervision of all transactions effected through the exchange, have the necessary infrastructure, maintain security and back-up procedures, insurance, guarantee or compensation fund for clients and to make provision for the clearing and settlement of transactions effected through the exchange.

Proposed Amendment

This section has been amended to extend the powers of the registrar in considering a licence application. The registrar may now prescribe fit and proper requirements for the applicant, directors and senior management of an exchange, request any additional information from the applicant and to take into account any other information, including the information sourced from a

supervisory authority. This is aimed at ensuring optimum adherence to good corporate governance principles and practices by exchanges and that exchanges are governed by persons with high integrity. Disclosure and exchange of relevant information between the supervisory authorities has also been enhanced.

7. *Clause 8 Licensing of exchange (amendment and addition to section 10)*

Current Provision

Section 10 of the SSA provides for the licensing of an exchange where the applicant complies with the licensing requirements and the registrar is satisfied that the granting of the licence will further the objects of the SSA. The exchange licence must specify the services that the exchange may provide, its main office in the Republic and places where the exchange may be operated. An exchange is allowed to apply to the registrar for an amendment of the terms or conditions of its licence, and the registrar is obliged to give notice of such application in two national newspapers at the expense of the applicant.

Proposed Amendment

The purpose of the amendment is to clarify the information that should be specified in the exchange licence. The requirement will be for an exchange licence to specify:

- ❖ the terms and conditions of the exchange licence;
- ❖ the categories of securities that may be listed on the exchange;
- ❖ the registered office of the exchange in the Republic; and
- ❖ places where the exchange may be operated and that the prior written approval of the registrar should be obtained should the exchange wish to operate at any other place.

The section has been further amended to ensure cost effective regulation by allowing publication of the licence amendment on the official web site, as well as publication of licence amendment applications in two national newspapers at the cost of the applicant. The amendment also provides confirmation of the applicability of this chapter to an exchange as a SRO.

8. *Clause 9 Functions of exchange and power of registrar to assume responsibility for functions (amends section 11)*

Current Provision

This section lists the functions of an exchange as, *inter alia*, the enforcement of exchange rules and listings requirements, supervision of compliance with the Act and the exchange rules, issuance of directives, amendment or suspension of rules, amendment of listings requirements in consultation with the registrar, provision of clearing and settlement of transactions in listed securities, appointment of clearing house and consultation with an appointed clearing

house when making or amending exchange rules pertaining to clearing and settlement, and supervision of issuers of listed securities' compliance with the listings requirements. The registrar may, if necessary to achieve the objects of the SSA, assume responsibility for one or more of these functions.

Proposed Amendment

This section has been amended by the addition or limitation of the following functions and powers of the registrar or exchange, as the case may be:

- ❖ an obligation on an exchange to provide an infrastructure for the trading of securities listed on the exchange.
- ❖ an obligation on an exchange to assist the registrar in the enforcement of the FMA. Failure to comply with this obligation allows the registrar to take administrative enforcement action against the exchange.
- ❖ to protect against systemic instability by improving communication of potentially systemic effects stemming from an exchange or its members, an exchange will be obliged to report any potential systemic concern to the registrar.
- ❖ an obligation on the exchange to supervise and enforce compliance with exchange rules, listing requirements, and exchange directives.
- ❖ alignment of the FMA with international best practice and giving of effect to the FSAP recommendation for the registrar to approve the listing requirements and any amendments thereto. The FSAP has recommended that, in order to bring the SSA in line with best international practice and standards, the registrar should assume the responsibility of approving the listing requirements and any amendments and suspensions relating thereto in the same manner as is the case with the rules of an exchange and the CSD.
- ❖ facilitation of the establishment of CCPs, and provision of an independent clearing house, i.e. independent from the exchange. This section has further been amended to reflect the extended role of clearing houses and to allow the exchanges to opt for an appointment of either an associated or independent clearing house to clear and settle transactions on behalf of the exchange..

9. *Clause 10 Listings of securities (amendment and addition to section 12)*

Current Provision

This section regulates the listing of securities by an exchange. It requires an exchange to make listings requirements for the listing and delisting of securities, requirements for issuer agents, standard of conduct, disclosure and corporate governance for issuers of listed securities, investigative and disciplinary

procedure for issuers, penalties to be imposed on issuers for non-compliance with the listings requirements and the binding nature of the listings requirements. An exchange is required to keep a list of the securities to be traded on the exchange and to consider applications for listing. It may list its own securities on itself and charge fees in terms of the listings requirements or exchange rules.

Proposed Amendment

This section has been amended to align the FMA with international best practice and to give effect to the FSAP Review recommendation that the registrar should approve the listing requirements, as well as to allow the registrar to act swiftly in mitigating systemic risk and protecting the stability of financial markets. An exchange may amend its listing requirements in accordance with the consultation process prescribed in the listing requirements, which process must provide for the persons who are to be consulted and the manner in which consultation will happen, including the time period or periods allowed for consultation. The registrar will in future approve the listing requirements as well as any amendments and conditions thereto. The proposed amendments will be published on the official website and the notice of the amendments will be published on the Gazette. The Registrar may amend the listing requirements of an exchange in certain exceptional specified circumstances, and then must inform the Minister and publish the amendments, and explain the imperative that necessitated the amendments.

The amendment further allows publication of the penalty imposed by the exchange on the exchange's website. Flexible granting of applications for listing will be permitted where necessary in furtherance of the national government's objective to encourage participation in the financial markets. However, a provision is also made to allow additional conditions to be imposed on an issuer where justified.

10. *Clause 11 Removal of listing and suspension of trading (amends section 13)*

Current Provision

This section regulates the delisting and suspension of trading in listed securities and gives the exchange the power to determine the conditions of listing. The section also refers to the "board of appeal".

Proposed Amendment

The section has been amended to give effect to the FSAP recommendation requiring approval of the listing requirements by the registrar through the shifting of the power to determine conditions of listing from the exchange to the registrar. In addition, a technical amendment has been made to replace the "board of appeal" with "appeal board" in alignment with the FSB Act.

11. *Clause 12 Application of amended listing requirements to previously listed securities (amends section 14)*

This section has been amended to clarify the extension of retrospective application of the listing requirements to securities listed before any subsequent amended listing requirements. Reference to “other conditions” has been deleted as the listing requirements (and conditions) must in future be approved by the registrar.

12. Clause 15 Funds of a Mutual Exchange (deletion of subclauses 2 and 3 of section 17)

Current Provision

The SSA currently allows distribution of surplus assets of an exchange, including a non-proprietary exchange, to any person with, inter alia, the written consent of the registrar. This was effected to ensure maximum benefit of the previous tax-benefit for mutual entities, including the mutual exchanges.

Proposed Amendment

The relevant subsections have been deleted as they are redundant in light of the fact that the tax exempt status of mutual (non-proprietary) exchanges has been removed.

13. Clause 16 Requirements with which exchange rules must comply (amendments and additions to section 18)

Current Provision

Section 18 regulates the scope of the exchange rules. This includes, *inter alia*, authorization criteria for authorised users, capital adequacy, guarantee and risk management requirements for authorised users, the trading, clearing and settlement of listed securities, management of securities, surveillance of any matter in terms of the Act, trading halts and suspensions, disciplinary proceedings for authorised users, furnishing of information by an authorised user, disclosure of fees, issuance of directives, supervision of compliance with FICA, etc. The SSA currently allows exchanges to provide in-house clearing and settlement services or to appoint a clearing house for the provision of these services subject to the applicable rules of that exchange.

Proposed Amendment

The amendment of this section is necessary in the light of, amongst other things, the insertion of new definitions of clearing services and settlement services. This clause introduces the following amendments:

- ❖ the facilitation of partial regulation and remote membership, subject to requirements prescribed by the Minister, by providing authorisation criteria for different categories of authorised users in accordance with the securities services provided as well as the securities in respect of which securities services are provided. Should an exchange wish to authorise

- remote members or “partially” regulate any of its authorised users, such an exchange will be required to make rules on the authorisation criteria.
- ❖ the requirement that the rules of an exchange should provide for repudiation of transactions by investors, has been deleted as it may potentially create legal uncertainty. Repudiation of transactions will be effectively dealt with under the existing paragraph allowing the exchanges to declare transactions void.
 - ❖ a provision has been made requiring a rule to be implemented for authorised users transacting with nominees to ensure that such nominees have received the necessary approval in accordance with the provisions of the SSA by the CSD, the exchange or the FSB, as the case may be. This is aimed at addressing concerns about nominees acting without the required approval.
 - ❖ a reference to “repository” has been removed herein as the term creates legal uncertainty.
 - ❖ a provision has been made for the UNIDROIT principle of segregation of the funds and securities held by an authorised user for its own account and those held for or on behalf of other persons. Currently, there is no provision in the SSA requiring rules to be made on the prohibition of debit balances and the amendment is specifically aimed at providing for this. This must be read in conjunction with clauses 20 and 21 of the Bill providing for the segregation of assets and funds of clients. Regrettably, the SSA currently places an obligation on the participants of the CSD to balance and reconcile their securities accounts’ with that of the CSD, while a similar obligation is not placed on the authorised users of an exchange in respect of the relevant upper tier custodian. The amendment accordingly places an obligation on the authorised users and ensures that the necessary protections are fully entrenched in the rules of the exchanges. This effectively means that daily balancing with the upper tier custodian will be required of authorised users.
 - ❖ a clarification has been provided to ensure that the responsibility of the exchange is limited to the exchange directives. This has been reflected by amending reference to directives, to exchange directives.
 - ❖ clarity has been provided that expeditious dispute resolution should be made available exclusively to clients of authorised users, and securities services provided to those clients provided in respect of listed securities.
 - ❖ a deletion of the reference to the exchange’s power to enforce the SSA, as the exchanges are not responsible for the enforcement of the SSA. However, an exchange will remain obliged to supervise compliance by authorised users with the Act, and to report any non-compliance with the Act to the Registrar.

- ❖ the exchange will be obliged to make rules on the supervision of compliance by authorised users and issuers with the FM Act and FICA, as well as the nature of respective enforcement assistance to be provided to the registrar.
- ❖ a provision has been added to allow for default rules similar to those provided for under the CSD rule requirements section in the absence of this enabling provision in the SSA. The addition will give the exchange the power to limit revocation of any settlement instruction by an authorised user or to revoke a settlement instruction on commencement of insolvency prior to settlement. Default rules for exchanges are currently provided for under section 35A of the Insolvency Act 24 of 1936 (“the Insolvency Act”) in terms of which an exchange (including a CSD), is entitled, in accordance with its rules, to cancel and terminate the unfulfilled obligations of a market participant upon the sequestration of the estate of the market participant. Section 35A of the Insolvency Act also envisions that the exchange (including a CSD) will have default rules that will enable it to cancel or terminate the unfulfilled obligations of a market participant upon the sequestration of the estate of the market participant. This gives effect to the UNIDROIT Convention recommendations on revocation of settlement instructions.
- ❖ an addition has been made to provide for the effective administration of securities under insolvency proceedings. The exchange is required to have rules on the administration of securities under insolvency, which includes rules on settlement of unsettled transactions under insolvency. Should this situation arise, the insolvency administrator will be bound by the rules of the exchange in respect hereof.
- ❖ a provision has been made for remote membership by allowing the exchanges to have rules in place for the approval of an external authorised user. The rules will be subjected to a rigorous public consultation process as well as the ultimate approval of the registrar. The rules must also be consistent with requirements prescribed by the Minister. Though an obligation is not placed on an exchange to make these rules, should the exchange opt to provide access to their systems and services to remote members, the exchange should cause such rules to be made and approved by the registrar.
- ❖ Lastly, clarification has been provided with regards to the general applicability of the binding nature of the rules on the issuers of securities listed on that exchange.

14. *Clause 17 (previously section 24)*

15. *Clause 17 (previously section 25)*

16. Clause 18 (previously section 26)

17. Clause 20 (previously section 27)

18. Clause 21 Segregation of securities (insertion of new clause)

This new section incorporates the IOSCO and Bank of International Settlement's recommendation for the legal framework to support the segregation of securities, as well as the UNIDROIT principle of segregation of securities held by an authorised user for its own account and those held for or on behalf of other persons to address custody risk. Authorised users will be required to deposit own securities and those of clients in separate securities accounts and to ensure that they are identifiable as belonging to a specific person. Due to the equal but different applicability of this provision to both the exchange and CSD environment, a distinction needs to be drawn between segregation requirements for authorised users and those relating to participants.

Currently, there is no provision in the SSA requiring rules to be made on the prohibition of debit balances and the amendment is specifically aimed at providing for this. This must be read in conjunction with clauses 20 and 31 of the Bill relating to segregation of assets and funds of clients. Securities held as such will be considered as trust property as defined in the Financial Institutions (Protection of Funds) Act. Regrettably, the SSA currently places an obligation on the participants of the CSD to balance and reconcile their securities accounts' with that of the CSD, while a similar obligation is not placed on the authorised users of an exchange in respect of the relevant upper tier custodian. The amendment accordingly places an obligation on the authorised users and ensures that the necessary protections are fully entrenched in the rules of the exchanges. This effectively means that daily balancing with the upper tier custodian, i.e. participant, CSD or a third party will be required of authorised users.

19. Clause 22 (replaces section 28)

20. Clause 23 Buying and selling listed securities (amends section 19)

Current Provision

The SSA allows a person to carry on the business of buying and selling of listed securities if that person is an authorised user, trades through an authorised user, is a financial institutions transacting with another financial institution in principal capacity or trades listed securities in order to give effect to the reconstruction of a company or effect a change in the control over management or business of a company.

Proposed Amendment

This section has been amended to clarify the uncertainty that exist in respect of the conclusion of transactions in listed securities. There has been confusion in the market with respect to the meaning of the “business of buying and selling of listed securities” and whether all trades should be executed on the exchange trading system. The amendment clarifies that all orders through or by an authorised user should be executed on the exchange trading system. Corporate actions and principal trades between financial institutions resulting in a change in beneficial ownership can be done outside of an exchange but should be reported to the registrar and the exchange on which the securities are listed.

21. *Clause 24 Reporting of transactions in listed securities (amends section 21)*

Current Provision

This section provides for the reporting of transactions in listed securities concluded outside of an exchange by a financial institution resulting in a change of beneficial ownership of such securities to the registrar in the manner prescribed by the registrar. The registrar is required to disclose information about a transaction so reported to the exchange and/or public.

Proposed Amendment

This section has been amended to address the uncertainty and inconsistency in respect of the reporting of transactions resulting in a change of beneficial ownership and executed outside of an exchange. Principal trades in listed securities between financial institutions as defined in the SSA and corporate actions concluded outside of an exchange and resulting in a change in beneficial ownership of those securities should be reported to the registrar by that financial institution or parties to the corporate action. The amendment further removes the obligation imposed on the registrar to disclose these transactions to the public if that disclosure will not enhance regulatory effectiveness or transparency.

22. *Clause 25 Definitions (amends and replaces section 29)*

This clause now simply provides that for purposes of the CSD Chapter, unless the context indicates otherwise, “securities”, means uncertificated securities, including money market securities.

“central securities account” (amendment and moved to clause 1)

Current Definition

The SSA defines this as an account kept by a CSD for a participant and reflecting the number or nominal value of securities deposited as well as all entries made in respect of such securities.

Proposed Amendment

The amended definition extends the entities for which the CSD may hold securities to include, in addition to participants, external central securities

depositories and other persons as determined in the depository rules. This is aimed, inter alia, at facilitating link-up markets between the local CSD and external CSDs, and to enable a securities ownership register (“SOR”). The FSB is investigating the preferred SOR model in consultation with the relevant industry stakeholders.

“central securities repository” (deletion)

The definition has been deleted as the term “repository” creates legal uncertainty.

“certificated securities” (amendment and moved to clause 1)

Current Definition

Certificated securities are defined as securities evidenced by a certificate or written instrument.

Proposed Amendment

This definition has been amended to align it to section 49 of the 2008 Companies Act, which defines “certificated” as securities being evidenced by a certificate. The amendment also provides for the securities being evidenced by either a certificate or written instrument where an issuer is not a public company.

“entry” (amendment and moved to clause 1)

Current Definition

This definition includes an electronic recording of, inter alia, other transactions in respect of securities.

Proposed Amendment

The definition has been amended to remove the uncertainty created by the use of the term “other transaction”. The uncertainty is created by the definition of “transaction” under section 1 of the SSA that relates to buying and selling only. The intention is to include all the other instructions in respect of securities or interests in those securities that may be effected within the CSD environment.

“securities” (amendment and moved to clause 1)

Current Definition

The current definition of “securities” makes reference to money market “instruments”.

Proposed Amendment

The definition has been amended to correct an error by replacing the reference to money market instruments with a reference to money market securities. This is aimed at distinguishing money market instruments from money market securities, and to align with the definition of “securities” which expressly excludes money

market securities from the definition except for purposes of the custody, administration and settlement chapter of the FMA.

“securities account” & “securities of the same kind” (amendment and moved to clause 1)

These definitions have been amended and moved to section 1 as they are appropriately placed there. The meaning of “securities account” has been extended to include accounts by authorised users and nominees and this has accordingly been reflected under Section 1.

“securities repository” (deletion)

This definition has been deleted to remove the reference to “repository” as the term creates legal uncertainty.

“subregister” (deletion)

This definition has been deleted and replaced with the definition of uncertificated register under section 1. This is to align the definition with that of uncertificated register provided for under the Companies Act.

“uncertificated securities” (amendment)

This definition has been moved to section 1 as it is more appropriately placed there and is not exclusively relevant to this section.

23. Clause 26 Application for central securities licence (replaces and amends section 30)

Current Provision

The section, inter alia, provides for the publication of an application for a CSD licence in two national newspapers. The Minister is also given the authority to prescribe fees.

Proposed Amendment

This section has been amended to allow the registrar to perform operational functions. The setting of the application fee is an operational matter as the fee is based on the costs associated with the resources the registrar will have to use to consider the application.

Furthermore, an amendment has been provided to ensure cost effective regulation. The Registrar has discretion, as an alternative to publication of licence applications in two national newspapers, to publish a licence application on the official web site.

24. Clause 27 Requirements applicable to applicant for central securities depository licence and licenced central securities depository (replaces and amends section 31)

Current Provision

This section requires an applicant for a CSD licence to have the necessary financial resources, management and human resources.

The section provides limited powers to the registrar in considering a licence application and no provision requiring fit and propriety in respect of an applicant for a CSD licence, its directors and senior management.

Proposed Amendment

This section has been amended to extend the powers of the registrar in considering a licence application. The registrar may now prescribe fit and proper requirements for the applicant, the directors and senior management of a CSD, request any additional information from the applicant and to take into account any other information into account, including the information sourced from a supervisory authority. This is aimed at ensuring optimum adherence to good corporate governance principles and practices by CSDs licensed under the Financial Markets Act, and that the CSD is governed by persons with high integrity.

25. *Clause 28 Licensing of central securities depository (replaces and amends section 32)*

Current Provision

The section requires, inter alia, the CSD licence to specify securities services to be provided by a CSD. In addition, the registrar is required to publish a CSD licence amendment in two national newspapers.

Proposed Amendment

The section has been amended to clarify the information that should be specified in the CSD licence, i.e. the securities services to be provided by the CSD and the securities in respect of which those securities services may be provided. The registrar must publish licence amendment applications in two national newspapers at the expense of the applicant, and on the official web site.

Clarification has also been provided for the applicability of this chapter to a CSD as an SRO.

26. *Clause 29 Functions of a licensed central securities depository (replaces and amends section 33)*

Current Provision

There is no obligation on CSDs to assist the registrar in enforcing the SSA. A CSD can only be licensed as an associated clearing house, and no specific requirement is imposed on the CSD to ensure prudent effective and efficient performance of functions.

Proposed Amendment

Section 33 has been amended to provide for the following:

- ❖ an obligation on a CSD to assist the registrar in the enforcement of the SSA. Failure to comply with this obligation allows the registrar to take administrative enforcement action.
- ❖ the removal of the reference to “repository” as the term creates legal uncertainty.
- ❖ the definition of “central securities account”. The CSD should act in the interest of all those for whom it opens the account, and to notify them of entries made in their respective accounts as well as fees and charges imposed.
- ❖ an alignment with the definition of “securities of the same kind”. This provides for the requirement for the CSD to balance and reconcile securities of the same kind. The original wording was “each kind of security”, and this has now been clarified.
- ❖ a reflection of the extended role of clearing houses and clarifies that should a CSD choose to be licensed as a clearing house, it can opt to be licensed as either an associated clearing house or independent clearing house.
- ❖ an enablement of the link-up markets and allow CSDs to enter into agreements with external CSDs in this regard. This is in line with the IOSCO recommendations and will enable cost effective cross border settlement of securities. The ability to enter into agreements with external CSD is subject to requirements prescribed by the Minister, and the requirements set out in clause 34(4).
- ❖ general requirements relating to prudence, the effective and efficient performance of functions and infrastructure in accordance with the IOSCO Principles. These are aimed at ensuring that CSD functions and settlement systems are performed and operated in a prudent, effective and efficient manner.
- ❖ clarification to the effect that the securities services CSDs provide are provided in performance of the CSD functions listed under section 33 of the SSA.
- ❖ the Registrar’s powers to assume the responsibility of any function of exchanges has been extended to CSDs as well. This amendment is aimed at aligning the provisions relating to exchanges, CSDs and clearing houses, as well as enhancing the registrar’s powers.

27. *Clause 30 (replaces section 34)*

28. Clause 31 Duties of Participant (replaces and amends section 35)

Current Provision

Participants are required to deposit the securities deposited with them with the CSD, unless the client directs otherwise. The SSA also makes provision for a “subregister” and limits the functions that may be performed by the participants.

Proposed Amendment

This section has been amended to provide for the following:

- ❖ an alignment with section 50 (3) of the 2008 Companies Act that requires deposit of clients’ securities with the CSD, notwithstanding any contrary direction by clients.
- ❖ an alignment with the definition of “uncertificated securities register” provided for under Section 1 of the 2008 Companies Act. The participant of the CSD will be required to deposit securities in an “uncertificated securities register”. This replaces the use of the current word “subregister”.
- ❖ an empowerment of the CSD to prescribe rules in accordance with which information may be disclosed to issuers.
- ❖ an extension of the functions of a participant in respect of a central securities account to include an attachment and the giving of effect to any lawful instruction in respect of a security. Currently, the SSA limits the participants’ general functions to instructions in respect of transfer, pledge and cession.
- ❖ a provision has been made for the UNIDROIT principle of segregation of the funds and securities held by a participant for its own account and those held for or on behalf of clients. Currently, there is no provision in the SSA requiring rules to be crafted on the prohibition of debit balances and the amendment is specifically aimed at providing for this.

29. Clause 32 Uncertificated securities (replaces and amends section 37)

Current Provision

New issues of listed securities can be in certificated or uncertificated (dematerialised) form.

Proposed Amendment

To signal policy commitment towards full dematerialisation for listed securities, new issues [of listed securities] must be in dematerialised form. Dematerialisation affords significant efficiency and investor protection benefits.

30. Clause 33 Duties of issuer of uncertificated (replaces and amends section 38)

Current Provision

Not aligned with the provisions of the 2008 Companies Act.

Proposed Amendment

This section has been amended to align it with section 50(2) of the 2008 Companies Act dealing with immediate entries of any new issuances in the securities register of the issuer company as well as with the 2008 Companies Act's definition of securities register.

31. Clause 34 Requirements with which depository rules must comply (replaces and amends section 39)

Proposed Amendment

The Section has been amended to provide for the following:

- ❖ a transfer of the CSD's enforcement powers in respect of contraventions of the SSA to the registrar. This power belongs with the registrar and this has now been clarified in the Bill under clause 5. The amendment also clarifies that the CSD can only take enforcement action in respect of a contravention of directives issued by it as an SRO and not those that are issued by the registrar.
- ❖ a requirement for the CSD to make rules relating to corporate actions, to ensure practical arrangements regarding notices and to remove the reference to "repository", as the term creates legal uncertainty.
- ❖ a requirement for the rules to be prescribed on the conveyance of the relevant information to clients by participants.
- ❖ the removal of the reference to "repository", as the term creates legal uncertainty.
- ❖ a provision has been made for the UNIDROIT principle of segregation of the securities held by a participant for its own account and those held for or on behalf of other persons. Currently, there is no provision in the SSA requiring rules to be made on the prohibition of debit balances. This has now been provided for in the Bill. It is clear in practice (internationally and nationally) that the CSD Rules and Directives could make provision for intraday debit balances in certain circumstances, as long as it does not flow into the next business day.

- ❖ an alignment with the new definition of “central securities account”. The rules must provide for a duty to disclose to a participant or CSD by those for whom the securities accounts and central securities accounts are kept.
- ❖ an insertion to ensure that participants transact only with approved nominees by requiring them to take reasonable measures to ascertain that the nominees have been so approved.
- ❖ an addition to ensure due performance of the CSD’s obligations.
- ❖ The SSA currently requires the exchanges to have client complaints resolution procedures in place and the same is not required from the CSD. In the interest of investor protection and to ensure a level playing field, a similar obligation is being placed on the CSD.
- ❖ an addition to allow for default rules, in the same manner as provided for under the exchange rule section. The insertion will give the CSD the power to limit revocation of any settlement instruction by a participant or to revoke a settlement instruction on commencement of insolvency proceedings but prior to settlement. This is aimed at ensuring certainty in the settlement system and to reduce systemic risk where there is a failure of a participant or client.
- ❖ an addition to provide for the effective administration of securities under certain insolvency proceedings. This includes the administration of unsettled transactions. Should a transaction be settled under insolvency, the insolvency administrator will be bound by the settlement.
- ❖ an addition to ensure coordinated cross-border supervision of an external central securities depository and to ensure that the relationship between the CSD and the external CSD is effective.
- ❖ an addition to enable remote membership for external participants. The requirements applicable hereto as prescribed by the Minister will be incorporated into the rules of the CSD and approved by the Registrar.
- ❖ an amendment to make the rules binding on the external central securities depositories and other persons referred to under the definition of central securities account.

32. *Clause 35 Registration and status of securities (replaces and amends section 40)*

Current Provision

The section makes reference to money market instruments.

Proposed Amendment

This section has been amended to correct the reference to money market instruments and replace it with electronic securities and to distinguish these securities from the money market instruments environment. The section has also been amended to align it to section 50 of the 2008 Companies Act.

It is also provided that any securities held by a central securities depository, participant or nominee for or on behalf of another person must be identifiable as belonging to a specific person and are considered to be trust property as defined in the Financial Institutions (Protection of Funds) Act and that Act applies to those securities.

33. *Clause 36 Ownership of securities (replaces and amends section 41)*

This section has been amended to remove the reference to “repository”, as the term creates legal uncertainty.

It is also provided that any securities held by a central securities depository, participant or nominee for or on behalf of another person must be identifiable as belonging to a specific person and are considered to be trust property as defined in the Financial Institutions (Protection of Funds) Act and that Act applies to those securities

34. *Clause 37 Transfer of securities (replaces and amends section 42)*

Current Provision

Transfer of securities occurs when the necessary entries are made in the central securities accounts or securities accounts of the transferor and the transferee. No further protections are provided.

Proposed Amendment

This section has been amended to align it with the 2008 Companies Act which makes provision for a transfer of uncertificated securities to be made only by a participant or a CSD, as well as to give effect to UNIDROIT.

35. *Clause 38 Pledge, or cession of uncertificated securities to secure debt (replaces and amends section 43)*

Current Provision

Pledges or cessions may only be effected by entry in either a central securities account or a securities account, both of which are held by or for a participant.

Proposed Amendment

This section has been amended to clarify that the required entries in respect of pledges and cessions should be effected at the level of holding and to make the entry effective to third parties in accordance with the provisions of the 2008 Companies Act. The amendment is aimed at extending the necessary protections to the pledgee or cessionary and to give effect to UNIDROIT. Out and out cessions have been excluded from this section as they are regarded as transfers to be effected under clause 39 of the Bill.

36. *Clause 39 Ranking of interests in securities (insertion of new section)*

A new section has been inserted to provide for the ranking of interests in securities and to give effect to UNIDROIT. The idea is to ensure that the first interest to be recorded in time against a security is afforded priority over subsequent interests.

37. *Clause 40 Acquisition by a bona fide purchaser (insertion of new section)*

This provision clarifies the protection of a bona fide purchaser, and ensures that the transfer is effective against third parties and the CSD, participant, authorised user and nominee are required to give effect to the transfer. An entry effected in terms of clause 37 or 38 is valid and effective against third parties despite any fraud or illegality that may have resulted in the entry being effected, unless a party to the transaction resulting in the entry was a party to or had knowledge of the fraud or illegality. This clause does not modify the order of priorities determined by clause 39. Sections 53(4), (5) and (6) of the Companies Act apply to an entry in terms of clause 37 or 38, with the changes required by the context.

38. *Clause 41 Withdrawal and delivery of securities (replaces and amends section 44)*

Current Provision

Delivery of the withdrawn securities should be within a reasonable time.

Proposed Amendment

This section has been amended to align it with Chapter 2 of the 2008 Companies Act providing for the notification of withdrawal of securities and the timeframes within which effect must be given to the request.

39. *Clause 42 (replaces section 45)*

40. *Clause 43 Warranty and indemnity (replaces and amends section 46)*

Current Provision

Warranty extends only to deposit of securities.

Proposed Amendment

This section has been amended to align it with section 55 of the 2008 Companies Act dealing with liability for loss in relation to uncertificated securities resulting from unlawful removal of a name for the securities register, increase of number of uncertificated securities or change in the description of any uncertificated securities.

41. *Clause 44 Attachment (replaces and amends section 48)*

Current Provision

No provision is made in the SSA for attachments to be effected at the appropriate level of holdings and for the relevant entries to be made at the relevant level of holdings.

Proposed Amendment

This section has been amended to ensure that the attachment of securities is done at the level where the securities are held and against the securities of the person to whom the warrant of execution was granted. This is also aimed at giving effect to the UNIDROIT.

42. *Clause 45 Effectiveness in insolvency (insertion of new clause)*

This section has been inserted to provide for the effectiveness of the settlement of securities or interests in securities in the event of insolvency and to give effect to UNIDROIT.

43. *Clause 46 Licensing of clearing house (replaces and amends section 64)*

Current Provision

Provision is made for the licensing of a clearing house appointed by an exchange.

Proposed Amendment

Section 64 (1) has been amended to reflect the extended role of clearing houses and to provide for an independent clearing house not linked by appointment to an exchange. The associated clearing house status has also been retained in the Bill. The licensing process and procedure of the clearing houses have been aligned with that of exchanges and CSDs. Similar operational powers as provided for under the exchange and CSD licence have been incorporated herein. As stated, the setting of an application fee is an operational matter because the fee is based on the costs associated with the resources the registrar

will have to use to consider the application. The amendment further provides for the notice of application for a clearing house licence on the website.

44. *Clause 47 Requirements applicable to applicant for clearing house licence and a licensed clearing house (replaces and amends section 65)*

Current Provision

The general requirements apply exclusively to “associated clearing houses”.

Proposed Amendment

This section has been amended to align the application requirements with that of exchanges and CSDs. The fit and proper requirements will have to be met by directors and senior managers of the applicant. In addition, supervision arrangements, and management and settlement of risk need to be adequately provided for.

45. *Clause 48 Licensing of clearing house (replaces and amends section 66)*

Current Provision

The existing section requires mention of services to be provided by a clearing house on the licence. The registrar may only publish the licence application in two national newspapers.

Proposed Amendments

This section has been amended to reflect the extended role of clearing houses, align the licensing processes and procedures with that of exchanges and CSDs, i.e. specify the securities services that may be provided by the clearing house and securities in respect of which those securities services may be provided, to allow for other means of publication of a notice and to provide a link between Chapter V and Chapter VI. The licence should also specify the insurance, a guarantee, compensation fund or other warranty to afford clients of clearing members the necessary protections. A publication process and as well as the medium similar to exchanges and CSD’s, i.e. websites, has also been provided for. An extension has been made of current sections 49 to 53 and 55 to 57 and section 62 to clearing houses associated to the exchange.

In line with the twin peaks philosophy, and given that clearing houses may pose systemic and other financial stability risks, it is proposed that a “two key” approach is taken, and both the registrar and the Governor are included in the licensing process.

46. *Clause 49 Functions of clearing house and power of registrar to assume responsibility for functions (insertion of new section)*

Current Provision

No provision is made for general functions of an independent clearing house.

Proposed Amendment

This section imposes general obligations on the clearing houses similar to that of exchanges and CSDs as well as the responsibility to the management of clearing and settlement transactions, partial regulation, consultation with relevant regulated persons when making or amending the clearing rules, disclosure of exposures underwritten by the clearing house as well as notification of the registrar in the event the clearing member's membership is terminated.

47. *Clause 50 Maintenance of insurance, guarantee, compensation fund or other warranty (insertion of new section)*

A new section has been inserted to allow an independent clearing house to impose levies to maintain the required insurance, guarantee, compensation fund or other warranty.

48. *Clause 51 Funds of mutual independent clearing house (insertion of new section)*

This new section has been added to allow a mutual independent clearing house to require their clients to contribute to the funds of the clearing house for the purpose of carrying on the business of the clearing house.

49. *Clause 52 Requirements with which clearing house rules must comply (insertion of new section)*

The extension of an SRO status to independent clearing houses means that the clearing house will be required to have rules regulating its members. The rules should provide for authorisation requirements, good character and business integrity, qualified staff, authorisation criteria (remote membership & partial regulation) capital adequacy requirements for members, clearing and settlement of transactions through the clearing house, monitoring of settlement obligations, surveillance of clearing and settlement, business conduct, client dispute resolution mechanisms, disciplinary action against its members, investigative powers, disclosure of fees, administration of securities during insolvency and transaction or position reporting. The clearing house does not need to have settlement rules if it is only licensed to provide clearing and not settlement services. The amendment also allows for rules to be made, if required, on remote clearing members and marketing or canvassing of business.

50. *Clause 53 Amalgamation, merger, transfer or disposal involving associated clearing house (replaces and amends section 69)*

This section has been amended to align it with a similar requirement under clause 65 in respect of amalgamation, merger, transfer or disposal of SROs. The registrar will approve any transfer of assets or disposal of more than 15 per cent of the assets, liabilities or both of an associated clearing house.

51. *Clauses 54 – 58 (Chapter VI) Trade repositories (insertion of new section)*

This Chapter enables an establishment, and licensing of trade repositories by the registrar. It sets out the application and licensing procedures, general requirements with which the trade repositories must comply, as well as the duties of a trade repository, and reporting requirements. Essentially, trade repositories will be required to have adequate systems, resources (including financial resources), internal controls and processes, fit and proper directors and senior managers, necessary for the operation of a trade repository and the protection and maintenance of the integrity and confidentiality of the information received. Development of subordinate legislation mandating reporting of all OTC derivatives transaction data to the trade repository as per the G20 recommendation is underway. Disclosure requirements to the registrar, and where applicable, to the public, will also be imposed on the trade repositories. Furthermore, and notwithstanding the fact that trade repositories will not be fully fledged SROs, some SRO obligations and functions have been imposed on and made applicable to trade repositories to ensure their effectiveness and efficiency, e.g. those relating to renewal of licence, other services, mergers, shareholding, etc.

In line with the twin peaks philosophy, and given that trade repositories may assist in monitoring systemic and other financial stability risks, it is proposed that a “two key” approach is taken, and both the registrar and the Governor are included in the licensing process.

52. *Clause 59 Expiry and renewal of licence of self-regulatory organization (replaces and amends section 49)*

Current Provision

The Minister has the power to prescribe fees.

Proposed Amendment

This section has been amended to allow the registrar to perform operational actions. The setting of the application fee is an operational matter because the fee is based on the costs associated with the resources the registrar will have to use to consider the application.

53. *Clause 60 Refusal of renewal of licence (replaces and amends section 50)*

Current Provision

Reference is made to the “board of appeal” and to the registrar’s power to refuse the renewal of a licence where the applicant failed to give effect to a decision of the board of appeal and such failure has defeated the objects of the SSA.

Proposed Amendment

This section has been amended to align it with the 2008 amendments to the FSB Act and to remove the limitation in respect of the registrar’s power being exercisable only where the failure to give effect to a decision of the board of appeal has defeated the objects of the SSA .

54. *Clause 61 Cancellation or suspension of licence (replaces and amends section 51)*

Current Provision

Reference is made to the “board of appeal” to the registrar’s power to cancel or suspend a licence where the SRO failed to give effect to a decision of the board of appeal and such failure has defeated the objects of the SSA. Furthermore, the section does not cover the independent clearing houses.

Proposed Amendment

This section has been amended to align it with the 2008 amendments to the FSB Act and to limitation in respect of the registrar’s power being exercisable only where the failure to give effect to a decision of the board of appeal has defeated the objects of the SSA . See the definition of “appeal board”.

With the introduction of independent clearing houses, should the registrar wish to cancel the licence of an SRO, he will have to be satisfied that such cancellation/suspension would be in the interest of clearing members of the independent clearing house.

55. *Clause 62 Carrying on additional business (replaces and amends section 52)*

Current Provision

The registrar may lay down requirements in respect of the carrying on of additional business of SROs.

Proposed Amendment

This section has been amended to better regulate the activities of SROs to minimise systemic risk and the potential conflict of interests, and to ensure regulatory effectiveness. See the proposed new clause 116A in respect of transitional provisions.

56. *Clause 63 Conflict of Interest (insertion of new section)*

This clause clearly places requirements on SROs take necessary steps to avoid, eliminate, disclose or otherwise manage possible conflicts of interest between its regulatory functions and its commercial services, which steps must include the implementation of appropriate arrangements, which arrangements must be documented and be publicly available, and an annual self-assessment of the arrangements referred to in sub-item (i), the results of which must be published.

57. *Clause 64 Demutualisation of self-regulatory organization (replaces and amends section 53)*

Current Provision

Reference is made to the demutualization of “a company having share capital” in terms of the 1973 Companies Act.

Proposed Amendment

This section has been amended to align conversions from mutual to private or public companies under the SSA with those provided for under the 2008 Companies Act. The alignment requiring acceptance of the notice of incorporation and registration of that company by the Companies and Intellectual Property Commission established under section 185 of the 2008 Companies Act. The section has also been amended to include, as assets of SROs, any insurance, guarantee, compensation and or other warranty maintained by the SRO to cover liabilities of clearing members of an independent clearing house.

58. *Clause 65 Amalgamation, merger transfer or disposal (replaces and amends section 54)*

Current Provision

Provision is made for amalgamation, merger or transfer of assets from one SRO to the other. No further clarification is provided on the applicable threshold.

Proposed Amendment

This section has been amended to empower the Registrar to approve any amalgamation, merger, transfer or disposal referred to in Chapter 5 of the Companies Act exceeding 25 per cent of assets and/or liabilities of SROs. This is

also an alignment with the Banks Act and it is required that the decision to merge, amalgamate, transfer or dispose of assets and/or liabilities in this manner should be disclosed to the Registrar prior to any compulsory disclosures being made by the respective SRO. The 25 per cent is calculated by aggregating the amount of assets and/or liabilities transferred within the same financial year of the SRO.

The section has also been amended to exclude any transfer of assets below 25 per cent from the requirement to seek the registrar's approval and to require that the registrar be notified of transfers above 10 per cent up to 25 per cent. This requires a consequential amendment to the Competition Act to prevent the Competition Commission or Tribunal from approving or prohibiting any merger provided herein as well as any acquisition provided for under section 57 of this Act where the Minister has issued a notice confirming the merger and that it is in the public interest that the merger be subject to the jurisdiction of this Act.

59. *Clause 66 Duty of members of controlling body of self-regulatory organization (replaces and amends section 55)*

Current Provision

Board members of SROs owe a fiduciary duty and duty of care and skill to the SRO.

Proposed Amendment

The section has been amended to ensure level playing fields in respect of all members of controlling bodies of SROs. Members of controlling bodies of SROs which are not companies will be subject to the same duties applicable to directors so appointed under the 2008 Companies Act.

60. *Clause 67 Appointment of members of controlling body of self-regulatory organization (replaces and amends section 56)*

Current Provision

Reference is made to the 1973 Companies Act.

Proposed Amendment

The section has been amended to align it with the Banks Act and section 69 of the 2008 Companies Act dealing with ineligibility and disqualification of persons to be directors and to ensure that only those persons who meet the fit and proper requirements as prescribed by the registrar are appointed as Board members of SROs.

61. *Clause 68 Limitation on control of and certain shareholding or other interest in certain self-regulatory organizations (replaces and amends section 57)*

Current Provision

The current definition of associate is too restrictive and not aligned with other legislative developments. Control is linked to shareholding of 15 percent nominal value of all the issued shares of an SRO. Approval of shareholding, or other interest above the set threshold falls purely within the jurisdiction of the registrar.

Proposed Amendment

The section provides clarity on who qualifies as an associate for purposes of implementation of the limitation of controlling shareholding of SROs. It has been aligned with the Banks Act, as well as the Companies Act. Section 57 (2) (a) has been amended to align it with section 35 (2) of the 2008 Companies Act dispensing with the requirement of shares to have nominal value. This has been replaced with fair value.

The amendments also provide an alignment with section 2(2) of the 2008 Companies Act (with the exclusion of section 2(2)(d)) providing a definition of control. The registrar will now approve shareholding and other interests below 49 per cent and above 15 per cent. The Minister will approve shareholding in the excess of 49 per cent.

62. *Clause 69 (replaces section 58)*

63. *Clause 70 (replaces section 59)*

64. *Clause 71 (replaces section 60)*

65. *Clause 72 Manner in which the rules of a self-regulatory organization may be made, amended or suspended and penalties for contraventions of such rules (replaces and amends section 61)*

Current Provision

The registrar is obliged to publish proposed rule amendments in the Gazette only. The penalty provision does not extend to clearing houses and clearing members.

Proposed Amendment

The title has been amended to align with the new definition of rules under clause 1. This section has been amended to allow publication of the notice of rule amendments in the Government Gazette and the actual rule amendments on the official website. This section is further amended to allow the Registrar to act

swiftly to mitigate systemic risk and protect the financial stability of the financial markets by effecting amendments to the rules where necessary and informing the Minister, publishing the amendments in the *Gazette* as well official website. The Registrar must provide to the Minister and publish in the *Gazette* the reasons and an explanation of the urgent imperative and exceptional circumstances that necessitated the amendment to the rules.. The section is further amended to extend the penalty rules to clearing members of an independent clearing house, and for the publication of the penalties on the website of the SROs.

66. *Clause 73 Limitation of liability (replaces and amends section 62)*

Current Position

The liability of SROs and trade repositories extends to *mala fides* and gross negligent acts by authorised users and participants. The liability is not limited to acts by the SROs themselves.

Proposed Amendment

This section has been amended to align it with the liability provision of the FSB Act. The section has been amended to limit the liability of SROs and trade repositories to acts of SROs and trade repositories only. Limited liability has been provided for in respect of authorised users and participants who fail to ensure that the persons they are transacting with or nominees they employ has received the required approval.

67. *Clause 74 Disclosure of information by self-regulatory organizations (replaces section 63)*

Subclause (1) has been added to what was contained in section 63, to define the limited circumstances in which confidential information might be disclosed by SRO's.

68. *Clause 75 Code of conduct for authorised users, participants or clearing members of independent clearing houses (replaces and amends section 70)*

Current Provision

The registrar is required to prescribe a code of conduct for authorised users only.

Proposed Amendment

This section has been amended to enable the registrar to prescribe a code of conduct for clearing members of independent clearing houses and participants as well. Currently, the registrar has prescribed the code of conduct for authorised users.

69. Clause 76 Principles of code of conduct (replaces and amends section 71)

Current Provision

The principles of the code of conduct are only applicable to authorised users.

Proposed Amendment

This section has been amended to extend the principle of a code of conduct to participants and clearing house members of independent clearing houses, i.e. fiduciary duties, operational requirements and business conduct principles.

70. Clause 77 Powers of the registrar in respect of unlisted securities (replaces and amends section 20)

Current Provision

The registrar's authority in respect of unlisted securities is limited to the business of buying and selling such securities. The registrar has the authority to prohibit a person from carrying on the business of buying and selling unlisted securities in the manner that contravenes the objects of the SSA, as well as to impose conditions in respect of the carrying on of such business. Furthermore, the registrar may prescribe conditions for the buying and selling of certain specified types of unlisted securities.

Proposed Amendment

The section has been amended to provide that the registrar may, in accordance with the regulatory framework prescribed by the Minister prescribe requirements for the authorisation of persons providing securities services in respect of unlisted securities. The section has also been amended to extend the regulatory authority of the registrar in respect of unlisted securities to include any "securities services" that may be provided in respect of such securities and not just the buying and selling. The global financial crisis has exposed shortcomings in the unregulated nature of the over-the-counter market and the amendment extends the regulatory reach to this market. The amendments enable and strengthen regulation of the unlisted market in line with the IOSCO and G20 recommendations. In addition, the registrar may prescribe conditions or standards (e.g. a code of conduct) for the provision of securities services in respect of unlisted securities, and also prescribe standards for certain types of unlisted securities relating to, inter alia, the clearing and settlement of those securities. This enables the registrar to prescribe standards for the clearing and settlement of transactions in unlisted securities through a CCP or a CSD, as the case may be, and the establishment of a trade repository should same be required.

Extensive industry consultation will inform the development of this regulatory framework. An initial consultation document is included as Annexure B to this explanatory memorandum setting the issues for consultation.

71. *Clause 78 Approval of nominees (replaces and amends section 36)*

Current Provision

The section requires nominees who open accounts with participants to be approved by the CSD and the same obligation is not placed on the exchanges in respect of nominees who open accounts with the authorised users.

Proposed Amendment

For clarity and to ensure a level playing field, the registrar will now approve the nominees who open accounts with either authorised users or participants. The section has also been amended to align the exchange and CSD criteria for approval of nominees with that of the registrar under the prescribed nominee approval requirements (published under the FAIS Act)

72. *Clause 79 Definitions (replaces section 72)*

The definition of “claims officer” is extended as a consequential amendment to align the definition with the new section 83.

The definition of “court of competent jurisdiction” has been removed.

The definition of “public sector body” is removed as a consequential amendment, because the public sector body defence in the old section 73(2)(b)(ii) is being removed.

The definition of “regional court” is removed as a consequential amendment because the old section 79 is repealed.

73. *Clause 80 Insider trading (replaces section 73)*

Current Provision

The defence that existed under the old section 73, that a person may deal with inside information because it was in pursuit of an affected transaction as defined in section 440A of the Companies Act, is repealed. Such a defence is unfair to uninformed sellers before a mandatory offer is made.

Proposed Amendment

A new subparagraph is inserted to provide for a safe harbour defence for a bona fide commercial transaction amongst insiders that is not designed to benefit from the price sensitive information.

Amendment to the defence available to an authorised user, who is an insider, but who acted on specific instructions from a client. This section now places an onus on the authorised user not to execute such a transaction if he had reason to suspect that the client was also an insider.

Amendment to the section to remove the archaic defence available to a public sector body in pursuit of monetary policy.

Amendment to extend liability for insider trading to a person who executed an offending transaction on behalf of another person, if he had reason to suspect that such a person was an insider.

74. *Clause 81 Publication (replaces section 74)*

Amendment to the definition of published information (that is no longer inside information) to ensure that such information must be more widely available before insiders may deal.

75. *Clause 82 Prohibited trading practices (replaces section 75)*

Amendment to extend the liability of persons who enter manipulative transactions into the market on behalf of another, to instances where such persons acted grossly negligent.

Amendment to extend the provision deeming a trading activity to be manipulative if the trader knew that an opposite order at the same price will or have been entered into the market.

Amendment to remove price stabilising as a lawful defence to insider trading. In future, it will only be a defence to price manipulation.

76. *Clause 83 False, misleading or deceptive statements, promises and forecasts (replaces section 76)*

Amendment to correct a previous drafting error making the section applicable to unlisted public companies. A requirement is included that a person who has made a false, misleading or deceptive statement and who was unaware that the statement was false, misleading or deceptive, and who becomes aware of the fact that such statement was false, misleading or deceptive, must, without delay, publish a full and frank correction with regard to such statement.

77. *Clause 84 Liability resulting from insider trading (replaces section 77)*

Amendment to extend joint liability of insiders to litigation costs.

Amendment to extend liability to a person who deals on behalf of an insider, if he or she had reason to believe that such a person was an insider.

78. Clause 85 (replaces section 81)

The section has been amended so that it now provides simply that on application by the board, a court may in relation to any matter referred to in Chapter X grant an interdict or order the attachment of assets or evidence to prevent their concealment, removal, dissipation or destruction.

79. Clause 86 Powers and duties of Financial Services Board (replaces section 82)

Amendment to remove a historic investigation power that is no longer relevant.

Amendment to confirm the jurisdiction of the FSB to assist foreign regulators with cross-border market abuse investigations.

Amendment to prescribe how search and seizures should be executed.

80. Clause 87 Composition and functions of directorate (replaces section 83)

Consequential amendments, and the removal of a reporting requirement to the Minister.

81. Clause 88 (replaces section 84)

82. Clause 89 (replaces section 85)

83. Clause 90 (replaces section 86)

Removal of requirement that the Takeover Regulation Panel, the South African Reserve Bank, the Independent Regulatory Board for Auditors, all self-regulatory organisations and the Financial Intelligence Centre must disclose to the board all information in its possession relating to an alleged offence in terms of this Chapter.

84. Clause 91 Auditor (replaces and amends section 88)

Current Provision

All regulated persons, including private companies, must appoint an auditor.

Proposed Amendment

The 2008 Companies Act no longer requires private companies to appoint auditors. In the interest of investor protection, the requirement has been retained in the Bill in respect of all regulated persons, whether a private company or otherwise.

85. *Clause 92 Accounting records and audit (replaces and amends section 89)*

Current Provision

It is a requirement that the financial statements of regulated persons should be prepared in conformity with the general accepted accounting practice and that the audited financial statements be submitted within three months after the financial year end.

Proposed Amendment

This amendment provides clarity as to the accounting standards that apply in respect of financial statements and provides for the flexibility in the period within which audited statements must be prepared. The annual financial statements will have to conform to the financial standards prescribed under the 2008 Companies Act. The amendment is further aimed at accommodating various types of financial institutions subjected to different timelines under other regulations.

86. *Clause 93 Functions of auditor (replaces and amends section 90)*

Current Provision

The section refers to the repealed Public Accountants and Auditors Act.

Proposed Amendment

The amendment is to correct references to the Auditing Professions Act and align the provisions with the Companies Act and relevant International Standards on Auditing. The amendment further extends the relevant provisions to the clearing house and clearing members and to require auditors' report in respect of matters relating to the nominees of those regulated persons and trade repositories.

87. *Clause 94 (replaces section 91)*

The clause now simply provides that the auditor must provide any report or information as required in terms of this Act despite the provisions of any contrary law or a provision of a code of professional conduct to which the auditor is subject.

The proviso that the failure, in good faith, by an auditor to furnish a report or information in terms of this Act does not confer upon any person a right of action against the auditor which, but for that failure, that person would not have had, has been removed.

88. *Clause 95 (replaces section 92)*

89. Clause 96 General Powers of Registrar (insertion of new section)

If the registrar receives a complaint, charge or allegation that a person who provides securities services (whether the person is licensed or authorised in terms of this Act or not) is contravening or is failing to comply with any provision of this Act, or if the registrar has reason to believe that such a contravention or failure is taking place, the registrar may investigate the matter by directing that respondent in writing to provide the registrar with any information, document or record reasonably required by the registrar about such services and/or appear before the registrar at a specified time and place.

The registrar may, if an advertisement, brochure or other document relating to securities is misleading or for any reason objectionable, direct that the advertisement, brochure or other document not be published or the publication thereof be stopped or that such amendments as the registrar considers necessary be effected.

90. Clause 97 Powers of registrar to conduct on-site visit or inspection (replaces and amends section 93)

Current Provision

The registrar has the authority to investigate any contraventions of the SSA by any person (whether regulated under the SSA or not), by summoning or inspecting such a person, as well as demanding disclosure of information by that person.

Proposed Amendment

This section has been amended to align the powers of the registrar in respect of on-site visits, search and seizures and inspections with those of other registrars under the legislation that the FSB administers, e.g. the Inspection of Financial Institutions Act. The amendment also allows the registrar to assist with other supervisory authorities with investigations into the contraventions of the authority's legislation.

91. Clause 98 Powers of registrar after on-site visit or inspection (replaces and amends section 94)

Current Provision

The section deals with the powers of the registrar after an investigation and inspection. Reference is still made to the 1973 Companies Act provisions relating to winding-up and judicial management.

Proposed Amendment

The amendment is aimed at aligning the powers of the registrar in respect of on-site visits and inspections with those of other registrars under legislation that the FSB administers, as well as aligning the application for winding-up of the

regulated person in line with section 81 of the 2008 Companies Act providing for winding up of solvent companies. The judicial management process has been abolished under the 2008 Companies Act and replaced with the business rescue provisions. The registrar may elect to either wind-up or apply to court to commence the business rescue proceedings.

This section has been further amended to ensure that once the registrar has issued a positive or negative direction for a respondent to take any corrective action, a compensation order is not issued against that respondent.

The registrar has discretionary powers to publish details or outcomes of inspections and on-site visits should the public interest principle warrant such disclosure.

92. *Clause 99 Power of registrar to impose penalties (replaces and amends section 95)*

Current Provision

The section makes reference to the “board of appeal”.

Proposed Amendment

This amendment is aimed at aligning the SSA with the 2008 amendments to the FSB Act. See definition of “appeal board”.

93. *Clause 100 Power of court to declare person disqualified (replaces and amends section 96)*

Current Provision

The applicability of the section is limited to authorised users and participants as well as their officers or employees.

Proposed Amendment

The amendment is aimed at extending the disqualification to clearing members of an independent clearing house.

94. *Clause 101 Referral to enforcement committee (insertion of new clause)*

The registrar’s powers to refer matters to the enforcement committee have been reinstated. This was removed when the provisions of the enforcement committee were moved to the FI Act.

95. *Clause 102 Winding-up or sequestration by court (replaces and amends section 107)*

Current Provision

The winding-up of a regulated person may be done on application to court by, inter alia, the judicial manager of the regulated person.

Proposed Amendment

The amendment introduces a concept of the business rescue practitioner. A business rescue practitioner may approach the court for a winding-up or sequestration order of a regulated person. The provisions of the Bill relating to business rescue will override the applicable 2008 Companies Act provisions in that any business rescue application or resolution made under the 2008 Companies Act must be filed with and approved by the registrar. A provision is also made for liquidation orders to be approved by the registrar. The provision is also made for the registrar to opt for a liquidation, winding-up or curatorship where a business rescue resolution is not approved. Should the registrar opt to place a regulated person under curatorship, such regulated person cannot be simultaneously placed under liquidation or sequestration.

96. *Clause 103 Business rescue (replaces and amends section 108)*

Current Provision

A provision is made for judicial management of a regulated person in accordance with the 1973 Companies Act.

Proposed Amendment

The amendment introduces a business rescue procedure and replaces the judicial management in alignment with the 2008 Companies Act. Business rescue proceedings provided for under section 110 of the 2008 Companies Act apply to regulated persons who are companies.

97. *Clause 104 Appointment of curator (replaces and amends section 109)*

Current Provision

A provision is made for the appointment of a curator.

Proposed Amendment

The overriding provision has been provided to ensure that the curatorship procedure in the Bill overrides any other law. The amendment is also aimed at ensuring that the curatorship proceeding is uninterrupted by business rescue and liquidation proceedings.

An application for the appointment of a curator of a regulated person which is a bank may only be brought in consultation with the Registrar of Banks.

98. *Clause 105 Appointment of business rescue practitioner or liquidator and approval of business rescue plan (replaces and amends section 110)*

Current Provision

The section provides for the appointment of a judicial manager and liquidator by the Master after consultation with the registrar.

Proposed Amendment

The approval of the appointment of a business rescue practitioner or liquidator, as well as the business rescue plan now vests with the registrar. The amendment overrides the provisions of the 2008 Companies Act in respect of the appointment of business rescue practitioners or liquidators, as well as the business rescue plans.

99. *Clause 106 General interpretation of Act (insertion of a new section)*

Current Provision

No provision is made in respect of the general interpretation of the SSA.

Proposed Amendment

This section has been inserted to provide guidance on the interpretation of this Act.

100. *Clause 107 Right of appeal (replaces and amends section 111)*

Current Provision

The section allows for appeal in respect of decisions of the registrar, exchanges, CSD, issuer, participant and claims officer. Reference is also made to the “board of appeal”.

Proposed Amendment

This section has been amended to extend the right of appeal to instances where an aggrieved party is affected by the decision of an independent clearing house as well in respect of a decision to admit or terminate membership of a clearing member. An alignment is also done to the 2008 amendments to the FSB Act by amending the reference to appeal board.

101. *Clause 108 (replaces section 112)*

102. *Clause 109 Regulations (replaces section 113)*

Current Provision

The Minister may make regulations to prescribe matters for which he is authorised in terms of the SSA and other matters necessary to achieve the objects of the SSA.

Proposed Amendment

An amendment has been made to clarify the scope of regulations that can be issued by the Minister, i.e. any ancillary or incidental matters necessary for the proper implementation or administration of the Financial Markets Act. In making regulations, the Minister must maintain the operational independence of the Registrar.

103. Clause 110 Fees (replaces and amends section 114)

Current Provision

The Minister has authority to prescribe fees, the person who must pay for the fees, the nature of the payment and the interest payable.

Proposed Amendment

The amendment allows the registrar to perform operational actions. The setting of fees is an operational matter because the fees are based on the costs associated with the resources the registrar will have to use to consider the application.

104. Clause 111 Offences and penalties (replaces and amends section 115)

Current Provision

The section does not specify the fine amount for which any person contravening the specific sections of the SSA may be liable. The section also makes mention of section 29 which is a definition section and should not form part of this section.

Proposed Amendment

This section is amended to correct an error. Section 29 is a definition section and should not be included herein. The amendment also introduces a R10 million fine limit in respect of contraventions of the SSA listed hereunder.

105. Clause 112 Savings (replaces and amends section 116)

The amendment is to provide for transitional provisions in respect of the SSA.

106. Clause 113 Amendment of laws (insertion of new section)

This new section deals with the amendment of laws listed in the Schedule.

107. Clause 114 Short title and commencement (replaces and amends section 117)

The amendment provides for the Financial Markets Act, 2012.