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FSB

FINAL DRAFT SUBMISSION TO THE STANDING COMMITTEE ON FINANCE

RESPONSE TO KEY ISSUES RAISED IN PUBLIC SUBMISSIONS

ON THE

FINANCIAL SERVICES LAWS GENERAL AMENDMENT BILL, 2013

7 October 2013

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1 INTRODUCTION

The National Treasury ("NT") and the Financial Services Board ("FSB") would like to thank the Standing Committee on Finance for the opportunity to formally respond to the comments raised in oral and written submissions during the public hearings on 22 April 2013 and 23 April 2013, as well as two workshops held on 13 March 2013 and 20 March 2013.

Whilst it is not possible to respond to each and every issue individually, and in detail, the NT and the FSB summarise the key issues or themes raised in comments received, and provide their response to such key issues and themes. Detailed responses to the specific technical comments are set out in detailed supporting matrices. The respective matrices are attached as **Annexures 1, 2, 3, 4, 5, 6, 7, 8, 9, 10** and **11** to this submission.

The NT and FSB acknowledge submissions presented during the public hearings by the Association of Savings and Investments South Africa ("ASISA"), South African Insurance Association ("SAIA"), Banking Association of South Africa ("BASA"), Principal Officers Association ("POA") and the Law Review Project ("LRP"). These submissions provided detailed drafting proposals for particular sections. It should be noted that key issues and themes from oral submissions or media reports are also taken into account in this response document, including comments from workshops with some of the trade union federations.

2 OVERVIEW OF KEY ISSUES FROM PUBLIC SUBMISSIONS

A. The ASISA submission

ASISA proposed a number of technical drafting amendments to specific sections and expressed the following summarised key concerns:

Consultation with industry: ASISA argued that the powers granted to the FSB need to be proportionally balanced with an appropriate and robust process whereby entities and persons that will be the subject of the powers being exercised will have an appropriate opportunity to be consulted and their comments properly considered and responded to by the FSB. ASISA supported the provision for an enabling Code of Consultation, and argued that this would alleviate legal uncertainty in respect of the consultation process.

FSB Liability: ASISA members are of the view that the FSB should be appropriately responsible and accountable in exercising the extensive powers granted to it by the legislation it administers. A *bona fide* exercise of power or carrying out of any duties or performance of any functions is not sufficient, since *bona fide* signals an intention of good faith, but such good faith can still be exercised in a negligent manner.

B. The SAIA submission

FSB Liability: SAIA is concerned that by removing the words "*but not grossly negligent*" will result in extending FSB immunity from liability further than is reasonable in the circumstances. SAIA recommends that the qualification "*but not grossly negligent"* provided for in Clause 67 be retained as it will provide clarity and certainty that the Regulator is required to demonstrate good faith as well as reasonableness in carrying out a duty or performing a function so as to ensure a high standard of care.

Policyholder Protection Rules: SAIA supports the enhancement of market conduct practices in the financial sector and enhanced policy holder protection. SAIA suggested that in the event that circumstances necessitate the immediate publication of a rule, this decision must be made by the Minister. SAIA does not support the implementation of rules without first submitting them for public comment.

Publication on the FSB's website: SAIA is of the view that the benefits of the gazetting for all stakeholders outweigh the potential costs saving on the FSB website.

SAIA raised concerns about the reliability of the FSB website as the only communication method. SAIA recommended that the enactment of the provisions in the Bill affording the right of the Regulator to publish them on the FSB's official website should be delayed in anticipation of the completion of the FSB's project to upgrade its website infrastructure, expected to be completed by September 2013.

Amendment to the Medical Schemes Act, 1998: SAIA proposed that the amendment to the definition of "*business of a medical scheme*" will result in an unreasonably broad application of the Act, in that it will apply to any person rendering a health service in return for the payment of a premium, and not just a person intentionally undertaking the actual business of a medical scheme. The result of the Omnibus Bill amendment will be to extend the ambit of the Medical Schemes Act to all medical insurance products. SAIA proposed that it would be appropriate for the implementation of this section to be delayed until such time as the Demarcation Regulations are law.

C. *The Law Review Project submission*

Policyholder Protection Rules: The LRP submission was confined to s102 which proposes a substitution of s62 of the Long-term Insurance Act 52 of 1998 (LTIA) and s140 proposes a substitution of s55 of the Short-term Insurance Act 53 of 1998 (STIA) which deals with Policyholder Protection Rules. The LRP recommended that the existing s55 be repealed; or nothing is substituted in its place; or the existing rules passed in terms to the existing s55 be re-promulgated as regulations to the Act.

Delegation of subordinate legislative powers: The LRP argued that the NT's proposal was unconstitutional as *"Parliament is being asked to hand-over its legislative powers, unfettered to an unelected regulator. Should parliament substitute the current section with the proposed section, which legally it cannot do, the legitimacy of parliament as an institution will be seriously undermined. Constitutionally the Regulator cannot legitimately be the approver of its own Rules."*

General vs specific application of Policyholder Protection Rules (Bill of Attainder): The LRP was concerned that s55(3), "*Rules referred to in subsection (2) may— (a) apply generally; or (b) be limited in application to a particular kind or type of* *policy, short-term insurer or short-term insurance business*", will enable the Registrar to make arbitrary specific rules applicable to a specific insurer. Parliament is supposed to only make laws of general application. It may not make laws applicable to specific persons and instances. (Specific laws are known as Bills of Attainder.)

Tabling of Policyholder Protection Rules in Parliament: The LRP raised concern about the practicality of s 55(6), "*If the Registrar publishes a rule in terms of subsection (5), the notice referred to in subsection (5) must be tabled in Parliament*, *and the National Assembly may instruct the Registrar to repeal or amend the rule."* It is not clear how this section will overcome constitutional illegitimacy. They argue that an illegitimate rule cannot become legitimate merely if the notice is tabled in [a House of] parliament. It is not clear what the tabling is supposed to achieve.

Regulator drafting policy wording: Concern was expressed with S 55(2)(d) and (e) "*The Rules may provide:(d) for norms and standards with which a policy, a short-term insurer or a type of short-term insurance business must comply; (e) for standardized wording, definitions or provisions that must be included in a policy"*. The provisions of s55(2) are unprecedented. The Regulator wishes to acquire the authority to write policy wordings of insurance contracts.

Stifling insurance innovation: The LRP is of the view that policy wording is central to insurance innovation, and interference by the regulator will stifle such innovation. The LRP claims that the Regulator does not have the expertise to draft policy wording.

No consultation with Advisory Committee: The LRP was concerned that neither the Advisory Committee nor the Minister will be involved in making the policyholder protection rules since Advisory Committees are now to be abolished in terms of other proposals. The Regulator would have greater powers than the Minister to make regulations, and indeed Parliament itself.

International Benchmarking for standardised contracts: The LRP is of the view that NT's reference to International Association of Insurance Supervisors ("IAIS") Insurance Core Principle ("ICP") 19 and the country examples to support the case for the introduction of standard contract provisions is incorrect.

Global financial crisis: The LRP argues that the NT's justification for the proposed legislative changes on the basis of the global financial crisis is flawed. The 2007 financial crisis was a banking not a short-term insurance crisis, and that the current crisis is caused by government deficits. There is factually no link or any rational reason to impose intrusive, draconian and unconstitutional legislation on the insurance market.

D. The BASA submission

BASA proposed a number of technical drafting amendments to specific sections and expressed the following summarised key concerns:

Code of Conduct on consultation: BASA is concerned that the Bill proposes the repeal of the Advisory Committee and its substitution with the Code of Conduct in relation to industry consultation. They argue that at present, the Advisory Committee serves an important function of providing a forum for industry engagement with the Regulator, as well as providing technical expertise and oversight on the FSB. BASA is also skeptical of the Code of Conduct, especially in providing the same benefits provided by the Advisory Committee.

Exemption from the Consumer Protection Act 68 of 2008: BASA recommends that banking services, as defined in the Banks Act of 1990 and the conduct of banks be excluded from the Consumer Protection Act, 2008 ("CPA"), in the same manner as those of financial institutions defined in the FSB Act.

Broad on-site visits and inspection powers: BASA was concerned that the term 'suitable persons' is too broad. BASA recommends that the Bill should require only qualified inspectors, who are appointed in terms of the Inspection of Financial Institutions Act, 1998 to conduct the on-site visits or inspections. These inspectors must be authorised to conduct such inspections or visits by means of a warrant only, as their powers are very extensive.

Publishing findings of investigation: BASA is concerned with the power of the inspector to publish onsite information in respect of their investigation.

Publishing on the FSB website as opposed to the Government Gazette: BASA raised concerns with the proposal that notices, directives and exemptions be published on the 'official website' set up by the FSB. Their concern is that the current FSB website is neither user friendly nor regularly updated.

Medical Schemes Act of 1998 Amendment: BASA was concerned that the proposed demarcation could be subject to constitutional challenge as there is no rationale connection between the draft regulation and the achievement of a legitimate government purpose through the amendment proposed in the Bill.

E. The POA submission

The POA proposed a number of technical drafting amendments to specific sections drafting amendments to specific sections and expressed the following summarised key concerns:

Principal Executive Officer ("PEO"): The POA recommended that the Pension Funds Act ("PFA") be amended to provide for a single definition that appropriately encompasses the functions, roles and responsibilities of this important officer.

The POA is of the view that the PEO is required to exercise and participate in a material degree in the general executive control over and management of the business and activities of the retirement fund.

"Acting" Principal Executive Officer: Given the short-term nature of the appointment of an acting Principal Executive Officer, which appointment is done by the fund, the POA recommends that the fund should only be required to notify the Registrar of Pension Funds of this appointment. The Board of Trustees must also ensure that the acting Principal Executive Officer is a fit and proper person.

Delegation of authority: The POA is of the view that the PEO (and not the Board) should be empowered to delegate any of the Principal Officer's functions under PFA and the rules of the fund to the Deputy Principal Officer, subject to the conditions determined by the Principal Officer. The POA is of the view that the Board (of Trustees) cannot delegate a power that it does not have.

3 RESPONSES TO KEY ISSUES RAISED IN PUBLIC SUBMISSIONS

3.1 Key issue 1: Limitation of liability (clause 67)

The National Treasury has obtained a formal legal opinion from Advocate Gerrit Grove, Senior Council on the proposed amendment. The opinion is attached as **Annexure 8** to this submission.

Clause 67 of the Bill proposes to amend section 23 of the Financial Services Board Act, 97 of 1990, and reads as follows:

''**Limitation of liability**"

23*. No person shall be liable for any loss sustained by, or damage caused to, any other person as a result of anything done or omitted by that person in the bona fide* ***[, but not grossly negligent,]*** *exercise of any power or the carrying out of any duty or the performance of any function under or in terms of this Act, the Acts referred to in the definition of 'financial institution', the Inspection of Financial Institutions Act, 1998 (Act No. 80 of 1998), or the Financial Institutions (Protection of Funds) Act, 2001 (Act No. 28 of 2001).*''

The proposed amendment to section 23 of the FSB Act was prompted by a delictual damages action by the Joint Municipal Pension Fund ("JMPF") in 2005 against the Registrar of Pension Funds relating to heavy futures trading losses it had incurred.

The challenge with the current wording of section 23 is that, firstly, it may mean that if a plaintiff can establish gross negligence then the FSB or relevant officer or appointee is liable for any ensuing economic loss even if the imposition of liability would not accord with the legal convictions of the community and the Constitution. The threat of personal liability will tend to make the staff of the supervisory agency more risk-averse, and will affect the ability of the FSB to act without fear, favour or prejudice. In this regard some of the FSB's decision-making powers concern contested matters, and in the Steenkamp case, the Constitutional Court[1] held that compelling public considerations require that adjudicators of disputes are immune from damages claims if they <u>*act honestly*</u>, which is a constitutional requirement for all valid exercises of public authority. Secondly, and equally important, proving gross negligence versus just negligence is extremely difficult. The amended provision will eliminate the above problems.

[1] 2007 (3) BCLR 300 (CC)

There are a number of examples in the South African legislation where administrative organs are protected from incurring liability:

<u>Banks Act No. 94 of 1990</u>

"**88**. *No liability shall attach to the South African Reserve Bank or, either in his or her official or personal capacity, to any member of the board of directors of the said Bank, the Registrar or any other officer or employee of the said Bank, for any loss sustained by or damage caused to any person as a result of anything done or omitted by such member, the Registrar or such other officer or employee in the <u>bona fide</u> performance of any function or duty under this Act."* (Our emphasis.)

<u>Labour Relations Act No. 66 of 1995</u>

*"**26 (2**) The Commission is not liable for any loss suffered by any person as a result of any act performed or omitted in <u>good faith</u> in the course of exercising the functions of the Commission."* (Our emphasis.)

<u>Social Services Professions Act No. 110 of 1978</u>

"*Subject to the provisions of this Act, the council or a professional board or a committee or any member or officer thereof shall not be liable in respect of anything done in <u>good faith</u> in terms of this Act*. (Our emphasis)

<u>Prevention of Public Violence and Intimidation Act No. 139 of 1991</u>

"14. *The Commission or any member of its staff or an institute or a person referred to in section 5(1)(b) shall not be liable in respect of anything done in <u>good faith</u> under any provision of this Act*." (Our emphasis.)

<u>Public Audit Act No. 25 of 2004</u>

"*The Auditor-General, the Deputy Auditor-General, any other staff member or any authorised auditor exercising a power or carrying out a duty in terms of this Act, is not liable in respect of any loss or damage resulting from the exercise of that power or the carrying out of that duty in <u>good faith</u>.* (Our emphasis.)

The proposed amendment will further bring the liability provision in line with international provisions and requirements. The International Organisation of Securities Commissions (IOSCO), of which South Africa is a member, prescribes that <u>adequate legal protection for regulators and their staff acting in the bona fide discharge of their functions and powers</u> (Principle 6.1).

The International Association of Insurance Supervisors ("IAIS") Insurance Core Principles ("ICP"), to which the FSB subscribes, provides for:

“*The supervisor and its staff have the necessary legal protection against lawsuits for actions taken in good faith while discharging their duties, provided they have not acted illegally. They are adequately protected against the costs of defending their actions while discharging their duties.*”

Finally, the draft Financial Services Laws General Amendment Bill, 2012, if enacted, will operate prospectively only. , i.e. it will not affect any existing cases or causes of action against the FSB or those acting exercising authority under the laws referred to in the section.

3.2 Key issue 2: Policyholder Protection Rules (clause 102 &140)

The LRP raised concern that the authority to make rules in respect of norms and standards with which policies, insurers or a type of insurance business must comply and standardised wording, definitions or provisions that must be included in policies unreasonably interferes with the right to contractual freedom and will stifle innovation. It should be noted that the SAIA and ASISA supported the proposed amendment and provided suggested drafting proposals.

The National Treasury disagrees with the Law Review Project submission. A detailed motivation is set out below.

The National Treasury agrees with the comments raised by the other commentators in respect of the immediate publication of Rules. Accordingly, the clause has been amended to remove the immediate publication of a rule and to clarify that the power is intended to be of general application. A detailed motivation is set out below.

The Bill empowers the Registrar of Insurance to make Policyholder Protection Rules, to give effect to Treating Customers Fairly principles, without Ministerial approval. It enables the Registrar to act swiftly to protect consumers by improving disclosure in insurance contracts and will enable consumers to compare insurance products thereby promoting competition in the insurance sector. The clause has been amended as follows:

“On page 52, from line 35, to omit paragraphs (d) and (e) and to substitute:

(d) for norms and standards with which policies, long-term insurers or types of long-term insurance business must comply;

(e) for standardised wording, definitions or provisions that must be included in policies;

2. On page 52, from line 41, to omit subsection (3), and to substitute:

(3) Rules referred to in subsection (2) may—

(a) apply generally; or

(b) be limited in application to a particular kind or type of policies, long-term insurers or long-term insurance” business.

The proposed amendment to the sections of the Long-term and Short-term Insurance Acts that address Policyholder Protection Rules extends the existing subordinate powers to allow the Registrar to set down norms and standards with which a policy, an insurer or a type of insurance business must comply, and for standardised wording, definitions or provisions that must be included in a policy. This is proposed as these measures appear to be effective tools in facilitating appropriate policyholder protections and negating inappropriate market practices.

The proposed amendment must also be seen against the background of the objective of insurance regulation which is to ensure safe and fair insurance markets in the interest of protecting policyholders. Fundamental to achieving this objective is the ability for the Registrar to protect policyholders by having appropriate supervisory powers.

In the context of insurance contracts, Government remains of the firm view that appropriate policyholder protection is best facilitated by empowering the Registrar to act in instances where industry contracts and practices are <u>inherently unfair and against public policy</u>. In empowering the Registrar in this way, broad overarching protection is afforded to policyholders and potential policyholders, and thereby negating the need for individual policyholders to initiate costly and lengthy litigation in instances where they are the victims of unfair contractual terms relating to insurance.

This approach is also consistent with internationally accepted norms and standards, like the International Association of Insurance Supervisors ("IAIS") Insurance Core Principle ("ICP") 19 that relates to the conduct of business. IAIS ICP 19 requires regulators to set requirements for the conduct of the business of insurance to ensure customers are treated fairly, both before a contract is entered into and through to the point at which all obligations under a contract have been satisfied..

The ICP specifically provides that the fair treatment of customers encompasses concepts such as ethical behaviour, acting in good faith and the prohibition of abusive practices. It goes on to state that the regulator must require insurers to take into account the interests of different types of customers when developing and marketing insurance products and recognise that in some jurisdictions, this can be achieved through a product regulation approach, whereby the supervisor reviews insurance products for compliance with applicable laws. It further recognises that the latter is likely to be more appropriate in certain circumstances, such as where the insurer is dealing with less financially-capable customers or where products are complex (such as in South Africa).

The FSB has also initiated a Treating Customers Fairly (TCF) programme in 2010, which programme will regulate the market conduct of financial services firms. It seeks to ensure that fair treatment of customers is embedded within the culture of regulated firms. The TCF programme will use a combination of market conduct principles and explicit rules to drive the delivery of clear and measurable fairness outcomes from product design and marketing, through to the advice, point-of-sale and after-sale stages.

One of the specific outcomes identified in the Roadmap published by the FSB in March 2011 provides that products and services marketed and sold in the retail market are designed to meet the needs of identified customer groups and are targeted accordingly. This outcome envisages regulation dealing with product features, charging structures, product governance and approval processes, <u>unfair terms</u>, undesirable business practices, regimes for particular consumers such as products aimed at addressing inclusion; and marketing and advertising restrictions and standards. These proposed amendments will assist in giving legislative effect to this programme.

Further, in considering the need for these amendments strong reliance should be placed on the Constitutional Court judgment in Barkhuizen v Napier (CCT72/05) [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) (4 April 2007), specifically the judgement of the honourable Judge Sachs. A copy of the full judgement is attached as Annexure A to this submission. Notably the judgement also refers to research undertaken by the South African Law Commission and international trends in respect of unfair contractual terms.

Insurance is not a luxury but part and parcel of every-day life, a virtual necessity for many to insure against unexpected peril. The insurance industry deals with members of the public who place their faith in the solvency, efficiency, probity and integrity of the insurers. Insurers compete actively, but often on the basis of price rather than the quality of cover; significant issues such as exclusions and conditions often appear in the small print of insurance contracts. The public interest in promoting fair dealing in insurance contracts so as to protect relatively vulnerable individuals contracting with large, specialist business firms, is accordingly strong. <u>The public is therefore in need of</u>

protection, not only as regards the solvency of insurers but also in respect of unfair contract terms and undesirable trade practices.

Further, most insurance contracts are standard form contracts. Standard form contracts are contracts that are drafted in advance by the supplier of goods or services and presented to the consumer on a “take-it-or-leave-it” basis, thus eliminating opportunity for arm’s length negotiations. They contain a common set of contract terms that tend to be weighted heavily in favour of the supplier and to operate to limit or exclude the consumer’s normal contractual rights and the supplier’s normal contractual obligations and liabilities. Not only is the consumer frequently unable to resist the terms in a standard form contract, but he or she is often unaware of their existence or unable to appreciate their import. Onerous terms are often couched in obscure legalese and incorporated as part of the “fine print” of the contract.

As it is impracticable for ordinary people in their daily activities to enlist the advice of a lawyer, most consumers simply sign or accept the contract without knowing the full implications of their act. The task of endlessly shopping around and wading through extensive small print in standard forms would be beyond the expectations that could be held of any ordinary person who simply wishes to get his or her car, house or life insured.

The use of standard forms responds to two economic pressures. It reduces the transaction costs of contracting by making available, at no extra cost, a suitable set of terms. In addition, the printed forms permit senior management of a firm to control the contractual arrangement made by subordinate sales staff. For these reasons, it makes sense to permit the use of standard forms, but to control the content of the terms of the contracts. What is needed is a principled approach, using objective criteria, consistent both with deep principles of contract law and with sensitivity to the way in which economic power in public affairs should appropriately be regulated to ensure standards of fairness in an open and democratic society.

A strong case can be made out for the proposition that clauses in a standard form contract that are unreasonable, oppressive or unconscionable are in general inconsistent with the values of an open and democratic society that promotes human dignity, equality and freedom. Parties to a contract must adhere to a minimum threshold of mutual respect in which the ‘unreasonable and one-sided promotion of one’s own interest at the expense of the other infringes the principle of good faith to such a degree as to outweigh the public interest in the sanctity of contracts'. The constitutional State introduced in 1994 mandates that all law should be congruent with the fundamental values of the Constitution. Oppressive, unreasonable or unconscionable contracts can fall foul of the values of the Constitution.

In considering these amendments it must also be borne in mind that the insurance industry (represented by ASISA and SAIA) has not raised concerns therewith.

As to the allegation made by the Law Review Project at their presentation to the Committee on 24 April 2013, that the international trends referred to by the National Treasury are incorrect, please see the brief scan of the international landscape relating to standard contract term and definitions attached as Annexures (specify the annexures), that includes information on the USA, UK, Singapore, China, South Korea, Malaysia and a number of other countries. This document does not purport to be a comprehensive international research document, but is intended to give the Committee a sense for international trends in this regard.

3.3 Key issue 3: Delegation of subordinate legislative powers by Parliament

The LRP is of the view that "Parliament is being asked to hand-over its legislative powers, unfettered to an unelected regulator". This comment emanates from the proposal which empowers the Registrar of Insurance to make Policyholder Protection Rules. ***National Treasury disagrees with the points raised above. A detailed motivation is set out below. A formal legal opinion provided by Advocate Gerrit Grove Senior Council, is attached as Annexure 9 to this submission.***

In constitutional democracies such as South Africa, the elected Parliament makes law, and Parliament cannot impermissibly surrender its law-making function to the executive. It is important to note, though, that inherent in the law-making function of Parliament is the power to assign or delegate subordinate legislative powers. Principal legislation enacted by Parliament can be viewed as the instrument laying down principles and policies, and subordinate legislation is a legitimate executive instrument to effectively implement the principles and policies contained in the principal legislation enacted by Parliament.

In the case of *Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others*[2] (CCT27/95) [1995] ZACC 8; 1995 (10) BCLR 1289; 1995 (4) SA 877 (22 September 1995), the Constitutional Court considered the question of delegation of legislative powers and held, that, although the Interim Constitution did not explicitly empower Parliament to delegate subordinate legislative powers to other bodies, such a power must be implied.

> "*The legislative authority vested in Parliament under section 37 of the Constitution is expressed in wide terms – "to make laws for the Republic in accordance with this Constitution". In a modern state detailed provisions are often required for the purpose of implementing and regulating laws, and Parliament cannot be expected to deal with all such matters itself. There is nothing in the Constitution which prohibits Parliament from delegating subordinate regulatory authority to other bodies. The power to do so is necessary for effective law making. It is implicit in the power to make laws for the country and I have no doubt that under our Constitution parliament can pass legislation delegating such legislative functions to other bodies. There is, however, a difference between delegating authority to make subordinate legislation within the framework of a statute under which the delegation is made, and assigning plenary legislative power to another body, including, as section 16A does, the power to amend the Act under which the assignment is made*.""[3]

As is highlighted in the quotation above, the power of Parliament to delegate legislative powers is not open-ended, and there are implied limitations on the delegation of legislative powers. Sachs J examined these limitations in the same case as follows:[4]

> *"[206] At the same time, if it is not to fail to discharge the functions entrusted to it by the Constitution, there must be some limit on the matters which it can delegate. I do not think it would be helpful to attempt to find a single formulation or criterion for deciding when delegation is permissible and when not, I feel that a complex balancing of various relevant factors has to be done, against a background of what Parliament is there for in the first case. There would seem to be a continuum between forms of delegation that are clearly impermissible at the one extreme, and those that are manifestly permissible at the other. To take tragic but telling examples from history, it would obviously be beyond the scope of Parliament to do what the Reichstag did when it entrusted supreme law making powers to Adolph Hitler, or in the manner of a Roman Emperor, to declare itself a god, and its horse a consul. At the other extreme, Parliament can, within the framework of clearly established criteria, delegate to other authorities or persons law-making power to regulate the implementation of its laws. There is however a large amount of delegation in between these two extremes that might or might not be permissible. As I have said, I do not think that any hard and fast*

[2] (CCT27/95) [1995] ZACC 8; 1995 (10) BCLR 1289; 1995 (4) SA 877 (22 September 1995).

[3] *Ibid*, at para 51, *per* Chaskalson P.

[4] *Ibid,* at paras 206-207, *per* Sachs J.

rule or simple formula can be used to find a point on the continuum that automatically distinguishes between the two classes of case. To my mind, what would have to be considered in relation to each Act of Parliament purporting to delegate law-making authority, is whether or not it involved a shuffling-off of responsibilities which in the nature of the particular case and its special circumstances, and bearing in mind the specific role, responsibility and function that Parliament has, should not be entrusted to any other agency. This will include an evaluation of factors such as the following:

- *The extent to which the discretion of the delegated authority (delegatee) is structured and guided by the enabling Act;*
- *The public importance and constitutional significance of the measure - the more it touches on questions of broad public importance and controversy, the greater will be the need for scrutiny;*
- *The shortness of the time period involved;*
- *The degree to which Parliament continues to exercise its control as a public forum in which issues can be properly debated and decisions democratically made;*
- *The extent to which the subject matter necessitates the use of forms of rapid intervention which the slow procedures of Parliament would inhibit;* (our emphasis)
- *Any indications in the Constitution itself as to whether such delegation was expressly or impliedly contemplated.*

These items should not in my view be regarded as a checklist to be counted off, but as examples of the interactive factors which have to be balanced against each other with a view to determining whether or not delegation in the circumstances was consistent with the responsibilities of Parliament. None of them, it should be emphasized, permit Parliament to infringe fundamental rights, violate protected spheres of provincial autonomy or in any other way deviate from the constitutional framework within which Parliament must function. Delegation takes place within, not outside the constitutional framework, but even within that framework it can be unconstitutional if it fails to satisfy the above criteria."

Mohamed DP stated the relevant criteria to consider for determining the validity of a delegation of legislative powers as follows:

> *"[136] The competence of a democratic Parliament to delegate its law-making function cannot be determined in the abstract. It depends inter-alia on the constitutional instrument in question, the powers of the legislature in terms of that instrument, the nature and ambit of the purported delegation, the subject-matter to which it relates, the degree of delegation, the control and supervision retained or exercisable by the delegator over the delegatee, the circumstances prevailing at the time when the delegation is made and when it is expected to be exercised, the identity of the delegatee and practical necessities generally."*

The above case was decided under the Interim Constitution, but the Constitutional Court has in subsequent reaffirmed that the position it took in that case is the same under the final Constitution.[5]

Careful attention has been given in respect of the Policyholder Protection Rules to setting clear boundaries in the enabling provisions for the rule-making, for instance by spelling out the matters in respect of which rules may be made, and open-ended language has been avoided. The provisions have been drafted with the intention to respect the fundamental rule that law making is the function of Parliament and that the purpose of rules is a subordinate one, namely to give effect to the principles and policies set out in the law and not to create new law.

Delegation of regulation-making powers to officials

The delegation of subordinate legislative powers to officials such as a Registrar of the FSB, as opposed to the Minister, and the extent of those powers, has been raised as an issue of concern to the Committee.

The delegation of subordinate legislative powers to Ministers is commonly accepted, as Ministers are in terms of section 92 of the Constitution accountable to Parliament for the exercise of their powers and functions and are also required to provide Parliament with full and regular reports concerning matters under their control. Ministers are also members of Parliament which facilitates direct interaction between them and Parliament and the Parliamentary Committees.

Administrative officials, on the other hand, are not as directly accountable to Parliament. However, it is relevant to note that they are responsible to their political heads, and are subject to parliamentary oversight in terms of section 55(2)(b) of the Constitution and to summoning to appear for this purpose before a Parliamentary Committee to explain and justify their actions.

[5] In re Constitutionality of the Mpumalanga Petitions Bill, 2000 (1) SA 447 (CC) at para 19; and AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and Another 2007 (1) SA 343 (CC).

Another important aspect for consideration regarding the delegation of powers to administrative officials is the extent and scope of the delegation. The kind of office-bearer to whom the power is delegated and the extent and scope of the delegated power are particularly important factors that relate to the constitutionality of a delegation.

That these two factors are very important considerations in determining constitutionality appear from the judgement of Mohammed DP in the *Executive Council Western Cape* case discussed above, where he quoted with approval the following extract from a leading Australian case on the delegation of legislative powers by the Australian Federal Parliament:[6]

> *"The fact that the grant of power is made to the Executive Government rather than to an authority which is not responsible to Parliament, may be a circumstance which assists the validity of the legislation. The further removed the law-making authority is from continuous contact with Parliament, the less likely is it that the law will be…(valid) …The scope and extent of the power of regulation-making conferred will, of course, be very important circumstances. The greater the extent of law making power conferred, the less likely is it that the enactment will be a (valid) law………………..".*

Under the current financial regulatory system, subordinate legislation making powers are in some cases vested in an official (the Registrar) and not in the Minister. It must be highlighted that there is nothing in the Constitution that prevents Parliament from delegating subordinate legislation making powers to an administrative authority. The critical factors determining constitutionality would, as indicated above, be the degree to which that authority is accountable to Parliament and the nature and ambit of the delegated powers.

In respect of the Policy-holder Protection Rules, there will be public consultations, that there is appropriate Parliamentary oversight of the powers through requiring the tabling of draft rules in Parliament for scrutiny in order to enable Parliament to scrutinise and make inputs on the rules prior to the rules being finalised and published in the *Government Gazette*.

[6] *The Victorian Stevedoring & General Contracting Company (Pty) Ltd v Dignan* 46 C.L.R. 73.

In relation to the aspect of the nature and ambit of regulation-making powers, the delegation of subordinate legislation making powers is essential, given the fact that the enabling Acts cannot fully regulate all the systems, mechanisms, procedures and other matters needed for effective regulation. Practical considerations which justify these powers to administrative authorities include the following:

- The technical nature of financial regulation and the degree to which specialist knowledge is needed for effective regulation.
- The importance of the time factor in addressing matters where rapid intervention is critical.
- Issues on which regulations tend to be non-political, administrative/technical nature.
- Best practice in other jurisdictions indicate that regulation-making powers are vested in financial-specialist or administrative authorities/bodies rather than in political office-bearers.
- Subordinate legislation is subject to the *ultra vires* rule, which means that they may be struck down by a court if not authorised in the enabling principal Act of Parliament.

Another aspect that is very relevant to consider in relation to the delegation of legislative powers to officials is the impact that the powers that are delegated may have on constitutional rights. The Constitutional Court considered this issue (although not directly in relation to delegated legislative powers) in *Dawood & Another v Minister of Home Affairs & Others*[7], and emphasised that where Parliament confers on officials a power to limit rights, it must provide guidance in the enabling Act as to how such constitutional rights were to be protected. In practice, providing appropriate guidance in the exercise of the power comes down to providing guidelines and criteria for the exercise of such powers.

[7] 2000 (3) SA 936 (CC) at paras 52 – 57.

3.4 Key issue 4: Removal of powers of the Minister and the Court in certain instances

Honourable members of the committee expressed concern that by removing the requirement to secure the Minister and Court approval for certain actions, this would place too much power with the Registrar.

The National Treasury disagrees with the concerns. A detailed response to the comments are set out below.

Long- and Short-term Insurance Acts: Removal of the necessity to secure the approval of the Minister of Finance prior to directing an insurer to stop conducting new insurance business [see clauses 76 and 118 of the FSLGAB amending section 12 of the Long- and Short-term Insurance Acts, respectively]

Authorising the Registrar of Long- and Short-term Insurance to prohibit an insurer from carrying on insurance business without securing the prior approval of the Minister of Finance is:

- consistent with the existing authorisation afforded to other Registrars to withdraw registrations and licences under legislation administered by the FSB;
- consistent with the Insurance Core Principles determined by the International Association of Insurance Supervisors (IAIS ICP) that calls for the operational independence of supervisors; and
- pragmatic as the Registrar who is responsible for the continued supervision of insurers is best placed to determine when such a step is necessary to protect existing and potential policyholders.

It must be noted that the circumstances under which the Registrar may act under section 12 of the Insurance Acts are clearly defined in the legislation. Any decision of the Register under section 12 of the Insurance Acts is subject to the Promotion of Administrative Justice Act (year) and may be taken on appeal to the Appeal Board of the FSB or on review to the High Court.

Long-term Insurance Act: Removal of the necessity to obtain a court order in respect of the transfer of long-term insurance business [see clauses 88, 89, 90 and 90 of the FSLGAB amending sections 37, 38, 39 and 40 of the Long-term Insurance Act]

The amendment of sections 37 to 40 of the Long-term Insurance Act aims to align the process for the approval of the transfer of insurance business from one insurer to another with the process as set out in the Short-term Insurance Act. The process provided for under the Short-term Insurance Act has been effective and efficient, and adequately protected the interests of policyholders. This process has been in place since 1998 and has stood the test of time.

Aligning the process under the Long-term Insurance Act with that provided for under the Short-term Insurance Act will allow for a less lengthy and costly process without negatively impacting policyholders. Notably, ASISA that represents the interests of long-term insurers supported this amendment. It must also be noted that this section only applies where an insurer requests a transfer. The Registrar cannot instruct that such a transfer takes place.

The proposed alignment is further consistent with the IAIS ICP 6.10 that requires the transfer of all or a part of an insurer's business to be *"subject to approval by the supervisor, taking into account, amongst other things, the financial position of the transferee and the transferor. The supervisor satisfies itself that the interests of the policyholders of both the transferee and transferor will be protected"*.

Long-term and Short-term Insurance Acts: Removal of the necessity to secure the Minister of Finance's approval prior to applying for the liquidation of an insurer [see clauses 94 and 134 of the FSLGAB amending sections 42 and 41 of the Long- and Short-term Insurance Acts, respectively]

Authorising the Registrar of Long- and Short-term Insurance to apply for the liquidation of an insurer without securing the prior approval of the Minister of Finance is:

- consistent with the Insurance Core Principles determined by the International Association of Insurance Supervisors (IAIS ICPs) that calls for the independence of supervisors; and
- pragmatic as the Registrar who is responsible for the continued supervision of insurers is best placed to determine when such a step is necessary to protect existing and potential policyholders.

The circumstances under which the Registrar may make such an application are clearly set out in the Insurance Acts, i.e. where an insurer may no longer conduct business or is financially unsound. This authority is balanced by the Court's authority, after objectively considering such an application, to grant or refuse the application.

3.5 Key issue 5: On-site visit powers

Honourable members of the committee raised the concern that the on-site power amendments proposed in the tabled Bill were not aligned with the provisions approved by the committee for the Credit Rating Services Act, 2012 last year.

National Treasury has adopted the Committee's recommendation to consolidate the supervisory visit powers. It is proposed that those powers be consolidated in the Financial Institutions (Protection of Funds) Act, 2001 (FI Act). This will ensure alignment of these powers across the FSB. To ensure alignment across all FSB legislation, it was deemed appropriate to also amend the current provisions of the Financial Markets Act, 2012 (No. 19 of 2012), as well as the Credit Ratings Services Act, 2012 (No. 24 of 2012). The empowering provision to conduct such visits and to instruct inspections remains in the sectors specific laws.

The Bill proposes amendments to various financial sector laws to empower the Registrar under those laws to conduct on-site supervisory visits of the business or affairs of regulated persons. This power already exists as part of the legislative structure of the FSB. However, it does not extend to all the sector specific laws. It is, therefore, contained in this Bill so as to create consistency across the various financial sector laws.

The NT, subsequent to the tabling of the Bill and due to deliberation by the Portfolio Committee on Finance in respect of on-site visit powers, undertook to amend, where appropriate, the proposed provisions to align with the approach adopted in the Credit Ratings Services Act of 2012.

Need for on-site visit compliance visit powers

On-site visits are aimed at determining compliance by those persons that are authorised, licensed, registered, appointed, or otherwise approved to perform an activity regulated under a law administered by the FSB. Ensuring effective compliance with rules and regulations by regulated persons is an important for creating trust in a society and in government.

Supervisory on-site visits are a key element of the supervisory processes of the FSB and are closely related to the off-site monitoring processes. It provides information that supplements the analysis of statutory reports submitted by a regulated person to the FSB and enables the FSB to obtain information and detect problems that cannot be obtained or detected through off-site monitoring. In particular:

- in the case of insurers, for example, experiencing asset difficulties, accounting irregularities or deficient management, it enables the FSB to identify problems that the insurer could be given to ignore and, sometimes, to hide;
- it offers the FSB the opportunity to have interactions with the managers, which is valuable to assess their suitability;
- it enables the FSB to assess the management's decision-making processes and internal controls;
- it enables the FSB to identify activities that could potentially breach rules and regulations and take appropriate action; and
- it provides the FSB the opportunity to analyse the impact of specific regulations, whether such regulations are effective and, more generally, to gather information for benchmarking.

Our Courts have in a number of cases pronounced that routine “administrative inspections” (supervisory visits) are an inseparable part of an effective regime of regulation[8] and that persons who participate in a regulated field can reasonably assume to accept that they must tolerate routine intrusions aimed at ensuring that such persons comply with their statutory duties.[9]

Rogers J in *Gaertner* noted that routine searches were justifiable and that the knowledge that premises can be randomly searched was an inducement for all persons who conduct a regulated activity to comply with the relevant laws.

The proposed supervisory on-site visit powers are critical to ensure the proper regulation of the industry, effective supervision and compliance with international standards.

[8] *Mistry v Interim Medical and Dental Council of South Africa & Others 1998 (4) SA 1127 (CC)*
[9] *Patrick Lorenz Martin Gaertner & 2 Others v Minister of Finance & Others 2013*

Deviation from on-site visit provisions in the Credit Rating Services Act, 2012

The proposed amendments deviate slightly from the wording of the on-site visit provisions in the Credit Rating Services Act of 2012. The deviations mainly provide for:

- additional safeguards to constrain the Registrar from intruding into the personal domain of the regulated person;
- an additional duty on the Registrar to conduct supervisory visits with strict regard to decency and good order;
- the protection of the regulated person's right to legal professional privilege;
- greater clarity as to the Registrar's right of access to documents/information of the regulated entity; and
- greater clarity as to when the Registrar may remove documents of the regulated person and the rights of the regulated person in such an event.

The deviations are deemed necessary to ensure that the supervisory visit provisions are not overbroad by limiting the Registrar's discretion as regards to time, place and scope of such visit and the type of person who could become subject to a supervisory visit.

3.6 Key issue 6: Relationship of the Board of the FSB with Enforcement Committee (clause 58)

Honourable members of the committee requested that an explanation be provided in terms of the relationship of the FSB Board with the Enforcement committee.

The NT proposes that this amendment be postponed to the broader twin peaks review.

3.7 Key issue 7: Effective Consultation

ASISA, SAIA and BASA commented that given the repeal of Advisory Committees and the additional powers afforded to the FSB, these powers must be proportionally balanced with an appropriate and robust consultation process whereby entities and persons that will be the subject of the powers being exercised will have an appropriate opportunity to be consulted and their comments properly considered and responded to. ASISA supported the provision for an enabling Code of consultation.

National Treasury agrees with the comments received on this clause. Accordingly, clause 63 has been amended to oblige the FSB to prescribe a code of norms and standards for consultation for the FSB and Registrars.

A draft Code is attached as **Annexure 10** to this submission. The draft Code discusses what is envisaged by each principle. The draft Code will ensure that the FSB follows a transparent approach to consultation and will alleviate legal uncertainty in respect of the process to be followed. Further, it will enable all departments within the FSB to apply a consistent standard of consultation.

Clause 63 has been amended to read:

"(3) The Executive Officer must prescribe a code of norms and standards for consultation for the board and Registrars as referred to in Financial Services Board Legislation, which must–

(a) incorporate the following principles, namely that the—

(i) appropriate stakeholders to be consulted must be identified;

(ii) the purpose and scope of consultation must be clear;

(iii) the timing, medium and process of consultation must be appropriate, proportional and transparent;

(iv) consultation material must be clear; and

(v) stakeholder input must be considered and feedback provided; and

(b) stipulate requirements and standards relating to publication."

ASISA, SAIA and BASA supported the publication of matters on the official website subject to the FSB website being re-developed – see key issue 9 in this regard. However, some concerns were raised that this may be contrary to the Interpretation Act No 53 of 1957 and impede accessibility to documents so published.

National Treasury has considered the comments. Actions prescribed by the Registrar will now be published on the FSB website. The Code of Consultation (key issue 7) will address the issue of appropriate stakeholder consultation. In addition, the Code will ensure that provision is made for a Notice to be published in the Government Gazette. The purpose of the Notice will be to alert the public to documents placed on the FSB website for consultation.

published in the Government Gazette. This is consistent with section 16 of the Interpretation Act No. 53 of 1957. Section 16 of this Act provides that when any by-law, regulation, rule or order is authorised by any law to be made, such by-law, regulation, rule or order must be published in the Government Gazette

It must be noted that subordinate legislation is also published on the website of the FSB to facilitate transparency and accessibility. This is done because the Government Gazette is not that readily available to the general public and financial institutions. The FSB therefore has a vested interest in ensuring that the public, in general, and financial institutions, specifically, are aware of the legislation that applies in respect of a regulated financial services sector.

The FSLGAB, however, provides for administrative decisions and certain requirements (such as reporting requirements, forms, fees, etc.) of the Registrar relating to financial institutions to be published on the official website of the FSB. Certain of these decisions and requirements had to be published in the Government Gazette. Publication of these decisions and requirements in the Government Gazette is costly, and as indicated above, not so readily accessible. These administrative decisions and requirements tend to affect financial institutions registered under the Acts administered by the FSB only and not the general public. Publication on the official website is and will be usually accompanied by emails to these affected financial institutions alerting them to the publication on the website to ensure that these financial institutions are aware thereof.

This approach is consistent with section 15 of the Interpretation Act that allows for different instruments or methods to be used for the notification that certain actions have been taken. Section 15 of the Interpretation Act provides that when any act, matter or thing is by any law directed or authorised to be done by the President or the Premier of a province, or by any Minister, or by any public officer, the notification that such act, matter or thing has been done may, unless a specified instrument or method is by that law prescribed for the notification, be by notice in the Government Gazette.

As has always been the case, regulations prescribed by the Minister would continue to be published in the Government Gazette. The Bill has been drafted to consistently specify that rules issued by the Registrar, such as the PPR, will be published for comment, and tabled in Parliament for scrutiny, and the final rules would also be published in the Government Gazette.

The approach has been retained as it was contained in the Bill as published, to allow for FSB directives and exemptions to be published on the FSB website rather than the Government Gazette, to avoid the high costs of publication in the Government Gazette. However, where a directive has been issued in the interest of public protection, then the Registrar may still consider publishing such rules, directives and exemptions in the Government Gazette, in order to ensure reliable public access to the directives. A clause has been inserted into the FSB Act which provide for a list of directives and exemptions which are intended to have a general application and to be published annually as a schedule to the FSB's Annual Report that is tabled in Parliament.

3.9 Key issue 9: Functionality and usability of the official FSB website

Most commentators supported the publication of matters to be prescribed on the official website subject to the FSB website being re-developed to provide for proper version control of documents and an archive facility to provide for access to historic documents to provide legal certainty, and Disaster Recovery and Business Continuity Plans to ensure the consistent availability of the website are in place. Concern was expressed that the FSB website is currently not generally reliable, effective and available.

The National Treasury notes the concern expressed by commentators. The FSB has committed to ensuring that the FSB website concerns are addressed. In this regard, the FSB has outlined the steps that are being taken to ensure accessibility and usability of the official website. Please see Annexure 11 for details.

3.10 Key issue 10: Addressing the division of pension interest arising from the dissolution of unions

Section 37D of the Pension Funds Act currently does not enable pension funds to distribute pension benefits on the dissolution of marriages in terms of Islamic law, while pension funds are able to distribute pension benefits on the dissolution of marriages, civil unions, and customary marriages. It is sought to amend the Pension Funds Act to enable pension funds to be able to distribute pension benefits on the dissolution of marriages in terms of Islamic law, subject to a court order.

The Pension Funds Act, 1956 (Act No. 24 of 1956) in section 37D appropriately provides for the distribution of pension benefits on divorce, the dissolution of customary marriages registered in terms of the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998), and the dissolution of civil unions in terms of the Civil Union Act, 2006 (Act No. 17 of 2006). Section 37D currently does not appropriately provide for the dissolution of marriages in terms of Islamic law.

When the Financial Services Laws General Amendment Bill, 2012 was drafted, consideration was given as to how potentially the Pension Funds Act might appropriately be amended to cater for the distribution of pension benefits on the dissolution of a marriage in terms of Islamic law.

At that time, it did not seem that the issue could be fully addressed, without either legislation first being enacted to provide for the recognition of marriages in terms of Islamic law, or amendments being effected to the Divorce Act, 1979 (Act No. 70 of 1979), which empowers courts to make orders for the distribution of assets (including pension interests) on divorce. The Recognition of Customary Marriages Act, 1998 and the Civil Union Act, 2006 provide that the courts have the powers set out in the Divorce Act, 1979 to make court orders for the distribution of assets on the dissolution of customary marriages and civil unions. Developing and tabling legislation providing for the recognition of marriages in terms of Islamic law, and amendments to the Divorce Act would be the competence of the Minister of Justice, and could not be effected in terms of the Financial Services Laws General Amendment Bill.

In the tabled Financial Services Laws General Amendment Bill, an amendment to the definition of "non-member spouse" is included, which provides as follows:

> ‘‘ **‘non-member spouse’**, in relation to a member of a fund, means a person who is no longer the spouse of that member **[due to the dissolution or confirmation of the dissolution of the relationship by court order and to whom the court ordering or confirming the dissolution of the relationship]** and who has been granted a share of the member's pension interest in the fund due to the dissolution of the relationship;’’

It was hoped that this amendment would facilitate addressing the issue of the division of pension interests on the dissolution of all types of unions, although it was recognised that by itself, this amendment would not fully address the issue. There would still need to be either legislation providing for the recognition of marriages in terms of Islamic law, or amendments to the Divorce Act, 1979, or possibly both.

Subsequent to the tabling of the Bill, and also in response to comments regarding the proposed amendment to the definition of "non-member spouse" above, the National Treasury and the Financial Services Board examined the possibility of effecting additional amendments to the Pension Funds Act in order to try and address this issue. We also had useful engagements with officials in the Department of Justice and Constitutional Development in relation to this issue.

Given the above, it has been identified that a more effective and appropriate way to address this issue, instead of amending the definition of "non-member spouse", would be to amend section 37D(1)*(d)*(i) of the Pension Funds Act, 1956 by including the following amendment in clause 52 of the Financial Services Laws General Amendment Bill:

"'*(b)* by the substitution in subsection (1)*(d)* for subparagraph (i) of the following subparagraph:

"(i) any amount assigned from such benefit or individual reserve to a non-member spouse in terms of a decree granted under section 7 (8) (*a*) of the Divorce Act, 1979 (Act No. 70 of 1979) <u>or in terms of any order made by a court in respect of the division of assets of a marriage under Islamic law pursuant to its dissolution</u>;"

This amendment provides that where parties to a marriage in terms of Islamic law make an application to court for the division of assets on the dissolution of the marriage, and the court makes an order for the division of the assets in the marriage (including the pension interests), a pension fund would be entitled to distribute pension benefits in accordance with that court order.

The above amendments are included in the draft "A" Bill which has been provided to the Committee.

3.11 Key issue 11: Information Exchange

Sharing of relevant information and engaging in co-operative activities with other regulators are vital for the FSB to carry out its market conduct and prudential regulatory functions. Much of the FSB legislation does not currently include specific provisions enabling the sharing of information and engaging in co-operative activities with other regulators.

The National Treasury proposes an amendment to section 22 of the FSB Act. All financial sector legislation administered by the FSB will be required to be implemented in accordance with section 22 of the FSB Act, as set out above. Along with this amendment, other consequential amendments repealing provisions in other pieces of FSB legislation that currently provide for information sharing and co-operation with other regulators are proposed, so that there will be a single comprehensive provision that would consistently enable and regulate the information sharing and co-operation activities of other regulators by all of the FSB Registrars.

It is important for the Financial Services Board as a regulator to be able to exchange information and engage in co-operative activities with other regulators, both domestically and internationally. Information sharing and co-operation amongst financial sector regulators is essential for the appropriate regulation of the financial system domestically and internationally.

The primary purpose for the FSB of disclosing information to the public and sharing information with other regulatory authorities is to ensure safe and fair financial services markets in the interests of promoting the stability of financial markets and consumer protection.

The FSB, therefore, discloses information to the public to:

- warn the public against conducting business with a financial institution or a person conducting business in contravention of the legislation administered by the FSB; and
- inform the public of actions taken against a financial institution under our legislation.

The FSB, therefore, shares information and secures information with other regulatory authorities (locally and internationally):

- to enhance the supervision of entities (also where these entities operate cross border);
- of individuals and companies that own and manage financial services companies to ensure that “fit and proper” persons operate in the different sectors and jurisdictions;
- that may support regulatory and enforcement actions where entities contravene legislation or owners and managers no longer meet “fit and proper” requirements; and
- where entities are in distress.

The FSB shares this information and secures information subject to three primary conditions (as dictated by international financial services standards). These are:

- The information must be treated as confidential;
- The information may be used only for the purposes specified in the request; and
- The information may not be made available to any other person without the prior written consent of the Financial Services Board or the other regulatory authority.

The National Council of Provinces is currently considering the Protection of Personal Information Bill, which has significant implications for the sharing of personal information by regulators. In order to endeavour to appropriately provide for the sharing of information by the FSB with other regulators, in line with the principles underlying the Protection of Personal Information Bill, it is proposed that section 22 of the FSB Act be replaced. Please see actual clause 64 in the Bill.

3.12 Key issue 12: Amendment to the Medical Schemes Act, 1998

SAIA and BASA expressed concern about the consequential amendment proposed to the Medical Schemes Act, 1998. SAIA proposed that it would be appropriate for the implementation of this Section to be delayed until such time as the Demarcation Regulations are finalised and are law.
National Treasury notes the concern expressed by the commentators. It is proposed that the effective date of this section in the Bill be delayed until the final Demarcation Regulations are published.

The Bill proposes a consequential amendment to the definition of a “medical scheme” in the Medical Schemes Act to correctly reflect the intention of the Medical Schemes Act and to facilitate the appropriate demarcation between health insurance products and medical schemes.

The initial draft Demarcation Regulations was published for public comment on 2 March 2012. A total of 343 public comments were received on the initial draft Regulations. The substantive public comments received necessitate a review of the position set out in the initial draft Regulations, which was to prohibit the sale of Gap Cover insurance[10] and to restrict the marketing of Hospital Cash Plan insurance.[11]

The initial draft Regulations aimed to draw a clear distinction between what constitutes health insurance and medical schemes. It also sought to address concerns that certain health insurance products, in particular Gap Cover insurance, can cause harm to medical schemes by attracting younger and generally health members out of comprehensive medical schemes. This has the effect of undermining the cross subsidisation principle embodied in medical schemes.

[10] Gap Cover insurance policies pay the difference between what the health practitioners charges and the maximum amounts paid by medical aid schemes for specified health events.
[11] Hospital Cash Plan insurance policies pay out a specified benefit per day. These benefits can be used to settle contingency expenses, for example transport costs for children during the time of hospitalisation.

The National Treasury and the Department of Health are currently engaging to ensure that revised Regulations are released for public comment. It is proposed that the Standing Committee on Finance considers approving the amendment, after engaging also with the Standing Committee on Health, but also consider suspending the effective date of the approved amendment until the revised Draft Regulations are finalised and officially approved by the Ministers of Health and Finance.