

FINANCIAL SECTOR REGULATION BILL

NATIONAL TREASURY'S RESPONSES TO ISSUES RAISED DURING THE PUBLIC CONSULTATION PERIOD ON THE TABLED DRAFT FSR BILL [B 34-2015]

(COMMENT PERIOD: NOVEMBER 2015 – MAY 2016)

DRAFT FOR DISCUSSION PURPOSES ONLY

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1. This document sets out the National Treasury's formal response in respect of comments submitted by stakeholders and oral submissions/comments made during public hearings.
 2. The document contains two sections:
 - (a) Section A outlines the major issues that were raised during the process, and National Treasury's response.
 - (b) Section B sets out in table form, comments on each particular clause.

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LIST OF COMMENTATORS

Agency/ Organisation	Contact Person
1. Association for Savings and investment South Africa (ASISA)	Rosemary Lightbody
2. Association of Black Securities and Investment Professionals (ABSIP)	Tryphosa Ramano
3. Banking Association of South Africa	Cas Coovadia
4. Centre for Applied Legal Studies (CALS)	Nomonde Nyembe
5. Congress of South African Trade Unions (COSATU)	COSATU
6. Foschini Retail Group (Foschini)	Jandre Robbertze
7. Free Market Foundation	Leon Louw
8. Information Governance Consulting	Mark Heyink
9. JSE	Louis Cockeran
10. LCH.Clearnet (LCH)	Geraint Rogers
11. South African Communist Party (SACP)	Malesela Maleka
12. South African Insurance Association (SAIA)	Aatika Kaldine
13. Strate	Maria Vermaas
14. S.J. Vivian	S.J. Vivian
15. Voluntary Ombudsman Schemes	Nicky Lala-Mohan

SECTION A: SUBSTANTIVE ISSUES RAISED

1. This section sets out issues raised by more than one stakeholder; or issues that raised concerns about potential Constitutional challenges to the law. These issues include:
 - a. Role of Parliament in standard making process
 - b. Binding interpretations (chapter 10)
 - c. Significant owners (chapter 11)
 - d. The role of the Tribunal (chapter 15)
 - e. Directives to Holding Companies
 - f. Liability for directors (clause 269)

ROLE OF PARLIAMENT IN MAKING REGULATORY INSTRUMENTS

2. Concerns were raised about the process of making standards, and the status of such instruments as subordinate legislation. The intention of such instruments is that they are subordinate legislation that the regulators are empowered to issue within a defined framework. Proposed amendments have been made to chapter 7 to refine the role of Parliament in the making of such instruments.

BINDING INTERPRETATIONS

3. National Treasury and the Financial Services Board approached Senior Counsel to provide guidance on the questions raised by stakeholders relating to binding interpretation issued by regulators. National Treasury and ASISA Senior Counsel also consulted to come to a common understanding of the intention of the clause. As noted in the responses to the comments, the revisions proposed now more closely follows the approach set out in the tax legislation to promote clarity and consistency in the interpretation and application of the law. Drafting has been refined to reflect this

SIGNIFICANT OWNERS

4. Stakeholders were concerned that the provisions of the sections were unnecessarily cumbersome and questioned the Minister's ability to reduce the 15% threshold through Regulations. The following concerns were raised:
 - a. The scope of the provisions is too wide and also captures FSPs
 - b. The ability of the Minister to lower the threshold creates uncertainty for investors and is inconsistent with international standards
 - c. The process of obtaining the Authority's approval in relation to the status of being a significant owner was unclear and cumbersome
5. National Treasury's response is as follows:

- a. Having considered the issues, National Treasury agrees, for consistency and certainty, that regulations will not prescribe a lower threshold, and will require an amendment to the Act. National Treasury is therefore proposing to amend the relevant clause to reflect as such.
- b. National Treasury is proposing to refine the relevant clauses to incorporate thresholds and materiality with respect to changes in the status of a significant owner that requires regulatory approval. Where there is an increase or decrease with respect to a person's ability to influence the business of a financial institution that is not material, the person must notify the responsible authority.

DIRECTIVES TO HOLDING COMPANIES

6. Stakeholders were concerned with the wide powers afforded to the regulators to direct financial conglomerates to restructure, the unintended consequences for SIFIs, the need to include a right for a financial conglomerate to make representations, and the need for an appeal process with regards to a financial conglomerate restructure.
7. National Treasury's response is as follows:
 - a. These directives are not additional directives from what is provided in part 2 of Chapter 10, and therefore the requirements and process for consultation as set out in this chapter would apply. The process will cater for the concerns raised

THE ROLE OF THE TRIBUNAL

8. Stakeholders noted uncertainty with respect to the role of the Tribunal. The following concerns were raised:
 - a. The interaction between the Tribunal and a court of law
 - b. Whether or not it is intended that the Tribunal can replace the decisions of the regulator (which many stakeholders refer to as "appeal") versus whether the Tribunal can only refer back decisions of the regulator for reconsideration (which many stakeholders refer to as "review").
9. National Treasury's response is as follows:
 - a. The intention of the draft Bill is that the Tribunal offers an expedited process for regulated persons to have decisions reconsidered.
 - b. It is not intended at any point that the Tribunal should replace the court. Rather it is intended to complement the existing court system. The use of the term "judicial review" in the functions clauses was intended to capture the complementary nature, and follows the wording in the Promotion of Administrative Justice Act.
 - c. Put another way, the intention is that regulated persons can request that the Tribunal reconsider a decision, and then if the regulated person is still unhappy, that they can approach the court.
 - d. Against this background, National Treasury is concerned that the term "judicial review" creates a mistaken impression.
 - e. It is therefore proposed to replace the terminology "judicial review" with "reconsideration", and to redraft certain clauses in the section on judicial review in a way that ensures that there is no uncertainty regarding the intention.
10. On the "appeal" versus "review" powers, National Treasury submits the following:

- a. There are essentially three types of decisions that the Tribunal will be given the opportunity to reconsider:
 - i. *Complex decisions* that require substantial judgment on the part of the regulator and her team, including analysis of public interest considerations, macroeconomic conditions, structure of the market, business models, and so forth. Examples of these decisions include the decision to grant a licence (e.g. a new stock exchange licence) or the decision to impose additional capital requirements on a bank;
 - ii. *Decisions with precedent*. These are reasonably straightforward decisions – e.g. fines. Here the regulator must consider the nature of the offence, the sanction previously, whether there is a repeat offence, etc. The regulator can largely rely on precedent and fairness.
 - iii. *Decisions that lie in between these two extremes*.
- b. It is the drafters’ intention that type (i) offences should always be referred back to the regulator for reconsideration (“reviewed”) and with type (iii) offences that the Tribunal can simply replace the decision if it wishes (“appeal”). It is the type (ii) offences that create the difficulty.
- c. National Treasury proposes amendments to Chapter 15 of the Bill to reflect this, and provides that additional offences can be listed through regulation.

LIABILITY OF DIRECTORS

11. On the matter of liability of directors, National Treasury senior counsel concluded that the concern raised by stakeholders was valid, but to a limited extent. The view expressed by stakeholders is that in *S v Coetzee*, the Constitutional Court found that a similar provision in the Criminal Procedure Act had a reverse onus of proof. While the two provisions are not identical, National Treasury accepts that there may be uncertainty about the legal enforceability of a clause that appears to have a reverse onus. Accordingly National Treasury proposes revised wording (as captured below), to clearly state that the case still needs to be made.
12. The question remains about what needs to be proved. To take an example – Ms Ima Rogue, a director, proposes a motion that the financial institutions do X (which would be an offence). The other directors, who are in awe of and terrified by Ms R, all say “yes ma’am”, except for the Chairman Sir Mark Time (an old dodderer) who has fallen asleep after lunch and fails to register a vote.

On the drafting submitted in comments, Sir Mark would get off scot free – even if he had understood the question and disagreed, his sole vote would not have prevented the offence (all other directors being fully behind Ms R). On the FSR Bill drafting, he would be held accountable just like the rest of the directors – he could have (and should have) voted against – even if knew he was going to be outvoted.
13. At the very least, directors should be vigilant and do what they can to prevent offences, even if they are bound to fail. It is thus proposed that the draft rather state that the director needs to prove that he or she voted against the resolution.

SECTION B: RESPONSES TO THE COMMENTS ON THE MAIN FSR BILL

FINANCIAL SECTOR REGULATION BILL			
Reviewer	Section	Issue	Response
Voluntary Ombudsman Schemes	Preamble	<p>The preamble to the Bill contains the following objective:</p> <p><i>“...to require financial product and financial service providers to be members of, or to be covered by appropriate ombud schemes...”</i></p> <p>It appears to us to be an oversight that the Bill does not contain a section which gives effect to the purpose expressed above. In this regard we refer to section 187(3) of the 2014 Draft Bill and point out that there was no adverse comment by any party to that provision, which introduced compulsory membership of an appropriate ombudsman scheme. In our view section 208 of the Bill does not address the issue raised above.</p>	<p><i>Comments are noted. The Preamble has been amended to align with the provisions of the Bill. In the absence of applicable ombud scheme, the Bill provides power to the Ombud Council to designate an ombud scheme to deal with any financial customer complaint. All financial customers will have access to a dispute resolution process for complains about financial services and products. See proposed revisions to the text of Bill.</i></p>
CALS	Preamble	<p>CALS recommends that the Draft Bill be amended to: (i) reflect Constitutional supremacy and the commitment to human rights in the Preamble and Purpose clause; (ii) demand compliance with human rights standards and the Constitution by financial institutions; and (iii) include provisions relating to the monitoring of human rights compliance by financial institutions operating in the financial sector. We recommend that the language of the Draft Bill be amended. The preamble should be amended to reflect a commitment to Constitutional supremacy. The amended preamble should read as follows:</p> <p><i>“To establish regulatory authorities for the purposes of strengthening financial stability and the fair treatment of financial customers in the interest of a safer financial sector; to establish and provide for the Financial Stability Oversight Committee, the Prudential Authority, and the Market Conduct Authority; to provide for co-operation between the regulatory authorities, including co-operation in rule making; to provide for co-operation</i></p>	<p><i>The Constitution is the supreme law of South Africa and prevails over any national legislation in the country. It is unnecessary to make reference to this in all legislation as Constitutional supremacy and the Bill of Rights will always apply regardless.</i></p>

		<i>between regulatory authorities and other financial regulators; to promote the maintenance of financial stability; to provide for the management and litigation of financial crisis; to provide for administrative penalties; <u>to provide for the protection and promotion of human rights as set out in the Constitution in the financial sector</u>; to provide for the establishment of the Financial Services Tribunal to hear appeals; to provide for regulations and codes of good practice; to provide for transitional provisions; and to provide for matters connected therewith.”</i>	
CHAPTER 1: INTERPRETATION, OBJECT AND ADMINISTRATION OF ACT			
ASISA	“business document”	<p>This definition was not included in the earlier drafts of the Bill, and should expressly exclude any document that is privileged (such as for example, an opinion or advice from legal advisers or counsel).</p> <p>This is relevant to section 131 (powers to conduct supervisory on-site inspections). Privileged documents should not form part of the documentation to which the official has access under subsection 4(a).</p>	<i>Comments are noted. Legal privilege has been addressed through protections provided for under new clause 130. See revisions to these clauses. See proposed revisions to the text of the Bill.</i>
BASA	“debarment”	<p>It is recommended that a definition for “debarment” be included to read:</p> <p><i><u>“debarment” shall mean a debarment as stipulated in Section 152(1) of the Bill.</u></i></p>	<i>Comment noted. It is unnecessary to define “debarment” as the reference clause is in relation to a “debarment order” made by a responsible authority. See clause 153</i>
BASA	“financial customer”	<p>The definition does not differentiate between wholesale and retail customers, nor does it take cognisance of current exempt customers as provided for in the Consumer Protection Act (CPA) and National Credit Act (NCA). While we note NT’s comments, “<i>The authorities are required to exercise powers and perform functions in a way that is outcomes focused and to take a risk-based approach</i>”, we respectfully submit that to date, much of the</p>	<i>Comments are noted.</i> <i>Given that the authorities are required to exercise powers and perform their functions in a way that is outcomes focused and risk-based, the distinction is not necessary for the purpose of the FSR Bill. However, standards and future conduct legislation</i>

		<p>market conduct discussion papers are following a prescriptive rules-based approach.</p> <p>BASA suggests that: Future differentiated rules for wholesale or juristic customers will necessarily need to reference back to different categories of “financial customer” in this Act which distinction should now already be made clear. If no cognisance is taken of clients who are currently exempt under the NCA, then in future the current NCA exempt clients will be subject to Financial Sector Conduct Authority (FSCA) regulation in respect of financial services provided under the credit agreement. Similar principles apply to future regulation of clients currently exempt under the CPA.</p>	<p><i>(COFI) can provide for the distinction between wholesale and retail customers.</i></p>
		<p>-The definition may be interpreted to limit the definition to products and services provided by a market infrastructure. BASA suggests that: It is recommended that “market infrastructure” be replaced with “financial institution”.</p>	<p><i>Grammatical</i></p> <p><i>This has not been addressed. It had been initially proposed that a comma be inserted after “financial service”, and after “market infrastructure”:</i></p> <p><i>“financial customer” means a person to, or for, whom a financial product, a financial instrument, a financial service, or a service provided by a market infrastructure, is offered or provided, in whatever capacity, and includes—</i></p> <p><i>(a) a successor in title of the person; and</i></p> <p><i>(b) the beneficiary of the product, instrument or service;</i></p>
BASA	“financial crime”	Lack of clarity on the extent to which an offence will be deemed as an offence across multiple pieces of legislation which could then potentially incur multiple penalties for the same offence.	<i>Common law principles will be applied. Phase 2 of the financial sector regulatory reform will ensure alignment of all financial sector laws.</i>
Foschini	“financial product”, “financial service” and “financial	Currently the referenced terms include the activities of credit providers, with the danger of credit providers being regulated by two regulators, while other FSP’s may only be subject to one. This overlapping has been discussed at length at the public hearings, however certainty is required thereon before the private	<i>The regulation of credit under the Twin Peaks framework is an issue that has indeed been discussed at length and much work has gone into ensuring that regulation is efficient, effective, and produces the correct outcomes for consumers and the financial sector. Ultimately credit providers will</i>

	service provider”	sector can give meaningful comment. Being over-regulated will naturally hamper the credit industry as a whole, and in turn limit access to credit for consumers. If the National Credit Regulator is to remain an independent body, it should function as such without interference from other regulators.	<i>fall under the ambit of both the NCR and the FSCA. The definitions in the Bill, as well as the reference to the NCR as a regulator throughout the Bill, is intended to provide for this to happen in a consistent and holistic manner, including by minimising duplications and preventing inconsistencies in regulation by the NCR and FSCA.</i>
BASA	“financial instrument” & “financial product”	The definitions of “financial instrument” and “financial product” incorporate portions of the Financial Advisory and Intermediary Services (FAIS) Act and Financial Markets Act (FMA) definitions. The wording between the FSRB, FAIS and FMA are however not aligned. By way of example, the consequential amendments to FAIS as contained in Schedule 4 do not reflect the deletion of “securities” as a product. We are concerned that a misalignment of definitions between the FSRB, FAIS and FMA will lead to uncertainty and unintended consequences. By way of example, a structured product could be defined as a financial product or a financial instrument, depending on whether the underlying investment is a share portfolio or a collective investment scheme. It is recommended that the definitions between the FSRB, FAIS and FMA be aligned.	<i>Comments are noted. The misalignment is deliberate and necessary given that FAIS definitions are meant to cover a narrower scope than is envisaged under the FSR Bill. Such misalignment will be addressed in phase 2 of the financial regulatory reform. See proposed revisions to the Bill.</i>
ASISA	“financial sector law”	Subparagraph (b) – we suggest that reference should be made to “an act” and not “a law”, as this in line with traditional naming conventions.	<i>Comments are noted but it is not necessary.</i>
		Subparagraph (c) – the definition of “this Act” already includes Regulations and regulatory instruments made in terms of the FSRB. Hence subpar (c) is a duplication insofar it refers to “a Regulation made in terms of this Act”. Subparagraph (d) – the definition of “this Act” already includes Regulations and regulatory instruments made in terms of the	<i>Disagree. The definition of “this Act” does not include Regulation or regulatory instruments made in terms of a law referred to in Schedule 1 and therefore the definition as it stands provides clarity, also to the status of primary legislation versus subordinate legislation.</i>

		<p>FSRB. Hence subpar (d) is a duplication insofar it refers to “a regulatory instrument made in terms of this Act”.</p> <p>Proposal: It is suggested that the section be amended as proposed:</p> <p>“financial sector law” means— (a) this Act; (b) <u>any act law listed in Schedule 1 and any Regulation or regulatory instrument made in terms of any such act;</u> (c) <i>a Regulation made in terms of this Act or made in terms of a law referred to in Schedule 1; or</i> (d) <i>a regulatory instrument made in terms of this Act or made in terms of a law referred to in Schedule 1;</i></p>	
BASA	“financial sector regulator”	<p>Promotion and Protection of Personal Information (POPI) Act: The third draft of the FSRB references the POPI regulator, but does not include the POPI regulator as a “financial sector regulator”. It is important that the POPI regulator be included as a “financial sector regulator” due to the substantive amount of personal information held by financial institutions which will require co-operation and collaboration between regulators.</p> <p>“financial sector regulator” means— (a) the Prudential Authority; (b) ...; (c) ...; (d) ...; (e) <u>the Promotion and Protection of Personal Information Regulator, but only in respect of Parts 2, 3 and 5 of Chapter 2, and Parts 1, 2 and 3 of Chapter 5.</u></p>	<i>This is not agreed with. The Promotion and Protection of Information Act is appropriately referenced in clause 239, where it is necessary. The PPI regulator is not a “financial sector regulator” for the purposes of the FSR Bill</i>
BASA	“governing body”	Lack of clarity as to whether the definition includes only the members of a governing body or also the attendees of a governing body.	<i>Misreading. The definition is intended to capture those persons (whether those persons are elected or not) who exercise authority over the financial institution, or perform functions as referred, i.e. the person or body of persons, that manage, control,</i>

		It is suggested that if it includes people invited on an ad-hoc basis to present at a committee meeting, the appointment of a secretary to take down the Minutes, etc., then the definition is too wide and must be rephrased.	<i>formulate the policy and strategy of the financial institution, direct its affairs or have the authority to exercise the powers and perform the functions of the financial institution</i>
SAIA	“industry ombud scheme”	Under the definition of “industry ombud scheme” it is noted that the draftsman distinguishes between “mediation” and “resolution of complaints”. Mediation is a means for resolving complaints. In addition, mediation and resolution of complaints are referred to conjunctively here, but disjunctively in the definition of the industry (voluntary) “ombud”: a person who has the function of... mediation OR resolving complaints..”. The SAIA submits that the reference to mediation and resolution of complaints should be conjunctive.	<i>Unnecessary</i>
Voluntary Ombudsman Schemes	“industry ombud scheme”	There should be an exclusion of internal schemes from this definition, as is done in the Financial Ombud Schemes Act, 37 of 2004 (“the FSOS Act”) and in the definition of “scheme” in the 2014 Draft Bill in paragraph (a)(ii).	<i>Agreed. See revised clause 211(2) places a restriction on internal procedures established by a financial institution. Furthermore, the revised definition also links the definition to the industry.</i>
BASA	“key person”	The definition is no longer limited to key persons linked to financial products and services as was the case in the second draft of the FSRB and is therefore too wide. The definition of key person, read together with the definition of ‘governing body’ is problematic as many of these persons already fall under the control of, prescribed or approved under existing legislation. Implementing this definition will have the unintended consequences of including a lot more persons than what is or may be the regulatory intent, for example in the context of a bank: <ul style="list-style-type: none"> • the trustees of testamentary trusts; • the executors of deceased estates; • the trustees or directors of shell companies, dormant companies or property-owning companies, etc. that have no material or strategic significance in the group. 	<i>This is not agreed with. The definition is not as wide as is alluded to, given that the referenced trusts are those trusts in relation to a financial institution. Not all trusts are financial institutions. The examples of trusts given as examples in BASA’s comment are not captured under the definition of a “key person”. See proposed revisions to the Bill.</i>

		<p>It is clearly incorrect to include such persons as key persons in relation to a financial institution/group as they have no material or strategic significance.</p> <p>The concepts ‘strategic, significant or material impact’ needs to apply to all components of the definitions.</p> <p>It is recommended that sections (a) and (f) of the definition of “key person” be rephrased to read:</p> <p>“key person”, in relation to a financial institution, means each of the following:</p> <p>(a) <u>a member of the governing body of the financial institution where such members have a material, strategic or significant impact within the definition of a governing body;</u></p> <p>(b) ... (e)</p> <p>(f) <u>a person performing a function in or for the financial institution that a financial sector law requires to be performed where such a person has a material, strategic or significant impact;</u></p> <p>It is, additionally, recommended that the legislature clearly distinguishes between an act requiring a position, e.g. the FAIS Act requiring the appointment of a Compliance Officer and a Key Individual and an act licensing a person to operate, e.g. the FAIS Act licensing a Representative to operate to ensure that persons licensed to operate do not form part of the definition of key person.</p>	
BASA	“levy body”	<p>Financial institutions could be faced with significantly increased levies under the new framework. There must be coordination amongst the various levy bodies to ensure there is no duplication of levies. Whilst the FSRB refers to the Levies Act that will be passed, there is still uncertainty on the manner in which these levy bodies will conduct themselves, e.g. how they will avoid duplication of fees; how they will be operationally structured and</p>	<p><i>The comment is noted. Details will be provided in the Money Bill.</i></p>

		<p>funded, etc. It is recommended that to ensure a fair and responsible application of the levy bodies’ powers, there should be high level principles in the FSRB setting out, at a minimum, how levy bodies are constituted and governed and their engagement with each other.</p>	
ASISA	“outsourcing arrangement”	<p>The need to keep the definition as broad and brief as possible is understood. However, the importance of avoiding coverage of tasks that are normally beyond the remit of financial supervisors needs to be taken into account. As currently defined, activities such as “intermediary services” and activities performed by mandated agents of the financial institution will be caught in the ambit of the definition and it is submitted that such activities should not constitute outsourcing. We would also recommend that the ambit of the services rendered by other persons be narrowed to only pertain to the services material to the core business of the financial institution.</p> <p>Proposal: That the section be re-worded in the following manner -</p> <p><i>“in relation to a financial institution, means an arrangement between the financial institution and another person <u>in terms of which such other person undertakes</u> for the provision to <u>provide</u> the financial institution of a specified service material related to the <u>core business of the financial institution to or on behalf of</u> provision by the financial institution <u>which pertains to the provision</u> of a financial product, a financial service, or a market infrastructure <u>by such financial institution, as the case may be,</u> but does not include a contract of employment with a person who is a staff member;”</i></p>	<p><i>In order to address concerns raised, it is proposed that the definition be amended to capture functions which a financial institution is required to perform in a particular manner, by a financial sector law. In addition, specified functions that are integral to the nature of a financial product, financial service or market infrastructure provided. See proposed revisions to the Bill.</i></p>
BASA	“outsourcing arrangement”	<p>The definition of an outsourcing arrangement is at odds with the definition of an outsourcing arrangement in terms of section 197 of the Labour Relations Act (LRA). The LRA requires that an outsourcing arrangement only exists where a significant portion of the services are outsourced to a third party. The test for this is</p>	<p><i>The proposed revisions to the definition of “outsourcing arrangement” address the concern raised.</i></p>

		<p>whether when an outsourcing arrangement is terminated the service can be transferred back to the outsourcer as a “going concern”. The current Outsourcing Directive definition is also not as wide as the FSRB definition. If we had to apply the FSRB definition as currently stands, it will include all Information Technology (IT) services, printing services, call centre services, marketing services, etc. which is not the desired outcome. It will open financial institutions up to claims to take over the services and requisite staff at the end of an outsourcing agreement. It is recommended that the definition be aligned to the definition of an outsourcing arrangement in the LRA.</p>	
BASA	“securities”	<p>Lack of inclusion of a definition for “securities”. It is noted that “securities services” is defined with reference to the Financial Markets Act (FMA). However, “securities” is also referenced in the FSRB with no reference to “securities services”. See clause 3(4)(a), definition of ‘dealing’ and clause 155(1)(d)(ii) and (iii), significant owners.</p> <p>It is recommended that a definition of “securities” be included to read:</p> <p><u>“securities” has the meaning ascribed to it in terms of section 1(1) of the Financial Markets Act</u></p>	<p><i>This is not agreed with. The definition of “securities” is not included in the Bill because the scope of the Bill is not to regulate “securities” but services related to securities. See proposed revisions to the Bill.</i></p>
BASA	“systemic event”	<p>Last phrase, word missing. It is recommended that the word ‘not’ be included between ‘are’ and ‘able’.</p> <p><i>“systemic event” means an event or circumstance, including one that occurs or arises outside the Republic, that may reasonably be expected to have a substantial adverse effect on the financial system or on economic activity in the Republic, including an event or circumstance that leads to a loss of confidence that operators of, or participants in, payment systems, settlement systems or financial markets, or financial institutions, are <u>not</u> able to continue to provide financial products or financial services;</i></p>	<p><i>Misreading. The proposed amendment is not necessary.</i></p>

<p>ASISA</p>	<p>“this Act” read with “financial sector law” and “regulatory instrument”</p>	<p>s9(1) of the Bill provides that “In the event of any inconsistency between a provision of this Act and a provision of another Act, the provision of this Act prevails”.</p> <p>The Bill defines “this Act” to include “the Regulations, Schedules and regulatory instruments made in terms of this Act”.</p> <p>A “financial sector law” is, in turn, defined to mean the Act; the laws listed in Schedule 1 (which include all the key Acts currently governing the provision of financial services in South Africa); and a Regulation or regulatory instrument made in terms of a law referred to in the Act or Schedule 1.</p> <p>The Bill defines <i>regulatory instruments</i> to include (amongst other instruments) the prudential and conduct standards (and joint standards), which standards are made and issued by either the Prudential or Conduct Authorities.</p> <p>Given the definition of “this Act” referred to above, the effect of section 9(1) of the Bill is that regulatory instruments issued by a Regulator under the Bill would, in the event of inconsistency, override both the original legislation referred to in Schedule 1 of the Bill and any subordinate legislation which may have been promulgated in terms thereof.</p> <p>Generally, the hierarchy of legislation is such that subordinate (or more accurately “delegated”) legislation ranks lowest, and original legislation (i.e. a law passed by Parliament) will be superior to subordinate legislation, with the Constitution prevailing as the supreme law of the land. As a general rule, Parliament cannot confer a power on a delegated legislative body to amend or repeal an Act of Parliament. This has been recognised by the Constitutional Court, including in a matter where the legislature purported to delegate to the President the power to amend an Act of Parliament. The Constitutional Court found this would subvert the manner and form of the Constitution and noted that delegating</p>	<p><i>Principle is agreed with. See proposed revisions to clause 9.</i></p>
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		<p>plenary powers of this nature entailed giving away too much of the Legislature's law-making responsibility.</p> <p>Proposal: That the regulations, the Schedules and regulatory instruments be excluded from the definition of "this Act".</p>	
BASA	1(3)	<p><i>1(3) A reference in a financial sector law, or in an instrument made or issued in terms of a financial sector law, to compliance with financial sector laws or to compliance <u>comply</u> with a particular financial sector law includes a reference to compliance with requirements in instruments made or issued in terms of the relevant financial sector laws.</i></p>	<p>Misreading. The proposed amendment is not necessary.</p>
BASA	<p>"financial products" 2(1) (g) & (h)</p>	<p>Clause 2(1)(g) and 2(1)(h): Lack of clarity whether the reference to "other credit support arrangement" in 2(1)(h) includes credit agreements that are excluded from the NCA, and accordingly from the definition in 2(1)(g) e.g. juristic entities above the prescribed NCA threshold. If this is the case, it will result in dual regulation of credit providers with an arbitrary distinction between which agreements are covered by the NCR and which agreements are covered by the FSRB.</p> <p>The National Credit Regulator (NCR) has adopted a risk-based approach in respect of credit granted to certain types of clients, the FSRB should avoid creating dual regulation of credit providers in respect of that client type.</p> <p>It is recommended that the term "other credit support Arrangement" be defined.</p>	<p>The comment is noted. There will be dual regulation of credit as well as regulation of credit that is not covered under the National Credit Act. See revised clause in the Bill.</p>
CALS	7	<p>The purpose of the Draft Bill should be amended to reflect the desire to align the South African financial sector with the Constitution and human rights principles. It should be amended as follows:</p>	<p>The Constitution is the supreme law of South Africa and prevails over any national legislation in the country. It is unnecessary to make reference to this in all legislation as Constitutional supremacy and the Bill of Rights will always apply regardless.</p>

		<p><i>7. The object of this Act is to achieve a stable financial system that works in the interests of financial customers and that supports balanced and sustainable economic growth in the Republic, by establishing, in conjunction with the specific financial sector laws, a regulatory and supervisory framework that promotes—</i> <u><i>(a) constitutionalism and compliance with the Bill of Rights as provided for in the Constitution;</i></u> <i>(b) financial stability;</i> <i>(c) the safety and soundness of financial institutions;</i> <i>(d) the fair treatment and protection of financial customers;</i> <i>(e) the efficiency and integrity of the financial system;</i> <i>(f) the prevention of financial crime;</i> <i>(g) financial inclusion; and</i> <i>(h) confidence in the financial system.</i></p>	
ABSIP	7	<p>MAKE TRANSFORMATION A PRINCIPLE</p> <p>We urge you to include as one of the principles, transformation of the financial sector with an explicit mandate to create a more equal, representative and inclusive environment. Our proposed change would be that “Object of the Act - Section 7” be reworded to include the following, new S7(g):</p> <p><i>7. The object of this Act is to achieve a stable financial system that works in the interests of financial customers and that supports balanced and sustainable economic growth in the Republic, by establishing, in conjunction with the specific financial sector laws, a regulatory and supervisory framework that promotes —</i> <i>(a) financial stability;</i> <i>(b) the safety and soundness of financial institutions;</i> <i>(c) the fair treatment and protection of financial customers;</i> <i>(d) the efficiency and integrity of the financial system;</i></p>	<p><i>Treasury acknowledges the importance of transformation for the sector, and the role of the BEE Codes and the Financial Sector Charter in achieving this. It is necessary to avoid potential conflict or duplication with the relevant BEE laws by retaining the financial inclusion clause as it is. Currently these provisions are included in the BEE codes and in the financial sector charter.</i></p>

		<p>(e) the prevention of financial crime; (f) financial inclusion; (g) <u>transformation of the financial system to ensure that it is more representative of all who live in South Africa; and</u> (h) confidence in the financial system.</p>	
ASISA	9	<p>Inconsistencies between Act and other financial sector laws</p> <p>The definition of “this Act” includes regulatory instruments made in terms of the Bill. A regulatory instrument will therefore prevail over another financial sector law in the event of inconsistencies between the regulatory instrument and the other financial sector law. National Treasury’s response to comments made on the previous draft of the Bill indicates that this is not the intention, and regulatory instruments, as delegated legislation, should not trump a provision of primary legislation.</p> <p>Proposal: In order to reflect the correct intention, we suggest that section 9(1) be amended to read as follows:</p> <p>“9. (1) <i>In the event of any inconsistency between a provision of this Act, <u>excluding any regulations, Schedules or regulatory instruments made in terms thereof,</u> and a provision of another Act that is a financial sector law, the provision of this Act prevails.”</i></p> <p>Alternatively, that the proposal under the definition of “this Act” be implemented.</p>	<p><i>Agreed. See proposed revisions to the Bill.</i></p>
CHAPTER 2: FINANCIAL STABILITY			
CALS	12	<p>12. The Reserve Bank must— (a) monitor and keep under review— (i) the strengths and weaknesses of the financial system; and (ii) any risks to financial stability <u>including human rights violations,</u> and the nature and extent of those risks, including risks that systemic events will occur and any other risks contemplated in matters raised by members of the Financial Stability Oversight</p>	<p><i>The Constitution is the supreme law of South Africa and prevails over any national legislation in the country. It is unnecessary to make reference to this in all legislation as Constitutional supremacy and the Bill of Rights will always apply regardless.</i></p>

		<p><i>Committee or reported to the Reserve Bank by a financial sector regulator;</i></p> <p><i>(b) take steps to mitigate risks to financial stability and constitutional non-compliance, including advising the financial sector regulators, and any other organ of state, of the steps to take to mitigate those risks; and</i></p> <p><i>(c) regularly assess the observance of principles in the Republic developed by international standard setting bodies for market infrastructures, and report its findings to the financial sector regulators and the Minister, having regard to the circumstances and the context within the Republic.</i></p> <p><i>(d) Assess complaints made to it concerning human rights violations directly from members of the public or affected communities.”</i></p>	
STRATE	<p>20; 45(2); 45(3)(a); 66(5); 68(2) and (3)</p> <p>Representation of CSD in the new structures and committees</p>	<p>Strate is still of the view that it is crucial that the CSD is represented in committees to fully understand policy expectations, its own rights and duties, but also to perform its role in the specific segment to contribute to the overall regulation of the financial sector.</p> <p>Full alignment between the regulatory and supervisory objectives of the Bill and the sectoral laws (e.g. FMA) is not possible or practicable without proper representation of the CSD in the various structures and committees of the Bill.</p> <p>Please also refer to Strate’s previous comment in the Response document on comments received for the first draft of the Bill on 40/233 with regard to a representation opportunity for Strate. We note the response, but the wording in the Bill is still not strong enough to enshrine the principle. In the interest of SA Inc., participation of the MIs in these circumstances must be set out in law and not just be discretionary.</p>	<p><i>Comments are noted. However it is Treasury’s view that the inclusion of Strate (or any other rule-making MI) in the Executive Committee, Prudential Committee and FSOC will be inappropriate given the functions and responsibilities of these committees, and Strate is in fact a regulated entity in this respect.</i></p>
CALS	20	<p><i>20. (1) A committee called the Financial Stability Oversight Committee is hereby established.</i></p>	<p><i>Not necessary. The Constitution is the supreme law of South Africa and prevails over any national legislation in the country. It is unnecessary to make</i></p>

		<p>(2) <i>The primary objectives of the Financial Stability Oversight Committee are to—</i></p> <p>(a) <i>support the Reserve Bank when the Reserve Bank performs its functions in relation to financial stability; and</i></p> <p>(b) <i>facilitate co-operation and collaboration between, and co-ordination of action among, the financial sector regulators and the Reserve Bank in respect of matters relating to financial stability; <u>and</u></i></p> <p>(c) <i>Ensure compliance with the Constitution and Bill of Rights.</i></p>	<p><i>reference to this in all legislation as Constitutional supremacy and the Bill of Rights will always apply regardless.</i></p>
BASA	27(4)	<p>A failure to comply with the requirement to draft and publish the Memorandum of Understanding (MoU) and a failure to comply with the MoU itself does not invalidate any action taken by a financial sector regulator and could disincentive the objective of co-operation and collaboration. It is recommended that clause 27(4) be deleted.</p> <p><i>27(4) The validity of any action taken by a financial sector regulator in terms of a financial sector law, the National Credit Act or the Financial Intelligence Centre Act is not affected by a failure to comply with this section or a memorandum of understanding contemplated in this section.</i></p>	<p><i>This is not agreed with.</i></p>
ASISA	30(a) to (i)	<p>The Reserve Bank has broad powers to impose additional obligations on systemically important financial institutions and also has a broad discretion to declare a financial institution as a systemically important financial institution. ASISA members suggest that a provision be incorporated that obliges the Reserve Bank to impose the obligations in 30(a) to (i) fairly and consistently between financial institutions.</p>	<p><i>Unnecessary. Note the process to be followed for setting standards and issuing directives. Authorities must take into account the need for primarily pre-emptive, outcomes focused and risk-based approach in performing their respective functions.</i></p>
ASISA	31	<p>It is submitted that disallowing the application of existing legislative rights, remedies and processes to a financial institution simply because that financial institution has been designated as systemically important, is not reasonable. These existing legal</p>	<p><i>It is not agreed that this clause affects existing rights. Further details on this process will be provided in the Resolution Bill</i></p>

		rights, remedies and processes are an important part of ensuring stability, certainty and consistency. Given the broad powers granted to the Reserve Bank to address a systemic event, it is also submitted that these provisions are not necessary.	
CHAPTER 3: PRUDENTIAL AUTHORITY			
SAIA	43(7)	It is suggested that the minutes kept for the Prudential Committee are kept in a manner approved by the Committee and not that the Chief Executive Officer. This will align to Clause 45(8).	<i>This is not agreed with.</i>
ASISA	45(2)	<i>45(2) The Prudential Committee may establish one or more other subcommittees with functions that the Prudential Authority Oversight Committee may determine.</i>	<i>Agreed. See proposed revisions to the Bill.</i>
BASA	46	Performance measures are clearly set out for the Chief Executive Officer (CEO) and the Governor, but not for the committee members. This will impact negatively on the committee members' understanding of what is expected of them and the measurement of their performance. It is recommended that clear performance measures be set out for the committee members.	<i>This is not agreed with.</i>
BASA	47	The regulatory strategy that the Prudential Committee must adopt will give "general guidance" to the Prudential Authority (PA) in terms of performance. This is more relaxed than the second draft of the FSRB. The second draft of the FSRB provided key aspects that the supervisory strategies should contain, which will assist financial institutions in understanding the regulatory approach. It is recommended that the key aspects in the second draft be retained in the third draft of the FSRB.	<i>The latest version of the Bill provides adequate guidance.</i>
STRATE	54	The response set out in the Response Document on comments received on the second draft of the Bill on page 93/337 is noted.	<i>The requirement for the CEO of the PA to provide information does not compromise the independence of the PA. Sub-clause 2 does not require or permit</i>

		However, Strate is still of the view that reporting to National Treasury remains problematic for independence.	<i>the provision of information about persons identifiable from the information.</i>
BASA	55	<p>The second draft of the FSRB stipulated more requirements, which strengthened the checks and balances undertaken in respect of the annual report of the PA.</p> <p>It is recommended that the requirements in the second draft be retained in the regulations to be issued under the FSRB.</p>	<i>This will not be necessary given that other additional requirements may still be prescribed through Regulations.</i>
CHAPTER 4: FINANCIAL SECTOR CONDUCT AUTHORITY			
BASA	58	<p>Clause 58, read together with clause 85(1), read together with clause 104(4): Clause 58 states that the Financial Services Conduct Authority (FSCA) may not regulate credit agreements, but only financial services provided in respect of credit agreements. The issue is that while stating the intent of co-operation and collaboration between the regulatory authorities and regulatory harmonization, the FSCA:</p> <ul style="list-style-type: none"> • may regulate financial services in respect of credit agreements; and • may create equivalent or more onerous legislation than the NCA, with the end result being that the equivalent or more onerous standard of the FSCA will likely prevail over the NCA. <p>In the interim, the regulation of the consumer credit industry will remain problematic and unclear, resulting in dual regulatory frameworks.</p> <p>It is recommend that the future MoU between the FSCA and NCR clearly and unambiguously address the issue of which regulatory authority will regulate what financial services related to credit agreements and how.</p>	<i>BASA's comment is noted. The regulation of credit under the Twin Peaks framework is an issue that has indeed been discussed at length and much work has gone into ensuring that regulation is efficient, effective, and produces the correct outcomes for consumers and the financial sector. Ultimately credit providers will fall under the ambit of both the NCR and the FSCA. The definitions in the Bill, as well as the reference to the NCR as a regulator throughout the Bill, is intended to provide for this to happen in a consistent and holistic manner, including by minimising duplications and preventing inconsistencies in regulation by the NCR and FSCA.</i>
BASA	71	The second draft of the FSRB stipulated that the FSCA could only delegate its powers by means of resolution. Clarity is sought as to why this is no longer the case. It is recommended that the	<i>Disagree. It is not necessary to be so prescriptive and may have unintended consequences in the practical operations of the Authority. The revised Bill provides</i>

		requirements in the second draft be retained in the regulations to be issued under the FSRB.	<i>for the Executive Committee, rather than the Commissioner, that is delegating and clause 67 provides guidance on the Decisions of the Executive Committee.</i>
CHAPTER 5: CO-OPERATION AND COLLABORATION			
BASA	83	<p>Chapter 5 is of paramount importance, the Twin Peaks system will not work if the financial sector and other regulators do not effectively work together. Breakdowns in cooperation generate significant risks to consumer protection and financial stability.</p> <p>It is recommended that to strengthen chapter 5, clause 83 be amended to mandate the Financial Sector Inter-Ministerial Council to review all proposed legislation with material implications for the financial system before such legislation is tabled in Parliament. Relevant examples include the Limitations of Fees and Interest Rates Regulations issued under the NCA, the draft Cybercrime and Cyber Security Bill and Part 8 of the Waste Management Act, all of which have material implications for financial stability.</p>	<i>Comments are noted. However the proposals are not agreed with as these can be addressed through the Financial System Council of Regulators. Please also note the objectives of the Inter-Ministerial Council as stipulated in the Bill.</i>
BASA	86	It is recommended that clause 86 be amended to provide that regulated financial institutions are consulted about the efficacy of the co-operation arrangements in practice.	<i>This is not agreed with.</i>
CHAPTER 6: ADMINISTRATIVE ACTION			
ASISA	Part 1	Save for section 87(3), the required number of members are not prescribed. In view of the responsibility being bestowed on the administrative action committee, this part should provide for a minimum number of members and include a requirement that any such member must meet prescribed fit and proper requirements, which requirements must be formulated with due regard to their responsibility.	<i>This will not be necessary.</i>
JSE	87	The unique role of the Directorate of Market Abuse (DMA) will not be able to be fulfilled through the administrative action	<i>The FSCA is empowered to establish administrative action committees that can perform similar</i>

		<p>committee provisions in the FSR Bill. National Treasury's comments appear to propose that a specialist DMA-type committee can be established in terms of the broad administrative action provisions of the FSR Bill but that the legislation does not have to specifically name (implying "create") such a committee. However, it is clear from the provisions of section 87 of the Bill dealing with the functions and composition of an administrative action committee that a committee established in terms of that section is intended to be an administrative body either recommending specific administrative action to be taken by the FSCA or, through delegated powers, taking administrative enforcement action on behalf of the FSCA. These administrative action committees are therefore essentially enforcement committees. In order to either recommend what administrative action should be taken or to take such action itself, an administrative action committee would need to consider both the administrative and legal issues to make a finding. It is for this reason that the composition of an administrative action committee must, in terms of section 87(3) of the Bill, include a retired judge or an advocate or an attorney with at least ten years' experience. The DMA has never fulfilled this function and therefore the provisions of section 87 of the Bill will not enable the establishment of a specialist committee equivalent to the DMA.</p>	<p><i>functions to the DMA. However concerns regarding the disparity between the current DMA that is not an administrative body vis-à-vis an administrative action committee, in terms of exercising its powers have been noted. It is proposed that the DMA is retained, subject to amendment necessary to align to the FSR Bill, and including the process of appointment which the Executive Committee shall be responsible for.</i></p>
ASISA	87(3)(a)(ii)	<p>It is submitted that the advocate or attorney concerned should, <i>inter alia</i>, have a sound knowledge of administrative law. In terms of section 87(1), the administrative committee will be tasked to consider and make recommendations to the financial sector regulator on administrative actions. As presently worded there only needs to be one lawyer as part of the committee and, it is submitted that it will not be appropriate if such person is not required to have a sound knowledge and experience of administrative law.</p>	<p><i>This is unnecessary to provide in legislation.</i></p>

ASISA	93(1)(b)	<p>It is not clear what the purpose will be to refer a draft to the Director-General without the comments and responses thereto. Furthermore, it is not clear what the Director-General is expected to do with such draft.</p> <p>Proposal: It should be a requirement that the Director-General approve such procedure and that the Director-General have power to refer it back to a financial regulator to make certain amendments.</p>	<p><i>This is not agreed with. This will be for information and not approval; the DG can submit comments that the financial sector regulator is required to consider before finalising the determining of or amending an administrative action procedure.</i></p>
ASISA	93(2)	<p>As currently worded, the regulator will be at liberty to introduce substantially different procedures than those that had been referred to the public for comment, and to that which has been submitted to the Director-General.</p> <p>Proposal: That the section be amended to read as follows:</p> <p><i>“(2) If a financial sector regulator changes a proposed procedure or amendment after expiry of the comment period, <u>in a manner which is not material</u>, it is not obliged to publish the change before publishing the final version of the procedure or amendment.”</i></p>	<p><i>This is not agreed with.</i></p>
ASISA	94	<p>Reconsideration of decisions</p> <p>ASISA members are concerned that a financial sector regulator will be empowered to exercise those powers listed in ss 94(1)(a) – (c) “...at any time...”.</p> <p>If a decision has consequences which necessitate administrative, process and procedural changes for financial institutions, the effect of this power is that this can be undone at any time, no matter how long the lapse of time since the original decision was taken. It is submitted that this leads to uncertainty and is unreasonable. Furthermore, to empower a financial sector regulator to initiate reconsideration of decisions “on its own initiative” will have the</p>	<p><i>Amendments to the drafting are proposed to provide further clarity, which will address the concern raised. It is suggested that reference is not made to reconsideration of decisions. See proposed revisions to the Bill.</i></p>

		<p>result that no decision is final, alternatively that it is final only to the extent that it is not reconsidered.</p> <p>Proposal: We submit that the phrases “...at any time...” and “...on its own initiative...” be deleted.</p> <p>Drafting error: The reference to section 215 may be incorrect – should the reference not be to section 230?</p>	
JSE	94	<p>Section 94 of the FSR Bill empowers a financial sector regulator to reconsider a decision it has made either on its own initiative or on written application by an aggrieved person. The section places no limit on the number of times that a financial sector regulator can reconsider a decision it has made. Under the FSR Bill's proposed amendments to the FM Act, the FSCA is the Authority that makes many of the decisions under the FM Act, including, for example, the decision whether to grant a licence application to be a central counterparty. The decisions of the FSCA to grant or refuse an application for a licence under the FM Act would constitute administrative action under the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"). The decisions would accordingly be subject to review under PAJA.</p> <p>However, section 7(2)(a) of PAJA provides that no court or tribunal shall review an administrative action unless an internal remedy provided for in any other law has first been exhausted. Section 94 of the FSR Bill provides an internal remedy for persons aggrieved by decisions of the FSCA. However, because it is unclear how many times the FSCA can be approached for a reconsideration of its decisions taken under the FM Act, it is unclear when that internal remedy of reconsideration will be exhausted for the purposes of section 7(2)(a) of PAJA.</p> <p>The JSE therefore respectfully submits that this section requires amendment to make it clear when the process of reconsideration ceases and aggrieved parties may approach the courts for relief.</p>	<p><i>Amendments to the drafting are proposed to provide further clarity, and which will address the concern raised. See proposed revisions to the Bill.</i></p>

CHAPTER 7: REGULATORY INSTRUMENTS

CALS	Chapter 7	Chapter 7 of the Draft Bill should be amended to include a section on human rights which may read as follows: “Financial Institutions must comply with the Constitution and the rights set out in the Bill of Rights in all regulated activities.”	<i>The Constitution of South Africa prevails over all legislation in the country. It is unnecessary to make reference to this in all legislation as Constitutional supremacy applies regardless.</i>
ASISA	97(1)	Whilst the section does provide for a consultative process, section 97(5) makes it clear that the Regulator will be the sole arbitrator as to whether or not the proposed legislative instruments should be implemented despite the submissions received. This does not accord with the “manner and form” provisions envisaged and prescribed in Chapter 4 of the Constitution. Proposal: That all such regulatory instruments which will be akin to national legislation must go through a parliamentary process before it becomes effective. If, however, the status of subordinate legislation is amended to its correct position in the hierarchy, then parliamentary approval would not be necessary or desirable.	<i>Regulatory instruments are subordinate legislation and will be submitted to Parliament. See proposed revisions to the Bill.</i>
ASISA	97(3)	It is not clear whether section 97(3) is for purposes of information sharing or awareness between regulators. The only other applicable regulatory authority in question appears to be the Prudential Authority or the Financial Sector Conduct Authority, but it is not clear whether other financial sector regulators (Counsel for Medical Schemes, National Credit Regulator, Financial Intelligence Centre) must be consulted and must agree with any proposed legislative regulatory instruments. The only obligation is to make a copy available. What will happen when a proposed conduct standard has major prudential impacts?	<i>See clause 98 (1)(b)(ii)(aa) which provides for the maker of the regulatory instruments to take into account all submissions received. The Bill provides for the FIC, PA, FSCA, NCR and the Reserve Bank to cooperate and collaborate when performing their functions, including the making of standards and other legislative instruments. See proposed revisions to the Bill.</i>
ASISA	97(4)	Proposal: We submit that any regulatory instrument issued by the Ombud Regulatory Council should also be furnished to every Ombud and adjudicator.	<i>The public consultation process is adequate and would cater for every ombud and adjudicator to submit input. See proposed revisions to the Bill.</i>
ASISA	97(5)	As currently worded, the maker remains the sole arbitrator as to whether or not it should implement the proposed legislative	<i>Regulatory instruments are subordinate legislation and will be submitted to Parliament. Furthermore</i>

		<p>instruments. As mentioned above this does not accord with the “manner and form” provisions envisaged and prescribed in Chapter 4 of the Constitution.</p> <p>Section 100, as currently worded, merely requires that the regulatory instrument be submitted to the National Assembly. Nothing further is required from National Assembly before the regulatory instrument becomes effective. Please refer to the comments on section 100.</p> <p>Proposal: It is ASISA members’ view that a regulatory instrument must be approved by the parliamentary standing committee. If, however, the status of subordinate legislation is amended to its correct position in the hierarchy, by removing it from the definition of “this Act”, then parliamentary approval would not be necessary or desirable.</p>	<p><i>the definition of “this Act” for the purpose of clause 9(1) will exclude Regulations and legislative instruments and this addresses ASISA’s concern.</i></p>
ASISA	99	<p>Whilst section 99(2) does provide for a subsequent consultative process, the pertinent question is what the impact of such a legislative instrument may be in the interim, pending such a consultative process. We point out that financial institutions might have to amend their systems, processes and implement change management initiatives (all of which are considerably costly), despite the fact that the instrument necessitating the changes might well be reversed. In our view the Bill itself should stipulate what measures may be introduced by the regulator upon the occurrence of a “systemic event” or crisis. It should also provide that such ‘urgent’ measures need to first be approved by a High Court. This will provide for the necessary “checks and balances” and ensure “proportionality”.</p> <p>In addition, the explanatory statement required by s99(2)(b) should require the Regulator to provide detailed reasons, supported by verifiable evidence, as to why, in its opinion, the delay involved in complying with sections 97 or 98 is likely to lead to prejudice to financial customers or harm to the financial system, or to defeat the object of the proposed regulatory instrument.</p>	<p><i>Proposed revisions in clause 100 should provide the necessary checks and balances for making urgent standards. See proposed revisions to the Bill.</i></p>

SAIA	99(1) & (2)	<p>This Clause reads: “A maker may make a regulatory instrument without having complied, or complied fully, with Clause 97 or 98 if the delay involved in complying, or complying fully, with those Clauses is likely to lead to prejudice to financial customers or harm to the financial system, or defeat the object of the proposed regulatory instrument.”</p> <p>Clarity is kindly sought with regard to whom makes the decision that the delay in complying with Clause 97 and 98 by the maker will prejudice customers or harm the financial system.</p>	<p><i>The maker may not comply with the consultation provisions in exceptional cases, only if the delay involved in complying, or complying fully, with those sections is likely to lead to prejudice to financial customers or harm to the financial system. See proposed revisions to the Bill.</i></p>
ASISA	100	<p>It is not clear what the purpose is of introducing a requirement to merely <u>submit</u> the regulatory instrument to the National Assembly. It is submitted that having been submitted, they should then be <u>noted</u> by the National Assembly.</p> <p>Proposal: The National Assembly should note the regulatory instruments so submitted.</p> <p>In addition, in order for the submission to the National Assembly to have any meaning, National Assembly should also be aware of the issues that were raised in submissions, and what the response was to issues raised.</p> <p>Proposal: That the section be amended as suggested.</p> <p>“100. A maker that makes a regulatory instrument must submit to the National Assembly, within 14 days after the regulatory instrument is made—</p> <p>(a) a copy of the regulatory instrument;</p> <p>(b) a statement explaining the need for, and the intended operation of, the regulatory instrument; and</p> <p>(c) a statement of the expected impact of the regulatory instrument.;</p> <p><u>(d) a general account of the issues raised in the submissions; and</u></p> <p><u>(e) a response to the issues raised in submissions.”</u></p>	<p><i>It is proposed that the clause is amended to provide for more clarity. See proposed revisions to the Clause.</i></p>

		The above comments are subject to amendments being made to the definition of “ the Act ” to establish the appropriate hierarchy for subordinate legislation. If this is not done, then being akin to primary legislation, regulatory instruments should follow the full parliamentary process.	
ASISA	103	<p>If a regulatory instrument comes into operation on the date the instrument is published in the Register, then the word “may” in section 103(1) should be “<i>must</i>”. Otherwise the instrument may never come into operation, if it is not a requirement to publish it.</p> <p>It should, however, only become effective once <i>approved</i> by National Assembly. The regulatory instruments have the effect of law and the legislature should at least be required to consider them prior to them becoming effective. Please also refer to our comments on s100. Clarity is required as to the process when Parliament is not in session.</p>	<i>See proposed revisions to the Bill.</i>
SAIA	103	We propose that a Clause be included dealing with transitional arrangements, extensions and exemptions with the introduction of a new regulatory instrument. Following the drafting of a regulatory instrument, a transitional arrangement and/or the ability to apply for extension or exemption should be allowed, dependent on the nature of the impact of the regulatory instrument as well as the risk being addressed by the instrument.	<i>An appropriate transitional arrangement can be provided for in a regulatory instrument, and the date on which a regulatory instrument comes into operation can be specified appropriately to allow a reasonable period of time to prepare for implementation.</i>
ASISA	104	With reference to our comments section 99 above, we submit that section 104 should be amended to determine that the instrument will become effective on the day as determined by the Court.	<i>This is not agreed with.</i>
BASA	104	The regulatory authorities must guard against misuse of urgent regulatory instruments with immediate effective dates as it could expose financial institutions to risks, e.g. financial instability, unstable IT systems, etc. as operational changes usually require a lead implementation time.	<i>BASA’s comment is noted.</i>

BASA	105(1)(a)	<p>The definition of securities services in the FMA is too broad as it includes advice. A prudential standard must exclude reference to conduct standards such as advice.</p> <p>It is recommended that the section be rephrased to clearly indicate that conduct standards, such as “advice” in the “securities services” definition are excluded from the Prudential Standards.</p>	<p><i>Comment noted. It is proposed that this be amended in phase 2 of the regulatory reform process when all the sectoral laws will be aligned.</i></p>
BASA	105(1)(d)(ii)	<p>Prudential Standards apply to the institution and not to individuals or financial crime. We submit that the prudential regulator should not set prudential standards with respect to key individuals or financial crime; these are conduct standards within the future regulatory authority of the FSCA. It is recommended that section 105(1)(d) be deleted.</p> <p>105(1)(d) key persons of such financial institutions, aimed at— (i) ensuring the safety and soundness of those financial institutions; (ii) reducing the risk that those financial institutions, significant owners and key persons engage in conduct that amounts to, or contributes to, financial crime; and (iii) assisting in maintaining financial stability.</p>	<p><i>This is not agreed with. It is important for the Prudential Authority to be able to make prudential standards on key persons.</i></p>
ASISA	105 & 106	<p>Chapter 7 of the Bill empowers the Regulators to make prudential standards and conduct standards, with respect to the subject matter and for the purposes set out in sections 105 and 106 respectively. Each of these sections then set out an extensive (but not exhaustive) list of matters which may be provided for in such standards, while Chapter 7 stipulates consultation requirements to be followed by a Regulator in making such standards.</p> <p>Section 29 of the Bill empowers the Governor of the Reserve Bank to designate a financial institution as a “systemically important financial institution”, and sets out the matters which must be taken into account and procedure to be followed when doing so.</p>	<p><i>The guidance and criteria for making standards provided in the Bill are extensive and adequate.</i></p>

		<p>On the face of it, the powers granted to the Regulators referred to above are wide-ranging, and they enjoy an extensive discretion to regulate the financial sector by means of making standards, issuing directives, etc. In this regard, the granting of broad discretionary powers to an executive organ (such as the Regulators) may be held to be unconstitutional in the event that the empowering legislation does not provide adequate guidelines or criteria as to how the power is to be exercised. There is case law to the effect that providing a member of the executive with “unfettered and unguided” power is an unjustifiable limitation on the right to procedurally fair administrative action provided for in the Constitution.</p> <p>The Constitutional Court has recognised, however (in the matter of <i>Dawood v Minister of Home Affairs [1999] JOL 5398 (C)</i>), that the scope of discretionary powers granted to a decision-maker would vary from case to case, and that the granting of broad powers would be acceptable if the factors relevant to the exercise of such power are “indisputably clear” or if the relevant decision-maker has expertise relevant to the decisions which need to be made.</p> <p>Proposal: That the empowering legislation provide guidelines/criteria for the exercise of the wide discretion being conferred.</p>	
Foschini	106	<p>The Financial Sector Conduct Authority should not be able to issue conduct standards on any item that would ordinarily require formal amending of legislation and/or regulations, and should be subject to the same level of public consultation, including regulatory impact assessments.</p>	<p><i>Standards will have the status of subordinate legislation and as such will not be able to amend primary legislation. Standards may only be made for the purpose of the FSCA fulfilling its mandate, and a rigorous process of consultation must be followed when making standards.</i></p>
BASA	105, 106 & 108	<p>The chapter grants the regulators extensive powers to issue Regulatory Instruments which are to be known as ‘Standards’. These Regulatory Instruments will replace the current plethora of Board Notices, Guidance Notes, and Codes of Conduct. The range of issues on which the regulators may issue Regulatory</p>	<p><i>Guidance and criteria for making standards provided in the Bill is extensive and adequate. In addition, the Bill also provides for the regulators to provide a statement of expected impact of the</i></p>

		<p>Instruments is extensive and covers almost every commercial aspect of operating a financial institution:</p> <ul style="list-style-type: none"> • product design; • product marketing and distribution; • disclosure of information to customers; • outsourcing arrangements; • recordkeeping and data management; and • “the operation of, and operational requirements for financial institutions” (Clause 108(c)). <p>The consultation mechanisms in respect of these instruments is welcomed, nevertheless, the powers are extensive and may potentially generate moral hazard.</p> <p>It is recommended that the range of matters on which the regulators may make rules be limited and that new rules be subject to a regulatory impact assessment before finalisation thereof.</p>	<i>regulatory impact and this should address BASA’s concern. See proposed revisions to the Bill.</i>
BASA	108(b)(iii)	<p>Clause 108(b)(iii) and (iv): Legislative conduct standards cannot be prescribed in respect of employment relationship matters, e.g. remuneration, reward and incentive schemes as these are contractually agreed to between the employer and the employee. Matters such as the suspension and/or dismissal of an employee may be unrelated to significant failings in relation to the provision of financial products or services. In addition, there may be differences of opinion around the facts and circumstances requiring suspension or dismissal.</p> <p>It is recommended that the section be amended to refer to the authority of the regulators to only promulgate standards in relation to the composition, roles, responsibilities and accountability of governing bodies. Failure of key persons and governance committee members should best be addressed through regulatory penalties and fines.</p>	<i>This is not agreed with. Regulators should be able to make standards with regard to members of the governing bodies.</i>
STRATE	108(b)(iv)	<p>Strate is of the view that the response given in the Response document on comments received on the second draft of the Bill on</p>	<i>This is not agreed with.</i>

		page 145/337 is incomplete. The business aspects of the position of a key person falls outside the scope of this legislation.	
BASA	108(k)	<p>It is noted that reference is made to setting conduct standards for business rescue, but that “business rescue” is not defined in the FSRB.</p> <p>It is recommended that the following definition of “business rescue” be included in the FSRB:</p> <p><u><i>“business rescue” means business rescue as defined in section 128 of the Companies Act, 2008.</i></u></p>	<i>It is proposed that “business rescue” be deleted from the clause and replaced with “recovery, resolution and continuity”. See proposed revisions to the Bill.</i>
CHAPTER 8: LICENSING			
SAIA	General	<p>It is noted that the licensing procedures and requirements shall be determined jointly by the FSCA and PA.</p> <p>We submit that any additional licencing requirements via subordinate legislation should follow the same requirements as in Chapter 7 in terms of the consultation requirements.</p> <p>We further propose that the costs for new applications versus existing license holders should be differentiated given the difference between variations and new applications.</p>	<i>Comment is noted. See proposed revisions to the Bill.</i>
BASA	116(3)(a)	<p>NT’s comment on the second draft FSRB is noted. We, respectfully, continue to hold the view that a notification of refusal should be issued from a certainty perspective as it will be unfair to applicant and new entrants to assume refusal without concrete certainty thereof. Informing applicants and new entrants of the refusal will allow for certainty as to the period in which the decision may then be taken on appeal.</p> <p>It is recommended that the clause be amended to provide for written notification of the outcome of the application together with</p>	<p><i>The regulator must determine an application within a specific time period – determining includes both an approval or refusal, either of which will be communicated to the applicant.</i></p> <p><i>Should no determination be made in the required amount of time, this is taken as a decision on the part of the regulator to refuse the application. Such a decision may be taken to the Tribunal. The clause is intended to provide certainty that a determination will be made in an appropriate amount of time</i></p>

		the reasons for the refusal which will then provide the applicant with an opportunity to reapply.	
ASISA	116(3)(a)	<p>It appears unreasonable that the regulator can by simply not responding to the applicant; decline an application for a licence. The Regulator should be compelled to respond to license applications and there should not be a deeming provision – applicants need administrative certainty. It could be that an application is misplaced, or not properly dealt with, and the applicant will simply (incorrectly) assume that it has been rejected, when in fact the regulator has simply not applied his/her mind to the application for whatever reason.</p> <p>Furthermore, s116(3)(b) allowing the regulator to deal with an application for up to nine months does not support the business environment, as a business may not be able to operate for a period of nine months while it waits for its license, and/or a business opportunity may be lost.</p> <p>The applicant has a right to procedurally fair administrative action in terms of section 3(2) of the Promotion of Administrative Justice Act, 2000 (“PAJA”). This section does not seem to constitute fair procedure. In their response to comments on the earlier draft of the Bill, National Treasury points out that the applicant would have recourse through PAJA. It is not understood why this should be necessary – the section as drafted is open to abuse and could easily be remedied by requiring the authority to acknowledge the application, to advise them of progress after thirty days and to inform them if the period is extended, and for how long and why.</p> <p>Proposal: Delete this subsection.</p>	<p><i>The regulator must determine an application within a specific time period – determining includes both an approval or refusal, either of which will be communicated to the applicant.</i></p> <p><i>Should no determination be made in the required amount of time, this is taken as a decision on the part of the regulator to refuse the application. Such a decision may be taken to the Tribunal. The clause is intended to provide certainty that a determination will be made in an appropriate amount of time. See proposed revisions to the Bill.</i></p>
Prof S.J. Vivian	Clause 117(1)(a) (Page 57) Read with Clause 254(2) – (Page 100)	The obligation to report to the responsible authority, any contraventions violates a host of fundamental legal rights. The right to remain silent; the right not to be compelled to make any confession or admission that could be used in evidence against a person, the right to be assumed innocent until proven guilty, the duty of the state to prove guilt beyond reasonable doubt on the	<i>The rights referred to are rights in section 35 of the Constitution that apply to accused, arrested, and detained persons in a criminal context. Clause 117 does not relate to persons who are accused, arrested, or detained.</i>

		<p>presentation of factual evidence; the right to do nothing, no liability for omissions, no interference by the state without probable cause, the right not to self-incriminate. In terms of Section 35 of the Constitution, these rights are even afforded to a person who has been arrested, but are not been afforded to any financial institution to whom any form of licence is given. There is not clarity in the Section as to whether any such disclosure would be considered a Protected Disclosure in terms of the Protected Disclosures Act.</p> <p>In terms of Clause 254 (2) : A licensee who contravenes section 117, commits an offence and is liable on conviction to a fine not exceeding R5 ,000,000.</p> <p>In terms of clause 266 each member of the Governing Body of the Financial Institution also commits the offence and is liable on conviction to a fine, if the licensee (as an incorporated entity) commits an offence. As a result, any admission by the licensee would then result in immediate vicarious criminal liability of each member of the Governing Body, without each member of the Governing Body being able to exercise their fundamental constitutional rights.</p>	<p><i>There is no “right to do nothing”, no right of “no liability for omissions”, and no right of “no interference by the state without probable cause” enumerated in the fundamental rights in the Constitution.</i></p> <p><i>A licensed financial institution has an obligation to comply with the financial sector laws, and imposing these requirements on licensed financial institutions does not violate any “rights” of financial institutions. They do not have any entitlement to a licence, it is a privilege, and financial institutions must comply with the requirements associated with having a licence to retain the privilege of being a licensed financial institution.</i></p> <p><i>The Protected Disclosures Act applies to employees who disclose illegal and irregular conduct by their employers, to protect them from possible victimisation. That legislation would not be applicable.</i></p> <p><i>Appropriate refinements have been made to clause 269.</i></p>
BASA	117(1)(a)(i)	<p>The request to “promptly” report a breach of a financial sector law, as and when these occur, is not practical. It is not clear if the expectation here is for the licensee to report any breach or a material breach of a financial sector law. It should suffice that internal governance committees address breaches and related remediation with escalation to more senior committees and/or the regulatory authority as necessary. BASA suggests the following insertion:</p> <p><i>117. (1) A licensee must promptly report any of the following to the responsible authority that issued the licence:</i></p> <p><i>(a) The fact that the licensee has <u>materially</u> contravened or is contravening—</i></p> <p><i>(i) a financial sector law;</i></p>	<p><i>Agreed. See proposed revisions to the Bill.</i></p>

		<i>(ii) a regulator's directive or</i>	
BASA	120	<p>The clause does not provide for any time period in which to correct the contravention.</p> <p>It is recommended that a time period be inserted to give the licensee a period to correct the contravention.</p>	<i>It is not appropriate to compel this in law as time periods may differ depending on the contravention.</i>
ASISA	120(g)	<p>It is submitted that a reasonable period would be 30 days.</p> <p>Proposal: Amendment of 14 to 30 days.</p>	<i>Agree</i>
BASA	120(1)(d)	<p>It is submitted that this provision should be applicable in respect of material contravention of a law of a foreign jurisdiction. It is recommended that the clause be amended to read:</p> <p><i>120(1)(d) the licensee has in a foreign country contravened <u>committed a material contravention of</u> a law of that country that corresponds to a financial sector law.</i></p>	<i>Agreed in principle. See proposed revisions to the Bill.</i>
BASA	123(6)(a)	<p>It is submitted that this subsection does not make sense. It is unclear why a licensee must give a written statement of the reasons why the responsible authority did not comply with subsection (1).</p> <p><i>123(6) (a) If the responsible authority takes action without having complied, or complied fully, with subsection (1) for the reason set out in subsection (5), the licensee <u>responsible authority</u> must be given a written statement of the reasons why that subsection was not complied with.</i></p>	<i>This is not agreed with. It is the licensee who is given reasons and the comment might be as a result of misreading the clause.</i>
BASA	127	<p>The disclosure requirements regarding licenses pose practical challenges. Financial institutions, such as banks, are required to hold a large number of licences, including, amongst others, a banking licence, a financial services provider license, a credit provider license, a payment system licence, etc. From an operational perspective, it is</p>	<i>Agreed that this is a matter that should be specified through the standards. See proposed wording.</i>

impractical and will be impossible for financial institutions, such as a bank, to: disclose all of the licences that it holds and/or that a license has been suspended in all of its business documentation (i.e. letter heads, deposit slips, other stationary), its advertisements (i.e. radio, television, billboards, newspapers, sms messages) and other promotional material (i.e. calendars, clothing items, diaries) relating to the licensed activity; and make available its licenses or a copy of its licenses at all places and to any person on request at no cost due to the large number of licenses that a bank holds and the large infrastructure of banks (i.e. the number of offices and branches). Referencing the objectives of the FSRB, a balanced, fair, practical and executable solution must be found. It is recommended that section 127 be amended to read:

127(1) A licensed financial institution must, subject to the standard made by the responsible authority for the financial sector law in terms of which a financial institution is required to be licensed,

*(a) identify the licence that it holds in all its business documentation, and in all its advertisements and other promotional material, relating to the licensed activity; and
 (b) make its licence or a copy of its licence available at no cost to any person on request.*

(c) In instances where a financial institution's licence has been suspended, the institution must, during the period of suspension, identify the licence, and state that it is suspended, in all its business documentation, and in all its advertisements and other promotional material, relating to the licensed activity.

CHAPTER 9: INFORMATION GATHERING, SUPERVISORY ON-SITE INSPECTIONS AND INVESTIGATIONS

Prof S.J. Vivian	Clause 130 Page 61, read with Clause 255 (Part 3- offences and penalties) (Page 100)	<p>This sanction does not appear to consider the right not to self-incriminate, amongst other rights as noted in the comment above. Particularly given the personal impact that Section 266 will have on the individual members of the Governing Body i.e. The Board of Directors.</p> <p>In terms of clause 266 each member of the Governing Body of the Financial Institution also commits the offence and is liable on conviction to a fine <u>unless it is established that</u> the member took all reasonable practicable steps to prevent the commission of the offence. Would the co-operation and provision of the information requested, if incriminating, ameliorate the culpability in respect of any offence committed. It cannot be said the co-operation after the fact would amount to a “reasonable practicable step to prevent the commission of the offence”; but should be taken into consideration in some form.</p>	<i>See revisions to clause 269.</i>
BASA	130	<p>The scope of this clause is broad and intrusive in terms of access/gathering information. In so far as the Promotion of Access to Information Act (PAIA) is concerned, access is to ‘records’ rather than ‘information’ and in so far as the Promotion of Administrative Justice Act (PAJA), the scope is even broader.</p> <p>It is recommended that “information” be restricted by adopting the approach in PAIA.</p>	<i>It is not agreed that this clause is too broad. Note that PAJA will continue to apply.</i>
		<p>It is recommended that the word “authority” be amended to read “regulator” as follows:-</p> <p><i>130(1)(b) The responsible authority <u>regulator</u> may require the information or document to be verified as specified in the notice, including by an auditor approved by the responsible authority.</i></p>	<i>The term ‘authority’ is used throughout the Bill.</i>
STRATE	130(3)	A colloquial term of this nature is inappropriate for legislation. We would suggest that it be clarified by use of plain language so as to avoid interpretational issues or defined.	<i>The term ‘mystery shopping’ is commonly understood.</i>

ASISA	131	<p>ASISA members are of the view that the powers conferred by section 131 must be made subject to the criteria set out in in section 136. It is noted that the phrase “without a warrant” was not included in the on-site inspection provisions in the previous version of the Bill. It is therefore a matter of concern that power will be conferred on a financial sector regulator to enter the business premises of a supervised entity without a warrant, at any time during office hours, and to conduct a supervisory on-site inspection of the premises, without due regard to the rights granted in the Constitution. In this regard, when sections 131 and 136 are compared, we submit that it is the <u>nature of the power</u> that is being exercised which is decisive and not the identity of the functionary.</p> <p>See, for example, the statement of the Constitutional Court that:</p> <p>“What matters is not so much the functionary or the function... The focus of the enquiry as to whether conduct is ‘administrative action’ is not the arm of government to which the relevant actor belongs, but on the nature of the power he or she is exercising” [<i>Administrative Law in South Africa – Hoexter 175</i>].</p> <p>Furthermore, the exercise of the powers to be conferred are subject to the same rights, notwithstanding which entity is exercising that power.</p> <p>Proposals:</p> <p>We accordingly submit that similarly to section 136, the power being conferred in terms of section 131 should be subject to the following requirements:</p> <ul style="list-style-type: none"> • The consent of the financial institution; or • A duly authorised warrant; or • If the regulator believes, on reasonable grounds, that a delay caused by applying and obtaining a warrant will defeat the purpose of the search and believes on reasonable grounds that a warrant would be issued; and 	<p><i>Section 132 and 137 refer to different activities of the regulator.</i></p> <p><i>Section 132 relates to the ability of the regulator to conduct visits to financial institutions in the normal course of its supervisory activities. The process as set out in 132 is thus suited to enabling this.</i></p> <p><i>Section 137 on the other hand relates to investigations, including at business premises, when wrong-doing is suspected. There are necessarily more stringent requirements.</i></p>
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		<ul style="list-style-type: none"> • That the exercise of these powers must be done with strict regard to decency, good order and a person’s rights to human dignity, freedom and security of the person and privacy. <p>Whilst conducting an investigation is an administrative action (and hence subject to the Promotion of Administrative Justice Act, 2000), it constitutes an invasion of privacy which is subject to section 36 of the Constitution. Compliance with section 36 can only be achieved by including guidelines in that set out how an inspector must conduct an investigation. This will ensure that the conduct is required to be within the bounds of the Constitution. The guidance afforded by the Constitutional Court in the in the matter of Magajane v Chairperson, North West Gambling Board 2006 (5) SA 250 (CC), ad para 77 informs the inspection of private premises.</p> <p>Proposal: For the sake of legal certainty it is suggested that the guidelines afforded by the Constitutional Court be incorporated in the legislation.</p>	
BASA	131	<p>A lack of a warrant is understandable in the event of a dawn raid, but it must not become the norm for any other on-site visit, the search must be limited to specific purposes and documents to be uplifted.</p> <p><i>131 (1) A financial sector regulator may, at any time during normal business hours— (a) with a warrant without a warrant enter the business premises of a supervised entity; and</i></p>	<i>Similar misunderstanding of the purpose of section 132 as the comment above. Due to the nature of an on-site inspection, a warrant is not required.</i>
ASISA	133	<p>ASISA members submit that is not appropriate for “any” person to be appointed to assist an investigator as provided in s133(1). It is proposed that some minimum standards be set for ‘qualifying’ investigators in order to ensure fair treatment and, as important, to prevent any potential conflicts.</p>	<i>This comment is not agreed with.</i>

BASA	134(b)	<i>134(b) to comply with a request by a requesting responsible authority in terms of a bilateral or multilateral agreement or memorandum of understanding contemplated in section 239.</i>	<i>Unnecessary change as the phrasing is correct.</i>
BASA	136	<p>It is recommended that clause 136 be aligned to the current provisions of section 4(1)(a) of the Inspection of Financial Institutions Act and be amended to read:</p> <p><i>“in carrying out an inspection of the affairs of an institution ... an inspector may</i></p> <p><i>(i) summon any person who is or was a director, employee, partner, member, trustee or shareholder of the institution and whom the inspector believes is in possession of or has under his or her control, any document relating to the affairs of the institution, to lodge such document with the inspector or to appear at a time and place specified in the summons to be examined or to produce such document and to examine or, against the issue of a receipt, to retain any such document for as long as it may be required for purposes of the inspection or any legal or regulatory proceedings.</i></p>	<i>This is not agreed with; the principles of the Inspection of Financial Institutions Act are incorporated but provisions do not have to be replicated verbatim.</i>
ASISA	136(5)(a)(v)	<p>The powers of investigators to enter and search premises under s136 should not include access to legally privileged documents.</p> <p>National Treasury, in its response to comments made on the previous draft of the Bill, comments that provisions to protect legal privilege have been included. However, the only section that ASISA members can find that does protect legally privileged documents is s139(4)(a) which only applies to Part 5 of the Bill. S136 is in Part 4.</p>	<i>The principle of this comment is agreed with; see proposed revisions to the Bill.</i>
ASISA	139(2)	<p>Section 139(2) ostensibly seeks to protect a person’s right against self-incrimination. The fact that evidence directly obtained or derived from an answer during examination may not be admissible in criminal proceedings does not protect a person’s right to self-incrimination if the information provided by the person is used to unearth or collate other information which would not have been</p>	<i>This is not agreed with.</i>

		<p>uncovered but for the information provide by answers and used in subsequent criminal proceedings.</p> <p>Proposal: The section as presently worded therefore needs to amended to provide that any incriminating evidence uncovered as a result of an answer furnished in the course of relevant proceedings may also not be relied upon in subsequent criminal and/or administrative proceedings.</p>	
BASA	139(2)(b)	<p>An investigator should not have the power to make a person furnish a self-incriminating response. This section may be regarded as being unconstitutional, as only the National Prosecuting Authority can take the decision not to prosecute a person. Neither the Regulator nor the Investigator has this power. It is submitted that the leniency agreements in clause 154 will not assist a person, as there are certain factors that must be taken into consideration prior to such agreement being entered into. It will, furthermore, not afford protection to the person at the time such person is required to provide an answer that is self-incriminating. It is recommended that the clause be deleted in its entirety.</p> <p>139(2)(b) On such an objection, the financial sector regulator or investigator may require the question to be answered.</p>	<i>This is not agreed with.</i>
CHAPTER 10: ENFORCEMENT			
Foschini	140/141	<p>“Responsible authorities” should not be able to <i>interpret</i> their own laws, which is generally a judicial function performed by the courts, in line with the principle of the separation of powers.</p>	<i>The wording of the section may have resulted in some ambiguity on the intended purpose of such an instrument. See revised wording to the sections.</i>
ASISA	141	<p>Binding interpretations</p> <p>In ASISA members’ view, this power is problematic from a constitutional law perspective.</p> <p>Firstly, it is arguable that this provision violates the separation of powers principle in that it is the judiciary’s role to interpret legislation. By granting the Regulator the power to issue binding interpretations of financial sector laws, the powers of the courts</p>	

are being usurped. In addition, the entire body of judicial precedent will be rendered superfluous if, for example, the Regulator decides to issue an interpretation that is contrary to the case law on that point. The fact that a particular interpretation ruling is only binding until a court finds otherwise does not, in our view, cure the separation of powers issue, and it also places the burden on affected financial institutions of incurring the costs of approaching the Court whenever they do not agree with a particular interpretation.

Secondly, this provision also arguably constitutes an unconstitutional abdication by Parliament of its law-making powers. In effect, by granting the Regulator the power to “interpret” the relevant primary legislation in a binding manner, this arguably gives the “interpretation rules” the status of primary legislation. We note that it is an accepted principle in our law that delegated legislation (such as formally gazetted regulations) cannot be used to interpret the Act under which they were promulgated. However, in the case of this Bill, instruments which fall short even of delegated legislation (i.e. interpretation rules) are given the power to interpret primary legislation.

In addition, at a practical level, section 141 does not clarify what the effect of a contrary court ruling will be on historic conduct where a financial institution did not adhere to the Regulator’s ruling.

On the face of it, sub- section 141(4) is inconsistent with ss141(3)(a) and (b) – the amendment or revocation is by operation of law and, as currently worded, suggests that the responsible authority still has a discretion to amend or revoke its binding interpretations, notwithstanding ss141(3)(a) or (b).

We furthermore submit that the proposed dispensation, in terms of which a financial institution must adhere to an “binding interpretation”, until such time “*as a court attaches a different interpretation ...*” (section 141(3)) will bring about great uncertainty for both financial institutions and customers, as it is by

		<p>no means clear what the impact of a contrary Court ruling will be on actions taken by financial institutions in accordance with the “binding interpretation”. In this regard it is to be noted that it will not always be possible to place the parties in the positions they would have been in, but for the binding interpretation.</p> <p>In view of section 275 (which we submit is unconstitutional to the extent that it seeks to deprive clients and/or financial institutions the right to claim damages in the event of non-compliance with the provisions of the Promotion of Administrative Justice Act, 2000), neither Financial Institutions, nor their customers, will have any recourse for damages suffered by reason of abiding by an erroneous interpretation.</p> <p>Proposal: It is submitted that the section be deleted and that section 141 be amplified to expressly provide that the Regulator may apply to the High Court for a declaratory order as regards the correct interpretation of a Financial Sector Law.</p>	
BASA	141	<p>This clause is viewed as ultra vires and unconstitutional. An Act cannot delegate power to a responsible authority to create a binding interpretation of an Act of Parliament, thus allowing the responsible authority to function both as law maker and interpreter. The delegation of power in terms of the legislature, government and the Courts is entrenched in the Constitution and this clause erodes the doctrine of separation of powers that is entrenched within the Constitutional Framework. The clause allows the responsible authority to make binding law, without the sanction of Parliament, even though subsection 4 does require public consultation that does not override the right of Parliament to ultimately draft and pass law. Further grounds of concern include:</p> <ul style="list-style-type: none"> whilst the purpose of a binding interpretation is said to be aimed at promoting clarity, consistency and certainty in the interpretation and application of financial sector laws, the creation of binding interpretations of law will have the 	<p><i>See comment above and proposed revisions to clause 141 and 142.</i></p>

		<p>opposite effect. It will create uncertainty as people or organisations in South Africa will no longer be able to rely on express provisions of financial sector laws and will instead rely on the interpretations of regulators;</p> <ul style="list-style-type: none"> • guidance and directives from the regulatory authorities are welcomed, but the issuing of binding interpretations by a regulatory authority is not supported as it is the prerogative of the courts to issue binding interpretation of legislation; • allowing the responsible authority to function both as law maker and interpreter leads to conflict of interest and eradication of independence; • the binding interpretation may interpret the law in such a way that it is not aligned to legislation; • practically, huge system and operational changes incurred by banks with associated costs, to implement and comply with new regulatory requirements, based on its own interpretation of the law may take place prior to a binding interpretation being issued by a responsible authority. A binding interpretation could therefore mean that the financial institution would have to unwind its changes and then apply to court for an interpretive ruling to resolve the issue; and the drafters, in consultation, have suggested that the Tax Administration Act has a similar precedent. • The SARS approach is however dissimilar in its application and cannot be applied as suitable justification by responsible authorities for creating binding interpretations. <p>It is recommended that the clause be deleted in its entirety, alternatively that the Parliamentary Standing Committee on Finance refers the matter for a legal opinion, specifically in terms of the Constitutional framework and the doctrine of separation of powers which may be open to challenge in a court of law.</p> <p>To the extent that the Parliamentary Standing Committee on Finance disagrees with the recommendation above, the following</p>	
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		<p>are grammatical and technical inconsistencies in the FSRB that must be looked at more carefully:</p> <ul style="list-style-type: none"> • Clause 141(3) states that a binding interpretation ceases to be effective if a law is repealed or amended in a manner that materially affects the binding interpretation, in which case the binding interpretation will cease to be effective from the date of repeal or amendment. • Clause 141(4) a regulatory authority may (not obliged, refer clause 141(7)) amend or revoke a binding interpretation that has ceased to be effective in terms of clause 141(3). It is uncertain as to how the regulatory authority may amend or revoke a binding interpretation that has ceased to be effective in terms of clause 141(4). • Clause 141(8) must be amended to read: <i>“The responsible authority that issues a binding interpretation must apply the provision of the financial sector law to which the interpretation relates in accordance with the interpretation in the circumstances specified in the interpretation”</i> 	
SAIA	141(6)	<p>The consultation period in Clause 141 (6)</p> <p><i>“Before the responsible authority issues a binding interpretation, it must publish-</i></p> <p><i>(a) a draft of the proposed interpretation; and</i></p> <p><i>(b) a notice calling for written public comments within a period specified in the notice, which period must be at least one month from the date of publication of the notice.”</i></p> <p>The SAIA submits that this should be aligned with the time period allowed for consultation in Chapter 7 (Clause 97 (2)) which provides allows a two month period for submissions to be made before a regulatory instrument is made.</p> <p>The ability of the responsible authority in this clause, still in our view results in an administrative function usurping the functions of the judiciary.</p>	<i>See proposed revisions to clause 141 and clause 142.</i>

BASA	141(6)(b)	<p>Financial sector law interpretative differences are often complex. One month's consultation period is not sufficient for the regulatory authority to engage meaningfully with industry regarding interpretative differences.</p> <p>It is recommended that the one month period be amended to a two month period from the date of publication of the notice, similar to section 97(2).</p>	<i>See proposed revisions to clause 141 and clause 142.</i>
BASA	141(7)	<p>Clause 141(7): Subsection 141(7) states that the responsible authority is not obliged to comply with subsection (4) in relation to an amendment to, or a revocation of, a binding interpretation. The implications of subsection 141(4) are however that the responsible authority will be obliged to amend or revoke a binding interpretation because of a change in law or a judicial decision. Subsection 141(7) is therefore unnecessary.</p> <p>It is recommended that subsection 141(7) be deleted in its entirety.</p> <p><i>141(7) The responsible authority is not obliged to comply with subsection (4) in relation to an amendment to, or a revocation of, a binding interpretation.</i></p>	<i>This comment results from there being an incorrect subclause reference for subclause (7) in the tabled version of the Bill, the reference should have been to subclause (6), and not to subclause (4). This will be corrected.</i>
BASA	143	<p>A directive to withdraw a product or service, particularly if issued against a large Bank, is likely to cause significant reputational damage, and may or may not be the cause of subsequent instability in the financial system.</p> <p>It is recommended that where the financial institution is a large conglomerate which is a bank, that the FSCA be required to consult and agree with the SARB before issuing a directive to withdraw a product or service</p>	<i>Section 76 places an obligation on regulators to cooperate and collaborate when performing their functions. Section 77 Memoranda of Understanding can cater for processes to be followed when issuing directives.</i>
BASA	144(1) (a)	<p>Clause 144 read with clause 145: Clause 144(1)(a) and clause 144(1)(b), there is no materiality threshold with regard to the contravention of a financial sector law. Penalties and fines or criminal proceedings should attach as a sanction for failure to materially comply with financial sector laws.</p>	<i>This is not agreed with, as there are sufficient checks and balances when issuing a directive to ensure that they are issued for appropriate reasons.</i>

		<p>144. (1) A financial sector regulator may not issue a directive in terms of this Part that requires a key person to be removed from his or her position in the financial institution unless the key person—</p> <p>(a) has contravened a <u>material contravention of a financial sector law</u>;</p> <p>(b) has been involved in financial crime;</p>	
BASA	144(1) (d)	<p>Due cognisance must be taken that existing and new key persons will have extensive experience and skill as deemed relevant and appropriate by their employer and many will have been preapproved by the SARB prior to their appointment. To remove key persons for failing to meet “new” fit and proper requirements without evidence of any mismanagement or misconduct resulting in poor products or service outcomes for customers, or financial crime, is not supported.</p> <p>It is recommended that reasons for removal of a key person should exclude failure to meet “fit and proper requirements” which are unlinked to poor product or service outcomes for customers, or financial crime.</p>	<p>Key persons should be required to comply with fit and proper requirements on an on-going basis, and not only comply with those that existed at the time of their appointment.</p> <p>There are sufficient checks and balances when issuing a directive to ensure that they are issued for appropriate reasons.</p>
BASA	145	<p>Directives issued without preconsultation with an option for the key person to make representations after the fact could result in the possible revoking of the directive and will present Industrial Relations challenges as the ‘removal’ as a key person will likely result in termination of employment.</p> <p>It is recommended that the clause proposing that a directive be issued without pre-consultation be removed in its entirety, alternatively that a process be included to allow for preconsultation with realistic timelines.</p>	<p>A directive will only require that a key person stand aside from their position, not that their employment with the institution be terminated.</p> <p>The financial institution can institute whatever internal measures may be appropriate in terms of applicable labour legislation.</p>
BASA	148	<p>Clause 148 read with clause 151: No appeal mechanism has been included for directives issued by the responsible authority for financial institutions to the High Court. It is recommended that an appeal mechanism be included.</p>	<p>It is an administrative action of the regulator and there is therefore recourse to the Tribunal established in Chapter 15. Further recourse to the courts has not been affected and the financial institution may approach the courts.</p>

ASISA	148(2)	<p>We believe the rendering null and void of certain provisions in contracts between two contracting parties to be an unwarranted interference into private arrangements between individuals. We believe there may be very good commercial/risk reasons why a financial institution may not want to do business with a person which has been issued with a directive (depending on the directive) and the parties should be free to specify in their contracts the consequences of certain actions taken by either of them. We are comfortable if the section in the Act does not give an automatic right to terminate / accelerate / close out, in the absence of such a contractual provision between them.</p>	<p><i>This comment is agreed with. See proposed revisions to the Bill.</i></p>
BASA	150(4)	<p>The principle of administrative justice needs to be reflected in this process given the potential impact of a suspension or withdrawal of a licence.</p> <p>It is recommended that the clause be amended to read:</p> <p><i>150(4) If a financial institution licensed under a specific financial sector law that gave an enforceable undertaking breaches a term of the undertaking, the responsible authority may must place the <u>financial institution on 60 days' notice to remedy such breach, and a failure by the financial institution to remedy such breach within the aforesaid time period shall entitle the responsible authority to suspend or withdraw the licence.</u></i></p> <p>Additionally, provision needs to be made for the licensee to make representations before the licence is suspended or withdrawn.</p>	<p><i>This is not agreed with. An enforceable undertaking is an agreement by the financial institution with the regulator on how it will conduct itself on a particular matter.</i></p> <p><i>Breaching an enforceable undertaking can therefore result in immediate enforcement action, including a suspension or withdrawal of a licence.</i></p>
BASA	151(2)(a)	<p>Lack of materiality threshold with regard to the contravention of a financial sector law.</p> <p><i>151(2) The High Court may make an order in terms of subsection (1)—</i> <i>(a) if it appears to the High Court that the person is engaging, or proposes to engage, in conduct <u>resulting in the material</u> contravening a financial sector law;</i></p>	<p><i>This is not agreed with. It is the prerogative of the High Court to decide what is material and what is not.</i></p>

BASA	152- General	<p>“Individuals” are not defined in the FSRB which refers in preceding sections to “key person”, “representative”, “contractor” or persons or to members of governing bodies. Clarity must be provided as to who may be debarred by the responsible authority.</p> <p>Furthermore, clarity is sought as to whether individuals debarred under section 14(1) of the FAIS Act by the Financial Services Provider (FSP) could also be debarred under section 152. The FAIS Act provides specific criteria for debarment, but there may be some overlap with the wider debarment criteria mentioned in section 152.</p> <p>It is recommended that all references to “individual” be amended to read: “person, excluding a representative”.</p>	<p><i>It is proposed that the word ‘individual’ is replaced with ‘natural person’. This includes representatives, as these should not be excluded from this provision.</i></p> <p><i>See proposed revisions to the Bill.</i></p>
BASA	152(1)(b)	<p><i>152(1) The responsible authority for a financial sector law may make a debarment order in respect of an individual if the individual has—</i></p> <p><i>(a) contravened a financial sector law in a material respect;</i></p> <p><i>(b) contravened in a material respect an enforceable undertaking that was accepted by the responsible authority in terms of section 151(1) 150(1);</i></p>	<p><i>Noted. With the refinements to the Bill, the referencing is now correct.</i></p>
BASA	152(2)	<p>The period of debarment is not specified, reference is merely made to a period of debarment specified in the order. Due cognisance must be taken of the existing FAIS subordinate legislation which provides that debarment endures for a minimum period of one year.</p> <p>It is recommended that the time periods for debarment be specified and aligned to current subordinate legislation by amending clause 152(2) to read:</p> <p><i>152(2) A debarment order prohibits the individual, for a <u>minimum specified period</u> as specified in <u>of at least 12 months from the date of the debarment order, from.</u></i></p>	<p><i>This is not agreed with; the provisions will apply beyond the scope of the FAIS subordinate legislation, and therefore should be more flexible.</i></p>
BASA	152	<p>Additionally it is recommended that the following clause be added as clause 152(4):</p>	<p><i>See clause 156.</i></p>

152. (1) *The responsible authority for a financial sector law may make a debarment order in respect of an individual if the individual has— (a) contravened a financial sector law in a material respect; (b) contravened in a material respect an enforceable undertaking that was accepted by the responsible authority in terms of section 151(1); (c) attempted, or conspired with, aided, abetted, induced, incited or procured another person to contravene a financial sector law in a material respect; or (d) contravened in a material respect a law of a foreign country that corresponds to a financial sector law.*

(2) *A debarment order prohibits the individual, for a specified period, as specified in the debarment order, from— (a) providing, or being involved in the provision of, specified financial products or financial services, generally or in circumstances specified in the order; (b) acting as a key person of a financial institution; or (c) providing specified services to a financial institution, whether under outsourcing arrangements or otherwise.*

(3) *A debarment order takes effect from— (a) the date on which it is served on the individual; or (b) if the order specifies a later date, the later date.*

(4) The financial sector regulator must immediately notify the person (excluding a representative) in writing of-

(i) the financial services provider's decision;

(ii) the grounds and reasons for such decision;

(iii) a right of appeal to an internal appeal mechanism established by the Authority, and a subsequent right of review of the decision of the Authority to the Tribunal;

(iv) the period within which the internal appeal proceedings to the Authority, or review proceedings to the Tribunal, must be instituted; and

(v) any other formal requirements in respect of the proceedings for the internal appeal to the Authority or the review to the Tribunal.

~~(4)~~ (5) *(a) An individual who is subject to a debarment order may not engage in conduct that, directly or indirectly, contravenes the debarment order. (b) Without limiting paragraph (a), an individual contravenes that paragraph if the individual enters into*

		<p><i>an arrangement with another person to engage in the conduct that directly or indirectly contravenes a debarment order, on behalf of, or in accordance with the directions, instructions or wishes of, the individual.</i></p> <p>(5) <u>(6)</u> <i>A licensed financial institution that becomes aware that a debarment order has been made in respect of an individual employed or engaged by the financial institution must take all reasonable steps to ensure that the debarment order is given effect to.</i></p> <p>(6) <u>(7)</u> <i>The responsible authority must publish each debarment order that it makes.</i></p>	
BASA	152(8)	<p>No reference is made to the procedure for upliftment of debarments. Clarity must be provided around the criteria for upliftment of debarments and the procedure that must be followed in this regard.</p> <p>It is recommended that clause 152 be amended, by introducing a clause 152(8) to read:</p> <p><u><i>152(8) A debarred person who seeks reappointment must submit a formal application for reappointment in accordance with the requirements and criteria for reappointment as prescribed in the Regulations.</i></u></p>	<p><i>This is agreed with in principle, and it is proposed that a provision is added providing for a regulator to revoke a debarment. See proposed revisions to the Bill.</i></p>
BASA	153(1)	<p>Debarment must follow due process and the debarred individual should have the ability to appeal the decision of the debarring to the regulator. Clarity is sought around the debarment and appeal process.</p> <p>Furthermore, the clause does not provide for notice to the employer when the FSCA begins debarment proceedings, the employer must however put into effect the debarment order. The FSCA must make the employer aware of a pending debarment by the FSCA against its employee as this will affect the continued employment relationship.</p> <p>It is recommended that clause 153(1) be amended to read:</p>	<p><i>These suggestions are not agreed with. In some instances debarred individuals may have employment or other contracts with multiple financial institutions. Debarment orders will be published and publically available.</i></p> <p><i>Appeal to the Tribunal is provided for in terms of Chapter 15.</i></p>

		<p>153(1) Before making a debarment order in respect of an individual, the responsible authority must—</p> <p>(a) give a draft of the debarment order to the individual, representative), <u>as well as to the licensed financial institution employer and to the other financial sector regulator, along with reasons for and other relevant information about the proposed debarment; and</u></p> <p>(b) invite the individual <u>person (excluding a representative)</u> to make submissions on the matter, and give them a reasonable period to do so.</p> <p><u>(c) Before effecting a debarment in terms of this subsection (1), the financial sector regulator must ensure that the debarment process is lawful, reasonable and procedurally fair by following the process as set out in section 153(1).</u></p>	
BASA	154	<p>The clause does not include a notification of termination of a leniency agreement.</p> <p>It is recommended that notification be provided and that the clause be amended to incorporate such a requirement.</p>	<i>See proposed revisions to the Bill.</i>
CHAPTER 11: SIGNIFICANT OWNERS			
ASISA	General: Significant Owners	<p>SUMMARY OF COMMENTS ON PROVISIONS IN RESPECT OF SIGNIFICANT OWNERS</p> <p>This supplementary submission follows ASISA’s presentation to the Standing Committee on Finance on 10 February 2016, when members of the Committee requested ASISA to summarize our concerns in relation to the provisions in the Bill pertaining to Significant Owners of financial institutions.</p> <p>Since the Committee public hearings, National Treasury has been engaging with ASISA in an attempt to understand ASISA members’ concerns. We are pleased to note that certain changes to be proposed by Treasury. However, certain remaining key issues still cause concern.</p>	<i>The chapter on significant owners has been redrafted in order to better clarify the criteria for determining who a significant owner is, in the interests of being clear and objective in law. See proposed changes to this chapter.</i>

ASISA reiterates our support for the principle that the regulatory authorities should be in a position to proactively monitor and manage systemic risks and events in the financial services industry, so as to safeguard investors and the financial system as a whole. Our understanding is that the Chapter in the Bill on Significant Owners is one of the mechanisms aimed at placing the authorities in this position. In particular, ASISA supports the principle of the authorities monitoring an appropriate shareholding threshold, including a materiality component, in relation to control over a financial institution’s business. We agree that this should be consistent with international standards where appropriate. However, it ASISA’s view that provisions in this regard should be balanced and proportionate. It is submitted that the provisions of the Bill should not be framed in a way that results in persons being included who are clearly not significant owners in the true/intended sense and/or who have no ability to materially control the business of the financial institution. Nor should the provisions result in the stifling of normal, legitimate asset management activities. This could have negative outcomes for investors which are often pension funds whose ultimate beneficiaries are the pension fund members.

ASISA welcomes some of Treasury’s proposed changes, most notably in respect of the shareholding threshold and the removal of the provision for an ad hoc lowering of that threshold. Our remaining concerns are set out below.

Control and influence

In terms of the Chapter on Significant Owners (with Treasury’s recently proposed amendments), regulatory approval will be required in advance before:

- Share acquisitions that result in holdings of above 15%.
- Entering into an “arrangement” that would result in an increase or decrease in a person’s ability to control or influence the business or strategy of the institution. This

arrangement can take any form, and does not need to involve a share acquisition or disposal; nor is any materiality required to be present.

It is submitted that a significant distinction exists between control on the one hand, and influence on the other hand, and these two principles should not be conflated i.e. the ability to influence does not equate to control. It is those persons able to influence *and* who are in a position to take decisions, who can be said to have the control. Therefore, ASISA believes that the existence of the ability to influence the business of an entity should not result in a person being deemed to be a significant owner, and this provision should be removed from the Chapter. This very subjective component could potentially result in the net being cast extremely wide to include junior and entry level employees as significant owners, which does not accord with the purpose of the Chapter. Should the concept of “influence” remain, then it needs to be qualified to include an ability to substantially control or influence a material component of the business.

ASISA therefore remains of the view that the provisions relating to the arrangements as contemplated need to contain a clear and more express objective measure of materiality when it comes to determining the presence of control over the business of a financial institution.

Disposals and exiting of other arrangements

It is also submitted that there is not a need in every case for regulatory approval for share disposals (or the exiting of the other arrangements contemplated) which result in a person ceasing to become a significant owner, or where a significant owner reduces its stake in a material way. In the majority of cases, the provision of notification of the authorities should suffice, and there are existing laws which already cover all South African companies and which could be leveraged e.g. the Companies Act requires shareholders to notify the company whenever a shareholder’s stake in a company crosses a multiple of 5%. The Chapter in the

Bill has been framed in such a way that where a listed entity has many operating subsidiaries that include an eligible financial institution, a shareholder who holds more than 15% in that listed entity and who wishes to reduce its shareholding to less than 15% will first have to wait for the approval of the regulator. The effect of this will be to potentially reduce the investment opportunity for institutional investors as well as the listed entities' ability to raise capital. Even where the regulator may approve the transaction, the time taken will be such that the markets will have moved, and this could result in losses to investors.

“Arrangements” more generally

ASISA is concerned that some of the proposed provisions are too wide and effectively bring substantially more persons into the net of significant ownership than those who would fall within the 15% shareholding threshold. This could potentially result in unintended consequences for investors and adversely impact upon the liquidity of shares in listed entities, regardless of whether or not the 15% threshold comes into play.

Appointment of a single board member

Focusing further on the issue of control/influence over the business of a financial institution, ASISA members are of the view that the ability of a person to appoint a single member of a governing body does not, of itself, result in that person having a level of material control over the business of that financial institution, and certainly not to such a level that should require that person to be subject to the same requirements that are applicable to a significant owner who controls the majority of a board, or who holds 15% of an entity. Likewise where a person's consent is required for the appointment of a board member, e.g. where 50% shareholder approval is required to appoint a board member, and where some shareholders are present in person but have abstained or voted against a proposed appointment, resulting in only 49% approval being obtained, then a person who voted against but who held 2% of the shares could be said to have had the ability to

consent to that approval by voting in favour of the appointment. That person cannot be said to have had any level of material control over the business of a financial institution and therefore should not fall within the ambit of this Chapter. Where a person has the ability to appoint the majority of a governing board, then only is it plausible that that person has the ability to control the business of the financial institution in question. However, should the principle remain that a person who has the power to appoint a single member of a governing body is a significant owner; we believe there must also be additional criteria to be met including whether that person substantially controls or has the ability to substantially control a material component of the business of the entity in question. In this regard the Companies Act has reference¹.

Declarations

ASISA submits that the provisions of this clause should be amended to align with the other provisions of the Chapter, particularly in the case of the regulator declaring a person to be a significant owner by reason of their having material control (and influence, should that concept be retained) over the business of a financial institution. To the extent that the control (and influence) provisions remain, a declaration (that follows the process set out in this section) should be required before a person can be said to have such material control (or influence) and thus fall within the ambit of this Chapter.

General Exemption provision

Although the Bill contains general exemption provisions (s271), which could, we understand, enable an entity or person that falls within the ambit of one the widely framed provisions of the Bill to apply for an exemption from those provisions and the consequences of being a significant owner, ASISA still believes

¹ The Companies Act concept of “control” provides that a person controls a juristic person, or its business, if that first person, together with any related or interrelated person is directly or indirectly able to exercise or control the exercise of a majority of the voting rights associated with the securities of that company or the right to appoint or elect, or control the appointment or election of directors of that company *who control a majority of the votes* at the meeting of the board.

		<p>that the more regulatory certainty that can be achieved at the outset, the better for all concerned (regulators and investors).</p> <p>Summary</p> <p>Overall, ASISA believes that the criteria for determining who a significant owner is should be clear and objective, and preferably limited to shareholding, being the 15% level proposed. Other additional provisions should be removed in the interests of certainty and proportionality. Aside from the shareholding threshold that exists in some current legislation, such as the Banks Act (15%) and Insurance legislation (25%), there is no current provision for these other types of measures in any existing financial services legislation, which position, it is submitted, should be maintained.</p>	
ASISA	General	<p>Concerns were raised with National Treasury in the ASISA response to the previous draft of the Bill. The revised provisions of this Chapter do not alleviate all previous concerns, in particular, in relation to the 15% threshold set out in s155(d) and the Minister's ability to reduce it through regulation.</p> <p>In addition, a new concern arises due to the provisions of s157, which section was not included in previous drafts.</p> <p>In both regards, the potential impact on investors not having certainty and being subject to a rapidly changing landscape (where the threshold can be lowered, even with a consultative process), potentially creates an unattractive investment environment for not only local investors, but also makes South Africa a less attractive investment destination in respect of listed financial institutions.</p> <p>Proposal: Given these various concerns, as well as the new principles embodied in s157 being introduced for the first time in this version of the Bill, it is proposed that this entire Chapter be deleted and rather dealt with during Phase 2 of Twin Peaks, that is, when sector-specific legislation is being revised e.g. Insurance Act, Collective Investments Schemes Act, especially as it is still</p>	<p><i>It is suggested that the significant owner provisions are revised in order to take cognisance of concerns raised, and to ensure better clarity.</i></p> <p><i>Revised provisions will cater for the following:</i></p> <p><i>Notification and approval from the regulator is required when a person becomes a significant owner (acquires 15% shareholding), and when a significant owner materially increases their shareholding</i></p> <p><i>Standards will specify what constitutes a material increase.</i></p> <p><i>The regulator will need to be notified of a material decrease, and of immaterial increases and decreases. Approval is not required.</i></p> <p><i>Standards will specify what constitutes an immaterial change and material decrease.</i></p>

		not apparent that a one-size-fits-all approach should be implemented across all financial institutions.	
ASISA	155	<p>Amongst other National Treasury responses on Chapter 10 (the previous draft Bill chapter dealing with Significant Owners), the following is stated:</p> <p>In relation to BASA’s comment that there are more than 10 000 registered financial services providers (“FSPs”) and that provision needs to be made to ensure that insignificant holdings are not caught in the net, Treasury commented: <i>“The scope of the Bill is limited to approvals relating to significant owners of Banks, FMIs, CIS and Insurance Firms. Any additional financial institutions would need to be prescribed through Regulations. See revised Bill”</i>.</p> <p>However, on our reading of the Bill, the significant owner provisions apply to all FSPs, and not just these entities. National Treasury provided the same response – that the scope of the Bill is “limited” – to the JSE’s concern on the previous section 120(1)(a). We do not agree with this statement. The definitions of the Bill are such that the scope of this Chapter is not limited to only these entities. Even if it were so limited, our concerns remain regarding the ability of Regulations to prescribe a lower percentage.</p> <p>National Treasury’s response on page 189 of their response document is that: <i>“The 15 percent threshold will provide alignment across the different financial institutions that currently have different thresholds. The 15 percent threshold is in line with the international standards”</i>. Our understanding is that the ‘alignment’ relates to the current 15% threshold in respect of Banks – the current threshold for insurers is 25%; the Collective Investment Schemes Act and Financial Advisory and Intermediary Services Act do not provide for any thresholds. The Banks Act does not permit the 15% threshold to be lowered by the Minister and nor does it require regulatory approval for a shareholder to</p>	<p><i>It is suggested that the significant owner provisions are revised in order to take cognisance of concerns raised, and to ensure better clarity.</i></p> <p><i>Revised provisions will cater for the following:</i></p> <p><i>Notification and approval from the regulator is required when a person becomes a significant owner (acquires 15% shareholding), and when a significant owner materially increases their shareholding</i></p> <p><i>Standards will specify what constitutes a material increase.</i></p> <p><i>The regulator will need to be notified of a material decrease, and of immaterial increases and decreases. Approval is not required.</i></p> <p><i>Standards will specify what constitutes an immaterial change and material decrease.</i></p>

dispose to a level below the stipulated threshold. Assuming that the 15% is in line with international standards, it is still not clear whether international standards permit the reduction of this threshold by the Minister in Regulations as proposed.

Regarding ASISA’s comment that the Minister not be permitted to prescribe a percentage lower than the (15%) threshold, on page 192 of their response document, National Treasury responds that “Where the shareholding is fragmented, a lower shareholding might be significant relative to the holdings of other shareholders. The clause is aimed at providing flexibility.”

Our understanding of this response is that it would mostly relate to listed entities i.e. fragmented shareholding is more typical in large listed entities. Assuming that to be the case, ASISA has previously raised the concern that this would have for entities trading on the JSE. Other stakeholders have also raised similar concerns. For example, Transaction Capital (on previous section 120 on pages 196 & 197 of National treasury’s response document. These concerns are similar to those we have raised previously and still valid (and more so where the Minister has the power to reduce the threshold “where the shareholding is fragmented” [*see example below]).

A further example, and possibly not directly related to this, is Strate’s comment about approval being required for a disposal of an interest in a financial institution. If an entity is or has become a significant owner under the Bill, and it wants to dispose of its interest to below the threshold (and assuming the buyers do not cross the threshold), approval should not be required.

Where the financial institution concerned is a listed entity, the provisions in Chapter 11 could and will have far-reaching (and unintended) consequences, given that one of the key reasons for the entities in question being listed is for the relative ease of trading in its shares. This is especially so where Chapter 11 applies to holdings below the threshold of 15% (a distinct possibility in light of the provisions mentioned above), as well as

		<p>where a significant owner holding, for example* 16%, seeks to dispose of 2% of those holdings on the open market and is naturally unaware of the counter-party's identity. The counter-party may or may not already hold shares in the entity concerned or may hold shares but well below the 15% threshold and thus not become a 15% shareholder even if it purchases 2% from the then significant owner. This would unduly impede market trading.</p> <p>We propose this principle be reconsidered and dealt with in financial sector specific legislation, as a one-size fits all approach is not appropriate - banks, insurers and financial services providers, for example, should be considered separately.</p>	
BASA	155	<p>The entire clause is unnecessarily cumbersome, complicated and repetitive. As a result and as an unintended consequence, it may, by way of example, create uncertainty for investors (also potential investors), especially on whether or not they are regarded as significant. Example: Clause 155 (d): “in the case of a financial institution that is a company, the person, directly or indirectly, alone or together with a related or interrelated person:</p> <ul style="list-style-type: none"> • holds at least 15%, or a lower percentage as may be prescribed in Regulations, of the issued shares of the financial institution; <p>Consistency: In terms of international standards (i.e. Principle 6 of the Basel Committee on Banking Supervision’s Core Principles for Effective Banking Supervision), it is required that laws and regulations should contain clear definitions of “significant ownership” and “controlling interests”.</p> <p>Having regard to the various provisions of the FSRB applicable to significant owners (i.e. section 106(1)(c), section 143(5), section 157(1) and (2), and section 257) pertaining to, inter alia, duties, responsibilities and related risks such as conduct standards, offences and penalties, etc.:</p> <ul style="list-style-type: none"> • investors will, as a minimum, require legal certainty on whether they will be regarded as significant owners; 	<p><i>The significant owner provisions are revised in order to take cognisance of concerns raised, and to ensure better clarity.</i></p>

- whether such investment will require regulatory pre-approval in order not be breach section 257 (offences and penalties).
- Reasonableness:** It follows that a decision to invest on this basis as a significant owner will have to be well considered and deliberate. Any uncertainty in this regard will not only be detrimental to the financial sector at large but will also impact the ability of financial institutions to attract the desired calibre of significant investors.
- Additional consideration:**
- Inconsistency and further uncertainty: It is confusing that section 155(1) states that “A person is a significant owner of a financial institution if i.e. (a) the person, directly or indirectly, alone or together with a related or interrelated person, has the ability to control or influence materially the business or strategy of the financial institution (as a fact), whereas in terms of clause 156, the responsible authority may declare whether or not a specified person is or is not a significant owner of a financial institution. In addition, and with reference to the above, in terms of clause 156(2), “The responsible authority may not declare that a person is a significant owner of a financial institution unless satisfied that the person has the ability to control or influence materially the business or strategy of the financial institution.
 - In the interest of legal and investor certainty, significance should simply, with reference to subsections (d), (e) and (f) of clause 155, be regarded as an interest of 15 per cent or more of the total nominal value or voting rights in respect of the issued shares held by a person, directly or indirectly, alone or together with a related or interrelated person. The logic behind the provision (clauses 155 (d), (e) and (f)) of “a lower percentage than 15 per cent as may be prescribed in Regulations”, is nonsensical in relation to significance. A person who directly or indirectly, alone or together with a related or interrelated person, holds less than 15 per cent of

		<p>the total nominal value or the voting rights in respect of the issued shares of a financial institution, will not be in any position to control or materially influence the business or strategy of a financial institution.</p> <ul style="list-style-type: none"> • With reference to clause 155(b), the power to appoint a director does not necessarily amount to significant ownership of that organisation. It will depend on the size of the board, the control that the directors will have over the board and the percentage voting rights of the “significant owner”. With reference to section 2(a)(ii)(bb) of the Companies Act, 2008, a significant owner will rather be a person who, alone or together with a related or interrelated person, has the right to appoint or elect, or control the appointment or election of, directors of that company who control a majority of the votes at a meeting of the board. • With reference to clause 155(b), a person who directly or indirectly, alone or together with a related or interrelated person, holds less than 15 per cent of the total nominal value or the voting rights in respect of the issued shares of a financial institution, will not be in any position to control or materially influence the business or strategy of a financial institution, merely by virtue of the fact that the person has the power to appoint a director of an organisation. Control or significant influence will in such an instance still require the ability to “materially influence or control the business or strategy”, as contemplated in section 2 of the Companies Act, 2008, which will remain non-existent in a case where a person, directly or indirectly, alone or together with a related or interrelated person, holds less than 15 per cent of the total nominal value or the voting rights in respect of the issued shares of a financial institution. <p>It is recommended that the clause be amended to read:</p> <p><u><i>155. A person is a significant owner of a financial institution, unless otherwise declared in writing by the responsible authority for the financial sector law in terms of which a financial</i></u></p>	
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BASA	157	<p>The clause introduces an additional regulatory requirement for approval of significant owners by the responsible authority for the financial sector law. This seems to be over and above the requirement for SARB approval, and possibly merger notifications to the Competition Commission, if appropriate (see clause 10(2)(a)). There is no appeal mechanism if the approval is not given. Clause 157(6) is particularly problematic, as it hints at collusion between the FSCA, PA and SARB. Each arm of the regulatory oversight functions must be independent. This requirement also brings added difficulty for investment in the country, as the requirements to allow international investment seems onerous.</p> <p>It is recommended that the clause be amended to clearly illustrate how the regulatory authorities must go about it to ensure independence in the approval process undertaken and must provide for an appeal mechanism.</p>	<i>See proposed changes to Chapter 11</i>
ASISA	157	<p>Approvals relating to significant owners</p> <p>The principles proposed in this new section are highly problematic – given the limited time available we note below only a couple of examples; there are no doubt more.</p> <p>Section 157 is entirely new and has far wider implications than those contained in the previous draft, especially sections 157(2) – (5). Whereas the previous draft of the Bill only captured entities which, through an acquisition of an interest in a financial institution became significant owners, or through a disposal of an interest in financial institution no longer qualified as a significant owner, the Bill now provides that <u>every</u> disposal or acquisition of</p>	<i>See proposed changes to Chapter 11</i>

shares in an eligible financial institution, manager of collective investment scheme or financial institution prescribed in the Regulations, which would affect that person’s level of control or influence in respect of the business or strategy of that financial institution, would require approval from the relevant responsible authority. This means that an acquisition or disposal by a significant owner which does not change their “significant owner” status would still require approval from the relevant authority.

It also means that a person need not acquire a 15% shareholding to become a significant owner e.g. so long as the arrangement, which need not involve an acquisition or disposition of shares, results in any increase or reduction in that person’s ability to influence the business, that person must obtain regulatory approval. This is extremely wide, without any reference to, for example, a material change. An example of such a situation might be where siblings are both shareholders and one is authorised to act on behalf of the other while the latter is indisposed.

The principle proposed here could throw markets into turmoil where for example, at some stage after the arrangement has been entered into, the regulator determines that the arrangement fell into the scope of this clause, whereas the entities themselves did not (whether reasonably or not) form that view. Section 157(4) provides that such an arrangement (which would not have been approved by the regulator) would have no effect. Assuming that the “arrangement” did, for example, involve a share sale, and that further share sales had since taken place, what kind of redress would be applicable?

Proposal: We propose this principle be reconsidered and dealt with in financial sector specific legislation, as a one-size fits all approach is not appropriate - banks, insurers and financial services providers, for example, should be considered separately. Alternatively, if this proposal is not accepted, then materiality should be brought into this provision.

		<p>See for example s155(1):</p> <p><i>“A person is a significant owner of a financial institution if the person ... has the ability to control or influence materially the business or strategy of the financial institution”.</i></p> <p>It is inconsistent that a person becomes a significant owner when that person can control or influence <u>materially</u> the business or strategy of the financial institution under s155(1)(a), but that under s157(2), an arrangement that need only result in influencing the business or strategy requires the registrar’s approval. At least the word “materially” should be inserted before “influencing”.</p>	
CHAPTER 12: FINANCIAL CONGLOMERATES			
ASISA	158	<p>Designation of financial conglomerates</p> <p>We propose the same type of consultation process as set out on s29(2)(b) and s156(3) namely that the affected group would be given notice and be able to make submissions, specifically as such a designation has far-reaching implications for a group of companies with regard to the power of the prudential authority under Chapter 12 (e.g. restructuring and approvals for acquisitions and disposals).</p>	<i>This is agreed with and it is proposed that provisions be included for a similar consultation process as set out in earlier chapters, to be followed. See proposed revisions to the Bill.</i>
SAIA	162	<p>The power of the Prudential Authority to set prudential standards in respect of financial conglomerates is still too wide and should be further defined in detail with adequate checks.</p>	<i>This is not agreed with.</i>
BASA	163	<p>This clause permits the regulator to direct the holding company of a conglomerate to alter its structure. Corporate restructurings have potentially massive implications for employees, customers, and investors. Such an intervention should be used only as a last resort, and must be subject to strict administrative justice procedures.</p> <p>It is recommended that the clause be amended to include the following provisions:</p>	<i>See extensive consultation process for directives in clause 146. Directives under clause 165 will follow this process. The financial institution does also have recourse to the Tribunal.</i>

		<ul style="list-style-type: none"> • the right for a financial conglomerate to make representations regarding the benefits of the conglomerate structure; • the right for a financial conglomerate to make representations regarding the costs, impacts and consequences of changing the conglomerate structure; • a duty on the PA to demonstrate objectivity, and to provide reasons why the structure of a financial conglomerate impedes the safety and soundness of any of the financial institutions that are part of the financial conglomerate and impedes the ability of the PA to effectively supervise the conglomerate; and • an appeal process for a financial conglomerate to appeal the decisions made by the regulatory authorities in regards to the financial conglomerate structure. 	
SAIA	164	Although the materiality of the disposal and/or acquisition will be dealt with through prudential standards, we believe it would be more prudent to give more direction in the Act.	<i>Standards will suffice and it is not necessary to provide for this in primary legislation.</i>
BASA	164	<p>This clause provides that the PA must approve a material acquisition or disposal; or be notified of any other acquisition or disposal. The clause does not, on the face of it, differ from the current section 52 and section 54 Banks Act requirements. It is however not clear what the interface between this clause and the Banks Act will be. Clarification is sought as to whether dual approvals will be required. This approval seems to be is duplication and may be unnecessary in terms of the existing provisions in the Banks Act.</p> <p>We will appreciate an opportunity to discuss this with NT to obtain a better understanding and clarity as to the intention of the clause before draft four of the FSRB is finalised.</p>	<i>While approval may indeed be granted under two pieces of legislation, the regulator responsible will minimise unnecessary overlap in this initial phase. Phase 2 of the reform process will more substantially streamline the legal framework.</i>

CHAPTER 13: ADMINISTRATIVE PENALTIES

ASISA	165	<p>Section 165 does not stipulate what process the Regulator should follow before an administrative penalty may be imposed. It is important that the process be prescribed in the Bill and that it provides for due process and the proper application of the principle that a person has the right to state their case. A person against whom the responsible authority is considering imposing an administrative penalty should first be informed of what such person did wrong, and the person should be granted an opportunity to submit mitigating circumstances.</p> <p>It is furthermore submitted that the maximum amount of the penalty that may be levied should be either prescribed in the Bill or by Regulation issued by the Minister.</p> <p>We note the introduction of section 171 which did not appear in previous drafts and which allows for a person to make application for remission of a penalty. However, this should not be the only process in terms of which representations may be made before the penalty is imposed.</p>	<p><i>Administrative action procedures may be determined by a regulator in terms of chapter 6. The provisions of PAJA also apply.</i></p> <p><i>Clause 165 as referenced [new clause 168] provides the opportunity to a person to provide submissions, including mitigating circumstances, which the regulator must consider in determining an appropriate penalty to impose.</i></p> <p><i>Clause 165(4) [new clause 168(2)(b)] incorporates the principle of proportionality in the application of an appropriate penalty to a particular contravention. Any penalty imposed must be appropriate in relation to the particular contravention.</i></p>
ASISA	172	<p>Prohibition of indemnity for administrative penalties</p> <p>We believe this provision constitutes an unwarranted interference into the private arrangements of individuals, and that parties should be free to contractually undertake to indemnify each other for causing an administrative penalty to be issued against the other party. An example of this is where a financial services provider (“FSP”) enters into a juristic representative arrangement with another entity. The FSP is responsible to the regulator for all the acts of its juristic representative and should be able to require that the juristic representative indemnifies the FSP for any breach of the contract which results in an administrative penalty being issued against the FSP.</p> <p>Another example is a delegation of administrative functions under the Collective Investment Schemes Control Act. The management company still remains responsible to the regulator for the function</p>	<p><i>It is proposed that the clause is amended in light of this comment, to allow for joint standards to clarify which types of indemnity may be permissible.</i></p>

		being performed by the delegated party, and should be entitled to hold the delegated party to book if it fails to perform its obligations, and causes loss to the management company by allowing an administrative penalty to be issued to the management company. The management company should be entitled to seek financial redress in the form of an indemnity from the delegated party, and in fact the delegated party would usually have insurance to cover this.	
CHAPTER 14: OMBUDS			
SAIA	General	In order for the objectives of the chapter and the legislators to be realised, all relevant financial institutions should be members of an industry Ombud Scheme	<i>It is proposed that a provision is included to compel membership of a scheme by a financial institution, where such scheme deals with the financial products and financial services that the financial institution provides. Where there is no such ombud scheme in place, the industry may either establish one, rely on the FAIS ombud or PFA as appropriate, or will have any complaints made against it allocated by the Chief Ombud to one of the existing ombud schemes. It is proposed that this is done in clause 212 under heading 'Applicable ombud schemes'</i>
Voluntary Ombudsman Schemes	174 & 199	Section 10(1)(e)(iv) of the FSOS Act requires an industry scheme to apply principles of equity. We do not regard sections 174 and 199(1) of the Bill as giving sufficient recognition to this principle.	<i>It is proposed that provisions are amended to require the Ombud Council to satisfy itself when recognizing a scheme that the ombuds apply principles of fairness and equity</i>
SAIA	175(1)(g)	This Clause provides that in order to achieve its objective, the Ombuds Regulatory Council must resolve in accordance with this Act, overlaps of coverage of different ombud schemes. The SAIA would recommend that this refers to the overlap in jurisdictional coverage, failing which the term becomes vague as there is no definition for coverage provided for in the definition Clause.	<i>Unnecessary.</i>

SAIA	175(1)(i)	It is noted that the Ombuds must promote financial inclusion. The SAIA requires clarity as regards the manner in which this will be done.	<i>Noted for further engagement</i>
SAIA	177	Chief Ombud requires a capital letter “O” throughout the Bill. It is our respectful submission that the term is misleading as this individual does not perform any actual “ombud” functions. The individual is more of a type of Chief Executive Officer. It is noted that the other Ombuds do not report to the individual. It is a strategic and operational role for the Ombud Regulatory Council. Accordingly we would recommend that a name change be considered as this creates confusion and is misleading.	<i>The proposed changes to the ombud system in the FSRB should be seen as an initial step in a reform process. While the chief ombud in this phase may not have specific ombud powers, this naming is intended to allow for a simple transition to whatever the ultimate model chosen in Phase 2 of the reform process is. The Chief Ombud may become a central statutory ombud, or a statutory ombud established to hear matters that do not fall within the jurisdiction of other ombuds already in place (i.e. to perform a backstop function.) It is therefore intended that this role will ultimately be given ombud powers and therefore the name should remain. Engagements on the reform process have taken place and National Treasury will further provide a policy note in the near future giving clarity on the reform process and potential options under consideration</i>
BASA	179	Word missing. <i>179 (1) A person appointed as a member of the Board— (a) holds office for a term of no longer than five years, <u>or</u> as the Minister may determine;</i>	<i>No word missing. The provision is correct as is.</i>
BASA	182(b)(iii)	Clarity is sought as to what the fees referenced are, whether it is the fees payable by the members of the ombud scheme to the ombud scheme or whether it is the fees payable by the ombud scheme to the Ombud Regulatory Council. We will appreciate an opportunity to discuss this with NT to obtain a better understanding and clarity as to the intention of the clause before draft four of the FSRB is finalised.	<i>It is the latter.</i> <i>The request is noted.</i>

SAIA	185(5)(b)	<p>This Clause currently reads as follows:</p> <p><i>“The majority of the members of that committee may not be as staff members of the Ombud Regulatory Council”</i></p> <p>It is our respectful submission that the word, “<i>employed</i>” should be inserted between “be” and “as”.</p>	<i>Agreed.</i>
Voluntary Ombudsman Schemes	186	<p>Chief Ombud</p> <p>“Ombud” is defined and in paragraph (d) of the definition the following appears:</p> <p><i>“A person who has the function in terms of the rules of an industry ombud scheme, of mediating or resolving complaints to which the scheme applies.”</i></p> <p>See also paragraph (c) of the definition of “industry ombud scheme”.</p> <p>Section 186 relates to the “Chief Ombud” whose functions are set out in sub-section (3) thereof. The Chief Ombud will not perform any function which is normally performed by an ombudsman and, therefore, the title of “Chief Ombud” is inappropriate. A more fitting and descriptive title may be “Ombud Regulatory Council Director” or “Ombud Regulatory Council Manager”.</p>	<i>The proposed changes to the ombud system in the FSRB should be seen as an initial step in a reform process. While the Chief Ombud in this phase may not have specific ombud powers, this naming is intended to allow for a simple transition to whatever the ultimate model chosen in Phase 2 of the reform process is; for simplicity and ease of customer interface, ombud consolidation of some kind is likely. Engagements on the reform process are underway and National Treasury will provide a policy note in the near future giving clarity on the reform process and potential options under consideration.</i>
BASA	186	<p>Clarity is sought as to what the role of the Chief Ombud is in relation to the different ombud schemes. We will appreciate an opportunity to discuss this with NT to obtain a better understanding and clarity as to the intention of the clause before draft four of the FSRB is finalised.</p>	<i>Noted. See response to comment above.</i>
SAIA	187	<p>This Clause currently reads:</p> <p><i>“A person who is or was a member of the Board, may not use that position, or any information obtained as a member of the Board to cause a detriment to the Ombud Regulatory Council.”</i></p>	<i>Agreed.</i>

		We would submit that the indefinite article “a”, before detriment be removed.	
Voluntary Ombudsman Schemes	190 – 195	<p>Section 190(1), (2)(b), Section 192(2) & Section 195(1), (2) and (5) of the 2014 Bill should be retained:</p> <ul style="list-style-type: none"> • Section 190(1) – sets out the jurisdiction of the different ombuds. • Section 190(2)(b) – there is an obligation on an ombudsman’s office to send complaints that fall within the jurisdiction of another ombudsman’s office to that office. • Section 192(2) – the rights of a complainant to seek legal redress are not affected by the Bill. • Section 195(1) – financial institutions cannot participate in ombudsman schemes that are not recognised. • Section 195(2) – such participation is null and void. • Section 195(5) – financial institutions cannot use terminology for in-house complaints handling arrangements that give the impression that it is an ombudsman scheme. 	<p>Please see responses per clause below:</p> <ul style="list-style-type: none"> • Section 190(1) – <i>Jurisdiction of ombuds will remain as they stand currently; there are no changes made through the FSRB</i> • Section 190(2)(b) – <i>see provisions for rules which the Ombud Council can set</i> • Section 192(2) – not necessary to specify in this Chapter. Customers can approach the Tribunal, and right to go to Court is not affected • Section 195(1) – <i>see clause 212</i> • Section 195(2) – <i>see clause 212</i> • Section 195(5) – <i>see clause 212</i>
BASA	192	<p>Clarity is sought as to whether the ombud schemes which have already been recognised by the FSOS Council have to reapply for recognition with the Ombud Regulatory Council or whether the recognition will automatically be carried over.</p> <p>BASA will appreciate an opportunity to discuss this with NT to obtain a better understanding and clarity as to the intention of the clause before draft four of the FSRB is finalised.</p>	<p><i>Provision should be made for a transitional period in which recognition is saved until new approval is granted by the Ombud Council.</i></p>
Voluntary Ombudsman Schemes	194(2)(a)	<p>Determination of Applications</p> <p>Sub-section (2)(a) states that “the Ombud Regulatory Council must not recognise an industry ombud scheme unless satisfied that a significant number of relevant financial institutions are or shall, on the industry ombud scheme’s being recognised, be members of the industry ombud scheme;</p>	

		<p>Reference to “a significant number of relevant financial institutions” is vague and open to different interpretations</p> <p>Voluntary Ombuds Schemes recommend that the reference should be to “a significant number of relevant financial institutions, based on asset value, gross income or financial customer base (as the Ombud Regulatory Council may determine in general or in a particular instance) in a particular category of financial institutions are or shall....”</p>	<i>This is unnecessary.</i>
Voluntary Ombudsman Schemes	194(2)(b)	<p>Sub-section (2)(b)(ii) should be tidied up and should read “<u>make adequate and appropriate provision for consumers to lodge complaints</u>”, instead of “making complaints”.</p> <p>The “governing body” of an ombudsman scheme is defined as being “the persons or body of persons that manage the affairs of the ombud scheme”. The provisions of section 194(2)(b)(iii) are compatible with the definition of “governing body”. It may be that the references to “a committee” in section 194 (2)(b)(vi) and (vii) are errors and that the references should have been to “a governing body”. The only members of any ombudsman scheme are companies and not individuals. As section 194(2)(b)(vi) currently reads, it prohibits a company from serving on a governing body. However, individuals and not companies serve on governing bodies.</p>	<p><i>Unnecessary.</i></p> <p><i>This comment is correct and it is proposed that the provisions are amended accordingly.</i></p>
ASISA	194(2)(b)	<p>Proposal: The following amended version of the wording contained in the second draft, clause 187(1)(e)(iii) should be included in the final draft of section 194(2)(b):</p> <p><u>“require that complaints be disposed of in an accessible, procedurally fair informal, economical and expeditious manner, having regard to what is equitable in all the circumstances, as well as—</u></p>	<i>Details on the process to be followed by ombuds in handling complaints can be provided for in Council rules rather than in legislation.</i>

		<p><u>(aa) the contractual arrangement or other legal relationship between the complainant and any other party to the complaint; and</u></p> <p><u>(bb) the provisions of any applicable law, conduct standard, codes of conduct, pension fund rules and rules of practice;”</u></p>	
BASA	194(2)(b)(iii)	<p>Clarity is sought as to whether the FSRB will give the governing rules of each industry ombud legal status or whether such legal status will be obtained by agreement (i.e. contractual agreement).</p> <p>We will appreciate an opportunity to discuss this with NT to obtain a better understanding and clarity as to the intention of the clause before draft four of the FSRB is finalised.</p>	<i>Noted.</i>
SAIA	194(2)(b)(iv)	<p>Clarity is sought as to whether Clause 194(2)(b)(vi) seeks to reintroduce a two-tier system of governance of an industry ombud scheme by providing for a committee to provide oversight and monitoring of the operations, or is this committee intended to be a sub-committee of the governing body.</p> <p>Does this reference imply that the governing body of an industry ombud scheme may not include an industry representative? SAIA submit that companies are members of industry ombud schemes hence we suggest that this clause reads as follows</p> <p><u>“...who are not employees of members of the industry ombud scheme.”</u></p> <p>We submit that it is impractical and sub-optimal for an industry ombud scheme to have no industry input at all in the governing body structures. This entity could make decisions that are not feasible or inappropriate for the industry to implement. We suggest that an industry association representative such as the SAIA be permitted to serve on the committee referred to in Clause 194(2)(b)(vi).</p>	<i>The committee referred to is intended to be the governing body and it is proposed that the provisions are corrected to properly reflect this.</i>

BASA	194(2)(b)(vi)	<p>Clarity is sought as to whether the intention is to substitute the current ombud scheme boards with the committee. If this is the case it is critical for the committee to include industry representation to ensure the correct technical expertise are represented at the committee.</p> <p>We will appreciate an opportunity to discuss this with NT to obtain a better understanding and clarity as to the intention of the clause before draft four of the FSRB is finalised.</p>	<p><i>The committee referred to is intended to be the governing body and it is proposed that the provisions are corrected to properly reflect this.</i></p>
Voluntary Ombudsman Schemes	194(3)	<p>Section 194(3) deems a non-response from the Ombud Regulatory Council after 3 months to be a refusal to recognise a scheme. We have read National Treasury's views on this type of provision in the Consolidated Comments. However, it is suggested that subsection (3) be deleted as it appears to us to offend against administrative justice because it removes accountability for proper decision making and giving reasons for a refusal.</p>	<p><i>To determine an application includes both an approval or refusal – the scheme will be notified of either.</i></p> <p><i>If no determination is made, it is taken to be a refusal. This is an action on the part of the Ombud Council, who can then be taken to the Tribunal on this action. The three month provision is intended to provide certainty to the scheme that a determination will be made in an adequate time period and the ombud scheme notified timeously</i></p>
SAIA	194(3)(a)	<p>There is a real concern by the SAIA and its members with the deeming provision that if the Ombud Regulatory Council has not determined an application for recognition of an industry ombud scheme within three months after it is made, that the application must be taken to have been refused.</p> <p>There could be real reasons for the delay and these could be due to delay on the part of the council. Moreover, it is contrary to the spirit of inclusiveness and <i>audi alteram partem</i>, which are inherent in alternative dispute resolution (which an ombud scheme seeks to provide) that the reach is as inclusive and broad as possible. It is our respectful submission that this clause be replaced with real timelines and provision for applications for an extension.</p>	<p><i>To determine an application includes both an approval or refusal – the scheme will be notified of either.</i></p> <p><i>If no determination is made, it is taken to be a refusal. This is an action on the part of the ORC, who can then be taken to the Tribunal on this action. The three month provision is intended to provide certainty to the scheme that a determination will be made in an adequate time period and the ombud scheme notified timeously</i></p>

Voluntary Ombudsman Schemes	196	<p>Suspension of recognition</p> <p>Section 196(1)(c) over-broadly refers to “<i>if a significant number of the financial institutions that are members of the industry ombud scheme...</i>” and the reference to “ombuds” therein appears to be an error.</p> <p>The reference to “<i>if a significant number of the financial institutions that are members</i>”, could be problematic as “the ombuds for the industry ombud scheme” have no control over the business practice of financial institutions and could be held accountable for their actions by withdrawal of recognition. This provision seems to be inappropriate - if the financial institutions contravene laws the regulatory action should be directed to them.</p>	<p><i>Appears to be a misreading by the commentator of the clause. The clause is correct.</i></p> <p><i>This is not agreed with. In addition to action against the financial institution, action against the ombud established by those same institutions could be appropriate.</i></p>
Voluntary Ombudsman Schemes	196(1)(g)	This provision dealing with the non-payment for 14 days of a fee, levy or penalty seems a drastic measure, given that a suspension will have a detrimental effect on complaints and complainants	<i>Agreed. It is proposed that this is amended to 30 days to address this comment.</i>
BASA	196(4)	<p>Clause 196(4): If an ombud scheme is suspended, it should not continue its operations. It is therefore unclear how the ombud scheme can still have obligations in terms of financial sector law.</p> <p>We will appreciate an opportunity to discuss this with NT to obtain a better understanding and clarity as to the intention of the clause before draft four of the FSRB is finalised.</p>	<i>It is proposed that this clause is revised to provide further clarity on when such instances may arise. For example, the scheme may still have to produce specific annual or financial reports.</i>
Voluntary Ombudsman Schemes	199	<p>Rules of Ombud Regulatory Council</p> <p>We suggest that any rule made by the Ombud Regulatory Council should be done in consultation with the relevant ombudsman or ombudsman scheme.</p>	<i>There will be a public consultation process followed through which ombuds schemes can engage, however their agreement is not required in order for the Council to set rules.</i>
Voluntary Ombudsman Schemes	199(2)(e)	Section 199(4) provides that no rule of the Ombud Regulatory Council may “ <i>interfere with the independence of an ombud or the investigation or determination of a specific complaint</i> ”.	<i>It is not agreed that acting in accordance with rules set by the Council as an oversight body with a clear and specific mandate, impinges on an ombuds independence.</i>

		<p>The above section empowers the Ombud Regulatory Council to make rules in relation to “dispute resolution processes”, in other words to prescribe how a complaint should be resolved.</p> <p>We believe that section 199(2)(e) thus impinges on the independence of an ombudsman and suggest that it should be deleted.</p>	
BASA	199	<p>Recommended that clause 199 be amended by addition of the following to read:</p> <p><i>199. (1) The Ombud Regulatory Council may make rules for, or in respect of, ombuds and ombud schemes, aimed at ensuring that financial customers have access to, and are able to use affordable and effective, independent and fair alternative dispute resolution processes for complaints about financial products and financial services. (2) Ombud rules in terms of subsection (1) may be made on any of the following matters:</i></p> <p><i>(a) Governing rules of ombud schemes;</i></p> <p><i>(b).....</i></p> <p><i>(h).....</i></p> <p><i>(3) A rule of the Ombud Regulatory Council must be consistent with relevant financial sector laws.</i></p> <p><i>(4) A rule of the Ombud Regulatory Council must not interfere with the independence of an ombud or the investigation or determination of a specific complaint.</i></p> <p><i>(5) The Ombud Regulatory Council must, in developing Ombud Regulatory Council rules, seek to provide for a consistent approach and consistent requirements for all ombud schemes, and promote co-ordination and co-operation between ombud schemes.</i></p> <p><i>(6) Different Ombud Regulatory Council rules may be made for, or in respect of—</i></p> <p><i>(a) different categories of ombuds and ombud schemes; or</i></p> <p><i>(b) different circumstances.</i></p> <p><i>(7) The Ombud Regulatory Council may, at any time, amend or revoke an Ombud Regulatory Council rule.</i></p>	<p><i>This is not agreed with.</i></p>

		<u><i>(8) The Ombud Regulatory Council may, on application by a party against whom the Ombud has made a determination, at any time, amend or revoke an Ombud Regulatory Council rule.</i></u>	
BASA	199 & 200	Clarity is sought as to what the difference is between a rule and directive and whether non-compliance with a rule or directive will be regarded as non-compliance with a financial sector law resulting in a debarment and/or administrative penalties. We will appreciate an opportunity to discuss this with NT to obtain a better understanding and clarity as to the intention of the clause before draft four of the FSRB is finalised.	<i>A rule applies generally to all ombuds, while a directive is specific to an individual ombud scheme. Both must be complied with</i>
BASA	201	Clause 201 reading with clause 150: Clause 150 states that an enforceable undertaking is regarded as a “legal instrument”. Clarity is sought as to the meaning of “legal instrument” as it is not defined in the definitions. We will appreciate an opportunity to discuss this with NT to obtain a better understanding and clarity as to the intention of the clause before draft four of the FSRB is finalised.	<i>It is proposed that clause 150 is amended to provide greater clarity by removing reference to legal instrument</i>
Voluntary Ombudsman Schemes	200(1)	Section 200(1) refers to a “ <i>financial sector ombud scheme</i> ” which is not a defined term. It should refer to “ <u><i>industry ombud scheme</i></u> ”.	<i>See proposed revisions to the Bill.</i>
Voluntary Ombudsman Schemes	200(3)	Section 200(3)(c) has a reference to “fit and proper” which seems inapplicable to an ombudsman. It should be deleted.	<i>See proposed revisions to the Bill.</i>
Voluntary Ombudsman Schemes	203	Debarment Section 203(9) states that “ <i>an ombud scheme that becomes aware that a debarment order has been made in respect of an individual employed or engaged by the ombud scheme must take all reasonable steps to ensure that the order is given effect to</i> ”. We question the need to debar an individual employed or engaged by the ombudsman scheme as this can be dealt with by the ombudsman himself/herself.	<i>Noted, but not agreed with. The Ombud Council must be able to debar individuals, and cannot rely solely on the ombudsman to do so.</i>

SAIA	203(5)	<p>The Clause currently reads as follows: <i>“In deciding whether or not to make debarment”</i></p> <p>There is an “<u>a</u>” missing between “make” and “debarment”</p>	<i>Agree.</i>
SAIA	Part 4, General provisions	<p>Clarity is sought as to how the new ombud structure to be funded?</p> <p>The Ombud Regulatory Council (described as a levy body in the interpretation Clause) is envisaged to be larger and more operationally active than the current FSOS Council and so will cost a lot more to operate.</p> <p>If by levies on the actual industry ombud schemes, these costs will be part of the scheme overheads, which are passed on to the industry scheme members to fund and so add to the overall industry levy burden (which is still to be quantified). How is it envisaged that the industry ombud schemes are to be funded? All these costs will ultimately be translated into higher premiums.</p> <p>Is the Ombud Regulatory Council a financial sector regulator as defined as this is not listed in the interpretation Clause? Thus it should not be able to conduct on-site supervisory inspections of ombud schemes as this is the function of financial sector regulators.</p> <p>This is substantiated by Clause 214(1) which refers separately to “the financial sector regulators” and the “Ombud Regulatory Council” as being subject to judicial review by the Financial Services Tribunal. By implication, the Ombud Regulatory Council is not deemed to be a financial sector regulator and therefore is not empowered to conduct on-site supervisory inspections. It is of concern that the rules made as a result of the proposed inspections have the force of law. We respectfully submit that this Clause be revisited and considered in light of this submission.</p>	<p><i>The Ombud Council will be a levy body and funded through levies raised.</i></p> <p><i>It will not be a financial sector regulator. Financial sector regulators will not be able to conduct on-site inspections of ombuds scheme, only of financial institutions. The Ombud Council will be able to conduct on-site inspections of ombud schemes should it be necessary.</i></p>
SAIA	209	As mentioned earlier in the comments, we submit that this be amended to specify jurisdictional overlaps.	<i>Unnecessary.</i>

		We respectfully submit that the Ombud Regulatory Council consider consumer awareness campaigns to mitigate the risk of overlapping and provide consumers with contact details as well as clarity regarding jurisdiction of the various Ombuds.	<i>See proposed revisions to the Bill.</i>
SAIA	212(1)(a)(iii)	We note that the financial sector ombud scheme must report on the operation of the financial sector ombud scheme during the financial year in respect of the conduct of financial institutions which are giving rise to complaints. Clarity is sought as to whether the industry Ombud is to report on trends in complaints. Is the intention to refer to market conduct issues?	<i>Yes.</i>
CHAPTER 15: FINANCIAL SERVICES TRIBUNAL			
ASISA	General	Please refer to the Extract from Counsel’s memorandum annexed to this document – paragraphs 60 – 71 refer.	<i>Noted. See summary of matter at beginning of this document (pages 3 –5) and redrafting of chapter as proposed.</i>
Foschini	214	The Financial Services Tribunal should not be able to 'judicially' rule on matters to the exclusion of the High Court. The Tribunal will especially not be regarded as truly independent, as the members thereof would be appointed by the Minister, who may also determine their respective terms of office. Our suggestion is to remove the reference to “judicially”, and to retain a right to appeal to the High Court.	<i>Agreed. See proposed revisions to the Bill.</i>
ASISA	222(5)	The meaning of this sub-section is unclear and the wording is vague. It does not add any value within the context of s.222. Proposal: Delete ss222(5)	<i>This is not agreed with.</i>
BASA	233	Clause 233 read with clause 199(7): The process for reconsideration is not adequate. Regarding the ombud, it is noted that decisions of the Ombud Regulatory Council will be limited to ombud schemes. An appeal or review needs to be conducted independently of the initial decision. The process is furthermore not simply a repeat of the initial process.	<i>It has been proposed that references to reconsideration be removed in earlier sections of the Bill (chapter 6). The proposed insertion is therefore no longer relevant.</i>

It is recommended that clause 233 be amended by the addition of the clause (6) to read:

233. (1) When reconsidering a decision, the financial sector regulator or Ombud Regulatory Council must follow substantially the same procedure that applied when that decision was initially taken.

(2) The decision may be reconsidered either by the internal organ or official who initially took the decision, or a higher authority within the financial sector regulator or the Ombud Regulatory Council.

(3) On reconsideration, a decision must either be confirmed, revoked, altered or substituted.

(4) The financial sector regulator or Ombud Regulatory Council must notify the applicant of its decision in terms of subsection (3) within 14 days after it was taken. (5) (a) If no decision is taken in terms of subsection (3) or the applicant is for any reason not notified of a decision in terms of subsection (4) within two months from the date of lodging the application for reconsideration, the financial sector regulator or Ombud Regulatory Council is taken to have confirmed the decision in terms of subsection (3). (b) Paragraph (a) does not apply if the financial sector regulator or Ombud Regulatory Council informs the applicant that the decision is still under consideration.

(6) A person aggrieved by a reconsideration decision of a financial sector regulator or the Ombud Regulatory Council may on the grounds that the decision was not lawful, reasonable or procedurally fair apply to the Tribunal for a judicial review of the decision in accordance with Part 4.

CHAPTER 16: FINANCES, LEVIES AND FEES

No comments were received on this Chapter

CHAPTER 17: MISCELLANEOUS

ASISA	239(1)(c) &(2)(b)	It is submitted that it would not be appropriate to exclude the financial sector regulators from the ambit of this Act.	<i>The National Treasury and Department of Justice and Constitutional Development are engaging on how best to capture the principle of this clause.</i>
Information Governance Consulting	239	<p>Exemption from Conditions for Processing of Personal Information by Information Regulator</p> <p>The Act expressly provides that the Information Regulator may exempt the processing of personal information where this is justified (Chapter 4). In those instances that the Financial Services Board believes that there is adequate motivation for exemptions they would be perfectly entitled to apply to the Information Regulator for the grant of an exemption.</p> <p>The purpose of having a consistent approach to the processing of personal information as contemplated in the Act would be defeated if government departments are simply allowed to make their own rules as to whether the Act applied to them or not. It is submitted that particularly in the light of the history of the extensive consultation in this regard that the inclusion of Section 239 in the Bill is expressly designed to subvert the powers granted to the Information Regulator by Parliament.</p> <p>As long ago as prior to the signing into law of the Act there was “gossip” in financial circles that the Financial Services Board would refuse to subject itself to regulation by the Information Regulator. This notwithstanding the fact that the Information Regulator has no say at all over the workings of the financial markets, merely on the protection of personal information. The Financial Services Board does not own personal information, it is owned by the individuals that the Constitution and the Act seeks to protect. As is the case in jurisdictions that have implemented credible privacy legislation, the protection of personal information and the arbiter of disputes in this regard are Information Regulators or Data Protection Officers (as they are termed in some other jurisdictions).</p> <p>Against this background the introduction of Section 239 is clearly an attempt on the part of the Financial Sector to free itself from its</p>	<i>The National Treasury and Department of Justice and Constitutional Development are engaging on how best to capture the principle of this clause.</i>

obligations in terms of the Act, contrary to the constitutional right of privacy enjoyed by South African citizens.

History

To enable the Committee to put this comment into context it is important that a brief background is provided relating to the interaction between the Financial Services Board and, at various stages of the development of the Act with the South African Law Reform Commission, the Parliamentary Portfolio Committee for Justice, members of the Technical Committee appointed by that Portfolio Committee, and the National Council of Provinces.

South African Law Reform Commission

It should be noted that while the Financial Services Board itself was not directly represented, The Life Officers Association (as it was then known) and the Banking Council of South Africa were represented in the SALRC Project Committee that investigated the protections necessary for the right of privacy enshrined in our Constitution.

On completion of the SALRC’s investigation a report and draft Bill was provided to the Minister of Justice and Constitutional Development for consideration and once approved by the minister, was published in February of 2009.

This research established the basis for internationally accepted principles of privacy to be established as law in South Africa. During the process of the investigation extensive consultation with interested parties was conducted. The Financial Services Board provided comment during this process but gave no indication that it would seek exclusion from the proposed legislation.

Parliamentary Portfolio and Technical Committee

Subsequent to public hearings on the draft Bill in October 2009 overtures were made by the Financial Services Board and the Financial Intelligence Centre to the Parliamentary Portfolio Committee that they be excluded from the operation of the

proposed legislation. After a thorough discussion of the issues the Financial Intelligence Centre accepted that there was no reason for it to be excluded from the operation of the proposed legislation and that it should comply with the Act.

On the other hand, the Financial Services Board persisted in numerous and lengthy consultations with members of the Technical Committee and drafters assigned to the task of amending provisions of the Bill, aimed at the Financial Sector's exclusion from the operation of the proposed legislation. It is safe to say that no single entity received more attention and was consulted with more extensively than the FSB. It is estimated that there were at least 20 meetings and consultations with the Financial Services Board both outside of and within the formal meetings of the Technical Committee and the Parliamentary Portfolio Committee. All of the issues raised by the Financial Services Board were thoroughly considered.

Throughout this process the Financial Services Board was unable to motivate and properly justify the exclusions requested by it. Where legitimate amendments were requested and properly motivated they were accepted and eventually included in what is now the Act.

National Council of Provinces

After the Parliamentary Portfolio Committee had completed its work and the Bill had been finalised it was referred to the National Council of Provinces. Once again, the Financial Services Board made representations to have the processing of personal information of entities subject to its Regulation excluded from the operation of the proposed legislation. At this point the NCOP requested that the Parliamentary Legal Advisors (and not the Department of Justice legal advisors) be instructed to independently consider the contentions raised by the Financial Services Board. The determination of the Parliamentary Legal Advisors was that these had no merit and without any further amendment to the Bill, the Bill was referred to the House of Assembly for a second reading. Ultimately the Bill was passed

with unanimous approval of all the parties in the House of Assembly. The Bill was then assented to and signed into law by the President on the 26th November 2013.

Exemption from Conditions for Processing of Personal Information by Information Regulator

The Act expressly provides that the Information Regulator may exempt the processing of personal information where this is justified (Chapter 4). In those instances that the Financial Services Board believes that there is adequate motivation for exemptions they would be perfectly entitled to apply to the Information Regulator for the grant of an exemption.

The purpose of having a consistent approach to the processing of personal information as contemplated in the Act would be defeated if government departments are simply allowed to make their own rules as to whether the Act applied to them or not. It is submitted that particularly in the light of the history of the extensive consultation in this regard that the inclusion of Section 239 in the Bill is expressly designed to subvert the powers granted to the Information Regulator by Parliament.

As long ago as prior to the signing into law of the Act there was “gossip” in financial circles that the Financial Services Board would refuse to subject itself to regulation by the Information Regulator. This notwithstanding the fact that the Information Regulator has no say at all over the workings of the financial markets, merely on the protection of personal information. The Financial Services Board does not own personal information, it is owned by the individuals that the Constitution and the Act seeks to protect. As is the case in jurisdictions that have implemented credible privacy legislation, the protection of personal information and the arbiter of disputes in this regard are Information Regulators or Data Protection Officers (as they are termed in some other jurisdictions).

Against this background the introduction of Section 239 is clearly an attempt on the part of the Financial Sector to free itself from its

obligations in terms of the Act, contrary to the constitutional right of privacy enjoyed by South African citizens.

Delays in the implementation of the Protection of Personal Act attributable to the Department of Finance

As is already evident in these representations, the unmotivated and unjustified requests for exclusion from the provisions of the proposed legislation significantly delayed the process of finalising the Bill and its enactment. But the delays attributable to the Financial Sector in this regard do not stop at the consultative process.

On the 11th April 2014 the President proclaimed the commencement of parts of the Act to allow for the establishment of the Information Regulator. It is important that the Information Regulator’s office be properly established to ensure that the operative provisions of the Act will be practically implementable. There is a dire need for personal information to be protected and the mechanisms to do so must be implemented as soon as possible as they are already long overdue. Until the Information Regulator becomes operational the rights of citizens of the Republic to protect their personal information is limited. In the meantime identity theft, cybercrime and other abuses of personal information continue at an alarming rate. Against this background there is cause for concern that one of the reasons for the delays (that has been provided to me on reliable authority) is that the Department of Finance refused to accept the pay scales that were required for the senior executive officers to be appointed to govern the regulation of personal information. Eventually after a lengthy delay and, I understand, inter-ministerial intervention, the pay grades were agreed, allowing for the Parliamentary Portfolio Committee for Justice and Constitutional Development to call for nominations for the positions that need to be filled. This only occurred in August of 2015, some 18 months after the proclamation of the commencement of the Act.

Against this background it can safely be said that the Financial Services Board and Department of Finance, which enjoy a very “cosy” relationship, are directly responsible for many of the significant delays which have occurred in the finalisation of the drafting and the implementation of the Act. Given the responsibility of the Financial Services Board and Department of Finance to protect the financial interests of citizens of the country, the irony of their actions in light of the harm suffered by citizens who are victims of abuse of their personal information, will not be lost on those aware of the circumstances that have occurred.

I have also been reliably informed by persons that have some insight into the Financial Services Board and work with it (hence they wish to remain anonymous), is that the Financial Services Board has made it clear that it will protect its turf jealously and it resents the establishment of an Information Regulator that may have any jurisdiction over the Financial Services Sector even though its remit is extremely limited and extends only to the protection of personal information. This indeed is borne out by the many representations that have been made by it, which have simply not been properly motivated in light of the principles relating to privacy and the importance of having laws in South Africa that are regarded internationally as adequate and are recognised as an essential element of the protection of human rights in 21st century democracies.

International Recognition

The research by the SALRC indicated that existing laws and regulations in other jurisdictions demand that certain globally accepted principles for the processing of personal information, which knows no borders, are integrated into legislation protecting the privacy of data subjects. The Act was aimed at ensuring that it would receive international recognition. Indeed, one of its stated purposes is to:

“Regulate the manner in which personal information may be processed, by establishing conditions, in harmony with

international standards, that prescribe the minimum threshold requirements for the lawful processing of personal information;
 ...”

The importance of international recognition is illustrated by the striking down in 2015 by the European Court of Justice of the Safe Harbour Accords which were established to facilitate communication and processing of information between European Union members and the United States of America in the absence of adequate law (general laws of application protecting consumer or personal information) in the United States of America. Against the revelations of Edward Snowden that the personal information of European citizens was being provided unlawfully to law enforcement and national security agencies in the United States of America in violation of the Safe Harbour provisions, the court had no option but to strike down the existing Safe Harbour Accord. This has led to frantic efforts over recent months to re-establish an acceptable framework to allow for the communication and processing of the personal information of European citizens in the United States of America. As recently as the last weekend in January 2016 it was announced that the new Regulation titled “EU – US Privacy Shield” that will replace the Safe Harbour Accords that were struck down have been agreed in principle.

It is against this international background that the cavalier approach of the Financial Services Board to exclude compliance with the provisions of the Act must be considered. Indeed, we can only live in hope that as South Africans we have learnt from the events of December 2015 that international opinion is important. Failing to take it into consideration can and sometimes has severe consequences, both financial and otherwise, to the wellbeing of South Africa as a citizen state in the global village.

Cybersecurity

A 21st century issue which is being grappled with globally is cybersecurity. It is indeed an issue that demands urgent attention and in which South Africa has been rather dilatory in taking steps

to establish appropriate legislative frameworks to deal with novel cybercrimes and the issues of cybersecurity. Having provided extensive comment on the “Cybercrimes and Cyber security Bill” in my personal and other public capacities, I have been reliably informed that Cabinet regards cyber security as a very important issue. This is to be welcomed as appropriate steps to curb abuses and address criminal acts, which are a scourge of the information economy, are long overdue.

However, it is essential to understand that protection of personal information laws (data protection as it is termed in some other jurisdictions) is an absolute necessity as a check and balance against the abuses of personal information by entities processing large volumes of personal information, and indeed the excesses of government in their use of personal information belonging to its citizens. The frameworks addressing cyber security in democratic countries globally, have as a non-negotiable feature the existence of data protection legislation. Thus the dilution or undermining of the powers of the Information Regulator and the exclusion from compliance by members of the Financial Sector as

contemplated in the Bill, runs counter to these concepts. If they are agreed to they will have as a consequence the weakening of both the Information Regulator and the potential that South Africa’s protection of personal information be regarded as inadequate and, to us a financial term, acquire the mantle of “junk” status.

Conclusion

Against this background the Parliamentary Portfolio Committee is respectfully requested to weigh heavily the various purposes of the Act and the powers of the Information Regulator in its consideration of the provisions of the Bill that seek to exclude compliance with the Act and avoidance of the authority of the Information Regulator. The consequences of not doing so are significant from the perspective of the status of our constitutional right of privacy and safeguards afforded by the Act.

		<p>Finally, and very importantly, there is no justifiable reason for the exclusions sought. The Financial Services Board has been unable over a period of almost 7 years to convince parties that it has consulted with that this is the case. There is nothing that has changed in this regard and the attempts to avoid obligations to protect personal information should be seen for what they are, a jealous protection of vested interests and turf which has no legal basis. The Act makes adequate provision that in circumstances where exemptions may be justified, these can be addressed to the Information Regulator.</p>	
<p>BASA</p>	<p>239(1)(ff)</p>	<p>Clause 239(1)(ff) goes beyond sharing of information as required by financial sector laws and it is therefore important to know what other circumstances may be seen as warranting the sharing of personal information. It is unclear what "material interest" is in this context. Whilst clauses 11(1), 12(1), 15(1), and 18(1) of the POPI Act do not apply to the use and disclosure of information by the financial sector regulators or the SARB for the purposes referred to in paragraphs (a) or (b), section 13(1) of the POPI Act will still apply. Section 11(1) of the POPI Act deals with consent, justification, and objection; section 12(1) deals with collection directly from the data subject; section 15(1) deals with further processing to be compatible with purpose of collection; and section 18(1) deals with notification to data subjects when collecting personal information. Section 13(1) deals with the purpose specification condition which requires that personal information must be collected for a specific, explicitly defined and lawful purpose related to a function or activity of the responsible party. Clauses 239(1)(a)(iv)(aa) to (ee), (gg) and (hh) of the FSRB all have specific purposes, however "material interest" makes the purpose in (ff) vague.</p> <p>It is recommended that clause 239(1)(a)(iv)(ff) be amended to provide a specific purpose, perhaps by replacing the words "material interest" with "lawful purpose"; alternatively that the term "material interest" be defined; or that clause 239(1) be amended by addition of the following to read:</p>	<p><i>This is not necessary; an FI would in any event not be deemed to be non-complaint in such a scenario. However note the National Treasury and Department of Justice and Constitutional Development are engaging on how best to capture the principle of this clause.</i></p>

		<u>239(1)(d) financial institutions shall not be deemed to be non-compliant with section 13(1) of the Promotion and Protection of Personal Information Act in respect of the use and disclosure of personal information by the financial sector regulators or the South African Reserve Bank for the purposes referred to in paragraphs (a) or (b).</u>	
ASISA	239(3)(a)&(b)	<p>In the context of data protection, and specifically where it involves the sharing of personal information with third parties (who may even be in other countries), the words “<i>proper and effective safeguards in place to protect personal information</i>” should also include reference to security measures that must be in place to protect the integrity of the personal information. Section 239 contains no reference to security safeguards.</p> <p>Proposal: While subsection 3(c) – (e) might be seen as a data protection safeguard, the section should also include a reference to security safeguards.</p> <p>It is submitted that it should not be up to the financial sector Authorities or the Reserve Bank to decide whether the third parties with whom they plan to share information have appropriate safeguards in place. This falls in the domain of the Information Regulator to be appointed in terms of the Protection of Personal Information Act.</p>	<i>The National Treasury and Department of Justice and Constitutional Development are engaging on how best to capture the principle of this clause.</i>
BASA	240(1)(a)(ii)(bb)	<p>The reference to “contravening or may contravene a financial sector law” raises concern. Materiality with reference to the contravention of financial sector laws must be included.</p> <p>It is recommended that the clause be amended to read:</p> <p><i>“...is materially contravening or may contravene a financial sector law in a material respect....;”</i></p>	<i>Agree. See proposed revisions to the Bill.</i>
BASA	241(1) (b)	<p>The clause is too broad with reference to “a contravention or suspected contravention of a financial sector law in relation to a financial institution.” Whilst the whistle-blowing provisions are</p>	<i>Disagree.</i>

		<p>supported, future legislation must be drafted in such a way that responsible reporting occurs. Care must further be taken as a whistle-blower may not be in possession of all of the relevant and material facts relating to the financial information of the financial institution or the contraventions of laws.</p> <p>It is recommended that the clause be amended to read: <i>"...a material contravention or suspected material contravention of a financial sector law in relation to a financial institution...."</i></p>	
BASA	254(3)	<p>Notwithstanding the objective of clause 127, from a practical perspective, this is not feasible, for example, in relation to billboard advertisements already in place before the suspension and also in relation to advertisements already published or being flighted in the media.</p>	<i>We have proposed that clause 127 is amended, so that this will no longer apply.</i>
BASA	254-257 & 259-266	<p>Clauses 254 to 257 and clauses 259 to 266: The proposed sanction limits extend to any contravention of a financial sector law. A degree of materiality with reference to contravention under these sections must be considered.</p> <p>It is recommended that the clauses be amended to make specific provision for the inclusion of the word material in relation to the relevant matters.</p>	<i>It is the prerogative of the court to decide on materiality if an offence has been committed.</i>
Voluntary Ombudsman Schemes	260	<p>Ombud Schemes</p> <p>Cross-referencing of the various sections quoted therein is not correct as it refers to inappropriate sections. The penalties and sentences for any offence should be appropriate – the proposed fines and sentences seem excessive and should be reconsidered.</p>	<i>Cross referencing to be amended. Fines seem to be appropriate for the contraventions referenced</i>
J.S Vivian	Clause 264(1) and 264(2) (Page 102)	<p>This section does appear to create strictly liability (of a criminal nature) for any error in record keeping or accounts. Strict liability (liability without proof of intention or negligence) in statute is generally a rare thing and is always limited to civil matters and not criminal sanctions.</p>	<p><i>Section 264(2) does not create a strict liability offence, there are requirements of knowledge, recklessness or intention that are indicated there.</i></p> <p><i>The critical importance of ensuring that accurate and complete records are kept by financial</i></p>

			<i>institutions, the importance of the information for the regulators to carry on their supervisory and regulatory activities appropriately, and the linkage of inaccurate or incomplete recording with other serious criminal activity, justifies the creation of an offence.</i>
BASA	266 (1)	<p>Clause 266: Incorrect application of vicarious liability in clause 266(1). The application of vicarious liability is in respect of the employer, for wrongful acts of its employees, in the course and scope of employment. This supports the argument that the application of vicarious liability in clause 266(1) is incorrect.</p> <p>In the case of <i>Mkize v Martens</i> 1914 AD 382 390 Innes CJ set out the terms for vicarious liability: ‘... a master is answerable for the torts of his servant committed in the course of his employment, bearing in mind that an act done by a servant solely for his own interests and purposes, and outside his authority, is not in the course of his employment, even though it may have been done during his employment.’</p> <p>The application of vicarious liability is in respect of the employer, for wrongful acts of its employees, in the course and scope of employment. This supports the argument that the application of vicarious liability in clause 266(1) is incorrect.</p> <p><i>266. (1) If a financial institution commits an offence in terms of a financial sector law, each member of the governing body of the financial institution also commits the offence 102 5 10 15 20 25 30 35 40 45 50 and is liable on conviction to a fine not exceeding the maximum amount of a fine that may be imposed for the commission of the offence, unless it is established that the member took all reasonably practicable steps to prevent the commission of the offence</i></p>	<i>See proposed revisions to this clause in the Bill.</i>

J.S Vivian	Clause 266 Page (102)	<p>This section appears to introduce criminal vicarious liability of directors for the conduct of management or for the conduct of the financial institution. Ignorance of the conduct of the institution or management does not seem to be a defence either, only a demonstrable attempts to prevent the commission of the offence. This is unprecedented in South African common Law and violates the fundamental principle on which the entire legal system rests i.e. personal responsibility.</p> <p>Vicarious criminal liability is unknown in western civilization. The general principle is that a company would be <i>doli incapax</i> as far as criminal acts are concerned. It is only people that can form a criminal intent, as any criminal action would be ultra vires the company's objects. Although people may use a company as an instrument to commit a crime, the agents of the company that direct a company to do so, would always be the persons responsible. The company should not ever be guilty of an offence, only subject to administrative penalties. Likewise, one director should not be held responsible for the criminal conduct of member of management; unless it is shown that the director was an co-conspirator or accomplice.</p>	<i>See proposed revisions to this clause in the Bill.</i>
Foschini	266(1)	<p>In the Bill's current form, directors of companies would automatically be guilty of an offence if the financial institution commits an offence, "<i>unless it is established that the member took all reasonably practicable steps to prevent the commission of the offence</i>".</p> <p>This reverses the onus of proof and has been held by our Constitutional Court to be unconstitutional. We submit that provisions similar to those of the Companies Act No 71 of 2008 (i.e. section 77(3)) are preferable - which essentially require actual knowledge or actions on the part of the director (which actions or knowledge will need to be proved with reference to the ordinary laws of evidence of our country.)</p>	<i>See proposed revisions to this clause in the Bill.</i>

BASA	266(2)	<p>The constitutionality of clause 266(1) and 266(2) – the implications of the wide definition of "governing body" read with clause 266(1) imposes personal liability on each member of the governing body. This may be contrary to clause 23 of the Constitution which protects and enshrines the right to fair labour practices. A similar argument applies to the application of vicarious liability in clause 266(2) in respect of "key persons". The definition of "key persons" is very wide and may extend personal liability to unintended persons.</p> <p>A corporate defence – the unintended consequences of the wide definitions of "governing body" and "key persons" also applies in relation to the vicarious liability of the employer in clause 266(2). The fines and penalties relating to clause 266(2) are onerous, and should therefore be prudently applied.</p> <p>It is recommend that, in addition to the recommendations made in respect of the definitions of "governing body" and "key persons" that clause 266(2) be amended to read:</p> <p><i>266(2) If a key person of a financial institution engages in conduct relating to the provision of financial products or financial services that amounts to a <u>material</u> contravention of a financial sector law, the financial institution must be taken also to have engaged in the conduct unless it is established that the financial institution took all reasonably practicable steps to prevent the conduct.</i></p>	<i>See proposed revisions to this clause in the Bill.</i>
ASISA	266	<p>Vicarious liability for offences and contraventions</p> <p>It is submitted that the effect of section 266(1) and (2) places a burden of proof on members of a governing body, who will be presumed to be guilty and there will be an onus on each member to prove his or her innocence, given the imputation of liability in both subsections. In ASISA members' view, this violates their Constitutional right to a presumption of innocence.</p>	<i>See proposed revisions to this clause in the Bill.</i>

		<p>This is because the effect of section 266(1) is that –</p> <ul style="list-style-type: none"> • a member of the governing body is presumed to be guilty unless “<i>it is established that the member took all reasonably practical steps to prevent the commission of the offence</i>”, • a member of the governing body is potentially a “guilty person” purely by reason of membership of a governing body.” 	
BASA	277(3) and 278(3)	Clause 277(3) and clause 278(3) are conflicting. Clause 278(3) must prevail.	<i>It is proposed that these clauses are revised to remove the inconsistency. It is intended that the Regulations are published in <u>both</u> the Gazette and Register.</i>
ASISA	283(1)	It is unclear why reference is being made to “ <i>further policy frameworks</i> ”. What is the original policy framework?	<i>Current policy approach of the National Treasury and government</i>
ASISA	283(2)	The meaning of sub-clause (2) is not at all clear. As it currently reads it doesn’t seem to make much sense – there would appear to be a drafting error.	<i>Grammatical errors in preceding subclause corrected</i>
ASISA	283(3)	<p>It is self-evident that if a power is exercised in terms of a law, it is valid. If the law is not consistent with the policy framework, then it should be motivated that the law be changed,</p> <p>Proposal: Amend the section as indicated:</p> <p>“(3) <i>The financial sector regulators must strive to exercise their powers in terms of financial sector laws in a manner consistent with policy frameworks so declared, but failure to do so does not affect the validity of any action taken by a financial sector regulator.</i>”</p>	<i>This is not agreed with.</i>
BASA	General- Risk Based approach to supervision	A risk-based approach must be adopted throughout the FRSB. Although the FSRB requires of the Prudential Authority and the Financial Sector Conduct Authority to	<i>References to materiality have been included where appropriate. Note that when a matter is in the court system, it is the court that will determine materiality.</i>

follow a risk-based approach in performing its functions and to prioritise the use of its resources in accordance with the significance of risks, there are numerous provisions in the FSRB, where a risk-based approach is absent. There are several examples where provisions in the FSRB are not subjected to a materiality and/or reasonableness test. The consequence of this will be that regulators will be stretched, possibly missing the material risks and breaches, as outlined below:

- Clause 1: ‘Financial stability’ means that financial institutions generally provide financial products and services without interruption: The clause should be rephrased to read without substantial or significant interruption; otherwise all IT system downtime - which is inevitable within complex IT systems - can be regarded as a systemic risk and a threat to financial stability.
- Clause 120(1)(d): If the financial institution contravened a law, in a foreign country, that corresponds to a financial sector law in South Africa its license can be suspended: The clause must be rephrased to read material contravention of the law, in a foreign country, otherwise it can generate systemic risk, especially if the foreign jurisdiction’s regulatory authority acts in bad faith.
- Clause 120(1)(g): If the financial institution has not paid its license fees or levies for at least 14 days its license can be suspended: This is unreasonable and could present a risk to financial stability if implemented – the failure to pay license fees over an extended period of time (e.g. 6 months) will be a more material reason to suspend a licence
- Clause 144: The removal of key persons from positions for contravening a financial sector law must be restricted to a material contravention of such law: The financial institution can suffer severe reputational damage and systemic risk can arise if a key person, such as a Chief Executive Officer, is removed due to a minor contravention of a financial sector law.

		<ul style="list-style-type: none"> • Clause 151(2)(a): The High Court, on the application of a regulatory authority, may make an order in relation to conduct that contravenes a financial sector law: The clause must be rephrased to read material conduct, otherwise orders can be issued in respect of a minor contravention of a financial sector law which can cause reputational damage and systemic risk. • Clause 157: All acquisitions and disposals must be approved by the regulatory authorities: This section must be rephrased to read that all material acquisitions and disposals must be approved; otherwise every single acquisition and disposal can be regarded as material which could lead to lag time for investors in the approval process and a loss of profit. • Clause 266: Every member of the governing body (for example each director of a Board) of a financial institution can be held vicariously liable for offences and contraventions of financial sector laws: The vicarious liability must be restricted to material contraventions, otherwise qualified persons will be further discouraged from serving as non-executive directors of financial institutions. It is recommended that the FSRB be revised to make specific provision for the inclusion of the word material in relation to all relevant matters. We will appreciate an opportunity to discuss each of the relevant clauses with NT before draft four of the FSRB is finalised. 	
ABSIP	General: Transformation, implementation and International recognition	<p>LAWS CAN BE BLUNT TOOLS</p> <p>The Financial Sector Regulation Bill (FSR) introduces a principles based regulatory environment for the South African financial sector, we at ABSIP support this. Laudable as this is, broad legal frameworks like the Twin-Peaks model do not address how the structure of the South African economy can be changed or how those who control the financial sector will become more representative of all who live in South Africa. The law is blind unless it is told not to be and we believe the FSR should know what it is looking at and what it wants to achieve.</p> <p>MAKE TRANSFORMATION EXPLICIT</p>	<p><i>The comments are noted, and the principle of transformation of the South African economy is one that is agreed with.</i></p> <p><i>Indeed, government has put in place measures aimed at the transformation of the economy, measures which extend beyond the financial sector. Within the financial sector specifically, the Financial Sector Code was developed to, amongst others, “actively promote a transformed, vibrant and globally competitive financial sector that reflects the demographics of South Africa”.</i></p>

The summary of the FSR tells us what aims it seeks to achieve, surprisingly transformation of the South African financial sector is not included. Treasury holds the view that the transformation of the South African financial sector is addressed by other laws and as a result there is no need to incorporate transformation in the FSR. We are of the opinion that the current legal framework is not strong enough to achieve the kind of economic transformation needed and would consider the addition of a principle with the aim of creating a more equal, representative and inclusive financial sector as essential.

IMPLEMENTATION WILL BE THE TRUE TEST

Twin-Peaks will usher in great changes to the regulatory environment. The principles based approach will provide those responsible for implementation thereof with considerable discretion in what needs to be done to achieve the aims of the FSR. This may result in a focus on how the current financial sector will be brought under the new umbrella, where there is no explicit mandate for transformation this is likely to become a secondary consideration. We want transformation as one of the core principles to avoid this type of behaviour. Provide the necessary tools to enable transformation.

INTERNATIONAL RECOGNITION

We have noted and welcomed the report by the International Monetary Fund’s Financial Sector Assessment Programme, for South Africa, released earlier this year which acknowledges that the Twin-Peaks model will enhance our regulatory environment which is in many respects already world class. However, the lack of focus on the need for economic transformation shows a gap in a holistic view of the proposed changes where ultimately an inclusive economy is the best mechanism to ensure trust in the financial sector.

While further work can be done to drive the objectives of this Code, it is submitted that this is not best achieved through a Bill of the nature of the Financial Sector Regulation Bill currently before Parliament.

The Financial Sector Regulation Bill has been drafted to address specific regulatory problems identified in the financial sector. These include a complex and confusing regulatory framework, which results in poor outcomes for individuals and the economy more broadly. The Twin Peaks reform is intended to drastically change a framework that sees multiple, overlapping areas of focus for regulation. A key focus of the Bill is thus ensuring that there are clear singular objectives for the regulators of the financial sector, so better outcomes are achieved. For this reason, it establishes one regulator dedicated to the financial safety and soundness of financial institutions, and another regulator dedicated to ensuring that customers are treated fairly and protected. As noted by the submission, these objectives of the Twin Peaks reforms have been supported by international peers in ensuring a financial sector that meets and in some instances leads standards internationally.

It is understood that the regulators do play a key role when it comes to broader outcomes in the financial sector. For this reason, an obligation is placed on regulators and other bodies as appropriate (e.g. the Ombuds Council) to support and promote financial inclusion. This not does only refer to access by customers to financial goods and services, but also to the ability of new players to enter the market. Regulation should not prevent small emerging businesses from participating in the financial sector, and where appropriate, regulation can be set to actively encourage broader participation, for

			<p><i>example through such initiatives as the proposed microinsurance framework.</i></p> <p><i>We would welcome further interaction with ABSIP with regard to this matter.</i></p>
Free Market Foundation	General: Need for a Socio-Economic Impact Assessment (SEIA)	<p>According to the 2011 National Treasury Policy Document (under the heading “A Safer Financial Sector to Serve South Africa Better”):</p> <p><i>“The financial services sector is at the heart of the South African economy and touches the life of each and every citizen. Financial services allow people to make daily economic transactions, save and preserve wealth to meet future aspirations and retirement needs, and insure against personal disaster. At the level of the macroeconomy, the financial sector enables economic growth, job creation, the building of vital infrastructure and sustainable development for South Africa and her people.”</i></p> <p>Given the paramount importance attached to the financial sector and the FSRB by the Treasury, we respectfully submit that Parliament should not proceed without a Socio Economic Impact Assessment (SEIA) as required by the Cabinet, the Presidency and the Treasury’s own Minister, Minister Nhlanhla Nene. It seems to us to be unacceptable for the Honourable Minister’s staff to disregard him and proceed as if he had not mentioned the matter in his recent Medium-Term Budget Speech.</p> <p>Not only did the Honourable Minister say that all new measures must be preceded by a Socio Economic Impact Assessment (SEIA), but his announcement followed a Cabinet resolution and elaborate Guidelines issued by the Presidency in 2012</p> <p>Given the prominence of the matter, the cost and effort that went into it, and the Honourable Minister’s commitment, a properly, independently and expertly conducted SEIA should be regarded as an absolute precondition for further consideration of the Bill.</p>	<p><i>Please see supporting documents available on http://www.treasury.gov.za/twinpeaks/ detailing the intention of the Twin Peaks reforms as first proposed in February 2011. (Note that the process began prior to the Cabinet requirement for SEIAs). A statement of impact has since also been prepared.</i></p>

The need of a SEIA takes on particular significance in view of the fact that not only was the Financial Advisory and Intermediary Services Act (FAIS) preceded by a SEIA2, but that none of the substantive predictions and promises materialised. On the contrary, the opposite of what was promised occurred. What should have improved deteriorated, and actual costs far exceeded promised costs.

In the absence of a professionally, properly and independently conducted SEIA, the government has no way of knowing whether benefits are likely to exceed costs, what benefits and costs are likely to be, who will enjoy benefits and who will endure costs, what the nature and extent of costs and benefits might be, and how society and the country's economy will be impacted.

The Bill proposes "twin peaks". The "peak" in particular need of a SEIA is the "market conduct" peak. The prudential regulation (the other "peak") has been the norm in most countries for many years. It is to be restored to the Reserve Bank (SARB) and entails, or should entail a conceptually simple formula for insurers and another for banks.

Market conduct regulation, on the other hand, is a new idea imported from the United Kingdom, where many regard it as a failed attempt to remedy problems arising from their equivalent of FAIS.

Since neither the Bill nor any of the voluminous documentation surrounding it provides any detailed or objective criteria for what market conduct regulation might be, or what actual (as opposed to hypothetical) problems it is supposed to address, parliament is being asked to empower the Financial Services Board (FSB) to do something unknown and unknowable.

	<p>The only solution for parliament would be for it to have a properly conducted SEIA. It will clarify, specify and quantify:</p> <ol style="list-style-type: none"> 1. What real documented problems exist (the “mischief principle”)? 2. Who precisely endures those problems? 3. How serious they are? 4. How common they are? 5. To what extent does existing law, including common law, not already provide protection and redress? 6. What concrete measures will be taken to redress problems? 7. Why and by what mechanism (causal nexus) those measures are expected to succeed? 8. To what extent they are expected to succeed? 9. What direct and indirect costs and benefits will be per problem successfully redressed? 10. Who will endure costs and enjoy benefits? 11. How will different socioeconomic groups be impacted? 12. By what methods will cost and benefits be monitored? 13. How and when will monitoring be reported? 14. What remedial action will be taken if predicted costs and benefits do not materialise? 15. Whether all provisions in the Bill are Constitutional? <p>There is legal opinion³ to the effect that section 33 of the Constitution (the administrative justice clause) could mean that all legislation must be preceded by something amounting to a SEIA.</p> <p>Few bills have been preceded by as much cause and effect confusion as the FSR Bill, which highlights the need for a SEIA. A common mantra, for instance, is that it is necessary because of “lessons learned from the financial crisis”. There is nothing in the Bill of relevance to the crisis. The crisis was a narrowly defined phenomenon that impacted banks, governments and a few other institutions that were heavily invested in US government-backed subprime mortgage derivatives.</p>	
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Secondary effects were so diluted that most companies and economies carried on growing. Most African countries grew at accelerated rates, and the sub-continent became the world's highest growth region. Our Treasury observed that "South Africa's financial institutions were resilient in the face of the crisis".

In the absence of a SEIA, there is no reason to expect the Bill to reduce the likelihood of failures that occurred by virtue of common law offences notwithstanding FAIS and the FSB (Masterbond, Fidentia, Tannebaum, African bank etc). The "crisis" had nothing to do with insurance, and is therefore of no relevance to insurance regulation proposed in the Bill.

There is much talk of the need to reduce "mis-selling" and improve insurance policy "persistency". That is what FAIS was meant to achieve. The opposite happened. In the absence of a SEIA, there is no reason to believe that this Bill will improve persistency.

It is not even clear whether there is a problem in need of a solution. So long as consumers have any freedom of choice at all, they will make mistakes. Freedom is the right to be wrong. All regulatory (as opposed to educational) attempts at improving consumer behaviour raise costs and reduce choices. It is also not clear why insurance is regarded as a special case. There are no regulations aimed at reducing "mis-selling" of houses, cars or wedding rings, even though the implications for consumers of making sub-optimal decisions are usually more severe. Only a properly conducted SEIA will establish whether the Bill will reduce mis-selling (if there should indeed be less of it).

The Bill might well have benefits that exceed costs in these and other contexts, but Parliament has no evidence to that effect. It does know that FAIS failed, and that the absence (as in this Bill)

		<p>of any substantive departure from the FAIS concept is also likely to fail.</p> <p>Parliament has not been given quantified estimates (as required by a SEIA) of what the Bill is expected to change – what problems precede it and what solutions will follow – or what each change will cost in cash and kind, directly and indirectly.</p> <p>Above all, we respectfully submit that it is disrespectful for the Minister’s staff to proceed with this Bill without a SEIA in defiance of his instruction, backed by the Cabinet.</p> <p>The simple, correct and obvious thing for Parliament to do is, we suggest, to return the Bill to the Treasury with an instruction to resubmit it only with properly conducted, independent and professional SEIA. Parliament should make it clear that, in the absence of such a SEIA, it is in no position to perform its legislative function properly, thereby doing justice to the country and all who live in it.</p>	
Foschini	General	Clarity regarding ambit of Bill needs to be provided before further comment can be given; powers of regulator and tribunal need to be considered in light of similar entities and should not impinge on the separation of powers.	<i>The scope of the Bill is set out by reading the definitions of financial products, financial services, financial institutions, and the mandates of the authorities established</i>
CALS	General	It is clear from the foregoing, therefore, that there has been a clear message from government with regards to corporate accountability in respect of human rights: corporate entities have the responsibility to, at the very least, respect human rights and, at most, take steps actively to protect, promote and fulfil human rights. The National Treasury, as an arm of government, has aligned itself to this commitment in the regulations that it has published. The protection of human rights is a constitutional duty on the state, but it extends towards private entities. The Bill should be amended to reflect this fact.	<i>See response to previous CALS comments</i>

Foschini	General: Consultation with stakeholders	There is general consensus that quality consultation regarding the Bill was lacking. Specifically, as per the Chair of the Standing Committee of Finance’s suggestion, retailers and other members of the private sector (e.g. stokvels) should specifically be included (by invitation) in consultations before any further or final drafts of the Bill are circulated.	<i>Please see annexure detailing extensive consultation process over a five year period. This included a NEDLAC process followed prior to the FSR Bill being tabled, at which members of the private sector, including retailers, were represented</i>
COSATU	General	<p>The Congress of South African Trade Unions (COSATU) welcomes and largely supports government’s Financial Sector Regulation Bill. COSATU appreciates the opportunity to share its views on this critical and progressive Bill with the Standing Committee on Finance and Parliament.</p> <p>COSATU appreciates that this Bill is aimed at ensuring financial stability for the banking sector, to draw lessons from and to avoid a repeat of what happened to African Bank, to strengthen oversight and accountability mechanisms and to strengthen consumer protection. Workers are particularly vulnerable to any instability in the financial sector and are all too often victims of unscrupulous financial lenders etc. For these reasons, COSATU supports this Bill.</p> <p>COSATU does believe that the Bill could be further expanded and strengthened to ensure greater protection for consumers and broaden government’s oversight and intervention capacities in the financial sector. COSATU is worried that the Bill may have unintended consequences in terms of the role and functioning of the National Credit Regulator and is thus calling upon government to engage with the NCR to ensure that this does not happen.</p> <p>2. Areas Of Support In The Bill</p> <p>COSATU welcomes and supports this Bill as a critical building block to ensure greater stability for the financial sector. COSATU in particular lauds its provisions to:</p> <ul style="list-style-type: none"> • Learn lessons from the 2008 economic recession; • Learn lessons from the African Bank episode; • Develop early warning mechanisms; 	<p><i>National Treasury welcomes the support from COSATU on key aspects of the FSR Bill and overall Twin Peaks process. The purpose of strengthened financial sector regulation is ultimately to ensure that the financial sector is working in the interests of the economy and its citizens.</i></p> <p><i>With regard to areas of further strengthening, as acknowledged by COSATU, some of these fall outside the ambit of the FSR Bill itself, but are still issues which National Treasury is aware of in relation to the financial sector. This includes the issues of monopoly capital, the lack of transformation and the aspect of job creation in the sector. There are initiatives underway by other government departments (including the DTI, EDD) to address these issues, not just in the financial sector but in all sectors of the economy. National Treasury will continue supporting these where possible and drive focused attention where it is necessary on the financial sector.</i></p> <p><i>A number of the other issues raised relate to poor market conduct by financial institutions. This includes the identified issues of:</i></p> <ul style="list-style-type: none"> • <i>Exorbitant Bank Charges and Interest Rates</i> • <i>Auctioning of Homes and Cars</i> • <i>Garnishee Order Abuses</i>

	<ul style="list-style-type: none"> • Expand the oversight role of the Reserve Bank; • Promote greater transparency, accountability and oversight; • Providing for greater coordination and intervention mechanisms; • Promoting greater consumer protection, rights and standards; • Minimise opaque banking charges and abuses; and • Strengthen crime prevention efforts. <p>COSATU believes this Bill is long overdue and will bring greater stability to the financial sector. We do not believe that it gives too much power to government or will stifle economic growth in any way.</p> <p>COSATU believes that it will bring some relief to consumers and empower government significantly to intervene and prevent future banking and financial sector turmoil. Turmoil that South Africa's economy and workers cannot afford.</p> <p>3. Areas Where The Bill Should Be Further Strengthened</p> <p>Whilst COSATU supports the FSR Bill, we do believe that significant problem areas remain in the financial sectors which are not sufficiently covered in the Bill. These are areas which have a heavy impact upon the daily lives of COSATU members and workers in general.</p> <p>These areas can be summarised as:</p> <p>Monopoly capital</p> <ul style="list-style-type: none"> • The excessive concentration of capital in what can be termed a monopoly banking, finance and insurance industry. <p>Lack of Transformation</p> <ul style="list-style-type: none"> • The lack of meaningful transformation in the financial sectors. Transformation targets must be strengthened and enforced. <p>Need to Save and Create Jobs</p>	<ul style="list-style-type: none"> • Loan Sharks <p><i>These are clear examples of financial institutions engaging in poor market conduct practises and not upholding the principle of fair treatment of customers. The new regulator being established under the FSR Bill will be mandated to root out and prevent such abuses in the financial sector. There is a NEDLAC process underway to fully develop a market conduct policy approach for the new regulator, and the participation of organised labour in the forum is valuable in ensuring that issues such as these are identified and are being appropriately dealt with.</i></p> <p><i>We support the points made on Financial Education and Empowerment. This is not being left up to financial service providers to do on their own. The FSCA will have an explicit mandate to drive financial education initiatives in South Africa. This could also include a greater role in directing the resources of financial institutions toward common objectives for financial literacy, rather than leave it up to the regulator alone to do.</i></p> <p><i>There has been constructive ongoing engagement between government departments regarding credit regulation under Twin Peaks. The FSR Bill provides clearly for the role of the National Credit Regulator to ensure that the regulators do not undermine each other's work, but rather work cooperatively and collaboratively to drive positive customer outcomes across the financial sector. The regulators have clear lines of responsibility and will be expected to develop Memoranda of Understanding amongst themselves to ensure effective working relationships.</i></p> <p><i>National Treasury welcomes the participation of Organised Labour and Civil Society in the work of</i></p>
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		<ul style="list-style-type: none"> • Insufficient levels of job creation as well as the recent retrenchments in the banking sector. The mandate of the Reserve Bank should be expanded to include the need to protect and save existing jobs and to ensure consistent and meaningful job growth. The protection and creation of jobs must be part of the SARB’s mandate when intervening in the banking sector. <p>In this regard, COSATU applauds government’s role in saving jobs at the African Bank where thousands of SASBO, COSATU’s banking affiliate, are employed. However more needs to be done to create jobs. Many jobs have been created in the financial sector. These need to be supported. However recently First National Bank stated it planned to retrench 600 staff in the Eastern Cape and Gauteng. Two years ago ABSA shed approximately 2000 workers. These occur whilst the very same banks’ CEOs reward themselves with performance bonuses worth millions of Rands. It should be noted that the employees who are threatened with retrenchment all too often earn salaries barely above the minimum income tax threshold. Such inequalities need to be tackled as well by government.</p> <p>Nationalise SARB</p> <ul style="list-style-type: none"> • Whilst it may not fall under the jurisdiction of the FSR Bill, COSATU strongly believes that the SARB belongs to the nation and is charged with protecting its financial stability. It thus needs to belong to the public and not its shareholders. It is long overdue that it simply be nationalised by government. <p>Exorbitant Bank Charges and Interest Rates</p> <ul style="list-style-type: none"> • Consumers face a wide variety of excessive bank charges and interest rates with little recourse for action. The Bill provides for the sector regulator to set sectoral standards. However this does not go far enough. All too often poor workers are fleeced by banks with exorbitant charges and interest rate levels. Caps and clear criteria need to be set in place by the Regulator. 	<p><i>the regulators under Twin Peaks, as these represent the voices of the customers who are involved in the financial sector. The FSR Bill will require regulators to consult beyond the financial institutions they regulate to ensure that civil society voices are heard.</i></p>
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		<p>Banks need to be reined in. They must not simply be allowed to be a law unto themselves and to milk workers dry. Judging by the massive levels of bank profits and assets, there is more than enough room to reduce excessive bank charges and interest rate levels.</p> <p>Greater criteria and regulations are needed with regards to interest rate charges. Whilst it may make theoretical text book logic to banks to charge higher interest to the poor, it does not make any economic or humanitarian sense. Those who can least afford it and who most desperately need the financial help of the bank to house their family or set up a small business, should be charged at a lower and the most affordable interest rate. It should not be the case that the rich are charged less and the poor are charged more. Thus the poor subsidise the rich!</p> <p>Banks should also not use the tightening of the law through this Bill as an excuse to reduce lending to workers and SMMEs. More so when we are in such desperate need of economic stimulus and job creating growth.</p> <p>Treasury has spent a great deal of effort trying to pass laws forcing workers to annuitise provident funds. Surely this Bill is an ideal opportunity to force banks to provide attract interest rates to incentivise, encourage and reward workers who invest and save?! How does Treasury expect workers to save when they are offered below inflation interest rates for savings?! More so when the same banks never miss a chance to charge consumers ridiculous bank charges.</p> <p>Financial Education and Empowerment</p> <ul style="list-style-type: none"> • The need for greater financial education and awareness, in particular amongst workers and the poor. Whilst the Bill provides for the regulator to set sector standards, this may not go far enough to empower consumers. There is an inherent contradiction with delegating financial education simply to 	
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		<p>financial service providers who will inevitably be blinded by their need to pursue profits above all else.</p> <p>The regulator needs to be mandate and required to provide neutral meaningful and accessible mass financial education to all South Africans. The consequences of continuing with the status quo will simply mean misery for more financially illiterate consumers. Such education and awareness needs to target the insurance sector as well to curb the frequency with which consumers find themselves underinsured or conned by their insurers when they can least afford it.</p> <p>Greater emphasis and standards need to be inserted to ensure meaningful and accessible assistance for consumers who have been taken advantage of.</p> <p>Auctioning of Homes and Cars</p> <ul style="list-style-type: none"> • All too often banks rush to auction the homes and cars of consumers who have fallen behind on their loans. Frequently corrupt bank officials sell these at below market value at auctions to their family and friends who then resell them shortly afterwards at a profit. Yet the consumers are left destitute. Decisive action needs to be undertaken to deal with this callous and criminal behaviour. Alternative means need to be developed to address and assist families who risk losing their homes due to financial hard ships. The Bill should be tightened to address this inhumane problem. <p>Garnishee Order Abuses</p> <ul style="list-style-type: none"> • The wide scale abuse of garnishee orders needs to be decisively tackled by government and the financial sector. Whilst the pending Magistrates and Debt Collectors’ Bills will go a long way towards this, the FSR Bill should also be further strengthened to compel the banking sector to put its customers’ needs above the army of barbaric debt collectors who routinely and wrongly loot workers’ bank accounts. 	
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Role of the National Credit Regulator

- COSATU strongly supports the important and progressive role of the National Credit Regulator. Whilst noting that the FSR Bill has been revised during the Nedlac engagements, COSATU remains concerned about possible unintended consequences which may see the role of the NCR inadvertently undermined. COSATU thus strongly pleads for Treasury, the Department of Trade and Industry and the NCR to engage and ensure that all parties' roles and concerns are adequately catered for in this progressive Bill.

Loan Sharks

- Whilst the FSR Bill and the National Credit Act empowers government to deal the abuses of loan sharks, the exponential growth of loan sharks and their preying upon the most poor and vulnerable, indicate that we are not getting to grips with this massive crisis. The FSR Bill or the NCA need to be strengthened in this regard.

Participation of Organised Labour and Civil Society

- A great deal of knowledge of the challenges facing the sector and how they impact upon workers and the poor, reside within organised labour and progressive civil society. Space should be provided for their inclusion in the relevant oversight and accountability authorities and regulating bodies and their working groups as envisaged in the FSR Bill. Such participation would enrich those bodies and help to provide a voice for ordinary workers and consumers in these key oversight and regulatory bodies. Participation should not simply be left to monopoly capital.

7. Conclusion

COSATU welcomes and supports the FSR Bill. It is long overdue and badly needed. It will greatly empower government to protect the integrity and stability of our critical financial sector.

		<p>COSATU urges Parliament to support and adopt it as a matter of urgency.</p> <p>However COSATU also urges Parliament to consider its various proposals on how can the FSR Bill be further strengthened to protect the needs of the vulnerable and poor, to strengthen oversight and accountability and to further capacitate government to intervene to ensure the well-being of the sector as a whole.</p>	
<p>SACP</p>	<p>General</p>	<p>1. Introduction</p> <p>The SACP welcomes the opportunity to table its written submission to the Parliamentary Portfolio Committee as it considers the Financial Sector Regulation Bill. This Bill is not submitted to parliament for consideration for the first time. We are also cognizant of the fact that the Bill has gone through NEDLAC.</p> <p>2. Context to the Bill</p> <p>The Bill is presented whilst the memories of what in mainstream language is referred to as the financial crisis are still quite fresh with us. This is why when the main object of the bill is emphasized as tightening regulation and streamlining institutions to make regulations effective, one is likely to find it very attractive at face value. It fits into the dominant mainstream idea that the reason we experienced a crisis is that there was no one supervising the system widely – regulators in their fragmented way were just looking at the sector narrowly and thus no one could predict the wider crisis. In pre-crisis days supervision was underpinned by trust in market participants and light touch enforcement.</p> <p>However herein lies the fundamental issue of difference between the SACP at a theoretical and practical level with the assumptions of the Bill.</p> <p>The crisis, which in our language as the SACP we refer to as a Capitalist crisis, was not just a failure of regulation alone. The crisis is an inherent crisis; it is built in into the system precipitated by the</p>	<p><i>In response to the five main points as summarized by the SACP in their submission:</i></p> <p><i>a) <u>The regulations deal in the main with regulation of the private financial sector. How this will affect public finance management and the fight against corruption we are not certain given the nexus that exists with the private financial sector on the matter.</u></i></p> <p><i>As correctly identified, this Bill deals with the regulation of private financial institutions in South Africa. There are a number of other laws capturing both the private and public sector that deal specifically with anti-corruption and anti-criminal matters. The Financial Intelligence Centre is more closely involved with the role of the financial sector in criminal and corrupt activities.</i></p> <p><i>b) <u>Secondly the SACP would appreciate that we move to regulate if we are certain that prudential regulation will not suffocate release of resources for investment in the productive sector.</u></i></p> <p><i>This is noted; the regulators will need to be cognizant of the impact of their regulation on the economy. For this reason, the regulators are required to consult extensively before any standards are set, and are required to undertake an impact assessment for such</i></p>

method of profit accumulation of the financial sector. It is a crisis emanating from the illusion of profitability and dynamism through asset price bubbles. Investment was driven away from the actual productive sectors but into paper that represented a claim over some value to be produced in some future. This allowed for speculation over the claim as investors bid for the value to be produced and thus prices of this paper claim were pushed over the limit of the actual value of goods and the plant to produce that value. Interest bearing capital was no longer loaned to industrialist to generate surplus value and payback interest to banks and thus transcending fictitious accumulation to real accumulation.

It is for this reason that the SACP believes that in the context of the second radical phase of our transition, outlined in the Medium Term Strategic Framework 2014 to 2019 as “Radical economic transformation, rapid economic growth and job creation”, there is an opportunity to use the process of drafting the Bill to move away from the mantra of tightening regulations as the be it all of fixing the Financial system but consider radical structural issues that necessitates or give birth to the crisis of the financial system. We can tighten regulation but unless accompanied by structural changes, the SACP argues, the exercise will not achieve the desired outcomes of putting our country on a new growth path whose at its center is to build our productive sectors of the economy and promote an inclusive economic growth.

To what extent do we have a regulatory crisis the question would be posed? Commenting on this matter of the resilience of our regulatory framework even before the proposals contained in the Bill the IMF noted “Relatively high capital buffers as well as sound regulation and supervision have helped mitigate the risks”. However the very same IMF report did welcome the proposals contained in the Bill to upgrade the regulatory framework. In the upgrade process we submit the bill puts extreme emphasis on the Macro-prudential framework at the expense of micro prudential

tools, in order than any unintended consequences can be identified and mitigated if necessary. National Treasury agrees that the stability of the sector cannot be at the expense of the growth and development of the sector and its contribution to the economy.

c) Thirdly the SACP submits that our approach to prudential regulation should not compromise the important task of consolidating public and cooperative banking.

This is noted and agreed. Regulators are expected to take a proportionate approach to regulation, rather than a ‘one-size-fits-all’ approach which can hamper the development of the sector to meet identified needs.

d) That the current mandate and powers of the National Credit Regulator are not diluted.

There has been constructive ongoing engagement between government departments regarding credit regulation under Twin Peaks. The FSR Bill provides clearly for the role of the National Credit Regulator to ensure that the regulators do not undermine each other’s work, but rather work cooperatively and collaboratively to drive positive customer outcomes across the financial sector. The regulators have clear lines of responsibility and will be expected to develop Memoranda of Understanding amongst themselves to ensure effective working relationships.

e) In the context of the concerns raised by the IMF itself around spillover risks and the vulnerabilities of our economy to external shock, parliament secures broader consensus around capital control and capital account management to defend national resources from speculative capital flight.

	<p>aspects – we understand the need for systemic wide efforts, however it must not be at the expense of individual behaviour of financial institutions. We should concomitantly strengthen the micro aspects the SACP submits. What is the institutional proposed interface with respect to macro prudential regulation, micro-prudential efforts and monetary policy we are not certain as the SACP.</p> <p>Furthermore in the South African context are we dealing with a situation of poor regulations or a culture or non-compliance or what exactly are we dealing with? We submit that if we are not clear we might pursue the Bill simply to comply global trends. We need better information from a comprehensive research of the local financial sector. We appreciate the need for the implementation of BASEL III requirements.</p> <p>Focus on system wide stability and prudential regulation must not come at the expense of transformation of the sector. It is quite telling, as a matter of fact, that the IMF notes in its Financial System Stability Assessment of 2014 that SA’s financial sector “The financial sector has a high degree of concentration and interconnectedness. The top five banks hold 90.5 percent of banking assets, the top five insurers account for 74 percent of the long-term insurance market and the seven largest fund managers control 60 percent of unit trust assets (Appendix Table 3). All major banks are affiliated with insurance companies through holding companies or direct ownership. Bank-affiliated insurers underwrite a substantial proportion of private pension assets, and some banks also own fund managers that offer unit trusts. There are substantial levels of related party transactions within financial groups (Figure 1). This concentrated structure gives major financial institutions significant pricing power and enables them to achieve returns on equity and assets higher than in more competitive economies” (IMF, 2014, p10)</p> <p>Furthermore the IMF notes “The existing legal framework limits entry, particularly in the banking sector” (IMF, 2014, p. 29).</p>	<p><i>This is noted</i></p>
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These matters have been ignored and there is a drive only to address regulatory weaknesses that have been pointed out. The SACP believes that the context that has been painted in relation to predatory market conduct of the financial sector are issues that will not be sufficiently addressed by change in regulations only but by fundamental changes in structure of the system. How do we deal with the concentration and interconnectedness as raised by the IMF? To ignore this concentration and interconnection, reduce treating them to regulatory strengthening and institutional alignment along the New Public management values of a lean state and accept them as god ordained will be a fatal error.

How will prudential regulation, important as it is, help us to transform barriers of entry so that we can diversify the financial sector? Are we approaching prudential regulations with an idea that it is one-size fits all for what in essence ought to be building a regulatory framework that is diverse? Our view is that the approach to regulation shows the bias toward the degree of concentration and it will throttle diversification. The banking law as it exists requires a careful and well-measured review to deal with how structurally the questions of competition and diversification are addressed and barriers to entry are dealt with. In this regard we support the view by the Financial Sector Campaign Coalition that the Payment Systems Act, which the Prudential Regulator must enforce, also requires review to deal with questions of entry especially for co-operatives bank.

Unless we have a corresponding review of all related legislation, we run the risk of tightening regulation at the expense of other important transformational imperatives and thus not address key questions of the system. If we do so the SACP argues we will fall short of the radical transformation goals of the MTSF. The SACP submits that there has been selective bias, an ideologically driven bias, in picking the areas that needs attention of the law makers and hence subsequently pushing to the margins the discourse on

structural reforms necessary to correct endogenous errors of the system. This kind of bias, which asserts that there is nothing wrong with the system but just how it is engineered and managed, is not new. It existed even in the pre-crisis era and hence now the idea that the crisis couldn't have been predicted. We need to address issues of stability of the financial sector post the crisis free of this bias. It is not just about regulating market conduct, it is about simultaneous efforts to change market structure and diversify financial services provision that will in the long term ensure stability. The two objectives cannot be pursued separate from each other. It is better to embed the regulatory changes in the structural changes as opposed to pursuing regulatory changes as an end in itself to the challenges of the sector.

3. Too big to Fail opposed to Too big to have and too interconnected to fail

Related to the questions of concentration and interconnectedness is the acceptance by regulators that at the center of the regulation is to deal with the question of too big financial institutions such that society cannot afford to have them failing? If they fail, given the extent to which they are big or connected, they disrupt the whole economy. At an elementary level this goes against the grain of even the very same system of organising society that we principally are opposed to, i.e. the free market system wherein those who succeed get the profits and those who loose bear the consequences. The too big to fail or too interconnected to fail notion accepts that the sector role players must continue to get profits alone but the consequences of failure, often derived from an undue chase of more profits, must be shared by all.

If parliament follows this logic the SACP would urge parliament then to also adopt corresponding measures to direct profits of the financial sector into activities deemed not detrimental to society if society must share in the consequences of bad behavior. In this regard a compelling release of resources for community reinvestment requirements into social housing, or vocational

training for instance should be considered. In other words, if we accept the share of the loss then we must also share the profits. Well-structured prescribed assets laws (or responsible investment) must therefore be considered we submit in that instance. This issue in any case should not be resolved only within the remits of the too big and too interconnected to fail debate but on its own must be evaluated against the track record of SA's financial sector of generating profits whilst simultaneously pursuing transformational goals. We argue that upon deeper reflection the record will prove that we cannot continue to allow the sector to make profits at the expense of transformation.

4. On the National Credit Regulator (NCR)

Since the idea of a twin peak model was mooted the SACP has raised issues around the potential to weaken the powers and mandate of the NCR. It is our submission as the SACP that issues of consumer credit should continue to be regulated by the NCR under the National Credit Act (NCA).

The proposed Financial Services Conduct Authority should not have concurrent regulatory mandate on credit agreement with the NCR and it should not have the powers to issue conduct standards on credit agreements. To this end we suggest parliament amends relevant sections accordingly to give effect to this submission.

Furthermore the definition of a financial product in section 2 of the Bill should exclude a credit agreement regulated by the NCR through the NCA.

The SACP also believes that instead of providing the necessity for financial public education to the conceptualized Financial Sector Conduct Authority such functions must be left under the work of the National Credit Regulator as directed by the National Credit Act. We are opposed to the moving of the function. In the alternate the SACP calls for parliament to be undertaking measures to deepen this work under the National Credit Regulator.

		<p>5. Suggested areas going forward</p> <p>Whilst the SACP is amenable to the idea of prudential regulation taking into consideration our current realities, we however would like to suggest that the idea be driven forward on the basis of soliciting agreements on following key aspects over and above what has been raised above:</p> <p>a) The regulations deal in the main with regulation of the private financial sector. How this will affect public finance management and the fight against corruption we are not certain given the nexus that exists with the private financial sector on the matter.</p> <p>b) Secondly the SACP would appreciate that we move to regulate if we are certain that prudential regulation will not suffocate release of resources for investment in the productive sector.</p> <p>c) Thirdly the SACP submits that our approach to prudential regulation should not compromise the important task of consolidating public and cooperative banking.</p> <p>d) That the current mandate and powers of the National Credit Regulator are not diluted.</p> <p>e) In the context of the concerns raised by the IMF itself around spillover risks and the vulnerabilities of our economy to external shock, parliament secures broader consensus around capital control and capital account management to defend national resources from speculative capital flight.</p>	
<p>Financial Sector Campaign Coalition (FSCC)</p>	<p>General</p>	<p>Briefly about the FSCC: The FSCC is a coalition formed in 2002 made up, then out of around 80 progressive civil society formations representing tens of thousands of members in the political, religious, labour, community, and cooperatives sectors to drive issues aimed at the need for the transformation of the financial sector as well as to pursue changes necessary for the development of an alternative people focussed economy in South Africa.</p> <p>1. The FSCC commends and takes note of the fact that the FSR bill is presented to parliament for the third time now after extensive changes to the first and second bills were effected</p>	<p><i>National Treasury welcomes the support of the FSCC for the FSR Bill, and welcomes the previous positive engagements held with the FSCC on the Twin Peaks reforms, some of which has engaged with issues raised (such as the role of the National Credit Regulator)</i></p> <p><i>Some of the areas of concern raised by the FSCC are indeed receiving attention from the National Treasury, albeit separately from the FSR Bill process. For example, some of the concerns raised around the</i></p>

		<p>following due consideration of relevant public comments. We trust that this process will continue to indeed ensure meaningful participation of the general public in the processes of the formulation of legislation as part of the dictates of the constitution of the country.</p> <ol style="list-style-type: none"> 2. We note, with due appreciation too, the extent to which the bill now emphatically provides for the independence and added potential effectiveness of the Credit Regulator, in particular, within the envisaged Twin Peaks model. This, factor among others, has been and continues to be a key bone of contention for the FSCC all along – given the relentless campaigns that have been waged by the FSCC to date which have, directly contributed to the creation of the current credit regulation regime. 3. Paradoxically, it is further noted with measured reservations, that while the bill correctly seeks to empower the minister with wide and far reaching powers for the further regulation of the financial sector, most of this is to be done through the same Reserve Bank which continues to be an entity that is saddled with somewhat opaque private investors, some of whom are foreigners that include one powerful European family which owns shares in over 100 other central banks around the world and is a major player in the globe with regard to thought control. 4. Interestingly, the bill appears to skirt around tampering with matters related to the pending review of the banks act and the payment systems act – the latter being, in our view, a key tool used for the maintenance of the status quo and the slow pace of the transformation of the sector. 5. The bill very eloquently makes no bones about its main purpose – which we understand as to regulate, supervise and to stabilise financial sector institutions (perhaps so that they may mainly continue to make even bigger profits) but it also continues to fall short with respect to elevating most of the intrinsic interests of especially the poor beyond somewhat glibly promising to 	<p><i>payments system, and the protection and participation of consumers in the financial sector, are being looked at as part of the next phase of the Twin Peaks process. This will look at a strengthened market conduct framework for the new regulator being established. There is also work underway on reforming the ombuds system to ensure it is an accessible channel for all consumers, regardless of their income levels. We agree that reference to international standards must always take into account South African circumstances to make sure they are appropriately included and only where relevant.</i></p>
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protect customers and or to provide added proverbial “customer education etc.” To briefly illustrate this critical point – the bill does not appear to provide for any mechanisms save for “consumer education” which can meaningfully begin to transform the low savings culture of South Africans at this stage or it does not mention how the poor would afford to ensure a court may enforce the recovery of their losses from what any rogue institutions may visit upon them while it seems to clearly enhance measures for what would essentially be bail outs for ailing or even errant financial institutions.

6. The clamour to set high international standards for the sector, while it is in itself, commendable has to be balanced with the conditions prevailing in our country now and perhaps into the near future - such as the low literacy rate as well as the widespread absence of financial literacy since stringent bars tend to feed the un-intended proliferation of, for instance, questionable funeral parlour operators who exist in large numbers, precisely because they serve a dire need – to mention but one example.
7. The notion of both the ombuds schemes and the Financial Sector Tribunal have to be supported by measures that will provide for affordability as well as the widest possible accessibility by the poorest of the poor to ensure economic justice which is currently denied.
8. We welcome the approach to enter into leniency agreements with co-operative persons who may be deemed willing to assist the authorities to investigate those entities whose operations may be found to be outside specific financial sector laws.
9. The intention to regulate financial conglomerates is highly welcomed with the hope that it will, among others, lead to unravelling the widespread tendencies to evade tax and channel profits into tax havens.

Overall – the bill appears to have numerous merits on the whole and we eagerly await its regulations which we hope will provide it will real teeth.

SCHEDULE 4: AMENDMENTS AND REPEALS

FINANCIAL ADVISORY AND INTERMEDIARY SERVICES ACT, 2002

Reviewer	Section	Issue	Response
ASISA	General comment on Section 10 Debarment of representatives FAIS s14 Pages 151-154	<p>There are thousands of licensed financial services providers (“FSP”s) and it is generally known that they have been inconsistent in terms of their approach to debarment investigations, the quality of evidence gathered and the processes followed in the consideration and imposition of debarment of representatives. These inconsistencies have led to a number of court judgements and appeals. In this context it is appreciated that the regulator wishes to amend these provisions with a view to addressing some of the problems with the existing wording and interpretation of the debarment provisions in FAIS, but the proposed changes in the Bill will, in our view, not address these inconsistencies; taking into account the comments made by National Treasury in response to submissions on the previous draft. We believe that the lack of legal certainty will result in a number of unintended consequences and impracticalities as amplified in our comments below.</p> <p>First, however, and while it is agreed that debarment is necessary in order to protect the public from unscrupulous individuals, the fundamental question is not how FSPs should proceed in terms of debarments or whether FSPs should also debar representatives who resign prior to</p>	<p><i>This is not agreed with; however it is proposed that the internal appeal mechanism in relation to debarments under FAIS be revised to align with the revised Tribunal provisions in the FSR Bill. See proposed changes</i></p>

		<p>debarment hearings but rather whether FSPs are best positioned and capable to impose debarments.</p> <p>“Debarment” has serious consequences for the individual concerned i.e. it constitutes an infringement of the rights set out in section 22 of the Constitution (freedom of trade, occupation and profession). National Treasury’s response in this regard is that the appeals process created will address this concern. However, the underlying problem will, in our view, not be addressed within the proposed new regime given the fact that FSPs will simply not be in a position to follow “due” process. In this regard, FSPs investigative capabilities are severely limited and constrained unlike the FSB’s powers of investigation and gathering of evidence referred to in subsection 3 of the Commissions Act, 8 of 1947, which powers are bestowed on the FSB in terms of subsection 12(1) of the Financial Services Board Act, 97 of 1990. The Bill gives extensive investigative powers to the Authority. It is submitted that the Authority is therefore in a much better position to conduct such investigations and to impose all debarments under s145 of the Bill.</p> <p>Apart from the practical difficulties alluded to under the specific comments provided below, we believe that in principle, the objectives of debarring individuals would be better served if considered and imposed by the Authority from the outset and in all instances.</p> <p>Proposal: Section 14 of the FAIS act should be deleted in its entirety.</p>	
ASISA	Schedule 4 Page 147 s1(h) “intermediary services”	<p>The comments of two large ASISA members are quoted verbatim in the attached Annexure.</p> <p>The current definition of “<i>intermediary services</i>” in the Act makes it clear that intermediary services are services that are</p>	<p><i>The issue sought to be addressed by the proposed amendment to the definition of ‘intermediary services’, inter alia, is to make it clear that the provisions of the FAIS Act apply to product suppliers, their employees and agents when selling their own products to clients.</i></p>

performed by a person other than a “client” or a “product supplier”.

This accords with the definitions of “client”, “product supplier” and “financial services provider” in FAIS and it is clear from the relevant provisions in FAIS (including but not limited to sub-section 1(3)(b)) that the Legislature clearly distinguishes between a “product supplier” and a “financial services provider”.

We would like to refer to the matter of Tristar Investments (Pty) Ltd v The Chemical Industries National Provident Fund (Case number: 455/12) where the Supreme Court of Appeal has held as follow: (For your convenience we quote part of the judgment here below (the emphasis is ours) and have also highlighted the proposed deletions to the definition in terms of the proposed amendments, in the current definition quoted in the judgement below.)

[5] It is not controversial that a substantial portion of the services TriStar undertook to provide constitutes the furnishing of ‘advice’. It is also clear from the agreement that some of the services it undertook to provide did not constitute furnishing advice. The court below found that because TriStar was licensed only to ‘furnish advice’ it was prohibited from rendering those other services, and the agreement was consequently invalid.

*[6] That approach to the matter was not correct. The Act does not prohibit TriStar from performing any service other than ‘furnishing advice’ (which it is licensed to do). It prohibits it only from providing an ‘intermediary service’ in the absence of a licence to do so. **The correct question, then, is not whether the services in issue constitute something other than ‘furnishing advice’ (which they are), but instead whether they constitute an ‘intermediary service’.***

The activity of “selling” without advice is currently defined as an intermediary service. However, product suppliers have taken the view, increasingly so, that when they (through their employees or agents) sell a financial product to a client without advice, they are not subject to the FAIS Act mainly because of the following:

- *The definition of intermediary services requires a tripartite arrangement between a client, product supplier and intermediary – where a product supplier sells its own products there is no tripartite arrangement ; and*
- *The exclusion granted to product suppliers from the FAIS Act when rendering intermediary services as contemplated in section 1(3)(b)(ii) of that Act.*

Since the inception of the FAIS Act there has been an increase in the number of call centres operated by employees of product suppliers. The reason for that seems to be, inter alia, because those employees do not have to meet the FAIS fit and proper requirements and they do not have to comply with the conduct requirements as set out in the FAIS Act because of the views referred to in paragraph above (and supported by the commentators). However, it is clearly the activity performed by a person that should determine whether it is subject to specific provisions, in keeping with the need to ensure level playing fields and minimizing arbitrage. It is for that very reason that the amendment to the definition is proposed.

Currently all persons, other than the employees of a product supplier, who sells a financial product without advice are subject to the FAIS Act in that those persons are rendering an intermediary service. Where that activity is performed by a person on behalf of a FSP, the person must be appointed as representatives because the activity does not fall under the exclusions provided for in the definition of ‘representative’. The intention of the

[7] In ordinary language an ‘intermediary’ is one who ‘acts between others; a go-between’ and the word has a corresponding meaning when used as an adjective. The Act assigns its own meaning to the term that retains that characteristic. The definition contemplates a person who is interposed between a ‘client’ (or a group of clients), on the one hand, and a ‘product supplier’ on the other hand. It is as well to have clarity on what is meant by those terms – which are also defined – before turning in more detail to the definition of an ‘intermediary service’.

[8] A ‘product supplier’ is a person who issues a ‘financial product’. The Act contains a comprehensive list of ‘financial products’, which include shares, debentures, money-market instruments, insurance contracts, investment instruments, and the like. A ‘client’ means (to paraphrase that definition) a specific person or group of persons to whom a financial service is provided’.

[9] With those definitions in mind an ‘intermediary service’ is defined to mean (with a reservation that is not now relevant) ‘any act other than the furnishing of advice, performed by a person for or on behalf of a client or product supplier –

a) the result of which is that a client may enter into, offers to enter into or enters into any transaction in respect of a financial product with a product supplier; or

(b) with a view to –

(i) buying, selling or otherwise dealing in (whether on a discretionary or nondiscretionary basis), managing, administering, keeping in safe custody, maintaining or servicing a financial product purchased by a client from a product supplier or in which the client has invested;

(ii) collecting or accounting for premiums or other moneys payable by the client to a product supplier in respect of a financial product; or

proposed amendment is to ensure that all persons performing the same activity should be subject to the same requirements.

It is not agreed that ‘hard selling’ will by definition result in the furnishing of advice. Although call centre operators may sell their product suppliers’ products without giving advice they are all trained to sell products employing “hard selling” techniques and methods that include techniques to overcome client objections and to ensure a sale.

It is further important to note that the FAIS Act does not only regulate advice. It also regulates the rendering of intermediary services that includes the activity of selling a financial product without advice.

It is unclear how the proposed amendment will detract from consumer protection. As stated before, a consumer who buys a financial product, without advice, directly from a product supplier does not have the same the protection and recourse as a person who buys the exact same product but through an intermediary. The purpose of the amendment and the advantage for consumers should the amendment be adopted is clear.

The following must be noted as regards the unintended consequences listed by the commentators:

- 2. Most product suppliers are already authorised as FSPs;*
- 3. Not all persons will have to be appointed as representatives as some of the activities eg, those activities relating to administering, servicing, etc. might be rendered by persons who do not qualify as representatives as defined in the FAIS Act;*
- 4. An analysis of the ‘particular law’ under which a product supplier operates are presently required*

	<p>(iii) receiving, submitting or processing the claims of a client against a product supplier in respect of a financial product.....”</p> <p>[13] Sub-clause (a) of the definition of an intermediary service, properly construed, contemplates acts that directly result in the consequences referred to. To construe it as including any act that indirectly has that result would lead to absurdities. It contemplates a person who stands with a client (or clients) on the one side, and a supplier of financial products on the other side, acting as the ‘go-between’ to effect the relevant transactions. Quintessentially, that person is the asset manager, who is mandated to act on behalf of the Fund. As for sub-clause (b), it contemplates a person who manages or administers the relevant financial products.</p> <p>[14] None of the services TriStar undertook to provide falls foul of those provisions. Initially they were to compile and convey the appropriate mandates and instructions to the asset managers, and thereafter to take steps to ensure compliance with their mandates. It was not to bring about the relevant transactions – those would be brought about by the asset managers – nor was it to manage or administer the financial products. So far as it was to manage or administer anything at all, it was to manage and administer no more than the mandates of the asset managers.</p> <p>[15] In my view none of those constitutes ‘intermediary services’ on the ordinary meaning of the language of the definition. I can also see no reason – and none could be suggested – why the legislature would have thought it necessary for services of that kind to be regulated. In those circumstances TriStar was not required to be licensed to provide them, and the objection raised by the Fund ought to have been dismissed.</p> <p>The proposed amendment seeks to remove the words “...for or on behalf of a client or a product supplier...” in the</p>	<p>if the product supplier wishes to rely on the current exclusion in section 1(3)(b)(ii) of the FAIS Act – there is thus no additional burden;</p> <ol style="list-style-type: none"> 5. Only third parties that render financial services as defined in the FAIS Act will be subject to the Act - third parties who perform other services on behalf of product suppliers fall outside the ambit of the Act; 6. Binder holders are currently subject to the FAIS Act as they are rendering intermediary services; and 7. The intention is that all persons who render financial services must be subject to the FAIS Act in order to protect consumers and ensure no unequal treatment of persons performing the same activities. <p><i>It is correct that the proposed amendment to the definition of intermediary services ‘runs counter’ to the ordinary meaning of “intermediary” as recorded in the Tristar matter. As previously stated, the proposed amendment changes the normal meaning of “intermediate” and assigns a specific meaning to the terminology. This will not lead to absurdities as the examples referred to in the Tristar matter was based on the interpretation of that definition in its current form and more specifically whether “any act” performed by a person that may result in a client entering into a transaction could be interpreted to include any action which may indirectly result in a client entering into a transaction. The proposed amendment does not alter the requirement that there must be a direct nexus between the act and the result as contemplated in the definition. It merely removes the requirement that the act must be performed on behalf of a person.</i></p>
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introductory part of the definition, as well as the references to “product supplier” in paragraphs (a) and (b) thereof. This runs counter to the ordinary meaning of ‘intermediary’, as recorded in the Tristar matter. NT responded to this comment by stating that “the amendment changes the normal meaning of “intermediate”. That, however, is not problematic as the Act assigns specific meaning to the terminology.”

In our view this approach will lead to absurdities. As pointed out by the SCA in the TriStar matter the current definition accords with the ordinary meaning of “intermediary” and was intended to regulate activities performed in respect of a financial product by someone who stands between the product supplier and the client, acting on either’s behalf, and whose actions directly result in the consequences referred to in the definition. As pointed out by the Court an interpretation that it includes any action which may indirectly result in such consequences will lead to absurdities. Take for example, the situation where a taxi driver who regularly drives potential customers to the offices of a product supplier. In terms of the current definition such a person will not be rendering “intermediary services” because such a person is not interposing between the product supplier and the customer with regard to a financial product and the taxi driver’s action will not directly result in the consequences envisaged. In terms of the proposed amendment, such person may well be regarded as rendering “intermediary services”, as his/her “act” of driving the client to the offices of the product supplier may result in a situation that the client “may enter into, offers to enter into or enters into any transaction in respect of a financial product...”.

We also wish to point out that neither a client nor a product supplier can render intermediary services on behalf of itself. When a product supplier contracts with clients, it acts in its capacity as product supplier and is therefore not rendering intermediary services on its own behalf. As such it cannot be

		<p>regarded as rendering intermediary services on behalf of itself nor on behalf of the client, because the client is the counterparty. To illustrate, if a customer purchases goods from the retailer, a transaction is concluded between the retailer and the customer. The retailer is acting as itself and not on behalf of itself. It is also not acting on behalf of the customer, because the customer is acting in its own capacity. Upon our reading of the proposed amendment of the definition it is intended that the retailer must be regarded as rendering intermediary services on behalf of itself when it contracts with clients, which is, with respect, absurd.</p>	
		<p>It is submitted that it was never the intention of FAIS to regulate product suppliers when acting in its capacity as product suppliers.</p>	
ASISA	General: Consumer protection	<p>Consumer Protection</p> <p>Whilst we fully support the protection of financial customers and also fully agree that all persons who render financial services to consumers must be adequately regulated, we do not agree that product suppliers, when selling their products to clients without the intermediation of an FSP, are currently excluded from FAIS.</p> <p>One of the examples provided by NT in support of their contention that the definition needs to be amended in order to protect consumers, is that of call centers operated by employees of product suppliers who are “hard selling” products. NT stated in their response that these employees presently do not have to comply with the requirements of FAIS, which includes, inter alia, requirements relating to honesty and integrity, competency, conflicts of interest and conduct. It is also stated that clients, when dealing directly with product suppliers, are not afforded the protection of FAIS, as would have been the case if they had interacted through an intermediary. For the reasons set out below we do not agree with these statements.</p>	<i>See above</i>

FAIS provides that “...any recommendation, guidance or proposal of a financial nature furnished , by any means or medium...” constitutes “advice” , which is subject to the provisions of FAIS, irrespective of whether the activity is performed by persons employed or mandated by a product supplier, or by a Financial Services Provider (FSP).

Put differently, if a product supplier elects to market and sell its products directly to customers through call center consultants employed or mandated by it and such selling involves a recommendation, guidance or proposal, it will be regarded as “advice” and the consultant concerned will therefore have to be registered as a “representative” and comply with the fit and proper requirements.

Call center consultants are often employed by product suppliers in order to provide consumers with “factual advice”, which is expressly excluded from the ambit of “advice” by subsection 1(3)(a) of FAIS. (Please refer to subsection 1(3)(a) of FAIS where it is stated that “advice” expressly excludes “factual advice “ given in respect of “...the procedure for entering into a transaction ;...description of a financial product;...answer to routine administrative queries...;objective information about a particular financial product...”.)

It is submitted that such “factual advice” clearly does not amount to ‘hard selling’. However, rendering the services envisaged in section 1(3), i.e. activities excluded from advice, does by its very nature entail that the person doing so on behalf of the product supplier, will have to provide factually correct information and should the person fail to do so, the consumer concerned will have all the common law remedies available to the victim of a misrepresentation, including the right to resile from any agreement concluded by him/her as a result of such misrepresentation. We

respectfully submit that there is therefore no need for any specific fit and proper regulations to be imposed on employees who are simply providing factual information and is not providing advice.

It is furthermore submitted that “hard selling” must by definition involve some recommendation, guidance or proposal with regard to the financial product being marketed and does therefore constitute “advice” as defined in FAIS.

A product supplier which employs or mandates persons in its call center to “hard sell” its products to consumers is therefore presently already subject to FAIS and will have to register such persons as representatives (with all the entailing fit & proper, honesty and integrity, and other requirements that goes with that).

In their response NT refers to the unequal treatment of persons performing the same activity, e.g. an independent intermediary must comply with FAIS and meet competency requirements when selling financial products, while employees of product suppliers performing the same activity do not have to meet such requirements.

We also do not agree with this statement. It is the activity concerned that dictates whether the fit and proper requirements prescribed by FAIS applies or not.

Should a product supplier employ the services of a third party to render “financial services” on its behalf, such third party will either have to be licensed as a FSP or appointed as a representative and will therefore also be subject to the same provisions of FAIS with regard to representatives.

It is to be noted that whilst the key individual of an external FSP / call center must, inter alia, meet fit and proper requirements, the call center agents will only have to meet the fit and proper requirements if they qualify as representatives of the FSP.

They are therefore in exactly the same position as employees of product suppliers who are not regarded as representatives in terms of the relevant definition. They also do not have to be fit and proper if they are only providing factual information. As such, it is unclear on which basis the allegations are made that external center agents are subject to fit and proper regulation, while their internal product supplier employee counterparts are not.

NT also referred to the situation where complicated derivative instruments are being sold to clients “without the protection of FAIS”, as these products are mainly being sold by the issuers of the instruments. They state that the growth and proliferation of the Internet has caused an increase of derivative instruments being offered and sold to retail clients and that issuers increasingly reach potential clients from all walks of life through the internet.

We point out that FAIS does not provide that any person who wish to purchase or invest in a financial product may not do so before he/she/it has obtained “advice”. It only stipulates who may provide “advice” in respect of such product and how such “advice” must be furnished.

It is furthermore clear that FAIS does not prohibit product suppliers from advertising their products and from providing “factual information” in respect thereof. In our view, should a product supplier sell derivatives to a customer electing not to obtain advice, the persons employed to provide such a customer with “factual information” about the product in question ought not to be subjected to fit and proper requirements. In addition, it is submitted that the proposed changes under the FSB Retail Distribution Review limiting the type of products which may be sold on an execution only basis should in any event address these concerns.

The proposed amendment is therefore not going to add to the protection currently afforded to consumers in terms of FAIS and it is accordingly not clear how the proposed amendments will be in the interest of clients.

Unintended consequences

In our view the proposed amendment will have a whole number of consequences (several possibly unforeseen), which will have a significant impact on the financial services industry without, for the reasons set out above, a corresponding (or any material) benefit to clients.

1. All product suppliers will have to register as an FSP

One of the consequences of the proposed amendment is that every product supplier will have to be registered as an FSP under FAIS by virtue of the fact that by performing functions which are inherent or incidental to their business as a product supplier, they will now be seen to be rendering intermediary services (under the new proposed definition).

According to NT the proposed amendment aims to clarify that where a product supplier performs an activity set out under the definition of “intermediary services” through its employees, such product supplier must be licensed under FAIS and its employees must be registered as “representatives” unless the exclusion referred to in the proposed amendment to section 45 applies (our emphasis).

It must be noted that it is being proposed that sub-section 1(3)(b) of the FAIS (which provides for the exclusion of certain activities from the definition - more specifically an intermediary service rendered by a product supplier who is authorised under a particular law to conduct business as a financial institution and where the rendering of such service is regulated by such law) be deleted and that

section 45 be amended by the insertion of the following subsection after sub-section 1:

*“(1A) The provisions of this Act do not apply to the—
 (a) performing of the activities referred to in paragraph (b)(ii) and (iii) of the definition of ‘intermediary service’ by a product supplier—*

*(i) who is authorised under a particular law to conduct business as a financial institution; and
 (ii) where the rendering of such service is regulated under such law; and
 (b) rendering of financial services by a manager as defined in section 1 of the Collective Investment Schemes Control Act, 2002, to the extent that the rendering of financial services is regulated under that Act.*

*(1B) The exemption referred to in—
 (a) subsection (1A)(a) does not apply to a person to whom the product supplier has delegated or outsourced the activity, or any part of the activity, contemplated in paragraph (a) and where the person is not an employee of the product supplier; and*

(b) subsection (1A)(b) does not apply to an authorised agent as defined in section 1 of the Collective Investment Schemes Control Act, 2002.’’.

This means that the activities in sub-paragraph (b)(i) of the current definition of intermediary services will therefore no longer be excluded. These include:

“(i) buying, selling or otherwise dealing in (whether on a discretionary or nondiscretionary basis), managing, administering, keeping in safe custody, maintaining or servicing a financial product purchased by a client from a product supplier or in which the client has invested;”

		<p>The majority of these activities are activities which are incidental to the day to day activities of a product supplier and the proposed amendments will therefore result in a situation that every product supplier will also have to apply to for a FAIS license and will have to appoint a key individual(s) (who will have to meet the fit and proper requirements prescribed in respect of the relevant financial product/s) in order to conduct its business as a product supplier.</p> <p>Put differently, in terms of the proposed amendment any product supplier who contracts with a client, receives money from the client in respect of the relevant financial product (which it has to do in order to give effect to the agreement), manages and administers its own financial product (which it is bound to do in accordance with the various financial sector laws applicable to product suppliers), will now also have to be licensed in terms of FAIS,</p> <p>Furthermore, as regards the activities listed in subparagraphs (ii) and (iii) , there will first have to be a proper analysis of the provisions of the particular law under which a product supplier operates before it can be concluded that the product supplier has been rendering a financial service.</p> <p>The costs incidental to such a licence as well as those incidental to complying with the relevant provisions of FAIS, will eventually be passed on to the consumer.</p> <p>We do not believe that it was ever the intention to subject all product suppliers to the provisions of FAIS.</p> <p><u>2. Third parties to register as FSP's</u> A further concern is that any third party rendering a service on behalf of an FSP, such as the so-called "Independent contractors" who refer clients to the FSP for purposes of</p>	
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obtaining financial advice (e.g. attorneys dealing in Road Accident Fund cases), will now apparently also have to be licenced and comply with the fit and proper requirements. It is our view that such a dispensation, which is bound to lead to a cessation of such referral, can never be in the interest of clients.

Another potential conundrum is the situation where product suppliers advertise their products in newspapers, magazines, chain stores or on TV and clients who wish to purchase same can either send in the relevant form provided or phone a call center. Whilst such activities will most probably not be regarded as constituting “advice”, by virtue of the provisions of sub-section 1(3)(a) of FAIS (activities expressly excluded from the ambit of advice), and will presently also not constitute intermediary service by virtue of the provisions of sub-section 1(3)(b) thereof, the questions *inter alia* posed in terms of the proposed amendments is whether the newspaper, magazine, etc. concerned will now also have to be licensed (as the publishing of such an advertisement may result in a client entering into a transaction in respect of a financial product). This in turn begs the question as to which of the employees of the third party concerned (newspaper, etc.) or the product supplier concerned will have to be registered as a representative (because it can be argued that their action will “lead the client into a specific transaction in respect of a financial product”)?

3. Binder holders to be licensed as FSP’s

In view of the wording of sub-paragraphs (b) (i)(ii) and (iii), read with the provisions of section 49A of the LTIA, many “binder holders” will now also have to be licensed as FSP’s and appoint a key individual, unless they are a product supplier as defined in FAIS.

		<p>4. <u>Services rendered on behalf of discretionary and administrative FSP's</u> Persons or institutions rendering any of the services covered under the definition of intermediary services on behalf of a discretionary and administrative FSP's will now also have to be licensed, as the limitation incidental to the words "for or on behalf of a client or product supplier" will no longer have application.</p>	
ASISA	s10 FAIS s14(3)	<p>Where a decision is made not to debar, It would also serve no purpose to inform such person of the appeal procedures. Refer to proposed rewording of the relevant provisions under s14(3)(b) and (c)(i).</p> <p>It is clear from s14(3)(a)(i) that written notification of the intention to debar and a notification of the decision to debar in terms of s14(3)(c), is required.</p> <p>Clarification is required as to the exact nature or evidence needed to meet the notification requirement.</p> <p>In reality, and due to circumstances beyond the control of the FSP (for example where the FSP is unable to establish the whereabouts of the representative), there will be many instances where it will not be possible to notify the representative.</p> <p>In these instances, and given the pre-emptory nature of 14(3) i.e. "a financial services provider must", the FSP will ostensibly remain in breach in perpetuity and until such time as the whereabouts of the representative has been established and notification has taken place. It is this impasse that also highlights a significant gap in the process where such a representative could join another FSP without the knowledge of the FSP or the FSB. This situation will clearly undermine the objectives of the debarment provisions.</p>	<p><i>This comment is noted. The proposed revision submitted would not address the concern. Notice of the decision should be provided, whether the decision is to debar or not. In practice, if a decision is made not to debar a person, such a decision would not be challenged, even if there happened to be a failure to advise of a right to appeal in that instance.</i></p> <p><i>Consideration has been given to the concern of notification of a representative whose whereabouts is not able to be determined, and revisions are proposed to address this concern.</i></p>

Perhaps this impasse could be addressed by adding a provision whereby FSPs will be obliged to notify the FSB of its inability to comply with the notification requirements after unsuccessful attempts to either locate the whereabouts of the representative and/or to effect service of the notification. See suggested changes to the introductory clause and the addition of subparagraph (d) which is to be read with the suggested changes under s14(5).

In the current s14A regime where the FSB is unable to serve their notice of intention to debar, they “record list” the representative which means that the representative will not be able to be registered as a representative of any other FSP until the pending investigation/debarment proceedings have been resolved. We submit that the FSB employ the same practice upon notification by a FSP as per the suggestions made above i.e. insertion of subparagraph (d). In this regard the FSB may also want to consider provisions which will clearly set out what will be expected of FSPs in terms of the process and what role the Authority will play in such cases e.g. take over the matter and consider debarment in terms of s145.

As regards the further changes being made to s14(3)(c)(iii), (iv) and (v) pertaining to appeals/reviews, it is not clear what the duties and powers of the “internal appeal proceedings” would entail and what the formal requirements will be. For example, whether such powers of the internal appeal mechanism established by the Authority include reviewing both the merits and procedures followed by the debarring FSP and/or involve a complete and separate investigation and/or whether such powers include the setting aside of the debarment imposed by the FSP.

It is not clear what the implications of upholding an appeal would be and how this would relate or impact the previously terminated underlying contractual relationship (employment

The provision is being revised such that there would not be an internal appeal mechanism, appeals would be considered by the Tribunal.

		<p>or mandate contract) between the debarring FSP and the debarred representative. In this regard there could potentially also be legal arbitrage between these provisions and labour law i.e. CCMA proceedings where a representative was dismissed and debarred by its FSP employer. Further clarity is sought as to the scope and powers of such an appeal mechanism.</p>	
ASISA	<p>s10 FAIS s14(4)</p>	<p>As regards s14(1)(d) we have previously recommended that the time period within which to notify the Authority be changed from five days to fifteen days.</p> <p>In some larger FSPs, the debarment process forms part of the industrial relations hearing which may take place at a decentralised level (in branches across the country) and which process may involve various role-players at the hearing such as the forensic team, management representatives, or the Chair at such hearing as well as local branch staff including secretaries that may perform certain administrative functions related to the industrial relations and debarment proceedings.</p> <p>The mere collation of all the evidence used in such hearings, the time taken to transcribe minutes of the hearing and also making copies of the entire record, all takes time; not to mention the time required to post or courier documentation (often voluminous evidence packs) to other departments and staff members in different locations where these staff members may be tasked with preparing the documents, completing the form prescribed by the Authority and dispatching the final and complete set of documents to the Authority.</p> <p>In light of the above we believe it would be unreasonable to expect notification to be made within five days of the debarment and recommend that a fifteen day period should be allowed</p>	<p><i>Disagree, the period referred to does not refer to the hearing and consideration of the matter must take place within a specified matter. The period referred to is the period, after the decision has been taken, in which the Authority must be notified of the decision that has been taken to debar. It is essential that the Authority is very timeously notified of the debarment.</i></p>

ASISA	s10 FAIS s14(5)	<p>The provisions relating to the three month period remain ambiguous. For ease of reference National Treasury’s response is quoted below:</p> <p><i>“A three month period within which to begin a process of debarment is considered sufficient, once the reason for debarment becomes known.</i></p> <p><i>In those instances where it is impossible due to no fault of the provider to complete the investigation within the three month period, the matter can be referred to the regulator once the investigation has been finalised, for consideration of debarment by the regulator.”</i></p> <p>With reference to the first paragraph, the three month period is used in the context of an obligation on the FSP to “begin a process” as opposed to the second paragraph where it is used in the context that the FSP must “complete” the investigation within the three month period and inform the FSB where they are unable to complete their investigation.</p> <p>Experience has shown that while a financial services provider (“FSP”) may suspect the existence of reasons for a person to be debarred, the available evidence may be inadequate or insufficient for a debarment procedure to be commenced without undue delay. Hence the need for forensic investigations to be pursued, often with ex-representatives being either obstructive or totally un-cooperative. Forensic investigations often take longer than three months for sufficient information to be obtained before debarment proceedings can be commenced, given that one is dealing with representatives who are no longer attached to the FSP.</p> <p>The fact remains that it will be impossible to complete all investigations within the three months period and to suggest that the Authority will consider debarment in cases where it is “impossible” for the FSP to complete an investigation is</p>	<p><i>The period referred to means that a process to debar must be commenced not longer than three months after the FSP became aware that there were reasons for the person potentially to be debarred. Three months is a sufficient period to allow for the process to be commenced. There needs to be an onus on an FSP to promptly investigate a matter when there may be a reason to debar a representative. It does not require that the process of determining whether or not the person should be debarred must be completed within that three month period.</i></p>
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confusing and not aligned or in accordance with the proposed provisions as they stand. A distinction is also to be made between instances where the FSP is unable to fully investigate the matter within the three month period or unable to effect the debarment due to, for example, the inability to serve the notice of debarment.

In any event, we believe it would be unreasonable to expect or prescribe a standard three month time period within which to complete the entire process; irrespective whether the representative had left the employ of the FSP or not. It is simply an unrealistic expectation to prescribe a specific period considering the following aspects:

- Nature, scale, complexity and circumstance of each case differ. In this regard it must also be kept in mind that s14(3)(a)(i) provides that the FSP is required to provide “adequate notice” to the representative of the FSP’s intention to debar.
- Gathering of evidence is dependent on numerous factors such as the availability and co-operation of various witnesses including handwriting experts. Also see comments under the “General” section above regarding the lack of investigative powers of FSPs who are unable to compel individuals to provide or produce information/documentation.
- Often the residential, postal or contact details of the resigned representatives are unknown and difficult to establish. In the context of the notification provisions under ss14(3)(a)(i) and (c), the process will inevitably be delayed where the whereabouts of the representative is not known and where such notifications cannot be served. The FSB is well aware of these difficulties where they are unable to effect a debarment under the current

		<p>s14A provisions i.e. where they were unable to serve their intention to debar an individual.</p> <p>Unintended consequences of these provisions as currently formulated may lead to situations where FSPs, in order to avoid possible non-conformance of not being able to fully complete an investigation and effecting the debarment within the prescribed three month period, will simply review the whatever evidence is available at that stage, however incomplete, which in turn, may result in a decision not to impose debarment for lack of evidence where the decision may have been different had there been more evidence available after the investigation could be properly completed.</p> <p>It is therefore strongly recommended that consideration be given to amend the provision as per the proposed wording:</p> <p><i>“14 (5) A debarment in terms of subsection (1) that is proposed to be undertaken in respect of a person who no longer is a representative of the financial services provider, must be commenced without undue delay from the date of the financial services provider becoming aware of the reasons for debarment, <u>and must, within three months from such date request the Authority to consider debarment under section 145,</u> where the provider is unable to complete its investigation and or effect the debarment as contemplated under section 14(3). not longer than three months from that date.”</i></p> <p>Also refer to comments relating to “effecting” the debarment where notification is not possible; either in terms of s14(3)(a)(i) or (c).</p> <p>Alternatively, at least consider extending the period from three months to six months.</p>	
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FINANCIAL MARKETS ACT, 2012

Reviewer	Section	Issue	Response
BASA	“central counterparty” and “clearing house”	<p>We are supportive of the distinction between a central counterparty and a clearing house, however the distinction raises questions of application of the law in respect of the functions and the licencing requirements of the two types of market infrastructures:</p> <p>The functions of a central counterparty are not specifically defined; however this can be inferred from the definitions of “clear” and “central counterparty”. It is clear that a central counterparty must be an independent clearing house, but it does not necessarily follow that a clearing house may not perform all the functions of a central counterparty. Consequently, a reference to a clearing house in the FMA cannot be read as a reference to a central counterparty.</p> <p>The consequential amendments to Section 47(3)(c)(v) and 47(4)(b)(ii) of the FMA imply that a juristic person that performs the functions of a central counterparty does not necessarily need to be licensed as both an independent clearing house and a central counterparty, i.e. it can be licenced as a central counterparty only. Consistent consequential amendments have not been made to relevant provisions in Sections 47, 48 and 50. (See specific comments below).</p>	<p><i>Comments have been noted. The functions of a central counterparty are specified in sections 50(3) and (3A), and are in addition to what is required of an independent clearing house. A central counterparty is a category of a clearing house and must fulfil all the requirements pertaining to a clearing house, including being licensed as such. The CCP licence would be an extension of the independent clearing house licence.</i></p> <p><i>What is envisaged going forward is that a CCP must be an independent clearing house and for clarity, Treasury proposes that amendments specify that a central counterparty must be licensed as both an independent clearing house and a central counterparty by 1 January 2022, to allow for a sufficient transitional period to accommodate the status quo. Please refer to Schedule 4 of the FSR Bill.</i></p>
JSE	Licensing of CCPs	<p>Licensing of CCPs under the Bill</p> <p>JSE Clear (previously known as Safex Clearing Company or SAFCOM) has (since its inception in September 1998) been a clearing house for the South African Futures Exchange</p>	<p><i>Transitional concerns have been noted and Treasury had always proposed to allow for a five-year phase in period in order to minimise disruption to the markets.</i></p> <p><i>For clarity, Treasury is proposing to amend the definition of “central counterparty” and to strengthen wording in</i></p>

(“Safex”). In 2001, Safex was purchased by the JSE and has been operating as an “associated clearing house” since then. It is an associated clearing house because it acts as a clearing house in accordance with the JSE’s Rules and in terms of the clearing agreements concluded between JSE Clear and the clearing members of the JSE.

SAFCOM also historically performed the function of a central counterparty for Safex. A central counterparty is a clearing house that is positioned between counterparties to contracts traded in one or more financial markets. This structure insulates market counterparties from one another’s default. This is evidenced as far back as 1988 when rule 8.3.2 of Safex’s original rule book stated that:

“upon a trade being cleared, by novation the clearing house shall replace the buyer and become the counterparty to the seller and it shall replace the seller and become the counterparty to the buyer.”

The above wording remains unchanged and is the wording currently used in section 8.30.2 of the latest version of the JSE’s Derivatives Rules. The current version of the Financial Markets Act, 19 of 2012 (the “FM Act”) defines a “clearing house” as:

“a person who constitutes, maintains and provides an infrastructure to clear transactions in securities.”

The current FM Act also defines an “associated clearing house” as:

“a clearing house that clears transactions in securities on behalf of one or more exchanges in accordance with the rules of the relevant exchange and that does not approve or regulate clearing members”

The current FM Act recognises “independent clearing houses” that clear transactions in securities on behalf of any

section 47 of the Act to allow for a sufficient transitional period to accommodate the status quo. This means that until 31 December 2021, a licensed associated clearing house that is performing the functions of a central counterparty may be allowed to continue to operate as such in terms of the licence obligations applicable to it at the time of commencement for a transitional period. See proposed revisions in the Bill.

It should also be noted that while the FMA (and its predecessors) neither specified a definition for “central counterparty” nor prescribed any requirement in relation to licensing and ongoing regulation that attach to the specific systemic functions of a CCP, the inclusion of an independent clearing house in the FMA reflects the well-documented and explicit policy stance to establish a legal framework to accommodate a CCP structure to promote central clearing through an independent clearing house, especially given the G20 requirement to mandate central clearing. This policy approach that was approved by Parliament and Cabinet when it adopted the FMA. The requirement that a CCP must be an independent clearing house is permissible under the law, and on this matter Treasury has had to make policy decisions that place a high priority on objectives that support financial stability and other public interest considerations. CCPs are systemic institutions (super-SIFIs) given interconnectedness with other SIFIs, and because a failure of CCP could trigger a financial crisis. Globally regulators are applying the strictest standards of regulation, particularly in relation to the governance and risk management of CCPs. Over and above international recognition, the reforms are intended to safeguard the financial system, and ensure that financial markets are safe and efficient, and contribute to economic growth and promote the competitiveness of the South African financial markets.

person, and authorises and supervises its clearing members in accordance with its clearing house rules. JSE Clear does not qualify as an independent clearing house under the current Act because it does not authorise or supervise its clearing members in accordance with its own clearing house rules.

The associated clearing house model used by Safex and SAFCOM, and subsequently, JSE Clear and the JSE was necessitated by the provisions of the Securities Services Act, 36 of 2004 and its predecessor, the Financial Markets Control Act, 55 of 1989 which excluded clearing houses from being classified as self-regulatory organisations. The Securities Services Act defined a “*self-regulatory organisation*” as “*an exchange or a central securities depository*”.

This classification had the effect that SAFCOM (as JSE Clear was previously known) was not empowered to promulgate clearing house rules and the contractual arrangements through which SAFCOM managed its affairs were not afforded the protection of section 35A of the Insolvency Act, 24 of 1936 (the “**Insolvency Act**”). Safex and the JSE were therefore obliged to promulgate exchange rules to ensure that all transactions concluded on the exchange and cleared through JSE Clear were subject to the protection afforded by the provisions of section 35A of the Insolvency Act.

The associated clearing house model is therefore recognised and permitted under the provisions of the current FM Act and JSE Clear has the status of a licensed associated clearing house under the current regime.

Central counterparties under the FSR Bill

The FSR Bill proposes numerous amendments to the FM Act. Although it retains the definition of, and references to, an “*associated clearing house*”, it introduces a new definition of “*central counterparty*” that excludes “*associated clearing houses*”.

Under the Bill, a “*central counterparty*” is defined as:

“*an independent clearing house that-*

- (a) *interposes itself between counterparties to transactions in securities, becoming the buyer to every seller and the seller to every buyer and thereby ensuring the performance of open contracts; and*
- (b) *becomes a counterparty to trades with market participants through novation, an open offer system or through a legally binding agreement.”*

An “*independent clearing house*” is defined as:

“*a clearing house that clears transactions in securities on behalf of any person in accordance with its clearing house rules, and authorises and supervises its clearing members in accordance with its clearing house rules.”*

As set out above, JSE Clear does not currently qualify as an “*independent clearing house*” because it does not authorise or supervise its clearing members in accordance with its own clearing house rules.

As a result of the manner in which a central counterparty has been defined in the Bill, JSE Clear will also not qualify as a central counterparty because it does not qualify as an independent clearing house.

This has serious ramifications for JSE Clear. If JSE Clear no longer qualifies as a central counterparty under the FM Act, and hence South African law, it will not be able to meet the first requirement for international recognition as a central counterparty.

Moreover, because of JSE Clear’s current status as a qualifying central counterparty, all market participants that conclude transactions in securities cleared by JSE Clear qualify for capital relief in accordance with the Basel III principles. If JSE Clear no longer qualifies as a central counterparty because of the particular way in which that term has been defined in the proposed amendments to the FM Act these market participants’ capital relief will fall away and with it there will be significant disruption to South African markets with the potential result of systemic risk to the South African economy. In addition if JSE Clear ceases to qualify as a central counterparty as a consequence of the FM Act being amended as is currently envisaged, it may lose its status as a central counterparty recognised and accredited by the Committee on Payment and Settlement Systems (“CPSS”) of the International Organisation of Securities Commissions Organisation (“IOSCO”) and many market participants will have no choice but to withdraw from the South African derivatives market. This will invariably result in a massive loss of liquidity in this markets which will again impact negatively on and compromise the integrity of the South African financial markets as a whole.

Chapter V of the FM Act deals with clearing houses. Under the current FM Act, all clearing houses, both independent and associated, have to be licenced under section 49. Under section 50 of the current Act the functions of licenced clearing houses are set out. The Bill proposes far reaching amendments to this chapter of the Act. It provides not only

that clearing houses must be licenced but also that central counterparties must be licensed.

It also defines the functions that a central counterparty may perform. These will be introduced in the new section 50(3A). Under this new subsection, a licensed central counterparty, in addition to other functions set out in the section, must:

1. interpose itself between counterparties to transactions in securities through the process of novation, legally binding agreement or open offer system;
2. manage and process the transactions between the execution and fulfilment of legal obligations between counterparties and clients; and
3. facilitate its post-trade management functions.

JSE Clear (through the provisions of the JSE's Derivatives Rules) currently performs all of these functions as an associated clearing house and central counterparty. It will therefore face an intractable problem if the Bill is enacted in its current form.

Simply put, JSE Clear, as an associated clearing house, does not qualify as an independent clearing house. However, the Bill seeks to define a central counterparty in terms that recognise only independent clearing houses as central counterparties. Thus, despite the fact that JSE Clear currently performs the functions of a central counterparty, when the Bill takes effect, it will be precluded from performing the functions of a central counterparty because it will not fall within the new statutory definition of a central counterparty.

This problem arises from the particular manner in which the Bill proposes to define a central counterparty. The JSE has

previously made representations on earlier versions of the Bill and the Proposed Regulations that preceded it to explain that it does not make sense to define a central counterparty in terms that recognise only independent clearing houses performing the functions of a central counterparty. The definition of a central counterparty should be neutral as between types of clearing houses.

If the definition of a central clearing house is therefore amended to be neutral as between associated clearing houses and independent clearing houses, the problems faced by JSE Clear would be avoided. Alternatively, if the definition proposed in the Bill is to be retained then it will be necessary for JSE Clear to meet all of the criteria to be licensed as a central counterparty. In order to be licensed as a central counterparty, JSE Clear will need to transform itself into an independent clearing house and then apply for a licence as a central counterparty. To apply for this licence, JSE Clear will need to comply with the following requirements:

1. provide proposed clearing house rules – section 47(3)(c)(v) of the FM Act (as amended by the FSR Bill)
2. implement a margin system that establishes margin levels commensurate with the risks and particular attributes of each product, portfolio and market it serves – section 48(1A)(a) of the FM Act (as amended by the FSR Bill)
3. collect and manage collateral held for the due performance of the obligations of clearing members or clients of clearing members – section 48(1A)(b) of the FM Act (as amended by the FSR Bill);
4. establish and maintain a default fund to mitigate the risk should there be a default by a clearing member and to

		<p>ensure, where possible, that the obligations of that clearing member continues to be fulfilled – section 48(1A)(c) of the FM Act (as amended by the FSR Bill)</p> <ol style="list-style-type: none"> 5. supply initial capital as prescribed, including the appropriate buffer – section 48(1A)(d) of the FM Act (as amended by the FSR Bill) 6. have a clearly defined waterfall where the obligations of the defaulting clearing member, other clearing members and the central counterparty are legally and clearly managed – section 48(1A)(e) of the FM Act (as amended by the FSR Bill); 7. provide for portability in the case of default of a clearing members – section 48(1A)(f) of the FM Act (as amended by the FSR Bill); and 8. provide the necessary infrastructure, resources and governance to facilitate its post trade management function, and in the event of one or more of the clearing members: <ol style="list-style-type: none"> 8.1. ensure sufficient risk policies, procedures and processes; and 8.2. have sound internal controls for robust transaction processing and management – section 48(1A)(g) of the FM Act (as amended by the FSR Bill). <p>Complying with these requirements will require various structures to be put in place, documentation to be drafted and/or amended, and other transitional arrangements (including capital arrangements) to be made. JSE Clear cannot do so overnight and therefore requires a reasonable period of time within which to put these structures and arrangements in place.</p>	
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It appears that the Bill contemplates the need for a delayed implementation of the licencing for central counterparties. It proposes to introduce a new subsection in section 110. The new subsection (6) reads as follows: *“With effect from a date prescribed by the Minister, a licensed clearing house performing the functions of a central counterparty must be licensed as a central counterparty under section 49 and comply with the requirements set out in this Act”*.

The provision appears to speak to the situation in which JSE Clear will find itself when the Bill is enacted. It will be performing the functions of a central counterparty but will not be able to be licensed as such until it can comply with the new requirements. Section 110(6) therefore appears to contemplate a delayed implementation of this licensing requirement to permit the Minister to designate a future date by which parties performing the functions of a central counterparty must be licensed to do so.

This delayed implementation of to the licensing obligation is not, however, reflected in section 47 of the FM Act itself where the obligation to be licensed is contained in the Act. It would therefore be preferable for a cross reference to section 110(6) to be inserted into section 47(1A). The current wording of that new section in the Bill reads as follows:

“Subject to the regulations prescribed by the Minister, a central counterparty must be licensed under section 49”

It is unclear what regulations the proviso is referring to. It would be preferable for this section to be worded as follows:

“Subject to [section 110\(6\)](#), a licensed clearing house performing the ~~functions of regulations prescribed by the Minister~~, a central counterparty must be licensed [as a central counterparty](#) under section 49.”

		<p>In order to make it clear that a licensed clearing house may continue lawfully to perform the functions of a central counterparty despite not being licensed as such, the JSE respectfully submits that it would be prudent to add a further subsection to section 110 to the effect that:</p> <p><i>“notwithstanding any other provision of this Act, until the date prescribed by the Minister under subsection (6), a licensed clearing house may continue to perform the functions of a central counterparty despite not being licensed to do so.”</i></p> <p>Summary of the comment</p> <p>For historical reasons, JSE Clear functions as an associated clearing house. In order to permit it to continue to perform its important function as a central counterparty under the FM Act, either:</p> <ul style="list-style-type: none"> • The definition of “<i>central counterparty</i>” should be amended to be neutral as between types of clearing houses;OR • Sections 57(1A) and 110 should be amended to make it clear that until a date prescribed by the Minister; an existing licensed clearing house may lawfully perform the functions of a central counterparty without being licensed as such. 	
BASA	CCPs	<p>We are supportive of the policy that a central counterparty should be an independent clearing house and we welcome National Treasury’s proposal for a period of five years, to minimise disruption to the financial system, for the existing licensed associated clearing house (JSE Clear) to transition to an independent clearing house. However, we are of the opinion that this amendment should explicitly provide for the five-year transition period.</p>	<p><i>Agree, it is proposed that the wording in section 47 and 110 be strengthened, to provide that a clearing house performing the functions of a CCP may continue to do so, and allow for a sufficient transitional period to accommodate the status quo. See proposed revisions in the Bill.</i></p>

<p>JSE</p>	<p>External CCPs</p>	<p>External central counterparties</p> <p>The Bill also introduces a new definition of an “<i>external central counterparty</i>”. This is:</p> <p><i>“a foreign person who is authorised by a supervisory authority to perform a function or functions similar to one or more of the functions of a central counterparty as set out in this Act and who is subject to the laws of a country other than the Republic, which laws (a) establish a regulatory framework equivalent to that established by this Act; and (b) are supervised by a supervisory authority”.</i></p> <p>A supervisory authority is defined in the FM Act as “<i>a body designated in national legislation to supervise, regulate or enforce legislation or a similar body designated in the laws of a country other than the Republic to supervise, regulate or enforce legislation of that country</i>”.</p> <p>Chapter V of the FM Act will be amended by the Bill to introduce the concept of, and requirements for, the licensing of external counterparties.</p> <p>The proposed amendments will make it a requirement for external counterparties to be licensed under section 49A of the FM Act, unless they are exempted from having to be licensed under section 49B.</p> <p>Under section 49B, external counterparties may apply to the Authority to be exempted from the requirement to be licensed under section 49A.</p> <p>The Authority is then empowered (provided it has the concurrence of the Prudential Authority and the South African Reserve Bank) to grant such an exemption if four requirements are met:</p> <p>(a) The applicant is recognised under section 6A;</p>	<p><i>Objections are noted. Clause 49B has been deleted, however the proposed framework is not intended to subject external market infrastructures to lesser regulatory standards. It is possible to defer to the other jurisdictions regulatory regimes without giving the global CCPs a regulatory advantage over local CCPs due to lower standards. It is important to recognise that global CCPs are already subject to extensive regulatory and supervisory oversight in the home jurisdictions.</i></p> <p><i>The vast majority of the South African OTC derivatives transactions are cross-border and inter-bank dominated, and most domestic banks are already clients of international banks who are clearing members of global CCPs and whose inter-bank transactions are subject to European and US clearing mandates. Treasury has always supported the view that the cross-border nature of financial markets necessitates an appropriate regulatory framework that promotes the efficiency and competitiveness of the South African financial markets without significantly undermining stability. Regulatory constraints however could severely undermine the ability of, and even disincentive, these global entities from providing clearing services to South Africa, and at the same time limit the ability of the market to manage and hedge out risk, given that domestic market participants are significantly exposed to global markets. Furthermore, South African market participants would be deprived of a significant source of liquidity.</i></p> <p><i>The proposed regime for equivalence, licensing and supervision of external CCPs is consistent with international jurisdictions to adopt cross-border frameworks, including Canada and Australia (see below).</i></p> <p><i>Licensing of external CCPs is dependent on a number of factors including that such market infrastructure are subject to equivalent regulatory standards in the home jurisdiction, and that appropriate regulatory and co-</i></p>
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	<p>(b) The applicant is subject to an appropriate regulatory and oversight regime in the foreign country by the relevant supervisory authorities;</p> <p>(c) The applicants agrees to co-operate and share certain information; and</p> <p>(d) The granting of the exemption will not compromise the objects of the Act.</p> <p>The objects of the FM Act are set out in section 2. They include ensuring that the South African financial markets are fair, efficient and transparent (section 2(a)) and reducing systemic risk (section 2(d)).</p> <p>The JSE respectfully submits that permitting an exemption from the requirements of licensing is in conflict with these objectives.</p> <p>An exemption for external central counterparties introduces unfairness into the South African financial markets because it permits certain providers to be exempt from licensing requirements while they provide the same services as their local counterparts who are required to be licensed.</p> <p>It also has the potential to undermine financial stability and introduce systemic risk. It has been recognised in South Africa and abroad that in order to ensure financial stability system-wide risk needs to be managed through a macro-prudential regulatory approach. The regulatory approach needs to be of universal application in order to reduce the risk of regulatory arbitrage.</p> <p>If external central counterparties are exempted from the oversight of South African authorities, their regulation is effectively outsourced to foreign regulators. This denudes any oversight and or regulatory role that the South African authorities may wish to fulfil in respect of entities.</p>	<p><i>operation arrangements with foreign Authorities have been entered into by the South African Authorities. Authorities are required to assess the foreign regulatory framework, including the foreign jurisdiction’s licensing requirements, rules, regulations and supervision, and must take into account international standards such as the CPSS-IOSCO Principles for Financial Market Infrastructures. The outcome of the applicable regulatory framework should be equivalent to that established by the relevant South African laws in respect of the regulatory objectives that they achieve.</i></p> <p>THE AUSTRALIAN APPROACH</p> <p><i>Part 7.3 of the Australian Corporations Act of 2001 deals with the licensing of CS facilities (i.e. CCPs) in Australia. A CCP operating in Australia must be licensed in Australia, unless it has exempted from Part 7.3 of the Corporations Act from holding a CS facility licence in terms of section 820C. An overseas CCP operator may still be subject to ongoing obligations even after an exemption has been granted.</i></p> <p><i>“820C Exemptions</i></p> <p><i>(1) The Minister may, by publishing a notice in the Gazette, exempt from the operation of this Part a particular clearing and settlement facility or type of clearing and settlement facility.</i></p> <p><i>(2) The Minister may, at any time, by publishing a notice in the Gazette:</i></p> <p><i>(a) impose conditions, or additional conditions, on an exemption; or</i></p> <p><i>(b) vary or revoke the conditions on an exemption; or</i></p> <p><i>(c) revoke an exemption.</i></p>
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In the event of an economic crisis, such as the one experienced in 2008, the consequences arising from this deficiency could be severe.

South Africa was largely insulated from the recent financial crises as a result of the robust risk management policies of JSE Clear and the fact that, in terms of the JSE’s rules, collateral and assets are segregated to client level. This in turn precludes the so called “re-hypothecation” of collateral and the co-mingling of assets of market participants.

For example, client A has concluded a client agreement with authorised user (trading member) M. A posts R 100 000 margin to JSE Clear as collateral for the due performance of its obligations on the derivatives market. Member M is insolvent as a result of large trading losses but all its clients’ margin and assets do not fall within its insolvent estate as a result of the segregation of client assets provided for in the JSE Rules. All the clients of M will be ported to another trading member, M’s positions will be closed out but its clients’ positions, assets and collateral will be unaffected. In addition hereto, all the collateral held is held in South Africa and JSE Clear will have immediate access to margin posted to ensure due performance of a defaulter’s obligations. This will however not be the case in many international jurisdictions where “re-hypothecation” of collateral is permissible and where assets and collateral are not segregated down to client level. In these jurisdictions it is permissible that M may use A’s R 100 000 as collateral for its own obligations (the R 100 000 will be “re-hypothecated”). M’s default will also result in A’s default and clients will not be protected and insulated from the default of trading member M. This will expose the South African financial markets to unknown and unlimited risks from jurisdictions over which the South African regulatory authorities have no control. It is therefore of critical

(3) However, the Minister may only take action under subsection (2) after:

- (a) giving notice, and an opportunity to make submissions on the proposed action, to the operator of each clearing and settlement facility known by the Minister to be covered by the exemption; and
- (b) if the exemption covers a type of clearing and settlement facility—causing a notice to be published in a newspaper or newspapers circulating generally in each State and internal Territory allowing a reasonable time within which the operator of each facility covered by the exemption may make submissions on the proposed action.

This subsection does not apply to the Minister imposing conditions when an exemption is made.”

These proposals are important to ensure level playing fields for global and domestic CCPs, minimise duplication and uncertainty, and reduce opportunities for regulatory arbitrage that would have severe consequences for financial stability and adversely impact the competitiveness of the South African financial markets. The proposed framework enables Authorities to consider applications on a case-by-case basis. For consistency and certainty, Treasury is proposing to amend the exemption provisions under section 6(3)(m).

importance that the South African authorities have direct and effective regulatory oversight over all central counterparties that conduct business in South Africa.

The JSE recognises that the cross border nature of financial markets requires an appropriate supervisory and cooperative regulatory framework should external central counterparties wish to perform functions within South Africa. However removing the requirement of licensing is in the JSE's considered opinion not the appropriate way to achieve this co-operation. If external central counterparties are to fulfil the same duties and functions as local ones, fairness and the stability of the South African financial system requires that the South African authorities themselves regulate the business of these external entities and not abdicate that responsibility to foreign authorities. Regulatory oversight of all market infrastructures operating in South Africa is key to ensuring the stability of the South African financial system.

It is a condition of the licences of local central counterparties that they fulfil certain duties prescribed under the FM Act (see sections 59(2) and (3)). Under the current FM Act, if a local central counterparty fails to fulfil its duties and responsibilities, the Registrar may directly assume responsibility for one or more of these functions and duties (see section 50(4) of the FM Act). Under the proposed amendment to the FM Act there will be no equivalent oversight role for the Registrar in relation to external central counterparties nor will the Registrar have the power to directly assume responsibility for the fulfilment of these important duties and functions.

It may well be that an external central counterparty is subject to a similar regulatory regime in an international jurisdiction but if it is exempted under section 49B, the South African authorities will have no control over the external central counterparty's risk management methodologies. The

authorities will not be able to prescribe the type of collateral and manner in which collateral is held nor will they be able to have immediate access to margin and other collateral held in a foreign jurisdiction in which the external central counterparty is domiciled. It is also unavoidable that assets and collateral that were earmarked to fulfil obligations in the South African markets will be tied up or used to fulfil other obligations as a result of an international crisis.

Because such exemptions are inconsistent with two of the primary objects of the FM Act, it would, in the JSE’s opinion, never be lawful for the Authority to grant an exemption under section 49B(3)(d). On its own terms, that section requires an exemption to be granted only if it would not compromise the objects of the Act. However, permitting an exemption at all is inconsistent with the objects of fairness and ensuring financial stability.

The introduction of an exemption regime that is inconsistent with the objects of the FM Act and that could accordingly never permit a lawful exemption to be issued would be irrational.

If the exemption provisions of section 49B are introduced into the FM Act they would be liable to challenge on the basis of irrationality. The JSE therefore submits that they should be deleted.

Over and above the exemption provisions for external central counterparties, there is also an inconsistency introduced into the FM Act between the treatment of local and external central counterparties.

In terms of the provisions of the FM Act, financial market infrastructures (“**FMI**s”) fulfil licensed duties and functions (Section 10 – exchanges, section 30 CSDs and section 50 clearing houses). FMI’s authorise users, clearing members and participants to provide securities services, as defined, in

		<p>terms of the rules of the FMI and an integral part of the FMI's licensed duties and functions is the supervision and regulation of the securities services provided by these authorised participants.</p> <p>In terms of the general regulatory framework envisaged under the FM Act, it is not permissible for FMIs to provide securities services themselves, <i>inter alia</i> as a result of the insoluble conflicts of interests that it will cause if they do so. The proposed new section 49A(1) however states that an external central counterparty "<i>may provide securities services</i>". This is inconsistent with the provisions applicable to local FMIs.</p>	
ASISA	s1(d) and (j) p.165	<p>The definitions proposed in the Bill are also included in the draft Financial Markets Act Regulations published for comment by National Treasury on 5 June 2015.</p> <p>Having definitions for the same terms in both the Act and Regulations could lead to confusion.</p> <p>Since ASISA has commented on the definitions in the draft Regulations, we propose those definitions are used and our comments in respect of those draft Regulations be taken into account.</p> <p>Proposal: The definitions are either contained in the Financial Markets Act or the Regulations, but not both.</p>	<i>Noted and agree</i>
BASA	1A(9)(a)	<p>Incorrect cross-reference and use of term "<i>code of conduct</i>" as amended in Section 74 (1):</p> <p>"(9) For the purposes of the Financial Sector Regulation Act, the following are regulatory instruments: (a) Directives issued by the Authority under section 6(4)(b)(i)6(4)(a); and (b) a code of <u>conduct standards</u> in terms of section 74;"</p>	<i>Noted and agree</i>

BASA	4(1)(e)	<p>With reference to the amendments to Section 4(1)(e), it is unclear whether a person is permitted to act as a clearing member of a licensed external central counterparty and we propose the following amendment:</p> <p>“(e) act as a clearing member unless authorised by a licensed exchange, a licensed independent clearing house, <i>[or]</i> a licensed central counterparty <u>or a licensed external central counterparty</u>, as the case may be;”</p>	<i>Noted and agree</i>
BASA	5(2)	<p>Proposed amendment to align with the amendments to 5(1)(c) and ensure consistency of language, amend 5(2) as follows:</p> <p>“5(2) An external authorised user, external exchange, external participant, external securities depository, external clearing house, <u>external central counterparty</u>, external clearing member of external trade repository may only provide those securities services or exercise functions or duties, as the case may be, prescribed by the Minister in terms of subsection (1)(c).”</p>	<i>Agree. See proposed revisions in the Bill.</i>
JSE	6	<p>Powers of FSCA</p> <p>If the FSR Bill is enacted, it will amend section 6(3)(k) of the FM Act to provide that the FSCA may issue “guidance notes” and “binding interpretations” on the application and interpretation of the Act.</p> <p>The FSCA is an administrative body; it is not a court of law. And yet, section 6(3)(k) purports to give any interpretation of the FM Act that it issues, the status of a court order because the section provides that its determinations will be binding. This is inconsistent with section 165(2) of the Constitution which entrenches the independence of the courts. Section</p>	<p><i>Comments are noted. Treasury has considered the comments and has obtained Senior Counsel opinion on the Constitutionality of the provisions. It is Treasury’s view, and supported by SC opinion, that the FSR Bill provisions do not offend the independence of the Courts as binding interpretations can still be challenged in a Court of Law. The approach adopted is also consistent with the process set out in the Tax Administration Act.</i></p> <p><i>References to “binding rulings” have nevertheless been removed and the FSR Bill now refers to “interpretation</i></p>

		<p>165(2) provides that the courts are subject only to the Constitution and the law.</p> <p>However, the proposed new section of the FM Act purports to give the FSCA the power to issue binding determinations on the proper interpretation of the FM Act and thereby make the courts subject to the determinations of this administrative body. This is incompatible with the independence of the courts.</p> <p>The JSE respectfully submits that, if enacted, this section would be unconstitutional.</p>	<p><i>rulings” for the purpose clarified in the FSR Bill. The Courts have final say on the interpretation of the Act.</i></p>
BASA	6(3)	<p>Proposed amendment to ensure consistency of language:</p> <p>“(c) must take steps he or she <u>it</u> considers necessary to protect investors in their dealings in relation to securities services or regulated persons;</p> <p>...</p> <p>(e) may, despite the provisions of any law, furnish information acquired by him or her <u>it</u> under this Act to any person charged with the performance of a function under any law, including a supervisory authority;</p> <p>...</p> <p>(l) may take any measures he or she <u>it</u> considers necessary for the proper performance and exercise of his or her <u>its</u> functions, or for the implementation of this Act;”</p>	<p><i>Noted, but not necessary.</i></p>
BASA	6(3)(k)	<p>We note that the FMA is the only financial sector law that was amended to include “binding interpretation” Aligned to our general comment that Section 141 should be deleted from the FSR Bill, the reference to binding interpretation in Section 6(3)(k) should also be deleted.</p>	<p><i>Comments are noted. Treasury has considered the comments and has obtained Senior Counsel opinion on the Constitutionality of the provisions. It is Treasury’s view, and supported by SC opinion, that the FSR Bill provisions do not offend the independence of the Courts as binding interpretations can still be challenged in a Court of Law. The approach adopted is also consistent with the process set out in the Tax Administration Act.</i></p>

			<i>References to “binding rulings” have nevertheless been removed and the FSR Bill now refers to “interpretation rulings” for the purpose clarified in the FSR Bill. The Courts have final say on the interpretation of the Act</i>
BASA	6(6)(a)(ii)	<p>Proposed amendment to ensure consistency of language:</p> <p>“(ii) negotiate agreements with any supervisory authority to coordinate and harmonise the reporting and other obligations of a regulated person, an external exchange, an external clearing house, <u>an external central counterparty</u>, an external central securities depository or its subsidiary or holding company including, but not limited to, circumstances which may indicate systemic risk;”</p>	<i>Section 6(6) was repealed by section 258 of Act 45 of 2013.</i>
BASA	6(6)(b)(i), (ii) and (iii)	<p>“(i) a provision that the registrar <u>Authority</u> may conduct an <u>a</u> <u>supervisory</u> on-site examination or an inspection or investigation of a regulated person, on the request of a supervisory authority, and that the supervisory authority may assist the registrar in such on-site examination or an inspection <u>or investigation</u>;</p> <p>(ii) a provision that the registrar <u>Authority</u> and supervisory authority may share information relating to the financial condition and conduct of a regulated person, an external exchange, an external authorised user, an external clearing house, <u>an external central counterparty</u>, an external clearing member, an external central securities depository or an external participant or its subsidiary or holding company including, but not limited to, circumstances which may indicate systemic risk;</p> <p>(iii) a provision that the registrar <u>Authority</u> or supervisory authority—</p> <p>(aa) be informed of adverse assessments of qualitative aspects of the operations of a regulated person, an external exchange, an external authorised user, an external clearing house, <u>an external central counterparty</u>, an external clearing</p>	<i>Section 6(6) was repealed by section 258 of Act 45 of 2013.</i>

		<p>member, an external central securities depository, an external participant or its subsidiary or holding company including, but not limited to, circumstances which may indicate systemic risk; or</p> <p>(bb) may provide information regarding significant problems that are being experienced within a regulated person, an external exchange, a trade repository, an external authorised user, an external clearing house, <u>an external central counterparty</u>, an external clearing member, an external central securities depository, an external participant or its subsidiary or holding company including, but not limited to, circumstances which may indicate systemic risk;”</p>	
BASA	6A(1)(b), (d) and (e)	The term “ <u>external</u> ” should be inserted before the words “market infrastructure”.	<i>Noted and agree</i>
BASA	6A(2)(b)	<p>It is not clear whether the intention of this subsection is to refer to the international standards provided for in subsection (1)(a) or the joint standards provided for in subsection (1). We propose the following amendment:</p> <p>“(b) assessing the external market infrastructure against the joint<u>international</u> standards referred to in subsection (1)(a);”</p> <p>OR</p> <p>“(b) assessing the external market infrastructure against the joint standards referred to in subsection (1)(a);”</p>	<i>The intention was to refer to joint standards as provided for in subsection (1), however section has been refined</i>
BASA	6A(4)	<p>Section 6A does not provide for “conditions”, consequently, we propose the following amendment:</p> <p>(4) In addition to the requirements in terms of section 6C, the Authority and the Prudential Authority must regularly assess the whether a recognised <u>external</u> market infrastructure with the conditions <u>meets the criteria</u> set out in section 6A.</p>	<i>Agree</i>

BASA	6B	<p>Section 6A does not provide for “conditions”, consequently, we propose the following amendment:</p> <p><i>The Authority and the Prudential Authority may withdraw recognition of an external market infrastructure where the <u>external market infrastructure no longer meets the criteria</u> conditions set out in section 6A are no longer met.</i></p>	<p><i>Sections have been revised to clarify that recognition in terms of this section applies to the Authorities recognising a foreign country as an equivalent jurisdiction.</i></p>
BASA	6C(2)(c) and (e)	<p>The term “<i>regulated entity</i>” is not defined in the FSRB or the consequential amendments and the term is not appropriate in this context, as a recognised external market infrastructure is not “regulated” by the Authority. The term “<i>on-site visit</i>” is also not defined in the FSRB or the consequential amendments. We propose the following amendments:</p> <p><i>“(c) the procedures concerning the coordination of supervisory activities including, where appropriate, for collaboration regarding the timing, scope and role of the authorities with respect to any cross-border on-site visits <u>inspections</u> of a regulated entity <u>recognised external market infrastructure</u>;</i></p> <p>...</p> <p><i>(e) procedures for cooperation, including, where applicable, for discussion of relevant examination reports, for assistance in analysing documents or obtaining information from a regulated entity <u>recognised external market infrastructure</u> and its directors or senior management; and”</i></p>	<p><i>Agree, see revised sections</i></p>
BASA	6C(3)(d) and (g)	<p>The term “<i>regulated entities</i>” is not defined in the FSRB or the consequential amendments and the term is not appropriate in this context, as a recognised external market infrastructure is not “regulated” by the Authority. The terms “<i>internationally-active</i>” and “<i>globally-active</i>” are introduced and although it is not necessary to define these terms, one term should be used consistently. We propose the following amendments:</p>	<p><i>Agree</i></p>

		<p>“(d) cooperate in the day-to-day and routine oversight of internationally active regulated entities <u>globally-active recognised external market infrastructures</u>;</p> <p>...</p> <p>(g) undertake ongoing and ad hoc staff communications regarding globally-active regulated entities <u>recognised external market infrastructures</u> as well as more formal periodic meetings, particularly as new or complex regulatory issues arise.”</p>	
ASISA	s7(c) p.172	<p>The Authority should not have the power to make legislation without following the parliamentary process.</p> <p>Proposal: Delete the word “binding”.</p>	<i>References to “binding rulings” in the FMA have been removed and the FSR Bill now refers to “interpretation rulings”</i>
ASISA	s8; s6A(3) p.174	<p>We submit that the current wording allows the regulators to inform the applicant of a decision within six months but does not oblige the regulators to conclude the application within six months. This could lead to a drawn out application process, which is not ideal.</p> <p>Proposal: To ensure that applications are concluded finally within six months, the following wording is proposed:</p> <p>“(3) The Authority must <u>conclude the application for recognition by notifying</u> notify the external market infrastructure that has applied for recognition of <u>their</u> its decision, within six months of receiving the application.”</p>	<i>See revised sections</i>
BASA	33(1) p.180	<p>We note that the numbering of subparagraph is numerical not alphabetical. The proposed amendment should read:</p> <p>“17. The substitution, in section 33(1), for the words preceding paragraph (a) <u>(i)</u> of—”</p>	<i>Agree</i>

STRATE	33(1)	<p>The proposed amendment of section 33(1) is intended to clarify that certificated securities may be converted to uncertificated securities at the election of either the issuer or the holder of the securities. The proposed wording should therefore be further amended as shown, so as to provide sufficient clarity. This clarification is important to address the industry need for efficient and cost effective bulk dematerialisation of share certificates.</p> <p>The need for bulk dematerialisation of numerous share certificates has arisen as a result of the Financial Services Board’s policy drive for the protection of investors e.g. holders of BEE securities in issuers BEE schemes, through the requirement that such shares should be traded on licensed exchanges. The bulk dematerialisation (of e.g. about 100 000 share certificates for some issuers) is required to facilitate efficient and cost effective compliance with the requirements of the Financial Services Board, the central securities depository, and the applicable exchange.</p> <p>Delete proposed inserted wording below:</p> <p>“An issuer may convert certificated securities to uncertificated securities, and may, subject to subsection (2), issue uncertificated securities despite any contrary provision in –”</p> <p>Amend existing wording of section 33(1) as per below:</p> <p><i>“Certificated securities may be converted to uncertificated securities <u>by an issuer, at the election of the issuer or the holder of certificated securities</u>, and an issuer may, subject to issue uncertificated securities despite any contrary provision in –”</i></p>	<i>Agree</i>
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BASA	47(2), (3) and 4(a)	<p>With reference to our general comment 2 above, we are of the opinion that the consequential amendments regarding the introduction of a central counterparty have not been consistently applied. We propose the following amendments, in addition to the consequential amendments:</p> <p>“CHAPTER V CLEARING HOUSE AND CENTRAL COUNTERPARTY Licensing of clearing house and central counterparty Application for clearing house licence and central counterparty licence</p> <p><i>47 (1) A clearing house must be licensed under section 49.</i></p> <p>...</p> <p><i>(2) A juristic person may apply to the registrar Authority for a clearing house licence or a central counterparty licence.</i></p> <p><i>(3) An application for a clearing house licence or a central counterparty licence must—</i></p> <p>...</p> <p><i>(4) (a) The registrar must publish a notice of an application for a clearing house licence or a central counterparty licence in two national newspapers at the expense of the applicant and on the official website.”</i></p>	<i>Agree</i>
BASA	48(1)(b), (e), (f), and (g) 48(2)(a) and (b)	<p>With reference to our general comment 2 above, we are of the opinion that the consequential amendments regarding the introduction of a central counterparty have not been consistently applied. We propose the following amendments, in addition to the consequential amendments:</p> <p>“Requirements applicable to applicant for clearing house licence and licensed clearing house and an applicant for a central counterparty licence and a licensed central counterparty</p> <p><i>48. (1)An applicant for a clearing house licence and a licensed clearing house and an applicant for a central</i></p>	<i>Agree</i>

		<p><u>counterparty licence and a licensed central counterparty must—</u></p> <p>...</p> <p>(b) governance arrangements that are clear and transparent, promote the safety and efficiency of the clearing house or <u>central counterparty</u>, and support the stability of the broader financial system, other relevant public interest considerations, and the objectives of relevant stakeholders;</p> <p>...</p> <p>(e) implement an effective and reliable infrastructure to facilitate the clearing of securities cleared by the clearing house <u>or central counterparty</u>;</p> <p>(f) implement effective arrangements to manage the material risks associated with the operation of a clearing house <u>or central counterparty</u>;</p> <p>(g) have made arrangements for security and back-up procedures to ensure the integrity of the records of transactions cleared, settled or cleared and settled through the clearing house <u>or central counterparty</u>; and</p> <p>...</p> <p>(2) The registrar may—</p> <p>(a) require an applicant, or a licensed clearing house <u>or a licensed central counterparty</u> to furnish such additional information, or require such information to be verified, as the registrar may deem necessary;</p> <p>(b) take into consideration any other information regarding the applicant, or a licensed clearing house or <u>a licensed central counterparty</u>, derived from whatever source, including any other supervisory authority, if such information is disclosed to the applicant or a licensed clearing house and the latter is given a reasonable opportunity to respond thereto; and⁷</p>	
LCH.Clearnet Ltd	49B	We note that the proposed amendments to section 49B of the Financial Markets Act (FMA) envisage that an external	Comments are noted. The policy proposal was to intentionally not extend the insolvency protections to an

central counterparty will be able to apply for an exemption from the requirement to be licensed under Section 49A of the FMA in order to be able to offer clearing services in South Africa. In addition, although not the subject of the current consultation, we also note that there are existing exemption provisions available to the registrar within the Financial Markets Act 19 2012 (Section 6(3)(m)). LCH.C Ltd is considering applying for a license following the enactment of Section 49A (although, for the avoidance of doubt, any such application remains subject to a full internal review and the completion of all necessary governance processes. However, the prospect of obtaining an exemption ahead of the completion of any license application process is of considerable interest as it may allow LCH.C Ltd to begin offering direct clearing services to within South Africa to South Africa based banks sooner.

However, the proposed amendments to the definition of “market infrastructure” in section 35A(1) of the Insolvency Act 1936 (IA) will mean the protections of the IA will only be extended to licensed external central counterparties and not an external central counterparty or other entity who has been granted an exemption. An important element of a CCP’s ability to offer clearing services in any particular jurisdiction is the protections granted to it that prevent actions it may take, particularly in the operation of its’ default rules, from being set aside under otherwise applicable insolvency laws. LCH.C Ltd is unable to operate in a jurisdiction where such protections are not granted.

The fact that an external central counterparty granted an exemption would not benefit from the protections which are otherwise afforded to licensed clearing houses would therefore prevent LCH.C Ltd from seeking to operate on this basis. LCH.C Ltd would expect the absence of protection to act as a disincentive for other CCPs to seek to obtain authorisation in this manner.

external CCP that is exempt from having to be licensed. Section 49B has been deleted, however the Authority may in terms of section 6(3)(m) of the Act exempt an external CCP from certain provisions of the FMA.

As the issues raised are subject to ongoing discussions with the Regulators, Treasury would encourage LCH.C Ltd to continue to engage with the South African Regulators regarding its consideration of applying for a license in terms of section 49A.

		<p>LCH.C Ltd would therefore ask that consideration be given to including external central counterparties who are granted an exemption under Section 49B (or Section 6(3)(m) of the current Act) in the definition of market infrastructure in section 35A(1) of the IA. We consider that this amendment is necessary in order to make an exemption under Section 49B (or Section 6(3)(m)) something that LCH.C Ltd as an external central counterparty could consider operating under in South Africa. In addition, LCH.C Ltd believes that being able to operate under an exemption ahead of the completion of a formal license application would accelerate their ability, as an external central counterparty, to offer direct clearing services within South Africa to South Africa based banks which would help facilitate the implementation of the regulatory reforms for the OTC derivatives market.</p>	
BASA	50(4)(b)	<p>With reference to our general comment 2 above, we are of the opinion that the consequential amendments regarding the introduction of a central counterparty have not been consistently applied. We propose the following amendments, in addition to the consequential amendments:</p> <p><i>“(4) (a) The registrar may assume responsibility for one or more of the regulatory and supervisory functions referred to in subsections (2) and (3) if the registrar considers it necessary in order to achieve the objects of this Act referred to in section 2.</i></p> <p><i>(b) The registrar must, before assuming responsibility as contemplated in paragraph (a)—</i></p> <p><i>(i) inform the clearing house <u>or central counterparty</u> of the registrar’s intention to assume responsibility;</i></p> <p><i>(ii) give the clearing house <u>or central counterparty</u> the reasons for the intended assumption; and</i></p> <p><i>(iii) call upon the clearing house <u>or central counterparty</u> to show cause within a period specified by the registrar</i></p>	<i>Agree</i>

		<i>why responsibility should not be assumed by the registrar.”</i>	
JSE	s51: Repealing of section 85 of the FMA discontinuing the Directorate of Market Abuse	<p>Repeal of Section 85 dealing with the Directorate of Market Abuse</p> <p>One of the significant (and highly problematic) proposed amendments to the FM Act is the discontinuation (and dissolution) of the Directorate of Market Abuse (“DMA”) through the repeal of section 85 of that Act. This raises concerns for the JSE in our role as a market regulator, market operator and a stakeholder in the fight against market abuse. We previously raised these concerns in our comments on the draft FSR Bill published in December 2014 but they have unfortunately not been taken on board. The rationale for the repeal of section 85 appears to be reflected in National Treasury’s response to the JSE’s previous comments as follows:</p> <p><i>“In the interests of harmonisation and rationalization of administrative processes and procedures across the financial sector, the DMA has been replaced by the FSCA directly. The FSR Bill does allow however for the FSCA to create administrative action committees. Such administrative action committee/s will allow for a more flexible approach that provides the same set of powers for all administrative actions by the FSCA, and not just those that relate to the FMA. A specialist DMA type panel can therefore be established in the new regime. It does not need to be specifically named as such.”</i></p> <p>From the above comment it appears that National Treasury is supportive of the establishment of the equivalent of the DMA by the Financial Sector Conduct Authority (“FSCA”) but that the establishment of such a committee would be in terms of the administrative action committee provisions in the FSR Bill.</p>	<p><i>Agreed. Concerns regarding the disparity between the current DMA that is not an administrative body vis-à-vis an administrative action committee, in terms of exercising its powers have been noted. It is proposed that the DMA is retained, subject to amendments necessary to align to the FSR Bill, and including the process of appointment which the Authority shall be responsible for, rather than the Minister.</i></p>

It is common cause that South Africa is highly regarded for the regulation of its securities markets. Market abuse is probably the most visible form of market misconduct in terms of the impact that it has on investors' perceptions of the integrity of a market. Investor confidence is built on a combination of factors but local and international investors' perceptions of the extent of market abuse in a market and the effectiveness of anti-market abuse regulation and enforcement is one of the key pillars in building that confidence. The effectiveness of the regulatory structures in South Africa in combatting market abuse is one of the big success stories in financial sector regulation in this country. The DMA has contributed significantly to that success as it brings together individuals with valuable skills and knowledge from a variety of relevant disciplines to provide input on important decisions during the enforcement process.

In exercising certain powers of the FSB under the FM Act, the DMA is not an administrative body and it does not make enforcement decisions. It considers matters that have been brought to the attention of the FSB's Department of Market Abuse and the results of the work undertaken by that department in relation to those matters, and through the collective knowledge and experience of its members, it determines whether a matter merits further investigation, provides guidance on aspects of the investigation and ultimately determines whether a matter should be referred for enforcement action, either administrative or criminal.

Under the FSR Bill, the FSCA will have extensive enforcement powers, including the power to investigate market abuse. The necessary powers to conduct investigations and prosecute market abuse will therefore continue to exist. However, the DMA currently plays an important and valuable role that supports the investigative process and essentially sits between the investigation and the

enforcement action and it is that role that will be lost if section 85 of the FM Act is repealed.

A market conduct regulator typically has a good understanding of the market abuse provisions that it is enforcing and possesses effective investigative skills. However, it would not necessarily possess the insight into the trading strategies and business activities of the entities from which market abuse may originate. Furthermore, whilst a market conduct regulator will naturally possess legal skills it can often benefit from the insights of legal professionals who are steeped in some of the legal complexities associated with the prosecution of offences such as market abuse and who can provide useful input into the scope and focus of investigations and the decisions on whether or not to initiate enforcement action. The DMA has brought together these skills and insights in a very effective manner over the past 15 years. This combination of skills has enabled it to make a significant contribution to the effectiveness of the enforcement structures in South Africa and the fight against market abuse.

This unique role will not be able to be fulfilled through the administrative action committee provisions in the FSR Bill.

National Treasury's comment above appears to propose that a specialist DMA-type committee can be established in terms of the broad administrative action provisions of the FSR Bill but that the legislation does not have to specifically name (implying "create") such a committee. However, it is clear from the provisions of section 87 of the Bill dealing with the functions and composition of an administrative action committee that a committee established in terms of that section is intended to be an administrative body either recommending specific administrative action to be taken by the FSCA or, through delegated powers, taking administrative enforcement action on behalf of the FSCA.

These administrative action committees are therefore essentially enforcement committees.

In order to either recommend what administrative action should be taken or to take such action itself, an administrative action committee would need to consider both the administrative and legal issues to make a finding. It is for this reason that the composition of an administrative action committee must, in terms of section

87(3) of the Bill, include a retired judge or an advocate or an attorney with at least ten years' experience. The DMA has never fulfilled this function and therefore the provisions of section 87 of the Bill will not enable the establishment of a specialist committee equivalent to the DMA.

Market abuse is a unique issue that requires and has benefited from a unique approach. It is not a subject that pertains to a particular regulated industry as is the case with other financial services legislation. It is an issue of conduct that spans the activities of issuers of securities and investors from various industries as well as investors who are not regulated by any other legislation in relation to their investment activities (such as retail investors). Unlike most other financial sector legislation it is not about the services or the protection provided by a regulated entity to its customers or investors; it is about the impact that the actions of participants in a market can have on each other and on the confidence that market participants (both local and foreign) have in the integrity of the South African financial markets. It is for this reason that an approach that simply seeks to "*harmonise and rationalise processes*" across the entire financial sector is not suited to the unique challenges that we face in combatting market abuse.

The skills, experience and knowledge of individuals who collectively have insight into, and an understanding of, the activities and objectives of the numerous issuers and

investors participating in the financial markets and who understand the legal complexities of applying market abuse legislation has proven to be extremely valuable for the past 15 years in promoting the objectives of the FM Act and supporting the good work of the FSB. Harnessing the valuable contribution that those individuals can make during the enforcement process requires the law to specifically recognise the function that a committee made up of those individuals should perform. This cannot be achieved through legislation that makes broad provision for administrative action structures that can be applied uniformly to all matters that fall within the regulatory jurisdiction of the FSCA.

If the intention behind the creation of the administrative action committees is to retain the existing structures (or the equivalent thereof) that have proven to be successful in combatting market abuse but to provide the FSCA with greater flexibility in achieving the objectives of those structures then this can be achieved through appropriate amendments to the FM Act that provide for the establishment and operation of a market abuse committee with the appropriate functions but which provide greater flexibility to the FSCA in relation to matters such as the composition and activities of the committee. These operational matters can be left to the FSCA to manage. The JSE would support such an approach.

Harmonising and rationalising existing processes by discontinuing the DMA should not come at the expense of weakening the structures that have proven to be effective in the fight against market abuse. The JSE therefore submits that the FM Act should continue to make provision for the establishment of a specialist committee such as the DMA but that the FSCA be granted the powers to determine the composition and procedures of the committee.

BASA	74(2)	<p>Proposed amendment to ensure consistency with the amendments to 74(1)</p> <p>“(2)A code of conduct <u>conduct standard</u> is binding on authorised users, participants or clearing members of independent clearing houses <u>or central counterparties</u> or any other regulated person in respect of whom the code of conduct <u>conduct standard</u> was prescribed, as the case may be, and on their officers and employees and clients.”</p>	<i>Agree</i>
BASA	75(1), (2) and (3)	<p>Proposed amendment to ensure consistency with the amendments to 74(1)</p> <p>“75.(1) A code of conduct <u>conduct standard</u> for authorised users, participants or clearing members of independent clearing houses <u>or central counterparties</u> must be based on the principle that—</p> <p>(a) an authorised user, participant or clearing member of an independent clearing house or <u>central counterparty</u> must—</p> <p>...</p> <p>(2) A code of conduct <u>conduct standard</u> for regulated persons, other than the regulated persons mentioned in subsection (1), must be based on the principle that the regulated person must—</p> <p>...</p> <p>(3) A code of conduct <u>conduct standard</u> may provide for—”</p>	<i>Agree</i>
BASA	General: OTC Provisions	<p>We are supportive of the policy that provisions relating to the OTC derivative framework are provided for in primary legislation rather than subordinate legislation</p>	<i>Noted and agree</i>

Annexure

Twin Peaks Reform Process – Summary of consultation

The below provides a summary list of the process of consultation related to the Twin Peaks regulatory reform programme as first approved by Cabinet in 2011. It does not include bi-lateral (on-going) engagements between the National Treasury and various stakeholders, nor the engagements undertaken by the relevant regulators (including the SARB and FSB)

Date	Type of consultation	Audience
Discussion Document: A Safer Financial Sector to Serve South Africa better		
23 February 2011	Discussion document published	Public (invited to make comment)
15 March 2011	Press conference	Media and audience
Banking sector engagements		
27 August 2012	Meeting with banking CEOs and Minister of Finance	Banking industry
19 October 2012	Meeting with banking representatives and Minister of Finance	Banking industry
1 November 2012	Joint statement by BASA, Minister of Finance, on market conduct in banking	Public
Roadmap: Implementing a Twin Peaks Model in South Africa		
1 February 2013	Roadmap published	Public (invited to make comment)

14 March 2013	Workshop on implementing a Twin Peaks model in SA	Public
Financial Sector Regulation Bill: Draft One		
11 December 2013	FSR Bill published	Public (invited to make comment)
11 December 2013	Government Gazette: FSR Bill published for public comment	Public (invited to make comment)
28 January 2014	Public workshop	Public – workshop in Pta
29 January 2014	Public workshop	Public – workshop in Jhb
3 February 2014	Public workshop	Public – workshop in CPT
7 February 2014	Public comments submitted (24 submissions made)	Public
10 September 2014	Presentation to SAIFM	Financial Markets Practitioners
3 November 2014	Presentation to CMS	Council for Medical Schemes
10 November 2014	Presentation to Insurance Regulatory Seminar	Insurance Industry
Financial Sector Regulation Bill: Draft Two		
11 December 2014	FSR Bill published	Public (invited to make comment)
30 January 2015	Public workshop	Public – workshop in Pta
3 February 2015	Public workshop	Public – workshop in Jhb
9 February 2015	Public workshop	Public – workshop in CPT
5 February 2015	Presentation to BASA Task Group on Twin Peaks	Banking industry representatives

12 February 2015	Presentation at FSB regulatory strategy seminar	Cross-sector industry representatives
13 February 2015	Presentation to JSE	JSE
19 February 2015	Presentation to MicroFinance SA	Microfinance industry representatives
25 February 2015	Presentation to SAIA	Insurance industry representatives
2 March 2015	Public comments submitted (26 submissions made)	Public
12 March 2015	Presentation at the Risk and Return SA Conference	Risk management practitioners
16 April 2015	Convening of NEDLAC Task Team on Twin Peaks	Business (including retail and motor industry representatives); labour
6 May 2015	Workshop on Ombuds Schemes under Twin Peaks	Ombud scheme representatives
13 May 2015	NEDLAC Task Team Meeting on Twin Peaks	Business (including retail and motor industry representatives); labour
21 May 2015	Presentation to Compliance Officers Association Annual Conference	Industry compliance officers
29 May 2015	NEDLAC Task Team Meeting on Twin Peaks	Business (including retail and motor industry representatives); labour
2 June 2015	Presentation to Standing Committee on Finance on Twin Peaks reform	Public
24 June 2015	Presentation to FPI Annual Convention	Financial planners
30 June 2015	NEDLAC Task Team Meeting on Twin Peaks	Business (including retail and motor industry representatives); labour
15 July 2015	NEDLAC Task Team Meeting on Twin Peaks	Business (including retail and motor industry representatives); labour
11 August 2015	Presentation to Standing Committee on Finance on FSR Bill	Public
3 September 2015	Presentation to Financial Sector Campaign Coalition (SACP)	Civil society
6 October 2015	NEDLAC Task Team Meeting on Twin Peaks	Business (including retail and motor industry representatives); labour

Response and Explanatory Document accompanying the second draft of the FSR Bill		
11 December 2014	Document published	Public
Comments matrix		
11 December 2014	Matrix published with detailed responses to comments submitted on draft one of the Bill (233pgs)	Public
Financial Sector Regulation Bill: Draft three (tabled in Parliament)		
27 October 2015	Tabled in Parliament	Public (invited to make comment)
6 November 2015	Presentation to Standing Committee on Finance	Public
19 November 2015	Presentation to Nedbank Wealth Cluster Compliance Indaba	Banking industry
21 November 2015	Presentation by Minister of Finance to SACP Augmented Central Committee Meeting	Civil society
24 November 2015	Public hearings on FSR Bill in Parliament	Public
25 November 2015	Public hearings on FSR Bill in Parliament	Public
27 November 2015	Presentation to Financial Sector Campaign Coalition (SACP)	Civil society
10 February 2016	Public hearings on FSR Bill in Parliament	Public
16 February 2016	Presentation to Standing Committee on Finance on FSR Bill	Public
3 March 2016	Meeting with Voluntary Ombuds Association on FSR Bill provisions	Financial sector ombud scheme
10 March 2016	Meeting with statutory ombuds on FSR Bill provisions	Financial sector ombud scheme

3 May 2016	Public hearings on FSR Bill in Parliament	Public
Comments matrix		
27 October 2015	Matrix published with detailed responses to comments submitted on draft two of the Bill (337 pgs)	