Response document supporting the revised Conduct of Financial Institutions Bill

September 2020

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1. Summary of COFI Bill development process to date

The first draft of the Conduct of Financial Institutions (COFI) Bill was published for public comment by the National Treasury in December 2018. The draft was informed by inputs from a Technical Expert Panel that the National Treasury convened at the beginning of 2018. The December 2018 Bill was accompanied by an Explanatory Policy Paper.[1]

During the comment period (11 Dec 2018 – 1 April 2019), the National Treasury hosted a series of public workshops to support the submission of comments on the Bill. This included the following:

- 22 February 2019 Public workshop – Pretoria
- 6 March 2019 Media workshop
- 11 March 2019 Public workshop – Cape Town

At the close of the comment period, close to 800 pages of comments were received, including from, but not limited to, the following stakeholders:

	Organisation
1.	27four Investment Managers
2.	Actuarial Society of South Africa (ASSA)
3.	AIG
4.	Aon South Africa
5.	Association for Savings and Investment South Africa (ASISA)
6.	Association of Black Securities & Investment Professionals (ABSIP)
7.	Baillie Gifford & Co
8.	Banking Association of South Africa (BASA)
9.	Board of Healthcare Funders of Southern Africa
10.	Brilliance in Business
11.	Clientele Group
12.	Commercial Independent Bureaux Association (CIBA)

[1] Documents available at www.treasury.gov.za/twinpeaks

13.	Consumer Goods Council of South Africa
14.	Deloitte
15.	Etude Risk Management
16.	FAIS Ombud
17.	Financial Intermediaries Association of Southern Africa (FIA)
18.	Financial Planners Institute (FPI)
19.	Free Market Foundation (2 submissions)
20.	Guardrisk Group
21.	Innovation Group
22.	Institute of Retirement Funds South Africa (IRF)
23.	Independent Regulatory Board for Auditors (IRBA)
24.	Johannesburg Stock Exchange (JSE)
25.	Large Non-Bank Lenders Association
26.	Lloyd's South Africa
27.	Maitland
28.	MMI Holdings
29.	Moody's Investors Service
30.	Moonstone Compliance
31.	National Black Consumer Council
32.	Norton Rose Fulbright
33.	Payments Association of South Africa (PASA)
34.	Private individual
35.	Private analyst
36.	PSG
37.	RisCura

38.	Road Accident Fund (RAF)
39.	South African Insurance Association (SAIA)
40.	South African Institute of Chartered Accountants (SAICA)
41.	SASRIA
42.	South African Institute of Stockbrokers
43.	South African Underwriting Managers Association (SAUMA)
44.	Southern African Venture Capital and Private Equity Association (SAVCA)
45.	Strate
46.	Task Team comprising various associations in the funeral services industry
47.	Telesure
48.	The Foschini Group (TFG)
49.	The Unlimited

Comments were also submitted by regulators such as the Financial Sector Conduct Authority (FSCA), the Prudential Authority (PA), the South African Reserve Bank (SARB), and the Council for Medical Schemes (CMS).

Bi-lateral engagements were held over the course of 2019 between the National Treasury and various commentators to further discuss comments submitted.

The 2018 Explanatory Policy Paper raised a number of specific issues in the COFI Bill requiring further consideration and development. The comment process allowed for issues to be more fully considered and the Bill to be refined accordingly.

The process to revise the COFI Bill established the following structures, led by the National Treasury and with representation from the FSCA, PA, and SARB:

- Technical teams to consider some of the key technical areas requiring refinement
- A Policy Working Group to consider policy-related comments and issues for resolution
- A Drafting Working Group to manage changes to the drafting of the Bill
- The COFI Bill Committee as a governance structure to discuss and agree on proposals made through the technical teams, policy and drafting working groups.

This Response Document serves to outline the key changes made to the COFI Bill in response to comments received and engagements held. The document addresses:

- Key changes made from a design and policy perspective
- Changes made in relation to specific technical matters

- Matters under consideration (in particular, crypto-asset regulation).

This document supports the refined draft of the COFI Bill published for a second round of public comment.

2. Key changes made in response to overarching design/policy matters

Commentators submitted inputs suggesting refinements or amendments to the manner in which key design and/or policy matters were addressed in the first draft of the COFI Bill. The below summarises the main issues raised and explains how these have been addressed in the latest draft of the COFI Bill.

2.1. Application of the COFI Bill in relation to other legislation

In introducing a new legislative framework for the financial sector, the COFI Bill needs to appropriately interface with existing legislation that applies to the sector. This will ensure clarity and minimise regulatory inconsistencies for financial institutions that are subject to requirements under both the COFI Act (once enacted) and other legislation.

Key changes:
In response to comments and engagements that flagged potential inconsistencies and ambiguities with existing laws, as well as to ensure an overall stronger customer protection framework, the revised COFI Bill has proposed consequential amendments as follows:

- **Financial Sector Regulation (FSR) Act, No. 9 of 2017:** Definitions of financial products and financial services in the FSR Act are aligned with the COFI Bill licensing schedule; supporting transformation is made an explicit function of the FSCA; the FSCA is further enabled to apply proportionality in the performance of its functions to support market development and transformation; improved coordination measures with the SARB especially in relation to payment services and services related to foreign exchange; improved coordination measures with other regulators of financial institutions like the National Credit Regulator and Council for Debt Collectors; strengthened licensing provisions; strengthened and refined conduct standard setting provisions; strengthened enforcement provisions; enabling equivalence framework provisions; and consolidated recovery and exit provisions for non-systemically important financial institutions (non-SIFIs).
- **Pension Funds Act, No. 24 of 1956 (Pension Funds Act):** The Act is retained to provide a framework to establish retirement funds and address matters otherwise not dealt with under the COFI Bill framework. Over time certain such matters may become the responsibility of the PA, as envisaged by the FSR Act. Amendments to the Act improve alignment with the COFI Bill and introduce a centralised unclaimed benefits fund. Other technical refinements are also made.
- **Financial Markets Act (FMA), No. 19 of 2012:** Improved alignment between the FMA and the COFI Bill, and also alignment between the FMA and certain consequential amendments made to the FSR Act (notably, in relation to recovery and exit from the financial sector).
- **Medical Schemes Act, No. 131 of 1998:** The repeal of the Financial Institution (Protection of Funds) Act, No. 28 of 2001 (Protection of Funds Act) through the COFI Bill

requires powers to be preserved for the Council of Medical Schemes in relation to inspections and curatorships of medical schemes.

- **Collective Investment Schemes Control Act, No. 45 of 2002:** The Act has been retained to provide a framework to establish the schemes and address matters otherwise not dealt with under the COFI Bill framework. Over time certain such matters may become the responsibility of the PA, as envisaged by the FSR Act. Amendments to the Act improve alignment between laws. Other technical refinements are also made. Amendments also promote alignment with consequential amendments to the FSR Act in respect of recovery and exit from the financial sector.
- **Insurance Act, No. 9 of 2019:** Consequential amendments are made to this Act as necessitated by the repeal of the Protection of Funds Act.
- **Co-operatives Act, No.14 of 2005:** Amendments are made in order to facilitate the migration of friendly societies from the Friendly Societies Act, No. 25 of 1956 to become co-operatives registered under the Co-operatives Act.

All of these revisions are aimed at overall promoting the more appropriate regulation of the conduct of financial institutions, in line with the framework established by the COFI Bill. Certain of these aspects are dealt with more fully below.

For the sake of clarity, it is confirmed that the following laws will be repealed:

- Long-term Insurance Act, No. 52 of 1998
- Short-term Insurance Act, No. 53 of 1998
- Protection of Funds Act
- Financial Advisory and Intermediary Services Act, No. 37 of 2002 (FAIS Act) (except for part I of Chapter VI providing for the Ombud for financial services providers, and definitions in section 1(1))
- Credit Ratings Services Act, No. 24 of 2012
- Friendly Societies Act.

2.2. Refined approach to conduct standards

The first draft of the COFI Bill contained enabling provisions for making conduct standards in chapters 2, 4 – 10, and chapter 12. Comments noted that this provided a great level of detail in the Bill, which could be to the detriment of the stated policy aim of creating principle-based and enabling legislative frameworks. There was also concern regarding duplication of requirements across chapters. Finally, comments noted that the approach may also create unintended duplication and uncertainty when read together with the conduct standard provisions in the FSR Act.

Key change: The detailed enabling conduct standard clauses have been removed from each chapter of the revised COFI Bill. The COFI Bill now contains an enabling provision allowing the FSCA to set conduct standards on the range of matters provided for in the FSR Act, which matters are slightly expanded. Through consequential amendments, the FSR Act will be amended to refine these enabling provisions (read clause 67 of the revised Bill alongside proposed amendments to clauses 106 and 108 of the FSR Act).

The intended effect of this approach is to ensure that there is better alignment between the COFI Bill and the FSR Act, to address the duplication of requirements. In practice, the FSCA will issue conduct standards under the COFI Act, on the matters provided for in the FSR Act, and can issue

joint standards with the PA and SARB. It is reiterated that the conduct standard clauses should be seen as enabling rather than prescriptive. It is envisaged that the overall regulatory framework will be a combination of principles and more granular rules, with the level of regulatory protection afforded determined by "need" based on the specific conduct risk identified.

2.3. Refined approach to licensing

The 2018 draft of the COFI Bill included a chapter on licensing, which was to be read together with Schedule 2 (licensed activities). Both the licensing chapter and the Schedule of licensed activities have been revised to address concerns raised.

It is noted that the FSCA plays an important gatekeeper function through licensing.

The licensing process serves as gatekeeper for keeping potentially rogue financial institutions out of the financial system in the first instance and removing unfit institutions when necessary. Looking for the right "red-flags" upfront supports an effective gate-keeping function. Licensing also sets the appropriate operational and governance standards to drive effective delivery and sustainability. This can mean denying access into the system in total, or where allowing access, implementing the right monitoring mechanisms by the FSCA so that shortcomings by the financial institution are corrected.

2.3.1. **Licensing chapter:** Through comments submitted, as well as in bilateral engagements, it was recognised that there was potential for legislative ambiguity and uncertainty in the same or similar licensing provisions being housed in both the COFI Bill and FSR Act. This is particularly so as the FSR Act is intended to be regulator-facing. There was also a need to ensure alignment as far as possible between licensing undertaken by the FSCA and its twin regulator, the PA.

Key change: The licensing chapter has been significantly shortened in the COFI Bill. Key enabling provisions have been proposed for inclusion in the FSR Act licensing chapter (see sections 111 to 113, 115, 116(2), 119(4), 126 and 127 of the FSR Act) through consequential amendments. Provisions have been expanded and strengthened to endeavor to provide for a more comprehensive licensing framework for the Twin Peaks regulatory authorities. The intended effect of this approach is that an entity will require a licence issued under the COFI Act, but the provisions that set out the framework for licensing are those in the FSR Act. This is similar to the approach proposed for the making of conduct standards.

2.3.2. **Licensing schedule**: Many comments submitted on the licensing schedule related to technical definitions of activities proposed to be licensed. Extensive engagement was held to consider relevant additions to the list of activities. Comments also questioned the interplay between the schedule and relevant legislation applicable to entities performing those activities.

Key change: The licensing schedule is now Schedule 1 of the Bill. The list of licensed activities has been refined; the amendments are discussed in detail in this document in the sections addressing technical matters. The Schedule now contains a column indicating the chapters of the Bill that will apply to each licensed activity. Furthermore, the Schedule

indicates the activities which will form the basis of a revised definition of financial product and financial services in the FSR Act. Through consequential amendments, the definitions of “financial product” and “financial service” in sections 2 and 3 of the FSR Act, respectively, are aligned with the activity schedule.

2.4. Rationalisation of and amendments to governance requirements

Chapter 3 of the first draft of the COFI Bill addressed culture and governance requirements. The main concerns raised in relation to this chapter were that provisions may be too detailed; may create unduly burdensome requirements in primary law; and may result in duplication with prudential requirements of the PA.

Key changes: the revised chapter (Chapter 4: Culture and Governance) now makes reference to governance ***arrangements***, instead of the previous wording which required a governance-related ***policy.*** Together with this change, provisions have been streamlined, so the chapter now provides more appropriate high-level requirements in primary law. More detailed requirements for governance arrangements may be set through subordinate legislation.

The chapter has also been refined to better align to other relevant primary legislation. In particular, the PA and FSCA considered the provisions of the chapter to ensure that it allows for the setting and supervising of joint governance requirements by the regulators without duplications and inconsistencies; this will be done practically through the setting of Joint Standards.

The principles related to culture and governance now include the requirement for licensed financial institutions to conduct their business in a manner that enhances and supports the efficiency and integrity of financial markets (clause 17(1)(b)), and this efficiency and integrity outcome is similarly embedded across the chapter. This is because culture and governance practices pertaining to a financial institution’s conduct have a dual impact on customer and the market outcomes. In other words, culture and governance practices will materially impact whether the entity treats its customers fairly and whether it operates fairly and with integrity in the markets. The overall approach to financial markets is set out in section 7 of this document.

The revised Bill is further informed by recommendations made by international standard setting bodies and best practice, by putting added emphasis on “culture” (see for example clauses 17(2)(c) and 18), providing for the removing of “rolling bad apples” (clause 19(2)(d)), and giving greater clarity on a senior management regime. On this latter aspect, the definition of “control function” now includes the senior management function. This implies that governance requirements applicable to control functions in the COFI Bill are applicable to senior managers. It is envisaged that a full senior management regime will be implemented through conduct standards in line with the Markets in Financial Instruments Directive (MiFiD) and UK approaches, which identifies critical senior management roles within an organisation and imposes requirements thereon.

2.5. Consolidation of chapters

Chapters 4 and 5 in the December 2018 version of the Bill, which addressed financial products and services, have been significantly streamlined and combined into a single chapter - Chapter 5 in the revised draft of the Bill.

Chapter 7 in the December 2018 draft of the Bill – which addressed distribution, advice, and discretionary investment management – has been removed. It is envisaged that much of the detail that was included in that chapter will be dealt with in conduct standards. Some of the principles contained in the former Chapter 7 have been incorporated into Chapter 5 in the revised draft of the Bill.

Chapter 11 of the December 2018 draft Bill, which addressed remedial action for financial customers, is not included in the revised draft Bill, as the matters will now be addressed through consequential amendments to strengthen relevant provisions in the FSR Act.

The overall approach is that overarching principle-type requirements that apply to all categories of activities and financial institutions are provided for in the Bill. The FSCA should, to the extent possible, rely on the overarching principle-based requirements contained in the COFI Bill and supervise and enforce such principles on a proportionate basis in order to ensure more consistent outcomes across the sector. However, it is acknowledged that more detailed requirements in conduct standards will likely be necessary to support the overarching principles in certain circumstances, including where such detailed requirements are necessary in the context of particular activities, or to ensure alignment with international standards or to address market failures and persistent abusive practices.

2.6. Application to small enterprises

In designing a proportionate approach to legislation, the first draft of the COFI Bill proposed exempting small enterprises licensed under the COFI Bill from certain requirements of the Bill. This included exemption from the previous governance policy requirements. Concern was raised that this would result in unlevel playing fields and may unintentionally result in poor customer outcomes.

Key change: In reviewing the Bill in line with concerns raised, it was noted that small enterprises were only referenced in the Bill in relation to the governance policy requirements. Exemptions were not needed for small enterprises in the majority of the Bill because the nature of requirements were sufficiently high-level to not pose an undue burden on smaller enterprises; proportionality would be further supported through tailored subordinate legislation.

The manner in which the governance provisions have been refined (see above, and for example clause 19(2)(e)) means that the provisions are now sufficiently high-level to apply to all licensed financial institutions; more detailed requirements in subordinate law can differentiate between institutions that pose differing levels of conduct risk. The reference to small enterprises has therefore been deleted. Note that the principle of proportionality has been embedded in the FSR Act in relation to how the FSCA performs its functions (see consequential amendments of sections 58 and 106).

2.7. Achieving transformation objectives

An object of the FSR Act is the establishment of a regulatory and supervisory framework that promotes transformation of the financial sector. Accordingly, the first draft of the COFI Bill included transformation of the financial sector as an objective. As set out in the 2018 Explanatory Policy Paper, the first draft of the COFI Bill proposed that a financial institution be required as part of its governance arrangements to design, publish and implement a transformation policy that should satisfy the requirements of the Broad-Based Black Economic Empowerment (BBBEE) Act and the Financial Sector Code. Comments submitted in relation to transformation requirements questioned whether the provisions in the Bill were sufficiently enabling for the FSCA to achieve the objectives of transformation.

Key change: The revised draft of the COFI Bill takes steps to strengthen the transformation approach. Promoting transformation is made an explicit function of the FSCA in section 58 of the FSR Act, through consequential amendment to that Act. The COFI Bill requirements for a transformation plan (rather than policy) are retained and have been reworded to require the plan to more closely align to the achievement of tangible targets informed by the targets in the Financial Sector Code. The revised draft also allows for the FSCA to issue directives in relation to transformation plans and clarifies that the FSCA may use its supervisory and enforcement powers to ensure that a financial institution's governance frameworks – including in relation to transformation – are adequate and adhered to. The principle of proportionality embedded in the FSR Act and the COFI Bill is further intended to support transformation and competition objectives, for example by providing for progressive compliance (see for example also clause 7(1)(d) of the COFI Bill).

2.8. Consistency in referring to financial instruments

Due to the fact that the FSR Act defines financial product and financial instrument distinctly, the COFI Bill makes references to financial products *and* financial instruments where appropriate. It was flagged that in some clauses, the reference to financial instrument may have been omitted.

Key change: The Bill has been revised to ensure that reference to financial instrument is included where appropriate. Given the nature of refinements made throughout the Bill, there may be instances where the reference to financial instrument is misplaced or has been unintentionally omitted, and commentators are encouraged to make note of these in submissions. Also, the definition of "financial instrument" has been amended in the FSR Act to ensure that securitisations in relation to credit are provided for.

2.9. Clauses relevant to retail financial customers

The first draft of the Bill included clauses specified as applicable only to retail financial customers. While the Bill is intended to apply to financial institutions of all financial customers, the specified requirements were necessarily more stringent, applicable to institutions interacting with the relatively more vulnerable retail customer. Some commentators flagged certain clauses of the Bill

which were not noted as specific only to retail financial customers, but which should not sensibly apply to the non-retail market.

Key change: A holistic review of the Bill has been undertaken to ensure that the necessary delineations of provisions applicable only to retail customers are in place. Also, Schedule 1 specifies which chapters of the COFI Bill apply for each authorised activity, and the application of chapters is determined by the level of conduct risk introduced by the activity taking the intended target market into account. Lastly, the FSCA is enabled to use conduct standards to further tailor the regulatory framework for different categories of financial customers (see clause 67(5) of the COFI Bill and Section 106(4)(b) of the FSR Act). The intention is to model the approach on that for professional clients adopted for OTC Derivative Providers under the FMA. This approach provides for a professional client to "opt out" of regulatory protections afforded, subject to prescribed checks and balances.

2.10.Completion of schedules of the Bill

When the COFI Bill was published in 2018, it contained a placeholder for schedules which were intended to be included in the Bill, but which had not been fully completed. These schedules have now been finalised and are included in the Bill for comment.

2.10.1. **Activities requiring licensing**: Schedule 1 of the COFI Bill has been further considered and refined in line with comments (see section 2.3.4 of this document and technical considerations below for further detail in this regard).

2.10.2. **Institutional form schedule:** Schedule 2 of the COFI Bill contains the institutional form requirements for licensed entities. Where entities are regulated only by the FSCA, the institutional form requirement generally references the Companies Act. Where existing legislation prescribing institutional form requirements is present, the Schedule references such legislation. This is mainly applicable to entities that are regulated by another regulator such as the PA.

2.10.3. **Activities of representatives:** Schedule 3 of the COFI Bill sets out the activities which may be performed by a representative and the institutional requirements for such representative. A financial institution may only appoint a person as a representative for the activities listed in Schedule 3 and only if that person meets the institutional requirements. The effect of Schedule 3 is that where a person provides a Schedule 1 activity for or on behalf of a financial institution and that activity does not appear on Schedule 3 or the person does not meet the institutional requirements set out in that Schedule, it will have to obtain a license under the COFI Bill to perform that activity.

In addition, the exclusion of an arrangement between a financial institution and a person that acts as its representative has been removed from the definition of "outsourcing arrangement" as defined in section 1 of the FSR Act. The definition further has been amended to clarify that an arrangement between a financial institution and another person for the provision to, or for, the financial institution of a Schedule 1 activity that is integral to the nature of a financial product or financial service that the financial institution provides, or is integral to the nature of the market infrastructure,

will be regarded as an outsourced arrangement and all requirements relating to outsourced arrangements will be applicable.

The removal of the exclusion referred to above does not impact on representatives who are employed by the financial institution. However, other types of representatives, in addition to the representative specific requirements, will also be subject to any applicable outsourcing requirements. Any overlap of requirements will be addressed in standards.

It is important to note that the institutional form as set out in Schedule may change depending on the finalization of the RDR review.

2.10.4. **Transitional licensing arrangements**: Schedule 4 on transitional arrangements in respect of licensing has been carefully considered and revised.

2.10.5. **Consequential amendments**: Schedule 5 has been substantially further populated and completed.

3. Technical considerations: Medical scheme sector and the COFI Bill

The FSR Act includes in its definition of a financial product "a health service benefit provided by a medical scheme as defined in section 1(1) of the Medical Schemes Act". The FSCA's and PA's full powers and duties under the FSR Act thus apply in respect of medical schemes. However, the Minister of Finance has determined that the Council for Medical Schemes (CMS) must exercise these powers until 31 March 2021, but with the concurrence of the FSCA in relation to conduct matters and the PA in relation to prudential matters. A task team has been established between NT, CMS, PA and FSCA to address issues of regulatory approach of the three regulators. While the first draft of the COFI Bill envisioned application of requirements in relation to medical schemes and medical scheme administrators, in light of the engagement taking place between regulators, and to avoid pre-empting the outcomes of this engagement, the revised draft of the Bill removes all reference to medical schemes and medical scheme administrators and therefore the Bill does not apply to these entities.

The status quo remains regarding the FSCA licensing and regulating the activity of "financial advice" and "sales and distribution" activities in relation to health benefits (i.e. medical schemes brokers). Changes to this approach can be considered in future once the work of the task team is concluded.

4. Technical considerations: treatment of retirement fund sector

Following extensive internal and external engagements on the topic of the treatment of the retirement fund sector under the COFI Bill, the revised draft of the Bill proposes the following:

4.1. Approach to commercially sponsored funds

The revised draft of the COFI Bill defines “commercially sponsored fund” and “commercial sponsor”.

A “commercially sponsored fund” is any retirement fund (see new definition in the COFI Bill) established by a “commercial sponsor”, that establishes the retirement fund with the intent that the financial institution or other financial institutions in its group (associates) will provide financial products or financial services to the fund, once established, or its members. (Only a licensed financial institution as defined in the FSR Act may be a commercial sponsor.)

To limit confusion and ambiguity, the term “sponsor” is limited to the context of a commercial sponsor. The term is not and should not be used in relation to employers, unions, or other entities that establish retirement funds.

A “commercially sponsored fund” is not one of the types of retirement funds. Various types of retirement funds can be commercially sponsored.

The COFI Bill has very limited application to the sponsor in its capacity *as sponsor*. Once the commercially sponsored fund is established, the ongoing activities performed by the sponsoring entity (which is itself a financial institution) in respect of the fund are activities which are regulated under other provisions of the COFI Bill – e.g. provision of financial products or financial services (such as providing insurance policies or other financial products to the funds; discretionary investment management for the fund; benefit administration for the fund; advice to the fund or its members; etc.).

Further, while the rules of commercially sponsored funds often provide that the sponsor may nominate one or more of the trustees of the fund, once these trustees are appointed they are subject to the current Pension Funds Act (and future COFI Act) provisions regulating trustee conduct – they are not acting in the capacity of *sponsor*, but in the capacity of *trustee*. In light of the above, the activity of sponsoring a commercial fund does not need to dealt with as an activity requiring COFI Bill authorisation / licensing, and does not need to be defined in COFI Bill as a licensed activity.

Instead, the only situation in which the COFI Bill needs to directly refer to the commercial sponsor, is to deal with activities in the period prior to the actual registration of the fund. The COFI Bill thus provides that obligations imposed on a financial institution in relation to a commercially sponsored fund, applies equally where the financial institution is providing the product or service concerned in relation to a “to-be-established” fund in its capacity as commercial sponsor of that fund. For example, where an insurer sponsors a commercially sponsored fund, and designs financial products that will be held by that fund, the insurer will need to comply with the COFI Act product design requirements, notwithstanding the fact that the financial customer concerned (the fund) has not yet come into existence. Although the insurer is, in this example, in any event subject to the product design requirements *in its capacity as a product provider*, it should be beyond doubt that these requirements also apply where the insurer is also acting as *sponsor*. This is therefore largely an “avoidance of doubt” approach.

4.2. Approach to trustees, employers, principal officers

The revised draft of the COFI Bill removes the proposal that retirement fund trustees require a licence under the COFI Bill. Instead, the Bill now contains appropriate enabling provisions for setting conduct standards in relation to trustees regarding eligibility criteria, fit and proper requirements and governance. Moreover, different conduct standards may be applied for different types of funds and different types of trustees. (Trustee and other retirement fund governance related requirements will largely migrate from the PFA to COFI Bill).

Employers will be regarded as "supervised entities" for FSR Act and COFI Bill purposes, in relation to their obligations as currently provided for in section 13A of the Pension Funds Act. This will require a change to the definition of "supervised entity" in the FSR Act as proposed through consequential amendments through the COFI Bill. Employers are defined as "supervised entities" for purposes of Chapters 7, 9, 10 and 13 of the FSR Act, so that those powers may be exercised in relation to the obligations of employers.

In order for the COFI Bill provisions applicable to "key persons" to apply to principal officers and deputy principal officers of retirement funds, a consequential amendment is proposed to the definition of key persons in the FSR Act, to include principal officers and deputy principal officers of retirement funds.

4.3. Approach to benefit administrators and self-administered funds

The revised COFI Bill now requires that a retirement fund that performs its own benefit administration should be authorised for the licensing activity of benefit administration in addition to the activity of providing a financial product (item 5.b on Schedule 1). This is to ensure that the current regulatory gap in respect of self-administered funds is closed, as s13B of the Pension Funds Act only applies to third party administrators.

Retirement fund benefit administrators, previously known as section 13B administrators, will be subject to the requirements in the Bill as "third-party retirement fund administrators" (item 5.c on Schedule 1). The regulation of retirement fund benefit administration is accordingly removed from the Pension Funds Act to the COFI Bill framework (section 13B is set to be repealed).

4.4. Treatment of asset consultants

After consultation and inputs, including from the FSCA, it was agreed that the services of asset consultants should be captured by the definition of "advice" in the COFI Bill; asset consultants will thus be required to be licensed for the "advice" activity. This is necessary to close the current loophole where some asset consultants argue that their services fall outside the ambit of the FAIS Act because their recommendations do not necessarily relate to a "financial product" as defined (e.g. where they recommend general investment strategies, or where their services entail

manager selection, rather than actual products). See the definition of “financial advice” in Schedule 1 in this regard.

4.5. Approach to public sector retirement funds

As proposed in the first draft of the COFI Bill, public sector retirement funds established in terms of legislation will be included in the definition of retirement funds. This means that such funds will be subject to conduct requirements, and their customers will be permitted to lodge complaints with the Pension Funds Adjudicator.

4.6. Consequential amendments to the Pension Funds Act

Consequential amendments have been proposed to the Pension Funds Act to address provisions that are better placed in the COFI Bill framework. Also, as indicated in section 2.1 in this document, amendments to the Pension Funds Act improve alignment with the COFI Bill, introduce a centralised unclaimed benefits fund, and make other technical refinements in support of strengthening the protection of pension fund members.

Notably, the term “retirement fund” will replace the term “pension fund” in the COFI Bill as the overarching term for the various types of regulated funds. This is recommended as a “pension fund” is only one type of regulated retirement fund, and it is therefore confusing to also use “pension fund” as the overarching term.

For alignment with the above, through consequential amendments, the Pension Funds Act is proposed to be renamed the Retirement Funds Act, and the definition in that Act of a “pension fund organisation” will be replaced with a definition of “retirement fund”. In addition the definitions of the different types of “retirement funds”, namely “pension fund”, “pension preservation fund”, “provident fund”, “provident preservation fund”, “retirement annuity fund” and “unclaimed benefit fund” have been updated to provide a description of what the funds do rather than referring to the Income Tax Act.

Amendments to other legislation that currently refers to the “Pension Funds Act” has also been included in the consequential amendments, but further analysis will be undertaken to ensure that all relevant references to “Pension Funds Act”, “pension funds” and “pension fund organisation” in other legislation are appropriately amended.

It is noted that the Income Tax Act and relevant other items of legislation establishing or defining specific retirement funds, should also appropriately cross-reference the Pension Funds Act and COFI Bill definitions. However, those amendments will need to be effected to tax legislation through the annual taxation amendment legislation.

The purpose of capturing all of the current fund type definitions in the Pension Funds Act is not because the COFI Bill treats all of these fund types differently in the primary law, but will ensure that the Bill enables the setting of different conduct standards for different types of funds.

5. Technical considerations: payment services

The first draft of the COFI Bill noted that further consideration would be given to the issue of payment service regulation, particularly to align with the concurrent review of the NPS Act.

5.1. Clarifying the scope of payment services

A national payment system (NPS) broadly encompasses the total payment process from payer to beneficiary, and includes all the systems, mechanisms, institutions, agreements, procedures, rules and laws that come into play from the moment an end user – using a payment instrument – issues an instruction to pay a beneficiary/recipient, through to the final interbank settlement of the transaction in the records of the central bank i.e. when the funds are received by the beneficiary/recipient. It enables parties to conclude financial transactions, which is core to the smooth functioning and growth of the economy.

Therefore, the NPS comprises everything across the payment cycle from pre- to post transaction, and all providers / role-players involved across that chain; in other words, any entity or person involved in making a payment happen.

A payment service is a sub-set of the NPS activities.

5.2. Approach to definitions

To ensure alignment across the governing laws, it is proposed that the definition of payment services will be provided in the new NPS Act, against which the COFI Act will cross-reference. Noting however that the new NPS Act is itself still being developed, this will require careful coordination over time. The existing NPS Act may need to be amended with the new definition as an interim measure.

The definition of payment service in the FSR Act and NPS Act will also need to be aligned.

It is intended that a payment service will be a service provided to financial customers to ensure a payment happens, excluding activities related to clearing and settlement. It should accommodate banks and non-banks, as per the NPS Policy Review. Generally, this then means the “front end” of the national payment system i.e. financial customer facing activities in the NPS.

5.3. Licensing, regulating and supervising payment services

While it is envisaged that a payment services provider will need authorisation from the FSCA in addition to the SARB to operate, the systemic nature of the NPS means that the SARB will have the ultimate decision regarding certain critical supervisory matters like the withdrawal of a licence.

The FSCA can set and supervise conduct standards in order to ensure the protection of financial customers.

5.4. Clearing

Clearing refers to the process of transmitting, reconciling and, in some cases, confirming transactions prior to settlement, potentially including the netting of transactions and the establishment of final positions for settlement. Sometimes this term is also used (imprecisely) to cover settlement. For the clearing of futures and options, this term also refers to the daily balancing of profits and losses and the daily calculation of collateral requirements.

Entities operating in this space include Payment Clearing House (PCH) System Operators (SOs) and Clearing Participants. Clearing rules refer to the rules governing the relationships between the clearing members, and how the clearing members interface with the physical system (hardware/software/infrastructure).

While the clearing rules mainly ensure the safety, integrity, stability and efficiency of the NPS, the FSCA believes that these rules also determine practices amongst clearing members that can harm customers.

Given that primary purpose of the clearing rules are to ensure the efficiency, integrity and stability of the NPS, and that these rules are highly technical in nature, it is proposed that responsibility for the issuing and oversight of these rules sits with the SARB. It follows that licensing of PCHs sits solely with the SARB as well. However, certain rules, which reflect a particular design approach for the system, can have a material impact on customer outcomes.

The following is proposed, and does not impact the COFI Bill at this stage:

- The FSCA remains primarily responsible for protecting financial customers by promoting their fair treatment, across the financial sector and including the NPS; this duty for the FSCA in respect of the NPS will need to be made clear in the NPS Act.
- The SARB remains the licensing and supervisory authority for clearing in the NPS. Drafting in the new NPS Act should consider adding a role for the SARB to assist the FSCA in promoting the fair treatment of financial customers.
- The FSCA should monitor customer outcomes that may be impacted by practices in the clearing environment, and in doing so, may request information about practices in the clearing environment from financial institutions; such requests should be directed through the SARB.
- The FSCA should make recommendations to the SARB regarding aspects of clearing that may need change.

5.5. Settlement

Settlement refers to the discharge of settlement obligations, which in turn refers to an indebtedness that is owed by one settlement system participant to another as a result of one or more settlement instructions.

It is agreed that there may be little or no matters impacting customer outcomes in the settlement environment. Therefore, it is proposed that the FSCA does not licence or set conduct standards

for this activity. Similar to the clearing environment, it is proposed that more information regarding practices by financial institutions in settlement may be requested by the FSCA through the SARB.

6. Technical considerations: credit and debt collection services

The COFI Bill has been revised to give effect to the approach taken to credit regulation under the FSR Act. Accordingly, the chapter on culture and governance applies to credit providers. Further, financial services provided in relation to a retail credit agreement are captured in the licensing schedule (Schedule 1).

Schedule 1 thus provides as follows:

- "providing a financial product" includes a credit product, however the application of requirements in the COFI Bill is limited to matters of culture and governance i.e. Chapter 4.
- "sales and execution" in relation to retail credit products is a financial service and an authorised activity.
- "financial advice" in relation to retail credit products is a financial service and an authorised activity.
- "debt collection service" is defined to mean the collection of debt originating from a credit agreement; this includes the collection of debt originating from incidental credit, where such is done as a business. This is in line with the scope of debt collection in the FSR Act.

Transitional arrangements in Schedule 4 of the COFI Bill will enable the FSCA to bring in different categories of financial institutions at different phases. For example, banks and vehicle asset financing companies may be prioritised and brought into the framework as a first step.

In line with strengthening the alignment of approaches between regulators with jurisdiction in the financial sector (as discussed above), the COFI Bill proposes amending the FSR Act to allow the FSCA to enter into an MOU with other regulators of financial institutions, like the Council for Debt Collectors (the FSCA and NCR already have an operational MoU). Through the FSR Act, the FSCA will also be enabled to delegate powers to these other regulators, and take those regulators own powers and approaches into account when designing its licensing, regulatory and supervisory frameworks (see section 10.1). This will allow for a consistent and streamlined application of market conduct requirements in the debt collection and retail credit space. Engagements between the regulators in this regard are ongoing.

7. Technical considerations: financial markets and the COFI Bill

The potential for overlap between the revised draft COFI Bill and envisaged new financial markets legislation was the subject of ongoing discussions during the process of refining the COFI Bill. As a result, activities defined in Schedule 1 of the Bill (Licensing Schedule), capture certain activities currently regulated in terms of the FMA. These include for example activities performed by authorised users, participants and OTC Derivative Providers, as well as new activities proposed to be regulated from a conduct perspective through the 2018 Financial Markets Review and the

review of the FMA, explained in the National Treasury workplan for proposed structural market reforms: "*Building Competitive Markets for Innovation and Growth*" (hereafter referred to as the FMA Review).

Taking these recommendations into account, the COFI Bill aims to reduce legal fragmentation and accommodate all financial institutions (i.e. those that operate across the retail, institutional and wholesale spectrum) to mitigate the risk of regulatory arbitrage whilst allowing for regulatory proportionality.

NT is mindful of the potential for overlap and duplication between the COFI Bill and FMA, and as such the exercise to determine the extent and scope of FSCA responsibilities in relation to financial market activities in the COFI Bill vis-a-vis the new FMA are ongoing and subject to further engagement.

Financial market activities that are proposed to be licensed activities in terms of the COFI Bill are:

- Trading: Schedule 1 item 2.a "Sales and execution"
- Advice in relation to trading: Schedule 1 item 3 "Financial Advice"
- "Underwriting and placement": Schedule 1 item 9.a
- Custody and administration: Schedule 1 item 9.b "Custody and administration service"
- Providing OTC derivatives: Schedule 1 item 9.c "Providing over-the-counter derivative instruments"
- Providing other OTC instruments: Schedule 1 item 9.d "Providing other over-the-counter financial instruments"
- "Providing a benchmark": Schedule 1 item 9.e
- "Credit rating services": Schedule 1 item 9.f
- "Third party treasury management": Schedule 1 item 9.g.

7.1. Credit Rating Services Act

A dedicated CRS chapter has been included in the new draft of the Bill. The chapter essentially mirrors the regulatory approach currently taken in the Credit Rating Services Act. Cross-cutting powers and requirements relating to licensing and standard-setting are brought into the FSR Act to reduce fragmentation and repetition. Some further amendments to provide clarification or to address international developments relating to the regulation of rating agencies are also included.

One particular aspect for consideration is the inclusion of "sovereign rating" in the definition of credit rating. Noting that it has already been the practice of the FSCA to consider sovereign ratings as a credit rating, this amendment is intended to give legal certainty, meet international standards and best practice, and in doing so ensure that South Africa continues to satisfy equivalence criteria of the EU securities regulator, the European Securities and Markets Authority (ESMA).

7.2. Definition of 'financial instruments' and 'securities'

Comments submitted on the COFI Bill proposed that the definitions of 'financial instruments' in the FSR Act and 'securities' in the FMA should be aligned. As indicated above, there are distinct definitions of financial products and financial instruments in the FSR Act. "Securities" as defined

in the FMA captures financial instruments excluding money market securities, but includes participatory interests in CISs, which are defined as financial products under the FSR Act. As such it is not possible at this stage to completely align the two definitions. A slightly refined definition is however proposed to the definition of "financial instrument", including making certain that securitisations in relation to credit are captured. This definition may be further refined as a result of further consultation on the Bill, and to include, among others, other instruments such as crypto assets. It is expected that these definitions will be more fully aligned over the FMA Review.

7.3. Trading

The definition of trading was reconsidered. It was decided that the inclusion of the phrase 'the use of or using of the trading system or infrastructure of an exchange to buy or sell listed securities' is overly restrictive and inconsistent with the more flexible activity-based approach embedded in the COFI Bill and proposed through the FMA Review.

It was therefore agreed to delete this part of the definition of trading. The remainder of the elements of this activity are then fully captured by the definition of "sales and execution" in the Schedule. It is therefore not considered necessary to define this activity separately, however further engagement should take place in this regard.

Authorised users of an exchange may be captured by both the "sales and execution" and "financial advice" definitions of Schedule 1 and will accordingly be required to be authorised under the Bill for those activities, in addition to being authorized by any exchange that it wants to trade on. This is consistent with the recommendation in the Financial Markets Review that all market participants should be subject to the same conduct requirements, for example relating to being fit and proper, irrespective of the market. This means that the FSCA should replace the market infrastructures in setting regulatory standards in this regard. It can be likened to a broker obtaining first a passport from the FSCA and then a visa from an exchange/s in order to perform activities in the formal financial market. Notwithstanding these proposed changes to the self-regulatory model in South Africa, it is envisaged that self-regulation (in some form) in the formal markets space will be generally retained, subject to the outcomes of the FMA Review underway.

7.4. Trading for own account

Concerns related to the inclusion of "trading for own account" in the definition of trading, or proprietary trading, proposed that regulating such an activity in and of itself is not appropriate. It was also noted that the FMA contains provisions relating to market abuse. Furthermore, views were expressed that prudential regulation would more appropriately apply to financial institutions holding assets relating to its obligations to financial customers on balance sheet and dealing in client assets.

However, in line with recommendations made by the Financial Markets Review and FMA Review, which looked to international standards and best practice, it is important that conduct risks pursuant to proprietary trading need to be specifically addressed. Trading for one's own account has been removed as an element of the trading activity but will be subject to the culture and governance requirements in Chapter 4, to ensure that conduct risks are suitably considered by the financial institution and addressed. It is however noted that other jurisdictions, for instance the

EU, license this activity, and the FMA Review has proposed that South Africa in general mirrors MiFiD II, meaning that the COFI Bill approach will be the subject of ongoing engagement.

7.5. Definition of 'financial institution' including market infrastructure

Comments noted that the COFI Bill definition of financial institution should align with the definition used in the FSR Act, as disparate definitions could lead to arbitrage and negative consequences. It was proposed that transitional provisions should rather be included to state that until the FMA Review is finalized, the COFI Bill provisions will not apply to market infrastructures.

In response, it is considered legally permissible for the definition of "financial institution" to be restricted in the COFI Bill to exclude market infrastructures. The intention is for the market infrastructures to be excluded from the COFI Bill as they will continue to be licensed and regulated by the FSCA in terms of the FMA, and having an entity licensed twice by the same regulator i.e. the FSCA for the same activity may be unnecessarily onerous and cumbersome. It could be considered however that market infrastructures be required to comply with specified obligations in the COFI Bill, especially Chapter 4 on Culture and Governance. Comments would be appreciated in this regard.

7.6. ODP as a licensed category; provider of financial instruments

It was initially proposed that ODPs and "providers of other over-the-counter financial instruments" would be regulated as providers of financial instruments. Comments however proposed that ODPs should be regulated separately. Concerns were also raised that the General Application of the COFI Bill (clause 4) does not refer specifically to providers of financial instruments, and that there was no definition in either the COFI Bill or the FSR Act of "providers of financial instruments".

After consideration it was decided to include ODPs and "providers of other over-the-counter financial instruments" as separate licencing activities under the Financial Markets activity in the COFI Bill.

7.7. Clearing and settling

It was decided that clearing and settlement will not be included as activities in the licensing schedule of the COFI Bill. These activities will continue to be regulated in terms of the FMA and under the revised financial markets legislation, possibly subject to Chapter 4 on Culture and Governance. Comments would be appreciated in this regard.

7.8. CSDPs

Concerns were raised that there is currently a fragmented approach across the financial sector in relation to custody and administration, in terms of both regulatory requirements and supervision and enforcement. The services rendered by participants of a central securities depository were carefully considered to understand what they entail. It was decided that it is important to have a

level playing field across the financial sector and as such to have a single set of requirements for the activity of “custody”.

“Custody and administration” has accordingly been included as a licence category under financial markets activities. The following definition is included:

(a) Holding financial instruments and participatory interests in a collective investment scheme in custody on behalf of another person by maintaining securities account; and

(b) administering corporate action or other event affecting the rights or benefits in respect of financial instruments and participatory interests in a collective investment scheme.

A similar approach as with authorised users will be followed, namely that participants will be required to be licensed for this activity under the CoFI Act and then be approved by the CSD to make use of the infrastructure.

7.9 Underwriting and placement

Underwriting is currently included under the FSR Act as part of “dealing”, as per section 3(4) of that Act, while placement is not specifically covered. International standards and best practice suggest that these should be licensed from a conduct perspective, in support of market integrity. The COFI Bill follows the MiFiD II approach, and as such is included as a licensed activity in Schedule 1.

8. Technical considerations: approach to wholesale/non-retail activities

A series of engagements were held to specifically consider the application of the COFI Bill to the non-retail environment. As a result of comments submitted and engagements held, the revised COFI Bill provides as follows:

- The existing approach of defining *only* a retail financial customer in primary law, as a sub-category of the broader financial customer definition, remains.
- The COFI Bill was extensively reviewed to ensure that those clauses that should apply only in the retail customer environment, are specified as such.
- As outlined in section 2.9 of this document, Schedule 1 specifies which chapters of the COFI Bill apply for each authorised activity, and the application of chapters is determined by the level of conduct risk introduced by the activity taking the intended target market into account. The FSCA is enabled to use conduct standards to further tailor the regulatory framework for different categories of financial customers, to replicate the professional client model adopted for providers of OTC derivatives under the FMA.

Wholesale/non-retail activities that are proposed to be licensed activities by the FSCA in terms of the COFI Bill include:

- Non-retail lending that takes place outside of the National Credit Act: Schedule 1 item 1.e “Lending”

- Investment banking: Schedule 1 item 10 “Corporate advisory services”.

It is proposed that the provision of “research services” by financial institutions is subject to culture and governance requirements (see section 8.3 below).

8.1. Corporate advisory services

A new license activity of “corporate advisory services” has been included. This intends to better capture the transaction advisory services typically undertaken by investment banks in relation to the arrangement of debt and equity issues and mergers and acquisitions.

The definition of “corporate advisory services” does not intend to capture attorneys providing legal support to corporate transactions.

8.2. Lending

A new license activity has been added to capture the provision of non-retail credit, i.e. lending agreements that are not regulated in terms of the National Credit Act. This is intended to provide for “cash” lending as opposed to lending securities, although consideration is being given to whether this should be incorporated, and if so how. The main focus of regulatory attention in relation to this activity is culture and governance. Although included into the FSR Act as financial product providers, it is envisaged that lenders will not be regulated and supervised by the PA.

8.3. Research services

A new activity of “research services” is defined in the COFI Bill and made subject to Chapter 4 on Culture and Governance. The reliance of financial institutions and investors on market research means that such should be fair and reliable, so that it can be trusted. Conflicts of interest presented by financial institutions that provide research services in addition to their other financial sector activities led to the international standard setting body IOSCO setting principles in relation to research services with which countries should comply. This was an area identified for improvement by the 2014 assessment of South Africa by IMF as part of the Financial Sector Assessment Plan. The proposed approach is consistent with the FMA Review recommendations. The FSCA will explore whether other requirements should be imposed, for example those related to competency. These would be issued by conduct standards.

8.4 Sales and execution

Potential confusion was created in the first draft of the COFI Bill with the use of the term ‘execution’ in the licensing schedule referring to sales of things like insurance policies rather than securities. Given that intermediating a financial product brings the same or similar risks to intermediating financial instruments, this activity has been combined into “sales and execution” under the activity of “distribution.”

9. Technical considerations: treatment of services in relation to foreign exchange

Read together, the recommendations in the Financial Markets Review and FMA Review in relation to the OTC markets, including foreign exchange, suggest that market participants should be licensed and subject to overarching conduct standards, set by the FSCA, that address both their own behaviour and trading processes (including systems). Requirements relating to managing and mitigating conflicts of interest should be prioritised, including in relation to proprietary trading.

Forex platforms bring two main risks, originating from the fact that these entities lie outside of conduct frameworks and reside in a foreign jurisdiction. These risks are:

- local market participants would like to get prices on these foreign platforms and this may compromise the integrity of South Africa's markets; and
- consumers are vulnerable to these products being marketed in South Africa, often not understanding the investor risks involved. It is be noted that the forex markets are at present subject to strict financial surveillance requirements overseen by the SARB.

9.1. Additional categories of activities in the forex market

Advice and discretionary investment management that takes place in relation to foreign exchange was already provided for in the first draft of the COFI Bill. It is noted that there are five additional categories of regulated persons operating in the forex market:

i. **Authorised Dealers in foreign exchange (AD):** Buying and selling foreign exchange as an Authorised Dealer. These do proprietary trading and intermediation.

ii. **Authorised Dealer in foreign exchange with limited authority (ADLA):** Buying and selling foreign exchange as an ADLA, including Bureaux de Change, authorised by National Treasury to deal in foreign exchange for the following purposes:

- Category 1 – Travel related transactions only.
- Category 2 – Travel related transactions and certain prescribed single discretionary allowance of R1 million per applicant within the calendar year and offer money remittance services in partnership with external money transfer operators.
- Category 3 - Independent money transfer operator or value transfer service provider, facilitating transactions not exceeding R5 000 per transaction per day within a limit of R25 000 per applicant per calendar month.
- Category 4 - A combination of the services provided by Category 2 and Category 3.

These act only as intermediaries and do no proprietary trading.

iii. **Treasury Outsourcing Company (TOC):** Entity to which treasury functions are outsourced i.e. broker managing forex on a discretionary or non-discretionary (execution only) basis

iv. **Agent Treasury Outsourcing Company (Agent TOC):** Other forex intermediaries, including interbank brokers.

v. **Forex platform operator:** Operating a foreign exchange trading platform.

As the COFI Bill takes an activity-based approach to authorisations, the activities performed by these regulated persons can be represented as:

i. **Proprietary trading**: includes the activity of Authorised Dealers
ii. **Providing OTC derivative instruments (forward and spot FX) and other OTC financial instruments**: includes the activity of Authorised Dealers
iii. **Sales and execution**: includes the activities of Authorised Dealers, ADLAs, TOCs and Agent TOCs
iv. **Third party treasury management**: includes the activities of the traditional TOCs
v. **Market operator**: includes the activities of the forex trading platform operator.

It is therefore proposed that the following Schedule 1 categories be extended to reference foreign exchange:

- "Sales and execution".
- "Discretionary investment management".
- "Providing OTC derivative instruments".
- "Providing other OTC financial instruments".

The activity of "third party treasury management" has been added as a sub-category under the existing category of "Financial market activities". The activity of "proprietary trading" is discussed in the financial markets section (see section 7.4 above). The activity of "market operator" is expected to be built into the new FMA.

10. Other policy matters in the FSR Act

As indicated above, the FSR Act – as the Act that establishes the Twin Peaks regulatory architecture – has been amended so that the FSCA may better exercise its powers in conjunction with other relevant legislation and other regulators.

10.1 Cooperation and coordination

The FSR Act now considers in more detail other regulators which jurisdiction may overlap with the FSR Act, including the SARB and NCR.

Measures to support improved coordination are as follows:

- The FSCA, when licensing financial institutions, may take into account the fact that another licence may be granted to that entity by another regulator with jurisdiction over financial sector activities (proposed new section 111(8) of the FSR Act contained in the consequential amendments in the Bill);
- The scope and intensity of regulation and supervision by the FSCA can take into account

existing regulatory and supervisory requirements by another regulator ((proposed new section 58(6A) of the FSR Act contained in the consequential amendments in the Bill); and

- The FSCA may delegate its powers and functions to the other identified regulators with jurisdiction in the financial sector (proposed new section 77(5)*(b)* of the FSR Act contained in the consequential amendments in the Bill).

Particular attention is given to the systemic nature of payment services and payment service providers, and additional coordination requirements are imposed across both the FSR Act and COFI Bill.

The effect of these amendments is that the FSCA, in conjunction with other regulatory bodies and applicable legislation, can implement a harmonised approach to licensing and market conduct regulation of the sector.

10.2 Further strengthening of enforcement provisions

Since the commencement of the FSR Act, it became apparent that the regulators' hands must be strengthened in circumstances where they may be obliged to act with speed to protect the interests and assets of financial customers and the financial system in general. For this reason, a new part is proposed to be inserted in chapter 10 of the FSR Act which empowers the regulators to issue 'take-down' notices to internet service providers in accordance with the Electronic Communications and Transactions Act, 2002. The regulators may exercise this power where a person is conducting, advertising, soliciting or marketing a business on the internet in contravention of a financial sector law or in a manner that is likely to lead to prejudice to financial customers or harm the financial system.

Other enforcement matters addressed through the consequential amendment in the FSR Act are:

- Investigations may be undertaken to investigate matters and not specific persons or institutions, s 135(1);
- It is clarified that a person may also be debarred where the person no longer complies with the prescribed fitness and propriety requirements (s 153);
- Amounts recovered through administrative penalties in chapter 13 may also be applied to provide redress to prejudiced financial customers (171); and
- The responsible authorities may suspend any part of an administrative penalty on any condition the authorities deem appropriate.

10.3 Equivalence requirements

Certain financial sector laws empower or require the financial sector regulators to recognise or otherwise approve foreign regulatory jurisdictions as equivalent to the framework established in terms of that financial sector law. A consolidated and cross-cutting framework is now proposed to be inserted as part 1A of chapter 17 of the FSR Act to provide for equivalence recognition of foreign jurisdictions. The criteria that the regulators must consider are listed and will apply consistently across the different sectors. The provisions also provide for the withdrawal of the

recognition and the principles of co-operation. These provisions will then be repealed in the sectoral laws through consequential amendments in Schedule 5 of the COFI Bill.

10.4 Inclusion of chapter on recovery and exit from the financial sector

The Protection of Funds Act currently contains, in chapter 1, requirements regarding funds of financial institutions and trust property, whilst chapter 2 contains enforcement powers such as the appointment of curators and statutory managers as well as the power for the FSCA to approach the court in order to enforce compliance with financial sector laws and protect financial customers. Sector laws such as the FAIS Act require the FSCA's approval before actions such as liquidation, business rescue proceedings are brought against financial institutions. These laws also empower the FSCA to bring applications for the sequestration or liquidation of financial institutions in prescribed circumstances. Through the CoFI Bill and the consequential amendments to the FSR Act, these laws are repealed and a consolidated framework for the recovery and exit of financial institutions are provided as a new chapter 12B of the FSR Act.

The Financial Sector Laws Amendment Bill, 2020, which has been tabled in Parliament, includes a new chapter 12A in the FSR Act to provide for the establishment of a framework for the resolution of designated institutions as to be defined in the FSR Act, as well as to designate the Reserve Bank as the resolution authority for designated institutions. Designated institutions include, among others, banks and systemically important financial institutions. Chapter 12B is therefore intended to provide for a consolidated and comprehensive recovery framework for non-systemically important financial institutions, except for insurers and financial co-operatives, which are proposed to still be dealt with under the Insurance Act and Co-operatives Act respectively. Consequential amendments are made to the sector laws which are not set to be repealed, namely the Pension Funds Act, the Collective Investment Schemes Control Act, and the FMA, to align with and cross-reference to the provisions in chapter 12B of the FSR Act.

Chapter 1 of the Protection of Funds Act was taken up in part 1 of chapter 8 of the Bill, so as to continue to impose obligations on financial institutions when they deal with trust property.

11. Further matters under consideration: crypto-asset regulation

A matter that is still under consideration is the alignment of the COFI Bill to proposals made in the Intergovernmental Fintech Working Group (IFWG) position paper on crypto-assets published for comment in April 2020.[2] The paper recommends including crypto-assets within the COFI Bill framework; this will be evaluated and the Bill revised accordingly to take these matters into account.

[2] The IFWG is a collaborative effort and resultant body of several South African financial sector regulators, including NT, FSCA, PA, SARB, the Financial Intelligence Centre, the National Credit Regulator and the South African Revenue Service (SARS). It was established in 2016 to understand the growing role of financial technology (fintech) and innovation in the South African financial sector and explore how regulators can more proactively assess emerging risks and opportunities in the market.

12. Questions for commentators

While these questions are intended to guide stakeholders to respond on particular policy matters, they do not limit responses in any way. Stakeholders are invited to comment on any aspect of the Bill.

12.1. Noting the overlaps between the COFI Bill, FSR Act and the intended new FMA, should the COFI Bill and new FMA both be incorporated into the FSR Act? For example, the COFI Bill could form its own "part" in the FSR Act. This should be considered not just from the perspective of the COFI Bill and FMA, but all sectoral laws, like the Banks Act and Insurance Act.

12.2. Should "research services" be a licensed activity, included in Schedule 1?

12.3. Should the FSCA set requirements directly on analysts working in the areas of "research services" and "credit rating services", and be able to debar delinquents?

12.4. Should market infrastructures and their members be subject to the COFI Bill for their conduct in relation to their customers, and Chapter 4 in particular? Currently only CSDPs that perform custody and brokers are captured.

12.5. Should "sovereign ratings" be included as a credit rating, and if so, how should this be defined?

12.6. How should the activity of providing a retail and non-retail hedge fund be provided for in the licence schedule i.e. should a hedge fund targeted at the wholesale or professional market be treated as an alternative investment fund, rather than a collective investment scheme? (provided that the existing tax treatment can be retained).

12.7. Should the licensed activity of "lending" be divided into sub-categories of cash and non-cash to accommodate securities lending transactions?

12.8. In relation to Schedule 1 that reflects licensed activities, should the activity of "trading" be captured under the generic activity of "sales and execution" or should it be a specific sub-category under the activity category of "financial markets activities"? If the latter, how do you propose that the definitions be differentiated, and why?