

## MEMORANDUM ON THE OBJECTS OF THE FINANCIAL SECTOR REGULATION BILL

### 1. BACKGROUND TO THE BILL

- 1.1 In December 2013, Cabinet approved the establishment of two regulators: a Prudential Authority within the South African Reserve Bank (“Reserve Bank”) to supervise the safety and soundness of banks, insurance companies and other financial institutions, and the Financial Sector Conduct Authority to supervise how financial services firms conduct their business and treat customers. This followed earlier approval in July 2011 for a shift to a Twin Peaks approach to financial regulation, including the role of the Reserve Bank in overseeing financial stability.
- 1.2 The draft Financial Sector Regulation Bill (“the Bill”) was approved by Cabinet on 4 December, 2013 for publication for public comment. The Bill was substantially revised after carefully considering comments received during the public comment process. The Bill was published again for public comment in December 2014. This version of the Bill was finalised after consideration of the comments received during the second public comment process.
- 1.3 Twin Peaks is a comprehensive and complete system for regulating the financial sector, prioritising the customer and protecting their funds. It represents a decisive shift away from a fragmented regulatory approach.
- 1.4 The Twin Peaks model of financial regulation is designed to underpin a comprehensive regulatory system, with two main aims:
  - to strengthen financial stability and the soundness of financial institutions, by creating a dedicated Prudential Authority; and
  - to protect financial customers and ensure that they are treated fairly by financial institutions, by creating a dedicated Financial Sector Conduct Authority.
- 1.5 In addition to the two regulators, the approach establishes a harmonised system of licensing, supervision, enforcement, addressing customer complaints (including ombuds), a mechanism for the reconsideration of decisions and consumer education. This “single system” supports regulatory consistency, and reduces the scope for regulatory arbitrage or “forum shopping”. It also makes it easier for any customer experiencing a problem, as the customer is often confused about where to complain when experiencing unfair treatment from a financial institution.
- 1.6 Within this system, the Reserve Bank oversees financial stability within a policy framework agreed between the Minister of Finance and the Governor of the Reserve Bank (“the Governor”).
- 1.7 The Bill aims to improve the structure of regulation of the financial services sector, by ensuring more consistent and complete regulation, including for market conduct. It will give the Financial Sector Conduct Authority and the Prudential Authority jurisdiction over all financial institutions, and will provide them with a range of supervisory tools to fulfil their objectives.
- 1.8 Given the scale of the transformation in regulating the financial sector, the Twin Peaks system will be implemented in two stages. The first stage establishes the regulators and a uniform system and standards, with existing sub-sectoral (or activity-based) laws (for example on insurance and banking) remaining in place. In the second stage, the focus will be to streamline the current activity-based legislation (separate for banking, insurance, credit, pensions, etc.) into consolidated legislation, to reduce the scope for regulatory arbitrage.

## 2. OBJECT OF THE BILL

2.1 The object of the Bill is to achieve a financial system that works in the interests of financial customers, and supports balanced and sustainable economic growth in the Republic, by establishing, in conjunction with the other financial sector laws, a regulatory and supervisory framework that promotes—

- financial stability;
- the safety and soundness of financial institutions;
- the fair treatment and protection of financial customers;
- the efficiency and integrity of the financial system;
- the prevention of financial crime;
- financial inclusion;
- transformation of the financial sector; and
- confidence in the financial system.

### 2.2 Key matters addressed in the Bill:

#### 2.2.1 Financial stability and the management of systemic events

2.2.1.1 The Bill explicitly confers on the Reserve Bank the mandate to protect and enhance financial stability, and if a systemic event has adversely affected financial stability, to restore and maintain financial stability.

2.2.1.2 The Reserve Bank must monitor and keep under review the strengths and weaknesses of the financial system; and any risks to financial stability, and the nature and extent of those risks, including systemic risks and any other risks contemplated in matters raised by members of the Financial Stability Oversight Committee or reported to the Reserve Bank by the Prudential Authority, the Financial Sector Conduct Authority (“the financial sector regulators”) the National Credit Regulator, or the Financial Intelligence Centre.

2.2.1.3 The Reserve Bank must take steps to mitigate risks to financial stability, including advising the financial sector regulators, the National Credit Regulator, the Financial Intelligence Centre and any organ of state, of tools to use and measures to take to mitigate those risks.

2.2.1.4 The Reserve Bank must regularly assess the observance of principles developed by international standard-setting bodies for market infrastructures in the Republic and report its findings to the Minister, the financial sector regulators, the National Credit Regulator and the Financial Intelligence Centre.

2.2.1.5 The Governor is empowered to determine, after consultation with the Minister of Finance, that an event or circumstance, or a combination of events or circumstances, is a systemic event.

2.2.1.6 The Reserve Bank must take all practicable steps to prevent a systemic event from occurring, and if a systemic event has occurred or is imminent, to mitigate as soon as practicable the

adverse effects on financial stability, and manage the systemic event and its effects.

- 2.2.1.7 The Governor must ensure that the Minister of Finance is informed and kept abreast of steps being taken to address a systemic event, and the Minister must approve any actions taken that may have an impact on public finances or the cost of borrowing, or that will or may create a future financial commitment of the Republic or a contingent liability of the Republic.
- 2.2.1.8 If the Governor has determined that a systemic event has occurred or is imminent, each financial sector regulator, the National Credit Regulator and the Financial Intelligence Centre must provide the Reserve Bank with any information in the regulator's possession that may be relevant to managing the effects of the systemic event, including information on any actual or potential impact on public finances, and consult the Governor before exercising any of their powers in a way that may affect measures that are being or are proposed to be taken to manage the systemic event or the effects of the systemic event.
- 2.2.1.9 The Governor may issue directives to financial sector regulators and the National Credit Regulator, which may—
- (a) require the financial sector regulator, the National Credit Regulator or the Financial Intelligence Centre to provide the Reserve Bank with information in the regulator's possession, or available to the regulator, that is specified in the directive; and
  - (b) include requirements as to the exercise of the powers of the financial sector regulator, the National Credit Regulator or the Financial Intelligence Centres, so as to assist the Reserve Bank in complying with the Reserve Bank's obligations under clause 14 and the object of this Bill, which may include measures aimed at supporting the restructuring, resolution or winding up of any financial institution; preventing or reducing the spread of risk, weakness or disruption through the financial system; and increasing the resilience of financial institutions to risk, weakness or disruption.
- 2.2.1.10 Other organs of state exercising powers with respect to the financial system may not, without the approval of the Minister, acting in consultation with the Cabinet member responsible for that organ of state, exercise its powers in a way that will be inconsistent with a decision or action taken by the Governor or the Reserve Bank to manage that systemic event or the effects of that systemic event.
- 2.2.1.11 The Financial Stability Oversight Committee is established, which will to support the Reserve Bank in performing the Reserve Bank's functions in relation to financial stability, and foster collaboration and co-ordination of action among and between the financial sector regulators, the National Credit Regulator, the Financial Intelligence Centre and the Reserve Bank in relation to matters relating to financial stability.
- 2.2.1.12 The Financial Stability Oversight Committee will—
- (a) provide a forum for representatives of the Reserve Bank and of each of the financial sector regulators, the National Credit Regulator and the Financial Intelligence Centre to be informed, and to exchange views,

about the activities of the Reserve Bank and the regulators relating to financial stability;

- (b) advise the Governor on the designation of systemically important financial institutions and matters relating to crisis management and prevention; and
- (c) make recommendations to relevant organs of state that are appropriate for them to take to assist in managing or preventing risks to financial stability; and
- (d) perform any other function conferred on it in terms of legislation.

2.2.1.13 The Financial Stability Oversight Committee will be assisted by the Financial Sector Contingency Forum, comprised of representatives from the relevant industry bodies, the financial sector regulators, the National Credit Regulator, and other relevant organs of state and any other entities or bodies determined by the chairperson of the Forum.

2.2.1.14 A duty is placed on the financial sector regulators, the National Credit Regulator and the Financial Intelligence Centre to—

- (a) co-operate and collaborate with the Reserve Bank, and with each other, to maintain, protect and enhance financial stability,
- (b) provide assistance and information to the Reserve Bank and the Financial Stability Oversight Committee in the performance of the functions of those bodies with respect to financial stability that the Reserve Bank or the Committee may reasonably request;
- (c) promptly report to the Reserve Bank any matter of which the regulator becomes aware that poses or may pose a risk to financial stability; and
- (d) gather information from or about financial institutions that concerns financial stability.

2.2.1.15 The financial sector regulators, the National Credit Regulator, the Financial Intelligence Centre and the Reserve Bank are mandated to enter into one or more Memoranda of Understanding with the Reserve Bank specifying how they will co-operate and collaborate with, and provide assistance to, each other and otherwise perform their roles, and comply with their duties, relating to financial stability.

2.2.1.16 The Reserve Bank must, when acting in terms of its financial stability mandate, and when exercising its powers in terms of the Bill, take into consideration:

- (a) views expressed and the information reported by the financial sector regulators, the National Credit Regulator and the Financial Intelligence Centre; and
- (b) the recommendations of the Financial Stability Oversight Committee.

## 2.2.2 Establishment of Financial Sector Regulators

2.2.2.1 The Bill establishes two new financial sector regulators, the Prudential Authority and the Financial Sector Conduct Authority (“the financial sector regulators”).

2.2.2.2 The Prudential Authority’s objective is to—

- (a) promote and enhance the safety and soundness of financial institutions that provide financial products;

- (b) promote and enhance the safety and soundness of market infrastructures; and
- (d) assist in maintaining financial stability.

2.2.3 The Financial Services Board will be disestablished, and the new Financial Sector Conduct Authority will be established, with the objective to—

- (a) enhance and support the efficiency and integrity of the financial system; and
- (b) protect financial customers by—
  - (i) promoting that financial institutions treat financial customers fairly; and
  - (ii) providing financial customers and potential financial customers with financial education programs, and otherwise promoting financial literacy; and
  - (iii) assist in maintaining financial stability.

2.2.4 Co-operation and collaboration between the financial sector regulators, the National Credit Regulator, the Financial Intelligence Centre and the Reserve Bank

2.2.4.1 The Bill places obligations of co-operation and collaboration on the financial sector regulators, the National Credit Regulator, the Financial Intelligence Centre and the Reserve Bank, who must for this purpose—

- (a) generally assist and support each other in pursuing their objectives in terms of the financial sector laws, the National Credit Act and the Financial Intelligence Centre Act;
- (b) inform each other about, and share information about, matters of common interest;
- (c) strive to adopt consistent regulatory strategies, including addressing regulatory and supervisory challenges; and
- (d) co-ordinate, to the extent appropriate, actions in terms of financial sector laws, the National Credit Act and the Financial Intelligence Centre Act, including in relation to—
  - (i) standards and other regulatory instruments, including similar instruments provided for in terms of the National Credit Act and the Financial Intelligence Centre Act;
  - (ii) licensing;
  - (iii) routine on-site inspections and investigations;
  - (iv) actions to enforce financial sector laws, the National Credit Act and the Financial Intelligence Centre Act;
  - (v) information sharing;
  - (vi) recovery and resolution; and
  - (vii) reporting by financial institutions (including statutory reporting and data collection measures);
  - (viii) minimise the duplication of effort and expense, including by establishing and using, where appropriate, common or shared databases and other facilities;
  - (ix) agree on attendance at relevant international forums; and
  - (x) develop, to the extent that is appropriate, consistent policy positions, including for the purpose of presentation and negotiation at relevant South African and international forums.

2.2.4.2 The financial sector regulators, the National Credit Regulator, the Financial Intelligence Centre and the Reserve Bank must

enter into one or more memoranda of understanding addressing how they will fulfil their obligations to co-operate and collaborate with each other. The financial sector regulators, the National Credit Regulator and the Financial Intelligence Centre may provide for the delegation of powers between themselves.

2.2.4.3 A Financial System Council of Regulators is established, to facilitate consultation, co-operation and where appropriate, consistency of action, between the institutions represented on the Council by providing a forum for senior representatives of those institutions to discuss, and inform themselves about, matters of common interest.

2.2.4.4 A Financial Sector Inter-ministerial Council is established, to facilitate co-operation and collaboration between Cabinet members administering legislation relevant to the regulation and supervision of the financial sector, by providing a forum for discussion and consideration of matters of common interest.

## **2.2.5 Maintaining and enhancing prudential regulation and supervision**

The new approach to prudential regulation seeks to create an effective legal and regulatory environment that ensures that financial institutions are capable of complying with their undertakings to participate in the financial system, including the maintenance of a sound financial position. Enhanced monitoring and supervision powers will promote compliance with applicable financial sector laws, which is necessary for the proper identification and mitigation of systemic risks.

## **2.2.6 Maintaining and enhancing market conduct regulation and supervision**

The comprehensive and rigorous market conduct reporting and supervision requirements created under the new regulatory framework will ensure that consumers of financial products and financial services are not vulnerable and exploited, by introducing measures for the identification, detection and reporting of unfair treatment to customers, including financial awareness and financial literacy among South Africans. These measures will ensure that the efficiency and integrity of final markets is protected and enhanced, contribute to the maintenance of financial stability, promote financial inclusion, and assist in combating financial crime.

## **2.2.7 Operational independence and governance**

The Bill will provide an appropriate governance framework that ensures operational independence, organisational effectiveness and adaptability of the new statutory structures and institutional frameworks including accountability mechanisms to enhance transparency and fairness.

## **2.2.8 Administrative action procedures and administrative action committees**

The Bill permits the financial sector regulators to adopt administrative action procedures, setting out how administrative actions will be taken in terms of financial sector laws. They may also each establish an administrative action committee, to consider and make recommendations to the regulator on administrative actions that are referred to it by the regulator. The reconsideration of decisions by the financial sector regulators in specified circumstances is provided for.

## **2.2.9 Standards for financial products and service**

- 2.2.9.1 An important mechanism for enhancing both the prudential and market conduct regulation of financial products and services is the provision for the Prudential Authority to issue prudential standards, the Financial Sector Conduct Authority to issue market conduct standards, and for the Prudential Authority and the Financial Sector Conduct Authority to be able, where they deem appropriate, to issue joint standards, in accordance with a consistent, specified procedure.
- 2.2.9.2 The Prudential Authority and the Financial Sector Conduct Authority may not make a standard that imposes requirements on providers of payment services, or a standard aimed at assisting in maintaining financial stability, without the concurrence of the Reserve Bank.
- 2.2.9.3 Going forward, the issuing of standards will largely replace the diversity of instruments that are currently issued in terms of financial sector laws, which will promote clarity and standardisation in relation to regulatory action.

## **2.2.10 Supervision of financial conglomerates**

Another very important mechanism in the Bill that will enhance both prudential and market conduct regulation and supervision, is that a framework for the supervision for financial conglomerates is provided for.

## **2.2.11 Enforcement mechanisms**

- 2.2.11.1 The Bill provides important enforcement mechanisms for the financial sector regulators.
- 2.2.11.2 The Bill contains detailed provisions enabling the regulators to gather information, and carry out supervisory on-site inspections and investigations, which are vital tools for the supervision and enforcement of the financial sector laws by the financial sector regulators.
- 2.2.11.3 The financial sector regulators may issue guidance notices and interpretation rulings.
- 2.2.11.4 The financial sector regulators are empowered to issue directives in order to ensure compliance and to prevent or stop non-compliance with the financial sector laws.
- 2.2.11.5 The regulators may also enter into enforceable undertakings with a licensed financial institution, in terms of which the financial institution voluntarily agrees to comply with the terms of the undertaking. The financial sector regulators are also empowered to issue administrative penalties, and to enter into leniency agreements with a person in exchange for that person's co-operation in an investigation or proceedings.
- 2.2.11.6 The financial sector regulators may issue debarment orders to natural persons who have contravened the financial sector laws or an enforceable undertaking; attempted or conspired with, aided, abetted, induced, incited or procured another person to contravene a financial sector law in a material respect; or contravened in a material respect a law of a foreign country that corresponds to the financial sector law.

2.2.11.7 A debarment order prohibits the natural person, for a specified period, as specified in the order, from providing, or being involved in the provision of, specified financial products or financial services, generally or in circumstances specified in the order; acting as a key person of a financial institution; or providing specified services to a financial institution, whether under outsourcing arrangements or otherwise.

2.2.11.8 The financial sector regulators may also apply to court for orders to ensure compliance with the financial sector laws.

#### 2.2.12. Ombuds

The Ombud Council is established to provide for the regulation of ombud schemes, and is provided with necessary powers to enable the appropriate regulation of ombud schemes. A person with a complaint regarding a financial product or a financial service in terms of the Bill will have access to either an applicable ombud scheme, or to an ombud scheme designated to handle the complaint by the Ombud Council.

#### 2.2.13. Reconsideration of decisions

A Financial Services Tribunal ("Tribunal") is established, which is mandated to adjudicate on applications for reconsideration of decisions taken by the financial sector regulators, the Ombud Council, and other designated decision-makers.

### 3. SUMMARY OF THE BILL

- 3.1 Chapter 1 of the Bill deals with the Interpretation, Object of the Act, Administration of the Act and the application of other legislation, as follows:
- (a) Part 1 (clauses 1 to 6), sets out definitions and clarifies certain matters to assist with the interpretation of the Act.
  - (b) Clause 2 defines "financial product", and empowers the Minister in regulations to designate as a financial product any facility or arrangement that is not regulated in terms of a specific financial sector law if—
    - (i) doing so will further the object of the Bill; and
    - (ii) the facility or arrangement is one through which, or through the acquisition of which, a person conducts one or more of the following activities:
      - (aa) Lending;
      - (bb) making a financial investment;
      - (cc) managing financial risk.
  - (c) Clause 3 defines "financial service". If doing so will further the object of this Act set out in section 7, Regulations promulgated by the Minister may designate as a financial service—
    - (a) any service that is not regulated in terms of a specific financial sector law if the service, that is provided in the Republic, relates to—
      - (i) a financial product, a foreign financial product, a financial instrument or a foreign financial instrument;
      - (ii) an arrangement that is in substance an arrangement for lending, making a financial investment or managing financial risk, all as contemplated in sections 2(2) to (4); or
      - (iii) the provision of a benchmark or index; or
    - (b) a service provided by a market infrastructure;
  - (d) Part 2 (clauses 7 to 8) sets out the Object of the Act, and specifies that the Minister of Finance is responsible for the administration of the Act.
  - (e) Part 3 (clauses 9 to 10) deals with the application of the Act in relation to other legislation.



- 3.2. **Chapter 2** of the Bill addresses financial stability, as follows:
- (a) **Part 1** (clauses 11 to 13) explicitly defines the Reserve Bank's responsibility, functions and powers in relation to financial stability, and its duty to monitor and mitigate risks to financial stability. It also provides for the publication of the financial stability review.
  - (b) **Part 2** (clauses 14 to 19) addresses the critical concerns of managing systemic risks and systemic events.
  - (c) **Part 3** (clauses 20 to 24) provides for the establishment of the Financial Stability Oversight Committee, its composition, membership and functioning.
  - (d) **Part 4** (clause 25), provides for the establishment of the Financial Sector Contingency Forum, to assist the Financial Stability Oversight Committee in its functions.
  - (e) **Part 5** (clauses 26 to 28) addresses the duties of the financial sector regulators, the National Credit Regulator, the Financial Intelligence Centre and other organs of state in maintaining financial stability.
  - (f) **Part 6** (clauses 29 to 31) deals with systemically important financial institutions. Clause 29 deals with the designation of systemically important financial institutions, and the Governor is empowered to designate financial institutions as being systemically important. Clauses 30 and 31 provide for powers in relation to systemically important financial institutions. The Reserve Bank is empowered, after consulting with the Prudential Authority, to instruct the prudential authority impose, either through directives or prudential standards additional prudential requirements on those institutions that have been designated as being systemically important. The winding-up, business rescue, amalgamations and mergers, and compromise arrangements of systemically important financial institutions are also briefly dealt with.
- 3.3. **Chapter 3** provides for the establishment of the Prudential Authority, as follows:
- (a) **Part 1** (clauses 32 to 34), provides for the establishment of the Prudential Authority, and describes the objective and the functions of the Prudential Authority.
  - (b) **Part 2** (clauses 35 to 49) deals with the governance of the Prudential Authority, including setting out the governance objectives of the Authority, establishing the post of the Chief Executive Officer and the Prudential Committee.
  - (c) **Part 3** (clauses 50 to 55) addresses the staffing, resources and financial management of the Prudential Authority.
- 3.4. **Chapter 4** provides for the establishment of the Financial Sector Conduct Authority, as follows:
- (a) **Part 1** (clauses 56 to 58) provides for the establishment of the Financial Sector Conduct Authority, and describes the objective and the functions of the Financial Sector Conduct Authority.
  - (b) **Part 2** (clauses 59 to 72) deals with, the governance of the Financial Sector Conduct Authority, including setting out the governance objectives of the Financial Sector Conduct Authority, establishing the posts of the Commissioner and Deputy Commissioners, and the Executive Committee.
  - (c) **Part 3** (clauses 73 to 75) addresses the staffing, resources and financial management of the Authority.
- 3.5 **Chapter 5** addresses the vital need for co-operation and collaboration between the financial sector regulators, the National Credit Regulator, the Financial Intelligence Centre, the Reserve Bank, and with other organs of state, as follows:
- (a) **Part 1** (clauses 76 to 78), places obligations of co-operation and collaboration on the financial sector regulators, the National Credit Regulator, the Financial Intelligence Centre and the Reserve Bank, and they are required to enter into one or more memoranda of understanding addressing how they will fulfil their obligations to co-operate and

collaborate with each other. The financial sector regulators, the National Credit Regulator and the Financial Intelligence Centre may provide for the delegation of powers between themselves.

- (b) **Part 2** (clauses 79 to 82) provides for the establishment of the Financial System Council of Regulators, and its functioning. The Financial System Council of Regulators is established to facilitate co-operation and collaboration and where appropriate, consistency of action, between the institutions represented on the Financial System Council of Regulators by providing a forum for senior representatives of those institutions to discuss, and inform themselves about, matters of common interest.
- (c) **Part 3** (clauses 83 to 86), provides for the establishment of the Financial Sector Inter-Ministerial Council to facilitate co-operation and collaboration between Cabinet members administering legislation relevant to regulation and supervision of the financial sector by providing a forum for discussion and consideration of matters of common interest.

3.6. **Chapter 6** addresses administrative actions, as follows:

- (a) **Part 1** (clauses 87 to 90) empowers the financial sector regulators to establish administrative action committees, provides for their functioning and also provides for the application of the Chapter to the Ombud Regulatory Council.
- (b) **Part 2** (clauses 91 to 96) deals with administrative actions. Clause 91 addresses the application of the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000) to administrative action taken by financial sector regulators. Clause 92 empowers the financial sector regulators to make administrative action procedures, and clause 93 sets out the processes that must be followed for determining, reviewing and amending administrative action procedures. Clause 94 addresses the review of administrative action procedures. Clause 95 provides that the financial sector regulators may revoke decisions in certain specified circumstances. Clause 96 provides for interpretation.

3.7. **Chapter 7** provides for making regulatory instruments, as follows:

- (a) **Part 1** (clauses 97 to 104) specifies requirements for making regulatory instruments. Consultation requirements are set out, and a process is provided for regulatory instruments to be made in situations of urgency. Reports on consultation processes are required. The consultation processes stipulated do not preclude additional consultation processes being undertaken by the financial sector regulators. The commencement of regulatory instruments is provided for.
- (b) **Part 2** (clauses 105 to 110) deals with standards for Financial Products and Financial Services. The Prudential Authority is empowered to make prudential standards, and the Financial Sector Conduct Authority is empowered to make conduct standards in relation to financial products and financial services. The regulators may also make joint standards if they determine that it is appropriate. The Prudential Authority and the Financial Sector Conduct Authority may not make a standard that imposes requirements on providers of payment services, or a standard aimed at assisting in maintaining financial stability, without the concurrence of the Reserve Bank.

3.8. **Chapter 8** deals with licensing, as follows:

- (a) **Part 1** (clause 111) provides that no person may provide, as a business or part of a business, a financial product, financial service or market infrastructure except in accordance with a licence in terms of a specific financial sector law, or if no specific financial sector law provides for such a licence, in accordance with a licence issued in terms of this Act.
- (b) **Part 2** (clauses 112 to 124) sets out licensing requirements for licenses for financial products designated in terms of clause 2, financial services designated in terms of clause 3, and holding companies of financial conglomerates who are required to be licensed in terms of clause 162.
- (c) **Part 3** (clauses 125 to 128) contains provisions that relate to all licenses issued in terms of the financial sector laws. Clause 126 provides that the

responsible authority who is the responsible authority in terms of a financial sector law may not issue, vary, suspend or revoke a licence or grant an exemption in terms of clause 281 unless the other financial sector regulator has concurred, and if the action relates to or affects a systemically important financial institution, the Reserve Bank has also concurred.

3.9. Chapter 9 deals with information gathering, supervisory on-site inspections and investigations, and will replace provisions currently contained in the Inspection of Financial Institutions Act, 1998 (Act No. 80 of 1998), and the Financial Institutions (Protection of Funds) Act, 2001 (Act No. 28 of 2001), as follows:

- (a) Part 1 (clauses 129 to 130) provides that the provisions of this Chapter are applicable to the Prudential Authority, Financial Sector Conduct Authority and the Council for Medical Schemes. Legal professional privilege is addressed.
- (b) Part 2 (clause 131) deals with information gathering, and empowers the Prudential Authority, the Financial Sector Conduct Authority, and the Council for Medical Schemes to make information requests to supervised entities.
- (c) Part 3 (clauses 132 to 133) empowers the financial sector regulators and the Council for Medical Schemes to conduct supervisory on-site inspections. Clause 133 provides that a person may not interfere with the conduct of a supervisory on-site inspection.
- (d) Part 4 (clauses 134 to 139) deals with investigations.
- (e) Part 5 (clause 140) provides certain protections for persons during questioning, or when a person is required to produce a document or information during a supervisory on-site inspection or an investigation.

3.10 Chapter 10 provides important enforcement powers to the financial sector regulators, as follows:

- (a) Part 1 (clauses 141 to 142) provides for the issue of guidance notices and interpretation rulings by the financial sector regulators. Clause 141 empowers the financial sector regulators to issue non-binding guidance notices on the application of the financial sector laws. Clause 142 provides for the issuing of binding interpretations on the application of specified provisions of the financial sector laws.
- (b) Part 2 (clauses 143 to 150) empowers the financial sector regulators to issue regulator's directives. The Prudential Authority and the Financial Sector Conduct Authority are each empowered to issue directives in relation to specified matters.  
A period to comply with a directive is specified. The financial sector regulators are empowered to revoke directives. A financial institution, key person, representative or contractor to which a directive has been issued must comply with the directive. The power to issue directives in terms of this Bill applies in addition to the powers to issue directives that are provided for in other financial sector laws.
- (c) Part 3 (clause 151) provides for the acceptance by a responsible authority for a financial sector law (which is the financial sector regulator that is designated in Schedule 2 of the Bill as being the responsible authority for that financial sector law) of an enforceable undertaking in relation to future conduct that may be engaged in by person that is regulated by the financial sector law. An enforceable undertaking is a legal instrument that is enforceable by the authority in a court. An enforceable undertaking may include an undertaking to provide specified redress to financial customers. An enforceable undertaking may be varied or withdrawn if the responsible authority agrees. If an enforceable undertaking is breached, the responsible authority may suspend or cancel the licence of the person.
- (d) Part 4 (clause 152) empowers the financial sector regulators to institute proceedings in order to enforce compliance with a financial sector law. The financial sector regulator must publish court orders that are obtained.

- (e) Part 5 (clauses 153 to 155) empowers the financial sector regulators to make debarment orders in respect of a person for contraventions of financial sector laws, enforceable undertakings, as well as in respect of attempting, conspiring, aiding and abetting, inducing, inciting or procuring another person to contravene a financial sector law, or contravening a law of a foreign country that corresponds to a financial sector law.
- (f) Part 6 (clause 156) empowers a responsible authority for a financial sector law to enter into leniency agreements, in exchange for a person's co-operation in investigations or in proceedings relating to a contravention of a financial sector law, which may provide that the responsible authority will not impose an administrative penalty.

3.11 Chapter 11 addresses significant owners of financial institutions. Clause 157 provides for the declaration of a significant owner of a financial institution by a responsible authority. Clause 158 provides for approvals and notifications in respect of significant owners. Clause 159 empowers standards to be made and directives to be issued in relation to significant owners.

3.12 Chapter 12 provides for a framework for the supervision of financial conglomerates, an important area that is not currently well addressed in the financial sector legislation, as follows:

- (a) Clause 160 empowers the Prudential Authority, after having consulted the Financial Sector Conduct Authority, to designate members of a group of companies, as defined in section 1 of the Companies Act, as a financial conglomerate. A financial conglomerate that is designated must include both an eligible financial institution and a holding company of the eligible financial institution, but it does not have to include all the members of a group of companies.
- (b) Clause 161 requires an eligible financial institution that becomes a member of a group of companies to notify the Prudential Authority within 30 days after it becomes a member of a group of companies.
- (c) Clause 162 empowers the Prudential Authority to require the holding company of a financial conglomerate to be licensed.
- (d) Clause 163 empowers the Prudential Authority to require the holding company of a financial conglomerate to be non-operating.
- (e) Clause 164 empowers the Prudential Authority to make prudential standards for financial conglomerates.
- (f) Clause 165 empowers the Prudential Authority to issue directives to the holding company of a financial conglomerate imposing requirements on the holding company to manage and otherwise mitigate risks to the prudent management or financial soundness of an eligible financial institution in the conglomerate arising from other members of the conglomerate. A directive may also be issued with respect to restructuring the conglomerate in accordance with a plan submitted to the Authority within a period agreed by the Authority, and approved by the Authority. The Financial Sector Conduct Authority may issue a directive to the holding company of a financial conglomerate requiring the holding company to ensure that a financial institution in the conglomerate complies with a financial sector law for which the Financial Sector Conduct Authority is the responsible authority.
- (g) Clause 166 provides that a holding company of a financial conglomerate may not acquire or dispose of a material asset as defined in prudential standards made for this section without the approval of the Prudential Authority.

3.13 Chapter 13 provides for the imposition of administrative penalties by a responsible authority. Clause 167 stipulates criteria for the imposition of administrative penalties. Clause 168 provides for the potential for an agreement to be made for payment of the penalties by instalments. Clause 169 provides for the imposition of interest. Clause 170 provides for the enforcement of administrative penalties. Clause 171 provides for the application of funds received from administrative penalties. Clause 172

provides that when determining the sentence to impose on a person convicted of an offence in terms of a financial sector law, a Court must take into account any administrative penalty order in respect of the same set of facts. Clause 173 provides that the responsible authority may remit some or all of an administrative penalty. Clause 174 prohibits indemnification in respect of administrative penalties.

3.14 Chapter 14 provides for the regulation of Ombuds. It expands and broadens what is currently provided in the Financial Services Ombud Schemes Act, 2004 and incorporates ombud schemes as an important component of the financial sector regulatory framework established by the Bill. This Chapter provides, as follows:

- (a) Part 1 (clauses 175 to 193) provides in clause 175 for the establishment of the Ombud Council. It is to assist in ensuring that financial customers have access to, and are able to use, affordable, effective, independent and fair alternative dispute resolution processes for complaints about financial institutions in relation to financial products, financial services, and services provided by market infrastructures. The functions of the Ombud Council are set out in clause 177, and the governance, staffing, and resources of the Ombud Council are dealt with in the rest of that Part.
- (b) Part 2 (clauses 194 to 200) sets out requirements for the recognition of industry ombud schemes, and for the suspension or revocation of that recognition.
- (c) Part 3 (clauses 201 to 208) empowers the Ombud Council to make rules, issue directives, accept enforceable undertakings, apply to court to ensure compliance with financial sector laws, issue debarment orders and administrative penalties, make information requests, and conduct supervisory on-site visits and inspections.
- (d) Part 4 (clauses 209 to 217) provides for general provisions relating to Ombud Schemes, including access to ombud schemes, restrictions on financial institutions in relation to Ombud Schemes, the determination of an ombud scheme when there is no applicable ombud scheme, and addressing instances where there may be overlapping jurisdiction between ombud schemes. It is also required that the governing rules of an ombud scheme may not be amended without the approval of the Ombud Council.

3.15 Chapter 15 addresses the reconsideration and review of decisions, as follows:

- (a) Part 1 (clause 218) provides for definitions for the purposes of the Chapter.
- (b) Part 2 (clauses 219 to 227) provides for the establishment of the Tribunal and sets out its membership, terms and conditions of appointment and disclosure of interests. It also provides for the constitution of Panels of the Tribunal to consider decide applications for the review of decisions. An application for a review of a decision or the review proceedings do not suspend the operation of the decision unless the Tribunal makes an order that the operation of the decision is suspended. The orders that the Tribunal may make are specified, and the rules and procedures for proceedings of the Tribunal are provided for.
- (c) Part 3 (clauses 228 to 229) addresses the right to reasons for decisions.
- (d) Part 4 (clauses 230 to 236) addresses the reconsideration of decisions by the Tribunal.

3.16 Chapter 16 (clauses 237 to 249) deals with fees, levies and finances.

3.17 Chapter 17 deals with various miscellaneous matters, as follows:

- (a) Part 1 (clauses 251 to 255) deals with information sharing and reporting. It provides a framework for information sharing by the financial sector regulators. It mandates the reporting by auditors or actuaries to the financial sector regulators, who in the performance of their duties, become aware of a matter that has or is likely to have adverse effects on the financial condition of a financial institution. Provision is made for complaints to be made to the financial sector regulators. Disclosures by

persons who properly report contraventions of the financial sector laws are afforded legal protection and may not be victimised.

- (b) Part 2 (clauses 256 to 264) provides for the establishment of the Financial Sector Information Register, that will be managed by the National Treasury, with a view to providing financial institutions, financial customers and the general public with reliable access to accurate and up to date information relating to financial sector laws, regulatory instruments and their implementation.
- (c) Part 3 (clauses 265 to 276) contains certain offences and administrative penalties provisions, including but not limited to, offences relating to investigations and onsite inspections, offences relating to enforcement, and proceedings in the Tribunal.
- (d) Part 4 (clauses 277 to 287) covers general matters. It provides that the financial sector regulators must if requested assist a person to make a complaint to an appropriate ombud. It provides that a person who suffers a loss as a result of a contravention of a financial sector law may recover the loss in a court action. A financial sector regulator may extend timeframes specified in a financial sector law, and may issue exemptions to persons or a category of persons from compliance with a provision of a financial sector law, provided that specified requirements are met. Licences may be made subject to conditions. It is provided that the financial sector regulators may, in terms of the Memorandum of Understanding that they are required to enter into, agree in specified instances that notification and concurrence requirements in terms of the Act may not necessarily need to be adhered to. The financial sector regulator and the Ombud Regulatory Council must establish and give effect to arrangements to facilitate consultation with, and the exchange of information with, relevant stakeholders on matters of mutual interest. The provision of notices to licensees and publication requirements in terms of financial sector laws are dealt with. There is also a provision dealing with immunities.
- (e) Part 5 (clause 288) empowers the Minister of Finance to make regulations and guidelines in terms of the Bill. There is also a provision dealing with immunities.
- (f) Part 6 (clauses 28 to 304) deals with amendments, repeals and transitional and saving provisions.
- (g) Part 7 (clause 305) provides for the short title and commencement.

#### 4. ORGANISATIONS AND INSTITUTIONS CONSULTED

The National Treasury worked with the Financial Services Board and the Reserve Bank preparing the Bill. Previous drafts of the Bill were published for public comments in December 2013 and December 2014. Comments received on Bill from the relevant stakeholders and industry participants have been considered, and where appropriate, addressed in the finalised Bill.

#### 5. FINANCIAL IMPLICATIONS FOR THE STATE

There are no significant financial implications envisaged for the fiscus, as the financial sector regulators will be funded through fees and levies imposed on financial institutions.

#### 6. CONSTITUTIONAL IMPLICATIONS

None.

#### 7. PARLIAMENTARY PROCEDURE

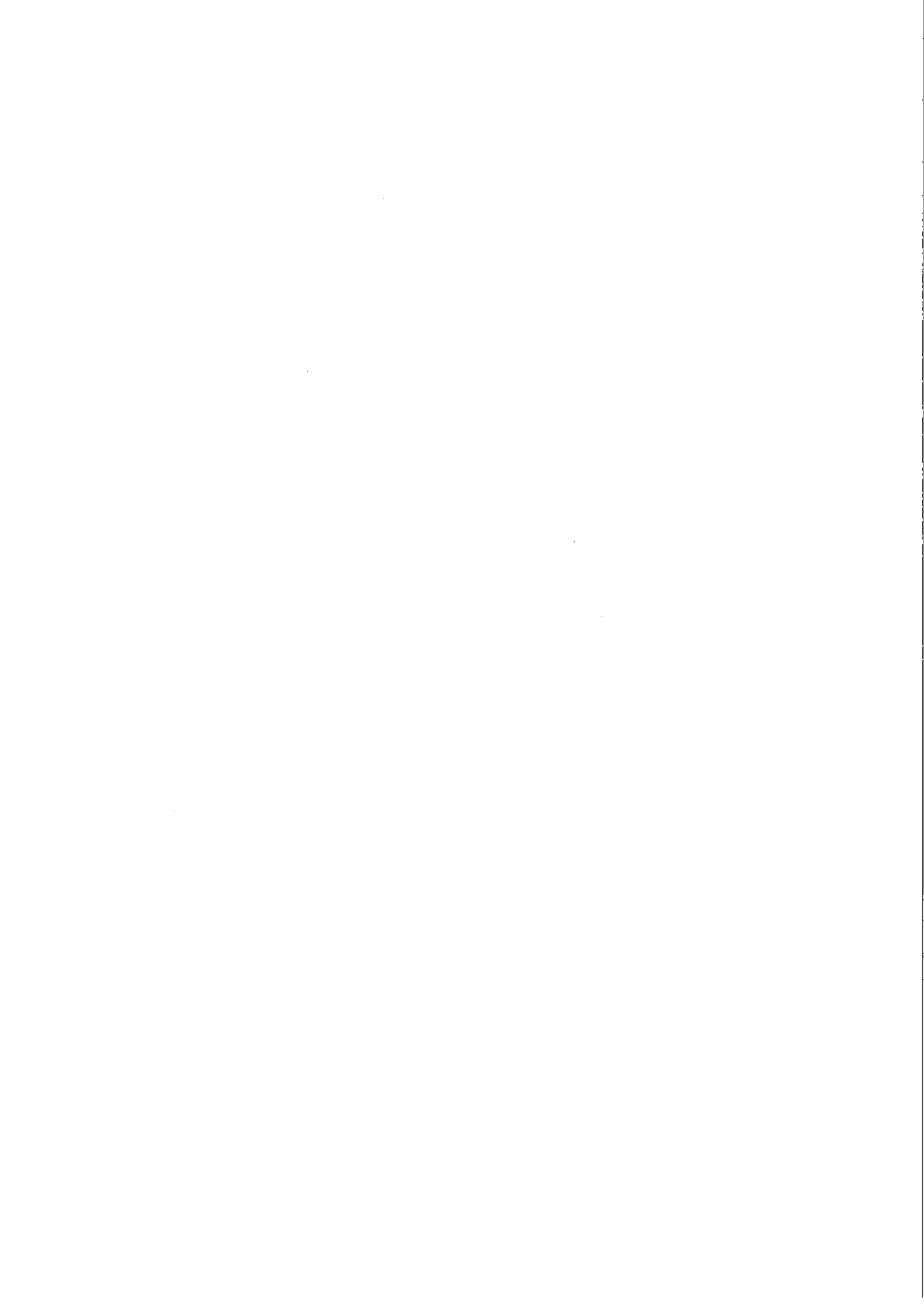
7.1 The Constitution prescribes procedure for the classification of Bills, therefore a Bill must be correctly classified so that it does not become inconsistent with the Constitution.

- 7.2 The State Law Advisers have considered the Bill against the provisions of the Constitution relating to the tagging of Bills and against the functional areas listed in Schedule 4 (functional areas of concurrent national and provincial legislative competence) and Schedule 5 (functional areas of exclusive provincial legislative competence) to the Constitution.
- 7.3 The established test for classification of a Bill is that any Bill whose provisions in substantial measure fall within a functional area listed in Schedule 4 to the Constitution must be classified in terms of that Schedule. The process is concerned with the question of how the Bill should be considered by the provinces and in the National Council of Provinces. Furthermore, how a Bill must be considered by the provincial legislatures depends on whether it affects the provinces. The more the Bill affects the interests, concerns and capacities of the provinces, the more say the provinces should have on the contents of the Bill.
- 7.4 Therefore, the issue to be determined is whether the proposed amendments to the Act, as contained in the Bill, in substantial measure, fall within a functional area listed in Schedule 4 to the Constitution.
- 7.5 The main object of the Bill is to achieve a financial system that works in the interests of financial customers, and supports balanced and sustainable economic growth in the Republic, by establishing, in conjunction with the other financial sector laws, a regulatory and supervisory framework that promotes—
- financial stability;
  - the safety and soundness of financial institutions;
  - the fair treatment and protection of financial customers;
  - the efficiency and integrity of the financial system;
  - the prevention of financial crime;
  - financial inclusion;
  - transformation of the financial sector; and
  - confidence in the financial system.
- 7.6 In order to achieve it objects the Bill establishes the two new financial sector regulators, the Prudential Authority and the Financial Sector Conduct Authority.
- 7.7 The main objective of the Prudential Authority is to promote and enhance the safety and soundness of financial institutions that provide financial products and promote and enhance the safety and soundness of market infrastructures.
- 7.8 The main objective of the Financial Sector Conduct Authority is to enhance and support the efficiency and integrity of the financial system, to protect financial customers and to promote fair treatment of financial customers by financial institutions.
- 7.9 The Bill provides for, and ensures that there is, co-operation and collaboration between the financial sector regulators, the National Credit Regulator, the Financial Intelligence Centre and the Reserve Bank.
- 7.10 The Bill enhances and maintains prudential regulation and supervision; enhances and maintains market conduct regulation and supervision; maintains standards for financial products, financial services, and market infrastructure;

the supervision of financial conglomerates; provides important enforcement mechanisms for the financial sector regulators.

- 7.11 The Ombud Council is established to provide for the regulation of ombud schemes. The Ombud Council is provided with necessary powers to enable the appropriate regulation of ombud schemes, in order to resolve complaints about financial institutions in relation to financial products, financial services, and services provided by market infrastructures.
- 7.12 A Financial Services Tribunal is established and it is mandated to adjudicate on applications for reviews of decisions taken by the financial sector regulators or the Ombud Council.
- 7.13 The Bill also contains consequential amendments in respect of various relevant Acts of Parliament in order to align these Acts with the envisaged Financial Sector Regulation Bill.
- 7.14 The proposed amendments reflected have been carefully examined to establish whether, in substantial measure, they fall within any of the functional areas listed in Schedule 4 to the Constitution.
- 7.15 In the view of the State Law Advisers, the subject matter of the proposed amendments does not fall within any of the functional areas listed in Schedule 4 to the Constitution and it does not affect provinces whereby the procedure set out in section 76 of the Constitution would be applicable.
- 7.16 The State Law Advisers are therefore of the opinion that since this Bill does not deal with any of the matters listed in Schedule 4 of the Constitution, it must be dealt with in accordance with the procedure set out in section 75 of the Constitution.
- 7.17 The State Law Advisers are also of the opinion that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.





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