

CONDUCT OF FINANCIAL INSTITUTIONS BILL - SCHEDULE 2

CATEGORIES AND SUBCATEGORIES OF ACTIVITIES REQUIRING LICENSING³

In this Schedule-

"acquisition" includes participation or investing in, subscribing for, contributing or commitment to, underwriting of or exercising any rights conferred by an investment;

"credit rating" means an opinion regarding the creditworthiness of-

- (a) an entity;
 - (b) a security or a financial instrument; or
 - (c) an issuer of a security or a financial instrument, using an established and defined ranking system of rating categories, excluding any recommendation to purchase, sell or hold any security or financial instrument;
- "benchmark"** means a standard against which the performance of a financial instrument is measured;

"disposal" includes-

- (a) disinvesting, unsubscribing, ceasing participation or withdrawal of commitment;
- (b) in the case of a financial product consisting of rights under a contract-
 - (i) surrendering, assigning or converting those rights; or
 - (ii) assuming the corresponding liabilities under the contract;
- (c) in the case of a financial product consisting of rights under other arrangements, assuming the corresponding liabilities under the contract or arrangements;
- (d) in the case of any other investment, issuing or creating the investment or granting the rights or interests of which it consists.

"index" means any figure-

- (a) that is regularly determined-
 - (i) entirely or partially by the application of a formula or any other method of calculation, or by an assessment; and
 - (ii) on the basis of the value of one or more underlying assets or prices, and any derivative thereof;

"investment" has the meaning defined in section 1 of the Financial Sector Regulation Act.

Treasury Comment: The descriptions of activities in this Schedule still require further discussion and input to confirm their scope and accuracy, and comments on the content of the descriptions will be very welcome.

1 Providing a financial product or financial instrument

Treasury Comment: This activity includes classes of business that are authorised by the Prudential Authority. The licensing of this activity would occur essentially automatically, although it would be necessary for the holder of a licence for this activity to adhere to additional standards in terms of this Bill. This activity includes the activity of a pension fund providing pension benefits to its members, medical schemes providing medical benefits to members, and credit provided in terms of credit agreements.

a. Providing a financial instrument

Structuring a financial instrument for the purpose of making it available to financial customers to purchase or transact in as an investment.

b. Providing a financial product

Undertaking responsibility for the obligations owed under the contract or arrangement that constitutes or establishes a financial product.

2. Distributing Financial Products

a. Sales and execution

Providing a facility or performing a service or any other act (other than the performance of another authorised activity defined in this Schedule) on the instruction of a financial customer that results in the conclusion of an agreement to buy, sell, deal, invest or disinvest in, replace or vary one or more financial products or financial instruments.

b. Product comparison or aggregation services

Providing a facility or performing a service or any other act (other than the performance of another authorised activity defined in this Schedule) through a website portal, web-based search utility or any other similar medium that enables the public to obtain and/or compare similar t of financial product prices, benefits and/or features

3. Financial Advice

Providing a recommendation, guidance or proposal, by any means or medium, to any financial customer or group of financial customers

(a) in respect of—

- (i) the acquisition or disposal of a financial product or financial instrument, or class of financial product or financial instrument;
- (ii) the allocation of an investment or part of an investment in a financial product or class of financial product;
- (iii) maintaining or holding a financial product or financial instrument or class of financial product or financial instrument;

- (b) on the conclusion of any other transaction, including a loan or cession, aimed at the incurring of any liability or the acquisition of any right or benefit in respect of any financial product;
- (c) on the variation of any term or condition applying to a financial product or on the replacement of any such product; or
- (d) in respect of the selection by a financial customer of one or more particular financial product providers or financial service providers and irrespective of whether or not such advice—
 - (i) is furnished in the course of or incidental to financial planning in connection with the affairs of the client; or
 - (ii) results in any such acquisition, disposal, allocation, investment, disinvestment, transaction, variation, replacement, termination, or selection as the case may be, being effected.

4. Managing and Administering Investments

a. Discretionary investment management

Treasury Comment: The FSCA, through its Retail Distribution Review (RDR) process, is in the process of consulting stakeholders on a definition of this activity. The FSCA has identified a need to define the activity in a way that distinguishes it more clearly from the broader situation (contemplated in the current FAIS Cat II license criteria) of simply holding a customer mandate to make decisions regarding the purchase of or investment in financial products. Input on the activities that comprise "true" investment management to be included in such a definition is invited

b. Administering a pooled investment

Administering a pooled investment by—

- (a) receiving, paying or investing of money or other assets, including income accruals derived or resulting from investments held on behalf of or due to financial customers, in respect of a pooled investment or portfolio;
- (b) selling, repurchasing, issuing or cancelling of an investment in a pooled investment or portfolio and disclosing of information on any of those matters to financial customers or potential financial customers; and / or
- (c) buying and selling of assets or handing over thereof to a trustee or custodian for safe custody.

c. Operating an investment platform

Arranging, safeguarding, administering and distributing financial products offered to retail financial customers by more than one financial institution, but not solely paid for by adviser charges and not ancillary to the activity of discretionary investment management, by giving effect to instructions of a retail financial customer or financial institution, through the method of bulking.

Treasury Comment: At this stage, this description is limited to the current FAIS "administrative FSP" (LISP) activity, where the distinguishing feature is "bulking" (also defined in FAIS). The current FAIS

definition of an administrative FSP is as follows: "means an FSP, other than a discretionary FSP, that renders intermediary services in respect of [an identified list of financial products] on the instructions of a client or another FSP and through the method of bulking". The current description simply indicates that this activity is the activity currently carried out by an Administrative FSP (Cat III licence) as contemplated in FAIS, but further consideration is being given to whether there are any other forms of "investment platform" that need to be licensed in the category.

5. Benefit Administration

a. Pension fund benefit administration

Receiving, controlling or managing contributions and benefits in accordance with the rules of a licensed pension fund.

b. Medical scheme administration

Receiving, controlling or managing contributions and benefits in accordance with the rules of a medical scheme registered under the Medical Schemes Act.

Treasury Comment: This is included as an activity that requires licensing, as in terms of section 291 of the Financial Sector Regulation Act, the Authority is given authority in relation to conduct regulation of medical schemes, subject to the transitional measures contemplated in that section.

c. Funeral administration

Receiving, controlling or managing premiums and benefits or providing other administration services on behalf of an insurer in relation to a policy of insurance in the funeral class of policies as defined in the Insurance Act.

6. Professional Fiduciary or Custodian Service

a. Professional custodian service

Holding assets in custody on behalf of financial customers as a business or part of a business.

b. Professional nominee company service

Holding assets in custody on behalf of financial customers as a business or part of a business.

c. Professional pension fund trustee service

Holding assets in custody on behalf of financial customers as a business or part of a business.

d. Independent pension fund trustee service

Holding assets in custody on behalf of financial customers as a business or part of a business

7. Payment Service

Any of the following:

- (a) enabling cash to be placed on or deposited into a payment account and all of the operations required for operating a payment account;
- (b) enabling cash withdrawals from a payment account and all of the operations required for operating a payment account;
- (c) executing of the following types of payment transactions (excluding clearing and settlement as defined in section 1 of the National Payment System Act, whether the funds are covered by a credit line for the payment user or not—
 - (i) debit orders, including one-off debit orders;
 - (ii) payment transactions through a payment card or a similar device;
 - (iii) credit transfers, including debit orders and stop orders;
- (d) issuing payment instruments;
- (e) money remittance, in respect of operator/provider interactions with the consumer;
- (f) executing of payment transactions where the consent of the payer to execute the payment transaction is given by means of any telecommunication, digital or IT device and the payment is made to the telecommunication, IT system or network operator acting only as an intermediary between the payment user and the supplier of the goods or services;
- (g) initiating a payment order at the request of the payment service user with respect to a payment account held at another payment service provider; excluding—
 - (i) payment transactions executed wholly in cash and directly between the payer and the payee, without any intermediary intervention;
 - (ii) payment transactions between the payer and the payee through a commercial agent authorised to negotiate or conclude the sale or purchase of goods or services on behalf of the payer or the payee;
 - (iii) the professional physical transport of banknotes and coins, including their collection, processing and delivery;

- (iv) payment transactions consisting of non- professional cash collection and delivery as part of a not-for-profit or charitable activity;
- (v) services where cash is provided by the payee to the payer as part of a payment transaction for the purchase of goods or services following an explicit request by the payer immediately before the execution of the payment transaction;
- (vi) money exchange business consisting of cash-to-cash operations where the funds are not held on a payment account;
- (vii) payment transactions based on any of the following documents drawn on the payment service provider with a view to placing funds at the disposal of the payee—
 - (aa) paper cheques of any kind, including travellers' cheques;
 - (bb) bankers' drafts;
 - (cc) paper-based vouchers;
 - (dd) paper postal orders;
- (viii) payment transactions carried out within a clearing or securities settlement system between payment services providers and settlement agents, central counterparties, clearing houses, central banks or other participants in the system;
- (ix) payment transactions related to securities asset servicing, including dividends, income or other distributions, or redemption or sale, carried out by persons referred to in subparagraph (viii) or by investment firms, credit institutions, collective investment undertakings or asset management companies providing investment services or by any other entities allowed to have the custody of financial instruments;
- (x) services provided by technical service providers, which support the provision of payment services, without the provider entering at any time into possession of the funds to be transferred, including—
 - (aa) the processing and storage of data;
 - (bb) trust and privacy protection services;
 - (cc) data and entity authentication;
 - (dd) information technology;
 - (ee) communication network provision; and
 - (ff) the provision and maintenance of terminals and devices used for payment services;
- (xi) services based on instruments that can be used to acquire goods or services only—
 - (aa) in or on the issuer's premises; or
 - (bb) under a commercial agreement with the issuer, either within a limited network of service providers or for a limited range of goods or services,
 and for these purposes the "issuer" is the person who issues the instrument in question;
- (xii) payment transactions executed by means of any telecommunication, digital or IT device, where the goods or services purchased are delivered to and are to be used through a telecommunication, digital or IT device,

provided that the telecommunication, digital or IT operator does not act only as an intermediary between the payment service user and the supplier of the goods and services;

- (xiii) payment transactions carried out between payment service providers, or their agents or branches, for their own account;
- (xix)¹ payment transactions between a parent undertaking and its subsidiary or between subsidiaries of the same parent undertaking, without any intermediary intervention by a payment service provider other than an undertaking belonging to the same group;
- (xx) services by providers to withdraw cash by means of automated teller machines acting on behalf of one or more card issuers, which are not party to the framework contract with the customer withdrawing money from a payment account, where no other payment service is conducted by the provider’;
- (xxi) the clearing and settlement of payment instruction/obligations in the payment system as regulated in terms of the National Payment System Act.

Treasury Comment: This definition will be engaged upon and refined, and some terms referred to within the definition also may subsequently be defined.

8. Financial Markets Activities

Treasury Comment: The scope and definitions of these sub-activities will be informed by the Financial Markets Review currently being undertaken.

a. Underwriting a public offering

Guaranteeing of the sale of an issue or part of an issue of securities by purchasing it at a stated price from the issuer

Treasury Comment: Input is invited as to whether this activity must be licensed. In the current regulatory framework this activity is indirectly regulated under the Financial Markets Act in respect of listed securities (through exchange rules) and the Companies Act in respect of unlisted securities issued by public companies. The underwriting of CIS participatory interests is included in the activity of the provider of a pooled investment (i.e. the CIS management company itself).

¹ Numbering as per original

9. a. Trading

Buying or selling of securities for own account or on behalf of another person as a business, a part of a business or incidental to conducting a business, or using of the trading system or infrastructure of an exchange to buy or sell listed securities

Treasury Comment: Input is invited on whether the proposed sub-activity "Trading" should be limited to only trading in securities. [Note: The definition of 'securities' in the FMA includes participatory interests in CISs] or whether trading in a broader range of products and instruments should be covered. This would result in the scope of Trading being broader than the current scope of securities services as defined in the Financial Markets Act (which deals with transactions in relation to "securities" only). Stakeholder engagement is also required to ensure there is appropriate demarcation between Trading and the sub-activity Distribution: Sales and Execution.

b. Making a market

Stating, through a facility, at a place or otherwise, the prices at which a person offers to acquire or dispose of financial instruments, whether or not on the person's own account, and other persons reasonably expect that they can enter into transactions for those instruments at those prices

Treasury Comment: The FSRA definition of making a market relates to "financial instruments" (as defined in the FSRA) only. Stakeholder engagement is required as to whether there are any other types of facilities (financial products) to which this sub-activity should apply. There are overlaps between this definition of making a market and aspects of the sub-activity Financial Markets Activities: Underwriting a Public Offering. Generally, the purpose of making a market is to inject liquidity into financial markets. Stakeholder engagement is required to clarify the scope of the activity. For example, it needs to be clarified whether the activity may be carried out either as principal or agent (as per the FSRA definition) or as principal only (as per certain international descriptions of the activity). At this stage, the only South African entities that have been clearly identified as performing the activity of making a market are the Primary Dealers appointed by the National Treasury in respect of the SA bond market.

c. Clearing service

In respect of securities, calculating and determining, before each settlement process, the exact number or nominal value of securities of each kind to be transferred by or on behalf of a seller, and the amount of money to be paid by or on behalf of a buyer, to enable settlement of a transaction or a group of transactions

Treasury Comment: The current FMA definitions of clearing service and clear refer to the services provided by clearing members of an exchange or clearing house, and applies only to transactions in relation to securities. Input is required on whether this sub-activity should also focus on clearing activities that are not carried out by clearing members of a market infrastructure, and, on the scope of the activity. One possible example is the clearing and settlement activities carried out by prime brokers, particularly in relation to hedge funds. Depending on the scope of activities identified, the question may arise whether separate licensing of this sub-activity is in fact necessary, or whether the activities concerned can be regarded as incidental to certain other sub-activities (such as Trading or Making a Market)

d. Settlement service

In respect of securities, settling transactions in securities, "settlement" means the completion of the transaction and the fulfilment of all contractual obligations, by effecting the transfer of a security in the relevant uncertificated securities registers and the payment of funds or any other consideration payable in respect of that transaction, through a settlement system as defined in the rules in the listed environment

Treasury Comment: The current FMA definitions of settlement service and settlement refer to services provided by members of the relevant MIs and apply only to transactions in relation to securities. The FMA definition for "transaction" is limited to a contract of sale and purchase of 'securities'. This raises the question whether a 'transfer' as defined in section 1 of the FMA is included. A transfer does not appear to fit the definition as it is neither buying nor selling of securities but is a transfer of uncertificated securities or an interest in uncertificated securities by debiting and crediting the account in the securities register. These transfers are concluded outside of the exchange.

e. Custody service

Holding securities or funds in custody on behalf of another person

Treasury Comment: The current FMA definition of safeguarding refers to services provided by authorised users, whilst 'custody and administration of securities' are services performed by participants of central securities depositories. Similar discussion points therefore apply as for the sub-activities Clearing Service and Settlement Service. Engagement is also required regarding the demarcation between this Custody Service sub-activity and the sub-activities Professional

10. Providing benchmarks and related services

a. Providing a benchmark

Providing a benchmark that –

- (a) is used directly or indirectly within a combination of benchmarks as a reference for financial instruments or financial contracts or for measuring the performance of investments funds having a total average value of the Rand value determined by the Authority from time to time on the basis of all the range of maturities or tenors of the benchmark, where applicable, over a period of six months; or
- (b) has no or very few appropriate market-led substitutes and, in the event that the benchmark ceases to be provided or is provided on the basis of input data no longer fully representative of the underlying market or economic reality or unreliable input data, there would be a significant and adverse impact on market integrity, financial stability, consumers, the real economy or the financing of households or businesses

b. Providing an index

Providing any of the following indices

Treasury Comment: This list will be developed.

c. Administering a benchmark or index

Controlling the provision of a benchmark or index, and in particular, administering the arrangements for determining the benchmark or index, collecting and analysing the input data, determining the benchmark or index, and publishing the benchmark or index

11. Service related to buying or selling of foreign exchange

Exchanging of one currency for another or the conversion of one currency into another currency as a business or part of a business

Treasury Comment: Inputs will be welcome, regarding whether this should be captured as a separate activity, or whether it should form part of one of the other activities or sub-activities - for e.g. trading, sales & execution, etc.

12. Credit Rating Service

Gathering, collecting of data and information analysis, evaluation, approval, issuing for review of such data and information for the purposes of providing an opinion regarding the creditworthiness of—

- (a) an entity;
- (b) a security or financial instrument; or
- (c) an issuer of a security or a financial instrument; or
- (d) a sovereign state using an established and defined ranking system of rating categories, excluding any recommendation to purchase, sell or hold any security or

financial instrument, and includes a rating outlook; but excluding credit scores, credit scoring systems or similar assessments related to obligations arising from consumer, commercial or industrial relationships.

13. Debt Collection Service

Treasury Comment: A definition of this activity must still be developed. Note that it is intended to refer to the collection of debts arising from all credit agreements that are subject to the oversight of the National Credit Regulator in accordance with the National Credit Act. Inputs on a potential definition and scope of the activity will be welcome.

CoFI Definitions

"alternative investment fund" means a collective investment undertaking, including investment compartments of a collective investment undertaking, excluding a collective investment scheme, constituted in any legal form, including in terms of a contract, by means of a trust, or in terms of a statute, which-

- (a) raises capital from one or more financial customers to facilitate the participation or interest in, subscription, contribution or commitment to, a fund or portfolio, with a view to investing it in accordance with a defined investment policy for the benefit of the financial customers; and
- (b) the financial customers share the risk and the benefit of investment in proportion to their participation or interest in, subscription, contribution or commitment to, the fund;

"conduct standard" means a conduct standard prescribed by the Authority as contemplated in section 106 of the Financial Sector Regulation Act and section 107(1)(a) of this Act;

"financial institution" has the meaning defined in section 1(1) of the Financial Sector Regulation Act, but does not include a market infrastructure; *(See below)*

"financial instrument" has the meaning defined in section 1(1) of the Financial Sector Regulation Act, and includes a foreign financial instrument; *(See below)*

"financial product" has the meaning defined in section 2 of the Financial Sector Regulation Act, and includes a foreign financial product; *(See below)* [The content of this definition will be considered and further discussed in light of comments received. Refinements to the definition in the Financial Sector Regulation Act potentially may also be considered.]

"financial service" has the meaning defined in section 3 of the Financial Sector Regulation Act, and for the purposes of this Act, where required by the context, includes an activity that is listed in Schedule 2; *(See below)* [The content of Schedule 2 will potentially necessitate refinements to the definition of "financial service" in the Financial Sector Regulation Act, as is proposed in Schedule 1.]

"pooled investment" includes a collective investment scheme and an alternative investment fund;

"representative" means any person, including a person employed or mandated by the first-mentioned person, who provides an activity listed in Schedule 5 for or on behalf of a financial institution in terms of an employment contract or any other mandate or agreement other than an outsourcing arrangement

"service provider" means any person (whether or not that person is the representative or other agent of a financial institution) with whom a financial institution has an arrangement relating to the marketing, distribution, administration or provision of financial products or related services;

FSRA Definitions

"contractor" means a person with whom a financial institution has entered into an outsourcing arrangement but does not include an independent contractor as described in the definition of "staff member";

"financial institution" means any of the following, other than a representative:

- (a) A financial product provider;
- (b) a financial service provider;
- (c) a market infrastructure;
- (d) a holding company of a financial conglomerate; or
- (e) a person licensed or required to be licensed in terms of a financial sector law;

"financial instrument" means-

- (a) a share as defined in section 1 of the Companies Act;
- (b) a depository receipt and other equivalent instruments;
- (c) a debt instrument such as a debenture or a bond, but not a credit agreement;
- (d) money market securities as defined in section 1 (1) of the Financial Markets Act;
- (e) a derivative instrument as defined in section 1 (1) of the Financial Markets Act; or
- (f) a warrant, certificate, securitisation instrument or other instrument acknowledging, conferring or creating rights to subscribe to, acquire, dispose of, or convert, the financial instruments referred to in paragraphs (a) to (e);

"financial product" means a financial product as defined in section 2;

2. Financial products -

(1) In this Act "financial product" means-

- (a) a participatory interest in a collective investment scheme;
- (b) a long-term policy as defined in section 1 (1) of the Long-term Insurance Act or a life insurance policy as defined in section 1 of the Insurance Act;
- (c) a short-term policy as defined in section 1 (1) of the Short-term Insurance Act or a non-life insurance policy as defined in section 1 of the Insurance Act;
- (d) a benefit provided by-
 - (i) a pension fund organisation, as defined in section 1 (1) of the Pension Funds Act, to a member of the organisation by virtue of membership; or
 - (ii) a friendly society, as defined in section 1 (1) of the Friendly Societies Act, to a member of the society by virtue of membership;
- (e) a deposit as defined in section 1 (1) of the Banks Act;
- (f) a health service benefit provided by a medical scheme as defined in section 1 (1) of the Medical Schemes Act;
- (g) except for the purposes of Chapter 4 and section 106, the provision of credit provided in terms of a credit agreement regulated in terms of the National Credit Act;
- (h) a warranty, guarantee or other credit support arrangement as provided for in a financial sector law;
- (i) a facility or arrangement designated by Regulations for this section as a financial product; and

- (j) a facility or arrangement that includes one or more of the financial products referred to in paragraphs (a) to (i).

"financial sector law" means-

- (a) this Act;
- (b) a law listed in Schedule 1;
- (c) a Regulation made in terms of this Act or made in terms of a law referred to in Schedule 1;
or
- (d) a regulatory instrument made in terms of this Act or made in terms of a law referred to in Schedule 1;

"financial service" means a financial service as defined in section 3;

3. Financial services

(1) In this Act "financial service" means-

- (a) any of the following activities conducted in the Republic in relation to a financial product, a foreign financial product, a financial instrument, or a foreign financial instrument:
 - (i) Offering, promoting, marketing or distributing;
 - (ii) providing advice, recommendations or guidance;
 - (iii) operating or managing;
 - (iv) providing administration services;
- (b) dealing or making a market in the Republic in a financial product, a foreign financial product, a financial instrument or a foreign financial instrument;
- (c) a payment service;
- (d) securities services;
- (e) an intermediary service as defined in section 1 (1) of the Financial Advisory and Intermediary Services Act;
- (f) a service related to the buying and selling of foreign exchange;
- (g) a service related to the provision of credit, including a debt collection service, but excluding the services of-
 - (i) a debt counsellor registered in terms of section 44 of the National Credit Act who provides the services of a debt counsellor as contemplated in that Act;
 - (ii) a payment distribution agent as defined in section 1 of the National Credit Act; or
 - (iii) an alternative dispute resolution agent, as defined in section 1 of the National Credit Act;
- (h) a service provided to a financial institution through an outsourcing arrangement;
- (i) any other service provided by a financial institution, being a service regulated by a specific financial sector law; and
- (j) a service designated by the Regulations for this section as a financial service.

"financial service provider" means a person that, as a business or as part of a business, provides a financial service;

"key person", in relation to a financial institution, means each of the following:

- (a) A member of the governing body of the financial institution;
- (b) the chief executive officer or other person in charge of the financial institution;
- (c) a person other than a member of the governing body of the financial institution who makes or participates in making decisions that-
 - (i) affect the whole or a substantial part of the business of the financial institution; or
 - (ii) have the capacity to affect significantly the financial standing of the financial institution;
- (d) a person other than a member of the governing body of the financial institution who oversees the enforcement of policies and the implementation of strategies approved, or adopted, by the governing body of the financial institution;
- (e) the head of a control function of the financial institution; and
- (f) the head of a function of the financial institution that a financial sector law requires to be performed;

"outsourcing arrangement", in relation to a financial institution, means an arrangement between a financial institution and another person for the provision to or for the financial institution of any of the following:

- (a) a control function;
- (b) a function that a financial sector law requires to be performed or requires to be performed in a particular way or by a particular person; and
- (c) a function 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, but does not include-
 - (i) a contract of employment between the financial institution and a person referred to in paragraph (a) or (b) of the definition of "staff member"; or
 - (ii) an arrangement between a financial institution and a person for the person to act as a representative of the financial institution;

"supervised entity" means each of the following:

- (a) A licensed financial institution;
 - (b) a person with whom a licensed financial institution has entered into an outsourcing arrangement; and
 - (c) a representative of a financial institution;
-