

March 2019

**ADDITIONAL SUBMISSION TO THE
NATIONAL TREASURY
ON THE
CONDUCT OF FINANCIAL INSTITUTIONS BILL, 2018**

Attn: marketconduct@treasury.gov.za

BOARD OF ADVISERS Former Judge Rex van Schalkwyk (Chairman) | Adv Norman M Davis, SC
Adv Greta Engelbrecht | Johnny Goldberg | Candice Pillay | Adv Frans Rautenbach
Prof Richard Epstein | Prof Robert Vivian | Judge Prof Douglas Ginsburg

Johannesburg PO Box 4056 | Cramerview 2060 | **Tel** 011 884 0270 | **Email** martinvanstaden@fmfsa.org
NPO No 020-056-NPO | PBO & Section 18A(1)(a) No 930-017-343

Further comments by Rule of Law Project

In February 2019, the Rule of Law Project lodged initial submission on the draft Conduct of Financial Institutions Bill, 2018.

The Project now lodges the following further submission on the Bill.

It is submitted that interested persons are not restricted to one set of comments.

(The National Treasury's *Gazette* notice and media statement inviting comments on the Bill do not limit a person to one set of comments, and say merely that comments will be accepted until 1 April,¹ and can be sent to a Treasury email address until that date.²)

Project's initial comments

Our initial comments show how certain clauses of the Bill contravene the Rule of Law.³

We make the following further comments, about the approach of the Bill as a whole.

Summary comments

The draft Bill contains a great number of clauses which delegate the power to prescribe a very wide range of matters to the Financial Sector Conduct Authority in conduct standards, and as a whole is in effect a plenary assignment to the Conduct Authority of the task of legislating and an abdication of Parliament's legislative power.

The Constitutional Court has ruled that there is nothing in the Constitution which prohibits Parliament from delegating subordinate regulatory authority to other bodies, but that there a difference between delegating authority to make subordinate legislation within the framework of a statute under which the delegation is made, and assigning plenary legislative power to another body.

In the United Kingdom parliament, the House of Lords Select Committee on the Constitution has investigated the delegation of legislative powers, and recently reported that it is constitutionally objectionable for the government to seek delegated powers simply

¹ Treasury: Media Statement of 11 Dec 2018: Release of Conduct of Financial Institutions Bill for public comment (http://www.treasury.gov.za/comm_media/press/2018/2018121101%20Media%20statement%20-%20COFI%20Bill.pdf).

Gen Notice 808 of 2018 (*Gazette* 42114 of 14 Dec 2018): National Treasury: Draft Conduct of Financial Institutions Bill, 2018: Publication for public comment.

² marketconduct@treasury.gov.za.

³ Those clauses in the Bill, it is submitted, would confer unfettered discretions or unjustifiably oppressive powers on the Authority, or unjustifiably treat persons unequally or are vague.

Most of the clauses concerned would violate the principles of the Rule of Law that questions of legal right and liability should be resolved by application of the law and not by exercise of a discretion, that laws should not unreasonably interfere with fundamental rights, and that laws should apply equally to all unless objective differences justify differentiation.

because substantive policy decisions have not yet been taken. Broad powers, or those sought for the convenience of flexibility, are inappropriate. There must be a compelling justification for delegated powers.

Greater delegation of legislative power to a subordinate regulatory agency may be legitimate in the case of relatively unpredictable complex systems or environments such as financial, securities, foreign-exchange or energy markets, to allow for greater flexibility.

But even in the case of complex systems, parliaments should be unwilling to delegate an undue degree of legislative power. In 2016 a Western Australia parliamentary committee found that bills introduced for control of energy markets would delegate excessive power to makers of delegated legislation, prioritise executive expedience, and not strike a proper balance with parliament's lawmaking powers.

The Bill has a number of provisions which contain substantive rules themselves rather than envisaging that any such rules be prescribed by the Authority in conduct standards. But those substantive rules will not outweigh the manifold conduct standards that are to be prescribed under the Bill's many enabling provisions.

The Bill as it stands is an abdication of plenary lawmaking power to the Financial Sector Conduct Authority.

Bill abdicates to Authority the prescribing of many matters in standards

The Conduct of Financial Institutions Bill will be an important component of the new regulatory structure for the financial sector, along with the Financial Markets Act 2012 and the Financial Sector Regulation Act 2017.

But the draft Bill, though divided into chapters and parts with many headings, is relatively emaciated.

The draft Bill contains a great number of clauses which delegate the power to prescribe a very wide range of matters to the Financial Sector Conduct Authority in conduct standards.

The Bill as a whole is in effect a plenary assignment to the Conduct Authority of the task of legislating.

We submit that the Bill is an abdication of Parliament's legislative power in favour of the Authority, for the latter to exercise in conduct standards.

Clauses of the draft Bill which authorise or oblige the Conduct Authority to prescribe conduct standards are outlined⁴ in the Schedule.

Stated more briefly (the list is extensive), the draft Bill provides that the Conduct Authority may or must prescribe conduct standards on the following, very many, matters:

The Conduct Authority will be authorised by the Bill to prescribe conduct standards that apply to any type of or all financial institutions, key persons, contractors, representatives or significant owners.

(Where the Bill envisages that the Authority may “prescribe” anything or refers to anything “prescribed”, this means prescribed in a conduct standard issued by the Authority.)

The Authority will be able to make standards about any category of financial product, service or business.

The Authority will be authorised to make standards that apply to financial groups or conglomerates, and related persons, and make different standards based on customer categories.

It will be authorised, in standards applying to prudentially-regulated financial groups and conglomerates, to impose requirements on holding companies.

Its standards may stipulate that specified acts require its approval, or that they apply to existing matters.

Where the Bill requires information to be published by a financial institution, it will be sufficient, unless the Authority otherwise prescribes, if an electronic version is published in a form that allows it to be printed by the recipient in a reasonable time at reasonable cost, or if notice, satisfying any prescribed requirements, of the availability of the information is delivered to the intended recipient with instructions for receiving the full information.

The Conduct Authority will be able to prescribe conduct standards imposing requirements on a pension fund’s board members and sponsors and anyone else involved in a pension fund.

The Authority will be able to issue notices and directions about the Bill’s application to smaller financial institutions.

The Authority will be authorised to exempt financial institutions from the application of the Bill or part of it if applying it is deemed not to be in the public interest, and can withdraw an exemption on any ground it deems sufficient.

The Authority will be able to issue directions about the Bill’s application when the Bill overlaps with laws administered by the Prudential Authority or Reserve Bank.

The Authority will be able to prescribe reporting duties, and how financial institutions must remedy contraventions.

A financial institution may not provide a financial product or a financial service, without a licence from the Authority stipulating which of the activities listed in a schedule to the Bill the institution is authorised to perform, and for which product category prescribed in conduct standards the institution can perform that activity.

The Authority will be able in conduct standards to require anyone to whom financial institutions outsource a function to be licensed.

To qualify for a licence, an applicant would have to show to the Authority’s satisfaction that he meets the Authority’s prescribed fit and proper requirements, that he can comply with requirements in the Authority’s conduct standards for conducting that activity, and that he satisfies all other licensing requirements prescribed by the Authority.

The Authority will be able in conduct standards to prescribe licensing requirements for prudentially-regulated and systemically-important financial institutions, for payment-service and foreign-exchange-service providers, for financial institutions regulated by other regulators, for foreign entities, and for any category of financial product, activity or customer.

The Authority will in conduct standards be authorised to stipulate provisions that a financial institution’s founding document must or must not include.

⁴ With some minor abbreviation.

The Authority will be able to impose additional licensing conditions whenever it deems this to be in the public interest or the interests of customers or potential customers.

The Authority will be authorised to prohibit representatives from acting for more than one licensee, or from providing services in respect of particular financial products.

A licensee will not be able to appoint representatives who were previously debarred, unless they comply with requirements prescribed by the Authority in conduct standards.

A licensee must maintain a register of its representatives containing information prescribed by the Authority.

The Authority will be authorised in conduct standards to impose requirements about licensees, and about representatives (including their debarment and reappointment).

The Authority will be able to prescribe fit-and-proper, governance, threshold-operational-ability and capital requirements, as well as requirements for conducting certain activities and requirements to have a local presence.

It will be authorised to prescribe different requirements for natural persons and for companies.

The Authority may in conduct standards prescribe culture-and-governance requirements applicable to small enterprises.

A financial institution's contracts with retail customers will be deemed to be unfair and unreasonable, if the contract's nature and effect are not disclosed to a customer in a way that satisfies requirements prescribed by the Authority.

A financial institution will have to implement a governance policy that addresses matters prescribed by the Authority in conduct standards.

Key persons and significant owners will have to comply with prescribed fit and proper requirements.

If the Authority believes that a key person does not comply, it will be able to direct the institution to make arrangements satisfactory to the Authority to address the non-compliance in accordance with conditions prescribed in conduct standards.

Conduct standards will be able to require key persons to be approved or registered by or notified to the Authority.

A financial institution will be required to have a documented conflict-of-interests policy which must provide for and address matters prescribed by the Authority in conduct standards.

The Authority will be authorised to prescribe governance-and-culture standards about a financial institution's governing body and committees and their composition and duties.

It will be able to prescribe who has the duty or power to act for the institution and under which circumstances.

The Authority will be able to prescribe conduct standards about a financial institution's compliance, internal controls and management of risk.

It will be able to prohibit function outsourcing, specify which functions require its approval to be outsourced, and stipulate what must be included in outsourcing agreements and what must not.

The Authority in conduct standards will even be able to prohibit or limit the remuneration payable by a financial institution to its employees and the compensation payable to outsourced contractors and others, to regulate timing and conditions of payment, and to provide for the refund or clawing back of unauthorised remuneration or consideration.

The Authority will be authorised to prescribe conducts standards requiring a financial institution's governance policy to align the institution's remuneration practices with the deemed long-term interests of the institution in order to avoid any risk-taking which is deemed by the Authority to be excessive, and any treatment of customers which it deems to be unfair.

The Authority, in the name of avoidance of conflicts of interests, will be able to prescribe conduct standards that prohibit or restrict any business practice, including ownership or business arrangements between financial institutions, representatives, contractors and service providers, and franchise, distribution and third-party arrangements.

The Authority will be able to make standards that prohibit or restrict the financial services or activities that financial institutions, representatives, contractors or service providers may perform on behalf of other financial institutions.

The Authority will be authorised to prescribe standards imposing requirements, limitations and prohibitions on financial products, including standards to regulate product features, and valuations, costing, pricing and charging, and requiring product testing.

It will be able to prescribe standards which address the terms and conditions of financial-product contracts, unfair terms, and terms deemed to be just and reasonable.

It will be able to prohibit financial products and require product flexibility, the monitoring and reporting of product performance and suitability, the identification of appropriate and inappropriate target markets of a financial product, the design and offering of a financial product to an appropriate target market, product transparency, disclosure and reporting to customers, and prohibit or restrict the offering of products to types of customers.

The Authority will be able to prohibit or restrict contract terms governing the transfer or termination of agreements for the provision of financial products and services.

The Authority will be able to prescribe standards governing the provision of financial services, including standards that address services provided for other financial institutions, charging structures, terms and conditions of financial-service contracts, unfair terms and terms deemed just and reasonable, monitoring of the continuing suitability of a financial service, the identification of appropriate and inappropriate target markets, the offering of services to suitable target markets, the assessment of whether it is appropriate to offer to a customer a financial service involving complex products, transparency and reporting to customers, and prohibitions or restrictions against offering products to types of customers.

The Authority will be able to regulate how financial benchmarks must be determined.

The Authority will be able to prescribe conduct standards that impose requirements, limitations and prohibitions on promotion, marketing and disclosure, including standards for design of promotional and marketing material, the positioning of words in and the display and presentation of promotional and marketing material, information in material, the appropriateness of the medium used for promoting and marketing a financial product or service, the identification of the institution that is liable or accountable for the product or service, direct marketing, descriptions of products and services, bait marketing and predatory marketing practices, negative option marketing, inducements, loyalty programmes and competitions, the publication of prices, investment performance and projected values contained in promotional and marketing material, comparative selling; misleading or deceptive representations, as well as puffery, endorsements, value judgments, matters of opinion and subjective assessments, remedial action if an institution has published inaccurate or misleading material, use of plain language, standardised point-of-sale disclosure and key-information documents, required disclosures, unsolicited communications from an institution to a customer before contracting and after a contract is terminated, and disclosures about financial products where membership is a requirement of employment.

These standards will be able to distinguish between marketing materials and disclosures targeted at different segments of customers or different financial products and services.

Distribution arrangements between financial institutions will have to comply with any prescribed requirements.

Financial institutions that distribute a financial product which is provided to them by another financial institution for distribution will have to adhere to prescribed standards.

A provider of a financial product will have to take reasonable measures to ensure that any financial institutions that provide advice about the former's products comply with competency requirements prescribed by the Authority.

The Authority will be authorised to prescribe standards concerning any matter related to distribution and advice about financial products and instruments and discretionary investment management, that may impose requirements, limitations or prohibitions on ownership, disclosure, distribution methods, persons who distribute financial products and instruments, financial institutions involved in distribution, provision of advice, intermediation, remuneration, incentives, financial interests, fees, product aggregation, product comparison,

leads and referrals, distribution to the low-income market, sales execution, and on-going maintenance and servicing of financial products or financial instruments, relationships between financial institutions involved in distribution.

The standards will be able to deal with financial advisers, planners and intermediaries.

The Authority will be authorised to prescribe standards about risk management and liquidity, voting rights, risk limits and leverage, execution of transactions for customers, terms and conditions of product and service agreements, requirements for client contracts of engagement and client mandates, and order handling and allocation.

The Authority will in conduct standards be able to prescribe requirements about the termination of contractual relationships between financial institutions and customers.

The Authority will be enabled to prescribe standards imposing requirements, limitations or prohibitions regarding post-sale barriers and obligations, including product flexibility and portability, complaint handling, learning from complaints, reporting of complaints, disputes and provision of redress for customers, handling of claims, prohibited claims practices, access by customers to information, charges and penalties that may be imposed on a customer when terminating financial products or services or transferring to other products, renewal and automatic renewal of contracts for provision of products and services, and cooling-off rights.

The Authority will be able to prescribe conduct standards stipulating when amounts must be repaid to customers on termination of a contract, the determination of the value of amounts repayable and timing of repayments, regulating how unclaimed benefits and other amounts owing to customers must be dealt with, collection and assignment of debts, service-level and administration agreements, and post-sales obligations and barriers.

An institution that holds assets of financial customers or collects moneys on financial products will have to comply with conduct standards by the Authority imposing any requirements regarding assets, working capital and liquidity in addition to those contained in the Bill.

A financial institution will, if the Authority so prescribes and subject to conditions and requirements so prescribed, have to maintain a bank indemnity or guarantee or fidelity insurance to cover it and its employees against risks of loss arising from negligence or dishonesty.

The Authority will be authorised to prescribe categories of financial institutions that may not without its approval conduct businesses other than their licensed activity.

The Authority will be able to prescribe categories of financial institutions that will require its approval to transfer to anyone over quarter of its assets and liabilities relating to its licensed business.

The Authority will be able to prescribe processes that a financial institution must comply with i.r.o. transfers of assets and liabilities, fundamental transactions or changes in institutional form.

A financial institution that is a profit company will be prohibited from registering transfers of its shares, or allotting or issuing shares, to anyone other than intended holders of beneficial interests in the company, unless the Authority approves or prescribes circumstances in which its approval is not required.

The Authority will be able to prescribe what constitutes a material acquisition or disposal by a financial institution, and a financial institution will have to notify the Authority prior to making such an acquisition or disposal.

The Authority will be authorised to prescribe conduct standards that provide for requirements, limitations or prohibitions regarding safeguarding assets and operational requirements.

Without limiting their scope, the Authority will be able to prescribe conduct standards regarding safeguarding and handling of assets of financial customers, operational capital, the operational ability of financial institutions, transactions, institutional structures, and guarantees and professional-indemnity or fidelity insurance to be held by institutions.

Different standards may be made for different activities, and different categories of institutions or persons including significant owners, holding companies, financial groups and conglomerates, and persons to whom functions are outsourced.

A financial institution will annually have to disclose prescribed quantitative and qualitative information publicly, in full or by reference to equivalent information disclosed publicly under other law.

In prescribing quantitative and qualitative information, the Authority will be able to differentiate between different types of institutions and activities, customer categories, and products and services.

The Authority will have to prescribe what constitutes a beneficial interest. A financial institution must, when required by the Authority, provide it with any information it may require about the names of holders of its shares or beneficial interests and size of their holdings, and the name of anyone who has power to require holders of shares to exercise their shareholder rights.

A financial institution will be obliged annually to prepare financial statements i.r.o. its financial year, in such format as may be prescribed, that reflect matters that are prescribed.

The Authority will be authorised to prescribe statements or reports that must be included in such financial statements, after having consulted any relevant regulatory authority.

A financial institution will be obliged to cause its annual financial statements to be audited and to submit the audited financial statements to the Authority and make them available to the public in a prescribed period after its financial year-end.

The Authority will be authorised to prescribe auditing standards or requirements regarding information to be reported, disclosed or retained in terms of the Bill's reporting Chapter, in addition to auditing pronouncements contemplated in the Auditing Profession Act.

The Authority will be able to exempt types of financial institution from having their financial statements or such information audited, subject to Companies Act requirements.

Exempted institutions will, if required by the Authority in a conduct standard, have to comply with that Companies Act provision's independent-review requirements.

A financial institution will be obliged to submit its audited annual financial statements to the Authority and make them available to the public in a prescribed period after its financial year-end.

A financial institution will have to retain data and records i.a.w. requirements prescribed.

An auditor's appointment will be subject to the approval of the Authority in the form and manner prescribed by the Authority.

The Authority will be authorised to prescribe minimum requirements for auditors. Auditors will have to comply with prescribed fit and proper requirements.

The auditor of a financial institution will be obliged to audit annual financial statements of a financial institution in the manner prescribed, and perform any other duties prescribed.

The Authority will be able to prescribe conduct standards providing for requirements, limitations or prohibitions regarding reporting, that might include conduct standards regarding public disclosures, accounting and auditing.

Different such standards may be made for different categories of activities, institutions and persons, including significant owners, holding companies, financial groups and conglomerates, and auditors.

The Authority will be required to provide in conduct standards for the reporting to the Authority of contraventions of the statute.

(This ends this comparatively brief listing of matters on which the Authority must or may prescribe conduct standards. One may refer to the Schedule for a more complete outline.)

It is evident, from this list of matters on which in terms of the draft Bill the Authority must or may prescribe conduct standards, that the Bill as a whole is in effect, as we state above, a plenary assignment to the Authority of the task of legislating, and an abdication of

Parliament's legislative power in favour of the Conduct Authority for the latter to exercise in conduct standards.

Parliament should not assign plenary legislative power to other bodies

The Constitutional Court has ruled that, in a modern state, detailed provisions are often required for the purpose of implementing and regulating laws, and Parliament cannot be expected to deal with all such matters itself.

There is nothing in the Constitution which prohibits Parliament from delegating subordinate regulatory authority to other bodies. The power to do so is necessary for effective lawmaking. It is implicit in the power to make laws and under our Constitution parliament can pass legislation delegating legislative functions to other bodies.

There is, however, a difference between delegating authority to make subordinate legislation within the framework of a statute under which the delegation is made, and assigning plenary legislative power to another body.⁵

In UK, delegation of plenary legislative power is seen as unconstitutional

In the Parliament of the United Kingdom, the House of Lords has Select Committees, which investigate and conduct inquiries about specialist subjects⁶ and issue reports about them.⁷

The Select Committee on the Constitution undertakes investigative inquiries into constitutional issues, and publishes reports with recommendations.⁸

This Committee takes annual evidence from the Minister for the Constitution, Lord Chancellor, Lord Chief Justice of England & Wales, and President of the Supreme Court.⁹

(The Committee also assesses public Bills for constitutional implications, and may¹⁰ publish a report on the Bill to inform the House.)

⁵ *Executive Council of the Western Cape Legislature and others v President of the Republic and others* 1995 (10) BCLR 1289 (CC) par [51] per Chaskalson P.

⁶ Committees in the House of Lords concentrate on six main areas: communications, the constitution, economics, Europe, international relations, and science.

(House of Commons select committees, in contrast, are largely concerned with examining the work of government departments.)

Parliament: About Parliament: How Parliament works: Committees: Select committees
<https://www.parliament.uk/about/how/committees/select/>

⁷ Committee members are appointed at the beginning of every parliamentary session.

⁸ Aimed principally at the Government.

⁹ Parliament: Parliamentary business: Lords select committees: Constitution Committee: Role
<https://www.parliament.uk/business/committees/committees-a-z/lords-select/constitution-committee/role/>.

¹⁰ Where appropriate.

In November 2018, this Select Committee on the Constitution published a report about the delegation of legislative powers,¹¹ after receiving written or oral evidence.¹² The Committee's conclusions and recommendations were¹³ as follows:

[I]t is unacceptable that the delegation of power is seen by at least some in the Government as a matter of what powers they can get past Parliament. It is a responsibility for all, including Parliamentary Counsel, to uphold constitutional standards in relation to delegated powers.¹⁴

It is constitutionally objectionable for the Government to seek delegated powers simply because substantive policy decisions have not yet been taken. It is our judgement that there has been a significant and unwelcome increase in this phenomenon.¹⁵

Delegated powers should be sought only when their use can be clearly anticipated and defined. Broad or vague powers, or those sought for the convenience of flexibility for the Government, are inappropriate. There must be a compelling justification for delegated powers [...].¹⁶

Skeleton bills inhibit parliamentary scrutiny and we find it difficult to envisage any circumstances in which their use is acceptable. The Government must provide an exceptional justification for them [...]; it cannot rely on generalised assertions of the need for flexibility or future-proofing.¹⁷

If the Government uses delegated powers to propose secondary legislation which makes technical provision within the boundaries of the policy [that] has previously been agreed in primary legislation, Parliament is unlikely to wish to block statutory instruments. However, we are concerned, and this report has shown, that these boundaries are not always respected and that ministers may seek to use statutory instruments to give effect to significant policy decisions. Without a genuine risk of defeat, and no amendment possible, Parliament is doing little more than rubber-stamping the Government's secondary legislation. This is constitutionally unacceptable.¹⁸

If the Government's current approach to delegated legislation persists, or the situation deteriorates further, the established constitutional restraint shown by the House of Lords towards secondary legislation may not be sustained.¹⁹

¹¹ Select Committee on the Constitution (HL), "The Legislative Process: The Delegation of Powers", 20 Nov 2018 (16th report of session 2017–19, HL paper 225).

¹² From academic specialists, the leaders of both Houses, relevant Lords committees, Association of British Insurers, Bingham Centre on the Rule of Law, British Bankers' Association, Chartered Institute of Taxation, Law Commission of England & Wales, Law Society of Scotland, Low Incomes Tax Reform Group, and Scottish Parliament, among others.

¹³ *Inter alia*.

¹⁴ Select Committee on the Constitution (HL), "The Legislative Process: The Delegation of Powers", 20 Nov 2018 (*supra*) par 15.

¹⁵ Select Committee on the Constitution (HL), "The Legislative Process: The Delegation of Powers", 20 Nov 2018 (*supra*) par 26.

¹⁶ Select Committee on the Constitution (HL), "The Legislative Process: The Delegation of Powers", 20 Nov 2018 (*supra*) par 48.

¹⁷ Select Committee on the Constitution (HL), "The Legislative Process: The Delegation of Powers", 20 Nov 2018 (*supra*) par 58.

¹⁸ Select Committee on the Constitution (HL), "The Legislative Process: The Delegation of Powers", 20 Nov 2018 (*supra*) par 110.

¹⁹ Select Committee on the Constitution (HL), "The Legislative Process: The Delegation of Powers", 20 Nov 2018 (*supra*) par 113.

Delegation of broad legislative powers may be legitimate to regulate a “complex system”

A greater degree of delegation of legislative power to a subordinate regulatory agency may be legitimate in the case of relatively unpredictable “complex systems” or environments (such as financial markets, securities markets or energy markets), to allow for greater flexibility.²⁰

The foreign-exchange market would be such a complex environment. The Constitutional Court has found that exchange control requires a flexible and speedy approach that may need a specific set of rules to be in place in specific circumstances which can change at any time, entailing an adaptation of the rules, and it would be impossible in advance to lay down rules or set out factors. The Court found there was a need for agility and speed in responding to domestic and global currency trends to protect the currency.²¹

But even in the case of complex systems, parliament should not delegate unduly

Even in the case of a complex system, a parliament should be unwilling to delegate an undue degree of legislative power.

In Western Australia in 2016 the government sought to introduce bills in the Legislative Council for the control of electricity and gas markets:

The sponsoring public-utilities department contended that such an energy regime did not readily lend itself to treatment in a statute, that a governing statute should provide for a high degree of delegated legislative authority, and that principal legislation was better suited to establishing the high-level architecture and structural elements of the framework and to mandate the main desired policy outcomes.²²

The department asserted that care was taken during drafting of the bills to comply with fundamental legislative principles to the greatest extent practicable. While some clauses in the bills fell short of those principles, their inclusion had only come about where absolutely necessary to achieve an important policy outcome or to ensure the necessary complex transitional arrangements were not impeded.²³

²⁰ Roger Jacobs (Senior asst parliamentary counsel, Western Australia), “Legislation in a Complex and Complicated World,” *The Loophole*, Oct 2017, p 19 at pp 20, 22 and 23.

(*The Loophole* is the journal of the multinational Commonwealth Association of Legislative Counsel).

²¹ *South African Reserve Bank and ano v Shuttleworth and ano* 2015 (8) BCLR 959 (CC) pars [80], [81] per Moseneke DCJ.

²² Public Utilities Office, Dept of Finance, briefing paper for Standing Cttee on Uniform Legislation and Statutes Review (2016 Electricity, Gas and Energy Bills), Govt of Western Australia, Perth, 23 June 2016, pp 17–18.

²³ Public Utilities Office, submission 5, 21 Jul 2016, pp 6–7.

The Legislative Council's standing committee was unconvinced: The committee described the Bills as skeletal, in that they proposed to delegate much of the substantive and operational detail of the energy schemes to makers of delegated legislation.²⁴

The committee decided that the bills did not strike the appropriate balance between maintaining the Western Australian parliament's lawmaking powers on the one hand, and providing legislative flexibility on the other.

The committee concluded that many specific clauses of the bills prioritised expedience and flexibility on the part of the executive and constituted an erosion of parliamentary law-making power.

In the committee's view, there was an unacceptable and concerning trend towards eroding parliamentary sovereignty in favour of executive power, and the bills were examples of the trend. The committee took the view that the bills in that form should not be passed.²⁵

Draft Bill does not regulate a complex system

The 2018 draft Conduct of Financial Institutions Bill does not provide for the regulation of a complex system.

The Bill is intended merely to govern financial institutions, not any market in which they might operate.

The Bill itself is not a "complex" scheme, in the way that a financial market is.²⁶

The Bill may however be a "complicated" scheme. The complicated nature of a legislative scheme can derive from its large scale, many components, and need for coordination. Such a system might not be simple, but is knowable. It is susceptible to analysis, so an understanding of the parts of the system will yield understanding of the whole system. A complicated system is generally predictable.²⁷

(Legislation can fit this description of being "complicated", but not "complex". A legislative scheme is, until it is amended, fixed. With sufficient time and expertise, it can be fully analysed. Once one understands all the parts, one can understand the whole system. Legislative schemes are largely predictable. Legislative schemes do not in themselves bear

²⁴ Western Australia Legislative Council, 39th Parliament, report 103, Sep 2016, Standing Cttee on Uniform Legislation and Statutes Review: 2016 Electricity Bill, Gas Access Amendment Bill and Energy Legislation Amendment and Repeal Bill, pp ii and 11.

²⁵ Western Australia Leg Council, report 103, Sep 2016, Standing Cttee on Uniform Legislation and Statutes Review: 2016 Electricity, Gas and Energy Bills (supra), pp iii, iv, 13 and 14.

²⁶ See above.

²⁷ R Jacobs, "Legislation in a Complex and Complicated World" (supra), *The Loophole*, Oct 2017, p 19 at pp 20 and 22.

the characteristics of a complex system (although complexity can arise when a legislative scheme is applied to a complex environment such as a market).)²⁸

(The draft Bill has been described as “complex”.²⁹ It is respectfully submitted that the Bill may more properly be described as a “complicated” scheme, in light of the distinction between complex and complicated schemes discussed above.)

But the mere fact that a statute may be complicated does not, on its own, justify regulating the matters to be governed by the statute by means of delegated legislation, such as conduct standards in the case of the draft Bill.

Bill’s substantive clauses cannot outweigh its contemplated conduct standards

The Bill includes a number of provisions which contain substantive rules in the provisions themselves rather than in contemplated conduct standards to be prescribed by the Authority under other provisions.

The provisions of the Bill that contain substantive rules are:

- Clause 9 (General application and supervision of requirements), subclauses (1) and (2)
- cl 13 (Licensing required per authorisation categories and subcategories), subcls (5), (6), (7)
- cl 14 (Requirements for licensing: General)
- cl 15 (Requirements for licensing: Specific)
- cl 16 (Requirements for licensing: Legal status, institutional form and structure), subcl (2)
- cl 23 (Appointment and registration of representatives), subcl (1)
- cl 24 (Requirements for appointment of representatives)
- cl 25 (Specific requirements for representatives)
- cl 30 (Principles relating to culture and governance for financial institutions)
- cl 32 (Prohibited practices in relation to financial customers)
- cl 33 (Unfair contract terms in contracts with retail financial customers)
- cl 34 (General confidentiality obligations of financial institutions)
- cl 36 (Governance policy)
- cl 38 (Transformation policy)
- cl 39 (Fitness and propriety and appointment of key person or significant owner), subcls (2) and (3)(b)
- cl 42 (Disclosure by financial institutions of interest in related and inter-related parties and other undertakings)
- cl 44 (Principles for determining remuneration and compensation), subcl (2)
- cl 47 (Principles for design and provision of financial products)
- cl 48 (Oversight and governance of product design)
- cl 49 (Design and suitability of products for retail financial customers)
- cl 50 (Product performance)
- cl 53 (Principles for provision of financial services)
- cl 54 (Oversight of the provision of financial services)

²⁸ R Jacobs, “Legislation in a Complex and Complicated World” (supra), *The Loophole*, Oct 2017, p 19 at pp 20, 22 and 23.

²⁹ Jeannine Bednar-Giyose (Director of financial-sector legislation and regulation, National Treasury, South Africa), “Complexity and Interconnection in Financial Sector Legislation in South Africa”, *The Loophole*, Oct 2017, pp 1–18.

- cl 58 (Principles for promotion, marketing and disclosure)
- cl 59 (Promotion and marketing), subcls (3) – (6) and (7)
- cl 64 (Principles for distribution, advice and discretionary investment management)
- cl 65 (Selection of distribution and advice channels)
- cl 67 (Principles for financial institutions providing advice or discretionary investment management)
- cl 68 (Responsibilities of providers of products and financial instruments i.r.t. advice), subparas (a) and (b)
- cl 71 (Principles relating to post-sale barriers and post-sale obligations)
- cl 72 (Limiting unreasonable post-sale barriers)
- cl 73 (Post-sale obligations), subcls (1), (3) and (4)
- cl 74 (Service levels)
- cl 78 (Principles for persons dealing with assets of financial customers or financial institutions)
- cl 79 (Declaration of interest)
- cl 80 (Investment of assets of financial customers)
- cl 81 (Segregation of assets of financial customers from property of financial institution)
- cl 82 (Operating capital), subcls (1) – (3) and (5), (6) and (8)
- cl 83 (Operational ability)
- cl 86 (Transfer, fundamental transaction or change of institutional form), subcls (2), (3), (5)
- cl 87 (Registration of shares in name of nominee), subcl (1)
- cl 88 (Acquisitions or disposals), subcls (1) and (3)
- cl 89 (Alteration of Memorandum of Incorporation or equivalent constitution, deed or founding instrument of a financial institution, and change of name of a financial institution)
- cl 95 (Financial year of financial institution)
- cl 100 (Duties of auditor), subcl (1)
- cl 102 (Redress)
- cl 103 (Remedies for financial customers)
- cl 104 (Court orders)
- cl 113 (Offences)

The existence in the draft Bill of those substantive provisions will not outweigh the manifold conduct standards that are to be prescribed under the Bill's many enabling provisions.

We do not here set out the content of those substantive provisions of the Bill. We submit that to do so is of no use:

Those substantive provisions are to be weighed and measured, not against the Bill's many enabling provisions that authorise the Authority to prescribe conduct standards, but against the manifold conduct standards that will be so prescribed.

Schedule

Outline of clauses of draft Bill that authorise Conduct Authority to prescribe conduct standards on stated matters

Clause 107(1)(a) of the draft Bill states that the Authority may make a conduct standard on any matter about which it is i.t.o. the Bill “required or permitted” to make a conduct standard.

(Clause 1(1) defines a “conduct standard” as a conduct standard prescribed by the Authority contemplated in s 106 of the Financial Sector Regulation Act and cl 107(1)(a) of the Bill. It defines “prescribed” to mean prescribed by the Authority in a conduct standard contemplated in cl 107(1).)

Clause 107(3) states that a conduct standard may—

- (a) apply to financial institutions, key persons, contractors, representatives or significant owners generally;
- (b) apply to financial products, financial services, or the conduct of business in respect of financial products or financial services generally;
- (c) be limited in application to particular categories, subcategories, kinds or types of—
 - (i) financial institutions, key persons, contractors, representatives or significant owners;
 - (ii) financial products or financial services; or
 - (iii) activities referred to in Schedule 2 (categories and subcategories of activities requiring licensing);
- (d) apply to financial groups or financial conglomerates, or categories of financial groups or financial conglomerates;
- (e) apply to a category, kind or type of other related person; and
- (f) differ based on category or subcategories of financial customers.

Clause 107(4) states that a conduct standard may impose requirements for approval by the Authority in respect of specified matters, or be made applicable to existing actions, activities, transactions, policies, contracts, and appointments.

(Schedule 2 lists a dozen categories of activity requiring licensing (with subcategories and a description of each subcategory), viz.: Providing a financial product or financial instrument; Distributing financial products; Financial advice; Managing and administering investments; Benefit administration; Professional fiduciary or custodian service; Payment service; Financial markets activities; Providing benchmarks and related services; Service related to buying or selling of foreign exchange; Credit rating service; Debt collection service.)

Clause 2(3) states that if, i.t.o. the Bill, information or a document is required to be published, disclosed, produced or provided by a financial institution, it is sufficient, “unless otherwise prescribed,” if—

- (a) an electronic original or a reproduction of the information or document is published, disclosed, produced or provided by electronic communication in a manner and form that allows the information or document to be printed by the recipient within a reasonable time and at a reasonable cost; or
- (b) a notice of the availability of that information or document, summarising its content and satisfying any “prescribed requirements”, is delivered to each intended recipient of the information or document, together with instructions for receiving the complete information or document.

Clause 5(2)(a) states that the Conduct Authority may after, consulting the Prudential Authority and Reserve Bank, impose requirements on the holding company of a prudentially regulated financial group or conglomerate, in conduct standards that apply to the whole group or conglomerate.

Clause 6(1) states that the Authority may prescribe conduct standards regulating and imposing

requirements on pension funds' board members and sponsors.

Clause 6(2) authorises the Authority to prescribe requirements for supervised entities other than licensed financial institutions who are involved in the activities of a pension fund, in order to ensure the protection of members, pensioners, and beneficiaries of pension funds as defined in the Pension Funds Act and that the activities of a pension fund comply with the requirements of the Bill.

Clause 7(1)(a)–(e), and (i) and (ii)(aa)–(dd) stipulates that the Authority must adopt a licensing framework, prescribe conduct standards, develop and implement its supervisory approach, enforce compliance and consider the granting of exemptions in a way that promotes the statute's object and supports achievement of the Authority's objective and takes in account and is proportionate to the nature, size, scale and complexity of the risks associated with a type of activity, the nature, size, scale and complexity of financial institutions, achieving the purpose of the requirement, and the significance of risks to the achievement of the Act's object and Authority's objectives.

Subclause 7(2) states that, to minimise regulatory burden, the Authority may issue guidance notices and interpretation rulings to facilitate the statute's proportionate application to small financial institutions.

Clause 8(1) authorises the Authority to exempt financial institutions from the application of the statute or part of it where applying it is not practical or proportional to the size or complexity of the institution's business or in the public interest.

Subclause 8(2) states that an exemption may be withdrawn by the Authority on any ground it may deem sufficient.

Clause 9(3)(c) states that the Authority must, where requirements imposed under the Bill overlap with requirements imposed under another Act that is the responsibility of the Prudential Authority or Reserve Bank, to the extent that is reasonable and practical, prescribe joint standards with the Prudential Authority or issue guidance notes and interpretation rulings to facilitate the appropriate implementation of requirements i.t.o. the Bill i.r.t. requirements under the other Act.

Clause 10(4) states that the Authority may prescribe in conduct standards how notifications must be made, including ongoing reporting requirements and manner in which remediation must be effected.

Clause 13(1) states that, subject to cl 13(2), a financial institution may not provide, as a business or part of a business, a financial product or a financial service unless licensed i.a.w. the Bill.

Clause 13(2) states that a licence i.t.o. the Bill—

- (a) must stipulate one or more activities listed in Schedule 2 of the Bill that the financial institution is authorised to perform; and
- (b) may stipulate, where applicable, the categories and subcategories of financial products “prescribed by conduct standards” i.r.t. which the financial institution is authorised to perform the authorised activities.

Clause 13(3) states that a person with whom a financial institution has entered into an outsourcing arrangement must be licensed, if required under conduct standards prescribed by the Authority.

Clause 13(7)(a) states that a person may not perform any act which indicates that the person is licensed unless the person is so licensed.

(Clause 113(2) states that a person who contravenes the latter provision commits an offence.)

Clause 14(1)(b)(i) of the Bill states that to qualify for licensing an applicant must demonstrate to the satisfaction of the Authority that prescribed fit and proper requirements are met.

Clause 14(1)(b)(iv) states that, to qualify for licensing, an applicant must also demonstrate that it is able to comply with “the applicable requirements as prescribed” for conducting the categories and subcategories of activities for which it is applying to be licensed, in relation, where applicable, to identified financial products and targeted categories of financial customer.

Clause 14(1)(d) states that, to qualify for licensing, an applicant [must also demonstrate that it³⁰] satisfies “any other prescribed licensing requirements”.

Clause 15(1)(a) to (j)(i) and (ii) state that the Authority may in a conduct standard prescribe specific licensing requirements regarding—

- Prudentially-regulated financial institutions;
- systemically-important financial institutions;
- payment-services providers and providers of services relating to the buying and selling of foreign exchange;
- financial institutions that are regulated by another regulator;
- categories or subcategories of activities;
- categories or subcategories of financial products;
- categories and subcategories of targeted financial customers;
- threshold requirements for conducting certain activities;
- licensing applications for specific activities including additional information that must be provided with an application; and
- foreign entities, including foreign entities which have been approved i.t.o. provisions providing for equivalence or recognition of foreign entities in terms of the Bill or another financial-sector law, and requirements relating to local presence.

Clause 16(3) states that the Authority may in conduct standards stipulate provisions which the memorandum of incorporation or other founding instrument of a financial institution must or must not include.

Clause 20(1)(b) states that the Authority may amend, replace or vary any licensing conditions or impose other or additional licensing conditions when in the public interest.

Subclause 20(1)(c) authorises the Authority to replace or vary any licensing conditions when in the interests of the financial customers or potential customers of the licensee.

Clause 23(2) states that the Authority may prohibit—

- (a) representatives generally;
- (b) particular categories of representatives; or
- (c) representatives with a particular institutional form, from—
 - (i) acting on behalf of more than one licensee; or
 - (ii) providing certain financial services in respect of certain financial products, financial instruments or foreign financial products.

Clause 24(c) provides that a licensee may appoint a previously debarred person as a representative only if the person complies with requirements prescribed by the Authority in conduct standards for the reappointment of a debarred person as a representative.

Clause 25(4)(a) states that a licensee must maintain a register of its representatives that must contain information prescribed by the Authority.

Clause 26(9) states that a person who was a representative of a licensee and who has been debarred by the licensee from rendering financial services may not provide financial services or act as a representative of any licensee, unless the person has complied with the requirements prescribed by the Authority in conduct standards for the reappointment of a debarred person as a representative of a licensee.

Clause 27(1) empowers the Authority to prescribe licensing requirements in conduct standards.

³⁰ The draft Bill by oversight omits the bracketed wording (i.e., “*must also demonstrate that it*”).

Clause 27(2) stipulates that, without limiting the scope of such standards, the Authority may prescribe conduct standards imposing requirements for licensing and licensees, requirements relating to representatives including matters relating to debarment and reappointment, fit and proper requirements, governance requirements, threshold operational ability and capital requirements, threshold requirements for conducting certain activities, naming convention requirements, and requirements to have a local presence.

Clause 27(3) states that the Authority may prescribe requirements i.r.t. activities i.r.o. which authorisation by or notification of the Authority is required.

Clause 27(4) states that, w.r.t. fit and proper requirements, different requirements may be prescribed for persons that are natural persons and for those that are not natural persons.

Clause 28, the opening clause of the Bill's Chapter on culture and governance, states that three parts of the chapter do not apply to small enterprises. Yet the Chapter's final clause has a subclause stating that despite the opening clause the Authority may in conduct standards prescribe requirements which are applicable to small enterprises on matters referred to in those three parts of the chapter.

Clause 33(1) states that a financial institution that provides financial products or financial services to retail financial customers must ensure that the terms and conditions of a contract or agreement i.r.o. a financial product or financial service are fair and reasonable. Clause 33(2)(f)(ii) states that a term or condition of such a contract or agreement is unfair or unreasonable if *inter alia* the fact, nature and effect of that term, condition or requirement was not appropriately disclosed to the retail financial customer in a manner that satisfied the "prescribed notice requirements".

Clause 36(1) and (2)(d)(v) and (e) state that a financial institution must adopt, document, implement and monitor the effectiveness of a governance policy that *inter alia* includes (besides a transformation policy, conflict-of-interests policy, financial-product oversight arrangements, and processes and procedures for approval of promotional and marketing material, all as required by other provisions of the Bill), any other policy "that may be prescribed", and must "address and provide for prescribed matters".

Clause 39(1) states that key persons and significant owners must comply with the prescribed fit and proper requirements.

Clause 39(3)(a) states that the Authority may, if it reasonably believes that a key person does not comply with the fit and proper requirements, direct the institution to make arrangements satisfactory to the Authority to address the non-compliance subject to such conditions as may be prescribed.

Clause 41(1)(a) and (2)(g) state that a financial institution must have a documented conflict-of-interests policy to promote effective oversight of conflicts of interests [so as] to ensure the fair treatment of customers, which policy must *inter alia* address and provide for "prescribed matters".

Clause 45(1) and (3) states that the Authority may prescribe conduct standards regarding governance and culture which, without limiting their scope, may provide for requirements, limitations or prohibitions on—

- (a) committees or other structures that a financial institution must establish;
- (b) the governing body of the financial institution, including—
 - (i) its composition, governance and independence;
 - (ii) its roles and responsibilities of the governing body;
 - (iii) duties of members of the governing body; and
 - (iv) structure of the governing body, including committees that must be established;
- (c) risk management, including i.r.o. a risk-management system, strategy and policy, and self-assessments;
- (d) compliance, including i.r.o. a compliance system, strategy and policy;
- (e) internal controls;

- (f) control functions, including i.r.o. required control functions, requirements for control functions, and roles, responsibilities and functions of control functions and heads of control functions;
- (g) outsourcing arrangements, including i.r.o.—
 - (i) an outsourcing policy, and matters that must be included and addressed in it;
 - (ii) principles and requirements with which any outsourcing arrangements, and remuneration paid i.r.o. outsourcing, must comply;
 - (iii) requirements with which a financial institution, and any person who will perform an outsourced function or activity, must comply;
 - (iv) matters that must, or may not be, included in an outsourcing arrangement;
 - (v) functions or activities that may not be outsourced, or may only be outsourced after the Authority has granted approval for or been notified of the proposed outsourcing;
- (h) record keeping, data management and protection of financial-customer information;
- (i) matters which must be addressed in the governance policy, including providing for—
 - (i) roles and responsibilities of persons accountable for the management and oversight of the financial institution, by clarifying who possesses legal duties and powers to act on behalf of the financial institution, and under which circumstances;
 - (ii) how decisions and actions are taken, including documentation of significant or material decisions, along with their rationale;
 - (iii) sound remuneration practices which promote the alignment of remuneration policies with the long-term interests of the financial institution to avoid excessive risk taking, conflicts of interest and unfair treatment of financial customers;
 - (iv) providing for communication with the Authority, as appropriate, regarding matters relating to the management and oversight of the financial institution;
 - (v) corrective actions to be taken for non-compliance or weak oversight, controls or management; and
 - (vi) effective systems of corporate governance, conduct risk management (including contingency planning) and internal controls;
- (j) matters which must be addressed in the transformation policy;
- (k) fit and proper requirements i.r.o. key persons and significant owners of financial institutions, including the approval, notification and registration of key persons;
- (l) avoiding or mitigating conflict of interest, including conduct standards that limit, prohibit or impose requirements on—
 - (i) certain business practices;
 - (ii) certain ownership or business arrangements between financial institutions, representatives, contractors and service providers, including franchise or similar agreements, third party arrangements, distribution arrangements, and outsourcing arrangements; or
 - (iii) the financial services or any other activities or services that certain types or kinds of financial institutions, representatives, contractors or service providers may perform on behalf of another financial institution;
- (m) remuneration and compensation, including in respect of—
 - (i) prohibiting or limiting the remuneration or consideration which may be offered, provided or accepted;
 - (ii) the timing, manner and conditions under which remuneration or consideration may be offered, provided or accepted; and
 - (iii) the adjustment, refund or claw back of remuneration or consideration; and
- (n) prohibited practices and unfair practices.
 - (4) Different conduct standards may be made for, or in respect of—
 - (a) different services, activities or functions in respect of which remuneration or consideration is offered, provided or accepted or different types of financial customers in relation to whom those services, activities or functions are carried out;
 - (b) different categories, subcategories or types of financial institutions or persons referred to in section 44(1); and
 - (c) different types or kinds of key persons or significant owners, including the types or kinds of key persons of different types of financial institutions whose appointment by financial institutions require—

- (i) the approval of the Authority;
- (ii) notification to the Authority; or
- (iii) registration with the Authority.

Clause 51(1) states that the Authority may prescribe conduct standards that provide for requirements with which specific financial products must comply, and limitations or prohibitions on financial products.

(2) Without limiting the scope of conduct standards that may be prescribed in terms of subsection (1), the Authority may prescribe conduct standards that address—

- (a) financial product features;
- (b) valuation and pricing methodologies;
- (c) charging structures;
- (d) appropriate financial product testing;
- (e) the terms and conditions of financial product contracts, including unfair terms and fair, just and reasonable terms and conditions;
- (f) prohibited financial products;
- (g) financial product flexibility;
- (h) financial product performance, including monitoring and reporting of performance;
- (i) on-going monitoring requirements relating to the suitability of a financial product;
- (j) the identification of—
 - (i) an appropriate target market of a financial product; and
 - (ii) a target market for whom a financial product would likely be inappropriate;
- (k) the design and offering of a financial product or financial service to an appropriate target market;
- (l) appropriate remedial action in respect of a financial product or financial service in the event of poor customer outcomes;
- (m) transparency of financial products;
- (n) frequency and nature of disclosure and reporting to financial customers;
- (o) financial product cost and charging structures;
- (p) the prohibition or restriction of the offering of products or services to particular categories, subcategories or types of customer; and
- (q) prohibited terms relating to the transfer or termination of a contract for the provision of financial products and financial services.

Clause 56(1) states that the Authority may prescribe conduct standards that provide for requirements with which a financial institution providing specific financial services must comply, and limitations or prohibitions on financial services.

(2) Without limiting the scope of conduct standards that may be prescribed in terms of subsection (1), the Authority may prescribe conduct standards that address—

- (a) investment platform administration;
- (b) financial services provided to another financial institution;
- (c) charging structures for financial services;
- (d) the terms and conditions of financial services contracts, including unfair terms and fair, just and reasonable terms and conditions;
- (e) on-going monitoring requirements relating to the suitability of a financial service;
- (f) the identification of—
 - (i) a suitable target market of a financial service; and
 - (ii) a target market for whom a financial service would likely be unsuitable;
- (g) the offering of a financial service to a suitable target market;
- (h) the assessment of whether it is appropriate to offer a financial service to a particular customer, and in particular where the financial customer would gain access to complex financial products;
- (i) appropriate remedial action i.r.o. a financial service in the event of poor customer outcomes;
- (j) transparency of financial services;
- (k) frequency and nature of reporting to financial customers; and
- (l) prohibited financial services or the prohibition or restriction of the offering of services to particular categories, subcategories or types of customer;

- (m) payment services; and
- (n) the methodologies in determining a benchmark.

Clause 61(1) states that the Authority may prescribe conduct standards providing for requirements, limitations or prohibitions on promotion, marketing and disclosure.

(2) Without limiting the scope of the conduct standards that may be prescribed in terms of subsection (1), the Authority may prescribe conduct standards i.r.o.—

- (a) the design of promotional and marketing material;
- (b) the positioning of words in, and the display and presentation of promotional and marketing material;
- (c) information, data, descriptions and disclosures in promotional and marketing material;
- (d) the appropriateness of the medium used for promoting and marketing a financial product or service;
- (e) the identification of the financial institution that is financially liable or accountable for the financial product or financial service that is being promoted or marketed;
- (f) direct marketing, product and services descriptions, bait marketing, negative option marketing;
- (g) inducements;
- (h) loyalty programmes and competitions;
- (i) the publication of prices;
- (j) investment performance and projected values contained in promotional and marketing material;
- (k) comparative promotional and marketing practices;
- (l) false, misleading or deceptive representations;
- (m) third party arrangements;
- (n) puffery, endorsements and value judgments, matters of opinion or subjective assessments;
- (o) prohibited and predatory marketing practices;
- (p) remedial actions to be taken by a financial institution when it has published an inaccurate, unclear, misleading or fraudulent promotional or marketing material;
- (q) the provision of information in plain and understandable language;
- (r) standardised point-of-sale disclosure documents, or key information documents, which may be adapted to also provide for the standardisation of disclosure over the life of the financial product or financial service, and which may include information about pricing;
- (s) disclosures, including—
 - (i) the person responsible for making certain disclosures;
 - (ii) required disclosures;
 - (iii) the appropriateness of certain disclosures;
 - (iv) the content of and accuracy of disclosures; and
 - (v) the method and timing of disclosures;
- (t) restrictions on unsolicited communications between a financial institution that provides a financial product or financial service and a financial customer before contracting and once the contractual relationship is terminated; and
- (u) disclosures in relation to financial products where membership is a requirement of employment.

(3) Conduct standards in terms of this section may distinguish between promotional and marketing materials and disclosures targeted at different segments of financial customers or relating to different financial products and financial services, including providing that certain requirements do not apply in relation to a category, subcategory or type of financial customer, financial product or financial service or that more stringent requirements apply in relation to a specified category, subcategory or type of financial customer, financial product or financial service.

Clause 66(1)(b) states that “distribution models” between financial institutions that are involved in the distribution of a financial product or financial instrument must *inter alia* comply with any “prescribed institutional or structural arrangements”.

(3) A financial institution, other than the financial institution that provides a financial product or financial instrument, who is involved in the distribution of a financial product or financial instrument must ensure that the distribution model that is employed i.r.t. that product or instrument adheres to prescribed standards.

Clause 68(c) states that a provider of a financial product or financial instrument must take reasonable measures to *inter alia* ensure that financial institutions providing advice in respect of the provider's financial products or financial instruments comply with any applicable prescribed competency requirements in relation to the provision of such advice.

Clause 69(1) states that the Authority may prescribe conduct standards that provide for requirements, limitations or prohibitions regarding distribution, advice and discretionary investment management.

(2) Without limiting the scope of conduct standards that can be prescribed, the Authority may prescribe conduct standards i.r.o—

- (a) ownership;
- (b) disclosure;
- (c) distribution models;
- (d) distribution design;
- (e) persons who distribute financial products and financial instruments;
- (f) requirements that apply in relation to any financial institution who is involved in the distribution of financial products and financial instruments, whether or not that person may be required to be authorised or licensed in terms of this Act or another financial sector law;
- (g) the provision of advice and advice process;
- (h) intermediation;
- (i) remuneration and incentive arrangements and financial interests;
- (j) initial and on-going fees;
- (k) advice models, and wholesale models, of distribution;
- (l) product aggregation and comparison and leads and referrals; and
- (m) distribution to the low-income market;
- (n) sales execution;
- (o) on-going maintenance and servicing of financial products or financial instruments;
- (p) relationships between financial institutions involved in the distribution of a financial product or financial instrument;
- (q) financial advisers;
- (r) financial planners;
- (s) intermediaries;
- (t) risk management and liquidity management;
- (u) exercising of voting rights;
- (v) risk limits and leverage;
- (w) frequency and nature of reporting;
- (x) valuations and pricing methodologies;
- (y) best execution of transactions on behalf of customers;
- (z) the terms and conditions of product and service agreements;
- (aa) minimum requirements relating to the terms and provisions of the contract of engagement with the client, including the provision of a mandate by a client;
- (bb) order handling, aggregation and allocation; and
- (cc) any other matter related to the distribution and advice of financial products or financial instruments.

Clause 73(2) states that the contractual relationship between a financial institution and a financial customer may only be terminated in a fair manner, i.a.w. procedures and requirements that may be prescribed.

Clause 75(1) states that the Authority may prescribe conduct standards that provide for requirements, limitations or prohibitions regarding post-sales barriers and obligations.

Subcl (2) states that, without limiting the scope of conduct standards that may be prescribed i.t.o. subcl (1), the Authority may prescribe conduct standards i.r.t.—

- (a) product flexibility and portability;

- (b) the handling, management and reporting of complaints and disputes, which may include requirements relating to monitoring, processes to promote 'learning' from complaints, reporting of complaints information to the Authority or to the public;
- (c) the provision of redress for financial customers;
- (d) handling and management of claims, including prohibited claims practices;
- (e) access to information by customers of financial products and financial services;
- (f) limits, restrictions and any other requirements relating to charges, fees and penalties that may be imposed on a financial customer when transferring to another financial product or terminating a financial product or financial service;
- (g) the renewal and automatic renewal of contracts for the provision of financial products and financial services;
- (h) cooling-off rights and requirements relating to the termination of financial products and financial services;
- (i) circumstances under which amounts must be repaid to a financial customer on the termination of a contract for the provision of a financial product or a financial service, and determining the value of the amount payable and the timing of those repayments;
- (j) the termination of agreements, accounts or contracts for financial products and financial services;
- (k) how unclaimed benefits or other amounts owing to a financial customer must be managed;
- (l) debt collection, including the cession or transfer of debt;
- (m) appropriate service level and administration agreements;
- (n) post-sales obligations; and
- (o) post-sales barriers that may be identified by the Authority.

Subclause 82(4) states that a financial institution must, if it holds assets of financial customers or collects, holds or receives any monies i.r.o. a financial product, comply with, in addition to what is provided in the Bill, any asset, working capital and liquidity requirements that are prescribed by conduct standard.

Clause 82(10)(a) states that the Authority may require the governing body or senior management of the financial institution to demonstrate that the operational capital requirements provided for in this section and any other prescribed requirements are being complied with.

Clause 84 states that a financial institution, if and to the extent prescribed by the Authority, must maintain in force appropriate guarantees or professional indemnity insurance or fidelity insurance to cover the risk of losses due to negligence, fraud or dishonesty, both for itself and its employees subject to those conditions and requirements that may be prescribed.

Clause 85(1) states that a financial institution that belongs to a category prescribed by the Authority may not without approval of the Authority conduct any business other than the activity for which it is licensed.

Clause 86(1)(a) and (b) state that a financial institution which belongs to a category, subcategory or type of financial institution that is prescribed by the Authority may not, without the approval of the Authority, transfer to another person more of its assets and liabilities relating to the financial service that it is licensed to conduct than 25% (calculated by aggregating the amount of the transferred assets and liabilities together with any previous transfer of assets and liabilities in the same financial year of that institution).

Clause 86(4)(a) states that the Authority may prescribe processes that a financial institution must comply with i.r.o. transfers of assets and liabilities, fundamental transactions or changes in institutional form.

Clause 87(1)(a) and (b) states that a financial institution that is a profit company registered under the Companies Act may not, without the approval of the Authority, allot or issue any of its shares to, or register any of its shares in the name of, a person other than the intended holder of a beneficial

interest, or register a transfer of any of its shares to a person other than the intended holder of a beneficial interest.

(2) The Authority “may prescribe” the circumstances in which the Authority’s approval for registration of a company’s shares in the name of a nominee is not required.

Clause 88(2) read with subcl (1) states that the Authority must prescribe what constitutes a material acquisition or disposal by a financial institution. A financial institution must notify the Authority prior to making such an acquisition or disposal.

Clause 90(1) states that the Authority may prescribe conduct standards that provide for requirements, limitations or prohibitions regarding safeguarding assets and operational requirements.

(2) Without limiting the scope of such conduct standards, the Authority may prescribe conduct standards i.r.o.—

- (a) the safeguarding and handling of assets of financial customers;
- (b) operational capital;
- (c) the operational ability of financial institutions;
- (d) certain transactions;
- (e) institutional structures; and
- (f) guarantees and professional indemnity insurance or fidelity insurance to be held by financial institutions.

(3) Different standards may be made for or i.r.o. different activities and sub-categories of activities, and different categories, subcategories or types of financial institutions or persons, including—

- (a) significant owners;
- (b) holding companies of financial institutions;
- (c) financial groups and financial conglomerates; and
- (d) persons to whom a function is outsourced.

Clause 92(1) states that a financial institution must annually disclose publicly the prescribed quantitative and qualitative information in full, or by way of prominent references to information equivalent in nature and scope disclosed publicly under any other law.

(2) In prescribing the quantitative and qualitative information i.a.w. subcl (1), the Authority may differentiate between different —

- (a) types of financial institutions;
- (b) types of activities;
- (c) categories, subcategories or types of financial customers; or
- (d) financial products or financial services.

Clause 94 states that the Authority must, for the purposes of this provision about information concerning beneficial interests, prescribe what constitutes a beneficial interest.

A financial institution must, when required to do so by the Authority, provide the Authority with any information the Authority may require, in the form and manner, determined by the Authority, i.r.o.—

- (a) the names of its shareholders, other holders of a beneficial interest, and the size of their shareholding and other beneficial interests, as the case may be; and
- (b) the name of any person who, directly or indirectly, has the power to require the shareholders referred to in paragraph (a) to exercise their rights as shareholders in the financial institution.

Clause 96(1)(b)(iii) and (iv) states that a financial institution must annually prepare, in respect of the relevant financial year of the financial institution, financial statements in the format as may be prescribed that *inter alia* reflect those matters that are prescribed.

Clause 96(5) states that the Authority may prescribe statements or reports that must be included in the annual financial statements of a financial institution after having consulted with any relevant regulatory authority.

Clause 97(1)(a) and (2) state that a financial institution must cause its annual financial statements to be audited and must submit its audited annual financial statements to the Authority and make them available to the public within the prescribed period after its financial year-end.

Clause 97 (3) states that the Authority may, in addition to auditing pronouncements as defined in section 1 of the Auditing Profession Act, prescribe auditing standards or requirements i.r.o. the information required to be reported, disclosed or retained i.t.o. the Bill's reporting Chapter.

(4) Despite that, the Authority may exempt certain types or kinds of financial institutions from the requirement to have their financial statements and the information referred to audited, subject to the Companies Act's provision governing annual financial statements.

(5) Those financial institutions, including financial institutions that are not companies, which are exempted under subsection (4) must, if so required by the Authority in a conduct standard, comply with the independent review requirements of that provision of the Companies Act.

Clause 97(2) states that a financial institution must submit its audited annual financial statements to the Authority and make it available to the public within the prescribed period after its financial year-end.

Clause 98(1) states that a financial institution must retain data and records i.a.w. requirements prescribed in conduct standards i.r.t. the activities that the institution is conducting.

Clause 99(1)(a) and (2)(a) state that a financial institution must appoint and at all times have an auditor approved in terms of the Auditing Profession Act who has no direct or indirect financial interest in the business of the institution, unless it is exempted from the requirement to have audited annual financial statements.

The appointment of an auditor is subject to the approval of the Authority in the form and manner prescribed by the Authority.

Clause 99(3)(a) and (b) state that the Authority may prescribe minimum requirements for auditors. Auditors must at all times comply with prescribed fit and proper requirements.

Clause 100(2)(a) and (c) state that the auditor of a financial institution must audit the annual financial statements of a financial institution in the manner prescribed and, (besides performing the duties and functions assigned to the auditor of a financial institution under the Bill and the Companies Act and Auditing Profession Act) perform any other duties or functions prescribed.

Clause 101(1) states that the Authority may prescribe conduct standards that provide for requirements, limitations or prohibitions regarding reporting.

Clause 101(2) states that, without limiting the scope of such conduct standards, the Authority may prescribe conduct standards i.r.o.—

- (a) reporting;
- (b) public disclosures;
- (c) accounting; and
- (d) auditing.

(3) Different conduct standards may be made for different activities and sub-categories of activities, and different categories, subcategories or types of financial institutions or persons, including—

- (a) significant owners;
- (b) holding companies of financial institutions;
- (c) financial groups and conglomerates; and
- (d) auditors.

Clause 114(1) states that the Authority must prescribe in conduct standards a framework to provide for the reporting of contraventions of the statute to the Authority.