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COMMENTS

on

Financial Sector Conduct Authority (FSCA)

draft Strategy for

Promoting Financial Sector Transformation

To:

Financial Sector Conduct Authority

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COMMENTS TEMPLATE

DRAFT FSCA STRATEGY FOR PROMOTING FINANCIAL SECTOR TRANSFORMATION

Date	29 April 2022	
Name of organisation/Individual	Free Market Foundation (Southern Africa)	
Type of organisation (if applicable)	Independent public benefit organisation	
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SPECIFIC COMMENTS

Section of the draft strategy	Comments
Part 1 (Background)	<p>Part 1 of the draft Strategy (<i>Background</i>) states: “<i>The proposed Conduct of Financial Institutions Act (CoFI Act), currently a draft Bill, will provide for transformation requirements for all financial institutions, to be supervised by the FSCA.</i>”</p> <p>That prediction will only be proved correct if the draft Conduct of Financial Institutions Bill is enacted on its present lines.</p> <p>In September 2020, The Treasury invited public comments on a second draft of the Bill. The Treasury’s September 2020 media statement indicated that the Treasury aimed to finalise the Bill, submit the Bill to the Cabinet for approval and table it in Parliament “in early 2021”.</p> <p>But, in late April 2022, the Bill has yet to be tabled in Parliament.</p>

<p>Part 3 (The role of financial sector regulators in promoting transformation)</p>	<p>Part 3 of the draft Strategy (<i>The role of financial sector regulators in promoting transformation</i>) states:</p> <p><i>“It is recognised that regulators such as the FSCA can better support the FSTC in driving meaningful progress toward commitments made under the FS Code. Regulators are able to set requirements on regulated entities at licensing stage and on an on-going basis (related to the regulatory objectives) and enforce the achievement of these requirements.</i></p> <p><i>“In relation to transformation, and in line with the National Treasury’s proposed COFI Bill and consequential amendments to the FSR Act, the FSCA could potentially take actions such as—</i></p> <ul style="list-style-type: none"> <i>• require financial institutions to have in place a transformation plan, aimed at achieving targets set under the FS Code;</i> <i>• set minimum B-BBEE levels that must be targeted by each firm and documented in the transformation plan, especially for larger firms within the financial sector, and particularly to require progression through the levels of transformation over defined periods of time;</i> <i>• consider transformation plans during the licensing process;</i> <i>• supervise the progress of financial institutions against their plans;</i> <i>• take action when there is a lack of commitment to or achievement of targets set in transformation plans; [...].”</i> <p>Insofar as the FSCA may suggesting that it has any such powers under current legislation, that suggestion is not correct.</p> <p>The FSCA currently does not have power (under either the B-BBEE Act or the FSR Act) to require financial institutions to have a transformation plan, or to set minimum B-BBEE levels that must be targeted by each firm, or to require progression through levels of transformation over defined periods of time, or to supervise the progress of financial institutions against their plans; or to take action when there is a lack of achievement of targets set in transformation plans.</p> <p>The FSCA’s Press Release inviting public comments on the draft Strategy states that a <i>“strategic objective of the FSCA”</i> includes <i>“supporting the transformation of the financial sector”</i>. This is not correct. The Financial Sector Regulation Act, 2017 (“the FSR Act”) says that promoting sector</p>
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transformation is an object of the Act, but not a particular object of the FSCA.

The FSCA's transformation role is merely to attend a working group or subcommittee set up to deal with that topic, if the Financial System Council of Regulators selects the FSCA as a member, and only to deal with an agenda determined by that Council. The draft *Strategy* acknowledges, correctly, that a direct role for financial-sector regulators in promoting transformation has been limited due to the lack of enabling legislation.

The FSR Act does not say that it is an "*objective of the FSCA*," let alone a "*strategic objective of the FSCA*," to promote or support financial-sector transformation.

The FSR Act states that the FSCA must, to achieve its objective, regulate and supervise the conduct of financial institutions in accordance with the financial sector laws. But the FSCA is not responsible for all financial-sector laws. The FSCA is the responsible authority only for the laws governing pension funds, insurers (excluding prudential supervision), advisory and intermediary services, collective investment schemes and credit-rating services. (The Prudential Authority is responsible for laws governing banks, financial co-operatives and markets, the road accident fund, and prudential supervision of insurers.)

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Part 3 of the draft *Strategy* also states: "*The promulgation of the COFI Act, together with consequential amendments to the FSR Act, are expected to provide the FSCA with the enabling framework to set requirements related to transformation on all financial institutions and supervise and enforce these requirements.*"

As mentioned, that will only be correct if the draft Bill is enacted on its present lines.

In 2020, the Treasury invited comments on a second draft of the Bill. The Treasury's media statement indicated that the Treasury aimed to table the Bill in Parliament in early 2021. But the Bill has yet to be tabled in Parliament.

<p>Phase 1:</p> <p>Part 4 (The FSCA’S approach to promoting financial sector transformation):</p> <p>§ 4.1 (Phase 1: Promoting transformation under the existing policy and legislative framework):</p> <p>4.1.7 (Developing licensing, regulatory and supervisory frameworks that promote transformation of the financial sector)</p>	<p>Part 4 of the draft Strategy (<i>The FSCA’S approach to promoting financial sector transformation</i>) states:</p> <p><i>“Given that the legislative framework that specifically empowers the FSCA to promote transformation is still under development, the FSCA has adopted a two-phase approach to promoting transformation:</i></p> <ul style="list-style-type: none"> • <i>Phase 1 will focus on the role that the FSCA will play within the current legislative framework i.e. the FSR Act, B-BBEE Act, and FS Code.</i> • <i>[...].”</i> <p>And § 4.1 of the draft Strategy (<i>Phase 1: Promoting transformation under the existing policy and legislative framework</i>) states:</p> <p><i>“Some of the strategic initiatives outlined in FSCA’s Regulatory Strategy can be achieved in Phase 1, while others are reliant on the legislative framework to be provided under the COFI Act.</i></p> <p><i>“The FSCA will achieve the following objectives in Phase 1:”</i></p> <p>Subdivision 4.1.7 of the draft Strategy (<i>Developing licensing, regulatory and supervisory frameworks that promote transformation of the financial sector</i>) sets out one of the objectives that the FSCA says it will achieve in Phase 1. In Phase 1, says subdivision 4.1.7:</p> <p><i>“In support of transformation, the FSCA will develop licensing, regulatory and supervisory frameworks and instruments [...]</i></p> <p><i>“Where appropriate, regulatory instruments may also introduce explicit requirements aimed at transformation.”</i></p> <p>This violates the Rule of Law, in proposing measures in Phase 1 which are beyond the FSCA’s powers.</p>
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<p>Phase 2:</p> <p>Part 4 (The FSCA’S approach to promoting financial sector transformation):</p> <p>§ 4.2 (Phase 2: Promoting transformation under a new legislative framework):</p> <p>4.2.1 (Regulatory and supervisory actions to promote transformation)</p>	<p>Part 4 of the draft Strategy (<i>The FSCA’S approach to promoting financial sector transformation</i>) states:</p> <p><i>“Given that the legislative framework that specifically empowers the FSCA to promote transformation is still under development, the FSCA has adopted a two-phase approach to promoting transformation:</i></p> <ul style="list-style-type: none"> • <i>[...].</i> • <i>Phase 2 will focus on the role that the FSCA will play within the COFI Act legislative framework.”</i> <p>And § 4.2 (<i>Phase 2: Promoting transformation under a new legislative framework</i>) states:</p> <p><i>“Phase 2 will build on rather than replace efforts undertaken in Phase 1, which in many instances will be ongoing. In addition to the work undertaken in Phase 1, once the COFI Act is implemented, the FSCA will be empowered to set direct requirements on financial institutions relating to transformation and supervise compliance with these.”</i></p> <p>Subdivision 4.2.1 (<i>Regulatory and supervisory actions to promote transformation</i>) states:</p> <p><i>“Actions that can be considered where financial institutions fail to meet the targets identified in their transformation plans could include [...] issuing an administrative penalty for non-compliance with COFI Act transformation requirements [...].</i></p> <p><i>“It is important to note that the FSCA mandate would be limited to enforcing financial sector laws only, and not the B-BBEE Act or the FS Code [...].”</i></p> <p>The CoFI Bill does not require that a Conduct Standard issued by the FSCA under the Bill should be developed by major stakeholders in the Sector, in contrast to Sector Transformation Charters and Codes issued under the BBBEE Act.</p> <p>(The B-BBEE Act authorises the Minister of Trade & Industry to issue Codes of Good Practice on BEE. Such a Code may include further definition of B-BBEE, and indicators to measure it and the weighting to be attached to them, and specify target dates by when they must be achieved. The Minister’s amended guidelines for developing sector codes says that the main responsibilities of Sector Charter Councils are to develop the sector codes and monitor their implementation.)</p>
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Under the Bill, the FSCA will be able to revoke a licence, if the licensee has materially contravened the Bill's provisions requiring the licensee to perform its activities in accordance with the requirements the Bill, or of conduct standards prescribed by the FSCA under the Bill, or of conditions of the licence.

(The draft Bill states that a licensed financial institution that is subject to the BB-BEE Act and its Financial Sector Code must have a transformation plan. The Bill stipulates that a licensed financial institution must conduct its business in a way that promotes transformation in a manner reasonably consistent with its transformation plan. The Bill states that the FSCA may make conduct standards for financial institutions required to be licensed under the Bill. A conduct standard so prescribed must be aimed at supporting the performance of the FSCA's functions described in the FSR Act. The Bill will amend the FSR Act's provision describing the FSCA's functions by inserting a subclause that the FSCA must promote "*transformation of the financial sector*". The Bill will insert in the FSR Act a provision that the FSCA may make conduct standards on transformation and matters which must be addressed in a transformation plan. The Bill will also authorise the FSCA to make conduct standards under the Bill about these matters. The draft Bill states that a licensee must perform its licensed activities in accordance with the applicable requirements of the Bill, conduct standards under it and the licence conditions. The FSCA may revoke a licence granted under the Bill, in accordance with the FSR Act's provisions about revocation of licences. The FSR Act's provisions state that the FSCA that may revoke a licence it issued, if the licensee contravenes a financial sector law in a material way. This means that the FSCA will be able to revoke a licence, if the licensee has materially contravened the Bill's provisions requiring the licensee to perform its activities in accordance with the requirements the Bill, or of conduct standards prescribed by the FSCA under the Bill, or of conditions of the licence.)

Transformation enforcement measures which the FSCA might impose in Phase 2 could well violate the fundamental right to freedom of association.

It is a principle of the Rule of Law that the law must afford adequate protection of fundamental human rights. The fundamental rights in the Bill of Rights in the Constitution include the right of everyone to freedom of association.

The Constitution declares that the Republic is founded on the Rule of Law, and the State must in all its conduct observe the Rule of Law. The Courts may review any exercise of public power under the Rule of Law principle.

GENERAL COMMENTS	
Issue	Comments
FSCA has no authority to publish a Strategy for promoting transformation.	<p>The B-BBEE Act states that Minister of Trade & Industry must issue a strategy for B-BBEE. The Act does not authorise the FSCA to publish a Strategy for B-BBEE or for promoting transformation.</p> <p>The B-BBEE Act also states that the Minister must publish and promote a transformation charter for a particular sector of the economy, if satisfied that it was developed by major stakeholders in that sector. In 2007 the Minister issue a Financial Sector Charter which stated that it was voluntarily developed by the financial sector. The Charter established targets, principles and responsibilities for the implementing of BEE in the sector and for monitoring and reporting progress, and established an independent Charter Council to oversee implementation. The Charter's targets would apply until 2014, but its principles would be relevant beyond that. In 2015 the Charter Council would comprehensively review Charter progress, draw conclusions about its impact on the sector and economy, and decide what further steps (if any) should be taken to address any identified shortcomings. The targets would be achieved consistent with sound business practice. The B-BBEE Act does not authorise the FSCA to publish transformation charters or strategies.</p> <p>And, as mentioned, the FSR Act does not say that it is a strategic objective of the FSCA to promote financial-sector transformation.</p>
Draft Strategy was published for comment without a socio-economic impact assessment	<p>The draft <i>FSCA Strategy</i> was published for comment without a socio-economic impact assessment. The Constitution states that public administration must be governed by the principle that transparency must be fostered by providing the public with timely, accessible and accurate information. It is by gazetting a socio-economic impact assessment that the government can show that transparency is being fostered and that the public are being provided with timely, accessible and</p>

	<p>accurate information. Publishing the draft <i>Strategy</i> without a socio-economic impact assessment is administrative action that can be reviewed by a court for being procedurally unfair, or because relevant considerations have been ignored.</p>
<p>Accompanying comprehensive comments by Free Market Foundation</p>	<p>Please see the Free Market Foundation's accompanying comprehensive Comments on the draft <i>FSCA Strategy For Promoting Financial Sector Transformation</i></p>

Comments end

Please see BELOW the Free Market Foundation's accompanying comprehensive Comments on the draft *FSCA Strategy For Promoting Financial Sector Transformation*.

Introduction

On 28 Feb 2022 the Financial Sector Conduct Authority (FSCA) issued a Press Release¹ inviting public comments about its draft *FSCA strategy for promoting financial sector transformation*.

The invitation states that comments must be submitted by 29 April 2022.

The Free Market Foundation comments as follows on that February 2022 draft *FSCA Strategy for Promoting Financial Sector Transformation*.

Summary of Comments

1. Supporting transformation of the financial sector is not an FSCA “*strategic objective*”.
2. FSCA has only a limited role regarding B-BBEE financial-sector transformation.
3. FSR Act does not say promoting transformation is an FSCA objective.
4. Draft *Strategy* incorrectly suggests that the FSCA is currently empowered to take action if firms do not meet transformation targets.
5. FSCA is not responsible for all financial-sector laws.
6. FSR Act’s “*transformation*” definition refers to B-BBEE Act’s Financial Sector Code definition.
7. Minister of Trade and Industry (not the FSCA) must issue strategy for B-BBEE.
8. Failure to achieve a certain level of B-BBEE compliance is not an offence, yet the FSCA will have the power to cancel licences if licensees breach transformation standards.
9. B-BBEE Act says, if sector develops “*transformation charter*,” the Minister of Trade and Industry must gazette it.
10. No Socio Economic Impact Assessment has been provided, invalidating the legitimacy of the draft *strategy*.

The FSCA’s Press Release² states that a “*strategic objective of the FSCA*” includes “*supporting the transformation of the financial sector*”. This is not an accurate statement. The Financial Sector

¹ FSCA Press Release, 28 Feb 2022, “Release of FSCA draft Financial Sector Transformation Strategy for public comment”.

² FSCA Press Release, 28 Feb 2022, “Release of FSCA draft Financial Sector Transformation Strategy for public comment”.

Regulation Act, 2017 (“the FSR Act”) says that promoting sector transformation is an object of the Act. It does not say that it is an object of the FSCA.

The FSCA’s transformation role is merely to attend a working group or subcommittee set up to deal with that topic, only if the Financial System Council of Regulators selects the FSCA as a member, and then only to deal with an agenda determined by that Council. The draft *Strategy* correctly admits that a direct role for financial-sector regulators in begetting transformation has been limited due to the fact that no legislation has been enacted to enable it to do so.

The FSR Act does not say that it is an “*objective of the FSCA*,” let alone a “*strategic objective of the FSCA*,” to promote or support financial-sector transformation.

The draft *Strategy* suggests that, despite the current legislation’s lack of teeth for enforcing transformation, the FSCA could set minimum B-BBEE levels that must be targeted by each financial firm, and require progression through levels of transformation over defined periods of time, and take action if firms don’t meet such targets. But under neither the B-BBEE Act nor the FSRA Act is the FSCA directed or empowered to involve itself with such matters.

The FSR Act states that the FSCA must, to achieve its objective, regulate and supervise the conduct of financial institutions in accordance with the financial sector laws. The FSCA is however, not responsible for all financial-sector laws. The FSCA is the responsible authority only for the laws governing pension funds, insurers (excluding prudential supervision), advisory and intermediary services, collective investment schemes and credit-rating services. (The Prudential Authority is responsible for laws governing banks, financial co-operatives and markets, the road accident fund, and the prudential supervision of insurers.)

The FSR Act defines “*transformation of the financial sector*” as transformation envisaged by the Financial Sector Code for BroadBased Black Economic Empowerment (“B-BBEE”) issued under the B-BBEE Act, 2003. The B-BBEE Act declares that it is a statute to establish a national policy on B-BBEE through socio-economic strategies that include increasing the number of black people, communities and black women that manage, own and control enterprises, and to facilitate B-BBEE by promoting economic transformation.

The B-BBEE Act states that Minister of Trade & Industry must issue a strategy for B-BBEE. The Act authorises neither the FSCA, nor the Minister of Finance, to publish a strategy for B-BBEE or for promoting transformation.

The B-BBEE Act states that it is the Minister of Trade & Industry who must publish and promote a transformation charter for a particular sector of the economy, when satisfied that it was developed by major stakeholders in that sector. In 2007 the Minister issue a Financial Sector Charter which stated that it was voluntarily developed by the financial sector. The Charter established targets, principles and responsibilities for the implementing of BEE in the sector and for monitoring and reporting progress, and established an independent Charter Council to oversee implementation. The Charter's targets would apply until 2014, but its principles would be relevant beyond that. In 2015 the Charter Council would comprehensively review Charter progress, draw conclusions about its impact on the sector and economy, and decide what further steps (if any) should be taken to address any identified shortcomings. The targets would be achieved consistent with sound business practice. The B-BBEE Act does not authorise the FSCA to publish transformation charters or strategies, whether or not developed by the major stakeholders in the financial services industry.

The B-BBEE Act authorises the Minister of Trade & Industry to issue Codes of Good Practice on BEE. Such a Code may include further definition of B-BBEE, and indicators to measure it and the weighting to be attached to them, and specify target dates by when they must be achieved. The Minister's amended guidelines for developing sector codes says that the main responsibilities of Sector Charter Councils are to develop the sector codes and monitor their implementation. The FSCA is excluded from any such monitoring, and for good reason. An economic sector cannot be expected to serve two masters on the same issue without inevitable confusion and conflict.

The B-BBEE Act states that every organ of state and public entity must apply any relevant Code of Good Practice issued under the Act "*in determining qualification criteria for the issuing of licences*" or other authorisations of economic activity in terms of any law. The Minister issued a Financial Sector Code in 2012 which stated that it was a harmonisation of the Charter prepared by the financial sector and gazetted in 2007 and of the generic (*i.e.*, not sector-based) Codes issued under the Act. The Minister issued an amended Financial Sector Code in 2017 which states that it is a harmonisation of the 2012 Financial Sector Code and the amended generic Codes. The 2017 amended Financial Sector Code records that the Financial Sector Charter Council was of the opinion

that the 2017 Code met all requirements of the provision in the amended guidelines for developing sector codes that sets out the procedure for developing sector codes. This includes the requirement that the sector body seeking to have a Sector Code gazetted must provide evidence of compliance with the B-BBEE Act's provision that requires the Minister of Trade and Industry to publish a sector transformation charter, but only if satisfied that it was developed by major stakeholders in that sector.

In September 2020, the Treasury invited public comments on a second draft of the Conduct of Financial Institutions (CoFI) Bill. The Bill would require most providers of a financial product or service to hold a licence from the FSCA authorising it to do so. The Treasury's September 2020 media statement indicated that the Treasury aimed to finalise the Bill, submit the Bill to the Cabinet for approval and table it in Parliament "*in early 2021*". In late April 2022, the Bill has yet to be tabled in Parliament.

The draft CoFI Bill states that a licensed financial institution that is subject to the BB-BEE Act and its Financial Sector Code must have a transformation plan. The Bill stipulates that a licensed financial institution must conduct its business in a way that promotes transformation in a manner reasonably consistent with its transformation plan. The Bill states that the FSCA may make conduct standards for financial institutions required to be licensed under the Bill. A conduct standard so prescribed must be aimed at supporting the performance of the FSCA's functions described in the FSR Act. The Bill will amend the FSR Act's provision describing the FSCA's functions by inserting a subclause that the FSCA must promote "*transformation of the financial sector*". The Bill will insert in the FSR Act a provision that the FSCA may make conduct standards on transformation and matters which must be addressed in a transformation plan. The Bill will also authorise the FSCA to make conduct standards under the Bill about these matters. The Bill does not require that a Conduct Standard issued by the FSCA under the Bill should be developed by major stakeholders in the sector, in contrast to Sector Transformation Charters and Codes issued under the B-BBEE Act. The draft Bill states that a licensee must perform its licensed activities in accordance with the applicable requirements of the Bill, conduct standards under it and the licence conditions. The FSCA may revoke a licence granted under the Bill, in accordance with the FSR Act's provisions about revocation of licences. The FSR Act's provisions state that the FSCA that may revoke a licence it issued, if the licensee contravenes a financial sector law in a material way. This means that the FSCA will be able to revoke a licence, if the licensee has contravened the Bill's provisions requiring the

licensee to perform its activities in accordance with the requirements of the CoFI Bill, or of conduct standards prescribed by the FSCA under this Bill, or of conditions of the licence.

The *Strategy* envisages that FSCA could under current laws issue conduct standards which introduce explicit requirements aimed at transformation. That is beyond its powers. It states that “*Some of the strategic initiatives [...] can be achieved in Phase 1*” (i.e., within the current legislative framework), “*while others are reliant on the legislative framework to be provided under the [2020 draft CoFI Bill]*”. The *Strategy* states that in Phase 1 the FSCA will achieve the objective of “*Developing licensing, regulatory and supervisory frameworks that promote transformation of the financial sector. [...] Where appropriate, regulatory instruments may also introduce explicit requirements aimed at transformation.*”

Therefore, in proposing measures in Phase 1 that are beyond the FSCA’s powers, the draft *Strategy* violates the Rule of Law. The *Strategy* also proposes measures in Phase 2 that would likely violate everyone’s fundamental right to freedom of association, assuming Parliament enacts the draft CoFI Bill along its 2020 lines. The Constitution declares that the Republic is founded on the Rule of Law, and the State must in all its conduct observe the Rule of Law. The Courts may review any exercise of public power under the Rule of Law principle.

The draft *FSCA Strategy* was published for comment without a socio-economic impact assessment. The Constitution states that public administration must be governed by the principle that transparency must be fostered by providing the public with timely, accessible and accurate information. It is by gazetting a socio-economic impact assessment that the government can show that transparency is being fostered and that the public are being provided with timely, accessible and accurate information. Publishing the draft *Strategy* without a socio-economic impact assessment is administrative action that can be reviewed by a court for being procedurally unfair, or because relevant considerations have been ignored.

Supporting transformation of the financial sector is not an FSCA “*strategic objective*”

The Financial Sector Regulation Act, 2017³ (“the FSR Act” or “the Act”) provides for the establishing of the FSCA and its objectives and functions.⁴

The FSCA’s Press Release⁵ states that a “*strategic objective of the FSCA*” is to promote the development of an “*innovative,*” inclusive, and sustainable financial system, and that this includes “*supporting the transformation of the financial sector*”.

It is submitted that these statements in the Press Release are not entirely correct. It is not correct to say that “*a strategic objective of the FSCA*” is to promote the development of an “*innovative,*” inclusive, and sustainable financial system, or that this includes “*supporting the transformation of the financial sector*”.

The FSR Act, 2017 in its provision which sets out the object of the Act⁶ states⁷ that the object of “*this Act*” is to achieve a stable financial system that works in the interests of financial customers and that supports balanced and sustainable economic growth, by establishing⁸ a regulatory and supervisory framework that promotes “*transformation of the financial sector*”⁹ among many other things.¹⁰

This means that it is the object of “*this Act*” to promote transformation of the financial sector.

³ FSR Act 9 of 2017.

⁴ FSR Act, 2017 Ch 4 (ss 56–58).

⁵ FSCA Press Release, 28 Feb 2022, “Release of FSCA draft Financial Sector Transformation Strategy for public comment”.

⁶ FSR Act, 2017 s 7 (object of Act).

⁷ FSR Act, 2017 s 7(1).

⁸ In conjunction with the specific financial sector laws.

⁹ FSR Act, 2017 s 7(1)(g).

¹⁰ *I.e.*, financial stability, the safety and soundness of financial institutions, the fair treatment and protection of financial customers, the efficiency and integrity of the financial system, the prevention of financial crime, financial inclusion, and confidence in the financial system. FSR Act, 2017 s 7(1)(a)–(f) and (h).

FSCA has only a limited role regarding financial-sector transformation

The Act does not say that it is a “*strategic objective of the FSCA*” to promote development of an “*innovative*” financial system or that it includes “*supporting the transformation of the financial sector*”.

The FSCA’s transformation role is merely to attend a working group or subcommittee set up to deal with that topic if the Financial System Council of Regulators selects the FSCA as a member, and then only to deal with the agenda determined by that Council:

The FSR Act mentions “*transformation of the financial sector*” in only three provisions:

In the Act’s definition of “*transformation of the financial sector*,”¹¹
in the provision about the object of the Act,¹² being to achieve a stable financial system that¹³
supports balanced and sustainable growth, by establishing a regulatory and supervisory
framework that promotes¹⁴ “*transformation of the financial sector*”; and
in the Act’s provision about “*working groups and subcommittees*”.¹⁵

That provision about working groups and subcommittees¹⁶ says that the Financial System Council of Regulators must establish working groups or subcommittees regarding—

Enforcement and financial crime; financial stability and resolution; policy and legislation;
standard-setting; financial sector outcomes; financial inclusion;¹⁷
“*transformation of the financial sector*”;¹⁸ and
any other matter that the Director-General may determine after consulting that Council’s other
members.¹⁹

The Council of Regulators must determine “*the membership, terms of reference and procedure*” of a working group or subcommittee.²⁰

¹¹ FSR Act, 2017 s 1(1) svv “*transformation of the financial sector*”.

¹² FSR Act, 2017 s 7(1)(g).

¹³ *Inter alia*.

¹⁴ *Inter alia*.

¹⁵ FSR Act, 2017 s 81 (working groups and subcommittees).

¹⁶ FSR Act, 2017 s 81 (working groups and subcommittees).

¹⁷ FSR Act, 2017 s 81(1)(a)–(f).

¹⁸ FSR Act, 2017 s 81(1)(g).

¹⁹ FSR Act, 2017 s 81(1)(h).

²⁰ FSR Act, 2017 s 81(2).

The draft *FSCA Strategy* acknowledges, correctly, that a direct role for financial-sector regulators in promoting transformation of the sector has been limited, in part due to “*the lack of enabling financial-sector legislation in relation to transformation*”.²¹

FSR Act does not say promoting transformation is an FSCA objective

The FSR Act’s provision about the objective of the FSCA²² states:

Objective

57. The objective of the Financial Sector Conduct Authority is to—

- (a) enhance and support the efficiency and integrity of financial markets; and
- (b) protect financial customers by—
 - (i) promoting fair treatment of financial customers by financial institutions; and
 - (ii) providing financial customers and potential financial customers with financial education programs, and otherwise promoting financial literacy and the ability of financial customers and potential financial customers to make sound financial decisions; and
- (c) assist in maintaining financial stability.
- (d)

This does *not* say that the FSCA’s objective includes “*promoting or supporting the transformation of the financial sector*”. Still less does it say that this is the FSCA’s “*strategic*” objective.

Draft *Strategy* incorrectly suggests FSCA can take action if firms don’t meet transformation targets

The draft *FSCA strategy* suggests, tentatively, that, despite the current legislation’s current lack of teeth for enforcing transformation—

“*[T]he FSCA could potentially take actions such as—*

- *require financial institutions to have in place a transformation plan, aimed at achieving targets set under the FS Code;*
- *set minimum B-BBEE levels that must be targeted by each firm and documented in the transformation plan, especially for larger firms within the financial sector, and particularly to require progression through the levels of transformation over defined periods of time;*
- *consider transformation plans during the licensing process;*

²¹ Draft *FSCA Strategy for Promoting Financial Sector Transformation*, part 3 (the role of financial sector regulators in promoting transformation).

²² FSR Act, 2017 s 57 (objective of the FSCA).

- *supervise the progress of financial institutions against their plans;*
- *take action when there is a lack of commitment to or achievement of targets set in*
- *transformation plans; [...].”²³*

Insofar as the FSCA may be suggesting that it has any such powers under current legislation, that suggestion is wholly incorrect.

The FSCA currently does not have power (under either the B-BBEE Act or the FSR Act) to require financial institutions to have a transformation plan, or to set minimum B-BBEE levels that must be targeted by each firm, or to require progression through levels of transformation over defined periods of time, or to supervise the progress of financial institutions against their plans; or to take action when there is a lack of achievement of targets set in transformation plans.

FSCA is not responsible authority for all financial-sector laws

The FSR Act’s provision about the functions of the FSCA²⁴ states that, in order to achieve its objective, the FSCA must “*regulate and supervise*” the conduct of financial institutions “*in accordance with the financial sector laws*”.²⁵

But the FSCA is not the responsible authority for all financial-sector laws.

The responsible authority for a financial sector law²⁶ is identified in a schedule to the Act,²⁷ as a rule.²⁸

²³ Draft *FSCA Strategy for Promoting Financial Sector Transformation*, part 3 (the role of financial sector regulators in promoting transformation).

²⁴ FSR Act, 2017 s 58 (functions of the FSCA).

²⁵ FSR Act, 2017 s 58(1)(a).

²⁶ FSR Act, 2017 Sched 2 (responsible authorities).

²⁷ FSR Act, 2017 s 5(1).

²⁸ If a memorandum of understanding provides for a financial sector regulator to delegate its functions and powers in relation to a provision of a financial sector law for which it is the responsible authority to another financial sector regulator, the other financial sector regulator is, to the extent of the delegation, the responsible authority for the provision. FSR Act, 2017 s 5(2).

The FSCA is the responsible authority only for the laws governing pension funds, friendly societies, long- or short-term insurance (excluding prudential supervision), financial advisory and intermediary services, collective investment schemes and credit-rating services.²⁹

(The Prudential Authority is responsible for the laws governing banks of all kinds,³⁰ deposit-taking financial co-operatives,³¹ financial markets, the road accident fund, and prudential supervision of insurers.³²)

FSR Act’s “*transformation*” definition refers to B-BBEE Act’s Financial Sector Code definition

The FSR Act defines “*transformation of the financial sector*” as “*transformation as envisaged by the Financial Sector Code for BroadBased Black Economic Empowerment issued in terms of section 9 (1) of the BroadBased Black Economic Empowerment Act, 2003*”.³³

The BroadBased Black Economic Empowerment Act, 2003³⁴ (“the B-BBEE Act”) declares³⁵ that it is a statute to—

promote the achievement of the constitutional right to equality and increase broad-based and effective participation of black people in the economy;³⁶ and
establish a national policy on “*broad-based black economic empowerment*” so as to promote equal opportunity.³⁷

The B-BBEE Act defines “*broad-based black economic empowerment*” (“B-BBEE”) as the viable economic empowerment of all black people³⁸ through diverse but integrated socio-economic strategies that include³⁹—

²⁹ FSR Act, 2017 Sched 2 (responsible authorities).

³⁰ Banks, cooperative banks, mutual banks.

³¹ Credit unions, financial co-operatives, financial-services co-operatives, savings-and-credit co-operatives. See Cooperative Banks Act 40 of 2007 s 1(1) svv “co-operative banks”, “co-operative financial institutions”.

³² FSR Act, 2017 Sched 2 (responsible authorities).

³³ FSR Act, 2017 s 1(1) svv “*transformation of the financial sector*”.

³⁴ BroadBased Black Economic Empowerment Act 53 of 2003.

³⁵ B-BBEE Act, 2003, *Preamble*.

³⁶ And promote a higher growth rate, increased employment and more equitable income distribution.

³⁷ And promote the economic unity of the nation, protect the common market, and promote equal access to government services.

³⁸ In particular women, workers, youth, people with disabilities and people living in rural areas.

³⁹ But are not limited to.

increasing the number of black people that manage, own and control enterprises and productive assets;

facilitating ownership and management of enterprises and productive assets by communities, workers, co-operatives and other collective enterprises.⁴⁰

The B-BBEE Act states that its objectives are to facilitate B-BBEE by—

“*promoting economic transformation*” in order to enable meaningful participation of black people in the economy;

achieving a substantial change in the racial composition of ownership and management structures and in the skilled occupations of existing and new enterprises;

increasing the extent to which communities, workers, cooperatives and other collective enterprises own and manage existing and new enterprises and increasing their access to economic activities, infrastructure and skills training; and

increasing the extent to which black women own and manage existing and new enterprises, and increasing their access to economic activities, infrastructure and skills training.⁴¹

Minister of Trade & Industry (not the FSCA) must issue strategy for B-BBEE

The B-BBEE Act states that Minister must issue a strategy for B-BBEE.⁴²

The Minister’s strategy must—

provide for an integrated coordinated and uniform approach to B-BBEE by all organs of state, public entities, the private sector, nongovernmental organisations, local communities and other stakeholders;

⁴⁰ And human resource and skills development; achieving equitable workforce representation in all occupational categories and levels; preferential procurement from enterprises owned or managed by black people; and investment in enterprises owned or managed by black people. B-BBEE Act, 2003 s 1 svv “*broad-based black economic empowerment*”.

⁴¹ And promoting investment programmes that lead to broadbased and meaningful participation in the economy by black people in order to achieve sustainable development and general prosperity; empowering rural and local communities by enabling access to economic activities, land, infrastructure, ownership and skills; promoting access to finance for black start-ups, small, medium and micro enterprises, cooperatives and black entrepreneurs, including those in the informal business sector; and increasing effective economic participation and black owned and managed enterprises, including small, medium and micro enterprises and cooperatives and enhancing their access to financial and nonfinancial support. B-BBEE Act, 2003 s 2(a)–(h).

⁴² B-BBEE Act, 2003 s 11(1).

develop a plan for financing B-BBEE, including the creation of incentive schemes to support effective black owned and managed enterprises;
provide a system for organs of state, public entities and other enterprises to prepare B-BBEE plans and to report on compliance with those plans.⁴³

The B-BBEE Act does not authorise *the FSCA* to publish B-BBEE (or transformation) strategies.

B-BBEE Act says, if sector develops “*transformation charter*,” Minister of Trade & Industry must gazette it

The B-BBEE Act states that the Minister must publish⁴⁴ for general information and promote a “*transformation charter*” for a particular sector of the economy, “*if the Minister is satisfied that the charter has been developed by major stakeholders in that sector*”.⁴⁵

(In February 2007, the Minister issue a Financial Sector Charter,⁴⁶ which⁴⁷—

records that the financial sector committed itself at the NEDLAC Financial Sector Summit in 2002 to develop a “*Black Economic Empowerment*” (BEE) charter;
states that the Charter—
was voluntarily developed by the financial sector;
constitutes a framework and establishes principles on which BEE will be implemented in the sector;
establishes targets and responsibilities in respect of each principle; and
outlines processes for implementing the Charter and mechanisms to monitor and report on progress,
provided for the establishing of an independent Charter Council, to oversee implementation of the Charter;
the Charter’s targets would be applied from January 2004 until December 2014, but its principles would be relevant beyond 2015;

⁴³ B-BBEE Act, 2003 s 11(2)(a), (b) and (c).

⁴⁴ In the *Gazette*.

⁴⁵ And advances the objectives of the Act. B-BBEE Act, 2003 s 12 (transformation charters).

⁴⁶ Govt N 110 of 9 Feb 2007: Financial Sector Charter on Black Economic Empowerment.

⁴⁷ *Inter alia*.

in 2015 (based on the reports for the year ended December 2014) the Charter Council would undertake a second comprehensive review of Charter progress, draw conclusions about the impact of the Charter on the sector and the economy, and make decisions about what further steps (if any) should be taken to address identified shortcomings at institution, subsector, sector or national levels; the Charter’s provisions were to be achieved consistent with sound business practice.⁴⁸⁾

The B-BBEE Act does not authorise the FSCA to publish transformation charters (or strategies).

Minister of Trade & Industry may issue Codes of Good Practice

The B-BBEE Act states that the Minister, in order to promote the purposes of the Act, may⁴⁹ issue Codes of Good Practice on black economic empowerment (“BEE”).⁵⁰

Such a Code may—

(a) include—

- (i) the further interpretation and definition of B-BBEE and the interpretation and definition of different categories of black-empowerment entities,
- (ii) qualification criteria for preferential purposes for procurement and other economic activities,
- (iii) indicators to measure B-BBEE, and
- (iv) the weighting to be attached to such indicators;
- (v) guidelines for stakeholders in the relevant sectors of the economy to draw up “*transformation charters*”⁵¹ for their sector;⁵² and

(b) specify targets⁵³ and the period within which they must be achieved.⁵⁴

⁴⁸ Govt N 110 of 9 Feb 2007: Financial Sector Charter on Black Economic Empowerment, paras 1.1 and 1.3; paras 4.2, 4.4 and 4.5; paras 10.1, 10.2 and 10.5; para 15.1.1; para 16.1 read with annex A (scorecard).

⁴⁹ By notice in the *Gazette*.

⁵⁰ B-BBEE Act, 2003 s 9(1).

⁵¹ And codes of good practice.

⁵² B-BBEE Act, 2003 s 9(1)(a)–(e).

⁵³ Consistent with the objectives of the Act.

⁵⁴ B-BBEE Act, 2003 s 9(3).

The Minister's 2015 amended statement of guidelines for developing sector codes states that the main responsibilities of Sector Charter Councils are to develop the Sector Codes and to monitor their implementation.⁵⁵

The FSCA is excluded from any such monitoring, and for good reason. An economic sector cannot be expected to serve two masters on the same issue without inevitable confusion and conflict.⁵⁶

Status of Codes of Good Practice

The B-BBEE Act states⁵⁷ that every organ of state and public entity must apply any relevant Code of Good Practice issued under the Act “*in determining qualification criteria for the issuing of licences*” or other authorisations of economic activity in terms of any law.⁵⁸

An enterprise in a sector for which the Minister has issued a Sector Code of Good Practice may only be measured for compliance with the requirements of B-BBEE in accordance with that Code.⁵⁹ Such an enterprise must report annually on its compliance to the sector council which may have been established for that sector.⁶⁰

In 2012, the Minister issued a Financial Sector Code of Good Practice for BEE.⁶¹

That 2012 Financial Sector Code states⁶² that it is a harmonisation of the Financial Sector Charter (that was prepared by the financial sector and gazetted in 2007) and the generic (*i.e.*, not sector-based) Codes of Good Practice issued under the B-BBEE Act.

In 2017, the Minister issued an Amended Financial Sector Code.⁶³

⁵⁵ Govt N 408 of 6 May 2015 (*Gazette* 38766): “Statement 003: Amended guidelines for developing and gazetted of sector codes” par 6.1.

⁵⁶ “No man can serve two masters: for either he will hate the one, and love the other; or else he will hold to the one, and despise the other. Ye cannot serve God and mammon.” *King James Version*, Matthew 6:24.

⁵⁷ *Inter alia*.

⁵⁸ B-BBEE Act, 2003 s 10(1)(a).

⁵⁹ B-BBEE Act, 2003 s 10(3).

⁶⁰ B-BBEE Act, 2003 s 10(4).

⁶¹ Govt N 997 of 26 Nov 2012 (*Gazette* 35914): Financial Sector Code of Good Practice for BEE.

⁶² Govt N 997 of 26 Nov 2012, Financial Sector Code for BEE, *Preamble*.

⁶³ Govt N 1325 of 1 Dec 2017 (*Gazette* 41287): Amended Financial Sector Code.

That 2017 Amended Financial Sector Code states that it is a harmonisation of the 2012 Financial Sector Code and the Amended generic Codes of Good Practice.⁶⁴

The 2017 amended Financial Sector Code records⁶⁵ that the Financial Sector Charter Council was of the opinion that the 2017 Code met all requirements of the provision in the amended guidelines for developing sector codes that sets out the procedure for developing sector codes,⁶⁶ including the requirement that a sector body seeking to have a Sector Code gazetted must⁶⁷ provide evidence of compliance with the B-BBEE Act's provision that requires the Minister to publish a sector transformation charter if satisfied that it was developed by major stakeholders in that sector.⁶⁸

B-BBEE Act is not enforceable

The draft *FSCA Strategy for Promoting Financial Sector Transformation* recognises, correctly, that the B-BBEE Act does not impose obligations upon any enterprise to achieve specific B-BBEE targets. Failure to achieve a certain level of B-BBEE compliance is not an offence.

The B-BBEE Act requires enterprises operating in a sector for which the Minister of Trade & Industry has issued a Sector Code of good practice must report annually on their B-BBEE compliance to the Sector Council which may have been established for that sector.

For the financial sector, the Financial Sector Transformation Council (FSTC) was established to enforce the FS Code, but the FSTC is not mandated to take action against financial institutions for failure to achievement of targets in the FS Code, or failure to report on compliance.⁶⁹

⁶⁴ Govt N 1325 of 1 Dec 2017, Amended Financial Sector Code, *Preamble*.

⁶⁵ Govt N 1325 of 1 Dec 2017 (Gazette 41287): Amended Financial Sector Code, *sub tit* "Status of this Code."

⁶⁶ Govt N 408 of 6 May 2015 (Gazette 38766): "Statement 003: Amended guidelines for developing and gazetiting of sector codes" par 3.

⁶⁷ Govt N 408 of 6 May 2015 (Gazette 38766): "Statement 003: Amended guidelines for developing and gazetiting of sector codes" par 3.2.3.

⁶⁸ B-BBEE Act, 2003 s 12 (transformation charters).

⁶⁹ Draft *FSCA Strategy for Promoting Financial Sector Transformation*, § 2.3 (institutional mechanisms for monitoring and evaluating B-BBEE), subdivision 4.1.7 (Financial Sector Transformation Council).

Second draft Conduct of Financial Institutions Bill gazetted for comment in Sep 2020

In September 2018, the National Treasury invited public comments on a first draft of a Conduct of Financial Institutions Bill (“*CoFI Bill*” or “*Bill*”).

In September 2020, the Treasury invited public comments on a second draft of the Bill.⁷⁰

The Bill appears to require most providers of a financial product or service to hold a licence from the FSCA authorising it to do so.⁷¹

The Treasury’s September 2020 media statement indicated that the Treasury aimed to finalise the Bill taking any comments received into account, and then submit the Bill to the Cabinet for approval and tabling⁷² “*in early 2021*”.⁷³

Yet, as at mid-to-late April 2022 at the time of writing of this submission, the Bill had not yet been introduced in Parliament.

Bill provides for framework to promote “*transformation of the financial sector*”

The Treasury’s September 2020 media statement which invited comments on the second draft of the Bill stated that the Bill seeks to strengthen transformation in the financial sector.

The second draft Bill declares that it is a Bill to provide for a regulatory framework for the conduct of financial institutions that will⁷⁴ promote “*transformation of the financial sector*.”⁷⁵

⁷⁰ The second draft was accompanied by a Response Document that explained changes to the first draft in response to comments and engagements.

⁷¹ 2020 draft CoFI Bill cls 4(1), 8(1) and 10(2)(b) read with Sched 1.

⁷² *I.e.*, introduced in Parliament. “Process of drafting legislation” Adv Lawrence Bassett, *Justice Today* (official newsletter of the Dept of Justice & Constitutional Development) 2012 issue 1 p 8.

⁷³ National Treasury. Media statement, 29 Sep 2020. “Second draft Conduct of Financial Institutions Bill published for public comment.”

⁷⁴ Inter alia.

⁷⁵ September 2020 draft Conduct of Financial Institutions Bill, *Preamble*.

The draft Bill defines “*transformation of the financial sector*”⁷⁶ in the same terms as the FSR Act defines that expression, *i.e.*, as transformation envisaged by the Financial Sector Code for B-BBEE⁷⁷ issued in terms of the B-BBEE Act.⁷⁸

The Bill’s stated object is to establish a consolidated⁷⁹ regulatory framework for the conduct of financial institutions that will support the Authority in the achievement of its objective and functions set out in⁸⁰ the FSR Act.⁸¹

The draft Bill states that a financial institution must have arrangements in place to comply⁸² with the Bill’s requirements, and to identify any non-compliance with those requirements.⁸³ If the Authority reasonably believes that the effectiveness of arrangements in place to comply with those requirements requires further investigation, the Authority may direct a financial institution to procure the performance, by a person who is approved by the Authority, of an independent review of the arrangements at the cost of the financial institution.⁸⁴ The Authority may direct a financial institution⁸⁵ to strengthen or improve the arrangements.⁸⁶

The draft Bill states that, if a licensed financial institution is subject to the requirements of the BB-BEE Act and the Financial Sector Code for BB-BEE issued in terms of that Act, “*it must have a plan in place to meet its commitments*” in terms of promoting “*transformation of the financial sector*” in line with those requirements.⁸⁷

⁷⁶ 2020 draft CoFI Bill cl 1(1) svv “*transformation of the financial sector*”.

⁷⁷ Discussed above.

⁷⁸ *I.e.*, that “*transformation of the financial sector*” means transformation as envisaged by the Financial Sector Code for Broad-Based Black Economic Empowerment issued in terms of section 9(1) of the Broad-Based Black Economic Empowerment Act, 2003 (Act No.53 of 2003).

This definition is unnecessary in the Bill, because the Bill states that expressions in the Bill that are defined in the FSR Act have the meaning ascribed to them in that Act, unless the context otherwise indicates. 2020 draft CoFI Bill cl 1(1).

⁷⁹ And comprehensive and consistent.

⁸⁰ In the FSR Act ss 57 and 58.

⁸¹ 2020 draft CoFI Bill cl 3(1).

⁸² On an ongoing basis.

⁸³ 2020 draft CoFI Bill cl 8(1)(a).

⁸⁴ 2020 draft CoFI Bill cl 8(1)(b). (The language of the clause requires correcting.)

⁸⁵ Or the governing body or other key persons of the financial institution, or a representative or contractor.

⁸⁶ To comply with requirements in the Bill. 2020 draft CoFI Bill cl 8(2).

⁸⁷ 2020 draft CoFI Bill cl 23.

The Bill contains a chapter on “culture and governance,”⁸⁸ which stipulates that a licensed financial institution must conduct its business in a manner that⁸⁹ promotes transformation in a manner “*reasonably consistent with*” its transformation plan.⁹⁰ An institution must adopt⁹¹ and implement⁹² “governance arrangements” that are reasonably necessary to ensure adherence to the requirements in this culture-and-governance chapter.⁹³ These governance arrangements must demonstrate how the institution will comply with “*this Chapter and with standards relating to this Chapter,*”⁹⁴ and must “*at least address*” the transformation required by the chapter.⁹⁵

The Bill states that the FSCA may make conduct standards for⁹⁶ financial institutions required to be licensed under the Bill.⁹⁷ A conduct standard prescribed for the purposes of the Bill must be aimed at achieving the FSCA’s objective stated in the FSR Act,⁹⁸ and at supporting the performance of the FSCA’s functions described in that Act.⁹⁹

The draft Bill does not require that a Conduct Standard issued by the FSCA under the Bill should be developed by major stakeholders in the Sector, in contrast to Sector Transformation Charters and Codes issued under the BBBEE Act.

The Bill will amend the FSR Act’s provision describing the FSCA’s functions¹⁰⁰ by inserting a subclause that the FSCA must promote “*transformation of the financial sector*”.¹⁰¹

The Bill will amend the FSR Act’s schedule that lists the “financial sector laws,”¹⁰² by the insertion of the Bill into that list (as the “Conduct of Financial Institutions Act, 2022”).¹⁰³ The Bill will also

⁸⁸ 2020 draft CoFI Bill Ch 4 (culture and governance).

⁸⁹ *Inter alia*.

⁹⁰ 2020 draft CoFI Bill cl 17(1)(d).

⁹¹ And document.

⁹² And monitor the effectiveness of.

⁹³ 2020 draft CoFI Bill cl 19(1).

⁹⁴ 2020 draft CoFI Bill cl 19(2)(f).

⁹⁵ 2020 draft CoFI Bill cl 19(2)(g)(viii).

⁹⁶ And in respect of.

⁹⁷ 2020 draft CoFI Bill cl 67(1)(a).

⁹⁸ See FSR Act s 57 (objective of FSCA).

⁹⁹ See FSR Act s 58 (functions of FSCA).

¹⁰⁰ See FSR Act s 58 (functions of FSCA).

¹⁰¹ 2020 draft CoFI Bill cl 78 read with Sched 5 (laws amended) Part 16 (amendments of FSR Act) item 6(a) (amendments of s 58(1)) to insert subcl (eA).

¹⁰² FSR Act, 2017 Sched 1 (financial sector laws).

¹⁰³ 2020 draft CoFI Bill cl 78 read with Sched 5 (laws amended) P 16 (amendments of FSR Act) item 39 (Sched 1 (financial sector laws)) item 39(c) inserting “Conduct of Financial Institutions Act, 2022”.

amend the FSR Act’s schedule of “responsible authorities,” to include the FSCA as the responsible authority for the Conduct of Financial Institutions Act, 2022.¹⁰⁴

The Bill will amend a provision of the FSR Act regarding additional matters for standards,¹⁰⁵ by inserting a provision to the effect that the FSCA, to achieve its objectives,¹⁰⁶ may make conduct standards on governance, including: Governing bodies’ obligations, responsibilities and duties; a governance framework and matters which must be addressed in it; and transformation and matters which must be addressed in a transformation plan.¹⁰⁷

The FSCA will also be able to make conduct standards under the Bill about these matters.¹⁰⁸

FSCA will have power to cancel licence if licensee breaches transformation standards

The draft Bill states that a licensee must perform the activities for which the institution is authorised in accordance with the requirements applicable in respect of those activities in terms of the Bill, conduct standards and the conditions of the licence.¹⁰⁹

The Bill stipulates¹¹⁰ that the FSCA may suspend or revoke a licence granted under the Bill, in accordance with the FSR Act’s provisions about suspension or revocation of licences.¹¹¹

The FSR Act’s provisions state that the authority that issued a licence may suspend or revoke it, if the licensee contravenes a financial sector law in a material way.¹¹²

This means that the FSCA will be able to suspend or revoke a licence, if the licensee has materially contravened the Bill’s provisions requiring the licensee to perform its activities in accordance with

¹⁰⁴ 2020 draft CoFI Bill cl 78 read with Sched 5 (laws amended) Pt 16 (amendments of FSR Act) item 40 (Sched 2 (responsible authorities)) item 40(c) inserting the FSCA for the Conduct of Financial Institutions Act, 2022.

¹⁰⁵ See FSR Act s 108 (additional matters for making standards).

¹⁰⁶ As set out in FSR Act s 57 (objective of FSCA).

¹⁰⁷ 2020 draft CoFI Bill cl 78 read with Sched 5 (laws amended) Part 16 (amendments of FSR Act) item 11 (amendments of s 108(1) read with ss 57 and 106) to amend s 108(1)(b) (standards on governance).

¹⁰⁸ 2020 draft CoFI Bill cl 67(2) and (3), read with FSR Act ss 57, 58 and 108.

¹⁰⁹ 2020 draft CoFI Bill cl 10(2)(b)(i), (ii) and (iii).

¹¹⁰ 2020 draft CoFI Bill cl 9(2)(d).

¹¹¹ See FSR Act ss 120 and 121.

¹¹² FSR Act s 120(1)(c)(i) and s 121(1)(b).

the requirements the Bill, or of conduct standards prescribed by the FSCA under the Bill, or of conditions of the licence.¹¹³

Strategy envisages FSCA will exercise powers under current laws that will be ultra vires

The draft *Strategy* states that “Some of the strategic initiatives [...] can be achieved in Phase 1 (focusing on the role that the FSCA will play within the current legislative framework¹¹⁴), “while others are reliant on the legislative framework to be provided under the [2020 draft Bill]”.¹¹⁵

The *Strategy* states that “in Phase 1” the FSCA will achieve the objective of¹¹⁶ “Developing licensing, regulatory and supervisory frameworks that promote transformation of the financial sector. [...] Where appropriate, regulatory instruments may also introduce explicit requirements aimed at transformation.”¹¹⁷

Bill will enable FSCA enforce transformation standards only if enacted in present form

The draft *FSCA Strategy* anticipates that the promulgation of the draft Bill, with its amendments to the FSR Act, will enable the FSCA to set transformation requirements and enforce them against all financial institutions.¹¹⁸

That prediction will only be proved correct if the draft Bill is enacted on its present lines.

¹¹³ See 2020 draft CoFI Bill cl 10(2)(b)(i), (ii) and (iii).

¹¹⁴ *I.e.*, the current FSR Act, B-BBEE Act and FS Code.

¹¹⁵ Feb 2022 draft *FSCA Strategy for Promoting Financial Sector Transformation*, Part 4 The FSCA’S approach to promoting financial sector transformation, § 4.1 Phase 1: Promoting transformation under the existing policy and legislative framework.

¹¹⁶ *Inter alia*.

¹¹⁷ 2022 draft *FSCA Strategy*, Part 4 The FSCA’S approach to promoting financial sector transformation, § 4.1 Phase 1: Promoting transformation under the existing policy and legislative framework: 4.1.7 Developing licensing, regulatory and supervisory frameworks that promote transformation of the financial sector.

¹¹⁸ Draft *FSCA Strategy for Promoting Financial Sector Transformation*, part 1 (background) and part 3 (the role of financial sector regulators in promoting transformation).

Rule of Law

The Constitution declares that the Republic is founded on the values of supremacy of the Constitution and the Rule of Law.¹¹⁹ It is a fundamental principle of the Rule of Law that the exercise of public power is only legitimate where it is lawful.¹²⁰

The State at all levels must in all its conduct observe the Rule of Law.¹²¹ Courts may subject any exercise of public power to constitutional review under the Rule of Law principle.¹²²

It is a principle of the Rule of Law that public officers and agencies must exercise powers conferred on them, without exceeding the limits of such powers. Many would, with reason, regard this as the core of the Rule of Law. Although citizens empower their representative institutions to make laws and it falls to the executive to carry those laws into effect, nothing authorises the executive to act otherwise than in strict accordance with those laws.¹²³

It is also a principle of the Rule of Law that the law must afford adequate protection of fundamental human rights.¹²⁴ Fundamental rights include the right of everyone to freedom of association.¹²⁵

No Socio Economic Impact Assessment provided

Fundamental rights include the right to “*just administrative action*”. The Bill of Rights¹²⁶ declares that everyone has “*the right to administrative action that is lawful, reasonable and procedurally fair*”.¹²⁷

¹¹⁹ Constitution s 1(c).

¹²⁰ *Minister of Local Government, Housing & Traditional Affairs, Kwazulu-Natal v Umlambo Trading 29 CC*, 2008 (1) SA 396 (SCA) par [17].

¹²¹ *De Villiers v Head of Department: Education, Western Province* (2010) 31 ILJ 1377 (LC) par [23].

¹²² *Democratic Alliance v Acting National DPP*, [2012] 2 All SA 345 (SCA).

¹²³ Lord Bingham, “The Rule of Law” (Sixth Sir David Williams Lecture, 2006, Centre for Public Law, Univ of Cambridge), sixth sub-rule.

¹²⁴ Lord Bingham, “The Rule of Law” (Sixth Sir David Williams Lecture, 2006, Centre for Public Law, Univ of Cambridge), fourth sub-rule.

¹²⁵ Constitution s 18.

¹²⁶ Constitution of the Republic of South Africa, 1996 Ch 2 (ss 7–39), Bill of Rights.

¹²⁷ Constitution, Bill of Rights s 33(1).

National legislation must be enacted to give effect to that right¹²⁸ and must impose a duty on the state to give effect to it.¹²⁹ That legislation, the Promotion of Administrative Justice Act, 2000,¹³⁰ declares that a court can review an administrative action if¹³¹ it was “*procedurally unfair*”, or was taken “*because [...] relevant considerations were not considered*”.¹³²

The Constitution states that public administration must be governed by¹³³ the principle that “*transparency must be fostered by providing the public with timely, accessible and accurate information*”.¹³⁴

Perhaps mindful of all this, the Cabinet in 2007 decided on the need for consistent assessment of the socio-economic impact of policy initiatives and laws.¹³⁵

From October 2015, departmental Memoranda seeking Cabinet approval of draft policies and laws must include information generated by a socio-economic impact assessment of the proposed legislative measure,¹³⁶ as well as the full assessment, countersigned by the Socio-Economic Impact Assessment System (SEIAS) Unit established by the Department of Planning, Monitoring & Evaluation (DPME). Policies and laws that are internally signed should also be subjected to impact assessments.¹³⁷

¹²⁸ *Inter alia*.

¹²⁹ Constitution, Bill of Rights s 33(3)(b).

¹³⁰ Promotion of Administrative Justice Act 3 of 2000.

¹³¹ *Inter alia*.

¹³² Promotion of Administrative Justice Act, 2000 s 6(2)(c) and (e)(iii).

¹³³ *Inter alia*.

¹³⁴ Constitution s 195(1)(g).

¹³⁵ This followed a study commissioned by the Presidency and National Treasury in response to concerns about failure to understand the full cost of regulations, especially the impact on the economy.

¹³⁶ And a summary of the socio-economic impact assessment’s main findings and the full assessment.

¹³⁷ Dept of Planning, Monitoring & Evaluation, “Socio Economic Impact Assessment System (SEIAS)” (undated) <https://www.dpme.gov.za/keyfocusareas/Socio%20Economic%20Impact%20Assessment%20System/Pages/default.aspx> (accessed 12 Apr 2022).

(The SEIAS Unit is responsible for ensuring the implementation of the SEIAS across government, and for supporting the institutionalisation of the new system. An interdepartmental Steering Committee¹³⁸ oversees the SEIAS's implementation.¹³⁹)

The DPME states that the role of SEIAS is to “*minimise unintended consequences from policy initiatives, regulations and legislation, including unnecessary costs from implementation and compliance*” and “*anticipate implementation risks*”

The gazetting of a SEIA is how government can comply with its constitutional requirement that public administration must be governed by the principle that transparency must be fostered by providing the public with timely, accessible and accurate information.¹⁴⁰ It is by conducting a SEIA that the government can show that proposed regulations are supported by evidence. The Rule of Law requires that official measures not be irrational.¹⁴¹

The broad sweep and emphasis of the Rule of Law is on “*the absence of arbitrary power*”.¹⁴²

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¹³⁸ An interdepartmental Steering Committee oversees the implementation of the SEIAS. The Committee comprises senior officials of the Presidency, National Treasury and DPME, the Departments of Economic Development, Trade & Industry, Environmental Affairs, Labour, Public Service & Administration, and Social Development, the State Security Agency and the Chief State Law Advisors.

¹³⁹ Dept of Planning, Monitoring & Evaluation, “Socio Economic Impact Assessment System (SEIAS) Guidelines”, May 2015.

¹⁴⁰ Constitution s 195(1)(g).

¹⁴¹ Free Market Foundation, “An Analysis of the Principle of Public Participation in Policy-Making, including Socio-Economic Impact Assessments, and their Application in South Africa” (published 16 May 2017), Martin van Staden (legal researcher, Rule of Law Project).

¹⁴² *Van der Walt v Metcash Trading Ltd* 2002 (5) BCLR 454 (CC) par [66] per Madala J.

Free Market Foundation

The Free Market Foundation (Southern Africa) is an independent public benefit organisation founded in 1975 to promote and foster an open society, the rule of law, personal liberty, and economic and press freedom as fundamental components of its advocacy of human rights and democracy based on classical liberal principles.

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