

# Presentation to the Select Committee of Finance on the Financial Sector Regulation Bill

3 February 2017



**national treasury**

Department:  
National Treasury  
REPUBLIC OF SOUTH AFRICA

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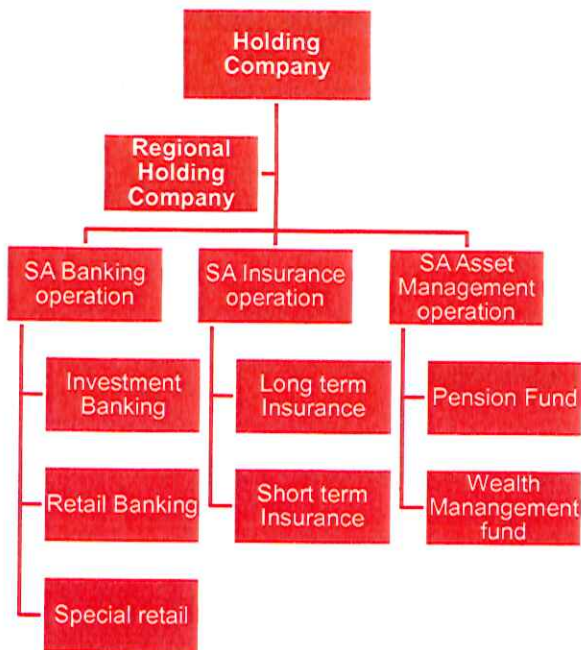
# 1. The Twin Peaks system

## Regulatory challenges within SA

- Within SA, there are **too many regulators** involved with the financial sector
- Most financial firms are regulated by a number of financial regulators
  - Major banks in SA are regulated by SARB, FSB, FIC, NCR, as most banking groups do banking, credit, insurance, asset management etc
  - But each “activity” is regulated separately, with own law → fragmentation means unlevel playing field, gaps, regulatory coordination compromised
- **Need for regulators to co-ordinate** and ensure that they do not contradict or work against each other
- How do we **prevent regulatory (forum) shopping?**
- Internationally this is even a harder problem – most of our banks operate in more than one country, so need regulatory co-operation between the different country regulators as well. Concept of home-host regulators means SA is not the home regulator for two of our major banks and insurers



# Complex and interconnected financial institutions



- Financial institutions increasingly involved in range of financial activities
- Multiple regulators involved (e.g. FSB, SARB, JSE, CIPC)
- Globally and domestically significant
- Systemically Important Financial Institutions – failure could trigger instability in wider financial system (domestically and globally)

## Why do we need the twin peaks system?

Financial Stability / Prudential	Market conduct	Access to financial services	Combating financial crime
<p>Need to strengthen <b>financial stability</b></p> <ul style="list-style-type: none"> <li>• Reserve Bank to lead on macro-prudential (systemic stability) and micro-prudential (safety and soundness of institutions)</li> </ul>	<p>Need to improve <b>market conduct</b></p> <ul style="list-style-type: none"> <li>• Much wider regulatory net, higher standards applied consistently across sector</li> <li>• Focus on outcomes incl. Treating Customers Fairly</li> </ul>	<p>Need to widen access to <b>financial services</b></p> <ul style="list-style-type: none"> <li>• Treasury to lead</li> <li>• Financial sector code</li> <li>• Co-operative and dedicated banks, and Postbank</li> <li>• Introduce a microinsurance framework</li> </ul>	<p>Need to combat <b>financial crime</b></p> <ul style="list-style-type: none"> <li>• Enforcement agencies to lead</li> <li>• Investigating and prosecuting abuses</li> <li>• Continued work with international partners</li> </ul>

*It is vital to ensure coordination and information sharing between regulators particularly in the face of an event that threatens systemic stability*

## Aim of Twin Peaks regulatory model in SA

- Increased regulatory coverage, minimising potential for regulatory gaps
- Regulatory laws that are **complete, harmonised, integrated, proportionate**
- **Dedicated and equal emphasis** on monitoring stability, prudential and conduct risks in financial sector
- Enhanced oversight of **micro-prudential regulation** for banks, insurers, financial markets, special focus on conglomerates – **Prudential Authority**
- **Increased focus on outcomes**, especially fair customer treatment – **FSCA**
- **More efficient use of supervisory capacity**, strengthen risk-based approach
- **Strong and swift action** for contraventions

## What is the difference between prudential and market conduct regulation?

- **Prudential regulation** looks at the financial health and soundness of a financial institution
  - Focus is on financial institutions directly, to the indirect benefit of customers. Prudential regulators ensure financial institution can meet its commitments now and in the future
- **Market conduct regulation** prioritises the customers of a financial institutions and evaluates how financial institutions interact with customers and each other
  - Market conduct regulators must ensure that financial institutions are not abusing their customers
  - Regulators need to be pro-active and have to prevent the crime rather than only punish after the crime
  - Market conduct is more than consumer protection, as we expect higher standards from the financial sector



# Prioritising both prudential and conduct regulation

- Focus of financial regulators in SA has been on prudential objectives, too little emphasis on market conduct objectives
- Poor prudential and conduct practices compromise customer and economic outcomes, hurting confidence and trust, and limiting the potential for sustainable growth
- Sources of conduct risk can differ to that of prudential risk, although poor conduct can affect prudence, and vice versa
- An integrated approach to regulation often results in one objective being prioritised to detriment of other
- **Key to the Twin Peak reforms is to set up two separate regulators, each dedicated to one objective only**

## What are the 'peaks'?

### Prudential Authority

- Promote & enhance the **safety and soundness of financial institutions**
- Assist in maintaining financial stability

### Financial Sector Conduct Authority

- To **protect financial customers** by–  
(a) ensuring that financial institutions treat financial customers fairly  
(b) enhancing the efficiency and integrity of financial markets  
(c) promoting financial literacy and financial capability

### Financial Services Tribunal and Enforcement

- Clear internal policies & procedures for administrative actions, including enforcement
- Enhanced transparency & accountability
- Tribunal will hear and decide appeals

### Financial Stability

- Powers to SARB – stability standards, SIFIs, managing systemic risk/events
- FSOC - Inter-agency co-ordination of financial stability issues

## 2. Consultation process

### Twin Peaks Reform Process – Summary of consultation

Date	Type of consultation	Audience
<b>Discussion Document: A Safer Financial Sector to Serve South Africa better</b>		
23 February 2011	Discussion document published	Public (invited to make comment)
15 March 2011	Press conference	Media and audience
<b>Banking sector engagements</b>		
27 August 2012	Meeting with banking CEOs and Minister of Finance	Banking industry
19 October 2012	Meeting with banking representatives and Minister of Finance	Banking industry
1 November 2012	Joint statement by BASA, Minister of Finance, on market conduct in banking	Public
<b>Roadmap: Implementing a Twin Peaks Model in South Africa</b>		
1 February 2013	Roadmap published	Public (invited to make comment)
14 March 2013	Workshop on implementing a Twin Peaks model in SA	Public
<b>Financial Sector Regulation Bill: Draft One</b>		
11 December 2013	FSR Bill published	Public (invited to make comment)
11 December 2013	Government Gazette: FSR Bill published for public comment	Public (invited to make comment)
28 January 2014	Public workshop	Public – workshop in Pta
29 January 2014	Public workshop	Public – workshop in Jhb
3 February 2014	Public workshop	Public – workshop in CPT



## Twin Peaks Reform Process – Summary of consultation

Date	Type of consultation	Audience
23 February 2011	Discussion document published	Public (invited to make comment)
15 March 2011	Press conference	Media and audience
7 February 2014	Public comments submitted (24 submissions made)	Public
10 September 2014	Presentation to SAIFM	Financial Markets Practitioners
3 November 2014	Presentation to CMS	Council for Medical Schemes
10 November 2014	Presentation to Insurance Regulatory Seminar	Insurance Industry
7 February 2014	Public comments submitted (24 submissions made)	Public
<b>Financial Sector Regulation Bill: Draft Two</b>		
11 December 2014	FSR Bill published	Public (invited to make comment)
30 January 2015	Public workshop	Public – workshop in Pta
3 February 2015	Public workshop	Public – workshop in Jhb
9 February 2015	Public workshop	Public – workshop in CPT
5 February 2015	Presentation to BASA Task Group on Twin Peaks	Banking industry representatives
12 February 2015	Presentation at FSB regulatory strategy seminar	Cross-sector industry representatives
13 February 2015	Presentation to JSE	JSE
19 February 2015	Presentation to MicroFinance SA	Microfinance industry representatives

## Twin Peaks Reform Process – Summary of consultation

Date	Type of consultation	Audience
25 February 2015	Presentation to SAIA	Insurance industry representatives
2 March 2015	Public comments submitted (26 submissions made)	Public
12 March 2015	Presentation at the Risk and Return SA Conference	Risk management practitioners
16 April 2015	Convening of NEDLAC Task Team on Twin Peaks	Business (including retail and motor industry representatives); labour
6 May 2015	Workshop on Ombuds Schemes under Twin Peaks	Ombud scheme representatives
13 May 2015	NEDLAC Task Team Meeting on Twin Peaks	Business (including retail and motor industry representatives); labour
21 May 2015	Presentation to Compliance Officers Association Annual Conference	Industry compliance officers
29 May 2015	NEDLAC Task Team Meeting on Twin Peaks	Business (including retail and motor industry representatives); labour
2 June 2015	Presentation to Standing Committee on Finance on Twin Peaks reform	Public
24 June 2015	Presentation to FPI Annual Convention	Financial planners
30 June 2015	NEDLAC Task Team Meeting on Twin Peaks	Business (including retail and motor industry representatives); labour
15 July 2015	NEDLAC Task Team Meeting on Twin Peaks	Business (including retail and motor industry representatives); labour
11 August 2015	Presentation to Standing Committee on Finance on FSR Bill	Public
3 September 2015	Presentation to Financial Sector Campaign Coalition (SACP)	Civil society
6 October 2015	NEDLAC Task Team Meeting on Twin Peaks	Business (including retail and motor industry representatives); labour

## Twin Peaks Reform Process – Summary of consultation

Date	Type of consultation	Audience
<b>Response and Explanatory Document accompanying the second draft of the FSR Bill</b>		
11 December 2014	Document published	Public
<b>Comments matrix</b>		
11 December 2014	Matrix published with detailed responses to comments submitted on draft one of the Bill (233pgs)	Public
<b>Financial Sector Regulation Bill: Draft three (tabled in Parliament)</b>		
27 October 2015	Tabled in Parliament	Public (invited to make comment)
6 November 2015	Presentation to Standing Committee on Finance	Public
19 November 2015	Presentation to Nedbank Wealth Cluster Compliance Indaba	Banking industry
21 November 2015	Presentation by Minister of Finance to SACP Augmented Central Committee Meeting	Civil society
24 November 2015	Public hearings on FSR Bill in Parliament	Public
25 November 2015	Public hearings on FSR Bill in Parliament	Public
27 November 2015	Presentation to Financial Sector Campaign Coalition (SACP)	Civil society
10 February 2016	Public hearings on FSR Bill in Parliament	Public
16 February 2016	Presentation to Standing Committee on Finance on FSR Bill	Public
3 March 2016	Meeting with Voluntary Ombuds Association on FSR Bill provisions	Financial sector ombud scheme
10 March 2016	Meeting with statutory ombuds on FSR Bill provisions	Financial sector ombud scheme
3 May 2016	Public hearings on FSR Bill in Parliament	Public

## Twin Peaks Reform Process – Summary of consultation

Date	Type of consultation	Audience
<b>Comments matrix</b>		
27 October 2015	Matrix published with detailed responses to comments submitted on draft two of the Bill (337 pgs)	
<b>Updated documents reflecting proposed revisions to FSR Bill (as agreed by SCOF)</b>		
21 July 2016	Comments matrix responding to public submissions on FSR Bill (published on NT website) Proposed revisions to FSR Bill published to accompany comments matrix	Public
04 August 2016	Meeting with Voluntary Ombuds Association on updated documents published	Financial sector ombud scheme
10 August 2016	Meeting with JSE on updated documents published	JSE
10 August 2016	Meeting with South African Insurance Association on updated documents published	SAIA/insurers
11 August 2016	Meeting with the Banking Association of South Africa on updated documents published	BASA/banks
12 August 2016	Meeting (telecon) with Association for Savings and Investment South Africa on updated documents published	ASISA/member institutions
<b>Updated documents reflecting further proposed revisions to the FSR Bill (as agreed by SCOF)</b>		
21 October 2016	Comments matrix responding to issues raised in consultations on FSR Bill (published on NT website) Proposed revisions to FSR Bill and schedules published to accompany comments matrix	Public
<b>FSR Bill voted on in the National Assembly</b>		
6 December 2016	FSR Bill voted on and passed in the National Assembly	



## Twin Peaks Reform Process – Summary of consultation

- The **Standing Committee on Finance** undertook a study visit to the United Kingdom between 07 - 11 December 2015. Met with Bank of England; HM Treasury; Financial Conduct Authority; Parliament; London Stock Exchange; Financial Sector Ombud; Money Advice Service; and a number of private financial institutions
- The **Select Committee on Finance** undertook a study visit to Mexico between 27 August and 3 September 2016. Met with, amongst others, the House of Parliament; Nacional Banking and Securities Commission; Institute for the Protection of Bank Savings; with former Deputy Minister of Trade and Industry in Mexico; and National Commission for the Protection and Defence of Users of Financial Services (CONDUSEF).

## 3. Overview of the FSR Bill

# Financial Sector Regulation Bill

*deal with the power of regulator*

**Chapter 1 – Definitions**

- Financial products – bank deposits, insurance policies, unit in a unit trust (UIS), etc.
- Financial services defined as services performed in relation to financial products, foreign financial products, and financial instruments (cl.3):
  - Offering, promoting, marketing or distributing
  - Providing advice, recommendations or guidance
  - Dealing or making a market
  - Operating or managing or providing administrative services

**REGULATOR ACTIONS**

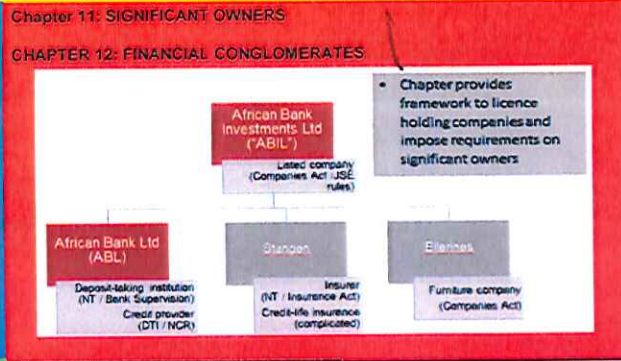
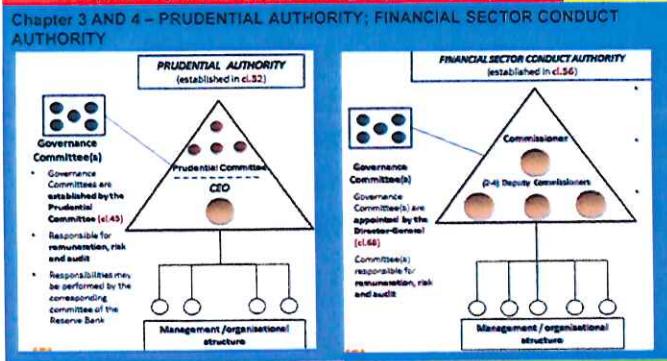
- CHAPTER 6: ADMINISTRATIVE ACTIONS**  
Provisions of PAJA apply; regulators can establish administrative action committees
- CHAPTER 7: REGULATORY INSTRUMENTS**  
Prudential standards; conduct standards; joint standards
- CHAPTER 8: LICENSING**  
No change to existing licenses; process to license designated products and services; dual key approach
- CHAPTER 9: INFORMATION GATHERING, INSPECTIONS AND INVESTIGATIONS**  
Requests for information; routine supervisory visits; investigation when contraventions suspected
- CHAPTER 10: ENFORCEMENT**  
Remediation to rectify breach, prevent recurrence. Other option is to institute criminal prosecutions
- CHAPTER 13: ADMINISTRATIVE PENALTIES**  
Penalties for various contraventions

**Chapter 2 RESERVE BANK AND FINANCIAL STABILITY**

- Must monitor financial system for potential systemic risks (cl. 12)
- Manages systemic events (cl. 14-19)
- Grants powers to intervene only when there is a crisis

**FINANCIAL STABILITY OVERSIGHT COMMITTEE**  
Role of the FSOC:  
Plays an advisory role to the Reserve Bank to support it in fulfilling its financial stability mandate (cl. 20-24)  
Supported by Financial Sector Contingency Forum (cl. 25)

*sketch*



**Chapter 5 COOPERATION AND COORDINATION**

- Memoranda of Understanding
- Financial System Council of Regulators
- Inter-ministerial Council
- FSOC

**Chapter 14: OMBUDS**

- FSR Bill proposes to repeal the FSOS Act
- Align ombud system to evolving Twin Peaks regulatory system
- Establishing the Ombud Council as a statutory body that will establish a single point of entry into the ombud system.

**Chapter 15: FINANCIAL SERVICES TRIBUNAL**

- Judicially review decisions of financial sector regulators and Ombud Regulatory Council on application by aggrieved persons
- Panels are constituted for each application for review

**Chapter 16: FEES AND LEVIES**  
• Money Bill to be tabled

**Chapter 17: Miscellaneous**

*must talk to each other*



## 4. Substantive policy issues raised on FSRB



## Substantive issues raised in comment period

### 1. Role of Parliament in making Regulatory Instruments (Chapter 7)

- Concerns raised about the process for making standards, and the status of such instruments as subordinate legislation.

#### *Response*

- Intention of such instruments is that they are subordinate legislation that the regulators are empowered to issue within a defined framework.
- Amendments were made to **chapter 7** to refine the role of Parliament in the making of such instruments.

### 2. Binding Interpretations (Chapter 10)

- Concerns raised about the status of “binding interpretations” and usurping the powers of the court.

#### *Response*

- National Treasury and FSB approached Senior Counsel to provide guidance on the questions raised by stakeholders relating to binding interpretation issued by regulators. Now refer to **Interpretation Rulings**
- Drafting now more closely follows the approach set out in the tax legislation to promote clarity and consistency in the interpretation and application of the law.

## Substantive issues raised (cont.)

### 3. Significant Owners (Chapter 11)

- Stakeholders concerned that provisions were unnecessarily cumbersome; questioned the Minister’s ability to reduce the 15% threshold through Regulations.

#### *Response*

- National Treasury refined the relevant clauses to better specify changes in the status of a significant owner or a person’s ability to influence the business of a financial institution:
  - Material increase (decrease) requires regulatory **approval**
  - Otherwise person must **notify** the responsible authority
- Standards will clarify what constitutes **material (immaterial) increase or decrease**

### 4. Directives to Holding Companies (Chapter 12)

- Stakeholders concerned at powers afforded to the regulators to direct financial conglomerates to restructure. This could have unintended consequences for SIFIs. Should be a right for a financial conglomerate to make representations, and an appeal process

#### *Response*

- Directives are not additional directives from what is provided in part 2 of Chapter 10, and therefore the requirements and process for consultation as set out in this chapter would apply. The process will cater for the concerns raised.

## Substantive issues raised (cont.)

### 5. Financial Services Tribunal (Chapter 15)

- Stakeholders noted uncertainty with respect to the role of the Tribunal. The following concerns were raised: the interaction between the Tribunal and a court of law; whether or not it is intended that the Tribunal can replace the decisions of the regulator (“appeal”) versus whether the Tribunal can only refer back decisions of the regulator for reconsideration (“review”).

#### *Response*

- Drafting clarified to indicate that the Tribunal does not replace a court
- Complex regulatory decisions should only be reviewable to the Tribunal, where less complex and more administrative can be appealable to the Tribunal rather than a court
- Propose drafting to clearly set out where the Tribunal may set aside a decision and send back to the regulator for reconsideration, or substitute their decision for that of the regulator, or dismiss the application

## Substantive issues raised (cont.)

### 6. Liability of Directors (chapter 17)

- Concern that clauses place burden of proof for offences and contraventions on the members of the governing body. The presumption of guilt until proven otherwise violates Constitutional right to a presumption of innocence.

#### *Response*

- National Treasury senior counsel concluded that the concern raised by stakeholders was valid, but to a limited extent. The view expressed by stakeholders is that in *S v Coetzee*, the Constitutional Court found that a similar provision in the Criminal Procedure Act had a reverse onus of proof.
- While the two provisions are not identical, National Treasury accepts that there may be uncertainty about the legal enforceability of a clause that appears to have a reverse onus.
- Accordingly wording was revised to indicate that at the very least, directors should be vigilant and do what they can to prevent offences, even if they fail. It is thus proposed that the draft rather state that the director needs to prove that he or she voted against a resolution.



## Substantive issues raised (raised by SCOF)

### 7. Role of the National Credit Regulator

- The place and role of the National Credit Regulator (NCR), which falls under the Department of Trade and Industry (DTI), in the Twin Peaks Model was regularly discussed in the Committee's considerations of the Bill.

#### *Response*

- The Committee decided that there should be a clear delineation of the respective roles of the FCA and NCR. The NCR will be responsible for regulating the market conduct of credit agreements issued by banks and non-banks, e.g. furniture retailers. The FSCA will be responsible for regulating the market conduct of these players for other financial services that they may provide.
- Clauses in the Bill provide for strong working relationship between regulators in interests of enhanced customer protections
- Report of SCOF indicated that at an appropriate time in the future, depending on how this works out in practice, and if conditions warrant it, consideration could be given to the two structures merging in some appropriate form, **provided this is in the interests primarily of the poor and low-income earners.**

## Substantive issues raised (raised by SCOF)

### 8. Transformation of the Financial Sector

- Committee believes that NT and government in general shape policies and Bills too much on the basis of international standards and too little on the specific requirements of the country. Could serve to undermine the goals of economic and social transformation in the country and exacerbate the race, class, gender and other inequalities

#### *Response*

- Provisions have been inserted in the Bill that will strengthen financial inclusion and transformation. Include making transformation an object of the Bill, referring to the Financial Sector Charter in the Bill, and requiring that a transformation working group or subcommittee be established in terms of section 81 which deals with the structures for coordination between the various regulators and the various national departments responsible for regulating the financial sector

## Substantive issues raised (raised by SCOF)

### 9. Fees and Levies

- The Committee raised concerns regarding the provisions dealing with fees and levies on financial institutions.

#### *Response*

- It was decided to revise Chapter 16 to set out a detailed system of calculating fees and specifying that levies can only be raised in accordance with an accompanying Money Bill. National Treasury presented to the Committee a draft Money Bill setting out the terms under which levies may be raised. It will be tabled in Parliament shortly

### 10. Implementation of the Bill

- The Committee believed that it could not process the Bill properly unless NT had a clear and practical implementation plan, which includes phases

#### *Response*

- The Committee was briefed on the Insurance Bill, Conduct of Financial Institutions Bill and market conduct framework, and the Resolution Bill. SARB and FSB indicated their preparations for transitioning to the Twin Peaks model

## 5. Chapter by chapter summary of the FSRB



# Chapter 1: Definitions – financial products

- Definitions anchor the structure of the Bill and structure of regulatory architecture.
- To delineate regulatory jurisdiction - **financial product** providers will be regulated and supervised by the PA and **financial service** providers by the FSCA
- PA responsible for supervising safety and soundness of financial institutions that provide **financial products and securities services (cl.33)**. Products require prudential oversight so institutions meet their financial obligations to customers ('promises').
- **Financial product** is defined in **cl.2** to mean:
  - a participatory interest in a collective investment scheme
  - a long-term or a short-term policy (**Long/Short-term Insurance Act**)
  - a benefit provided by a pension fund organisation (**Pension Funds Act**); or a friendly society (**Friendly Societies Act**)
  - a deposit (**Banks Act**)
  - a health service benefit provided by a medical scheme
  - a credit agreement
- FSR Bill allows Finance Minister to designate new financial products



# Chapter 1: Definitions – financial services

- Financial services provided in relation to financial products, or on their own (e.g. advice)
- FSCA responsible for market integrity, customer education, and promoting fair treatment of financial customers by all institutions providing financial products and services (**cl. 57**)
- **Financial services** defined as those performed in relation to **financial products, foreign financial products, and financial instruments (cl.3)** :
  - Offering, promoting, marketing or distributing
  - Providing advice, recommendations or guidance
  - Dealing or making a market
  - Operating or managing or providing administrative services
- Financial services also include (**cl. 3**):
  - a **payment service**
  - a **service provided by a financial institution and regulated under a financial sector law**
  - services related to the **buying and selling of foreign exchange**
  - Services provided to financial institutions through **outsourcing, and includes debt collection**
- FSR Bill allows Finance Minister to designate new financial services



## Comments on Chapter 1

- No significant disputes with definitions. Some comments related to factual corrections or requests for clarity in definitions:
  - Inclusion of credit agreement in definition of financial product
  - What is captured by terms 'financial customer', 'governing body', 'key person'?
- Application of the Act
  - Clarified clause 9 to ensure that Regulations/standards made under FSRB will not trump existing primary legislation
  - Request to state that Constitution prevails – this is implicit for all law in South Africa

## Chapter 2: Financial Stability

- **Chapter 2 sets out mandate, role and powers of SARB in relation to financial stability :**
  - Must monitor financial system for potential systemic risks (cl. 12)
  - If a systemic event occurs/ is imminent, must inform the Minister and propose actions, and can give directions to other authorities i.e. PA, FSCA, NCR (cl. 14-19)
  - Can designate SIFIs according to a clearly set out process (cl. 29)
  - In consultation with the PA, can set enhanced prudential standards for SIFIs, to be supervised by the PA (cl. 30)
  - Provisions related to winding up of SIFIs set out (cl 31)
  - Produces annual Financial Stability Review (cl. 13)
- Role of the FSOC:
  - Plays an advisory role to the Reserve Bank to support it in fulfilling its financial stability mandate (cl. 20-24)
  - Supported by Financial Sector Contingency Forum (cl 25)
- **The Bill also provides for Conglomerate (group) supervision** and allows authorities to regulate and supervise groups in their entirety, rather than only at holding company level (ch. 12)





## Comments on Chapter 2

- Strate requested to be included in governance committees established for the regulators and the FSOC.
  - This is inappropriate as they are a regulated entity
- BASA suggested deleting the clause that states a regulator's actions are not invalidated by an MoU provision or the lack of an MoU being established.
  - This is not agreed with. MoUs are a non-binding but public mechanism to encourage better working relationships amongst regulators. Should not be used as a tool dispute regulator actions
- ASISA expressed concerns on the designation of SIFIS and the actions the SARB will be able to take against such institutions.
  - There are sufficient checks and balances to ensure that this process does not unduly affect the rights of such institutions.

## The Regulators: PA and FSCA (Chapters 3 & 4)

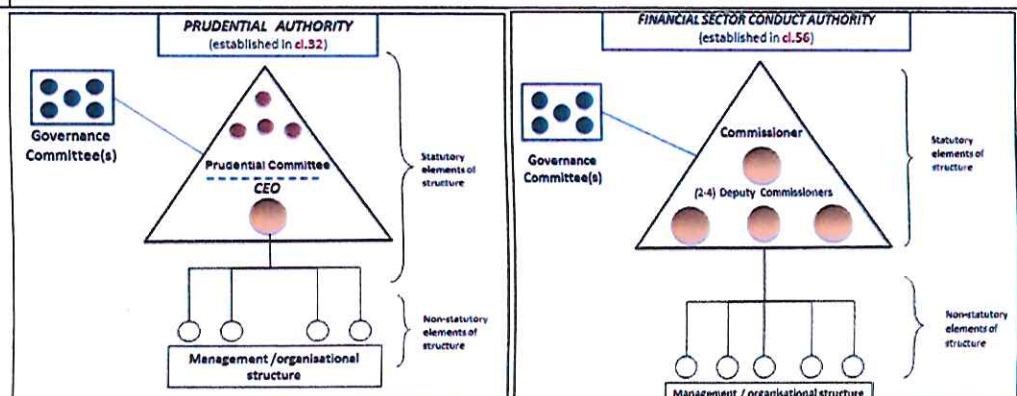
	PA	FSCA
<b>Part 1 Establishment, objectives and functions</b>	<p>32. (1) An authority called the Prudential Authority is hereby established.</p> <p>(2) The Prudential Authority is a juristic person operating within the administration of the Reserve Bank.</p> <p>(3) The Prudential Authority is not a public entity in terms of the Public Finance Management Act.</p> <p>33. The objective of the Prudential Authority is to—</p> <p>(a) promote and enhance the safety and soundness of financial institutions that provide financial products and securities services;</p> <p>(b) promote and enhance the safety and soundness of market infrastructures;</p> <p>(c) protect financial customers against the risk that those financial institutions may fail to meet their obligations; and</p> <p>(d) assist in maintaining financial stability.</p> <p>34 – List of functions</p>	<p>56. (1) The Financial Sector Conduct Authority is hereby established, as a juristic person.</p> <p>(2) The Authority is a national public entity for the purposes of the Public Finance Management Act and, despite section 49(2) of the Public Finance Management Act, the Commissioner is the accounting authority of the Financial Sector Conduct Authority for the purposes of that Act.</p> <p>57. The objective of the Financial Sector Conduct Authority is to—</p> <p>(a) enhance and support the efficiency and integrity of the financial markets; and</p> <p>(b) protect financial customers by—</p> <p>(i) promoting fair treatment of financial customers by financial institutions; and</p> <p>(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</p> <p>(c) assist in maintaining financial stability</p> <p>58 – List of functions</p>

# The Regulators: PA and FSCA (Chapters 3 & 4)

	PA	FSCA
<b>Part 2 Governance</b>	<ul style="list-style-type: none"> <li>• CEO appointed by the Governor with the concurrence of the Minister (cl.36)</li> <li>• CEO is responsible for the day-to-day management and administration of the PA (cl.37)</li> <li>• Prudential Committee for the PA consists of the Governor, CEO of PA and other Deputy Governors (cl.41)</li> <li>• Prudential Committee responsible for overseeing the management and administration of the PA (cl.42)</li> <li>• Governance Committees are established by the Prudential Committee (cl.45)</li> <li>• Responsible for remuneration, risk and audit</li> <li>• Responsibilities may be performed by the corresponding committee of the Reserve Bank</li> </ul>	<ul style="list-style-type: none"> <li>• Commissioner and between two and four Deputy Commissioners appointed by the Minister (cl.61)</li> <li>• Commissioner is responsible for the day-to-day management and administration of the FSCA (cl.62)</li> <li>• Executive Committee consists of the Commissioner + Deputy Commissioners (cl.60). ExCo exercises powers and duties of FSCA</li> <li>• Governance Committee(s) are appointed by the Director-General (cl.68)</li> <li>• Committee(s) responsible for remuneration, risk</li> </ul>

# The Regulators: PA and FSCA (chapters 3 & 4)

	PA	FSCA
<b>Part 3 Staff, resources, financial management</b>	<ul style="list-style-type: none"> <li>• Reserve Bank may provide PA with staff and resources it identifies as necessary</li> <li>• CEO responsible for managing financial affairs of the PA</li> <li>• Annual report and financial statements must be annually submitted to the National Treasury and Parliament</li> </ul>	<ul style="list-style-type: none"> <li>• Process for appointment of staff members</li> <li>• Obligations of staff members</li> <li>• Note that the FSCA will comply with PFMA requirements in terms of financial management</li> </ul>





## Comments on Chapters 3 & 4

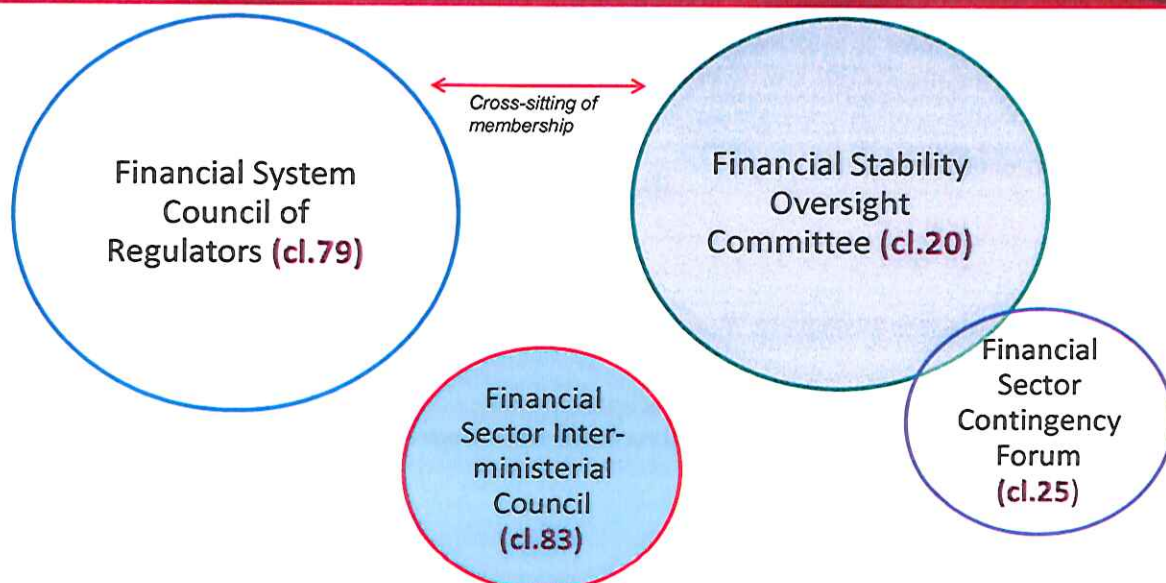
### Prudential Authority

- Minor comments questioning the level of detail to be prescribed for the PA's regulatory strategies and annual reports (**necessary as they are accountability measures and are similar to requirements for FSCA**), requesting set KPIs for Prudential Committee members (**viewed as unnecessary**), and questioning whether reporting to the National Treasury compromises the independence of the PA (**reporting to NT an important accountability measure for the regulator**)

### FSCA

- Minor comments submitted – one noting the dual regulation of credit with the NCR and one querying the ability of the FSCA ExCo to delegate some of its powers (**list of delegable activities will be clarified**)

## Chapter 5: Co-operation and co-ordination between financial sector regulators



- FSCA and the PA have an obligation to co-operate with all key regulators (cl.76)
- Required to enter in MoU agreements that will be submitted to relevant Ministers and published (cl 77)

## Comments on Chapter 5

- Suggestion that Interministerial council mandated to review all proposed legislation with impact on the financial sector
  - This is not agreed with. The objective of the Inter-Ministerial Council is as stipulated in the Bill.
- Suggestion that it is legislated that financial institutions are consulted about the efficacy of co-operation among regulators
  - This is not agreed with; note that MoUs will be public so financial institution co-operation can be evaluated against that

## Chapter 6: Administrative Actions

- Authorities must have written **administrative action procedures** regarding the actions it may take in terms of a financial sector law, to promote a fair and consistent approach **(cl. 92)**

- Provisions of PAJA still apply

### **The Promotion of Administrative Justice Act (the PAJA)**

- Administrative action procedures must be consulted on before being determined **(cl. 93)**
- Regulators may establish **administrative action committees** to consider and make recommendations on administrative actions referred to it by relevant authority **(cl 87)**



## Comments on Chapter 6

- Questioned status regarding continuation of the function of the Directorate for Market Abuse
  - Drafting has been proposed to retain the DMA (while not so named), with the necessary alignment to the FSR Bill. The process of appointment will be the responsibility of the Executive Committee
- Reconsideration of decisions
  - Drafting related to the ability of the regulator to reconsider decisions was ambiguous. Drafting has been proposed to clarify the circumstances under which a regulator may reconsider a decision without unfairly affecting the rights of regulated entities

## Chapter 7: Regulatory Instruments

- In addition to provisions in current legislation, two authorities can impose **standards** (subordinate legislation) through FSR Bill on financial institutions (cl.105 - 106). Similar status to current rules, board notices etc
- PA can set **prudential standards**, including to maintain financial stability, for matters such as:



Liquidity



Leverage



Risk management



Capital

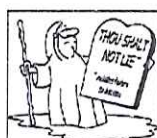
- FSCA can set **conduct standards** for matters such as:



Product design



Advice



Disclosure



Transparency

- Where standards overlap, the **two authorities may set joint standards**
- Harmonise process for issuing regulatory instruments by setting same minimum consultation requirements (cl. 97 - 104)

- FSCA may not set standards on credit agreement services without consulting NCR (cl. 106(4)) and on payment service providers without concurrence of SARB (cl. 109)

# Comments on Chapter 7

- Status of regulatory instruments
  - Clarified that these will have the status of subordinate legislation
- Role of Parliament in the making of regulatory instruments
  - Stipulated a consultation period with Parliament before a regulatory instrument can be made
- Some concern expressed about ability to make urgent standards
  - Ability to set urgent standards necessary to act swiftly in responding to urgent matters. Checks and balances are provided so that the regulator cannot abuse this power.
- Clarity requested in terms of the coming into effect of instruments and the need to provide adequate transitional time
  - Process to be followed in making standards, including consultation, will cater for this
- Questioned ability to set standards on key persons
  - Regulators must be able to set standards for such persons to follow

# Chapter 8: Licensing

- Under phase 1, responsibilities for licensing under the current Acts allocated to one of the two responsible authorities (see Schedule 2), including in certain instances for a transitional periods (cl. 281 - 282)



–Medical Schemes Act  
(subject to s.231)



–National Credit Act

*Prudential Authority*

–Banks Act  
–Mutual Banks Act  
–Co-operative Banks Act  
– Financial supervision of RAF Act

–Long term Insurance Act  
*Prudential aspects*

–Short term Insurance Act  
*Prudential aspects*

*Financial Sector conduct Authority*

–Friendly Societies Act  
–Financial Advisory and Intermediary Services Act  
–Financial Markets Act  
–Credit Rating Services Act  
–Pension Funds Act  
–Collective Investment Schemes Control Act

–Long term Insurance Act  
*Conduct Aspects*

–Short term Insurance Act  
*Conduct Aspects*



## Chapter 8: Licensing

- The relevant licensing authority will be responsible for licenses issued under the Act and supervising requirements of the Act:
  - Licensing requirements remain set by the relevant industry-specific sectoral laws (cl 111). FSR Bill sets out licensing requirements only for newly designated product/service (cl. 2(2) or 3(2))
  - The FSR Bill delinks authority powers from licensing – regardless of which authority issues the license, both authorities can apply their regulatory, supervisory and enforcement powers on all financial institutions
  - New licenses and renewal, termination or variations of existing licenses will require the licensing authority to seek the approval of the other authority in respect of matters under its jurisdiction ('two key') – cl. 126
- Phase 2 of Twin Peaks process will require more significant changes to licensing process as prudential and conduct frameworks develop



## Comments on Chapter 8

- Objections raised to regulator not responding to a license application being read as a refusal of a license (cl 116)
  - Drafting intended to give certainty that a license applicant **will** be adequately communicated with. If they do not hear from the regulator after a specified period, it is deemed an action - a refusal. The institution can take the regulator to the Tribunal on the basis of such an action. It is in the regulators interest therefore to respond in an adequate time frame. For clarity it has been framed in the positive
- Objections to obligation of licensed entity to report a contravention of law (cl.117)
  - This requirement does not impinge on their rights. Financial institutions are obligated to comply with laws as a consequence of being licensed. Some refinements made relating to consequences of non-compliance
- Requirement to disclose licenses viewed as onerous (cl. 127)
  - Agreed that drafting was too open-ended; specific requirements to be set in standards instead of broadly in the law

## Chapters 9 – 10: Inspections, investigations, enforcement

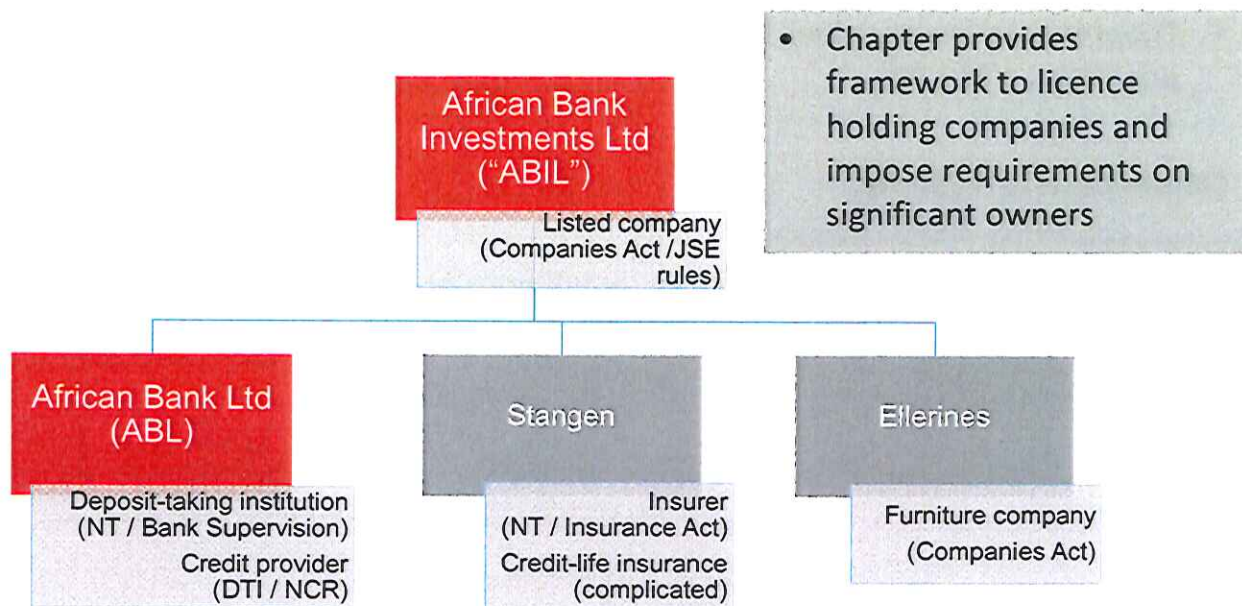
- **Access to correct information** will be key to ensure effectiveness of regulators. Powers of regulators in respect of information gathering to support proactive and preemptive approach to supervision (cl. 130)
- **Inspections** refer to on-site visits undertaken in the normal course of supervisory functions (cl. 131 – 132). **Investigations** undertaken when contraventions of law suspected (cl. 133 – 138)
- **Enforcement actions (chapter 10)**
  - If there is a breach of a financial sector law, prudential or conduct standard, authority can choose to remediate the situation, including by issuing directives, entering into enforceable undertakings, declaring practices as undesirable, or applying to court for appropriate orders, imposing an administrative penalty. **Remediation aims to rectify the breach and ensure it does not recur.**
  - Authority may also institute criminal prosecutions
- Process for issues administrative penalties set out in **Chapter 13**
- Financial Services Tribunal established in **Chapter 15** to review decisions of regulators

## Comments on Chapters 9 and 10

- Self-incrimination concerns flagged
  - Proposed drafting changes to Part 5 so it applies to chapter and concerns taken into account, where appropriate
- Some misunderstanding on the purposes of on-site inspections and investigations
- Several comments flagged concerns on the nature and purpose of binding interpretations
  - Initial drafting clarified by removing reference to 'binding' interpretation and instead allowing regulator to issue interpretation rulings, in a manner consistent with tax legislation
- Comments submitted on consultation process for directives and nature of directives that can be made, however **no changes necessary** apart from deletion of 148(2)
- Debarment process – **the term 'individuals' replaced with natural person, and added ability for regulator to revoke a debarment**



## Chapters 11 – 12: Significant owners, financial conglomerates



## Comments on chapters 11 and 12

- Concerns flagged around complex drafting of significant owner provisions which could create uncertainties as to process with regulator
  - Suggested to revise provisions to provide clearly the following:
    - Notification and approval required when a person becomes a significant owner (acquires 15% shareholding), and when a significant owner materially increases their shareholding
    - Regulator notified of a material decrease, and of immaterial increases and decreases. Approval not required.
    - Standards will specify what constitutes an material increase, immaterial change and material decrease
- For financial conglomerates, it was agreed to include a process of consultation with the holding company of the eligible financial institution, as well as the institution itself, prior to action

## Chapter 13: Administrative penalties

- Chapter specifies penalties that will apply for non-compliance with specific provisions of the Bill

### Comments and response:

- Amend drafting of cl172 to specify in regulations or standards what type of indemnity insurance may be provided for

## Chapter 14: Ombud scheme system

- **FSR Bill proposes to repeal the FSOS Act, and integrate provisions into the FSR Bill, to align ombud system to evolving Twin Peaks regulatory system, in keeping with a unified regulatory approach and move away from the range of industry specific legislation (Chapter 14)**
- The FSR Bill proposes :
  - Establishing the **Ombud Regulatory Council as a statutory body that will establish a single point of entry** into the ombud system. Replaces current FSOS Council. Will be the regulator of ombud schemes in financial sector
  - **Chief Ombud** is responsible for day to day management and administration of Ombud Council (a 'Managing Director')
  - Requiring **all ombuds schemes to be registered** with the Ombud Council
  - Strengthening **mechanisms for Ombud Council to ensure a consistent framework for external dispute resolution mechanisms** across the financial services industry, including increasing awareness of ombuds, advising on jurisdictions, and prescribing rules for ombud schemes to follow
  - Ombud Council will be able to issue **directives, enter into enforceable undertakings, conduct inspections and investigations, issue administrative penalties and make debarment orders**



## Comments on Chapter 14

- Propose to change the name of the Ombud Regulatory Council to Ombud Council
- Role of the Chief Ombud questioned as it does not have ombud powers
  - Chief Ombud defined specifically to refer to the executive head of the Ombud Council. Name necessary should further steps be taken to consolidate the ombuds system further
- Corrected errors in references to the governing bodies of industry ombud schemes
- Some concerns raised on the powers of the Ombud Council to issue rules and directives and debar individuals
  - Such powers are necessary to ensure effectiveness of Ombud Council. Same checks and balances that apply to regulators will apply to Ombud Council
- Agreed that transitional provisions should allow for recognition of existing ombuds to apply for a period

## Chapter 15: Financial Services Tribunal



- The FSR Bill establishes a Financial Services Tribunal (cl.214)
- The function of the Tribunal is to judicially review decisions of financial sector regulators and Ombud Regulatory Council on application by aggrieved persons
- Members of the Tribunal are appointed by the Minister (cl.216)
- The Tribunal consists of as many members as the Minister considers necessary, including, at least two retired judges or persons with suitable legal experience; and at least two persons who have experience and expert knowledge of financial products or financial services.
- All of the members of the Tribunal must be independent
- Panels are constituted for each application for review (cl. 219)
- An order by the Tribunal has legal force and may be enforced as if it were issued in civil proceedings in the division of the High Court
- Decisions of the Tribunal are made public

## Comments on Chapter 15

- Use of the word 'judicially' review created confusion
  - Amended drafting to clarify the role of the Tribunal which is not intended to replace the courts
- The ability of a financial institution to approach the Tribunal relating to reconsideration of decisions by the regulator was unclear
  - The clauses pertaining to reconsideration of decisions were amended in Chapter 6 which deals with this matter
- Appeal and review functions of Tribunal
  - Complex regulatory decisions should only be reviewable to the Tribunal, where less complex and more administrative can be appealable to the Tribunal rather than a court
  - Propose drafting to clearly set out where the Tribunal may set aside a decision and send back to the regulator for reconsideration, or substitute their decision for that of the regulator, or dismiss the application

## Chapters 16 (Levies and Fees) and 17 (Miscellaneous)

- An impact study related to the FSRB has been prepared and is available. Draft Levies Bill has also been prepared (see Funding slides)
- Concerns raised about vicarious liability of directors (cl 266)
  - Proposed that drafting is amended to take concerns into account so that it doesn't presume guilt
- Concerns flagged on exemptions from Protection of Personal Information Act
  - NT engaged DoJCD and Parliament legal adviser. Proposed revision of information sharing clause that does not use the wording of providing exemptions to PoPI. DoJCD has indicated revision is acceptable



# 6. Consequential amendments

## Aim of consequential amendments

- Currently 13 pieces of financial sector legislation (**Schedule 1**). FSR Bill intended to be overlay on current legal framework, and take steps toward final Twin Peaks framework
- Consequential amendments indicate **how current laws will operate when FSR Bill enacted** – clarifies that powers and duties in FSR Bill are in **addition to** those in current law
- Amendments ensure **common definitions and understanding across laws** – e.g. **'Authority'** replaces **'registrar'**, **'regulations'** to be read as **'standards'** etc.
- Amendments ensure **same processes followed in all laws** when undertaking actions such as inspections, investigations, consulting on legislative instruments, publishing documents on Register etc
- Amendments ensure **uniform appeal mechanism** – Financial Services Tribunal
- See **"Relationship between Act and Financial Sector Regulation Act"** in consequential amendments

# 7. Corrections identified

## Corrections identified

1. Changes agreed to in the SCOF deliberations, and with the NCR and DTI, pertaining to clauses 58(2) and 106(5) were not captured in the printed Bill. These deal with the role of the FSCA in relation to credit supervision.
2. Changes agreed to in the SCOF deliberations on a clause related to consequential amendments to the Financial Markets Act was not captured in the printed Bill.
3. A clause allowing for standards to be set on the issue of bank account closures is proposed to be inserted, at the request of the SCOF.
4. Changes may be required to the inspections and investigations provisions following the SCOF deliberations on the FIC Amendment Bill



Thank you

