AN OVERVIEW OF THE FIRST DRAFT OF THE CONDUCT OF FINANCIAL INSTITUTIONS BILL AND THE POTENTIAL IMPACT ON THE NATIONAL PAYMENT SYSTEM IN SOUTH AFRICA

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I INTRODUCTION

Over the last decade National Treasury ('Treasury') has been rigorously acting on its commitment to promote a stable and safe financial sector for South Africa. The means by which Treasury elected to do so was the decision to move to a twin-peaks model of financial sector regulation in South Africa ('the Twin Peaks').

Through the introduction of various carefully drafted legislative and regulatory instruments, South Africa, on 1 April 2018, welcomed the introduction of the Twin Peaks model of financial sector regulation through the commencement of the Financial Sector Regulation Act 9 of 2017 ('FSR Act'). On this very same day, we saw the establishment of the two main Twin Peaks regulators: the Prudential Authority ('PA') and the Financial Sector Conduct Authority ('FSCA').

Since the commencement of the FSR Act, first drafts of two regulatory instruments have been published for public comment under the relevant empowering provisions of the FSR Act. These are the Conduct of Financial Institutions Bill [B-2018] as published in GN R808 *GG* 42114 of 14 December 2018 ('the CoFI Bill') and the Conduct Standard for Banks ('the CSB') (FSCA: Financial Sector Conduct Authority, 'Statement supporting the draft conduct standard for banks' available at https://www.fsca.co.za/Regulatory%20Frameworks/Pages/Banks.aspx, accessed on 15 May 2019). The purpose of the CoFI Bill is to regulate market conduct in the financial sector which is aimed at, and impacts, financial customers, and to assist the South African Reserve Bank ('the SARB') in maintaining 'financial stability'. The purpose of the CSB is to introduce and impose upon 'banks' (as defined in the CSB) requirements that promote the fair treatment of their customers.

In this analysis we provide an overview of the first draft CoFI Bill and provide our comments in relation to the potential impact of this regulatory instrument on the national payment system ('NPS') in South Africa. We begin our analysis by giving a brief overview of the FSCA, specifically its powers to make 'regulatory instruments' under the FSR Act. We then deal with the CoFI Bill in some detail, including its stated purpose and its purposed layout, scope, requirements, application, and exemptions as well as the amendment and repeal by the CoFI Bill of certain other financial sector laws. We then give a very short, high-level introduction to the NPS in South Africa (a detailed discussion falls outside the scope of this analysis). Next, we provide our comments on the potential impact of the CoFI Bill on the NPS in South Africa, specifically including a discussion on the application of CoFI Bill to the provision of 'payment services', as contemplated under the CoFI Bill. Finally, we look at certain amendments which are proposed to be made to the FSR Act by the CoFI Bill which relate to the NPS and we provide our preliminary views thereon. We conclude this analysis with our thoughts on the CoFI Bill and some final remarks.

II THE FINANCIAL SECTOR CONDUCT AUTHORITY

The Financial Sector Conduct Authority (FSCA) (previously known as the Financial Services Board) was established on 1 April 2018. In terms of section 56(2) of the FSR Act, the FSCA is a juristic person and a national public entity in terms of the PFM Act. The FSCA is responsible for the regulation of conduct in the South African financial services sector and is a financial sector regulator under the FSR Act.

Section 113(1) of the FSR Act gives the FSCA the power to grant, on application, licences for those persons in respect of whom it is the responsible authority. The FSCA may not issue, vary, suspend, or revoke a licence, or grant an exemption from a specified provision of a financial sector law ('regulatory actions') without the concurrence of the PA. Concurrence from the SARB is required if a regulatory action relates to a SIFI (s 126 of the FSR Act read with s 282). However, concurrence from the PA is not required if the FSCA and the PA have agreed, under a memorandum of understanding concluded between them, that concurrence is not necessary. The same applies to concurrence from the SARB under the provisions of a memorandum of understanding between the FSCA and the SARB (see s 282(2) and (3) of the FSR Act).

The FSR Act gives the FSCA the power to make 'regulatory instruments' under the FSR Act and sets out the processes which must be followed when making them. Of particular importance is the power

given to the FSCA in terms of section 106(1) of the FSR Act to make conduct standards in respect of FIs; representatives of FIs (a 'FSP representative') as defined in section 1 of the FSR Act with reference to section 1 of the Financial Advisory and Intermediary Services Act 37 of 2002 ('the FAIS Act'); 'key persons' of FIs as defined in section 1 of the FSR Act ('key persons'); and contractors as defined in section 1 of the FSR Act with reference to section 213 of the Labour Relations Act 66 of 1995 ('contractors').

In terms of section 106(2) of the FSR Act, conduct standards must be aimed at ensuring the efficiency and integrity of the South Africa financial markets. More importantly, they must ensure that FIs and their FSP representatives treat 'financial customers' (as defined in section 1 of the FSR Act ('financial customers')) fairly by offering financial education programmes and/or activities which promote financial literacy and are appropriate for financial customers. Finally, conduct standards must be aimed at reducing the risks in the conduct that FIs and their FSP representatives, key persons and contractors are engaged in and assist the SARB in maintaining financial stability in South Africa.

In terms of section 106(3) of the FSR Act, conduct standards that may be made by the FSCA include conduct standards relating to efficiency and integrity requirements for financial markets, measures to combat abusive practices, requirements for the fair treatment of financial customers as well as the design, suitability, implementation, monitoring and evaluation of financial education programmes, or other initiatives promoting financial literacy.

The FSCA may not, in terms of section 109 of the FSR Act, make conduct standards that impose requirements on providers of payment services or which are aimed at assisting the maintenance of financial stability without the concurrence of the SARB. We discuss the definition of a 'payment service' under the FSR Act in more detail in para IV*(f)(iv)* below.

III OVERVIEW OF THE COFI BILL

(a) Introduction

In terms of the powers given to the FSCA in the FSR Act to make conduct standards, Treasury, as noted in para I above, published a first draft of the CoFI Bill in December 2018. The first draft of the CoFI Bill was published alongside an 'Explanatory Policy Paper accompanying the Conduct of Financial Institutions Bill, Paper accompanying the first draft of the CoFI Bill' (see National Treasury, 'Explanatory Policy Paper

accompanying the Conduct of Financial Institutions Bill, Paper accompanying the first draft of the CoFI Bill', available at http://www.treasury.gov.za/twinpeaks/CoFI%20Bill%20policy%20paper.pdf, accessed on 22 April 2020). Comments on the CoFI Bill were accepted until 1 April 2019. Public and media workshops have since been held to discuss the first draft.

The CoFI Bill builds on a 2014 discussion paper entitled 'Treating Customers Fairly in the Financial Sector: A Draft Market Conduct Policy Framework for South Africa' (National Treasury, 'Treating Customers Fairly in the Financial Sector: A Draft Market Conduct Policy Framework for South Africa', Discussion Document, December 2014, available at http://www.treasury.gov.za/public%20comments/FSR2014/Treating%20Customers%20Fairly%20in%20the%20Financial%20Sector%20Draft%20MCP%20Framework%20Amended%20Jan2015%20WithAp6.pdf, accessed on 27 January 2020).

According to Treasury, the CoFI Bill is designed to be principles-based (as opposed to rule-making-based), outcomes-focused, activity-based (as opposed to institutionally driven) as well as risk-based and proportionate (see National Treasury 'Media Statement, Invitation for public comments on the draft Conduct of Financial Institutions Bill 2008' (2018) (no page numbers included)).

A second draft of the CoFI Bill has since been published for comment by 30 October 2020 (Gen N 519 *GG* 43741 of 29 September 2020).

(b) Purpose of the Conduct of Financial Institutions Bill

According to clause 3 of the CoFI Bill, the purpose of the CoFI Bill is to establish a consolidated, comprehensive and consistent regulatory framework for the conduct of 'financial institutions', as defined in section 1 of the FSR Act and discussed in more detail in para III*(f)(ii)*, that will protect financial customers; promote the fair treatment and protection of financial customers by 'financial institutions'; support fair, transparent, and efficient financial markets; promote innovation and development of and investment in innovative technologies, processes and practices; promote trust and confidence in the financial sector; promote sustainable competition in the provision of 'financial products' and 'financial services', as defined in clause 1 of the CoFI Bill and discussed in more detail in paras III*(f)(iv)* and III*(f)(v)* below; promote 'financial inclusion' as defined in section 1 of the FSR Act; promote transformation of the financial sector; and assist the SARB in maintaining 'financial stability' as defined in section 1 of the FSR Act.

In summary, the CoFI Bill will regulate market conduct that impacts financial customers, with a specific focus on treating customers fairly

(also commonly referred to as 'TCF'), and it will assist the SARB in maintaining financial stability.

(c) Layout of the first draft of the CoFI Bill

The first draft of the CoFI Bill is divided into the following 13 chapters: interpretation, objects and application (chap 1); licensing (chap 2); culture and governance (chap 3); financial products (chap 4); financial services (chap 5); promotion, marketing and disclosure (chap 6); distribution, advice and discretionary investment management (chap 7); post-sale barriers and obligations (chap 8); safeguarding assets and operational requirements (chap 9); reporting (chap 10); remedial actions for financial customers (chap 11); general principles (chap 12); and final provisions (chap 13).

(d) The scope of conduct standards to be made under the CoFI Bill

General conduct standards will be prescribed in the CoFI Bill itself, or where they are not prescribed and only guidelines are given on what may be prescribed in terms of the CoFI Bill, will be prescribed by way of separate subordinate legislation in respect of: licensing; governance and culture; 'financial products' (as discussed in para III*(f)* below); 'financial services' (as discussed in para III*(f)* below); promotion, marketing and disclosure; distribution, advice and discretionary investment management; post-sale barriers and obligations; safeguarding assets and operational requirements; and reporting.

(e) Additional requirements in respect of 'retail financial customers'

In addition to conduct standards, the CoFI Bill sets out certain requirements which must be met when the entities and persons who the CoFI Bill will apply to deal with 'retail financial customers'. In terms of section 1 of the CoFI Bill, a 'retail financial customer' includes a natural person and a juristic person whose asset value or annual turnover is less than the threshold value as determined by the Minister of Finance, taking into consideration the threshold values determined under the Consumer Protection Act 60 of 2008 and the National Credit Act 34 of 2005 ('the NCA').

These additional requirements will relate to: prohibited practices (cl 32 of the CoFI Bill); unfair contract terms (cl 33 of the CoFI Bill); the

design and suitability of 'financial products' (cl 47 of the CoFI Bill); and the provision of 'financial services' (cl 49 of the CoFI Bill).

(f) Comments on the definitions section of the CoFI Bill

(i) Introduction

A number of definitions in the CoFI Bill cross-refer to the definitions given to them under the FSR Act. For instance, a 'financial institution', a 'financial instrument' and a 'financial product' are all defined in the CoFI Bill with reference to their respective meanings as set out in the FSR Act.

Another important definition requiring discussion is that of a 'financial service'. The meaning given to this term under the CoFI Bill is also derived from the FSR Act, but for one addition, which we discuss in para III*(f)(v)* below.

(ii) 'Financial institution' as defined under the FSR Act

A 'financial institution' (a 'FI') is defined in section 1 of the FSR Act to include: a 'financial product provider' (as defined in section 1 of the FSR Act); a 'financial service provider' (as defined in section 1 of the FSR Act); a 'market infrastructure' (as defined in section 1 of the FSR Act and discussed in para III*(f)(vi)* below); a holding company of a 'financial conglomerate' (as defined in section 1 of the FSR Act); and a person licensed or required to be licensed in terms of a financial sector law. A FSR representative is excluded from the definition of this term.

(iii) 'Financial instrument' as defined under the FSR Act

In terms of section 1 of the FSR Act, the following instruments each qualify as a 'financial instrument' falling within the ambit of the FSR Act: a 'share' as defined in the Companies Act 71 of 2008 ('the Companies Act'); a depository receipt and other equivalent instruments; a debt instrument such as a debenture or a bond (excluding a credit agreement); 'money market securities' as defined in section 1(1) of the Financial Markets Act 19 of 2012 ('FMA'); a 'derivative instrument' as defined in section 1(1) of the FMA, or a warrant, certificate, securitisation instrument or other instrument acknowledging, conferring or creating rights to subscribe to, acquire, dispose of, or convert, financial instruments listed in the definition of a 'financial instrument' under the FSR Act (each a 'financial instrument').

(iv) 'Financial product' as defined under the FSR Act

A 'financial product' is defined in section 1 of the FSR Act read with section 2 of the FSR Act to include: a participatory interest in a 'collective investment scheme' as defined in the Collective Investment Schemes Act 45 of 2002 ('CISCA'); a long-term policy as defined in section 1(1) of the Long-term Insurance Act 52 of 1998 ('the LTI Act'); a short-term policy as defined in section 1(1) of the Short-term Insurance Act 53 of 1998 ('the STI Act'); a benefit provided by a pension fund organisation, as defined in section 1(1) of the Pension Funds Act 24 of 1956, to a member of the organisation by virtue of membership; or a benefit provided by a friendly society, as defined in section 1(1) of the Friendly Societies Act 25 of 1956 to a member of the society by virtue of membership; a 'deposit' as defined in section 1(1) of the Banks Act 94 of 1990 ('the Banks Act'); a health service benefit provided by a medical scheme as defined in section 1(1) of the Medical Schemes Act 131 of 1998; subject to certain exemptions from the provision of the FSR Act, the provision of credit provided in terms of a credit agreement regulated in terms of the NCA; a warranty, guarantee or other credit support arrangement as provided for in a financial sector law; a facility or arrangement designated by regulations made in terms of section 288 of the FSR Act as a 'financial product'; and a facility or arrangement that includes one or more of the financial products referred to in *(a)* to *(i)* above (each a 'financial product').

(v) A 'financial service' as defined under the FSR Act

In terms of section 1 of the FSR Act read with section 3 of the FSR Act, a 'financial service' includes:

(a) Any of the following activities conducted in South Africa in relation to a financial product, a 'foreign financial product' (as defined in section 1 of the FSR Act), a financial instrument, or a 'foreign financial instrument' (as defined in section 1 of the FSR Act)
  (i) offering, promoting, marketing or distributing;
  (ii) providing advice, recommendations or guidance;
  (iii) operating or managing;
  (iv) providing administration services.

(b) '[D]ealing' or 'making a market' in South Africa in a financial product, a 'foreign financial product', a financial instrument or a 'foreign financial instrument'(the meanings of the terms 'dealing' and 'making a market' in the context of 'financial services' are expanded on in section 3(4) of the FSR Act).

(c) A 'payment service' as defined in section 1 of the FSR Act and which is discussed in more detail in para IV*(e)(ii)* below).
(d) '[S]ecurities services' as defined in section 1 of the FSR Act, which definition cross-refers to its definition under the FMA.
(e) An intermediary service as defined in section 1(1) of the current FAIS Act.
(f) A service related to the buying and selling of foreign exchange.
(g) A service related to the provision of credit, including a debt collection service, but excluding the services of:
  (i) a debt counsellor registered in terms of section 44 of the NCA who provides the services of a debt counsellor as contemplated in the NCA;
  (ii) a 'payment distribution agent' as defined in section 1 of the NCA;
  (iii) an 'alternative dispute resolution agent', as defined in section 1 of the NCA;
(h) A service provided to a financial institution through an 'outsourcing arrangement' as defined in section 1 of the FSR Act and which is discussed in more detail in para III*(g)(ii)* below.
(i) Any other service provided by a financial institution, being a service regulated by a specific financial sector law.
(j) A service designated by regulations made in terms of section 288 of the FSR Act.

(each a 'Financial Service').

A service provided by a 'market infrastructure' (as defined in section 1 the FSR Act) is not a financial service unless designated by regulations made by the Minister of Finance in terms of section 288 of the FSR Act. Such regulations may be made only if doing so will further the objects of the FSR Act. In terms of section 3(3) of the FSR Act, the regulations may designate as a 'financial service':

(a) *Any service that is not regulated in terms of a specific financial sector law if the service that is provided in South Africa relates to:*
  (i) A financial product, a foreign financial product (as defined in the FSR Act), a financial instrument or a foreign financial instrument (as defined in the FSR Act).
  (ii) An arrangement that is in substance an arrangement for lending, making a financial investment or managing financial risk.
  (iii) The provision of a 'benchmark' (as defined in the FSR Act) or an index (as defined in the FSR Act).

or

(b) A service provided by a 'market infrastructure' (as defined in section 1 of the FSR Act).

A 'financial service' as defined under the CoFI Bill is discussed in more detail in para IV*(f)(i)* below.

(vi) 'Market infrastructure' as defined under the FSR Act

The term 'market infrastructure' is defined in section 1 of the FSR Act to include a 'central counterparty'; a 'central securities depository'; a 'clearing house'; an 'exchange'; and a 'trade repository', as such terms are defined in the FMA (each a 'market infrastructure').

(g) Application of the CoFI Bill

(i) Financial institutions

In terms of clause 4(1) read with clause 4(3) of the CoFI Bill, the CoFI Bill will regulate, and will set out the requirements for, all FIs that provide financial products and financial services. These FIs will also need to be licensed, and their activities authorised, by the FSCA.

(ii) Supervised entities

In addition to FIs, the CoFI Bill will apply to any 'supervised entity' that is not a FI (cl 4(2) of the CoFI Bill). The term 'supervised entity' is not defined in the CoFI Bill, but it is defined in section 1 of the FSR Act to include a licensed FI; a person with whom a licensed FI has an 'outsourcing agreement'; and a FSP representative of a FI ('supervised entities').

An 'outsourcing agreement' in relation to a FI is defined in section 1 of the FSR Act as an arrangement between a FI and another person for the provision to, or for, the FI of a 'control function' (as defined in section 1 of the FSR Act and which includes a risk management function, compliance function, internal audit function and actuarial function); a function that a sector law required to be performed or requires to be performed in a particular way or by a particular person; and a function that is integral to the nature of a financial product or financial service that a FI provides, or is integral to the nature of the market infrastructure.

Excluded from the definition of an 'outsourcing agreement' is a contract of employment between a FI and *(a)* an employee of that FI,

and *(b)* a natural person who is seconded to the FI. The definition also excludes a FSP representative of a FI.

We note that supervised entities which are not FIs will not be required to be licensed by the FSCA, but clause 4(2) read with clause 4(3)(*b*) of the CoFI Bill will impose certain requirements on them to promote the object, purposes, principles and requirements set out in the CoFI Bill.

(iii) Persons related to FIs

In terms of clause 4(3)*(c)* of the CoFI Bill, the CoFI Bill will impose requirements relating to the licensing, approval, notification, registration and conduct of certain persons 'related' to FIs. The CoFI Bill does not expand on what 'related' means under the CoFI Bill. Section 1 of the FSR Act, however, contains a definition for the term 'related party' and defines this term with reference to the section 2 of the Companies Act.

(iv) Financial products and financial services provided by FIs

In terms of clause 4(3)(*d*) of the CoFI Bill, the CoFI Bill will impose requirements relating to the financial products and financial services provided by FIs, the activities of FIs and the conduct of FIs in relation to the provision of financial products and financial services and the performance of those activities.

(v) Other

In terms of clauses 5 and 6 of the CoFI Bill, the CoFI Bill will also apply to prudentially regulated 'financial groups' (as defined in clause 1 of the CoFI Bill); 'financial conglomerates' (as defined in clause 1 read with section 160 of the FSR Act); 'pension funds' (as defined in clause 1 of the CoFI Bill); and activities in relation to pension funds, to the extent set out in the CoFI Bill.

A detailed discussion on the application of the CoFI Bill to these specific entities and activities falls outside the scope of this analysis.

(h) Avoidance of regulatory arbitrage

In terms of clause 13(5) of CoFI Bill, a person may not structure, arrange, separate or combine businesses in a way that avoids or attempts to avoid the licensing under the CoFI Bill. This practice is commonly referred to as 'regulatory arbitrage'. We shall discuss this issue further in para V below.

(i) Exemptions from the application of the CoFI Bill

In terms of section 8 the CoFI Bill, FIs, and only FIs, will, on application, be eligible for exemption from the whole of the CoFI Bill or a certain part of provision thereof. In terms of clause 8(1)(*a*) of the CoFI Bill, the FSCA will also have the authority to grant an exemption on its own initiative.

Section 8 of the CoFI Bill will regulate the grounds on which an exemption application can be brought; to whom and what the FSCA may grant an exemption; the time period and conditions for, and on which, an exemption may be granted; when an exemption may not be granted by the FSCA; and when an exemption may be withdrawn by the FSCA.

(j) Amendment and repeal of other financial sector laws

Schedule 1 to the CoFI Bill sets out certain proposed amendments to the PF Act, the Insurance Act 18 of 2017 and, more importantly, the FSR Act. Schedule 1 to the CoFI Bill also sets out proposals to repeal the whole of the LTI Act, the STI Act, the Financial Institutions (Protection of Funds) Act 28 of 2001, the FAIS Act, and CISCA. We shall discuss this issue further in para V below.

(k) Transitional arrangements in relation to licensing

In terms of clause 4 of the CoFI Bill, it is proposed that previously licensed FIs will continue to exist as licensed FIs in terms of the relevant Acts under which they were licensed (for example, the FAIS Act or CISCA) as if they have been licensed under the CoFI Bill. They may also continue to conduct business as per their current licensing conditions until their existing licences have been converted into licences under the CoFI Bill. It is anticipated that this process will take two years.

IV THE NPS UNDER TWIN PEAKS, THE FSR ACT, AND THE COFI BILL

(a) Introduction to the NPS and its general regulatory framework

In lay terms, the NPS in South Africa can described as the system of arrangements and infrastructures that enables persons to effect payments to one another (South African Reserve Bank, 'The National Payment System Framework and Strategy, Vision 2025', available at https://www.resbank.co.za/RegulationAndSupervision/National

PaymentSystem(NPS)/Documents/Overview/Vision%202025.pdf, accessed on 22 April 2020).

The Bank for International Settlements defines a payment system as '[a] set of instruments, procedures, and rules for the transfer of funds between or among participants; the system includes the participants and the entity operating the arrangement' (Bank for International Settlements, 'Glossary', available at https://www.bis.org/cpmi/publ/d00b.htm?&selection=49&scope=CPMI&c=a&base=term, accessed on 27 February 2019).

Section 1 of National Payment System Act 78 of 1998 ('NPS Act') defines a payment system as 'a system that enables payments to be effected or facilitates the circulation of money and includes any instruments and procedures that relate to the system'.

(b) General regulatory framework

(i) Introduction

The SARB is responsible for the NPS in South Africa. The SARB performs its NPS management and oversight functions through the National Payment System Department within the SARB ('NPSD').

The SARB derives its power and responsibility for the NPS from s 10(1)*(c)* of the SARB Act. Section 2 of the NPS Act enables the SARB to perform its NPS-related functions as required by the SARB Act. The NPSD is accordingly regulated by legislation.

(ii) The SARB Act and the NPS Act

In terms of section 10(1)*(c)*(*i*) of the SARB Act, the SARB may 'perform such functions, implement such rules and procedures and, in general, take such steps as may be necessary to establish, conduct, monitor, regulate and supervise payment, clearing or settlement systems'.

Section 2 of the NPS Act enables the NPSD to exercise the powers given to the SARB in the SARB Act and it must do so in accordance with the NPS Act. The NPS Act was specifically enacted to provide for the management, administration, operation, regulation and supervision of payment, clearing and settlement systems in South Africa (see the preamble to the NPS Act).

(iii) Directives and position papers

In terms of section 12 of the NPS Act, the NPSD may issue directives to any person regarding a NPS or the application of the provisions of the NPS Act. The NPSD may, however, only do so after consultation with the

payment system management body provided for in section 12 of the NPS Act (currently, the Payment Association of South Africa, commonly known as PASA). The directives issued by the NPSD are gazetted and are legally binding on the persons to whom they are addressed (s 12 of the NPS Act and South African Reserve Bank, 'Review of the National Payment System Act 78 of 1998, Policy Paper, September 2018', available at http://www.treasury.gov.za/publications/other/NPS%20Act%20Review%20Policy%20Paper%20-%20final%20version%20-%2013%20September%202018.pdf, accessed on 22 April 2020).

The NPSD also issues non-binding position and information papers and these are published on the SARB's website. Position papers state the SARB's position in respect of specific payment system issues. These papers are not legally binding, although they are treated as 'morally persuasive'. Position papers normally contain approaches, procedures and policy matters which are applicable in the NPS environment (South African Reserve Bank, 'Review of the National Payment System Act 78 of 1998, Policy Paper, September 2018', available at http://www.treasury.gov.za/publications/other/NPS%20Act%20Review%20Policy%20Paper%20-%20final%20version%20-%2013%20September%202018.pdf, accessed on 22 April 2020).

(iv) Current review of the NPS Act

Treasury and the NPSD are currently reviewing the NPS Act in light of recent legislative and regulatory developments in the financial sector, including the introduction of FSR Act, as well as international reforms, recommendations and standards set by the Group of 20, the Financial Stability Board, the BIS Committee on Payments and Market Infrastructures, the International Organisation of Securities Commissions, and the Southern African Development Community. Their comments and views on the NPS Act and the regulation of the NPS systems and participants under the Twin Peaks model are set out in a policy paper published in September 2018 entitled 'Review of the National Payment System Act 78 of 1998' (South African Reserve Bank, 'Review of the National Payment System Act 78 of 1998, Policy Paper, September 2018', available at http://www.treasury.gov.za/publications/other/NPS%20Act%20Review%20Policy%20Paper%20-%20final%20version%20-%2013%20September%202018.pdf, accessed on 22 April 2020). We discuss certain of their comments and views pertaining to the NPS regulatory framework, specifically the interplay

between the current NPS Act and the FSR Act, as well as the proposed regulation of the NPS systems and participants under the CoFI Bill below.

(c) NPS under the South African Twin Peaks model

Under the South African Twin Peaks model, oversight of the safety, efficiency and stability of the NPS remains with the SARB as provided for in the SARB Act and the NPS Act. This position has not been altered by the FSR Act.

(d) The role and regulation of the NPS participants in other financial sectors

Before we discuss the NPS under the FSR Act and, more importantly, the CoFI Bill, we point out that a large number of NPS participants are also role-players in other financial sectors and are regulated in those sectors under applicable legislation. For instance, a bank which is a NPS participant is also a bank registered under the Banks Act (for which the PA is the responsible authority) and a financial services provider registered under the FAIS Act (for which the FSCA is the responsible authority). The CoFI Bill will, accordingly, not only apply to a bank in its capacity as a NPS participant, but also in, for instance, its capacity as a registered financial services provider and the bank's conduct will be regulated accordingly under the CoFI Bill.

The scope of this analysis and our discussions are, however, limited to the NPS participants in their capacities as participants in the NPS (for instance, banks in their capacity as clearing system participants or settlement system participants) and not in any other capacities, such as being registered financial services providers under the FAIS Act.

(e) The National Payment System under the FSR Act

(i) Licensing requirement

As noted earlier in para III*(f)(v)*, the definition of a financial service under the FSR Act includes 'a payment service'. In terms of section 111(1) of the FSR Act, a provider of a financial service, which includes a 'payment service', may not provide such service unless it has been licensed under the NPS Act. If the provider of the 'payment service' does not qualify for licensing under the NPS Act, it must be licensed under the FSR Act.

(ii) The definition of a 'payment service' under the FSR Act

Section 1 of the FSR Act defines a 'payment service' as any service provided to a financial customer to facilitate payments to, or from, the financial customer.

We note that this particular definition in the FSR Act has been criticised by the SARB as being too broad. In the SARB's view, the definition includes payment services provided in both the retail environment (where financial customers are involved or affected) and the non-retail environment (where the interactions between the NPS participants in the clearing and settlement domain take place and financial customers are not involved or affected) and there should be a clear distinction between these two environments, as they should be regulated differently. The SARB has proposed that these two environments be clearly separated in a new definition of 'payment services', to be created and included in the revised NPS Act (South African Reserve Bank, 'Review of the National Payment System Act 78 of 1998, Policy Paper, September 2018', available at http://www.treasury.gov.za/publications/other/NPS%20Act%20Review%20Policy%20Paper%20-%20final%20version%20-%2013%20September%202018.pdf, accessed on 22 April 2020). We discuss this particular issue in more detail in para IV*(f)* below.

We expect that an introduction of a definition of a 'payment service' in the NPS Act will have a knock-on effect on the definition of 'payment services' in the FSR Act and the CoFI Bill and that these two pieces of legislation would need to be amended accordingly to ensure that they are sufficiently aligned with the NPS Act so that no gaps or loopholes are created.

(iii) Conduct standards under the FSR Act

As noted earlier in para II above, the FSCA may not make conduct standards that impose requirements on the providers of 'payment services' (as defined in the FSR Act) without the concurrence of the SARB. It follows that the FSCA would need concurrence from the SARB to legislate the CoFI Bill to the extent that it imposes conduct standard requirements on them.

(iv) Joint standards under the FSR Act

We note that the PA and the FSCA may make joint standards on any matter in respect of which the PA and the FSCA have the power to make a standard under the FSR Act (s 107 of the FSR Act).

(f) The NPS under the CoFI Bill

(i) Licensing under the CoFI Bill

In terms of clause 13(1) of the CoFI Bill, an FI may not provide a financial product or a financial service unless it has been licensed under the CoFI Bill. It follows that, broadly speaking, an FI which provides a 'payment service' needs to have two licences: one as required under the FSR Act (which would be a licence under the NPS Act) and one as required under the CoFI Bill.

The meaning of a 'financial service' under the CoFI Bill is interesting. Clause 1 of the CoFI Bill defines a 'financial service' as having the meaning given to it in the FSR Act (which we discussed in para III*(f)(v)* above), but then goes one step further by including certain activities, called 'payment service activities', as listed in clause 2 of the CoFI Bill, in the CoFI Bill definition. The definition of a 'financial service' in the CoFI Bill reads as follows:

> '"financial service"' has the meaning defined in section 3 of the Financial Sector Regulation Act, and for the purposes of this Act, where required by the context, includes an activity that is listed in Schedule 2'.

This definition and specifically the activities relating to payment services set out in clause 2 of the CoFI Bill are discussed in more detail in para IV*(f)(iv)* below. Before we do so, we first look at why the oversight of the market conduct of payment service providers has been included in the CoFI Bill and what the proposed application of the CoFI Bill to the NPS currently looks like under the first draft of the CoFI Bill.

(ii) Rationale for including oversight of the conduct of payment service providers in the CoFI Bill

According to Treasury, one of the reasons for including oversight of the conduct of payment service providers within the ambit of the FSCA's powers and accordingly, the CoFI Bill, relates to poor customer outcomes and issues identified in the NPS environment during Treasury's comprehensive review of the financial sector's legislative and regulatory framework between 2007 and 2011. These issues highlighted that there is not only abuse of the debit order system in South Africa, but also unfair costs to financial customers as a result of complex and opaque structures set up by FIs. Treasury also identified a need to improve competition, access to and financial inclusion in the NPS environment (National Treasury, 'Explanatory Policy Paper accompanying the Conduct of Financial Institutions Bill, Paper accompanying the first draft of the

CoFI Bill', available at http://www.treasury.gov.za/twinpeaks/CoFI%20Bill%20policy%20paper.pdf, accessed on 22 April 2020).

(iii) The proposed application of the CoFI Bill to the NPS

According to Treasury, the CoFI Bill attempts to define the different activities within the NPS environment and to limit the application of the CoFI Bill to payment services provided directly to financial customers (ie, the 'retail environment'), as opposed to the wholesale or 'back-office' interactions between the NPS participants and systems where financial customers are not involved or affected (the 'non-retail environment') (National Treasury, 'Explanatory Policy Paper accompanying the Conduct of Financial Institutions Bill, Paper accompanying the first draft of the CoFI Bill', available at http://www.treasury.gov.za/twinpeaks/CoFI%20Bill%20policy%20paper.pdf, accessed on 22 April 2020). In our view this attempt is evident from the inclusion of the list of payment service activities in clause 2 of the CoFI Bill. For purposes of this analysis, it is not required that we quote this list of activities.

However, drawing a line between payment service activities impacting financial customers and those that do not is not that simple. Treasury has recognised that some activities and interactions that take place in the clearing and settlement networks of the NPS (in other words, in the 'non-retail environment'), while not involving financial customers directly, can have an indirect impact on financial customers. In this regard, Treasury specially mentions the activities of, and payment services provided by, 'payment clearing house system operators' as defined in section 1 of the NPS Act ('PCH System Operators') such as BankServ, Visa, and Mastercard (National Treasury, 'Explanatory Policy Paper accompanying the Conduct of Financial Institutions Bill, Paper accompanying the first draft of the CoFI Bill', available at http://www.treasury.gov.za/twinpeaks/CoFI%20Bill%20policy%20paper.pdf, accessed on 22 April 2020).

Treasury has also recognised that that further work may have to be done to designate 'certain payment systems' or PCH System Operators as SIFIs under the FSR Act, with the result that the FSCA will not be able to take regulatory actions in respect of those payment systems and PCH System Operators without the concurrence of the SARB (National Treasury, 'Explanatory Policy Paper accompanying the Conduct of Financial Institutions Bill, Paper accompanying the first draft of the CoFI Bill', available at http://www.treasury.gov.za/twinpeaks/CoFI%20Bill%20policy%20paper.pdf, accessed on 22 April 2020).

(iv) Payment services under the CoFI Bill

From our discussions above, it is clear that 'payment services' under the FSR Act and 'payments services' under the CoFI Bill have different meanings.

It seems to us that the purpose of including a list of payment services activities is to refine, and in some cases limit, the application of the CoFI Bill to certain payment services activities which makes sense in light of the comment made by Treasury that the CoFI Bill attempts to define the different activities within the NPS environment and to limit the application of the CoFI Bill to payment services provided in the retail environment. The list of activities also places emphasis on the regulation of 'activities', as opposed to regulation of 'institutions', which is in line with the statement by Treasury that the CoFI Bill is designed to be activity-based as opposed to institutionally driven.

(v) Specific licensing requirements under the CoFI Bill

The FSCA may prescribe specific licensing requirements regarding payment services providers (cl 15(1)*(c)* of the CoFI Bill). At this stage the intent to prescribe such requirements, if any, and the anticipated scope is unknown as, to date, no further information has been provided in this regard. We anticipate that more clarity will be provided as the legislative law-making process of the CoFI Bill evolves.

(vi) Conduct standards addressing payment services in the CoFI Bill

The FSCA will have the authority to prescribe conduct standards that address payment services as defined under the CoFI Bill. These must be made with the concurrence of SARB, as prescribed under section 109(1) of the FSR Act (cl 56(2)*(m)* of the CoFI Bill). The power of the FSCA to make conduct standards imposing requirements in relation to payment services with the concurrence of the SARB is reiterated in s 106*(a)* of the CoFI Bill.

(vii) Assessment by the FSCA of the impact of the CoFI Bill on payment service providers

The FSCA will have to regularly assess the impact of the requirements under the CoFI Bill placed on the providers of payment services in order to determine if the requirements are achieving the objectives and purposes they are intended to achieve under the CoFI Bill and if the

requirements are resulting in unintended consequences or have a disproportionate effect on the providers of payment services (cl 9(6) of the CoFI Bill).

(viii) Overlap of requirements and inconsistencies

In the event that there is an overlap between the requirements under the CoFI Bill and the requirements imposed under any Act which is the responsibility of the SARB (the NPS Act), that the FSCA and the SARB should prescribe joint standards or issue guidance notes and interpretation rulings to facilitate the appropriate implementation of the requirements under the CoFI Bill in relation to the requirements under that Act (cl 9(3) of the CoFI Bill).

As regards any inconsistencies in conduct standards under the CoFI Bill and the provisions of any legislation administered, or regulatory instruments prescribed, by the SARB, clause 105(1)*(b)* of the CoFI Bill requires that a process to address these inconsistencies be included in the legislatively required memorandum of understanding concluded, or to be concluded, between the SARB and the FSCA under sections 76 and 77 of the FSR Act. In terms of clause 105(1)*(a)* of the CoFI Bill, the same applies to inconsistencies in the provisions of the CoFI Bill that relate to matters other than conduct standards.

(g) NPS-related amendments to the FSR Act proposed under the CoFI Bill

The CoFI Bill proposes certain amendments to be made to the FSR Act which relates to the NPS.

(i) Amendments to the powers of the PA and FSCA to make joint standards

The CoFI Bill proposes to amend the FSR Act provisions relating to the making of joint standards by the PA and the FSCA under the FSR Act (as discussed in para IV*(e)(iv)* above). The proposal is to add two additional provisions. The first is to give the PA and the FSCA both the power to make joint standards with the SARB in respect of the SARB's legislative functions relating to the NPS. The second is to give both the PA and the FSCA the power to also make joint standards with the SARB on matters in respect of which the SARB may issue directives under, among other things, legislation regulating the NPS (being, amongst others, the NPS Act). As noted earlier, the NPSD may, in terms of the NPS Act, issue

directives to any person regarding a NPS or the application of the provisions of the NPS Act.

(ii) Amendments to provisions dealing with consulting and concurrence in respect of Regulatory Actions under the FSR Act

The CoFI Bill further proposes to amend the provisions relating to regulatory actions by the PA or FSCA as set out in section 126 of the FSR Act. As noted earlier, in terms of the FSR Act, the PA and the FSCA may not take any regulatory action without the concurrence of the FSCA or the PA (as applicable). In addition, concurrence from the SARB is required if such regulatory action relates to a 'significantly important financial institution' ('SIFI'), which under the FSR Act (s 1 read with ss 29–31) is essentially a FI designated by the Governor of the SARB as a 'SIFI' to which certain additional prudential standards and directives made by the PA may apply in order to mitigate any risk(s) that a 'systemic event' (as defined in s 1 of the FSR Act) in South Africa may occur. However, the prescribed concurrence is not required if there is an agreement between the PA, FSCA and the SARB (as applicable) under a memorandum of understanding that such concurrence is not necessary.

The CoFI Bill proposes to limit the duty of the PA and the FSCA to obtain the concurrence of the FSCA or the PA (as applicable) under section 126 of the FSR Act for regulatory actions to a SIFI, 'a system operator' and 'other participant in a systemically important payment system'.

Concurrence from SARB will still be required if such action relates to, of affects, a SIFI.

We assume that the term 'system operator' refers to a PCH system operator and not a system operator as catered for under the Directive for conduct within the NPS (in respect of system operators (Directive 2 of 2007 in GN 1111 in *GG* 30261 of 6 September 2007)).

It remains to be seen what is meant by 'other participant in a systemically important payment system' as this can include any number of participants operating in the NPS environment as long as the payment system in which it operates is designated as 'systemically important'.

The CoFI Bill proposes to add to section 126 of the FSR Act that the PA and the FSCA may only take any regulatory actions relating to, or affecting, a FI that provides a 'payment service' as defined under the FSR Act if the PA or the FSCA (as applicable) has consulted the SARB.

Lastly, the CoFI Bill proposes to widen the ambit of consulting and obtaining concurrence as noted earlier to include in the scope of

regulatory actions not only exemptions granted under the FSR Act, but also exemptions granted under any other financial sector law.

Under the FSR Act, a 'financial sector law' does not include the NPS Act. Therefore, any exemptions given under the NPS Act will not fall within the ambit of the revised section 126 of the FSR Act if the amendments are accepted and legislated.

V ANALYSIS AND FINAL REMARKS

As noted earlier in para III*(a)*, comments on the CoFI Bill were accepted until 1 April 2019, and both public and media workshops have been held to discuss the first draft. A second draft of the CoFI Bill was published on 29 September 2020. The main differences between the two drafts are set out in General Notice 519 (*GG* 43741 of 29 September 2020).

There is no doubt that, given the ambit and application of the CoFI Bill, it will have an impact on every single participant in the financial sector, including the FSRs, the SARB, the persons and entities to which the CoFI Bill apply (FIs) and, finally, the financial customer.

(a) The definition of 'payment services' under the CoFI Bill

Based on the research we have conducted on the documentation available to us at this time, it is difficult at this stage to assess what precisely the impact of the CoFI Bill on the NPS may or will be. The biggest reason for this is that the application of the CoFI Bill to the NPS will largely depend on the finalised and accepted meaning and scope of the provision of 'payment services' under the CoFI Bill and the list of payment service activities set out in clause 2 of the CoFI Bill. One must also bear in mind that, as noted earlier in para IV*(e)(ii)* above, Treasury is currently considering the insertion of the definition of a 'payment service' in the NPS Act and this may very well have a knock-on effect on the definition of a 'payment service' in the FSR Act and the CoFI Bill. There is also no doubt in our minds that the first draft of the definition of 'payment service' (including the list of payment service activities set out in clause 2) in the CoFI Bill has not gone without scrutiny during the time that the CoFI Bill was open for public comment and that this may result in amendments and further refinement to the definition and the list of activities.

In our view, it is accordingly highly likely that the definition of 'payment service' under the CoFI Bill will turn up in an amended form in the second draft of the CoFI Bill. In this regard, it will be interesting to see the public's comments on the current proposed definition of

'payment service', including the list of payment service activities. It will also be interesting to see what Treasury and the FSCA's responses to these received comments will be and how a workable solution for this definition and the list of payment service activities will eventually be found and agreed upon between the law-makers and the financial sector participants. From the above it is clear that the definition is in fact very important in the context of the NPS as it will be determine which of the NPS participants will be required to be licensed by the FSCA under the CoFI Bill and who will need to comply with the requirements relating to market conduct standards as prescribed under the CoFI Bill.

(b) Prescribed requirements relating to market conduct standards to be made by the FSCA

It is of particular importance that the FSCA has the required, skilled employees or contractors and other professional advisors (such as attorneys) available to it to enable it to exercise its rights and comply with its duties under the CoFI Bill as well as any subordinate legislation made by it under the empowering provisions contained in the FSR Act and the CoFI Bill. These employees or contractors and advisors must, in our view, have very good working knowledge, not only of the CoFI Bill and the FSR Act, but also of the pieces of legislation that are proposed to be repealed by the CoFI Bill.

We specifically mention this because, as mentioned earlier in para III*(x)* above, schedule 1 to the CoFI Bill proposes to repeal the whole of the LTI Act, the STI Act, the Financial Institutions (Protection of Funds) Act 28 of 2001, the FAIS Act and CISCA. This means that the provisions currently existing, and which are in force, under those pieces of legislation will need to be 'incorporated' into the CoFI Bill or other regulatory instruments to be made by the FSCA and/or the PA in terms of their powers to do so under the FSR Act (as discussed in para II above). This may prove to be a rather daunting task.

For us this raises the following question: how will the FSCA ensure that all the provisions contained in the pieces of legislation to be repealed, except those provisions which relate to prudential standards which we believe will be dealt with through regulatory instruments to be made by the PA, are 'transferred' to the CoFI Bill and/or any regulatory instruments published along with it? To put it differently, what would happen should any provision(s) currently existing, and in force, under the pieces of legislation to be repealed (1) not be dealt with in the CoFI Bill and/or any regulatory instruments published along with it; and (2) also not be 'dealt' with by the PA in terms of regulatory instruments,

such as prudential standards, made by it under the FSR Act? What would happen to provisions that are neither 'conduct standards' nor 'prudential standards' and as a result might fall through the cracks?

This bring us to our next topic, being that of 'regulatory arbitrage'.

(c) Regulatory arbitrage and the provisions of the CoFI Bill

Regulatory arbitrage occurs when a person or entity structures, arranges, separates or combines businesses in a way that avoids or attempts to avoid obligations (in most cases, less favourable obligations) imposed by law. This may occur when laws are not fully aligned and a legislative and/or regulatory loophole is created.

During Treasury's comprehensive review of the legislative and regulatory framework pertaining to the financial sector between 2007 and 2011, it was found that the legislative and regulatory framework regulating the South African financial sector was fragmented with different standards and requirements applying to different industries which increased the scope for the use of regulatory arbitrage (National Treasury, 'Twin Peaks in South Africa: Response and explanatory document accompanying the Second Draft of the Financial Sector Regulation Bill', available at https://juta.co.za/media/filestore/2015/03/2014_12_12_Response_document.pdf, accessed on 22 April 2020). Accordingly, the use of regulatory arbitrage was identified as an issue which needed to be addressed and it was indeed one of the reasons why Treasury decided to move to a Twin Peaks model of financial sector regulation — this model was found to represent a 'decisive shift away from a fragmented regulatory approach, minimising regulatory arbitrage or forum shopping' (*ibid*).

We must commend the drafters of the CoFI Bill for proposing a clause in the CoFI Bill which will outright prohibit the use of regulatory arbitrage to avoid a licensing obligation under the CoFI Bill. As also noted earlier in para III*(xiii)*, clause 13(5) of the CoFI Bill contains a legislative prohibition on the practising of regulatory arbitrage, specifically in respect of the licensing requirements set out in the CoFI Bill. In addition to this provision, in term of clauses 115(2)*(a)*, 115(2)*(b)*, and 115(2)*(c)* of the CoFI Bill, Treasury and the FSCA have an obligation to develop new legislation or amend the CoFI Bill to address: any shortcomings identified in the CoFI Bill which shortcomings inhibit the effectiveness of its implementation, identified gaps in the legislative framework, and unintended consequences that may have arisen in the implementation of the CoFI Bill.

Even though this is commendable from a CoFI Bill perspective, we cannot help but to wonder if this provision is enough in the context of

the Twin Peaks model as a whole. Should there perhaps not be a similar legislative provision, included at higher level such as the FSR Act, and not only one piece of subordinate legislation such as the CoFI Bill? We explain our reasoning in the next paragraph.

(d) Regulatory arbitrage and the provisions of the FSR Act

As noted earlier in para I, the FSR Act establishes the legislative and regulatory framework for the introduction and implementation of the Twin Peaks model in South Africa. In our view, it goes without saying that it is of paramount importance that the FSR Act must cover all areas of financial sector regulation and be flawless in respect of the financial sector matters that it regulates. There can be no scope for matters to be legislatively governed to fall through the cracks, especially since the legislature is now tasked with having to consolidate the legislative and regulatory framework of a financial sector which has been found to be fragmented with different standards and requirements applying to different industries. As an example, one could merely look at the number of new pieces of subordinate legislation which still need to be made under the FSR Act, specifically regulatory instruments for the PA and the FSCA. However, we acknowledge that no piece of legislation is perfect and that it is only through practical implementation (as is the case with the FSR Act now) that legislative and/or regulatory gaps or loopholes are identified. Identifying gaps or loopholes is important as these potentially provide potential scope for regulatory arbitrage.

During our analysis of the provisions of the FSR Act, we have considered the roles to be played by the FSRs and the SARB as well as the requirements *vis-à-vis* memoranda of understanding to be concluded between the FSRs and the SARB with respect to how they will co-operate and collaborate with, and provide assistance to, each other in respect of their functions and duties in terms of financial sector laws according to sections 76 and 77 of the FSR Act.

During our analysis, specifically sections 76 and 77 of the FSR Act, and bearing in mind the proposed provisions in the CoFI Bill relating to regulatory arbitrage as discussed in para V*(c)* above, we have been unable to find: a clear provision in the FSR Act which places an express legislative duty on the FSRs and the SARB to take all reasonable steps to avoid the creation of any scope for regulatory arbitrage when making or amending any financial sector law, including regulatory instruments; or a clear provision in the FSR Act requiring Treasury, with the assistance of the SARB and the FSRs (as applicable), to regularly assess the provisions of the FSR Act and any subordinate legislation

promulgated under the FSR Act in order to identify any potential legislative and/or regulatory gaps or loopholes created during the making of new financial sector laws impacting the financial sector (including any applicable and impacted laws which have not been designated as financial sector laws), or any amendment(s) thereto.

We have also found that there is no express duty under section 76 read with section 77 of the FSR Act placed on the FSRs and the SARB to include in their memoranda of understanding any agreed action(s) to actively identify, reduce and deal with legislative and/or regulatory gaps or loopholes which could potentially provide scope for regulatory arbitrage in exercising their duties and especially their law-making powers.

Although one can argue that the above duties are implied or that they can be read into sections 76 and 77 of the FSR Act, one must be mindful, as we noted earlier in para V*(b)* above, of the number of subordinate pieces legislation which still have to be drafted and enacted in order to fully implement the Twin Peaks model of financial sector regulation in South Africa. In our view, these subordinate pieces of legislation will need to be carefully scrutinised in order to ensure that no legislative and/or regulatory gaps or loopholes are created. It is further our view that this does not only apply to financial sector laws designated as such under the FSR Act, but also to other laws which have not been designated as financial sector laws, but which are impacted by any new or amended financial sector laws, for example, the NPS Act. Our suggestion would be to legislatively require the FSRs and the SARB to agree to a process for identifying any shortcomings in financial sector laws and identifying potential or actual legislative and/or regulatory gaps or loopholes created in the new legislative framework relating to the financial sector under the Twin Peaks model. They should also be required to address any unintended consequences that may have arisen during the implementation of the FSR Act and its subordinate legislation. As a suggestion, these provisions could be required by the FSR Act to be included in the required memoranda of understanding between the FSRs and the SARB (as applicable).

(e) Compliance issues and costs relating to the CoFI Bill

With regard to any implementation issues in relation to the CoFI Bill, it is in our view a little too early to conduct a full analysis on the exact measures that FIs, supervised entities, persons related to FIs, prudentially regulated 'financial groups', financial conglomerates and pension funds would need to take in order to ensure that they are compliant with

the provisions of the CoFI Bill. The reason for this is twofold. First, given the new legislative and regulatory landscape to be created by the CoFI Bill and the comments we have seen being raised against the CoFI Bill during our research, we expect that a vast number of comments were submitted on the first draft and that it is very likely that the second draft of the CoFI Bill will materially differ from the first draft. Secondly, a number of subordinate pieces of legislation or regulatory instruments still need to be drafted, commented on and enacted to deal with the provisions contained in the pieces of legislation that the CoFI Bill is intending to repeal.

We do, however, note that there is a legislative obligation placed on the FSCA under clause 7(1) of the CoFI Bill that it must adopt a licensing framework, set market conduct standards, develop and implement its supervisory approach, enforce requirements and consider the granting of exemptions, 'in a manner that is proportionate to the nature, size, scale and complexity of the risks associated with a type of activity or a FI itself, and is proportionate to achieving the purpose of the requirement'. This should provide some relief and comfort that the FSCA will not and may not adopt a 'comply all' approach in relation to the CoFI Bill.

One should also bear in mind that an increased compliance framework (such as the CoFI Bill) will inevitably result in increased compliance costs to the FIs, supervised entities, persons related to FIs, prudentially regulated 'financial groups', financial conglomerates and pension funds to which the CoFI Bill applies, who might, in turn (and depending on their attitude towards and response(s) to the CoFI Bill), ultimately pass these costs on to financial customers. However, Treasury has unequivocally stated that during the implementation of the Twin Peaks model, which includes the implementation of the CoFI Bill, there may be no direct or indirect increased costs over and above the costs that generally apply to financial customers and FIs specifically for poor households, black people, the youth, women, small and emerging businesses and rural development (National Treasury, 'Financial Sector Regulation Bill, Impact Study of the Twin Peaks Reforms', available at http://www.treasury.gov.za/twinpeaks/Impact%20Study%20on%20Twin%20Peaks%20Reforms.pdf, accessed on 22 April 2020). We do, however, expect that the increased compliance framework created by the CoFI Bill, the increased costs related thereto and the question of who will ultimately bear the cost are topics that will still be hotly debated during the evolvement of the CoFI Bill and its related subordinate legislation.

(f) Final remarks

We believe that even though the CoFI Bill is still in relatively raw form, it is a start in the right, but a difficult, direction, which, based on our

research findings, will be subject to a lot of scrutiny from financial sector participants, especially the providers of financial products, financial services and market infrastructures. It is also common knowledge that people resist change. One particular hurdle which the drafters of the CoFI Bill will need to overcome, which has been evident from our research findings, is that the CoFI Bill will need much more refinement, given that it will regulate the market conduct of a vast number of industries such as insurance, health and finance, which was not the case under our previously fragmented financial sector legislative and regulatory framework. The financial sector participants will need to be provided with the comfort that the market conduct standards under the CoFI Bill will be tailored in respect of each of these industries to the extent that it is required and possible.

As noted earlier in para V*(a)* above, it will be interesting to see the public's comments on the first draft of the CoFI Bill as well as the overall attitude of financial sector participants towards this unprecedented piece of legislation. It will also be interesting to see the evolvement of the CoFI Bill from the first draft to the final version which is officially enacted and how the CoFI Bill will be developed into a piece of legislation which is acceptable and practically workable for the whole of the financial sector in South Africa, whilst ensuring that it meets the main objectives of protecting financial customers and promoting their fair treatment and protection by FIs.