

**CONSULTATION REPORT: FMA CONDUCT STANDARD 2 OF 2018 (CONDUCT STANDARD FOR AUTHORISED OVER-THE-COUNTER DERIVATIVE PROVIDERS)**

**FINANCIAL MARKETS ACT NO 19 OF 2012**

1. In this consultation report, the following definitions apply:  
“**Authority**” means the Financial Sector Conduct Authority;  
“**Financial Markets Act**” means the Financial Markets Act, 2012 (Act No. 19 of 2012);  
“**Financial Markets Act Regulations**” means the Financial Markets Act Regulations promulgated under the Financial Markets Act on 9 February 2018;  
“**Financial Sector Regulation Act**” means the Financial Sector Regulation Act, 2017 (Act No. 9 of 2017); and  
“**Prudential Authority**” means the Prudential Authority established by section 32 of the Financial Sector Regulation Act.
2. The Authority, hereby under section 104(1) of the Financial Sector Regulation Act, publishes this report on consultation undertaken during the making of **FMA Conduct Standard 2 of 2018** as set out in comment matrix in the Schedule.
3. In March 2012, National Treasury published the discussion document “*Reducing the risks of over-the-counter derivatives in South Africa*”<sup>1</sup> to outline the proposed policy approach to regulating OTC derivatives markets.
4. This was followed by the enactment of the Financial Markets Act setting out the empowering provisions catering for the licensing of market infrastructures relevant for these reforms in OTC derivative markets i.e. introduction of licensing requirements for clearing houses, trade repositories and recently in the consequential amendments that include licensing frameworks for central counterparties and provision for external market infrastructures. In addition a regulatory framework was developed jointly by National Treasury, the Financial Services Board (now the Financial Sector Conduct Authority) and

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<sup>1</sup> Reducing the risks of over-the-counter derivatives in South Africa, 2012. Available at <http://www.treasury.gov.za/legislation/bills/2012/FMB/Annexure%20B%20Reducing%20the%20Risks%20of%20OTC%20Derivatives.pdf>

the South African Reserve Bank. The regulatory framework includes the Financial Markets Act Regulations and the following regulatory instruments:

- 4.1 Criteria for Authorisation of OTC derivative providers (FMA Conduct Standard 1 of 2018)
  - 4.2 Requirements and additional duties of a trade repository (FMA Joint Standard 1 of 2018)
  - 4.3 Conduct Standard for OTC derivative providers
  - 4.4 The reporting obligations in respect of transactions or positions in over-the-counter derivatives (Joint Standard)
  - 4.5 Margin requirements for non-centrally cleared OTC derivative transactions to be set out in a Joint Standard.
5. This consultation report relates to the FMA Conduct Standard 2 of 2018: Conduct Standard for authorised Over-The-Counter Derivative Providers. This Standard has been published a number of times for public comments and in addition extensive stakeholder engagement has taken place. More specifically, the Standard was first published on 4 July 2014 and a second draft was published on 5 June 2015. The Standard was published for a third round of public comments on 21 July 2016. Comments were incorporated and the standard was published for a final round of comments on 6 April 2018.
6. The Minister of Finance promulgated the Financial Markets Act Regulations on 9 February 2018. After the commencement of the Financial Sector Regulation Act on 1 April 2018, the regulatory instruments were submitted to Parliament as required in section 103 of that Act. In addition, prior to submission for the parliamentary process, numerous and extensive engagements were held with market participants.
7. The issues raised by commentators were of a technical nature and engagement has taken place with industry to address their comments. There were no substantive policy issues to be addressed. A combined comment matrix as per the Schedule includes the comments raised during the consultation periods referred to in paragraph 5 and sets out the comments on each particular paragraph of the Standard and the Authority's response to the issues.

## SCHEDULE

### COMMENT MATRIX: CONDUCT STANDARD FOR AUTHORISED OVER-THE-COUNTER DERIVATIVE PROVIDERS

#### RESPONSE TO COMMENTS SUBMITTED FOR THE PUBLIC CONSULTATION PROCESS FOR THE DRAFT MINISTERIAL REGULATIONS ISSUED IN TERMS OF THE FINANCIAL MARKETS ACT (ACT, 19 OF 2012)

##### COMMENT MATRIX 6 APRIL 2018: CONDUCT STANDARDS

**Commentators:**

Banking Association of South Africa

Macquarie Securities

Standard Bank

JSE Limited

<b>Respondents</b>	<b>Section</b>	<b>Comments</b>	<b>Responses</b>
Banking Association of South Africa	<b>General Comments</b>	We note that the Board Notice is titled "Code of Conduct for authorised over-the-counter derivative providers", whilst the consequential amendments to the FMA delete all references to code of conduct and replaced it with the term "Conduct Standards". In order to align the consequential amendments with this Notice, we	Amended to "Conduct Standards for Authorised OTC Derivative Providers"

Respondents	Section	Comments	Responses
		propose the following amendment – Code Of Conduct Standards For Authorised Over-The-Counter Derivative Providers	
Banking Association of South Africa	<b>Definitions</b>	<p>The term “<b>confirmation</b>” is not defined in the Code or in the FMA (including the proposed consequential amendments to the Act by the FSR Bill), the proposed Regulations or this proposed Board Notice. We recommend that the term be defined along the same definition included in a previous version of the draft FMA Regulations (meaning the consummation, in writing, of legally binding documentation that records the agreement of the parties to all of the terms of an OTC derivative transaction and occurs when a record, in writing, of all of the terms of an OTC derivative transaction is signed manually, electronically or by some other legally equivalent means by the OTC derivative provider and client or counterparty).</p> <p><b>“complex transactions”</b> Transactions in respect of “complex products” are required to be confirmed within T+5. The code does not contain a definition of complex products, and it is not clear what the basis for such determination by ODP’s will be. We recommend that a definition of complex products be added, or alternatively that</p>	<p>Agreed. A definition has now been included in the Standard.</p> <p>A definition on a complex product was included in the Financial Markets Act Regulations: <b>“complex product”</b> means a bespoke OTC derivative which combines two or more product types or embeds one or more derivatives into another;</p>

Respondents	Section	Comments	Responses
		<p>confirmation timelines be set per asset class for the avoidance of doubt. We would recommend the latter option. In the event that the former option is taken, the definition of “complex products” could be drawn from the International Organisation of Securities Commissions (IOSCO) report on "Suitability Requirements with respect to the Distribution of Complex Financial Products". In that report, they are defined as “products whose terms, features and risks are difficult to value and are not reasonably likely to be understood by a retail customer because of their complex structure”.</p>	<p>The Conduct Standard on Reporting obligations in respect of transactions in over-the-counter derivatives was also amended to include a field on complex trade component identifiers</p>
Banking Association of South Africa	<b>2. Application of the Code of Conduct</b>	<p>How is it contemplated that the Code can be binding on Clients and Counterparties when there are no specific duties required and all requirements are on the ODP?</p> <p>Proposed amendment to ensure consistency of language with the FSR Bill and the consequential amendments to the FMA –</p> <p>2. Application of the conduct standard</p> <p>This conduct standard is binding on providers, their officers and employees, clients and counterparties</p>	<p>The provision has been amended to provide that it is binding on ODPs as these are the regulated persons in terms of the framework.</p>
Banking Association of South Africa	<b>4. General Principals (d)</b>	<p>What is considered proper standards of market conduct? Will this be further articulated in a</p>	<p>The provider must adhere to existing general principles/standards on market</p>

Respondents	Section	Comments	Responses
		Board Notice?	conduct
Banking Association of South Africa	<b>4. Categorisation of clients and counterparties (6)</b> “	<p><u>Appropriate</u>” under Section 4 (6) of the Code in relation to an ODP dealing with a client who elects to be categorised as a counterparty.</p> <p>The wording does not make it clear what criteria will be used to assess the knowledge and experience of a client to allow them to potentially be classified as a counterparty.</p>	The ODP should use discretion depending on the circumstances of each particular case.
Banking Association of South Africa	<b>Section5 Appropriateness (2)</b>	<p>What would be considered appropriate knowledge and experience? If it is expected that each ODP formulates their own criteria for assessment this could be prejudicial to the client.</p> <p>There should be guidelines proposed as to what is appropriate knowledge and experience otherwise the enquiry becomes very subjective</p>	Please see response above.
Banking Association of South Africa	<b>6. Disclosure to clients</b>	<p>Grammar suggestion -</p> <p>(1) A provider must ensure that representations and information provided to a client are –</p> <p>(b) provided in plain language, avoid uncertainty or confusion and not be misleading, provided that for purposes of this Notice, a disclosure is in plain language if it is reasonable to conclude that a person of the class of persons for whom the disclosure is</p>	Amendments have been incorporated

Respondents	Section	Comments	Responses
		intended, with average literacy skills and experience in dealing with derivative transactions, could be expected to understand the content, significance and importance of the disclosure without undue effort.	
Banking Association of South Africa	<b>Section 6 (2)</b>	Reasonable time” under Section 6 (2) relating to the provision of representations and information with regards to disclosure to clients. The absence of an agreed time may lead to different interpretations of “reasonable”	Reasonable will depend on the circumstances of each case.
Banking Association of South Africa	<b>Section 7 Client and counterparty agreements</b>	<p>Section 7 refers to “agreements in writing” that must be concluded with clients and counterparties, together with a list of items that must be included in these agreements.</p> <p>We recommend that the regulator specify that electronic agreements be acceptable under this provision and specify whether standards apply in respect of the wording to be included in an agreement or whether this will be at the discretion of the ODP.</p> <p>We further recommend that negative affirmation be allowed to suffice for client acceptance, and satisfy the standards of an</p>	In terms of the definition of ‘in writing’ in the Financial Markets Act, electronic actions are included The ODP may use its discretion with regard to wording as long as the requirements specified in the Standard are met.
Banking Association of South Africa	<b>8. Timely confirmations</b>	In the response document titled “MINISTERIAL REGULATIONS AND NOTICES COMMENT	In response to the comment below relating to negative affirmation – ODPs

Respondents	Section	Comments	Responses
		<p>MATRIX” released in July 2016 on page 70, the regulator agrees with the comment that the negative affirmation process should be included, however, we note that Notice does not provide for such affirmation.</p> <p>A negative affirmation process would allow ODPs to continue a trading relationship with clients and counterparties who are unable to assist ODPs in meeting these short confirmation timeline requirements. The allowance for negative affirmation also accords with the confirmation procedures that have developed in practice (negative affirmation has also been included as an acceptable and compliant form of EMIR confirmation by the International Swaps and Derivatives Association).</p> <p>We request the regulators to include a provision in the Notice that allows for negative affirmation</p>	<p>and counterparties/clients must reach consensus/ legally binding agreement on the terms of the OTC derivatives contracts.</p> <p>Where the deadline passes to finalise the agreement the ODPs /counterparties/clients will be deemed compliant provided ODPs/counterparties/clients have agreed in advance to confirm in this manner.</p>
Banking Association of South Africa	Section 8	Section 8 provides for confirmations within T+1 between counterparties, T+2 with a client, and T+5 in respect of complex products. Considering that timely confirmations have not previously been prescribed, it will be difficult to satisfy these stringent timelines from the outset	Given that transitional arrangements have been provided for ODPs authorisation – the Authority will not phase in the confirmation timelines.



Respondents	Section	Comments	Responses
		<p>of the regulation.</p> <p>We recommend that a phased, progressively decreasing, timeline be adopted, as was the case under EMIR (which commenced with a T+7 timeline). Should the timelines not be relaxed to allow ODPs to transition to timely confirmations, we anticipate that a number of exception reports will be submitted at the end of each month, as a result of a failure to confirm trades with the prescribed timelines.</p>	
Banking Association of South Africa		<p>We also recommend that the Code include language that specifies that an ODP will not be penalised where it has appropriate procedures and arrangements for timely confirmations in place, but nevertheless does not achieve the deadline for legitimate reasons, and reports this as required.</p> <p>EMIR expressly authorises confirmations to be performed “via electronic means” and we recommend that this confirmation method is included here.</p>	<p>Paragraph 8(3) provides as follows:</p> <p>Where the fixed deadline for confirmation has passed, the trade economics of the OTC derivative transaction are deemed to be confirmed, provided that the provider and client or counterparty have entered into a prior written agreement to that effect.</p> <p>Please refer to definition of ‘confirmation’ - acknowledgement may be in writing or electronically</p>
Banking Association of South Africa	<b>9. Portfolio reconciliations</b>	Currently international best practice recognises two alternate methods of portfolio reconciliation: "Exchange of Portfolio Data" and	The Standard is not prescriptive on the method of portfolio reconciliation – it requires that the ODP agrees with

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	<b>General</b>	<p>"One-Way Delivery of Portfolio Data". They differ mainly in the level of activity of the parties to the agreement in executing the portfolio reconciliation, where under the former scenario both parties initiate the procedure, while under the latter only the one. The former scenario is suitable where both parties are ODPs, whilst the latter is best suited when ODP's transact with non-ODPs.</p> <p>Insufficient detail regarding the portfolio reconciliation obligation is included, and we recommend that these two methods are specifically authorised. As with confirmations, we recommend that a negative affirmation process be expressly authorised in respect of portfolio reconciliations.</p>	<p>counterparties of clients in advance on which method will be applied. Therefore, in relation to counterparties that are ODPs the "exchange of portfolio data" may be utilised. In circumstances where another method is appropriate for the counterparty or client, this must be documented by the ODP or based on what an ISDA protocol permits.</p>
Banking Association of South Africa	<b>10 (1) (a) (i)</b>	<p>What would be considered <u>material terms</u> and is this based on contractual agreement between the parties?</p> <p>We recommend that a definition of "material term" is included, and that this should reference those terms that are reported to trade repositories.</p>	<p>The material terms relate to the terms of the OTC derivatives contract.</p>
Banking Association of South Africa	<b>10. Dispute resolution 10(2)</b>	<p>Correction of typo –</p> <p>(2) A provider must promptly notify the registrar of any disputes relating to an OTC derivative</p>	<p>Typo has been corrected</p> <p>The dispute threshold amount relates to "per counterparty"</p>

Respondents	Section	Comments	Responses
		<p>transaction, its valuation or the exchange of collateral for an amount or a value higher than R100 million and not resolved within 10 business days.</p> <p>Is this per counterparty or across the whole collateral book?</p>	
Banking Association of South Africa	<b>11. Portfolio Compressions</b>  <b>General</b>	<p>Portfolio compression is currently prescribed in the Code of Conduct. Compressions are not currently performed across all asset classes and tend to be costly. We recommend, due to the technicalities and expenses associated with portfolio compression, that a compression threshold be set, as is the case under EMIR, where compression is only required where there are “500 or more OTC Derivatives contracts outstanding with a counterparty”.</p> <p>We would welcome additional information in relation to the processes, legal documentation or economic outcome of compressions. We recommend that exceptions to the requirements of portfolio compression be included, and in this regard note the statement made in IOSCO’s Risk Mitigation Standards for non-centrally cleared OTC derivatives FR01/2015 that “portfolio compression may carry some disadvantages specific to a party's legal, tax, accounting and/or operational status</p>	<p>Compression is limited to at least twice a year with other ODPs- the provisions do not state “must”, but states that providers analyse possibility of performing portfolio compression exercises. Please see the revised Standard.</p> <p>There is no restriction on use of third parties to complete compression exercises.</p>

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		<p>and may therefore not be appropriate in all circumstances.”</p> <p>The requirements for portfolio compressions contained in the Code appear to extend further than offshore compression requirements. Under EMIR, the corresponding requirement is to “analyse the possibility to conduct a portfolio compression exercise in order to reduce their counterparty credit risk and engage in such a portfolio compression exercise.”</p> <p>We recommend that similar wording be included in the Code to evidence that compression is not mandatory.</p> <p>Further, we require clarity is respect of whether current compressions performed in TriOptima will suffice for these purposes. This goes to the general point made above in respect of how much guidance industry can expect to receive on these enhanced requirements.</p>	
Banking Association of South Africa	<b>12 Safeguarding of collateral and margin</b>	Clarity on whether a single account may be used for all client collateral, or alternatively whether an account per client is required. We do not support the latter interpretation.	The requirement is for clients and counterparties’ collateral to be segregated from that of the ODP, accordingly a single account for all client and counterparty collateral will suffice provided that identification in its books of which collateral belongs to

Respondents	Section	Comments	Responses
			which client or counterparty is done.
Banking Association of South Africa	<b>17. Waiver of rights</b>	<p>Proposed amendment to ensure consistency of language with the FSR Bill and the consequential amendments to the FMA –</p> <p>A provider may not request or induce in any manner a client or counterparty to waive any right or benefit conferred on the client or counterparty by or in terms of this conduct standard, or recognise, accept or act on any such waiver by the client or counterparty, and any such waiver is void</p>	Wording revised
Banking Association of South Africa	<b>18. Legal certainty</b>	<p>Proposed amendment to ensure consistency of language with the FSR Bill and the consequential amendments to the FMA –</p> <p><b>18. Legal certainty</b></p> <p>Non-compliance with the provisions of this conduct standards will not</p>	Wording revised
Banking Association of South Africa	<b>19. Transactional arrangements and commencement date</b>	<p>The Code of Conduct for authorised ODPs includes a 6 month transition period, in terms of which ODPs only have to comply with the Code within 6 months of their authorisation.</p> <p>We recommend that this transition period also be included in subsequent clearing and trade reporting regulation (no mention is made of</p>	The comment is noted.

Respondents	Section	Comments	Responses
		<p>whether these regulations will include the transition period).</p> <p>We recommend that this transition period be calculated from the date of licensing of a South African clearing house or trade repository respectively.</p>	
Macquarie Securities (Round 3)	<b>Section 4</b>	<p>We propose that statutory protection be included for ODPs who receive prima facie proof that the “contracting party” is a “counterparty” (as defined in the FMA Regulations) i.e. it presents its FSP certificate then it can be deemed to be “appropriate” in the circumstances</p>	<p>Not accepted. The provider will assess the status of the counterparty in accordance with the provider’s written policies and procedures.</p>
Macquarie Securities (Round 3)	<b>Section 5(7) Appropriateness</b>	<p>It appears that the ODP is “cleansed” in circumstances where client proceeds to transact despite the warnings – please can this be made clear.</p>	<p>Correct – it is the clients’ risk should they decide to continue with the transaction despite warning by the ODP</p> <p>Section 5 (7) stipulates:</p> <p>If a client, despite the warnings by a provider as provided for in subparagraphs (5) and (6), elects to execute a transaction or transactions in OTC derivatives, the provider may continue with such transaction or</p>

Respondents	Section	Comments	Responses
			transactions.
Macquarie Securities	<b>Clause 12- Safeguarding of collateral</b>	This clause does not distinguish between initial and variation margin, and implies no re-hypothecation of collateral, please clarify so as to give effect to the re-use, re-hypothecation of variation margin as per the final margin requirements provisions.	Clause 12 of the Standard deals with the safeguarding of collateral. This Standard would need to be read with the finalised margin requirements. The requirements for initial margin and variation margin and re-hypothecation are imposed in terms of the margin requirements.
Standard Bank (Round Two)		<p>The RTS described in the Code of Conduct for the draft FMA regulations appear to be in line with the readiness that has been / is being introduced offshore under EMIR, Dodd Frank and other frameworks. Standard Bank proposes that these be split out from the Code of Conduct into a separate document dealing with only RTS that applies to non-cleared OTC derivatives.</p> <p>In particular:</p> <ul style="list-style-type: none"> <li>a) CSA documentation will be required to support the new margin arrangements;</li> <li>b) Currently existing CSA documents will</li> </ul>	The Authorities note your comment regarding the requirements in the code of conduct and risk mitigation technique requirements – the confirmation period for non-bank entities have not been amended, however, deemed confirmation will be acceptable where ODPs, counterparties and clients agree in advance to it if a fixed deadline for confirmation is missed. Amendments included for deemed confirmation. Please see the revised Standard.

Respondents	Section	Comments	Responses
		<p>have to be amended in line with new margin requirements;</p> <p>c) Authorised ODPs will require written self-certification from the their entire client / counterparty base, supported by the large scale independent communication effort from each authorized ODP;</p> <p>d) Master documentation will require amendment to accommodate a consent provision for reporting of a transaction.</p> <p>ISDA and CSA agreements are currently not a regular feature of our corporate market. To ease the pressure of the repapering exercise, we ask regulators' implementation timelines take into consideration the time and effort needed to arrange, negotiate and execute such agreements.</p> <p>Typically, in South Africa, the exchange confirmation with non-bank entities in the timelines currently proposed (T+1 to T+5, depending on entity type and transaction) is problematic as most non-bank entities do not have the operational capabilities to ensure the processing thereof within very short periods of time. Therefore the following must be</p>	<p>Amendments incorporated.</p>



Respondents	Section	Comments	Responses
		<p>considered:</p> <p>a) Extending the confirmation timelines with non-bank entities to be more realistic / practical for our market; or</p> <p>That the regulator is accepting of a negative affirmation process (agreed bilaterally with counterparties at a master agreement level). This would all ODPs to comply on an “affirmed” basis with stringent confirmation requirements and avoid the need to need to disrupt trading activities with the counterparties who are unable to return confirmations within such timelines.</p>	
JSE Limited (Round Two)	<b>Code of Conduct – s7(2)(iii)</b>	Clarity is sought on why the written agreement between a provider and a client or counterparty must make provision for “re-hypothecation” of securities used as collateral or margin for non-cleared OTC derivatives transactions when “re-hypothecation” is not permitted in terms of the draft notice margin requirements.	The margin requirements have been revised – re-hypothecation is permitted with conditions in respect of initial margin. Therefore the provision in the Standard is relevant.
JSE Limited (Round Two)	<b>Code of Conduct - s7(2)f</b>	Every ODP will be obliged to obtain consent for every client and they will be in breach of the Code of Conduct if they do not obtain consent. But consent is not necessary because it is a regulatory requirement for ODPs to report. Therefore we recommend deleting this section.	The authorities disagree with the comment – consent is required from the client or counterparty for information disclosure
JSE Limited (Round Two)	<b>Code of Conduct –</b>	Reference is incorrectly made to sub-paragraph (2)(f)	Please see amendments in 7(4), reference refers to sub-paragraph

Respondents	Section	Comments	Responses
	<b>s7(3)</b>		7(2)(f) on valuation of transactions, collateral and portfolios
JSE Limited (Round Two)	<b>Code of Conduct – s10(2)</b>	<p>Clarity is sought on whether the amount disputed must be higher than R100m or whether the value of derivatives or collateral, which is subject to the dispute, must be higher than R100m. If it is the former and the Registrar wants to be made aware of material disputes that may arise, we are of the view that the amount seems very high. If it is the latter, we propose re-wording to clarify the ambiguity.</p> <p>Also correct the typo in the paragraph by removing “in” before the words “10 business days”.</p>	<p>Transaction or its valuation or collateral - Value of the OTC derivatives transaction or the collateral for an amount higher than R100 million - therefore the latter interpretation.</p> <p>Typo “in” corrected.</p>
JSE Limited (Round Two)	<b>Code of Conduct – s12</b>	<p>As drafted, the provisions of safeguarding collateral and margin seem to be aimed at ODPs which are not banks. S12(2) stipulates that ODP must open and maintain a separate account designated for clients’ and counterparties’ funds “at a bank” and must ensure that the separate account does not contain the ODPs own funds.</p> <p>What if the ODP is a bank? On assumption that an ODP is also required to segregate clients’ collateral, we would suggest re-wording to make it clear that if the ODP is bank that the</p>	<p>The amendments to the Standard have been made to section 12; the provision requires the segregation of the client or counterparties funds or securities collected as collateral from proprietary assets including from the books and records of a third party custodian or through a legally effective arrangement made by the ODP.</p>

<b>Respondents</b>	<b>Section</b>	<b>Comments</b>	<b>Responses</b>
		account containing client collateral should be opened at another bank as we are not aware of any other way in which a bank could segregate its clients' assets from its own assets.	
JSE Limited (Round Two)	<b>Code of Conduct – s12(2)(a)</b>	Counterparty's" should be "counterparties".	Amendments have been made to the Standard; please see revised Standard.
JSE Limited (Round Two)	<b>Code of Conduct – s18(a)</b>	"Contractor" should be "contract	Please see revised Standard
JSE Limited (Round Two)	<b>Code of Conduct – s18(c)</b>	What is the basis for non-compliance with a provision of the Code of Conduct not giving rise to any right to compensation from a party to an OTC derivatives contract? What about instances where a client suffers financial prejudice as a result of non-compliance with provision(s) of the Code regarding treatment of clients?	Agreed to amend and delete reference to 18(b) - another legal framework would be applicable for breach of contract/material terms and not the Conduct standard.

**COMMENT MATRIX 5 June 2015:**

**Commentators:**

Banking Association of South Africa

Respondents	Section	Comments	Responses
Banking Association of South Africa (BASA)	<b>Section 6(8)(b)</b>	<p>General comments</p> <p>Although this proposed Board Notice is named “Code of Conduct”, save for paragraphs 3, 5 and 6, all the provisions relate to risk mitigation standards in respect of non-centrally cleared OTC derivatives and not “conduct standards”.</p> <p>Given that the SARB has published, for comment, the Code of Conduct for the South African Over-the-Counter (OTC) Markets, and to avoid confusion it is recommended that this “code” is incorporated in this proposed “Code of Conduct” and the risk mitigation standards are provided for in a separate Board Notice - Risk Mitigation Standards for Non-centrally cleared OTC derivatives, in terms of section 6(8)(c), which provides for “standards” to be prescribed by the Registrar.</p>	The Code of Conduct published by the SARB will be aligned with these standards which are specifically applicable to authorised ODPs.
Banking Association of South Africa (BASA)	Transitional arrangements	<p>While we are cognisant that an ODP will be required to comply with the provisions of this Board Notice once it has been authorised, we recommend that specific transition provisions are provided for to allow an authorised ODP to fully comply with all the requirements. We propose the following provision:</p> <p><b><u>19. Transitional Arrangements</u></b></p> <p><u>A provider must comply with the provisions of this Notice within six months of its authorisation by the Registrar.</u></p>	Agreed.
Banking Association of South Africa	<b>3. General principles</b>	Correction of typo - 3. General principles	Agreed.

Respondents	Section	Comments	Responses
(BASA)		A provider must – (a) ... (e) conduct itself in such a manner that does not <del>to</del> impede the objects of the Act	
Banking Association of South Africa (BASA)	<b>5. Appropriateness</b>	Undefined term  8) The provision of warnings required in sub-paragraphs (5) and (6) does not constitute the provision of advice for the purposes of the <del>FAIS Act</del> <b><u>Financial Advisory and Intermediary Services Act, 2002 (Act No. 37 of 2002)</u></b>  .	Agreed.
Banking Association of South Africa (BASA)	<b>7.Client and counterparty agreements</b>	Sufficient lead-in time (i.e. six months) for agreements to be in place should be provided for in a transition provision.	Agreed - see transitional provision.
Banking Association of South Africa (BASA)	<b>7(2)(b)(iii)</b>	We note that this provision is not aligned to the proposed Board Notice – Margin for non-centrally cleared OTC derivative transactions, however we strongly advocate the alignment with the IOSCO Principles	The provision is qualified by the phrase ‘if any’. If no such arrangements are in place, there would be no necessity to include same in the agreement.
Banking Association of South Africa (BASA)	<b>7(2)(d)</b>	Proposed amendment to clarify that this provision in an agreement is only required in the circumstances where a client elects to be categorised as a counterparty  Despite the minimum requirements provided in sub-paragraph (1) the agreement must make provision for – (a)...  (d) <b><u>where applicable</u></b> , an attestation that the client meets the requirements to be categorised as a counterparty;	Agreed.

Respondents	Section	Comments	Responses
Banking Association of South Africa (BASA)	<b>7(2)(e)</b>	<p>Proposed amendment to ensure clarity of the requirement –</p> <p>Despite the minimum requirements provided in sub-paragraph (1) the agreement must make provision for –</p> <p>(a)...</p> <p>(e) <b>the requirement for</b> notification by the counterparty if it ceases to meet the requirements to be categorised as a counterparty;</p>	Agreed.
Banking Association of South Africa (BASA)	<b>7(3)</b>	<p>Incorrect cross-reference –</p> <p>(3) In order to comply with sub-paragraph <del>(2)(f)</del> <b>(2)(g)</b> a provider...</p>	
Banking Association of South Africa (BASA)	<b>8. Timely confirmations</b>	<p>It is not clear what the term “confirmation” means as it is not defined in the Act (including the proposed consequential amendments to the Act by the FSR Bill), the proposed Regulations and this proposed Board Notice.</p> <p>If it is the drafter’s intention that the term “confirmation” has the same meaning as the internationally accepted term and the term defined in the first draft of the Regulations (means the consummation, in writing, of legally binding documentation that records the agreement of the parties to all of the terms of an OTC derivative transaction and occurs when a record, in writing, of all of the terms of an OTC derivative transaction is signed manually, electronically or by some other legally equivalent means by the OTC derivative provider and</p>	The comment is noted. Please see the revised wording.

Respondents	Section	Comments	Responses
		<p>client or counterparty then we submit that the requirement for a provider to “ensure” confirmation within the short timelines provided for in Annexure is unreasonable.</p> <p>We strongly recommend that the following amendment</p> <p><b>8. Timely confirmations</b></p> <p>(1) ...</p> <p>(2) A provider must <b><u>use best efforts to ensure</u></b> that the details of the transactions are confirmed—</p> <p>In addition, to avoid market disruption, we propose that provision is made for a negative affirmation process to be agreed, in writing, prior to execution of a transaction.</p> <p>A negative affirmation process would allow ODPs to continue a trading relationship with its clients and counterparties who are unable to assist ODPs in meeting these short confirmation timeline requirements.</p>	
Banking Association of South Africa (BASA)	<b>9. Portfolio reconciliation</b>	<p>We propose that the requirement that an ODP be responsible for the performance of portfolio reconciliations with counterparties and clients is impractical and not aligned to market practice.</p> <p>Interbank or inter-provider portfolio reconciliation could typically be achieved automatically via platforms such as TriResolve. However, in respect of non-bank entities the reconciliation will typically be a manual process.</p> <p>The ODP provides the data to its client/counterparty, who then has the ability within a certain period of time to raise discrepancies. The discrepancies are then subject to the requirement for dispute resolution within a certain period of</p>	Noted. Please see the revised wording.

Respondents	Section	Comments	Responses
		<p>having been raised.</p> <p>Consequently, we propose the following amendment:</p> <p><b>9. Portfolio reconciliation</b></p> <p>(1) In order to identify at an early stage any discrepancy in a material term of a non-cleared open OTC derivative transaction, including its valuation, a provider must establish, maintain and implement written policies and procedures reasonably designed <del>to ensure that it performs a portfolio reconciliation in order to reconcile its portfolio</del> –</p>	
Banking Association of South Africa (BASA)	<b>18(a)</b>	<p>Correction of typo –</p> <p><b>18. Legal certainty</b></p> <p>Non-compliance with a provision of this Code of Conduct will not- affect the validity of an OTC derivative contract; <del>or</del></p> <p><u>or</u></p>	Agreed.