



Financial Sector
Conduct Authority

CONSULTATION REPORT

DETERMINATION RELATING TO FOREIGN COLLECTIVE INVESTMENT SCHEMES SOLICITING INVESTMENTS IN THE REPUBLIC

Consolidated comments and responses to the public comments received

March 2026

1. Purpose

- 1.1 Section 104 of the Financial Sector Regulation Act, 2017 (Act No. 9 of 2017) (FSR Act) states that with each regulatory instrument, the maker must publish a consultation report which must include:
- (a) a general account of the issues raised in the submissions made during the consultation; and
 - (b) a response to the issues raised in the submissions.
- 1.2 The purpose of this document is to set out, as required in terms of section 104 of the FSR Act, a report on the consultation process undertaken in respect of the draft Determination – Requirements Related to Foreign Collective Investment Schemes, soliciting investments in the Republic.

2. Summary of public consultation process

- 2.1 On 29 August 2024, the Financial Sector Conduct Authority (FSCA) published the following documents, with the comments due on 11 October 2024:
- (a) draft Determination;
 - (b) draft Statement in support of the draft Determination; and
 - (c) comments template providing the manner in which the comments must be submitted in accordance with the provisions of the draft Determination.
- 2.2 Following the public consultation process on the draft Determination, the FSCA received 34 individual comments from 3 different commentators.
- 2.3 A general account of the issues raised during the consultation process, the responses of FSCA, details of the commentators, as well as the full set of comments can be found in paragraph 3 and the Schedule below. Where appropriate, certain comments and/recommendations made by the commentators resulted in amendments effected on the draft Determination.

3. General account of the most fundamental issues raised in the submissions made during the consultation process

The following are the most fundamental issues that were raised during the consultation process:

No	Issue	Summary of comments	FSCA response
1.	Conditions relating to prohibited investment and borrowing	It is understood that this prohibition is intended to outright prohibit certain types of investments. The prohibition does not seem to align with a principles-based approach and appears contradictory to the principles-based approach. These paragraphs cannot be made prohibitions for structured products and investment in other schemes. It also seems as if hedge fund CIS were not considered as foreign hedge funds might invest in complex derivatives or structured products, and they are permitted to use net short positions. If certain instruments or strategies are to be prohibited, it must be clearly	The essential premise of a principle-based regulation or framework is that of establishing values and norms by which financial institutions must abide. Through principle-based regulation, regulators set out specific outcomes flowing from the actions, processes and governance arrangements of financial institutions. The move from a rules-based regulation to outcomes and principle-based approach does, however, not imply the complete absence of any rules. In this light, the conditions relating to prohibited investments contemplated in paragraph 7(1) are designed to ensure specific outcomes for investors.

No	Issue	Summary of comments	FSCA response
		<p>defined, for example synthetic instruments and structured products. It is submitted that the prohibitions contained in paragraph 7(1) are unreasonably restrictive and contradictory to the principles-based approach. It is thus proposed that paragraph 7(1) be deleted, and that paragraph 4(5) be appropriately amended to deal with these instruments.</p>	<p>However, we agree that some of the prohibitions might have unintended consequences. As such, paragraph 7(1) has been amended to –</p> <p>(a) remove the reference to “financial derivative instruments or structures / strategies which are complex or of exotic compositions” and “structured products; and</p> <p>(b) change the “synthetic instrument” prohibition to only apply in a non-qualified investor context.</p> <p>Further, paragraph 4 of the Determination was amended to mitigate potential risks flowing from the changes to paragraph 7(1). Essentially when the Authority assess an application for approval, it would be able to consider the type of derivative instruments and structured products comprising a portfolio. Therefore, instead of applying an outright prohibition, the Authority can consider these matters on a case-by-case basis.</p>
2.	Prohibited investments for a CIS in securities	<p>There can at times be a disconnect between how the FSCA and a fund's home state regulator categorises hedge funds. We believe that to some extent, there is a 'gap' in the FSCA's foreign CIS approval mechanism, where offshore funds that are not hedge funds in their home state are unable to obtain approval as a CIS in securities, for example if they use derivatives for purposes other than hedging or efficient portfolio management. Such a strategy can be permitted in a fund's home and the fund is suitable for all investors, including those considered less sophisticated and given the most local regulatory protection; for example, non-complex UCITS funds in the UK</p> <p>We believe that the approval mechanism for a foreign CIS in securities should be on a case-by-case basis and a fund should not automatically be excluded categorisation as a CIS in</p>	<p>The proposed Determination does away with the comparative content requirement and evaluates the applications on a case-by-case basis. However, if found acceptable, the Authority may determine the similar category or investor market that the fund may be sold in. It may also make further conditions that the particular scheme must comply with so as not to create risks etc. that are not comparable with the risk limitations for investments in South Africa.</p>

No	Issue	Summary of comments	FSCA response
		<p>securities if it utilises a prohibited condition in section 7 of the draft determination.</p> <p>It was suggested that the FSCA should, where an equivalent home state regulator determines a fund is suitable for all investors (e.g. a non-complex UCITS Fund), take this into consideration in the approval process for a CIS in securities, rather than solely relying on rigid provisions within Cisca and BN 257.</p>	
3.	Solicitation of investments in the foreign scheme that may be contrary to the interests of the public.	<p>Commentators acknowledged that the FSCA intends to move to principle-based requirements and may exercise discretion on the manner and extent to which instruments are used in a foreign portfolio. However, commentators were of the view that this creates significant uncertainty as to what the FSCA will regard as appropriate for the solicitation of investments in the foreign scheme to be in the interest of investors. This is complicated further by the provisions contemplated in Board Notice 90. Commentators contended that it important that the FSCA issues guidance as to how the discretion will be exercised so that managers and trustees can exercise the discretion similar to the FSCA.</p>	<p>Comments noted. Our view is that, when a local CIS wishes to invest in a foreign CIS, then the manager and trustee must perform a due diligence on the foreign CIS and determine whether it is appropriate. What is contemplated in paragraph 4(5) is that the Authority, based on regulatory and supervisory insights, may apply its discretion to the extent appropriate in determining public interest. It is expected that this discretion is not open ended and subject to regulatory prescripts. The extent, ambit and granularity of such discretion is beyond the scope of this Notice.</p> <p>To mitigate any concerns, the Authority may where appropriate and based on supervisory and regulatory insights, issue a guidance notice in respect of how and what factors will be considered when exercising such discretion. Guidance notices are consulted on before finally published.</p>



FSCA CIS NOTICE 1 OF 2026

DETERMINATION RELATING TO FOREIGN COLLECTIVE INVESTMENT SCHEMES SOLICITING INVESTMENTS IN THE REPUBLIC

INDEX

Section A	List of Commentators
Section B	Comments on the draft Notice
Section C	Questions relating to the anticipated impact of the draft Notice
Section D	General Comments

SECTION A - COMMENTATORS

	Commentator	Acronym
1.	Association of Savings and Investments South Africa	ASISA
2.	Standard Bank of South Africa	SBSA
3.	Baillie Gifford Overseas Limited (FSP 44870)	Baillie Gifford

SCHEDULE

FURTHER PUBLIC COMMENTS AND RESPONSES: NOTICE OF DETERMINATION REQUIREMENTS FOR FOREIGN COLLECTIVE INVESTMENT SCHEMES SOLICITING INVESTMENTS IN THE REPUBLIC

SECTION B - COMMENTS ON THE DRAFT DETERMINATION

No	Commentator	Section of the Determination	Comment	FSCA Response
CHAPTER 1. DEFINITIONS, PURPOSE, AND DETERMINATIONS				
1.	ASISA	“market gearing” refers to the ratio of a company’s debt relative to its equity;	<p>The definition appears inappropriate if the context within which it is used is considered. Paragraph 4(5)(d) provides that the FSCA, in determining if solicitation on investments in a foreign scheme may be contrary to the interests of investors, etc., will consider if (and the extent to which) gearing is used and the purpose for such gearing for several uses (derivatives, etc.). It is understood that the FSCA intended to refer to fund/portfolio gearing, as opposed to market/company gearing, indicating that funds/portfolios should not be exposed beyond the value of its assets. It is thus proposed that the definition be rephrased.</p> <p><u>Proposed wording:</u> “market gearing” refers to the ratio of a company’s debt relative to its equity means the use of financial instruments, including derivative instruments, short positions or borrowed capital to increase the exposure beyond the capital employed to assets; The proposed wording is aligned to the wording of the definition of “leverage” in Board Notice 52 and assets is a term defined in CISA.</p>	Agree. See changes made to the revised Determination.
2	SBSA	“commodities exchange traded funds” means an exchange traded fund invested in physical commodities, such as agricultural goods, natural resources and precious metals;	In so far a commodities are mentioned in BN90, it only references precious metals and minerals. Will BN90 need to be expanded to include ETF’s and ETN’s that include other commodities apart from precious metal?	This instrument focuses on a broad description of requirements for foreign funds, not local fund legislation.

No	Commentator	Section of the Determination	Comment	FSCA Response
3.	ASISA	“REITS” has the meaning assigned to that term in Board Notice 42 of 2014; and	Referring to a specific Board Notice is problematic. The BN42 (conditions for the winding up of a property CIS) definition refers to the JSE and Income Tax Act compliance which limits it to South African REITs. For the sake of clarity, it is suggested that the definition be rephrased: <u>Proposed wording:</u> “REITS” has the meaning assigned to that term in Board Notice 42 of 2014 means Real Estate Investment Trust, a company that derives income from the ownership, trading, and development of income-producing real estate assets, listed on an external exchange as defined in the Financial Markets Act, No. 19 of 2012; and	Agree. See changes made to the revised Determination.
CHAPTER 2. FORMAT OF APPLICATION APPROVAL FOR A FOREIGN SCHEME UNDER SECTION 65(1) OF THE ACT				
4	ASISA	3(1)(b) and (c) An application for approval in terms of section 65 of the Act must be in writing and, to the extent applicable, include – (b) the full name and address of the applicant; (c) the full name and address of the foreign regulator to which the applicant and foreign scheme is subject in the applicant's country of registration;	The reference to applicant in this context is incorrect because it, by definition, includes a South African manager. It is suggested that the reference to “applicant” be replaced with a reference to “operator”. (b) the full name and address of the applicant operator; (c) the full name and address of the foreign regulator to which the applicant operator and foreign scheme is subject in the applicant's operator's country of registration;	Comments noted. In our view, the question is whether any other person other than an operator could apply. Ultimately the conditions for approval must be met by the operator. Accordingly, if the Authority receives an application, it must be clear why the operator itself is not applying. In those circumstance, proof may need to be submitted e.g. power of attorney. However, to address the comment, a relevant definition of “applicant” has been included.
5	ASISA	3(1)(i) An application for approval in terms of section 65 of the Act must be in writing and, to the extent applicable, include –	The reference to applicant in this context is incorrect because it, by definition, includes a South African manager. It is suggested that the reference to “applicant” be replaced with a reference to “operator”. (i) where a representative agreement has been concluded, details of the manager with which the applicant operator has	See response above at item 4.

No	Commentator	Section of the Determination	Comment	FSCA Response
		(i) where a representative agreement has been concluded, details of the manager with which the applicant has entered into the representative agreement, and a copy of the representative agreement;	entered into the representative agreement, and a copy of the representative agreement	
6	ASISA	<p>3(1)(j) An application for approval in terms of section 65 of the Act must be in writing and, to the extent applicable, include –</p> <p>(j) written confirmation from the applicable foreign regulator verifying that the scheme -</p> <ul style="list-style-type: none"> (i) has been approved and authorised in accordance with the legislation of the domicile of registration of the foreign scheme; (ii) is subject to supervision by the foreign regulator in the relevant jurisdiction; (iii) is by applicable law permitted to solicit investment in the respective jurisdiction and outside its domicile of registration; and (iv) the applicant is fit and proper and in good standing with such foreign regulator; 	<p>1. It is ASISA members' experience that foreign regulators do not provide this kind of written confirmation and that the FSCA has obtained it directly from the foreign regulator through co-operation agreements with its counterparts in other jurisdictions. It is submitted that the requirement should not form part of application requirements. It should rather be a condition for approval so that the FSCA can obtain the required confirmation from the relevant foreign regulator.</p> <p>2. The reference to applicant in the context of subparagraph (j)(iv) is incorrect because it, by definition, includes a South African manager. If one considers that the introductory sentence of paragraph (j) refers to a foreign scheme, and that the definition of applicant refers to an operator of a foreign collective investment scheme, it is unclear for which entity the FSCA requires a written confirmation relating to fit and proper and good standing. Is it for the foreign scheme or for the foreign operator? This should be clarified.</p>	<p>Comments noted. The scheme if it is self-managed, or the operator itself, must be in good standing. The provision for this requirement is made in section 3(j)(iv) of the Determination.</p> <p>However, whilst the Authority may, and does, obtain confirmations from the foreign regulators in the case of most European countries to assist, this cannot be made a duty of the Authority, nor make the application dependent upon the Authority obtaining such confirmations; it must remain an onus on the applicant and therefore grounds for an unsuccessful application (which would happen if the Authority also cannot obtain the confirmations.)</p>

No	Commentator	Section of the Determination	Comment	FSCA Response
7	ASISA	3(1)(k) An application for approval in terms of section 65 of the Act must be in writing and, to the extent applicable, include – (k) a certified copy of the approval or registration of the foreign scheme;	It is ASISA members' experience that the FSCA has, since 2020, accepted a copy of the approval or registration of a foreign scheme, without it being certified as a true copy of the original document. In foreign jurisdictions, it is not as easy as in South Africa to certify copies. It is costly to obtain such a certification from a foreign notary or attorney. It is submitted that a copy, together with the FSCA obtaining confirmation from a foreign regulator (as suggested in the comment on paragraph 3(1)(j)) should be sufficient. It is therefore suggested that the reference to "certified" be deleted. (k) a certified copy of the approval or registration of the foreign scheme;	Comments noted. The principle of reciprocity may be an issue in this instance as foreign regulators require notarised/certified copies. Supervisory experience shows that not in all instances are the finer details provided by an applicant. A copy may be sufficient, and the Determination has been amended, however if there was any reasonable belief that a copy is not authentic, then the Authority may require copy of the approval document.
8	ASISA	3(1)(l) An application for approval in terms of section 65 of the Act must be in writing and, to the extent applicable, include – (l) a certified copy of the fund rules and instruments of incorporation of the scheme and portfolio(s);	Please refer to the comment on paragraph 3(1)(k). Similarly, it is suggested that the reference to "certified" be deleted. In some foreign jurisdictions, depending on the structure of the scheme, the fund rules (portfolio rules or investment restrictions for portfolios) and the instrument of incorporation of the scheme (founding document) are in the same document. Considering paragraph 3(1)(m) which requires a prospectus, seemingly referring to portfolio prospectuses, this may cause confusion. It is suggested that paragraph 3(1)(l) refers only to instruments of incorporation, or the founding document and that paragraph 3(1)(m) refers to fund or portfolio rules. The reference to "to the extent applicable" in the introductory paragraph of paragraph 3(1) will provide for cases where	Agree. See changes made to the Determination. However, a "portfolio" may be relevant. In our view the word "portfolio" should be retained. In agreeing with the intended meaning of the proposal, whilst fund rules are very important to evaluate the acceptability of the fund, an additional paragraph is added after 3(1)(m): <i>"The detailed fund rules must be included in either the founding documents or the document or</i>

No	Commentator	Section of the Determination	Comment	FSCA Response
			<p>the founding document and the portfolio particulars are in the same document.</p> <p><u>Proposed wording:</u></p> <p>(l) a certified copy of the fund rules and <u>founding document or</u> instruments of incorporation of the <u>foreign scheme and</u> portfolio(s);</p>	<i>prospectus contemplated under 3(1)(m)"</i>
9	ASISA	<p>3(1)(m) An application for approval in terms of section 65 of the Act must be in writing and, to the extent applicable, include –</p> <p>(m) the prospectus and any amendments to the prospectus including clear disclosure of all risks pertaining to the foreign scheme or portfolio and the nature of the foreign scheme or portfolio, which must be provided to all investors;</p>	<p>Although the current requirement in BN257 is phrased similarly, the reference to “any amendments” causes confusion. It is understood that the FSCA requires the latest prospectus as that will include any amendments.</p> <p>It is further understood that paragraph 3(1)(m) refers to portfolio particulars, in other words a document similar to a Minimum Disclosure Document (MDD) as contemplated in BN92. Please also refer to the comments on paragraph 3(1)(l) related to differentiation between paragraphs 3(1)(l) and 3(1)(m). Further, a prospectus is not always required to be <u>provided</u> to investors, it should be <u>available</u> to investors. Accordingly, it is suggested that paragraph 3(1)(m) be rephrased for the sake of clarity.</p> <p><u>Proposed wording:</u></p> <p>(m) the <u>document or prospectus and any amendments to the prospectus including used for purposes of disclosing information clear disclosure of all risks pertaining to the foreign scheme or portfolio and the nature of the foreign scheme or portfolio, setting out the essential characteristics of the foreign scheme or portfolio which will enable an investor or potential investor to understand the nature and risks of the foreign scheme or portfolio, which must be provided available to all investors and potential investors;</u></p> <p>The proposed wording is aligned with BN92 wording relevant to an MDD and it is believed that it achieves the aim of paragraph 3(1)(m).</p>	The Authority essentially agrees with the comments. However, the issue is that fund rules form part of the approval process. The Authority needs to assess the application, and must have sight of the fund rules and prospectus disclosures. Whether it is in the fund rules or prospectus, the relevant fund rules, as appropriate, must be included with an application for approval. See comments above at item 8 and the amendment made to the Determination.
CHAPTER 3. CONDITIONS FOR APPROVAL UNDER SECTION 65(1) OF THE ACT				
10.	ASISA	<p>4(1) General conditions An applicant and foreign scheme must be authorised and supervised</p>	Chapter 3 contains ongoing conditions for approval. It is not appropriate to refer to applicant in this context because it, by definition, includes a South African manager. It is the operator and the foreign scheme that must comply with the condition, not the SA	Comments noted, changes made to the Determination by means

No	Commentator	Section of the Determination	Comment	FSCA Response
		by a foreign regulator which has a regulatory framework equivalent to the regulatory framework established under the Act.	<p>manager. The reference to “applicant” should be replaced with a reference to “operator”.</p> <p>An applicant <u>operator</u> and foreign scheme must be authorised and supervised by a foreign regulator which has a regulatory framework equivalent to the regulatory framework established under the Act</p>	of a relevant definition for applicant.
11.	ASISA	4(4) The applicant must satisfy the Authority on an ongoing basis that –	<p>The reference to “on an ongoing basis” in the introductory sentence of the paragraph causes confusion. It is understood that the FSCA intended to indicate that the applicant must satisfy the Authority that the operator and the foreign scheme will on an ongoing basis comply with the conditions in subparagraphs (a) to (h), and not that the applicant must provide the satisfaction on an ongoing basis. It is suggested that the introductory sentence of paragraph 4(4) be rephrased for the sake of clarity.</p> <p><u>Proposed wording:</u> The applicant must satisfy the Authority, <u>that</u> on an ongoing basis, that -</p>	Agree with the proposal. See changes made to the draft Determination.
12.	ASISA	4(4)(e)The applicant must satisfy the Authority on an ongoing basis that – (e) the foreign scheme does not lend out investor’s funds;	<p>Paragraph 4(4)(e) causes confusion. The paragraph refers to a prohibition on lending, and it is construed that the FSCA meant to set a condition on foreign schemes similar to the provision in section 95(1)(b) of CISCAs applicable to a manager. However, because the definition of foreign scheme includes its portfolios, and considering that section 85(2) of CISCAs allows for lending of portfolio assets within the limits or on the conditions determined in the deed (scrip lending), it could lead to an interpretation that portfolios are prohibited from lending regardless of it being allowed in terms of the deed/prospectus. This could not have been the intention. It is suggested that paragraph 4(4)(e) be re-phrased for the sake of clarity.</p> <p><u>Proposed wording:</u> (e) the foreign scheme does not lend out investor’s funds or advance any money, except that the foreign scheme may lend or offer to lend assets included in the foreign scheme in the manner, within the limits or on the conditions determined in the founding document or the instruments of incorporation, document or the prospectus;</p>	Agree with the proposal. See changes made to the draft Determination.

No	Commentator	Section of the Determination	Comment	FSCA Response
13.	ASISA	4(4)(h) The applicant must satisfy the Authority on an ongoing basis that – (h) the pooling structure of the foreign scheme is one which is allowable in the Republic under the Act.	It is presumed that structures allowable/permissible in terms of Cisca is as contemplated in the definition of collective investment scheme in Cisca. This definition allows for a scheme, in whatever form, in pursuance of which members of the public are invited or permitted to invest money or other assets in a portfolio. The reference to “pooling structure” is likely to cause confusion. For the sake of clarity, it is suggested that the reference to “pooling” be deleted. <u>Proposed wording:</u> (h) the pooling structure of the foreign scheme is one which is allowable in the Republic under the Act.	This is stated within the context of a CIS i.e. the structure of a foreign CIS meets the definitions of a CIS. However, to mitigate any confusion and to ensure clarity, the draft Determination has been amended to address the proposal
14.	ASISA	4((5) Without limiting the generality of paragraph of 4(4)(b), in determining whether the solicitation of investments in the foreign scheme may be contrary to the interests of investors, potential investors, the financial sector or the public interest, the Authority will consider the manner and extent to which the following is used appropriately by the foreign scheme:	While it is understood that the FSCA intends to move to principle-based requirements and wishes to exercise discretion on the manner and extent to which instruments are used in a foreign portfolio etc., it creates significant uncertainty as to what the FSCA will regard as appropriate for the solicitation of investments in the foreign scheme to be in the interest of investors, etc. More importantly, Board Notice 90 paragraphs 3(3)(a)(ii) for a standard portfolio, 10(g) for a fund of funds and 12(c) for feeder funds require that where a manager includes foreign portfolios, the underlying foreign portfolio must – (i) must have been approved in terms of section 65, and be subject to an annual review by the manager to ensure that it continues to comply, or (ii) where the underlying portfolio has not been approved in terms of 65, be subject to a due diligence investigation conducted by the manager, to the satisfaction of the trustee, to ascertain if the portfolio would qualify for approval in terms of the conditions under section 65. This means that a manager and trustee should exercise the same discretion as the FSCA. It is therefore critically essential that the FSCA issues guidance as to how the discretion will be exercised so that managers and trustees can exercise the discretion similar to the FSCA. It is believed that such guidance will lead to consistent application by all. It is crucial that such guidance be crafted in consultation with industry to avoid the challenges experienced with Guidance Notes 2 and 2A.	Comments noted. Our view is that, when a local CIS wishes to invest in a foreign CIS, then the manager and trustee must perform a due diligence on the foreign CIS and whether it is appropriate. What is contemplated in paragraph 4(5) is that the Authority, based on regulatory and supervisory insights, may apply its discretion to the extent appropriate in determining public interest. It is expected that this discretion is not open ended and subject to regulatory prescripts. The extent, ambit and granularity of such discretion is beyond the scope of this Determination. To mitigate any concerns, the Authority may where

No	Commentator	Section of the Determination	Comment	FSCA Response
				appropriate and based on supervisory and regulatory insights, issue a guidance notice in respect of how and what factors will be considered when exercising such discretion. Guidance notices are consulted on prior to final publication.
15.	ASISA	<p>4(5)(e) Without limiting the generality of paragraph of 4(4)(b), in determining whether the solicitation of investments in the foreign scheme may be contrary to the interests of investors, potential investors, the financial sector or the public interest, the Authority will consider the manner and extent to which the following is used appropriately by the foreign scheme:</p> <p>(e) financial derivative instruments, where used for purposes other than hedging or efficient portfolio management such as -</p> <ul style="list-style-type: none"> (i) for investment purposes; (ii) to follow an active investment strategy; (iii) furtherance of the investment objective or strategy; (iv) to actively manage the investment policy or objective; (v) to obtain or manage exposure to the market or to specific asset classes (including the use of total 	<p>With reference to subparagraph (e)(iv), any use of derivatives will be done in an active sense; you cannot passively use derivatives to manage an investment policy. With reference to subparagraphs (e)(ii), (e)(iii), (e)(iv) and (e)(v), these elements forms part of efficient portfolio management, and creates uncertainty if specified separately. It is also uncertain why only certain types of derivatives (total return swaps and contracts for differences) are referenced in subparagraph (e)(v). For the sake of clarity, it is suggested that “efficient portfolio management” should be defined. If it is defined as</p>	<p>Comments noted. See amendments made to the Determination and aligned with the Conduct Standard on Requirements for CIS Managers.</p>

No	Commentator	Section of the Determination	Comment	FSCA Response
		return swaps and contracts for difference);	<p>suggested, subparagraphs (e)(ii) to (e)(v) could be deleted as the definition encapsulates these conditions.</p> <p><u>Proposed definition of “efficient portfolio management:</u> <u>“efficient portfolio management” means giving effect to an investment policy for one or more of the following objectives -</u> <u>(a) hedging;</u> <u>(b) the reduction of cost; or</u> <u>(c) the generation of additional capital or income, with a risk level consistent with the investment policy;</u></p> <p>The proposed definition is aligned with UCITS, the definition in the Conduct Standard containing conditions for pension funds’ investment in derivatives, and paragraph 3(8)(b) of Board Notice 90.</p> <p><u>Proposed wording of subparagraph (e):</u> (e) financial derivative instruments, where used for <u>investment purposes other than hedging or efficient portfolio management such as—</u> (i) for investment purposes; (ii) to follow an active investment strategy; (iii) furtherance of the investment objective or strategy; (iv) to actively manage the investment policy or objective; (v) to obtain or manage exposure to the market or to specific asset classes (including the use of total return swaps and contracts for difference);</p>	
	ASISA	4(6) An operator ¹ may not make a statement or disseminate information which the operator or the representative of the operator or ought reasonably to know is	<p>It is suggested that the footnote be incorporated in paragraph 4(6) as “representative office” is a defined term.</p> <p><u>Proposed wording:</u> An operator <u>or representative office</u> may not make a statement or disseminate information which the operator or the representative of the operator or office ought reasonably to know is false, or misleading or is likely or intended to –</p>	Agree with the proposal. See changes made to the draft Determination.

No	Commentator	Section of the Determination	Comment	FSCA Response
		false, or misleading or is likely or intended to - (a) induce members of the public to purchase or deal with a participatory interest; (b) conceal material information; or (c) have the effect of inflating, depressing or maintaining the price of a participatory interest.		
16.	ASISA	4(7) The applicant must avoid any conflict between the interests of the operator and the interests of an investor.	<p>1. It is not possible to always avoid conflict of interests. It is suggested that the paragraph be rephrased to provide for conflict of interests being mitigated and disclosed where it cannot be avoided.</p> <p>2. The reference to applicant in this context is incorrect because it, by definition, includes a South African manager. It is suggested that the reference to “applicant” be replaced with a reference to “operator”.</p> <p><u>Proposed wording:</u> The applicant <u>operator</u> must avoid, and where this is not possible, <u>mitigate and disclose</u> any conflict between the interests of the operator and the interests of an investor.</p>	Agree with the proposal. See changes made to the draft Determination.
17.	ASISA	4(9) The applicant must comply with any additional conditions the Authority determines under section 65(1) of the Act as part of the applicant’s application for approval, which conditions may be based on nature and type of category of the scheme, or portfolios under the scheme, and the target market of the scheme or portfolios.	<p>1. Although paragraph 4(9) attempts to indicate what the conditions may be based on, the open-ended nature of the paragraph creates uncertainty and could potentially be interpreted as allowing unfettered discretion. It is presumed that the FSCA intended to allow for additional conditions to enable the FSCA to, on a case-by-case basis, set conditions so that the foreign scheme or portfolios are subject to the additional conditions set in its approval by a foreign regulator in South Africa also, or conditions that would be necessary to ensure that foreign schemes or portfolios are subject to similar requirements as applicable to South African portfolios. ASISA members are of the view that it is important to incorporate the objective of the FSCA setting additional conditions in paragraph 4(9).</p> <p>2. The reference to applicant in this context is incorrect because it, by definition, includes a South African manager. It is</p>	1. Note that section 65(1)(c) of Cisca does not contain any limitation on the types of conditions that the Authority may determine. Therefore, the approach reflected in the Determination is aligned to section 65(1)(c) and proposal is thus not accepted. The intention of the Determination is to set general conditions that will apply, but additional entity specific (or type of entity specific) conditions will be

No	Commentator	Section of the Determination	Comment	FSCA Response
			<p>suggested that the reference to “applicant” be replaced with a reference to “operator”.</p> <p><u>Proposed wording:</u> The applicant <u>operator</u> must comply with any additional conditions the Authority determines under section 65(1) of the Act as part of the applicant’s application for approval, which conditions may be based on nature and type of category of the scheme, or portfolios under the scheme, and the target market of the scheme or portfolios, <u>provided that the conditions are similar to conditions applicable in the domicile of registration of the foreign scheme or similar to conditions applicable in the Republic.</u></p>	<p>considered on a case-by-case basis.</p> <p>2. To include the proposed addition here is superfluous as the Authority may in any event not act outside of its legislated mandate in setting conditions on a case-by-case basis and the industry has the protection of the PAJA.</p> <p>3. However, the balance of the suggested change i.e. “operator” is accepted. See amendments made to the Determination by means of appropriate definition of “applicant”.</p>
18.	ASISA	4(10) If the applicant at any time amends the prospectus of any portfolio approved in accordance with subparagraph (9), the operator must cease soliciting investments in respect of that portfolio and may only proceed soliciting investments in respect of that portfolio if the Authority so confirms, subject to additional conditions determined by the Authority, if relevant.	<ol style="list-style-type: none"> 1. The reference to portfolios approved in accordance with subparagraph (9) causes confusion as subparagraph (9) does not deal with the approval or amendment of prospectuses. Paragraph 8 deals with conditions if a foreign scheme is changed. It is presumed that the FSCA intended to provide that if amendments to a prospectus affecting the rights of investors are made (not immaterial amendments), the FSCA must confirm that solicitation can continue. If the foreign operator does not obtain the FSCA’s confirmation, the operator must cease solicitation. If the presumption is correct, it is suggested that paragraph 4(10) be rephrased accordingly. If the presumption is incorrect, ASISA requests engagement to understand the objective because ceasing solicitation is impractical. 2. The reference to applicant in this context is incorrect because it, by definition, includes a South African manager. It is suggested that the reference to “applicant” be replaced with a reference to “operator”. 	<p>Agree with the proposal. See changes made to the draft Determination.</p>

No	Commentator	Section of the Determination	Comment	FSCA Response
			<p>Proposed wording:</p> <p>If the <u>applicant operator</u> at any time amends the <u>document or prospectus of any portfolio approved in accordance with subparagraph (9) contemplated in paragraph 3(1)(m) and the amendment materially affects investors or the approval in terms of section 65 of the Act</u>, the operator must cease soliciting investments in respect of that portfolio and may only <u>proceed continue</u> soliciting investments in respect of that portfolio if the Authority so confirms, subject to additional conditions determined by the Authority, if relevant.</p>	
19	ASISA	<p>5(1) and (2) Conditions in respect of representative office and representative agreement</p> <p>(1) The applicant must enter into a representative agreement with a -</p> <p>(a) representative office established in the Republic; or</p> <p>(b) manager registered under the Act.</p> <p>(2) If an applicant establishes a representative office as contemplated in subparagraph (1)(a), such representative office must maintain paid-up share capital and reserves of no less than R2 million.</p>	<p>The reference to applicant in this context is incorrect because it, by definition, includes a South African manager. It is suggested that the reference to “applicant” be replaced with a reference to “operator”.</p> <p>(1) The <u>applicant operator</u> must enter into a representative agreement with a -</p> <p>(a) representative office established in the Republic; or</p> <p>(b) manager registered under the Act.</p> <p>(2) If an <u>applicant operator</u> establishes a representative office as contemplated in subparagraph (1)(a), such representative office must maintain paid-up share capital and reserves of no less than R2 million.</p>	Agree with the proposal. See changes made to the Determination.
20	ASISA	<p>6(1) Conditions relating to name changes</p> <p>The applicant may not, without the approval of the Authority, pending the lodging and disposal of an application in terms of section 65 or the change of the name of its business, include in or have part of the name of its business or in any description of its business any reference to a scheme approved</p>	<p>1. It is understood that paragraph 6 intends to prohibit a foreign operator and a SA manager (applicant) from including in its name or business description any reference to section 65 approval before such approval is granted, without the FSCA approval. This aligns with section 6 of Cisca. It is suggested that paragraph 6 be rephrased for the sake of clarity.</p> <p>2. The reference to applicant in this context is incorrect because it, by definition, includes a South African manager. It is suggested that the reference to “applicant” be replaced with a reference to “operator”.</p>	Agree with the proposal. See changes made to the Determination.

No	Commentator	Section of the Determination	Comment	FSCA Response
		under section 65. If not approved as a manager or operator, the applicant may not perform any act to lead the public to believe that it has been approved to solicit investments in the scheme from the members of the public in the Republic.	<p>Proposed wording: Conditions relating to name changes misleading names and acts</p> <p>6(1) The applicant operator may not, without the approval of the Authority, pending the lodging and disposal of an application prior to approval in terms of section 65 or the change of the name of its business, include in or have part of the name of its business or in any description of its business any reference to a scheme approved under section 65, without the approval of the Authority.</p> <p>6(2) If not approved as a manager or operator, the Prior to approval in terms of section 65, the applicant operator may not perform any act to lead the public to believe that it has been approved to solicit investments in the scheme from the members of the public in the Republic.</p>	
21	ASISA	<p>7(1) Conditions relating to prohibited investment and borrowing</p> <p>The applicant may not utilise any of the following investment strategies or approaches, or invest in the following assets or instruments in respect of and on behalf of its foreign scheme:</p> <p>(a) financial derivative instruments or structures/ strategies which are complex or of exotic compositions;</p> <p>(b) net short positions or naked short selling;</p> <p>(c) synthetic instruments including synthetic exchange- traded funds;</p> <p>(d) structured products which include any of the above in paragraph 7(1)(a) - (c) and paragraph 4(5) (a) - (h); and</p> <p>(e) investment in other schemes that include any of the</p>	<p>It is understood that the FSCA in addition to following a principles-based approach, intended to outright prohibit certain types of investments. The prohibition does not seem to align with a principles-based approach as dealt with in paragraph 4(5) which allows the FSCA to consider the manner and extent to which certain instruments are used. Including paragraphs 4(5)(a) to (h) is also contradictory to the principles-based approach. These paragraphs cannot be made prohibitions for structured products and investment in other schemes. How does one prohibit for example diversification limits referred to in paragraph 4(5)(b)? It also seems as if hedge fund collective investment schemes were not considered as foreign hedge funds might invest in complex derivatives or structured products, and they are permitted to use net short positions. If certain instruments or strategies are to be prohibited, it must be clearly defined, for example synthetic instruments and structured products. It is submitted that the prohibitions contained in paragraph 7(1) is unreasonably restrictive and contradictory to the principles-based approach. The FSCA could exercise its discretion as set out in paragraph 4(5). It is thus proposed that paragraph 7(1) be deleted, and that paragraph 4(5) be appropriately amended to deal with these instruments.</p>	<p>Comments are noted. Firstly, the essential premise of a principle-based regulation or framework is that of establishing values and norms by which financial institutions must abide. Further, through principle-based regulation, regulators set out specific outcomes flowing from the actions, processes and governance arrangements of financial institutions.</p> <p>Secondly, the move from a rules-based regulation to outcomes and principle-based approach, does not imply the absence of rules. In this light, the conditions relating to</p>

No	Commentator	Section of the Determination	Comment	FSCA Response
		investment strategies or approaches, assets or instruments referred to in paragraph 7(1)(a) - (c) and paragraph 4(5) (a) - (h).		<p>prohibited investments contemplated in paragraph 7(1) are designed to ensure fair outcomes for investors. Thirdly, the nature of the prohibited investments contemplated in paragraph 7(1) e.g. synthetic instruments etc. justifies the prohibition.</p> <p>However, to mitigate any unintended consequences, paragraph 7(1) has been amended to –</p> <p>(a) remove the reference to “financial derivative instruments or structures / strategies which are complex or of exotic compositions” and “structured products; and</p> <p>(b) change the “synthetic instrument” prohibition to only apply in a non-qualified investor context.</p> <p>Further, paragraph 4 of the Determination was amended to mitigate potential risks flowing from the changes to paragraph 7(1). Essentially when the Authority assess an application for approval, it would be able to consider the type of derivative</p>

No	Commentator	Section of the Determination	Comment	FSCA Response
				instruments and structured products comprising a portfolio. Therefore, instead of applying an outright prohibition, the Authority can consider these matters on a case-by-case basis.
22	ASISA	10 Conditions relating to advertising, marketing and information disclosure When soliciting investments from members of the public in the Republic, the operator must comply with the applicable advertising, marketing and information disclosure requirements in Board Notice 92 of 2014 and paragraph 27 of Board Notice 52 of 2015.	It is suggested that the specific references to Board Notice 92 and Board Notice 52 be improved by adding an indication that these requirements may be amended or replaced from time to time. <u>Proposed wording:</u> When soliciting investments from members of the public in the Republic, the operator must comply with the applicable advertising, marketing and information disclosure requirements in Board Notice 92 of 2014 and paragraph 27 of Board Notice 52 of 2015, <u>as may be amended or replaced from time to time.</u>	Agree with the proposal. See changes made to the draft Determination.
23	ASISA	11 Conditions relating to submission of quarterly statistics The operator, must within 30 days after the end of each calendar quarter, submit the assets under management on behalf of South African investors to the Authority in respect of the foreign scheme and each portfolio thereof, in the manner determined by the Authority on its website.	Hedge funds currently submit the AUM manually, not on the Online Portal as by other section 65 approved funds. Will the FSCA make online submission available to hedge funds?	The AUM is obtained via the submission of portfolio holdings. The Authority is in the process with an FSCA -wide upgrading of its ICT system and will advise on the manner and format for various submissions.
CHAPTER 4. ADMINISTRATIVE MATTERS				
24	ASISA	13 Short title, commencement, amendment and repeal (1) This Determination is called the Determination Relating to	It is submitted that Guidance Notes 2 and 2A should be withdrawn. If it is not appropriate to do so in paragraph 13, an appropriate notice should be issued	Comments noted. The Authority may consider the timing and manner of

No	Commentator	Section of the Determination	Comment	FSCA Response
		<p>Foreign Collective Investment Schemes Soliciting Investments in the Republic, 2024 and comes into effect on the date of publication.</p> <p>(2) This Determination is subject to –</p> <p>(a) amendment thereof, published by the Authority by notice on the website of the Authority; and</p> <p>(b) withdrawal in a like manner.</p> <p>(3) Board Notice 257 of 2013, as published in <i>Government Gazette</i> Number 37123 of 13 December 2013, is hereby repealed.</p>		withdrawal of Guidance Notes 2 and 2A.

SECTION C - QUESTIONS RELATING TO THE ANTICIPATED IMPACT OF THE DRAFT NOTICE

No.	Question	Comment	FSCA Response
1.	Will the Notice impose additional compliance costs on the business? If yes, please provide details including the expected costs.	Generally, the Notice will not impose additional compliance costs.	Comment noted.
2.	How do you anticipate the Notice affecting the operational cost of the business, if at all?	Generally, the Notice will not affect operational costs.	Comment noted.

3.	Will the Notice result in termination of existing arrangements? If yes, please be specific and make reference to specific aspects of the Notice that will lead to such a termination.	No	Comment noted.
4.	If the answer to question 3 is yes, how many arrangements will be impacted and what is the expected cost implication thereof?	N/A	Comment noted.
5.	Are any other transitional arrangements necessary to implement the Notice? If yes, what transitional arrangements do you propose and for which section of the Notice? (Please provide a justification for your response and details on timeframes to comply with the relevant section).	No.	Comment noted.

SECTION D - GENERAL COMMENTS

No.	Question	Comment	FSCA Response
FORMAT OF THE NOTICE			
1.	Do you find the format of the Notice user friendly and simple to understand? If no, please provide suggestions for improvement.	The format of the Notice is user friendly and simple to understand.	Comment noted.

No.	Issue	Comment/input	
ANY OTHER GENERAL COMMENTS			
1.	Typographical errors	<ol style="list-style-type: none"> 1. Definition “foreign scheme” - missing semi-colon at end of definition. 2. Paragraph 3(1)(g) - missing a ‘the’ before the word ‘legal’ - Amend so that it reads “a description of <u>the</u> legal and operational structure...” 3. Paragraphs 4(4)(b), 4(4)(e) and 5(5)(f) – duplicated numbering. 	Comment noted. The Determination has been amended.
2.	Drafting improvements	<ol style="list-style-type: none"> 1. Definition of “commodities exchange traded funds”, paragraphs 4(5)(a), 4(5)(b) and 4(5)(g) – ‘fund’ to be replaced with ‘portfolio’ as the term is defined in CISCA. 2. Paragraphs 3(1)(h), 3(1)(j), 3(1)(l) and 5(5)(f)(ii) - ‘scheme’ to be replaced with ‘foreign scheme’ as the term is defined. 3. Paragraphs 5(5)(b), 5(5)(c), 5(5)(d) and 5(5)(f) – ‘local manager’ to be replaced with ‘manager’ as the term is defined in CISCA. 	Comment noted. The Determination has been amended.
3.	Application form	It is assumed that the existing application form will be amended.	The Authority intends to amend all application forms.
4.	Submission of annual financial statements	Paragraph 3.2.2 of the Statement Supporting the Draft Determination indicates that the foreign CIS/operator must submit financial statements to the FSCA on an annual basis. This is not a current requirement, and such a requirement is not included in the Draft Notice. Please confirm that annual financial statements are required for an application for approval (paragraph 3(1)(n)), but it is not required to be submitted on an annual basis.	Annual financial statements are required for an application for approval (paragraph 3(1)(n)), but it is not required to be submitted on an annual basis.
5.	Baillie Gifford Prohibited investments for a CIS in securities	There can at times be a disconnect between how the FSCA and a fund’s home state regulator categorises hedge funds. We believe that to some extent, there is a ‘gap’ in the FSCA’s foreign CIS approval mechanism, where offshore funds that are not hedge funds in their home state are unable to obtain approval as a CIS in securities, for example if they use derivatives for purposes other than hedging or efficient portfolio	The proposed legislation does away with the comparative content and evaluates the applications on a case by case basis. However, after found acceptable, the Authority may determine the similar category or investor market that the fund may be sold in. It may also make further

	<p>management. Such a strategy can be permitted in a fund's home and the fund is suitable for all investors, including those considered less sophisticated and given the most local regulatory protection; for example, non-complex UCITS funds in the UK</p> <p>We believe that the approval mechanism for a foreign CIS in securities should be on a case-by-case basis and a fund should not automatically be excluded categorisation as a CIS in securities if it utilises a prohibited condition in section 7 of the draft determination. Points to consider might include:</p> <ul style="list-style-type: none"> - Whether derivative exposures are covered by the assets of the scheme - If there are net short positions - The extent of leverage permitted by the fund prospectus i.e. can this exceed 100% of the Fund's net asset value - The types of derivative instruments used and their classification under home state regulations - The proportion of the fund which comprises financial derivative instruments <p>We would also suggest that the FSCA should, where an equivalent home state regulator determines a fund is suitable for all investors (eg a non-complex UCITS Fund), take this into consideration in the approval process for a CIS in securities, rather than solely relying on rigid provisions within CISCA and BN 257.</p>	<p>conditions that the particular scheme must comply with so as not to create risks etc. that are not comparable with the risk limitations for investments in South Africa.</p>
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