

**CONSULTATION REPORT: CONDUCT STANDARD 1 OF 2018 (CRITERIA FOR
AUTHORISATION OF OTC 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;
 - “**Conduct Standard 1 of 2018**” means Conduct Standard 1 of 2018: Criteria for Authorisation of OTC Derivatives Providers;
 - “**Financial Markets Act**” means the Financial Markets Act, 2012 (No. 19 of 2012);
 - “**Financial Markets Act Regulations**” means the Financial Markets Act Regulations promulgated under the Financial Markets Act on 9 February 2018; and
 - “**Financial Sector Regulation Act**” Financial Sector Regulation Act, 2017 (Act No. 9 of 2017).

2. The Authority, hereby under section 104(1) of the Financial Sector Regulation Act, publishes this report on consultation undertaken during the making of **Conduct Standard 1 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*” to outline the proposed policy approach to regulating OTC derivative markets. In terms of the empowering provisions set out in the Financial Markets Act, the regulatory framework was developed jointly by National Treasury, the Financial Services Board and the South African Reserve Bank. The regulatory framework includes the Financial Markets Act Regulations and the following regulatory instruments:
 - 3.1 The Criteria for Authorisation of OTC derivative providers
 - 3.2 Licensing requirements and additional duties of a trade repository
 - 3.3 Conduct Standards for OTC derivative providers

3.4 The reporting obligations in respect of transactions or positions in over-the-counter derivatives

4. The proposed instruments have been published a number of times for public comments and in addition extensive stakeholder engagement has taken place. Draft Regulations and instruments were first published on 4 July 2014 and a second draft was published on 5 June 2015. The draft instruments were published for a final round of comments on 21 July 2016. 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.
5. 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 4 and sets out the comments on each particular paragraph of the Standard and the Authority's response to the issues.

SCHEDULE

COMMENT MATRIX: CRITERIA FOR AUTHORISATION AS AN OVER-THE-COUNTER DERIVATIVES PROVIDER

The following comments as per the matrix below have been captured as at 5 June 2015

List of Commentators:

Banking Association of South Africa

Comments and Responses

COMMENTATOR	SECTION	COMMENT	RESPONSES
Banking Association South Africa	Section 6(8) (a) of the FMA	General comments In respect of the proposed FMA Regulations, a recommendation has been made for the provision of a 12 month transitional period in which to enable affected market participants to apply for authorisation as an OTC derivatives provider (ODP) to avoid ODPs being in technical breach of the authorisation requirement when the regulations take effect. Consideration should also be given to phasing the transition period for different categories of affected market participant (e.g. banks, non-bank financial	Regulation 43 provides that a person conducting the business of an OTC Derivative Provider must, within 6 months from the commencement date of Regulation 2, lodge with the Authority an application for registration as an OTC derivative provider in the manner prescribed by the Authority. We disagree with a phased in approach for authorisation however.

COMMENTATOR	SECTION	COMMENT	RESPONSES
		counterparties and non-financial counterparties), to ensure efficient and timely processing of applications by the FSB.	
Banking Association South Africa	4.1 Prudential requirements	As banks are prudentially supervised by the SARB, it is recommended that the provisions of this paragraph are not applicable to providers that are banks. Specifically the requirement to provide the Registrar with a quarterly report in terms of paragraph 4.1(2) (a), creates unnecessary administration for banks. We propose the following amendment – “4.1 Prudential requirements (1) A provider, <u>other than a bank</u> , must-	Disagree, the provisions should apply equally to all OPDs. It should not be difficult for banks to comply with these requirements, as they are not more prescriptive than the current prudential requirements applicable to banks. Banks could potentially be excluded, on application to the Authorities, from the ODP prudential requirements.
Banking Association South Africa	4.6 (e) Record keeping and data retention	Incorrect cross-references – “A provider - (e) must keep a record referred to in- (i) paragraph 4.3(9)(c)(i) 4.6(b)(i) for a period of at least six months after the instruction has been given; (ii) paragraph 4.3(9)(c)(ii) 4.6(b)(ii) for a period of at least five years after the contractual relationship has been terminated.”	Agreed.
Banking Association South Africa	5.1(5) Involuntary termination	We have assumed that the	Agreed.

COMMENTATOR	SECTION	COMMENT	RESPONSES
Africa		intension of the drafter was to include counterparties in this provision. Proposed amendment – “9. The range of clients and counterparties, both local and foreign, expected to transact with the provider.”	
Banking Association South Africa	Annexure 2 to Form FM 6.	The term “controlling body” is not defined in the Act, the proposed Regulations and this proposed Board Notice.	The term applies as described in the FMA
Banking Association South Africa	Fit and Proper. Annexure B	We recommend that the requirement, that Annexure B is completed in respect of directors and senior managers of a provider, be limited to those directors and senior managers involved in and/or responsible for OTC derivative trading and those who are in a position of influence over OTC derivatives trading strategies. In a large organisation, such as a bank, it is unreasonable to expect that each director and senior manager should complete the form and provide the information required therein	It is preferable to leave the requirement broad. If it is impractical an exemption may be considered

The following comments as per the matrix below have been captured as at 31 August 2016.

List of Commentators

Banking Association of South Africa (BASA)

Macquarie Securities (Round 2)

Macquarie Securities (Round 3)

Standard Bank (Round Two)

Johannesburg Stock Exchange (Round Two)

Comments and Responses

COMMENTATOR	SECTION	COMMENT	RESPONSES
Banking Association South Africa	2. Application	Proposed amendment to ensure consistency of language with the FSR Bill and the Ministerial Regulations – A person who applies for the authorisation as a provider must submit to the Authority a written application on Form FM 6 accompanied by the information –	Amendments incorporated - please refer to notice

COMMENTATOR	SECTION	COMMENT	RESPONSES
Banking Association South Africa	2 Application 2 (b)	<p>The note that the term “controlling body” has still not been defined in the Act, the proposed Regulations and this proposed Board Notice. We note further National Treasury’s response to this point in its response document titled “MINISTERIAL REGULATIONS AND NOTICES COMMENT MATRIX” released in July 2016, wherein Treasury maintains that the term “controlling body” applies as described in the Financial Markets Act, 2012 (FMA).</p>	Term not defined in the FMA, but applied in the context - i.e. if it <u>is</u> the company then it <u>is</u> the board
		<p>Section 65 and 66 of the FMA deals with the duties and appointment of the members of the controlling body, respectively. Notwithstanding the aforesaid, the FMA does not state whom or at what level the controlling body needs to be at i.e. is it EXCO level or is it the Board of the ODP?</p> <p>In light thereof, we kindly seek clarity in this regard.</p>	
Banking Association	3. Address	It is proposed that the application submission should also allow for electronic submissions.	Other methods are approved /accepted

COMMENTATOR	SECTION	COMMENT	RESPONSES
Macquarie Securities (Round 3)	4.2.5 Financial soundness of directors and senior managers	<p>[1] We propose, for the sake of clarity, defining “senior manager” in Section 1 as a “member of “senior management” as defined in the Financial Markets Act and as specified in the OTC derivative provider’s application. and will be impractical</p> <p>[2] We propose the deletion of the requirements relating to “credit references” on the basis that it does not seem to be relevant</p>	<p>Disagree with comment - Notice indicates that it is defined in the FMA – therefore not required to be defined again</p> <p>Agreed to delete reference to credit reference - however fit and proper checks are required</p>
Banking Association	Criteria for authorisation 4.1(2)(a) and (b)	<p>Proposed amendment to ensure consistency of language with the FSR Bill and the Ministerial Regulations –</p> <p>(2) (a) A provider must furnish the Authority with a quarterly report detailing the calculation of the required liquid net assets, calculated in terms of this Notice and the measures to taken to obtain additional funding, if necessary.</p> <p>(b) If the Authority is not satisfied that such liquid assets are sufficient to cover the risks involved, the Authority may require a provider to obtain additional liquid assets funded by equity over a time period as determined by the Authority.</p>	Refer to section 1(1) of the FMA

COMMENTATOR	SECTION	COMMENT	RESPONSES
Banking Association South Africa	4.2 Fit and Proper	<p>The Notice specifying requirements for authorisation of an ODP refers in various sections to “senior managers”. The notice does not define “senior managers”. No other financial sector legislation currently incorporates obligations for senior managers.</p> <p>The fit and proper requirements apply to institutions. For large institutions this specialised business is not managed by the directors by the relevant business unit within the institution.</p> <p>Our recommendation: Refer to Managers of the relevant business rather than Directors and or Senior Managers in general Alternatively: We require more details on what a senior manager refers to locally.</p>	<p>Wording revised to “senior management” - since this is defined and wording includes senior managers.</p> <p>Member of the controlling body replaces director.</p>

COMMENTATOR	SECTION	COMMENT	RESPONSES
Banking Association South Africa	4.2 Fit and Proper and (4 4.2.1(2)	<p>Proposed amendment to ensure consistency of language with the FSR Bill and the Ministerial Regulations –</p> <p>A provider must satisfy the Authority that it complies with the following fit and proper requirement-</p> <p>4.2.1 Honesty and integrity</p> <p>(2) In determining whether a director or senior manager complies with subparagraph (1), the Authority may refer to any information in possession of the Authority or brought to the Authority’s attention.</p> <p>(4) An provider, director or senior manager must in the application be candid and accurate and must of own accord disclose all facts or information at the disposal of, or which may be accessible to the provider, director and senior manager and which may be relevant for purposes of a decision by the Authority whether the provider, director or senior manager complies with subparagraph (1).</p>	<p>Amendments incorporated - please refer to notice</p>

COMMENTATOR	SECTION	COMMENT	RESPONSES
	4.2.2 Competency 4.2.2(1) and (3)	<p>Proposed amendment to ensure consistency of language with the FSR Bill and the Ministerial Regulations –</p> <p>(1) A provider must satisfy the Authority that its directors or senior managers have the competency to undertake the relevant duties and functions, and where appropriate, detailed knowledge of the structure, purpose and risks of the OTC derivatives associated with the duty or function.</p> <p>(3) Without limiting the generality of sub-paragraph (1), in determining a person’s competence, the Authority may have regard to the following matters-</p>	
Banking Association South Africa	4.2.2(4)	<p>Proposed amendment to ensure consistency of language with the FSR Bill and the Ministerial Regulations –</p> <p>(4) A provider must, in addition to any conditions imposed by the Authority to the authorisation of the provider-</p> <p>(c) complete Annexure B when a new director or senior manager is appointed, and promptly submit it to the Authority;</p>	Amendments incorporated - please refer to notice

COMMENTATOR	SECTION	COMMENT	RESPONSES
Banking Association South Africa	4.2.5 Financial soundness of directors and senior managers 4.2.5(c)	Proposed amendment to ensure consistency of language with the FSR Bill and the Ministerial Regulations – A director or senior manager of a provider- (c) must provide the Authority with a satisfactory credit reference.	Noted - refer to response above.
Banking Association South Africa	4.3 Compliance function	Incorrect numbering Should be 4.4 Compliance Function	Board Notice amended – see revised notice
Banking Association South Africa	4.3(c) (aa)	Any non-compliance instances” is impractical We propose: Any <u>material</u> non-compliance instances	Disagree with the comment - cannot restrict provision to material aspects as non-compliance in any case relates to material issue.
Banking Association South Africa	4.3(6)	Annual sign off of operational procedures: This is very onerous and institutions may spend an inordinate amount of time reviewing procedures We propose: a review of material changes.	Disagree with the comment - as the requirement is necessary to pick up any changes or inefficiencies as opposed to only reviewing when changes occur.

COMMENTATOR	SECTION	COMMENT	RESPONSES
Banking Association South Africa	4.3(8)(c) Approval process relating to all relevant risk pricing models and valuation systems used by front office and back office personnel	We do not believe that reliance should be placed on front office valuations We propose: We believe that reliance should be on the finance and risk valuations	Reference 4.3.9 (c) - agree with comment - but interpretation is wrong — reliance is not placed on the front or back offices rather read with 4.3.9
Banking Association South Africa	4.6(b)	Please indicate for how long verbal instructions must be retained- we propose that one year is reasonable.	Currently refers to 6 months - it is thought to be reasonable

COMMENTATOR	SECTION	COMMENT	RESPONSES
Banking Association South Africa	5. Suspension and termination of authorization 5.1 (1) and (c)	<p>Proposed amendment to ensure consistency of language with the FSR Bill and the Ministerial Regulations –</p> <p>(1) The Authority may suspend or terminate the authorisation of a provider if satisfied, on the basis of available facts and information, that the provider-</p> <p>(c) has failed to make a full disclosure of all relevant information to the Authority, or furnished false or misleading information in its application for authorisation; or</p>	Amendments incorporated - please refer to notice

COMMENTATOR	SECTION	COMMENT	RESPONSES
Banking Association South Africa	5.1(2), (3), (3)(b)(i), (4), (5), (6), (8) and (9)	<p>Proposed amendment to ensure consistency of language with the FSR Bill and the Ministerial Regulations –</p> <p>(2) Before suspending or terminating any authorisation, the Authority must-</p> <p>3) Where the Authority contemplates the suspension of a provider, the Authority must inform such provider of-</p> <p>(b) any terms to be attached to the suspension, including-</p> <p>(i) a prohibition on concluding any new business by the provider as from the effective date of the suspension and, in relation to outstanding business, such measures as the Authority may determine for the protection of the interests of clients of the provider; and</p> <p>(4) The Authority must consider any response received, and may thereafter decide to suspend or withdraw, or not to suspend or withdraw, the authorization of the provider, and must notify the provider of the decision.</p>	Amendments incorporated - please refer to notice

COMMENTATOR	SECTION	COMMENT	RESPONSES
		<p>(5) Despite the provisions of subparagraph (2), the Authority may under urgent circumstances, where the Authority is satisfied on reasonable grounds that substantial prejudice to clients or the general public may occur provisionally suspend or terminate the authorisation of a provider, and inform the provider of-</p> <p>(6) The Authority must, within a reasonable time after receipt of any response contemplated in sub-paragraph (2) consider the response, and may decide to-</p> <p>(8) A person whose authorisation has been withdrawn under this section is prohibited from carrying on the business of an OTC derivatives provider for a period specified by the Authority and from applying for a new authorisation.</p> <p>The Authority may, on good cause shown, vary any such period.</p>	

COMMENTATOR	SECTION	COMMENT	RESPONSES
Banking Association South Africa	5.2 Voluntary Termination 5.2(1), (2) and (2)(b)	Proposed amendment to ensure consistency of language with the FSR Bill and the Ministerial Regulations – (1) A provider may voluntarily terminate its authorisation by making a submission to the Authority at least 30 days prior to such termination. (2) The Authority may – (a) accept such termination unconditionally; or terminate the membership subject to such measures as the Authority may determine for the protection of the interests of clients of the provider.	Amendments incorporated - please refer to notice
Banking Association South Africa	Annexure 2 To Form FM6	Proposed amendment to ensure consistency of language with the FSR Bill and the Ministerial Regulations – 7. Full details of any fact which may have an impact on the evaluation by the Authority of the good character and integrity of a member of the controlling body.	Amendments incorporated - please refer to notice
Macquarie (Round 2) Securities	General Comments	Albeit obvious this notice needs to precede any other regulations requiring derivative providers to be approved as “authorised OTC derivative providers” – current product providers cannot have a situation where they are awaiting registrar approval and have to halt their business activities	The requirement does not restrict current product providers from continuing their business - read with transitional provisions in the FMA regulations - continue to operate until authorized or rejected.

COMMENTATOR	SECTION	COMMENT	RESPONSES
Macquarie (Round 2) Securities	4.1 Prudential requirements	<p>The prudential requirements are generic and section (2)(b) grants the registrar the power to unilaterally require additional liquid net assets. What are the intended criteria based on which the registrar may require such additional liquid net assets?</p> <p>We propose bringing in similar detail as set out in the Financial Markets Act Regulations sections 24 to 33.</p> <p>Where OTC derivative providers are subject to “other” capital adequacy requirements – for example banks under the Banks Act and/or as an “authorised user” under the Financial Markets Act read with the exchange rules – then we propose that such regime should continue to apply to the exclusion of this notice to avoid conflicts</p>	<p>Criteria for determining additional liquid assets is not intended to prescriptive and will be determined on case-by-case and outcome of risk assessment on the applicant.</p> <p>The intention is not to include prescriptive prudential requirements - applicants already subject to prudential requirements may be exempted by the authority.</p>

COMMENTATOR	SECTION	COMMENT	RESPONSES
Macquarie (Round 2) Securities	<p>4.2.5 Financial soundness of directors and senior managers</p> <p>(1) (1) (2) the deletion of the requirements relating to “credit” records on the basis that it does not seem to be relevant and will be practically burdensome.</p>	<p>(1) We propose, for the sake of clarity, defining “senior manager” in Section 1 as a “member of “senior management” as defined in the Financial Markets Act and as specified in the OTC derivative provider’s application.</p> <p>(2) We propose the deletion of the requirements relating to “credit” records on the basis that it does not seem to be relevant and will be practically burdensome</p>	Responded to above for round 3

The following comments as per the matrix below have been captured as at 15 June 2018

List of Commentators:

Banking Association of South Africa

Allen & Overy (South Africa) LLP

UBS South Africa (Pty) Ltd

Comments and Responses

COMMENTATOR	SECTION	COMMENTS	RESPONSES
The Banking Association of South Africa	1. The Financial Markets Act	<p>The Financial Markets Act Regulations were gazetted on 9 February 2018. These regulations include, in Regulation 2, the requirement that persons conducting the business of authorised over-the-counter derivatives provider must be authorised to do so. The transitional provisions included in Regulation 43 provide that ODPs are required to lodge their applications in the prescribed manner within 6 months from the date of commencement of regulation 2 (going by this reading, ODPs would have to be compliant by August 2018).</p> <p>At the date of publication of the FMA Regulations, no detail was given as to the manner in which the ODP application must be made. As such, any ODP would be in breach of the FMA Regulations. We respectfully submit that this period; only begin to run after the final criteria have been published, so as not to unduly prejudice ODPs</p>	<p>The matter is currently being considered by the Authorities with the view to providing clarity on the matter.</p> <p>The FSCA will extend the period provided for in Regulation 2.</p>
	2. Requirements for	Many of the requirements relating to operational capital requirements overlap with the general	The Authorities are cognisant of the potential impact of having duplicate

COMMENTATOR	SECTION	COMMENTS	RESPONSES
	authorisation	<p>requirements in relation to bank capital. Since practically, only banks will be required to license as ODPs (only banks conduct the activities of market making in derivatives), we recommend that South African banks are allowed to leverage off the capital requirements already in existence and not have to prove specific compliance with these items.</p> <p>The same applies in respect of the requirements relation to operational ability, risk management and internal control, the compliance function and business continuity planning. Replicating the general criteria applicable to banks creates unnecessary duplication. The banking license held by the applicant should be taken as prima facie evidence of meeting these requirements. If, for some reason, an ODP has its bank license revoked, this should automatically allow for the suspension of its license to act as ODP.</p>	<p>requirements. However, it may not only be banks that could be scoped into this framework, based on the definition of an ODP in the FMA Regulations. A general exemption on capital requirements will not be provided; but the Authority will determine compliance to such requirements on a case-by-case basis on application for authorisation.</p>
	3. Trade Repository & Clearing Houses	<p>ODP's will be required to provide details in respect of the trade repository and clearing house they will use. To date, these infrastructures have not yet been licensed locally to undertake this and hence ODP's will not be in a position to furnish such detail. ODP's will also not be in a position to evidence compliance with market conduct standards as required, as these have not yet been published.</p> <p>We recommend that ODPs will be granted exemptions from complying with those criteria that they are unable to satisfy, due to circumstances outside of their control. Such criteria include naming the TR and CCP and complying with market conduct standards, whose publication is in the hands of the regulator.</p>	<p>Regarding the requirements relating to reporting and clearing, the necessary frameworks are being developed and will be implemented in due course.</p> <p>Applicants are required to include such information in their applications and this will be taken into account by the Authorities when assessing applications for authorisation.</p> <p>The Authorities in granting its approval may issue a licence with conditions and will therefore have the discretion to take into account the issues raised in the comments.</p>

COMMENTATOR	SECTION	COMMENTS	RESPONSES
		<p>We request further engagement with yourselves on this topic, as we do not support any form of mandated counterparties as trade repositories or clearing houses.</p>	
		<ul style="list-style-type: none"> The term “<i>the Standard</i>” is used in the content of the Standard. We propose that it should instead be defined in the definitions section as follows: “<i>the Standard</i>” means the Conduct Standards of 2018 published under section 6(8)(a) of the Act 	<p>It is unnecessary to define Standard as it is clear from the context which Standard is intended.</p>
		<p>Reference is often made to:</p> <p>a) “<i>an applicant and a provider</i>” in certain provisions of the Standard and “<i>a provider</i>” in other.</p> <p>We propose that such reference should be consistent throughout the document to ensure that both an applicant and provider comply with the relevant requirements; and:</p> <p>b) “<i>the Republic</i>” in certain provisions of the Standard and “<i>the Republic of South Africa</i>” in others.</p> <p>We propose that such reference should be consistent throughout the document and should be defined in the definitions section.</p> <ul style="list-style-type: none"> We understood that there was agreement to align terminology with the Financial Sector Regulation Act, 2017 and that such amendments would be incorporated in the Standards. 	<p>The Authority wishes to point out that the term “provider” has been defined in the FMA Regulations. The distinction is necessary as some requirements are imposed on an applicant and other obligations are imposed on an authorised provider.</p> <p>In as far as the point on “<i>the Republic</i>” and “<i>Republic of South Africa</i>” the Authority will affect the amendments to ensure consistency.</p>

COMMENTATOR	SECTION	COMMENTS	RESPONSES
		<p>The term “<i>registrar</i>” is still reflected in the Standard.</p> <p>We propose that the term “registrar” be amended throughout the document to reflect “<i>the Authority</i>”.</p>	
		<ul style="list-style-type: none"> • We do not agree with the references made to securities services in the Annexes. The relevant business activity (that requiring a license) is market making in derivatives (which is not included within the definition of securities services set out in the Financial Markets Act). <p>We recommend that the references be removed.</p>	Please see the revised Standard.
	Controlling body	<p>In many sections, the members of the controlling body or senior manager are referred to alternately. This creates confusion as to the details to be included in the application. Annexure 1 to Form FM 6 requires information in respect of members of the controlling body only, but incorporates additional concepts, such as persons “exercising control over the provider” (is this different to the controlling body? Both sets of information are required). Information in respect of “management” is also required but there is no explicit distinction made between “management” and “senior managers”, and members of the controlling body and those exercising control over the provider.</p> <p>We recommend that the regulator consider including a definition of “controlling body” to avoid wrongful interpretation of the term</p>	The comment is noted and the necessary amendments were made in the Standard.
	1. Definitions	<p>Definition: ‘senior manager’</p> <ul style="list-style-type: none"> • The definition of “senior manager” is quite broad 	Please see revised Standard – a definition of ‘senior manager’ was included.

COMMENTATOR	SECTION	COMMENTS	RESPONSES
		<p>and open to various interpretation.</p> <p>We recommend that the regulator be explicit in the definition and assign the definition to the head of the global markets division which actually conducts the business of market making in derivatives (these are currently indicated as alternatives, but have markedly different consequences on the length of the application and the information required to be provided).</p> <ul style="list-style-type: none"> The reference to “senior managers” in other sections also indicates that this definition contemplates more than a single individual (i.e. the head of the division). This could lead to an incorrect interpretation as to whether the definition applies only to the business unit in question, or the entire organization. <p>Does the term refer to a managing director of a division or is it the intention that the term would include various individuals who in their individual capacities are in charge of a particular unit?</p> <ul style="list-style-type: none"> How will the application be affected/managed in instances where the applicant has various senior managers in charge of their respective divisions from which the covered activity emanate? 	
	<p>2.2. Application</p>	<p>It is unclear why the criteria reference both “applicant” and provider? In the current drafting, this can lead to the interpretation of the “applicant” being the natural person making the application.</p>	<p>Applicants must comply with the requirements and continue to comply with the requirements after authorisation.</p>

COMMENTATOR	SECTION	COMMENTS	RESPONSES
		<p>If so, a number of provisions included in the Standard would not make sense. It also creates confusion as to whether the “applicant” must meet the various requirements set out in the Standard at the time of application and for as long as the ODP license subsist or after the time of the application and beyond the validity of the ODP license.</p> <p>We recommend that the regulator use provider to avoid any confusion.</p> <p>Please advise if any entity that is currently recognised as a Financial Services Provider (FSP) under the FAIS regime will be subject to an automatic conversion as an ODP under the new regime. We would also recommend that this is aligned to the definition on the FSR Act.</p> <p>In the event that various “Senior Managers” are implicated as per the concern raised above with respect to the definition, will the applicant be required to submit information for all affected individuals to comply with the requirements in clauses 4.2.1-4.2.2 respectively?</p> <p>Where the applicant is a branch of a foreign bank, we seek clarity on whether reference to the controlling body is the Board executives of the Group holding company or the Board of the locally incorporated company. We would recommend that this is also aligned the definitions in Prudential Standards and FSR Act.</p>	<p>Authorised FSPs will not be automatically converted to ODPs and will still have to apply to be authorised as an ‘ODP’.</p> <p>A person that meets the definition of “senior manager” would need to comply with 4.2 in the Standard.</p> <p>This will be the Board of the locally incorporated company that is applying for authorisation.</p>
	<p>4.1. Operational Requirements</p>	<p>What would be the extent of collaboration between the various regulators, i.e. the FSCA, the JSE and the SARB with respect to capital requirements?</p>	<p>The comment is noted. The intention is not to have misaligned capital requirements.</p>

COMMENTATOR	SECTION	COMMENTS	RESPONSES
		<p>If a Bank would seek authorization under these requirements as an ODP, would it be exempted from the provisions of 4.1 on the basis that it would be lead regulated by the SARB as its prudential authority?</p> <p>Alternatively, what would be the consideration in instances where the ODP is a stockbroker and is recognized as an authorized user/member of the exchange?</p> <p>Such an ODP would be subject to the capital adequacy requirements in terms of the exchange regulations. Would the same ODP be subject to the provisions of 4.1?</p> <p>Refer comments under key concerns</p>	<p>See comment above on outright exemptions – authorisation for ODPs is on its own merit.</p>
	4.2. Fit & Proper	<p>What would be the consideration in the event that the prospective applicant is operating as an FSP and its status has not been altered/varied in terms of fit and proper requirements?</p> <p>Will the same information be utilized/considered or will the new application require new considerations?</p>	<p>The Authorities' view is that the applicant/provider will have to comply with these requirements irrespective of whether they have already complied with FAIS requirements or not.</p> <p>The applicant is required to submit the required information as set out in the Standard.</p>
	4.2.2(4)(d) Competency	<p>We note we will need to submit an annual report.</p> <p>On what date must the report be submitted i.e., date of registration, financial year end, prescribed by the registrar?</p>	<p>It is expected that the annual statement will be submitted annually from the date of authorisation as the provider.</p>
	4.2.5(c) Financial Soundness of	<p>Does the word “credit reference”, in this section deal with solvency / liquidity provisions as opposed to the entire “Fit and Proper” requirements?</p>	<p>Please see the revised Standard.</p>

COMMENTATOR	SECTION	COMMENTS	RESPONSES
	members of the controlling body & senior managers	If not, we propose that the reference should be deleted and replaced with “Fit and Proper” and should read “that a member of the controlling body or senior manager of a provider “must provide the Authority with a satisfactory report on the fit and proper requirements under section 4.2 of the Standard”	
	4.4. Compliance Function	Is there a form that must be followed to notify the registrar of the Head of Compliance?	There is no prescribed form. A letter will suffice.
	Annexure 1 to Form FM 6	<p>If applicable to the provider in question, must be contained in an application for authorization as an-over-counter derivatives provider</p> <p>1.(e) What is meant by “the attorney”? The applicant may not have a registered attorney, rather the applicant may have an approved panel of attorneys that will be briefed on various matters.</p> <p>Can we assume that, where this is the case, the information is not applicable?</p> <p>Additional information, which must be contained in an application for an over-the-counter- derivatives provider, point 3:</p> <ul style="list-style-type: none"> An applicant will not be in a position to submit detail on licensed trade repository used as the infrastructure has not yet been established. <p>Additional information, which must be contained in an application for an over-the-counter- derivatives provider, point 4:</p>	The applicant should advise the Authority that it does not have an attorney but makes use of a panel of attorneys. Should the Authority require any additional information, it would request the same from the applicant.

COMMENTATOR	SECTION	COMMENTS	RESPONSES
		<ul style="list-style-type: none"> An applicant will not be able to provide details on the licensed independent clearing house or associated clearing house as the infrastructure has not yet been established. Related to this is the ongoing discussion to classify “clearable” products. <p>Until such time as we have a clearly defined list of products eligible for clearing by an independent clearing house, we will not be in a position to meet the primary obligations of an ODP provider i.e. clearing and reporting.</p>	<p>This comment is noted.</p> <p>To the extent that the necessary infrastructures are not in place, , the ODPs do not have to comply with the provision.</p>
	Annexure 2 to Form 6	<p>Information required in respect of members of controlling body of an over-the-counter derivatives provider</p> <ul style="list-style-type: none"> Does this refer to all members of the controlling body or only the member responsible for over-the-counter derivatives activities? <p>Refer: Comments under “General”</p>	<p>The requirement is applicable to all members of the controlling body</p>
	Annexure A General Information on completion of questionnaires as contained in Annexure B and C	<p>Does this refer to all members of the controlling body or only the member responsible for over- the- derivatives activities?</p>	<p>The requirement is applicable to the relevant person/s i.e. members of the controlling body or t senior managers</p>
Allen & Overy (South Africa) LLP		<ul style="list-style-type: none"> Would a foreign entity who only enters into two or three collar financing transactions with South African counterparties a year fall within the 	<p>The following response is proposed: The intention is to capture ODPs who are conducting business in and whose</p>

COMMENTATOR	SECTION	COMMENTS	RESPONSES
		<p>scope of an “OTC derivatives provider” (in particular, would this be considered a “regular feature of their business”)?</p> <ul style="list-style-type: none"> Is there any mechanism or process whereby a foreign entity which is already regulated as an OTC derivatives provider in a foreign jurisdiction (such as England) can obtain exemption from the requirement to comply with the authorisation requirement under the FMA Regulations (such as is the case under the FAIS Merchant Banking Exemption)? 	<p>main place of business is in the Republic. It will be a factual question in each instance whether the activities are a regular feature of an entity’s business.</p> <p>See Paragraph 4.2.3 Operational ability in the Standard which requires that an applicant and a provider must have and be able to maintain the operational ability to fulfil the responsibilities imposed by the Act, including the following-</p> <ul style="list-style-type: none"> (i) a fixed business address in the Republic of South Africa; ... (ii) an account with a registered bank in the Republic of South Africa” <p>please refer to 2014 statement referring foreign jurisdictions http://www.treasury.gov.za/otc/Policy%20Statement%204%20July%202014.pdf</p>
UBS South Africa (Pty) Ltd	1. Application of the Regulations and Criteria for Authorisation to Offshore Entities -	As mentioned above, there are UBS offshore entities that undertake OTC business with South African domiciled clients in a principal capacity. However, both the Criteria and Regulations are silent as to whether the requirements are meant to apply to offshore entities. For example, we note from section 4.2.3 (a) of the Criteria (Operational ability) that applicants for OTC providers status are required to have a 'fixed business address' in the	<p>The intention is to capture ODPs who are conducting business in and whose main place of business is in the Republic.</p> <p>See Paragraph 4.2.3 Operational ability in the Code of Conduct which requires that an applicant and a provider must have and be able to maintain the</p>

COMMENTATOR	SECTION	COMMENTS	RESPONSES
		<p>Republic of South Africa. Neither of our offshore entities have such a fixed business address in South Africa and to impose such a requirement on an offshore entity could have unintended consequences for offshore entities such as permanent establishment concerns, from a tax perspective. The clarification of the application of the Regulations and Criteria to offshore entities is urgently required in order that such entities can take the necessary steps that their business model and structures are compliance with the laws and regulations of the Republic of South Africa .This is especially urgent as the deadline for registration as an OTC Derivatives Provider currently stands at 9th August 2018.</p> <p>Question/comment- do the regulations and criteria apply to offshore entities?</p>	<p>operational ability to fulfil the responsibilities imposed by the Act, including the following-</p> <ul style="list-style-type: none"> (i) a fixed business address in the Republic of South Africa; ... (ii) an account with a registered bank in the Republic of South Africa” <p>Please refer to 2014 statement referring to foreign jurisdictions http://www.treasury.gov.za/otc/Policy%20Statement%204%20July%202014.pdf</p> <p>“The relevant provisions of the FMA and this regulatory framework will apply to any derivative transactions that take place between:</p> <ul style="list-style-type: none"> • any two ODPs that are located in the Republic, whether those ODPs are locally incorporated or are a branch or subsidiary of a parent undertaking in a foreign jurisdiction. • an ODP and a counterparty/client, whether that counterparty/client is locally incorporated, a branch or a subsidiary of a parent undertaking in a foreign jurisdiction or located in a foreign jurisdiction (cross-border trade)”.
	2. Equivalent	We note the absence of an equivalence provision in	The consequential amendments to the

COMMENTATOR	SECTION	COMMENTS	RESPONSES
	<p>Regulatory Framework -</p>	<p>either the Criteria or the Regulations in terms of their application to offshore entities. If the intention is that the ambit of the Regulations and Criteria should include offshore entities surely this should include the concept of equivalence in respect of jurisdictions equivalent requirements are already in force? This is particularly significant as the Regulations and Criteria stem from South Africa's commitment to G20 and the Financial Stability Board's agreements for OTC derivatives market reforms to which other jurisdictions signed up. Principle 2 of the guiding principles of the development of the regulatory framework for regulating the OTC Derivatives market (as articulated in the National Treasury document titled Regulating OTC Derivatives Markets in South Africa- Published on 4th July 2014), acknowledges the need for an equivalent regulatory frameworks so as to minimize duplication and uncertainty as well as ensure a level playing field.</p> <p>Question/comment - is there an intention to implement an equivalence regime and if so, what is the scope of the proposed regime, which jurisdictions are being considered and what is the likely timeframe?</p>	<p>FMA make provision for the licensing of an external central counterparty as well as the licensing of an external trade repository.</p> <p>An external central counterparty and/or an external trade repository may be exempt from the requirement to be licensed in terms of section 6(3)(m) of the FMA.</p> <p>An external trade repository as well as an external central counterparty from an equivalent jurisdiction may apply for a licence.</p> <p>Section 6A of the FMA deals with Equivalence recognition of foreign jurisdictions.</p> <p>Regarding ODPs, such entities will have to be in the Republic and cannot be based offshore.</p>

COMMENTATOR	SECTION	COMMENTS	RESPONSES
	3. Entity Registration –	<p>If the intention is that the Regulations and Criteria apply to offshore entities, then in a situation where one offshore branch of an offshore entity conducts OTC Derivatives business with South African domiciled clients, will the FSB expect the specific branch conducting the business to be the registered OTC Derivatives provider or would you expect the actual entity itself to be the registered OTC provider?</p> <p>Question/comment - if the regulations and criteria are applicable to offshore entities and an offshore branch of an offshore entity conducts OTC derivatives business with South African domiciled clients, will the registration requirements apply to the offshore branch only or will the actual offshore entity itself be required to register as an OTC derivatives provider?</p>	<p>The intention is to capture ODPs who are conducting business in and whose main place of business is in the Republic.</p> <p>See Paragraph 4.2.3 Operational ability in the Standard which requires that an applicant and a provider must have and be able to maintain the operational ability to fulfil the responsibilities imposed by the Act, including the following-</p> <ul style="list-style-type: none"> (iii) a fixed business address in the Republic of South Africa; (iv) an account with a registered bank in the Republic of South Africa.
	4. Intra-group Transactions –	<p>We acknowledge your intention that Regulations and Criteria apply to South African domiciled entities that enter into OTC Derivatives transactions in a principal capacity with South African domiciled clients. However, we are unclear as to whether the intention is to apply them to onshore entities in respect of intra-group OTC Derivatives transactions whereby an onshore entity enters into OTC derivatives transactions with another group entity which is domiciled offshore. This is particularly</p>	<p>The Authorities' view is that each case will be determined on its own merits as to whether an activity constitutes a 'regular feature of its business' or not.</p>

COMMENTATOR	SECTION	COMMENTS	RESPONSES
		<p>relevant to international firms for whom such intra-group transactions are a regular feature of their group activity. It would, therefore, be useful to get your clarification on this point.</p> <p>Question/comment - do the regulations and criteria apply to onshore entities in respect of intra-group derivatives transactions, where an onshore entity enters into OTC derivatives transactions only with another group entity which is domiciled offshore?</p>	
	<p>5. Definition of OTC Derivatives Provider –</p>	<p>A key component of the definition of an OTC Derivatives provider (as stated in the Regulations and reflected in the Criteria) is that the origination, issuing, selling or making a market in OTC derivatives in a principal capacity is a <i>'regular feature of its business'</i>. It is unclear as to how this 'regular feature of its business' test should be applied. Are we to imply some sort of volume threshold in terms of the entities OTC derivatives business and if so, is this in relation to the sized of OTC derivatives business with South African domiciled clients as a percentage of its global OTC Derivatives business or is it the size of its OTC derivatives business conducted on a global basis as a percentage of the entity's entire business. On the basis that this test is a key component in determining whether an entity falls within the definition of an OTC derivatives provider, we believe that it the regulator should, as a matter of urgency, provide some guidance as to the criteria for the 'regular feature of its business' test.</p> <p>Question/comment - is there a test for determining what constitutes 'a regular feature of its business' in</p>	<p>Case by case determination – including a threshold on the number of transactions/volumes might have unintended consequences.</p>

COMMENTATOR	SECTION	COMMENTS	RESPONSES
		<p>terms of the definition of an OTC derivatives provider? If not, does the FSB intend to provide appropriate guidance?</p>	
	<p>6. Trade Repository –</p>	<p>Annexure 1 to form M6 sets out the information which must be contained in an application for an OTC Derivatives provider. It includes the details of a licensed trade repository that will be used for the reporting of transactions. On the basis that there are currently no licensed trade repositories in South Africa, is it envisaged /allowed for an OTC derivatives provider to use a trade repository that is licensed by an offshore regulator to undertake the reporting on its behalf? This is particularly relevant for, a potential OTC Derivatives Provider that is part of an international group where the group already has a trade repository that is licensed offshore by a recognised regulator and already provides similar reporting services in respect of OTC Derivatives on behalf of other entities within the group. From a cost perspective, this would be critical for our firm and other international firms.</p> <p>Question/comment - will offshore (if the regulations and criteria apply to offshore entities) and onshore OTC derivatives providers be allowed to utilise the services trade repositories licensed in offshore jurisdictions for reporting purposes?</p>	<p>The consequential amendments to the FMA make provision for the licensing of an external trade repository (section 56A).</p> <p>An external trade repository from an equivalent jurisdiction may apply for a licence</p> <p>Section 6A of the FMA deals with Equivalence recognition of foreign jurisdictions.</p>
	<p>7. Timeframe for Registration /Implementation – reporting obligations?</p>	<p>The Regulations effectively require potential OTC Derivatives providers to submit their registration by 9th August 2018. On the basis that the proposed Criteria for Authorisation is not yet finalised nor are the Reporting Obligations for OTC Derivatives Providers, do you intend to grant an extension to the timeframe for registration? Furthermore,</p>	<p>The Authority will communicate the revised timelines in due course.</p>

COMMENTATOR	SECTION	COMMENTS	RESPONSES
		<p>potential OTC Derivatives providers will require sufficient time to consider the reporting obligations (once published) on their current business model and then build the necessary processes and systems required to comply with the reporting obligations. In the event that the reporting obligations result in a change to an entity's business model, it could take upwards of 9-12 months from the finalisation of the Reporting Obligations for a firm to be in a position to comply with the reporting obligations. Therefore, we strongly urge you to consider an adequate and realistic timeframe for implementation/compliance.</p> <p>Question/comment- as the criteria and reporting obligations for OTC derivatives are yet to be finalised, does the FSB intend to grant an extension to the registration timeframe and if so, will the FSB ensure that the extension takes into account the likely length of time that OTC derivatives providers will require to build the systems and processes necessary to comply with the criteria and reporting obligations?</p>	