

| | | |
|--------------------------|---|--|
| 28(6)(d) | <p>CURRENT WORDING: "A fund may as collateral for the fund defaulting on a loan ..."</p> <p>SUGGESTED WORDING: "A fund may as collateral for the fund defaulting on a loan or derivative transaction."</p> <p>is not well phrased. Suggest redraft to: "If a fund defaults on a loan referred to in paragraph (b), the fund may as collateral -"</p> | Allow funds to cede or grant options on derivatives as for loans instead of collateralising derivatives (which can be expensive) |
| 28(7) Exemptions | | Consider including a note from the registrar providing some guidance of how and when exemptions would be applied. |
| 28(8) Definitions | | <p>Capitalise defined terms wherever used.</p> <p>Consider expanding the definitions, and including the definitions from the annexures in this part of the document.</p> |

| | | |
|---|--|---|
| <p>28(8) Definition of "cash"</p> | <p>"cash" means: - (i) notes and coins; (ii) a deposit in a South African bank or a foreign bank; (iii) a positive net balance in a margin account with an exchange; and (iv) a positive net balance in a settlement account with an exchange, operated for the buying and selling of <i>underlying</i> assets;</p> <p>CURRENT WORDING: Move constituents of "Cash" - SUGGESTED WORDING: And include them under "money market instruments". Consider adding Negotiable Certificates of Deposit (NCDs) to the list of examples.</p> | <p>Include cash in debt category as term asset to facilitate the most appropriate asset liability matching results for a retirement fund. The liquidity requirement should come from a pension fund.</p> <p>Include negotiable certificates of deposit.</p> <p>Group short-term and long-term exposure to banks. Refer also to the comments on item 1 and 2.1 in Table 1.</p> <p>If the proposal is not accepted, define "deposit" in the same way as it is defined in the Banks Act. This will clarify and provide consistency in interpretation.</p> <p>See comments on use of cash in derivatives draft notice.</p> <p>Combine "cash" and "money market instrument" under "money market instrument" as distinction seems redundant.</p> <p>Clarify whether a Fixed Deposit is defined as "cash" or a "money market instrument".</p> <p>Broaden definition of "cash" to include NCDs and Money Market Instruments. Alternatively, it may be worth considering deleting Item 1 of Table 1 in its entirety and including "cash" with "Debt Instruments" under Item 2 of Table 1. If the latter approach is adopted, then the maximum exposure limits need to be changed: the capacity for bank debt instruments needs to be increased from 75% to 100% and the Capacity for "Other Debt Instruments" also needs to be raised, because it will mean that corporate (listed or unlisted) short term commercial paper issues will use up the market's longer term funding capacity in Item 2.1(e), and in so doing have a "crowding out" effect and thereby diminish the ability for corporates to raise longer or medium term debt on a dis-intermediated basis (since retirement and pension funds' investment capacity for investing in corporate debt instruments may then be taken up by their investments in shorter term money market instruments). From a policy perspective, this would be a regressive step, as it would inhibit the ability of the domestic corporate bond market to grow (at a time when the SA bond market's listings requirements are in the process of being revamped by the JSE and will help borrowers reduce funding costs and hence optimize their capital structures). It is proposed rather, that inclusion of NCDs and CP be included under "cash", if necessary with market capitalisation limits along the lines of Items 2.1(c) (for banks) and 4.1(a) for listed corporates.</p> |
| <p>28(8) Definition of "debt instruments"</p> | | <p>Provide clear definition of "debt instruments."</p> |

| | | |
|--|---|---|
| <p>28(8) Definition of "exchange"</p> | <p>"exchange" has the meaning assigned to it in means an exchange licensed under section 10 of the Securities Services Act, 2004 (Act No. 36 of 2004) and, for the purposes of this regulation, any other exchange that is a full member of the World Federation of Exchanges or a member of the African Securities Exchanges Association or to which the due diligence guidelines as determined by the Registrar has been applied;</p> <p>CURRENT WORDING: "any other exchange that is a full member of the World Federation of Exchanges"</p> <p>SUGGESTED WORDING: "any other exchange that is a full member of the World Federation of Exchanges or to which the fund has applied the due diligence guidelines determined by the registrar"</p> <p>"any other exchange that is a full member of the World Federation of Exchanges or to which the fund or its agent has applied the due diligence guidelines determined by the Registrar"</p> <p>Reference should be had to section 14 of CISA General Notice 569 of 2003 which sets out clear guidelines for due diligence of exchanges by the trustees or managers of collective investment schemes.</p> | <p>Widen definition of "exchange". To retain current approach will dramatically affect the ability of retirement funds to obtain exposure to listed securities in African markets, which has been a major trend in recent years as risk has been re-priced following 9/11 and the financial crisis of 2008. To entrench this restriction will also undermine policy which aims to encourage investment in African markets.</p> <p>Allow participation in stock exchanges that are members of the African Securities Exchanges Association (ASEA). Please also refer to the comments on Regulation 28(2)(h).</p> <p>Widen definition of "exchange". Only three African exchanges are members of the WFE, probably as a result of the high cost of WFE membership.</p> <p>Clarify the definition of "exchange" – currently it is either as defined in the Securities Services Act or any other exchange which is a full member of World Federation of Exchanges (the "WEF"). The London Metal Exchange (the "LME") is not listed as being a member. This may mean that pension funds cannot invest in metals traded on the LME. The LME accounts for something like 90% of the base metal market.</p> <p>Expand this definition to include the African Securities Exchanges Association, which currently has 22 members or those exchanges that are going through the process of being 'full members'.</p> <p>The definition of "exchange" is too narrow and certainly narrower than under CISA. Only three African exchanges are members of the WFE, probably as a result of the high cost of WFE membership. To retain this approach will dramatically affect the ability of SA retirement funds to obtain exposure to listed securities in African markets, which has been a major trend in recent years as risk has been repriced following 9/11 and the financial crisis of 2008. To entrench this restriction will also undermine policy which aims to encourage investment in African markets.</p> |
| <p>28 (8) definition of "fair value"</p> | <p>"fair value" has the meaning assigned to it in financial reporting standards, including <i>"International Private Equity and Venture Capital Valuation Guidelines, edition September 2009"</i>, and any other condition or provisions as may be prescribed</p> | |
| <p>28 (8) definition of "financial reporting standards"</p> | <p>"financial reporting standards" has the meaning assigned to it in the Companies Act, 2008 (No 71 of 2008)</p> | <p>Clarify whether the references to the Companies Act in the definitions to the regulations is appropriate as the Companies Act is not applicable to Retirement Funds in South Africa.</p> |
| <p>28 (8) add definition for "fund"</p> | | <p>Clarify that the use of "fund" throughout the regulation refers specifically to a "pension fund" to avoid any confusion with "private equity fund", or "hedge fund"</p> |

| | | |
|--|---|---|
| 28(8) Definition of "fund of hedge fund" | | Define the word "primarily". It seems ostensibly this may mean anything more than 50%. In other words, the fund of funds could hold say 49% corporate bonds, and 51% fund of hedge funds and be deemed a "fund of hedge funds". This can severely undermine the look through process and allow regulations to be bypassed. |
| 28(8) Definition of "fund of private equity funds" | | Define the word "primarily". See above comment on "fund of hedge fund" definition. Such definitions potentially allow a provider to significantly bypass the regulations and look through principle. |
| 28(8) Definition of "hedge fund" | <p>"hedge fund" means a portfolio which uses any strategy or takes any position that may which could result in the aggregate exposure of the portfolio incurring losses greater than its aggregate market value to that strategy or position exceeding the fair value of the portfolio at any point in time, and which strategies or positions include but are not limited to leverage and net short positions;</p> <p>SUGGESTED WORDING: "hedge fund" means a portfolio which uses any strategy or takes any position which could result in the portfolio incurring losses greater than its aggregate market value at any point in time. And which strategies or positions include but are not limited to leverage and net short positions"</p> <p>"hedge fund" means a portfolio which uses any strategy or takes any position which could result in the portfolio incurring losses greater than its aggregate market value at any point in time, and which strategies or positions include but are not limited to leverage and net short positions"</p> | <p>Use definition of "hedge fund" in FAIS Act for legislative consistency because current definition is too broad and unworkable -it potentially includes any portfolio that includes derivatives.</p> <p>Redraft to a more technically accurate level of definition for the asset class or there may be unintended consequences. We continue to be concerned that the proposed Regulation seems to inadequately distinguish between hedge funds, private equity and any other unlisted or listed equity investment. In fact, it becomes clear that because the values of listed companies are not measured at NAV like private equity funds and hedge funds, listed equity assets actually carry more risk relative to their underlying assets. Given this unclear distinction between listed companies with indirect exposure to gearing, hedge funds, private equity etc., the Regulation as proposed requires many listed companies to be disclosed as hedge funds.</p> |
| 28(8) Definition of "Islamic debt instrument" | <p>CURRENT WORDING: "Islamic debt instrument" means an Islamic investment instrument that is a bond ..."</p> <p>SUGGESTED WORDING: ?</p> | Clarify definition of "Islamic debt instrument" – currently it seems circular, referring to the undefined "Islamic investment instrument" |
| 28(8) Definition of "long-term insurer" | "long-term insurer" means a person company registered or deemed to be registered as a longterm insurer in terms of the Long-term Insurance Act, 1998 (Act No. 52 of 1998). | |

| | | |
|---|--|---|
| <p>28(8) Definition of "money market instruments"</p> | <p>"money market instrument" means an instrument creating or acknowledging indebtedness and is defined as including but not limited to the like of:</p> <p>(i) "banker's acceptance" means a bill as defined in the Bills of Exchange Act, 1964 (Act No. 34 of 1964), drawn on and accepted by a bank as defined in the Banks Act, 1990 (Act No. 94 of 1990), or a mutual bank as defined in the Mutual Banks Act, 1993 (Act No. 124 of 1993);</p> <p>(ii) "bill" means a bill as defined in the Bills of Exchange Act, 1964 (Act No. 34 of 1964);</p> <p>(iii) "bridging bond" means an acknowledgement of debt in which the issuer thereof undertakes to repay the debt together with interest on the maturity of the debt to the holder of the bridging bond;</p> <p>(iv) "commercial paper" means any negotiable acknowledgement of debt;</p> <p>(v) "debenture" means a debenture as defined in the Companies Act, 2008 (Act No. 71 of 2008) any document issued as evidence of the borrowing of money by an institution, whether constituting a charge on the assets of the institution or not;</p> <p>(vi) "Islamic liquidity management financial instrument" means a financial instrument that is issued by a South African bank or a foreign bank:</p> <p>—</p> <p>(aa) that is negotiable under specific conditions and with specific Shari'ah rules that govern the underlying transaction; and</p> <p>(bb) in respect of which the title to ownership of the underlying tangible asset or assets passes from a fund to a third party within seven business days from the date of purchase thereof, and at which purchase date the future sale price of the tangible asset or assets is fixed despite any increase or decrease in the market value thereof;</p> <p>(vii) "land bank bill" means a bill or note as defined in the Bills of Exchange Act, 1964, drawn, accepted or issued by the Land and Agricultural Bank of South Africa;</p> | <p>More generic definition for "bills."</p> <p>Delete definition of bridging bond as not relevant anymore and can also be read as "commercial paper".</p> <p>Delete words "liquidity management" in the definition of "Islamic financial instrument" as is not necessary.</p> <p>Replace reference to "title" in definition of "Islamic financial instrument" with "ownership" to align with CISCA.</p> <p>Replace reference to "and is defined as" be replaced with "including but not limited to the like of" as this will provide for instruments that may in future be developed. The list should not be a closed list.</p> <p>Remove reference to Companies Act, 2008 in definition of "debenture". Debenture is not defined in the Companies Act, 2008. The definition in the Companies Act, 1973, only referred to companies and precluded debentures issued by the South African Reserve Bank.</p> <p>Amend subparagraph (vi)(aa) to ensure that the evolution of Islamic instruments is always aligned with Shari'ah rules.</p> <p>Show list of types of money market instruments, as the definition of "money market instrument" is unlikely ever to be comprehensive.</p> <p>Insert a general sub-clause in the definition of "money market instruments" that allows the registrar to add to the list when necessary. Also, how are inflation linked notes or exchange traded notes classified?</p> <p>Reduce level of prescription of Islamic finance instruments as it is not flexible enough to move along with developments in the new field of Islamic Finance law.</p> <p>Change "Islamic debt instrument" to "Islamic investment instrument".</p> <p>Align Islamic finance definitions with CISCA Notice 131 of 2010 or clarify, where conflict, which is to prevail.</p> |
|---|--|---|

| | |
|---|--|
| <p>28(8) Definition of "money market instruments" (cont.)</p> | <p>(viii) "national housing bill" means a bill or note as defined in the Bills of Exchange Act, 1964, drawn, accepted or issued by the National Housing Board;</p> <p>(ix) "negotiable certificate of deposit" means a certificate of deposit issued by a South African bank or a foreign bank and payable to order or to bearer;</p> <p>(x) "parastatal bill" means a bill or note as defined in the Bills of Exchange Act, 1964, drawn, accepted or issued by a parastatal;</p> <p>(xi) "promissory note" means a promissory note as defined determined in section 87 of the Bills of Exchange Act, 1964;</p> <p>(xii) "trade bill" or "trade note" means a bill or note as defined in the Bills of Exchange Act, 1964, drawn, accepted or issued to provide for the payment for goods; "treasury bill" means a bill drawn by the Government on the Treasury calling on the latter to pay a sum certain in money to a specified person or his order or to bearer, on demand or on a certain specified future date;</p> <p>CURRENT WORDING: "money market instrument" means an instrument creating or acknowledging indebtedness and is defined as:-</p> <p>SUGGESTED WORDING: "money market instrument" means an instrument creating or acknowledging indebtedness and includes the like of:- Consider adding Negotiable Certificates of Deposit (NCDs) to the list.</p> |
|---|--|

| | | |
|--|--|--|
| <p>28(8) Definition of "private equity fund"</p> | <p>"private equity fund" means a managed pool of capital that:</p> <p>(i) has as its main business the making of equity, equity orientated or equity related investments primarily in unlisted companies to earn income and capital gains; and</p> <p>(ii) is not offered to the public as contemplated in the Companies Act, 2008 (No. 71 of 2008); (ASISA)</p> <p>"private equity fund" means a managed pool of capital that:</p> <p>(i) has as its main business the making of equity, equity orientated or equity related investments primarily in unlisted companies to earn income and capital gains; and</p> <p>(ii) is not offered to the public as contemplated in the Companies Act, 2008 (No. 71 of 2008);</p> | <p>Clarify by referring to equity. The proposed wording may unintentionally include debt and property funds as property or debt funds invest primarily in unlisted property-owning companies or debt issuances by private companies.</p> <p>Clarify that the intention of the regulations are that a pension fund may invest, at the prescribed limits per private equity fund, where a private equity fund manager may manage a number of private equity funds at one time. The current definition could be interpreted that the prescribed limits apply to the private equity fund manager and not the private equity fund itself.</p> <p>Do not restrict private equity funds from offering to the public. all private equity funds until closed would take money from any investor, and are therefore offered in 'spirit' to the public. Also, there are some listed companies that are so tightly held that they are not effectively open to the public. In all other concerns there is no difference between listed, unlisted and private equity. Even secondary sales are possible with private equity investments. Given the tendency of BEE deals to be done through this mechanism, which allows for the gearing of capital into BEE hands, we find the restriction of private equity counterproductive to development in SA.</p> <p>Narrow the definition by inserting the words "equity, equity oriented or equity-related" before the word "Investments" in paragraph (1) of the definition of "Private equity fund".</p> |
| <p>28(8) New definition</p> | <p>"Long-term Insurance Act" means the Long-term Insurance Act, 1998 (Act No. 52 of 1998).</p> | <p>Define Long-term Insurance Act. The term is used but not defined.</p> |

REGULATION 28 SECOND DRAFT COMMENTS TABLE 1

| TABLE 1 | | |
|----------------|---|--|
| ITEM | | COMMENT |
| General | <p>CURRENT WORDING: "with a market capitalisation of"</p> <p>SUGGESTED WORDING: "where the market capitalisation of common equity is"</p> <p>CURRENT WORDING 2.1, 3.1, 4.1, 5.1 and 8.1</p> <p>SUGGESTED WORDING Delete</p> | <p>The numbers 2.1, 3.1, 4.1, 5.1 and 8.1 all seem redundant. It is suggested that it should be deleted.</p> <p>Refer to "market cap of common equity" when referring to market cap.</p> <p>The new Companies Act may/is likely to end the existence of preference shares. <i>Suggest simply referring (globally, throughout Reg 28) to "all shares, of whatever nature" (could use a definition).</i></p> |
| Item 1 | <p>CURRENT WORDING: "1. CASH 1.1 Inside the Republic 1.2 Foreign assets"</p> <p>SUGGESTED WORDING Delete</p> | <p>Combine cash and debt under Debt instruments, where most "cash" will fall under "Debt issued by banks". The distinction between 1Cash and 2 Debt instruments seems redundant.</p> <p>Increase 75% maximum limit in item 2.1(c) to 100% if all debt is grouped together. Please refer to the comments above on the definition of "cash".</p> <p>Consider increasing the limits if deposits are collateralised, as this should provide an additional layer of security.</p> <p>Include cash in the debt category (Section 2).</p> |

| | | |
|---------------------------------|--|---|
| Item 2: Debt Instruments | Change "listed on an exchange" in 2.1(e)(i) to "subject to the debt listings and disclosure requirements of the exchange". | <p>Clarify whether the non-government debt instruments cap can be raised to 100% in order to allow for money market only portfolios, fixed deposit investments and capital protected investments with large NCD components for members close to retirement.</p> <p>Consider and clarify whether foreign debt instruments not issued by governments been intentionally left off. Many funds probably already invest in these and you may want to make the treatment of foreign debt relative to foreign equity the same as for local debt and equity.</p> <p>1) Clarify the differentiation between listed and unlisted debt. The concern in this regard is that asset managers may choose to interpret the status of instrument whose trades are simply reported to the exchange as "listed" and therefore use the 25% limit instead of the correctly more conservative 15%.</p> <p>Leave money market instruments in a separate section in order to ensure that there is no crowding out of investments such as commercial paper not issued or guaranteed by a bank (for example securitisation vehicles). This sector has become an important component of the listed debt market and we are concerned that if a crowding-out effect is evident that it may affect this asset class.</p> <p>Revise and increase issuer/entity limit levels to a more practical level. The alternative for funds would be to endeavour to manage this at mandate level, but this could become very complicated and could incur additional costs. Another possibility is to set the limit with reference to the debt issue, rather than the issuer.</p> |
| Item 2.1(b) | See ASISA table tracked changes | Reword Column to say "Subject to Regulation 28(2)(j)". Regulation 28(2)(j) states that foreign asset limits are determined by the South African Reserve Bank. Column 2 of item 2.1(b) currently refers to "an amount as prescribed". Prescribed is in turn defined as "prescribed by the registrar in consultation with the Minister". |
| Item 2(b)(ii) | See ASISA table tracked changes | Re-think lower allowance for foreign unlisted equity. Having regard to some sophisticated foreign unlisted equity markets there appears to be no <i>prima facie</i> reason for this unless it is meant as protection against possible risky emerging markets. |

| | | |
|---------------------------|---|---|
| <p>Item 2.1(c)</p> | <p>CURRENT WORDING: "Debt instruments issued or guaranteed by a South African bank against its balance sheet: 75%"</p> <p>SUGGESTED WORDING: "Debt instruments issued or guaranteed by a bank or foreign bank against its balance sheet: 100%"</p> <p>CURRENT WORDING: "Debt instruments issued or guaranteed by a South African bank against its balance sheet"</p> <p>NO SUGGESTED WORDING</p> | <p>Clarify or remove all mention of country from the table so that foreign exposure is limited only by exchange controls. Unclear why (c) refers only to South African banks.</p> <p>Clarify why bank exposure is limited to 75% when both Cisca and current Reg 28 allow 100%.</p> <p>Clarity required on what constitutes debt issued by a bank. For example, does this include subordinated debt, CLNs and structured notes?</p> <p>Consider lowering the limit per issuer (now bank per issuer limit for debt same as that for cash), although this adds more complexity.</p> <p>Consider credit ratings for this section. Perhaps the limits could be 15%, 10% and 5% respectively or some other combination depending on ratings.</p> <p>Consider increasing the limits if debt is collateralised, as this should provide an additional layer of security - a collateralised debt instrument has different risk characteristics to other debt instruments.</p> <p>Increase limit for bank debt from 75% to 100%.</p> <p>Consider the <i>risk of moral hazard</i> by permitting 75% in bank paper <i>only</i>. It may put added pressure on the central bank/government to bail out a failing bank in that eventuality (since the proposed 75% limit for banks seems to endorse banks as issuers ahead of corporates, since corporates only have a 25% debt limit in terms of Item 2.1(e).</p> <p>Consider the risk of investors in bank debt adopting the view that a bank is "<i>too big to fail</i>" by virtue of the bands per issuer which are applicable pursuant to the proposed provisions of Items 2.1(c)(i) to (iii) being linked to the market capitalisation of banks (rather than their solvency of capital adequacy ratios, or some more appropriate risk measures). Adopt other measure, not market cap.</p> <p>Amend all references to "market capitalisation" throughout Reg 28 to refer to the "Equity market capitalisation".</p> |
|---------------------------|---|---|