planning, monitoring
& evaluation

Department:
Planning, Monitoring and Evaluation
REPUBLIC OF SOUTH AFRICA

SOCIO-ECONOMIC IMPACT ASSESSMENT SYSTEM (SEIAS)
INITIAL IMPACT ASSESSMENT TEMPLATE (PHASE 1)
CONDUCT OF FINANCIAL INSTITUTIONS BILL, 2018

The Initial Impact Assessment for the Conduct of Financial Institutions (COFI) Bill

The Initial Impact Assessment aims to ensure that the policy is on the right track by requiring evaluation of alternative approaches. It should help drafters avoid finalising an inappropriate solution because they moved too quickly to select a strategy without adequately analysing the roots of the problem and considering alternative measures. It should facilitate a brainstorm about issues involved in the problem and full range of alternatives to deal with them.

1. The problem/ Theory of Change

1.1. What is the social or economic problem that you are trying to solve?

The 2008 Global Financial Crisis highlighted the immense costs that a poorly regulated financial sector can impose on customers, companies and the economy. The crisis saw individuals and companies fall into bankruptcy and pushed economies in many different countries into recession. While the South African financial sector was spared the direct impact of the crisis (no financial institutions were directly involved or had to close down), the economy also fell into recession as the effects of the crisis spread through the global economy. A key driver of the crisis was opaque and complex financial products which were poorly designed and poorly sold.

The crisis coincided with an evaluation of financial sector regulation in South Africa, and consideration of whether the sector was producing the best possible outcomes. Some of the findings of the evaluation were contained in the 2011 discussion document, "A Safer Financial Sector to Serve South Africa better"[1]. The review was in part in response to a number of high profile incidences of poor customer outcomes, including:

[1] http://www.treasury.gov.za/twinpeaks/20131211%20-%20Item%202%20A%20safer%20financial%20sector%20to%20serve%20South%20Africa%20better.pdf

- the 2005 Statement of Intent between the Minister of Finance and long-term insurance industry which addressed high penalties and termination fees in the long-term insurance industry
- The 2006 Competition Commission Inquiry into competition in the retail banking sector, which made a number of recommendations to ensure greater competition in the retail banking sector, to achieve real benefits for customers through lower costs and greater access
- Fidentia fraud against 47 000 widows and orphans exposed in Feb 2007

It is evident that the South African financial sector has been producing many incidences of poor conduct, leading to poor financial customer outcomes. High and opaque fee structures, weak disclosure and transparency of highly complex products, and inappropriate financial products and services (especially for the poor and most vulnerable) have emerged as particular concerns. The crisis pointed to the risks of light-touch approaches to regulation, and of regulation that does not keep pace with the dynamic nature of an increasingly complex and interconnected financial sector. In South Africa, this was further emphasised with the experience of African Bank being placed under curatorship, and the over-indebtedness crisis that was exacerbated by the economic recession.

Market conduct challenges identified in South Africa

- Complex fee structures that undermine product comparisons and competitiveness, e.g., fees relating to account transactions, penalties and ATM charges
- Incentives reduce customer scrutiny of core product features and distort decision making
- Unfair debit order practices, e.g., penalties on dishonoured debit orders and double debit orders
- Payment system issues relating to competition, pricing transparency and poor outcomes for end-users
- Lack of regulatory oversight of market conduct practices has slowed reforms
- Insufficient focus on new customer channels and technologies, e.g. mobile banking
- Fraud risk, particularly through electronic channels.
- Opaque, high and sometimes inappropriate charges, especially in multi-layered investment products
- Some product design features can weaken returns and competition, e.g., causal event charges.
- Gaps in the regulatory net allow for structuring of investment vehicles to avoid regulation
- Scope for weak understanding of risk exposure in money market funds by retail investors
- Poor disclosure of risk of securitised assets in the wholesale market

- Reckless lending practices that lead to over-indebtedness, especially payday lending
- The sale of unsuitable, incorrectly targeted credit products
- Poor sales incentives that drive unfair lending practises
- Abuse of the payments system to collect debt, including abuse of suretyships; abuse of emolument attachment (garnishee) orders; and abusive debit order practices e.g. abuse of NAEDO system
- Poor conduct in consumer credit insurance, especially linked to mandatory cover, bundled products, interconnected business models and conflicted distribution models
- Poor disclosure of product terms and weak understanding by customers of technical policy language
- Weak governance in outsourcing arrangements
- Conflicted commission-based remuneration structures of intermediaries or service providers
- Poor claims handling practices, e.g., repudiations and non-transparency of exclusions, unreasonable excesses on asset cover, “underwriting at claim stage”
- Too much focus on premium price rather than value, where costs to the consumer are displaced to higher excesses, especially in short-term insurance
- High incidence of illegal operators in the funeral insurance market
- Conflicts of interest, especially around remuneration and outsourcing; complicated relationships between product providers and intermediaries compromise accountability and transparency of advice
- Selling is incentive driven (product provider focused), rather than advice driven (customer focused)
- Unclear regulatory framework for non-advice selling; an uneven playing field
- ‘Tick box’ compliance approaches which do not fulfil the intent of financial sector policy
- Structuring of intermediaries that leads to regulatory arbitrage and consumer confusion.

South Africa’s fragmented legal framework has not been optimally effective in addressing market conduct practises. While South Africa’s financial sector is generally resilient, it could be delivering better outcomes for customers and the economy. Many customers in the financial sector are not treated fairly, and are often sold products or services that do not deliver value for money, are complex, and do not perform as expected or are not appropriate to their needs. This can pose risks to customers, to the stability of the financial sector, and to the growth of the economy more widely.

In response to the identified problems, South Africa is implementing a Twin Peaks model of financial regulation, which has seen the creation of a new Financial Sector Conduct Authority (FSCA) specifically tasked with ensuring the fair treatment of customers in the financial sector, and the efficient and integrity of financial markets. The FSCA was established on 1 April 2018. However, the FSCA currently operates within the existing legal framework of regulation for the financial sector, which is fragmented. There are thirteen pieces of legislation that apply differing requirements on the financial sector in different ways. There is no specific legislation addressing banking market conduct issues. The legislation in place is prescriptive and has led to a tick-box approach to compliance, resulting in the letter of the law being followed even as poor outcomes are produced. **This fragmented regulatory framework impedes the effective achievement of fair customer treatment**. In 2014 the National Treasury proposed the development of a stronger market conduct framework for regulating the financial sector in South Africa, including the development of a new market conduct law[2].

1.2. **What are the main causes of the problem? That is why the problem arise and why does it persist?**

Identified Problem	Main Causes of the Problem	Why the problem arises and why does it persist?
South African financial sector has been producing many incidences of poor conduct, leading to poor financial customer outcomes. High and opaque fee structures, weak disclosure and transparency of highly complex products, and inappropriate financial products and services (especially for the poor and most vulnerable) have emerged as particular concerns.	• Fragmented legal framework for market conduct regulation in South African financial sector, leading to poor customer outcomes • Legislation applicable to the financial sector has been developed gradually over time and has been based on an institutional approach to financial sector regulation. Laws range from the Pension Funds Act first enacted in 1956 to the more activity-based Financial Advice and Intermediary Services (FAIS) Act implemented in 2002. Regulation is based on the institutional form of a financial company.	• The legal framework has not kept pace with the dynamic nature of the financial sector, which is increasingly complex and interconnected. Institutions do not necessarily perform only one type of financial activity and so have to be regulated under a number of different laws. • The different laws apply differing requirements. The fragmented approach has presented opportunities to exploit regulatory arbitrage, and has resulted in inefficient regulatory overlaps.

[2]http://www.treasury.gov.za/public%20comments/FSR2014/Treating%20Customers%20Fairly%20in%20the%20Financial%20Sector%20Draft%20MCP%20Framework%20Amended%20Jan2015%20WithAp6.pdf

Identified Problem	Main Causes of the Problem	Why the problem arises and why does it persist?
		• The fragmented legislative environment and has impeded the ability of the regulator to effectively monitor and supervise risks emerging in the sector. It has led to a tick-box approach to compliance both by the regulator and the industry • This has culminated in a regulatory environment that does not prevent persistent poor market conduct outcomes from occurring in the financial sector.

1.3. **Whose behaviours give rise to the problem, and why does that behaviour arise? Remember that several groups including some in government may contribute to the identified problem. Their behaviour may arise amongst others because the current rules are inappropriate; because they gain economically from the behaviour; or because they are convinced that they are doing the right thing. Identifying behaviours that cause the problem should point to the behaviours that must be changed in order to achieve the desired solution.**

Identified Problem	Behaviour giving rise to the identified problem	Groups whose behaviour give rise to the identified problem?	Why does the behaviour arise?
South African financial sector has been producing many incidences of poor conduct, leading to poor financial customer outcomes. High and opaque fee structures, weak	• Financial sector regulation and supervision doesn't address persistent poor market conduct outcomes • Financial institutions do not treat customers fairly	• Financial sector regulator • Financial institutions	• The fragmented legal framework allows for regulatory arbitrage, duplication and overlap, that impedes effective regulation and supervision • The myriad of different laws imposing numerous and differing requirements on financial

Identified Problem	Behaviour giving rise to the identified problem	Groups whose behaviour give rise to the identified problem?	Why does the behaviour arise?
disclosure and transparency of highly complex products, and inappropriate financial products and services (especially for the poor and most vulnerable) have emerged as particular concerns.			institutions has led to financial institutions and regulators taking a tick-box approach to regulation • This has entrenched a regulatory approach that is reactive and only responds to problems once they have arisen rather than preventing the problem from arising.

1.4. **Identify the major social and economic groups affected by the problem, and how are they affected. Who benefits and who loses from the current situation?**

Identified Problem	Groups (Social/ Economic)	How are they affected by the identified problem?	Are they benefitting or losing from the current situation?
South African financial sector has been producing many incidences of poor conduct, leading to poor financial customer outcomes. High and opaque fee structures, weak disclosure and transparency of highly complex products, and	Financial customers	• Sold inappropriate financial products and services • Financial products and services purchased carry high and opaque fee and charging structures • Complex financial products that are difficult to compare and understand	They are losing.

Identified Problem	Groups (Social/ Economic)	How are they affected by the identified problem?	Are they benefitting or losing from the current situation?
inappropriate financial products and services (especially for the poor and most vulnerable) have emerged as particular concerns.		• Difficulty in resolving complaints	
	Small businesses	**As customers:** • Financial products and services can be inappropriate, expensive and complex As financial institutions: • Fragmented and cumbersome regulatory environment may make it difficult for small new financial institutions to enter the market	They are losing.
	Regulator	• Difficult to meet its mandate of protecting financial customers • Inefficient regulation that can result in wasted resources	Losing
	Financial institutions	• Mistrust in financial institutions • Unscrupulous institutions are able to mistreat customers more easily, and	Some institutions may benefit from the problem, particularly in terms of being able to charge high fees, and make it difficult for

Identified Problem	Groups (Social/ Economic)	How are they affected by the identified problem?	Are they benefitting or losing from the current situation?
		ensure their own interests are protected • Unlevelled playing fields between unscrupulous institutions and institutions who choose to ensure fair customer treatment	customers to compare and switch financial products and services. Financial institutions also lose from a sector that is mistrusted, and where no action is taken against unscrupulous players

1.5. **Which of the five top priorities of the State- that is , Social Cohesion, Security, Economic Growth, Economic Inclusion (Job Creation and Equality) and a Sustainable Environment is/ are negatively affected by the identified problem?**

National Priority	How is the priority negatively affected by the identified problem?
1. Social Cohesion	Financial products and services can be inappropriate, expensive and complex, poor households are highly impacted.
2. Security (Safety, Financial, Food, Energy and etc.)	Inappropriate and expensive financial products and services can make it more difficult for South Africans to use the financial sector to ensure their financial security (e.g. low savings rate, low insurance rates etc.).
3. Economic Growth	• Low levels of saving, high levels of indebtedness and poor lending practises by institutions can threaten financial sector stability and ultimately compromises economic growth. • Lack of customer confidence due to (high fee structures, product design unsuitable for customers etc.), mistrust to the sector by financial service customer’s, resulting in low levels of participation in the sector, potentially compromising growth.

National Priority	How is the priority negatively affected by the identified problem?
	• Low levels of financial inclusion impedes economic inclusion and poverty alleviation
4. Economic Inclusion (Job Creation and Equality)	• A complex and fragmented regulatory environment can impede the entry of new financial institutions
5. Environmental Sustainability	N/A

2. Options

2.1. List at least three options for addressing the identified problem, including (a) your preferred proposal, and (b) an option that does not involve new or changed regulation (baseline or existing option)

a) FSCA operates within the current fragmented regulatory landscape for financial sector regulation (baseline)

b) The Conduct of Financial Institutions Bill introduces a stronger, comprehensive law for regulating market conduct

c) Improvements are made to the FAIS Act to drive better market conduct outcomes, including making it more consistent and more generally applicable across the financial sector

2.2. What social groups would gain and which would lose most from the each of the three or above options? Consider specifically the implications for the households earning under R 7000 a month; micro and small business; black people, youth and women; and rural development.

Option	Main Beneficiaries	Main Cost bearers
a) FSCA operates within the current fragmented regulatory landscape for financial sector regulation	• Financial institutions may benefit from not having to comply with a new regulatory framework • Unscrupulous financial institutions who depend on predatory practises will continue to benefit from a fragmented regulatory system • Companies that structure their business models to remain outside the regulatory net will continue to benefit from a lack of regulatory oversight	• Financial customers, including vulnerable households and small businesses • Financial regulators
b) COFI Bill	• Financial customers: Will benefit from a substantially strengthened market conduct framework by consolidating and strengthening existing conduct laws. This will address regulatory overlaps and improve transparency, suitability and costs of financial products and services and assist in building greater confidence and trust in financial institutions, addressing the market conduct risks that have been identified by National Treasury. • Poorest households: Will benefit from improved conduct of business and the development of financial products and services that are more relevant to their needs. Vulnerable customers will be better protected against predatory actions by financial institutions • A stable and efficient financial sector should assist the development of small and emerging enterprises through providing access to financial	Financial institutions may have to bear costs related to implementing a new regulatory framework. New costs will be imposed on those institutions who were outside the regulatory net.

Option	Main Beneficiaries	Main Cost bearers
	capital for investment and to affordable transactional services (i.e. appropriate financial products and services). The new regulatory framework will benefit small businesses through facilitating access to financial services reinforced by conduct standards to ensure fair treatment. A more streamlined and proportionate approach to regulation can also reduce regulatory barriers to entry for small financial institutions	
c) FAIS Act improvements	• Some financial customers (would not apply to all) • Some financial institutions (would not apply to all)	• Government would have to bear costs in deviating from the current proposed approach and researching and implementing a new approach • Financial institutions would bear costs in term of complying with a new Act.

2.3. For each option, describe the possible implementation costs, compliance costs and the desired outcomes, listing who would bear the costs or, in case of the outcomes, enjoy the benefits.

Option	Implementation costs	Compliance costs	Desired Outcomes (Benefits)
a) FSCA operates within the current fragmented regulatory landscape for financial sector regulation	• None	• Financial institutions have compliance costs to bear in meeting range of different legislative requirements	• Benefits to unregulated and unscrupulous financial institutions who can continue to operate by mistreating customers
b) CoFI Bill	• The COFI Bill is not expected to raise any additional levies. Levies are raised in line with the FSCA's new mandate through the implementation of the Levies Bill as part of the overall Twin Peaks reform. • The regulator will face costs in ensuring it is adequately resourced to implement a new	• Institutions may have costs to bear in shifting toward new models of compliance. This will differ across institutions. • The compliance costs could be offset by efficiencies in regulatory approach by the supervisor	• Strengthened customer protection through a single comprehensive market conduct law in the financial sector, resulting in the consistent application of consumer protection principles across the sector. • Benefits accrue to financial customers (including small businesses), financial institutions (including new financial institutions) and the regulator

Option	Implementation costs	Compliance costs	Desired Outcomes (Benefits)
	regulatory and supervisory approach under the COFI Bill.		
c) FAIS ACT	The regulator will face some costs in ensuring it is adequately resourced to develop and then implement a new regulatory and supervisory approach under an amended FAIS Act.	Institutions may have costs to bear in shifting toward new models of compliance.	• Some financial customers (would not apply to all) would benefit from strengthened FAIS Act requirements • Some financial institutions (would not apply to all) would benefit from strengthened FAIS Act requirements

2.4. Based on the above table on costs and benefits, describe how different options would contribute to or detract from the national priorities. Remember this is a think-tool, so explore the issues freely.

Priority	Option 1: FSCA operates within the current fragmented regulatory landscape for financial sector regulation	Option 2: COFI Bill	Option 3: FAIS ACT
1. Social Cohesion	N/A	• Poorest households: Will benefit from improved conduct of business and the development of financial	N/A

Priority	Option 1: FSCA operates within the current fragmented regulatory landscape for financial sector regulation	Option 2: COFI Bill	Option 3: FAIS ACT
		products and services that are more relevant to their needs. Vulnerable customers will be better protected against predatory actions by financial institutions	
2. Security (Safety, Financial, Food, Energy and etc.)	N/A	Enhanced financial security through ensuring more appropriate financial products and services	N/A
3. Economic Growth	Detract from economic growth through a mistrusted financial sector	• Can assist in improving levels of saving, reducing indebtedness and preventing poor lending practises by institutions, improving financial sector stability and ultimately economic growth. • Improved customer confidence resulting in better levels of participation in the sector, potentially improving growth. • Better financial inclusion	• May result in slight improvements but largely would not affect growth
4. Economic Inclusion (Job Creation and Equality)	Could detract from inclusion due to mistrust in financial sector, and	• Better support the inclusion of new entrants into the financial sector by reducing regulatory barriers to entry	N/A

Priority	Option 1: FSCA operates within the current fragmented regulatory landscape for financial sector regulation	Option 2: COFI Bill	Option 3: FAIS ACT
	difficulty in creating new businesses in financial sector		
5. Environmental Sustainability	N/A	N/A	N/A

2.5. Describe the potential risks that could threaten implementation of each option and indicate what can be done to mitigate the identified risks.

Option	Potential Risks	Mitigation Measures	Comments
a) FSCA operates within the current fragmented regulatory landscape for financial sector regulation	• Continuation of poor conduct outcomes in the financial sector, negatively affecting financial customers, financial institutions and the economy	• None	• Mitigating the risks posed by the current situation would entail the implementation of the COFI Bill
b) COFI Bill	• Resistance by the financial sector industry/lobby groups	• Thorough engagements with financial institutions will be	• A consultative approach has been followed to include government,

Option	Potential Risks	Mitigation Measures	Comments
	• Poorly designed law that does not achieve intended outcomes • Lack of skills and resources by regulator to implement	necessary to ensure that there is support • Thorough engagements with industry and other stakeholders, including through NEDLAC, to ensure that the legislation is properly designed for the South African financial sector • FSCA to have adequate resourcing plan to ensure it is capacitated to shift toward a new regulatory approach	regulators, industry, and other independent stakeholder views in developing a first draft of the COFI Bill to ensure it is appropriate for the intended outcome and for the needs of the South African financial sector and its customers
c) FAIS Act improvements	• FAIS Act does not apply to all financial institutions and will not solve for fragmented financial sector	• Unclear	The risks posed by an improvement to the FAIS Act could be addressed by the implementation of the COFI Bill

Option	Potential Risks	Mitigation Measures	Comments
	• Poor outcomes are still produced and regulatory burden is enhanced rather than improved		

At this point, if you think the analysis points to a more useful or stimulating set of options, revise the SEIAS. You may find that you would like to combine some of the options, or that the process of discussion around the options has generated ideas that are better than your original ideas. Ideally, the three options considered should all be good ideas-that provides the best test for the final strategy adopted.

3. Summary

3.1. **Based on your analysis, as reflected in the discussion of the three options above, summarise which option seems more desirable and explain?**

The COFI Bill aims to significantly streamline the legal landscape for conduct regulation in the financial sector. It will strengthen customer protection by putting in place a single comprehensive market conduct law in the financial sector, resulting in the consistent application of consumer protection principles across the sector.

It is intended to create a new 'best of breed' law that is much more appropriate to the nature of the financial sector as it operates today. Further, it will provide flexibility to respond to changes in the financial sector; the Bill can be seen as 'framework legislation', setting broad principles of law and the outcomes that the financial sector will be expected to meet, rather than only prescribing in detail in law how such outcomes are to be achieved. These outcomes are likely to remain consistent over time, even as new types of financial activities enter the market and the manners in which to achieve the outcomes change.

The benefits outweigh the potential costs it may bring in terms of implementation or compliance costs, which will also generally reduce over the longer term. The COFI Bill will better support the entry of new financial institutions into the market.

3.2. **What specific measures can you propose to minimise the implementation and the compliance costs of your preferred option, to maximise the benefits?**

Implementation costs can be offset by improved efficiencies in regulation, including by minimising the amount of different regulatory requirements that currently apply in a fragmented regulatory framework. Compliance costs may initially be high as institutions have to adjust to a new regulatory model, but this should similarly be minimised over time as the model becomes entrenched. Extensive consultation on the proposed approach, before it is implemented, can also give affected stakeholders adequate time to ensure they have the resources in place to meet new requirements.

3.3. **What are the main risks associated with your preferred option, and how can they best be managed?**

Risks include, resistance by the financial sector industry/lobby groups; a poorly designed law that does not achieve intended outcomes; a lack of skills and resources by regulator to implement the new approach. Thorough engagements with financial institutions will be necessary to ensure that there is support, and engaging other stakeholders, including through NEDLAC, can ensure that the legislation is properly designed for the South African financial sector. The FSCA must have adequate resourcing plan to ensure it is capacitated to shift toward a new regulatory approach before it is implemented.

3.4. **What additional research should you do to improve your understanding of the costs and benefits of the option adopted?**

A cost study of the impact of poor conduct in the financial sector may be beneficial in properly quantifying the tangible costs in economic terms that misconduct has levied on the South African financial sector and economy.

For the purpose of building SEIAS body of knowledge please complete the following:

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