Responses to comments on draft Financial Services Authority (FSA) Bill, 2016 (Draft)

Feedback response 15 June 2016 (Updated 23 June 2016)

1 Introduction

This paper responds to a number of comments on the draft Financial Services Authority (FSA) Bill, 2016 made by the following stakeholders after meetings with various industry association and bodies, and after the close of the public consultation on 10th June 2016:

1. World Bank Group (WBG)
2. Central Bank (CBK)
3. Fund Managers Association (FMA)
4. Standard Chartered Bank (SCB)
5. Association of Kenya Insurers (AKI)
6. Capital Markets Authority (CMA)
7. Association of Retirement Benefits Schemes (ARBS)
8. The Actuarial Society of Kenya (TASK)
9. Institute of Certified Public Accounts of Kenya (ICPAK)
10. Barclays Bank of Kenya (BBK)
11. Association of Microfinance Institutions (AMFI)
12. Kenya Union of Savings & Credit Cooperatives (KUSCO)
13. PricewaterhouseCoopers Limited (PWC)
14. UAP-Old Mutual Group (UOM)

The comments and suggestions that are agreed have been incorporated into the final draft FSA Bill. Others will be effected into the market conduct framework document. We appreciate the time and effort taken by those who have submitted comments.

FSD Kenya has prepared a separate note with additional points in terms of how the process for the Bill was conducted, and the work preceding it.

2 Overview of the scope and operation of the Bill

We note that a number of comments arise from a possible misunderstanding of the way in which the Bill allocates regulatory responsibilities between the FSA and the CBK. The relationship between the two is established in the definitions in clause 2. The accompanying diagram gives an overview of these relationships and the operation of the Bill. It identifies the following key concepts:

(a) financial institutions (which are the regulatory responsibility of the FSA) –

(i) *CBK supervised entities* – are excluded from the definition and therefore from the force the Bill (there are incidental consequences for CBK supervised entities that are members of an FSA regulated financial group – see below)

all other financial institutions are subject to FSA regulation for conduct and will need a financial conduct licence – there is a staged introduction to allow this to be managed smoothly

(ii) *prudentially regulated financial institutions* – regulated under the current sectoral laws – i.e., insurance companies, Saccos, pensions funds, brokers, dealers and all other entities that are licensed or otherwise authorised under any of the sectoral laws

the sectoral laws' regulatory arrangements will largely continue, although a second round of reforms is expected in the future that will update these laws and rationalise/harmonise regulatory powers between these laws and those in the FSA Bill

(iii) eligible *prudentially regulated financial institutions* – a sub-set of prudentially regulated institutions, defined for the purposes of consolidated supervision by the FSA

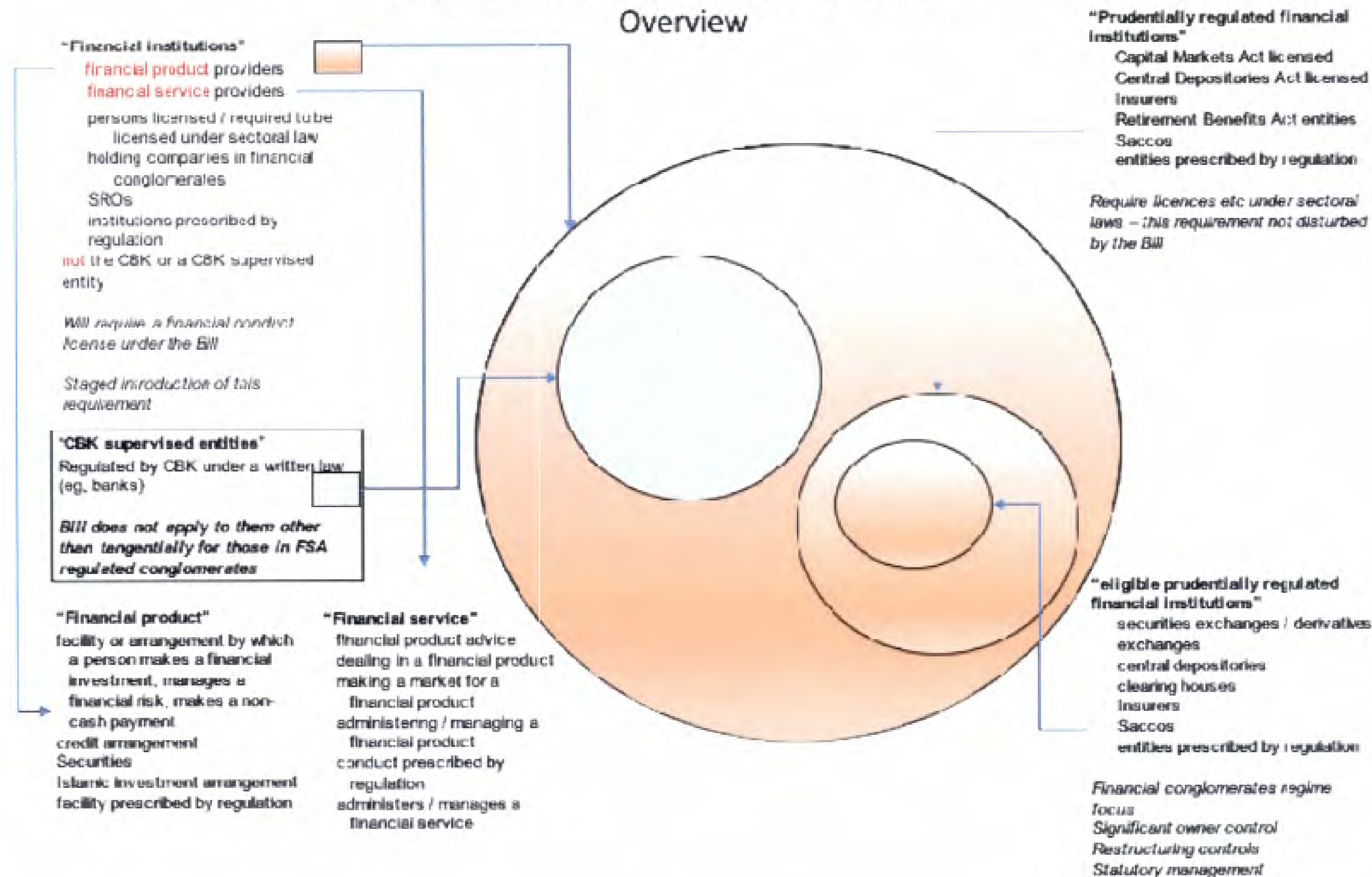
a set of special requirements in relation to financial conglomerates, significant owners, corporate restructuring and statutory management apply to them

(b) financial products and financial services.

3 Commentary

The matrix following the diagram provides the consultant's responses to comments.

Kenya Financial Services Authority Bill, 2016
Overview



As a consequence of possible misunderstandings arising from the terminology in the first draft of the Bill, the final draft uses the term "non-bank" when referring to the financial institutions, financial sector and financial conglomerates that are covered by the Bill. We trust this will reduce the potential for misunderstanding about roles.

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1	**Concerns with the rationale, scope, cost, and mandate of the FSA** After reviewing more than 175 pages of the documents the scope of coverage of FSA remains unclear. The FSA Bill indicates that "any person, that as a business, or part of a business, provides a financial service" or product is considered a financial institution and would be subject to FSA oversight. Based on this definition banking agents, share-based SACCOs, MFIs, pawnshops, incorporated moneylenders and mobile money providers all seem to fall within the scope of FSA as well as those supervised by the existing four foundation supervisors (CMA, IRA, RBA and SASRA). However, VSLAs, ROSCAs and unincorporated moneylenders may also fall within FSA.	As noted above, the lack of clarity likely arises from the definitions used in the draft. It is nonetheless not correct that all persons that, as a business, or part of a business, provide a financial service or product will be "subject to FSA oversight". As noted above, CBK supervised entities (e.g., banks) are *not* financial institutions for the purposes of this Bill. There is one incidental impact of the Bill on CBK supervised entities that are members of financial conglomerates that are regulated on a consolidated basis by the FSA. This is explained below.
2	In addition, there still appears to be little consideration or analysis for how FSA could in practice be successful at overseeing these banking agents, share-based SACCOs, MFIs, pawnshops, incorporated moneylenders, VSLAs, ROSCAs, unincorporated moneylenders and mobile money providers. These institutions number in the tens or hundreds of thousands (i.e., 4,500 SACCOs and VLSA of nearly 1 million) and are primarily rural based. We understand that there are two primary reasons for the development of the FSA: 1) to close the regulatory gaps, and 2) to streamline government agencies. The generic framework presented does not include any diagnostic information on which regulatory gaps need to be closed, it does not identify current regulatory problems with unregulated financial services, and therefore is silent on how the FSA will concretely have the capacity to address gaps. The FSA is also unlikely to streamline regulation – the new structure is inherently	Consideration and analysis are not normally included in a Bill, although we recognise their importance in the broader public debate. In practical terms the FSA will continue to regulate prudentially regulated financial institutions (as defined) in much the same way that the 4 predecessor agencies currently do. The Bill provides some additional powers for the FSA in this respect and it is expected that the FSA's prudential practices will continue to evolve appropriately over time. The Bill extends the FSA's prudential responsibility in one key area relative to the 4 predecessor agencies. Namely, it provides the FSA with the power to regulate certain financial conglomerates. This is explained below. The main new responsibility provided by the Bill is in respect of conduct regulation. This will apply to the existing prudentially regulated entities, plus a broader group of entities that are currently unregulated. While there will be an additional demand on regulatory

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	more complex, creates many potential areas for conflict within the FSA (detailed below) and between the FSA and Central Bank, and in fact creates 4 new entities. The recommendations from the parastatal task force were also grounded in consolidation as a cost cutting activity. However, the FSA is likely to entail considerably higher costs than under the current structure, and there has been no exercise to date to identify the magnitude of the costs, nor the sustainability of the cost structure (detailed below).	resources, conduct regulation is less intrusive and resource intensive than prudential regulation. The Bill allows for the FSA to roll the conduct framework out over time (see comments below on time frames), which will require the FSA to assess where the risks are greatest. For example, the considerable work that has been done in Kenya in recent years on misconduct in the area of credit provision suggests that this is likely to be an early priority – but that is a decision for the FSA Board. As per instructions to the drafters, the Bill is intended to provide responsibilities and powers that the FSA can evolve into overtime. In addition to the above, especially with respect to costs of the new structure, three points need to be kept in mind. First, the essence of the parastatal taskforce was not just on rationalisation to save costs (though this was a major part of their mandate especially regarding duplication of roles), but also on effectiveness and efficiency of different categories of public agencies, including regulatory institutions. Secondly, the proposed reform will likely increase costs in the short-term. However, the marginal benefit or impact on overall policy objectives is potentially very large, given that the new structure is designed to deliver a significantly larger and better organised prudential and conduct mandate, address regulatory gaps and enhance coordination. Thirdly, on the question of prior diagnostics, there has been considerable work and multiple reviews over the past few years that underpin the current reform. These may not fit the standard definition of a diagnostic in the sense of a one-off, deep dive, but do provide strong evidence and rationale on the need to protect consumers and address gaps in the regulatory framework. A separate note by FSD Kenya summarises some of the Kenyan work that underpin the current reform.
3	The rapid process to draft the FSA and lack of public consultation to date raises the questions regarding the level of understanding and impact of this framework. In discussions with the affected regulators,	There are always alternative ways to organise a country's regulatory architecture. None is perfect. The decision to create the FSA has been taken by the Government of Kenya. The Bill was scoped to ensure that the FSA would amount to more than a single institution

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	we found little understanding of the impact of this framework, nor of the other possible solutions that could have been available had there been an upstream consultation process. As cited in the Aide Memoire of November 2015, we believe there could be improvements in the market conduct supervisory practices of the foundation supervisors especially in the areas of disclosure, complaint monitoring and reporting, credit infrastructure, among others. For example the establishment of an FSA that focuses solely on market conduct supervision for non-bank credit providers (the primary stated area of concern) and which operates an out of court, but binding, dispute resolution and complaint monitoring system could be one of many solutions for consideration. Such a narrow scope organization would significantly add to efficiency, stability and consumer protection without the costs, conflicts, delays, and destabilizing effect of the current proposal. This is just one example of a continuum of solutions that could be debated before selected one specific model. Other proposed solutions are outlined below, but are not exhaustive.	with 4 silos and that the FSA would have a conduct mandate that it could grow into overtime. The process to create the FSA started in early 2014. In particular, the foundation agencies undertook a significant amount of consultation with their respective regulated entities. The foundation agencies have been engaged at the highest level in the current process that started late 2015 as well as the prior assessments done in late 2014 and 2015. In all cases the leaders of the four agencies have confirmed their overall support for the establishment of the FSA along the lines set out in the draft Bill. The Bill is currently out for public consultation under the leadership of National Treasury.
4	The FSA Bill consolidates CMA, IRA, RBA, and SASRA but also creates 4 new entities. FSA (9 person board), creates Financial Sector Ombudsman (4 person board), a Compensation Funds Board (4 directors) and a Financial Sector Tribunal (7 member board). Unanswered is what will be the compliance costs associated with the four new agencies that are created within this Bill and the impact on the institutions that pay these the fees?	This statement implies that the Bill will increase the number of entities in the non-bank regulatory space. In fact, many of these institutions already exist, and in significant numbers. For example, there is already one functioning Compensation Board (in insurance), and there is provision in the sectoral laws for three more to be established. Similarly, there are four existing Tribunals (that mix complaints by customers and industry). We agree with the importance of not adding to the complexity of the regulatory architecture. The Bill seeks to rationalise these institutions and prevent the proliferation and ineffective duplication of additional institutions that might otherwise occur under existing laws.
5	There are 4 specific sectoral compensation funds (Capital Markets, Insurance, Pensions and SACCOs) plus a 5th "Conduct" Compensation Fund. It's unclear who can and cannot be compensated from this last Conduct Compensation Fund.	The Conduct Compensation Fund is to compensate financial customers who suffer loss because of a contravention of the Bill or of a contract in relation to the provision of a product or service not regulated by a sectoral law – see clause 126(1), (2)(e).

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6	While it is reassuring to see that a financial sector ombudsman is addressed in this version of the Bill, there is no analysis or evidence provided for a Compensation Funds Board or Financial Sector Tribunal or if these two entities and the Ombudsman cover banks as well.	As noted earlier, the Bill is not intended to encroach on CBK supervised entities. At the same time, we agree with the WB that a broader industry ombudsman scheme would be efficient in Kenya. The final draft includes scope to extend the ombudsman's coverage at a later date, although issues of funding etc would need to considered carefully.
7	There could be significant costs for financial institutions to establish market conduction compensation funds, yet deposit guarantee funds for SACCOs do not yet exist and are of a much greater priority given their scope and number of affected depositors.	The establishment of a Sacco deposit guarantee fund is provided for – clause 158(1)(d) – to address this priority need. Details of the operation of the various funds will be provided in regulations.
8	**Preparedness to meet the challenges & consideration of costs and pitfalls** The Framework refers at several places to the serious challenges and the potential pitfalls in implementing a 'conduct' supervision framework (please see Annex 1 for excerpts highlighting the challenges). The Framework does not present a coherent and objective assessment of the risks that arise from the identified challenges and potential pitfalls, if and how to overcome these and a comparison of the cost and benefits of simultaneously implementing a formal conduct supervision framework along with the proposed integration of the four constituent agencies. The Framework draft gives the impression that the FSA is already operational and that the constituent agencies and relevant stakeholders have deliberated on the implications of the proposed framework, their attendant challenges and potential pitfalls, and taken a conscious decision on the priorities and transition as laid down in the Framework. We have not observed that such deliberation has taken place, nor have we observed a conscious buy-in from the relevant agencies, nor an assessment of whether they are equipped to overcome the challenges and pitfalls as and when they arise. This observation is, in	We don't disagree that there is a massive implementation task ahead for the FSA. Addressing these tasks was not the scope of the Conduct Framework. The Framework was drafted as an information document for stakeholders, explaining to them the conceptual basis of conduct regulation and how the FSA intends to implement it. The actual draft was designed to be a "straw man" model for the FSA to discuss, debate and modify as needed once it is in place. Thus it was written as it "might" appear in a year or more – it is primarily to help guide the FSA as it moves ahead. The main intent was to provide a framework document to establish a starting point for the FSA to take its own decisions on priorities and allocation of resources. The framework document has been shared with all the agencies and no objections have been raised. By design, it is broad and done at a meta-level in order to permit it to be *moulded* and *further developed* by the FSA itself, with guidance from National Treasury, other stakeholders, notably including in consultation with the regulated community. Note: While implementation challenges were not part of the Conduct Framework or the Bill, they have been discussed already at the Steering Committee level and the final report from this

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	a way, confirmed by the opening paragraph of the Executive Summary to the Framework, which states *"This draft Framework document sets out the foundations of conduct regulation in Kenya. It is written in a manner that indicates that that Financial Services Authority (FSA) will finalise and own it, as a Framework document that will provide broader understanding and explanation about how is conduct mandate will be rolled out, and provide basis for engagement with regulated entities and sectors."* ***We, therefore, propose*** that the authorities should not rush with the draft FSAB and the draft Framework. The authorities should first hold detailed and structured discussions amongst the relevant stakeholders to understand fully the implications of the challenges and the potential pitfalls that they may face during implementation. The discussion can include assessment of their ability to meet or overcome the challenges and pitfalls, the availability and adequacy of the skills and resources, and the eventual costs and benefits for the financial system. The issues that will be identified during these discussions and the remedies or mitigants should be appropriately reflected in the Framework and the FSAB to assure a smooth transition. This may also include modification or deletion of some of the current provisions/ proposals. We believe that this process is essential to maximize the likelihood of success in achieving the desired outcome.	project will provide additional details and guidance. Note: As noted above, discussions about the case for establishing an integrated regulator have been active in Kenya for some years.
9	**Modified approach to transition** Implementing the Framework and the FSAB will be a daunting task for the regulatory agencies and the market participants. It is clear from the above discussion that the magnitude or complexity of the reform proposals have not been adequately reflected while developing some of the reform proposals or while determining the recommended transition. Implementing this reform in entirety can be expected to surely place huge demands on the limited resources available in the constituent agencies, which can lead to diversion of	We agree that the transition to the FSA will be difficult and demanding on staff. The Bill is silent on the timeframe for establishing the FSA. The only timeframe addressed is that for rolling out the conduct licensing framework. We agree with the WB suggestion that the timeframe be extended. A more flexible approach is adopted in the final draft Bill. The agencies (Technical and Steering Committees) have already put in motion the process to set out the transition and implementation

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	resources and attention from the core mandate of the financial sector supervisory agencies, namely prudential supervision, safety and soundness of individual supervised entities and of the financial system. The Framework has proposed a very ambitious timeframe for the issue of financial conduct licenses and conduct rules. At the same time, the reform package does not clearly articulate the additional demands (burden) that are being placed on the (already) limited resources and skill sets available in the constituent supervisory agencies and the ability of the constituent agencies to meet the additional demands. ***We, therefore, propose*** that the relevant stakeholders undertake an objective assessment of the implications of implementing the reform package and consider developing a more pragmatic milestone-based sequential or incremental approach to implementation as per the identified priorities. While making such assessment, the stakeholders should attempt a quantitative assessment of the cumulative additional burden/ responsibilities that are being placed on the constituent agencies / FSA and the realistic timeframe for achieving effective fulfilment of the additional responsibilities without compromising on their prime mandate. *For example*, at a high level, a proposed approach to prioritization can be along the following lines. The timelines are indicative and can be determined by the assessed magnitude of the tasks involved for each stage: a) **Stage 1:** integration of the four supervisory constituent agencies: 2016-2018 (24 months); b) **Stage 2:** implementation of formal conduct supervision for non-bank entities: i. Stage 2a: for unsophisticated or retail customers: 2018-2020 (24 months), ii. Stage 2b: for other customers: 2020-2021 (15 months); c) **Stage 3:** implementation of formal conduct supervision for entities supervised by the CBK: (2020 to 2022) 24 months. In the interim, the FSA can pursue with the initiatives of the	plan, and it may well borrow from what is suggested here. Overall, National Treasury will guide.

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	constituent agencies on conduct supervision, supplemented by the launch of the dispute resolution component that includes the Statutory Ombudsman Scheme and customer education initiatives.	
10	**Independence and autonomy** There are several provisions in the FSAB that collectively clearly suggest erosion of the operational independence and autonomy of the FSA, its supervisory effectiveness and its lack of flexibility to meet exigencies. These relate to removal of executives and board members, FSA's powers to issue prudential rules and conduct rules, scope for suspension, reversal or substitution of its decisions (including enforcement actions), to impose levy, to prescribe fees and charges for services rendered, to approve budgets, and to deal with surplus and exigencies. ***We, therefore, propose*** that these provisions and other similar provisions in the FSAB that impinge on the FSA's independence and autonomy are suitably amended.	We agree with the WB that the Bill falls short of all international standards with respect to independence and autonomy. However, there is no "erosion" relative to the 4 existing agencies. The governance arrangements are stronger than existing arrangements. We recognise that the independence of the FSA nevertheless does not meet international best practice in every respect and, ideally, this should improve over time. This Bill, however, was drafted for the Kenyan context. While international best practice with respect to independence and autonomy is an admirable aspiration, it is not practicable in Kenya given current public sector practice and existing laws governing how they operate (e.g., the Statutory Instruments Act). We have nevertheless taken on board WB suggestions, where practicable.
11	a. Sections 15, 19, 119 and 131, allow for the removal of the FSA board members (other than ex-officio members), FSA Chief Executive, the Ombudsman Board members, and the Compensation Funds Board Members, but do not require public disclosure of such removal or the reasons for such removal.	We agree that the dismissal provisions for independent FSA board members could be more transparent. The final draft Bill now provides for public disclosure of appointments and dismissals by requiring the Cabinet Secretary to publish notice of these in the Gazette.
12	b. Sec 143 allows the proposed Financial Sector Tribunal to suspend the operation of FSA's decisions, including enforcement actions.	An effective review process requires the ability to suspend a decision – if only to ensure that the review is not nugatory. This is standard international practice.
13	c. Sec 146 allows the proposed Financial Sector Tribunal to set aside the FSA decision or substitute with the Tribunal's decision, including enforcement actions.	We agree with the WB's intention of limiting the powers of the Tribunal to replace agency decisions with its own. Unlike existing tribunals in Kenya, the final Bill limits the Tribunal's power in this way (other than decisions about fines). Enforcement actions are appropriate for review. Again, this is

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		standard international practice.
14	d. Sections 29 & 30 allow the Cabinet Secretary (CS) to make prudential rules and conduct rules, in consultation with the FSA.	We recognise the WB's position on the FSA's ability to issue subordinate instruments. This is international best practice. The potential for such independence in Kenya is limited by the Statutory Instruments Act. The role of the CS in making these was a deliberate decision based on both the improved likelihood of their passage through the Parliament and is in keeping with current Kenyan practice.
15	e. Sec 28(5) requires the FSA to comply with any request for information about the FSA and its operations by the CS.	Since the CS is the Minister responsible, requiring the FSA to meet information requests from the CS is not inappropriate. The CS as the minister responsible and part of the Executive that is accountable to Parliament must have clear basis to request for information and that is the general intent of this provision.
16	f. Sec 149 requires the FSA to submit the estimates of its operating expenditure, income, and the projected estimates of the operating expenditure for the next two years to the CS for approval.	This was included for good governance. No regulatory agency should set its own budgets without some oversight. Since industry approval would risk capture, and Parliamentary oversight would be potentially disruptive, the Minister responsible is the appropriate and logical point of approval.
17	g. Sec 165 provides powers to the CS to impose the FSA levy; the FSA cannot do this by itself.	Having the CS impose the levies (with FSA input) was suggested by local experts as the best way to achieve protection of the FSA in this area. As the levies are taxes, it is appropriate that the Government take responsibility for imposing them. In practice the CS will act on the recommendation of the FSA in relation to imposition of levies, particularly if they have been the subject of consultation.
18	h. Sec 174 does not allow FSA to impose levy in excess of the estimated expenditures approved by the CS (Sec 174).	The Bill does envisage reserves. Clause 174(1) refers to reserves as well as operating expenses. Clause 150(5) allows the FSA to build up a substantial operating reserve.
19	i. Sec 174 provides powers to the CS to not make the regulation	The pre-requisites all relate to transparency and seem to us to be

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	imposing the levy unless the FSA complies with certain pre-requisites.	reasonable.
20	j. Sec 175 provides powers to the CS to prescribe fees and charges payable in case of services rendered by the FSA; the FSA cannot do this by itself.	The role of the CS is as noted above. Again, while the CS has the power to prescribe fees and charges, in practice the CS will act on the recommendation of the FSA.
21	**Clarity of roles & responsibilities vis-a-vis CBK** Some of the conflicts with the Central Bank of Kenya have been eliminated in this draft. However, there are now new conflicts within FSA that have been created. There are potential overlaps and conflicts between the roles and responsibilities of the FSA and the CBK, in at least three important areas.	The comments in this area possibly arise from confusion raised by the terminology used in the first draft - see item 1 above and the accompanying diagram. The underlying principle of the Bill is that every financial institution should be subject to some form of regulatory oversight (for conduct – although **not** necessarily for prudence), unless explicitly exempted (see FSA's power in clause 36(1) to exempt institutions from the conduct licensing requirement). The Bill is structured so that the CBK regulates any financial institution that it has legal jurisdiction over (note that the definition of "CBK supervised entities" was provided by the CBK). The FSA has powers over every financial institution that is not CBK supervised. We believe this is clearer than a definition of scope based on industry classifications and reduces the potential for gaps.
22	a. **Microprudential supervision**: Section 33(1) allows FSA to impose, with CBK's concurrence, prudential requirements on CBK supervised entities. It is not clear why the FSA would require powers to impose prudential requirements on entities that are not under its prudential supervision. This power can give rise to potential situations that can lead to avoidable coordination, cooperation and conflict situations, which would lead to inefficiencies and drain on the scarce supervisory and other resources. ***We, therefore, propose that*** Section 33(1) be modified to exclude CBK supervised entities from the purview of FSA's prudential supervision.	The FSA will not have micro-prudential jurisdiction over CBK supervised entities. Clause 33(1) relates only to rules made under clause 29(3)(b). These are specific to financial conglomerates (headed by a non-CBK supervised entity – see below). There is no general power for the FSA to issue rules for CBK supervised entities.
23	b. **Conglomerate supervision:** Financial conglomerates in Kenya usually have a bank at the top (holding company or parent) or are	We believe the WB thinking and the Bill are consistent in this area. While the statement is correct that bank headed conglomerates are

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	bank dominated. This would suggest that the conglomerate supervision mandate should more appropriately be with the CBK. Part VII of the FSAB deals with FSA's powers to designate a group of companies as a financial conglomerate and their obligations to the FSA, and allows the FSA to take enforcement actions against financial conglomerates. The FSAB also explicitly states that the holding company in a financial conglomerate shall not be a CBK supervised entity. This would collectively imply that the FSA powers can extend to a group of companies that includes a bank that is not the holding company of the group, but is a dominant member of the group. In such situations, the FSA can exercise its prudential supervision powers directly or indirectly, including enforcement actions, on CBK supervised entities and bank dominated financial conglomerates.	"usual" in Kenya, they are by no means the only type of financial conglomerate. Kenya has non-bank financial conglomerates and financial conglomerates headed by non-banks that include as members CBK supervised entities (including banks). These latter groups have been recognised as a source of risk and need to be regulated (for prudence). Similarly, there are banking conglomerates that include non-banks that will be supervised by the FSA. This section is designed to provide symmetry between the two regulators. Where the CBK regulates the holding company (e.g., a bank or a bank holding company) the CBK also regulates the group on a consolidated basis. The FSA will continue to regulate the non-bank entities on a solo basis. This structure is already in place in Kenya. Part VII enables the FSA to designate a conglomerate that is not headed by a CBK supervised entity and to regulate such a group on a consolidated basis. Again, if such a group includes a CBK supervised entity (e.g., a bank), the CBK will continue to regulate the bank on a solo basis. The point of clause 33(1) is to prevent the FSA from issuing a rule that applies to an FSA regulated conglomerate group that includes a CBK regulated entity without first having the concurrence of the CBK. For example, the FSA may plan to issue a rule about fitness and propriety of key persons to apply to the consolidated group. If this were to conflict with the terms of the comparable requirement imposed by the CBK on the solo entity, there would be need for the two agencies to agree the details of the FSA's rule or carve out its applicability to the solo entity. Clause 33(1) provides this protection for the CBK, thereby avoiding the conflicts that the World Bank wishes to see avoided.
24	Though the FSAB provides that the FSA *shall consult* the CBK and *shall take into account* any comments made by CBK, this will not be	We do not agree with the assumption that consultation will be "inadequate" – which suggests a failure on the part of one of the consulting parties to consult properly.

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	adequate to achieve meaningful and effective conglomerate supervision and it does not explicitly pre-empt possibilities of bank dominated conglomerates from coming within FSA's supervisory perimeter. The FSAB provisions are sources of potential conflicts and overlaps that can divert precious and scarce supervisory resources in both agencies, and confuse the functioning and operations of the financial institutions.	
25	***We, therefore, propose*** that the authorities adopt a more comprehensive approach to conglomerate supervision. They should review and amend the FSAB and the CBK Act to establish a clear and comprehensive framework for the supervision of financial conglomerates by assigning clear roles and responsibilities to the FSA and the CBK to avoid any scope for overlaps or gaps or conflicts.	The WB may be correct that the CBK should take a more comprehensive approach to conglomerate supervision – but that is not within the mandate of this Bill. The Bill is designed both to protect the CBK's interests and to ensure that there are no holes in the regulatory net.
26	c. **Financial stability:** Several sections in the FSAB *{for example, Sec 10(e) (Objectives), Sec 12(h) (Powers), Sec 29(2)(d) Prudential rules, Sec 30(2)(d) Conduct rules}* empower the FSA to promote financial stability, aim prudential and conduct rules at, among others, promoting financial sector stability. Sec 33(2) provides that a prudential rule or a conduct rule shall not include provision aimed at promoting financial sector stability unless the CBK has been consulted. Since 'consultation' may not necessarily mean 'concurrence', and since the CBK holds the primary mandate for financial system stability, the FSA powers to make rules aimed at financial system stability need to be modified to establish better clarity of the roles and responsibilities vis-a-vis financial stability.	We do not disagree with the WB's underlying thinking. However, there is some misreading here possibly arising from the definition of "financial sector". As defined in the Bill – the financial sector **exclude** CBK supervised entities. This should be clearer in the final Bill by the use of the term "non-bank" financial sector. In practice, the FSA's role in financial stability is nothing more than is required by international standard setting bodies and is supportive of the CBK's lead role in overall financial stability, i.e., a supporting role.
27	***We, therefore, propose*** that the relevant provisions in FSAB should be reviewed and suitably modified to (i) avoid scope for overlaps, gaps and conflicts, and (ii) to establish an appropriate framework for cooperation, coordination and information sharing on an ongoing	We agree that there should be an appropriate framework for cooperation, coordination and information sharing on an ongoing basis. This is provided for in detail in clause 13, which allows for and requires both CBK and FSA to establish such a framework. The

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	basis between the FSA and the CBK with a view to promoting financial stability.	provisions in section 13 and 14 allow the FSA and any other institution to agree on effective frameworks for cooperation.
28	d. **Scope of application of conduct supervision**: The draft Framework reflects a clear struggle between the need to meet the immediate requirements in Kenya and the aspirational aspects. The foreword to the Framework provides the context for embarking on a formal framework for conduct supervision where it states that "... *for many years, the Government lacked a strong institutional and legal framework to deal with the unique nature of customer abuses in the financial sector, especially those affecting vulnerable members of the society*". The Framework also acknowledges this "... *behavioural economics research shows that humans are generally poor at making decisions involving uncertainty. This can be particularly problematic where customers have low levels of literacy and education*". Yet, the Framework and the FSAB envision and provide that the FSA would undertake conduct supervision with reference to both unsophisticated or retail customers and the participants in wholesale markets. This seems to suggest a mechanistic application of conduct supervision without fully reckoning the real needs, effective costs and benefits. We understand that the Capital Market Authority (CMA) is already addressing some of the conduct issues from the markets perspective and that the immediate priority in Kenya will be protection of unsophisticated or retail customers. ***We, therefore, propose*** that given the predominance of unsophisticated or retail customers in Kenya and the immediate need to address their concerns, it seems appropriate to adopt a more nuanced and incremental approach to conduct supervision in Kenya. The revised approach should better reflect the needs of the financial system in Kenya, instead of mechanistically applying a concept that may be more relevant in advanced markets/ international financial centers. Accordingly, a possible approach can be to first address conduct issues with reference to the unsophisticated or retail	We believe the WB comment supports the approach taken in the Framework. The Framework acknowledges that there are two different components of conduct regulation. The first (wholesale markets) is already conducted by the CMA and, while some upgrading of practices will be helpful over time, this is not likely to be the priority for the near future. We do not suggest abandoning it – simply that the upgrades are lower priority than the second area – customer protection (i.e., retail). Since the law needs to give the FSA the flexibility to grow and expand its powers the Bill needs to cover both wholesale and retail conduct.

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	consumers, and expand the scope to embrace the wider definition of customer that includes the wholesale or sophisticated customers at a later stage – say after 18 to 24 months.	
29	**Scope & applicability of conduct supervision to CBK and other entities** The Framework (Para 1.4, page 3) states explicitly that "... *the initial mandate for conduct regulation by the FSA is limited to financial institutions excluding those institutions that are regulated by the CBK....*". But, in the very next sentence, the Framework adopts an aspirational approach and states that "*The principles of conduct regulation are nevertheless universal and so this Framework uses the more generic terminology of "financial institutions"*. This struggle between meeting the "needs" and the "aspiration" is also reflected in some of the provisions in the FSAB that give rise to ambiguities. As a result, it is not clear what is excluded from the purview of FSA's conduct supervision and what is not, and how the transition will operate. Some examples that give rise to ambiguity are presented below.	This comment again reflects misunderstanding arising from terminology (see earlier sections).
30	a. Section 34(1) requires all financial institutions to hold a financial conduct licence issued by the FSA. Section 35 states that a CBK supervised entity is not required to hold a financial conduct licence. However, Section 37(1) provides that there shall be a transition period for each financial institution and a financial institution is exempt from the requirements of section 34 (1) until the end of its transition period - which will be 2 years from the date of commencement of the FSA. According to the transition proposed in the framework, it appears that the exemption offered to entities supervised by CBK would lapse automatically at the end of the 2 year transition period, when these entities will need to obtain a financial conduct licence.	a. Clause 34(1) does not apply to CBK supervised entities. Clause 35 merely reinforces this (because of the centrality of licensing as a regulatory tool). The transition is for financial institutions as so defined. The exemption provided (not "offered") for CBK supervised entities does not lapse through the transition period.
31	b. The FSAB defines 'financial institution' to include 'financial product provider' and 'financial service provider'. The definitions of 'financial	b. The definitions of financial product' and 'financial service' are all inclusive.

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	product' and 'financial service' are all inclusive. Sec 35 excludes CBK supervised entities, but the agents appointed by the CBK supervised entities are ***not*** excluded. A collective reading of these provisions seems to suggest that the FSAB (and therefore conduct supervision) will be applicable to 'agents' appointed by banks, as they can be deemed to meet the definition of 'financial institution' in the FSAB.	However, the definition of "FI", as noted above, explicitly *excludes* CBK supervised entities. If an agent of a CBK supervised entity does an act to financial customer, the CBK supervised entity is responsible for it, under normal agency principles. If what the agent does is provide a financial service to the CBK supervised entity (which is possible), the CBK supervised entity will be the financial customer and the agent a financial service provider. If the agent is not a CBK supervised entity it will be a financial institution for the purposes of the Bill – thereby providing protection to the CBK supervised entity against misconduct by the agent. In the event that the CBK extends its regulatory net to the agent, the agent will cease to be a financial institution as defined under the Bill.
32	c. The FSAB allows the FSA to make prudential rules and conduct rules for financial institutions. Section 33(1) provides that the prudential rule shall not include a provision that imposes requirements on a Central Bank of Kenya supervised entity without the concurrence of the Central Bank of Kenya.	c. See above (item 23) – this relates only to FSA regulated conglomerates that include a CBK supervised entity.
33	This provision, read with Sec 34 and 35 seem to suggest that while the CBK supervised entities are exempt from obtaining a conduct licence (for 24 months), the FSA's conduct rules will be applicable to these entities, namely banks, microfinance institutions and credit bureaus from the date it is applicable to other entities.	The exemption for CBK supervised entities is indefinite (not 24 months). As for the other entities, the licensing requirement applies for a period of at least 6 but no longer than 24 months. FSA will determine the exact period for each class of financial institutions (as defined) – see clause 37(2)(b). As noted earlier, we agree with the WB that the timeframe for implementing the conduct licence should be longer. The final draft takes a more flexible approach.
34	The above provisions are likely to lead to unintended confusion in the operation of the conduct supervision framework in Kenya, resulting in avoidable drain on the scarce supervisory and other resources in the	See the definition of 'financial institution' – clause 2(1) - (which <u>excludes all</u> CBK supervised entities).

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	FSA and the CBK. ***We, therefore, propose*** that the FSAB and the Framework be modified to explicitly clarify that the financial institutions that are regulated by the CBK and their agents will be exempted from the FSAB and FSA's conduct supervision. This may entail incorporating adequate conduct supervision elements for the exempted entities, under the CBK Law. Accordingly, the CBK should consider extending meaningful and effective conduct supervision to its regulated entities and their agents, if these are not already in place.	
35	In addition, these provisions go even beyond conflicts with the CBK. For example, page 23 of the Framework document makes it clear that existing licensed financial service providers must also obtain a Kenya Financial Conduct License. It is unclear how the Financial Conduct License and existing licenses co-exist.	We recognise that the dual licensing regime will be new to many. Nevertheless, we believe the co-existence of prudential and conduct licenses is clear from the Bill. It is also clear in international practice how these two particular licenses can and do operate together in other jurisdictions. The Bill also provides the FSA with flexibility in deciding the exact form and order in which it will roll out the conduct licensing regime. More generally, it is common for financial institutions to hold many licenses (often in the hundreds). Indeed, many financial institutions in Kenya already hold multiple financial sector licenses.
36	The problem with this dual licensing structure from within the same regulatory agency will occur when one part of the FSA wants to rescind the license (i.e., the envisioned centralized enforcement unit) but the other prudential part of FSA may not want the financial institution closed. This can be solved by having the market conduct requirements within the 'institutional' licensing requirements. FSA could then issue licenses to new financial providers that are just now coming under regulation for the first time. Issuing a license with market conduct requirements makes sense for institutions that do not need prudential supervision and do not have an existing license. However, the conflict set up and required by the dual licensing is emblematic of the lack of tailoring of this framework to Kenya.	This comment appears to assume that the FSA will be organised on a "silo" structure. It is also possible that the comment is based on the assumption that banks will be included in the licensing regime (which they will not). Hopefully the new terminology will remove the confusion. More generally, there should be no inherent conflict in dual licensing requirements. Where both licences are required, both licences will be required. Clause 46(1)(c) says that suspension / revocation of a sectoral Act licence is grounds for suspending / revoking the financial institution's conduct licence and corresponding provisions are included in the sectoral laws – Schedule 2 Pt 1 clause 9, Part 2 clause 4, Part 3 clause 9, Part 4 clause 7(a), Part 5 clause 8(a). This is established international practice where separate prudential and

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		conduct regimes apply. Clause 48 expressly allows continuation in certain cases even after termination of a conduct licence.
37	There also remains scope for conflicts, duplication and ambiguities with other laws or agencies. Reference is made in the bill (s. 46) to contravention of the Consumer Protection Act as grounds for suspending a license. It is not clear how this Act or the resulting rules intersect or overlap with this Consumer Protection Act.	Financial institutions will have to comply with the Consumer Protection Act (just as they will have to comply with a wide range of other laws). There should be no difficulty with this. A contravention of the Consumer Protection Act is ground for suspending / terminating the conduct licence by the FSA. This is appropriate, as the Consumer Protection Act provides conduct protection.
38	Promoting competition is also an objective of the FSA, but the respective jurisdictions of the FSA and Competition Commission are unclear. These ambiguities should be clarified. In the matter of market conduct and consumer protection, it would be preferable to give the FSA jurisdiction over financial consumer protection in the markets for which it is responsible.	There should be no confusion simply because there is a competition agency, (correctly, the Competition Authority of Kenya (CAK)). The FSA is required to have regard to competition matters – clause 10(b), (f), 11(1)(c) - and to cooperate with the competition agency – clause 11(1)(i), 13(2). In practice, the CAK (and the team met with the CAK Director General severally) has been working together with regulators in sectors where it currently lacks staff and expertise, and that could continue even with the FSA, which in fact will accord the CAK platform to reach an even wider part of the economy that it has been previously possible.
39	**Lack of understanding of Financial Cooperatives** All SACCO members own a qualifying stake of their financial institution per the definition of Article 5 (4)(a)(i) and therefore are considered "significant owners". The consequence of being a significant owner is that Article 72 requires specific approval from the Authority for adding significant owners. This could be a tremendous administrative burden for the Authority and SACCOs.	This comment appears to have misinterpreted clause 5(4)(a)(i). A Sacco member's stake in the Sacco will be a qualifying stake only it amounts to 25% of the voting power (we note that this no different to the existing clause in the Sacco Societies Act section 2 definition of "control" paragraph (b)). In other words, a Sacco member will only be a controller if the Sacco has 4 or fewer members. We doubt that this is the case for many, if any, Saccos.
40	Articles 73 and 74 related to mergers but contemplate this only in the Companies Act. Insurers are exempt from these Articles and SACCOs should be as well as the Companies Act does not apply to	The clauses override the Companies Act. The Insurance Act requirements are intended to remain undisturbed at this point – clause 74(3) The Bill will override the Sacco Societies Act (as it is later

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	SACCO mergers.	legislation).
41	With well entrenched concepts of risk-based, proportional and principal-based supervision the Bill glosses over the messy structure of the SACCO sector, it size, complexity and challenges with oversight. There are an estimated 4,500 Savings and Credit Cooperatives (SACCOs) in Kenya with over 5 million memberships. For the majority of the 100 year history of cooperatives in Kenya they have largely been left to self-supervision. On-going problems with self-regulation led to the creation in 2010 of SASRA – this is a cautionary tale for the SRO structure that is described in the FSA Bill. SACCOs have 11% market share of loans in the total financial sector. The FinAccess survey indicates that 23% (1.7 million consumers) of users of the formal sector utilized SACCOs compared to 7% in MFIs and 70% in banks. SACCO usage is especially strong among agricultural workers. SACCOs are also some of, if not the, largest lenders for housing in the country.	We were not sure exactly how to interpret this comment. There is no suggestion in the Bill that the FSA will, or should, delegate supervision of Saccos to an SRO. The SRO power is included primarily for SROs such as the Securities Exchange. But there was no reason to limit it unnecessarily.
42	However, because of the large number of small SACCOs, primarily operating in rural areas, SASRA decided to supervise only those SACCO which presented the greatest risk to consumers and accept fully withdrawable savings – called front offices (FOSA) or deposit taking-SACCOs. In Kenya there are 180 deposit-taking SACCOs licensed and supervised by SASRA – together these 180 SACCOs hold approximately 70% of the assets and serve 70% of the members of the SACCO sector.	These will transfer to FSA.
43	All other SACCOs which utilize members' shares (which are more encumbered than savings) as the source of funds for lending are overseen by the Registrar of Cooperatives within the Ministry of Industry, Investment and Trade. It's unclear if FSA would supervise such SACCOs and if so, how it will do this in practice. Other unaddressed questions related to SACCOs include: How deposit insurance for deposit-taking SACCOs as foreseen in the SASRA Act	It is clear that the FSA will regulate these – but only for conduct. The FSA will have considerable flexibility in how it goes about regulating these smaller entities. This challenge is faced by regulators worldwide every day. It is not a reason to ignore the sector. Taking a risk-based and proportional approach (as required in the Bill – clauses 10 and 11) is a start. The Bill provides for a Sacco deposit guarantee fund (as does the SASRA Act, although it has never been implemented). The details

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	would be implemented under FSA? What would be the interface with KDIC and how would related crisis mechanisms, such as, access to emergency liquidity at the central bank be handled within FSA?	will need to be implemented through regulations after consultation on the many issues involved.
44	**Statutory manager** Section 76 provides for the appointment of statutory manager. It provides the circumstances justifying the appointment of the manager, the fit and proper test for manager. This section suffers from 6 key provisions. One is the duration of the appointment which is not stipulated. Second –there is no appeal process against the appointment. Third, limited powers of the statutory manager. Fourth, the absence of provisions on reporting and ongoing monitoring of the manager. Fifth, the provisions are silent on who pays the manager. Sixth, the law allows the statutory manager to obtain direction from the court (subsection 6), instead of the FSA.	While we disagree with the comments about statutory management (see below), we nevertheless agree that these points are debatable.
45	The law must stipulate the duration for which a statutory manager can be appointed. In some countries it is for a maximum period of 2 years, with an option of addition 1 more year if it is absolutely necessary. This is to ensure that the statutory administration goes on for unreasonable time. Also, stipulation of time puts a check on the statutory manager to complete his or her tasks on time.	We do not agree that the law must stipulate a period. His or her primary function is to provide the report required by clause 77(4) – do we try to save this institution or put it out of its misery? While that assessment may be made relatively quickly, actually implementing the winding up or rescue may take longer than 2 years – or 3 years –it will not be a question of "putting a check on the SM". The only practical non-bureaucratic solution is that adopted by the Bill – clause 78 (if a statutory manager is appointed to a prudentially regulated financial institution, the Authority shall ensure that such a statutory manager remains appointed until the earlier of the times when the FSA is satisfied that the grounds for making the appointment no longer exist; and an application is made by or with the approval of the Authority for the institution to be wound up on the basis that the institution is insolvent and is unlikely to return to solvency within a reasonable time). See also clause 76(7) (FSA may at any time remove a statutory manager from office, and appoint a replacement).

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46	There is no appeal process provided when a statutory manager is appointed. It is unclear whether the definition of "reviewable decision" includes this decision. Section 76 provides that the decision ought to take effect immediately. It is critical that the law provides for - appeal process, the right to dispense with the appeal process if it is deemed necessary, the right to appeal after the appointment, and that in the event it was a wrongful appointment, the remedy can only be in damages.	We do not agree that "It is critical that the law provides for - appeal process, the right to dispense with the appeal process if it is deemed necessary, the right to appeal after the appointment, and that in the event it was a wrongful appointment, the remedy can only be in damages". The appointment of an SM needs to occur immediately (clause 76). Appealing the appointment can be extremely damaging for the creditors of the institution. Any right of review will encourage delaying actions from those affected or who may be at risk of discovery of their evildoing. The definition of 'reviewable decision' does not exclude decisions in relation to a SM. *Consideration will be given to* including that exclusion. We note that, notwithstanding the terms of the Bill, there is always a right to judicial review of decisions under the Constitution's Bill of Rights (most likely sections 40, 24). This cannot be dispensed with.
47	The current provision on the effect of appointing the statutory manager is very limited and we propose to be expanded as follows-	We believe the drafting is appropriate (see below).
48	1) Upon the appointment of an Statutory Manager the financial institution and its directors, chief executive and officers shall submit the property, business and affairs of the financial institution to the control of the Statutory Manager, and shall provide the Statutory Manager with all such facilities as may be required to carry on the business and affairs of the financial institution.	Clause 77(1)(a) provides to this effect automatically, without the need for the ousted management to do anything (which could delay the SM). With respect to the proposals in the comments: • How is a "submission" effected – what has to be done to discharge this obligation? • The obligation to provide facilities would seem to be a personal obligation of the directors. How will they provide facilities that are the company's, given that they have lost control of the company and its resources (proposed clause (2))? Is it intended that they have put their hands in their pockets to provide resources to the SM? Does this include amounts for wages and benefits? • How are disputes about what are "facilities as may be

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		required to carry on the business and affairs of the financial institution" resolved?
49	(2) The Statutory Manager shall assume control of the property, business and affairs of the financial institution concerned, and carry on the business and affairs of that financial institution in the name and on behalf of that financial institution, for such time as many be specified in the order or until such time when the order is revoked.	Clause 77(1)(a) provides to this effect automatically.
50	(3) Throughout the period the order is in force, all the powers of the financial institution, and of its directors and shareholders, under the constituent documents or memorandum or articles of the financial institution, or exercisable by the financial institution or its directors under any written law, or otherwise, shall be vested in the Statutory Manager.	Clause 77(1) provides to this effect. The powers of the financial institution are not vested in the SM. The financial institution's powers remain with the financial institution. The management powers of the board are exercised by the SM (not the board).
51	(4) While the order is in force, no director, chief executive or officer of a financial institution shall, either directly or indirectly, engage in any activity in relation to the financial institution, except as may be required or authorized by the Statutory Manager and no remuneration of whatever nature shall accrue or be payable to any director, chief executive or officer of the financial institution, except such as may be approved in writing by the Statutory Manager.	The first part of this comment are very wide and could prevent a director who has a loan from the financial institution making repayments or pension contribution.
52	Apart from the above, the specific action that the statutory manager can take is also not comprehensive. The following is suggested- A Statutory manager may with the approval of the FSA, and notwithstanding any provisions of the Companies Act or any other law, take any one or more of the following measures for the purpose of carrying out the rehabilitation of the financial institution- suspend, terminate and wind up, any part of the financial institution's activities in or outside Kenya; sell the assets of the financial institution to any other financial institution or entity on such terms and conditions as may be approved	The comment is that the list is not comprehensive. If the proposed list is intended as comprehensive, it should cover: • paying taxes • paying wages and benefits to staff • carrying on the business (not just suspend etc...) • acquire assets (e.g. pens and pencils) (not just dispose of them ...) Is it intended that the disclosure requirements of the Companies Act and the Capital Markets Act on the sale of shares are to be overridden, and the SM has no disclosure obligations or liabilities?

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	by the FSA; terminate the employment of any officers or staff, or replace any officers and staff, of the financial institution; make such arrangements as the Statutory manager considers necessary for the merger of the financial institution with another financial institution; re-organize the financial institution by increasing its capital and selling shares to new shareholders and reconstituting the board of directors of the financial institution; re-construct the financial institution in any such manner as the Statutory manager considers to be in the interest of investors/ policy holders, including the closing down of unviable business or the financial institution or re-organizing its management; or take such other measures as may be approved by the FSA to rehabilitate the financial institution.	What about the financial institution's disclosure and obligations and liabilities? In the case of an insurer, does this clause override the merger provisions in the Insurance Act? The correct approach is that taken by the Bill.
53	Furthermore, the current provisions on statutory manager does not provide for ongoing reporting to FSA and the right of the FSA to remove the manager if he fails to fulfil his or her duties.	Clause 77(4) provides that the SM shall manage the affairs of the institution with the greatest economy possible compatible with efficiency and, as soon as practicable, shall report to the FSA as prescribed. Periodic reporting will be managed by FSA direction or as part of the SM's contract of engagement with FSA. The FSA has the right to remove the SM at any time for any reason – clause 77(7).
54	Also, it is silent as to who pays the manager.	See clause 77(1)(c).
55	The most worrisome provision is the fact the statutory manager obtaining direction from the court. Since the FSA appoints the statutory manager, the direction must come from FSA. Involving the court will in most cases result in delay and lack of clear direction.	Clause 77(5) provides that the statutory manager shall comply with directions from the FSA in relation to his or her functions. While there may be situations where a facility to get court approval for a particular course of action may be particularly useful (e.g., if there is a Bill of Rights issue with a particular course the SM wishes to pursue) the clause has been deleted from the final draft Bill.
56	**Annex 1: Additional technical comments**	

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	Article 89 does not protect FSA "investigators" (i.e., the supervisors) while discharging their duties in good faith. This is critical to provided legal protection to FSA staff and its part of the Basel Core Principles – see core principle 2.	We agree. Clause 26 has been amended to extend protections expressly to investigators
57	Article 162 suggests that the monies of the SACCO Deposit Guarantee Fund and operating funds of the FSA's SACCO division, and potentially other sectors market conduct compensation schemes, be co-mingled. This is concerning and should be eliminated.	Clause 162 does not mention "operating funds of the FSA's SACCO division (nor is there any expectation / obligation that there will necessarily be such a section). "Appropriations" will have to be appropriations to the Fund (not to the FAS for operating purposes). There is no suggestion of co-mingling compensation funds from the different sectors and, like the WB, we would oppose that vigorously.
58	Section 108 deals with Administrative penalties. The provision also says that FSA may not impose an administrative penalty on a person if a prosecution of the person for an offence arising out of the same set of facts has been commenced. This provision is an unnecessary shackle on implementation. There is a fundamental difference between a civil liability and criminal liability. The burden of proof is different between a civil and criminal liability. One is "balance of probability" and the other "beyond reasonable doubt". A prosecutable offence is a criminal liability. Thus the outcome of a civil liability will not necessarily have an adverse effect on a criminal liability case. In fact, many laws provide that imposition of administrative penalties shall not prevent the commencement of criminal action. This section also provides that administrative penalties order is not a conviction. As such, this section ought to be revised to allow the imposition of administrative penalties, irrespective of whether prosecution has commenced.	Double jeopardy is a widely debated subject. In our view (supported by considerable international legal opinion), an administrative penalty is a penalty – a punishment for a contravention. It is a punishment even though not imposed in criminal proceedings. It has all the hallmarks of a punishment – imposed only if a contravention is established, designed to deter individually and generally etc. The principle underlying the prohibition on being punished twice for the same contravention dictates that, if the regulator chooses to "go the easy route" and impose an administrative penalty, it has decided that that is the appropriate punishment.
59	The establishment of the financial sector tribunal is one way to have an internal mechanism to review administrative decisions and to filter cases that end up in the court. The members of the tribunal are members of the judiciary. While the Tribunal will serve as a dedicated	The Tribunal is not an internal mechanism. It sits outside the FSA. Tribunals in Kenya are effectively courts (unlike in many other countries). The qualifications of Tribunal members under clause 134(1) are such that the members will have sufficient expertise and experience when reviewing matters under the FSAB. Further, under

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	lower court for the FSA, given its members, it may act like a court and may result in protracted processes. Furthermore, the appeal against the Tribunal goes to the High Court. In many countries all matters of appeal against a regulator's decision is often heard at a High Court level allowing each party another appeal. However, the current arrangement allows a matter to go through 4 levels- Tribunal, high court, Appeals Court and Supreme Court. It may be more expedient to appoint at least 2 non judicial members to the Tribunal to ensure capacity and relevant knowledge of the tribunal members and limiting appeals from the Tribunal to 2 more levels only.	clause 145(6) the Tribunal may appoint a person with relevant special skills or knowledge to act as an assessor in an advisory capacity in a proceeding on a review. Section 147 then allows a party to proceedings on a review who is aggrieved by a decision of the Tribunal *on or involving a question of law* to appeal the decision to the High Court.
60	The bill does detail the consequential changes to the relevant laws. The substantive changes relating to micro prudential requirements, complying with requirements of international standards and addressing the gaps in the sectoral laws remains to be done. Thus, the FSA ought to, going forward, undertake the updating and revising the relevant sectoral law to have real impact on the quality and effectiveness of its supervision.	We agree. This was always contemplated as a second stage of the reforms.
61	The FSA and Framework call for the establishment of a unified Financial Sector Ombudsman (for entities regulated by the FSA). This would be a separate legal entity with its own board and budget. Aggrieved customers would have first to seek redress from the financial institution, and would only have recourse to the Ombudsman if the problem is not resolved within the stipulated timeframe. Decisions would be binding on FIs, but customers could appeal decisions to the courts. The proposed governance and operating principles are in line with good practice. Banks and CBK-regulated entities are not covered. Since the Ombudsman is not part of the FSA, the authorities might wish to consider establishing the Ombudsman in a separate Act, and making it a true financial sector ombudsman with jurisdiction over banks as well as FSA-regulated entities.	We agree with the WB, as noted earlier. At this stage, the establishment and jurisdiction of the Ombudsman will be enacted by the Bill. Specific provision has nevertheless been made in the draft final Bill to permit the scope of coverage to be extended beyond the non-bank sector at a later date. Note: To correct the comment: There is no requirement that a financial customer seek redress from the financial institution before making a complaint.

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62	There may remain some scope for confusion between the provisions of the FSA and existing sectoral laws. In some matters, the FSA will apply, and in others the underlying sectoral laws prevail. The draft bill enumerates which clauses of existing laws are repealed or amended; however based on experience elsewhere, there may remain conflicts and ambiguities between legacy laws and the new FSA Act.	We agree with the WB that there is some overlap between the FSA and sectoral Acts. It was not possible in the timeframe available to amend the sectoral Acts, other than for necessary administrative purposes. As noted above, a second stage of reform will be needed to address the sectoral Acts and to create greater alignment between the FSA and sectoral laws.

2	CBK Comments	Response
1	In terms of the timing of the Bill, we remain of the view that it would be best to first allow the ongoing very positive changes in the financial sector to run their course. We therefore recommend delaying the finalization of this Bill.	Overall, the timing for the finalisation of the Bill was agreed and set by the Government. The FSA was first recommended in end 2013, but has been delayed for various reasons since that time. In any case, varying the timing of the Bill is a matter for the Government of Kenya. We understand that the timetable has been determined. The Bill has been designed to have minimal impact on the CBK. Proposed reforms could be complementary to ongoing efforts to strengthen supervision, oversight and overall protect customers across the system.
1	Since entities falling under Central Bank of Kenya's regulatory purview will not be covered by the FSA Act, the definition of "Central Bank of Kenya supervised entity" should be amended to mean "an entity regulated by the Central Bank of Kenya under any written law. "	This is essentially the wording used in the draft Bill – as provided by the CBK. The only difference is the use of "an" rather than "any".
2	Replace all references to "Sacco Act" with "Sacco Societies Act".	*Change accepted.*
3	Section 5(3) is unnecessary and should be deleted. CBK or the Cabinet Secretary are ordinarily not shareholders in institutions.	Being a shareholder is not the only basis for control. Significant ownership is the ability to control of influence significantly a financial institution's business or strategy. CBK and CS clearly meet these criteria. There is merit in being explicit or clear, given that the advice given initially during the discussion on the principles that should guide the law is that while a principles-based approach should be undertaken, a bit more specificity is needed given the litigious practices in Kenya.
4	Section 14 compels FSA and CBK to cooperate, including on inspections as well as establish joint databases. This goes contrary to FSA and CBK's respective regulatory independence that is enshrined in law. As previously stated, issues of cooperation should be left to Memoranda of Understanding. Section 14 should therefore be deleted. In any event, the Governor of CBK will sit on FSA's board which already captures the spirit and intent of cooperation.	This is possibly an over-reading of the intention of the clause (actually clause 13, not 14). The sharing of information etc. is qualified by terms such as "to the extent permitted by law" and "coordinate to the extent appropriate". This is not an infringement on either body's independence. Independence does not require isolation. The Bill simply provides guidance to encourage better cooperation that is clearly in Kenya's interests. The need for this clause was emphasised by the four agencies and

		the technical Committee.
5	Section 24 - The establishment of an Executive Committee comprising of senior staff creates an additional reporting line for FSA 's Chief Executive Officer (CEO), which may diminish efficiency. This creates a situation where the CEO will report to the Board as well as a committee of senior staff who should be reporting to the CEO. Section 24 should therefore be deleted.	Agree with CBK – EXCO has been deleted.
6	Section 52(3) - Substitute "institution" with "organization"	There is no section 52(3) and it is unclear what this comment refers to.
7	Section 86 - Should specify the maximum period of a debarment order for purposes of certainty.	We assume this refers to clause 107 (not 86). Imposing a maximum debarment period, while certain, would be undesirable, as it would rule out a permanent debarment which will be appropriate in some cases.
8	The entire Bill should be revisited to correct grammar and enhance clarity.	Without examples it is difficult to understand exactly which grammatical changes the CBK would like to see. However, a check on grammar and typos will be done, and we expect the drafter at AG Office to also undertake the same.
9	The title of the Bill reads "Financial Services Authority" therefore giving the impression that it only deals with financial services. The Bill does cover extensively "financial products". There is need to coin a more neutral title for the Bill.	While we might agree, we understand that the title of the agency has already been decided.
10	The Preamble focuses on conduct of providers yet the body of the bill covers both conduct and prudential issues. The Preamble should be aligned with the body.	Agree with CBK. This has been fixed in final draft.
11	FSA prudentially regulated financial institutions are required to hold a financial sector licence under one of the sectoral laws, as well as financial conduct licence. A dual licensing framework will not be conducive to the business operations of these institutions.	We recognise the issue, but disagree (see responses to WB). Most financial institutions already hold multiple licences under a range of laws (not just financial laws). The roles of the two licences are clearly delineated, and are designed to complementary provide a better and stronger regulatory oversight in Kenya, which should be conducive for both businesses and consumers, which is the foundational purpose of regulatory policy.
12	Part IV makes reference to financial conduct licenses. The name	It is unclear what is intended by this comment. Part IV licences are

of these licenses should be changed as the licenses are not limited to "conduct" only.	specifically conduct licenses. Prudential licences will continue to be issued under the sectoral Acts.

3	FMA Comments	Response
1	1. Proposed Structure of the FSA: • An additional license category – The Kenya Financial Conduct License (KFCL); and • The FSA Bill has created additional structures in the regulation of financial services, including The Financial Sector Ombudsman and a Financial Sector Tribunal. It is noteworthy that these shall be funded from, among others, fees and charges under the financial sector laws. • The impact of these fees & charges is likely to be passed on to clients, raising the costs to the clients.	It is unclear what point is being made here.
2	2. Recognition of Current License Holders in the New Regime: Although the Bill provides for transition periods for current licensees (up-to 2018), it should also consider providing exemptions for current license holders in good standing, especially where the sector regulator has made significant regulatory provisions that will fall under the scope of the FSA (e.g. Capital Markets)	The licensing regime is a critical tool in achieving conduct goals. The FSA will nevertheless take account of information provided by existing licence holders in assessing conduct licence applications, so as to avoid duplication. It is also unlikely that existing licence holders will be a high priority in rolling out the conduct licensing regime.
3	3. Rules of Customer Protection under the Conduct Regulation Framework: • The principle of suitability of products as proposed in the Conduct Framework implicitly infers that FSA will apply a suitability measure in considering certain market products (e.g. derivatives, unit-linked, etc). This may result in stifling innovation at the product creation level. • Regulator should consider eligibility at product approval as long as licensee has provided proof of business viability.	The Bill includes market development as one of the FSA's core objectives. The Bill requires the FSA to take a risk-based and proportionate approach to regulation. These clauses were included to ensure that the FSA strikes a balance between protecting customers and promoting innovation and development. In this context, the suitability requirement should be viewed as primarily focused at point-of-sale, rather than applying to the entire product cycle.
4	4. Market Intelligence and Analysis The Conduct Framework provides for FSA's information gathering in order for it to make good decisions. However, from a licensee's perspective, technology investments will be required to meet the demand for management information from regulators. To ensure licensees do not suffer inordinately, new or advanced	Given that the information is limited to conduct, it is unlikely to be especially onerous. For example, information required for a thematic review would typically be one-off.

	reporting requirements should be phased.	
5	5. Consumer Protection Act The FSA Bill invokes the provisions of the Consumer Protection Act (CPA) as one of the grounds for suspension of a license. The CPA is not prescriptive especially for capital markets industry. The FSA should consider issuing interpretive guidelines regarding interpretation of CPA particularly in the context of capital markets or prescribe consumer protection guidelines for this market segment which align it to the CPA provisions.	For FSA to act under this power it will have to establish the contravention of the CPA. We agree with FMA suggestion. The Bill gives the FSA power to issue "interpretative rulings", which state the FSA's approach to interpreting the Act.
6	6. Fit & Proper Test FSA Bill should include relying on professional standards bodies for fit & proper evaluation. A fit & proper test using the Authority's own standards may be subjective	This will be a matter for the FSA to determine on a case-by-case basis.

4	Standard Chartered Bank Comments	Response
1.	**1. Interpretation under Section 2 of the Bill.** **1.1 "Financial Institution"** 'Financial Institution" has been defined to exclude the Central Bank of Kenya or a Central Bank of Kenya supervised entity. The financial industry model in Kenya is such that Banks regulated by the Central Bank of Kenya hold various subsidiaries that fall under the scope of the proposed financial services authority. For avoidance of doubt, there is need to categorically clarify whether subsidiary companies falling under the financial institution regulated by the Central Bank shall fall within the definition of a Financial Institution regulated under the Act.	See response 23 above to World Bank comments. In essence, the allocation of responsibilities between the CBK and FSA within conglomerates will little changed from present arrangements. Where a bank subsidiary is, for example, an insurance company, it will continue to be regulated on a solo basis by the FSA and from a conglomerate group perspective, by the CBK – as is the current arrangement.
2.	**1.2 "Financial year"** The Bill defines financial year as a period of 12 months starting on 1st July. Section 153 of the Bill provides that the amount of financial sector levy payable by a levy payer in respect *of a financial year* shall be calculated in accordance with the Regulations imposing the levy. We propose a change on the calendar with the financial year ending on 31st December of each year for purposes of levies.	The levy period should align with the FSA's financial year. This is required to be July / June by the PFMA.
3.	**2. Part IV - Financial Conduct Licences.** **2.1 Licensing in overlapping financial services.** The FSA Bill mandates the authority to issue licenses for FI's to be regulated under the Act. Section 35 of the Bill does not require a Central Bank regulated entity or issuers of securities to obtain a financial conduct	See diagram on p.2. CBK-supervised entities are exempted from the need to hold an FSA conduct licence. Thus, if a bank offers advice as part of its banking activities, it is exempted from the conduct licence since it is a CBK-supervised entity. It will be subject to whatever conduct regime the CBK may implement, but it will not be subject to FSA regulation. If the advice is provided through a subsidiary that is regulated by the FSA, it will be subject to the

	license. With regard to overlapping financial products and services which lie in both CSK regulated areas and FSA regulated areas, it is not clear as to whether the provision of such financial product or service by a CBK-supervised entity is exempted from licensing under the FSA bill. For example, in certain transactions, banks may advice clients on securities issued and may also facilitate the purchase of the said securities from the markets. In such an instance, we propose that the Bill states the application of the requirement for licensing in clear terms.	licensing regime, since the subsidiary will be regulated by the FSA on a solo basis.
4.	**2.2 Perpetual Licences.** We recognise that the financial conduct licences to be issues under the section 36 of the Bill shall be perpetual and shall remain in force until revoked or suspended under the FSA Bill. We also note the transitional provisions u·nder section 182 of the Bill where operative licences shall continue to be in force following the enactment of the Bill as an Act. Clarity is sought as to licences held by FI's which have a date of expiration. In such event, the Bill is does not provide whether such licences shall need to be re-applied for to be re-issued by the FSA or whether the licences shall convert into perpetual licences by operation of the law.	All existing licences are issued under the sectoral laws, and will not be affected by the FSA Bill. So their life / expiry continue to be determined in accordance with the sectoral laws.
5.	**3. Part XI -Establishment of the Financial Sector Ombudsman** In a laudable step, the Bill establishes the office of the financial sector Ombudsman who shall handle customer complaints affecting financial institutions regulated by the FSA. Three issues arise there from as noted below:	This is not double jeopardy. The risks associated with a customer rejecting an Ombudsman's determination will mean that the customer will generally accept Ombudsman determinations. The proposal made is complex and would likely discourage use of the Ombudsman by customers.

	3.1. Binding effect and finality of Ombudsman decision. S. *112 (3) of the Bill* provides that the determination of the Ombudsman shall bind the provider. The interpretation of the provision is that the decision shall bind the provider and not the customer. There is need to reform this provision as it exposed the financial institution ("FI") to double jeopardy as the customer may seek remedy against the FI at the Ombudsman, reject the decision and proceed to seek remedy against the FI in a court of law. The Ombudsman decision will however remain binding on the provider thus creating a loop-hole that may be exploited by the customer. ***Recommendation.*** a. To avoid exposing FI's to double jeopardy we propose to adopt the position taken in comparative jurisdictions where the Ombudsman is required to notify both the customer and the FI of the determination of the dispute and state the reasons of the findings therein. In the notification, the Ombudsman shall require the customer to notify him in writing, before a date specified in the statement, whether the customer accepts or rejects the determination. b. If the customer notifies the ombudsman that he accepts the determination, it shall be final and **binding** on the **FI** and the customer. Where the customer fails to notify the Ombudsman of his acceptance or rejection of the determination in the specified period, the customer is to be treated as having rejected it and the determination shall cease to be binding on either party.	
6.	**3.2. Remedy available through Ombudsman.** The Act fails to provide details on the remedies that shall be available under financial Ombudsman's office. We opine that it	Agree with comment. A range of example determination has been included in the final draft.

	is important to provide the remedies available as this shall inform a customer's choice as to whether the dispute and remedy sought shall be adequately available if they opt to have the dispute administered under the office of the Ombudsman. This shall reduce the number of rejected determinations on account of unsatisfactory remedy.	
7.	**3.3. Powers of the Court to require production of information.** S. *113 of the Bill* requires all FI's to cooperate in relation to a complaint filed by a customer. This however fails to provide for instances where either party, including the customer, may decline to provide the requisite information. ***Recommendation.*** The committee should consider including a provision in the Bill that permits the Ombudsman authority to apply to court for an order compelling the production of the said information.	This is considered to be unnecessary. Provision is added requiring the financial institution to comply with directions as to production of documents and information.
8.	**4. Part XII - Compensation.** The Bill establishes a Financial Sector Compensation Scheme to administrate five separate funds; one for each of the existing sectors and one for Conduct. It establishes a Compensation Fund Board which shall determine and make compensation payments to customers. **4.1. Compensation under the scheme.** Generally, S.116 provides that a financial customer who suffers loss from contravention of the law by a provider, breach of contract and when loss results from a provider going insolvent, such a customer shall be entitled to compensation from the fund where the loss is not an excluded loss under regulations to be established. It further provides that the Board may on application by the customer pay by way of compensation the amount calculated under	Details for the operation of the compensation funds will need to be specified in regulations. These are useful suggestions to be considered when the regulations are being drafted.

the regulations to be established.

The provisions as framed raises two issues:

a. The Compensation fund board is allowed to evaluate claims arising from the listed grounds, including breach of contract and to make a determination as to the amount payable in form of compensation to a customer. Further, the Bill does not provide a process or framework under which the board is to evaluate the legality of the claim and here both parties can participate in determining the amount payable as compensation;
b. It is not clear whether the Compensation Fund shall be applied for payment of all claims as no requirement on capability of settlement of the claim by the FI has been included.

Recommendation.

a. We propose that a clear framework enumerating the process to be followed by the Compensation Fund Board be included in the Bill. The framework must allow for the adjudication of the matter in a transparent manner that adopts the rules of natural justice allowing both parties to be heard. To gain acceptance, the framework must allows for a legal finding on breach of the law or breach of a contractual obligation and provide for the assessment of the monetary award in consideration of legal principles applicable.

   To achieve this, we recommend that all claims for compensation be submitted for determination at the office of the Financial Ombudsman or a court of law. Claims submitted to the Compensation Fund Board shall be supported by a validly accepted determination of the Ombudsman or a Court order

	from a competent court having jurisdiction. b. From best practice and to reduce administrative costs arising from a large number of payouts and court action for restitution of payment from FI's by the Compensation Fund, we propose that the Compensation Fund be preserved for compensating persons in cases FI's are unable, or are likely to be unable, to satisfy claims against them.	
9.	4.2. **Recovery of funds from FI by the Compensation Fund Board.** S.117 of the Bill provides that the payment made to a customer from the fund and costs therefrom may be recoverable from the FI through an action in court. We argue that this exposes the provider to double jeopardy as the customer may claim compensation from the fund and also proceed to recover against the provider directly from the courts. For example, the assessment for compensation may be based on breach of contract; however, the client may frame a claim on defamation arising from the same set of facts and seek compensation against the FI through a court action where the customer, if successful, shall enforce the award against the FI ***Recommendation.*** Our proposal to cure this loop-hole is that the Bill should explicitly provide that a customer who seeks remedy under the compensation fund effectively waives their right to seek a similar remedy against the provider from a court of law on the same cause of action and on similar facts.	The total amount that the customer can recover from the financial institution on the basis of breach of law / breach of contract is the amount of its loss flowing from those breached. If the customer has another cause of action against the financial institution, the losses it can receive under that cause of action will be those flowing from the breach founding that cause of action. There should be no potential for double jeopardy.

10.	**4.3. Composition of the Compensation Fund Board.** The criterion for selecting a member of the Board is laid out under S.121 of Bill.	We assume there is a missing comment here.
11.	**Part IX - Inspections and Investigations.** Inspection and investigative powers of the of the FSA are provided for under Part IX of the Bill. We note that section 82 of the Bill provides that an investigator may, for the purposes of conducting an investigation, enter any premises at any time with the prior consent of the person apparently in control of the premises without the approval of a person having control of the premises with or without a warrant if an investigator believes, *on reasonable grounds*, that the delay caused by applying for and obtaining the warrant will defeat the purpose of the search, and believes, on reasonable grounds, that a warrant would be issued. We opine that the for reasonable grounds is ambiguous and subjective which is not a sufficient threshold to be left to any one person. It is our suggestion that these powers be limited to ensure that entry without consent from the person in control may only be allowed where a court order has been issued. This is to uphold the constitutional right to against arbitrary search allowed to all persons. In the alternative, the committee may consider enumerating the grounds under which such a search may be allowed to ensure that clear parameters have been set regulating a search without a warrant.	The "delay" requirement is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom – see Constitution s24. The proposal would defeat the intent of the regime. Provision has been added to meet section 24 requirements.

5	Association of Kenya Insurers Comments	Response
1.	Part IV: Financial Conduct Licences • Will Retirement Benefits Schemes be required to get a Financial Conduct License? • This is not clear from the bill. It needs to be clarified. • We propose that retirement benefit schemes be exempted from the requirement of acquiring a conduct license. Such a requirement would increase the cost of running the schemes which would in turn negatively affect pension coverage which currently stands at only 15% of Kenyan workforce. • It's also not clear from the bill if the scheme trustees would be required to get financial conduct licenses in order to run the business of the scheme. This needs clarification.	• If the scheme is a legal person, yes. Otherwise, the operators of scheme (who provide the financial product involved in the scheme) will have to get a conduct licence. • The likely additional cost is not expected to be excessive. It is anticipated that holders of existing sectoral licences will face reduced licensing requirements so as to reduce duplication of information etc • Trustees will need to get a conduct licence if they provide the financial product that is the scheme. If the trustees are akin to the directors of a company that is a financial institution, the institution will need to get the licence but the "directors" only need to be fit and proper.
2.	Section 39 - Determination of applications • Part 2 states that if the Authority has not granted an application or notified the applicant in terms of subsection (1) (b), within the notification period for the application it is taken to have refused the application. • We propose that this be changed to state that 'The Authority will communicate any declinature of an application in writing.	• This clause provides the "deemed" decision that will allow the applicant to go to the Tribunal. The proposal is unnecessary and would confuse the matter.
3.	Section 41 Part a) ii) states; the fact that it has contravened or iscontravening in a material way; a directive This is very vague. We propose that it should be indicated clearly what directive is being referred to.	Directive is defined as a directive under specified sections
4.	Part V - Self Regulatory organizations The definition of a Self-Regulatory Organization is very vague and not clear. Which organizations fall under this category? We Propose that a clearer definition be outlined in the Bill.	C53 is the definition of an SRO. There may be other industry associations etc but, for the purposes of this Act, an SRO is an organisation that authorised by the FSA to perform specified regulatory functions of the FSA under delegation

5.	Creation of a Financial Sector Ombudsman and the Tribunal. We welcome this noble idea. However we are concerned about the cost implications which could then translate to high levies for the retirement benefits players in order to finance the same. High levies would contribute negatively to the growth of the Retirement Benefits Sector.	Some of the Ombud functions already exist in industry Tribunals. This section is intended to rationalise these and provide better, more coordinated complaints handling and protection for financial customers.

6	Capital Market Authority Comments	Response
1.	Definitions (1) The terms used in FSA Bill should be reviewed to ensure that Capital Markets terminologies are consistently defined and relevant to the Kenyan Jurisdiction. (2) Common terms such as business documents should be excluded.	(1) Noted, thanks (2) Unclear what is intended
2.	There needs to be a clear distinction between fees and levies.	Levy is fixed and collected under the detailed provisions of the Bill. They are taxes. The Bill also provides for setting fees for services provided by the FSA. These will presumably be on a cost recovery basis They are not taxes.
3.	Clause 6 to be revised to expand the scope. To be harmonized with section 24 of the Capital Markets Act.	This appears slightly unneccessary
4.	The developmental objective is not sufficiently propagated. Clause 10 (c) to be redrafted, could be split into 2 parts i.e. 1. Facilitate/promote the development of financial products and services and 2. If necessary, promote confidence in the financial sector.	The current formulation reflect Government policy
5.	Clauses 29, 30 and 193 grants the Cabinet Secretary powers to make subsidiary legislation. We propose that the FSA be expressly be given powers to issue administrative instruments which include guidelines and notices similar to powers given to CMA under section 12A of the Capital Markets Act. This will ensure that the FSA is not incapacitated by the Statutory Instruments Act.	The decision has been taken to adopt the process in the Bill. The FSA can issue guidelines and directives. There is a limited application of the SIA, as set out in the Bill.
6.	Clause 12 (d) and Clause 28 to be aligned with the Public Finance Management Act.	The Bill expressly provides that he FSA is a national government entity under the PFMA
7.	Clause 15 (1) (e) Board appointment should clearly specify the qualifications, and nomination from professional bodies to ensure sectoral representation from all sectors overseen	Qualifications are in 15(3) We disagree that there should be any suggestion of industry

	by FSA.	representation or nomination. This could infer capture, and would contradict international requirements for independence.
8.	Grounds for removal of CEO should be more than those set out under Clause 15 (7) (b) (i – iv)	It is considered that the current grounds are sufficient
9.	Clause 21 to be amended to remove the delegation by the CEO to the Board of the Authority.	*Agreed – this has been done.*
10.	Clause 24 Definition for Board Secretary should be given in addition the Bill should set out the requisite qualifications of a Board Secretary.	This is a matter for the Board.
11.	Clause 35 - (a) Kenya is in the process of establishing an OTC market for bonds where banks are expected to be the key players. Given the high expectations in terms of financial conduct standards, wouldn't it be prudent to have a provision allowing FSA to require financial conduct license in consultation with CBK under special circumstances? (b) It is likely that we shall have securities markets participants (Brokers and Investment Banks) who don't fall under CBK regulated holding company being expected to have 2 licenses while same brokers and Investment banks that fall under CBK regulated holding company having only 1 license. Are there measures to forestall this likely scenario that will create an unlevel playing field within the securities markets space?	a) If the FSA regulates the market (which it should) then it should set the licensing requirements for market participants. It may choose to exempt banks, but that should be a conscious decision. b) If a broker or investment bank is a subsidiary of a bank holding company, it should have a licence from the FSA under the CMA Act. i.e., the CBK regulates the group on a consolidated basis and the FSA should regulate it on a solo basis. Thus, it would be also required to hold a conduct licence.
12.	Clause 39 to provide for an application fee to be payable on application.	The regulations fixing fees will deal with this.
13.	Clause 43 (1) (a) - Material way is subjective. Any contravention should be reported to the Authority and it's the Authority to determine whether it is material or not and also add that failure to comply amounts to an offence.	Agreed - this suggestion has been adopted.
14.	Clause 51 to be amended to require the list of licensees to be published rather than each individual licence.	Form of publication is up to FSA.

15.	Part V- to be reviewed to ensure that SROs will not have challenges providing oversight to brokers and investment banks with some having Financial Conduct license while others don't have.	See above. In any case, FSA should only delegate what can reasonably be regulated by an SRO.
16.	Clause 87 – (a) Does this clause derogate Section 13 of the CM Act? It should use the term require as opposed to request and it should also provide for punishment for non-compliance. (b) Insinuates that FSA will be approving auditors. If this is the case are there guidelines being developed in line with this.	C87 applies to anyone, not just regulated entities. Thus: a) Cannot require and b) Has no implications for auditors (where did this come from?)
17.	Clause 89 to be amended to distinguish between internal and external investigators. This clarity is essential to ensure findings are not challenged in Court.	This comment is not understood
18.	Clause 91(1) (b) to be amended in line with the current section 33 in the Capital Markets Act.	The current drafting is considered adequate.
19.	Clause 91 (2) to be amended. The word receipt can be replaced with acknowledge of receipt .In addition they should provide for punishment for failing to comply with the investigative powers of summoning,etc	The "receipt" is unnecessary Offences for interfering with investigations, failure to comply with direction etc are included.
20.	Clause 93 to provide that Warrants to be acquired only if the financial institutions refuses to allow access to investigators and should not be a precondition to initiate regulatory investigations.	This would tip the suspected wrongdoer off as to impending investigation.
21.	Clause 95 (1) and (2) to be deleted. Any obstruction to regulatory investigations should be an offence and should not be subject to right to self-incrimination. FSA Investigation should not be obliged to tell a person of his right to remain silent. This is not a criminal investigation but regulatory investigations. Further culpable persons on self-incriminating evidence should still be subjected to financial	The draft attempts to strike a balance between the regulator's need to investigate and the rights to privacy and to silence. The consequence of compulsion is only that the answer cannot be used for punitive purposes. It can be used for regulatory purposes (eg licensing).

	penalty.	
22.	Clause 96 to be deleted. Regulatory investigation should not be subject to professional privileges.	Legal professional privilege is a common law right that should be preserved.
23.	Clause 97 (2) to be amended. Enforcement guidelines should be binding on financial institutions.	This is contrary to the division of powers in the Constitution – the FSA would be usurping the judicial power
24.	Clause 99 to be amended to ensure that FSA Directive should be applicable on both financial institutions and any person engaging in regulated activities.	Not sure what the point is. The clause applies to regulated institutions and key persons. If they are engaging in regulated activities unlicensed then they are in trouble anyway.
25.	Clause 105. The Definition of the term undertaking should be given since it is not provided in any law including IGPA also enforceable undertakings to be enforced through other regulatory functions in addition to court processes.	This comment is not fully understood. A person who is engaging in activity for which it should be licensed should be prosecuted for that offence
26.	Clause 107. Debarment should apply to both natural and artificial persons.	Given that artificial persons can be closed down easily and started up again (phoenix companies), extension to them would be ineffective. The point is to bar the individuals.
27.	Clause 108 (4) to be deleted.	If the FSA decides to impose an administrative penalty, it has selected the appropriate punishment mechanism for the contravention. It should not have 2 bites at the cherry.
28.	Clause 116. The provisions on the Financial Services Ombudsman to be reviewed taking into consideration the role played by the Commission on Administrative Justice and how these two institutions will operate alongside each other.	Noted
29.	Clause 117. To provide clarity on what kind of complaints ombudsman will investigate because it covers all violation of FSA laws.	These are elaborated in the Bill
30.	Clause 121 to delete provision providing for complaints relating to contravention of a financial sector law in relation to the pro-vision of the financial product or financial service	It is unclear if this is necessary

	to the financial customer.	
31.	Clause 122 (2) which penalties would apply in this case since the ombudsman will not be able to enforce the penalties under the Act. Would the FSA penalize based on the ombudsman determination?	The Ombud will not penalise the FI. The ruling will be a legally binding determination which the customer is able to take to a court to enforce if needed. If FI is insolvent, then the customer goes to the Compensation Fund
32.	Clause 125 There is no clarity of the mechanism of moving Compensation Funds from the existing regulators (CMA, IRA etc) to the FSA. Or will they automatically revert to the latter upon establishment.	The Bill requires the amounts to be transferred – the mechanism is for the FSA / NT to arrange.
33.	Clause 126 (2) (e) There is lack of clarity on how the Financial Conduct Compensation fund will be funded. The provision on application of funds indicating 'any other' is ambiguous and open abuse. Since the other funds tend to cover all the sectors of the financial sector, there is need for the envisaged key areas of funds' application to be identified to minimize abuse/confusion by the Board.	The regulations will detail all these matters.
34.	Clause 152 Presentation of F.S to auditor general should be within 90days of year end per PFMA.	See comments above about the PFMA. The 90 days period has been included.
35.	Clause 158 (1) (e) - The sources of funds for the conduct compensation fund should be identified. E.g. what if a capital markets licensee gets fined for conduct issues, doe the money for to ICF or to the CCF.	This is comprehensively provided for.
36.	Clause 164 this may bring confusion if funds are mixed, what happens if the mixed funds are invested in an instrument and money is required by one of the funds, this means the whole investment may have to be liquidated. This can result into some unnecessary losses.	The funds themselves will be ring-fenced. The investments, however, will be able to be operated as a pooled fund for efficiency.
37.	Clause 165 Proposal to have a Schedule of levies, instead of "each financial year imposition" what parameters will be used to impose the levy?	The structure of levies is quite open. It should not be necessary to pass an Act to change the levy rates etc. It will be up to the FSA to model alternative levy structures

38.	Clause 167. Clarity to be made on the assessment of financial sector levy. Is this similar to tax assessment?	It is essentially an invoice for payment
39.	Clause 169 It should be clear whether the refund will be refunded with interest or will it be the principle only?	The "amount of the overpayment" is to be refunded – incudes wrong calculation of principal or interest or both.
40.	Clause 177 to be amended. The Authority should not be excluded from paying Income Tax. The PFM Act requires that 90% of the surplus be remitted to the Government, this effectively means that the rate of tax for FSA is 90%. The impact of exempting FSA from income tax is negative to the institution and its employees.	The comment about 90% repatriation is not understood. What is the benefit of imposing income tax? Levies would have to increase to meet it.
41.	The penalties provided to be reviewed to ensure they are sufficient to act as a deterrent. Kindly refer to sections 25A and 34A of the Capital Markets Act.	Noted.
42.	Clarify whether the ICF in the Bill intends to include the Derivatives Compensation Fund.	It is not intended to include this as a separate fund
43.	**Consequential amendments - CMA**	
44.	The powers of the Authority to issue guidelines and notices are proposed to be deleted with no corresponding provisions in the FSA Bill. i.e. section 11 (3) (d), 11(3) (v) and section 12A. it is important to have these explicitly set out in the Act as it may be necessary for the Authority to issue enforceable guidelines and this will be not possible in the absence of such a provision.	It is not intended that the FMA issue "enforceable" guidelines. It should issue standards.
45.	The requirement to publish draft regulations for thirty days is proposed to be deleted. Rationale not clear.	This comment is not understood. The SIA applies to regulations.
46.	The proposed amendment to section 26(1) is not clear. What licence would the Authority be issuing under the Capital Markets Act? The relationship between the two licences needs to be very clear. e.g. will the annual fees be	Licence is defined in the FSA Bill (and thus also in the CMA) as any authority, licence etc – very wide definition - under a sectoral law – such as the CMA. CMSA and FSA conduct licences will both be required.

	payable twice?	
6.	Sec 33.A is to be amended by the inclusion of the following provision-"(1A) this section does not apply to an eligible prudentially regulated financial institution." Since all licenced institutions are prudentially regulated, it is not clear with the inclusion, which companies will be subject to sec.33A.	The comment is not understood. CMA s 33A will continue to have effect and will apply to any entity that is covered by CMA. The entity's coverage by FSA Bill will not affect this except where a specific provision of the FSA says so (such as in relation to winding up an EPRNBFI. The power under FSA Bill to appoint a statutory manager is simpler and more efficient than that in CMA and so FSA will likely use the FSA Bill mechanism. Alignment of the FSA Bill with sectoral legislation is for a later phase of the project.
7.	**Consequential amendments – Central Depositories Act**	
8.	The definition of financial institutions is proposed to be amended to mean institutions as defined under the FSA Bill. The definition of financial institutions under the CD Act was to cover the institutions covered under the Banking Act. The Banking Act defines financial institutions as deposit taking institutions that are not banks. The definition of financial institutions under the FSA Bill covers all non-bank institutions within the financial sector. This may not be applicable under section 9 on appointment of financial institutions as CDAs	This proposed amendment has been deleted.

7	Association of Retirement Benefits Schemes Comments	Response
1.	**PART I, Preliminaries** On page 14 of the draft FSA Bill the definition of prudentially regulated financial institution includes a trustee of a scheme fund. Does this apply only to trust corporations or does it include individual trustees of scheme funds? It is our view that this should only apply for trust corporations.	The definition of prudentially regulated applies to the licence (or authorisation) holders under the RBA. If you need a licence under RBA to be a trustee, then you are a prudentially-regulated institution. See above comments about trustees and the application of the Bill to them.
2.	**Part II, Section 14** We request for an inclusion under section 14 of the bill a requirement for FSA to consult with recognised industry associations i.e. ARBS, FMA, AKI etc. particularly in development of regulations etc. This section of the FSA Bill refers only to cooperation with CBK.	Regulations and standards are subject to the SIA, which sets out very broad consultation requirements. The associations can rest assured they will be consulted.
3.	**Part** IV, **Section 34** Section 34(1) states that, "Subject to this Act, a person shall not provide, as a business or part of a business, a financial product or a financial service except in accordance with a financial conduct licence." It is our view that this should apply for both individual trustees, jointly and severally, and trust corporations. The conduct licences should only be issued to certified trustees who have been trained under the current Trustee Certification Programme managed under the Retirement Benefits Authority.	See above comments about trustees.
4.	**Part XI and XII**	There should be no clash. The Ombudsman deals with disputes

Will the roles of the Tribunal and Ombudsman clash or give room for abuse? Section 124 states that "The Ombudsman Board may make rules, not inconsistent with this Act or the sector laws, with respect to complaints to which this Part applies." Section 139 (1) also states that "The Chief Justice may make rules, not inconsistent with the financial sector laws, in respect of the procedure to be followed in connection with proceedings in the Tribunal, and may at any time make rules amending or revoking those rules. " There is need to ensure there will be harmony in the functions of the Ombudsman and the Tribunal.	between the industry and its customers. The Tribunal deals with disputes between the industry and the regulator (FSA). Current arrangements are less clear and do involve potential clashes. The new scheme should remove these conflicts.

8	TASK Comment	Response
1.	Establishment of a Government Actuarial Department (GAD) Proposed wording The Board shall establish a Government Actuarial Department (GAD) comprising appropriate staff selected by the Board. The oversight and mandate of the GAD will be through a qualified actuary with appropriate experience who will report to the Board. Rationale We believe this is integral in supporting the FSA to deliver its mandate. This will provide one of the centres of excellence within the authority. Looking at other countries, we see that Canada has established the Office of the Chief Actuary; the UK has established the Government Actuary's Department, Australia has established the Australian Government Actuary and the US has established the Office of the Chief Actuary. We strongly believe that this is an appropriate inclusion into the bill. (3)	This is not within the Bill's scope.

9	ICPAK Comments	Response
1.	**Emerging Issues** Why did the Financial Authority Services Bill only amend certain sections of the CMA Act, RBA Act, IRA Act and Central Depositories Act when repealing the entire pieces of legislations would have made sense. This will pose serious challenges in implementation and might lead to other hurdles such as litigation.	The sectoral Acts will continue to operate for the present. A second stage of reform will amend these Acts to remove overlap with the FSA Act and to update them where they need updating. However, these Acts need to remain since they address the mechanics of operating a prudentially licensed entity.
2.	In addition, if transition and implementation issues are not handled properly, execution of the Bill might lead to duplication and overlap of functions and responsibilities. For instance, in the Sacco subsector there are concerns that the merging of financial regulators may derail the growth of the sector especially BOSA operating SACCOs. The transition period should be prolonged even for 5 years to enable these SACCOs to adopt to new requirements.	Noted.
3.	It needs to be clear whether this institution (FSA) will be the primary regulator of the Financial Services Sector in Kenya. This stems from the fact that the Nairobi International Financial Centre Bill establishes an Authority to develop financial services sector in Kenya. This might lead to duplicity and overlap of mandates between the FSA and NIFCA	Our understanding is that the Nairobi IFC will establish an operating environment for certain institutions. However, entities established under that umbrella will still be regulated by CBK (if qualifying as CBK supervised entities) or by FSA
	Comments on Specific sections	
4.	The definition of *"Financial Institution"* is too generic It's difficult to clearly delineate the various players that fall under the ambit of the Financial Services Authority and the Central Bank of Kenya. For instance, a credit union is a member-owned financial cooperative, democratically controlled by its members, and operated for the purpose of promoting thrift, providing credit at competitive rates, and providing other financial services to its members. From this fundamental definition and	See diagrammatic representation above. We note that the comments define a Sacco as a credit union in this section, yet argue elsewhere that the two are fundamentally different.

	intended purpose, how are Sacco's qualified to be locked together with other financial institutions like bank which are purely cooperate oriented?	
5.	Interpretation - The Bill fails to define Non-prudential *micro-finance institutions,* yet they play a pivotal role in the national economic growth and development. There's need to define non- prudential "Micro finance institutions" in the Bill and the changing environment of the Financial Sector. They may be considered for or classified as part of the Self-Regulated Organization - SRO.	The Bill does not define new institutional groups, beyond what is already defined in the sectoral Acts. The institutions covered by the conduct aspects of the Bill are non-CBK supervised "providers of financial services and products. This is deliberate – see earlier discussion of definitions. Note: it is not clear how micro-finance institutions could possibly be classified as SROs. There is not 1 SRO (as the comments suggests) – individual industries may have their own SROs.
6.	C11 - A look at the repeal and amendments section shows that the FSA has mandate to license prudentially regulated institutions such as Saccos and entities previous licensed under the CMA Act, yet this is not reflected in the functions under Clause 11. Amend 11(a) to read a) License, regulate and supervise prudentially regulated financial institutions in accordance with this Act and the sectoral laws;	This suggestion has been adopted.
7.	C15(3) - Need to strengthen the requirements for Board appointments. Amend the following: - Add (c) immediately after 3(b), "Must be a member of a professional body in good standing; - Amend c) to read, "have at least ten years' experience in top management of a public or private institution ~~within the financial sector~~ - - Amend (d) to read, "have at least three years' experience as a board member". This will be in line with the general tenures of board appointments to parastatals - normally 3 years	There should not be a requirement that a member be a member of a specific professional organisation. Otherwise, the clause reflects Kenyan practice

8.	C17 - Strengthen this provision to include best practices of Corporate Governance. Borrow from the Mwongozo Code provisions. Add the following provisions 17(3) At least one Board Member should be a financial expert, meaning that he or she has the necessary financial qualifications or accounting and is bona fide member of a professional body regulating the accountancy profession 17(4) The Board should establish an audit committee to discharge the functions of risk management and governance	The governance regime was developed in the light of Mwongozo. This is covered by the PFMA Act.
9.	Amend 19(3)(a) to read, "unless the person has at least a relevant master's degree and membership of a professional body **established by law**.	This is a specific decision, to follow Kenyan practice.
10.	C29 (and C30) - This provisions does not reflect the mandate of the Authority in recommending drafting of rules. Ammend as follows: 29. "The Cabinet Secretary may, **on the recommendation of the Financial Services Authority,** make rules ("prudential rules")	Noted
11.	C31 - The penalties and sanctions not stiff/punitive enough Amend the Clause to read Penalty- (a) for a first offence — KShs. 20,000,000; and (b) for a second or later offence — KShs. 30,000,000.	Treasury

12.	C32 - In making the prudential and conduct rules, the authority needs to give due regard to institutions that regulate various functions within the financial sector. Include an additional sub- clause(32(k) as follows, "The Authority shall consult institutions and all professional bodies that regulate various functions within the financial sector in developing prudential and conduct rules"	Noted
13.	Part V 9 SROs - There's ambiguity in the definition of SROs in the Bill. The functions delegated to SROs should be limited to the core functions around development of the Financial sector.	Comment noted but a different view has been taken, not to limit (except in a number of specific cases) what can be delegated to SROs.
14.	C76 and 77 - The entry of statutory should be seen as a life lifting changer to the institution to reverse trail of destruction associated with poor governance in the work place and make it a better institution. • Statutory manager role should be enhanced to include mandate to order shrinking firms for financial health check, legal audit and governance audit among other services provided for in the Public Audit Act 2015 bringing modernity in business decision making	Statutory management is about orderly resolution, not about growing dying institutions. In rare cases the institution may be resurrected, but that is not the expected outcome, nor should it be the mandate of the SM.
15.	Part XIV – II(5) - The Saccos are currently Under Commissioner of Co- operatives whereby it falls to Ministry of Industrialization and Enterprise Development. • Does it mean the matter pertaining deposit taking Saccos will be under Ministry of National Treasury? • The requirement to obtain new licenses in addition to the existing licenses from SASRA may be another tall order. Can these licenses be transited to FSA? How are the Sacco shares going to be traded to raise	This is a Government decision that was taken. Engagements at the highest level in Industrialisation ministry were done There is no suggestion that the prudential capital regime applying to Saccos will necessarily change under the FSA

	capital? That the Government should consider the role played by Sacco in providing alternative source of finance, reducing poverty and its impact in GDP. The issue of Corporate Governance is not well exercised in co-operative movement thus the Authority should stress its muscle	
16.	C200 – staff - It may cause redundancy and duplication of roles and functions by staff in the new Authority There's need for a rethink of this strategy of redeploying all the former Regulator's staff and CEOs to the new Financial Authority. - Can they be redeployed in the larger public service? Carry out staff rationalization and skills audit before redeployment	Given the broader mandate of the FSA, relative to the 4 existing agencies, there is no automatic presumption of redundancies.

10	Barclays Bank of Kenya Comments	Response
1.	Licences: It is unclear if prudentially regulated financial institutions will in addition to obtaining operating licences under the respective predecessor regulations, also obtain a financial conduct licence or if the FSA will issue one operating licence (with conditions for the different categories of licensees) and a financial conduct licence Propose: • Harmonise the licensing regime to ensure that licensees are clear on the licenses they require. • Streamline the number of licences to ensure that licensees are not required to obtain multiple licences.	There will be two licences. The FSA will need to be conscious of duplication in licensing existing prudential licence holders.
2.	Financial Conglomerates: • The definition of holding company is restricted to companies incorporated in Kenya. The question that arises for purposes of part VII/section 80 (1) is how the FSA will treat a group of financial companies whose ultimate beneficial owner is a holding company outside the country. • Section 80 (3) restricts entities licensed by CBK from being holding companies. Commercial banks have diversified their revenue streams and as such hold controlling interests in different financial sector companies. In addition, some banks have non-operating holding companies. Whereas CBK vets all non-operating holding companies, the licence is issued in the name of the bank and as such an argument can be made that banks with non-operating holding companies may be deemed financial conglomerates but those without will not be financial conglomerates in spite of their interest in other financial sub-sectors	The regime can only apply to HCs incorporated in Kenya. To go beyond this would involve extra-territoriality. The designation of banks with controlling interests in subsidiaries in different sectors is clear – they are CBK supervised at both the group level. The non-bank subsidiaries may be subject to FSA regulation on a solo basis.

	Proposal: • The Bill needs to clarify the position of foreign holding companies • The Bill also needs to clarify the designation of banks with controlling interests in different financial sub-sectors.	
3.	Insolvency: Sections 76-79 do not exclude derivative contracts, repurchase agreements from assets/liabilities available at the time of insolvency. Section 49 of the Kenya Deposit Insurance Act excludes these type of agreements. and aligning the provisions will ensure that financial institutions whose counter parties are commercial banks have similar protection. These provisions are not in the Insolvency Act. Proposal: Include a clause that excludes these.	C76-79 are relatively high level. Details about creditor hierarchy in resolution will need to be developed either in resolution or in amendments to the sectoral Acts.
4. h	Tribunal: • The chair of the tribunal has the authority of a Chief Magistrates court under section 145 (4) (a) of the Bill. The tribunal is therefore a local tribunal with the jurisdiction of a subordinate court as provided for under Article 169 (1) (d) of the Constitution. The pecuniary jurisdiction of a Chief Magistrates court is K.Shs. 20 million. Considering the nature of the financial institutions that will be regulated, a number of the cases may be above K.Shs. 20 million and parties will therefore have to go directly to the High Court. This defeats the purpose of having a tribunal. • The wording of the Bill suggests that the Financial sector tribunal will be part of the judiciary unlike the current tribunals which are not part of the judiciary. The tribunal rules are to be prepared by the Chief Justice	The jurisdiction of the Tribunal is fixed by the Bill (not the Magistrate's Court legislation).

	- Part XIII of the Bill mandates the Judicial Service Commission to appoint members of the financial sector tribunal as well as staff of the tribunal. Under the constitution, the JSC's mandate is limited to the appointment of judges, magistrates and other judicial officers. From the wording of the Bill it appears the tribunal members and staff will be employees of the FSA and not the judiciary. - Indicating that their terms of service will be determined by the JSC does not clarify this issue Proposal: - Consider changing the chair's authority to be similar to the existing tribunals to enable high value disputes have a right to appear before the tribunal similar to the current tribunals. - If the tribunal is considered part of the judiciary, there is likelihood that the speed and efficiency tribunal's operations may be affected. The tribunal should be flexible enough to hear disputes promptly. - The tribunal is part of the judiciary; and the employees of the tribunal will be employees of the FSA or judiciary.	
5.	Penalties: - The standard penalty for offences is K.Shs. 5,000,000/= to K.Shs. 10,000,000/= regardless of whether the person is a natural person or corporate body. - High penalties against individuals are only payable where a person has been insured or has the resources. Such insurance is primarily given to directors or a company. However, day to day operations are not conducted by the directors and an officer may be held liable for making material misstatements.	This is provided for in clause 2.

No.	Comment	Response
	Proposal: • Differentiate the penalty payable by an individual from that of a company	
6.	Appeals: Section 197(1) provides that any unresolved appeals to Tribunals of predecessor regulators shall be transferred to the FSA tribunal in accordance with the tribunal rules. The FSA tribunal can only be set up by the JSC In addition, the tribunal rules have not been published for stakeholder comment. Should the Bill be passed without the tribunal and tribunal rules being in place, it is unclear how ongoing appeals will be managed Proposal: • Insert a transition clause to allow for ongoing appeals to be handled by the FSA tribunal in accordance with the current rules in the event that the FSA tribunal rules are not yet in place at the time the Bill is passed. • Alternatively circulate tribunal rules for stakeholder comments simultaneously with the Bill. Section 139 mandates the Chief Justice to prepare the tribunal rules	Agreed. Appropriate changes have been made
7.	Foreign securities: There is a definition of foreign securities; however, the definition is not used in the body of the Bill. Proposal: • Consider including regulation of foreign security offerings to Kenyan residents.	The reference is deleted – thanks.
8.	Board Chair: The Chairman of the Board is appointed by the President pursuant to section 15(1) (a). However, under section 15(7), the Cabinet Secretary can terminate the services of	Agreed - This suggestion has been adopted

	all board members excluding ex officio members. Since the chairman is not an ex officio member, his services can be terminated by the Cabinet Secretary Proposal: • Termination or removal of the chairman should be by the appointing authority. i.e the President	
9.	Borrowing and Lending: The bill grants the Authority and the Ombudsman powers to operate funds including borrowing and lending Proposal: The bill should clearly define what lending by the Authority/Ombudsman relates to. Is it to employees/ related institutions or to the public and does this then make the Authority a lending institution?	Not necessary. FSA's activities are constrained by its objectives and functions
10.	Directions by FSA: The bill states that No person shall give direction to the Authority in relation to a particular matter. This provision would mean that the Authority has absolute powers and sole discretion over its decisions or rulings Proposal: The Authority should be open to guidance and suggestions from the National Treasury. Professional membership bodies such as KBA, AKI should also have a right to lobby the FSA on matters mutually affecting their members	No – it provides protection from improper interference when dealing with specific cases (e.g., a licensing decision).
11.	CBK supervised entities: CBK Licensed entities are exempt from obtaining a Financial Conduct Licence however, the FSA can still exercise its powers over the entities and require them to comply with their directives as well as conduct inspections and investigations. The bill duplicates roles currently carried	This is not correct. See earlier diagram.

	out by the CBK and creates dual regulation for CBK licensed entities. Proposal: The bill should clearly draw the demarcation line for CBK regulated entities and FSA regulated entities. CBK licensed entities should also be exempted from the provisions of FSA bill to avert any overlap between the two regulators. Alternatively, the Central Bank mandate can be revised such that the regulatory responsibility shifts to the FSA and CBK is left to manage the monetary policy.	
12.	Unrestricted entry: Section 88 (1) states that the Authority may at any time during normal business hours enter the business premises to conduct an inspection Proposal: The bill should provide for a notification period/ a court order to enable the regulated entity prepare for the inspection unless it's a circumstance of gross violation of prudential/conduct rules	Inspections are friendly and do involve some notification. It would be rare for a period to be specified in law. It could be counterproductive.

11	AMFI Comments	Response
1.	Microfinance Act	Not within the scope of this Bill
2.	Credit-only Regulations under the Microfinance Act	Not within the scope of this Bill
3.	Levies should be fair especially if you intend to bring in small financial products providers e.g. Chamas. We propose they be graduated for it to be fair to all especially for entities which are not subject to prudential rules.	They will be – subject to proportionality principle
4.	Even as the Bill intention is to merge the existing government entities which is quite elaborate, the inclusion of other players generally classified as 'product providers' and 'financial service providers 'is confusing and they need to be defined or a separate section in the bill created to separate them from current government institutions	Don't understand the reference to existing licenced entities as "government" entities. They are private sector entities. They are also all providers of financial products and services. All will be subject to conduct regulation to protect financial customers.
5.	To serve the financial sector better the Bill should express intention to create distinctive directorates for various subsectors. It is not clear how the FSA will handle various players e.g. insurances, CMA, Saccos, Microfinance Institutions and other players. These directorates will develop regulations for each sub-sector.	No – this would be an unreasonable encroachment on the Board's responsibilities and would negate the value of amalgamation
6.	The FSA Bill is only one of the recommendations of the Presidential Taskforce. There is a concern that piecemeal approach (passing some laws and not passing others) may not be prudent.	Outside the scope of this Bill
7.	Lamping together government entities and private entities will create confusion and may not achieve the intended goals.	Comment not understood
8.	Financial service providers and product providers should be treated differently by the proposed law. Their services and outcome are totally different.	There is no suggestion in the Bill that services and products will be treated the same or that any two services will be treated the same. The framework for implementing conduct regulation is a matter for

		the FSA Board.
9.	Creating a supper entity for both private companies and government entities creates a challenge of supervision and regulation. CMA, IRA, SASRA are already large entities. Bring in Microfinance institutions, non-regulated Saccos and other supper entity will most likely not deliver.	Comment not understood
10.	Let Government entities have a stand-a-lone supervisory institution and defined credit providers their own entity. It is impossible to harmonize regulation for financial sector players - both state and private.	This would run against the Government's decision to amalgamate regulatory agencies
11.	Finally, it is observed that the intention of the Bill on government regulated entities is clear but this is not the same for non-government organisations e.g. Microfinance companies, Saccos, Chamas etc.	It is clear – prudential regulation will continue, and continue to develop, as it currently operates for existing licensed entities under the sectoral Acts. The new component will be conduct regulation and this will apply to both prudentially regulated entities and to currently unregulated entities.
12.	The FSA Bill 2016 anticipates licensing financial service providers and product providers. Article 2, 3 and 4 in the Bill are fairly wide and may result in an unintended consequence. 1. The definition may create serous huddles in implementation and should not extend to ordinary suppliers of credit. 2. Microfinance as a financial sector play a major role in the development of the country, especially rural areas in achieving financial inclusion for all has not been recognized in the Bill.	There will be a period of transition and the new rules will be rolled out sequentially and with proper consultation.

12	KUSCO Comments	Response
1.	Consultation: There was lack of consultation on drafting this Bill and players in the SACCO sector were ignored. Since consultation is a constitutional requirement, it should have been appropriate to have a back and forth engagement with the stakeholders in order to own both the process and the document. There is need to understand that SACCOs are not "capital" based and generally start with only member savings, with a lead time of six (6) months before loaning can start. If this model is tinkered with from inception as proposed, then it will collapse rapidly as we have seen with banks which rely on external capital. It is apparent that there is lack of understanding of a SACCO model among the proponents of this Bill. We also note that there was no study conducted to justify inclusion of SACCO regulation with other financial institutions who do not serve a similar market segment. We suggest that it is not too late to involve stakeholders and that a law which is rushed through parliament will only hurt a sector ranked number one and seven in Africa and the world respectively.	There is no change in the prudential model that applies to Saccos. Those Saccos that are currently regulated for prudential purposes (including capital requirements) under Sacco Societies Act will continue to be s regulated. The change is that Saccos that provide financial services will be required to meet standards of conduct in providing those services. There are no new "capital" requirements implied by this Bill.
2.	SACCOs as a Target of the Bill: The Finance Act 2013 defines 'financial institutions' to include 'SACCOs registered under the SACCO Societies Act, 2008'. However, there is no SACCO that is registered under the SACCO Societies Act though the SACCO Act 2008 defines them as a 'Savings and Credit Co-operative Society registered under the Co-operative Societies Act, 1997.' We wish to reiterate that the SACCO Societies Act, only licenses deposit taking SACCOs. The inclusion as a "financial" institution was for excise duty/taxation purposes only. Needless to reiterate, SACCO members who borrow from their society to buy or build homes do	This comment is primarily about tax. Definitions in the tax legislation are not relevant to the Bill. As for the regulatory comments – see response above.

not enjoy similar tax benefits as borrowers from other financial institutions as follows:

- They do not enjoy mortgage interest relief of up to Kshs 150,000 per annum available to mortgages from banks, insurance companies, building societies and National Housing Corporation;
- They do not enjoy Home Ownership Savings Plan relief of up to Kshs 48,000 per annum available to savers with banks, insurance companies and building societies.
- Further, we observed that the Bill borrowed heavily on the Credit Union, Micro-finance and Banking Models and tries to force the definition of "financial institutions" on SACCOs without making reference to the requirements of Banking Act and the Central Bank Act in the use of that term.

It is not clear then whether SACCOs will be required to register under the Banking Act or can be called "banks" or "Financial Institutions" from a legal stand point, given that these terms are restricted.

Both Central Bank Act of Kenya Chapter 491 and the Banking Act Chap. 488 define financial institutions and related business without including SACCOs. Licensing of SACCOs to carry out deposit-taking does not meet the threshold of a financial institution given that ownership is inseparable from customers. It is therefore imprudent to collectively regulate all SACCOs using same parameters .

3. The Sections 35 to 50 is restrictive on SACCOs:

The Sections 35 to 50 of the Bill is a disincentive to BOSA based SACCOs which should be exempted from these rigorous regulations. Additionally, Section 38 (2) (a) is hard to measure since SACCO Savings build over time and since they are stated without capital, none can declare from the onset how the

Conduct rules will be applied proportionately. They are nevertheless designed to protect customers of financial product and service providers.

	exponential growth will be achieved in say, one year to come.	
4.	Levies: Whereas we support regulation, we wish to state that they should be facilitative to the sector. We note that RBA, IRA and CMA do not deal with any institution that can be called Deposit Taking. Neither do they deal with member based organizations. Regulating SACCOs world over is a preserve of a sector specific Act even in the developed jurisdictions. Section 162 (1) has created fees payable, in addition to other levies and funds. We feel that it is unfair to bring taxes at different stages, without clear justification. No country introduces taxes that are bent to frustrate businesses. With modest incomes of SACCOs and limited sources of revenues, all the taxes disguised as levies are anti-business. The nature of services to be charged is not specified; and the SACCOs may be arbitrarily charged for unnecessary services.	It is international best practice for the cost of regulation to be borne by industry and for industry to pass that cost onto customers, who are the ultimate beneficiaries. We do not anticipate that the cost of the conduct licence under the FSA Bill will be a barrier to entry or growth in any sector that is regulated. The underlying principle is that ALL providers of financial products and services should be subject to regulation and should bear the cost of that regulation.
5.	Market Conduct and Multiplicity of Consumer Protection Laws: Whereas it is envisaged that this Bill will address the above issue, the question remains on why the current Consumer Protection Act should not be improved to address the problems. Multiplicity of laws causes confusion in the minds of consumers. Market Conduct - Members of a SACCO are a closed member-user group who set their rules on how to manage their affairs through by-laws and there is lack of homogeneity of products across the sector. Why introduce regulation where it cannot work is what the sector does not understand. Why try to standardize rules that can never be uniform? The Bill points to the direction of forcing even small SACCOs to operate as sophisticated big ones. Therefore, we wish to state that the motivation for forming SACCOs is not for profit but member service and the multiple licenses will create artificial barriers and make the business expensive and untenable. BOSA	Amending the Consumer Protection Act was not within the scope of this Bill. In any case, the fact that it applies to both CBK supervised entities and FSA supervised entities makes any amendment problematic at the present time.

	based SACCOs should be left out of these stringent regulations.	
6.	Multiplicity of Levies and Funds: The Bill has created other funds basically meant to make it expensive to do business as follows: • FSA Fund - created under section 140 (i) (d). • Ombudsman Fund; • Compensation Fund; Even though these are proposed in the Bill, the SACCOs should be exempted from paying them.	If Sacco members enjoy the protections offered by the funds it is not obvious why they, and no other group, should be exempted from the cost of providing these protections.
7.	Deposit Guarantee Fund and Compensation Fund: The deposit guarantee fund and compensation fund. If the two have to operate, then we are unable to clearly decipher the distinction between them. We suggest that we retain what is in the SACCO Act part VI (Deposit Guarantee Fund). The SACCO Compensation Fund Section SO(i)(a)(c). SACCOs unlike financial institutions owe members the net difference between loans and savings. Practically, it's rare for a SACCO to owe members substantially since the model is purely Savings and Credit. This has been borrowed from the Credit Union model without customizing and understanding the SACCO model. We suggest exemption from it	There will not be two funds. It is intended that the Sacco Compensation Fund will be a deposit insurance fund. The details will need to be developed in regulations, with ample opportunity for industry to comment on the design and structure of the fund.

13	PWC Comments	Response
1.	For us, the most important factor will be how the current regulatory bodies are merged into the new body to provide an effective single regulator. Are we just going to have the current regulators operating separately as before under one roof, or are we going to get real synergies? This is not clear from the Bill and will probably be driven by the more detailed organisation structure that is adopted.	Synergies are critical to effective regulation. The intent of the Bill is the FSA will definitely be greater than the sum of the existing parts. The details, however, are for the FSA Board to determine.
2.	it is also important the process of discussing, finalising and passing the bill is accelerated to reduce the uncertainty in the financial services sector. This uncertainty, which began from the time the intention to set up the authority was announced, may affect the ability of the current regulators to respond to developments in the sector.	Agreed, but not for inclusion in the Bill
3.	Paragraph 3(4) This section refers to "an Islamic investment arrangement", but should it also refer to Takaful insurance products?	The term is meant to capture all Islamic financial products.
4.	Part V Part V - there is a typo in the header "Self Reguatory Organisations" (sic)	Noted – thanks.
5.	Part VIII - Information Gathering How do the provisions of this section correlate with the standard statute of limitations, i.e. can the FSA request information that "any person" would not have been legally obliged to retain under existing statute?	The FSA can request any information that it believes will assist it in meeting its objectives. Only licensed entities have an obligation to respond.
6.	Paragraph 172 Paragraph 172 - the other levies to which the new FS levy is being compared should be defined herein.	It is unclear exactly what issue the comment is raising. Clause 172 simply states that, if a levy notice has been issued for any of the levies covered by the Act, and the recipient overpays the amount in the notice, that excess will be refunded.
7.	Part XV Part XV gives power to the Authority to exempt a person from specified provisions of a financial sector law. What	The comment is not strictly correct. Part XV gives the FSA power to exempt FIs or groups of FIs from the conduct licensing requirement (not all financial sector laws). The FSA will issue public documents

	safeguards are there to ensure that this power is not abused and exemptions are not given arbitrarily? Shouldn't there be a defined framework under which such exemptions can be given?	to indicate how it will implement the conduct framework, so there should be some transparency about how exemptions might work. The key to the exemption power, however, is that there will be some groups of institutions for which the need to hold a conduct licence may be unclear and, for some of these, an exemption may be the logical decision (e.g., a cooperative society that lends seed to growers as part of its agricultural cooperative activities – in this case the financial service of lending is largely tangential to its core business and an exemption may be warranted while the nature of the service remains tangential).

14	Old Mutual Group Comments	Response
1.	We wish to state that we are in support of the move to consolidate regulation and supervision of non-banking financial institutions in Kenya through the establishment of the Financial Services Authority and the consequent abolition of the separate regulatory bodies that have been in operation. From our preliminary review of the Bill, we are confident that the country will benefit from the consolidation of the non-banking financial services industry. In particular the benefits are likely to be accrued from, the promotion of consistency in the application of the law, sound corporate governance practices, consumer protection as well as excellence in service delivery. We are also supportive of the shift in supervision from the compliance based regime to a more consolidated risk based regime. We enclose herewith our detailed views on specific sections in which we believe there is still room for improvement. Nevertheless, the comments do not in way detract from the general spirit of the law which we are fully in support of.	Noted
2.	Possible wide application of the clause relating to making non-cash payments and Section 3 (5) Section 3 defines financial products as arrangements through which one does the following: • makes a financial investment • Manages financial risks • Makes non-cash payments Section 3 (5) defines non-cash payments as payments made otherwise than by physical delivery of Kenyan currency in the form of notes and coins Our interpretation is that any facility or arrangement that is acquired through non-cash payments (e.g. mobile payment platform such as mobile money transfer systems or through an Electronic Funds	The inclusion of non-cash payments in this definition is to allow the FSA to capture services such as credit cards and electronic payments channels to the extent that they involve a genuine financial product. The important distinction here is between a pure transmission mechanism, such as an internet service provider who enables electronic payments to take place, and a product provider that offers stored value or credit. The definition is deliberately open-ended to enable the FSA to assess substance over form. In an innovative world a narrow definition is likely to open gaps for creative operators to circumvent regulation, while actually providing a genuine financial product.

	Transfer) may be considered as a financial product. There is no definition of the word facility or arrangement in the Act. It could cover anything such as informal loan arrangements granted by 'chamas' which are disbursed through mobile money transfer, cheque or other electronic payment means. It could also include services/goods purchased online. We propose that a definition for the term "facilit y" or "arrangement" be included. In addition under section 3 (5) any facility that has substantially the same economic effect as a facility or arrangement is a financial product. This "sweep up" clause makes the definition of financial products too wide/far reaching.	
3.	Wrong cross references on the sections Section 3 (1) (a-c) makes references to the wrong sub-sections within section 3.	Noted and changes made
4.	Establishment of the Financial Services Authority Comments Rules to be made in Consultation with the Central Bank of Kenya The proposed consultation with the Central Bank of Kenya that are set out throughout the Act should be more structured (eg. Who has the ultimate say? Is the Central Bank more superior to the FCA? What happens in the event of a deadlock?). We propose that amendments should also be made to the Central Bank of Kenya Act to give efficacy to the proposed amendments	The intent is to encourage consultation. Nevertheless, with the exception of clause 33(1), which involves rules that apply to FSA financial conglomerates that include a CBK supervised entity, the decision on the wording of the rule rests with the rule maker. However, since the rule is made by the CS on the recommendation of the FSA, it is reasonable to expect that material differences would need to be sorted out before the CS would propose it to Parliament. Amending the CBK Act was not within the scope of this Bill.
5.	Section 32 (1) (b) of the Act states that the Conduct rules may stipulate conditions relating to "governance, including governance in relation to the composition, membership and operation of governing bodies of the governing bodies." The section should be re-looked at as it is incoherent.	The clause should read "governance, including governance in relation to the composition, membership and operation of governing bodies." Correction made.
6.	The fact that the authority will have powers to fix the terms and	It is standard international practice now for regulators to set rules

	conditions/remuneration and incentives of members of governing bodies may severely restrict the industry 's ability to tap into and obtain good talent. The rules should instead define parameters/ matters to take into consideration when making such appointments as opposed to the actual definition of terms.	affecting remuneration. These rules are typically high level and focus on the extent to which poorly designed remuneration practices may introduce risk, either for conduct or prudence. To parameterise the policy further in law would limit the FSA's ability to approach this topic flexibly.
7.	Self-Reporting should be encouraged - The Authority should encourage self-reporting by providing a window for no penalties for those who report non compliances.	The FSA will have considerable flexibility in how it imposes penalties for non compliance. It is normal for regulators to consider the degree of cooperation in setting fines. Nevertheless, there are some areas of non-compliance where a fine may be appropriate, regardless of the extent of cooperation.
8.	Under section 29 (3) it is provided that prudential rules may make provision in respect of governance and management arrangements for holding companies. Our interpretation is that there is a contradiction in these two provisions as the governance and management of the conglomerate very well touches on its conduct.	There is no contradiction. Conglomerate supervision is aimed at prudential issues. Governance and management arrangements are regularly set by prudential regulators.
9.	There is also need to clarify whether there is power for the Authority to supervise the conglomerate in respect of capital requirements as section 29 (3) is silent on the issue.	Clause 29(3) refers to "financial soundness" which includes capital requirements.
10.	The parameters for collaboration with the Central Bank of Kenya at section 82(2) should be defined.	Unclear what is intended here – there is no clause 82(2). In general, the details of collaboration between the FSA and CBK is for them to agree.
11.	There should be defined criteria for the appointment of investigators. The outcomes of the inspection and investigation should be provided to the licensee.	Investigators are set out in clause 90. It is undesirable to set out firm criteria, as the suitability of an investigator will depend on the nature of the conduct being investigated. The outcomes of inspections and investigations may be shared with the licensee where this is appropriate and will not prejudice the investigation or other regulatory or enforcement action, and will not infringe confidentiality of informants. The basis of enforcement action (reasons) must be disclosed when the action is taken..
12.	Section 110 provides that interest is payable in respect of the unpaid portion of the amount payable as an administrative penalty	Noted

	until it's fully paid. The applicable interest rates should be defined. We propose the prevailing Court rates be used.	
13.	The Financial Sector Ombudsman should be given power to request for information from parties so as to make the process effective. In addition, there should be a linkage between the Financial Services Authority and the Ombudsman's office with powers for the two institutions to share information.	See answer earlier on this topic. Noted

15	Nicasio Karani Migwi Comments	Response
1.	Formal CBK and FSA Coordination Agency/Forum/Board Explicit specification of creation of a formal structure e.g. Agency/Forum/Board that mandates frequent and consistent CBK and FSA meetings more so on issues of Financial Sector Stability. This can be modelled in line with the EU's European Systemic Risk Board (ESRB), the UK's Financial Policy Committee (FPC) and USA's *Financial* Stability Oversight *Council* (FSOC) chaired by Treasury with members from the FED; Office of Comptroller of Currency; FDIC; SEC; Consumer Financial Protection Bureau; Commodity Futures Trading Commission; National Credit Union Administration Board. At minimum, it must meet quarterly.	Comment noted, but this is not within the scope of the Bill
2.	Scope of Vision for Expected Impact on Kenyan, African and Global Economy as –well as the Nairobi International Financial Centre - NIFC	Comment noted, but this is not within the scope of the Bill
3.	Unique Macro-prudential measures for Non-bank systemically important financial institutions (SIFIs) and systemically important financial market utilities (FMUs)	Comment noted, but this is not within the scope of the Bill
4.	Role- develop macro prudential policy in coordination with international and domestic regulatory institutions	Comment noted, but this is not within the scope of the Bill
5.	Developing Large Pool of Multilingual banking, insurance, pensions, Sacco, capital market and commodity trading specialists	Comment noted, but this is not within the scope of the Bill
6.	Regulation on excessive incentive compensation structures in financial services from Short Term to Long Term focus; Limits on bonuses to align risk taking; Claw back clauses on Directors and management	The subject of this comment is provided for in clause 29. The details are a matter for the FSA.