

**FINANCIAL PLANNING INSTITUTE OF SOUTH AFRICA:**

**COMMENTARY ON THE CONDUCT OF FINANCIAL  
INSTITUTIONS BILL**

**Comments to National Treasury**

**To whom it may concern**

**Per email: [marketconduct@treasury.gov.za](mailto:marketconduct@treasury.gov.za)**

## Our Vision

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Professional financial planning for all.

## Our Mission

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The FPI's mission is to advance and promote the pre-eminence and status of financial planning professionals, while at all times acting in the interests of the society (community, constituency) whom the profession serves, by:

1. Improving the quality and accessibility of professional financial planning for all in Southern Africa.
2. Acting as advocate for professional financial planning, building a recognition of the importance and need for such planning by the general public.
3. Providing a framework within which members can achieve qualifications and maintain competence to create greater value for their clients, practices and employers.
4. Ensuring that members maintain the highest ethical standards in the pursuance of their profession.
5. Providing a leadership role within financial services by providing balanced, credible input and commentary to government and the public.
6. Facilitating transformation within the profession.

# About the FPI

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As a non-profit organisation FPI's mission is to benefit consumers and potential consumers of financial planners by establishing, upholding and promoting standards in financial planning. FPI, along with 25 other countries, is an affiliate of the Financial Planning Standards Board (FPSB). Through this affiliation we ensure that the work we do meets international standards.

FPI creates internationally relevant standards so that:

- The public can identify qualified, competent and ethical financial planners;
- Practitioners can distinguish themselves as qualified, competent and ethical financial planning professionals; and
- Consumers, regulators and other key stakeholders can have confidence in the financial planning profession and in financial planning professionals, and recognize the benefits financial planning offers to individuals and society.

## FPI's Viewpoint

FPI and National Treasury are aligned in a shared interest to foster positive outcomes for consumers engaging with financial institutions in an effort to improve their financial wellbeing. While proposals for financial regulation often focus on consumer outcomes through the rubric of the distribution and sale of financial products, FPI focuses on *standards of professionalism* for financial planners and financial advisers, the *competency* of individuals offering financial planning and advice, and the *process* financial planners and advisers use to engage with clients to understand their goals, needs and objectives prior to the delivery of financial planning recommendations.

The financial planning process consists of developing strategies to assist clients in managing their financial affairs to meet life goals, and can involve reviewing all relevant aspects of a client's situation across a large breadth of activities (including inter-relationships among often conflicting objectives).

Consequently, FPI's response to National Treasury's call for comment on the COFI Bill is through the rubric of financial planning –a client-centric, process-driven professional practice that can help (re)build trust and restore consumer confidence in financial planners and financial advisers specifically and the financial sector as a whole.

Regards,



David Kop CFP®  
Head: Stakeholder Engagement

## General Comments

We are in agreement with the objectives of the Bill would like to also emphasis the following principles:

**Regulatory Certainty** - The regulatory environment in financial services is changing drastically. While we support the move to a principle-based regulatory system, we do foresee that sufficient guidance is to be provided by the policy maker and regulator as to the intent of the legislation.

The lack of sight of conduct standards (and indeed some parts of the Bill itself) increases the currently level of uncertainty. We encourage the robust consultation on the conduct standards (such as has been done through the RDR process), while being mindful that the time delay between the promulgation of the Act and the issuance of conduct standards could lead to further uncertainty.

**A Level Playing Field** - While we support the need promote innovation, the development of and investment in innovative technologies, processes and practices, this cannot be done at the expense of existing business models.

From and advisers' perspective it is important to ensure that the business model chosen (tied or independent) and how an advisor chooses to deliver their advice (technology, face to face, telephone) should not lead to arbitrage.

**Shared Responsibility** - The principle reasons a financial intermediary or firm provides a customer with an unsuitable product are:

- (a) a lack of knowledge of one's own abilities and obligations to the customer;
- (b) a lack of understanding of the client's goals, needs and objectives (and to a lesser extent risk tolerance);
- (c) a lack of knowledge of the product and its potential to impact the customer's financial situation adversely; or
- (d) the product seller's external obligations or motivation for personal gain (resulting in an unsustainable conflict of interest), which compromise the duty of care owed to the customer purchasing the product.
- (e) Deliberate misleading or negligence on the part of the product provider

The situations described in (a), (b) and (c) above speak to the practitioner's professionalism and competence, an understanding of his or her own abilities and obligations to the customer, and an understanding of the customer's needs and the products being sold. The situation in (d) speaks to an insufficient duty of care afforded to the customer by those whose personal interests or external obligations conflict with public expectations and the customer's needs, which can be exacerbated by the absence, or by a limited form, of remuneration or other disclosures.

We have seen cases where the situation in (e) is placed at the hands of the adviser. Where the failure can be attributed to the product provider, the sanctions should be against the product provider and not the financial adviser. This also aligns to the objective of proportionality.

As Product Provider should have the same level of transparency that is currently required by financial advisers in terms of the Financial Advisory and Intermediary Services (FAIS) Act.

## The COFI Bill and RDR

The desired outcomes of RDR are distribution models that:

- Support the delivery of suitable products and provide fair access to suitable advice for financial customers;
- Enable customers to understand and compare the nature, value and cost of advice and other services intermediaries provide;
- Enhance standards of professionalism in financial advice and intermediary services to build consumer confidence and trust;
- Enable customers and distributors to benefit from fair competition for quality advice and intermediary services, at a price more closely aligned with the nature and quality of the service, and
- Support sustainable business models for financial advice that enable adviser businesses to viably deliver fair customer outcomes over the long term.

Many of these objectives are mirrored in the COFI Bill and we are encouraged to see that proportionality is an important factor. Financial planning and advisory practices have had a huge compliance burden, which may very well stifle innovation in the sector due to the increased compliance burden.

We believe that as the professionalism of financial planners and financial advisers increase the regulatory burden and costs should decrease, and may even lead to a time when the advice profession can co-regulate through professional bodies.

## Product Information vs Product Advice vs Financial Advice and Planning

The RDR Discussion paper highlighted three forms of advice that can be delivered by financial advisors:

- 1) Financial Planning Advice
- 2) Up Front Product Advice
- 3) Ongoing Product Advice

The current description of advice in the COFI Bill deals with only the latter two forms of advice. This means that while components of the advice provided by financial planners are regulated, the provision of comprehensive and integrated financial planning services is currently unregulated.

The RDR (and FAIS) also refers to “factual information”. Under 2.2.5 of the RDR is said to be “distinguished from advice in that it does not entail any form of recommendation” it goes on to say “This is typically the type of service provided by so-called “execution only” direct marketing distribution models, where factual information is provided to a potential customer, who then makes his or her own (non-advised) decision in regard to a product, after considering the factual information provided”.

This concept is not clearly understood nor consistently applied but is vital in defining services and associated remuneration benchmarking. We suggest that this be conclusively addressed conduct standards to be set in terms of Paragraph 69 (2) of the Bill, supported by the current activity segmentation analysis being conducted by FSCA. FPI requests that we be directly involved in such discussions.

## Protection of Titles

While Section 13 of the COFI Bill prohibits a person from performing an activity for which they are not licensed, we recommend that this is extended to titles that a person (financial institution, key individual or represented) may use. Like someone cannot hold themselves out as a lawyer, doctor or Chartered Accountant if they have not met the professional standards, the title of financial planner and financial adviser must be protected, in order to protect consumers and allow consumers to make informed decisions. Anyone holding themselves out as a financial adviser or financial planner, who is not duly authorised, should be subject to the same penalties as an unauthorised person delivering financial services or products.

By protecting the use of these titles, the consumer will immediately be able to identify the competence level of the person they are dealing with and also recognise that they are in fact correctly trained and licensed. This will lead to greater consumer protection and increase trust in the profession and industry.

We have made specific comments, in the relevant sections, below in order to give effect to this proposal.

## Specific Commentary

Chapter	Part	Paragraph	Comments
1	1	Competence	<p>We recommend that the definition of competence is more broadly defined as:</p> <p><b>“Competence”</b> shall mean having the skills, knowledge and expertise needed for the proper discharge of a person’s responsibilities in the performance of his or her functions.</p> <p>This provides a clearer meaning to competence. We believe that experience, qualifications and continuous professional development are components of fit and proper, rather than an indication of competence. These are also listed under sub-para (a)(iii) (aa) to (ff) of the definition of “fit and proper requirements”.</p>
1	1	Financial Group	<p>In sub paragraph (b) and (c) we would like to confirm if the definition of “group of companies” is as per the Companies Act or if there is another meaning assigned hereto?</p>
1	1	Potential Financial customer	<p>In sub paragraph (c) we seek clarification as to what “received” means. For instance, does driving past a billboard advertising a financial product or service form part as having received advertising?</p>
1	1	Representative	<p>Schedule 5 is not populated so it does make it difficult to comment on this definition.</p> <p>We would however like clarification that “including a person employed or mandated by the first mention person” refers to a juristic representative?</p>
1	1	Small Enterprise	<p>We assume this definition to apply to small and micro enterprises. We also note that the definition in the National Small Enterprise Act is currently being amended.</p>
1	1	Third Party	<p>The definition currently only refers to a financial product provider, but not a financial services provider. From the definition of “third party arrangement” it seems that the intention is also to include a financial service.</p>
2	2	13 (6)	<p>In order to ensure compliance with this section is it vital that the FSCA database is up to date. This will ensure that live accurate verification can be done.</p>
2	2	13 (7) (e)	<p>While section 7 prohibits a person performing an activity that they do not hold a licence for, it does not go as far as to prohibit the title that a person (financial institution, representative or key individual) can use to describe themselves or the services they offer.</p> <p>We recognise that paragraph 13 (7) (c) provides for limitation of names or descriptions for a business, we <b>recommend</b> that sub paragraph (e) is added that will expressly prohibit a person (key individual or</p>

			<p>representative) using a title that may infer that they are licensed for an activity that they are not in fact licensed for.</p> <p>In order to give effect to this we propose that a definition of a financial adviser and financial planner be added as follows:</p> <p><b>“Financial Advisor”</b> means fit and proper financial institutions or representatives of financial institutions that render financial advice to financial customers.”</p> <p><b>“Financial Planner”</b> means a person who is authorised by a Professional Body to use a professional designation afforded a person in the practice of Financial Planning, having met that body’s competency and minimum experience standards, who is in good standing and who is subject to that body’s code of ethics and conduct rules;</p> <p><b>“Financial Planning”</b> means the rendering of Financial Advice by a Financial Planner through developing strategies that integrates the elements of a clients’ personal and financial circumstances, which culminate in a financial life plan which is regularly monitored and adjusted as required”</p> <p>Note: we have not recommended a definition for financial advice here as this would be a sub activity in schedule 2</p>
2	2	15 (1) (g)	<p>Without sight of the proposed financial products or subcategories of targeted financial customers it is difficult to comment on this. We would however advise caution on this clause. We would like to avoid a situation where a persons’ livelihood can be destroyed by limiting the customer base that they may interact with.</p> <p>Once the sub category of financial customer is published we may provide further comments.</p>
2	2	15 (2)	<p>We would like clarification if this clause would also apply in a situation where a person did not require a license for an activity, but now that activity has been identified as requiring a licence.</p>
2	2	16 (1)	<p>Once schedule 3 has been published we may provide further comments in this section. However, at this stage it is not possible to comment.</p>
2	3	18 (a)	<p>Whilst the principle is sound, without a list of identified financial products and targeted categories of financial customers it is difficult to provide commentary.</p>
2	4	19 (1)	<p>We seek clarity as to what is meant by “customer limitations” and on the intention of this clause.</p>
2	4	19 (4) (b)	<p>Again, we seek clarity on what is meant by this clause. Does this clause allow the Authority to limit the customers that a licensee may deal with?</p>
2	4	19 (4) (f)	<p>This clause is concerning for us. While we understand that there has been abuse in this area, when it comes to fees and remuneration payable to an adviser we believe in the following principles:</p>

			<p><b>Principle 1</b> It is the client, in consultation with the planner or advisor, not a Regulator or product provider, who should determine the quantum of fees payable, as well as the method of remuneration for the services provided;</p> <p><b>Principle 2</b> The fees charged by the planner or advisor must be fair, reasonable and transparent to the client and the client must understand what services they are paying for;</p> <p><b>Principle 3</b> The client should understand which portion of the planner or advisor remuneration is in respect of advice and which portion is in respect of product implementation;</p> <p><b>Principle 4</b> Client's must be able to switch off/stop the fees if the agreed service is no longer provided.</p> <p>Within these principles the free market would normalise the fees payable to a financial planner or advisor by the customer.</p>
2	6	24 (1) (a) (ii), (iii) and (iv)	We fail to understand the relevance of governance, operational ability and operational capital requirements when appointing a representative. It should be incumbent on the financial institution to ensure operational ability. We believe that the fit and proper standards (including financial soundness) should be sufficient when appointing a representative.
2	6	25 (1)	We seek clarity on what the word "certified" means.
2	6	25 (5)	In order to ensure transparency, we recommend that the word "may" be replaced with the word "must". This creates the requirement for the Authority to maintain and publish a central register with details of all representatives. This will ensure that financial institutions and financial customers can verify information provided.
2	6	25 (5)	...information referred to in subsection (3) should read in subsection (4)?
2	6	26 (4)	Allowing a period of six months to commence a debarment seems like an extraordinary long period and may allow a representative to continue in that capacity without the necessary authority and may affect consumer protection. We seek clarity of the reason for such a lengthy period.
3		28	We understand why parts 2 and 3 are not applicable to small enterprises. However, part 5 deals with conflict of interest and we do not believe that intention is for conflict of interest NOT to apply to a small enterprise. We believe that this may be a drafting error.
3	2	36(d) (ii)	The conflict of interest policy is now part 5, not part 4.
7	1	67 (2) (a) and (d)	Clause (a) and (d) are duplicates.

7	1	68 (a)	While we agree with the sentiment that the product supplier should monitor the quality of advice, we question how practical it is to implement. The reality is that the advice process takes place over many meetings and discussions. A product provider (where they are not themselves providing the advice) could never understand the depth of those discussions from a mere view of a file and the final recommendation. Ultimately the responsibility for the advice given should be the responsibility of the financial institution giving advice.
7	2	69(2)	The scope and powers are quite wide in this section. We do not disagree in principle but will engage further once the conduct standards are published for comment.
10	20	97 (5)	Our interpretation is that every financial institution (regardless of the requirements of the Companies Act) would need to have their financial statements at least <b>independently reviewed</b> , meaning that an accounting officer report is not acceptable. Please confirm if our interpretation is correct?
Schedule 2	3 - Financial Advice		<p>The RDR Discussion paper highlighted three forms of advice that can be delivered by financial advisors:</p> <ol style="list-style-type: none"> <li>1) Financial Planning Advice</li> <li>2) Up Front product Advice</li> <li>3) Ongoing Product Advice</li> </ol> <p>The current description of “<b>financial advice</b>” deals with only the latter two forms of advice. This means that while components of the advice provided by financial planners are regulated, the provision of comprehensive and integrated financial planning services is currently unregulated.</p> <p>We believe that the activity should be “Advice”, which is understood to have the common meaning of:</p> <ul style="list-style-type: none"> <li>• “guidance or recommendations offered with regard to prudent action”</li> <li>• “recommendation regarding a decision or course of conduct”</li> </ul> <p>The description of the forms of advice can then be contained in the description of the sub activities:</p> <p>Sub Activity 1 - <b>Financial <u>Product</u> Advice</b>. The current description of financial advice is suitable for this sub activity.</p> <p>Sub Activity 2 - <b>Financial Advice</b> - means providing an ongoing, customer-centric service in terms of which a <i>financial customers’</i> financial circumstances, as measured against their lifestyle goals, needs, and priorities, are assessed, that culminates in delivering financial solutions and/or Financial Product Advice which is implemented, monitored and adjusted from time to time.</p>

		<p><b>Note:</b></p> <p>“As stated previously it is also important once the standards have been drafted to limit the title of “Financial Adviser” to someone who is licenced for “Financial Advice”, and “Financial Planner” to a Financial Adviser who is authorised by a Professional Body to use a professional designation afforded a person in the practice of Financial Planning, having met that body’s competency and minimum experience standards, who is in good standing and who is subject to that body’s code of ethics and conduct rules.”</p> <p>Persons providing product advice, or sales execution should be prohibited from using the title of “Financial Adviser or Financial Planner</p>
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