

THE FSCA CONDUCT STANDARD FOR BANKS AS A MEANS TO REFORM THE INTERNAL FINANCIAL CONSUMER COMPLAINT RESOLUTION MECHANISMS OF SOUTH AFRICAN BANKS*

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SUMMARY

The result of South Africa adopting the Twin Peaks model of financial regulation was the establishment of two regulators, namely the Prudential Authority (PA) and the Financial Sector Conduct Authority (FSCA). One aspect of the Financial Sector Regulation Act 9 of 2017 is that it specifically empowers the FSCA to regulate and supervise the internal dispute resolution frameworks that financial institutions are required to implement. The FSCA can publish conduct standards, which standards should be used to assist in achieving the FSCA's objectives. One such objective includes aspects of supervising and regulating the dispute resolution framework of financial institutions. In this regard, the FSCA has produced the Conduct Standard for Banks, which deals, among other things, with certain internal dispute resolution requirements for banks. This article briefly discusses the content and practical enforceability of the Conduct Standard for Banks and considers whether this standard will adequately assist in reforming the internal dispute resolution framework of banks, such that bank customers will be sufficiently protected and treated fairly during the internal dispute resolution process. The change from a voluntary code to a statutory code strengthens the accountability of banks when there is non-compliance. Arguably, the added level of enforceability and level of compliance with set standards for dispute resolution frameworks will ensure that customer complaints are treated more fairly. However, the exact sanction for non-compliance with the provisions remains uncertain and clearer guidance is required. In the end, successful

* This contribution was inspired by the research done for the first author's LLM dissertation, *A Customer-Focused Approach to Dispute Resolution in the South African Banking Sector* (Unisa) 2021. The second author was the supervisor for this dissertation.

implementation of the Conduct Standard for Banks may depend on the extent to which banks decide to implement its provisions.

1 INTRODUCTION

Customer protection is an important aspect to be considered by all financial institutions. Since the adoption of the Twin Peaks model of financial regulation by the South African National Treasury in 2011,¹ the South African financial sector has begun reforming its regulatory framework. One consequence resulting from such reform shifted focus towards ensuring the protection and fair treatment of financial customers.

A key component of financial customer protection is having effective dispute resolution frameworks in place. For post-sale barriers² to be removed, financial customers must be able to hold financial institutions accountable for their conduct. For this reason, financial customer complaints must be managed effectively.³ Accordingly, for complaints from South African financial customers to be dealt with adequately, it is vital that internal dispute resolution frameworks be developed and maintained within the financial sector and, more specifically, the banking sector on which sector this article focuses.

To substantially improve financial customer protection within the banking sector, banks must develop and implement internal dispute resolution frameworks that adequately protect customers' rights. To regulate and supervise the various financial institutions, which also includes oversight of the internal dispute resolution frameworks that each must implement, the Financial Sector Regulation Act (FSR Act)⁴ established the Financial Sector Conduct Authority (FSCA)⁵ as the market conduct regulator, which is empowered to make conduct standards for banks, among others. One such conduct standard published by the FSCA is the Conduct Standard for

¹ The Twin Peaks model of financial regulation separates the prudential and market conduct regulation within the financial sector. A detailed discussion of the Twin Peaks model falls outside the ambit of this article.

² This would relate to unreasonable obstacles a consumer would face after acquiring a financial product – e.g., when they change products or switch providers. See the discussion on post-sale barriers by Millard and Maholo “Treating Customers Fairly: A New Name for Existing Principles” 2016 79 *THRHR* 610–612. In simple terms, this relates to barriers present when the customer has already received the service or acquired the product.

³ FSB “FSB Complaints Management Discussion Document: Proposed Requirements For Customer Complaints Management by Regulated Financial Institutions, Aligned to the Treating Customers Fairly (TCF) Framework” (October 2014) <https://www.fsc.co.za/Regulatory%20Frameworks/Documents%20for%20Consultation/TCF%20Complaints%20Management%20Discussion%20Document.pdf> (accessed 2022-02-02) 1.

⁴ 9 of 2017.

⁵ The Prudential Authority is the other established regulator and is responsible for ensuring the safety and soundness of financial institutions and supports financial stability. See South African Reserve Bank Prudential Authority “Prudential Regulation” (undated) <https://www.resbank.co.za/en/home/what-we-do/Prudentialregulation> (accessed 2022-02-03).

Banks,⁶ which forms the focus of this article, but with reference only to the provisions on internal dispute resolution.

The purpose of this article is twofold. First, it briefly discusses the content and the practical enforceability of the Conduct Standard for Banks. Secondly, it establishes the extent to which the Conduct Standard for Banks will assist in reforming the internal dispute resolution framework of banks to ensure that bank customers do not encounter a post-sale barrier. This article excludes a detailed discussion of all the complaint resolution frameworks available to bank customers but focuses on the importance of the Conduct Standard for Banks in improving the internal dispute resolution framework of banks. Likewise, the article does not contain a discussion of the legal framework applicable to external dispute resolution mechanisms.⁷ The Conduct Standard for Banks only includes guidelines concerning a bank's internal complaint process. Consequently, this article does not consider external dispute resolution frameworks, such as the Ombud for Banking Services. The next section provides an overview of the regulatory framework applicable to the internal dispute resolution frameworks of banks.

2 AN OVERVIEW OF THE REGULATORY INSTRUMENTS ASSOCIATED WITH THE INTERNAL DISPUTE RESOLUTION FRAMEWORK OF BANKS

Several regulatory instruments, both legislative and otherwise, determine how dispute resolution in the South African banking sector must take place. The legislation that regulates dispute resolution within the financial sector includes: the FSR Act; the National Credit Act (NCA);⁸ and the Financial Advisory and Intermediaries Services Act (FAIS).⁹ Once enacted, the Conduct of Financial Institutions Bill (CoFI Bill)¹⁰ will also assist in the regulation of dispute resolution in the broader financial sector, which includes banks. The other regulatory instruments that assist with determining the nature of dispute resolution frameworks of banks are, *inter alia*, the Code of Banking Practice (Banking Code),¹¹ the General Code of Conduct for Authorised Financial Services Providers and Representatives (Financial

⁶ Conduct Standard 3 of 2020 (Conduct Standard for Banks) <https://www.fsca.co.za/Regulatory%20Frameworks/Pages/Notices.aspx> (accessed 2022-02-02).

⁷ See Koekemoer "An Analysis of Aspects of the Proposed Reform of the Financial Consumer Complaint Resolution Mechanisms in the South African Banking Sector" 2021 *Obiter* 336–351 for a general discussion or outline of the dispute resolution framework (internal and external) for the banking sector.

⁸ 34 of 2005.

⁹ 37 of 2002. This list is not exhaustive, but we merely state the most dominant.

¹⁰ The first draft of the CoFI Bill was published for comment in 2018. The second draft was published in September 2020. See http://www.treasury.gov.za/legislation/GovernmentNotices/43741_29-09_NatTreasury.pdf (accessed 2022-02-02).

¹¹ The Banking Association of South Africa "Code of Banking Practice" (2012) <https://www.banking.org.za/wp-content/uploads/2019/04/Code-of-Banking-Practice-2012.pdf> (accessed 2022-02-03).

Services Providers Code),¹² and the Conduct Standard for Banks. The Banking Code is a voluntary code, while the Financial Services Providers Code and the Conduct Standard for Banks are statutory in nature, as their development and adoption is mandated by legislation. While the Financial Services Providers Code can apply to other non-bank financial institutions, the Banking Code and the Conduct Standard for Banks apply exclusively to banks.¹³

Although each of the regulatory instruments mentioned above assists in regulating dispute resolution in the banking industry, they do not all regulate *internal* dispute resolution frameworks exclusively. The FSR Act, the NCA, the FAIS Act, the Banking Code, and the Financial Services Providers Code also provide guidelines for *external* dispute resolution frameworks,¹⁴ while the CoFI Bill and the Conduct Standard for Banks aim to regulate *internal* dispute resolution exclusively. However, until the CoFI Bill is enacted, the Conduct Standard for Banks is the only instrument with a statutory foundation that regulates internal dispute resolution in the banking industry.

3 CURRENT FRAMEWORK: INTERNAL COMPLAINT RESOLUTION FRAMEWORKS

3.1 The Banking Code

It is mandatory for the members of the Banking Association of South Africa (BASA) to subscribe to the Banking Code. The Banking Code sets out the minimum standards that consumers may expect from their bank's service and conduct.¹⁵ Considering that the Banking Code is not a statutory code (it is a voluntary code), the exact legal nature of the Banking Code is debated. Du Toit argues that since some of the provisions of the Banking Code were derived from trade usage, such provisions could be considered as implied by law in the contractual relationship between the bank and its customer.¹⁶ Du Toit supports his contentions with the fact that the Banking Code is universally observed by the banking sector since all banks that are members of BASA must adhere to it.¹⁷ In addition, he argues that there is a strong indication that a trade usage exists by virtue of the mere fact that all major banks in any event adhere to the Banking Code.¹⁸ Interestingly, as Du Toit points out, the earlier version of the Banking Code¹⁹ specifically stated that none of its provisions would create either a trade custom or a tacit contract,

¹² GN 80 in GG 25299 of 2003-08-08.

¹³ Clause 1 of the Banking Code.

¹⁴ The Financial Services Ombud Schemes Act 37 of 2002 previously applied, but this Act was repealed in its entirety by Schedule 4 of the FSR Act.

¹⁵ Preamble to the Banking Code 2012 par 1.

¹⁶ Du Toit "Reflections on the South African Code of Banking Practice" 2014 *TSAR* 568.

¹⁷ Du Toit 2014 *TSAR* 571.

¹⁸ Du Toit 2014 *TSAR* 570.

¹⁹ Code of Banking Practice (2004) <https://www.banking.org.za/wp-content/uploads/2019/04/Code-of-Banking-Practice-2012.pdf>.

whereas the current version of the Banking Code contains no such provision.²⁰

The Banking Code is an important regulatory instrument for banks and, although only voluntary, it arguably guarantees that banks conduct themselves in a fair, transparent, accountable and reliable manner when dealing with customers.²¹ Thus, the Banking Code should rightly be regarded as “one of the most important influences on the modern bank and customer relationship in South Africa”.²² The Banking Code has four objectives, namely: (1) promoting good banking practice, which is done through setting standards for a bank when dealing with customers; (2) increasing transparency to enable customers to better understand the products and services they receive from their banks; (3) promoting bank-customer relationships that are fair and open; and (4) inspiring confidence within the South African banking system.²³

Dispute resolution is dealt with in clause 10 of the Banking Code, which provides a basic framework to be followed for both internal and external dispute resolution. As far as internal dispute resolution is concerned, the Banking Code merely provides a brief outline of what a customer can expect from their bank when a complaint is lodged. This includes that a bank will inform its customer of how to lodge a complaint, and that it will further advise what the customer should do if they are unsatisfied with the outcome of their dispute resolution; it also sets out the timelines within which the complaint ought to be attended to by the bank.²⁴ One of the shortcomings of the Banking Code is that it does not provide *specific* procedures that banks must follow in managing these complaints and provides no time limit within which a complaint must be resolved, leaving this decision on the exact process to follow up to individual banks. Accordingly, there is no set internal dispute resolution standard that all South African banks must follow, and this has the potential to give rise to a fragmented process across different banks. Put differently, South African banks currently might be following different internal dispute resolution procedures. Moreover, the Banking Code applies to commercial banks in general, but the Financial Services Providers Code applies to institutions providing financial products that fall within the definition of the FAIS Act, which may in some instances also include banks. The provisions relating to the internal dispute resolution frameworks for financial service contained in the Financial Services Providers Code are briefly discussed next.

²⁰ Du Toit 2014 TSAR 569.

²¹ These are the four principles set as the standard for banks when dealing with their clients; see Preamble to the Banking Code 2012.

²² Du Toit 2014 TSAR 568.

²³ Clause 2 of the Banking Code.

²⁴ Clause 10 of the Banking Code.

3 2 Financial Services Providers Code

In accordance with the provisions of the FAIS Act,²⁵ the FAIS Registrar²⁶ must produce a code of conduct to be followed by all authorised financial services providers, as defined in the Act. The Financial Services Providers Code was published on 8 August 2003,²⁷ and it applies to all financial services providers and representatives.²⁸ Section 16 of the FAIS Act sets out details on how the code of conduct must be drafted, and the objectives that the code of conduct aims to achieve. It is submitted that it is apparent, from a reading of the Financial Services Providers Code, that it has been drafted in accordance with the requirements set out in section 16 of the FAIS Act.

Dispute resolution is dealt with in Part XI of the Financial Services Providers Code. All financial services providers must ensure that they have a satisfactory system and procedures in place to attend to internal complaints, which includes having an adequate complaints policy to which customers have access and of which customers are aware.²⁹ With regard to the handling of internal complaints, the Financial Services Providers Code requires that financial services providers: (1) request that all complaints be in writing (no verbal complaints are allowed); (2) keep a record of the complaints received for the past five years; (3) manage complaints fairly and speedily; (4) investigate the complaint received; and (5) respond to the customer concerning the resolution of their complaint.³⁰

Even though the Financial Services Providers Code contains more detail concerning internal dispute resolution than the Banking Code, it applies only to specific products provided by banks and not to the banking industry as a whole. However, with the enactment of the CoFI Bill, the FAIS Act together with its subordinate legislation (such as the Financial Services Providers Code) will be repealed³¹ and thus the Financial Services Providers Code will have to be replaced by either one or a multiple of codes. It is hoped that having the Conduct Standards for Banks operating in practice will assist when a new conduct standard in respect of financial services providers is drafted by providing one instrument that regulates all activities of a bank, including those previously regulated under the FAIS Act.

4 CONDUCT STANDARDS

The FSCA is empowered in terms of the FSR Act (and, in the future, the Act to follow the CoFI Bill)³² to publish conduct standards.³³ Such conduct

²⁵ S 15 of the FAIS Act.

²⁶ See s 2 of the FAIS Act.

²⁷ See GN 80 in GG 25299 of 2003-08-08.

²⁸ As defined in s 1 of the FAIS Act.

²⁹ S 17 of the Financial Services Providers Code.

³⁰ S 16(1) of the Financial Services Providers Code.

³¹ See Part 11 of Schedule 5 of the second draft of the CoFI Bill http://www.treasury.gov.za/legislation/GovernmentNotices/43741_29-09_NatTreasury.pdf (accessed 2022-02-02).

³² The making of conduct standards is dealt with in Ch 11 Part 1 of the COFI Bill.

standards may relate to financial institutions,³⁴ key persons or representatives of financial institutions,³⁵ and contractors.³⁶

Section 106(2) of the FSR Act sets out the various objectives that conduct standards must aim to achieve; these include the fair treatment and education of financial customers.³⁷ The FSR Act also sets out the types of matter to which a conduct standard may relate.³⁸ The list of matters includes: (1) the prevention of abusive practices by financial institutions;³⁹ (2) the “fair treatment of customers”, which includes the appropriateness of products and services, marketing and promotion of products and services, reporting requirements and, relevant to this study, dispute resolution;⁴⁰ and (3) financial education programmes for customers.⁴¹ The FSR Act also provides that different standards may be made in relation to different types of financial institution or that will relate to different circumstances.⁴² Although it is not clear from the FSR Act exactly what circumstances would require conduct standards to be made, the FSR Act states that a conduct standard may be made in relation to “existing actions, activities, transactions and appointments”.⁴³ The circumstances intended in this subsection should become clearer as and when the FSCA publishes additional conduct standards.⁴⁴

FSCA conduct standards may also declare specific conduct relating to financial products and services to be “unfair business conduct”.⁴⁵ Conduct that may be declared as “unfair” includes conduct that is contrary to the fair treatment of financial customers⁴⁶ and conduct that may mislead⁴⁷ or cause prejudice to financial customers.⁴⁸

Much like the FSR Act, the CoFI Bill also contains provisions empowering the FSCA to create and implement conduct standards.⁴⁹ The provisions in the CoFI Bill relating to the creation of conduct standards mirror those contained in the FSR Act. The first draft of the CoFI Bill⁵⁰ contained detailed

³³ S 106 of the FSR Act.

³⁴ S 106(1)(a) of the FSR Act.

³⁵ S 106(1)(b) and (c) of the FSR Act.

³⁶ S 106(1)(d) of the FSR Act.

³⁷ S 106(2)(b) and (c) of the FSR Act.

³⁸ S 106(3) of the FSR Act.

³⁹ S 106(3)(b) of the FSR Act.

⁴⁰ S 106(3)(c) of the FSR Act.

⁴¹ S 106(3)(d) of the FSR Act.

⁴² S 110(1) of the FSR Act.

⁴³ S 110(2) of the FSR Act.

⁴⁴ To date, the FSCA has published 18 conduct standards. See FSCA “Standards” (undated) <https://www.fsca.co.za/Regulatory%20Frameworks/Pages/Standards.aspx> (accessed 2023-03-14).

⁴⁵ S 106(4) of the FSR Act.

⁴⁶ S 106(4)(a) of the FSR Act.

⁴⁷ S 106(4)(b) of the FSR Act.

⁴⁸ S 106(4)(c) of the FSR Act.

⁴⁹ The making of conduct standards is dealt with in Ch 11 Part 1 of the COFI Bill.

⁵⁰ The first draft Conduct of Financial Institutions Bill, 2018 was published for comment in December 2018 http://www.treasury.gov.za/twinpeaks/SKM_C364e18121411550.pdf (accessed 2022-02-02).

provisions relating to the conduct standards that the FSCA may develop. After consulting various stakeholders, National Treasury reported concerns raised that such detail may be disadvantageous to the intended framework, and that it could potentially conflict with the provisions of the FSR Act relating to such conduct standards.⁵¹ For this reason, these detailed provisions were removed from the revised second draft of the CoFI Bill,⁵² which simply empowers the FSCA to make conduct standards as provided for by the FSR Act,⁵³ which conduct standards are aimed at achieving the objectives of both the CoFI Bill and the FSR Act.⁵⁴ The CoFI Bill further confirms that the matters in respect of which conduct standards may be made by the FSCA are those as set out in sections 106 and 108 of the FSR Act.⁵⁵ One such conduct standard, which has already been published by the FSCA, is the Conduct Standard for Banks, which is briefly discussed next.

5 THE CONDUCT STANDARD FOR BANKS

5.1 The creation of the Conduct Standard for Banks

The FSCA became operational, replacing the Financial Services Board (FSB), on 1 April 2018. Unlike the FSB, the FSCA's mandate includes, but is not limited to, the oversight of the banking sector.⁵⁶ The FSCA regards it as important to create a supervisory regulatory framework against which to measure the conduct of banks.⁵⁷ It is submitted that part of the foundation for this supervisory regulatory framework is the Conduct Standard for Banks.

The FSCA published the Conduct Standard for Banks on 3 July 2020, and the Conduct Standard applies to all banks⁵⁸ in the provision of financial products and services to their customers.⁵⁹ Thus far, this is the only conduct standard published by the FSCA with respect to *banks*.⁶⁰ In 2021, the South

⁵¹ Response document supporting the revised Conduct of Financial Institutions Bill September 2020 [http://www.treasury.gov.za/public%20comments/2020%2010%2008%20COFI%20Document%20V4_FINAL%20published%20\(commentators%20updated\).pdf](http://www.treasury.gov.za/public%20comments/2020%2010%2008%20COFI%20Document%20V4_FINAL%20published%20(commentators%20updated).pdf) (accessed 2022-02-02) 6–7.

⁵² The Second Draft Conduct of Financial Institutions Bill was published for comment in September 2020 [http://www.treasury.gov.za/public%20comments/2020%2010%2008%20CoFI%20Bill%20\(version%20published%20for%20comment\)%20\(ightly%20updated\).pdf](http://www.treasury.gov.za/public%20comments/2020%2010%2008%20CoFI%20Bill%20(version%20published%20for%20comment)%20(ightly%20updated).pdf) (accessed 2022-02-02).

⁵³ Clause 67 of the second draft Conduct of Financial Institutions Bill.

⁵⁴ Clause 67(2) of the CoFI Bill.

⁵⁵ Clause 67(3) of the CoFI Bill.

⁵⁶ FSCA “Regulatory Strategy of the Financial Sector Conduct Authority: October 2018 to September 2021” https://www.fsca.co.za/Documents/FSCA_Strategy_2018.pdf (accessed 2022-02-02).

⁵⁷ FSCA https://www.fsca.co.za/Documents/FSCA_Strategy_2018.pdf 16.

⁵⁸ The definition of a “bank”, as contained in section 1 of the Conduct Standard for Banks, includes a bank as defined in the Banks Act 94 of 1990 (“the Banks Act”), a mutual bank as defined in the Mutual Banks Act 124 of 1993, and a co-operative bank as defined in the Co-operative Banks Act 40 of 2007.

⁵⁹ See clause 2 of the Conduct Standard for Banks.

⁶⁰ The FSCA published conduct standards relating to retirement funds, hedge funds, and capital markets. See <https://www.fsca.co.za/Regulatory%20Frameworks/Pages/Standards.aspx> (accessed 2022-02-04).

African Reserve Bank (SARB) published a report⁶¹ that recorded the number of banks in South Africa at the time as 69.⁶² Each of these banks must comply with the Conduct Standard for Banks. The Conduct Standard for Banks does not replace any of the financial sector laws currently applicable to banks, but is in addition to existing financial sector laws.⁶³ Since the FAIS Act is limited in its application to banks, and its provisions only apply to deposit transactions and not to other lending products and services offered by commercial banks,⁶⁴ the Act does not prescribe either the conduct of the banking industry as a whole, or the monitoring of the broader banking sector. With the implementation of the Conduct Standard for Banks, the entire banking sector will, for the first time, be monitored and regulated by a single legal instrument.

The Conduct Standard for Banks incorporates the Treating Customers Fairly Principles (TCF Principles).⁶⁵ The TCF Principles were adapted from principles initially created in the United Kingdom,⁶⁶ and are aimed at ensuring the fair treatment of financial customers.⁶⁷ Although a detailed discussion of the TCF Principles is not required for purposes of this article, these principles warrant a brief discussion, since they form the foundation of many South African financial sector laws, and they are likewise arguably the basis upon which the Conduct Standard for Banks was drafted.

There are six TCF Principles, which were also adopted by the South African financial sector. The first principle provides that customers should be confident that the fair treatment of customers is central to the culture of the financial institutions with which they are dealing.⁶⁸ The second principle requires that, where products and services are marketed and sold, they must be designed to meet the needs of customers and should be targeted at these customers.⁶⁹ The third principle aims to ensure that customers receive clear information and that they should always remain adequately informed.⁷⁰ The fourth principle prescribes that, when giving advice, a financial institution must ensure that each customer's individual circumstances are considered, and that useful advice is given. The fifth principle requires customers' expectations to be met when financial institutions provide financial products

⁶¹ SARB "Selected South African Banking Sector Trends, August 2021" <https://www.resbank.co.za/content/dam/sarb/publications/prudential-authority/pa-statistics-selected-trends---monthly/2021/August%202021.pdf> (accessed 2022-02-02).

⁶² This figure is made up as follows: 18 registered banks; 4 mutual banks; 5 co-operative banks; 13 local branches of foreign banks; and 29 foreign banks with approved local representative offices.

⁶³ FSCA "Statement Supporting the Conduct Standard for Banks" <https://www.fsca.co.za/Regulatory%20Frameworks/Pages/Notices.aspx/> (accessed 2022-02-02).

⁶⁴ S 1 of the FAIS Act.

⁶⁵ FSCA <https://www.fsca.co.za/Regulatory%20Frameworks/Pages/Notices.aspx>.

⁶⁶ Millard and Maholo 2016 *THRHR* 594.

⁶⁷ *Ibid.*

⁶⁸ FSB "Treating Customers Fairly Roadmap" (2011) <https://www.fscamymoney.co.za/Treating%20Customers%20Fairly/TCFRoadmapFinal231Mar2011.pdf> (accessed 2022-02-02) 7.

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

and services. The sixth and final principle requires financial institutions to remove unreasonable post-sale barriers for customers.⁷¹ The final principle relates directly to the dispute resolution procedures available to customers, which forms the topic of this article.

The alignment of the Conduct Standard for Banks with the TCF Principles is evident if one considers the fact that the main objective of the Conduct Standard for Banks is to treat customers fairly,⁷² and to ensure that customers have access to appropriate dispute resolution frameworks. Moreover, the Conduct Standard for Banks specifically mandates banks to conduct their business “in a manner that prioritises the fair treatment of financial customers”.⁷³

5.2 Implementation and Enforcement of the Conduct Standard for Banks

The Conduct Standard for Banks was signed into law on 3 July 2020, but the implementation was staggered, taking place over a period of a year from the date of publication, with some of the provisions of the Conduct Standard for Banks coming into effect on 3 March 2021,⁷⁴ while others only became effective from 3 July 2021.⁷⁵ Despite the Conduct Standard for Banks having been implemented fully from 3 July 2021, it may still take some time for the banking sector to become completely compliant with it.

The FSCA requires banks to create and implement regulatory measures to ensure that the fair treatment of customers remains their primary concern, and that these measures are continuously being implemented.⁷⁶ To monitor the banks’ compliance with the Conduct Standard for Banks, the FSCA will identify potential risks and engage with the affected bank(s) to avoid or mitigate such risks.⁷⁷ In cases where harm to customers may already have occurred, the Statement Supporting the Conduct Standard for Banks provides that the FSCA may seek redress.⁷⁸ It is, however, not clear what redress may be sought in such cases.

In contrast with the Banking Code (a voluntary code of conduct), the Conduct Standard for Banks is, as defined in the FSR Act, a regulatory instrument,⁷⁹ and therefore a financial sector law⁸⁰ that must be adhered to.

⁷¹ FSB <https://www.fscamymoney.co.za/Treating%20Customers%20Fairly/TCFRoadmapFinal231Mar2011.pdf> 7.

⁷² Clause 2(5) of the Conduct Standard for Banks.

⁷³ Clause 2(4) of the Conduct Standard for Banks.

⁷⁴ Clauses 3, 4, 5 and 6 of the Conduct Standard for Banks.

⁷⁵ Clauses 7, 8, 9 and 10 of the Conduct Standard for Banks.

⁷⁶ Clause 6 of the Financial Sector Conduct Authority: Statement Supporting the Conduct Standard for Banks FSCA <https://www.fsca.co.za/Regulatory%20Frameworks/Pages/Notices.aspx>.

⁷⁷ Financial Sector Conduct Authority: Statement Supporting the Conduct Standard for Banks <https://www.fsca.co.za/Regulatory%20Frameworks/Pages/Notices.aspx>.

⁷⁸ Clause 6 of the Financial Sector Conduct Authority: Statement Supporting the Conduct Standard for Banks <https://www.fsca.co.za/Regulatory%20Frameworks/Pages/Notices.aspx>.

⁷⁹ See the definition of “regulatory instrument” as contained in section 1 of the FSR Act.

In the event of non-compliance with the Conduct Standard for Banks, the FSCA may issue a written directive to the bank,⁸¹ requiring the bank to remedy its non-compliance⁸² within a specified period.⁸³ Once a directive to comply has been issued by the FSCA, the bank must comply with it.⁸⁴ Should the bank fail to comply with such a directive within the specified time, the High Court may make an order in respect of such directive.⁸⁵ The High Court may make an order requiring the bank either to perform its obligations or pay compensation.⁸⁶ Moreover, the FSCA is empowered in terms of section 152 of the FSR Act to commence legal proceedings against a financial institution that fails to comply with the financial sector laws, which laws, it is submitted, include the Conduct Standard for Banks. If it appears to the High Court that a financial institution has engaged in, is engaging in, or intends to engage in conduct that contravenes a financial sector law, and that there is a risk of substantial or irreparable damage resulting from such conduct, the High Court may make an order.⁸⁷

The FSR Act also empowers the FSCA to impose administrative penalties on persons who contravene financial sector laws.⁸⁸ If the offender does not pay the administrative penalty, the FSCA may file a copy of the administrative penalty order with the court (presumably the High Court). Once the administrative order has been filed at court, it can be enforced as though it were a civil court judgment handed down by that court.⁸⁹

In summary therefore, where a bank does not comply with the provisions of the Conduct Standard for Banks, it may be directed to do so by the FSCA, and thereafter be subjected to an order of the High Court, with the possibility of a fine being imposed on the contravening bank.

Although the FSR Act provides a detailed framework for the enforcement of conduct standards and sets out several steps that may be followed in the case of non-compliance with any such conduct standards, it is silent on the exact penalties that financial institutions may face should they fail to comply with these. Section 149 of the FSR Act is also unclear on what types of order the High Court may make when there has been non-compliance with an FSCA directive – for example, whether a fine may be imposed on a non-compliant bank or whether its licence⁹⁰ could be suspended or revoked because of such non-compliance. Ultimately, a compliance framework, such as the Conduct Standard for Banks, can only be successful if its provisions are fully and consistently implemented and complied with by the financial institutions it was created to govern. To ensure the successful

⁸⁰ See the definitions of “financial sector law” as contained in section 1 of the FSR Act.

⁸¹ S 144(1) of the FSR Act.

⁸² S 144(3) of the FSR Act.

⁸³ S 147 of the FSR Act.

⁸⁴ S 149(1) of the FSR Act.

⁸⁵ S 149(2) of the FSR Act.

⁸⁶ S 149(3) of the FSR Act.

⁸⁷ S 152(2) of the FSR Act.

⁸⁸ S 167(1) of the FSR Act.

⁸⁹ S 170 of the FSR Act.

⁹⁰ See Ch 8 of the FSR Act regarding the licensing of financial institutions.

implementation of and compliance with the Conduct Standard for Banks, and to discourage non-compliance, there must be significant and far-reaching consequences for banks that do not comply with its provisions. The banking sector collectively must also be seen as complying with the provisions of the Conduct Standard for Banks.

5.3 The Conduct Standard for Banks and Internal Dispute Resolution

The Conduct Standard for Banks prescribes a number of general obligations that apply to banks, including the obligation of a bank to conduct its business in “a manner which prioritises the fair treatment of customers”⁹¹ and which is also aimed at achieving the TCF Principles.⁹² The Conduct Standard for Banks also sets out requirements relating, *inter alia*, to the culture and governance of a bank,⁹³ the design and suitability of financial products and services offered by the bank,⁹⁴ and advertising undertaken by the bank.⁹⁵

The part of the Conduct Standard for Banks specifically relevant to this study is the clause relating to customer complaints.⁹⁶ The Conduct Standard for Banks refers to a complaint as:

“[a]n expression of dissatisfaction that the bank is in breach of a law, an agreement or a code of conduct and that the bank’s actions have caused the complainant harm, prejudice or distress or that the bank has treated the complainant unfairly.”⁹⁷

To manage internal complaints, the Conduct Standard for Banks prescribes obligations for banks to establish and operate an effective internal dispute resolution framework that will guarantee that adequate processes and standards be implemented to safeguard the fair treatment of banking customers.⁹⁸ This Conduct Standard directs that such dispute resolution framework must: (1) be proportionate, considering the bank’s risks and business;⁹⁹ (2) be appropriate taking into account the bank’s “business model, financial products, financial services and financial customers”;¹⁰⁰ (3) allow for a complaint to be considered within a reasonable time, while taking into account that the bank needs time to investigate a complaint;¹⁰¹ and (4) ensure that no unreasonable barriers are imposed on customers lodging complaints against a bank.¹⁰²

⁹¹ Clause 2(4) of the Conduct Standard for Banks.

⁹² Clause 2(5) of the Conduct Standard for Banks.

⁹³ Clause 3 of the Conduct Standard for Banks.

⁹⁴ Clause 4 of the Conduct Standard for Banks.

⁹⁵ Clause 6 of the Conduct Standard for Banks.

⁹⁶ Clause 8 of the Conduct Standard for Banks.

⁹⁷ Clause 1 of the Conduct Standard for Banks.

⁹⁸ Clause 8(1) of the Conduct Standard for Banks.

⁹⁹ Clause 8(1)(a) of the Conduct Standard for Banks.

¹⁰⁰ Clause 8(1)(b) of the Conduct Standard for Banks.

¹⁰¹ Clause 8(1)(c) of the Conduct Standard for Banks.

¹⁰² Clause 8(1)(d) of the Conduct Standard for Banks.

The internal dispute resolution framework of a South African bank must follow the processes as prescribed by the Conduct Standard for Banks – that is, the framework must: (1) ensure that the bank has an adequate complaints management system; (2) provide for monitoring and analysis of aggregate complaints; (3) include effective referral processes; and (4) include processes to ensure that complainants are informed of what processes are followed by the bank and the outcome of such processes.¹⁰³ The Conduct Standard for Banks recommends the minimum requirements expected of the banks when designing and implementing an internal dispute resolution framework. These include provision for, *inter alia*: (1) the objectives, principles and responsibilities for dealing with internal complaints;¹⁰⁴ (2) performance standards that are required and any reward strategies that may be implemented;¹⁰⁵ (3) the procedures that must be followed when handling internal complaints and the time frames to be adhered to;¹⁰⁶ (4) a set of coherent procedures that deal with “escalation, decision-making, monitoring, oversight and review processes”,¹⁰⁷ (5) the reporting and record-keeping requirements;¹⁰⁸ and (6) communication channels between the bank and the customer, as well as between the bank and the relevant ombud schemes.¹⁰⁹

The Conduct Standard for Banks also prescribes practical elements of the process that must be followed by the bank when handling internal complaints. Upon receipt of a complaint, the bank must acknowledge receipt of the customer’s complaint and provide the customer with information regarding the process that will be followed by the bank in dealing with the complaint.¹¹⁰ Upon receipt of a complaint, banks must also provide the customer with the contact details of the person(s) who will be dealing with the complaint,¹¹¹ an approximate time frame for the handling of the complaint,¹¹² details of any review or escalation processes available to the customer,¹¹³ and details of the ombud whom the customer may approach following unsuccessful resolution by a bank.¹¹⁴ At all times during the dispute resolution process, the customer must be kept adequately informed regarding the progress of the complaint and any decisions that have been made by the bank.¹¹⁵

Where a bank rejects a customer’s complaint, the bank must give reasons to the customer for its decision and provide the customer with further details on how the customer can escalate their complaint, where need be, to the

¹⁰³ Clause 8(3)(i) of the Conduct Standard for Banks.

¹⁰⁴ Clause 8(3)(a) of the Conduct Standard for Banks.

¹⁰⁵ Clause 8(3)(b) of the Conduct Standard for Banks.

¹⁰⁶ Clauses 8(3)(c) and 8(3)(d) of the Conduct Standard for Banks.

¹⁰⁷ Clauses 8(3)(d) and 8(3)(h) of the Conduct Standard for Banks.

¹⁰⁸ Clauses 8(3)(e) and 8(3)(h) of the Conduct Standard for Banks.

¹⁰⁹ Clauses 8(3)(f) and 8(3)(g) of the Conduct Standard for Banks.

¹¹⁰ Clause 8(21) of the Conduct Standard for Banks.

¹¹¹ Clause 8(21)(a) of the Conduct Standard for Banks.

¹¹² Clause 8(21)(b) of the Conduct Standard for Banks.

¹¹³ Clause 8(21)(c) of the Conduct Standard for Banks.

¹¹⁴ Clause 8(21)(d) of the Conduct Standard for Banks.

¹¹⁵ Clause 8(22) of the Conduct Standard for Banks.

relevant ombud. In accordance with clause 8(7) of the Conduct Standard for Banks, complaints that are received and which are classified as “reportable complaints”¹¹⁶ must be categorised into a minimum of nine separate categories according to the product or service to which they relate – for example: complaints relating to the design of a product,¹¹⁷ complaints relating to advertising,¹¹⁸ complaints relating to advice¹¹⁹ or complaints in respect of the bank’s handling of complaints.¹²⁰ Arguably, having these complaints divided into categories may allow the FSCA to detect any broader industry-wide problem, allowing the regulator (the FSCA) to intervene in the event of systemic infringement of consumer rights; and it potentially allows for banks to align their complaint procedures to each other in dealing with each category. In addition to the categories set out in clause 8(7) of the Conduct Standard for Banks, a bank can include additional complaint categories that they deem necessary.¹²¹

Banks are required to keep accurate records of complaints and should contain the details of the complaint,¹²² copies of any documents relating to the complaint,¹²³ and the category of the complaint,¹²⁴ as well as the status of the complaint.¹²⁵ They must also keep information in respect of the number of reportable complaints received, the number of those received complaints upheld and the number of complaints the bank rejected; the reasons for all rejections, escalations and referrals to an ombud scheme; the number of complainants that ended in the payment of compensation or goodwill payments; and how many complaints are still outstanding.¹²⁶ Once collected, these records must be stored, analysed on an ongoing basis, and used by the bank to improve outcomes and to assist in identifying any potential risks.¹²⁷ Again, such information will also assist the FSCA in effectively regulating and supervising the way in which banks implement their complaint resolution frameworks. Arguably, this also assists the FSCA to identify risk factors prevalent in the banking sector that could influence customers – for example, deficiencies in the customer complaint management framework causing harm to customers. Also, the fact that the

¹¹⁶ Defined in terms of clause 1 of the Conduct Standard for Banks as: “any complaint other than a complaint which has been – (a) upheld immediately by the person who initially received the complaint; (b) upheld within the bank’s ordinary processes for handling customer queries in relation to the type of financial product or financial service complained about, provided that such process does not take more than five business days from the date the complaint is received; or (c) submitted or brought to the attention of the bank in such a manner that the bank does not have a reasonable opportunity to record such details of the complaint as may be prescribed In relation to reportable complaints”.

¹¹⁷ Clause 8(7)(a) of the Conduct Standard for Banks.

¹¹⁸ Clause 8(7)(c) of the Conduct Standard for Banks.

¹¹⁹ Clause 8(7)(d) of the Conduct Standard for Banks.

¹²⁰ Clause 8(7)(h) of the Conduct Standard for Banks.

¹²¹ Clause 8(8) of the Conduct Standard for Banks.

¹²² Clause 8(14)(a) of the Conduct Standard for Banks.

¹²³ Clause 8(14)(b) of the Conduct Standard for Banks.

¹²⁴ Clause 8(14)(c) of the Conduct Standard for Banks.

¹²⁵ Clause 8(14)(d) of the Conduct Standard for Banks.

¹²⁶ Clause 8(15) of the Conduct Standard for Banks.

¹²⁷ Clause 8(16) of the Conduct Standard for Banks.

analysis will be ongoing ensures a timely intervention with regard to a potential risk.

The responsibility to implement and oversee an effective dispute resolution framework falls on the governing body of the bank.¹²⁸ However, this responsibility may be delegated to an appropriate senior person within the bank.¹²⁹ In this regard, the Conduct Standard for Banks specifically prescribes that a person who bears responsibility for making any decisions or recommendations relating to complaints must be trained and must have appropriate experience and knowledge of dispute resolution and the fair treatment of customers.¹³⁰ To avoid any confusion among customers, the person appointed to oversee and implement the dispute resolution may not be referred to as an ombud,¹³¹ and it is submitted that this could be to ensure a clear distinction between the internal and external dispute resolution frameworks that a client has available to them.

The Conduct Standard for Banks requires that banks regularly review their internal dispute resolution framework, and any changes to the framework must be recorded.¹³² Nevertheless, in practice, the review by the bank itself may not provide the best outcomes for customers, and it may become necessary for these internal dispute resolution frameworks to be reviewed instead by an external, independent body or regulator. An external review also ensures that banks align their complaint procedures to that of other banks.

In addition to prescribing the internal dispute resolution processes, the Conduct Standard for Banks directs that banks must also establish an escalation and review process.¹³³ Such process must allow for the escalation of complicated or unconventional complaints to a senior-level employee of the bank who must be suitably qualified to attend to them.¹³⁴ Moreover, the dispute resolution processes implemented by banks must be straightforward and easily accessed by bank customers,¹³⁵ and therefore be user-friendly for the customer.

When a bank upholds a complaint and agrees to make a payment or to undertake any other action, the bank must do so within the agreed time frame and without undue delay.¹³⁶ In the instance where a bank rejects a complaint, the complainant must receive reasons for such rejection and be advised in detail of any escalation or review processes that are available to them.¹³⁷

¹²⁸ Clause 8(4) of the Conduct Standard for Banks.

¹²⁹ Clause 8(5) of the Conduct Standard for Banks.

¹³⁰ Clause 8(6)(a) and (b) of the Conduct Standard for Banks.

¹³¹ Clause 8(6)(c) of the Conduct Standard for Banks.

¹³² Clause 8(2) of the Conduct Standard for Banks.

¹³³ Clause 8(10) of the Conduct Standard for Banks.

¹³⁴ Clause 8(11) of the Conduct Standard for Banks.

¹³⁵ Clause 8(19) of the Conduct Standard for Banks.

¹³⁶ Clause 8(12) of the Conduct Standard for Banks.

¹³⁷ Clause 8(13) of the Conduct Standard for Banks.

6 THE EFFECT OF THE CONDUCT STANDARDS ON THE REGULATION OF THE BANKING SECTOR

Prior to the publication of the Conduct Standard for Banks, no financial sector law specifically regulated internal consumer complaints within the whole banking sector. While certain sub-sectors of the banking sector were regulated by financial sector laws such as the Banks Act, the NCA and the FAIS Act, the area of consumer complaints and dispute resolution in the broader banking sector can at best be referred to as fragmented. Moreover, while banking customers had access to many external dispute resolution mechanisms available in the financial sector, internal dispute resolution lacked uniform regulation and was arguably, ineffectual. Moreover, the fact that banks did not all follow the same internal complaints procedure arguably gave rise to a fragmented approach to internal complaints resolution.

Prior to the creation of the FSCA and its Conduct Standard for Banks, the conduct of banks was governed by the Banking Code, which was a voluntary code. The Banking Code, however, provides little direction in relation to the way banks are required to approach dispute resolution. The Banking Code merely gives a basic outline, providing that the bank concerned will inform its customer how to lodge a complaint or what to do if the customer is not satisfied with the outcome of the complaint.¹³⁸

In contrast, it is evident that the Conduct Standard for Banks provides greater guidance and regulation for banks, as it provides a detailed list of exactly what is required from banks when dealing with their customers and, most importantly, any disputes that may arise, with a specific focus on internal dispute resolution. The Conduct Standard for Banks also requires that a proper, well-maintained and effective internal dispute resolution framework be implemented and that banks follow a number of processes in dealing with customer complaints. Arguably, this will create a more streamlined, standardised process for customers to follow when they wish to lodge a complaint with their bank, and will ultimately result in an improvement in internal dispute resolution across the banking sector.

In publishing the Conduct Standards for Banks, the FSCA has, rather than discouraging banks from implementing and following their own frameworks for the handling of internal dispute resolution, provided banks with a uniform standard against and by which they can measure their performance and continuously improve their internal dispute resolution frameworks in alignment with their own business models. This approach to regulation is what is known as a principles-based approach.¹³⁹ By using this approach to financial regulation, rather than placing the banking sector under the burden of following a rules-based approach, the banking sector will align its conduct

¹³⁸ Clause 10 of the Banking Code.

¹³⁹ For a discussion of the various regulatory principles, see the National Treasury "Explanatory Policy Paper Accompanying the Conduct of Financial Institutions Bill" <http://www.treasury.gov.za/twinpeaks/CoFI%20Bill%20policy%20paper.pdf> (accessed 2022-02-02) 10.

with a set of principles (in this case the Conduct Standard for Banks) to achieve the intended outcome of customer protection, while implementing a uniform standard against which banks can measure their conduct. Moreover, as the TCF Principles constitute the foundation of the Conduct Standard for Banks, the latter is also aligned with international best practice.

7 CONCLUDING REMARKS

This article has discussed the Conduct Standard for Banks and highlighted the differences between it and the Banking Code. While the Banking Code provides a brief, and often vague, set of rules with which banks should comply, the Conduct Standard for Banks provides a detailed, principles-based framework from which banks must develop, maintain and assess their own internal dispute policies. Although the Conduct Standard for Banks is a worthy addition to the financial sector laws and undoubtedly provides an important framework for banks to follow, it is likely to be imperfect. It is difficult, at this stage, to state with certainty the extent to which the Conduct Standard for Banks will be successful in regulating the banking industry as far as dispute resolution is concerned. Much like any new legal measure, several issues may still arise during the implementation of the Conduct Standard for Banks. Moreover, as discussed above, the success of the Conduct Standard for Banks in regulating dispute resolution depends on the degree of compliance by the banks, which, in turn, depends on whether the sanctions that are imposed for non-compliance will deter banks from conduct that contravenes the Conduct Standard for Banks. However, at least, the fact that the Conduct Standard has a statutory basis means that the adoption of its provisions by banks will no longer be voluntary as was the case with the Banking Code.