Discussion Paper

Financial Stability Committee

SOUTH AFRICAN RESERVE BANK

SARB 100 YEARS 1921–2021

A purposeful journey

Proposed principles and requirements for

Flac instruments

Contents

1. Definitions

Term	Definition
Bail-in	refers to a resolution action taken by the South African Reserve Bank in terms of sections 166R and 166S of the Financial Sector Laws Amendment Bill, 2018, that results in losses being assigned to shareholders and creditors of the designated institution in resolution
Banks Act	means the Banks Act, 1990 (Act No. 94 of 1990).
Capital adequacy ratio	means the capital adequacy ratio as set out in the Regulations issued in terms of the Banks Act.
Core business lines	means those business lines that the South African Reserve Bank would seek to protect through the implementation of resolution options to ensure the sustainability of the designated institution after the implementation of one or more resolution options
Critical function	means a critical function as defined in the Financial Sector Laws Amendment Bill, 2018
Designated institution	means a designated institution as defined in the Financial Sector Laws Amendment Bill, 2018
Flac instruments	means Flac instruments as defined in the Financial Sector Laws Amendment Bill, 2018
Financial sector regulators	means financial sector regulators as defined by the Financial Sector Regulation Act 9 of 2017
Holding company	means a holding company as defined in the Companies Act 71 of 2008
Insolvency Act	means the Insolvency Act 24 of 1936

Market infrastructure	means a market infrastructure as defined in the Financial Sector Regulation Act 9 of 2017
Point-of-resolution	means the point at which the Minister of Finance makes a determination to place a designated institution in resolution as provided for in the Financial Sector Laws Amendment Bill, 2018.
Regulated financial institution	means an institution that is regulated and supervised by a financial sector regulator
SARB	means the South African Reserve Bank as referred to in section 223 of the Constitution, read with the South African Reserve Bank Act 90 of 1989, as amended
Resolution authority	means the South African Reserve Bank as designated by the Financial Sector Laws Amendment Bill, 2018
Resolution entity	means the entity in a resolution group as set out in the standard on resolution group reporting requirements
Risk-weighted assets	means risk-weighted assets as referred to in the Banks Act 94 of 1990
Systemically important financial institution	means a financial institution that has been designated as a systemically important financial institution in terms of section 29 of the Financial Sector Regulation Act 9 of 2017
the Act	refers to the Financial Sector Regulation Act 9 of 2017, and includes the Regulations and regulatory instruments made in terms of that Act
the Bill	refers to the Financial Sector Laws Amendment Bill, 2018

2. Executive summary

2.1. This discussion paper sets out proposals on the characteristics, calibration and implementation period for Flac instruments. The purpose of the discussion paper is to solicit public comment on the proposed principles and requirements. After the promulgation of the Financial Sector Laws Amendment Bill, 2018 (Bill), the approved proposals will be incorporated into a Prudential Standard.

2.2. The proposed characteristics set out in the South African Reserve Bank's (SARB) 2019 paper titled 'Ending too big to fail: South Africa's intended approach to bank resolution' (2019 resolution paper) have been revised following public consultation. The revised characteristics set out in this paper aim to address the issues highlighted by industry during the consultation process.

2.3. The calibration proposed in this discussion paper includes a sector-wide base minimum requirement with a firm-specific additional requirement. The proposed level of Flac instruments that designated institutions will need to issue will ensure that designated institutions hold sufficient levels of Flac instruments to support the SARB's recapitalisation strategy during a resolution.

2.4. It is further proposed that the base minimum requirement be phased in over a six-year period. The proposed implementation period takes into consideration the maturity of existing debt instruments, regulatory requirements and the cost associated with issuing new debt instruments.

2.5. The discussion paper also sets out a number of general principles and requirements for designated institutions to provide the SARB, as the resolution authority, with relevant information on their loss-absorbing capacity.

3. Introduction

3.1 On 23 July 2019 the SARB published a paper titled 'Ending too big to fail: South Africa's intended approach to bank resolution'. The 2019 resolution paper provides an overview of the resolution provisions in the Bill that require further detailed requirements to be set by the SARB.

3.2 An underlying objective of the new framework is to reduce the reliance on public funds when conducting a resolution, including being able to assign losses to shareholders and certain creditors. The powers in the Bill allow the SARB, as the resolution authority, to bail in all the liabilities of the designated institution in resolution, except for those specifically stated in section 166R.

3.3 To mitigate the practical implications of bailing in all eligible liabilities and any possible systemic risk caused by such a bail-in, and also to enhance the transparency of the appropriate pricing of risk, the Bill has created a new class of instruments, referred to as Flac instruments, which will be subject to bail-in just after share capital and regulatory capital instruments, but before any other unsecured liabilities.

3.4 The Bill includes amendments to section 30 of the Financial Sector Regulation Act 9 of 2017 (FSR Act). In terms of the amended section 30, the SARB can direct the Prudential Authority (PA) to (i) issue Prudential Standards setting out the characteristics of Flac instruments; and (ii) direct designated institutions to maintain a minimum level of Flac instruments as prescribed by the SARB.

3.5 The recapitalisation through a bail-in must enable the designated institution to continue operating during the resolution and to exit resolution as a viable entity. This requires that the recapitalisation be sufficient to restore the designated institution's capital levels to a point where it meets regulatory capital requirements and the market has confidence that the designated institution can continue operating.

3.6 To achieve a successful bail-in, a designated institution will need to maintain a sufficient level of Flac instruments that will be available during resolution and that can be converted to regulatory capital.

3.7 The proposals set out herein aim to ensure that designated institutions maintain sufficient levels of Flac instruments with characteristics that will ensure they are available for bail-in during resolution.

4. Scope

4.1 The proposed requirements set out in this discussion paper apply to banks that have been designated as systemically important financial institutions (SIFIs) and their holding companies.

4.2 In this paper, reference to a designated institution only refers to the designated institutions in paragraph 4.1.

5. Proposed general requirements

5.1 Designated institutions must maintain sufficient levels of unsecured subordinated debt to absorb losses and to recapitalise themselves during a resolution without disruption to their critical functions and core business.

5.2 Designated institutions must have the operational capability to enable the SARB to execute its resolution actions. Designated institutions must ensure that their operations will support the bail-in of their Flac instruments in a resolution.

5.3 Designated institutions must update and maintain their management information systems to be able to provide the SARB with all relevant information regarding loss-absorbing debt instruments. At a minimum, designated institutions must be able to provide the SARB with the information set out in any standards on resolution reporting requirements.

5.4 Designated institutions must provide counterparties and market participants with sufficient information on the nature and terms of Flac instruments to enable them to make informed decisions on the risk profile of these instruments. At a minimum, designated institutions must meet the disclosure requirements set out in any relevant standards.

6. Location of Flac instruments

6.1 If South Africa ever has to apply bail-in to a SIFI with an open-bank resolution strategy, there is bound to be a range of complexities to consider in the execution of this process. It is, therefore, sensible to try to eliminate complexities that can be foreseen in advance, so as to make the process as clear and simple as possible, both legally and operationally. One element that simplifies the bail-in process is if all instruments that are earmarked for bail-in in a resolution are located in the same entity. This should include both regulatory and Flac instruments designed to absorb losses and recapitalise the SIFI in resolution.

6.2 Having all these instruments in one entity will make the creditor hierarchy clear to investors, will make it legally simpler, and will avoid having to resolve situations of unintended structural subordination. Furthermore, it will have the least effect on the operations of the SIFI and the continuation of critical services if bail-in occurs in the holding company without directly affecting the operating entities. Moreover, having a loss-absorbing capacity centralised in one entity in a financial conglomerate may facilitate a more efficient downstreaming of capital to different group entities in resolution, where applicable.

6.3 An initial desk-top analysis of the six SIFI banks in South Africa indicated that they are all fully owned by holding companies, and that their holding companies do not themselves have extensive operations. This is a good departure point to move to a situation where all regulatory and Flac instruments are issued from the holding companies of SIFIs.

6.4 Currently, the banking regulations do not prescribe the location of regulatory capital instruments. A possible change to this approach with regard to regulatory capital instruments will be explored by the PA and the SARB, in consultation with the banks involved. However, with regard to Flac instruments, it will be a requirement that external issuance should occur from the holding company, and that by the time the Flac requirements are fully phased in, all externally issued Flac instruments should be located in the holding company.

6.5 Each resolution entity[1] that falls within the scope of the Flac Standard will have to calculate its minimum Flac requirement as set out in section 6. The holding company must then issue Flac instruments to meet the sum of these requirements and put in place arrangements to ensure that the capital can be downstreamed to these entities.

7. Proposed qualifying criteria for Flac instruments

7.1 The proposed characteristics for Flac instruments were set out in the 2019 resolution paper. Concerns raised during the public consultation period have been taken into consideration and it is proposed that the following amendments to the original proposals be made:

i. *Approval*: The timing of the issuance of Flac instruments is important and requiring regulatory approval for every issuance would lead to unnecessary delays. The proposed requirement has been revised to only require approval of the initial draft terms or any amendments thereto. After the draft terms have been approved, the designated institution must

1 Resolution entities will be determined in terms of the proposed requirements set out in the discussion paper on the group structure reporting requirements for resolution planning published on 30 September 2020. https://www.resbank.co.za/en/home/publications/publication-detail-pages/media-releases/2020/10278

only notify the SARB when it issues Flac instruments, provided the terms of the issued instruments are in line with the draft approved terms.

ii. *No early redemption*: A requirement for Flac instruments is that they have a minimum remaining maturity of 12 months. Therefore, the instrument will not count as Flac in its final year of maturity and will have to be replaced by new Flac instruments. To ensure that designated institutions are not forced to carry non-qualifying instruments that were initially issued as Flac, the proposed requirements are being amended to provide for early redemption when the instrument ceases to qualify as Flac.

iii. *Governing law:* The proposed requirement for these instruments to be issued under South African law will limit a designated institution's ability to issue to foreign investors, as it is standard practice to issue under the governing law of major counterparties. To reduce the limitation on foreign issuance, the proposed requirement is being amended to limit its application to the resolution of the designated institution and bail-in of the instrument.

iv. *Holder:* It will be difficult for issuers to keep an up-to-date record of the ultimate beneficial holders of Flac instruments. Requiring designated institutions to deduct their Flac holdings from their qualifying Flac instruments is a simpler way to achieve the objective of reducing contagion risk when bailing in Flac instruments.

7.2 The proposed (amended) qualifying criteria for Flac instruments that will be set out in the standard are the following:

7.2.1 Flac instruments must:

i. be issued by the holding company of banks that have been designated as SIFIs;

ii. be fully paid;

iii. not be funded, fully or partially, by the issuing designated institution, its holding company or other resolution entity within the group;

iv. be unsecured;

v. not be subject to set-off;

vi. have a minimum initial maturity of 24 months;

vii. have a minimum remaining maturity of 12 months;

viii. set out the ranking of the instruments in line with the creditor hierarchy provided for in the Insolvency Act 24 of 1936;

ix. not contain any derivative-linked features;

x. not allow for early redemption, other than in the manner provided for in paragraph 7.2.4. below;

xi. not contain any acceleration clauses; and

xii. be for a sum equal to or more than the prescribed minimum denomination, when converted to South African rands.

7.2.2 Instruments that are issued under foreign law must contain provisions that exclude the resolution of the designated institution from the foreign governing law to ensure that the resolution of the designated institution and bail-in of the Flac instruments remain subject to South African law. Designated institutions must ensure that Flac instruments contain terms that promote the ability of the

South African authorities to conduct a resolution and for these instruments to be subject to bail-in under South African law.

7.2.3 Designated institutions must deduct their holdings of Flac instruments issued by another designated institution from the calculation of their minimum Flac requirement. This requirement reduces the potential that losses caused by the bail-in of Flac instruments lead to increased systemic risk.

7.2.4 Flac instruments may only be subject to early redemption if:

i. the instrument ceases to qualify as a Flac instrument; or

ii. on application to the SARB, the designated institution shows that the early redemption will not result in the designated institution breaching its minimum Flac requirement. *(The ability to show that it will not cause a breach could be either because the designated institution has sufficient Flac buffers or it issued new instruments before the redemption.)*

7.3 Designated institutions must submit the terms of these instruments, or any amendments thereto, to the SARB for approval. The SARB will need to assess the terms of the Flac instruments to determine whether they meet the minimum requirements. Designated institutions must submit the initial terms and any amendments thereto for approval. Any subsequent issuance on the approved terms will only require notification to the SARB prior to its issuance.

8. Proposed calculation of minimum Flac requirement

8.1 There are a number of factors that the SARB must consider in determining the minimum level of Flac instruments that designated institutions must hold. These factors not only influence the minimum required amount of Flac, but also how the requirement will be set and when the institutions will be required to issue the instruments.

8.2 The first consideration is the regulatory capital requirements that the designated institution will need to comply[2] with during a resolution and upon exit from the resolution. The base assumption is that regulatory capital requirements are calibrated to absorb going-concern losses, based on the specific institution's degree of risk-taking, and that the losses that will cause a resolution will therefore deplete the institution's regulatory capital. The Flac instruments will be used to replenish capital levels and must thus be enough to achieve this. An open resolution strategy is not a feasible option if the capital levels of a designated institution cannot be restored to acceptable levels.

8.3 The market needs to have confidence in the designated institution's ability to continue operating. It is difficult to make an accurate assessment on the capital levels that will instil market confidence, but it is nonetheless an important consideration when determining Flac levels.

8.4 South African banks are required to maintain overall regulatory capital levels above the international standard, and eligible capital instruments are subject to stricter requirements. Banks also maintain internal buffers consisting of instruments that qualify as regulatory capital. These instruments cannot qualify as Flac instruments due to their lower ranking in the creditor hierarchy. It is, however, important to consider the role of excess regulatory capital in the calibration of the minimum Flac requirement.

8.5 It is important for designated institutions to be resolvable and remove barriers to an orderly resolution. Increased resolvability improves the ability of the SARB to execute a resolution strategy and is likely to reduce the overall cost of a resolution. A designated institution's resolvability should be taken into account when determining the level of Flac instruments it must hold. However, determining an institution's resolvability will only be possible after the development of its resolution plan and upon completion of resolvability assessments. To allow for the resolvability of individual institutions, the SARB could set a general minimum Flac requirement and a separate institution-

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[2] Comply is being used in a 'voluntary' sense. A designated institution will be exempted in resolution from complying with regulatory requirements. However, for practical reasons, the SARB will aim to avoid having a designated institution operate below regulatory requirements.

specific additional requirement that takes into account resolvability, among other things.

8.6 The cost of issuing Flac instruments must also be considered. A portion of these instruments will most likely be issued as a replacement for existing unsecured debt instruments. The cost pressure may be relieved to a certain extent by aligning the implementation period to the maturities of existing debt instruments and by allowing a sufficient phase-in period.

8.7 Based on the above considerations, the options for setting the minimum Flac requirement include the following:

8.7.1 (a) A single minimum Flac requirement equal to the total regulatory capital ratio (including all buffers) calculated on the designated institution's *current* balance sheet; or

(b) A single minimum Flac requirement equal to the total regulatory capital ratio (including all buffers) calculated on the designated institution's *resolution* balance sheet (factoring in losses estimated by the capital adequacy ratio (CAR) and risk weightings).

8.7.2 a. A single minimum Flac requirement equal to the total regulatory capital ratio (*excluding all buffers*), calculated on the designated institution's *current* balance sheet; or

b. A single minimum Flac requirement equal to the minimum total regulatory capital ratio (*excluding all buffers*), calculated on the designated institution's *resolution* balance sheet (factoring in losses estimated by the CAR and risk weightings).

8.7.3 a. A *base* Flac requirement plus an institution-specific *additional requirement*. The base requirement must be equal to the total minimum regulatory capital ratio (excluding all buffers), calculated on the designated institution's *current* balance sheet; or

b. A *base* Flac requirement plus an institution-specific *additional requirement.* The base requirement must be equal to the total minimum regulatory capital ratio (excluding all buffers), calculated on the designated institution's *resolution* balance sheet (factoring in losses estimated by the CAR and risk weightings).

8.8 It is proposed that the SARB adopt the approach in paragraph 8.7.3.b, being a base requirement plus an additional institution-specific requirement. It is further proposed that both requirements be calculated using the resolution (post-loss) balance sheet estimated from current capital requirements and risk weightings. The detailed requirements for this calculation are set out in paragraph 8.9 to 8.11.

8.9 Base minimum Flac requirement (bMFR)

8.9.1 Flac instruments enable the SARB to restore the designated institution's capital to the point where it complies with its minimum regulatory capital requirement. Thus, the two critical factors when determining the minimum Flac requirement (MFR) are: (i) the estimated available regulatory capital at the point of resolution, after factoring in losses incurred by the time the institution enters resolution, as well as further losses that may occur; and (ii) the minimum capital that the PA will require from the specific designated institution when it exits resolution.

8.9.2 Available capital after factoring in losses: In terms of the regulatory framework, the CAR measures a bank's regulatory capital in relation to its risk-weighted assets (RWA). A designated institution's minimum CAR is therefore a reflection of the riskiness of its assets. The risk weighting of the bank's assets takes into account loss factors such as its probability of default, loss given default and exposure at default. In summary, the minimum regulatory capital requirement reflects the regulator's estimation of the potential losses that a designated institution could experience based on its asset profile. To this end, the SARB must rely on the regulator's estimation of the potential losses. The base MFR of a designated institution should be equal to the institution's minimum regulatory requirement, or ***b*MFR = CAR**.

8.9.3 The minimum regulatory capital requirement set by the PA includes the base minimum capital requirement of 8% of the RWA plus the Pillar 2A and 2B requirements. The Pillar 2A requirement is a systemic risk capital requirement, while the Pillar 2B requirement is an idiosyncratic risk capital requirement that will proportionately influence the calibration of the Flac requirement according to a bank's risk profile.

8.9.4 Post-resolution minimum regulatory capital requirement: Upon exiting resolution, the designated institution will be required to meet its regulatory requirements, including its minimum capital requirement. During resolution, Flac instruments will be converted to common equity tier 1 (CET1) to enable the designated institution to meet its minimum capital requirement. Factoring in the losses set out in 8.9.2, the bank's post-resolution minimum required CAR (***pr*CAR**) will be set in relation to the RWA on its post-resolution balance sheet.

Proposal: A bank's *b*MFR must be sufficient to ensure that it can recapitalise the bank to a level that meets its estimated minimum ***pr*CAR** requirement set by the PA, or

$$\boldsymbol{b}\mathbf{MFR} = \boldsymbol{pr}\mathbf{CAR} \tag{1}$$

8.9.5 Calculating the estimated *pr*CAR: To determine its *pr*CAR*,* a bank must assume that the amount it holds towards meeting the minimum regulatory capital requirement (paragraph 8.9.3) is equal to the amount of losses it may suffer at the point of resolution and after entering resolution. The estimated losses must then be deducted from its assets according to the risk weighting prescribed to these assets. This amount, after taking into account the losses, represents the estimation of its resolution balance sheet. It must then, based on its resolution balance, determine the amount of its *prCAR* using its current minimum regulatory capital requirement. (An example of this is provided in Annexure A.)

8.10 Additional Flac requirement

8.10.1 There are additional factors that should be considered when setting the minimum Flac requirement that a designated institution must comply with. These factors, set out in 8.10.2 to 8.10.4, must not result in a change of the *b*MFR, but could be considered for an additional (firm-specific) Flac requirement.

8.10.2 Market confidence premium (***Pm***): To operate as a going concern when exiting resolution, a designated institution must be able to obtain funding in the market after resolution. This will require the market to have confidence in the institution's ability to continue operating as a going concern. In general, the designated institution's CAR provides the market with confidence that the institution will be able to absorb losses without becoming non-viable. However, the market will take a more conservative view of a designated institution exiting resolution. In addition, to provide the market with confidence that the institution can operate as a going-concern may require an additional level of capital. This can be viewed as a market premium, or ***Pm*****.** The SARB will have to estimate what this premium will be and include it in the calculation of the additional Flac requirement.

Proposal: The SARB should use a range of 0−25 percentage points, stated as a percentage of the ***bMFR,*** to determine the market confidence premium.

8.10.3 Resolvability rebate (***Rr***): A function of the SARB is to increase the resolvability of designated institutions through resolution planning on a going-concern basis. The SARB will conduct resolvability assessments and set requirements to improve resolvability, and the designated institutions must take the steps prescribed to remove barriers to their resolvability. Increased resolvability improves the feasibility of resolution actions and the probability that a designated institution with an open resolution strategy can exit a resolution and operate as a going concern. Designated institutions that are more resolvable will require less capital above the regulatory minimum to instil market confidence in their ability to operate as a going concern.

Proposal: The resolvability of a designated institution should be considered as a deduction in the calculation of the additional Flac requirement and should be stated as a percentage of the ***bMFR*** with a range of 0−15 percentage points.

8.10.4 Excess regulatory capital (***CREG***): Designated institutions maintain excess levels of regulatory capital above the regulatory minimum as internal buffers. This capital provides an additional buffer that can absorb losses. The purpose of capital, including regulatory and internal buffers, is to absorb losses on a going-concern basis. However, excess regulatory capital reduces the likelihood that the losses at the point of resolution will completely deplete capital levels.

Proposal: The SARB should consider including excess regulatory capital (***CREG***) as a deduction to the minimum Flac requirement (***MFR***), limited to an amount equal to the additional Flac requirement.

8.11 Minimum Flac requirement

8.11.1 The MFR includes: (i) the base minimum requirement that will be converted to common equity to enable the designated institution to meet its post-resolution minimum CAR; (ii) the market confidence premium; (iii) the deduction for the resolvability of the designated institution; and (iii) a limited deduction for excess regulatory capital. The calculation for the MFR can be stated as:

$$MFR = bMFR \times (1+(Pm - Rr)) - C_{REG} \quad (2)$$

9. Effective date

9.1 The proposed effective date of the base minimum Flac requirement (***bMFR***) is 30 January 2028 (subject to the standard being issued by 30 January 2022). It is further proposed that the requirement be phased in, in accordance with Table 1 below.

9.2 The effective date for the additional Flac requirement and deduction for excess regulatory capital will be determined by the end of the first phase-in period, if at that point the SARB has resolution plans for each SIFI bank in place and has finalised at least one round of resolvability assessments.

9.3 The final phase-in period will take the following into account:

9.3.1 the maturities of existing debt instruments that may be replaced by Flac instruments; and

9.3.2 the introduction (or re-introduction) of regulatory requirements that may impact the financial sector's ability to issue or invest in new (regulatory) financial instruments.

Table 1: Proposed phase-in period for *bMFR*

Date	End of year 3	End year 4	End of year 5	End of year 6
Percentage of ***bMFR***	60%	80%	90%	100%

10. Annexure A: Stylised example of base Flac calculation

	Current B/S			Resolution B/S					
Total assets	100'000								
RWA	80'000								
CAR		10%	8'000						
R assets				92'000					
ResRWA				73'600					
bMFR					***7'360***				
Pm						1'104			
Rr							736		
CREG									

Note:

1. *The example is based on the proposed calculation set out in section 6 of the paper.*
2. *The example is only for illustration of the calculation and uses a base minimum capital requirement of 8% plus 2% for the Pillar 2A and 2b requirements.*
3. *The amounts used for total assets and risk-weighted assets (RWA) are examples for illustration purposes only.*
4. *The resolution assets (R assets) are calculated by deducting the estimated losses (as reflected by the capital adequacy ratio (CAR) from the current assets. For purposes of the example, the RWA in resolution (ResRWA) is determined using the same ratio to assets as the ratio before resolution. Designated institutions will, however, need to distribute expected losses according to the risk-weighting of assets. This may result in the ratio of RWA to total assets being different in resolution.*
5. *The* **bMFR** *is the same percentage as the CAR, as set out in section 6 of the paper.*
6. *The market premium (***Pm***) and resolution rebate are the percentage ranges of* **bMFR,** *as set out in section 6 of the paper. For this example, the* **Pm** *is 15% and the* **Rr** *is 10%.*

Proposed formula	
MFR	= bMFR x (1+(Pm – Rr)) – CREG
	= 7360 x (1+(0.15 – 0.10)) – CREG
	= 7360 x (1+0.05) – CREG
	= 7360 x 1.05 – CREG
	= 7728 – CREG

11. Abbreviations

Banks Act	Banks Act 94 of 1990
Bill	Financial Sector Laws Amendment Bill, 2018
bMFR	base minimum Flac requirement
CAR	capital adequacy ratio
CREG	excess regulatory capital
FSR Act	Financial Sector Regulation act 9 of 2017
MFR	minimum Flac requirement
Pm	market premium
PA	prudential authority
prCAR	post-resolution minimum required CAR
R assets	resolution assets
ResRWA	RWA in resolution
Rr	resolvability rebate
RWA	risk-weighted asset
SARB	South African Reserve Bank
SIFI	systemically important financial institution