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28 February 2018

COMMENTS

on proposed amendments to

General Code of Conduct
for Authorised Financial Services Providers and Representatives

and on proposed amendments to

Specific Code of Conduct
for Authorised Financial Services Providers and Representatives
conducting Short-term Deposits Business

Invitation to comment

On 1 November 2017, the Deputy Registrar of Financial Services Providers posted on the Financial Services Board's official website[1] an invitation to comment on her proposed amendments to —

(a) the General Code of Conduct for Authorised Financial Services Providers and Representatives, 2003 (hereinafter called "the General Code"); and

(b) the Specific Code of Conduct for Authorised Financial Services Providers and Representatives conducting Short-term Deposits Business, 2004 (hereinafter called "the Short-term Deposit Code").

The invitation invites interested persons to submit written submissions by 28 February 2018 on the proposed amendments.[2]

The Free Market Foundation accordingly makes the following submissions.

Free Market Foundation

The Foundation is an independent public benefit organisation founded in 1975.

The Foundation promotes and fosters the Rule of Law, personal liberty, an open society, and economic and press freedom.

Foundation's submissions

The Foundation's submissions briefly outline relevant Rule of Law principles, mention the need for plain language, and refer to the Act's provisions about codes of conduct.

The Foundation then comments on the following proposed amendments to the General Code:

Five definitions
"At all times act honestly"
Conflicts of interests
"Fair outcomes"
Records of advice
Advertisements leading to false conclusions
Puffery
Complaints management

We also touch on the proposed amendments to the Short-term Deposit Code, relating to—

Advertisements leading to false conclusions
Puffery
Complaints management

… / Summary submission

[1] At https://www.fsb.co.za/Departments/fais/communication/Documents/Invitation%20to%20comment%*20on%20proposed%20amendments%20to%20General%20Code%20and%20Specific%20Code%20for%20Short-term%20Deposits.pdf*

[2] To FAIS.Consulation@fnb.co.za.

Summary submission

The Republic is founded on the ***Rule of Law***. Implicit in the Rule of Law are the principles that laws should not be vague; officials exercising a power to make regulations should stay within the empowering provisions of the Act concerned (otherwise they act *ultra vires* and their conduct is invalid); and officials must not exceed powers conferred, so an official to whom power to make legislation is delegated should not delegate the power to another.

The Codes of Conduct should be in ***plain language***. The General Code requires financial-services providers to communicate in plain language, avoid uncertainty and not be misleading. It is submitted that, in the same way, the Code itself and its amendments should also be in plain language, avoid uncertainty, and not be misleading.

The Financial Advisory and Intermediary Services Act requires the Registrar to draft ***codes of conduct***, and lays down ***principles of codes of conduct***. A code of conduct must among other things contain provisions relating to disclosure of personal interests to clients, avoidance of false advertising and marketing, and control of incentives.

As to the proposed amendments to the General Code, and dealing first with proposed ***definitions***, the definition of *"comparative"* is not ideal. The definition of *"direct marketing"* is misleading and inaccurate and contains jargon. The definition of *"loyalty benefit"* is not entirely clear. The definition of *"puffery"* is not accurate. The definition *"replace or replacement"* is baffling, repetitive and unduly wordy. We suggest wording for all these.

The proposed clause that a provider must "***at all times act honestly***" etc is unduly broad and vague. We suggest a narrower wording for greater precision.

As to ***conflicts of interests***, the clause that a provider may not describe itself or services it renders as independent if an arrangement exists between it and a supplier for whose products the provider renders financial services "that would constitute a conflict of interest" is unduly vague and might be struck down for not indicating with reasonable certainty what is required. Existing Code provisions may suffice.

The clause that a provider may not offer its representatives financial interests determined with reference to quantity of business secured, without also giving due regard to the delivery of ***fair outcomes*** for clients, is unduly vague and liable to be struck down in not indicating with reasonable certainty what sort of things would constitute fair outcomes. The Act requires only that, in a situation of conflicting interests, the Code should oblige providers to "treat" clients fairly. This clause, and the clause that a provider may only receive fees if payment thereof does not impede delivery of fair outcomes to clients, should both be deleted.

The draft proposes inserting a clause that the Registrar may determine matters to be addressed in in ***records of advice to clients***. This is redundant. The Code itself already determines matters to be addressed in records of advice. The clause should be deleted.

The clause about ***advertisements leading to false conclusions***, that an advertisement must not lead the average targeted client or the public to false conclusions they might reasonably rely on, is not well stated, and we suggest clearer wording. Other proposed clauses overlap with this clause and deal with the same subject-matter, and consideration should be given to whether they are necessary.

The clause that advertisements which include ***puffery*** must be consistent with the provisions relating to puffery in the Code of Advertising Practice issued by the Advertising

Standards Authority is probably an impermissible delegation by the Registrar to that body of powers conferred on her to draft a code of conduct, and should be deleted.

The proposed amendments that would insert in the Code a new part that would prescribe detailed provisions governing ***complaints management*** are in large part probably *ultra vires* (beyond the powers of the Registrar). The amendments propose inserting in the Code definitions of "complainant" and "complaint," although Act defines these words in quite different terms. The proposed amendments would also insert in the Code clauses which would require a provider to maintain a "complaints management framework" that meets numerous requirements. Those proposed clauses are probably *ultra vires*: The Act's provision setting out principles of codes of conduct does not authorise the Registrar in codes of conduct to prescribe procedures for dealing with complaints. The Act stipulates that the Financial Services Board (not the Registrar) may make Rules regarding the rights of complainants in connection with complaints, the manner of submitting a complaint to the provider concerned, and the rights and duties of the provider on receipt of a complaint. The Board made Rules in 2003 which state that, for a complaint to be justiciable by the Ombud, the provider must have failed to address it satisfactorily in six weeks. The Registrar's proposed amendments do not expressly mention this six-week period prescribed in the Board's Rules. The Registrar's proposed amendments would require providers to maintain an unduly-elaborate complaints management framework for what ought to be a six-week-long procedure at best. It is concluded that these proposed "complaints management framework" clauses are *ultra vires*, and should be deleted, or at the very least substantially reduced but with insertion of more direct references to the Board's Rules.

The proposed amendments to the ***Short-term Deposit Code of Conduct*** would require banks conducting short-term deposit business to comply with the General Code's provisions governing advertising and complaints management. Our submissions accordingly also apply to those proposed amendments to the Short-term Deposit Code, in so far as our submissions deal with advertisements leading to false conclusions, puffery and complaints management.

[Summary submission ends]

Rule of Law

The Rule of Law is a foundational value of our constitutional democracy.[3]

It is a principle of the Rule of Law that laws should not be vague:[4] Laws must be written in a clear manner,[5] and indicate with reasonable certainty to those bound by them what is required so that they may regulate their conduct accordingly.[6]

Another incident of the Rule of Law is the doctrine of legality, which entails that an official exercising power to make regulations or the like must comply with empowering provisions of the statute concerned.[7] If she exceeds the powers conferred by empowering provisions, she acts *ultra vires*[8] and in breach of the doctrine,[9] and her conduct is invalid.[10]

A core Rule of Law principle is that public officers must exercise powers conferred on them without exceeding the limits of those powers.[11] A person to whom a power to make legislation is delegated may not delegate that power further (*delegatus delegare non potest*[12]). Where the Legislature delegates powers to a subordinate authority, it intends that authority to exercise the powers and not delegate them to someone else.[13]

Plain language

Amendments to the General Code should, we submit, be in plain language.

The General Code itself requires providers to communicate in plain language. The Code states, "When a provider renders a financial service, representations made and information provided to a client by the provider…must be provided in plain language, avoid uncertainty or confusion and not be misleading".[14]

And the proposed amendments state, "All communications with a complainant must be in plain language".[15]

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3 Constitution s 1; *Affordable Medicines Trust and others v Minister of Health and ano* 2005 (6) BCLR 529 (CC) par 108.

4 The so-called doctrine of vagueness.

5 *Affordable Medicines Trust and others v Minister of Health and ano* 2005 (6) BCLR 529 (CC) par 108.

6 *HTF Developers (Pty) Ltd v Minister of Environmental Affairs and Tourism and others* [2007] 4 All SA 1108 (SCA) par [9].

7 The common-law principle of *ultra vires* remains under the new constitutional order, underpinned (and supplemented where necessary) by a constitutional principle of legality, which in relation to legislation is implicit in the Constitution. *Fedsure Life Assurance Ltd and others v Greater Johannesburg Transitional Metropolitan Council and others* 1998 (12) BCLR 1458 (CC) pars [58], [59].

8 Beyond the powers (conferred).

9 And thus in a manner inconsistent with the Constitution.

10 *Affordable Medicines Trust and Others v Minister of Health of RSA and Another*, ibid, paras [48] – [50].

11 Lord Bingham (then Senior Law Lord), "The Rule of Law" (Sir David Williams Lecture 2006, Centre for Public Law, Univ. of Cambridge), sixth sub-rule.

12 *Hospital Association of S.A. Ltd v Minister of Health and ano; ER24 EMS (Pty) Ltd and ano v Minister of Health and ano; S A Private Practitioners Forum and others v Director-General of Health and others* 2010 (10) BCLR 1047 (GNP) pars [67], [68].

13 *Chairman of the Board on Tariffs and Trade and others v Teltron (Pty) Ltd* [1997] 1 All SA 387 (A) 394. Not every delegation of delegated powers is hit by the maxim *delegatus delegare non potest*, but only such delegations as are not, expressly or by necessary implication, authorised by the delegated powers. *Government of the Province of the Eastern Cape v Frontier Safaris (Pty) Ltd* [1997] 4 All SA 500 (A) 510.

14 General Code s 3(1)(a)(ii).

15 Proposed amendments cl 13, to substitute General Code Part XI (Complaints management), cl 17(8)(c). The amendments would define "plain language" (proposed amendments cl 2(k), to amend General Code s 1 (Definitions, construction and application) by inserting in s 1(1) a definition of "plain language" as follows:

In the same way, the Code and its amendments should also be in plain language, avoid uncertainty or confusion, and not be misleading.

Act's provisions regarding codes of conduct, and principles of codes of conduct

The Financial Advisory and Intermediary Services Act, 1980[16] provides that the registrar must, after consultation with representative bodies of the financial services industry and client and customer bodies, draft a code of conduct for financial services providers.[17]

The code must, after consultation, be published by notice in the *Gazette*, and, on any such publication, becomes binding on all authorised financial services providers and representatives referred to therein.[18]

Different codes of conduct may be drafted in respect of the rendering of a financial service to different categories of clients and of different categories of authorised financial services providers and their operations in different sectors of the financial services industry, and different categories of representatives.[19]

A code of conduct must[20] be drafted for the rendering of financial services in respect of deposits with a term not exceeding 12 months by a provider which is a bank,[21] mutual bank[22] or co-operative bank.[23]

Codes of conduct may be amended or replaced, in accordance with the procedure for drafting and publishing such codes.[24]

The Act lays down principles of codes of conduct:[25] A code of conduct must be drafted in such a manner as to ensure that the clients being rendered financial services will be able to make informed decisions, that their reasonable financial needs regarding financial products will be appropriately and suitably satisfied, and that for those purposes authorised financial services providers and their representatives are obliged by the provisions of such code to—

(a) act honestly and fairly, and with due skill, care and diligence, in the interests of clients and the integrity of the financial services industry;

(b) have and employ effectively the resources, procedures and appropriate technological systems for the proper performance of professional activities;

"**plain language**" means communication that—

(a) is clear and easy to understand;

(b) avoids uncertainty and confusion; and

(c) is adequate and appropriate in the circumstances,

taking into account the factually established or reasonably assumed level of knowledge of the person or average persons at whom the communication is targeted."

16 Financial Advisory and Intermediary Services Act 37 of 2002.

17 Financial Advisory and Intermediary Services Act s 15(1)(a).

18 Financial Advisory and Intermediary Services Act s 15(1)(b).

19 Financial Advisory and Intermediary Services Act s 15(2)(a).

20 Financial Advisory and Intermediary Services Act s 15(2)(b) read with s 1(1) svv "financial product par (f) and Banks Act 94 of 1990 s 1(1) sv "deposit".

21 As defined in the Banks Act 94 of 1990.

22 As defined in the Mutual Banks Act 124 of 1993.

23 As defined in the Co-operative Banks Act 40 of 2007.

24 Financial Advisory and Intermediary Services Act s 15(3) read with s 15(1)(a) and (b).

25 Financial Advisory and Intermediary Services Act s 16 (Principles of code of conduct).

(c) seek from clients appropriate and available information regarding their financial situations, financial product experience and objectives in connection with the financial service required;

(d) act with circumspection and treat clients fairly in a situation of conflicting interests; and

(e) comply with all applicable statutory or common law requirements applicable to the conduct of business.[26]

A code of conduct must in particular contain provisions relating to—

(a) the making of adequate disclosures of relevant material information, including disclosures of actual or potential own interests, in relation to dealings with clients;

(b) adequate and appropriate record-keeping;

(c) avoidance of fraudulent and misleading advertising, canvassing and marketing;

(d) proper safe-keeping, separation and protection of funds and transaction documentation of clients;

(e) where appropriate, suitable guarantees or professional indemnity or fidelity insurance cover, and mechanisms for adjustments of such guarantees or cover by the registrar in any particular case;

(eA) the control or prohibition of incentives given or accepted by a provider; and

(f) any other matter which is necessary or expedient to be regulated in such code for the better achievement of the objects of the Act.[27]

PROPOSED AMENDMENTS TO GENERAL CODE

We comment on certain proposed amendments[28] to the General Code:[29]

DEFINITIONS

Clause 2 (Amendment of s 1(1) of General Code)

"Comparative"

The proposed amendments would insert in the General Code a definition of "comparative"[30] which would state—

> **"comparative"** refers to a direct or indirect comparison between providers or between financial products, financial services or related services of one or more provider or product supplier.

We submit that this definition would be clearer if it stated instead —

> **"comparative"** means directly or indirectly comparative between providers or financial products, financial services or related services of one or more providers or product suppliers.

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[26] Financial Advisory and Intermediary Services Act s 16(1)(a)–(e).

[27] Financial Advisory and Intermediary Services Act s 16(2)(a)–(f).

[28] We address only amendments which we consider to be objectionable,

[29] General Code of Conduct for Authorised Financial Services Providers and Representatives. Bd Notice 80 of 8 Aug 2003.
The General Code has been amended five times (by Bd Notices 43 of 14 May 2008, 152 of 29 Dec 2008, 171 of 28 Dec 2009, 58 of 19 Apr 2010 and 146 of 4 Dec 2014).

[30] Proposed amendments cl 2(c), to amend General Code s 1 (Definitions, construction and application) by inserting in s 1(1) a definition of "comparative".

"Direct marketing"

The proposed amendments would amend the definition of "Direct[31] marketing"[32] in the General Code, so that it would state:

> **"Direct marketing"** means rendering of financial services by way of telephone, internet, **digital mail platform,** media insert, direct **or electronic** mail **[,or electronic mail]**, **but excludes[excluding] the publication of an advertisement [any such means which are advertisements not containing transaction requirements.]**;

We submit that it is misleading, and mere jargon, to refer[33] to the rendering of financial services as "marketing".

We also submit that it is inaccurate and likewise jargon to describe an interaction by way of telephone, media insert, direct mail or electronic means as "Direct",[34] without mentioning face-to-face dealing which is in truth direct, and indeed more "direct" than the ways mentioned, which are actually indirect.

"Loyalty benefit"

The amendments would insert in the Code a definition of "loyalty benefit" as follows:

> "**loyalty benefit**" means any benefit that is directly or indirectly provided or made available to a client by a provider or a product supplier or an associate of the provider or product supplier, which benefit is wholly or partially contingent upon—
>
> *(a)* the financial product with that provider or product supplier remaining in place;
> *(b)* the client continuing to utilise a financial service of that provider or product supplier; or
> *(c)* the client increasing any benefit to be provided under a financial product; or
> *(d)* the client entering into any other financial product or benefit or utilising any related services offered by that provider, product supplier or their associates.

The intent of paragraphs *(c)* and *(d)* in this definition would be clearer if they were to state instead:

> *(c)* the client **agreeing to purchase, or invest in, an increase in** any benefit to be provided under a financial product; or
> *(d)* the client **agreeing to purchase, or invest in,** any other financial product or benefit or **pay for** any related services offered by that provider, product supplier or their associates.

"Puffery"

The amendments would insert in the Code the following definition of "puffery":

> "**puffery**" means any value judgments or subjective assessments of quality based solely on the opinion of the evaluator and where there is no pre-established measure or standard.

This definition is not accurate:

The mere fact that a value judgment or a subjective assessment of quality is "based solely on the opinion of the evaluator" would not make it "puffery", even if "there is no pre-established measure or standard": A value judgment or subjective assessment of quality based solely on opinion might nevertheless be accurate.

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[31] It is not clear why this word should gave a capital letter.

[32] Proposed amendments cl 2(d), to amend General Code s 1 by substituting in s 1(1) the definition of "Direct marketing".

[33] As the Code currently does and which the amendment will leave untouched.

[34] It is unclear why the word "Direct" is dignified with a capital letter.

Even if a judgment or assessment is wrong, and even if there is no pre-established measure or standard, this does not mean that the judgment or assessment is puffery. The judgment or assessment might well be an understatement of quality.

Accurately, "puffery"[35] is recommendation in extravagant terms, advertising with exaggerated or inflated praise;[36] a salesperson's exaggerated opinion of quality.[37]

We recommend that the definition simply state that—

"**puffery**" means an exaggerated opinion of quality.

"Replace or replacement"

This proposed definition reads:

"**replace or replacement**" means the action or process of—

(a) substituting a financial product, wholly or in part, with another financial product; or

(b) the termination or variation of a financial product and the purchase, entering into, investment in or variation of another financial product,

with the purpose of achieving the same or similar needs or objectives of the client or in anticipation of, or as a consequence of, effecting the substitution or variation, irrespective of the sequence of the occurrence of the transactions.

This proposed definition is baffling, repetitive and unduly wordy.

Paragraphs *(a)* and *(b)* are identical in meaning.

We recommend that the definition be replaced by the following:

"**replace**" means substitute a financial product wholly or partly with another financial product with the purpose of achieving the same or substantially similar needs or objectives of the client and irrespective of the sequence of transactions, and "**replacement**" has a corresponding meaning.

"AT ALL TIMES ACT HONESTLY"

Clause 3 (Amendment of s 2 of General Code)

"At all times act honestly"

This clause proposes to substitute this section by the following:

A provider must at all times **[render financial services] act** honestly, fairly, with due skill, care and diligence, and in the interests of clients and the integrity of the financial services industry.

This proposed requirement that a provider must "at all times act" honestly, etc, is too wide. It would require a provider to act honestly, fairly and with due skill etc, when playing golf or tennis.

The clause is unduly ambitious, and goes beyond powers conferred on the Registrar.

The Registrar does not have the power to prescribe a conduct provision that a provider must "at all times act" honestly and fairly, etc.

Her powers are restricted to prescribing that a provider must act honestly and fairly etc, for the purposes of ensuring that the clients being rendered financial services will be able

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35 Or "puffing".

36 *Shorter Oxford English Dictionary* svv "puff" and "puffery" (and see "laudation" and "commendation").

37 *Black's Law Dictionary* 6 ed sv "puffing".

to make informed decisions, and that their reasonable financial needs regarding financial products will be appropriately and suitably satisfied.[38]

It is respectfully submitted that the clause could state instead:

> A provider must**, [at all times render financial services]** for the purposes of ensuring that the clients being rendered financial services will be able to make informed decisions, and that their reasonable financial needs regarding financial products will be appropriately and suitably satisfied, act honestly, fairly, with due skill, care and diligence, and in the interests of clients and the integrity of the financial services industry.

CONFLICTS OF INTERESTS

Clause 4 (Amendment of s 3 of General Code)

Arrangement or relationship that "would constitute a conflict of interest"

This clause would insert, in that section of the Code, a subsection which would state—

> (5) A provider may not describe itself or the financial services it renders as being "independent" if […]
> (ii) any direct or indirect arrangement or relationship exists between the provider and any product supplier in respect of whose products the provider renders financial services that would constitute a conflict of interest.

This is unduly vague: It does not indicate, with reasonable certainty, the arrangements or relationships between a provider and supplier "that would constitute a conflict of interest".[39]

Arrangements or relationships commonly well exist between a provider and a supplier of products in respect of which the provider renders financial services. For example, a provider might regularly sell insurance policies of a particular supplier. The Code states that providers may receive commission from insurers.[40]

The Code already stipulates that a provider must furnish the client with particulars of—

> Any contractual relationship with the relevant supplier, and whether the provider has contractual relationships with other suppliers;
>
> Any conditions or restrictions imposed by the supplier regarding the types of products or services that may be provided or rendered by the provider;
>
> That the provider (if applicable)—
>
> holds *more than ten percent* of the product supplier's shares or has any equivalent substantial financial interest in the supplier;

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[38] Financial Advisory and Intermediary Services Act s 16(1)(a).

[39] There must be at least two interests before there can be a conflict thereof. Despite that, the Code refers incorrectly to a conflict of "interest" (in the singular).
The Act on the other hand refers correctly to conflicting "interests" (in the plural). Financial Advisory and Intermediary Services Act s 16(1)(d).

[40] For example. General Code s 3A(1)(a)(i).
The Long-term Insurance Act stipulates that no consideration shall be offered by a long-term insurer, or accepted by any person, for rendering services referred to in that regulations under that Act, other than commission or remuneration contemplated in those regulations: Long-term Insurance Act 52 of 1998 s 49. (An amendment, not relevant, is pending: Insurance Act 18 of 2017 s 72 read with Sched 1.)
The Long-term Insurance Act's regulations stipulate that no consideration shall be provided to or accepted by an independent intermediary for rendering services as intermediary, other than commission in monetary form, and the total commission payable in respect of the policy shall not exceed the maximum prescribed. Regulations under Long-term Insurance Act (Govt Notice R1492 of 27 Nov 1998) regs 3.2 and 3.4.

received *more than 30 percent* of total commission during the preceding 12 months from the product supplier.[41]

(This gives rise to the question whether a conflict of interests would exist if a provider —

(holds *some percentage* of a product supplier's shares (but *less than ten percent*); or

(received *a substantial percentage* of his commission from one supplier in the preceding 12 months (but *less than 30 percent*)?)

The Code does not define any particular contractual relationship, condition or restriction, shareholding or commission percentage (or any other, whether smaller or larger in ambit) as a conflict of interests.

The Code defines a conflict of interests in merely general terms:[42]

> **"conflict of interest"** means any situation in which a provider or a representative has an actual or potential interest that may, in rendering a financial service to a client—
> *(a)* influence the objective performance of his, her or its obligations to that client; or
> *(b)* prevent a provider or representative from rendering an unbiased and fair financial service to that client, or from acting in the interests of that client,
> including, but not limited to—
> (i) a financial interest;
> (ii) an ownership interest;
> (iii) any relationship with a third party.

(This definition also raises questions:

(What is an interest that may "influence" objective performance of obligations?

(When would a conflict of interests "prevent" a provider from rendering unbiased and fair service or acting in the interests of clients?

(Would a provider's interest in receiving commission constitute a conflict of interests?)

It is concluded that the proposed clause (that a provider may not describe itself or its services as independent if an arrangement or relationship exists between it and a supplier of products regarding which it renders services that "would constitute a conflict of interest") is unduly vague and liable to be struck down by the courts, and should be deleted.

The concerns which might be behind the draft clause appear to be addressed already by the existing provisions of the Code that—

A provider must avoid, and where this is not possible mitigate, any conflict of interest between it and a client;[43]

A provider must disclose to a client any conflict of interest in respect of that client, including—

Any ownership or financial interest[44] that the provider may be or become eligible for;[45] and

The nature of any relationship or arrangement with a third party that gives rise to a conflict of interest, in sufficient detail to a client to enable the client to understand the exact nature of the relationship or arrangement and the conflict;[46] and

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41 General Code s 4(1)(b)(i), (c), and (d)(i) and (ii).
42 Code s 1(1) svv "conflict of interest".
43 General Code s 3(1)(b).
44 Other than an immaterial financial interest.
45 General Code s 3(1)(c)(i)(bb).
46 General Code s 3(1)(c)(i)(cc).

The service must be executed with due regard to the interests of the client, which must be accorded appropriate priority over any interests of the provider.[47]

"FAIR OUTCOMES"

Clause 5 (Amendment of s 3A of General Code)

"Fair outcomes"

This clause proposes to substitute a paragraph in this section as follows:[48]

(b) A provider may not offer any financial interest to a representative of that provider **[for]**—

(i) **that is determined with reference** **[giving preference]** to the quantity of business secured for the provider **without also giving due regard** to the **[exclusion of the quality of the service rendered to]** **delivery of fair outcomes for** clients.

This "fair outcomes" criterion for judging a representative's performance, appears to goes beyond a provider's specific duty stipulated in the Code that, when a provider (and a representative[49]) renders a financial service, it must be rendered in accordance with the contractual relationship and reasonable requests or instructions of the client, which must be executed as soon as reasonably possible and with due regard to the interests of the client which must be accorded appropriate priority over any interests of the provider.[50]

This criterion impliedly incentivises representatives (but not the provider itself) to "deliver" undefined "fair outcomes for clients".

It is submitted that this clause is unduly vague, in not indicating with reasonable certainty what sort of things would constitute "fair outcomes for clients".

The clause, if adopted, would be liable to be struck down by the courts, in not indicating with reasonable certainty what is required.

The Act requires only that the Code should oblige a provider to "treat" clients fairly in a situation of conflicting interests.[51]

This clause (that a provider may not offer a financial interest to a representative without giving due regard to delivery of "fair outcomes" for clients) should therefore be deleted.

(The same applies to the clause which would insert a paragraph to the effect that a provider or its representatives may only receive fees as specified if the payment thereof does not impede the "delivery of fair outcomes" to clients.[52])

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47 General Code s 3(1)(d).

48 Amendment cl 5(b) substituting Code s 3A(1)(b)(i).

49 In the Code, unless the context indicates otherwise, a "provider" means an authorised financial services provider, and includes a representative. General Code s 1(1) sv "provider".

50 General Code s 3(1)(d).

51 Financial Advisory and Intermediary Services Act s 16(1)(d).

52 Amendment cl 5(e) inserting Code s 3A(1)(d)(iv).

RECORDS OF ADVICE

Clause 10 (Amendment of s 9 of General Code)

Registrar determining matters to be addressed in records of advice to clients

The draft proposes inserting, in the section of the Code dealing with records of advice,[53] a clause that—

> (1A) The Registrar may determine […] the matters to be addressed in the record of advice referred to in section 9(1).

This is redundant and confusing:

The Code already determines the matters to be addressed in a record of advice:

The Code's provision dealing with records of advice stipulates that a provider must maintain a record of the advice furnished to a client, which record must reflect the basis on which the advice was given, and in particular—

(a) a brief summary of the information and material on which the advice was based;

(b) the financial products which were considered;

(c) the financial product or products recommended with an explanation of why the product or products selected is or are likely to satisfy the client's identified needs and objectives; and

(d) where the financial product or products recommended is a replacement product—

(aa) the comparison of fees, charges, special terms and conditions, exclusions of liability, waiting periods, loadings, penalties, excesses, restrictions or circumstances in which benefits will not be provided, between the terminated product and the replacement product; and

(bb) the reasons why the replacement product was considered to be more suitable to the client's needs than retaining or modifying the terminated product.[54]

It is submitted that this proposed clause (authorising the Registrar to determine the matters to be addressed in the record of advice) should be deleted.

Clause 11 (Amendment of s 14 of General Code):

ADVERTISEMENTS LEADING TO FALSE CONCLUSIONS

Advertisements mustn't lead clients to false conclusions they might "reasonably" rely on

The proposed amendments would insert in the Code the following provisions:[55]

> An advertisement, when examined as a whole, must not be constructed in such a way as to lead the average targeted client to any false conclusions he or she might reasonably rely on.
>
> For purposes of this section, "client" includes the general public.

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53 General Code s 9 (Record of advice).

54 General Code s 9(1)(a), (b), (c), (d)(aa) and (bb).
Such record of advice is only required to be maintained where, to the knowledge of the provider, a transaction or contract in respect of a financial product is concluded by or on behalf of the client as a result of the advice furnished to the client. General Code s 9(1) proviso.

55 Amendment cl 11 inserting Code s 14(3)(i) read with s 14(1)(a).

The proposed clause is confusing, in stating that an advertisement must not be constructed[56] to lead a client to false conclusions he "might reasonably rely on".

This seems to imply that a client can reasonably rely on false conclusions.

It is submitted that the clause might be less confusing if it were to state:

> An advertisement must not contain a misrepresentation that misleads a client and induces him or her to transact in respect of a financial product or financial service to his or her financial detriment.

Other proposed clauses overlap with this clause and deal with the same subject-matter.[57]

Consideration should be given to whether they are necessary.

PUFFERY

Advertisements with puffery must conform to Advertising Standards Authority rules

The proposed amendments[58] would insert in the Code this clause:

> (11) Advertisements that include puffery must be consistent with the provisions relating to puffery in the Code of Advertising Practice issued by the Advertising Standards Authority of South Africa from time to time.

The Advertising Standards Authority states that it draws up its Code of Advertising Practice with the participation of representatives of the marketing communications industry.[59]

That body's current Code of Advertising Practice, in its general section relating to truthful presentation,[60] contains a provision[61] relating to puffery.[62]

The proposed clause to be inserted in the Code (that advertisements which include puffery must be consistent with the puffery provisions in the code of advertising practice issued by the Advertising Standards Authority) is probably an impermissible delegation of the powers afforded the registrar to draft a code of conduct.

It is submitted that the proposed clause should be deleted.

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56 Instead of referring to advertisements being "constructed", it would be more appropriate to refer to advertisements as being "framed".

57 Amendment cl 11 inserting Code s 14(3)(a)(i), (ii) and (iii); (j)(i), (ii) and (iii); (l); (o)(bb) and (cc); and (5)(c).
One proposed amendment refers in error to "policyholders". Amendment cl 11 inserting Code s 14(3)(j).

58 Amendment cl 11 inserting Code s 14(11).

59 The Advertising Standards Authority of South Africa: Codes: Code of Advertising Practice, *http://www.asasa.org.za/codes/advertising-code-of-practice/* .

60 Advertising Standards Authority, Code of Advertising Practice, Section ii – General principles, cl 4 (Presentation).

61 Among paragraphs dealing, respectively, with: Misleading claims, puffery, hyperbole, expert opinion, statistics and scientific information, headlines, and truthful presentation.

62 Which states:
4..2 2 Puffery
Value judgments, matters of opinion or subjective assessments are permissible provided that:
1. it is clear what is being expressed is an opinion;
2. there is no likelihood of the opinion or the way it is expressed, misleading consumers about any aspect of a product or service which is capable of being objectively assessed in the light of generally accepted standards.
The guiding principle is that puffery is true when an expression of opinion, but false when viewed as an expression of fact.
Advertising Standards Authority, Code of Advertising Practice, Section ii – General principles, cl 4 (Presentation) subclause 4.2 (Claims), para 2. Puffery.

Clause 13 (Substitution of Part XI of General Code): Complaints management

Clause 13 would insert a new Part XI ("Complaints management") which would comprise four sections[63] that would prescribe detailed procedures regarding complaints.

We do not in this memorandum point out the vague or otherwise invalid provisions in these four proposed new sections.

We restrict ourselves to pointing out that the proposed sections are *ultra vires* (beyond the powers of the Registrar), as we make clear below.

The provisions purport to address the following matters:

"complainant", "complaint"

The proposed amendments propose inserting in the Code definitions of a "complainant" and a "complaint."[64]

The Act, however, already defines a "complainant" and a "complaint," in quite different terms.[65]

Complaints management framework

The amendments would also purport to insert into the Code detailed and extensive sections dealing with a "complaints management framework".[66]

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[63] Amendment cl 13 inserting Code s 16 (Definitions), s 17 (Complaints management framework), s 18 (Engagement with ombud and reporting), s 19 (Reporting complaints information).

[64] Section 16 (Definitions) svv "complainant". "complaint".
These definitions would state:
"complainant" means a person who submits a complaint and includes a—
(a) client;
(b) person nominated as the person in respect of whom a product supplier should meet financial product benefits or that person's successor in title;
(c) person whose life is insured under a financial product that is an insurance policy;
(d) person that play a premium or an investment amount in respect of a financial product;
(e) member;
(f) person whose dissatisfaction relates to the approach, solicitation marketing or advertising material or an advertisement in respect of a financial product, financial service or related service of the provider,
who has a direct interest in the agreement, financial product or financial service to which the complaint relates, or a person acting on behalf of a person referred to in (a) to (f);
"complaint" means a expression of dissatisfaction by a person to a provider or, to the knowledge of the provider, to the provider's service supplier relating to a financial product or financial service provided or offered by that provider which indicates or alleges, regardless of whether such an expression of dissatisfaction is submitted together with or in relation to a client query, that—
(a) the provider or its service supplier has contravened or failed to comply with an agreement, a law, a rule, or a code of conduct which is binding on the provider or to which it subscribes;
(b) the provider or its service supplier's maladministration or wilful or neglectful action or failure to act, has caused the person harm, prejudice, distress or substantial inconvenience; or
(c) the provider or its service supplier's has treated the person unfairly.

[65] Financial Advisory and Intermediary Services Act s 1(1) svv "complainant", "complaint," as follows:
"complainant" means, subject to section 26 (1)(*a*)(ii), a specific client who submits a complaint to the Ombud;
"complaint" means, subject to section 26(1)(*a*)(iii), a specific complaint relating to a financial service rendered by a financial services provider or representative to the complainant on or after the date of commencement of this Act, and in which complaint it is alleged that the provider or representative—
(a) has contravened or failed to comply with a provision of this Act and that as a result thereof the complainant has suffered or is likely to suffer financial prejudice or damage;
(b) has wilfully or negligently rendered a financial service to the complainant which has caused prejudice or damage to the complainant or which is likely to result in such prejudice or damage; or
(c) has treated the complainant unfairly.

[66] Section 17 (Complaints management framework). This would purportedly regulate the following matters:
(1) Establishment of complaints management framework
(2) Requirements for complaints management framework

Those proposed four sections dealing with a "complaints management framework" are probably *ultra vires* (beyond the powers of the Registrar), for the following reasons:

The Act's provision setting out principles of a code of conduct[67] does not[68] authorise the Registrar in a code of conduct to prescribe procedures for dealing with complaints.

That provision describes the sort of duties which a code must oblige providers to comply with,[69] and what a code of conduct must contain.[70]

The provision[71] does not authorise the Registrar to prescribe procedures for dealing with complaints which may arise if a provider breaches a code of conduct.

Still less does it authorise the Registrar to prescribe complaints procedures if (as the proposed amendments say) a provider breaches "an agreement, a law, a rule […] which is binding on the provider or to which it subscribes".[72]

In short, the Act does not authorise the Registrar in a code of conduct to prescribe procedures for dealing with complaints.

Indeed, the Act stipulates[73] that the Financial Services Board[74] (not that the Registrar) may make Rules regarding complaints, including the manner of submitting a complaint to the provider concerned, and the rights and duties of the provider on receipt of a complaint.

The applicable provision of the Act[75] states:

> **Powers of Board**
>
> **26.** (1) The Board may make Rules, including different rules in respect of different categories of complaints or investigations by the Ombud, regarding—
>
> (*a*) […]
>
> (iv) the rights of complainants in connection with complaints, including the manner of submitting a complaint to the authorised financial services provider or representative concerned;
>
> (v) the rights and duties of any such provider or representative on receipt of any complaint, particularly in connection with the furnishing of replies to the complainant;
>
> (vi) the rights of a complainant to submit a complaint to the Ombud where the complainant is not satisfied with any reply received from the provider or representative concerned; […].

The Ombud means the Ombud for Financial Services Providers appointed under the Act.[76]

Board's Rules require referral to Ombud of complaints not resolved in six weeks

The Board in 2003 made Rules regarding proceedings of the office of the Ombud.[77] The Board's Rules state:

> **Type of complaint justiciable by Ombud.**—
>
> **4.** *(a)* For a complaint to be submitted to the Office—

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(3) Allocation of responsibilities
(4) Categorisation of complaints
(5) Complaints escalation and review process
(6) Decisions relating to complaints
(7) Record keeping, monitoring and analysis of complaints
(8) Communication with complainants.

67 Financial Advisory and Intermediary Services Act s 16 (Principles of code of conduct).
68 Whether expressly or impliedly.
69 Financial Advisory and Intermediary Services Act s 16(1)(a)–(e).
70 Financial Advisory and Intermediary Services Act s 16(2)(a)–(f).
71 Financial Advisory and Intermediary Services Act s 16 (Principles of code of conduct).
72 Amendment cl 13 inserting Code s 16 (Definitions) sv "complaint" par (a).
73 Financial Advisory and Intermediary Services Act s 16 (Principles of code of conduct).
74 Financial Advisory and Intermediary Services Act s 1(1) svv "Board", "Financial Services Board Act".
75 Financial Advisory and Intermediary Services Act s 26 **(**Powers of Board).
76 Financial Advisory and Intermediary Services Act s 1(1) sv "Ombud" read with s 21(1).
77 Bd Notice 81 of 8 Aug 2003, as amended by Bd Notice 100 of 29 Sep 2004. Rules on Proceedings of the Office of the Ombud for Financial Services Providers, 2003.

> […]
> (ii) the person against whom the complaint is made must be subject to the provisions of the Act (hereafter referred to as "the respondent");
> […]
> (iv) the respondent must have failed to address the complaint satisfactorily within six weeks of its receipt.

The Board's Rules also stipulate:

> **Rights and duties of respondent**
>
> **6.** *(a)* Where a complaint cannot within three weeks be addressed by the respondent, the respondent must as soon as reasonably possible after receipt of the complaint send to the complainant a written acknowledgment of the complaint with contact references of the respondent.
>
> *(b)* If within six weeks of receipt of a complaint the respondent has been unable to resolve the complaint to the satisfaction of the complainant, the respondent must inform the complainant that—
>
> (i) the complaint may be referred to the Office if the complainant wishes to pursue the matter; […]

Registrar's amendments don't mention six-week limit

The Registrar's proposed amendments to the Code regarding a "complaints management framework" are silent about the period of six weeks prescribed in the long-standing Rules of the Board for a provider to resolve a complaint.

The Registrar's proposed amendments state only that a provider must (contradictorily) "within a reasonable time" after receipt of a complaint "promptly" inform a complainant of the process to be followed in handling it, including details of escalation of complaints to the office of "the relevant ombud" and "any applicable timeline", and details of the provider's duties and complainant's rights "as set out in "the rules applicable to the relevant ombud."[78]

The proposed amendments also state that a provider must have appropriate processes in place for engagement with "any relevant ombud" in relation to its complaints;[79] and must endeavour to resolve a complaint before a final determination or ruling is made by "an ombud", or through its internal escalation process, without impeding or unduly delaying a complainant's access to "an ombud".[80]

Registrar's amendments unduly elaborate, not authorised

The Registrar's proposed amendments to the Code of Conduct regarding a "complaints management framework" are unduly elaborate, detailed and extensive, deal with a subject that the Registrar is not authorised to draft Codes about, and address matters which the Act envisages should be governed by the Rules made by the Board.

It is concluded that the "complaints management framework" is *ultra vires* the powers of the Registrar.

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78 Amendment cl 13 inserting Code s 17(8)(f)(iv) and (v).
79 Amendment cl 13 inserting Code s 18(1)(a)(i).
80 Amendment cl 13 inserting Code s 18(1)(b)(ii).

PROPOSED AMENDMENTS TO SHORT-TERM DEPOSIT CODE

The Registrar's proposed amendments to the Short-term Deposit Code of Conduct would require banks conducting short-term deposit business to comply with the provisions of the General Code of Conduct governing Advertising and Complaints.

Our submissions accordingly also apply to the proposed amendments to the Short-term Deposit Code, in so far as our submissions deal with—

Advertisements leading to false conclusions

Puffery

Complaints

Prepared by Gary Moore
28 February 2018

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