



FREE MARKET FOUNDATION

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Free Market Foundation submission on the Financial Advisory and Intermediary Services Act (FAIS)

To: Committee 1 (Triple Challenges of Inequality, Poverty and Unemployment)
High Level Panel on the Assessment of Key Legislation

By: Free Market Foundation

1. The Free Market Foundation

The Free Market Foundation (FMF) is an independent non-profit public benefit organisation founded in 1975 to promote and foster an open society, the rule of law, personal liberty, and economic and press freedom as fundamental components of its advocacy of human rights and democracy based on classical liberal principles. It is financed by membership subscriptions, donations and sponsorships.

2. Introduction

In its attached submissions to Parliament in 2001 when the Financial Advisory and Intermediary Services Bill (now Act 37 of 2002) was being considered, the FMF recommended that the entire draft law be scrapped. It reached this conclusion due to three factors: firstly, some provisions were inconsistent with the Constitution; secondly, the law would do more harm than good in our developing economy; and finally, the common law and criminal law were sufficient at the time to deal with the issues the bill was aimed at.

The Act has now been part of South African law for more than a decade and has been amended several times. In this submission we will therefore highlight the existing problems in the Act and suggest what needs to be changed, especially considering South Africa's triple challenges of poverty, inequality, and unemployment.

3. Unconstitutional powers

The rule of law is a foundational provision of our constitution, which provides for the 'supremacy' of the rule of law. FAIS violates every element of the rule of law. One of the first principles of the rule of law is the separation of powers, which demands that legislative functions be retained by Parliament, judicial functions by the courts, and executive functions by the executive. FAIS violates this principle in that substantive law, as opposed to regulations for the implementation of law, may not be created by bureaucratic whim. (Note: In the interests of brevity, we avoid such cumbersome phrases as 'it therefore appears as if ...' or "we respectfully suggest that ...")

Under the definition of 'financial products' in section 1 of the Act the registrar may, under subsection 1(h) declare something to be a financial product. Prior to the enactment of the Financial Services Laws General Amendment Act of 2013, the registrar had to consult the Advisory Committee. The Amendment removed this requirement and abolished the committee. This left virtually unlimited personal discretion in the hands of a single official, save for subsection (2), which provides that certain products can be exempted from being 'financial products' in the Act, or by the registrar 'taking into consideration the extent to which the rendering of financial services in respect of the product is regulated by any other law.' Notwithstanding this provision, the registrar's discretionary power remains virtually unfettered.

Section 22 of the Constitution provides that every citizen has the right to choose their trade, occupation or profession freely, and the practice of these occupations may be regulated by law. The registrar's unfettered discretion does not amount to regulation 'by law', but by personal whim. The rest of the Act's definition of 'financial product', excluding subsection (1)(h), is an example of how this 'regulation' may be executed.

Section 34 of the Act gives the registrar unbridled and therefore unconstitutional powers which directly infringe on South Africans' section 22 rights. The 'guidelines' in subsection (2) are insufficient, especially in light of subsection (2)(b) which could be stretched so far as to make any practice an 'undesirable practice'. The rule of law requires objective criteria where discretion cannot be avoided. This provision essentially confers on the registrar, an executive official, the

right to ban a trade or occupation chosen by a rights-bearing citizen by arbitrary decree. Such provisions in FAIS not only strike at the heart of our constitutional democracy, but also exacerbate the challenges of transformation and unemployment.

Section 28(5) usurps judicial functions. Subsection (a) states that a judgment by the 'board of appeal' must be regarded as a judgment by a court, and subsection (b) states that a matter can only be appealed to the 'board of appeal' with the leave of the Ombud. These powers are unconstitutional because they are inconsistent with the separation of powers requirement of the rule of law. .

4. Over-regulation

When the Act was passed, a cost-benefit analysis was conducted. It was profoundly flawed in various respects. It did at least make quantified predictions. The opposite happened of what was promised and predicted. The perceived need for far-reaching amendments and new 'twin peaks' proposals amounts to an admission that FAIS failed. In any event, economic theory predicted that FAIS would have negative effects for our developing economy on balance. The Act imposes various 'duties', examinations and qualifications on financial service providers which impose compliance costs in addition to taxes and burdens imposed by other laws.

These increased costs and requirements necessarily have negative (intended and unintended) consequences, such as fewer jobs, increased costs passed on to consumers, reduced innovation and product range, and less value for many. One of the conspicuous failures of FAIS is that, instead of there being improved policy and premium persistency, as promised and predicted, there has been a dramatic deterioration.

Before FAIS there was transformational and burgeoning independent black insurance broker fraternity, which has been virtually exterminated.

It is now clear that the law as it existed prior to FIAS was perfectly adequate to deal with concerns that the Act was supposed to address. Alleged failings of the industry were simply a result of ineffective law enforcement rather than insufficient or inappropriate law. Increased regulation disincentivises law enforcement and creates entry barriers enterprising people hoping to enter the financial services field, especially for emerging communities. On the contrary, FAIS has forced many fledgling providers or needed services in lower and middle income communities out of the industry often into destitution.

5. Conclusion

Ideally, the FMF would recommend that the Act be repealed in its entirety so as to allow civil and criminal common law to deal with the matters that the Act has failed to address successfully. However, within the context of this High Level Panel which focuses especially on matters of poverty and unemployment, the FMF recommends as follows:

1. Section 1(1)(h) (in the definitions clause) be repealed.
2. Section 34 be amended or preferably repealed so as to temper the near-absolute discretion of the registrar to criminalise 'particular business practices'.
3. Section 28(5) and section 39 be amended to provide an explicit right to appeal to the ordinary courts of law, and to provide that 'board of appeal' rulings not be considered judgments of a court. Alternatively, that such rulings are all subject to the full right of merit appeal to the courts (as opposed to mere review on alleged irregularities).
4. Section 6A (Fit and Proper Requirements) be amended so as to temper the near-absolute discretion of the registrar to determining who is 'fit and proper' to serve in the financial services industry and how an individual may be denied that status.

Attachments

1. FAIS Act with highlighted concerns
2. FAIS Bill original FMF submission
3. FAIS to Twin Peaks – executive summary

(28 February 2014 – to date)

[This is the **current** version and applies as from **28 February 2014**, i.e. the date of commencement of the Financial Services Laws General Amendment Act 45 of 2013 – to date]

FINANCIAL ADVISORY AND INTERMEDIARY SERVICES ACT 37 OF 2002

(Government Notice 1453 in Government Gazette 24079 dated 15 November 2002.

Commencement date: 15 November 2002, excluding sections 13(1)(a) and 20 to 31. [Proc. R81, Gazette No. 24075, dated 15 November 2002].

Commencement date of sections 20 to 31: 8 March 2003 [Proc. R21, Gazette No. 25027, dated 7 March 2003].

Commencement date of section 13(1)(a): 30 September 2004 [Proc. 35, Gazette No. 26496, dated 2 July 2004]].

As amended by:

Financial Services Laws General Amendment Act 22 of 2008 – Government Notice 1071 in Government Gazette 31471, dated 30 September 2008. Commencement date: 1 November 2008, unless otherwise indicated [Government Notice 1170, Gazette No. 31561, dated 31 October 2008].

Financial Markets Act 19 of 2012 – Government Notice 70 in Government Gazette 36121, dated 1 February 2013. Commencement date: 3 June 2013 [Proc. No. 12, Gazette No. 36485, dated 31 May 2013].

Financial Services Laws General Amendment Act 45 of 2013 – Government Notice 15 in Government Gazette 37237, dated 16 January 2014. Commencement date: 28 February 2014, unless otherwise indicated [Government Notice 120, Gazette No 37351, dated 18 February 2014].

(English text signed by the President.)

(Assented to 15 November 2002.)

ACT

To regulate the rendering of certain financial advisory and intermediary services to clients; to repeal or amend certain laws; and to provide for matters incidental thereto.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:-

TABLE OF CONTENTS

Prepared by:

In partnership with:

INTRODUCTORY PROVISIONS

1. Definitions and application

CHAPTER I ADMINISTRATION OF ACT

- 2. Registrar and deputy registrar of financial services providers
- 3. General provisions concerning registrar
- 4. Special provisions concerning powers of registrar
- 5.
- 6. Delegations and authorisations
- 6A. Fit and proper requirements

CHAPTER II AUTHORISATION OF FINANCIAL SERVICES PROVIDERS

- 7. Authorisation of financial services providers
- 8. Application for authorisation
- 8A. Compliance with fit and proper requirements after authorisation
- 9. Suspension and withdrawal of authorisation
- 10.
- 11. Lapsing of licence
- 12. Exemptions in respect of product suppliers

CHAPTER III REPRESENTATIVES OF AUTHORISED FINANCIAL SERVICES PROVIDERS

- 13. Qualifications of representatives and duties of authorised financial services providers
- 14. Debarment of representatives
- 14A. Debarment by registrar

CHAPTER IV CODES OF CONDUCT

- 15. Publication of codes of conduct
- 16. Principles of codes of conduct

CHAPTER V DUTIES OF AUTHORISED FINANCIAL SERVICES PROVIDERS

- 17. Compliance officers and compliance arrangements

Prepared by:

In partnership with:

18. Maintenance of records
19. Accounting and audit requirements

CHAPTER VI ENFORCEMENT

PART I

Ombud for financial services providers

20. Office of Ombud for Financial Services Providers
21. Appointment of Ombud and deputy ombuds
22. Funding of Office
23. Accountability
24. General administrative powers of Ombud
25. Disestablishment and liquidation of Office
26. Powers of Board
27. Receipt of complaints, prescription, jurisdiction and investigation
28. **Determinations by Ombud**
29. Record-keeping
30. Report of Ombud
31. Penalties
32. Promotion of client education by registrar

PART II

Other enforcement measures

33.
34. **Undesirable practices**
35. Regulations
36. Offences and penalties
37.
38. Voluntary sequestration, winding-up and closure
- 38A. Business rescue
- 38B. Application by registrar for sequestration or liquidation
- 38C. Directives
39. **Right of appeal**

CHAPTER VII MISCELLANEOUS

40. Saving of rights
41. Fees and penalties

Prepared by:

In partnership with:

- 42.
- 43.
- 44. Exemptions by registrar and Minister
- 45. Exemptions, and amendment or repeal of laws
- 46. Commencement and short title

SCHEDULE

LAWS AMENDED OR REPEALED

(Arrangement of sections amended by section 207 of Act 45 of 2013)

INTRODUCTORY PROVISIONS

1. Definitions and application

- (1) In this Act, unless the context indicates otherwise -

“advice” means, subject to subsection (3)(a), any recommendation, guidance or proposal of a financial nature furnished, by any means or medium, to any client or group of clients -

- (a) in respect of the purchase of any financial product; or
- (b) in respect of the investment in any financial product; or
- (c) on the conclusion of any other transaction, including a loan or cession, aimed at the incurring of any liability or the acquisition of any right or benefit in respect of any financial product; or
- (d) on the variation of any term or condition applying to a financial product, on the replacement of any such product, or on the termination of any purchase of or investment in any such product,

and irrespective of whether or not such advice -

- (i) is furnished in the course of or incidental to financial planning in connection with the affairs of the client; or
- (ii) results in any such purchase, investment, transaction, variation, replacement or termination, as the case may be, being effected;

“Advisory Committee”

(Definition of “Advisory Committee” deleted by section 175(a) of Act 45 of 2013)

“application”, in relation to the performance of any act by the registrar, means, except where in a specific case other specific provision is made, an application referred to in section 3(2);

“auditor” means an auditor registered in terms of the Auditing Profession Act, 2005 (Act No. 26 of 2005);

(Definition of “auditor” substituted by section 45(a) of Act 22 of 2008)

“authorised financial services provider” or **“provider”** means a person who has been granted an authorisation as a financial services provider by the issue to that person of a licence under section 8;

“Board” means the Financial Services Board established by section 2 of the Financial Services Board Act;

“board of appeal” means the board of appeal established by section 26(1) of the Financial Services Board Act;

“client” means a specific person or group of persons, excluding the general public, who is or may become the subject to whom a financial service is rendered intentionally, or is the successor in title of such person or the beneficiary of such service;

“code of conduct” means any published code of conduct contemplated in section 15;

“collective investment scheme” means a collective investment scheme as defined in the Collective Investment Schemes Control Act, 2002;

“Companies Act” means the Companies Act, 2008 (Act No. 71 of 2008);

(Definition of “Companies Act” inserted by section 175(b) of Act 45 of 2013)

“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;

“compliance officer” means a compliance officer for an authorised financial services provider referred to in section 17;

“continuous professional development” means a process of learning and development with the aim of enabling a financial services provider, key individual, representative or compliance officer to maintain the competency to comply with this Act;

(Definition of “continuous professional development” inserted by section 175(c) of Act 45 of 2013)

“Court” means any court having jurisdiction;

“document” includes a document created, recorded, transmitted or stored in digital or other intangible but readable form by way of electronic, magnetic, optical or any similar means;

(Definition of “document” inserted by section 45(b) of Act 22 of 2008)

“exempt” means to exempt, on application by a person or on the registrar’s own initiative, on any of the grounds mentioned in section 44(1)(a), (b) or (c) and (4)(a);

“financial product” means, subject to subsection (2) –

(a) securities and instruments, including –

- (i) shares in a company other than a “share block company” as defined in the Share Blocks Control Act, 1980 (Act No. 59 of 1980);
- (ii) debentures and securitised debt;
- (iii) any money-market instrument;
- (iv) any warrant, certificate, and other instrument acknowledging, conferring or creating rights to subscribe to, acquire, dispose of, or convert securities and instruments referred to in subparagraphs (i), (ii) and (iii);
- (v) any “securities” as defined in section 1 of the Financial Markets Act, 2012 (Act No. 19 of 2012);

(Paragraph (a)(v) of the definition of “financial product” substituted by section 175(d) of Act 45 of 2013)

(b) a participatory interest in one or more collective investment schemes;

(c) a long-term or a short-term insurance contract or policy, referred to in the Long-term Insurance Act, 1998 (Act No. 52 of 1998), and the Short-term Insurance Act, 1998 (Act No. 53 of 1998), respectively;

(d) a benefit provided by -

- (i) a pension fund organisation as defined in section 1(1) of the Pension Funds Act, 1956 (Act No. 24 of 1956), to the members of the organisation by virtue of membership; or
- (ii) a friendly society referred to in the Friendly Societies Act, 1956 (Act No. 25 of 1956), to the members of the society by virtue of membership;

(e) a foreign currency denominated investment instrument, including a foreign currency deposit;

(f) a deposit as defined in section 1(1) of the Banks Act, 1990 (Act No. 94 of 1990);

(g) a health service benefit provided by a medical scheme as defined in section 1(1) of the Medical Schemes Act, 1998 (Act No. 131 of 1998);

(h) any other product similar in nature to any financial product referred to in paragraphs (a) to (g), inclusive, declared by the registrar by notice in the *Gazette* to be a financial product for the purposes of this Act;

(Paragraph (h) of the definition of "financial product" substituted by section 175(e) of Act 45 of 2013)

(i) any combined product containing one or more of the financial products referred to in paragraphs (a) to (h), inclusive;

(j) any financial product issued by any foreign product supplier and marketed in the Republic and which in nature and character is essentially similar or corresponding to a financial product referred to in paragraphs (a) to (i), inclusive;

"financial service" means any service contemplated in paragraph (a), (b) or (c) of the definition of "financial services provider", including any category of such services;

"Financial Services Board Act" means the Financial Services Board Act, 1990 (Act No. 97 of 1990);

"financial services provider" means any person, other than a representative, who as a regular feature of the business of such person -

(a) furnishes advice; or

(b) furnishes advice and renders any intermediary service; or

(c) renders an intermediary service;

"fit and proper requirements" means the requirements published under section 6A;

(Definition of "fit and proper requirements" inserted by section 175(f) of Act 45 of 2013)

"intermediary service" means, subject to subsection (3)(6), any act other than the furnishing of advice, performed by a person for or on behalf of a client or product supplier -

- (a) the result of which is that a client may enter into, offers to enter into or enters into any transaction in respect of a financial product with a product supplier; or
- (b) with a view to -
 - (i) buying, selling or otherwise dealing in (whether on a discretionary or non-discretionary basis), managing, administering, keeping in safe custody, maintaining or servicing a financial product purchased by a client from a product supplier or in which the client has invested;
 - (ii) collecting or accounting for premiums or other moneys payable by the client to a product supplier in respect of a financial product; or
 - (iii) receiving, submitting or processing the claims of a client against a product supplier;

"key individual", in relation to an authorised financial services provider, or a representative, carrying on business as -

- (a) a corporate or unincorporated body, a trust or a partnership, means any natural person responsible for managing or overseeing, either alone or together with other so responsible persons, the activities of the body, trust or partnership relating to the rendering of any financial service; or
- (b) a corporate body or trust consisting of only one natural person as member, director, shareholder or trustee, means any such natural person;

"licence" means a licence contemplated in section 7(1);

"licensee" means a financial services provider to whom a licence has been issued under section 8;

"Minister" means the Minister of Finance;

"Office" means the Office of the Ombud established by section 20(1);

"official web site" means a web site as defined in section 1 of the Electronic Communications and Transactions Act, 2002 (Act No. 25 of 2002), set up by the Board;

(Definition of "official web site" inserted by section 175(g) of Act 45 of 2013)

“Ombud” means -

- (a) the Ombud for Financial Services Providers appointed in terms of section 21(1); and
- (b) for the purposes of sections 27, 28, 31 and 39, includes a deputy ombud;

“person” means any natural person, partnership or trust, and includes -

- (a) any organ of state as defined in section 239 of the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996);
- (b) any company incorporated or registered as such under any law;
- (c) any body of persons corporate or unincorporate;

“prescribe” means prescribe by regulation;

“product supplier” means any person who issues a financial product;

(Definition of “product supplier” substituted by section 175(h) of Act 45 of 2013)

“publish” means any direct or indirect communication transmitted by any medium, or any representation or reference written, inscribed, recorded, encoded upon or embedded within any medium, by means of which a person, other than the registrar, seeks to bring any information to the attention of any other person, or all or part of the public;

(Definition of “publish” inserted by section 175(i) of Act 45 of 2013)

“registrar” means the person referred to in section 2;

(Definition of “registrar” substituted by section 175(j) of Act 45 of 2013)

“regulation” means a regulation made under section 35;

“regulatory authority” means an entity established in terms of national legislation responsible for regulating activities of an industry, or sector of an industry;

(Definition of “regulatory authority” inserted by section 45(c) of Act 22 of 2008)

“representative” means any person, including a person employed or mandated by such first-mentioned person, who renders a financial service to a client for or on behalf of a financial services provider, in terms of conditions of employment or any other mandate, but excludes a person rendering clerical, technical, administrative, legal, accounting or other service in a subsidiary or subordinate capacity, which service -

- (a) does not require judgment on the part of the latter person; or
- (b) does not lead a client to any specific transaction in respect of a financial product in response to general enquiries;

(Definition of "representative" substituted by section 45(d) of Act 22 of 2008)

"rule" means a rule made by the Board under section 26;

"this Act" includes any regulation, rule or code of conduct, and any notice given, approval or exemption granted, determination made, requirement or condition determined or imposed, or any other decision referred to in section 3(1).

- (2) For the purposes of this Act a financial product does not include any financial product exempted from the provisions of this Act by the registrar by notice in the *Gazette*, taking into consideration the extent to which the rendering of financial services in respect of the product is regulated by any other law.

(Section 1(2) substituted by section 175(k) of Act 45 of 2013)

- (3) For the purposes of this Act -

- (a) advice does not include -

- (i) factual advice given merely -

- (aa) on the procedure for entering into a transaction in respect of any financial product;

- (bb) in relation to the description of a financial product;

- (cc) in answer to routine administrative queries;

- (dd) in the form of objective information about a particular financial product; or

- (ee) by the display or distribution of promotional material;

- (ii) an analysis or report on a financial product without any express or implied recommendation, guidance or proposal that any particular transaction in respect of the product is appropriate to the particular investment objectives, financial situation or particular needs of a client;

- (iii) advice given by -

- (aa) the board of management, or any board member, of any pension fund organisation or friendly society referred to in paragraph (d) of the definition of "financial product"

in subsection (1) to the members of the organisation or society on benefits enjoyed or to be enjoyed by such members; or

(bb) the board of trustees of any medical scheme referred to in paragraph (g) of the said definition of "financial product", or any board member, to the members of the medical scheme, on health care benefits enjoyed or to be enjoyed by such members; or

(iv) any other advisory activity exempted from the provisions of this Act by the registrar by notice in the *Gazette*;

(Section 1(3)(a)(iv) substituted by section 175(l) of Act 45 of 2013)

(b) intermediary service does not include -

(i) the rendering by a bank, mutual bank or co-operative bank of a service contemplated in paragraph (b)(ii) of the definition of "intermediary service" where the bank, mutual bank or co-operative bank acts merely as a conduit between a client and another product supplier;

(Section 1(3)(b)(i) substituted by section 45(e) of Act 22 of 2008)

(ii) an intermediary service rendered by a product supplier -

(aa) who is authorised under a particular law to conduct business as a financial institution; and

(bb) where the rendering of such service is regulated by or under such law;

(iii) any other service exempted from the provisions of this Act by the registrar by notice in the *Gazette*.

(Section 1(3)(b)(iii) substituted by section 175(m) of Act 45 of 2013)

(4) The rendering of a financial service in respect of a deposit referred to in paragraph (f) of the definition of "financial product" in subsection (1) with a term not exceeding 12 months by a provider which is a bank as defined in the Banks Act, 1990 (Act No. 94 of 1990), or a mutual bank as defined in the Mutual Banks Act, 1993 (Act No. 124 of 1993), or a co-operative bank as defined in the Co-operative Banks Act, 2007 (Act No. 40 of 2007), is regulated by this Act in the code of conduct contemplated in section 15(2)(b).

(Section 1(4) substituted by section 45(f) of Act 22 of 2008)

(Section 1(4) substituted by section 175(n) of Act 45 of 2013)

(5) Provisions of this Act relating to financial services providers, representatives and product suppliers apply to any natural person or group of natural persons acting within the scope of their official duties in

the employ of the State, or any organisational unit of the State, or any public entity, unless the Minister by notice in the *Gazette* determines otherwise in respect of any such person, group, unit or entity.

- (6) This Act must be construed as being in addition to any other law not inconsistent with its provisions and not as replacing any such law.

CHAPTER I ADMINISTRATION OF ACT

2. Registrar and deputy registrar of financial services providers

- (1) The executive officer referred to in section 1 of the Financial Services Board Act, 1990 (Act No. 97 of 1990), is the registrar of financial services providers and has the powers and duties provided for by or under this Act and any other law.
- (2) The deputy executive officer referred to in section 1 of the Financial Services Board Act, 1990 (Act No. 97 of 1990), is the deputy registrar of financial services providers.
- (3) The deputy registrar of financial service providers exercises the powers and duties of the registrar of financial services providers to the extent that such powers and duties have been delegated to the deputy registrar under section 20 of the Financial Services Board Act, 1990 (Act No. 97 of 1990).

(Section 2 substituted by section 176 of Act 45 of 2013)

3. General provisions concerning registrar

- (1) Subject to the provisions of this Act, any notice given, approval or exemption granted, determination made, requirement or condition determined or imposed, or any other decision taken by the registrar under an enabling provision of this Act is valid only if it is reduced to a durable written or printed form or, where communicated electronically, has been correctly transmitted in a legible form.
- (2) Whenever the performance of any act contemplated in subsection (1) is sought by a person under this Act or any other law, application therefor must, subject to any other specific provision of this Act, be made in writing to the registrar and the application must -
- (a) be made in the form and manner determined by or in terms of this Act, or any other law, or as otherwise required by the registrar;
 - (b) be accompanied by -
 - (i) the fees payable in terms of this Act; and
 - (ii) the information or documents required by the registrar.

- (3) The registrar must in connection with the application of any provision of this Act to or in respect of any financial product or financial service, consult with any regulatory or supervisory authority in the Republic, including the Registrar of Medical Schemes, referred to in section 42, who is by law empowered to perform a regulatory or supervisory function in respect of such product or service.

4. Special provisions concerning powers of registrar

- (1) When anything is required or permitted to be done by the registrar in terms of this Act within a particular period, the registrar may on application or on own initiative before the expiry of that period, extend it for any sufficient cause.
- (2) The registrar may by notice direct an authorised financial services provider, representative or compliance officer to furnish the registrar, within a specified period, with specified information or documents required by the registrar for the purposes of this Act.

(Section 4(2) substituted by section 177(a) of Act 45 of 2013)

- (3)
- (a) If any advertisement, brochure or similar document relating to the rendering of a financial service by an authorised financial services provider or a representative is being, or is to be, published by any person, and any such document is misleading, or confusing, or contains any incorrect statement of fact, the registrar may by notice direct that person not to publish it, to cease publishing it or to effect changes thereto.
- (b) A notice contemplated in paragraph (a) takes effect on a date specified in such notice after the registrar has -
- (i) provided the person concerned with the reasons for the notice; and
- (ii) afforded the person concerned a reasonable opportunity to be heard.
- (4) If there is reason to believe that a person is contravening or failing to comply with, or has contravened or failed to comply with, a provision of this Act, the registrar may -
- (a) by notice direct that person -
- (i) to furnish the registrar within a specified period with any specified information or documents in the possession or under the control of that person and which relate to the subject-matter of such contravention or failure;
- (ii) to appear before the registrar at a specified time and place for the purpose of discussing such matter with the registrar; or

(iii) to make arrangements for the discharge of all or any part of that person's obligations in terms of this Act;

(b) if satisfied that in the case concerned significant prejudice or damage to clients has occurred or may occur, apply to a Court for an order restraining such person from continuing business or dealing with the funds or other property held by such person on behalf of clients or other persons, pending the institution by the registrar of an application or action contemplated in section 33(1) and (2), or the exercising by the registrar of such other legal remedy as may be available to the registrar;

(c) if prejudice or damage may have occurred to a client, refer the matter, together with any information or documentation in the registrar's possession, to the Office to be dealt with as a complaint by the client concerned.

(5)

(a) The registrar may—

(i) conduct an on-site visit under Chapter 1A of the Financial Institutions (Protection of Funds) Act, 2001 (Act No. 28 of 2001); or

(Section 4(5)(a)(i) substituted by section 177(b) of Act 45 of 2013)

(ii) instruct an inspector to conduct an inspection under the Inspection of Financial Institutions Act, 1998 (Act No. 80 of 1998).

(Section 4(5)(a)(ii) substituted by section 177(b) of Act 45 of 2013)

(b)

(Section 4(5)(b) deleted by section 177(c) of Act 45 of 2013)

(6) After an on-site visit or inspection has been carried out in terms of subsection (5), the registrar may direct the provider, representative, compliance officer or person concerned to take any steps, or to refrain from performing or continuing to perform any act, to terminate or remedy any contravention of or failure to comply with any provision of this Act: Provided that the registrar may not make an order contemplated in section 6D(2) (b) of the Financial Institutions (Protection of Funds) Act, 2001 (Act No. 28 of 2001).

(Section 4(6) substituted by section 177(d) of Act 45 of 2013)

(7)

(Section 4(7) deleted by section 177(e) of Act 45 of 2013)

(Section 4 substituted by section 46 of Act 22 of 2008)

5.

(Section 5 repealed by section 178 of Act 45 of 2013)

6. Delegations and authorisations

- (1) The Minister may, on such conditions as the Minister may determine (which the Minister may at any time thereafter amend or withdraw), delegate any power conferred upon the Minister by this Act, excluding the power to make regulations under section 35, to the head of the National Treasury, any other official in the National Treasury, or the registrar.
- (2) The Board may -
 - (a) on such conditions as the Board may determine (which the Board may at any time thereafter amend or withdraw), delegate to the chairperson, any other member of the Board or the registrar, any power conferred on the Board by or under this Act, excluding the power to make rules under section 26; or
 - (b) so authorise the chairperson, any other member of the Board or the registrar, to carry out any duty assigned to the Board by or under this Act.
- (3) The registrar may -
 - (a) on such conditions as the registrar may determine (which the registrar may at any time thereafter amend or withdraw), delegate to -
 - (i) another member of the executive of the Board;
 - (ii) any person who has been appointed by the Board; or
 - (iii) any person or body recognised by the Board for that purpose, any power conferred upon the registrar by or under this Act, including a power delegated to the registrar under this Act; or
 - (b) so authorise such member of the executive, person or body to carry out any duty assigned to the registrar by or under this Act.
- (4) For the purposes of recognition by the Board of a body contemplated in subsection (3)(a)(iii), the following provisions apply:
 - (a) Any body of persons which represents a group of persons falling within the ambit of this Act, may apply to the registrar for recognition by the Board by notice on the official web site as a representative body for the purpose of performing the functions determined by the registrar.

(Section 6(4)(a) substituted by section 179(a) of Act 45 of 2013)

- (b) an application for such recognition -
 - (i) must be made in the manner determined by the registrar by notice on the official web site;
(Section 6(4)(b)(i) substituted by section 179(b) of Act 45 of 2013)
 - (ii) must be accompanied by the fee determined in terms of this Act;
 - (iii) must be accompanied by information proving that the applicant has sufficient financial, management, and manpower resources and experience necessary for performing the functions determined by the registrar, and that the applicant is reasonably representative of the relevant group of persons which it purports to represent;
- (c) if the registrar is satisfied that the applicant has complied with all requirements, the application must be submitted by the registrar to the Board for consideration;
- (d) the Board may -
 - (i) grant an application unconditionally; or
 - (ii) grant an application subject to such conditions as it deems necessary, after having given the applicant a reasonable opportunity to make submissions on the proposed conditions and having considered any such submissions, and direct the registrar to inform the applicant accordingly; or
 - (iii) after having given the applicant a reasonable opportunity to make submissions and having considered any such submissions, refuse an application and direct the registrar to furnish the applicant with the written reasons of the Board for the refusal;
- (e) a body recognised as a representative body contemplated in this subsection may at any time apply to the Board for the withdrawal or amendment of any condition imposed on the granting of the application;
- (f) the Board may -
 - (i) grant any application, or portion thereof, referred to in paragraph (e) and direct the registrar to inform the applicant accordingly; or
 - (ii) refuse any such application, or portion thereof, and direct the registrar to furnish the applicant with the written reasons of the Board for the refusal.

- (5) Any delegation or authorisation contemplated in this section does not prohibit the exercise of the power concerned or the carrying out of the duty concerned by the Minister, Board or registrar, as the case may be.
- (6) Anything done or omitted to be done under any delegation or authorisation contemplated in this section is deemed to have been done or omitted by the Minister, the Board or the registrar, as the case may be.

6A. Fit and proper requirements

- (1) The registrar, for purposes of this Act, by notice in the *Gazette*-
 - (a) must-
 - (i) classify financial services providers into different categories;
 - (ii) determine fit and proper requirements for each category of providers; and
 - (iii) in each category of providers determine fit and proper requirements for-
 - (aa) key individuals of providers;
 - (bb) representatives of providers;
 - (cc) key individuals of representatives of providers; and
 - (dd) compliance officers; and
 - (b) may determine fit and proper requirements for providers, key individuals, representatives, key individuals of representatives and compliance officers in general.
- (2) Fit and proper requirements may include, but are not limited to, appropriate standards relating to-
 - (a) personal character qualities of honesty and integrity;
 - (b) competence, including-
 - (i) experience;
 - (ii) qualifications; and
 - (iii) knowledge tested through examinations determined by the registrar;

- (c) operational ability;
 - (d) financial soundness; and
 - (e) continuous professional development.
- (3) Different fit and proper requirements may be determined for providers, representatives and compliance officers that are natural persons and for those that are partnerships, trusts or corporate or unincorporated bodies.
- (4) The registrar may, by notice in the *Gazette*, amend the fit and proper requirements from time to time, and a provider, key individual, representative, key individual of a representative and compliance officer must comply therewith within such period as determined by the registrar.

(Section 6A inserted by section 180 of Act 45 of 2013)

CHAPTER II

AUTHORISATION OF FINANCIAL SERVICES PROVIDERS

7. Authorisation of financial services providers

- (1) With effect from a date determined by the Minister by notice in the *Gazette*, a person may not act or offer to act as a-
- (a) financial services provider, unless such person has been issued with a licence under section 8; or
 - (b) a representative, unless such person has been appointed as a representative of an authorised financial services provider under section 13.

(Section 7(1) substituted by section 181 of Act 45 of 2013)

- (2) Subject to section 40, a transaction concluded on or after the date contemplated in subsection (1) between a product supplier and any client by virtue of any financial service rendered to the client by a person not authorised as a financial services provider, or by any other person acting on behalf of such unauthorized person, is not unenforceable between the product supplier and the client merely by reason of such lack of authorisation.
- (3) An authorised financial services provider or representative may only conduct financial services related business with a person rendering financial services if that person has, where lawfully required, been issued with a licence for the rendering of such financial services and the conditions and restrictions of

that licence authorises the rendering of those financial services, or is a representative as contemplated in this Act.

(Section 7(3) added by section 47 of Act 22 of 2008 with effect from 1 May 2009)

8. Application for authorisation

- (1) An application for an authorisation referred to in section 7(1), including an application by an applicant not domiciled in the Republic, must be submitted to the registrar in the form and manner determined by the registrar by notice on the official web site, and be accompanied by information to satisfy the registrar that the applicant complies with the fit and proper requirements determined for financial services providers or categories of providers, determined by the registrar by notice in the *Gazette*, in respect of-

(a) personal character qualities of honesty and integrity;

(b) competence;

(bA) operational ability; and

(c) financial soundness.

(Section 8(1) substituted by section 182(a) of Act 45 of 2013)

- (1A) If the applicant is a partnership, trust or corporate or unincorporated body, the requirements in paragraphs (a) and (b) of subsection (1) do not apply to the applicant, but in such a case the application must be accompanied by additional information to satisfy the registrar that every person who acts as a key individual of the applicant complies with the fit and proper requirements for key individuals in the category of financial services providers applied for, in respect of-

(a) personal character qualities of honesty and integrity;

(b) competence; and

(c) operational ability,

to the extent required in order for such key individual to fulfil the responsibilities imposed by this Act.

(Section 8(1A) inserted by section 182(b) of Act 45 of 2013)

- (2) The registrar may -

- (a) require an applicant to furnish such additional information, or require such information to be verified, as the registrar may deem necessary; and

- (b) take into consideration any other information regarding the applicant or proposed key individual of the applicant, derived from whatever source, including the Ombud and any other regulatory or supervisory authority, if such information is disclosed to the applicant and the latter is given a reasonable opportunity to respond thereto.

(Section 8(2)(b) inserted by section 182(c) of Act 45 of 2013)

- (3) The registrar must after consideration of an application -

- (a) grant the application if the registrar-

- (i) is satisfied that the applicant and its key individual or key individuals comply with the requirements of this Act; and
- (ii) approves the key individual or key individuals of the applicant, in the case of a partnership, trust or corporate or unincorporated body; or

(Section 8(3)(a) substituted by section 182(d) of Act 45 of 2013)

- (b) refuse the application if the registrar-

- (i) is not satisfied that the applicant and its key individual or key individuals comply with the requirements of this Act; or
- (ii) does not approve the key individual or key individuals of the applicant in the case of a partnership, trust or corporate or unincorporated body..

(Section 8(3)(b) substituted by section 182(d) of Act 45 of 2013)

- (4)

- (a) Where an application is granted, the registrar may impose such conditions and restrictions on the exercise of the authority granted by the licence, and to be included in the licence, as are necessary, having regard to -

- (i) all facts and information available to the registrar pertaining to the applicant and any key individual of the applicant;
- (ii) the category of financial services which the applicant could appropriately render or wishes to render;
- (iii) the category of financial services providers in which the applicant is classified for the purposes of this Act; and

(Section 8(4)(a)(iii) substituted by section 182(e) of Act 45 of 2013)

- (iv) the category or subcategory of financial products in respect of which the applicant could appropriately render or wishes to render financial services.

(Section 8(4)(a)(iv) substituted by section 182(e) of Act 45 of 2013)

- (b) Conditions and restrictions contemplated in paragraph (a), may include a condition that where after the date of granting of the licence -

- (i) any key individual in respect of the licensee's business is replaced by a new key individual; or
- (ii) any new key individual is appointed or assumes office; or
- (iii) any change occurs in the personal circumstances of a key individual which renders or may render such person to be no longer compliant with the fit and proper requirements for key individuals,

(Section 8(4)(b)(iii) substituted by section 182(f) of Act 45 of 2013)

no such person may be permitted to take part in the conduct, management or oversight of the licensee's business in relation to the rendering of financial services, unless such person has on application been approved by the registrar as compliant with the fit and proper requirements for key individuals, in the manner and in accordance with a procedure determined by the registrar by notice on the official web site.

(Words following section 8(4)(b)(iii) substituted by section 182(g) of Act 45 of 2013)

(5)

- (a) Where an application for authorisation is granted, the registrar must issue to the applicant-
(Words preceding section 8(5)(a)(i) substituted by section 182(h) of Act 45 of 2013)

- (i) a licence authorising the applicant to act as a financial services provider, in the form determined by the registrar by notice in the *Gazette*; and
- (ii) such number of certified copies of the licence as may be requested by the applicant.

- (b) The registrar may at any time after the issue of a licence -

- (i) on application by the licensee or on own initiative withdraw or amend any condition or restriction in respect of the licence, after having given the licensee a reasonable opportunity to make submissions on the proposed withdrawal or amendment and having considered those submissions, if the registrar is satisfied that any such withdrawal or amendment is justified and will not prejudice the interests of clients of the licensee; or

- (ii) pursuant to an evaluation of a new key individual, or a change in the personal circumstances of a key individual, referred to in subsection (4)(b), impose new conditions on the licensee after having given the licensee a reasonable opportunity to be heard and having furnished the licensee with reasons,

(Section 8(5)(b)(ii) substituted by section 182(i) of Act 45 of 2013)

and must in every such case issue an appropriately amended licence to the licensee, and such number of certified copies of the amended licence as may be requested by the licensee.

- (6) Where an application referred to in subsection (1) is refused, the registrar must –

- (a) notify the applicant thereof; and
- (b) furnish reasons for the refusal.

(7)

- (a) Despite any other provision of this section, a person granted accreditation under section 65(3) of the Medical Schemes Act, 1998 (Act No. 131 of 1998), must, subject to this subsection, be granted authority to render as a financial services provider the specific financial service for which the person was accredited, and must be issued with a licence in terms of subsection (5).

(Section 8(7)(a) substituted by section 182(j) of Act 45 of 2013)

- (b) The registrar must be satisfied that a person to be granted authority under paragraph (a), and any key individual of such person, comply with the fit and proper requirements.

(Section 8(7)(b) substituted by section 182(j) of Act 45 of 2013)

- (c) A person granted authority and licensed as contemplated in paragraph (a), together with any key individual, are thereafter subject to the provisions of this Act.

- (d) If a licence –

- (i) is refused in terms of this section;
- (ii) is suspended in terms of section 9;
- (iii) is withdrawn in terms of section 10; or
- (iv) lapses in terms of section 11,

the accreditation referred to in paragraph (a) is deemed to have lapsed in terms of the Medical Schemes Act, 1998, or to have been suspended or withdrawn, as the case may be.

- (e) If an accreditation referred to in paragraph (a) is suspended or withdrawn or lapses in terms of the Medical Schemes Act, 1998, the licence issued in terms of that paragraph is deemed to have been suspended or withdrawn or to have lapsed in terms of sections 9, 10 and 11, respectively, of this Act.

(8) A licensee must -

- (a) display a certified copy of the licence in a prominent and durable manner within every business premises of the licensee;
- (b) ensure that a reference to the fact that such a licence is held is contained in all business documentation, advertisements and other promotional material; and
(Section 8(8)(b) amended by section 182(k) of Act 45 of 2013)

- (c) ensure that the licence is at all times immediately or within a reasonable time available for production to any person requesting proof of licensed status under authority of a law or for the purpose of entering into a business relationship with the licensee.

(9) No person may -

- (a) in any manner make use of any licence or copy thereof for business purposes where the licence has lapsed, has been withdrawn or provisionally withdrawn or during any time when the licensee is under provisional or final suspension;
- (b) perform any act which indicates that the person renders or is authorised to render financial services or is appointed as a representative to render financial services, unless the person is so authorised or appointed; and
- (c) perform any act, make or publish any statement, advertisement, brochure or similar communication which-
 - (i) relates to the rendering of a financial service, the business of a provider or a financial product; and
 - (ii) the person knows, or ought reasonably to know, is misleading, false, deceptive, contrary to the public interest or contains an incorrect statement of fact.

(Section 8(9) substituted by section 182(l) of Act 45 of 2013)

(10)

- (a) Where a provider is a corporate or unincorporated body, a trust or a partnership, the provider must—

- (i) at all times be satisfied that every director, member, trustee or partner of the provider, who is not a key individual in the provider's business, complies with the requirements in respect of personal character qualities of honesty and integrity as contemplated in paragraph (a) of subsection (1A); and

(Section 8(10)(a)(i) substituted by section 182(m) of Act 45 of 2013)

- (ii) within 15 days of the appointment of a new director, member, trustee or partner, inform the registrar of the appointment and furnish the registrar with such information on the matter as the registrar may reasonably require.

- (b) If the registrar is satisfied that a director, member, trustee or partner does not comply with the requirements as contemplated in paragraph (a) of subsection (1A), the registrar may suspend or withdraw the licence of the provider as contemplated in section 9.

(Section 8(10)(b) substituted by section 182(n) of Act 45 of 2013)

(Section 8(10) added by section 48 of Act 22 of 2008)

8A. Compliance with fit and proper requirements after authorisation

An authorised financial services provider, key individual, representative of the provider and key individual of the representative must-

- (a) continue to comply with the fit and proper requirements; and
- (b) comply with the fit and proper requirements relating to continuous professional development.

(Section 8A inserted by section 183 of Act 45 of 2013)

9. Suspension and withdrawal of authorisation

- (1) The registrar may, subject to subsection (2) and irrespective of whether the registrar has taken or followed, or is taking or following, any step or procedure referred to in section 4, at any time suspend or withdraw any licence (including the licence of a licensee under provisional or final suspension) if satisfied, on the basis of available facts and information, that the licensee—

- (a) does not meet or no longer meets the fit and proper requirements applicable to the licensee, or if the licensee is a partnership, trust or corporate or unincorporated body, that the licensee or any key individual of the licensee does not meet or no longer meets the fit and proper requirements applicable to the licensee or the key individual;

(Section 9(1)(a) substituted by section 184(a) of Act 45 of 2013)

- (b) did not, when applying for the licence, make a full disclosure of all relevant information to the registrar, or furnished false or misleading information;

- (c) has failed to comply with any other provision of this Act;
(Section 9(1)(c) substituted by section 184(b) of Act 45 of 2013)
- (d) is liable for payment of a levy under section 15A of the Financial Services Board Act, 1990 (Act No. 91 of 1990), a penalty under section 41(2) and (3) or an administrative sanction under section 6D(2) of the Financial Institutions (Protection of Funds) Act, 2001 (Act No. 28 of 2001), and has failed to pay the said levy, penalty or administrative sanction and any interest in respect thereof;
(Section 9(1)(d) substituted by section 184(b) of Act 45 of 2013)
- (e) does not have an approved key individual;
(Section 9(1)(e) added by section 184(c) of Act 45 of 2013)
- (f) has failed to comply with any directive issued under this Act; or
(Section 9(1)(f) added by section 184(c) of Act 45 of 2013)
- (g) has failed to comply with any condition or restriction imposed under this Act.
(Section 9(1)(g) added by section 184(c) of Act 45 of 2013)

(2)

- (a) Before suspending or withdrawing any licence, the registrar—
 - (i) may consult any regulatory authority; and
 - (ii) must inform the licensee of the intention to suspend or withdraw and the grounds therefor and must give the licensee a reasonable opportunity to make a submission in response thereto.
- (b) Where the registrar contemplates the suspension or withdrawal of any licence, the registrar must also inform the licensee of -
(Words preceding section 9(2)(b)(i) substituted by section 184(d) of Act 45 of 2013)
 - (i) the intended period of the suspension; and
 - (ii) any terms to be attached to the suspension or withdrawal, including-
 - (aa) a prohibition on concluding any new business by the licensee as from the effective date of the suspension or withdrawal and, in relation to unconcluded business, such measures as the registrar may determine for the protection of the interests of clients of the licensee; and

(bb) terms designed to facilitate the lifting of the suspension.

(Section 9(2)(b)(ii) substituted by section 184(e) of Act 45 of 2013)

(c) The registrar must consider any response received, and may thereafter decide to suspend or withdraw, or not to suspend or withdraw, the licence, and must notify the licensee of the decision.

(d) Where the licence is suspended or withdrawn, the registrar must make known the reasons for the suspension or withdrawal and any terms attached thereto by notice on the official web site and may make known such information by means of any other appropriate public media.

(Section 9(2)(d) substituted by section 184(f) of Act 45 of 2013)

(3) Notwithstanding the provisions of subsection (2), the registrar may under urgent circumstances, where the registrar is satisfied on reasonable grounds that substantial prejudice to clients or the general public may occur—

(a) provisionally suspend or withdraw a licence, and inform the licensee of the—

(i) grounds therefor; and

(ii) period and terms of suspension as referred to in subsection (2)(b),

and give the licensee a reasonable opportunity to respond thereto and to provide reasons why the provisional suspension or withdrawal should be lifted or why the period and terms should be changed; and

(b) make known such provisional suspension or withdrawal by notice on the official web site and, if necessary, by means of any other appropriate public media.

(Section 9(3)(b) substituted by section 184(g) of Act 45 of 2013)

(4)

(a) The registrar must, within a reasonable time after receipt of any response contemplated in subsection (3)(a) consider the response, and may thereafter decide to—

(i) lift the provisional suspension or withdrawal; or

(ii) render the provisional suspension or withdrawal final,

(Section 9(4)(a)(ii) substituted by section 184(h) of Act 45 of 2013)

and must inform the licensee accordingly.

- (b) The registrar must make known the terms of and reasons for such final suspension or withdrawal, or the lifting thereof, by notice on the official web site and, if necessary, in any other appropriate public media.

(Section 9(4)(b) substituted by section 184(i) of Act 45 of 2013)

- (5) During any period of suspension, whether provisional or final, the licensee concerned is for the purposes of this Act regarded as a person who is not authorised to act as a financial services provider.

(6)

- (a) A person whose licence has been withdrawn under this section is debarred for a period specified by the registrar from applying for a new licence.

- (b) The registrar may, on good cause shown, vary any such period.

(Section 9 substituted by section 49 of Act 22 of 2008)

10.

(Section 10 repealed by section 50 of Act 22 of 2008)

11. Lapsing of licence

- (1) A licence lapses -

- (a) where the licensee, being a natural person -

- (i) becomes permanently incapable of carrying on any business due to physical or mental disease or serious injury;

- (ii) is finally sequestered; or

- (iii) dies;

- (b) where the licensee, being any other person, is finally liquidated or dissolved;

- (c) where the business of the licensee has become dormant; and

- (d) in any other case, where the licensee voluntarily and finally surrenders the licence to the registrar.

- (2) The registrar must be advised in writing by the licensee, any key individual of the licensee, or another person in control of the affairs of the licensee, as the case may be, of the lapsing of a licence and the reasons therefor and the registrar may make known any such lapsing of a licence by notice on the official web site and, if necessary by means of any other appropriate public media announcement.

(Section 11(2) substituted by section 51 of Act 22 of 2008)

(Section 11(2) substituted by section 185 of Act 45 of 2013)

12. Exemptions in respect of product suppliers

- (1) The registrar may exempt a product supplier who is authorised or approved under a particular law to conduct business as a financial institution, and who is required to apply for authorisation under section 8, from submitting some or all of the information otherwise required from an applicant: Provided that the product supplier -
 - (a) applies for exemption when submitting the application; and
 - (b) complies with the requirements of the registrar with regard to information still required.
- (2) Authorisation granted to a product supplier contemplated in subsection (1) is supplementary to, but separate from, the supplier's authorisation or approval under a particular law as a financial institution.

CHAPTER III

REPRESENTATIVES OF AUTHORISED FINANCIAL SERVICES PROVIDERS

13. Qualifications of representatives and duties of authorised financial services providers

- (1) A person may not -
 - (a) carry on business by rendering financial services to clients for or on behalf of any person who -
 - (i) is not authorised as a financial services provider; and
 - (ii) is not exempted from the application of this Act relating to the rendering of a financial service;
(Section 13(1)(a) amended by section 186(d) of Act 45 of 2013)
(Commencement date of section 13(1)(a): 30 September 2004)
 - (b) act as a representative of an authorised financial services provider, unless such person -
 - (i) prior to rendering a financial service, provides confirmation, certified by the provider, to clients-
(Words preceding section 13(1)(b)(i)(aa) substituted by section 186(a) of Act 45 of 2013)

 - (aa) that a service contract or other mandate, to represent the provider, exists; and
(Section 13(1)(b)(i)(aa) substituted by section 52(a) of Act 22 of 2008)

- (bb) that the provider accepts responsibility for those activities of the representative performed within the scope of, or in the course of implementing, any such contract or mandate;

(Section 13(1)(b)(i)(bb) substituted by section 52(a) of Act 22 of 2008)

- (iA) meets the fit and proper requirements; and

(Section 13(1)(b)(iA) inserted by section 186(b) of Act 45 of 2013)

- (ii) if debarred as contemplated in section 14, complies with the requirements determined by the registrar by notice in the *Gazette*, for the reappointment of a debarred person as a representative; or

(Section 13(1)(b)(ii) substituted by section 186(c) of Act 45 of 2013)

(Section 13(1)(b) amended by section 186(d) of Act 45 of 2013)

- (c) render financial services or contract in respect of financial services other than in the name of the financial services provider of which such person is a representative.

(Section 13(1)(c) added by section 186(d) of Act 45 of 2013 with effect from 30 May 2014)

- (2) An authorised financial services provider must -

- (a) at all times be satisfied that the provider's representatives, and the key individuals of such representatives, are, when rendering a financial service on behalf of the provider, competent to act, and comply with-

- (i) the fit and proper requirements; and

- (ii) any other requirements contemplated in subsection (1)(b)(ii);

(Section 13(2)(a) substituted by section 52(b) of Act 22 of 2008)

(Section 13(2)(a) substituted by section 186(e) of Act 45 of 2013)

- (b) take such steps as may be reasonable in the circumstances to ensure that representatives comply with any applicable code of conduct as well as with other applicable laws on conduct of business.

- (3) The authorised financial services provider must maintain a register of representatives, and key individuals of such representatives, which must be regularly updated and be available to the registrar for reference or inspection purposes.

- (4) Such register must -

- (a) contain every representative's or key individual's name and business address, and state whether the representative acts for the provider as employee or as mandatory; and
 - (b) specify the categories in which such representatives are competent to render financial services.
- (5) The registrar may require information from the authorised financial services provider, including the information referred to in subsection (4), so as to enable the registrar to maintain and continuously update a central register of all representatives and key individuals, which register must be published in any appropriate media.

(Section 13(5) substituted by section 52(c) of Act 22 of 2008)

- (6) A person who on the date contemplated in section 7(1) complies with the requirements of this Act for a representative and on such date acts as employee or mandatory for any person who on or after such date becomes an authorised financial services provider, is for the purposes of this Act but subject to the provisions of this Act relating to representatives, regarded as a representative.

14. Debarment of representatives

- (1) An authorised financial services provider must ensure that any representative of the provider who no longer complies with the requirements referred to in section 13(2)(a) or has contravened or failed to comply with any provision of this Act in a material manner, is prohibited by such provider from rendering any new financial service by withdrawing any authority to act on behalf of the provider, and that the representative's name, and the names of the key individuals of the representative, are removed from the register referred to in section 13(3): Provided that any such provider must immediately take steps to ensure that the debarment does not prejudice the interest of clients of the representative, and that any unconcluded business of the representative is properly concluded.

(Section 14(1) substituted by section 53 of Act 22 of 2008)

- (2) For the purposes of the imposition of a prohibition contemplated in subsection (1), the authorised financial services provider must have regard to information regarding the conduct of the representative as provided by the registrar, the Ombud or any other interested person.

(Section 14(2) substituted by section 53 of Act 22 of 2008)

- (3)
- (a) The authorised financial services provider must within a period of 15 days after the removal of the names of a representative and key individuals from the register as contemplated in subsection (1), inform the registrar in writing thereof and provide the registrar with the reasons for the debarment in such format as the registrar may require.

- (b) The registrar may make known any such debarment and the reasons therefor by notice on the official web site or by means of any other appropriate public media.

(Section 14(3)(b) substituted by section 187 of Act 45 of 2013)

(Section 14(3) substituted by section 53 of Act 22 of 2008)

14A. Debarment by registrar

- (1) The registrar may, subject to subsection (2), at any time debar a person, including a representative, for a specified period from rendering financial services if satisfied on the basis of available facts and information that the person—
 - (a) does not meet, or no longer meets, the requirements contemplated in section 8(1)(a); or
 - (b) has contravened or failed to comply with any provision of this Act.
- (2) The provisions of section 9(2), regarding a decision to suspend a licence, apply with the necessary changes to the debarment of a person contemplated in subsection (1).
- (3) An authorised financial services provider must within a period of five days after being informed by the registrar of the debarment of a representative or key individual, remove the names of that representative and key individuals from the register as contemplated in section 13(3).
- (4) The registrar may make known any such debarment and the reasons therefor, or the lifting thereof, by notice on the official web site or by means of any other appropriate public media.

(Section 14A(4) substituted by section 188 of Act 45 of 2013)

(Section 14A inserted by section 54 of Act 22 of 2008)

**CHAPTER IV
CODES OF CONDUCT**

15. Publication of codes of conduct

- (1)
 - (a) The registrar must, after consultation with representative bodies of the financial services industry and client and customer bodies, draft a code of conduct for authorised financial services providers.

(Section 15(1)(a) substituted by section 189 of Act 45 of 2013)
 - (b) 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.

(2)

Prepared by:

In partnership with:

- (a) Different codes of conduct may be so 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.
- (b) A code of conduct must be drafted for the rendering of a financial service in respect of a deposit referred to in paragraph (f) of the definition of "financial product" in section 1(1) with a term not exceeding 12 months by a provider which is a bank as defined in the Banks Act, 1990 (Act No. 94 of 1990), a mutual bank as defined in the Mutual Banks Act, 1993 (Act No. 124 of 1993), or a co-operative bank as defined in the Co-operative Banks Act, 2007 (Act No. 40 of 2007).

(Section 15(2) substituted by section 55 of Act 22 of 2008)

- (3) Such codes of conduct may from time to time be amended or replaced in accordance with the procedure set out in subsection (1).

16. Principles of code of conduct

- (1) 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;
 - (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.
- (2) 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;

(Section 16(2)(e) amended by section 56 of Act 22 of 2008)

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

(Section 16(2)(eA) inserted by section 56 of Act 22 of 2008)

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

CHAPTER V

DUTIES OF AUTHORISED FINANCIAL SERVICES PROVIDERS

17. Compliance officers and compliance arrangements

(1)

- (a) Any authorised financial services provider with more than one key individual or one or more representatives must, subject to section 35(1)(c) and subsections (1)(b) and (2)(a)(i), appoint one or more compliance officers to oversee the provider's compliance function and to monitor compliance with this Act by the provider and such representative or representatives, particularly in accordance with the procedures contemplated in subsection (3), and to take responsibility for liaison with the registrar.

(Section 17(1)(a) substituted by section 190(a) of Act 45 of 2013)

- (b) Such person must comply with the fit and proper requirements.

(Section 17(1)(b) substituted by section 57(a) of Act 22 of 2008)

(Section 17(1)(b) substituted by section 190(a) of Act 45 of 2013)

- (bA) The provisions of section 8A apply with the necessary changes to a compliance officer.

(Section 17(1)(bA) inserted by section 190(b) of Act 45 of 2013)

- (c) The provisions of section 19(4), (5) and (6), relating to an auditor of an authorized financial services provider, apply with the necessary changes to a compliance officer.

(Section 17(1)(c) substituted by section 57(a) of Act 22 of 2008)

(2)

(a)

- (i) A compliance officer must be approved by the registrar in accordance with the criteria and guidelines determined by the registrar.
- (ii) The registrar may amend such criteria and guidelines, and an approved compliance officer must comply with the amended criteria and guidelines within such period as may be determined by the registrar.

(b) The registrar may at any time withdraw the approval if satisfied on the basis of available facts and information that the compliance officer-

- (i) has contravened or failed to comply with any provision of this Act;
- (ii) does not meet or no longer meets the fit and proper requirements; or
- (iii) does not comply or no longer complies with the criteria and guidelines contemplated in paragraph (a).

(c) The provisions of section 9(2) and (6) regarding a decision to withdraw an authorisation (excluding such provisions relating to periods and terms) apply with the necessary changes to a withdrawal of an approval contemplated in paragraph (b).

(d) The registrar may make known any withdrawal of approval under this subsection and the reasons therefor by notice on the official web site or by means of any other appropriate public media.

(Section 17(2) substituted by section 57(b) of Act 22 of 2008)

(Section 17(2) substituted by section 190(c) of Act 45 of 2013)

(3) An authorised financial services provider must establish and maintain procedures to be followed by the provider and any representative concerned, in order to ensure compliance with this Act.

(4)

(a) A compliance officer or, in the absence of such officer, the authorised financial services provider concerned, must submit reports to the registrar in the manner and regarding the matters, as from time to time determined by the registrar by notice on the official web site for different categories of compliance officers.

(b) An authorised financial services provider must ensure that the reports referred to in paragraph (a) are submitted in accordance with the provisions of that paragraph.

(Section 17(4) substituted by section 190(d) of Act 45 of 2013)

- (5) The provisions of subsections (3) and (4) apply with the necessary changes to any authorised financial services provider who carries on a business with only one key individual or without any representative.

18. Maintenance of records

An authorised financial services provider must, except to the extent exempted by the registrar, maintain records for a minimum period of five years regarding –

- (a) known premature cancellations of transactions or financial products by clients of the provider;
- (b) complaints received together with an indication whether or not any such complaint has been resolved;
- (c) the continued compliance with the requirements referred to in section 8;
- (d) cases of non-compliance with this Act, and the reasons for such non-compliance; and
- (e) the continued compliance by representatives with the requirements referred to in section 13(1) and (2) .

19. Accounting and audit requirements

- (1) Except to the extent exempted by the registrar, an authorised financial services provider must, in respect of the business carried on by the provider as authorised under the provider's licence –
- (a) maintain full and proper accounting records on a continual basis, brought up to date monthly; and
 - (b) annually prepare, in respect of the relevant financial year of the provider, financial statements reflecting –
 - (i) the financial position of the entity at its financial year end;
 - (ii) the results of operations, the receipt and payment of cash and cash equivalent balances;
 - (iii) all changes in equity for the period then ended, and any additional components required in terms of South African Generally Accepted Accounting Practices issued by the Accounting Practices Board or International Financial Reporting Standards issued by the International Accounting Standards Board or a successor body; and

- (iv) a summary of significant accounting policies and explanatory notes on the matters referred to in paragraphs (i) to (iii);

(Section 19(1)(b) substituted by section 58(a) of Act 22 of 2008)

(2)

- (a) An authorised financial services provider must cause the statements referred to in subsection (1)(b) to be audited and reported on in accordance with auditing pronouncements as defined in section 1 of the Auditing Professions Act, 2005 (Act No. 26 of 2005) by an external auditor approved by the registrar.

- (b) The financial statements must –

- (i) fairly represent the state of affairs of the provider's business;
- (ii) refer to any material matter which has affected or is likely to affect the financial affairs of the provider; and
- (iii) be submitted by the authorised financial services provider to the registrar not later than four months after the end of the provider's financial year or such longer period as may be allowed by the registrar.

(Section 19(2) substituted by section 58(b) of Act 22 of 2008 with effect from 1 May 2009)

- (3) The authorised financial services provider must maintain records in accordance with subsection (1)(a) in respect of money and assets held on behalf of clients, and must, in addition to and simultaneously with the financial statements referred to in subsection (2), submit to the registrar a report, by the auditor who performed the audit, which confirms, in the form and manner determined by the registrar by notice on the official web site for different categories of financial services providers –

(Words preceding section 19(3)(a) substituted by section 191(a) of Act 45 of 2013)

- (a) the amount of money and financial products at year end held by the provider on behalf of clients;
- (b) that such money and financial products were throughout the financial year kept separate from those of the business of the authorised financial services provider and, report any instance of non-compliance identified in the course of the audit and the extent thereof; and
- (c) any other information required by the registrar.

(Section 19(3) substituted by section 58(c) of Act 22 of 2008)

- (4) Despite anything to the contrary contained in any law, the auditor of an authorised financial services provider must report to and inform the registrar in writing of any irregularity or suspected irregularity in

the conduct or the affairs of the authorised financial services provider concerned of which the auditor became aware in performing functions as auditor and which, in the opinion of the auditor, is material.

- (5) If the appointment of an auditor of an authorised financial services provider is terminated -
- (a) the auditor must submit to the registrar a statement of what the auditor believes to be the reasons for that termination; and
 - (b) if the auditor would, but for that termination, have had reason to submit to the registrar a report contemplated in subsection (4), the auditor must submit such a report to the registrar.
- (6)
- (a) The registrar may by notice require an authorised financial services provider to terminate the appointment of an auditor of that provider, if the auditor concerned no longer complies with the requirements considered when the auditor was approved by the registrar in terms of subsection (2)(a) or otherwise fails to comply with any provision of this section in a material manner.
 - (b) A notice contemplated in paragraph (a) takes effect on a date specified in such notice and may only be sent out after the registrar -
 - (i) has given the authorised financial services provider and the auditor concerned the reasons why the notice is to be issued; and
 - (ii) has given the authorised financial services provider and the auditor concerned a reasonable opportunity to be heard; and
 - (iii) has considered any submissions made by or on behalf of the authorized financial services provider or the auditor concerned.
- (7)
- (a) A financial services provider may not change a financial year end without the approval of the registrar.
 - (b) Despite paragraph (a), the approval of the registrar is not necessary where a change of a financial year end has been approved by another regulatory authority, other than the Companies and Intellectual Property Commission, regulating the financial soundness of the provider.

(Section 19(7)(b) substituted by section 191(b) of Act 45 of 2013)
 - (c) Where a change of a financial year end was approved by another regulatory authority as is contemplated in paragraph (b), the provider must inform the registrar of that approval within 14 days of the approval being granted.

(Section 19(7) added by section 58(e) of Act 22 of 2008)

CHAPTER VI ENFORCEMENT

PART I

Ombud for financial services providers

20. Office of Ombud for Financial Services Providers

- (1) There is an office to be known as the Office of the Ombud for Financial Services Providers.
- (2) The functions of the Office are performed by the Ombud for Financial Services Providers.
- (3) The objective of the Ombud is to consider and dispose of complaints in a procedurally fair, informal, economical and expeditious manner and by reference to what is equitable in all the circumstances, with due regard to -
 - (a) the contractual arrangement or other legal relationship between the complainant and any other party to the complaint; and
 - (b) the provisions of this Act.
- (4) When dealing with complaints in terms of sections 27 and 28 the Ombud is independent and must be impartial.

(Commencement date of section 20: 8 March 2003)

21. Appointment of Ombud and deputy ombuds

- (1) The Board -

(Words preceding section 21(1)(a) substituted by section 192(a) of Act 45 of 2013)

 - (a) must appoint as Ombud a person qualified in law and who possesses adequate knowledge of the rendering of financial services;
 - (b) may appoint one or more persons qualified in law and who possess adequate knowledge of the rendering of financial services, as deputy ombud.
- (2) The remuneration and other terms of appointment of the Ombud and a deputy ombud must be determined by the Board.

- (3) The Ombud or deputy ombud may at any time resign by submitting a written resignation to the Board at least three calendar months prior to the intended date of vacation of office, unless the Board allows a shorter period.
- (4) The Board may on good cause shown remove the Ombud or deputy ombud from office on the ground of misbehaviour, incapacity or incompetence, after affording the person concerned a reasonable opportunity to be heard.

(Section 21(4) substituted by section 192(b) of Act 45 of 2013)

(Commencement date of section 21: 8 March 2003)

22. Funding of Office

- (1) The funds of the Office consist of -
 - (a) funds provided by the Board on the basis of a budget submitted by the Ombud to the Board and approved by the latter; and
 - (b) funds accruing to the Office from any other source.
- (2) The Ombud must deposit all funds in an account opened with a bank registered under the Banks Act, 1990 (Act No. 94 of 1990).
- (3) The Ombud must utilise such funds for the defrayal of expenses incurred in the performance of functions under this Act, and may invest funds which are not required for immediate use.
- (4) The financial year of the Ombud ends on 31 March in every year.
- (5) Funds standing to the credit of the Ombud in the account mentioned in subsection (2) at the end of the financial year, as well as funds invested under subsection (3), must be carried forward to the next financial year.

(Commencement date of section 22: 8 March 2003)

23. Accountability

- (1) Despite the provisions of the Public Finance Management Act, 1999 (Act No. 1 of 1999), the board of the Financial Services Board as defined in section 1 of the Financial Services Board Act, 1990 (Act No. 97 of 1990), is the accounting authority of the Office.

(Section 23(1) substituted by section 193 of Act 45 of 2013)

- (2) The accounting authority must comply with the Public Finance Management Act.

(Section 23(2) substituted by section 193 of Act 45 of 2013)

- (3) The records and financial statements mentioned in subsection (2) must be audited by the Auditor-General.

(Commencement date of section 23: 8 March 2003)

24. General administrative powers of Ombud

The Ombud may for the performance of functions in the Office and as a charge against or for the benefit of the funds of the Office, as the case may be -

- (a) hire, purchase or otherwise acquire property, and let, sell or otherwise dispose of property so purchased or acquired;
- (b) enter into an agreement with any person for the performance of any specific act or function or the rendering of specific services;
- (c) insure the Office against any loss, damage, risk or liability;
- (d) employ persons to assist the Ombud, determine their terms of appointment and, subject to such conditions as may be determined by the Ombud, delegate or assign to any such employee, including a deputy ombud, any administrative function vesting in the Ombud in terms of this Part;
- (e) obtain such professional advice as may reasonably be required; and
- (f) in general, do anything which is necessary or expedient for the achievement of the objective of the Ombud.

(Commencement date of section 24: 8 March 2003)

25. Disestablishment and liquidation of Office

- (1) The Office may not be disestablished or liquidated except by an Act of Parliament.
- (2) In the event of any such disestablishment or liquidation, the surplus assets of the Office (if any) accrue to the Board.

(Commencement date of section 25: 8 March 2003)

26. Powers of Board

- (1) The Board may make rules, including different rules in respect of different categories of complaints or investigations by the Ombud, regarding –

(Words preceding section 26(1)(a) substituted by section 194 of Act 45 of 2013)

(a)

- (i) any matter which is required or permitted under this Act to be regulated by rule;
- (ii) the category of persons qualifying as complainants;
- (iii) the type of complaint justiciable by the Ombud, including a complaint relating to a financial service rendered by a person not authorised as a financial services provider or a person acting on behalf of such first-mentioned person;
- (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;
- (vii) the circumstances under which a complaint may be dismissed without consideration of its merits;
- (viii) the power of the Ombud to fix a time limit for any aspect of the proceedings before the Ombud and to extend a time limit;

- (b) the payment to the Office by the authorised financial services provider or representative involved in any complaint submitted to the Ombud, of case fees in respect of the consideration of the complaint by the Ombud;
- (c) liaison between the Ombud and the registrar, and administrative duties of those functionaries regarding mutual administrative support, exchange of information and reports, other regular consultations and avoidance of overlapping of their respective functions; and
- (d) any other administrative or procedural matter necessary or expedient for the better achievement of the objects of this Part, but which is not inconsistent with a provision of this Act.

(2) The Board must -

- (a) ensure that no rule made under subsection (1) detracts from or affects the independence of the Ombud in any material way;

- (b) publish rules made under subsection (1) in the *Gazette*.

(Commencement date of section 26: 8 March 2003)

27. Receipt of complaints, prescription, jurisdiction and investigation

- (1) On submission of a complaint to the Office, the Ombud must -
- (a) determine whether the requirements of the rules contemplated in section 26(1)(a)(iv) have been complied with;
 - (b) in the case of any non-compliance, act in accordance with the rules made under that section; and
 - (c) otherwise officially receive the complaint if it qualifies as a complaint.
- (2) Official receipt of a complaint by the Ombud suspends the running of prescription in terms of the Prescription Act, 1969 (Act No. 68 of 1969), for the period after such receipt of the complaint until the complaint has either been withdrawn, or determined by the Ombud or the board of appeal, as the case may be.
- (3) The following jurisdictional provisions apply to the Ombud in respect of the investigation of complaints:
- (a)
 - (i) The Ombud must decline to investigate any complaint which relates to an act or omission which occurred on or after the date of commencement of this Act but on a date more than three years before the date of receipt of such complaint by the Office.
 - (ii) Where the complainant was unaware of the occurrence of the act or omission contemplated in subparagraph (i), the period of three years commences on the date on which the complainant became aware or ought reasonably to have become aware of such occurrence, whichever occurs first.
 - (b)
 - (i) The Ombud must decline to investigate any complaint if, before the date of official receipt of the complaint, proceedings have been instituted by the complainant in any Court in respect of a matter which would constitute the subject of the investigation.
 - (ii) Where any proceedings contemplated in subparagraph (i) are instituted during any investigation by the Ombud, such investigation must not be proceeded with.

- (c) The Ombud may on reasonable grounds determine that it is more appropriate that the complaint be dealt with by a Court or through any other available dispute resolution process, and decline to entertain the complaint.
- (4) The Ombud must not proceed to investigate a complaint officially received, unless the Ombud -
 - (a) has in writing informed every other interested party to the complaint of the receipt thereof;
 - (b) is satisfied that all interested parties have been provided with such particulars as will enable the parties to respond thereto; and
 - (c) has provided all interested parties the opportunity to submit a response to the complaint.
- (5) The Ombud -
 - (a) may, in investigating or determining an officially received complaint, follow and implement any procedure (including mediation) which the Ombud deems appropriate, and may allow any party the right of legal representation;
 - (b) must, in the first instance, explore any reasonable prospect of resolving a complaint by a conciliated settlement acceptable to all parties;
 - (c) may, in order to resolve a complaint speedily by conciliation, make a recommendation to the parties, requiring them to confirm whether or not they accept the recommendation and, where the recommendation is not accepted by a party, requiring that party to give reasons for not accepting it: Provided that where the parties accept the recommendation, such recommendation has the effect of a final determination by the Ombud, contemplated in section 28(1);
 - (d) may, in a manner that the Ombud deems appropriate, delineate the functions of investigation and determination between various functionaries of the Office;
 - (e) may, on terms specified by the Ombud, mandate any person or tribunal to perform any of the functions referred to in paragraph (d).
- (6) For the purposes of any investigation or determination by the Ombud, the provisions of the Commissions Act, 1947 (Act No. 8 of 1947), regarding the summoning and examination of persons and the administering of oaths or affirmations to them, the calling for the production of books, documents and objects, and offences by witnesses, apply with the necessary changes.

(Commencement date of section 27: 8 March 2003)

28. Determinations by Ombud

Prepared by:

In partnership with:

- (1) The Ombud must in any case where a matter has not been settled or a recommendation referred to in section 27(5)(c) has not been accepted by all parties concerned, make a final determination, which may include -
 - (a) the dismissal of the complaint; or
 - (b) the upholding of the complaint, wholly or partially, in which case -
 - (i) the complainant may be awarded an amount as fair compensation for any financial prejudice or damage suffered;
 - (ii) a direction may be issued that the authorised financial services provider, representative or other party concerned take such steps in relation to the complaint as the Ombud deems appropriate and just;
 - (iii) the Ombud may make any other order which a Court may make.
- (2)
 - (a) A monetary award may provide for the amount payable to bear interest at a rate and as from a date determined by the Ombud.
 - (b) The Board may by rule determine -
 - (i) the maximum monetary award for a particular kind of financial prejudice or damage;
 - (ii) different maximum monetary awards for different categories of complaints;
 - (iii) the granting of costs, including costs against a complainant in favour of the Office or the respondent if in the opinion of the Ombud -
 - (aa) the conduct of the complainant was improper or unreasonable; or
 - (bb) the complainant was responsible for an unreasonable delay in the finalisation of the relevant investigation:

Provided that an amount payable under a cost award bears interest at a rate and as from a date determined by the Ombud.
- (3) Any award of interest by the Ombud in terms of subsection (2) may not exceed the rate which a Court would have been entitled to award, had the matter been heard by a Court.

(4)

Prepared by:

In partnership with:

- (a) The Ombud must reduce a determination to writing, including all the reasons therefor, sign the determination, and send copies thereof to the registrar and all parties concerned with the complaint and, if no notice of appeal to the board of appeal has been lodged within the period required therefor, to the clerk or registrar of court which would have had jurisdiction in the matter had it been heard by a Court.
- (b) Where a notice of appeal has been lodged, the Ombud must send a copy of the final decision of the board of appeal to any such clerk or registrar.

(5) A determination -

- (a) or a final decision of the board of appeal, as the case may be, is regarded as a civil judgment of a Court, had the matter in question been heard by a Court, and must be so noted by the clerk or registrar, as the case may be, of that Court;
- (b) is only appealable to the board of appeal -
 - (i) with the leave of the Ombud after taking into consideration -
 - (aa) the complexity of the matter; or
 - (bb) the reasonable likelihood that the board of appeal may reach a different conclusion; or
 - (ii) if the Ombud refuses leave to appeal, with the permission of the chairperson of the board of appeal.

(6)

- (a) A writ of execution may, in the case of a determination or a final decision of the board of appeal amounting to a monetary award, be issued by the clerk or the registrar referred to in subsection (3) and may be executed by the sheriff of such Court after expiration of a period of two weeks after the date of the determination or of the final decision of the board of appeal, as the case may be.
- (b) Any other determination must be given effect to in accordance with the applicable procedures of a Court after expiration of a period of two weeks after the date of the determination or of the final decision of the board of appeal.

(Commencement date of section 28: 8 March 2003)

29. Record-keeping

- (1) The Ombud must keep proper files and records in respect of complaints as well as a record of any determination proceedings conducted in terms of section 28.
- (2) The registrar has, for the purposes of the performance of the registrar's functions, under this or any other law, access to the Ombud's files and records and may without further proof rely on a copy of any record of proceedings signed by the Ombud.
- (3) Any interested person may, subject to the discretion of the Ombud and applicable rules of confidentiality, obtain a copy of any record on payment of a fee determined by the Ombud.

(Commencement date of section 29: 8 March 2003)

30. Report of Ombud

- (1) The Ombud must during every year, within six months after the end of the financial year of the Ombud, submit a report to the Board on the affairs and functions of the Ombud during the financial year in question, including the annual financial statements referred to in section 23(2)(b).
- (2) The Ombud must at the same time submit a copy of the report to the Minister.

(Commencement date of section 30: 8 March 2003)

31. Penalties

Any person who -

- (a) commits any act in respect of the Ombud or an investigation by the Ombud which, if committed in respect of a court of law, would have constituted contempt of court, is guilty of an offence and liable on conviction to any penalty which may be imposed on a conviction of contempt of court; or
- (b)
 - (i) anticipates a determination of the Ombud in any manner calculated to influence the determination; or
 - (ii) wilfully interrupts any proceedings conducted by the Ombud.

is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding one year.

(Commencement date of section 31: 8 March 2003)

32. Promotion of client education by registrar

The registrar may take any steps conducive to client education and the promotion of awareness of the nature and availability of the Ombud and other enforcement measures established by or in terms of this Act, including arrangements with the Ombud, representative bodies of the financial services industry, client and consumer bodies, or product suppliers and authorized financial services providers and their representatives to assist in the disclosure of information to the general public on matters dealt with in this Act.

PART II

Other enforcement measures

33.

(Section 33 amended by section 59 of Act 22 of 2008)

(Section 33 repealed by section 195 of Act 45 of 2013)

34. Undesirable practices

- (1) Subject to subsections (2) and (3), the registrar may by notice in the *Gazette* declare a particular business practice to be undesirable for all or a category of authorised services providers, or any such provider.

(Section 34(1) substituted by section 196(a) of Act 45 of 2013)

- (2) The following principles must guide the registrar in considering whether or not a declaration contemplated in subsection (1) should be made:

- (a) That the practice concerned, directly or indirectly, has or is likely to have the effect of -

- (i) harming the relations between authorised financial services providers or any category of such providers, or any such provider, and clients or the general public;

- (ii) unreasonably prejudicing any client;

- (iii) deceiving any client; or

- (iv) unfairly affecting any client; and

- (b) that if the practice is allowed to continue, one or more objects of this Act will or is likely to, be defeated.

- (3) The registrar may not make such a declaration unless the registrar has by notice in the *Gazette* published an intention to make the declaration, giving reasons therefor, and invited interested persons to make written representations thereon so as to reach the registrar within 21 days after the date of publication of that notice.

- (4) An authorised financial services provider or representative may not, on or after the date of the publication of a notice referred to in subsection (1), carry on the business practice concerned.

(Section 34(4) substituted by section 196(b) of Act 45 of 2013)

- (5) The registrar may direct an authorised financial services provider who, on or after the date of the publication of a notice referred to in subsection (1), carries on the business practice concerned in contravention of that notice, to rectify to the satisfaction of the registrar anything which was caused by or arose out of the carrying on of the business practice concerned: Provided that the registrar may not make an order contemplated in section 6D(2)(b) of the Financial Institutions (Protection of Funds) Act, 2001 (Act No. 28 of 2001).

(Section 34(5) substituted by section 60(a) of Act 22 of 2008)

- (6) An authorised financial services provider concerned who is under subsection (5) directed to rectify anything, must do so within 60 days after such direction is issued.

(Section 34(6) substituted by section 60(b) of Act 22 of 2008)

35. Regulations

- (1) The Minister may by notice in the *Gazette*, after consultation with the registrar, make regulations relating to -

(Words preceding section 35(1)(a) substituted by section 197 of Act 45 of 2013)

- (a) any matter which is required or permitted to be prescribed under this Act;
- (b) a prohibition on -
 - (i) canvassing for, or marketing or advertising (whether within or outside the Republic) of any business relating to the rendering of financial services by any person who is not an authorised financial services provider or a representative of such a provider;
 - (ii) the publication by any person, who is not an authorised financial services provider or a representative of such a provider, of any advertisement, communication or announcement directed to clients and which indicates that such person is an authorised financial services provider or a representative of such a provider; and
 - (iii) the use by any person who is not an authorised financial provider or a representative of any such provider, of any name, title or designation indicating that the person is an authorised financial services provider or a representative of such a provider;
- (c) compliance arrangements, compliance monitoring systems and keeping of records;

- (d) powers of the registrar to call for information from any person to which this Act applies, including the powers of the Court to issue orders, on application by the registrar, to enforce obligations in that regard; and
 - (e) generally, any matter which it is expedient or necessary to prescribe for the better achievement of the objects of this Act, the generality of this provision not being restricted by the provisions of any foregoing paragraph.
- (2) The regulations may provide for offences in cases of contravention or non-compliance with the provisions thereof, and for penalties not exceeding a fine of R500 000 or imprisonment for a period not exceeding five years or to both such fine and such imprisonment.
- (3) Different regulations may be made in respect of different matters or categories of persons.

36. Offences and penalties

Any person who -

- (a) contravenes or fails to comply with a provision of section 7(1) or (3), 8(8), 8(10)(a), 13(1) or (2), 14(1), 17(4), 18, 19(2), 19(4) or 34(4) or (6);

(Section 36(a) substituted by section 61(a) of Act 22 of 2008)

- (b) in any application in terms of this Act, deliberately makes a misleading, false or deceptive statement, or conceals any material fact;

- (c) in the execution of duties imposed by this Act gives an appointed auditor or compliance officer information which is false, misleading or conceals any material fact; or

(Section 36(c) added by section 61(b) of Act 22 of 2008)

- (d) is not a representative appointed or mandated by an authorised financial services provider in accordance with the provisions of this Act, and who in any way declares, pretends, gives out, maintains or professes to be a person who is authorised to render financial services to clients on the basis that the person is appointed or mandated as a representative by another representative,

(Section 36(d) added by section 61(b) of Act 22 of 2008)

(Section 36(d) substituted by section 198(a) of Act 45 of 2013)

is guilty of an offence and is on conviction liable to a fine not exceeding R10 million or imprisonment for a period not exceeding 10 years, or both such fine and such imprisonment.

(Words following section 36(d) substituted by section 198(b) of Act 45 of 2013)

37.

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(Section 37 repealed by section 199 of Act 45 of 2013)

38. Voluntary sequestration, winding-up and closure

No -

- (a) application for the acceptance of the voluntary surrender of the estate, in terms of section 3 of the Insolvency Act, 1936 (Act No. 24 of 1936), of;
- (b) special resolution relating to the winding-up in terms of the Companies Act, and registered in terms of that Act, of;

(Section 38(b) substituted by section 200 of Act 45 of 2013)

- (c) written resolution relating to the winding-up, as contemplated in section 67 of the Close Corporations Act, 1984 (Act No. 69 of 1984), and registered in terms of that section, of; and
- (d) voluntary closure of business by,

any authorised financial services provider, or representative of such provider, and no special resolution in terms of the constitution of such a provider or representative which is not a company, to close its business, have legal force -

- (i) unless a copy or notice thereof has been lodged with the registrar and the registrar has, by notice to the provider or representative concerned, as the case may be, declared that arrangements satisfactory to the registrar have been made to meet all liabilities under transactions entered into with clients prior to sequestration, winding-up or closure, as the case may be; or
- (ii) if the registrar, by notice to the provider or representative concerned, as the case may be, declares that the application, resolution or closure, as the case may be, is contrary to this Act.

38A. Business rescue

(1)

- (a) Notwithstanding the provisions of the Companies Act or any other law under which a provider is incorporated, Chapter 6 of the Companies Act shall, subject to this section and with the necessary changes, apply in relation to the business rescue of a provider, whether or not it is a company.
- (b) This section does not apply if another registrar is authorised in terms of Financial Services Board legislation as defined in section 1 of the Financial Services Board Act, 1990 (Act No. 97

of 1990), or in terms of banking legislation, to make an application for the business rescue of a provider.

- (2) The registrar may make an application under section 131 of the Companies Act in respect of a provider if the registrar is satisfied that it is in the interests of the clients of the provider or the financial services industry.
- (3) The following acts are subject to the approval of the registrar:
 - (a) The resolution of a provider to begin business rescue proceedings;
 - (b) the appointment of a business rescue practitioner;
 - (c) the adoption of a business rescue plan; and
 - (d) the exercise of a power by the business rescue practitioner under the Companies Act.
- (4) In the application of Chapter 6 of the Companies Act-
 - (a) any reference to the Commission shall be construed as a reference also to the registrar;
 - (b) the reference to creditors shall be construed as a reference also to clients of the provider;
 - (c) any reference relating to the ability of a provider to pay all debts, shall be construed as relating also to the provider's inability to comply with the financial soundness requirement under section 8(1)(c) of this Act;
 - (d) there shall be considered, in addition to any question relating to the business of a provider, also the question whether any cause of action is in the interests of the clients.
- (5) If an application to a Court for an order relating to the business rescue of a provider is made by an affected person other than the registrar-
 - (a) the application shall not be heard unless copies of the notice of motion and of all accompanying affidavits and other documents filed in support of the application are lodged with the registrar, before the application is set down for hearing;
 - (b) the registrar may, if satisfied that the application is not in the interests of the clients of the provider, join the application as a party and file affidavits and other documents in opposition to the application.

- (6) As from the date upon which a business rescue practitioner is appointed, the business rescue practitioner of a provider shall not conduct any new business unless the practitioner has been granted permission to do so by a court.

(Section 38A inserted by section 201 of Act 45 of 2013)

38B. Application by registrar for sequestration or liquidation

- (1) Subject to subsection (3), if the registrar, after an on- site visit in terms of section 4(5) or an inspection in terms of the Inspection of Financial Institutions Act, 1998 (Act No. 80 of 1998), considers that the interests of the clients of a financial services provider or of members of the public so require, the registrar may apply to the court for the sequestration or liquidation of that provider, whether or not the provider is solvent, in accordance with-
- (a) the Insolvency Act, 1936 (Act No. 24 of 1936);
 - (b) the Companies Act;
 - (c) the Close Corporations Act, 1984 (Act No. 69 of 1984); or
 - (d) the law under which that provider is incorporated.
- (2) In deciding an application contemplated in subsection (1), the court-
- (a) may take into account whether sequestration or liquidation of the financial services provider concerned is reasonably necessary-
 - (i) in order to protect the interests of the clients of the provider; and
 - (ii) for the integrity and stability of the financial sector;
 - (b) may make an order concerning the manner in which claims may be proved by clients of the financial services provider concerned; and
 - (c) shall appoint as trustee or liquidator a person nominated by the registrar.
- (3) This section does not apply if another registrar is authorised in terms of Financial Services Board legislation as defined in section 1 of the Financial Services Board Act, 1990 (Act No. 97 of 1990), or in terms of banking legislation, to apply to the court for the sequestration or liquidation of that provider.

(Section 38B inserted by section 201 of Act 45 of 2013)

38C. Directives

- (1) The registrar may, in order to ensure compliance with or to prevent a contravention of this Act, issue a directive to any person or persons to whom the provisions of this Act apply.
- (2) A directive issued in terms of subsection (1) may-
 - (a) apply generally; or
 - (b) be limited in its application to a particular person or category of persons.
- (3) A directive issued in terms of subsection (1) takes effect on the date determined by the registrar in the directive.
- (4) In the event of a departure from section 3(2) or 4(1), (2) or (3) of the Promotion of Administrative Justice Act (Act No. 3 of 2000), the directive must include a statement to that effect and the reasons for such departure.
- (5) The registrar must, where a directive is issued to ensure the protection of the public in general, publish the directive on the official web site and any other media that the registrar deems appropriate, in order to ensure that the public may easily and reliably access the directive.

(Section 38C inserted by section 201 of Act 45 of 2013)

39. Right of appeal

Any person who feels aggrieved by any decision by the registrar or the Ombud under this Act which affects that person, may appeal to the board of appeal established by section 26(1) of the Financial Services Board Act, in respect of which appeal the said section 26 applies with the necessary changes.

CHAPTER VII MISCELLANEOUS

40. Saving of rights

No provision of this Act, and no act performed under or in terms of any such provision, may be construed as affecting any right of a client, or other affected person, to seek appropriate legal redress in terms of this Act, the common law or any other statutory law, and whether relating to civil or criminal matters, in respect of the rendering of any financial service by an authorised financial services provider, or representative of such provider, or any act of a person who is not an authorised financial services provider or a representative of such a provider.

(Section 40 substituted by section 202 of Act 45 of 2013)

41. Fees and penalties

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(1)

- (a) The Minister must, after consultation with the registrar, by notice in the *Gazette*, determine the fees payable to the registrar by any person, or category of persons, seeking a decision or the performance of any other act by the registrar under this Act and referred to in section 3(1).
- (b) The fees are payable in the manner, and are subject to the requirements, determined by the registrar by notice on the official web site.

(Section 41(b) substituted by section 203 of Act 45 of 2013)

(2)

- (a) A person who fails to furnish the registrar with a return, information or document, as provided by this Act, within the period specified or any extension thereof, is, irrespective of any criminal proceedings instituted against the person under this Act, but subject to paragraph (b), liable to a penalty not exceeding R1 000 or any greater amount prescribed, for every day during which the failure continues unless the registrar, on good cause shown, waives the penalty or any part thereof.
- (b) The penalty may be imposed by the registrar by notice to the person concerned, and such imposition must be preceded by a procedure giving such person a reasonable opportunity to be heard, and takes effect on a date specified in such notice which may be a date prior to the date of the notice.

(3)

- (a) A person who is liable to pay the fees or a penalty contemplated in subsection (1)(a) or (2)(a), respectively, and who fails to pay the amount due on the date or within the period specified, must pay interest on the amount outstanding and on unpaid interest at such rate, and calculated in such manner as may be determined by the Minister from time to time in respect of debts due to the state.
- (b) The fees and penalties, and interest owed in respect thereof, are regarded as debts due to the Board and may be recovered by the Board in a Court.

42.

(Section 42 repealed by section 204 of Act 45 of 2013)

43.

(Section 43 repealed by section 62 of Act 22 of 2008)

44. Exemptions by registrar and Minister

- (1) The registrar may on or after the commencement of this Act, but prior to the date determined by the Minister in terms of section 7(1), exempt any person or category of persons from the provisions of that section if the registrar is satisfied that -
 - (a) the rendering of any financial service by the applicant is already partially or wholly regulated by any other law; or
 - (b) the application of the said section to the applicant will cause the applicant or clients of the applicant financial or other hardship or prejudice; and
 - (c) the granting of the exemption will not -
 - (i) conflict with the public interest;
 - (ii) prejudice the interests of clients; and
 - (iii) frustrate the achievement of the objects of this Act.
- (2) The registrar -
 - (a) having regard to the factors mentioned in subsection (1), may attach to any exemption so granted reasonable requirements or impose reasonable conditions with which the applicant must comply either before or after the effective date of the exemption in the manner and during the period specified by the registrar; and
 - (b) must determine the period for which the exemption will be valid.
- (3) An exemption in respect of which a person has to comply with requirements or conditions, lapses whenever the person contravenes or fails to comply with any such requirement or condition: Provided that the registrar may on application condone any such contravention or failure and determine reasonable requirements or conditions with which the applicant must comply on or after resumption of the exemption as if such requirements or conditions had been attached or imposed on the first granting of the exemption.
- (4)
 - (a) The registrar may in any case not provided for in this Act, on reasonable grounds, on application or on the registrar's own initiative by notice on the official web site, exempt any person or category of persons from any provision of this Act.

(Section 44(4)(a) substituted by section 205 of Act 45 of 2013)
 - (b) The provisions of subsections (1), (2) and (3) apply with the necessary changes in respect of any exemption contemplated in paragraph (a).

- (5) The Minister, after consultation with the registrar, may, on such conditions as the Minister may determine, by notice in the *Gazette* exempt a financial services provider or representative, or category of financial services providers or representatives, from any provision of the Policyholder Protection Rules made under section 62 of the Long-term Insurance Act, 1998 (Act No. 52 of 1998), and section 55 of the Short-term Insurance Act, 1998 (Act No. 53 of 1998), respectively.

45. Exemptions, and amendment or repeal of laws

- (1) The provisions of this Act do not apply to the rendering of financial services by –

(a)

- (i) any "authorised user", "clearing member", "licensed clearing house", "licensed central securities depository" "licensed exchange" or "participant" as defined in section 1 of the Financial Markets Act, 2012 that is authorised by that Act to render those financial services;

(Section 45(1)(a)(i) substituted by section 111 of Act 19 of 2012)

- (ii) a manager as defined in section 1 of the Collective Investment Schemes Control Act, 2002;
- (iii) a person performing the functions referred to in section 13B of the Pension Funds Act, 1956 (Act No. 24 of 1956), if such person complies with the requirements and conditions contemplated in that section; or
- (iv) a person carrying on the business referred to in section 58 of the Medical Schemes Act, 1998 (Act No. 131 of 1998), if such person complies with the requirements contemplated in that section,

to the extent that the rendering of financial services is regulated by or under those Acts, respectively;

(b)

- (i) the executor, administrator or trustee of any deceased or insolvent estate, or a person acting on behalf of such executor, administrator or trustee;
- (ii) the curator of a person under curatorship, or a person acting on behalf of such curator;
- (iii) the liquidator of a company in liquidation, business rescue practitioner of a company subject to business rescue proceedings, or a person acting on behalf of such liquidator or business rescue practitioner;

(Section 45(1)(b)(iii) substituted by section 206 of Act 45 of 2013)

- (iv) the trustee of an *inter vivos* trust as defined in section 1 of the Trust Property Control Act, 1988 (Act No. 57 of 1988), not being a business trust created for the purpose of profit-making achieved through the combination of capital contributed by the beneficiaries of the trust and through the administration or management of the capital by trustees on behalf of and for the benefit of the beneficiaries, or a person acting on behalf of such first-mentioned trustee;
- (v) the parent, tutor or guardian of a minor, or a person acting on behalf of such parent, tutor or guardian,

unless the financial services are rendered as a regular feature of any such person's business; or

- (c) any other trustee or custodian appointed under any law to the extent that the rendering of such services is regulated by or under such law.

(2)

- (a) The law referred to in item I of the Schedule is hereby amended to the extent indicated in the fourth column of the Schedule.
- (b) The laws referred to in item II of the Schedule are hereby, with effect from the date determined in terms of section 7(1), amended or repealed to the extent indicated in the fourth column of the Schedule: Provided that any unconcluded business of any financial services provider in terms of such law on that date may be concluded within the prescribed period as if any such amendment or repeal has not taken effect.

- (3) Until such time as the Collective Investment Schemes Control Act, 2002, referred to in sections 1(1) and 45(1)(a)(ii) of this Act comes into operation, any reference in this Act to -

- (a) a collective investment scheme and manager must be construed as references to a unit trust scheme and management company, and scheme and manager, referred to in the Unit Trusts Control Act, 1981 (Act No. 54 of 1981), and the Participation Bonds Act, 1981 (Act No. 55 of 1981), respectively; and
- (b) any word or expression defined in the Unit Trusts Control Act, 1981, and the Participation Bonds Act, 1981, unless clearly inappropriate or inconsistent with this Act, has the meaning so defined.

- (4) Until such time as the Securities Services Act, 2002, referred to in sections 1(1) and 45(1)(a)(i) of this Act comes into operation, any reference in this Act to -

- (a) an authorised user, exchange, a clearing house, central securities depository and participant, must be construed as references to a member, stock exchange, clearing house, financial exchange, recognised clearing house, central securities depository and depository institution referred to in the Stock Exchanges Control Act, 1985 (Act No. 1 of 1985), Financial Markets Control Act, 1989 (Act No. 55 of 1989), and Custody and Administration of Securities Act, 1992 (Act No. 85 of 1992), respectively; and
- (b) any word or expression defined in the Stock Exchanges Control Act, 1985, Financial Markets Control Act, 1989, and Custody and Administration of Securities Act, 1992, unless clearly inappropriate or inconsistent with this Act, has the meaning so defined.

46. Commencement and short title

This Act is called the Financial Advisory and Intermediary Services Act, 2002, and comes into operation on a date fixed by the President by proclamation in the *Gazette*.

GENERAL EXPLANATORY NOTE:

[] Words in bold type in square brackets indicate omissions from existing enactments.

_____ Words underlined with a solid line indicate insertions in existing enactments.

SCHEDULE

LAWS AMENDED OR REPEALED

(Section 45)

ITEM	NUMBER AND YEAR OF LAW	SHORT TITLE	EXTENT OF AMENDMENT OR REPEAL
I	Act No. 97 of 1990	Financial Services Board Act, 1990	The amendment of section 1 by the addition of the following subparagraph to paragraph (a) of the definition of "financial institution": <u>"(xii) any 'authorised financial services provider' or 'representative' as defined in section 1 (1) of the Financial Advisory and intermediary Services Act, 2001;"</u> .
II (a)	Act No. 1 of 1985	Stock Exchanges Control Act, 1985	1. The amendment of section 4 by the –

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			<p>(a) substitution for subsection (1) of the following subsection:</p> <p><u>"(1) No member may, as a regular feature of the business of the member, undertake the management of investments on behalf of another person, and for such management receive any remuneration in whatever form, unless the member is authorised to do so in terms of the rules."</u>; and</p> <p>(b) deletion of subsections (1A), (2), (3), (4), (5), (6) and (7)(c).</p> <p>2. The amendment of section 12 by the substitution for paragraph (d) of subsection (1) of the following paragraph:</p> <p><u>"(d) that -</u></p> <p>(i) <u>a member carries on a business contemplated in section 4(1) in accordance with the provisions of the rules; and</u></p> <p>(ii) <u>a member may not effect a transaction with a person whom the member reasonably believes requires authorisation as a financial services provider or the status of a representative in terms of the Financial Advisory and</u></p>
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			<p><u>intermediary Services Act, 2001, without having taken reasonable measures to ascertain that such person has the required authorisation or status.”.</u></p> <p>3. The amendment of section 39 by the deletion of subsections (2), (2A) and (2B).</p> <p>4. The amendment of section 45 -</p> <p>(a) by the deletion of subparagraph (iii) of paragraph (a) of subsection (1);</p> <p>(b) by the deletion of the word “or” at the end of subparagraph (ii) of paragraph (b) subsection (1), and of subparagraph (iii) of the said paragraph (b);</p> <p>(c) by the substitution for the words following on subparagraph (iii) of paragraph (b) of subsection (1) of the following words:</p> <p>“but who is carrying on the business of a stock exchange <u>or</u> of a member, [or of a person requiring approval in terms of section 4] as the case may be; and”.</p> <p>5. The amendment of section 47 by the deletion of paragraph (b) of subsection (1).</p> <p>6. The amendment of section 48 by the substitution for paragraph (a) of subsection (1) of the following</p>
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			<p>paragraph:</p> <p>"(a) contravenes a provision of section 3(1) or (2), 4(1) [or (2)] or 14;".</p> <p>7. The substitution of the following heading and subsection for the heading and subsection (1) of section 50:</p> <p>"Powers of court to declare member, officer or employee of member disqualified"</p> <p>50. (1) If a court -</p> <p>(a) convicts a member <u>or</u> an officer or employee of a member [or a person approved in terms of section 4] under this Act or of an offence of which any dishonest act or omission is an element; or</p> <p>(b) finds, in proceedings to which a member <u>or</u> an officer or employee of a member [a person approved in terms of section 4 or such person's officer or employee] is a party or in which [his] such member's, officer's or employee's conduct is called in question, that [he] such member, officer or employee has been guilty of dishonest conduct,</p> <p>the court may (in addition, in a</p>
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			<p>case referred to in paragraph (a), to any sentence it may impose) declare that member, officer or employee of a member [person or such person's officer or employee] to be disqualified, for an indefinite period or for a period specified by the court, from carrying on the business of a member <u>or</u> from being an officer or employee of a member, [or from carrying on the business referred to in section 4] as the case may be."</p>
II (b)	Act No. 55 of 1989	Financial Markets Control Act, 1989	<p>1. The amendment of section 5 -</p> <p>(a) by the substitution for subsection (1) of the following subsection:</p> <p><u>"(1) No member may, as a regular feature of the business of the member, undertake the management of investments on behalf of another person, and for such management receive any remuneration in whatever form, unless the member is authorised to do so in terms of the rules."</u></p> <p>and</p> <p>(b) by the deletion of subsections (1A), (2), (3), (4), (5), (6) and (7)(c).</p> <p>2. The amendment of section 17 -</p> <p>(a) by the substitution in subsection (1) for paragraph (dC) of the</p>

			<p>following paragraph:</p> <p><u>"(dC) that a member carries on a business contemplated in section 5(1) in accordance with the provision: of the rules;"</u>: and</p> <p>(b) by the substitution in subsection (1) for paragraph (1B) of the following paragraph:</p> <p><u>• (1B) that no member may effect a transaction with a person who the member reasonably believes requires authorisation as a financial services provider or the status of a representative in terms of the Financial Advisory and Intermediary Services Act, 2001, without having taken reasonable measures to ascertain that such person has the required authorisation or status;"</u>.</p> <p>3. The amendment of section 21A by the deletion of subsections (2), (2A) and (2B).</p> <p>4. The amendment of section 26 -</p> <p>(a) by the deletion in subsection (1) of subparagraph (iii) of paragraph (a);</p> <p>(b) by the deletion of the word "or" at the end of subparagraph (ii) of paragraph (b) of subsection (1), and of subparagraph (iii) of the</p>
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			<p>said paragraph (b): and</p> <p>(c) by the substitution for the words following on subparagraph (iii) of paragraph (b) of subsection (1) of the following words:</p> <p>“but who is carrying on the business of a financial exchange <u>or</u> of a member [or of a person requiring approval in terms of section 5]; and”.</p> <p>5. The amendment of section 28 by the deletion of paragraph (c).</p> <p>6. The amendment of section 29 -</p> <p>(a) by the substitution for paragraph (b) of subsection (1) of the following paragraph:</p> <p>“(b) direct a financial exchange or a member thereof or a recognized clearing house [or a person approved in terms of section 5] to take any other steps, or to refrain from performing or continuing any act, in order to terminate or to obviate any undesirable practice or state of affairs brought to light by the inspection.”;</p> <p>and</p> <p>(b) by the substitution for subsection (2) of the following subsection:</p> <p>“(2) A financial exchange or a member thereof or a recognized clearing house [or a person</p>
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			<p>approved in terms of section 5]</p> <p>shall upon receipt of a request in writing by the Registrar to that effect immediately discontinue the publication or the issue of any advertisement, brochure, prospectus or similar document relating to financial instruments specified in the request which is not a correct statement of fact or is objectionable, or effect such adjustments thereto as the Registrar deems fit.” .</p>
			<p>7. The substitution of the following section for section 30:</p> <p>“Evidence</p> <p>30. A record purporting to have been made or kept in the ordinary course of the carrying on of the business of a financial exchange or the business of a member, or of a recognized clearing house [or the business of a person approved in terms of section 5] or a copy of or an extract from such record certified to be correct by the public prosecutor, shall on its mere production by the public prosecutor in any criminal proceedings under this Act, any other law or the common law against the person who carries or carried on the business in question or any other person, be admissible in evidence and be <i>prima facie</i> of the facts contained in such record, copy or extract.” .</p>
			<p>8. The substitution of the following heading</p>

			<p>and subsection for the heading and subsection (1) of section 31:</p> <p>“Power of court to declare member or officer or employee of member disqualified</p> <p>31. (1) If a court -</p> <p>(a) convicts a member or officer or employee of a member [or a person approved in terms of section 5] of an offence under this Act or of an offence of which any dishonest act or omission is an element: or</p> <p>(b) finds, in proceedings to which a member or officer or employee of a member [or a person approved in terms of section 5 or such person's officer or employee] is a party or in which such member's officer's <u>or</u> employee's [or person's] conduct is called in question, that such member, officer <u>or</u> employee [or person] has been guilty of dishonest conduct,</p>
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			<p>the court may (in addition, in a case referred to in paragraph (a) to any sentence it may impose) declare that member, officer or employee of a member [or person or such person's officer or employee] to be disqualified, for an indefinite period or for a period specified by the court, from carrying on the business of a member or from being an officer or employee of a member [or from carrying on the business referred to in section 5], as the case may be."</p>
II (c)	Act No. 140 of 1992	Drugs and Drug Trafficking Act, 1992	<p>1. The amendment of section 10 by the substitution in subsection (3) for paragraphs (a) and (b) of the following paragraphs:</p> <p>"(a) any stock-broker as defined in section 1 of the Stock Exchanges Control Act, 1985 (Act No. 1 of 1985) [or any person contemplated in paragraph (d), (e) or (f) of section 4(1) of that Act]; or</p> <p>(b) any financial instrument trader as defined in section 1 of the Financial Markets Control Act, 1989 (Act No. 55 of 1989) [or any person contemplated in paragraph (f), (g), or (h) of section 5(1) of that Act]."</p>

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In partnership with:



FREE MARKET FOUNDATION COMMENT ON THE FINANCIAL ADVISORY AND INTERMEDIARY SERVICES BILL 1 OCTOBER 2001

1. Introduction

There is a consensus that accelerated economic growth is needed to absorb the millions of jobless South Africans. Government, in its GEAR policy document set out a relatively mild but sound programme to bring about the required growth. GEAR concentrates on fiscal and monetary discipline, relaxation of exchange controls, restructuring of state assets, spending on infrastructure, a more flexible labour market, reduction of tariffs and the implementation of stable and co-ordinated policies. The stated purpose of GEAR was to increase GDP growth to 6 percent per annum and structure government policies to meet this objective. GEAR is a laudable document but it overlooked a major drag on the economy – over-regulation in areas other than labour laws.

2. Regulatory overburdening of our developing economy

Regulatory excesses that constitute an intolerable burden on the economy are eroding the sterling work being done at the macro-economic level by Finance Minister Trevor Manuel and his team. Every piece of legislation affecting business has costs that have to be paid by the taxpayer in increased taxes, by employers in increased costs of doing business, by employees and the jobless in reduced employment opportunities, and by consumers in the form of higher prices and reduced choices. The increased job opportunities in the public service resulting from unnecessary additional legislation are a negative consequence – they constitute a dead-weight loss to the economy.

The fact that the Financial Advisory and Intermediary Services (FAIS) Bill has gone through several incarnations with the Financial Services Board (FSB) attempting to deal with a veritable flood of criticisms indicates how controversial this bill is. It can be compared to using a cannon to try to kill a mosquito. In our view, existing legislation and the common law deals effectively with financial advisory services. This legislation is unnecessary and will impose unacceptable costs in the form of government administration costs, compliance costs and loss of services to consumers.

2.1 Cost/benefit analysis

In our earlier comments on this proposed legislation we made the following statement:

The Memorandum to the Financial Advisory and Intermediary Services Bill says that it “covers ground not covered presently by any other legislative measure in the Republic.” It also says that it will “result in real savings for the public and the financial services industry.” The first statement is obfuscatory in that the whole body of commercial law, and especially the laws relating to contract and fraud cover all activities. Although the activities may not have their own special *legislation*, the public is protected by *the law*. If law enforcement is not effective, or if access to the courts is not easy, or if people are not aware of their rights or how they may exercise them, then those issues ought to be addressed directly; more regulation is not the answer. Saying that there will be savings for the public and the financial services sector without conducting a cost/benefit analysis is dangerous and, for the reasons already mentioned, not true. Evidence from other countries suggests that there will be increased costs with little or no benefits.

A cost/benefit analysis (CBA) has now been carried out, which apparently maintains that substantial financial benefits will accrue. We have not had access to the full report but merely to presentation slides that are not fully explanatory. However, we wish to comment on the information presented in those slides:

- The cost benefit analysis is profoundly flawed in that it presupposes that the Bill governs only Insurance Brokers and agents. One of the most serious problems with the Bill is that it is completely unclear what or who it governs. The memorandum attached to the Bill says, for instance, that the “ambit of the Bill has ... been extended to all intermediaries rendered in respect of financial products as defined...” In addition to the “all-embracing” definition in the Bill, it empowers the Registrar, probably unconstitutionally, to declare arbitrarily any product to be a “financial product”.
- The Bill does not stipulate the benefits that it seeks to achieve and the Financial Services Board has consistently failed to provide such information. In carrying out the cost/benefit analysis Genesis Analytics were therefore either compelled to base their analysis on conjecture, or were privy to information that has not been released to the general public, and is therefore possibly also not available to Parliament.
- By their own admission a proper CBA could not be carried out, particularly as regards the emerging sector because of a lack of data.
- Genesis Analytics state that some costs cannot be measured because of the complexity of the industry, the complexity of the FAIS Bill including subordinate legislation, exemptions, and discretionary powers. (These difficulties highlight the undesirability of the Bill, especially the effect it will have on the emerging sector.)
- The estimated savings from lapses appear to be excessive:
 - The assumption made regarding the expected improvement to be brought about in the level of lapses of policies is too high. It is well known that most if not all lapses due to affordability and misselling occur in the first year. The estimated savings of R186-million, half of R373-million, for lapses in second and subsequent years is dubious.
 - The estimated saving of R121-million on commissions appears, without additional information, to be double counting as it is surely already included in the calculation of lapses.

- The largest figure of R559-million estimated as a potential saving from reduced misselling and improved disclosure is not explained in the slide but would need careful evaluation to determine whether it has validity.

No account has been taken in the CBA of the losses to the poorest consumers due to the loss of services that will be caused by this legislation. In the UK and Australia similar legislation has substantially reduced the numbers of people in the financial advisory sector. The result is that the existing advisors are not interested in business producing small premiums. The poor in those countries have therefore been totally deprived of financial advisory services where the intention had apparently been to improve services to the poor and not eliminate them. The result was consequently very different to what had been intended. We predict that if this legislation is adopted it will have similar consequences to those experienced in the UK and Australia.

2.2 The South African economy cannot afford the cost of over-regulation

Developed countries can carry the costs of over-regulation although, together with excessive taxation, these costs are responsible for the low economic growth rates we have come to expect from such countries. However, developing countries like South Africa cannot afford these costs. We cannot afford to cause increased unemployment, poverty and hunger through over-zealous regulation.

2.3 Emulating the current regulations of highly developed countries is a recipe for disaster

There is an unfortunate tendency for developing economies to attempt to emulate the regulatory regimes of highly developed economies. This is a grave error. What they should be looking at is the level of regulation that pertained in those countries when they were experiencing their highest growth rates and when they were at the same level of development as their own countries. Even highly developed countries, such as the United Kingdom, are badly affected by over-regulation. Reports emanating from the UK suggest that business is moving elsewhere because of the over-regulation of its financial sector. South Africa can therefore ill afford to impose unnecessary costs of this nature on its economy. Our civil service must come to terms with the fact that we have a developing economy and that each avoidable item of cost they impose on the productive sector of the economy translates into lost jobs, jobs that never get created, and lost economic growth.

3. Experience in the United Kingdom and Australia

In an earlier submission we provided evidence of the damage caused by legislation similar to this Bill that was adopted in the UK and Australia. Unfortunately the widespread economic damage in those countries has apparently not persuaded the protagonists of this Bill to abandon the proposed legislation. Our concern for the South African economy, and especially the interests of our most vulnerable citizens, leads us to repeat that evidence:

3.1 United Kingdom

Mr. Nigel Cooke of Jardine Arber, an actuarial consultancy firm based in Wheathamstead, England carried out a study in 1994, after the UK Financial Services Act had been in force for 8 years, and reported:

When measuring whether the regulations introduced meet the letter of the Act, there can be little argument that they have been very successful to date, but have they solved the underlying problem that produced the Act in the first place? If the practical objectives of the Act were to do things like, reduce the incidence of bad advice, encourage better value for money for investors, and increase investors' satisfaction, then sadly circumstantial evidence indicates that the regulations in the life assurance sector have yet to have any tangible benefits. This is because of the following:

1. More information is being given but the more vulnerable prospective purchasers are not reading it.
2. Policy values have not improved.
3. Complaints are not declining as a proportion of sales.
4. Overall lapses have not declined; but
5. Sales have declined.

Mr. Cooke's research showed that a full 8 years after the introduction of the UK Financial Services Act:

1. Linked life product forfeitures had risen.
2. Other product forfeitures had failed to decline.
3. The worst lapse rates were being experienced among those policies sold by company salesmen and Independent Financial Advisers, the very people whose services to the public the Act was supposed to improve.

Mr. Cooke concluded his report by saying:

Quite what this will mean to the regulatory process is open to conjecture. Also, whether that will prove to be the same answer as the one to the question "What ought this to mean to the regulatory process" is a whole subject on its own. If the regulations are designed for the purposes given earlier, then presumably the regulators will be becoming aware that there is still a very long way to go.

The British Actuarial Journal recorded a 1999 discussion of the British Actuarial Society on future financial regulation in the United Kingdom, having concluded that the existing regulation was a dismal failure and extremely deleterious to their industry.

Mr. J. Stretton, a Fellow of the Faculty of Actuaries, went to the heart of the matter:

The problem with the question is, of course, that the 1986 Act was totally silent about what regulation was expected to achieve – an omission which, I think, was most remiss. It is part of the political job to define what is to be achieved, enabling separation of the executive and legislative functions.

Against what people think it was there for, regulation has not achieved its objectives, and there is a big risk that we will fail again if we put the same sort of woolly-minded objectives up for UK Regulation Mark II.

Later on in the discussion, Mr. A. Neill, FFA, FIA, Past President of this Society, said:

The truth is that risk is part of everyday life. We need to separate the difference between acceptance of the natural risks of business and how to deal with the cowboys and fraudsters. To mix these two very different purposes together, as we have been doing in the past, is stupidity, and we should not condone it in the future. Do the public know that the current regulatory system costs them as much each year as Robert Maxwell did in a lifetime? Mr. Stretton is right to recall the forgotten words of the late Jim Gower: "Regulation should be no greater than is necessary to protect reasonable people from being

made fools of' and I think that we have forgotten that to the detriment of the system. What we will finish up with is exactly the problem we have at present. We cannot deliver this regulation at the top end of the market and we cannot afford even to try it at the bottom!

If you do not describe closely what is to be done, and you let loose the bureaucrats, then you have a recipe for disaster.

3.2 Australia

The Australians introduced their financial adviser regulations in 1993. By the end of 1996 LIMRA of Australia had the following to report:

1. The number of career agents in the life assurance industry has fallen from 20 000 to less than 4 500 (i.e. by 77,5 percent).
2. Total annual recurring premiums have fallen from A\$2.8 Billion to A\$1,9 billion.
3. Almost no company, general agents, life brokers or Independent Field Advisers are recruiting new advisers; they are simply relying on recycled advisers.
4. Full-time career life agent levels have dropped by almost 70%.
5. Traditional field force management skills are all but lost as companies have shed internal field forces and no longer employ traditional agency skills in-house.

4. South Africa and the proposed legislation

The Bill in its current format has several deficiencies, including some of the same problems mentioned in the reports from Australia and the United Kingdom:

4.1 The Bill does not say what problems it intends to solve

As happened in the U.K. and Australia, the Bill does not spell out clearly and precisely what problems it intends solving and whether this is the only way in which they can be solved. Is it a consumer protection law or is it a licensing law? Because it does not unequivocally state its intentions there will be no way of knowing or measuring its success or failure.

4.2 The probable cost to the taxpayer and the economy has not been established

No evaluation was carried out to determine the costs of this regulatory exercise and the potential benefits have not been articulated or quantified. There is consequently no empirical evidence to prove that the effects of the Bill will be positive i.e. there is no way of gauging whether the benefits to the country outweigh the costs. An important decision such as this should not be based on anecdotal evidence or unsubstantiated perceptions.

4.3 The Bill is vague and does not properly inform affected parties regarding its implications

The Bill, as it stands, is vague in its ambit since:

- it tells people who aspire to be Financial Services Providers that they have to obtain licences from the Registrar, but otherwise fails to specify what they have to do in

order to qualify for approval i.e. no objective criteria are spelled out. This lack of objective qualifying criteria forms a barrier to entry and is contrary to the spirit if not the letter of section 22 of the Constitution;

- it fails to elucidate for someone who wants to be a good Financial Services Provider and a good citizen, what he/she must or must not do in order to comply with the law;
- it is contrary to the principles of good law in that it is not self-contained and relies on regulations (which only come into existence after the Bill is promulgated) to complete it, thus bypassing the legislative/parliamentary process regarding some of its most important requirements.

4.4 The Bill diminishes the responsibility and accountability of Parliament

The Bill detracts from the legislative responsibility and accountability of Parliament as entrenched in the Constitution since it puts power into non-Parliamentary hands to determine the substance and extent of the legislation after it has been promulgated.

4.5 The Bill confuses two very different forms of supervision

The Bill introduces two forms of supervision: direct supervision by the Registrar and indirect supervision by Representative bodies. Since the Bill provides no certainty regarding either form of supervision, this arrangement is likely to lead to:

- confusion as to who is responsible for supervising what;
- regulatory arbitrage when the Registrar out-sources different aspects of supervision to different Representative bodies;
- uneven standards of supervision since there will be many bodies responsible for the supervision;
- a bloated Financial Services Board that will not be sure of its total responsibilities regarding supervision;
- dual costs of supervision.

4.6 Protection from fraud requires proper enforcement of the Criminal Law

It is possible that one of the underlying intentions of this Bill is to protect consumers from fraud. If so, it is the wrong way to go about addressing the problem. There are already laws against such criminal activities and the solution to the problem of fraud lies in proper enforcement of the Criminal Law.

4.7 Consumers will be lulled into an illusion of safety

The danger of this type of legislation is that consumers will believe that it will protect them against all eventualities and that they themselves need not exercise care. They may continue with the illusion of never suffering loss in making bad investment decisions because 'big daddy' is looking after them.

4.8 Innovation will be a casualty of this legislation

There is no doubt that innovation will be one of the main casualties of the type of over-regulated business environment the Bill seeks to introduce – the very innovation that provides new and better products, devises new methods of delivery and brings down costs – inevitably benefiting consumers.

4.9 The proposed legislation will confuse intended beneficiaries

There are so many bodies involved in the development, implementation and supervision of this proposed legislation that the man/woman in the street would not know where to go or what to do in order to receive 'benefits'.

4.10 Uncertainty as to the accountability and responsibility to consumers in the case of legislative and regulatory failure

There is no indication as to who will be accountable or responsible for consumer losses suffered despite this proposed costly legislative exercise. Even with strict adherence and enforcement losses will still occur. People will make mistakes or bad decisions, be they investment or otherwise, and no amount of regulation will eradicate such occurrences.

4.11 Granting unbridled power to the registrar is undesirable in law

Section 34 of the Bill, which deals with 'undesirable practices', grants the registrar unbridled powers that should be alien to a constitutional democracy that subscribes to the rule of law. A civil servant should not have the power to declare illegal by proclamation what the constitution and Parliament has up to that moment considered legal. Law-making by the administration leads to the worst form of tyranny as we learn from history and learned to our cost during the apartheid era. This section is itself highly undesirable and has no place in our law.

5. Impact on black South Africans

This Bill is likely to impact most severely on black South Africans. During the apartheid era blacks had limited opportunities to become insurance brokers and agents and sell other financial products. Now that South Africa has a constitutional democracy, care must be taken that legislation is not adopted that has a similar effect.

In a developing economy people from all walks of life turn to selling to improve their incomes. Retired people with inadequate pensions, housewives who wish to contribute to the family budget, young people leaving school, mothers wishing to earn money to improve their children's education, and many others. Many mothers choose to sell financial products during school hours so as not to detract from their family duties. This is how the white community in South Africa became involved in financial services – without registration and without complex requirements. Is it fair that at the very time that black South Africans have the opportunity to similarly earn a little extra money on a part-time basis they should be faced with this formidable and costly bureaucracy?

Some very effective apartheid stratagems were developed to protect whites from competition from blacks. One of these was followed in trades such as plumbing, electrical work, bricklaying, tiling etc. A provision was introduced that required contractors to use only qualified artisans and their apprentices. A further provision required apprentices to have Standard 8 Certificates. Although the barrier to entry was not explicitly racial, very few young black people could become apprentices because of

the educational requirement. The consequence of the legislation was that very capable black artisans were ineligible to work on contracts. Although the legislation did not refer to race, the effect was undeniably racial.

Although the Financial Advisory and Intermediary Services Bill makes no reference to race, it will act as a barrier to entry, especially to black South Africans. Given South Africa's past and the massive unemployment that exists amongst blacks, this is an intolerable prospect.

It is notable that the cost/benefit analysis did not quantify or attempt to determine the cost that this legislation will impose on what it describes as the "emerging sector". In our view this is one of the most important factor that have to be taken into account in considering this bill.

6. Will the 'Policy Holder Protection Rules' not provide adequate protection?

'Policy Holder Protection Rules' have been issued in terms of both the Long Term and Short Term Insurance Acts and are about to be promulgated in the Government Gazette. These rules overlap almost completely with the FAIS Bill and provide adequate disclosure requirements in all cases. The rules are intended to achieve the very same benefits for policyholders that this Bill is aimed at bringing about. There do not appear to be any potential additional benefits that could justify the adoption of this Bill.

As there has been no indication from the Financial Services Board as to the cost of implementing this Bill we asked a senior executive of an insurance company to give us an estimate. The estimate we received was R120, 000,000 per annum, and the executive believed this to be conservative. This does not include the compliance costs that will be imposed on the affected parties. Such costs will inevitably be passed on to the consumer.

7. The Bill is unconstitutional

The Bill reflects a general lack of appreciation by its formulators of key requirements for constitutionality, and the jurisprudential principles of good law. If enacted, key provisions would be unconstitutional with varying degrees of certainty.

- 7.1 Clauses 4(3)(a), 8(4)(a) and 34 violate s 22 of the Constitution. Clause 4(3)(a) empowers the registrar to prohibit publication of a document if he or she considers it to be "contrary to the public interest". Clause 8(4)(a) is unconstitutional to the extent that it empowers the registrar to impose conditions on a licence granted to a financial services provider. Clause 34 is unconstitutional since it empowers the registrar to prohibit a business practice on the basis that he or she considers the practice to be "undesirable". These clauses contravene the "guidance principle" established by the Constitution Court.
- 7.2 Para (h) of the definition of "financial product" is probably unconstitutional since it empowers the registrar to declare a product to be a "financial product" in a manner that contravenes the guidance principle.

- 7.3 Part I of Chapter VI is unconstitutional to the extent that it obliges a responding party to have a complaint determined by the Ombud, rather than by a court of law, if the complainant elects to lodge a complaint with the Ombud. This violates the constitutional right of a responding party to have a dispute resolved by the application of law before a court or other independent forum.

That these and possibly other provisions are unconstitutional is clear from the seminal judgements in:

- Dawood v Minister of Home Affairs 2000 3 SA 936 (CC)
- Janse van Rensburg NO v Minister of Trade and Industry 2001 1 SA 29 (CC)
- Arenstein v Durban Corporation 1952 1 SA 279 (A)
- City of Cape Town v AD Outpost (Pty) Ltd 2000 2 SA 733 (A)
- South African National Defence Union v Minister of Defence 1999 4 SA 469 (CC)
- S v Mamabolo 2001 BCLR 449 (CC)

These cases and the established principles of natural justice, due process and the rule of law require inter alia that:

- Laws must be clear and objective, subject to minimal arbitrary discretion;
- There must be a clear separation of powers, so that functions which amount to law-making or are of a judicial nature, are not performed by the executive – particularly subject to a constraint against using regulatory powers as a substitute for what should be done by the legislature. The executive branch of government may make regulations for the purposes of implementing and administering law only.
- Laws may not deprive or empower officialdom to deprive citizens of the right to practice their trade, subject to fair and reasonable regulation, but not prohibition. Citizens are entitled to have disputes settled by an independent judiciary, or its equivalent, but not by quasi-judicial processes within the executive, especially not the branch of government responsible for implementing the law concerned.

8. Conclusion

The experience of this type of legislation in the United Kingdom and Australia, and its effect on their financial industries, must be taken seriously. Their economies are developed, whilst ours is still developing and vulnerable. The legislation is reported, in the case of the UK, to have cost a great deal and to have failed in its intentions, and in Australia, to have wreaked havoc. Is this what the protagonists of South Africa's legislation wish to achieve, or are they recklessly unconcerned? If so, will our Members of Parliament be satisfied with a loss of such proportions in employment opportunities and in service delivery?

Calls for comment on Bills probably do not envisage that commentators will call for the entire scrapping of the proposed legislation. However, in view of the certainty that this Bill will cause major economic damage to the people of South Africa if adopted, and our view that it is unconstitutional, we recommend that the Bill be withdrawn in its entirety. No purpose will therefore be served by commenting on the rest of its content, much of

which is problematical because of the extensive administrative discretionary powers it grants.

This Bill is inappropriate, unconstitutional, and should not be passed into law. It will not achieve its stated objectives and will harm the economy. Most importantly, it has a striking resemblance to economic legislation with racial effects that was deliberately introduced during the apartheid era. This comment does not contend that there are racial intentions in the drafting of this Bill. However, it does contend that it will have unintended racial consequences.

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Attachment to FMF submission on FAIS

FAIS to Twin Peaks: Executive Summary

1. An on-going legislative wave started 13 years ago with the passing of the Financial Advisory and Intermediary and Services Act No.37 of 2002 (FAIS).
2. This was one of the few pieces of legislation ever to be subjected to a cost - benefit analysis. None of the promised benefits from that analysis have materialised. The original purpose of the legislation has been entirely forgotten and FAIS has acquired an expensive life all of its own. (Policy persistency has deteriorated. FSB alleges there are still unsatisfactory outcomes, yet provides no independent empirical evidence thereof.)
3. This enormous waste of resources is about to be compounded with the introduction of yet more legislation characterised as "Twin Peaks". Two Bills are currently circulating: The Financial Sector Regulation Bill (Twin Peaks) and the Insurance Bill. Several more are on their way for MPs to approve. They constitute a massive power grab by the executive branch who see themselves in future assuming more of the role of private insurance company directors and executives than prudential supervisors.
4. The intention *inter alia* is to specify insurance policy contract wording, interpretation and pricing, and thereafter to 'regulate and control' product and service innovation.
5. It is alleged that this follows international best practice, is being done *successfully* elsewhere, is as *recommended* by the IMF, is in response to the 2008 international 'financial crisis', and is *required* by South Africa's membership of various international bodies. None of these claims are supported by evidence and are generally untrue. (Twin Peaks has been tried in only 3 countries and has either failed or is currently under review there.)
6. Parliament has not granted Treasury authority to be bound by the requirements of any international bodies or the voluntary international insurance supervisor clubs / associations.
7. "Twin Peaks" already exists within the FSB and has done so at least since the passing of FAIS which introduced 'Market Conduct' regulation in 2002. Both Prudential (solvency) and so called 'Market Conduct' supervision are already in effect undertaken under one roof at the FSB.
8. The proposed new regulatory system is purely about creating a much bigger, overweening regulatory bureaucracy, *not* about a different approach.
9. "Twin Peaks" divides the existing FSB into two bureaucracies, **PLUS** it creates a permanent secretariat to try to prevent the inevitable duplication and ultimate conflict between the two.
10. The new regulatory system is predicted to be harmful in the extreme to all financial markets that will now have to try to serve two independent masters concurrently.
11. The new regulatory system contains little in the way of substantive preventative laws.
12. The new legislation is not directed at applying remedies to any known or stated problem or mischief. It merely creates new bureaucracies to deal with what has been dealt with by the FSB since 2002. (The FSB alone now employs +/- 500 bureaucrats – up from just 17 in 1985)
13. No regulatory impact assessment has been carried out on this massive proposed new bureaucracy. Parliament has not even been told how many people it will employ or at what cost.
14. Justification given does not stand up to scrutiny (International commitments, global 'crisis', IMF, etc, etc.)
15. The new legislation is increasingly violating the principles of the Rule of Law and the Separation of Powers. It now legislates without Parliament, executes alone, tries offenders without the judiciary, negotiates fines with them, and then keeps the money. (See also Snr Counsel Gilbert Marcus' opinion.)
16. The new system has already created job losses and consolidation of smaller insurance and intermediary companies into far fewer companies. (No Black brokerages now exist.)
17. More risk, danger and volatility is expected to be introduced through the Solvency Assessment and Management (SAM) model accompanying twin Peaks, not less as claimed.