



# **Module 7: Financial Advisory and Intermediary Services**

## **Learner Resource Guide**

Developed By  
Charlton Scheepers and Nerina de Waal

# Chapter 1

## Financial Advisory and Intermediary Services

### 1 The Act

- *“regulates the rendering of certain financial advisory and intermediary services to clients.”*

#### 1.1 The Aim of the FAIS Legislation

It is important to bear in mind, when seeing FAIS in context with other pieces of legislation, that what it really creates or aims to create is a formal system of regulating financial advisors and intermediaries. As a result of this, aggrieved consumers will be able to seek redress when they have been misled or misrepresented to by a representative or financial services provider.

It appears that in recent times, compliance and consumer protection have become buzzwords in the financial services industry and certainly FAIS is not the first piece of legislation in this industry to concern itself with the rights of consumers. Other pieces of legislation include the Long- and Short-Term Insurance Act – more specifically, the Policyholder Protection Rules – The Financial Markets Control Act and the Stock Exchanges Control Act. So, in a nutshell, different pieces of legislation are enacted with different aims in mind.

The FAIS legislation has been enacted with a strong emphasis on consumer protection and aims to achieve effective regulation of the different role-players through a number of mechanisms:

- Financial Services Providers (FSP’s) will have to be licensed in terms of the Act and they will have to comply with certain prescribed fit and proper criteria.
- The FSP’s are responsible for their representatives who also have to comply with fit and proper requirements.
- Further, the Act lays down standards for the market conduct of both FSP’s and representatives. Again, the focus here is on the consumer to receive fair treatment and to have full disclosure made to the consumer.

#### 1.2 Why the Need for the FAIS Legislation?

The FAIS Act was introduced to regulate the business of all Financial Service Providers who give advice or provide intermediary services to clients, regarding a wide range of financial products. In terms of the Act, such Financial Services Providers need to be licensed, and professional conduct is controlled through Codes of Conduct and enforcement measures.

The Act aims to achieve the following:

- Professional Conduct
- Better informed clients, and
- A professional, responsible sector

### **1.2.1 What is the history behind the legislation?**

Historically, there has been no formal system of regulating financial advisors and intermediaries. Aggrieved clients had very little recourse against dishonest advisors. Further, processes to protect clients such as Complaints policies and record keeping systems were not formally regulated.

The Board for Financial Services and Regulation was responsible for conceptualizing and designing the basic framework which would become FAIS. The FAIS Bill (before it was enacted) was drafted on the basis of a framework of specifications (provided by the Policy Board for Financial Services and Regulation), which only covered the furnishing of advice. Since then, the ambit of the Bill has been extended to all intermediary services rendered in respect of financial products (as defined in the legislation) and now has more far-reaching implications. During the drafting process (which lasted for more than 2 years), several drafts of the Bill were put on the Financial Services Board's (FSB) website, followed by statements in the media, inviting comments. In addition to this and given the fact that the Bill attracted interest from all the different industry players within the financial services sector, a number of workshops, as well as several road shows, were hosted by the FSB. These events covered discussions around the contents of the then Bill and its possible impact on the industry.

### **1.3 How does FAIS Address the Issue that there are Different Pieces of Legislation which Apply to Different Sectors of the Industry?**

The Act has a FUNCTIONAL and not an INSTITUTIONAL approach in its design. Since it regulates a FUNCTION, and not an INSTITUTION or group of institutions, it is not restrictive as to what institution it applies to. The applicability of the Act to an organisation depends on the following:

- If a person performs the function of "advice"; or
- Intermediary service

## 1.4 Definition of “ADVICE” and “INTERMEDIARY SERVICE”

These definitions are broad and all-inclusive and apply to a wide range of sectors within the industry.

- Advice is defined as any recommendation, guidance or proposal of a financial nature furnished, by any means or medium, to a client or group of clients in respect of the purchase or investment in any financial product, the conclusion of any other transaction aimed at incurring any right or benefit or liability in respect of any financial product (this includes a loan or cession), or the variation, replacement or termination of any financial product.
- “Intermediary Service” means any activity other than the furnishing of advice that is performed by a person for or on behalf of a client or product supplier.

In addition, in each instance, the “advice” or “intermediary service” must relate to a “financial product” which has a wide implication in terms of its definition.

## 1.5 Who or what is a Financial Services Provider (FSP)?

**In terms of the Act, an FSP is defined as**

*“any person, other than a representative, who as a regular feature of the business of such person furnishes advice, or renders any intermediary service, or both. “*

This could be an entity such as a large corporate who is also a product supplier or even an independent brokerage who operates as an SMME (Small, medium, micro enterprise). However, in terms of section 7 of FAIS, no person (including juristic persons) will be able to act as an FSP, unless such person has been issued with a licence by the Registrar.

In its application to become an authorised FSP, all relevant parties’ details must be disclosed. For example, Key Individuals, Representatives, and details about the FSP itself.

A licence may be granted subject to certain conditions and/or restrictions which results in categorisation of FSP’s according to the type and level of service rendered.

### **Key individuals**

These are natural persons within the FSP who are either managing or overseeing the activities of the FSP relating to financial services (for example a manager of a distribution unit in an FSP).

### **Representatives**

These are the persons who render a financial service to clients for or on behalf of an FSP, in terms of an employment or any other mandatory agreement. An example of a representative would be a tied agent of a large corporate or a financial advisor who operates under the auspices of an independent brokerage.

## Support staff

These are the staff that supports the function of the sales staff within the administrative functions of an FSP.

### 1.6 FSP's and their Representatives

In terms of FAIS, a person will not be able to act as a representative of an authorised FSP, unless such person is able to provide confirmation, certified by the FSP, to clients that:

- A service contract or other mandatory agreement, to represent the FSP exists
- The FSP accepts responsibility for the activities of the representatives falling within the contract or mandate.

The Act makes the FSP's liable for the conduct of their representatives. In terms of the Act, a representative engages in the same activities as its principal but does so for and on behalf of the FSP. This relationship is either based on the fact that the representative is an employee of the FSP or holds a mandate from the FSP. The FSP is expected to provide an updated register of its representatives to the Financial Services Board.

It therefore stands to reason that before an insurer mandates an organisation to perform certain functions on its behalf, it must ensure that such organisation is a registered FSP. This will mean that each FSP takes responsibility for its own employees or representatives, and the insurer is not held accountable for the behaviour of other organisations that perform certain functions on its behalf. Further, the Act is quite clear on the duties of the FSP regarding its representatives.

#### **An authorised financial services provider must:**

**(a)** at all times be satisfied that the provider's representatives, and key individuals of such representatives, are, when rendering a financial service on behalf of the provider, competent to act, taking into consideration requirements similar to those contemplated in paragraphs (a) and (b) of section 8(1) and subsection (1)(b)(ii) of this section, where applicable; and

**(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.

Every 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. Such register must 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. The register must also specify the categories in which such representatives are competent to render financial services.

It should be quite clear that the relationship between the FSP and its representatives is governed by a service contract or other mandatory agreement, and the FSP must accept responsibility for the activities of the representatives falling within the contract or mandate. For example –

### **1.7 What should an Authorised FSP do?**

An authorised FSP, once authorised, must, amongst others:

- Maintain a register of representatives.
- Take reasonable steps to ensure that the representatives comply with the applicable codes of conduct as well as other laws relating to conduct of business.
- Be satisfied at all times that the representatives are fit and proper – meaning that they must be competent (in terms of qualifications and experience), are honest and have integrity, are operationally sound and are financially sound.
- Display a certified copy of the licenses within every business premises and include reference to the licence in all business documentation, advertisements and promotional material.
- Maintain proper accounting records in respect of the business carried on by the authorised provider. Such records will have to be audited by an external auditor and approved by the Registrar. • Maintain records for a minimum period of five years, concerning various transactions and complaints received, amongst others.

Therefore typically, an FSP will have to accept responsibility for:

- Maintaining a representative register
- Compliance with the respective Code/s of Conduct
- Appointment of Compliance Officers
- Maintenance of various records
- Accounting and audit requirements
- Regular reporting to the Registrar
- Ongoing competency and integrity checks for their Representatives
- An internal complaints resolution process and policy
- General compliance with the Act

## 1.8 Who are FSP's?

### 1.8.1 FSP Category II (Discretionary FSP)

“Discretionary FSP” means a FSP:

- (a) that renders intermediary services of a discretionary nature as regards the choice of a particular financial product referred to in the definition of “administrative FSP” in this subsection, but without implementing any bulking; and
- (b) acting for that purpose specifically in accordance with the provisions of the Code set out in Chapter II of this Schedule, read with the Act, the General Code (where applicable) and any other applicable law.

It appears from the above definition that the type of FSP would most likely be a Discretionary Investment Manager, who renders intermediary services of a discretionary nature, without implementing any bulking. (Someone who would register as an Investment Manager in terms of FMCA & SECA.) In this instance, a client would give a mandate to the Investment Manager and s/he would move the client's funds around at his or her discretion.

### 1.8.2 FSP Category III

(Administrative FSP) “Administrative FSP” means a FSP, other than a discretionary FSP –

- (a) that renders intermediary services in respect of financial products referred to in paragraphs (a), (b), (c) (excluding any short-term insurance contract or policy referred to therein), (d) and (e), read with paragraphs (h), (i) and (j) of the definition of “financial product” in section 1(1) of the Act, on the instructions of a client or another FSP and through the method of bulking; and
- (b) acting for that purpose specifically in accordance with the provisions of this Code, read with the Act, the General Code (where applicable), and any other applicable law;

“bulking” means the aggregation by an administrative FSP of –

- (a) clients' funds when buying or investing in financial products on behalf of clients, and the subsequent allocation of such financial products to each client separately in the records of the FSP;
- (b) the financial products belonging to clients when selling such financial products on their behalf, and the subsequent allocation of the proceeds of such sale to each client separately in the records of the FSP;

If one looks to the definition of the product categories described above (i.e. a, b, c, d, e), this is what it reads like from the Act.

"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 Securities Services Act, 2002;

(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) any other product similar in nature to any financial product referred to in paragraphs (a) to (g), inclusive, declared by the Registrar, after consultation with the Advisory Committee, by notice in the Gazette to be a financial product for the purposes of this Act;

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

(h) 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 (1), inclusive;

It appears from the above definition that this type of FSP is most likely to be a Linked Investment Service Provider (LISP), who is involved the rendering of intermediary services in respect of the mentioned financial products through the method of bulking.

### **1.8.3 FSP Category I This Category of FSP has been defined in the Determination of Fit and Proper as:**

“All persons, other than persons referred to in Categories II and III, who require licences to render the financial services ...”

It appears from the above definition that this is a default category into which FSP’s will fall, if they do not fall into FSP category II or III. Therefore, if you are an FSP who is involved in all three of the above, you need to apply for three separate licences.

## **Chapter 2**

### **2.1 Financial Products Categories**

As can be seen from the definition of Financial Product looked at in Chapter 1 it is quite comprehensive. It is apparent from the list of products that the ambit of the Act is quite extensive and far-reaching, even so far as to include the products of Banks, Healthcare organisations and unit trust companies, to name a few.

**For our purposes the following CATEGORY OF PRODUCTS is clearly defined in the FAIS Fit and Proper Determination (an extension of that is included in the Act:**

**“Long-Term Insurance Category A”** means assistance policies as defined in the Long-term Insurance Act, 1998 (Act No. 52 of 1998), but excludes policies mentioned in Long-term Insurance Categories B and C.

**“Long-Term Insurance Category B”** means the following long-term insurance contracts as defined in the Long-term Insurance Act, 1998 (Act No. 52 of 1998):

(a) risk policies which provide cover in respect of death, disability and health events, and which are not marketed as investment or savings policies;

(b) investment/savings policies (including recurring premium retirement annuity policies, but excluding single premium retirement annuity policies and policies issued to and/or in respect of preservation funds) which guarantee a minimum return of capital invested at a specified future date or dates, and where such minimum is ascertainable in Rand terms at inception;

(c) annuities which guarantee a minimum annuity for the term of the policy which is ascertainable in Rand terms at inception; and

(d) any policy which combines the policy features included in paragraphs (a), (b) or (c), but excludes policies mentioned in Long-term Insurance Category C;

**“Long-Term Insurance Category C”** means single premium retirement annuity policies, policies issued to and/or in respect of preservation funds and other long-term insurance contracts or policies as defined in the Long-term Insurance Act, 1998 (Act No. 52 of 1998), and not specified in Long-term Insurance Categories A and B.

## 2.2 Other Categories of Products Include

- Short-term insurance commercial lines
- Short-term insurance personal lines
- Retail Pension Benefits
- Pension Fund Benefits (excluding Retail Pension Benefits)
- Securities and instruments
- Participatory Interests in collective investment schemes (unit trusts)
- Foreign currency denominated investment instruments, including foreign currency deposits
- Health Service Benefits
- Deposits as defined in section 1(1) of the Banks Act, term exceeding 12 months
- Deposits as defined in section 1(1) of the Banks Act, term less than 12 months
- A benefit provided by a Friendly Society

Below are examples:

Types of Product:	Example:
<p>a) Securities and instruments, including:</p> <p>1. Shares in a company other than a “share block company” as defined in the Share Blocks Control Act, 1980 (Act No. 59 of 1980);</p> <p>i. debentures and securitised debt;</p> <p>ii. any money-market instrument.;</p> <p>iii. any warrant, certificate,;and other</p>	<p>Shares in a company such as Capitec bank.</p> <p>An example of a debenture is an unsecured bond. Money market instruments are short-term financial instruments such as bankers’ acceptances, certificates of deposit.</p>

<p>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);</p> <p>iv. any “securities” as defined in Section 1 of the Securities Services Act, 2002.</p>	<p>Securities include shares, stocks and depository receipts in public companies.</p>
<p>b) A participatory interest in one or more collective investment schemes</p>	<p>Money market funds managed by a fund manager</p>
<p>c) A long-term or a short-term insurance contract or policy, referred to in the Long-Term Insurance Act (Act No 52 of 1998), and the Short-Term Insurance Act (Act No. 53 of 1998), respectively.</p>	<p>Credit life insurance as an example of Long-Term Insurance Category B</p>
<p>d) A benefit provided by: i. A pension fund organisation as defined in Section 1 (1) of the Pension Funds Act, 1956 (Act number 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 (Act No. 25 of 1956), to the members of the society by virtue of membership.</p>	<p>Benefits include pay-out of money accumulated in a pension fund, for the benefit of the members</p>
<p>e) A foreign currency denominated investment instrument, including a foreign currency deposit.</p>	
<p>f) A deposit as defined in Section 1 (1) of the Banks Act.(Act No 94 of 1990)</p>	<p>Savings and 31-day notice deposit accounts.</p>
<p>g) A health service benefit provided by a medical scheme as defined in Section 1 (1) of the Medical Schemes Act (Act No. 131 of 1998)</p>	<p>scheme as defined in Section 1 (1) of the Medical Schemes Act (Act No. 131 of 1998)</p> <p>Health benefits that are available in terms of a medical scheme</p>

## **2.3 What Measures are Available for Consumer Protection Purposes, as Contained in the Legislation?**

Clients who receive inappropriate advice can either approach the Ombud or institute civil proceedings based on delictual liability (i.e. a person suing another person, as opposed to the State suing a person), or breach of contract.

Further, the Act makes provision that:

*“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 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.”*

This means that the FAIS Act does not prevent a client who has been aggrieved by an FSP or a representative from seeking legal redress in terms of any other law.

## **2.4 Client Education**

Consumer Education is seen as a proactive consumer protection measure as can be seen from section 32 of the FAIS Act.

*32. 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 authorised financial services providers and their representatives to assist in the disclosure of information to the general public on matters dealt with in this Act.*

## **2.5 What are the Functions of the Role-players?**

### **2.5.1 Financial Services Board**

This is a regulatory body within the financial services industry, set up in terms of the Financial Services Board Act and is the “home-base for the FAIS legislation. Compliance Officers will have to work closely with the regulator to form part of the corporate governance structure of their organisations. The Compliance Officer will report on compliance by his/her organisation to the FSB.

### **2.5.2 Compliance Officer**

This is the person who embeds compliance within the FSP and reports to the FSB on compliance issues within the FSP. The Compliance officer can be an internal person or outsourced, but must always make application to the FSB to be an approved Compliance Officer. According to the Act, the following are the main requirements of the Financial Services Provider as far as Compliance Officer is concerned:

- If the FSP has more than one Key Individual or more than one Representative, it must appoint a compliance officer/s.
- The function of this Compliance Officer will be to monitor compliance with the FAIS Act and to be the liaison person with the Registrar.
- The designation of the person is detailed – may be a director, member, etc.
- The Compliance Officer must be approved by the Registrar in accordance with the subordinate legislation.
- The approved Compliance Officer must submit reports to the Registrar.

(The subordinate legislation covering the qualifications and experience of Compliance Officers is “QUALIFICATIONS AND EXPERIENCE OF COMPLIANCE OFFICERS IN RESPECT OF FINANCIAL SERVICES BUSINESS”. This will, however, not be dealt with herein as it falls outside the ambit of the unit standard.)

### **2.5.3 Recognised Body**

This is an entity (usually a representative body), which has applied to the FSB to become a recognised body, its function being to assist in the licensing of FSP's. In order to become a recognised body, representative and membership bodies have to make an application (special form to apply to be a “recognised body), containing all the details and infrastructure information about the organisation.

Once this application form is looked at, the FSB makes a decision and if it is accepted, then the organisation gets approved as a “recognised body” and may act as an agent on behalf of the organisation applying to become an authorised FSP, in submitting the licence to the FSB on the FSP's behalf.

## **2.6 The Authorisation Process**

The whole authorisation process is based on the application by the FSP to be licensed as an authorised FSP. The FSP persona within FAIS can be one of three categories as was seen earlier – either an FSP I, FSP II or an FSP III. Each of these FSP's operate in a different sub sector of the Financial Services Industry and therefore have different pieces of legislation which apply to them. While some of this applicable

legislation is generic (such as FAIS!), the others are specific (Long Term Insurance Act, Short Term Insurance Act, and Collective Investment Schemes Act).

It is important to see FAIS in this way – that it performs the extremely difficult task of regulating a number of very different sub sectors. More importantly, since FAIS is functional and not institutional in its applicability (it applies to an organisation that is either in the business of rendering an intermediary service or giving of advice, or both), the impact which it has on each of the sub sectors is slightly different, purely by virtue of the fact that the actual sub sectors are different.

## **2.7 What are the Minimum Requirements Needed to be Licensed?**

In order to be licensed, providers (both FSP's and their representatives) must prove that they are "Fit and Proper" in terms of the Determination of Fit and Proper requirements. This means that they have to comply in four different areas:

### **1. SOUND FINANCIAL SECURITY**

This refers to the financial soundness of the Financial Services Provider and Representative and clearly states that:

- The Provider may not be an un-rehabilitated insolvent, or
- In the case of an FSP II or III, that the assets of the FSP must exceed its liabilities.

### **2. HONESTY and INTEGRITY**

The Determination is quite clear that the following will determine the Honesty and Integrity of the Provider:

(1) An applicant must be of good character and integrity.

(2) In determining whether the applicant is of good character and integrity, the Registrar may refer to any information in possession of the Registrar or brought to the Registrar's attention. (3) Without prejudice to the generality of subparagraphs (2) and (4) of this paragraph any of the following factors is prima facie proof that the applicant does not comply with subparagraph (1), namely that the applicant: (a) has within a period of five years preceding the date of application been found guilty in any civil or criminal proceedings by a court of law or other competent authority (whether in the Republic or elsewhere) of having acted fraudulently, dishonestly, unprofessionally, dishonourably or in breach of a fiduciary duty; (b) has within a period of five years preceding the date of application been fined or censured by, or denied membership due to disqualification of, any professional or financial services industry body (whether in the Republic or elsewhere), recognised by the Board, on account of any act of dishonesty, negligence, incompetence or mismanagement; (c) has within a period of five years preceding the date of application been fined or censured by any regulatory

body (whether in the Republic or elsewhere), recognised by the Board, or that the applicant's authorisation to carry on business has been refused, suspended or revoked by any such body, because of negligence, incompetence or mismanagement; and (d) has at any time prior to the date of application been disqualified or prohibited by any court of law (whether in the Republic or elsewhere) from taking part in the management of any company or other statutorily created, recognised or regulated body, irrespective of whether such disqualification has since been lifted or not.

(4) An applicant must in the application be candid, frank and accurate and must of own accord disclose all facts or information at the disposal of or which may be accessible to the applicant and which may be relevant for purposes of a decision by the Registrar that the applicant complies or does not comply with subparagraph (1).

### **3. OPERATIONAL ABILITY**

(1) An applicant must have and be able to maintain the operational ability to fulfil the responsibilities imposed by the Act on licensees, including the following minimum requirements:

(a) A fixed business address from which business is conducted and which can also serve as a domicilium citandi et executandi for purposes of entry into contract and any judicial or quasi-judicial proceedings;

(b) adequate communication facilities including at least a full-time telephone or cell phone service, and typing and document duplication facilities;

(c) adequate storage and filing systems for the safe-keeping of records, and business communications and correspondence; and

(d) an account with a registered bank including, where necessary, a specific trust account for client moneys.

(2) An applicant must have in place the appropriate money laundering control systems and provision for training of staff, including identification, record-keeping and reporting procedures required under the Financial Intelligence Centre Act, 2001 (Act No. 38 of 2001).

### **4. COMPETENCY**

The competency requirements are fairly extensive and are based on what type of products the FSP deals with and then go on, for each product type to list the experience levels, academic qualifications and other requirements which the individual must hold to advice on such products.

## 2.8 Disclosure Rules for a Sub Sector of the Financial Services Industry

In order to establish professionalism within the FSP's in South Africa, the Act lays down strict standards for the market conduct of both FSP's as well as representatives. From the FAIS General Code of Conduct, certain disclosures have to be made by the Financial Services Provider to the client. It is imperative for the representative to understand the principles behind the code in order for the objectives of this legislation to be achieved. The purpose of the code is to ensure that the clients receiving financial advice will be able to make informed decisions, that their reasonable financial needs with regards to financial products be appropriately and suitably satisfied. It is for this reason that authorised financial services providers are required to comply with the provisions of the General and other codes and make the disclosures detailed therein. In so doing the authorised financial services provider is required to at all time:

- act honestly and fairly, with due skill, diligence and care in the interests of the client and the integrity of the financial services industry;
- have and employ effectively the resources, procedures and appropriate technological systems for the proper performance of professional activities;
- seek from clients appropriate and available information regarding their financial situations, financial product experience and objectives in connection with the financial service required;
- act with circumspection and treat clients fairly in a situation of conflicting interests; and
- comply with all applicable statutory or common law requirements applicable to the conduct of business.

In addition to the General Code of Conduct, there are also specific Codes of Conduct such as the Short Term Deposit Taking Code of Conduct and the Code of Conduct for Administrative and Discretionary Financial Services Providers.

In addition to the above requirement for professional behaviour, the code of conduct in particular contains provisions relating to:

- the making of adequate disclosures of relevant material information, including disclosures of actual or potential own interests, in relation to dealings with clients;
- adequate and appropriate record-keeping;
- avoidance of fraudulent and misleading advertising, canvassing and marketing;
- proper safe-keeping, separation and protection of funds and transaction documentation of clients; • 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; and

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

It is important to note that the spirit and requirements of disclosure in the Policyholder Protection Rules (PPR) are integrated into FAIS. The advantage of this transfer of disclosure requirements from PPR to FAIS is that disclosures can be effectively made into a marketing type document. This will ensure that the business process is not hindered, but enhanced.

## **2.9 Disclosures**

### **2.9.1 Disclosures by Product Suppliers**

According to the legislation a provider must at the earliest reasonable opportunity, and where appropriate, furnish the client with full particulars of the following information about itself:

(a) Name, physical location, and postal and telephone contact details of the product supplier;

(b)

(i) the contractual relationship with the product supplier (if any), and whether the provider has contractual relationships with other product suppliers;

(ii) names and contact details of the relevant compliance department of the product supplier;

(iii) details of complaints procedures in respect of complaints by clients maintained by the relevant product supplier;

(c) the existence of any conditions or restrictions imposed by the product supplier with regard to the types of financial products or services that may be provided or rendered by the provider; and

(d) where applicable, the fact that the provider:

(i) directly or indirectly holds more than 10% of the relevant product supplier's shares, or has any equivalent substantial financial interest in the product supplier;

(ii) during the preceding 12 month period received more than 30% of total remuneration, including commission, from the product supplier, and the provider must convey any changes thereafter in regard to such information at the earliest opportunity to the client.

If this information is provided orally, then the Product Supplier must confirm such information within 30 days in writing.

If a product supplier is also an authorised financial services provider and has entered into an intermediary contract or similar contractual relationship with another provider (not being a representative) – (in this instance, a brokerage), for the purpose of rendering a financial service in respect of its financial products then that product supplier must within a reasonable time after being requested to do so by such other provider provide such other provider with sufficient particulars to enable the provider to comply with the disclosure requirements of this Code relating to the furnishing of details of the product supplier and the product in question.

Further, the legislation stipulates that a provider must, where the relevant licence, terms of employment or mandate enables such provider to provide clients with financial services in respect of a choice of product suppliers, exercise judgment objectively in the interest of the client concerned.

Also, a provider may not, in dealing with a client compare different financial products, product suppliers, providers or representatives, unless the differing characteristics of each are made clear, and may not make inaccurate, unfair or unsubstantiated criticisms of any financial product, product supplier, provider or representative.

### **2.9.2 Disclosures by Providers**

Where a provider renders a financial service to a client, the provider must at the earliest reasonable opportunity furnish the client with full particulars of the following information:

(a) Full business and trade names, registration number (if any), postal and physical addresses, telephone and, where applicable, cellular phone number, and internet and e-mail addresses, in respect of the relevant business carried on, as well as the names and contact details of appropriate contact persons or offices;

(b) concise details of the legal and contractual status of the provider as regards the relevant product supplier (or, in the case of a representative, as regards the relevant provider and product supplier), to be provided in a manner which can reasonably be expected to make it clear to the client which entity accepts responsibility for the actions of the provider or representative in the rendering of the financial service involved and the extent to which the client will have to accept such responsibility;

(c) names and contact details of the relevant compliance department or, in the case of a representative, such detail concerning the provider to which the representative is contracted;

(d) details of the financial services which the provider is authorised to provide in terms of the relevant licence and of any conditions or restrictions applicable thereto; and

(e) whether the provider holds suitable guarantees or professional indemnity or fidelity insurance cover or not.

Where such information is provided orally, the Provider must confirm such information within 30 days in writing:

### **2.9.3 Disclosures Regarding Financial Services Products**

As far as a Financial Services Product is concerned, a provider must:

(a) provide a reasonable and appropriate general explanation of the nature and material terms of the relevant contract or transaction to a client, and generally make full and frank disclosure of any information that would reasonably be expected to enable the client to make an informed decision;

(b) whenever reasonable and appropriate, provide to the client any material contractual information and any material illustrations, projections or forecasts in the possession of the provider;

(c) in particular, at the earliest reasonable opportunity, provide, where applicable, full and appropriate information of the details of the product and its benefits. This includes information such as:

- the name, class or type of financial product concerned and the nature and extent of benefits to be provided, including details of the manner in which such benefits are derived or calculated and the manner in which they will accrue or be paid;
- If the product is positioned as an investment or as having an investment component, the details of the manner in which the value of the investment is determined, including concise details of any underlying assets or other financial instruments.
- The nature and extent of monetary obligations assumed by the client (including commission, consideration, fees, charges or brokerages payable to the provider by the client, or payable by the product supplier or any other person other than the client concerned), as well as the manner of payment or discharge thereof.
- Concise details of any special terms or conditions, exclusions of liability, waiting periods, loadings, penalties, excesses, restrictions or circumstances in which benefits will not be provided;
- any guaranteed minimum benefits or other guarantees;

- to what extent the product is readily realisable or the funds concerned are accessible;
- any restrictions on or penalties for early termination of or withdrawal from the product, or other effects, if any, of such termination or withdrawal;
- material tax considerations;
- whether cooling off rights are offered and, if so, procedures for the exercise of such rights.

(d) Fully inform a client in regard to the completion or submission of any transaction requirement:

- that all material facts must be accurately and properly disclosed, and that the accuracy and completeness of all answers, statements or other information provided by or on behalf of the client, are the client's own responsibility;
- that if the provider completes or submits any transaction requirement on behalf of the client, the client should be satisfied as to the accuracy and completeness of the details;
- of the possible consequences of the misrepresentation or non-disclosure of a material fact or the inclusion of incorrect information; and
- that the client must on request be supplied with a copy or written or printed record of any transaction requirement within a reasonable time.

No provider may in the course of the rendering of a financial service request any client to sign any written or printed form or document unless all details required to be inserted thereon by the client or on behalf of the client have already been inserted.

A provider must, where applicable, at the request of a client, provide the client with a statement of account in connection with any financial service rendered to the client.

## **2.10 Record Keeping**

### **2.10.1 The Requirements Regarding Record Keeping**

In terms of the General Code of Conduct an FSP will have to maintain records for at least five years regarding:

- Premature cancellations of transactions or financial products by clients of the FSP.
- Complaints received

- Continued compliance with requirements referred to in section 8 (which are licencing requirements)
- Instances of non-compliance with the Act and reasons for such non-compliance • The continued compliance by representatives with the requirement of the authorisation of the representative to act on behalf of the FSP and ensuring ongoing compliance.

The legislation says the following regarding RECORD KEEPING:

(a) A provider must have appropriate procedures and systems in place to:

- (i) record, subject to section 14(2), all written communications relating to a financial service rendered to a client, including verbal instructions by the client which the provider must reduce to writing;
- (ii) store and retrieve transaction documentation and all other documentation relating to the client; and
- (iii) keep the client records and documentation safe from destruction (b) All such records must be kept for a period of five years after termination, to the knowledge of the provider, of the product concerned or, in any other case, after the rendering of the financial service concerned;

(c) Providers are not required to keep the records themselves but must ensure that they are available for inspection within seven days of the Registrar’s request.

(d) Records may be kept in an appropriate electronic or recorded format, which are accessible and readily reducible to written or printed form.

## 2.11 Compliance

### 2.11.1 Compliance Provisions within an Organisation

The legislation is clear that certain compliance provisions (most of which have been covered under previous headings), have to be met by the Financial Services Provider (being the “organisation”). The provisions include, amongst others:

- Control measures
- Specific control objectives
- Insurance
- Advertising

#### Control Measures

A provider must at all times have and effectively employ the resources, procedures and appropriate technological systems that can reasonably be expected to eliminate as far as reasonably possible, the risk that clients, product suppliers and other providers or representatives will suffer financial loss through theft, fraud, other dishonest acts, poor administration, negligence, professional misconduct or culpable omissions.

### **Specific Control Objectives**

A provider must (without limiting the generality of section 11) structure the internal control procedures concerned so as to provide reasonable assurance that: (a) the relevant business can be carried on in an orderly and efficient manner; (b) financial and other information used or provided by the provider will be reliable; and (c) all applicable laws are complied with.

### **Insurance**

A provider must, if, and to the extent, required by the Registrar maintain in force suitable guarantees or professional indemnity or fidelity insurance cover.

### **Advertising**

An advertisement by any provider must not contain any statement, promise or forecast which is fraudulent, untrue or misleading.

Where a provider advertises a financial service by telephone-

- a) an electronic, voice logged record of all communications must be kept until such time as it becomes clear that no rendering of a financial service to a particular person so addressed by telephone will follow;
- (b) a copy of all such records must be provided on request by the client or the Registrar within seven days of the request;
- (c) all the information required by sections 4(1)(a) and (c) and 5(a) and (c) shall not be required: Provided that the client is provided with basic details (such as business name and telephone number or address) of the provider or relevant product supplier, and of their relevant compliance departments: Provided further that, if the promotion results in the rendering of a financial service, the full details required by those sections are provided to the client in writing within 30 days of the relevant interaction with the client.

(Where a provider advertises a financial service by means of a public radio service, the provisions of the above section apply with the necessary changes.)

## 2.12 The Importance of Timing

It is apparent under the FAIS General Code of Conduct that timing is of importance in carrying out the various compliance provisions. The following excerpts from the General Code illustrate the point about information made to a client and the time within which this must be done.

When a provider renders a financial service–

(a) representations made and information provided to a client by the provider–

- (i) must be factually correct;
- (ii) must be provided in plain language, avoid uncertainty or confusion and not be misleading;
- (iii) must be adequate and appropriate in the circumstances of the particular financial service, taking into account the factually established or reasonably assumed level of knowledge of the client;
- (iv) must be provided timeously so as to afford the client reasonably sufficient time to make an informed decision about the proposed transaction.

A provider other than a direct marketer must at the earliest reasonable opportunity, and only where appropriate, furnish the client with full particulars of the following information about the relevant product supplier and, where such information is provided orally, must confirm such information within 30 days in writing:

- (a) Name, physical location, and postal and telephone contact details of the product supplier;
- (b) the contractual relationship with the product supplier (if any), and whether the provider has contractual relationships with other product suppliers.

## 2.13 The Effect of Disclosure Requirements on Commission

In terms of the FAIS General Code of Conduct, the following excerpt covers the issue of disclosure of commission. It is apparent from the excerpt that the interest of the client is being considered and that the Provider has an obligation to disclose ALL costs and fees the client will be liable for, as a result entering into a particular transaction.

When a provider renders a financial service:

- (a) representations made and information provided to a client by the provider:  
*(vii) must, as regards all amounts, sums, values, charges, fees, remuneration or monetary obligations mentioned or referred to therein and payable to the product supplier or the provider, be reflected in specific monetary terms:*

*Provided that where any such amount, sum, value, charge, fee, remuneration or monetary obligation is not reasonably pre-determinable, its basis of calculation must be adequately described.*

## **2.14 Roles, Powers and Duties**

### **The Ombud**

The Office of the Ombud for Financial Services will serve as an expeditious, cost effective dispute resolution system through which customer complaints against FSP's or representatives will be processed. The office has been set up in such a way that the constitutional requirements of independence and objectivity are achieved.

In terms of the Act "Ombud" means: (a) the Ombud for Financial Services Providers appointed in terms of section 21(1); and 20 (b) for the purposes of sections 27, 28, 31 and 39, includes a deputy Ombud;

The Ombud will consider and dispose of complaints in a procedurally fair, informal, economical and expeditious manner, with due regard to:

- The contractual and legal relationship between the complainant and the other party
- The provisions of FAIS

The Ombud is empowered to:

- Award fair compensation for any financial prejudice or damage suffered by the complainant.
- Issue a direction to an FSP to take appropriate steps in relation to the complaint.

It is important to remember that a determination by the Ombud has the effect of a civil judgment and is executable through the ordinary judicial process. In addition to this, civil remedies are available in the form of class actions, and finally, criminal sanctioning is provided for through heavy fines and terms of imprisonment.

### **The Registrar**

Similar to other Acts administered by the FSB, the Act creates a Registrar, being the Executive Officer of the Financial Services Board. There is also an Advisory Committee which is representative of both industry and consumers, with whom the Registrar must consult on important issues affecting the Act and the implementation thereof. In terms of the legislation, the Registrar is empowered to:

- Approach a court for an order restraining a person from contravening the Act or requiring a person to take remedial steps.

- Declare a business practice undesirable by giving notice in the gazette and thereby prohibit the FSP from continuing the practice. In terms of this, the Registrar could withdraw or suspend the licence of an FSP, effectively closing down the business.
- Institute action in a court of law against any person who contravenes the FAIS Act for payment of compensation on behalf of another person and punitive damages.
- Institute civil proceedings on behalf of any person against an FSP and claim compensation plus punitive damages, similar to what is known as a class action.

### **The Consequences of Non-Compliance**

The following extract from the Act (section 36), outlines the consequences of non-compliance.

Any person who:

- (a) Contravenes or fails to comply with a provision of section 7(1), 8(8), 13(1), 14(1), 18, 19(2) or 34(4) or (6); or
- (b) in any application in terms of this Act, deliberately makes a misleading, false or deceptive statement, or conceals any material fact, is guilty of an offence and is on conviction liable to a fine not exceeding R1 000 000 or to imprisonment for a period not exceeding 10 years, or to both such fine and such imprisonment.

**The following extract from the Act further details what the consequences for non-compliance can be, in relation to an FSP who is involved in “Undesirable Practices”.**

(1) Subject to subsections (2) and (3), the Registrar may, after consultation with the Advisory Committee, by notice in the Gazette declare a particular business practice to be undesirable for all or a category of authorised financial services providers, or any such provider.

(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 therefore, and invited interested persons to make written representations so as to reach the Registrar within 21 days after the date of publication of that notice.

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

### **The Courts**

(1) The Registrar may, when satisfied on the basis of available facts and information that a person has contravened or not complied with any provision of this Act, or is likely so to contravene or not to comply, apply to a Court for an order restraining such person from continuing to commit any such act or omission or from committing it in future, and requiring the person to take such remedial steps as the Court deems necessary to rectify the consequences of the act or omission, including consequences which prejudiced or may prejudice any client.

(2) The Registrar may institute action in a Court against any person who has contravened or not complied with any provision of this Act, for payment of- (a) an amount determined by the Court as compensation for losses suffered by any other person in consequence of such contravention or non-compliance; (b) a penalty for punitive purposes in a sum determined in the discretion of the Court but not exceeding three times the amount of any profit or gain which may have accrued to the person involved as a direct result of any such act or omission; (c) interest; and (d) costs of suit on such scale as may be determined by the Court.

(3) Any amount recovered by the Registrar in terms of subsection (2) must be deposited by the Registrar directly into a specially designated trust account established by the Registrar with an appropriate financial institution, and thereupon- (a) the Registrar is, as a first charge against the trust account, entitled to reimbursement of all expenses reasonably incurred in bringing proceedings under subsection (2) and in administering the distributions made to persons in terms of subsection (5); (b) the balance, if any (hereinafter referred to as the "distributable balance" ) must be distributed by the Registrar to the persons referred to in subsection (5), any funds remaining, accruing to the Registrar in the Registrar's official capacity.

(4) Any amount not claimed within three years from the date of the first distribution of payments, accrues to the Registrar in the Registrar's official capacity.

(5) The distributable balance must be distributed on a pro rata basis to all persons who are affected by the occurrences referred to in subsection (2), and who prove to the reasonable satisfaction of the Registrar that they are persons contemplated in that subsection: Provided that no money may be distributed to a person who has contravened or failed to comply with any provision of this Act.

(6) A Court issuing any order under this section must order it to be published in the Gazette and by such other appropriate public media announcement as the Court considers appropriate.

(7) The Registrar may withdraw, abandon or compromise any civil proceedings instituted under this section, but any agreement or compromise must be made an order of Court and the amount of any payment made in terms of any such compromise must be published in the Gazette and by such other public media announcement as the Court considers appropriate.

(8) Where civil proceedings have not been instituted, any agreement or settlement (if any) may, on application to the Court by the Registrar after due notice to the other party, be made an order of Court and must be published in the Gazette and by such other public media announcement as the Court considers appropriate.

## Article 1

### 10 things your financial adviser should do

The Financial Advisory and Intermediary Services Act sets out a General Code of Conduct for financial service providers, but this is only a minimum standard. In this article, Personal Finance spells out the 10 things the Financial Services Board demands and enforces, and tells you what more you can expect from a good financial adviser.

There's plenty to celebrate in the new regulations introduced in terms of the Financial Advisory and Intermediary Services (FAIS) Act, which became fully effective on September 30, 2004. The main joy is that, for the first time, you have someone to whom you can turn if your financial adviser does not follow the correct procedures and gives you inappropriate advice.

You can complain to the Ombud for Financial Service Providers, and if your complaint is upheld, he can order that you be compensated.

In serious cases, the Financial Services Board (FSB) can withdraw the licence of the offending adviser.

In a nutshell, the FAIS Act requires financial service providers (FSPs) to give you honest and fair advice that is in your interests. And they must give it with due skill, care and diligence.

To this end, advisers must:

### **1. Give you information about themselves**

Within 30 days of appointing an adviser, he/she must give you the following information in writing:

- His/her full name.
- The name of his/her business. The business's postal and physical addresses, its telephone number/s and internet and email addresses.
- His or her legal and contractual status, such as if he/she is independent or represents a company that supplies financial products.

If your adviser represents a company, you must be told which company, so you know which entity accepts responsibility for the advice you receive.

If your adviser is independent, the company that supplies the product/s you buy on the adviser's recommendation takes no responsibility for the advice you are given. If you deal with a representative, the product supplier registered as the FSP takes responsibility for the advice.

- Whether or not your adviser has professional indemnity or fidelity insurance cover, in case you want to sue your adviser.

If a FSP has no fidelity insurance and you successfully sue for losses as a result of inappropriate advice, he/she may not have the money to pay you.

### **2. Tell you if they are registered with the FSB**

In terms of the FAIS Act, there are two different types of financial adviser. Any person or organisation that provides you with financial advice is called an FSP. Anyone who provides you with financial advice while working for an FSP is called an FSP representative.

So, for example, if Joe Duggs is an independent financial adviser working on his own, he will be licensed with the FSB as an FSP, while an agent working for one of the big life assurance companies must be registered as an FSP representative. The FSP employing the FSP representative must ensure that all its representatives meet the requirements of the FAIS Act when they give advice and sell financial products.

All FSPs and FSP representatives providing advice must meet "fit and proper requirements", which include minimum qualifications for providing you with advice and selling you certain products. For example, someone who meets only the minimum qualifications to sell you life assurance may not sell you, or give you advice on, products that are more complex.

At the top end of the advisory scale are discretionary FSPs, who must meet far tougher minimum qualifications before they can accept a mandate from you to make investment decisions on your behalf.

If your adviser is only licensed to sell funeral assurance, for example, you cannot expect him/her to provide proper investment advice. You will need to find another adviser with the appropriate qualifications and licence to give you investment advice.

An FSP must provide you with his/her licence number; an FSP representative must provide you with the licence number of his/her employer. You can check with the FSB whether your adviser is licensed.

### **3. Understand your financial status**

Before giving you any advice, your adviser must get as much information from you about your financial situation, experience with financial products and financial objectives as is necessary for him/her to provide you with appropriate advice.

This includes information about your assets and your debts, your income and expenses, your obligations to dependants, your life and disability assurance and your financial goals, such as the education of children and retirement.

### **4. Conduct a financial needs analysis**

Based on the information obtained from you, your adviser must analyse your financial situation before identifying the financial product/s that are appropriate to your risk profile and financial needs.

Your financial adviser should have a computer program that can assess all your financial needs, from life and disability assurance to retirement needs and investment goals.

If you do not provide all the information your adviser needs to conduct a proper financial needs analysis, or if he/she is unable to carry out a proper analysis for any other reason, your adviser must ensure that you "clearly understand" that:

- A full analysis was not done;
- As a result, there may be limitations on the appropriateness of the advice you have been given; and
- You should take "particular care" to consider whether or not the advice is appropriate considering your objectives, financial situation and needs.

Your adviser must take reasonable steps to ensure you understand the advice you receive and are in a position to make an informed decision.

Your adviser must warn you of any risks you are likely to incur if you decide to ignore his/her advice, take action that differs from his/her recommendations, or decide to accept more limited information or advice than your adviser is able to provide.

## **5. Give you factually correct and understandable advice**

All advice and information given to you by your adviser must be:

- Factually correct;
- Provided in plain language, avoiding uncertainty and confusion, and not be misleading;
- Adequate and appropriate; and
- Provided timeously, giving you the opportunity to make an informed decision about any transaction.

The information must also include details of all costs. Many product suppliers already provide full details of costs so that advisers can pass them on to you, but others, particularly life assurance companies, present them in an incomprehensible way. The costs are often provided as a hodge-podge of fixed rand amounts and various percentages.

Although the FAIS Act does not specifically make provision for this, to ensure you understand the costs and how they will affect your returns, you should insist that costs are provided as a percentage of any investment amount and on what is called a reduced-yield basis. A reduced-yield calculation enables you to compare the amount you will receive when your investment matures in two ways: without the costs deducted and with all the costs, including commissions, deducted.

By getting the costs as both a percentage of the investment amount and on a reduced-yield basis, you ensure your adviser meets the requirement to provide you with information that is understandable.

## 6. Tell you all about the financial product/service

When your adviser gives you advice about a product, he/she must inform you of all the consequences and implications of buying that particular product. This information includes:

- A general explanation of the nature and material terms of the contract or transaction, disclosing any facts that can be reasonably expected to enable you to make an informed decision.
- Providing you with any illustrations, projections or forecasts about the product's performance.

You must understand the difference between a projection and a guarantee. Projections of performance, such as those provided by life assurance companies, are very unlikely to be the actual rand amounts you will receive at maturity.

If you are offered a product with guarantees, they must be spelt out explicitly in writing. For example, are the guarantees on the capital or the returns or both? Are the guaranteed returns before or after costs have been deducted?

- Being given all the details about the product you are purchasing. This includes:

\* The name, class or type of the product. For example, in the case of a unit trust fund, you should be told the name of the fund and in what sector or sectors the underlying investments are made, and which company provides the product.

\* The nature and extent of benefits to be provided, including details of how the benefits will be paid out. For example, in the case of a life assurance policy, you must be told how and when your beneficiaries will receive the money.

The FAIS Act has special stipulations for the advice you must be given when you buy an investment product or a product that has any investment element. These requirements include being given details about:

- How the value of your investment is determined, including concise details of any underlying assets.
- All the charges and fees and, at your request, information about the past performance of the product over periods and at intervals that are reasonable

considering the type of product involved. This information should include a warning that past performance does not necessarily indicate future performance.

- The nature and extent of the financial obligations - either directly or indirectly - you have towards the product supplier, including the manner of payment and the consequences of non-compliance.

You must be told about any penalties you could incur if you withdrew from, for example, a life assurance investment. Life assurance investments notoriously come with tough penalties for early termination of a policy, and you can end up getting back less money than you paid in.

- Details of any anticipated or contractual escalations, increases or additions to the investment. For example, you should be told about any automatic increases in recurring premium investments.

- Details of any special terms or conditions, exclusions of liability, waiting periods, loadings, penalties, excesses, restrictions or circumstances in which benefits will not be provided.

- Any guaranteed minimum benefits or other guarantees attached to the product.

- The extent to which the product is readily realisable or how easy it is for you to access the funds you have already invested.

- Any tax consequences.

- Details of cooling-off rights, which give you an opportunity to change your mind about making an investment, and the conditions under which you can exercise these rights.

- Any investment or other risks associated with the product.

However, the Act also places obligations on you. The most important of these is that you provide any information the adviser requires as accurately and completely as possible. This is your responsibility, not that of your adviser.

If your adviser completes or submits any transaction requirement on your behalf, you should be satisfied about its accuracy. Your adviser is not allowed to ask you to sign any written or printed form or document unless all the required details have been completed.

## **7. Inform you about product providers**

When you buy a financial product, your adviser must give you in writing within 30 days:

- The name, physical location, and postal and telephone contact details of the product supplier;

- Details of the contractual relationship (if any) your adviser has with the product supplier, and of his/her contractual relationship/s (if any) with any other supplier/s;

- The names and contact details of the relevant compliance and complaints departments of the product supplier, in case you have any complaints; and
- The existence of any conditions or restrictions imposed on your adviser by the product supplier about the types of financial products or services your adviser may provide.

Your adviser must also tell you if he/she owns more than 10 percent of the product supplier's shares.

You must also be told whether, during the preceding 12-month period, your adviser (if he/she is a FSP) or the company he/she represents (if he/she is a FSP representative) received more than 30 percent of his/her total remuneration, including commission, from the product supplier.

This information is important because some FSPs, such as bank brokerages, have close relationships with product suppliers, such as life assurers. These FSPs then tend to "push" the products of their associated company, rather than offer you the full range of products.

In addition, the FAIS Act states that your adviser "may not compare different financial products, product suppliers, providers or representatives, unless the differing characteristics of each are made clear, and may not make inaccurate, unfair or unsubstantiated criticisms of any financial product, product supplier, provider or representative".

## **8. Inform you of the consequences of replacing financial products**

A major problem in the financial services industry is the way many unscrupulous advisers advise people to unnecessarily replace one financial product with another.

This is particularly common in the life assurance industry, where, perversely, commissions are paid upfront on recurring premium products, instead of being paid only when you make an investment, as in the unit trust industry. If you replace an existing policy with a new policy, you generate a new set of upfront commissions. Every year, investors lose millions of rands when they switch products.

The FAIS Act stipulates that, where a financial product will wholly or partially replace an existing product, you must be told the actual and potential financial implications, costs and consequences of making the switch. This includes full details of:

- All costs related to the replacement product;

- All the special terms and conditions that may apply to the replacement product, including exclusions of liability, waiting periods, loadings, penalties, excesses, restrictions and the circumstances in which benefits will not be provided;
- The impact of age and health changes on the premium, in the case of an insurance product;
- The tax implications of the replacement product and the terminated product;
- Material differences between the investment risks associated with the replacement product and the terminated product;
- Penalties or unrecovered expenses deductible or payable as a result of terminating a product;
- The difference between the products in terms of realising your investment or having access to your money; and
- Any vested rights, minimum guaranteed benefits or other guarantees or benefits that you will lose by terminating a product.

When you replace a long-term insurance contract or policy with any other financial product, your adviser must notify the issuer of the existing insurance policy of the impending termination, so that the issuer can check the advice on which you are basing your decision and also offer you advice.

## **9. Tell you how they will be paid**

Your adviser must disclose details of all earnings he/she receives directly or indirectly from giving you advice or selling you a financial product, including any potential earnings that might lead to a conflict of interest.

One such conflict of interest is the practice of many financial services companies to provide incentives for advisers to sell a particular product, or a number of products, in bulk. For example, FSPs might be offered luxury, all-expenses-paid overseas trips for themselves and their partners if they sell Rx million-worth of the products of a particular company. In other words, you will be encouraged to purchase the product on the basis of the potential reward to the adviser, instead of what is in your best interests.

You must be told precisely the nature, extent and frequency of any incentive, remuneration, consideration, commission, fee or brokerage ("valuable consideration") that will, or might, become payable to the provider, directly or indirectly.

Although the legislation does not prescribe this, it is in your best interests to discuss at your first meeting with your adviser precisely how he/she will be remunerated. You are entitled to - and should - negotiate commissions and fees. The best route is to negotiate payment based on an hourly rate rather than a percentage of your assets.

Your adviser may not deal in any financial product where the deal is based on advance knowledge of pending transactions on your behalf, or with you or other clients, or on any non-public information that, if disclosed, is likely to affect the price of a product.

## **10. Give you a record of advice**

Your adviser must keep a record of:

- All the advice he/she gives you;
- All the information and material on which the advice was based;
- The financial products that were considered;
- The products that he/she recommended; and
- An explanation of why the products that were selected are likely to satisfy your needs and objectives.

You must be provided with a written copy of the record. The record must be in clear and readable print in terms of size, spacing and format.

It is a criminal offence for your adviser to disclose any confidential information obtained from you without your written consent, unless the information is required in the public interest or under any law.

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## ARTICLE 2

FAIS FIT AND PROPER REQUIREMENTS INFLUENCE A FINANCE AND INSURANCE AGENT (F&I) IN THE MOTOR DEALER INDUSTRY?

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JUN, 2018



**How the Fit and Proper requirements for representative influence an F & I agent in the motor dealer industry?**

By Elmarie Aberdeen

**How will the new FAIS Fit and Proper requirements that was introduced in Board Notice 194 of 2017, influence me as a Finance and Insurance agent (F&I) in the motor dealer industry?**

The long awaited new Fit and Proper Requirements for Financial Services Providers, key individuals and representatives, as described in Board Notice 194 of 2017, became operational on 1 April 2018.

Current and prospective representatives in the financial services industry must comply with these changes.

In previous blog posts we discussed how the changes to the FAIS Fit and Proper Requirements would influence representatives and key individuals in the financial

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services industry. In this post, we will focus specifically on how the changes will influence F&I's, in their role as representatives in the financial services industry.

**Let's first consider what the role of the F&I in the financial services industry is.**

An F&I has two major functions. The "F" stands for finance (which means dealing with the major banks to negotiate credit for customers), while the "I" stands for insurance (selling insurance to customers).

There are two laws that an F&I must comply with. Firstly, they have to write the NCA (National Credit Act) examination and get a NCA card. This they must do for the "finance" part of the job.

For the "insurance" part, they are seen as representatives in the financial services industry, and therefore must comply with the "fit and proper" according to **Board Notice 194 of 2017**.

The FAIS Fit and Proper Requirements applicable to Representatives are as follows:

1. Honesty, Integrity and Good Standing
2. Competency Requirements
  - Experience
  - Qualification
  - Class of business Training
  - Product Specific Training
3. CPD requirements

**Honesty, Integrity and Good Standing**

All representatives must comply with the fit and proper requirements relating to honesty, integrity and good standing, and must disclose to the FSP promptly and on its own initiative, fully and accurately, all information in relation to matters which may be relevant in determining whether a person complies or continues to comply with the requirements.

**Competency Requirements**

Representatives must have adequate, appropriate and relevant skills, knowledge and expertise in respect of the financial services, products and functions that it performs, and must maintain their competence.

The competency requirements for representatives are:

## 1. Minimum experience

Representatives (including F&I's) must comply with the experience requirements in relation to the Financial products for which they are appointed, as set out in Column A of Table 1 (see below). The F&I must ensure that they know for which financial products they are appointed, so that they can comply with the experience requirements.

## 2. Minimum qualifications

Qualification requirements do not apply to representatives who are appointed only to perform the execution of sales according to a script, but do apply to all other representatives, therefore the F&I will have to complete a qualification that is approved by the FSCA.

## 3. Regulatory examination requirements

Regulatory examination requirements do not apply to Category I representatives that are appointed only to perform the execution of sales according to a script, and/or render financial services in respect of Tier 2 financial products. If the F&I is only appointed to render financial services in respect of Tier 2 financial products, they will be exempted from the Regulatory Examination requirements.

## 4. Class of business training requirements

Class of business training does not apply to representatives in Category 1 who performs the execution of sales according to a script, as well as Category I representatives who renders financial services in respect of Tier 2 financial products.

## 5. Product Specific training requirements

All representatives must do product specific training.

## 6. CPD requirements

CPD requirements do not apply to representatives who render financial services in respect of a Tier 2 financial product, and/or representatives who renders an intermediary service only, in respect of a Tier 1 financial product.

New product subcategories

Long-term insurance subcategory B1-A	Long-term insurance policies referred to in the definition of long-term insurance subcategory B1 which requires no or limited underwriting
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Short-term insurance personal lines A1	Short-term insurance personal lines policies with no or limited underwriting, with a contract term of less than 24 months, which are not subject to the principle of average and which meet certain conditions relating to policy benefits and exclusions
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FSP's who were already licensed at 1 April 2018 for Long-term insurance B1, will automatically be granted approval for Long-term Insurance B1-A, and FSP's already licensed at 1 April 2018 for Short-term Insurance Personal Lines, will automatically be granted approval for Short-term Insurance Personal Lines A1

If automatic approval was granted to an FSP, it will be deemed to have been authorised for the new product category on the same date as the associated existing subcategory. FSP's must update the central representative register within three months from the date of the automatic amendment.

How will the new FAIS Fit and Proper requirements influence me as a Finance and Insurance agent (F&I) in the motor dealer industry?

To answer the question how the new Fit and proper Requirements will influence me as a Finance and Insurance agent (F&I) in the motor dealer industry, the F&I must establish from their FSP in which product sub-categories they are appointed, in order to decide which fit and proper requirements will be applicable to them, as F&I's in certain product categories have been exempted from certain of these requirements.

Let's summarise the Fit and Proper requirements specifically applicable to F&I's:

- F&I's who renders advice in Tier 1 product categories will have to comply will all the requirements as it applies to representatives in the financial services industry.
- F&I's who renders financial services in Tier 2 product categories will have to comply will the experience, qualification and product specific requirements, but are exempted from regulatory examination, class of business training and CPD (Continuous Professional Development) requirements.
- F&I's who renders intermediary services only in Tier 1 product categories will have to comply will the experience, qualification, regulatory examination, class of business and product specific requirements, but are exempted from CPD (Continuous Professional Development) requirements.

However, if you consider advancing in your career as an F&I, or you might consider a career change in future, we recommended that you still comply with all the requirements as stipulated in Board Notice 194 of 2017, as this might just be the boost you need to advance to the next step in your career.

ANNEXURE ONE TABLE 1: EXPERIENCE REQUIREMENTS FOR AND IN RELATION TO CATEGORY I FSP's				ANNEXURE THREE TIER ONE AND TIER TWO FINANCIAL PRODUCTS	
Subcategory	Column A Financial Products	Column B: Advice – Minimum experience	Column C: Intermediary Services – Minimum experience	Column A: Tier 1 Financial Products	Column B: Tier 2 Financial Products
1.1	Long-term Insurance sub-category A	6 months	2 months	.	Tier 2
1.2	Short-term Insurance Personal Lines	1 year	6 months	Tier 1	.
1.3	Long-term Insurance sub-category B1	1 year	6 months	Tier 1	.
1.4	Long-term Insurance sub-category C	1 year	6 months	Tier 1	.
1.5	Retail Pension Benefits	1 year	6 months	Tier 1	.
1.6	Short-term Insurance Commercial Lines	1 year	6 months	Tier 1	.
1.7	Pension Fund Benefits	1 year	6 months	Tier 1	.
1.8	Shares	2 years	1 year	Tier 1	.
1.9	Money-market Instruments	2 years	1 year	Tier 1	.
1.10	Debentures and securitised debt	2 years	1 year	Tier 1	.
1.11	Warrants, certificates or other instruments	2 years	1 year	Tier 1	.
1.12	Bonds	2 years	1 year	Tier 1	.
1.13	Derivative instruments	2 years	1 year	Tier 1	.
1.14	Participatory interest in a Collective Investment Scheme	1 year	1 year	Tier 1	.

## References:

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