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GENERAL NOTICE

NOTICE 823 OF 2001

NATIONAL TREASURY

PUBLICATION OF FINANCIAL INSTITUTIONS (PROTECTION OF FUNDS) BILL, 2001

The Minister of Finance intends tabling the Financial Institutions (Protection of Funds) Bill, 2001 in Parliament during the third parliamentary term. The Bill is published in accordance with Rule 241(c) of the Rules of the National Assembly.

Interested persons and institutions are invited to submit written representation on the bill to the Secretary to Parliament by no later than 31 July 2001.

All submissions must be addressed to:

**The Secretary to Parliament
c/o Mr A Hermans
Committee Section
Parliament of the RSA
P.O. Box 15
CAPE TOWN
8000**

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FINANCIAL INSTITUTIONS (PROTECTION OF FUNDS) BILL

To provide for, and consolidate the laws relating to, the investment, safe custody and administration of funds and trust property by financial institutions; to enable the registrar to protect such funds and trust property; to repeal the Financial Institutions (Investment of Funds) Act, (Act. No. 39 of 1984); and to provide for matters incidental thereto.

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

INTRODUCTORY PROVISIONS

Definitions

1. In this Act, unless the context indicates otherwise—

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“**company**” includes a close corporation referred to in the Close Corporation Act, 1984 (Act No. 69 of 1984);

“**financial institution**” means—

- (a) any person or institution referred to in the definition of ‘financial institution’ in section 1 of the Financial Services Board Act, 1990 (Act No. 97 of 1990); 10
- or
- (b) any medical scheme contemplated in section 1 of the Medical Schemes Act, 1998 (Act No. 131 of 1998);

“**institution**”, for the purposes of sections 5, 6, 9 and 10, means—

15

- (a) a financial institution;
- (b) any person, partnership, company or trust in which, or in the business of which, a financial institution or an unregistered person has or had a direct or indirect interest;
- (c) any person, partnership, company or trust which has or had a direct or indirect interest in a financial institution or unregistered person, or in the business of a financial institution or an unregistered person; 20
- (d) a participating employer in a pension fund organisation;
- (e) any person, partnership, company or trust that controls, manages or administers the affairs or part of the affairs of a financial institution or an unregistered person; 25
- (f) any person, partnership, company or trust who or which is not registered, approved or otherwise authorised by the registrar under a relevant law to carry on the business of a financial institution, but who or which carries on such business or a business corresponding to a business normally carried on by a financial institution; 30

“**nominee company**” means a company, controlled by a financial institution, which—

- (a) is incorporated under the provisions of the Companies Act, 1973 (Act No. 61 of 1973);
- (b) has as its principal object to act as nominee for or representative of any person or persons in the holding of any property in trust for such person or persons; 35
- (c) is precluded by its memorandum of association from incurring any liabilities other than those to the persons on whose behalf it holds assets, to the extent of their respective rights to and interest in such assets; and

- (d) has entered into an irrevocable written agreement with a financial institution which controls the company, and in terms of which such financial institution has undertaken to pay all the expenses of and incidental to its formation, operations and liquidation;
- “registrar”** means— 5
- (a) the registrar as defined in any of the Acts referred to in paragraph (a) of the definition of “financial institution” in section 1 of the Financial Services Board Act, 1990;
- (b) the executive officer as defined in section 1 of the Financial Services Board Act, 1990; or 10
- (c) the registrar of medical schemes contemplated in section 1 of the Medical Schemes Act, 1998;
- “trust property”** means any corporeal or incorporeal, movable or immovable asset invested, held, kept in safe custody, controlled, administered or alienated by any person, partnership, company or trust for, or on behalf of, another person, partnership, company, trust or beneficiary; and such person, partnership, company, trust or beneficiary is hereinafter referred to as “the principal”. 15

CHAPTER 1

FUNDS AND TRUST PROPERTY HELD BY FINANCIAL INSTITUTIONS

Duties of persons dealing with funds of, and with trust property controlled by, financial institutions 20

2. A director, member, partner, official, employee or agent of a financial institution or of a nominee company who invests, holds, keeps in safe custody, controls, administers or alienates any funds of the institution or any trust property—
- (a) must, with regard to such funds, observe the utmost good faith and exercise proper care and diligence; 25
- (b) must, with regard to the trust property and the terms of the instrument or agreement by which the trust or agency concerned has been created, observe the utmost good faith and exercise the care and diligence required of a trustee in the performance or discharge of his or her powers and duties; and 30
- (c) may not alienate, invest, pledge, hypothecate or otherwise encumber or make use of the funds or trust property or furnish any guarantee in a manner calculated to gain directly or indirectly any improper advantage for himself or herself or for any other person to the prejudice of the financial institution or principal concerned. 35

Declaration of interest

3. (1) A director, member, partner, official, employee or agent of a financial institution, or of a nominee company, who takes part in a decision to invest any of the funds of the institution or any trust property in a company or other undertaking in which he or she has a direct or indirect financial interest, must declare that interest in writing to the board of management or other governing body of the financial institution or nominee company, indicating the nature and extent of such interest, before such investment is made. 40

(2) For the purposes of subsection (1), “invest” includes—

- (a) the purchase of shares in a company, or of an interest in a close corporation or partnership; 45
- (b) the granting of a secured or unsecured loan.

(3) A declaration of interest made in terms of subsection (1) must be recorded in the minutes of the meeting of the board or governing body at which the declaration is made or considered.

Investment of trust property 50

4. (1) A director, member, partner, official, employee or agent of a financial institution which administers trust property under any instrument or agreement, may not cause such trust property to be invested otherwise than in a manner directed in, or required by, such instrument or agreement.

(2) In the absence of a direction or requirement referred to in subsection (1), a director, member, partner, official, employee or agent of a financial institution may not cause any trust property to be invested otherwise than in the name of—

- (a) the principal concerned;
- (b) the financial institution in its capacity as administrator, trustee, curator or agent; or
- (c) a nominee company.

(3) (a) Despite subsections (1) and (2)—

- (i) where the articles of association of a company prohibit the registration of its shares or debentures in the name of—

- (aa) a trust;
- (bb) a financial institution in its capacity as administrator, trustee or curator; or
- (cc) any nominee; and

- (ii) where such shares or debentures form part of trust property administered by a financial institution,

those shares or debentures must be registered in the name of a director, member, partner or manager of that financial institution.

(b) The director, member, partner or manager must hold those shares or debentures in a fiduciary capacity on behalf of the principal concerned.

(c) Prior to the registration of any shares or debentures in the name of a director, member, partner or manager as contemplated in paragraph (a), the financial institution concerned must furnish security to the satisfaction of the Master of the High Court, if such security has not already been furnished in terms of the Trust Property Control Act, 1988 (Act No. 57 of 1988).

(4) A financial institution must keep trust property separate from assets belonging to that institution, and must in its books of account clearly indicate the trust property as being property belonging to a specified principal.

(5) Despite anything to the contrary in any law or the common law, trust property invested, held, kept in safe custody, controlled or administered by a financial institution or a nominee company under no circumstances forms part of the assets or funds of the financial institution or such nominee company.

(6) This section also applies in a case where a financial institution invests, holds, keeps in safe custody, controls, administers or alienates trust property under any instrument or agreement jointly with another person.

CHAPTER 2

ENFORCEMENT

Appointment of curator

5. (1) The registrar may, on good cause shown, apply to a division of the High Court having jurisdiction for the appointment of a curator to take control of, and to manage the whole or any part of, the business of an institution.

(2) Upon an application in terms of subsection (1) the court may—

- (a) provisionally appoint a curator to take control of, and to manage the whole or any part of, the business of the institution on such conditions and for such a period as the court deems fit; and
- (b) simultaneously grant a rule *nisi* calling upon the institution and other interested parties to show cause on a day mentioned in the rule why the appointment of the curator should not be confirmed.

(3) On application of the institution the court may anticipate the return day if not less than 48 hours' notice of such application has been given to the registrar.

(4) If at the hearing pursuant to the rule *nisi* the court is satisfied that it is desirable to do so, it may confirm the appointment of the curator.

(5) The court may make an order with regard to—

- (a) the suspension of legal proceedings against the institution for the duration of the curatorship;
- (b) the powers and duties of the curator;
- (c) the remuneration of a curator appointed provisionally under subsection (2)(a) or finally under subsection (4);

- (d) the costs relating to any application made by the registrar under subsection (1);
 - (e) the costs incurred by the registrar in respect of an inspection of the affairs of the institution concerned in terms of the Inspection of Financial Institutions Act, 1998 (Act No. 80 of 1998); or 5
 - (f) any other matter which the court deems necessary.
- (6) The curator acts under the control of the registrar who made the application under subsection (1), and may apply to that registrar for instructions with regard to any matter arising out of, or in connection with, the control and management of the business of the institution. 10
- (7) The curator must furnish the registrar of the institution concerned with such information concerning the affairs of that institution as the registrar may require.
- (8) (a) Any person, on good cause shown, may make application to the court to set aside or alter any decision made or any action taken by the curator or the registrar with regard to any matter arising out of, or in connection with, the control and management of the business of an institution which has been placed under curatorship. 15
- (b) A person who makes application contemplated in paragraph (a) must give notice of not less than 48 hours of such application to the registrar or the curator, as the case may be, and such registrar or curator is entitled to be heard at such application.
- (9) The court may, on good cause shown, cancel the appointment of the curator at any time. 20

Powers of registrar

6. (1) The registrar may, in an instance where no other statutory provision so provides, institute and conduct proceedings in the High Court having jurisdiction in order to—
- (a) discharge any duty or responsibility imposed on the registrar in terms of any law; 25
 - (b) compel any institution to comply with any law or to cease contravening a law;
 - (c) compel any institution to comply with a lawful request, directive or instruction made, issued or given by the registrar under a law; or
 - (d) obtain a declaratory order on any point of law relating to any law or to the business of an institution. 30
- (2) For the purpose of ensuring compliance with a law, or if the registrar has reason to believe that an institution is contravening or failing to comply with, or has contravened or failed to comply with, a provision of a relevant law, the registrar in an instance where no other statutory provision so provides— 35
- (a) may by notice direct that institution—
 - (i) to furnish the registrar within a specified period with any specified information or documents in the possession or under the control of that institution and which relate to the matter of such contravention or failure;
 - (ii) to appear before the registrar at a specified time and place for questioning by the registrar in connection with such matter; or 40
 - (iii) to make arrangements satisfactory to the registrar for the discharge of all or any part of that institution's obligations in terms of such law;
 - (b) may, if it appears that prejudice has occurred or may occur as a result of such contravention or failure to comply, apply to a court having jurisdiction for an order restraining such person from continuing business or dealing with trust property, pending an application to court by the registrar as contemplated by section 5, or the institution by the registrar of such other legal remedy as may be available to the registrar. 45
- (3) (a) If the registrar has reason to believe that an institution has contravened a law, including a lawful request, directive or instruction made, issued or given by the registrar under such law, the registrar may publish a statement to that effect in such manner as the registrar considers appropriate. 50
- (b) Before publishing a statement, the registrar must give the institution concerned a warning notice of the proposed statement, the reason therefor and the proposed date of publication. 55
- (c) The institution concerned may during the warning period make representations to the registrar concerning the proposed action.
- (d) If the registrar thereafter decides to publish the statement, the registrar must without delay give the institution concerned a notice which sets out the terms of the statement to be published. 60

(4) In paragraphs (a), (b), (c), and (d) of subsection (1), in subsection (2) and in subsection (3) "law" means this Act, the Inspection of Financial Institutions Act, 1998, any other Act referred to in the definition of "financial institution" in section 1 of the Financial Services Board Act, 1990, or the Medical Schemes Act, 1998, and includes any subordinate measure made under or in terms of any such Act. 5

(5) The registrar may take any reasonable steps, including the issue of an instruction to carry out an inspection in terms of the Inspection of Financial Institutions Act, 1998, to ensure that an institution which is subject to an order of court made in terms of subsection (1) or (2) is complying with that order.

Declaration of certain practices as irregular or undesirable 10

7. (1) The registrar may, in an instance where no other statutory provision so provides, by notice in the Gazette declare a specific practice or method of conducting business an "irregular or undesirable practice" or an "undesirable method of conducting business" for a specific category or categories of financial institutions, or for all such institutions.

(2) The registrar may not issue a declaration referred to in subsection (1) unless— 15

(a) the registrar has by notice in the Gazette published an intention to make the declaration and invited interested persons to make written representations concerning the intended declaration so as to reach the registrar within 21 days after the date of publication of that notice; and

(b) has consulted with any advisory committee or board established in respect of the supervision, regulation and control of the financial institutions concerned. 20

(3) A financial institution may not, on or after the date of the notice referred to in subsection (1), carry on the business practice concerned.

(4) The registrar may, by notice, direct a financial institution which, on or after the date of a notice referred to in subsection (1), carries on the business practice concerned, to rectify to the satisfaction of the registrar anything which was caused by or arose out of that business practice. 25

(5) A financial institution which is directed to rectify anything in terms of subsection (4), must do so within 60 days after the institution is so directed.

Restriction on powers of registrar 30

8. Despite any other provision of this Act, the registrar may not act under section 5, 6, or 7 in respect of a stock exchange, financial exchange, member or stock-broker referred to in paragraph (a)(v) and (vi) of the definition of "financial institution" in section 1 of the Financial Services Board Act, 1990, unless the registrar—

(a) has consulted with the committee or executive committee of the stock exchange or financial exchange in question; and 35

(b) is satisfied that no other adequate remedy is available.

Records and entries in account books admissible in evidence

9. In any proceedings conducted in terms of this Act, the records and books of account of an institution, a nominee company or a trust administered by such institution are admissible as *prima facie* evidence of the matters, transactions and accounts recorded therein, if supported by an affidavit by a person who alleges in that affidavit that— 40

(a) (i) he or she is a director, member, partner, official, employee or agent of such institution, nominee company or trust; or 45

(ii) he or she is an inspector appointed under the Inspection of Financial Institutions Act, 1998, section 11 or 12 of the South African Reserve Bank Act, 1989 (Act No. 90 of 1989), section 6 of the Banks Act, 1990, or section 4 of the Mutual Banks Act, 1993; and

(b) such records or books of account are or have been the ordinary records and books of account of that institution, company or trust. 50

Offences

10. (1) A person who contravenes or fails to comply with any provision of this Act is guilty of an offence and on conviction is liable to a fine or imprisonment for a period not exceeding 10 years or to both such fine and imprisonment. 55

(2) A court may, in addition to any penalty it may impose in terms of subsection (1), order that such person—

- (a) pay the institution or principal concerned any profit he or she made; and
- (b) compensate the institution or principal concerned for any damage suffered as a result of the contravention or failure.

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(3) A court may, in addition to any penalty imposed in terms of subsection (1) and an order made in terms of subsection (2), order that such person may not serve as a director, member, partner or manager of any financial institution for such period as the court may deem fit.

Repeal of laws

10

11. The laws mentioned in the Schedule are hereby repealed to the extent set out in the third column of the Schedule, subject to the provisions of section 12.

Transitional provision

12. Anything done or deemed to have been done under any provision of a law repealed by section 11 and which could be done under a provision of this Act, is deemed to have been done under the last-mentioned provision.

15

Short title

13. This Act is called the Financial Institutions (Protection of Funds) Act, 2001.

SCHEDULE
FINANCIAL INSTITUTIONS (PROTECTION OF FUNDS) BILL, 2001
LAWS REPEALED OR AMENDED

Number and year of law	Short title	Extent of repeal
Act No. 39 of 1984	Financial Institutions (Investment of Funds) Act, 1984	The whole
Act No. 6 of 1987	Financial Institutions Amendment Act, 1987	Sections 14, 15, 16 and 17
Act No. 51 of 1988	Financial Institutions Amendment Act, 1988	Section 23
Act No. 55 of 1989	Financial Markets Control Act, 1989	First item of Schedule
Act No. 83 of 1992	Financial Institutions Amendment Act, 1992	Schedule 33
Act No. 104 of 1993	Second Financial Institutions Amendment Act, 1993	Section 55
Act No. 22 of 1997	Financial Institutions Amendment Act, 1997	Sections 1, 2 and 3

MEMORANDUM ON THE OBJECTS OF THE FINANCIAL INSTITUTIONS (PROTECTION OF FUNDS) BILL, 2001

1 BACKGROUND

- (a) The Bill repeals and replaces the Financial Institutions (Investment of Funds) Act, 1984 (Act No. 39 of 1984) ("the Act").
- (b) The Bill further replaces the Financial Institutions (Investment of Funds) Bill ("the previous Bill") approved by Cabinet during 1999 and published for public information in Government Gazette No. 20801 of 7 January 2000.
- (c) The previous Bill was withdrawn in consultation with the Chairperson of the Portfolio Committee of Finance and the State Law Advisers after the promoters of the Bill had decided on the addition of further clauses in order to extend the remedies of the regulator for the sake of protecting consumers of financial services.

2 SCOPE OF THE BILL

- (a) The provisions of the Bill contained in the latest text are divided into two Parts:
 - (i) Part 1 which regulates the investment, keeping in safe custody and administration by financial institutions of funds and trust property. These are comprised by clauses 2, 3 and 4, the provisions of which essentially repeat the provisions of the Act, however in clearer language.
 - (ii) Part 2, comprising clause 5 up to and including clause 10, which deals with the enforcement powers of the regulator and which applies not only to financial institutions but also to associated institutions and unregistered persons. Clause 5, which deals with curatorship orders, succeeds an equivalent provision of the Act with some modification and more clarity so as to enhance the applicability of this extremely useful regulatory tool.

Clause 6 likewise repeats a similar provision in the Act, again with an extension to provide for more effective intervention powers for the regulator.

Clause 7 is completely new and although an equivalent provision does not appear in either the Act or the previous Bill, this type of provision is by no means strange in regulatory laws. This is a preventative measure aimed at the eradication of undesirable practices and consequential losses to the public.

Clauses 8, 9 and 10 again are repetitive of similar provisions contained in the Act.

Clauses 11, 12 and 13 deal with the repeal of existing laws, transition and the new title of the Bill.

3 CONSULTATIVE PROCESS

- (a) The previous Bill was exposed for comment to a large number of persons and institutions (approximately 90). Of these only eight parties responded, suggesting minor changes. Full details are to be found in the aforementioned Government Gazette of 7 January 2000 which are not repeated.
- (b) After the previous Bill had been withdrawn, the present Bill was subjected to public comment. In addition to being placed on the Financial Services Board website, copies of the Bill were either e-mailed or faxed to the parties.
- (c) With the exception of criticisms directed at clause 6(2)(b) of the Bill, comments on the Bill were mainly favourable. Useful suggestions were also received. All comments were duly considered and both criticisms and proposals were accommodated when the Bill was thereafter reviewed and its present text framed.

4 ORGANISATIONAL AND PERSONNEL IMPLICATIONS

The Bill does not have organisational or personnel implications for the State, other than to reduce the burden of the courts in removing the duty to exercise control over curators.

5 FINANCIAL IMPLICATIONS

The Bill does not have financial implications for the State.

6 COMMUNICATION IMPLICATIONS

The Bill does not have communication implications other than the commencement of the Bill as an Act of Parliament being published in the *Gazette*.

7 PARLIAMENTARY PROCEDURE

In the opinion of the Financial Services Board and the State Law Advisers this Bill should be dealt with in terms of section 75 of the Constitution. None of the procedures laid down in sections 74 and 76 are applicable.

GENERAL NOTICE

NOTICE 824 OF 2001**NATIONAL TREASURY****PUBLICATION OF FINANCIAL ADVISORY AND INTERMEDIARY SERVICES BILL, 2001**

The Minister of Finance intends tabling the Financial Advisory and Intermediary Services Bill, 2001 in Parliament during the third parliamentary term. The Bill is published in accordance with Rule 241(c) of the Rules of the National Assembly.

Interested persons and institutions are invited to submit written representation on the bill to the Secretary to Parliament by no later than 31 July 2001.

All submissions must be addressed to:

The Secretary to Parliament

c/o Mr A Hermans

Committee Section

Parliament of the RSA

P.O. Box 15

8000

You can contact Mr Hermans at:

Fax: (021) 461 7969

Tel: (021) 403 3776/3769

Email: ahermans@parliament.gov.za

FINANCIAL ADVISORY AND INTERMEDIARY SERVICES BILL

**To regulate the rendering of financial advisory and intermediary services to clients;
and to provide for matters incidental thereto**

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

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Schedule

Laws amended or repealed

INTRODUCTORY PROVISIONS**Definitions**

1. (1) In this Act, unless the context otherwise indicates— 40
 - (i) “advice” means, subject to subsection (3)(a), any recommendation, guidance or proposal 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 45
 - (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 contractual term 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 such advice—
- (i) is furnished in the course of or incidental to financial planning in connection with the affairs of the client; or 5
 - (ii) results in any such purchase, investment, transaction, variation, replacement or termination, as the case may be, being effected or not; (x)
 - (ii) “Advisory Committee” means the Advisory Committee on Financial Services Providers referred to in section 5; (x) 10
 - (iii) “application”, in connection with a required 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); and “apply” has a corresponding meaning; (x)
 - (iv) “auditor” means an auditor registered in terms of the Public Accountants’ and Auditors’ Act, 1991 (Act No 80 of 1991); (x) 15
 - (v) “authorised financial services provider” or “provider” means a person who or which has been granted an authorisation as a financial services provider by the issue to that person of a licence under section 8; (x)
 - (vi) “Board” means the Financial Services Board established by section 2 of the Financial Services Board Act; (x) 20
 - (vii) “board of appeal” means the board of appeal established by section 26(1) of the Financial Services Board Act; (x)
 - (viii) “client” means any ‘person’ as defined in this subsection; (x)
 - (ix) “code of conduct” means any published code of conduct contemplated in section 15(1); (x) 25
 - (x) “collective investment scheme” means a collective investment scheme as defined in the Collective Investment Schemes Control Act, 2001 (Act No. ?? of 2001); (x)
 - (xi) “complainant” means, subject to section 26(1)(a)(ii), a specific client who or which submits a complaint in respect of any authorised financial services provider or representative to the Ombud; (x) 30
 - (xii) “complaint”, means, subject to section 26(1)(a)(iii), a specific complaint of a complainant relating to a financial service rendered by an authorised 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— 35
 - (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; 40
 - (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; (x)
 - (xiii) “compliance officer” means a compliance officer for an authorised financial services provider referred to in section 17; (x) 45
 - (xiv) “Court” means any court having jurisdiction; (x)
 - (xv) “exempt”, in relation to the registrar, 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 50
 - “exemption” or “exempted” has a corresponding meaning; (x)
 - (xvi) “financial product” means, subject to subsection (2) of this section—
 - (a) securities and instruments, including—
 - (i) shares in a company other than a “share block company” as defined in the Share Block Control Act, 1980 (Act No. 59 of 1980); 55
 - (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) of this paragraph; 60
 - (v) any “securities” as defined in section 1 of the Stock Exchanges Control Act, 1985 (Act No. 1 of 1985);

- (vi) any "investments" as defined in section 4(7)(a) of the Stock Exchanges Control Act, 1985; and
- (vii) any "financial instrument" as defined in section 1 of the Financial Markets Control Act, 1989 (Act No. 55 of 1989);
- (b) a participatory interest in one or more collective investment schemes; 5
- (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 10
 - (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; 15
- (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); (x)
- (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); 20
- (h) any other product similar in nature to any financial product referred to in paragraphs (a) to (g), inclusive, of this definition, 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; 25
- (i) any combined product containing one or more of the financial products referred to in paragraphs (a) to (h), inclusive, of this definition;
- (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) of this definition; (x) 30
- (xvii) "financial service" means any service contemplated in paragraph (a), (b) or (c) of the definition of "financial services provider" in this subsection; (x)
- (xviii) "Financial Services Board Act" means the Financial Services Board Act, 1990 (Act No. 97 of 1990); (x) 35
- (xix) "financial services provider" means any person who or which as part of a regular business of such person—
 - (a) furnishes advice; or
 - (b) furnishes advice and renders any intermediary service; or
 - (c) renders an intermediary service; (x) 40
- (xx) "intermediary service" means, subject to subsection (3)(b), any act other than the furnishing of advice, performed by a person—
 - (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 45
 - (b) with a view to—
 - (i) 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; 50
 - (iii) receiving, submitting or processing of claims of a client against a product supplier; or
 - (iv) "management of investments" as defined in section 4(7)(b) of the Stock Exchanges Control Act, 1985; (x) 55
- (xxi) "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 60

- (b) a corporate body or trust consisting of only one natural person as member, director, shareholder or trustee, means any such natural person; (x)
- (xxii) "licence" means a licence contemplated in section 7(1); (x)
- (xxiii) "licensee" means a financial services provider to whom or which a licence has been issued under section 8; (x) 5
- (xxiv) "Minister" means the Minister of Finance; (x)
- (xxv) "Office" means the Office of the Ombud; (x)
- (xxvi) "Ombud" means—
- (a) the Ombud for Financial Services Providers; and 10
- (b) for the purposes of sections 27, 28, 29, 31 and 39, includes a Deputy Ombud, appointed in terms of section 21; (x)
- (xxvii) "person" means a "person" as defined in section 2 of the Interpretation Act, 1957 (Act No. 33 of 1957), a natural person, a partnership or a trust; (x) 15
- (xxviii) "prescribed" means prescribed by regulation; (x)
- (xxix) "product supplier" means any person who or which issues a financial product to clients by virtue of an authority, approval or right granted to such person under any law, including the Companies Act, 1973 (Act No. 61 of 1973); (x)
- (xxx) "registrar" means the registrar of financial services providers referred to in section 2; (x) 20
- (xxxi) "regulation" means a regulation made under section 35; (x)
- (xxxii) "representative", means any person who or which 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 mandatory agreement, excluding a person rendering clerical, technical, administrative, legal, accounting or other services in a subsidiary or subordinate capacity, and which service— 25
- (a) does not require judgment on the part of the latter person; or
- (b) does not lead to directing a client or group of clients to any specific transaction in respect of a financial product in response to general enquiries; 30
- (xxxiii) "rule" means a rule of the Board contemplated in section 26; (x)
- (xxxiv) "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 by the registrar referred to in section 3(1). (x) 35
- (2) For the purposes of this Act a financial product does not include any financial product exempted by the registrar, after consultation with the Advisory Committee, by notice in the *Gazette* from the provisions of this Act, taking into consideration the extent to which the rendering of financial services in respect of the product is regulated by any other law. 40
- (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; 45
- (bb) as regards 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 50
- (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 or group of clients; 55
- (iii) advice given by—
- (aa) the board of management, or any member thereof, of any pension fund organisation or friendly society referred to in paragraph (d) of the definition of "financial product" in subsection (1) of this section, to the members of the organisation or society on benefits enjoyed or to be enjoyed by such members in that capacity; or 60

- (bb) the board of trustees of any medical scheme referred to in paragraph (g) of the said definition of “financial product”, or any member thereof, to the members of the medical scheme, on health care benefits enjoyed or to be enjoyed by such members in that capacity;
- (iv) advice given to a client by 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 any employee of any such bank or mutual bank, on any deposits offered by that bank or mutual bank to clients; or
- (v) any other advisory activity exempted by the registrar, after consultation with the Advisory Committee, by notice in the *Gazette* from the provisions of this Act;
- (b) intermediary service does not include—
 - (i) the rendering by a bank or mutual bank of a service contemplated in paragraph (b)(ii) of the definition of “intermediary service” where the bank or mutual bank acts merely as a conduit between a client and another product supplier;
 - (ii) an intermediary service rendered by a product supplier—
 - (aa) who or which is authorised under a particular law to conduct business as a financial institution; and
 - (bb) where the rendering of such service is regulated by, under, or by virtue of such law;
 - (ii) any other service exempted by the registrar, after consultation with the Advisory Committee, by notice in the *Gazette* from the provisions of this Act.
- (4) 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 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.

CHAPTER 1

ADMINISTRATION OF ACT

Registrar of financial services providers

2. (1) There shall be a registrar and deputy registrar of financial services providers with the powers and duties conferred on or assigned to the registrar by or under this Act or any other law.

(2) The executive officer and a deputy executive officer of the Board shall also be the registrar and deputy registrar, respectively.

General provisions concerning registrar

3. (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, in terms or by virtue of an authorising provision of this Act, shall only be valid 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 by the registrar contemplated in subsection (1) is sought by a person under this Act or any other law, application therefor shall, subject to any other specific provision of this Act, be made in writing to the registrar and the application shall—

(a) be made in the form and manner determined by or in terms of this Act, 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.

Special provisions concerning powers of registrar

4. (1) When anything is required or permitted to be done by the registrar under 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 or representative to furnish the registrar, within a specified period, with specified information or documents required by the registrar for the purposes of this Act. 5

(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 in the opinion of the registrar misleading, or contrary to the public interest, 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 the changes thereto which the registrar deems fit. 10

(b) A notice contemplated in paragraph (a) takes effect on a date specified in such notice after the registrar has— 15

- (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— 20
 - (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 25
 - (iii) to make arrangements satisfactory to the registrar for the discharge of all or any part of that person's obligations in terms of this Act;

- (b) if satisfied that in the event 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 as contemplated by section 33(1) and (2), or the institution by the registrar of such other legal remedy as may be available to the registrar. 30 35

Advisory Committee on Financial Services Providers

5. (1) There shall be an Advisory Committee on Financial Services Providers which may on its own initiative, or shall at the request of the Minister or the registrar, investigate and report or advise on any matter relating to financial services providers.

(2) The Advisory Committee shall consist of a chairperson and other members, including persons representative of product suppliers, financial services providers and clients relevant to the application of this Act, appointed by the Minister after consultation with the Board. 40

(3) The registrar shall be a member of the Advisory Committee by virtue of the office of the registrar, but without voting power on matters on which the registrar is to be advised by the Committee. 45

(4) A member of the Advisory Committee, excluding the registrar, shall hold office for the period determined by the Minister when the appointment is made.

(5) A member of the Advisory Committee, excluding the registrar, who is not in the full-time employment of the State or the Board shall be paid the remuneration and allowances in respect of any expenses incurred in the performance of the functions of the Committee, as determined by the Board. 50

(6) The Advisory Committee may meet or otherwise arrange for the performance of its functions, and may regulate its meetings as it thinks fit, after consultation with the Board. 55

(7) The registrar may submit to the Advisory Committee any information which is in the registrar's possession, or which the registrar may obtain, and which is relevant to any matter which the Committee is investigating or considering.

(8) The Advisory Committee may call to its assistance such person or persons as it may deem necessary to assist it, or to investigate matters relating to financial services providers.

(9) The registrar shall be responsible for the administrative work incidental to the performance of the functions of the Advisory Committee.

(10) The expenditure connected with the functions of the Advisory Committee shall be paid out of the funds of the Board, whose approval shall be required for all expenditure proposed to be incurred, or actually incurred, by the Committee.

(11) For the purposes of any investigation by the Advisory Committee, 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.

Delegations and authorisations

6. (1) The Minister may, on such conditions as the Minister may determine (which the Minister may at any later time amend or withdraw), delegate any power conferred upon the Minister by this Act 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 later time 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; or

(b) so authorise the chairperson, any other member of the Board, or the registrar, to perform any duty assigned to the Board under this Act.

(3) The registrar may—

(a) on such conditions as the registrar may determine (which the registrar may at any later time 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 perform any duty assigned to the registrar by or under this Act.

(4) For the purposes of recognition by the Board of a body envisaged in subsection (3)(a)(iii), the following provisions shall 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 as a representative body for the purpose of performing the functions determined by the registrar, after consultation with the Advisory Committee and the Board, by notice in the *Gazette*;

(b) an application for such recognition—

(i) must be made in the manner determined by the registrar by notice in the *Gazette*;

(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 of this subsection, 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 granted the applicant a reasonable opportunity to make submissions on the proposed conditions and having considered those submissions, and instruct the registrar to inform the applicant accordingly; or

- (iii) refuse an application and instruct the registrar to furnish the applicant with 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; 5
 - (f) the Board may—
 - (i) grant any application, or portion thereof, referred to in paragraph (e) and instruct the registrar to inform the applicant accordingly; or
 - (ii) refuse any such application, or portion thereof, and instruct the registrar to furnish the applicant with the written reasons of the Board for the refusal. 10
- (5) Any delegation or authorisation contemplated in this section does not prohibit the exercise of the power or the performance of the duty in question by the Minister, Board or registrar, as the case may be.
- (6) Anything done or omitted to be done under any delegation or authorisation 15 contemplated in this section shall be deemed to have been done or omitted by the Minister, the Board or the registrar, as the case may be.

CHAPTER II

AUTHORISATION OF FINANCIAL SERVICES PROVIDERS

Authorisation of financial services providers 20

7. (1) With effect from a date determined by the Minister by notice in the *Gazette*, no person may act as a financial services provider contemplated in this Act (including pretending or professing to be, or holding out as such a provider), unless such person has been granted an authorisation by the issuing by the registrar to the person of a licence under section 8 of this Act. 25

(2) Subject to the provisions of subsection (3) of this section and 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 unauthorised person, shall not be unenforceable between the product supplier and the client merely by reason of such lack of authorisation. 30

Application for authorisation

8. (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 in the *Gazette*, and be accompanied by information to satisfy the registrar that— 35

- (a) where the applicant is a natural person, such applicant; and
 - (b) where the applicant is a partnership, a trust, or a corporate or unincorporated body, any key individual in respect of the applicant,
- complies with the fit and proper requirements determined by the registrar for financial services providers or categories of providers, after consultation with the Advisory Committee, by notice in the *Gazette*, in connection with— 40

- (i) personal character qualities of honesty and integrity;
- (ii) the competency and operational ability of the applicant to fulfil the responsibilities imposed by this Act; and 45
- (iii) the applicant's sound financial standing.

(2) The registrar may in addition

- (a) require an applicant to furnish any additional information, or require any information to be verified, as the registrar may deem necessary; and
- (b) take into consideration any other information as regards the applicant, derived from whatever source including the Ombud and any other regulatory or supervisory authority, provided that such information is disclosed to the applicant and the latter is provided with a reasonable opportunity to respond thereto. 50

(3) The registrar must after consideration of an application— 55

- (a) if satisfied that an applicant complies with the requirements of this Act grant the application; or

- (b) if not so satisfied, refuse the application.
- (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 the registrar may deem necessary having regard to—
- (i) all facts and information available and the category of financial services to be rendered by the applicant; and
 - (ii) any guidelines provided to the registrar by the Advisory Committee or the Board (if any).
- (b) Conditions and restrictions envisaged 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 affects the fit and proper requirements mentioned in subsection (1) of this section and renders or may render such person no longer a fit and proper person,
- any such person shall not be permitted to take part in the conduct or management or oversight of the licensee's business as regards the rendering of financial services, unless such person has on application been approved by the registrar in the manner and in accordance with a procedure determined, after consultation with the Advisory Committee, by the registrar by notice in the *Gazette*.
- (5) (a) Where an application is granted, the registrar shall issue to the applicant 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 the number of certified copies of the licence as may be requested by the successful 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 of the licence, after having provided 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), impose new conditions on the licensee after having furnished the licensee with reasons and having afforded the licensee a reasonably opportunity to be heard,
- and shall in either such case issue an appropriately amended licence to the licensee, and the 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 shall—
- (a) notify the applicant thereof; and
 - (b) furnish the reasons for the refusal.
- (7) A licensee—
- (a) must display the current licence in a prominent and durable manner within any business premises of the licensee;
 - (b) must include a reference to the fact that a licence is held in all business documentation, advertisements and other promotional material;
 - (c) must ensure that a certified copy of the licence will at all times be immediately available, or within a reasonable time, for production to any person requesting proof of licensed status under authority of a law or for purposes of entering into a business relationship with the licensee.
- (8) No person may in any manner make use of any licence or copy thereof for business purposes where the licence has lapsed or has been withdrawn or, subject to section 9(2), during any time when the licensee is under provisional or final suspension contemplated in section 9.

Suspension of authorisation

9. (1) The registrar may at any time suspend any licence if satisfied on the basis of available facts and information, and having afforded the licensee a reasonable opportunity to be heard, that the licensee no longer meets the requirements contemplated

in section 8, and irrespective of whether the registrar has taken or followed, or is taking or following, any step or procedure referred to in section 4.

(2) (a) Before effecting the suspension of any licence, the registrar must inform the licensee of the intention to suspend and of the grounds therefor, of the intended period of the suspension and of any conditions to be attached to the suspension, including— 5

(i) a condition requiring that the licensee may not, as from the effective date of the suspension, conclude any new business, and must as regards unconcluded business take such other measures determined by the registrar for the protection of the clients of the licensee; and

(ii) other conditions designed to facilitate the lifting of the suspension, 10
and must provide the licensee with a reasonable opportunity to make a submission in response thereto.

(b) The registrar shall duly consider any such response (if any), and may thereafter decide not to effect the suspension, or to effect the suspension, and shall notify the licensee of the final decision. 15

(c) Where the suspension is effected, the registrar shall in addition make known the details of the suspension or subsequent lifting thereof, by notice in the *Gazette* and, if deemed necessary by the registrar, by means of any other appropriate public media statement or announcement.

(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— 20

(a) provisionally suspend a licence, and inform the licensee of the grounds therefor, of the period of the suspension and of any conditions referred to in subsection (2)(a) attached to the suspension, and provide the licensee with a reasonable opportunity to respond thereto and to provide reasons why the provisional suspension should be lifted or why the stipulated period and conditions should be changed; and 25

(b) make known such provisional suspension by notice in the *Gazette* and, if deemed necessary by the registrar, by means of any other appropriate public media statement or announcement. 30

(4) (a) The registrar shall during the period of the provisional suspension duly consider any responses (if any) contemplated in subsection (3)(a), and may thereafter decide to lift the suspension, or decide to render the suspension final, and shall then inform the licensee accordingly. 35

(b) The registrar shall make known the details of any such final suspension, or lifting thereof, by notice in the *Gazette* and, if deemed necessary by the registrar, in any other appropriate public media statement or announcement.

(5) During any period of suspension, including a provisional suspension, envisaged in this section, the licensee involved shall for all purposes of this Act be regarded as a person who is not authorised to act as a financial services provider. 40

Withdrawal of authorisation

10. (1) The registrar may at any time withdraw any licence (including the licence of a licensee under provisional or final suspension in terms of section 9), if satisfied on the basis of available facts and information that the licensee— 45

(a) did not, when applying for the licence, make a full disclosure of all relevant information to the registrar, or furnished false or misleading information; or
(b) has since such issue contravened or failed to comply with any provision of this Act in a material manner.

(2) The provisions of— 50

(a) section 9(2), as regards decisions to suspend an authorisation (excluding such provisions relating to periods and conditions); and

(b) section 9 (3) and (4), as regards provisional suspensions followed by final decisions to lift suspensions or to finalise them, as the case may be,

shall with the necessary changes apply to a withdrawal of a licence contemplated in subsection (1) of this section. 55

(3) (a) A person whose licence has been withdrawn under this section shall be 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.

Lapsing of licence**11. (1) A licence shall lapse—**

- (a) where the licensee is a natural person, when the licensee becomes incapacitated to carry on any business due to physical or mental disease, or serious injury, on the final sequestration of the estate of the licensee or on his or her death; 5
- (b) where the licensee is any other person, on final liquidation or final dissolution;
- (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. 10

(2) The registrar must be advised of the lapsing of a licence and the reasons therefor and may, in any case where the registrar deems it necessary, make known any such lapsing of a licence by notice in the *Gazette* and, if deemed necessary by the registrar, by means of any other appropriate public media statement or announcement. 15

Exemptions in respect of product suppliers

12. (1) The registrar may exempt a product supplier who or which is authorised or approved under a particular law to conduct business as a financial institution, and who or which 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— 20

- (a) applies for exemption when submitting the application; and
- (b) complies with the requirements of the registrar with regard to information (if any) still required.

(2) Authorisation granted to a product supplier referred to in subsection (1) shall be supplementary to, but separate from, the supplier's authorisation or approval under a particular law as a financial institution. 25

CHAPTER III**REPRESENTATIVES OF AUTHORISED FINANCIAL SERVICES PROVIDERS**

30

Qualifications of representatives and duties of authorised financial services providers**13. (1) No person may—**

- (a) carry on business by rendering financial services to clients for or on behalf of any person who or which— 35
 - (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; or
- (b) act as a representative of an authorised financial services provider, unless—
 - (i) such person is able to provide confirmation, certified by the provider, to clients— 40
 - (aa) that a service contract or other mandatory agreement, to represent the provider exists; and
 - (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 agreement; and 45
 - (ii) such person, if debarred as contemplated in section 14, complies with the requirements determined by the registrar, after consultation with the Advisory Committee, by notice in the *Gazette*, for the reappointment of a debarred person as a representative. 50

(2) An authorised financial services provider—

- (a) must at all times be satisfied that the provider's representatives, and key individuals of any representative are, when rendering a financial service on behalf of the provider, competent to act, taking into consideration requirements similar to those mentioned in subparagraphs (i) and (ii) of section 8(1) and subsection (1)(b)(ii) of this section, where applicable; and 55

- (b) must 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 of their key individuals which must be regularly updated and be available to the registrar for reference or inspection purposes. 5
- (4) Such register must—
 - (a) contain every representative's or relevant key individual's name and business address, and the capacity in which the representative acts for the provider (i.e. as employee or as mandatory); and 10
 - (b) specify the categories in which representatives are competent to render financial services.
- (5) The registrar may require information from the authorised financial services provider so as to enable the registrar to maintain and continuously update a central register of all representatives and relevant key individuals. 15
- (6) A person who or which on the date envisaged in section 7(1) is a person who or which complies fully with all requirements of this Act for a representative and on such date acts as an employee or mandatory for any person who or which on or after such date becomes an authorised financial services provider, shall for the purposes of this Act, but subject to all provisions of this Act relating to representatives, be deemed to be a representative. 20

Debarment of representatives

- 14. (1) An authorised financial services provider must ensure that any representative of the provider who or which no longer complies with the requirements referred to in section 13(2), 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 its key individuals are removed from the register referred to in section 13(3); Provided that any such provider shall immediately take steps to ensure that the debarment shall not prejudice the interests of clients of the representative, and that any unconcluded business of the representative is properly concluded. 25 30
- (2) For the purposes of the imposition of a prohibition referred to in subsection (1), the authorised financial services provider shall have regard to—
 - (a) information on the conduct of the representative as provided by the registrar, the Ombud or any other interested person; and 35
 - (b) any contravention by the representative of, or failure to comply with, any relevant provision of this Act.
- (3) The authorised financial services provider must within a period of 30 days after removal of the names of a representative and its key individuals from the register mentioned in subsection (1), inform the registrar in writing thereof. 40

CHAPTER IV

CODES OF CONDUCT

Publication of codes of conduct

- 15. (1) The registrar shall in consultation with the Advisory Committee, and with representative bodies of the financial services industry and client and consumer bodies determined by the Advisory Committee, draft a code of conduct for authorised financial services providers which, if approved by that Committee, shall be published by notice in the *Gazette*, and which shall on any such publication become binding on all authorised financial services providers and representatives referred to therein. 45
- (2) Different codes of conduct may so be drafted in respect of different categories of authorised financial services providers and their operations in different sectors of the financial services industry, and different categories of representatives. 50
- (3) Codes of conduct may from time to time be amended or substituted in accordance with the procedure set out in subsection (1).

Principles of code of conduct

16. (1) A code of conduct must be drafted in a manner to ensure that the following objectives are achieved, namely, that clients being rendered financial services will be enabled to make informed decisions, that their reasonable financial needs as regards 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 the code—

- (a) to 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 safekeeping, 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; and
 - (f) any other matter which is necessary or expedient to be regulated in the code for the achievement of the objects this Act.

CHAPTER V

DUTIES OF AUTHORISED FINANCIAL SERVICES PROVIDERS

Compliance officers and compliance arrangements

17. (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), appoint one or more compliance officer to monitor, particularly in accordance with the procedures contemplated in subsection (3), compliance with this Act by the provider and such representative or representatives, and to take responsibility for liaison with the registrar, and who may be a director, member, trustee, principal officer, public officer or company secretary of any such provider, or any other person with suitable qualifications and experience determined by the registrar, after consultation with the Advisory Committee, by notice in the *Gazette*.

(b) The provisions of section 19(5) and (6), relating to an auditor of an authorised financial services provider, shall with the necessary changes apply to a compliance officer.

(2) A compliance officer must be approved by the registrar in accordance with the criteria and guidelines determined by the Advisory Committee.

(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 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 with reference to the matters, as from time to time determined by the registrar by notice in the *Gazette* for different categories of compliance officers, after consultation with the Advisory Committee.

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

Maintenance of records

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

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

Accounting and audit requirements

19. (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 and brought up to date monthly; and
- (b) annually prepare, in respect of the relevant financial year of the provider, financial statements reflecting with suitable particulars the financial position of the business as at the last day of the financial year in question, and the results of the operations and cash flow information for the period then ended.

(2) The authorised financial services provider must cause the statements referred to in subsection (1)(b) to be audited and reported on by an external auditor approved by the registrar, in order to produce—

- (a) an audited balance sheet, including notes thereon or documents attached thereto as may be necessary;
- (b) an audited income statement, including any notes thereon or documents attached thereto as may be necessary; and
- (c) an audited statement of the source and application of funds, and which financial statements must—
 - (i) be prepared in conformity with generally accepted accounting practice;
 - (ii) fairly represent the state of affairs of the provider's business;
 - (iii) 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 a date six months or such other period as determined by the registrar after the ending date of the provider's financial year.

(3) The authorised financial services provider must also maintain records in accordance with subsection (1)(a) in respect of money and assets held on behalf of clients, and shall, 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 in the *Gazette*—

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

(4) Notwithstanding anything to the contrary in any law contained, 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), 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 person concerned is no longer fit and proper to hold the office concerned.

(b) A notice contemplated in paragraph (a) shall take effect on a date specified in such notice after the registrar—

- (i) provided the authorised financial services provider and the person concerned with the reasons for the notice; and
- (ii) afforded the authorised financial services provider and the person concerned a reasonable opportunity to be heard.

CHAPTER VI

ENFORCEMENT

PART I

OMBUD FOR FINANCIAL SERVICES PROVIDERS

Office of Ombud for Financial Services Providers

20. (1) There is hereby established an office to be known as the Office of the Ombud for Financial Services Providers.

(2) The functions of the Office shall be performed by the Ombud for Financial Services Providers.

(3) The objective of the Ombud is to dispose of complaints in a procedurally fair, informal, economical and expeditious manner and by reference to what is, in the opinion of the Ombud, 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.

Appointment of Ombud

21. (1) The Board, after consultation with the Advisory Committee—

- (a) shall appoint as Ombud a person qualified in law or who possesses adequate knowledge of the rendering of financial services;
- (b) may, for the purposes of sections 27, 28, 29, 31 and 39, appoint one or more persons qualified in law or who possess adequate knowledge of the rendering of financial services, as Deputy Ombuds.

(2) (a) The Ombud must be appointed for a period of three years and may on expiry of any such term of office be reappointed.

(b) The remuneration and other terms of appointment of the Ombud and any Deputy Ombud must be determined by the Board and shall be paid out of the funds of the Office.

(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 at any time, after consultation with the Advisory Committee, remove the Ombud or Deputy Ombud from office on the ground of misbehaviour, incapacity or incompetence.

Funding of Office

22. (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.

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(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 close of the financial year, as well as funds invested under subsection (3), must be carried forward to the next financial year.

Accountability

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23. (1) The Ombud shall be the accounting officer in respect of all funds received and all payments made in respect of expenses incurred by the Office.

(2) The Ombud as accounting officer must—

(a) keep full and correct record of all funds received and payments made, and of all assets, liabilities and financial transactions of the Office;

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(b) as soon as is practicable, but not later than three months after the end of every financial year, prepare annual financial statements reflecting, with appropriate particulars, all funds received and payments made during, and all such assets, liabilities and transactions at the end of, the relevant financial year.

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

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(4) Save to the extent provided for in sections 27 and 28, the Ombud shall be accountable to the Board in respect of conduct, the performance of functions and the administration of the Office.

General administrative powers of Ombud

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24. The Ombud may for the purpose of performance of functions in the Office, with the prior concurrence of the Board, 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 movable property, and let, sell or otherwise dispose of property so purchased or acquired;

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(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 transfer to any such employee any administrative function vesting in the Ombud in terms of this Part;

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(e) obtain 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.

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Disestablishment and liquidation of Office

25. (1) The Office shall not be disestablished or liquidated except by Act of Parliament.

(2) In the event of any such disestablishment or liquidation, the surplus assets of the Office (if any) shall accrue to the Board.

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Powers of Board

26. (1) The Board may, after consultation with the Advisory Committee, make rules, including different rules in respect of different categories of complaints or Ombud investigations, regarding—

(a) (i) any matter which is required or permitted under this Act to be regulated by rule;

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(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 firstmentioned person;
- (iv) the rights of complainants in connection with complaints, including the manner of lodging of a complaint to the authorised financial services provider or representative involved; 5
 - (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; 10
 - (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; 15
- (b) the payment to the Office by the authorised financial services provider or representative involved in any complaint lodged with the Ombud, of case fees in respect of the consideration of a complaint by the Ombud;
 - (c) liaison between the Ombud and the registrar, and administrative duties of these functionaries as regards mutual administrative support, exchange of information and reports, other regular consultations and avoidance of overlapping of their respective functions; and 20
 - (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. 25
- (2) The Board—
- (a) must ensure that no rule made under subsection (1) detracts from or impinges in any material way on the extent of the independence of the Ombud envisaged in this Act;
 - (b) must publish rules made under subsection (1) in the *Gazette*. 30
- (3) The Board may, after consultation with the Advisory Committee, impose special levies on authorised financial services providers for purposes of the funding of the Office, for which purpose section 15A of the Financial Services Board Act applies with the necessary changes.

Receipt of complaints, prescription, jurisdiction and investigation 35

27. (1) On submission of a complaint to the Office, the Ombud—
- (a) must determine whether the requirements of the rules envisaged in section 26(1)(a)(iv) have been complied with;
 - (b) must in the case of any non-compliance, act in accordance with the provisions of the rules made under that section; and 40
 - (c) must 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 since 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. 45
- (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. 50
 - (ii) Where the complainant was unaware of the occurrence of the act or omission contemplated in subparagraph (i), the period of three years shall commence on the date on which the complainant became aware or ought reasonably to have become aware of such occurrence, whichever occurs first. 55
 - (b) (i) The Ombud must decline to investigate any complaint if, before the date of official receipt of the complaint, proceedings have been instituted in any Court in respect of a matter which would constitute the subject of the investigation. 60

- (ii) Where any proceedings contemplated in subparagraph (i) are instituted during any investigation by the Ombud, such investigation shall not be proceeded with.
- (4) The Ombud shall not proceed to investigate a complaint officially received, unless the Ombud—
 - (a) has in writing informed any other party to the complaint of the receipt thereof;
 - (b) is satisfied that all parties have copies of the complaint and supporting documents (if any); and
 - (c) has provided all parties the opportunity to submit to the Ombud 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 a right of legal representation in a case which the Ombud deems of a serious or complex nature;
 - (b) must, in the first instance, explore any reasonable prospect of resolving a complaint by a conciliated settlement acceptable to both 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 any of the parties, the reasons therefor: Provided that where the parties accept the recommendation, such recommendation shall have the effect of a final determination by the Ombud, contemplated in section 28(1).
- (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.

Determinations by Ombud

28. (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 involved, make a final determination, which may include—
- (a) the dismissal of the complaint; or
 - (b) the upholding of the complaint, 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 involved take such steps in relation to the complaint as the Ombud deems appropriate and just.
- (2) (a) A money award may provide for the amount payable to bear interest at a rate and as from a date specified by the Ombud.
- (b) The Board may by rule determine—
- (i) the maximum money award for a particular kind of financial prejudice or damage;
 - (ii) different maximum money 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; and
 that an amount payable under a cost award bears interest at a rate and as from a date specified by the Ombud.
- (3) 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 to the complaint and, if no notice of appeal to the board of appeal has within the period required therefor been lodged, to the clerk or registrar of court which would have had jurisdiction in the matter had it been heard by a court: Provided that where a notice of appeal has been lodged, the Ombud shall send a copy of the final decision of the board of appeal to any such clerk or registrar.
- (4) A determination—

- (a) or a final decision of the board of appeal, as the case may be, shall be deemed to be a civil judgment of the court of law which would otherwise have had jurisdiction, had the matter in question been heard by such court, and shall be so noted by the clerk or registrar of that court;
- (b) shall only be appealable to the board of appeal— 5
 - (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 10 chairperson of the board of appeal.

(5) (a) A writ of execution may, in the case of a determination or a final decision of the board of appeal amounting to a money 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 15 decision of the board of appeal, as the case may be.

(b) Any other determination shall be given effect to in accordance with the applicable procedures of a court of law after expiration of a period of two weeks after the date of the determination.

Record keeping

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29. (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 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. 25

(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.

Report of Ombud

30. (1) The Ombud must every year within three months after the end of the financial 30 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 simultaneously submit a copy of the report to the Minister.

Penalties

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31. Any person who—

- (a) commits any act in connection with the Ombud or an investigation by the Ombud which, if committed in respect of a court of law, would have constituted contempt of court, shall be guilty of an offence and liable on conviction to any penalty which may be imposed on a conviction of contempt 40 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, shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a 45 period not exceeding one year.

Promotion of client education by registrar

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, 50 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.

PART II

OTHER ENFORCEMENT MEASURES

Civil remedies

33. (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 commit non-compliance, 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. 5 10

(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 and gains 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. 15 20

(3) Any amount recovered by the registrar in terms of subsection (2) shall 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 shall, as a first charge against the trust account, be 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) of this section;
- (b) the balance, if any (hereinafter referred to as the “distributable balance”) shall be distributed by the registrar to the persons referred to in subsection (5), any funds remaining accruing to the registrar in his or her official capacity. 25 30

(4) Any amount not claimed within three years from the date of the first distribution of payments, shall accrue to the registrar in his or her official capacity.

(5) The distributable balance referred to in subsection (3)(b) shall be distributed on a pro rata basis to all persons who or which are affected by the occurrences referred to in subsection (2), and who prove to the reasonable satisfaction of the registrar that they are persons envisaged in that subsection: Provided that such person has not contravened or failed to comply with any provision of this Act. 35

(6) A Court issuing any order under this section must order it to be published in the *Gazette* and in any other appropriate public media statement or announcement as the Court considers appropriate. 40

(7) The registrar may withdraw, abandon or compromise any civil proceedings instituted in terms of 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 in a public media statement or announcement as the Court considers appropriate. 45

(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 in any other public media statement or announcement as the Court considers appropriate. 50

Undesirable practices

34. (1) Notwithstanding anything to the contrary in any law contained, 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 particular category of authorised financial services providers, or any such specific provider. 55

(2) The registrar shall not issue a declaration referred to in subsection (1) unless the registrar has by notice in the *Gazette* published an intention to make the declaration and invited interested persons to make written representations concerning the intended

declaration so as to reach the registrar within 21 days after the date of publication of that notice.

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

(4) The registrar may, by notice, direct an authorised financial services provider who or which, on or after the date of a notice referred to in subsection (1), carries on the business practice concerned, to rectify to the satisfaction of the registrar anything which was caused by or arose out of that carrying on of the business practice concerned. 5

(5) An authorised financial services provider who or which is under subsection (4) directed to rectify anything, shall do so within 60 days after the provider is so directed. 10

Regulations

35. (1) The Minister may, after consultation with the registrar and the Advisory Committee, make regulations relating to—

- (a) any matter which is required or permitted to be prescribed under this Act;
- (b) a prohibition on— 15
 - (i) canvassing for, or marketing or advertising (whether within or outside the Republic) of any business related to the rendering of financial services by any person who or which is not an authorised financial services provider or a representative of such a provider;
 - (ii) the publication by any person who or which 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 20
 - (iii) the use by any person who or which is not an authorised financial services 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; 25
- (c) compliance arrangements, compliance monitoring systems and keeping of records; 30
- (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 deemed expedient or necessary by the Minister 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 specific paragraph above. 35

(2) The regulations may provide for criminal offences in cases of contravention or non-compliance with the provisions thereof, and for penalties not exceeding a fine of R100 000, or the higher amount provided for in the regulations. 40

(3) Different regulations may be made in respect of different matters or persons, or different categories of authorised financial services providers, representatives or product suppliers.

Offences and penalties

36. Any person who— 45

- (a) contravenes or fails to comply with a provision of section 7(1), 13(1), 14(1), 18, 19(2) or 34(3) or (5); or
- (b) in any application in terms of a provision of this Act, deliberately makes a misleading, false or deceptive statement, or conceals any material fact, shall be guilty of an offence and shall on conviction be liable to a fine not exceeding R1 000 000 or to imprisonment for a period not exceeding five years, or to both such fine and such imprisonment. 50

Assessment of fines and penalties

37. (1) In the assessment of any penalty in terms of section 36, the Court shall take into consideration any award previously made under section 33 which arises from the same cause. 55

(2) In the assessment of any award under section 33, the Court shall take into account any penalty imposed in terms of section 36 which arises from the same cause.

Voluntary sequestration, winding-up and closure

38. No—

- (a) application for the acceptance of the voluntary surrender of the estate of an authorised financial services provider or representative of such provider in terms of section 3 of the Insolvency Act, 1936 (Act No. 24 of 1936); 5
- (b) special resolution relating to the winding-up of an authorised financial services provider or representative of such provider as contemplated in section 349 of the Companies Act, 1973 (Act No. 61 of 1973), and registered in terms of that Act, and no special resolution in terms of the constitution of such a provider or representative which is not a company; 10
- (c) written resolution relating to the winding-up of an authorised financial services provider or representative of such a provider as contemplated in section 67 of the Close Corporations Act, 1984 (Act No. 69 of 1984), and registered in terms of that section; and 15
- (d) voluntary closure of business by any authorised financial services provider, shall 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, 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 20
- (ii) if the registrar, by notice to the provider or representative concerned, declares that the application, resolution or closure is contrary to this Act. 25

Rights of appeal

39. Any person who or which feels aggrieved by any decision by the registrar or the Ombud under this Act which affects that person, shall, subject to the provisions of this Act, have a right to appeal to the board of appeal established by subsection (1) of section 26 of the Financial Services Board Act, in respect of which appeal the said section 26 shall with the necessary changes apply. 30

CHAPTER VII

MISCELLANEOUS

Saving of rights

40. No provision of this Act, and no act performed under, in terms of or by virtue of any such provision, shall be construed as affecting any right of a client, or other affected person, to seek appropriate legal redress in terms or by virtue of common law or 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 or which is not an authorised financial services provider or a representative of such a person. 35 40

Fees and penalties

41. (1) (a) The registrar shall, after consultation with the Advisory Committee, 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). 45

(b) The fees contemplated in paragraph (a) shall be payable in the manner and be subject to the requirements so determined by the registrar.

(2) (a) A person who or which fails to furnish the registrar with a return, information or document, as provided by this Act, within the applicable specified period or any extension thereof, shall, irrespective of any criminal proceedings instituted against the person under this Act, be liable to a penalty not exceeding R1 000 or the higher amount 50

prescribed for every day during which the failure continues, unless the registrar, on good cause shown, waives the penalty or any part thereof.

(b) A penalty contemplated in paragraph (a) shall be imposed by notice by the registrar on the person concerned, and such imposition shall be preceded by a procedure affording such person a reasonable opportunity to be heard, and shall take effect on a date specified in such notice which may be a date prior to the date of the notice. 5

(3) (a) A person who or which is liable to pay the fees or a penalty contemplated in subsections (1)(a) or (2)(a), respectively, and who or which fails to pay the amount due on the date or within the period as determined, shall at the rate, and calculated in the manner as may be determined by the registrar, pay interest on the amount outstanding 10 and on unpaid interest.

(b) The fees and penalties, and interest owed in respect thereof, shall be debts due to the Board and may be recovered by the Board in a Court.

Exchange of information

42. The registrar may disclose information regarding the business or financial affairs 15 of any person obtained in the course of performing functions under this Act, unless such disclosure will not be in the public interest, but subject to guidelines (if any) issued by the Board to the registrar—

(a) to any state department or organ of state (as defined in the Constitution of the Republic of South Africa, 1996), foreign financial or investment services 20 regulatory or supervisory authority, or any other regulatory or supervisory authority for financial or investment services in the Republic, including the Registrar of Medical Schemes and a representative body of the financial services industry or self-regulatory organisation approved by the Board, if the registrar is of the opinion that such information will be of importance to the 25 relevant department or organ of state, regulatory or supervisory authority, Registrar of Medical Schemes, representative body or self-regulatory organisation; or

(b) to any foreign financial or investment services regulatory or supervisory authority, where the information is required in terms of any agreement, 30 communiqué or memorandum of understanding concluded by the Board or the registrar with any such authority:

Provided that the Board or the registrar may impose conditions relating to the use of any information and the preservation of confidentiality in respect thereof.

Limitation of liability

43. The Minister, the Board or a member thereof, any officer or employee assisting the Board, the registrar, the Advisory Committee or any member thereof, the Ombud and any employee in the Office of the Ombud, or other body or person performing any function in terms of this Act, shall not be liable for any loss sustained by or damage 40 caused to any person as a result of anything done or omitted by any of them in the *bona fide*, but not grossly negligent, exercise of any power or carrying out of any duty or performance of any function under, in terms of or by virtue of a provision of this Act.

Exemptions

44. (1) The registrar may on or after the commencement of this Act, but prior to the date determined by the Minister as provided in section 7(1), exempt any person or 45 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 50
- (c) the granting of the exemption will not militate against the public interest, will not prejudice the interests of clients and will not frustrate the achievement of the objects of this Act.

(2) The registrar—

- (a) may attach to any exemption so granted reasonable requirements or impose 55 reasonable conditions, having regard to the factors mentioned in subsection (1)(a), (b) and (c), with which the applicant shall comply either before or after

the effective date of the exemption in the manner and during the period determined by the registrar; and

(b) shall determine the period of the exemption.

(3) An exemption in respect of which a person has to fulfil requirements or comply with conditions during the period of the exemption, shall lapse 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 shall comply on or after resumption of the exemption as if such requirements or conditions were 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 application, exempt any person from any other provision of this Act.

(b) The provisions of subsections (1)(a), (b) and (c), (2) and (3) of this section shall with the necessary changes apply in respect of any exemption referred to in paragraph (a).

Savings and amendment or repeal of laws

45. (1) The provisions of this Act shall, subject to subsection (2), not apply to the rendering of financial services by—

- (a) (i) a person referred to in section 3(2) of the Stock Exchanges Control Act, 1985 (Act No. 1 of 1985), any stock exchange as defined in that Act, or any clearing house referred to in the rules of any such exchange;
 - (ii) a person referred to in section 4(2) or 17C of the Financial Markets Control Act, 1989 (Act No. 55 of 1989), any financial exchange as defined in that Act, or any recognised clearing house in relation to any such exchange;
 - (iii) a central securities depository or depository institution referred to in the Custody and Administration of Securities Act, 1992 (Act No. 85 of 1992);
 - (iv) a manager or its authorised agent referred to in the Collective Investment Schemes Control Act, 2001 (Act No. ?? of 2001);
 - (v) a person referred to in section 13B of the Pension Funds Act, 1956 (Act No. 24 of 1956); or
 - (vi) a person referred to in section 58 or 65 of the Medical Schemes Act, 1998 (Act No. 131 of 1998),
- to the extent that the rendering of financial services is regulated by, under or by virtue of such respective Act;
- (b) (i) the executor, administrator or trustee in 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 or judicial manager of a company in liquidation or under judicial management, or a person acting on behalf of such liquidator or judicial manager;
 - (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 firstmentioned 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) by any other trustee or custodian appointed under any other law to the extent that such rendering of services is regulated by, under or by virtue of such law.

(2) (a) The law referred to in item 1 in the Schedule is hereby amended to the extent indicated in the fourth column of that Schedule.

(b) The laws referred to in item II in the Schedule are hereby, with effect from the date contemplated in section 7(1) of this Act, amended or repealed to the extent indicated in the fourth column of that Schedule: Provided that notwithstanding any provision of this paragraph any uncompleted business of any person qualifying as a financial services provider contemplated in this Act, as on the date when any such amendment or repeal comes into effect, shall be concluded within the prescribed period as if any such amendment or repeal has not taken effect.

(3) This Act shall otherwise be construed as being in addition to any other law not inconsistent with its provisions, and not as substituting any such law.

Commencement and short title

46. This Act is called the Financial Advisory and Intermediary Services Act, 2001, and comes into operation on a date fixed by the President by proclamation in the *Gazette*.

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 "financial institution": "(xii) any 'authorised financial services provider' or 'representative' as defined in section 1(1) of the Financial Advisory and Intermediary Services Act, 2001;"
II (a)	Act No. 1 of 1985	Stock Exchanges Control Act, 1985	<p>1. The amendment of section 4— (a) by the substitution for subsection (1) of the following subsection: "(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;" and (b) by the deletion of subsections (1A), (2), (3), (4), (5), (6) and (7)(c).</p> <p>2. The substitution for paragraph (d) of section 12(1) of the following paragraph: "(d) that— (i) a member carries on a business contemplated in section 4(1) in accordance with the provisions of the rules; and (ii) no member may effect a transaction with a person who or which 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."</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— (a) by the deletion of subparagraph (iii) of paragraph (a) of subsection (1); (b) by the deletion of the word "or" at the end of subparagraph (ii) of paragraph (b) of the said subsection (1), and of subparagraph (iii) of the said paragraph (b); (c) by the substitution for the words following on subparagraph (iii) of paragraph (b) of subsection (1) of the following words: "but who is carrying on the business of a stock exchange, or of a member, [or of a person requiring approval in terms of section 4] as the case may be; and"</p>

ITEM	NUMBER AND YEAR OF LAW	SHORT TITLE	EXTENT OF AMENDMENT OR REPEAL
			<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 paragraph: “(a) contravenes a provision of section 3(1) or (2), 4(1) [or (2)] or 14;”.</p> <p>7. The substitution for section 50 of the following section: “Powers of court to declare member, officer or employee of member [or person approved in terms of section 4] disqualified 50. (1) If a court— (a) convicts a member, or an officer or employee of a member [or a person approved in terms of section 4] of an offence of which any dishonest act or omission is an element; or (b) finds, in proceedings to which a member, or 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, 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, 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 4] as the case may be.</p> <p>(2) The court may, on sufficient cause shown, vary a declaration made under subsection (1).</p> <p>(3) The registrar or clerk of any court which has made any declaration under subsection (1), or varied any declaration under subsection (2), shall forthwith notify the Registrar and the committee of the stock exchange at which the member carries on business or at which the officer or the employee of a member is employed of that declaration or variation.</p> <p>(4) No declaration made under subsection (1) shall affect any right on the part of the committee to take disciplinary action against the member, or the officer or employee of a member, concerned.”.</p>

ITEM	NUMBER AND YEAR OF LAW	SHORT TITLE	EXTENT OF AMENDMENT OR REPEAL
II (b)	Act No. 55 of 1989	Financial Markets Control Act, 1989	<ol style="list-style-type: none"> 1. The amendment of section 5— <ol style="list-style-type: none"> (a) by the substitution for subsection (1) of the following subsection: <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 (b) by the deletion of subsections (1A), (2), (3), (4), (5), (6) and (7)(c). 2. The amendment of section 17— <ol style="list-style-type: none"> (a) by the substitution in subsection (1) for paragraph (dC) of the following paragraph: <u>"(dC) that a member carries on a business contemplated in section 5(1) in accordance with the provisions of the rules;"</u>; and (b) by the substitution in the said subsection (1) for paragraph (IB) of the following paragraph: <u>"(IB) that no member may effect a transaction with a person who or which 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> 3. The amendment of section 21A by the deletion of subsections (2), (2A) and (2B). 4. The amendment of section 26— <ol style="list-style-type: none"> (a) by the deletion in subsection (1) of subparagraph (iii) of paragraph (a); (b) by the deletion of the word "or" at the end of subparagraph (ii) of paragraph (b) of the said subsection (1), and of subparagraph (iii) of the said paragraph (b); and (c) by the substitution for the words following on subparagraph (iii) of paragraph (b) of subsection (1) of the following words: <u>"but who is carrying on the business of a stock exchange, or of a member [or of a person requiring approval in terms of section 5]; and"</u>. 5. The amendment of section 28 by the deletion of paragraph (c). 6. The amendment of section 29— <ol style="list-style-type: none"> (a) by the substitution for paragraph (b) of subsection (1) of the following paragraph: <u>"(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." ; and</u>

ITEM	NUMBER AND YEAR OF LAW	SHORT TITLE	EXTENT OF AMENDMENT OR REPEAL
			<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 approved person approved in terms of section 5] 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 for section 30 of the following section:</p> <p>"[e] 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 or which carries or carried on the business in question or any other person, be admissible in evidence and be <i>prima facie</i> proof of the facts contained in such record, copy or extract."</p> <p>8. The substitution for section 31 of the following section:</p> <p>"Power of court to declare member or officer or employee of member [or person approved in terms of section 5] 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 or employee's [or person's] conduct is called in question, that such member, officer or employee [or person] has been guilty of dishonest conduct,</p>

ITEM	NUMBER AND YEAR OF LAW	SHORT TITLE	EXTENT OF AMENDMENT OR REPEAL
			<p>the court may (in addition, in a case referred to in paragraph (a) to any sentence it may impose), declare the 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> <p>(2) The court may, on sufficient cause shown, vary a declaration made under subsection (1).</p> <p>(3) The registrar or clerk of any court which has made any declaration under subsection (1) or varied any declaration under subsection (2), shall forthwith notify the Registrar and the executive committee of the financial exchange at which the member carries on business, or of which the officer or employee of a member is employed, of that declaration or variation.</p> <p>(4) No declaration made under subsection (1) shall affect any right on the part of the executive committee concerned to take disciplinary action against the member, or the officer or employee of a member, concerned."</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: "(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) section 4(1) of that Act]; or (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>
II (d)	GN No R165 of 23 February 2001	Policyholder Protection Rules (Long-term Insurance), 2001	<p>1. The repeal of the whole in so far as it relates to the rendering of financial services as contemplated in this Act.</p>
II (e)	GN No R 164 of 23 February 2001	Policyholder Protection Rules (Short-term Insurance), 2001	<p>1. The repeal of the whole in so far as it relates to the rendering of financial services as contemplated in this Act.</p>

**MEMORANDUM ON OBJECTS OF THE
FINANCIAL ADVISORY AND INTERMEDIARY SERVICES BILL,
2001**

INTRODUCTORY

1. The Financial Advisory and Intermediary Services Bill ("the Bill") regulates the business of rendering financial services to clients as regards a large range of financial products. In terms of the Bill such providers need to be licensed, and professional conduct is controlled through codes of conduct and enforcement measures.
2. The Bill was originally drafted on the basis of a framework of specifications, as provided by the Policy Board for Financial Services and Regulation, which only covered the furnishing of advice. The ambit of the Bill has since been extended to all intermediary services rendered in respect of financial products as defined in the Bill.
3. Generally speaking the Bill covers ground not regulated by any other legislative measure in the Republic, especially as regards the furnishing of advice on the purchase of, or investment in, financial products. The Bill contemplates to establish, in that regard, a new properly regulated profession. As regards persons rendering other intermediary services mentioned in the Bill (for instance, the management of investments), many of their activities are presently regulated to a limited extent by other laws. The Bill will result in the necessary systematisation and rationalisation of the current fragmented regulation of activities very similar in nature. A more uniform approach, accompanied by the necessary standardisation in the regulation of such activities by a single regulator as proposed in the Bill, will not only remove confusion but should result in a more professional and responsible intermediary sector, as well as a better informed consumer of financial services. At the heart of the Bill lies consumer protection.

GUIDING PRINCIPLES IN DRAFTING THE BILL

4. The following principles were considered important in drafting the Bill and were adhered to as far as possible:
 - (a) The Bill was designed to be free-standing and complete as far as possible. Reference is made in the Bill to an envisaged new Collective Investment Schemes Control Act which will soon enter the Parliamentary stream. This Act will deal comprehensively with investment schemes where a pooling of client funds occur.
 - (b) There was a consistent endeavour to produce a more "user friendly" Bill. The language and content have been simplified to ease interpretation and to promote clarity.
 - (c) A deliberate attempt was made to create regulatory flexibility by providing for circumscribed discretionary power.
 - (d) Where the powers of the registrar are such as to increase the ability to act swiftly and decisively, sufficient checks and balances have been introduced to protect fundamental rights.
 - (e) Due to the costs associated with compliance, there was an endeavour not to impose any unnecessary costly regulatory requirements.
 - (f) It was accepted that it would not be in the public interest if the authorisation and compliance requirements were too strict or burdensome for the authorised financial services providers and their representatives. Consequently provision is firstly made for consultation with the Advisory Committee on Financial Services Providers (representative of the relevant sectors of the financial services industry and clients) in the making of regulations on the requirements for authorisation as well as the drafting of codes of conduct. Provision is secondly made for phasing in of the authorisation provisions and the granting of appropriate exemptions where justified.
 - (g) Several enforcement provisions already appearing in other Acts of Parliament have with the necessary changes been included in the Bill,

e.g. the establishment of a statutory ombud (Part I of Chapter VI); the granting of civil remedies to the registrar (Clause 33) and the declaration of undesirable practices (Clause 34).

CLAUSE BY CLAUSE ANALYSIS OF BILL

5. Introductory provisions (Clause 1): Definitions

The definitions are contained in Clause 1, particularly those which determine the ambit of the Bill, e.g.: "advice" (excluding a number of cases where, e.g., banks give advice to clients on deposits and boards of pension fund organisations and trustees of friendly societies give advice to relevant members), "client", "financial services provider", "financial product" and "representative" (excluding clerical, administrative and other merely supporting staff).

6. Chapter I (Clauses 2–6): Administration of Act

This Chapter deals with the general administration of the Bill:

- (a) the creation of the office of the registrar of financial services providers, being the Executive Officer of the Financial Services Board ("FSB"), is provided for in Clause 2;
- (b) Clause 3 deals with the way in which the registrar interacts with the persons to whom the Bill applies;
- (c) specific powers for the registrar to intervene swiftly and effectively are provided for in Clause 4;
- (d) the Advisory Committee on Financial Services Providers is established in terms of Clause 5 and its general functioning is provided for;
- (e) the delegation of functions by the Minister of Finance, the FSB and the registrar is provided for in Clause 6, including powers to delegate to industry organisations recognised by the Financial Services Board.

7. Chapter II (Clauses 7–12): Authorisation of financial services providers

This Chapter deals with the authorisation of financial services providers:

- (a) Clause 7 prohibits a person from acting as a financial services provider unless authorised by a licence issued by the registrar. Provision is also made for the consequences of a transaction concluded by a client with a product supplier with the intermediation of an unauthorised financial services provider;
- (b) Clause 8 deals with the applications of persons who wish to act as financial services providers, prescribing fit and proper requirements and powers of the registrar as regards the granting or refusal of applications and the duties and obligations of licensees;
- (c) Clause 9 deals with circumstances where authorisations may be suspended;
- (d) Clause 10 deals with the withdrawal of licences, and Clause 11 with the ultimate lapsing of licences;
- (e) Clause 12 deals with the granting of exemptions to product suppliers who are authorised as financial institutions in terms of other legislation, from submitting all information otherwise required from an applicant.

8. Chapter III (Clauses 13–14): Representatives of authorised financial services providers

This Chapter deals with representatives of authorised financial services providers who render financial services on behalf of such providers and which providers, on their part, accept responsibility for the activities of the representatives:

- (a) Clause 13 sets out their qualifications and authority and obliges authorised financial services providers to keep proper records of their representatives and to ensure that they comply with applicable codes of conduct;
- (b) Clause 14 provides for the debarment of persons to act as representatives of authorised financial services providers where they are no longer fit and proper persons.

9. Chapter IV (Clauses 15–16): Codes of conduct

This Chapter deals with codes of conduct with which authorised financial services providers and their representatives have to comply in the carrying on of their businesses:

- (a) Clause 15 empowers the registrar to draft and publish differentiating codes in consultation with the Advisory Committee and other interested parties;
- (b) Clause 16 deals extensively with the principles on which such codes shall be based, comprising, inter alia, sound principles of business conduct, and requirements in respect of proper disclosures, advertising, guarantees or professional indemnity or fidelity insurance cover to be maintained by authorised financial services providers.

10. Chapter V (Clauses 17–19): Duties of authorised financial services providers

This Chapter deals with a range of duties of authorised financial services providers to be carried out in the course of conducting their businesses as such providers:

- (a) Clause 17 requires the appointment of compliance officers and sets out compliance arrangements;
- (b) Clause 18 requires the maintenance of certain records and imposes certain reporting duties;
- (c) Clause 19 provides for auditing requirements.

11. Chapter VI (Clauses 20–39): Enforcement

This Chapter is divided into two Parts:

11.1 Part I (Clauses 20–32) provides for the creation of an independent Ombud scheme for expedient and informal resolution of disputes between authorised financial services providers or representatives and their clients:

- (a) Clause 20 provides for the Office of the Ombud;
- (b) Clause 21 provides for the appointment of the Ombud by the FSB;
- (c) Clause 22 provides for the funding of the Office of the Ombud, with a budget to be approved by the FSB;
- (d) Clause 23 provides for the accountability of the Ombud as regards the funds of the Office and, in other respects, to the FSB;
- (e) Clause 24 provides for general administrative powers of the Ombud;
- (f) Clause 25 provides that the Office of the Ombud may only be disestablished or liquidated by an Act of Parliament;
- (g) Clause 26 grants powers to the FSB to make rules, making clear who may use the scheme and in what circumstances, as well as regards the procedure to be applied to disputes; the FSB may set case fees and may also impose special levies on authorised financial services providers for funding purposes;
- (h) Clause 27 deals with the receipt of complaints, prescription requirements and jurisdiction of the Ombud in the investigation of complaints; the Ombud may, in dealing with a complaint, follow any procedure which may include mediation; in order to resolve a complaint speedily by conciliation, the Ombud may make a recommendation to the parties which on acceptance has the effect of a final determination;
- (i) Clause 28 deals with determinations by the Ombud; if a complaint is determined in favour of a complainant, the respondent may be ordered to pay compensation up to a maximum limit which may be set by the FSB, which limit may be different for different kinds of complaints; a respondent may also be ordered to take steps to rectify the matter complained of; the FSB may also make rules authorising cost awards; in this regard it is regarded as prudent to provide the FSB with the ability to make rules giving the Ombud a discretion to make a cost award also against a complainant in extreme cases; provision is also made for appeals to the FSB board of appeal;
- (j) Clause 29 provides for record keeping by the Ombud;

- (k) Clause 30 provides for annual reports by the Ombud;
- (l) Clause 31 provides for offences and penalties as regards interference with the functioning of the Ombud;
- (m) Clause 32 generally empowers the registrar to take steps for the promotion of client education and awareness of the Office of the Ombud and other enforcement measures contained in the Bill

11.2 Part II (Clauses 33–39) provides for other enforcement measures:

- (a) Clause 33 provides for powers of the registrar to apply to the Court for orders restraining unlawful conduct by authorised financial services providers, representatives and other persons, and so to apply for compensation orders in favour of persons who suffered damages or losses in consequence of contraventions;
- (b) Clause 34 regulates the declaration by the registrar of undesirable business practices for authorised financial services providers;
- (c) Clause 35 empowers the Minister of Finance to make regulations on a wide scope of detailed matters relevant to the application of the Bill, for the purpose of supplementing the substantive provisions of the Bill;
- (d) Clauses 36 and 37 regulate offences under the Bill and the assessment of fines and penalties by the Court;
- (e) Clause 38 provides for the registrar's powers in relation to the sequestration of estates, winding-up and closure of businesses of authorised financial services providers;
- (f) Clause 39 provides a general right of appeal to the FSB board of appeal, to persons aggrieved by decisions and other acts of the registrar or the Ombud under the Bill.

12. Chapter VII (Clauses 40–46): Miscellaneous

This Chapter deals with miscellaneous matters:

- (a) Clause 40 saves the common law rights of clients to take civil or criminal action against authorised (and unauthorised) financial services providers and representatives, e.g. actions for damages on the ground of breaches of statutory duties;
- (b) Clause 41 regulates incidental matters connected with fees and penalties payable to and recoverable by the registrar;
- (c) Clause 42 regulates disclosure of information between the registrar and other foreign or domestic supervisory or regulatory authorities, and to State departments or organs, representative bodies of the financial services industry and self-regulating organisations;
- (d) Clause 43 contains the customary limitation of liability provisions as regards functionaries acting under the Bill in any *bona fide* but not grossly negligent manner;
- (e) Clause 44 contains exemption provisions enabling the registrar to grant exemptions from the provisions of the Bill particularly in cases where the application of the Bill, at its commencement, may cause prejudice or hardship to persons instantly confronted with licensing requirements, and where the granting of exemptions will not be inimical to the public interest;
- (f) Clause 45 deals with cases where the Bill will not apply (mostly covering cases where statutory bodies are involved which are already regulated sufficiently under other laws), and the amendment or repeal of other laws (set out in detail in the Schedule to the Bill) in order to prevent unnecessary overlapping and duplication in regulation; and
- (g) Clause 46 contains the customary short title and commencement provision of the Bill.

CONSULTATIVE PROCESS

- 13. (a) During the drafting process which lasted for more than two years, several drafts of the Bill were put on the FSB's website followed by media statements inviting comments. The media statements were also sent to interested parties whose names are reflected on Annexure A. The drafts

were either e-mailed or made available in hard copies to interested parties.

- (b) Several television and radio programmes on the Bill took place. As the Bill attracted significant interest within the ranks of the financial services sector, the FSB hosted a number of public workshops and working groups across the country for purposes of discussing the contents of the Bill and explaining its possible effect on the industry.
- (c) This extensive process resulted in a vast number of written, electronic and oral comments being received by the FSB on almost every facet of the Bill. All of these were duly considered by the draftsmen and the basic approach was to accommodate proposals unless there was a distinct reason to discard them.
- (d) It is simply not possible to provide a list of all parties who commented on the Bill as many of these were received during workshops and other discussions. Suffice to say that overwhelming response was received over the entire period during which the Bill was framed and that its final text is the result of a collective effort by the draftsmen and those interested parties who contributed in one way or another to its content.
- (e) Finally it should be stated that the Policy Board also took responsibility for ensuring that the Bill was properly and extensively consulted.

FINANCIAL, ORGANISATIONAL AND PERSONNEL IMPLICATIONS

14. Once promulgated, the Act will be administered by the Financial Services Board, which is funded by a levy system imposed on the financial services industry. The Bill therefore has no financial, organisational or personnel implications for the State.

CONSTITUTIONAL IMPLICATIONS

15. Due care has been taken during the drafting process to ensure that there is no ground on which it could be claimed that the Bill might be inconsistent with the Constitution of the Republic of South Africa, 1996.

COMMUNICATION IMPLICATIONS

16. The Bill does not have communication implications other than the commencement of the Bill as an Act of Parliament being published in the *Gazette*.

PARLIAMENTARY PROCEDURE

17. In the opinion of the Financial Services Board this Bill should be dealt with in terms of section 75 of the Constitution. None of the procedures laid down in sections 74 and 76 of the Constitution are applicable.

ANNEXURE A

PARTIES CONSULTED

AW Salie
ABN Amro Securities (SA) (Pty) Ltd
Absa Enterprise-Wide Risk Management
Absa Insurance
ABSA Trust Participation Bond Managers (Pty) Ltd
Actuarial Society of South Africa
Advisory Committee on Long-term Insurance
Advisory Committee on Short-term Insurance
AECI Insurance
Aegis Insurance
Afgan Insurance
African Harvest Management Company Ltd
African Insurance Organisation
African Life Insurance
African People's Organisation
African Peoples Insurance
Afrikaanse Handelsinstituut
AIG South Africa Insurance
Air Insurance Limited
Alexander Forbes Risk Services
Allan Grey Unit Trust Management Ltd
Allan Grey Property Trust Management Ltd
Allianz Insurance
Anglo American Property Fund Managers Ltd
Arthur Andersen & Company
Association for the Advancement of Black Accountants
Association of Banking Lawyers of SA
Association of Black Securities and Investment Professionals
Association of Bond Issuers of SA
Association of Chartered Certified Accountants
Association of Corporate Treasurers of SA
Association of General Banks
Association of Health Benefit Advisors
Association of Participation Mortgage Scheme Managers
Association of Property Unit Trust Management Companies
Association of Retired Persons and Pensioners
Association of Trust Companies in SA
Association of Unit Trusts of SA
ASSUPOL
Attorneys Assurance
Auditor General
Auto & General Insurance
Avbob Lewens
Aviation Insurance Co Ltd
B Dube
B Tudor
Banking Adjudicator
Banking Council of SA
Barinor Insurance
BDO Spencer Steward
Bensure Insurance
Black Brokers Forum
Black Lawyers Association
Black Management Forum
BOE Investment Administrators
Boe Life Insurance
Boland Bank Beleggingsdiens Bpk
Bond Exchange of South Africa
Bonlife Insurance

Brait Management Company Ltd
Brantam Financial Services Ltd
British Engine Insurance
Broadcasting Complaints Commission of South Africa
Brokers Forefund
Brummers Insurance
Bundesaufsichtsamt für das Versicherungswesen
Business Practices Committee (now the Consumer Affairs Committee)
Business South Africa
C Wides
Capital Alliance Life Ltd
Capital Alliance Risk Insurance
Central RE Insurance
CGU Insurance
Charter Life Insurance
Chartered Institute of Management Accountants
Cigna Insurance
Clientèle Life
Commercial Union Management Company Ltd
Commercial Union Risk
Community Growth Management Company Ltd
Compass Insurance Co Ltd
Competition Commission
Compliance Institute of South Africa
Constantia Insurance Co Ltd
Consulting Actuaries Society of Southern Africa
Consumer Institute of SA
Consumer Protection Insurance Co Ltd
Coronation Management Co Ltd
Corporate Lawyers Association of South Africa
COSATU
Credit Guarantee
CTN Independent
CU Life Insurance
D Mansfield
Dagan International (Pty) Ltd
Deloitte & Touche
Densecure Insurance
Department of Economics, University of the Witwatersrand
Department of Finance
Department of Health
Department of Justice
Department of Mercantile Law, UNISA
Department of Mercantile Law, University of Pretoria
Department of Trade & Industry
Direct Marketing Association of SA
Discovery Health Insurance
Dr A Ruiters
Dr H B Falkena
Dr P van der Walt
Eagle Risk Insurance
Edm Solutions
Emerald Insurance
Enpet Africa Insurance Ltd
Ernst & Young
Escap Insurance
F Meiring
Federation for South African Labour Unions
Federation of Unions of South Africa
FEDSAL
Fedsure Health
Fedsure Life Insurance
Fedsure Participation Mortgage Bond Managers (Pty) Ltd

FEDUNSA
FEM Insurance
Ferrosure (SA) Insurance Co Ltd
Fidelity Bank Ltd
Fidelity Insurance
Financial Markets Advisory Board
Financial Intermediaries Federation of South Africa
Financial Services Board
Finstruct Investment Holdings
First Central Insurance
First National Asset Management & Trust Co (Pty) Ltd
First National Bank
First National Insurance
FirstRand Group
Firststrand Insurance
Fisher Hoffman Sitole
Fleming Martin Management Company Ltd
Forbes Life Insurance
Franklin Templeton Management Company Ltd
Free Market Foundation of Southern Africa
Fund Managers Association of SA
Furnguard Insurance
G Arroyo
G Gehle
General & Cologne RE
General Accident Insurance
General Council of the Bar of SA
Gerling General Insurance
Gerling Global Insurance
Global Insurance
Gobodo Associates
Goodall and Bourne Insurance
Grobelaars Insurance
Grove Property Fund Managers Ltd
Guardian National Insurance
Guardrisk Insurance
H Marx
H S Wilton
H Scholtz
H T G Insurance
Harvest Life Insurance
Herring Estates and Brokers
HMS Insurance
Hollandia Insurance
Hollandia Reinsurance Group
Hollard Insurance
HTG Life
I G F Insurance
I Smith
Incentive Life Insurance
Incentive Life Ltd Infologic
Institute of Bankers in South Africa
Institute of Financial Markets
Institute of Life and Pension Advisors (now the Financial Planning Institute)
Institute of Loss Adjusters of Southern Africa
Institute of Pension and Provident Fund Trustees
Institute of Pension Consultants & Administrators
Institute of Pension Consultants and Advisors
Institute of Retirement Funds of Southern Africa
Institutional NIB Multi-Managers
Insurance Brokers Council of SA
Insurance Institute of South Africa
Insurance Law Society of SA

Investec Guinness Flight Management Co Ltd
Investec Insurance
J E Rich—The Cologne Reinsurance Company of South Africa Ltd
J P Coetzer
J C L Gates
Johannesburg Stock Exchange
K Boyce
Kessel Feinstein
KGA Lewens
Khula Credit Guarantee
Kingfisher Insurance
KMMT Brey & Co
KPMG Aiken & Peat
L van Zyl
Law Society of SA
Lawyers for Human Rights
Leveton Boner Horwath
Lew Tudor Financial Services
Liberty Life
Life Offices Association
Life Underwriters Association of South Africa
Linked Investment Services Providers' Association
Lloyd's Representative
Lombard Insurance
M Ashfield
M Cubed Capital Unit Trusts Management Company Ltd
M Cubed Insurance
M Kourie
Marriott Property Services (Pty) Ltd
Marriott Unit Trust Management Company Ltd
MCLife Insurance
Mcsure Insurance
Melboard Property Fund Managers Ltd
Mervyn E King SC
Metboard Ltd
Metropolitan Life
Metropolitan Odyssey Insurance
Momentum Administration Services (now Momentum Wealth)
Monarch Insurance
Moore's Rowland
MSGM Masuku & Jeena
Munich RE Insurance
Munich Reinsurance Company of Africa Ltd
Mutual & Federal Insurance Company Ltd
N B S Life Insurance
N E G Insurance
N Gillman
Nasionale Versekeraars
National African Federated Chamber of Commerce and Industry
National Black Consumer Union
National Consumers Affairs Office
National Consumer Forum
National Council of Trade Unions
National Health and Allied Workers Union
National NGO Coalition
NBS Insurance
NBS Participation Bond Managers (Pty) Ltd
Nedcor Bank Management Company Ltd
Nedcor Investment Bank
NEDLAC
NEHAWU
Nel Commission of Inquiry into the Masterbond Affairs
Nest Life Insurance

New Era Life Insurance Co Ltd
New National Insurance
Nexia Levitt Kirson
NIB Investment Portfolio Services
NIB Management Company Ltd
NIB Private Asset Unit Trust Management Company Ltd
Nigel Franks & Ass
Nkonki Sizwe & Ntsaluba
Norwich Life Insurance
Nova Risk Insurance
Office for Public Enterprises
Office of Consumer Affairs: Department of Economic Affairs Gaming, Mpumalanga
Office of Consumer Affairs: Department of Economic Affairs, Eastern Cape
Office of Consumer Affairs: Department of Economic Affairs, Free State
Office of Consumer Affairs: Department of Economic Affairs, Gauteng
Office of Consumer Affairs: Department of Economic Affairs, KwaZulu Natal
Office of Consumer Affairs: Department of Economic Affairs, North West
Office of Consumer Affairs: Department of Economic Affairs, Northern Cape
Office of Consumer Affairs: Department of Economic Affairs, Northern Province
Office of Consumer Affairs: Department of Economic Affairs, Western Cape
Old Mutual
Old Mutual Group Schemes
Old Mutual Health Insurance
Ombud for Short-term Insurance
Ombud for Long-term Insurance
Outsurance Insurance
P J Kruger
P W Harvey & Co
Pagdens Incorporated
Pension Funds Adjudicator
Pension Funds Advisory Committee
Pension Lawyers Association
Perry & Associates
Pick & Pay Insurance Company
Pinnafrica Insurance Limited
Prestasi Unit Trust Managers Ltd
Price Waterhouse Coopers
Prima Eiendomstrustbestuurders Bpk
Prof Peter Havenga
Prosperity Insurance Company Ltd
Protea Insurance
PSG Anchor Life Insurance
PSG Insurance
PSG Management Company Ltd
Public Accountants' & Auditors' Board
Public Property Syndication Association
Quantim Consultancy Group (Pty) Ltd
Quantum Insurance
R Holders
Rand Merchant Bank
Rand Mutual Insurance
Regal Treasury Private Bank Limited
Regal Treasury Unit Trusts Management Company Ltd
Regent Life Insurance
Registrar of Banks
Registrar of Companies
Registrar of Medical Schemes
Reinsurance Union in Liquid Insurance
Relyant Insurance
Renasa Insurance Co Ltd
Rentmeester Insurance
RGA Insurance
RMA Life Insurance

RMB Unit Trusts Ltd
R T Besseling and Godfrey Mathabathe
S Pillay
SA Eagle Insurance
SA Reinsurance Offices' Association
Saambou Lewens
Safcol Captive
Safican Insurance
Sage Unit Trusts Ltd
Sanlam
Sanlamtrust-Bestuurders Bpk
Santam Insurance
Sasguard Insurance
Sasria
School of Management, University of Pretoria
Scott Adkins (Pty) Ltd
Securities Regulation Panel
Select Committee on Public Accounts
Sentraoes Insurance
Sentrasure Limited Insurance
Sentry Insurance
Senwes Versekering & Finansiële Dienste
Shareholders Association of South Africa
Shavian Management Consultants
Society of Risk Managers
South African Black Insurance Brokers Association
South African Chamber of Business
South African Consumer Union
South African Futures Exchange
South African Institute of Chartered Accountants
South African Institute of Chartered Secretaries and Administrators
South African Institute of Stockbrokers
South African Insurance Association
South African Insurance Brokers Association (now the South African Financial Services Intermediaries Association)
South African Insurance Law Association
South African Law Commission
South African Property Owners' Association
South African Reinsurance Brokers Association
South African Reinsurance Office's Association
South African Reserve Bank
South African Revenue Services
South African Risk and Insurance Management Association
South African Society of Claims Administrators
South African Society of Medical Underwriters
Southern Insurance
Southern Life Insurance
Southern Unit Trusts Management Company Ltd
St Paul Insurance Company
Stabilitas Participation Mortgage Bond Schemes (Pty) Ltd
Stanbic Insurance
Standard Bank
Standard Bank Insurance Brokers
Standard General Insurance
Standing Committee on Public Accounts
Stanfin
Superflex Insurance
Supreme Participation Mortgage Managers (Pty) Ltd
Swiss RE Health Insurance
Syfrets Participation Bond Managers Ltd
T W Harvey & Co
Lion Insurance
Transnet

Truck & General Insurance
Trustee Board Limited
Unit Trusts Advisory Committee
Unitrans Insurance Ltd
Universal Insurance
W Combrinck
W Koppel
W Lusted
Webber Wentzel Bowens
Westchester Insurance
Winterthur International Insurance Company Ltd
Zimre SA Insurance
Zodwa Manase & Associates

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