

Government Gazette

Vol. 449 Cape Town 15 November 2002 No. 24079

THE PRESIDENCY

No. 1453 15 December 2002

It is hereby notified that the President has assented to the following Act, which is hereby published for general information: –

No. 37 of 2002: Financial Advisory and Intermediary Services Act, 2002

(English text signed by the President.)

(Assented to 15 November 2002)

ACT

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

INTRODUCTORY PROVISIONS

1. Definitions and application

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

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

- (a) in respect of the purchase of any financial product; or
- (b) in respect of the investment in any financial product; or
- (c) on the conclusion of any other transaction, including a loan or cession aimed at the incurring of any liability or the acquisition of any right or benefit in respect of any financial product; or
- (d) on the variation of any term or condition applying to a financial product, on the replacement of any such product, or on the termination of any purchase of or investment in any such product, and irrespective of whether or not such advice-
 - (i) is furnished in the course of or incidental to financial planning in connection with the affairs of the client; or
 - (ii) results in any such purchase, investment, transaction, variation, replacement or termination as the case may be, being effected

"Advisory Committee" means the Advisory Committee on Financial Services 20 Providers referred to in section 5;

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

"auditor" means an auditor registered in terms of the Public Accountants' and Auditors' Act, 1991 (Act No. 80 of 1991);

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

"Board" means the Financial Services Board established by section 2 of the 30 Financial Services Board Act;

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

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

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

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

“complainant” means, subject to section 26(l)(a)(ii), a specific client who submits a complaint to the Ombud;

“complaint” means, subject to section 26(l)(a)(iii), a specific complaint relating to a financial service rendered by a financial services provider or representative to the complainant on or after the date of commencement of this Act, and in which complaint it is alleged that the provider or representative-

- (a) has contravened or failed to comply with a provision of this Act and that as a result thereof the complainant has suffered or is likely to suffer financial prejudice or damage;
 - (b) has wilfully or negligently rendered a financial service to the complainant which has caused prejudice or damage to the complainant or which is likely to result in such prejudice or damage; or
 - (c) has treated the complainant unfairly;
-

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

“Court” means any court having jurisdiction;

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

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

- a) securities and instruments, including
 - i) shares in a company other than a “share block company” as defined in the Share Blocks Control Act, 1980 (Act No. 59 of 1980);
 - ii) debentures and securitised debt;
 - iii) any money-market instrument;
 - iv) any warrant, certificate, and other instrument acknowledging, conferring or creating rights to subscribe to, acquire, dispose of or convert securities and instruments referred to in subparagraphs (i), (ii) and (iii);
 - v) any “securities” as defined in section 1 of the Securities Services Act, 2002;
- b) a participatory interest in one or more collective investment schemes;
- c) a long-term or a short-term insurance contract or policy, referred to in the Long-term Insurance Act, 1998 (Act No. 52 of 1998), and the Short-term Insurance Act, 1998 (Act No. 53 of 1998) respectively;

- d) a benefit provided by-
 - i) a pension fund organisation as defined in section 1 (1) of the Pension Funds Act, 1956 (Act No. 24 of 1956), to the members of the organisation by virtue of membership; or
 - ii) a friendly society referred to in the Friendly Societies Act, 1956 (Act No. 25 of 1956), to the members of the society by virtue of membership;
- e) a foreign currency denominated investment instrument, including a foreign currency deposit;
- f) a deposit as defined in section 1 (1) of the Banks Act. 1990 (Act No. 91 of 1990);
- g) a health service benefit provided by a medical scheme as defined in section 1 (1) of the Medical Schemes Act. 1998 (Act No. 13 1 of 1998):
- h) any other product similar in nature to any financial product referred to in paragraphs (a) to (g), inclusive, declared by the registrar, after consultation with the Advisory Committee, by notice in the Gazette to be a financial product for the purposes of this Act;
- i) any combined product containing one or more of the financial products referred to in paragraphs (a) to (h) inclusive;
- j) any financial product issued by any foreign product supplier and marketed in the Republic and which in nature and character is essentially similar or corresponding to a financial product referred to in paragraphs (a) to (i) , inclusive;

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

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

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

- (a) furnishes advice; or
- (b) furnishes advice and renders any intermediary service; or
- (c) renders an intermediary service;

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

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

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

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

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

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

"Minister" means the Minister of Finance;

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

"Ombud" means-

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

"person" means any natural person, partnership or trust, and includes-

- a) any organ of state as defined in section 239 of the Constitution of the Republic of South Africa, 1996 (Act No. 109 of 1996);
- b) any company incorporated or registered as such under any law;
- c) any body of persons corporate or unincorporate;

"prescribe" means prescribe by regulation;

"product supplier" means any person who issues a financial product 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);

"registrar" means the registrar or deputy registrar of financial services providers referred to in section 2;

"regulation" means a regulation made under section 35;

"representative" means any person who renders a financial service to a client for or on behalf of a financial services provider, in terms of conditions of employment or any other mandatory agreement, but excludes a person rendering clerical, technical, administrative, legal, accounting or other service in a subsidiary or subordinate capacity; which service-

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

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

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

(2) For the purposes of this Act a financial product does not include any financial product exempted from the provisions of this Act by the registrar, after

consultation with the Advisory Committee, by notice in the Gazette, taking into consideration the extent to which the rendering of financial services in respect of the product is regulated by any other law.

(3) For the purposes of this Act-

- a) advice does not include
 - i) factual advice given merely-
 - aa) on the procedure for entering into a transaction in respect of any financial product
 - (bb) in relation to the description of a financial product;
 - (cc) in answer to routine administrative queries;
 - (dd) in the form of objective information about a particular financial
 - (ee) by the display or distribution of promotional material;
 - ii) an analysis or report on a financial product without any express or implied recommendation, guidance or proposal that any particular transaction in respect of the product is appropriate to the particular investment objectives, financial situation or particular needs of a client:
 - iii) advice given by –
 - (aa) the board of management, or any board member, of any pension fund organisation or friendly society referred to in paragraph (d) of the definition of “financial product” in subsection (1) to the members of the organisation or society on benefits enjoyed or to be enjoyed by such members; or
 - (bb) the board of trustees of any medical scheme referred to in paragraph(g) of the said definition of “financial product”, or any board member, to the members of the medical scheme, on health care benefits enjoyed or to be enjoyed by such members; or
 - iv) any other advisory activity exempted from the provisions of this Act by the registrar, after consultation with the Advisory Committee, by notice in the Gazette;
- 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 is authorised under a particular law to conduct business as a financial institution; and
 - (bb) where the rendering of such service is regulated by or under such law
 - iii) any other service exempted from the provisions of this Act by the registrar after consultation with the Advisory Committee, by notice in the Gazette.

(4) The provisions of this Act only apply to the rendering of a financial service in respect of a deposit referred to in paragraph (f) of the definition of “financial product” in subsection (1) with a term not exceeding 12 months by a provider which is a bank as defined in the Banks Act, 1990, or a mutual bank as defined in the Mutual Banks Act, 1993, to the extent that such application is regulated in the code of conduct contemplated in section 15(2)(b).

(5) Provisions of this Act relating to financial services providers, representatives and product suppliers apply to any natural person or group of natural persons acting within the scope of their official duties in the employ of the State, or any organisational unit of the State, or any public entity, unless the Minister by notice in the Gazette determines otherwise in respect of any such person, group, unit or entity.

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

CHAPTER I ADMINISTRATION OF ACT

- 2. Registrar and deputy registrar of financial services providers**
The executive officer and deputy executive officer of the Board are respectively the registrar and deputy registrar of financial services providers and have the powers and duties provided for by or under this Act or any other law.
- 3. General provisions concerning registrar**
- (1) Subject to the provisions of this Act, any notice given, approval or exemption granted, determination made, requirement or condition determined or imposed, or any other decision taken by the registrar under an enabling provision of this Act is valid only if it is reduced to a durable written or printed form or, where communicated electronically, has been correctly transmitted in a legible form.
- (2) Whenever the performance of any act contemplated in subsection (1) is sought by a person under this Act or any other law, application therefor must, subject to any other specific provision of this Act, be made in writing to the registrar and the application must-
- a) be made in the form and manner determined by or in terms of this Act, or any other law, or as otherwise required by the registrar;
 - b) be accompanied by
 - i) the fees payable in terms of this Act; and
 - ii) the information or documents required by the registrar.
- (3) The registrar must in connection with the application of any provision of this Act to or in respect of any financial product or financial service, consult with any regulatory or supervisory authority in the Republic, including the Registrar of Medical Schemes, referred to in section 42, who is by law empowered to perform a regulatory or supervisory function in respect of such product or service.
- 4. Special provisions concerning powers of registrar**
- (1) When anything is required or permitted to be done by the registrar in terms of this Act within a particular period, the registrar may on application or on own initiative before the expiry of that period, extend it for any sufficient cause.
- 2) The registrar may by notice direct an authorised financial services provider 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.
- 3)
- a) If any advertisement, brochure or similar document relating to the rendering of a financial service by an authorised financial services provider or a representative is being, or is to be, published by any person, and any such document is misleading, or confusing, or contains any incorrect statement of fact, the registrar may by notice direct that person not to publish it, to cease publishing it or to effect changes thereto.
 - b) A notice contemplated in paragraph (a) takes effect on a date specified in such notice after the registrar has –

- i) provided the person concerned with the reasons for the notice; and
 - ii) afforded the person concerned a reasonable opportunity to be heard.
- 4) If there is reason to believe that a person is contravening or failing to comply with, or has contravened or failed to comply with, a provision of this Act, the registrar may –
 - a) by notice direct that person –
 - i) to furnish the registrar within a specified period with any specified information or documents in the possession or under the control of that person and which relate to the subject-matter of such contravention or failure;
 - ii) to appear before the registrar at a specified time and place for the purpose of discussing such matter with the registrar; or
 - iii) to make arrangements for the discharge of all or any part of that person's obligations in terms of this Act;
 - b) if satisfied that in the case concerned significant prejudice or damage to clients has occurred or may occur, apply to a Court for an order restraining such person from continuing business or dealing with the funds or other property held by such person on behalf of clients or other persons, pending the institution by the registrar of an application or action contemplated in section 33(1) and (2), or the exercising by the registrar of such other legal remedy as may be available to the registrar ; if prejudice or damage may have occurred to a client, refer the matter, together with any information or documentation in the registrar's possession, to the Office to be dealt with as a complaint by the client concerned.

5. Advisory Committee on Financial Services Providers

- 1) There is an Advisory Committee on Financial Services Providers which may on its own initiative, or must 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 consists of a chairperson and other members, including a representative of the Council for Medical Schemes established by section 3 of the Medical Schemes Act, 1998 (Act No. 131 of 1998), and persons representative of product suppliers, financial services providers and clients involved in the application of this Act, appointed by the Minister after consultation with the Board.
- 3) The registrar is 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.
- 4) A member of the Advisory Committee, excluding the registrar, holds 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 must be paid such remuneration and allowances in respect of any expenses incurred in the performance of the functions of that committee, as may be determined by the Board.
- 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.

- 7) The registrar may submit to the Advisory Committee any information which is in the registrar's possession, 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 is 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 must be paid out of the funds of the Board, whose approval is 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.

6. Delegations and authorisations

- 1) The Minister may, on such conditions as the Minister may determine (which the Minister may at any time thereafter amend or withdraw), delegate any power conferred upon the Minister by this Act, excluding the power to make regulations under section 35 to the head of the National Treasury, any other official in the National Treasury, or the registrar.
- 2) The Board may –
 - a) on such conditions as the Board may determine (which the Board may at any time thereafter amend or withdraw), delegate to the chairperson, any other member of the Board or the registrar, any power conferred on the Board by or under this Act, excluding the power to make rules under section 26; or
 - b) so authorise the chairperson, any other member of the Board or the registrar, to carry out any duty assigned to the Board by or under this Act.
- 3) The registrar may –
 - a) on such conditions as the registrar may determine (which the registrar may at any time thereafter amend or withdraw), delegate to –
 - i) another member of the executive of the Board;
 - ii) any person who has been appointed by the Board; or
 - iii) any person or body recognised by the Board for that purpose, any power conferred upon the registrar by or under this Act, including a power delegated to the registrar under this Act; or
 - b) so authorise such member of the executive, person or body to carry out any duty assigned to the registrar by or under this Act.
- 4) For the purposes of recognition by the Board of a body contemplated in subsection (3)(a)(iii), the following provisions apply :
 - a) Any body of persons which represents a group of persons falling within the ambit of this Act, may apply to the registrar for recognition by the Board by notice in the Gazette as a representative body for the purpose of performing the functions determined by the registrar, after consultation with the Advisory Committee and the Board;
 - 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, the application must be submitted by the registrar to the Board for consideration;
 - d) the Board may –
 - i) grant an application unconditionally; or
 - ii) grant an application subject to such conditions as it deems necessary, after having given the applicant a reasonable opportunity to make submissions on the proposed conditions and having considered any such submissions, and direct the registrar to inform the applicant accordingly; or
 - iii) after having given the applicant a reasonable opportunity to make submissions and having considered any such submissions, refuse an application and direct the registrar to furnish the applicant with the written reasons of the Board for the refusal ;
 - e) a body recognised as a representative body contemplated in this subsection may at any time apply to the Board for the withdrawal or amendment of any condition imposed on the granting of the application;
 - f) the Board may –
 - i) grant any application, or portion thereof, referred to in paragraph (e) and direct the registrar to inform the applicant accordingly; or (ii) refuse any such application, or portion thereof, and direct the registrar to furnish the applicant with the written reasons of the Board for the refusal .
- 5) Any delegation or authorisation contemplated in this section does not prohibit the exercise of the power concerned or the carrying out of the duty concerned by the Minister, Board or registrar, as the case may be.
- 6) Anything done or omitted to be done under any delegation or authorisation contemplated in this section is deemed to have been done or omitted by the Minister, the Board or the registrar, as the case may be.

7. Authorisation of financial services providers

- 1) **With effect from a date determined by the Minister by notice in the Gazette, a person may not act or offer to act as a financial services provider unless such person has been issued with a licence under section 8.**
- 2) Subject to section 40, a transaction concluded on or after the date contemplated in subsection (1) between a product supplier and any client by virtue of any financial service rendered to the client by a person not authorised as a financial services provider, or by any other person acting on behalf of such unauthorised person, is not unenforceable between the product supplier and the client merely by reason of such lack of authorisation.

8. Application for authorisation

- 1) An application for an authorisation referred to in section 7(1), including an application by an applicant not domiciled in the Republic, must be submitted to the registrar in the form and manner determined by the registrar by notice in the Gazette, and be accompanied by information to satisfy the registrar that the applicant complies with the requirements for fit and proper financial services providers or categories of providers, determined by the registrar by notice in the Gazette, after consultation with the Advisory Committee, in respect of –
 - a) personal character qualities of honesty and integrity;
 - b) the competence and operational ability of the applicant to fulfil the responsibilities imposed by this Act; and
 - c) the applicant's financial soundness : Provided that where the applicant is a partnership, a trust or a corporate or unincorporated body, the applicant must, in addition, so satisfy the registrar that any key individual in respect of the applicant complies with the said requirements in respect of –
 - i) personal character qualities of honesty and integrity; and
 - ii) competence and operational ability, to the extent required in order for such key individual to fulfil the responsibilities imposed on the key individual by this Act .
- 2) The registrar may –
 - a) require an applicant to furnish such additional information, or require such information to be verified, as the registrar may deem necessary; and
 - b) take into consideration any other information regarding the applicant, derived from whatever source, including the Ombud and any other regulatory or supervisory authority, if such information is disclosed to the applicant and the latter is given a reasonable opportunity to respond thereto.
- 3) The registrar must after consideration of an application –
 - 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 are necessary, having regard to –
 - i) all facts and information available to the registrar pertaining to the applicant and any key individual of the applicant ;
 - ii) the category of financial services which the applicant could appropriately render or wishes to render;
 - iii) the category of financial services providers in which the applicant will be classified in relation to the fit and proper requirements mentioned in subsection (1); and
 - iv) any guidelines provided to the registrar by the Advisory Committee or the Board.
 - b) Conditions and restrictions contemplated in paragraph (a), may include a condition that where after the date of granting of the licence –

- i) any key individual in respect of the licensee's business is replaced by a new key individual; or
 - ii) any new key individual is appointed or assumes office; or
 - iii) any change occurs in the personal circumstances of a key individual which affects the fit and proper requirements mentioned in subsection (1) and renders or may render such person to be no longer a fit and proper person, no such person may be permitted to take part in the conduct or management or oversight of the licensee's business in relation to the rendering of financial services, unless such person has on application been approved by the registrar 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 must issue to the applicant –
 - i) a licence authorising the applicant to act as a financial services provider, in the form determined by the registrar by notice in the Gazette; and
 - ii) such number of certified copies of the licence as may be requested by the applicant.
 - b) The registrar may at any time after the issue of a licence –
 - i) on application by the licensee or on own initiative withdraw or amend any condition or restriction in respect of the licence, after having given the licensee a reasonable opportunity to make submissions on the proposed withdrawal or amendment and having considered those submissions, if the registrar is satisfied that any such withdrawal or amendment is justified and will not prejudice the interests of clients of the licensee; or
 - ii) pursuant to an evaluation of a new key individual, or a change in the personal circumstances of a key individual, referred to in subsection (4), impose new conditions on the licensee after having given the licensee a reasonable opportunity to be heard and having furnished the licensee with reasons, and must in every such case issue an appropriately amended licence to the licensee, and such number of certified copies of the amended licence as may be requested by the licensee.
- 6) Where an application referred to in subsection (1) is refused, the registrar must –
 - a) notify the applicant thereof; and
 - b) furnish reasons for the refusal.
- 7)
 - a) Despite the provisions of subsections (1), (2) and (3), a person granted accreditation under section 65(3) of the Medical Schemes Act, 1998 (Act No. 131 of 1998), must, subject to this subsection, be granted authority to render as a financial services provider the specific financial service for which the person was accredited, and must be issued with a licence in terms of subsection (5).
 - b) The registrar must be satisfied that a person to be granted authority under paragraph (a), and any key individual of such person, comply with the applicable fit and proper requirements determined under subsection (1) .

- c) A person granted authority and licensed as contemplated in paragraph (a), together with any key individual, are thereafter subject to the provisions of this Act.
 - d) If a licence –
 - i) is refused in terms of this section;
 - ii) is suspended in terms of section 9;
 - iii) is withdrawn in terms of section 10; or
 - iv) lapses in terms of section 11, the accreditation referred to in paragraph (a) is deemed to have lapsed in terms of the Medical Schemes Act, 1998, or to have been suspended or withdrawn, as the case may be.
 - e) If an accreditation referred to in paragraph (a) is suspended or withdrawn or lapses in terms of the Medical Schemes Act, 1998, the licence issued in terms of that paragraph is deemed to have been suspended or withdrawn or to have lapsed in terms of sections 9, 10 and 11, respectively, of this Act.
- 8) A licensee must –
- a) display a certified copy of the licence in a prominent and durable manner within every business premises of the licensee ;
 - b) ensure that a reference to the fact that such a licence is held is contained in all business documentation, advertisements and other promotional material ;
 - c) ensure that the licence is at all times immediately or within a reasonable time available for production to any person requesting proof of licensed status under authority of a law or for the purpose of entering into a business relationship with the licensee.
- 9) A person may not 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.

9. Suspension of authorisation

- 1) The registrar may, subject to subsection (2), at any time suspend any licence if satisfied on the basis of available facts and information, 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 suspending any licence, the registrar must inform the licensee of –
 - i) the intention to suspend and the grounds therefor;
 - ii) the intended period of the suspension; and
 - iii) any terms to be attached to the suspension, including –
 - (aa) a prohibition on concluding any new business by the licensee as from the effective date of the suspension and, in relation to unconcluded business, such measures as the registrar may determine for the protection of the interests of clients of the licensee; and
 - (bb) terms designed to facilitate the lifting of the suspension, and must give the licensee a reasonable opportunity to make a submission in response thereto.

- b) The registrar must consider any such response, and may thereafter decide to suspend, or not to suspend the licence, and must notify the licensee of the decision.
 - c) Where the licence is suspended, the registrar must make known the terms of the suspension or subsequent lifting thereof, by notice in the Gazette and, if necessary, by means of any other appropriate public media announcement.
- 3) Despite the provisions of subsection (2), the registrar may under urgent circumstances where the registrar is satisfied on reasonable grounds that substantial prejudice to clients or the general public may occur –
- a) provisionally suspend a licence, and inform the licensee of the –
 - i) grounds therefor;
 - ii) period of the suspension; and
 - iii) terms referred to in subsection (2)(a)(iii) attached to the suspension, and give the licensee a reasonable opportunity to respond thereto and to provide reasons why the provisional suspension should be lifted or why the period and terms should be changed; and
 - b) make known such provisional suspension by notice in the Gazette and, if necessary, by means of any other appropriate public media announcement.
- 4)
- a) The registrar must within a reasonable time after receipt of any response contemplated in subsection (3)(a) consider the response, and may thereafter decide to –
 - i) lift the provisional suspension; or
 - ii) render the suspension final, and must inform the licensee accordingly.
 - b) The registrar must make known the terms of any such final suspension, or the lifting thereof, by notice in the Gazette and, if necessary, in any other appropriate public media announcement.
- 5) During any period of suspension, whether provisional or final, the licensee concerned is for the purposes of this Act regarded as a person who is not authorised to act as a financial services provider.

10. Withdrawal of authorisation

- 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 –
- 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 –
- a) section 9(2), regarding a decision to suspend an authorisation (excluding such provisions relating to periods and terms); and
 - b) section 9(3) and (4), regarding a provisional suspension followed by a decision to lift or to finalise it, as the case may be, apply with the necessary changes to a withdrawal of a licence contemplated in subsection (1).
- 3)

- a) A person whose licence has been withdrawn under this section is debarred for a period specified by the registrar from applying for a new licence.
- b) The registrar may, on good cause shown, vary any such period.

11. Lapsing of licence

- 1) A licence lapses –
 - a) where the licensee, being a natural person –
 - i) becomes permanently incapable of carrying on any business due to physical or mental disease or serious injury;
 - ii) is finally sequestered; or
 - iii) dies;
 - b) where the licensee, being any other person, is finally liquidated or dissolved;
 - c) where the business of the licensee has become dormant; and
 - d) in any other case, where the licensee voluntarily and finally surrenders the licence to the registrar.
- 2) The registrar must be advised by the licensee, any key individual of the licensee, or another person in control of the affairs of the licensee, as the case may be, of the lapsing of a licence and the reasons therefor and the registrar may make known any such lapsing of a licence by notice in the Gazette and, if necessary, by means of any other appropriate public media announcement.

12. Exemptions in respect of product suppliers

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

CHAPTER III

REPRESENTATIVES OF AUTHORISED FINANCIAL SERVICES PROVIDERS

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

- 1) A person may not--
 - a) carry on business by rendering financial services to clients for or on behalf of any person who-
 - (i) is not authorised as a financial services provider; and
 - (ii) is not exempted from the application of this Act relating to the rendering a financial service; or

- b) act as a representative of an authorised financial services provider unless such person -
 - (i) is able to provide confirmation, certified by the provider, to clients-
 - (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
 - (ii) 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.
- (2) An authorised financial services provider must-
 - a) at all times be satisfied that the provider's representatives, and key individuals of such representatives, are, when rendering a financial service on behalf of the provider, competent to act, taking into consideration requirements similar to those contemplated in paragraphs (a) and (b) of section 8(1) and subsection (1)(b)(ii) of this section, where applicable: and
 - (b) take such steps as may be reasonable in the circumstances to ensure that representatives comply with any applicable code of conduct as well as with other applicable laws on conduct of business.
- (3) The authorised financial services provider must maintain a register of representatives, and key individuals of such representatives, which must be regularly updated and be available to the registrar for reference or inspection purposes.
- (4) Such register must-
 - (a) contain every representative's or key individual's name and business address, and state whether the representative acts for the provider as employee or as mandatory; and
 - (b) specify the categories in which such representatives are competent to render financial services.
- (5) The registrar may require information from the authorised financial services provider so as to enable the registrar to maintain and continuously update a central register of all representatives and key individuals.
- (6) A person who on the date contemplated in section 7(1) complies with the requirements of this Act for a representative and on such date acts as employee or mandatory for any person who on or after such date becomes an authorised financial services provider is, for the purposes of this Act, but subject to the provisions of this Act relating to representatives, regarded as a representative.

14. Debarment of representatives

- (1) An authorised financial services provider must ensure that any representative of the provider who no longer complies with the requirements referred to in section 13(2)(a), is prohibited by such provider from rendering any new financial service by withdrawing any authority to act on behalf of the provider, and that the representative's name, and the names of the key individuals of the representative, are removed from the register referred to in section 13(3): Provided that any such provider must immediately take steps to ensure that the debarment does not prejudice

the interests of clients of the representative, and that any uncompleted business of the representative is properly concluded.

- (2) For the purposes of the imposition of a prohibition contemplated in subsection (1), the authorised financial services provider must have regard to -
 - (a) information regarding the conduct of the representative as provided by the registrar, the Ombud or any other interested person; and
 - (b) any contravention of, or failure to comply with, any relevant provision of this Act by the representative.
- (3) The authorised financial services provider must within a period of 30 days after the removal of the names of a representative and key individuals from the register as contemplated in subsection (1), inform the registrar in writing thereof.

CHAPTER IV CODES OF CONDUCT

15. Publication of codes of conduct

- (1)
 - (a) The registrar must, after 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.
 - (b) The code must, after consultation, be published by notice in the Gazette, and on any such publication, becomes binding on all authorised financial services providers and representatives to therein.
- (2)
 - (a) Different codes of conduct may be so 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.
 - (b) A code of conduct must be drafted for the rendering of a financial service in respect of a deposit referred to in paragraph (f) of the definition of "financial product" in section 1(1) with a term not exceeding 12 months by a provider which is a bank as defined in the Banks Act, 1990 (Act No 94 of 1990), or a mutual bank as defined in the Mutual Banks Act, 1993 (Act No 124 of 1993).
- (3) Such codes of conduct may from time to time be amended or replaced in accordance with the procedure set out in subsection (1)

16. Principles of code of conduct

- (1) A code of conduct must be drafted in such a manner as to ensure that the clients being rendered financial services will be able to make informed decisions, that their reasonable financial needs regarding financial products will be appropriately and suitably satisfied and that for those purposes authorised financial services providers, and their representatives, are obliged by the provisions of such code to -
 - (a) act honestly and fairly, and with due skill, care and diligence, in the interests of clients and the integrity of the financial services industry;
 - (b) have and employ effectively the resources, procedures and appropriate technological systems for the proper performance of professional activities:

- (c) seek from clients appropriate and available information regarding their financial situations, financial product experience and objectives in connection with the financial service required;
 - (d) act with circumspection and treat clients fairly in a situation of conflicting interests; and
 - (e) comply with all applicable statutory or common law requirements applicable to the conduct of business.
- (2) A code of conduct must in particular contain provisions relating to-
- (a) the making of adequate disclosures of relevant material information, including disclosures of actual or potential own interests, in relation to dealings with clients;
 - (b) adequate and appropriate record-keeping;
 - (c) avoidance of fraudulent and misleading advertising, canvassing and marketing;
 - (d) proper safe-keeping, separation and protection of funds and transaction documentation of clients;
 - (e) where appropriate, suitable guarantees or professional indemnity or fidelity insurance cover, and mechanisms for adjustments of such guarantees or cover by the registrar in any particular case; and
 - (f) any other matter which is necessary or expedient to be regulated in such code for the better achievement of the objects of this Act.

CHAPTER V

DUTIES OF AUTHORISED FINANCIAL SERVICES PROVIDERS

17. Compliance officers and compliance arrangements

- (1)
- (a) Any authorised financial services provider **with more than one key individual or one or more representatives** must, subject to section 35(l)(c), appoint one or more compliance officers to monitor compliance with this Act by the provider and such representative or representatives, particularly in accordance with the procedures contemplated in subsection (3), and to take responsibility for liaison with the registrar.
 - (b) Such person may be a director, member, auditor, 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 by notice in the Gazette after consultation with the Advisory Committee.
 - (c) The provisions of section 19(5) and (6), relating to an auditor of an authorised financial services provider, apply with the necessary changes 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 regarding 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) apply with the necessary changes to any authorised financial services provider who carries on a business with only one key individual or without any representative.

18. Maintenance of records

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

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

19. Accounting and audit requirements

(1) Except to the extent exempted by the registrar, an authorised financial services provider must, in respect of the business carried on by the provider as authorised under the provider's licence-

- (a) maintain full and proper accounting records on a continual basis, brought up to date monthly;
- (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)

- (a) An 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-
 - (i) an audited balance sheet, including such notes thereon or documents attached thereto as may be necessary;
 - (ii) an audited income statement, including such notes thereon or documents attached thereto as may be necessary; and
 - (iii) an audited statement of the source and application of funds.

(b) The 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
- (iv) be submitted by the authorised financial services provider to the registrar not later than six months after the end of the provider's financial year or such longer period as may be allowed by the registrar.

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

- (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) Despite anything to the contrary contained in any law, the auditor of an authorised financial services provider must report to and inform the registrar in writing of any irregularity or suspected irregularity in the conduct or the affairs of the authorised financial services provider concerned of which the auditor became aware in performing functions as auditor and which, in the opinion of the auditor, is material.
- (5) If the appointment of an auditor of an authorised financial services provider is terminated-
 - (a) the auditor must submit to the registrar a statement of what the auditor believes to be the reasons for that termination: and
 - (b) if the auditor would, but for that termination, have had reason to submit to the registrar a report contemplated in subsection (4), the auditor must submit such a report to the registrar.
- (6)
 - (a) The registrar may by notice require an authorised financial services provider to terminate the appointment of an auditor of that provider, if the auditor concerned no longer complies with the requirements considered when the auditor was approved by the registrar in terms of subsection (2)(a) or otherwise fails to comply with any provision of this section in a material manner.
 - (b) A notice contemplated in paragraph (a) takes effect on a date specified in such notice and may only be sent out after the registrar-
 - (i) has given the authorised financial services provider and the auditor concerned the reasons why the notice is to be issued; and
 - (ii) has given the authorised financial services provider and the auditor concerned a reasonable opportunity to be heard; and
 - (iii) has considered any submissions made by or on behalf of the authorised financial services provider or the auditor concerned.

**CHAPTER VI
ENFORCEMENT
PART I**

Ombud for financial services providers

- 20. Office of Ombud for Financial Services Providers 55**
- (1) There is an office to be known as the Office of the Ombud for Financial Services Providers.
 - (2) The functions of the Office are performed by the Ombud for Financial Services Providers.
 - (3) The objective of the Ombud is to consider and dispose of complaints in a procedurally fair, informal, economical and expeditious manner and by reference to what is equitable in all the circumstances, with due regard to-
 - (a) the contractual arrangement or other legal relationship between the complainant and any other party to the complaint; and
 - (b) the provisions of this Act.

- (4) When dealing with complaints in terms of sections 27 and 28 the Ombud is independent and must be impartial.

21. Appointment of Ombud and deputy ombuds

- (1) The Board, after consultation with the Advisory Committee-
 - (a) must appoint as Ombud a person qualified in law and who possesses adequate knowledge of the rendering of financial services;
 - (b) may appoint one or more persons qualified in law and who possess adequate knowledge of the rendering of financial services, as deputy ombud.
- (2) The remuneration and other terms of appointment of the Ombud and a deputy ombud must be determined by the Board.
- (3) The Ombud or deputy ombud may at any time resign by submitting a written resignation to the Board at least three calendar months prior to the intended date of vacation of office, unless the Board allows a shorter period.
- (4) The Board may on good cause shown, after consultation with the Advisory Committee, remove the Ombud or a deputy ombud from office on the ground of misbehaviour, incapacity or incompetence, after affording the person concerned a reasonable opportunity to be heard.

22. Funding of Office

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

23. Accountability

- (1) The Ombud is 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 a full and correct record of all funds received and payments made and of all assets, liabilities and financial transactions of the Office;
 - (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.

24. General administrative powers of Ombud

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

- (a) hire, purchase or otherwise acquire property, and let, sell or otherwise dispose property so purchased or acquired;

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

25. Disestablishment and liquidation of Office

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

26. Powers of Board

- (1) The Board may, after consultation with the Advisory Committee, make rules, including different rules in respect of different categories of complaints or investigations by the Ombud, regarding –
 - (a)
 - (i) any matter which is required or permitted under this Act to be regulated by rule;
 - (ii) the category of persons qualifying as complainants;
 - (iii) the type of complaint justiciable by the Ombud, including a complaint relating to a financial service rendered by a person not authorised as a financial services provider or a person acting on behalf of such first-mentioned person;
 - (iv) the rights of complainants in connection with complaints, including the manner of submitting a complaint to the authorised financial services provider or representative concerned;
 - (v) the rights and duties of any such provider or representative on receipt of any complaint, particularly in connection with the furnishing of replies to the complainant;
 - (vi) the rights of a complainant to submit a complaint to the Ombud where the complainant is not satisfied with any reply received from the provider or representative concerned;
 - (vii) the circumstances under which a complaint may be dismissed without consideration of its merits;
 - (viii) the power of the Ombud to fix a time limit for any aspect of the proceedings before the Ombud and to extend a time limit;
 - (b) the payment to the Office by the authorised financial services provider or representative involved in any complaint submitted to the Ombud, of case fees in respect of the consideration of the complaint by the Ombud;
 - (c) liaison between the Ombud and the registrar, and administrative duties of those functionaries regarding mutual administrative support, exchange of information and reports, other regular consultations and avoidance of overlapping of their respective functions; and
 - (d) any other administrative or procedural matter necessary or expedient for the better achievement of the objects of this Part, but which is not inconsistent with a provision of this Act.

- (2) The Board must-
 - (a) ensure that no rule made under subsection (1) detracts from or affects the independence of the Ombud in any material way;
 - (b) publish rules made under subsection (1) in the Gazette.

- 27. Receipt of complaints, prescription, jurisdiction and investigation**
- (1) On submission of a complaint to the Office, the Ombud must-
 - (a) determine whether the requirements of the rules contemplated in section 26(1)(a)(iv) have been complied with;
 - (b) in the case of any non-compliance, act in accordance with the rules made under this section: and
 - (c) otherwise officially receive the complaint if it qualifies as a complaint.
- (2) Official receipt of a complaint by the Ombud suspends the running of prescription in terms of the Prescription Act, 1969 (Act No. 68 of 1969), for the period after such receipt of the complaint until the complaint has either been withdrawn, or determined by the Ombud or the board of appeal, as the case may be.
- (3) The following jurisdictional provisions apply to the Ombud in respect of the investigation of complaints:
 - (a)
 - (i) The Ombud must decline to investigate any complaint which relates to an act or omission which occurred on or after the date of commencement of this Act but on a date more than three years before the date of receipt of such complaint by the Office.
 - (ii) Where the complainant was unaware of the occurrence of the act or omission contemplated in subparagraph (i), the period of three years commences on the date on which the complainant became aware or ought reasonably to have become aware of such occurrence, whichever occurs first.
 - (b)
 - (i) The Ombud must decline to investigate any complaint if, before the date of official receipt of the complaint, proceedings have been instituted by the complainant in any Court in respect of a matter which would constitute the subject of the investigation.
 - (ii) Where any proceedings contemplated in subparagraph (i) are instituted during any investigation by the Ombud, such investigation must not be proceeded with.
 - (c) The Ombud may on reasonable grounds determine that it is more appropriate that the complaint be dealt with by a Court or through any other available dispute resolution process and decline to entertain the complaint.
- (4) The Ombud must not proceed to investigate a complaint officially received unless the Ombud -
 - (a) has in writing informed every other interested party to the complaint of the receipt thereof;
 - (b) is satisfied that all interested parties have been provided with such particulars as will enable the parties to respond thereto; and
 - (c) has provided all interested parties the opportunity to submit a response to the complaint.
- (5) The Ombud-
 - (a) may, in investigating or determining an officially received complaint, follow and implement any procedure (including mediation) which the Ombud deems appropriate, and may allow any party the right of legal representation;

- (b) must, in the first instance, explore any reasonable prospect of resolving a complaint by a conciliated settlement acceptable to all parties;
 - (c) may, in order to resolve a complaint speedily by conciliation, make a recommendation to the parties, requiring them to confirm whether or not they accept the recommendation and, where the recommendation is not accepted by a party, requiring that party to give reasons for not accepting it: Provided that where the parties accept the recommendation, such recommendation has the effect of a final determination by the Ombud, contemplated in section 28(1);
 - (d) may, in a manner that the Ombud deems appropriate, delineate the functions of investigation and determination between various functionaries of the Office;
 - (e) may, on terms specified by the Ombud, mandate any person or tribunal to perform any of the functions referred to in paragraph (d).
- (6) For the purposes of any investigation or determination by the Ombud, the provisions of the Commissions Act, 1947 (Act No. 8 of 1947), regarding the summoning and examination of persons and the administering of oaths or affirmations to them, the calling for the production of books, documents and objects, and offences by witnesses, apply with the necessary changes.

28. Determinations by Ombud

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

- (3) Any award of interest by the Ombud in terms of subsection (2) may not exceed the rate which a Court would have been entitled to award, had the matter been heard by a court.
- (4)
 - (a) The Ombud must reduce a determination to writing, including all the reasons therefor, sign the determination, and send copies thereof to the registrar and all parties concerned with the complaint and, if no notice of appeal to the board of appeal has been lodged within the period required therefor, to the clerk or registrar of court which would have had jurisdiction in the matter had it been heard by a Court.
 - (b) Where a notice of appeal has been lodged, the Ombud must send a copy of the final decision of the board of appeal to any such clerk or registrar.
- (5) A determination-
 - (a) or a final decision of the board of appeal, as the case may be, is regarded as a civil judgment of a Court, had the matter in question been heard by a Court, and must be so noted by the clerk or registrar, as the case may be, of that court;
 - (b) is only appealable to the board of appeal-
 - (i) with the leave of the Ombud after taking into consideration-
 - (aa) the complexity of the matter; or
 - (bb) the reasonable likelihood that the board of appeal may reach a different conclusion; or
 - (ii) if the Ombud refuses leave to appeal, with the permission of chairperson of the board of appeal.
- (6)
 - (a) A writ of execution may, in the case of a determination or a final decision of the board of appeal amounting to a monetary award, be issued by the clerk or the registrar referred to in subsection (3) and may be executed by the sheriff of such Court after expiration of a period of two weeks after the date of the determination or of the final decision of the board of appeal.
 - (b) Any other determination must be given effect to in accordance with the applicable procedures of a Court after expiration of a period of two weeks after the date of the determination or of the final decision of the board of appeal.

29. Record-keeping

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

30. Report of Ombud

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

31. Penalties

Any person who-

- (a) commits any act in respect of the Ombud or an investigation by the Ombud which, if committed in respect of a court of law, would have constituted contempt of court, is guilty of an offence and liable on conviction to any penalty which may be imposed on a conviction of contempt of court: or
 - (i) anticipates a determination of the Ombud in any manner calculated to influence the determination: or
 - (ii) wilfully interrupts any proceedings conducted by the Ombud.
- is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding one year.

32. Promotion of client education by registrar

The registrar may take any steps conducive to client education and the promotion of awareness of the nature and availability of the Ombud and other enforcement measures established by or in terms of this Act, including arrangements with the Ombud, representative bodies of the financial services industry, client and consumer bodies, or product suppliers and 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

33. Civil remedies

- (1) The registrar may, when satisfied on the basis of available facts and information that a person has contravened or not complied with any provision of this Act, or is likely so to contravene or not to comply, apply to a Court for an order restraining such person from continuing to commit any such act or omission or from committing it in future, and requiring the person to take such remedial steps as the Court deems necessary to rectify the consequences of the act or omission, including consequences which prejudiced or may prejudice any client.
- (2) The registrar may institute action in a Court against any person who has contravened or not complied with any provision of this Act, for payment of-
 - (a) an amount determined by the Court as compensation for losses suffered by any other person in consequence of such contravention or non-compliance;
 - (b) a penalty for punitive purposes in a sum determined in the discretion of the Court but not exceeding three times the amount of any profit or gain which may have accrued to the person involved as a direct result of any such act or omission;
 - (c) interest; and
 - (d) costs of suit on such scale as may be determined by the Court.
- (3) Any amount recovered by the registrar in terms of subsection (2) must be deposited by the registrar directly into a specially designated trust account established by the registrar with an appropriate financial institution, and thereupon
 - (a) the registrar is, as a first charge against the trust account, entitled to reimbursement of all expenses reasonably incurred in bringing proceedings under subsection (2) and in administering the distributions made to persons in terms of subsection (5);

- (b) the balance, if any (hereinafter referred to as the “distributable balance”) must be distributed by the registrar to the persons referred to in subsection (5), any funds remaining, accruing to the registrar in the registrar’s official capacity.
- (4) Any amount not claimed within three years from the date of the first distribution of payments, accrues to the registrar in the registrar’s official capacity.
- (5) The distributable balance must be distributed on a pro rata basis to all persons who are affected by the occurrences referred to in subsection (2), and who prove to the reasonable satisfaction of the registrar that they are persons contemplated in that subsection: Provided that no money may be distributed to a person who has contravened or failed to comply with any provision of this Act.
- (6) A Court issuing any order under this section must order it to be published in the Gazette and by such other appropriate public media announcement as the Court considers appropriate.
- (7) The registrar may withdraw, abandon or compromise any civil proceedings instituted under this section, but any agreement or compromise must be made an order of Court and the amount of any payment made in terms of any such compromise must be published in the Gazette and by such other public media announcement as the Court considers appropriate.
- (8) Where civil proceedings have not been instituted, any agreement or settlement (if any) may, on application to the Court by the registrar after due notice to the other party, be made an order of Court and must be published in the Gazette and by such other public media announcement as the Court considers appropriate.

34. Undesirable practices

- (1) Subject to subsections (2) and (3), the registrar may, after consultation with the Advisory Committee, by notice in the Gazette declare a particular business practice to be undesirable for all or a category of authorised financial services providers, or any such provider.
- (2) The following principles must guide the registrar in considering whether or not a declaration contemplated in subsection (1) should be made:
 - (a) That the practice concerned, directly or indirectly, has or is likely to have the effect of-
 - (i) harming the relations between authorised financial services providers or any category of such providers, or any such provider, and clients or the general public;
 - (ii) unreasonably prejudicing any client;
 - (iii) deceiving any client; or
 - (iv) unfairly affecting any client; and
 - (b) that if the practice is allowed to continue, one or more objects of this Act will or is likely to, be defeated.
- (3) The registrar may not make such a declaration unless the registrar has by notice in the Gazette published an intention to make the declaration, giving reasons therefor, and invited interested persons to make written representations thereanent so as to reach the registrar within 21 days after the date of publication of that notice.
- (4) The authorised financial services provider concerned may not, on or after the date of the publication of a notice referred to in subsection (1), carry on the business practice concerned.
- (5) The registrar may direct an authorised financial services provider who, on or after the date of the publication of a notice referred to in subsection (1), carries on the business practice concerned in contravention of that notice, to rectify or reinstate to the satisfaction of the registrar any loss or

damage which was caused by or arose out of the carrying on of the business practice concerned.

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

35. Regulations

- (1) The Minister may by notice in the Gazette, 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-
 - (i) canvassing for, or marketing or advertising (whether within or outside the Republic) of any business relating to the rendering of financial services by any person who is not an authorised financial services provider or a representative of such a provider;
 - (ii) the publication by any person, who is not an authorised financial services provider or a representative of such a provider, of any advertisement, communication or announcement directed to clients and which indicates that such person is an authorised financial services provider or a representative of such a provider: and
 - (iii) the use by any person who is not an authorised financial provider or a representative of any such provider, of any name, title or designation indicating that the person is an authorised financial services provider or a representative of such a provider;
 - (c) compliance arrangements, compliance monitoring systems and keeping of records;
 - (d) powers of the registrar to call for information from any person to which this Act applies, including the powers of the Court to issue orders, on application by the registrar, to enforce obligations in that regard: and
 - (e) generally, any matter which it is expedient or necessary to prescribe for the better achievement of the objects of this Act, the generality of this provision not being restricted by the provisions of any foregoing paragraph.
- (2) The regulations may provide for offences in cases of contravention or non-compliance with the provisions thereof, and for penalties not exceeding a fine of R500 000 or imprisonment for a period not exceeding five years or to both such fine and such imprisonment.
- (3) Different regulations may be made in respect of different matters or categories of persons.

36. Offences and penalties

Any person who-

- (a) contravenes or fails to comply with a provision of section 7(1), 8(8), 13(1)(b), 14(1), 18, 19(2) or 34(4) or (6): or
- (b) in any application in terms of this Act, deliberately makes a misleading, false or deceptive statement, or conceals any material fact,

is guilty of an offence and is on conviction liable to a fine not exceeding R1,000,000 or to imprisonment for a period not exceeding 10 years, or to both such fine and such imprisonment.

37. Consideration of quantum of fines and penalties

- (1) In the consideration of the quantum of any penalty under section 36, the Court must take into consideration any award made or to be made under section 33, from the same cause.
- (2) In the consideration of the quantum of any award under section 33, the Court must take into account any penalty imposed or to be imposed under section 36, from the same cause.

38. Voluntary sequestration, winding-up and closure

No -

- (a) application for the acceptance of the voluntary surrender of the estate, in terms of section 3 of the Insolvency Act, 1936 (Act No. 24 of 1936), or;
- (b) special resolution relating to the winding-up, as contemplated in section 349 of the Companies Act, 1973 (Act No. 61 of 1973), and registered in terms of that Act; or;
- (c) written resolution relating to the winding-up, as contemplated in section 67 of the Close Corporations Act, 1984 (Act No. 69 of 1984), and registered in terms of that section; or;
- (d) voluntary closure of business by, any authorised financial services provider, or representative of such provider, and no special resolution in terms of the constitution of such a provider or representative which is not a company, to close its business, have legal force-
 - (i) unless a copy or notice thereof has been lodged with the registrar and the registrar has, by notice to the provider or representative concerned, as the case may be, declared that arrangements satisfactory to the registrar have been made to meet all liabilities under transactions entered into with clients prior to sequestration, winding-up or closure, as the case may be: or
 - (ii) if the registrar, by notice to the provider or representative concerned, as the case may be, declares that the application, resolution or closure, as the case may be, is contrary to this Act.

39. Right of appeal

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

**CHAPTER VII
MISCELLANEOUS**

40. Saving of rights

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

41. Fees and penalties

(1)

- (a) The Minister must, after consultation with the registrar, by notice in the Gazette, determine the fees payable to the registrar by any person, or category of persons, seeking a decision or the performance of any other act by the registrar under this Act and referred to in section 3(1).
 - (b) The fees are payable in the manner, and are subject to the requirements, determined by the registrar by notice in the Gazette.
- (2)
- (a) A person who fails to furnish the registrar with a return, information or document, as provided by this Act, within the period specified or any extension thereof is, irrespective of any criminal proceedings instituted against the person under this Act, but subject to paragraph (b), liable to a penalty not exceeding R1 000 or any greater amount prescribed, for every day during which the failure continues, unless the registrar, on good cause shown, waives the penalty or any part thereof.
 - (b) The penalty may be imposed by the registrar by notice to the person concerned, and such imposition must be preceded by a procedure giving such person a reasonable opportunity to be heard, and takes effect on a date specified in such notice which may be a date prior to the date of the notice.
- (3)
- (a) A person who is liable to pay the fees or a penalty contemplated in subsection (1)(a) or (2)(a) respectively, and who fails to pay the amount due on the date or within the period specified, must pay interest on the amount outstanding and on unpaid interest at such rate, and calculated in such manner as may be determined by the Minister from time to time in respect of debts due to the state.
 - (b) The fees and penalties, and interest owed in respect thereof, are regarded as debts due to the Board and may be recovered by the Board in a Court.

42. Exchange of information

The registrar may disclose information obtained in the course of performing functions in terms of this Act, unless such disclosure will not be in the public interest, but subject to any guidelines issued by the Board to the registrar-

- (a) to any department of state or organ of state as defined in section 239 of the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996), foreign financial or investment services 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 such information is likely to be of interest to the 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, 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.

43. Limitation of liability

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, is not liable for any loss sustained by or damage caused to any person as a result of anything done or omitted by any of them in the bona fide exercise of any power or carrying out of any duty or performance of any function under or in terms of a provision of this Act.

44. Exemptions by registrar and Minister

- (1) The registrar may on or after the commencement of this Act, but prior to the date determined by the Minister in terms of section 7(1), exempt any person or category of persons from the provisions of that section if the registrar is satisfied that-
 - (a) the rendering of any financial service by the applicant is already partially or wholly regulated by any other law; or
 - (b) the application of the said section to the applicant will cause the applicant or clients of the applicant financial or other hardship or prejudice; and
 - (c) the granting of the exemption will not -
 - (i) conflict with the public interest;
 - (ii) prejudice the interests of clients; and
 - (iii) frustrate the achievement of the objects of this Act.
- (2) The registrar-
 - (a) having regard to the factors mentioned in subsection (1), may attach to any exemption so granted reasonable requirements or impose reasonable conditions with which the applicant must comply either before or after the effective date of the exemption in the manner and during the period specified by the registrar; and
 - (b) must determine the period for which the exemption will be valid.
- (3) An exemption in respect of which a person has to comply with requirements or conditions, lapses whenever the person contravenes or fails to comply with any such requirement or condition: Provided that the registrar may on application condone any such contravention or failure and determine reasonable requirements or conditions with which the applicant must comply on or after resumption of the exemption as if such requirements or conditions had been attached or imposed on the first granting of the exemption.
- (4)
 - (a) The registrar may in any case not provided for in this Act, on reasonable grounds, on application or on the registrar's own initiative by notice in the Gazette, exempt any person or category of persons from any provision of this Act.
 - (b) The provisions of subsections (1), (2) and (3) apply with the necessary changes in respect of any exemption contemplated in paragraph (a).
- (5) The Minister, after consultation with the registrar, may, on such conditions as the Minister may determine, by notice in the Gazette exempt a financial services provider or representative, or category of financial services providers or representatives, from any provision of the Policyholder Protection Rules made under section 62 of the Long-term Insurance Act, 1998 (Act No. 52 of 1998), and section 55 of the Short-term Insurance Act, 1998 (Act No. 53 of 1998), respectively.

45. Exemptions, and amendment or repeal of laws

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

- (a)
- (i) any "authorised user", "clearing house", "central securities depository" or "participant" as defined in section 1 of the Securities Services Act, 2002, or exchange licensed under section 10 of that Act;
 - (ii) a manager as defined in section 1 of the Collective Investment Schemes Control Act, 2002;
 - (iii) a person performing the functions referred to in section 13B of the Pension Funds Act, 1956 (Act No. 24 of 1956), if such person complies with the requirements and conditions contemplated in that section: or
 - (iv) a person carrying on the business referred to in section 58 of the Medical Schemes Act, 1998 (Act No. 131 of 1998), if such person complies with the requirements contemplated in that section,
- to the extent that the rendering of financial services is regulated by or under those Acts, respectively;
- (b)
- (i) the executor, administrator or trustee of any deceased or insolvent estate, or a person acting on behalf of such executor, administrator or trustee;
 - (ii) the curator of a person under curatorship, or a person acting on behalf of such curator;
 - (iii) the liquidator 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 first-mentioned trustee;
 - (v) the parent, tutor or guardian of a minor, or a person acting on behalf of such parent, tutor or guardian,
- unless the financial services are rendered as a regular feature of any such person's business; or
- (c) any other trustee or custodian appointed under any law to the extent that the rendering of such services is regulated by or under such law.
- (2)
- (a) The law referred to in item I of the Schedule is hereby amended to the extent indicated in the fourth column of the Schedule.
 - (b) The laws referred to in item I1 of the Schedule are hereby, with effect from the date determined in terms of section 7(1), amended or repealed to the extent indicated in the fourth column of the Schedule: Provided that any unconcluded business of any financial services provider in terms of such law on that date may be concluded within the prescribed period as if any such amendment or repeal has not taken effect.
- (3) Until such time as the Collective Investment Schemes Control Act, 2002, referred to in sections 1 (1) and 45(1)(a)(ii) of this Act comes into operation, any reference in this Act to-
- (a) a collective investment scheme and manager must be construed as references to a unit trust scheme and management company, and scheme and manager, referred to in the Unit Trusts Control Act,

- 1981 (Act No. 54 of 1981), and the Participation Bonds Act, 1981 (Act No. 55 of 1981), respectively; and
- (b) any word or expression defined in the Unit Trusts Control Act, 1981, and the Participation Bonds Act, 1981, unless clearly inappropriate or inconsistent with this Act, has the meaning so defined.
- (4) Until such time as the Securities Services Act, 2002, referred to in sections 1 (1) and 45(1)(a)(i) of this Act comes into operation, any reference in this Act to-
- (a) an authorised user, exchange, a clearing house, central securities depository and participant, must be construed as references to a member, stock exchange, clearing house, financial exchange, recognised clearing house, central securities depository and depository institution referred to in the Stock Exchanges Control Act, 1985 (Act No. 1 of 1985), Financial Markets Control Act, 1989 (Act No. 55 of 1989), and Custody and Administration of Securities Act, 1992 (Act No. 85 of 1992), respectively; and
 - (b) any word or expression defined in the Stock Exchanges Control Act, 1985, Financial Markets Control Act, 1989, and Custody and Administration of Securities Act, 1992, unless clearly inappropriate or inconsistent with this Act, has the meaning so defined.

46. Commencement and short title

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