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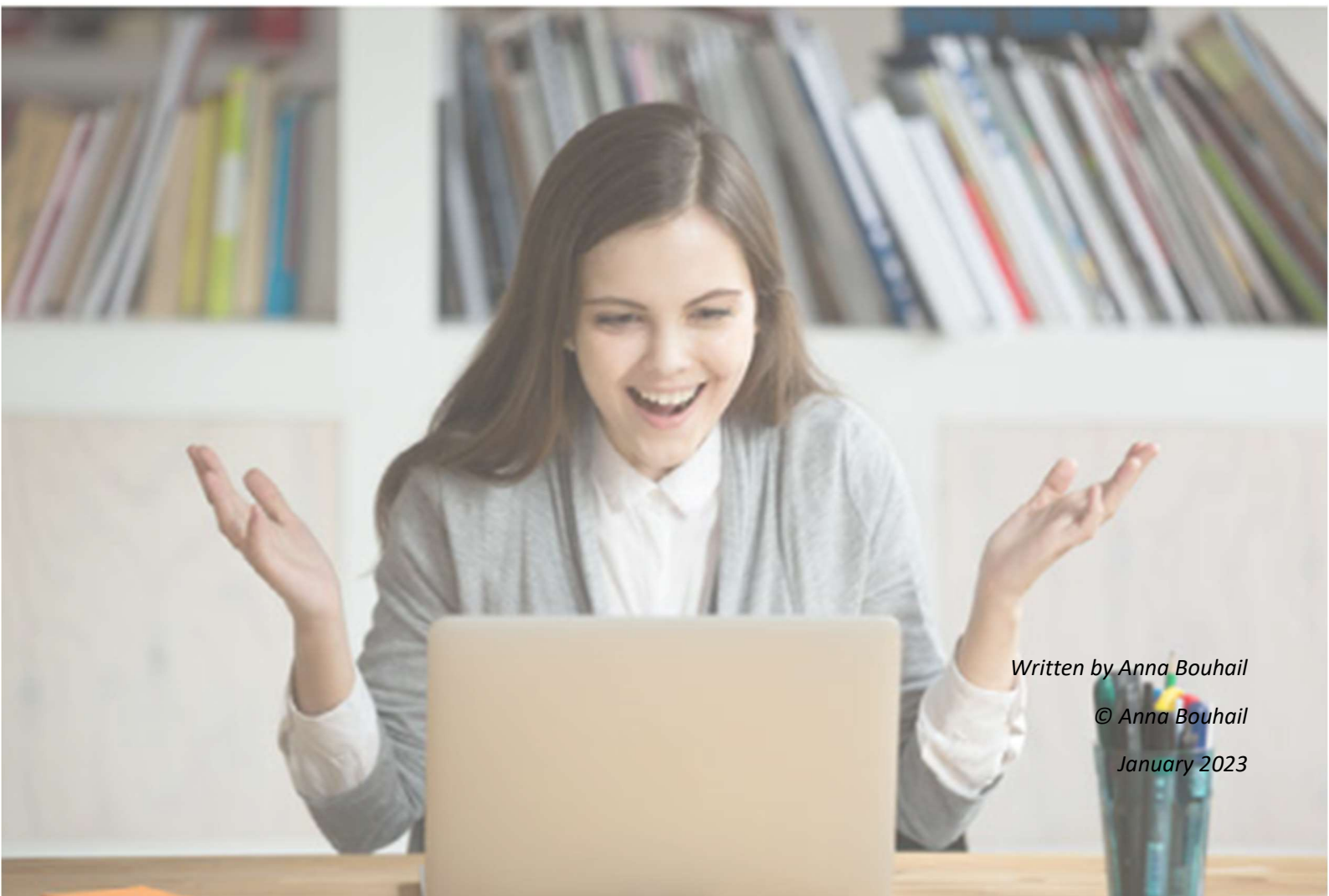
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# Study Guide

## RE5: Representatives in All Categories



*Written by Anna Bouhail*

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*January 2023*

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## Table of Contents

Topic 1	FAIS Act: Introduction	6
Topic 2	Duties and powers of the FAIS Ombud	18
Topic 3	Rights of the Financial Sector Conduct Authority	24
Topic 4	Licensing requirements for Financial Services Providers	26
Topic 5	Fit and proper requirements for representatives	35
Topic 6	Supervision arrangements	47
Topic 7	The debarment process	53
Topic 8	General Code of Conduct	62
Topic 9	Financial Intelligence Centre Act	96

## Preparation Tips

Participation in a an RE Prep workshop is not enough to pass the exam. Learners must follow the exam prep tips:

- ☐ Schedule the actual exam 2 to 3 weeks after attendance of the workshop to allow for learning.
- ☐ Schedule a paper-based exam and not a computer-based exam.
- ☐ Put at least one hour aside a day to prepare for the exam.
- ☐ Attempt to study at the same time every day at a time that is convenient with as few as possible interruptions.
- ☐ If you are a RE Prep Workshop Member, the RE1 & RE5 online Prep Material & Lessons will be added to your e-learning profile. Log in to your profile as follows:

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Click on *Lost Password* if the above does not work

Make sure you are logged in

Go to the *login* page

Under the My Course heading, click on the *RE1 & RE5 Online Prep Material & Lessons*

- ☐ Complete the general mock exam on the first day of prep using your study guide. This will ensure that you have a better understanding of how the questions are structured before you start studying.
- ☐ Read the study guide or work through the online lessons for one hour a day. Ensure that you not only memorize the stipulations but also understand the stipulations.
- ☐ Remember to categorize the knowledge as per topic so that you exactly understand to which legislation and role player or procedure a stipulation is applicable.
- ☐ Look for similarities and differences in stipulations for example, FAIS Act record keeping versus FICA record keeping.
- ☐ Use the memorizing techniques to better recall factual knowledge.
- ☐ After you have read a topic, complete the online quiz. There are three quizzes for each topic. The goal is to read the guide three times in total.
- ☐ Test your knowledge by referring to the knowledge criteria (detailed in annexure B at the end of the study guide) or downloadable from the download page on the online course.
- ☐ Re-study any knowledge you might still be lacking.
- ☐ The last section of the online course section is a readiness exam. Complete the readiness exam as many times as you deem necessary. The system will give you per topic results for you to see where still attention is needed.
- ☐ Study the summary of the representative fit and proper requirements (detailed in annexure A at the end of the study guide) the day or morning before the actual examination.

## Answering of the questions in the actual examination

Take the following with you on the day of the examination:

- ☐ A bilingual dictionary in your home language and English. Afrikaans English dictionaries are sometimes provided.
- ☐ Red pen.
- ☐ Ruler.

Follow the following process when completing the exam:

- ☐ Answer on the question paper itself the first time around.
- ☐ For RE5 answer the questions in the following order:
  - Questions 1 – 15
  - Then questions 35 – 50
  - And lastly questions 16 – 35
- ☐ For RE1 answer the questions in the following order:
  - Questions 1 – 25
  - Then questions 55 – 80
  - And lastly questions 26 – 54
- ☐ Follow the following processes when answering questions:
  - Firstly, see if the question is a positive or negative question.
  - Mark negative words and draw two red lines next to the options if the question is negative.
  - Scratch any negative words.
  - Read through the question carefully and highlight any keywords.
  - Ask yourself what subject is being tested.
  - Summarise quickly what you can recall regarding the subject.
  - Treat each option as a true or false question.
  - Choose the truest option if it is a positive question and the falsest option if it is a negative question.
  - Go through your paper at least one more time.
- ☐ Once you are sure about an answer, transfer the answer to the answer sheet.

**Wishing you the best for your prep and the exam**

# Topic 1 FAIS Act: Introduction

---

## 1.1 WHAT IS FAIS?

FAIS stands for Financial Advisory and Intermediary Services Act. This Act regulates the giving of financial services to clients in relation to a financial product.

FAIS can be regarded as putting on record the principles on which good business with clients should be based. The main goal of the act is client protection to maintain trust in the industry and maintaining systemic stability.

The FAIS act was enacted (promulgated) November 2002 but became effective 30 September 2004.

## 1.2 DEFINITION OF A FINANCIAL SERVICE UNDER THE FAIS ACT

Financial services can be provided as advice and/or intermediary service.

Persons may only provide financial services if they are licensed as, or represent, a licensed FSP.

Both advice and intermediary service need to be in relation to a financial product provided to a client for it to be regulated under the FAIS Act.<sup>1</sup>

### 1.2.1 Definition of advice under the FAIS Act

Under the FAIS Act, advice means any recommendation, guidance or proposal of a financial nature furnished, by any means or medium, to any client-

- ☐ In respect of the purchase of any financial product.
- ☐ In respect of the investment in any financial product.
- ☐ On the variation of any term or condition applying to a financial product
- ☐ On the replacement of any financial product.
- ☐ On the termination of any purchase of or any investment in a financial product.
- ☐ 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.

It is constituted as advice irrespective of whether such advice is furnished during or incidental to financial planning or results in such a purchase, investment, transaction, variation, replacement or termination being effective.<sup>2</sup>

The following actions are not categorised as the giving of advice:

- ☐ Describing a financial product to a client.
- ☐ Answering questions on administrative procedures of the business.
- ☐ Presenting information on a specific financial product without any recommendations.

For purpose of authorisation, advice is further divided into automated advice and non-automated advice.

Automated advice is the furnishing of advice through an electronic medium that uses algorithms and technology without the direct involvement of a natural person.<sup>3</sup>



### 1.2.2 Definition of intermediary service under the FAIS Act

Intermediary service is any act other than giving advice where a person perform an act on behalf of a client or product supplier in relation to a financial product for example:

- ☐ The keeping in safe custody of a financial product in which a client has invested.
- ☐ The collection of premiums from clients on behalf of product suppliers.
- ☐ Receiving, submitting or processing a client's claim against a product supplier.
- ☐ Buying, selling or dealing in (discretionary or non-discretionary basis) financial products.
- ☐ Administration of any financial product on behalf of product supplier.
- ☐ Maintaining or servicing a financial product on behalf of product supplier e.g. the nomination of a beneficiary on a policy or updating bank details.<sup>4</sup>

Intermediary service excludes a bank taking a premium on behalf of a product supplier in its function as a bank.

In other words, an intermediary service can be in short described as an act where a person or organisation intermediate between a client and a relevant product supplier in relation to a financial product i.e. the product supplier and the FSP is two separate entities and the FSP acts as link between the client and the product supplier.

For purpose of authorisation, intermediary service is further divided into scripted execution of sales and other intermediary services.

Execution of sales means an intermediary service performed by a person on instruction of a client to buy, sell, deal or disinvest in, replace or vary one or more financial product.<sup>5</sup>

### 1.2.3 Direct marketing

Financial services can be provided either face to face or via direct marketing. Direct marketing is providing a financial service predominantly in one or more of the following ways<sup>6</sup>:

- Telephonically
- Via Internet
- Via **Media Insert**
- Via **Direct Mail**
- Electronically

A direct marketer means a provider who, in the normal course of business, provides all or the predominant part of the financial services concerned in the form of direct marketing.

## 1.3 FINANCIAL PRODUCTS

A financial product is any product marketed in South Africa that has one or more features of the following products:

- ☐ Securities and instruments, including the following:
  - Shares in a company other than a share block company.
  - Debentures and securitised debt.
  - Any money-market instrument.
  - Any warrant, certificate, and other instrument acknowledging, conferring or creating rights to subscribe to, acquire, dispose of, or convert securities and instruments as described above.
  - Any "securities" as defined in Section 1 of the Financial Markets Act, 2002.



- ☐ A participatory interest in one or more collective investment schemes.
- ☐ A long-term or a short-term insurance contract or policy.
- ☐ Benefits provided by a pension fund.
- ☐ Benefits provided by a Friendly Society.
- ☐ A foreign currency denominated investment instrument, including a foreign currency deposit.
- ☐ A deposit as defined in the Banks Act.
- ☐ A health service benefit provided by a medical scheme.
- ☐ Any other product similar in nature to any discretionary recognised financial product referred to, declared by the Financial Sector Conduct Authority, notice on the official FSCA website to be a financial product for the purposes of the FAIS Act.
- ☐ Any combined product containing one or more of the discretionary recognised financial products referred to.
- ☐ Any financial product issued by any foreign product supplier and marketed in South Africa and which in nature and character is essentially similar or corresponding to a recognised financial product.<sup>7</sup>

## 1.4 CLIENTS

Clients are defined as 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.<sup>8</sup>

## 1.5 CATEGORIES OF FINANCIAL SERVICE

The FAIS Act makes provision for categorizing FSPs and their representatives into Categories and Product categories. The main categories indicate the types of service that can be provided and the subcategory the product. The table following outlines the various main categories of financial services that FAIS distinguishes between.

Table 1.1: FSP License service categories

Category	Description
<b>Category I</b> Ordinary FSP	A Category I FSP renders ordinary financial services in that they can only act on client instruction. We can distinguish between advice and intermediary service in this category.
<b>Category II</b> Discretionary FSP	A discretionary FSP renders intermediary services of a discretionary nature regarding the choice of a particular financial product but without implementing any bulking.
<b>Category IIA</b> Hedge Fund FSP	A hedge Fund FSP renders intermediary services of a discretionary nature regarding the choice of a particular hedge fund or fund of hedge funds regarding a particular financial product.
<b>Category III</b> Administrative FSP	An administrative FSP renders intermediary services in respect of financial products on the instructions of a client or another FSP and through the method of bulking.
<b>Category IV</b> Assistance Business FSP	An assistance business FSP performs the administration of assistance policies* and includes a person who is a binder holder as defined in the Regulations under the Long-term Insurance Act, where such administration is performed by that binder holder.

\* Administration of assistance policies means work performed by a person relating to the offsetting of claims, processing of claims or payment of fees or commission in respect of an assistance policy.

### 1.5.1 Product categories

The product categories (subcategories) specify the product for which the FSP is authorised to provide the financial services for. There are 26 product categories in Category I and 20 product categories in Category II.

The table following details the different product categories.

Table 1.2: Product categories of FSPs

Code Cat I	Code Cat II/IIA	Product category
1.1	N/A	Long-term insurance: Subcategory A
1.2	N/A	Short-term insurance: Personal lines
1.3	2.1	Long-term insurance: Subcategory B1
1.4	2.2	Long-term insurance: Subcategory C
1.5	2.3	Retail pensions benefits
1.6	N/A	Short-term insurance: Commercial lines
1.7	2.4	Pension fund benefits
1.8	2.5	S & I: Shares
1.9	2.6	S & I: Money market instruments
1.10	2.7	S & I: Debentures and securitized debt
1.11	2.8	S & I: Warrants, certificates and other instruments acknowledging debt
1.12	2.9	S & I: Bonds
1.13	2.10	S & I: Derivative instruments excluding warrants and a forex investment
1.14	2.11	Collective investment schemes
1.15	2.12	Forex investment business
1.16	N/A	Health service benefits
1.17	2.13	Long-term deposits
1.18	2.14	Short-term deposits
1.19	N/A	Friendly society benefits
1.20	2.15	Long-term insurance: Subcategory B2
1.21	2.16	Long-term insurance: Subcategory B2-A
1.22	2.17	Long-term insurance: Subcategory B1-A
1.23	N/A	Short-term Insurance Personal lines A1
1.24	2.18	Structured deposits
1.25	2.19	Securities and instruments
1.26	2.20	Participatory interest in a CIS hedge fund

The following product categories are regulated under Category I but not under Category II/IIA:

- |  |  |
|--|--|
| <input type="checkbox"/> Long-term insurance subcategory A       | <input type="checkbox"/> Short-term insurance Commercial lines |
| <input type="checkbox"/> Short-term insurance Personal lines     | <input type="checkbox"/> Health Service Benefits               |
| <input type="checkbox"/> Short-term insurance Personal lines A-1 | <input type="checkbox"/> Friendly Society Benefits             |

Table 1.3: Explanation of product categories

Product category	Examples of products in category (List is not exhaustive)
Long-term insurance: Subcategory A	Funeral policies
Long-term insurance: Subcategory B1	Life and disability insurance – risk product only
Long-term insurance: Subcategory B1-A	Life and disability policy that required no or limited underwriting.
Long-term insurance: Subcategory B2	Minimum Guaranteed Endowment Policy   Minimum Guaranteed annuity
Long-term insurance: Subcategory B2-A	Specified Endowment Policy   Specified Annuity
Long-term insurance: Subcategory C	Endowment policy or annuity with no minimum guaranteed performance on investment
Short-term insurance: Personal lines	Holder is an individual: Household insurance   motor insurance etc.
Short-term Insurance Personal lines A1	Short-term policy that requires no or limited underwriting - see definition
Short-term insurance: Commercial lines	Holder is an entity: Business insurance
Pension fund benefits	Products issued by Pension funds or Provident funds
Retail pensions benefits	Retirement annuity fund   Preservation funds   Preservation provident fund
Friendly society benefits	Stokvel Products
Health service benefits	Medical aid products  Hospital plan
Long-term deposits	Bank account with maturity of longer than 12 months excludes structured products
Short-term deposits	Bank account with maturity of 12 months or shorter excludes structured products
Structured deposits	Inflation rate linked account - See definitions
S & I: Shares	Securities & Instruments: Investment products
S & I: Money market instruments	
S & I: Debentures and securitized debt	
S & I: Warrants, certificates and other instruments acknowledging debt	
S & I: Bonds	
S & I: Derivative instruments excluding warrants and a forex investment	
Securities and instruments	Any other securities and instruments mentioned separately (crypto currencies)
Forex investment business	Any investment product that is subject to currency risk for example currency deposit
Collective investment schemes	Unit trust
Participatory interest in a CIS hedge fund	CIS which uses strategies that could result in the investment incurring losses greater than its total market value at any point which include leverage or net short positions

## I) Product definitions

Short-term insurance personal lines A1 means the short-term insurance policies that-

- ☐ Require no or limited underwriting.
- ☐ Define policy benefits as a sum insured, provide for the replacement of the insured asset or provide for the settlement of outstanding balances due and payable to credit providers.
- ☐ Have contract terms of 24 months or less.
- ☐ Are not subject to the principle of average.
- ☐ Do not provide for any exclusions or conditions from liability of the insurer other than-
  - Exclusions relating to unlawful conduct, provided that such exclusions may only be applied or relied on if there is a direct link between the cause of the loss and the unlawful conduct.
  - Special risks referred to in the Conversion of the SASRIA Act.
  - Exclusions relating to the condition of any asset insured at inception of the policy other than exclusions relating to the wear and tear of the asset.
  - Exclusions relating to the maintenance and usage of the insured asset under a policy that insures against unforeseen mechanical or electrical component failure.
  - Exclusions relating to consequential loss.

Short-term insurance personal lines A1 excludes marine and engineering policies.

Structured deposit means a one of the following:

- ☐ Combination of a short-term deposit or a long-term deposit and another tier 1 financial product.
- ☐ A short-term deposit or long-term deposit where the return or value is dependent on the performance of or is derived from the return or value of one or more underlying financial product, asset, rate or index, on a measure of economic value or on a default event.

Forex investment means an investment in a financial product in foreign exchange trading based on price fluctuation in the foreign exchange market but excludes transaction in foreign exchange conducted under Exchange Control laws by a bureau de change.

## II) Underwriting definitions

No underwriting means there is no requirement by a product supplier for any medical, financial, demographic or lifestyle information to be provided by a prospective policyholder or life insured for such product supplier to accept risk or pay a claim.<sup>9</sup>

Limited underwriting means where the only requirement a prospective policyholder or life insured must comply with for a product supplier to accept risk or pay a claim are one or more of the following:

- ☐ The furnishing of a health declaration structured as answers to no more than eight questions relating to specific medical conditions.
- ☐ The requirement that the policy of a life assured must undergo an HIV test
- ☐ The requirements imposed by the National Credit Act.<sup>10</sup>

### 1.5.2 Tiers of products

The product categories are divided into Tier 1 & 2. The product categories falling under each tier is listed in the table following.

Table 1.4 Tiers of financial products

Tier 1 financial product categories	Tier 2 financial product categories
Structured Deposits	Short-term Insurance Personal Lines A1
Short-term Insurance Personal Lines	Long-term Insurance Subcategory A
Short-term Insurance Commercial Lines	Long-term Insurance Subcategory B1-A
Long-term Insurance Subcategory B1	Long-term Insurance Subcategory B2-A
Long-term Insurance Subcategory B2	Friendly Society Benefits
Long-term Insurance Subcategory C	Short-term Deposits
Retail Pension Benefits	Long-term Deposits
Pension Fund Benefits	
Participatory interest in a collective investment scheme	
Participatory interest in a CIS hedge fund	
Forex Investment	
Health Service Benefits	
Shares	
Money market instruments	
Debentures and securitised debt	
Warrants, certificates and other instruments	
Bonds	
Derivative instruments	
Securities and Instruments	

### 1.5.3 Classes of business

For purpose of class of business training and the continuous professional development requirements, financial products are also categorised according to classes of business. The classes of business are outlined in the table following.

Table 1.5: Classes of business

Class 1: Short-term insurance: Personal Lines (Policyholder must be a natural person)	
1.1	Personal lines: Accident and health policy
1.2	Personal lines: Liability policy
1.4	Personal lines: Miscellaneous policy
1.5	Personal lines: Motor policy
1.6	Personal lines: Property policy
1.7	Personal lines: Transportation policy

1.8	Personal lines: Short-term reinsurance policy
<b>Class 2: Short-term Insurance: Commercial lines</b> (Policyholder must be a juristic person or a person acting in a business capacity)	
2.1	Commercial lines: Accident and health policy
2.2	Commercial lines: Engineering policy
2.3	Commercial lines: Guarantee policy
2.4	Commercial lines: Liability policy
2.5	Commercial lines: Miscellaneous policy
2.6	Commercial lines: Motor policy
2.7	Commercial lines: Property policy
2.8	Commercial lines: Transportation policy
2.9	Commercial lines: Short-term reinsurance policy
<b>Class 3: Long-term Insurance</b>	
3.1	Assistance policy
3.2	Life risk policy
3.3	Life investment policy
3.4	Fund policy
3.5	Sinking fund policy
3.6	Long-term reinsurance policy
<b>Class 4: Pension fund benefits</b>	
<b>Class 5: Short-term and long-term deposits</b>	
<b>Class 6: Structured deposits</b>	
<b>Class 7: Investments</b>	
7.1	Shares
7.2	Money market instruments
7.3	Debentures and securitised debt
7.4	Bonds
7.5	Derivative instruments, warrants, certificates or other instruments
7.6	Securities and Instruments
7.7	Participatory interests in a collective investment scheme
7.8	Participatory interest in a CIS hedge fund
7.9	Retail Pension Benefits
<b>Class 8: Forex investments</b>	
<b>Class 9: Health Services Benefits</b>	

## 1.6 FAIS ACT ROLE PLAYERS

In the subparagraphs, following we consider the various role players that are considered in the FAIS Act. Some role players act in more than one capacity.

### 1.6.1 The Financial Sector Conduct Authority

The Financial Services Board was established as a separate government agency and became operational as such on 1 April 1991. On 1 April 2018 the name of the Financial Services Board was changed to the Financial Sector Conduct Authority (FSCA) in terms of the Financial Sector Regulation Act. The Financial Sector Conduct Authority oversees the conduct regulation of the financial services industry.

The FAIS Division of the FSCA is responsible for the regulation of FSPs. The functions of the FAIS division FSCA are as follows:

- To register FSPs after being satisfied that the fit and proper requirements are met.
- Supervising FSPs.
- Ensuring compliance of FSPs and regulated officers (representatives, key individuals and compliance officers) with the FAIS Act.
- Taking enforcement action against those FSPs and regulated officers that does not comply with the FAIS Act.

In the exam, the FSCA is sometimes referred to as the Authority.

The FAIS Division of the FSCA is responsible for the regulation of FSPs. The division is divided in four departments namely registration, supervision, compliance and enforcement.

### 1.6.2 The Commissioner

The Commissioner is the natural person that has been appointed in terms of the Financial Sector Regulation Act to regulate the conduct of product suppliers and financial services providers.

The main duty of the Commissioner is to protect clients and maintain the integrity of the financial services sector.

### 1.6.3 Professional bodies

Professional bodies are organisations whose members are individual professionals. In South Africa professional bodies need to apply to the South African Qualifications Authority for recognition.

Professional bodies promote ethical behaviour in the industry by setting conduct and sometimes qualifications standards that is more sector specific.

In the financial services industry, being a member of a professional body is voluntary. Professional bodies in the financial services industry have not statutory regulatory powers. However, the FAIS does include professional bodies in their framework especially with regard to fit and proper requirements.



The following are some of the professional bodies within the financial services industry:

- ☐ **ASISA:** Association for Savings and Investment South Africa
- ☐ **FPI:** Financial Planning Institute
- ☐ **SAIA:** South African Insurance Association
- ☐ **CISA:** Compliance Institute Southern Africa
- ☐ **IOBSA:** Institute of Banking South Africa

#### **1.6.4 The Financial Services Tribunal**

The Financial Services Tribunal, which replaced the FSB Appeal Board from 1 April 2018, provides a person who is aggrieved by a decision of a decision-maker to apply to the Tribunal for a reconsideration of such a decision, including debarment of a person.

#### **1.6.5 Product supplier**

The product supplier is an entity that issues a financial product, for example an insurance company, a collective investment scheme or a company issuing shares.

#### **1.6.6 The financial services provider (FSP)**

An FSP is defined under the FAIS act as any person or entity, other than a representative, that as regular feature of the business of such a person furnishes a financial service.

The FSP needs to apply for a license with the Financial Sector Conduct Authority to be authorised to provide financial services. The application for authorisation must be submitted to FSCA in the form and manner determined and the FSP must meet the applicable fit and proper requirements.

#### **1.6.7 Key individual**

Any FSP must appoint one or more natural persons as key individual/s.

If the financial services provider is a sole proprietor or any other entity consisting of only one natural person, then that natural person needs to be registered as the key individual. In other words, the FSP may appoint any person as the key individual except if the FSP is a sole proprietor or a company with only one director. In such an event the sole proprietor or the director must be the key individual.

All key individual appointments must be approved by FSCA (FSCA) and any change to their profile must be reported to FSCA.

Key individuals in Category I must on date of approval have at least one year's practical experience in the management and oversight of a financial services provider providing service in the same product categories. The key individual must also hold a recognised qualification at date of approval as well as be found competent in the level 1 Regulatory Examination for Key Individuals (RE1) and have the applicable class of business training.

The function of the key individual is two-fold:

1. A key individual is responsible for the management or oversight of the rendering of a financial service by the representatives of the FSP's i.e., the key individual is in charge of the representatives.

2. A key individual must establish and maintain the compliance function i.e. the key individual is held accountable by FSCA for compliance and non-adherence of the FSP to the FAIS Act and subordinate legislation, except if stated otherwise in the FAIS Act.

The duties pertaining to the two functions are outlined in the table following.

*Table 1.6: Functions of a key individual*

<b>Manage /oversee the provision of a financial services by representatives</b>	<b>Establish and maintain the compliance function</b>
<input type="checkbox"/> Recruitment of representatives and other relevant staff. <input type="checkbox"/> Appointment and debarment of representatives. <input type="checkbox"/> Drafting of development plans for representatives not meeting the recognised qualification requirement. <input type="checkbox"/> Monitoring of financial services rendered by representatives. <input type="checkbox"/> Maintaining the register of representatives. <input type="checkbox"/> Liaising with representatives, product suppliers and third party FSPs.	<input type="checkbox"/> Ensuring that the FSP maintains operational ability. <input type="checkbox"/> Ensuring that the FSP remains financially sound. <input type="checkbox"/> Ensuring the internal control structures and procedures are in place to ensure adherence to the FAIS Act and relevant subordinate legislation. <input type="checkbox"/> Ensuring the appropriate risk control measures are in place and that the risks of the FSP are effectively monitored. <input type="checkbox"/> Ensuring that complaints are handled in an effective and procedurally fair manner.

### 1.6.8 Representative

A representative is a person or entity rendering financial services on behalf of the FSP in terms of an employment contract or a mandate.

A representative excludes persons performing clerical, technical, administrative, legal or accounting services, if such service does not require judgment or leads to a specific transaction in response to general enquiries.<sup>11</sup>

The FSP appoints and approve representatives therefore, it is the responsibility of the FSP to ensure that its representatives are fit and proper. After approval, the representative is registered as such with FSCA.

The FSP takes responsibility for the actions and omissions of representatives.

A key individual can also be a representative if the key individual provides a financial service. In such an event, the key individual will also have to adhere to the fit and proper requirements pertaining to representatives.

A juristic representative is a representative that is not a natural person.<sup>12</sup>

### 1.6.9 Third party FSPs

FSPs conduct either on a regular or periodic basis business with people or entities that also render financial services. Such persons or entities are referred to as third party FSPs.

The onus is on the FSP to ensure that third party FSPs possesses the necessary authorisation in the applicable categories and product categories of financial services. Failing to do so will render the FSP open to liability.<sup>13</sup>

Practically this means that the FSP must obtain a copy of the other FSP's or representative's license or authorisation to ensure that the necessary authorisation has been obtained.

### 1.6.10 Compliance officer

The FAIS Act requires an FSP who has more than one key individual or who has more than one representative, to appoint one or more compliance officers to perform the compliance service.

Such person may be a director, member, auditor, trustee, principal officer, public officer or company secretary of the FSP, or any other person with suitable qualification and experience determined by FSCA.<sup>14</sup>

If no compliance officer needs to be appointed, the key individual must perform the compliance service in addition to his/her functions.

The compliance service includes performing the following functions<sup>15</sup>:

- ☐ To monitor compliance of the FSP with the FAIS act and subordinate legislation i.e., oversee the compliance function.
- ☐ To monitor compliance of representatives with the FAIS act and subordinate legislation.
- ☐ To provide the FSP with written progress reports in respect of the compliance monitoring and make recommendations to the FSP relating to any aspect of the compliance monitoring functions.
- ☐ To report to FSCA regarding compliance issues.

Compliance officers must submit compliance reports on the period basis as prescribed by the FAIS Act. The compliance report must be signed by the compliance officer who completed the report and the key individual.

A compliance officer either refers to a natural person or a compliance practice that has been approved on application by FSCA for such purpose.<sup>16</sup>

A compliance practice means a company, close corporation or partnership that appoints one or more natural persons to render compliance service in respect of a particular FSP and such natural person are approved by FSCA as compliance officers.<sup>17</sup>

If the appointment of a compliance officer is terminated, the compliance officer must submit to FSCA a statement of what the compliance officer believes to be the reasons for the termination are.<sup>18</sup> The compliance officer must still report on any issues of non-compliance by the FSP.

FSCA may by notice require an FSP to terminate the appointment of a compliance officer if the compliance officer no longer complies with the applicable requirements or fail to comply with the FAIS Act in a material manner.

### 1.6.11 Office of the FAIS Ombud (Ombud for FSPs)

The FAIS Act establishes the FAIS Ombud to consider and dispose of FAIS complaints if the internal complaints procedure of the FSP failed and the complainant wants to pursue the matter.

If a loss was due to an action by the product supplier and not the FSP, the complaint must be referred to the relevant sectorial Ombud. Hereinafter the FAIS Ombud will only be referred to as the Ombud.

## Topic 2 Duties and powers of the FAIS Ombud

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### 2.1 INTRODUCTION

The FAIS Act establishes the FAIS Ombud to consider and dispose of FAIS complaints if the internal complaints procedure of the FSP failed and the complainant wants to pursue the matter.

The way the Ombud handles complaints must be procedurally fair, informal, economical and expeditious and by reference to what is equitable in all the circumstances, with due regard to the contractual arrangements as well as the provisions of the FAIS Act.<sup>19</sup> When dealing with complaints, the Ombud is required to be independent and impartial.<sup>20</sup>

A complainant includes the complainant's lawful successor in title or the nominated beneficiary of the financial product which is the subject of the relevant complaint.<sup>21</sup>

### 2.2 CONDITIONS FOR RECEIPT OF COMPLAINTS

On submission of a complaint, the Ombud must determine if the complaint was submitted to the FSP or representative concerned in the manner prescribed by the Ombud and if not, insist that the complaint be referred to and dealt with by the FSP or representative first.

The Ombud will officially receive any complaint if the following conditions are met:

- ☐ The complaint must fall within the ambit of the FAIS Act and the Rules on the Proceedings of the Office of the Ombud (*the rules*).
- ☐ The person against whom the complaint is made (the respondent) is subject to the provisions of the FAIS Act.
- ☐ The act or omission complained of must have occurred at a time when the Ombud Rules were in force.
- ☐ The respondent must have failed to address the complaint satisfactorily within six weeks of its receipt.
- ☐ The complaint must not constitute a monetary (financial) claim more than R800 000 for a particular kind of financial prejudice or damage, unless the respondent agrees in writing to this limitation being exceeded, or the complainant has abandoned the amount more than R800 000.<sup>22</sup>
- ☐ A complainant may seek any relief relating to the subject matter of the complaint, but a complaint constituting a claim for a monetary award, must relate to the redress of financial prejudice or damage suffered or likely to be suffered by the complainant.
- ☐ The Ombud may also entertain a complaint relating to a financial service rendered by a person not authorised as a financial services provider or by a person acting on behalf of such person.
- ☐ When the Ombud receives a referral from FSCA, the Ombud must in writing notify the client concerned thereof and require the client to inform the Ombud whether the client wishes to pursue the complaint.
- ☐ The complaint must not relate to the investment performance of a financial product which is the subject of the complaint, unless such performance was guaranteed expressly or implicitly, or such performance appears to the Ombud to be so deficient as to raise a prima facie presumption of misrepresentation, negligence or maladministration on the part of the person against whom the complaint is brought.

### **What is a FAIS Complaint?**

A complaint that falls within the ambit of the FAIS Act refers to a specific complaint where it is alleged that the FSP or representative has been guilty of one or more of the following:

- ☐ The FSP or representative has failed to comply with a provision of the FAIS act and that as a result thereof the complainant has suffered or is likely to suffer financial prejudice and damage.
- ☐ The FSP or representative 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.
- ☐ The FSP or representative has treated the complainant unfairly.

## **2.3 SUMMARY DISMISSAL OF COMPLAINTS**

The Ombud has the power to determine whether or not a complaint falls within the ambit (domain) of the FAIS Act and the Ombud Rules and must reject a complaint which falls outside such ambit.<sup>23</sup>

The Ombud may dismiss a complaint without referral to any other party if on the facts provided it appears that-

- ☐ The complaint does not have any reasonable prospect of success.
- ☐ The respondent has made an offer which is fair and reasonable, and which is still open for acceptance by the complainant.
- ☐ The matter has previously been considered by the Ombud.
- ☐ The essential subject of the complaint has been decided in court proceedings.
- ☐ The subject of the complaint is pending in court proceedings.
- ☐ The complaint or relief sought is of the nature that the Ombud can be of no assistance to the complainant.<sup>24</sup>

A complaint received officially may thereafter be dismissed if the complainant fails to co-operate in the pursuance or resolution of the complaint.<sup>25</sup>

If in the discretion of the Ombud a complaint is being pursued in a frivolous, vexatious or abusive manner, it may be dismissed summarily.<sup>26</sup>

The Ombud must decline to investigate any complaint which relates to an act which occurred more than 3 years before the date of receipt of such complaint by the Office of the Ombud.<sup>27</sup> Where the complainant was unaware of the occurrence, the period of 3 years commences on the date on which the complainant became aware or ought reasonable to have become aware of such occurrence, whichever occurs first.<sup>28</sup>

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 regarding the matter which would be the subject of investigation.<sup>29</sup> If any such proceedings are instituted during an investigation, the investigation must be stopped.<sup>30</sup>

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.<sup>31</sup>

The Ombud must in a manner deemed appropriate, inform parties of any dismissal of a complaint referred to in this Rule.<sup>32</sup>

## **2.4 RIGHTS AND RESPONSIBILITIES OF COMPLAINANT WITH REGARD TO A COMPLAINT<sup>33</sup>**

The complainant must qualify as such in terms of the FAIS Act and the Ombud rules.

Before submitting a complaint to the Ombud, the complainant must try to resolve the complaint with the respondent.

The complainant has six months after receipt of the final response of the respondent, or after such response was due, to submit a complaint to the Office of the Ombud.

On submitting a complaint to the Office of the Ombud, the complainant must satisfy the Ombud of having endeavoured (tried) to resolve the complaint with the respondent and must produce the final response (if any) of the respondent as well as the complainant's reasons for disagreeing with the final response.

A complaint must be submitted to the Office of the Ombud in writing or, in circumstances deemed appropriate, the Ombud may receive a complaint in any other manner which conveys the complaint in comprehensible (understandable) form.

A complaint must, where necessary, be accompanied by available documentation in the complainant's possession.

The complainant must be advised by the Ombud of the response of the respondent to the extent necessary to react to such response and to decide whether the complaint should be proceeded with and must thereafter within two weeks advise the Ombud of such reaction and decision.

Subsequent to lodging a complaint with the Ombud, the complainant is entitled to submit further facts, information or documentation in connection with the complaint and must do so, to the extent possible, if requested by the Ombud.

## **2.5 RIGHTS AND RESPONSIBILITIES OF RESPONDENT WITH REGARD TO A COMPLAINT<sup>34</sup>**

Where a complaint cannot within three weeks be addressed by the respondent, the respondent must as soon as reasonably possible after receipt of the complaint send to the complainant a written acknowledgment of the complaint with contact references of the respondent.

If within six weeks of receipt of a complaint the respondent has been unable to resolve the complaint to the satisfaction of the complainant, the respondent must inform the complainant that the complaint may be referred to the Ombud if the complainant wishes to pursue the matter within six months of receipt of such notification.

Any respondent must be informed of the complaint submitted to the Office to the extent necessary to respond thereto fully.

The respondent is entitled to submit any fact, information or documentation in relation to the complaint and must disclose relevant information or documentation to the Ombud.

If deemed necessary by the Ombud, the respondent must discuss the complaint with the Ombud and furnish such further relevant information as the Ombud may require.

A respondent is required to act professionally and reasonably and to cooperate with a view to ensuring the efficient resolution of the complaint.

## 2.6 ADMINISTRATIVE AND PROCEDURAL MATTERS<sup>35</sup>

The Ombud may decline to investigate a complaint, or may suspend the investigation, when to the knowledge of the Ombud the complainant intends proceeding to or has already embarked on litigation.

Information provided to the Ombud is confidential and may only be disclosed by the Ombud to FSCA or to another party to the complaint to the extent necessary to resolve the complaint, or where required under the FAIS Act or any other law.

The Ombud is not liable to be subpoenaed to give evidence on the subject of a complaint in any proceedings.

The Ombud may take such steps as deemed expedient to advise the public on the existence of the Office of the Ombud, the procedure for submitting a complaint to the Office, or on any other aspect concerning the Office in order to facilitate the submission or disposal of complaints.

## 2.7 DUTIES OF THE OMBUD

The Ombud must not proceed with an investigation unless the following stipulations has been complied with:

- ☐ The Ombud must inform every interested party to the complaint of the receipt of the complaint.
- ☐ Particulars provided must be enough to enable the parties to respond to the complaint received.
- ☐ All parties must be afforded the opportunity to submit a response to the complaint.<sup>36</sup>

The Ombud must, in the first instance, explore any reasonable prospect of resolving a complaint by a conciliated settlement (mediation) acceptable to all parties.<sup>37</sup>

## 2.8 RIGHTS OF THE OMBUD

The FAIS Act bestows on the Ombud the following rights:

- ☐ The Ombud may, in investigating or determining an officially received complaint, follow and implement any procedure which the Ombud deems appropriate, and may allow any party the right of legal representation.<sup>38</sup>
- ☐ The Ombud may, to resolve a complaint speedily by conciliation, make a recommendation to the parties, requiring them to confirm if they accept the recommendation and where the recommendation is not accepted by a party, requiring that party to give reasons for not accepting it. Where the parties accept the recommendation, such recommendation has the effect of a final determination by the Ombud.<sup>39</sup>
- ☐ The Ombud may, in a manner that the Ombud deems appropriate, delineate (assign) the function of investigation and determination between various functionaries of the Office or mandate any person or tribunal to perform such functions.<sup>40</sup>

For the purposes of any investigation or determination by the Ombud, the provisions of the Commissions Act, regarding the summoning and examination of persons and the administering of oaths or affirmations to them, the calling to produce books, documents and objects, and offences by witnesses apply with the necessary changes.<sup>41</sup>



## **2.9 TIME LIMITS<sup>42</sup>**

Time limits for any aspect of the proceedings in connection with a complaint may be fixed by the Ombud and must be honoured by the parties to the complaint.

Extensions of time limits imposed by the FAIS Act or the Ombud rules or the Ombud, may in the discretion of the Ombud be granted, and the parties involved notified accordingly.

If in the discretion of the Ombud a party has in a particular case not responded within a reasonable time, the Ombud may proceed to dispose of a complaint on the available facts and information.

## **2.10 DETERMINATIONS BY OMBUD**

### **2.10.1 Appeal against a determination**

A party against whom the Ombud has decided may apply to the Ombud for leave to appeal against the determination.<sup>43</sup>

Such application must be in writing, must be submitted to the Ombud within one month of the date of the determination, and must set out the grounds on which the application is made.<sup>44</sup>

A determination is only appealable to the board of appeal with the leave of the Ombud after taking into consideration the complexity of the matter or the reasonable likelihood that the board of appeal may reach a different conclusion.

The Ombud may request and consider submissions by any other party to the complaint concerning the merits of the application.<sup>45</sup>

If the Ombud refuses leave to appeal, the applicant must be advised in writing and given reasons for such refusal.<sup>46</sup>

The applicant may within one month of such refusal apply to the chairperson of the Financial Services Tribunal (previously Board of Appeal) for leave to appeal against the determination and advise the Ombud in writing accordingly.<sup>47</sup> The application must be submitted to the Financial Services Tribunal.

On receipt of leave to appeal, the Ombud must transmit to Financial Services Tribunal all the records concerning the complaint together with a copy of the determination and the Ombud's reasons therefor, and the Ombud's reasons for refusing leave to appeal.<sup>48</sup>

If the Ombud grants leave to appeal the applicant must be advised and the Ombud must transmit to the Financial Services Tribunal all the records concerning the complaints together with a copy of the determination and the Ombud's reasons therefor, and the Ombud's reasons for granting the leave to appeal.<sup>49</sup>

When granting or refusing leave to appeal, the Ombud must advise the other party to the proceedings of the outcome of the application for leave to appeal.<sup>50</sup>

If the Ombud refuses leave to appeal, the Financial Services Tribunal may permit such leave.<sup>51</sup>

If the Financial Services Tribunal becomes seized with the appeal, the appeal must be dealt with in terms of the rules applicable to that board, with the necessary amendments, and, unless requested by the Financial Services Tribunal, the Ombud shall not take part in the appeal proceedings and the appeal will continue between the parties to the complaint.<sup>52</sup>

On receipt of the final decision of the Financial Services Tribunal the Ombud must forward the decision to the clerk or registrar of that Court.

### 2.10.2 Stipulations regarding monetary awards

A monetary award (financial compensation) may provide for interest to be incurred on the amount payable from a date determined by the Ombud.<sup>53</sup> Any award of interest by the Ombud may not exceed the rate which a Court, would have been entitled to award, had the matter been heard by a Court.<sup>54</sup>

FSCA may by rule determine the following:

- ☐ The maximum monetary (financial) award for a particular kind of financial prejudice or damage.
- ☐ Different maximum monetary (financial) awards for different categories of complaints.
- ☐ The granting of costs, including costs against a complainant in favour of the Ombud or the respondent if in the opinion of the Ombud the conduct of the complainant was improper/unreasonable, or the complainant was responsible for an unreasonable delay in the finalisation of the relevant investigation. The amount payable under a cost award must bear interest at a rate and as from a date determined by the Ombud.<sup>55</sup>

A writ of execution may, in the case of a monetary award, be issued by the clerk or the registrar of the Court and may be executed by the sheriff after two weeks after the date of determination or the decision of the Financial Services Tribunal.<sup>56</sup>

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.<sup>57</sup>

## 2.11 CASE FEES, COSTS AND INTEREST<sup>58</sup>

The Ombud may, when accepting a complaint, require the respondent to pay a case fee to the Office not exceeding R1 000.

The case fee is non-refundable irrespective of the outcome of the matter.

Payment of a case fee may be enforced by the Office as a final determination by the Ombud.

When making a final determination, the Ombud may grant costs against the respondent or against the complainant, in either case in favour of the other party to the complaint or in favour of the Office of the Ombud.

Any costs awarded by the Ombud must be quantified by the Ombud with due regard to the nature of the complaint, the time spent on the complaint, the expense and inconvenience caused to a party, the conduct of a party in resolving the complaint and any other factor deemed by the Ombud to be appropriate.

Any award of interest and costs forms part of the relevant final determination of the Ombud. Interest will be levied from the date of the loss.

## 2.12 LIAISON BETWEEN OMBUD AND FINANCIAL SECTOR CONDUCT AUTHORITY<sup>59</sup>

The Ombud must report to FSCA such facts or information arising from complaints as may be capable of prompting FSCA to consider action under the FAIS Act, either generally or in relation to a particular matter.

Notwithstanding confidentiality constraints applicable to FSCA's office, the Ombud is entitled to information or sight of documentation in FSCA's possession which may be relevant in the consideration of a complaint.

The Ombud and FSCA must in addition regularly liaise and consult with one another as regards any matter relating to mutual administrative support and avoidance of overlapping of their respective functions.

## Topic 3 Rights of the Financial Sector Conduct Authority

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### 3.1 INTRODUCTION

The FAIS Act and subordinate legislation bestow certain rights on the Financial Sector Conduct Authority (FSCA) to protect the interest of clients, the general public and maintain a stable financial services sector.

This topic considers the rights of FSCA regarding the declaring of a practice as undesirable, the issuance of directives, and an application for business rescue, liquidation or sequestration of an FSP.

### 3.2 UNDESIRABLE PRACTICES

From time to time, FSCA may deem a general practice by FSPs as undesirable should the practice be considered not to be in the best interest of clients or the general public.

The FAIS Act makes provisions for the grounds on which a practice may be declared undesirable and the recourse FSCA may take in the event of non-compliance with the undesirable practice notice.

#### 3.2.1 Grounds on which a practice might be deemed undesirable

FSCA may, after consultation with the Advisory Committee, by notice in the government gazette declare a particular business practice to be undesirable for all or a specific category of FSPs.<sup>60</sup> FSCA will base his decision on the following grounds:

- ☐ The practice has or is likely to (directly or indirectly) have the following consequences:
  - Harming the relations between-
    - FSPs and FSPs
    - FSPs and clients
    - FSPs and the general public.
  - Unreasonably prejudicing any client.
  - Deceiving any client.
  - Unfairly affecting any client.
- ☐ If the practice is allowed to continue, one or more objectives of the FAIS Act will or is likely to be defeated.<sup>61</sup>

FSCA may not make such a declaration unless a notice of intention to make the declaration has been given by publication in the government gazette. The notice must include reasons for the intent as well invite interested persons to make written representations to FSCA regarding this matter within 21 days after publication of the notice.<sup>62</sup>

FSPs may not on or after the date of the publication of the notice of declaration of an undesirable business practice carry on the business practice concerned<sup>63</sup>.

### **3.2.2 Non-compliance with undesirable practice notice**

An FSP that does not stop an undesirable practice immediately after issuance of such a notice can be held liable for the maximum fine under the FAIS Act.

FSCA may also direct an FSP who does not comply with the notice to rectify or reinstate to the satisfaction of FSCA any loss or damage which was caused by the carrying on of the business practice concerned.<sup>64</sup> The FSP must do so within 60 days after such a direction is issued.<sup>65</sup>

In addition to issue a directive for the undesirable practice to stop and to reinstate any damage or loss caused, FSCA can take such an FSP to the enforcement committee.

Further to this, FSCA can also impose unlimited penalties, compensation orders and cost orders as per the Protection of Funds Act. Such orders are enforceable as if it was a judgment of the Supreme Court of South Africa.

## **3.3 DIRECTIVES ISSUED BY FSCA**

To ensure compliance with the FAIS Act, FSCA may issue a directive to any person or persons to whom the provisions of the FAIS Act apply. The directive may apply generally or be limited to a person or persons.

A directive issued takes effect on the date determined by FSCA in the directive.

Should the directive depart from the Promotion of Administrative Justice Act then the directive must include a statement to that effect and the reasons for such departure.

FSCA must, where a directive is issued to ensure the protection of the public in general, publish the directive on the official web site and any other media that FSCA deems appropriate to ensure that the public may access the directive.<sup>66</sup>

## Topic 4 Licensing requirements for Financial Services Providers

### 4.1 INTRODUCTION

The FAIS Act has made provision for standards to be set for FSPs, key Individuals and representatives. These standards are deemed the fit and proper requirements for FSPs and have been amended effective on 1 April 2018 as set out in Board Notice 194 of 2017.

For an FSP, key individual, representative or compliance officer to remain authorised that person must always comply with the fit and proper requirements to the extent applicable to the relevant categories and product categories in which a financial service is provided.

The elements of the fit and proper requirements as applicable to the different role players are outlined in the table following.

Table 4.1: Fit and proper elements and their applicability<sup>2</sup>

Fit & proper element	FSP	Key Individuals	Representatives	Compliance officers
Honesty, integrity & good standing	Applicable to members, directors	Applicable	Applicable	Applicable
Competence: Experience	-	Applicable	Applicable	Applicable
Competence: Qualifications	-	Applicable	Applicable	Applicable
CPD	-	Applicable	Applicable	Applicable
Operational ability	Applicable	Applicable	Applicable	Applicable
Financial soundness	Applicable	-	Applicable	Applicable

Competence means having the skills, knowledge and expertise needed for the proper discharge of a person's responsibilities in the performance of his or her functions.

### 4.2 APPLICATION FOR AUTHORISATION AS AN FSP

The FAIS Act stipulates that a person or entity may not act or offer to act as an FSP unless such a person has been authorised as such by the issuance of a financial services provider license.

The application for authorisation must be submitted in the manner prescribed by FSCA and be accompanied by such information to satisfy FSCA that the applicant complies with the following fit and proper requirements:

- Personal character qualities of honesty, integrity and good standing.
- Operational ability
- Financial soundness<sup>67</sup>

The application takes place through FSCA (FSCA) directly or through an authorised body i.e. an organisation that has been recognised to handle the application procedure on behalf of FSCA.<sup>68</sup>

An applicant must indicate in the application form which category of services or financial product authorisation is seek. Application for the approval of key individuals and compliance officer must accompany the application as well as a questionnaire completed by the appointed auditor in cases of FSPs receiving client funds.

### 4.3 COMPLIANCE FUNCTION

An FSP must ensure that a compliance function exists or is established as part of the risk management framework of the business, supervised by an approved compliance officer (where required in terms of the FAIS Act), or otherwise managed under control and responsibility of the provider alone.<sup>69</sup>

The compliance function is the function that must ensure that the FSP always adheres to the fit and proper requirements and the ongoing licensing responsibilities stipulated under the FAIS Act.

The key individual is responsible for establishing and maintaining the compliance function irrespective of the appointment of a compliance officer. The compliance officer oversees the compliance function as part of compliance monitoring that forms part of the compliance service. Representatives can also be reasonably expected to monitor their own compliance with the FAIS Act.

### 4.4 ONGOING LICENSING RESPONSIBILITIES

#### 4.4.1 Requirement regarding the display of license<sup>70</sup>

A licensee (FSP) has the following duties regarding the display of the FSP license:

- ☐ The FSP must display a certified copy of the FSP license in a prominent and durable manner within every business premises of the FSP where a financial service is rendered.
- ☐ The FSP must ensure that a reference to the fact that such a license is held is contained in all business documentation, advertisements and promotional material.
- ☐ The FSP must ensure that the license is always immediately or within a reasonable time available to any person requesting proof of license under authority of a law or for entering into a business relationship with the FSP.

#### 4.4.2 Requirement on FSPs to comply with all applicable laws<sup>71</sup>

The onus is on the FSP to ensure that key individuals and representatives comply with applicable laws on business conduct<sup>72</sup>.

Therefore, the FSP must be aware of any changes in or new legislation affecting the business of the FSP. Thus, it is important to ensure that procedures and systems are in place to identify changes in legislation. An example is a subscription to a service provider that specialises in updating business with changes, alerts and updates in legislation.

If such changes have been identified, employees and representatives must be informed and required action must be taken to ensure compliance with such changes.

#### 4.4.3 Record keeping duties

The subsections following consider the record keeping requirements under the FAIS act and General Code of Conduct.

##### I) Records that must be kept under the FAIS Act

Under the FAIS Act, an FSP is required to keep record of the following for a minimum period of 5 years from date of cancellation of transaction or date of incident (whichever is applicable):

- ☐ Known premature cancellations of transactions or financial products by clients.
- ☐ Complaints received together with an indication of whether or any such complaint has been resolved.
- ☐ The continued compliance with the initial and ongoing license requirements.
- ☐ Cases of non-compliance with the FAIS Act, and the reasons for such non-compliance.
- ☐ The continued compliance by representatives with qualification and duty requirements set out in the FAIS Act.<sup>73</sup>
- ☐ Record of advice if a transaction has been entered into.

##### II) General record keeping requirements under FAIS Act

General record keeping requirements are furthermore set out in the General Code of Conduct and prescribe the following:

- ☐ An FSP must have appropriate procedures and systems in place to record verbal and written communications relating to a financial service rendered to a client.
- ☐ All such records must be kept for a minimum period of five years after termination, to the knowledge of the FSP, of the product concerned or, in any other case, after the rendering of the financial service concerned.
- ☐ An FSP must be able to retrieve such records and any other material documentation relating to the client or financial service rendered within 7 days from request by Financial Sector Conduct Authority or client.
- ☐ An FSP must keep such client records and documentation safe from destruction.<sup>74</sup>
- ☐ Records may be kept in an appropriate electronic or recorded format, which are accessible and readily reducible to written or printed form.

FSPs are not required to keep the records themselves but must ensure that they are available for inspection within 7 days of FSCA's or client's request. The FSP must have a service level agreement that adheres to the stipulations of the FAIS Act with such an outsourced provider.

##### III) Voice logged records

A direct marketer must record all telephone conversations with clients during direct marketing and must have appropriate procedures and systems in place to store and retrieve such recordings.

Where an FSP advertises a financial service by telephone, an electronic voice logged record of all communications must be maintained. Where no financial service is rendered because of the advertisement, such record need not be maintained for a period exceeding 45 days.<sup>75</sup>

Where an FSP advertises a financial service by telephone a copy of all such records must be provided on request by the client or FSCA within 7 days of the request.

Records of advice furnished to a client telephonically need not be reduced to writing but a copy of the relevant voice logged records must be provided, on request, to the client or Financial Sector Conduct Authority within reasonable time.<sup>76</sup>



#### 4.4.4 Handle product in accordance with authorisation

The certified copy of the FSP license certificate contains the name of the licensee, the date of authorisation and the main category of financial services for which the FSP has been authorised. The annexure to the license certificate details the following:

- ☐ Product categories for which FSP has been licensed.
- ☐ Conditions and restrictions imposed on the license.
- ☐ Any exemptions applicable to the license.

An FSP must ensure that they have the necessary processes in place to ensure that a financial service is provided only for the products and services in which the license authorise them to do so and in accordance with any other conditions or restrictions imposed on the license.

#### 4.4.5 Accounting and audit requirements

An FSP must maintain full and proper accounting records on a continual basis, brought up to date monthly. The FSP must prepare annual financial statements accurately reflecting the financial status of the FSP.<sup>77</sup>

Such statements must be audited by an external auditor approved by FSCA.<sup>78</sup> Financial statements must be submitted to FSCA within 4 months of the financial year end of the FSP. The auditor must be registered in terms of the Auditors Profession Act.

The statements need not to be audited if FSCA has granted the FSP exemption from the requirement to appoint an external auditor.

The financial statements must fairly represent the state of affairs of the FSP's business and refer to any material matter which has affected or is likely to affect the financial affairs of the FSP.

The authorised financial services provider must maintain records in respect of money and assets held on behalf of clients, and must, in addition to and simultaneously with the financial statements submit to FSCA a report, by the auditor, which confirms the following:

- ☐ The amount of money and financial products at year end held by the FSP on behalf of clients.
- ☐ That such money and financial products were throughout the financial year kept separate from those of the business of the FSP and, report any instance of non-compliance identified in the course of the audit and the extent thereof.
- ☐ Any other information required by FSCA.<sup>79</sup>

An FSP may not change a financial year end without the approval of FSCA. The approval of FSCA is not necessary where a change of a financial year end has been approved by another regulatory authority, other than the Companies and Intellectual Property Commission, regulating the financial soundness of the FSP.

Where a change of a financial year end was approved by another regulatory authority, the FSP must inform FSCA of that approval within 14 days of the approval being granted.<sup>80</sup>

### **I) Exemption from requirement to appoint an auditor<sup>81</sup>**

A Category I FSP that does not receive premiums or otherwise receive or hold client's money or assets or a Category I FSP authorised in terms of Long-term Insurance A or friendly society benefits who receives or holds clients' money is exempted from appointing an auditor unless the FSP is required by any other law to have financial statement to be audited and reported on or it is obliged by any other law to have financial statements to independently reviewed by an independent reviewer.

A Category I FSP authorised in terms of Long-term Insurance A or friendly society benefits who receives or holds clients' money must appoint an accounting officer approved by FSCA. The accounting officer must certify and report on financial statements in conformity with the practices of the accounting officer's profession.

### **II) Duties of auditor**

Despite anything to the contrary contained in any law, the auditor of an FSP must report to and inform FSCA in writing of any irregularity or suspected irregularity in the conduct or the affairs of the FSP which the auditor became aware in performing functions as auditor and which, in the opinion of the auditor, is material.<sup>82</sup>

### **III) Termination of auditor**

If the appointment of an auditor of an authorised financial services provider is terminated the auditor must submit to FSCA a statement of what the auditor believes to be the reasons for that termination. If the auditor would, but for that termination, have had reason to submit to FSCA a report the auditor must submit such a report to FSCA.

FSCA may by notice require an FSP to terminate the appointment of an auditor, if the auditor concerned no longer complies with the requirements considered when the auditor was approved by FSCA or fails to comply with any provision of the FAIS Act in a material manner.

The notice takes effect on a date specified in the notice and may only be sent out after FSCA –

- ☐ Has given the FSP and the auditor concerned the reasons why the notice is to be issued.
- ☐ Has given the FSP and the auditor a reasonable opportunity to be heard.
- ☐ Has considered any submissions made by or on behalf of the FSP or the auditor.<sup>83</sup>

## **4.5 ENFORCEMENT ACTION**

When an FSP no longer meet the fit and proper requirements or adhere to the FAIS Act, FSCA will apply enforcement measures. Enforcement measures entails penalties or suspension and subsequent withdrawal of FSP license.

### **4.5.1 Penalty**

The maximum penalty that can be rewarded under the FAIS act is a maximum fine of R10 000 000 or imprisonment for a period not exceeding 10 years<sup>84</sup>, or to both such fine and such imprisonment.

A penalty will be issued for one or more of the following contraventions:

- ☐ Allowing a person to render financial services without being authorised as a representative.
- ☐ Conducting business with unauthorized FSPs.
- ☐ Not displaying the FSP license in the correct manner.
- ☐ Not withdrawing the authority of a representative or key individual to act on behalf of the FSP if role player is no longer competent to act as representative or key individual and to remove name from the applicable register.
- ☐ Not maintaining the fit and proper requirements applicable to members, directors, representatives, key individuals and compliance officers.
- ☐ Failure to maintain records in the prescribed manner.
- ☐ Failure to adhere to the provisions relating to the accounting and audit requirements.
- ☐ Failure to submit compliance reports.
- ☐ Failure to stop an undesirable practice immediately.
- ☐ Deliberately making a misleading, false or deceptive statement, or concealing any material fact regarding anything relating to the FAIS Act.
- ☐ Giving an appointed auditor or compliance officer information, which is false, misleading or concealing any material fact in the execution of duties imposed by the FAIS Act.
- ☐ Pretending to be an appointed or mandated representative of a licensed FSP when providing financial services to clients.

#### **4.5.2 Suspension of authorisation**

FSCA may at any time suspend or withdraw the FSP license if the FSP-

- ☐ No longer meet the requirements for the application of authorisation (fit and proper requirement for FSP).
- ☐ Did not make full disclosure to FSCA when applying for the license or furnished false or misleading information.
- ☐ Has failed to comply with the provisions of the FAIS Act.
- ☐ Is liable for a payment of a levy or administrative penalty to FSCA or any interest in respect thereof.
- ☐ Does not have an approved key individual.<sup>85</sup>
- ☐ Has failed to comply with any directive issued under the FAIS Act.
- ☐ Has failed to comply with any condition or restriction imposed under the FAIS Act.

#### **1) Suspension notice**

Before suspending any license, FSCA must inform the FSP (licensee) of the following:

- ☐ The intention to suspend and the grounds therefor.
- ☐ The intended period of suspension.
- ☐ Any terms to be attached to the suspension including the following:
  - A prohibition on concluding any new business by the licensee as from the effective date of the suspension and, in relation to unconcluded business, any such measures as FSCA may determine to protect the interests of the clients of the licensee.
  - Terms designed to facilitate the lifting of the suspension.

FSCA must give the FSP a reasonable opportunity to make a submission in response to the suspension notice.<sup>86</sup> FSCA must consider any such response and must notify the FSP [licensee] of the decision.<sup>87</sup>

Where the license is suspended, FSCA must make known the terms of the suspension or subsequent lifting thereof, by notice on the official FSCA website and, if necessary, by means of another appropriate public media announcement.<sup>88</sup>

## **II) Urgent suspension**

Subject to the provisions outlined, FSCA may under urgent circumstances (where FSCA is satisfied on reasonable grounds that substantial prejudice to clients or the general public may occur) suspend a license without notice.

## **III) Appeal against decision of decision-maker**

Any person or entity has the right to appeal against any decision of FSCA within 30 days of the person becoming aware of the situation. An appeal lodged in terms of this section does not suspend any decision of a decision-maker pending the outcome of an appeal, unless the Financial Services Tribunal, on application by a party, directs otherwise.<sup>89</sup>

## **IV) Conditions for reinstatement of a suspended license**

A suspended license could be reinstated by FSCA once all conditions attached to the suspension have been fulfilled, these may include the following provisions:

- ☐ All fit and proper requirements must be met.
- ☐ Providing acceptable reasons for non-disclosure of material information when applying for the license.
- ☐ All levies and administrative fines paid up to date to FSCA.
- ☐ Appointment of an approved key individual.
- ☐ Compliance with directive issued under the FAIS Act.
- ☐ Compliance with condition and restriction issued on the license.

FSCA may vary the period of suspension on good cause shown.

### **4.5.3 Withdrawal of authorisation**

FSCA may at any time withdraw any license (including a license under provisional or final suspension) if the information given at the time of approval was false or misleading or not full disclosure was made. A license may also be withdrawn if the FSP (licensee) has since approval contravened or failed to comply with any provision of the FAIS Act in a material manner.<sup>90</sup>

However, before withdrawing any license, FSCA must inform the FSP of the intention to withdraw and the grounds therefor.<sup>91</sup> FSCA must give the FSP a reasonable opportunity to make a submission in response to the withdrawal.<sup>92</sup> FSCA must consider any such response and must notify the FSP of the decision.<sup>93</sup>

Where the license is withdrawn, FSCA must make known the terms of the withdrawal, by notice on the official FSCA website and, if necessary, by means of another appropriate public media announcement.<sup>94</sup>

A new application is required if the license of an FSP was withdrawn.

A person whose license has been withdrawn is prohibited for a period specified by FSCA from applying for a new license, however, FSCA may on good cause vary any such period.<sup>95</sup>

## 4.6 LAPSING OF A LICENSE

A license lapses in the following circumstances:

- ☐ The FSP [licensee] is finally liquidated or dissolved.
- ☐ The business of the FSP is dormant.
- ☐ The FSP voluntarily and finally surrender the license to FSCA.
- ☐ The licensee, being a natural person (sole proprietor FSP) becomes permanently incapable of carrying on the business, is finally sequestrated or dies.<sup>96</sup>

The licensee, key individual or another person in control of the affairs of the licensee must inform FSCA of the lapsing of the license and the reasons therefor.

FSCA may make known any such lapsing by notice on the official FSCA website and, if necessary, by means of other appropriate public media announcement.<sup>97</sup>

Table 4.2: Difference between suspension/withdrawal and lapsing of license

Suspension or withdrawal of FSP license	Lapsing of FSP license
Initiated by FSCA following acts or omissions by the FSP	Initiated by the FSP, following an event which gave reason for lapse
Financial Sector Conduct Authority may allow reinstatement of suspended license under certain conditions	No provisions in the FAIS Act for reinstatement
After withdrawal, the person may apply but the fact the license was withdrawn previously will count negatively against the person, and the application may not be approved due to this fact	After lapsing, FSP may apply immediately again for a new license
Accreditation in terms of the Medical Schemes Act will be suspended or withdrawn if the license is suspended or withdrawn and vice versa	Accreditation in terms of the Medical Schemes Act will also be deemed to have lapsed.

## 4.7 PROHIBITION TO USE A SUSPENDED/LAPSED/WITHDRAWN LICENSE

During any period of suspension (provisional or final), the FSP is regarded as not authorised to act as an FSP<sup>98</sup> and may not use the license or a copy thereof for business purposes.<sup>99</sup>

A person may not in any manner make use of lapsed/ withdrawn license or a copy thereof for business purposes.

## 4.8 COUNCIL FOR MEDICAL SCHEMES ACCREDITATION

FSPs providing financial services in Health Service Benefits must have accreditation as brokerage from the Council for Medical Schemes (CMS) under the Medical Schemes Act before a financial services license will be approved and must remain authorised to maintain their FSP licensed status in terms of this category.

A representative of an FSP providing financial services in Health Service Benefits must also be accredited as a broker or apprentice broker (if working under supervision) in terms of the Medical Schemes Act. A representative no longer having accreditation in this regard, will not be permitted to provide a financial service longer in terms of Health Service Benefits.

The status of the CMS accreditation will affect the FSP license in the following ways:

- ☐ If broker accreditation is withdrawn the FSP license will be suspended.
- ☐ If CMS accreditation of FSP is suspended the FSP license will also be suspended and vice versa.
- ☐ If CMS accreditation of FSP is withdrawn the FSP license will also be withdrawn and vice versa.
- ☐ If CMS accreditation of FSP is lapsed the FSP license will also be lapsed and vice versa.

## **4.9 ADMINISTRATIVE PENALTIES**

### **4.9.1 Late submission**

Where an FSP does not submit a return, information or document to FSCA as required by the FAIS Act, that FSP is liable, in addition to other legal action instituted by FSCA, to pay a fine of up to R1 000 per day for every day that the return, information or document is late, plus interest.

### **4.9.2 Penalties relating to the FAIS Ombud**

If a person does something in relation to the FAIS Ombud or in relation to an investigation by the Ombud that could be regarded as contempt of court by a court, the person is guilty of an offence and liable on conviction to a penalty, which could have been imposed by a court.

A person who anticipates a determination of the Ombud and does something to influence the determination or who wilfully interrupts any proceedings of the Ombud, is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding one year.

## Topic 5 Fit and proper requirements for representatives

### 5.1 INTRODUCTION

As a representative render a financial service on behalf of an FSP, the representative does not act for himself, but for the FSP. Therefore, representatives must be authorised by an FSP to provide a financial service on their behalf.

A representative can be authorised either by employment contract or by mandate. A mandated representative can either be a natural person or an entity. If an entity is appointed as a representative it is referred to as a juristic representative.

Although FSPs are obligated to apply to FSCA for authorisation, a representative is not required to apply with FSCA for authorisation i.e. the representative is appointed and approved by the FSP. However, the representative needs to be registered by FSCA as representative and this is done when the FSP submits the register of representatives.

A representative not meeting some of the fit and proper requirements may work under supervision while obtaining those requirements, subject to certain conditions.

The duty lays with the FSP to ensure that the representative meet the fit and proper requirements prescribed by the FAIS Act before appointment. If the FSP, appoints a representative that does not adhere to the fit and proper requirements or the requirements for providing services under supervision, the FSP can be liable for a penalty.

Furthermore, the FSP must ensure that representatives acting on their behalf adhere to the following responsibilities:

- ☐ A representative must be able to provide clients with proof (as certified by the FSP) that he/she is authorised to act as representative of the FSP
- ☐ The representative must maintain their fit and proper status.
- ☐ If the representative is working under supervision, the fit and proper requirements must be met by the deadlines stated.
- ☐ A representative must comply with the FAIS Act and other relevant legislation which apply to the conduct of business.

If a representative also acts as a key individual, it follows that the representative will also have those responsibilities, in addition to the representative responsibilities.<sup>100</sup> Such a representative must then also meet the requirements for that specific category of key individual/

### 5.2 REGISTER OF REPRESENTATIVES

The FSP is required to maintain a register of representatives. The details of all natural and juristic representatives of the FSP must be entered into the register of representatives. Persons that render financial services employed by juristic representatives must also be appointed as representatives of the FSP and the details of such persons entered onto the register of representatives.

The register must be updated within 15 days of change and be available to FSCA for reference or inspection purposes<sup>101</sup>. The amended register of representatives must be submitted to FSCA within 15 days of amendment of the register.

Where an FSP does not maintain the register of representative or does not submit an amended register, that FSP is liable, in addition to other legal action instituted by FSCA, to pay a fine of up to R1 000 per day for every day that the return, information or document is late, plus interest.



### 5.2.1 Details to be contained in the register of representatives

The register of representatives must contain the information detailed in the subsections following.

#### I) Details to be provided by juristic representatives

The details to be provided regarding a juristic representative are as follows:

- |  |  |
|--|--|
| <input type="checkbox"/> Name and country of registration  | <input type="checkbox"/> Physical address.   |
| <input type="checkbox"/> Registration or reference number. | <input type="checkbox"/> B-BBEE status of representative.                              |
| <input type="checkbox"/> Description of person             | <input type="checkbox"/> Details of the key individual of the juristic representative. |

#### II) Details to be provided by natural representatives

The following details are to be provided by natural representatives:

- |   |  |
|---|--|
| <input type="checkbox"/> Title of representative.                     | <input type="checkbox"/> Nationality and country of residence.             |
| <input type="checkbox"/> Full names.                                  | <input type="checkbox"/> Physical address (may not be that of the FSP).    |
| <input type="checkbox"/> Surname and previous surnames if applicable. | <input type="checkbox"/> Mobile phone number (may not be that of the FSP). |
| <input type="checkbox"/> Date of birth.                               | <input type="checkbox"/> E-mail address (may not be that of the FSP).      |
| <input type="checkbox"/> Gender and race.                             |  |

#### III) Other information to be provided for juristic and natural representatives

Other details with regard to juristic and natural representatives to be provided are as follows:

- ☐ The date of appointment of representative in respect of the product categories and types of services.
- ☐ The date representative was placed working under supervision and date of completion of supervision.
- ☐ The broker accreditation number issued by the Medical Schemes Council in terms of the Medical Schemes Act if representative is to provide a financial service in terms of Health Service Benefits.
- ☐ Details of recognised qualification(s) completed by representative: Qualification code, institute code and year obtained.
- ☐ Which regulatory examinations were completed by representative?
- ☐ Debarred status and date of debarment.

### 5.2.2 The purpose of the register of representatives

The purpose of the register are as follows:

- ☐ Providing a record of all representatives of an FSP.
- ☐ Enabling FSCA to maintain a central register with all the information gathered from all the register of representatives.
- ☐ From the central register FSCA makes a look up facility available to public to look up names and the product categories for which the person is authorised to provide financial services in.
- ☐ Calculation of the levies (fees) payable by the FSP in respect of each representative and key individual.

### 5.3 REQUIREMENTS APPLICABLE TO REPRESENTATIVES

Representatives must meet all of the following elements of fit and proper requirements, the details of which is considered in the sections following:

- ☐ Personal character qualities of honesty and integrity and good standing
- ☐ Financial Soundness
- ☐ Operational Ability
- ☐ Competency
- ☐ Continuous Professional Development

### 5.4 HONESTY, INTEGRITY AND GOOD STANDING

The personal characteristics of representatives are clearly very important as clients rely on representatives to guide them honestly with respect to advice on financial services and products.

An FSP must assess if a representative is guilty of one of the following transgressions or offences:

- ☐ The person has been found guilty (and the conviction has not been expunged) in any criminal proceeding or liable in civil proceeding by a court of-
  - An offence relating to the regulation or supervision of a financial institution as defined in the financial Institutions Act or a corresponding offence under the law of a foreign country.
  - Theft, fraud, dishonesty, perjury, unprofessional or dishonourable activity or breach of fiduciary duty.
  - An offence under the Prevention of Corruption Act or the Prevention of Corrupt Activities Act or a corresponding offence under the law of a foreign country.
- ☐ The person has been convicted (and that conviction has not been expunged) of any other offence committed after 1996 where the penalty imposed for the offence was or may be imprisonment without the option of a fine.
- ☐ The person has accepted civil liability for theft, fraud, forgery, uttering a forged document, perjury or any conduct involving dishonesty, breach of fiduciary duty, misrepresentation or negligent, dishonourable and unprofessional conduct.
- ☐ The person has been the subject of frequent or material preventative, remedial or enforcement actions by FSCA or a regulatory authority.
- ☐ The person has been removed from an office of trust for theft, fraud, forgery, uttering a forged document, misrepresentation, dishonesty, breach of fiduciary duty or business conduct.
- ☐ The person has breached a fiduciary duty.
- ☐ The person has been suspended, dismissed or disqualified from acting as a director, managing executive, public officer, auditor or statutory actuary (or his or her alternate) under any law or any action to achieve one of the aforementioned outcomes has been instituted against the person.
- ☐ The person has been refused a registration, approval, authorisation or license to carry out a trade business or profession.
- ☐ The person has had a registration, approval, authorisation or license to carry out a trade business or profession suspended, revoked, withdrawn or terminated by a regulated authority.

- ☐ The person has been denied membership of a statutory professional or voluntary body recognised by FSCA because of negligence, incompetence or mismanagement of sufficient importance to impugn the honesty and integrity of the person in question.
- ☐ The person had been found guilty by any regulatory or supervisory body (inside or outside the South Africa) of negligence, incompetence or mismanagement of sufficient importance to impugn the honesty and integrity of the person in question.
- ☐ The person has been disciplined, reprimanded, disqualified or removed in relation to matters relating to honesty and integrity, incompetence or business conduct by a professional body or regulatory authority or any other action to achieve one of the aforementioned outcomes has been instituted against the person.
- ☐ The person has knowingly been untruthful or provided false or misleading information to FSCA or a regulatory authority or the person has been uncooperative in any dealings with FSCA or a regulatory authority.
- ☐ The person has demonstrated a lack of readiness and willingness to comply with legal, regulatory or professional requirements and standards.
- ☐ The person has been found to be not fit and proper by FSCA or a regulatory authority in any previous assessment of fit and proper and this has not been remedied.
- ☐ The person has failed to disclose information required to be disclosed in terms of the FAIS Act, including failure to disclose information relating to honesty, integrity and good standing.
- ☐ The person has been involved or is involved as a director, trustee, member, partner, controlling shareholder or managing executive or is concerned in the management of a business that has been subject to any of these conducts aforementioned while that person has been connected with that organisation or within one year of that connection.
- ☐ The person has been involved or is involved as a director, trustee, member, partner, controlling shareholder or managing executive or is concerned in the management of a business that has been placed in liquidation or business rescue while that person has been connected with that organisation or within one year of that connection.<sup>102</sup>

If a representative is guilty of any of the above mentioned, the key individual must make a final decision on the honesty, integrity and good standing status of the person.

In assessing whether the person has honesty, integrity and good standing the key individual must have due regard to the following:

- ☐ The seriousness of a person's conduct and the surrounding circumstances.
- ☐ The relevance of such conduct with relation to the duties to be performed by the person.
- ☐ The passage of time since the occurrence of the conduct.<sup>103</sup>

The person in question must disclose to FSCA promptly and on own initiative any information which may be relevant in determining that that person complies or continues to comply with the requirements relating to honesty and integrity and good standing.<sup>104</sup>

## I) Definitions

A regulatory authority includes the following:

- ☐ Any organ of state as defined in the Constitution of the Republic of South Africa, responsible for the supervision or enforcement of legislation, or a similar body designated in the laws of a country other than South Africa to supervise or enforce legislation of that country.
- ☐ A market infrastructure that is responsible for the supervision of persons authorised by such infrastructure under the Financial Markets Act, 2012.
- ☐ An Ombud established under Financial Sector Conduct Authority legislation or a recognised Scheme under the Financial Services Ombud Schemes Act, 2004.<sup>105</sup>

## 5.5 OPERATIONAL ABILITY

A representative of an FSP must have the operational ability to effectively function as a representative of the FSP or perform the activities for which that person was appointed.

A juristic representative must always have at least one key individual responsible for managing or overseeing the financial services rendered by the representative.<sup>106</sup>

## 5.6 FINANCIAL SOUNDNESS REQUIREMENTS

An FSP must ensure that where it appoints a natural person as a representative that the person is not-

- ☐ Declared insolvent or provisionally insolvent or is not subject to any pending proceeding which may lead to this.
- ☐ Under liquidation, provisional liquidation or business rescue or is not subject to any pending proceeding which may lead to this.<sup>107</sup>

Apart from this requirement, there is also additional financial soundness requirements applicable to juristic representatives.

## 5.7 COMPETENCY REQUIREMENTS

The competency requirements for representatives include the minimum experience and qualifications a representative must meet before appointment or must obtain whilst working under supervision.<sup>108</sup>

All the competence requirements must be met except if FSCA exempted a representative from any of the requirements while rendering a financial service under supervision. A sole proprietor FSP cannot work under supervision and therefore must meet all competency requirements before a license will be granted.<sup>109</sup>

Where a representative is responsible for more than one product, only the highest qualification requirement should be met.

There are different requirements for different date of first appointments (DOFA). The date of first appointment is the first date on which a representative was appointed by an FSP to render financial services in relation to a specific subcategory.

Representatives appointed between 2004 and 2010 are subject to transitional arrangements. These stipulations determine the type of qualification which is required as well as the arrangements regarding the requirements in terms of the regulatory examinations.

### 5.7.1 Experience requirements

The fit and proper requirements set different requirements with respect to experience for the different categories of representatives. The length of experience is also dependent on whether the representative provides advise or intermediary service. The requirements are outlined in the table following.

*Table 5.1: Experience requirements relative to different categories and product categories<sup>110</sup>*

Subcategory name	Cat I Advice Experience	Cat I Intermediary Experience	Cat II/II A Experience
Long-term insurance subcategory A	6 Months	2 Months	N/A
Friendly Society Benefits			
Short-term insurance Personal Lines			
Short-term insurance Personal Lines A 1			
Short-term insurance commercial lines			
Long-term insurance: Subcategory B1	1 Year	6 Months	2 Years
Long-term insurance subcategory C			
Long-term insurance: Subcategory B2			
Long-term insurance: Subcategory B2 A			
Long-term insurance: Subcategory B1 A			
Retail Pensions Benefits	2 Years	1 Years	3 Years
Pension Fund Benefits			
S & I: Shares			
S & I: Money Market instruments			
S & I: Debentures and securitized debt			
S & I: Warrants, certificates and other instruments acknowledging debt			
S & I: Bonds			
S & I: Derivative instruments excluding warrants			
Structured deposits			
Securities and instruments			
Participatory interest in a CIS hedge fund	1 Year	1 Year	2 Years
Collective investment schemes			
Forex investment business	2 Years	1 Year	3 Years
Health Service Benefits	2 Years	2 Years	N/A
Long-term deposits	6 Months	3 Months	1 Year
Short-term deposits			

### I) Conditions that the experience must met

The experience must be practical experience gained specifically in terms of the product categories for which the representative is appointed, providing the following:

- ☐ The experience involved the active and ongoing gaining of knowledge, skills and expertise required in terms of the FAIS Act.
- ☐ The experience was obtained through the active involvement in providing financial services and could have been gained while working under supervision for the minimum experience period, if proof of such experience can be submitted.<sup>111</sup>
- ☐ The experience could have been gained within or outside the borders of South Africa.
- ☐ The experience could have been gained in intermittent periods. The dates relating to the experience must be clearly stated.
- ☐ Experience gained prior to the implementation of the FAIS Act is acceptable.
- ☐ Experience gained more than 5 years prior to the application is not acceptable i.e. experience *expires* after 5 consecutive years.
- ☐ The experience could have been gained simultaneously in multiple product categories, if proof of such experience can be submitted.<sup>112</sup>

### 5.7.2 Qualification requirements

The new fit and proper requirements are moving away from the original 30/60 credit requirements with the introduction of product specific training, class of business training, recognised qualification and regulatory examination requirements. These requirements are considered in the subsections following:

However, representatives performing executing of sales is exempted from the class of business training, recognised qualification and regulatory examination requirements if they meet the following minimum requirements:

- ☐ The representative has a Grade 12 National Certificate or NQF level 4 or higher qualification.
- ☐ The execution of sales is performed in accordance with a script approved by a key individual and the relevant governance structure of the FSP and under the direct oversight of a key individual.
- ☐ Where the execution of sales is performed by telephone, all conversations with clients are recorded and the recordings are stored and retrievable.
- ☐ The FSP has sufficient and adequate controls in place to ensure and to monitor that the representative does not furnish the client with advice and that the sales practices are not misleading, false, inappropriate to the expected target clients or will not result in unfair outcomes for the client.
- ☐ The FSP must on a regular basis review the recordings and must monitor the representative to ensure that they do not deviate from the script or supplement the script with content not approved.
- ☐ The FSP must on a regular basis review and monitor the adequacy and efficiency of its controls and quality assurance processes in relation to the execution of sales.
- ☐ The FSP must on a regular basis review the script for appropriateness and compliance with applicable legislation.<sup>113</sup>

## **I) Product specific training**

Product specific training is training in respect of a particular financial product and which training is assessed, including any amendment to that particular financial products.<sup>114</sup>

### **Exemptions applicable to product specific training<sup>115</sup>**

The competency requirements relating to product specific training does not apply to representatives in Category II, IIA or III provided that-

- ☐ Such representatives have adequate, appropriate and relevant knowledge and expertise in respect of financial services, financial products and functions that it performs.
- ☐ Comply with the minimum fit and proper requirements.
- ☐ Maintain their competence.

### **Requirements in terms of product specific training**

An FSP and representative must prior to the rendering of any financial service in respect of a particular financial product complete the product specific training relevant to that financial product and for which they are authorised or in respect of which authorisation is sought.<sup>116</sup>

Representatives appointed before 1 April 2018 who no longer work under supervision is deemed to have completed the product specific training. This exemption is only applicable to particular financial products for which the representative was authorised. Such a representative still needs to undergo product specific training in the event to where an amendment to the product occurred after 1 April 2018<sup>117</sup>

## **II) Class of business training**

Class of business training is training in respect of a class of business and which the training is provided and assessed by an accredited provider or an education institution.

An accredited provider is an entity that is registered with the Quality Council as having the capacity to offer qualifications registered on the National Qualifications Framework (NQF) at the required standard or a foreign person that is so recognised by an authority that is equivalent to a Quality Council.<sup>118</sup>

Education institution has the meaning assigned to it in section 1(1) of the NQF Act.

Assessed in relation to competence requirements, means the structured process of gathering reliable evidence to determine the level of a person's competence in relation to a pre-determined standard, and the extent to which the person's competence meet the pre-determined standard.

The class of business training may be undertaken separately from or in combination with product specific training or a recognised qualification provided a person is able to demonstrate that the content of the qualification meets the criteria referred to.<sup>119</sup>

Where a financial product incorporates one or more other underlying financial products, the class of business training must include training in respect of the underlying product.<sup>120</sup>

### **Exemptions applicable to class of business training<sup>121</sup>**

The competency requirements relating to class of business training does not apply to representatives that are authorised to only render financial services or manage financial services in relation to-

- ☐ Perform execution of sales in respect of a tier 1 financial product provided that the minimum exemption provisions are complied with.
- ☐ Perform financial service in respect of tier 2 financial products.

### **Requirements in term of class of business training**

An FSP and representative must prior to the rendering of any financial service in respect of a particular financial product complete the class of business training relevant to that financial product and for which they are authorised or in respect of which authorisation is sought.<sup>122</sup>

An FSP representative other than a representative working under supervision appointed prior to 1 April 2018 is deemed to have completed the class of business training in respect of the financial products for which they were appointed.<sup>123</sup>

Representatives may work under supervision until the class of business training is obtained, for a period of not more than 12 months.

### **III) Recognised qualifications**

In addition to meeting the minimum qualification requirement, representatives must also have a recognised qualification as determined by FSCA.

Recognised qualification is approved by FSCA based on a subject list. The latest list of recognised qualifications is published in Board Notice 76 of 2015 with an additional list published in Board Notice 51 of 2017. The reader must familiarise himself with the qualifications listed in this notice. This is published in the government gazette.

Representatives may work under supervision until the recognised qualification is obtained, for a period of not more than 6 years.<sup>124</sup>

A representative registered for more than one category/subcategory need to meet the most onerous requirement.<sup>125</sup>

However, the recognised qualification requirement does not apply to representatives authorised only to render financial services for Long-term Insurance Subcategory A and/or Friendly Society benefits or for Category I representatives performing execution of sales if the minimum requirements are met.

### **IV) Regulatory Examinations<sup>126</sup>**

The regulatory examinations consist of five separate examinations and the examination that is applicable depends on the role and category of the person.

- ☐ **RE1:** Competency needed by key individual in all categories on appointment.
- ☐ **RE3:** Competency needed by key individual in category II/IIA on appointment.
- ☐ **RE4:** Competency needed by key individual in category III on appointment.
- ☐ **RE5:** Competency needed by representatives in all categories within 2 years of date of first appointment.



The regulatory examination does not apply to representatives that are authorised to only render financial services or manage financial services in relation to-

- ☐ Execution of sales in respect of a tier 1 financial product provided that the minimum exemption provisions are complied with.
- ☐ Financial service in respect of tier 2 financial products.<sup>127</sup>

### 5.7.3 Transitional Period

Transitional arrangements apply to representative whose date of first appointment is before 31 December 2009.

Representatives appointed between 2004 – 2007 had to complete the 30/60 credit requirement within 3 years from date of first appointment.

Representatives appointed between 2008 - 2009 could choose to either complete the 30/60 requirements within 3 years of date of first appointment or to complete a recognised qualification within 5 years of date of first appointment.

All representatives appointed in the transitional period had until December 2013 to be found competent in the RE5.

The representatives appointed in the transitional period is deemed to meet the qualification requirements but only insofar it relates to that particular subcategory.<sup>128</sup>

## 5.8 CONTINUOUS PROFESSIONAL DEVELOPMENT REQUIREMENTS

### 5.8.1 General requirements

A representative must maintain the required competence to render or manage or oversee the financial services for which the representative is authorised by complying with the minimum CPD requirements stipulated.

A representative must ensure that the type and combination of CPD activities undertaken-

- ☐ Are relevant to the functions and role of the representative.
- ☐ Contributes to the skill, knowledge, expertise and professional and ethical standards of the representative.
- ☐ Addresses any identified needs or gaps in the technical knowledge of representative.
- ☐ Addresses any identified needs or gaps the generic knowledge and understanding of the environment in which the financial service is rendered or managed or overseen.
- ☐ Addresses any identified needs or gaps in the knowledge and understanding of applicable laws.
- ☐ Adequately considers changing internal and external conditions relevant to the classes and subclasses of business, the category of financial services and the financial products for which the representative is authorised.<sup>129</sup>

### 5.8.2 Minimum CPD hours

Representative must complete the required number of hours of CPD activities within a CPD cycle. A CPD cycle is a period of 12 months and starts on 1 June every year and end 31 May the following year.<sup>130</sup>

The minimum CPD hours prescribed depends on the quantity of business classes and subclasses in which the representative renders a financial service in. The requirement is detailed in the table following<sup>131</sup>.

Table 5.2: Required CPD hours per cycle

Number of subclasses of business	Number of class of business	Number of CPD hours per cycle
1	1	6 hours
2 or more	1	12 hours
1 or more	2 or more	18 hours

Please note that CPD points and CPD hours is the same concept.

A representative must submit evidence of their CPD activities to the FSP within 15 days after expiry of the CPD cycle.<sup>132</sup>

A representative that is authorised for a period of less than 12 months in a particular CPD cycle must by the end of the CPD cycle complete a pro-rate minimum number of CPD hours calculated as follows<sup>133</sup>:

*Required pro rate CPD hours*

$$= \text{Number of annual required CPD hours} \times \frac{\text{Number of months authorised in cycle}}{12}$$

An FSP may pro-rata reduce the CPD hours in respect of a representative for a period of time which that representative is continuously absent from work if that absence is due to one of the following:

- ☐ Maternity, paternity or adoption leave.
- ☐ Long-term illness or disability.
- ☐ The representative's responsibilities to care for a family member of that representative who has a long-term illness or disability.<sup>134</sup>

The reduced hours must be calculated as follows:<sup>135</sup>

*Required pro rate CPD hours*

$$= \text{Number of annual required CPD hours} \times \frac{(12 - \text{number of months absent in cycle})}{12}$$

An FSP may not reduce the CPD hours of a representative for consecutive CPD cycles except where the absence commenced in a particular CPD cycle and uninterruptedly continues into the consecutive CPD cycle.<sup>136</sup> The reduction may only be applied for a maximum period of three consecutive CPD cycles.<sup>137</sup>

### 5.8.3 CPD activities

A CPD activity is an activity that is accredited by a Professional body that has been allocated an hour value of part thereof and is verifiable. CPD activities excludes an activity performed towards a qualification and product specific training.<sup>138</sup>

Verifiable means activities that can be objectively verified and includes evidence of the identity of the person who took part in such activities and proof of the completion thereof.<sup>139</sup>

A professional body is a body recognised by the South African Qualifications Authority (SAQA) as a professional body for purposes of the NQF Act.<sup>140</sup>

An FSP and representative must ensure that the CPD activities are tailored to meet the specific knowledge and skills, needs and/or gaps arising from changing internal and external conditions having cognisance of classes and subclasses of business and the financial product category for which it is authorised.<sup>141</sup>

#### 5.8.4 Exemptions to requirements

The continuous professional development (CPD) requirements does not apply to representatives that are authorised to only render financial services or manage financial services in relation to-

- ☐ Rendering a financial service in respect of a tier 2 financial product.
- ☐ Rendering intermediary services in respect of a tier 1 financial product.<sup>142</sup>

## Topic 6 Supervision arrangements

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### 6.1 INTRODUCTION

A representative other than a sole proprietor may work under supervision if the representative does not meet the prescribed requirements of competency. Board Notice 86 of 2018 stipulates the conditions for which representatives may render services whilst working under supervision.

### 6.2 DEFINITIONS

Competency requirements include the following:

- ☐ Experience requirements
- ☐ Qualification requirements
- ☐ Regulatory exam requirement
- ☐ Class of business training requirement

Supervised representative means a representative who does not meet one or more of the competency requirements and who renders financial services under supervision.

Supervision means the guidance, instruction and oversight by any means or medium by the supervisor using a variety of assessment, observation and oversight methods or tools that are appropriate for the assessed level of competence of the supervised representative.

### 6.3 ENTRY LEVEL REQUIREMENTS

Category I & IV representatives must have a Grade 12 National Certificate or a qualification equivalent to a Grade 12 National Certificate on appointment before being placed to render services under supervision. This does not apply to Category I representatives that is appointed only to perform the execution of sales or to representatives in respect of long-term insurance A and/or friendly society benefits.

Category I representatives that is appointed only to perform the execution of sales must have a Grade 10 or academic achievement equivalent to Grade 10 before being placed to render services under supervision.

Category II, IIA or III representatives must have a recognised qualification recognised for that category and subcategory on appointment before being placed to render services under supervision.

## 6.4 COMPLIANCE PERIODS

### 6.4.1 Regulatory examination requirement

A supervised representative must comply within the regulatory examination requirements within 2 years from date of first appointment.

A supervised representative that only has a date of first appointment to render financial services in respect of a tier 2 product or perform the execution of sales must within 2 years from the date on which it was first appointed as representative to render financial services, other than the execution of sales, in respect of a tier 1 financial product, comply with the applicable regulatory examination requirement.

### 6.4.2 Class of business training requirement

A supervised representative must within 12 months from the date on which a person was first appointed as a representative in respect of a particular financial product comply with the class of business training requirements applicable to that financial product.

### 6.4.3 Qualification requirement

A supervised representative must within six years from the date on which a person was first appointed as a representative in respect of a particular financial product comply with the qualification requirements applicable to that financial product.

### 6.4.4 CPD requirements

A supervised representative, other than a supervised representative that render financial services in respect of tier 2 products or the perform the execution of sales must comply with the applicable CPD requirements from the date on which the supervised representative meets the class of business training requirements, regulatory examination requirements and qualification requirements or after six years from date of first appointment, whichever occurs first.

A supervised representative that only has a date of first appointment to render financial services in respect of a tier 2 financial product or perform the execution of sales, and who after that date is appointed as a representative to render financial services, other than the execution of sales, in respect of a tier 1 financial product, must comply with the applicable CPD requirements from the date on which the supervised representative meets the class of business training requirements, regulatory examination requirements and qualification requirements applicable to that Tier 1 financial product or after six years from the date on which the supervised representative was first appointed as a representative to render financial services, other than the execution of sales, in respect of a tier 1 financial product, whichever occurs first.

Where the compliance date does not coincide with the start of a CPD cycle, the CPD hours for that particular CPD cycle must be calculated as follows:

$$\text{Required pro rate CPD hours} = \text{Number of annual required CPD hours} \times \frac{\text{Numer of months authorised in cycle}}{12}$$

#### 6.4.5 Experience requirements

A supervised representative, insofar it relates to the experience requirements must work under supervision for at least the minimum experience periods applicable to the categories of financial services and financial products for which it is appointed to work under supervision; and remain under supervision until being assessed as having the required experience in respect of the particular category financial services and financial products for which it is appointed.

The minimum experience periods -

- ☐ May run concurrently where a supervised representative is appointed for multiple categories of financial services and/or financial products.
- ☐ Commence on the date the supervised representative was first appointed as a representative in respect of the particular category of financial service or financial product.

### 6.5 SUPERVISION AGREEMENT

The FSP and supervised representative, prior to the rendering of services under supervision, must enter into a written supervision agreement, which agreement may form part of any other relevant agreement or the FSP's performance management process.

The supervision agreement must-

- ☐ Identify the supervisor.
- ☐ Set out the tasks and functions the supervised representative performs on behalf of the FSP, including the categories of financial services and financial products in respect of which the supervision agreement applies.
- ☐ Set out the appropriate and relevant knowledge, skills and expertise required to competently perform the tasks and functions referred to in aforementioned bullet point.
- ☐ Set out the training needs of the supervised representative and the training program that will be implemented to address those needs.
- ☐ Set out the supervision arrangements, including the —
  - Duties and responsibilities of the supervisor and supervised representative.
  - Supervision methodology, tools, processes and procedures, including the oversight, monitoring and assessment methodologies, processes and procedures.
  - Criteria and procedures to assess whether it is appropriate for the supervised representative to work under a reduced level of intensity of supervision.
  - Criteria against which the supervised representative will be assessed and the intervals of the assessments.
  - Sign-off criteria by the supervisor.

## 6.6 DUTIES OF THE FSP

An FSP that appoints a supervised representative to work under supervision must have the operational ability, including adequate and appropriate human, technical and technological resources, controls and procedures and an adequate and effective governance framework to —

- ☐ Appoint supervised representatives.
- ☐ Monitor and supervise supervised representatives, including monitoring and supervising compliance with the conditions stipulated in the exemption notice and the supervision agreement.

An FSP that appoints a supervised representative to work under supervision must ensure that such appointment does not —

- ☐ Materially increase any risk to the FSP or the fair treatment of clients.
- ☐ Materially impair the quality of the governance framework of the FSP, including the FSP's ability to manage its risks and meet its legal and regulatory obligations.
- ☐ Compromise the fair treatment and protection of or continuous and satisfactory service to clients.
- ☐ Prevent the FSP from acting in the best interests of its clients.

An FSP that appoints a supervised representative to work under supervision must assign a supervisor to the supervised representative that —

- ☐ Has adequate, appropriate and relevant skills, knowledge and expertise in respect of the financial services, financial products and functions that the representative performs.
- ☐ Meets the prescribed minimum competency requirements, including CPD requirements, applicable to a representative appointed for the financial services and financial products for which the supervised representative will be working under supervision; or a key individual approved to manage the financial services and class of business for which the supervised representative will be working under supervision.
- ☐ Has the required coaching and assessment skills.
- ☐ Has the operational ability to adequately and effectively monitor and supervise the supervised representative.

An FSP that appoints a supervised representative to work under supervision must ensure that a working relationship exists between the supervisor and supervised representative that enables the supervisor to have oversight of the activities performed by the supervised representative and that enables the transfer of skills.

An FSP that appoints a supervised representative to work under supervision must ensure the supervisor complies with the exemption conditions.

An FSP that appoints a supervised representative to work under supervision must ensure the supervised representative is supervised when performing its functions.

An FSP that appoints a supervised representative to work under supervision must at regular intervals review the appropriateness, effectiveness and adequacy of the supervision arrangements.

An FSP that appoints a supervised representative to work under supervision must ensure that the supervised representative actively pursue the completion of the class of business training, regulatory examination and recognised qualification within the prescribed time limits.

An FSP must reflect on its register of representatives, the central register and the competency register whether a representative is rendering financial services under supervision.

An FSP must update the registers within 15 days after a representative ceases to render financial services under supervision.

## **6.7 DUTIES OF SUPERVISOR**

A supervisor must implement and ensure compliance with the supervision agreement.

A supervisor must mentor and coach the supervised representative in respect of the financial services and financial products for which it is appointed in order for the supervised representative to acquire the required skills, knowledge and competencies to perform its functions.

A supervisor must at regular intervals review and assess the learning activities and progress of the supervised representative, including recording observations and aspects of further development.

A supervisor must immediately report to the FSP any unfair treatment of a client as a result of the supervised representative's actions or where the representative's actions may not have been in the best interest of the client.

A supervisor must document the method, frequency and level of intensity of supervision and any changes thereto. A supervisor must keep all records relating to the supervision, including information and documentation relating to-

- ☐ Development and training.
- ☐ Supervision activities.
- ☐ Assessments.
- ☐ Decisions to implement a reduced level of supervision.

## **6.8 DUTIES OF REPRESENTATIVE**

A supervised representative must actively pursue the completion of the class of business training, regulatory examination and recognised qualification within the prescribed time limits.

A supervised representative must at all times adhere to the provisions of the supervision agreement.

A supervised representative must disclose to clients that it is rendering financial services under supervision.

## **6.9 INTENSITY OF SUPERVISION**

An FSP must determine the supervision arrangements and the level of intensity of supervision that must apply to the supervised representative having regard to —

- ☐ The nature, scale and complexity of the financial services and products to be rendered by the supervised representative.
- ☐ The supervised representative's assessed level of competency.
- ☐ The risk to clients and the FSP.



An FSP must at regular intervals review the appropriateness, effectiveness and adequacy of the supervision arrangements and the level of intensity of the supervision. An FSP must determine the criteria and procedures to assess whether it is appropriate for a supervised representative to work under a reduced level of intensity of supervision.

## Topic 7 The debarment process

### 7.1 INTRODUCTION<sup>143</sup>

The requirement and duty imposed by the FAIS Act on FSPs to debar representatives and key individuals was enacted in 2002 as a measure of self-regulation of functions of advice and intermediary services. The legislature saw fit to clothe FSPs with the statutory power to debar representatives and key individuals.

Debarments in terms of section 14(1) of the FAIS Act is a regulatory tool aimed at ensuring that only persons who comply with the provisions of the FAIS Act and satisfy the fit and proper requirements are allowed to render financial services.

A debarment decision by an FSP constitutes the exercise of a statutory power and amounts to administrative action.

### 7.2 OBLIGATION ON FSP TO DEBAR

Debarment is a regulatory instrument intended to rid the industry of incompetent and dishonest representatives.

The following are grounds for debarment:

- ☐ The person does not meet (or no longer meets) the fit and proper requirements.
- ☐ The person has contravened or failed to comply with any provisions of the FAIS Act in a material manner.
- ☐ The person conspired with, aided, abetted, induced, incited or procured another person to contravene the FAIS Act in a material way.<sup>144</sup>

An FSP may only exercise the powers to debar in respect of a natural representative, juristic representative or a key individual of the FSP. From this point onwards, stipulations regarding debarment of a representative also related to a key individual.

Debarment should not be used to satisfy an FSP's contractual or other grievances against a representative, unrelated to fit and proper requirements or adherence to the FAIS Act.

An FSP can terminate an agreement with a representative without debarring him/her. It is important that the employment contract/mandate include the reasons for possible debarment and the possible consequence of debarment for the status of employment or the mandate.

The FAIS Act makes provision for debarment of a representative by either an FSP that authorised the representative to act on their behalf or by the FSCA.

### 7.3 THE MEANING OF DEBARMENT

A debarment order prohibits the natural person, for the period specified in the debarment order, from the following:

- ☐ Providing, or being involved in the provision of financial services, generally or in circumstances specified in the order.
- ☐ Acting as a key individual of an FSP
- ☐ Providing specified services to a financial institution, whether under outsourcing arrangements or otherwise.

A natural person who is subject to a debarment order may not engage in conduct that, directly or indirectly, contravenes the debarment order.

## 7.4 EFFECTIVE DATE OF DEBARMENT

A debarment order in respect of a natural person takes effect from the date on which it is served on the person or if the order specifies a later date, the later date.

An FSP that becomes aware that a debarment order has been made in respect of a natural person employed or engaged by the financial institution must take all reasonable steps to ensure that the debarment order is given effect to.

The FSCA may, by order and on application by the debarred natural person reduce the period of the debarment order or revoke the debarment order.

The FSCA may publish each debarment order, and each order to revoke or reduce the period of debarment.

## 7.5 DEBARMENT BY THE FSP

An FSP must ensure that any representative who no longer complies with the fit and proper requirements or contravened or failed to comply with any of the provisions of the FAIS Act in a material manner is prohibited from rendering any financial service by debarring such a representative.

Debarment means that the authority to act as a representative will be withdrawn and that no other FSP will be able to authorise the representative to act on their behalf until such a time that the re-appointment of the representative has been approved by the FSCA.

If the FSP does not debar a representative when circumstances so call for, the FSP will be subject to regulatory action, and the FSCA will handle the debarment process of the representative.

If an FSP had no mandate or contractual relationship with a representative at the time, it cannot affect a valid debarment.

### 7.5.1 Timing of debarment

Prior to the amendment of section 14 of the FAIS Act, the FAIS Act did not specifically deal with the timing of when a debarment may or should be affected, particularly where a person had ceased to be a representative of the debarring FSP.

Clarity in this regard has now been provided in sections 14(1)(b) and 14(5) of the FAIS Act, which provide that an FSP retains the obligation to debar a person who no longer is a representative of that FSP, provided that the following requirements are adhered to:

- ☐ **Requirement 1:** Reason for a debarment must have occurred and become known to the FSP while the person was still a representative of the FSP.
- ☐ **Requirement 2:** Debarment must commence no longer than six months from the date that the person ceased to be a representative of the FSP.

The first requirement means that, if the reason for debarment occurred or only became known after a representative had ceased to be a representative of the FSP, the FSP may not debar the representative and must refer the matter to the FSCA.

The second requirement means that if the first requirement is satisfied, i.e. the reason for the debarment occurred and became known whilst the person was still a representative of the FSP, the FSP may still (and is required) to proceed with the debarment notwithstanding the fact that the person may at the time of commencement of the debarment process no longer be a representative of the FSP. Under such circumstances it is, however, required that the FSP should take all reasonable steps to commence debarment proceedings within six months from the date on which the person had ceased to be a representative.

Although the debarment proceedings must commence within six months, it is not necessarily implied that the said proceedings must be completed within six months.

Where a representative's relationship with an FSP is terminated and the circumstances of the first requirement are present, it is incumbent upon the FSP to commence with debarment proceedings within 6 months. An FSP may not abdicate this and the FSCA may require of FSPs to show what steps had been taken to timeously commence debarment proceedings.

Failure to comply with the obligation under section 14 of the FAIS Act may lead to regulatory action against the FSP.

### **7.5.2 The debarment procedure**

Section 14(3) of the FAIS Act sets out the requirements with which an FSP must comply when debarring a person. These requirements must be contained in an FSP's policies and procedures governing its debarment process.

#### **1) Step 1: Give adequate notice to the person**

The FSP must inform the representative of the intention to debar and the grounds, therefore.

The notice should state the following:

- ☐ The FSP's intention to debar the person.
- ☐ The grounds and reasons for the debarment. Grounds refer to the factors stated in Paragraph 1.2 and reasons mean the facts that inform these factors.
- ☐ Any terms attached to the debarment, including, in relation to unconcluded business, any measures stipulated for the protection of the interests of clients.

The FSP should, through the notice, provide the person with a copy of its written policies and procedures governing the debarment process.

The FSP should further, through the notice, give the person a reasonable opportunity to make a submission in response to such a notice. What constitutes adequate notice and reasonable opportunity will depend on the circumstances of each case. For example, when there are reasonable grounds to believe that substantial prejudice to clients or the general public may occur, this may warrant that debarment proceedings are carried out on an urgent basis.

It has been noted by the FSCA that representatives approach the FSCA, after the debarment, to request the documentation and reasons for the debarment by the FSP from the FSCA. In this regard, the FSCA urges the FSP to also provide a representative with the documentation that informed the decision to debar the representative when it gives the representative notice of its intention to debar the representative. This will also enable the representative to formulate a proper response.

## **II) Step 2: Consider representations**

The FSP must consider together with all available facts and information, any response received from the person that the FSP intends to debar and where applicable have regard to information regarding the conduct of the person that is furnished by the FSCA, the Ombud or any other interested person.

## **III) Step 3: Take a decision**

The key individual must take a decision whether or not to debar the person and immediately notify the person in writing of the FSP's decision; the persons' rights in terms of section 228 of the FSR Act to request reasons for the decision and have the decision reconsidered by the Financial Services Tribunal.

### **7.5.3 Oral hearing not required**

Section 14 of the FAIS Act does not require that an oral hearing be held.

The debarment process may form part of employment related disciplinary proceedings which may be embarked upon by the employer against a representative.

Should an FSP conduct a disciplinary hearing with a representative, it is advisable for the FSP to combine its policy and procedures governing the debarment process with the FSP's policies and procedures in respect of disciplinary hearings.

In the event that this is not done, an FSP cannot summarily debar a person based on the outcome of a disciplinary hearing without following the required steps.

### **7.5.4 Abuse**

A debarment should only be affected in circumstances where there are relevant grounds for debarment and should not be used by FSPs to satisfy contractual or other grievances.

FSPs may, subject to the contract, terminate an agreement with a representative and key individual without debarring him/her, where the reason for the termination of the agreement does not constitute grounds for debarment. Debarment proceedings should not be abused for ulterior purposes.

To guard against abuse, a debarment of a person should only be affected by a person duly authorised by the FSP to do so. Such a person should preferably be a key individual of or hold the rank of senior management in the FSP.

FSPs must exercise their duties without bias. If the FSP might be seen as biased, it is recommended that an independent person be designated to evaluate whether there are valid grounds for debarment.

### **7.5.5 Rationality**

As stated above, a debarment decision by an FSP constitutes the exercise of administrative action. Such action is subject to the specific requirements of section 14 of the FAIS Act as well as the overarching requirements of the Promotion of Administrative Justice Act.

It is required of FSPs exercising the debarment power to act reasonably and rationally. This means that the decision taken by an FSP must make sense and be justifiable given the information that is available.

FSPs must use the power to debar within the framework of the law. When an FSP considers a debarment, it must only take relevant factors into account. Failure to take relevant factors into account or considering irrelevant factors may render the debarment unlawful.

### 7.5.6 Duties after debarment

After the debarment has been affected the FSP must adhere to the following:

- ☐ Immediately withdraw any authority given to a debarred person to act on behalf of the FSP.
- ☐ The FSP must remove the name of the representative from the register of representatives within 15 days of debarment. The amended register must be submitted to FSCA within 15 days of date of amendment of register.
- ☐ Immediately take steps to ensure that the debarment does not prejudice the interests of clients of the debarred person.
- ☐ The FSP must also inform the clients of the representative of the debarment.
- ☐ Ensure that any unconcluded business of the debarred person is properly attended to by transferring the clients to another authorised representative of the FSP.

Failure to comply with the aforementioned may result in regulatory action against the FSP.

### 7.5.7 Reporting the debarment to the FSCA

The FSP must inform the FSCA of the debarment within 5 days of date of the debarment by submitting Part I of the Debarment Notification form by either hand delivery or electronic mail notification. The form includes the reasons for debarment<sup>145</sup>

The FSP must provide the FSCA with the particulars of debarment within 15 days of date of the debarment by submitting Part II of the Debarment Notification form by either hand delivery or electronic mail notification. The form must provide particulars of reasons for debarment including the following:<sup>146</sup>

- ☐ All documentary evidence and information supporting the grounds/reasons for debarment.
- ☐ A copy of the employment contract or mandate between the FSP and the debarred representative.
- ☐ A copy of the transcript/minutes and outcome of the debarment hearing.
- ☐ Forensic/investigation report and any other relevant documents.<sup>147</sup>

The FSCA must enter the name of the representative into the database of debarred representatives and take the name off the central register of representatives.

The FSCA may make known any such debarment and the reasons therefor by notice on the official FSCA website or by means of any other appropriate public media.<sup>148</sup>

#### **Fine for late submission of the debarment notification**

A maximum fine of up to R1 000 per day per change applies for late submission plus interest.

## 7.6 DEBARMENT BY THE FSCA<sup>149</sup>

The FAIS Act also make provisions for the debarment of a representative or key individual by the FSCA if the key individual fails to debar a representative when circumstances so call.

Before debarment, the FSCA must inform the person of the following, by way of an intention to debar notice:

- ☐ Give a draft of the debarment order to the person and to the Prudential Authority, along with reasons for and other relevant information about the proposed debarment.
- ☐ Invite the person to make submissions on the matter and give the person a reasonable period to do so. This period must be at least one month.

In deciding whether or not to make a debarment order in respect of a natural person, the FSCA must consider at least any submission made by, or on behalf of, the person and any advice from the other prudential authority.

The representative must also be given reasonable opportunity to respond to the notice. It must be ensured that the debarment does not prejudice the interest of clients of the representative and that any unconcluded business of the representative is properly concluded.

The FSP must within 5 days after being informed by the FSCA of the debarment, indicate the debarment on the register of representatives.

The FSCA may make known any such debarment and the reasons therefor by notice on the official FSCA website or by means of any other appropriate public media.<sup>150</sup>

## 7.7 WHERE A PERSON CANNOT BE LOCATED

If the FSP or FSCA after taking all reasonable steps, including through electronic means, cannot locate a person to be given a debarment order, delivering the document or information to the person's last known e-mail or physical business or residential address will be sufficient.<sup>151</sup>

## 7.8 CONDUCT OF REPRESENTATIVES

The purpose of the process envisaged in terms of section 14(3) of the FAIS Act is to afford a representative an opportunity to make submissions in response to the grounds and reasons that inform an FSP's intention to debar him/her. An election by a representative not to make use of this opportunity does not prevent the FSP from considering the matter and taking a decision concerning the debarment of that person.

It has come to the attention of the FSCA that a practice has developed whereby certain representatives, who anticipate their debarment, try to avoid the debarment by resigning employment or terminating his/her mandate. For the reasons stated above, an FSP retains its power to debar a person who is no longer a representative of that FSP, provided that the first and second requirement set out in Paragraph 7.5.1 are adhered to.

## 7.9 RECOURSE MEASURES FOR DEBARRED REPRESENTATIVES

A debarment decision by an FSP constitutes administrative action. The debarment decision will accordingly stand until it is set aside or until the debarred person has been re-appointed.

Administrative law does not allow FSPs and representatives to self-help. This means that they may not decide to ignore or simply undo a debarment decision once it has been taken. Administrative action may be overturned by a competent Court or in terms of such other processes as may be specified in legislation.

Debarred persons may exercise their right to make application to a High Court having jurisdiction to review debarment decisions in terms of the provisions of Promotion of the Administrative Justice Act. However, the Promotion of Administrative Justice Act requires that before a Court may review administrative action, all internal remedies must be exhausted first. An internal remedy is now afforded to persons aggrieved by a debarment decision.

A person who feels aggrieved by a debarment decision may, in terms of section 230 of the FSR Act, apply to the Financial Services Tribunal for a reconsideration of the decision.

Debarred persons may therefore make application for reconsideration by the Financial Services Tribunal and should do so before launching review proceedings in a High Court, unless there are exceptional circumstances that may cause the Court to exempt the debarred person from first exhausting the internal remedy.

It should be noted that the Financial Services Tribunal does not have the jurisdiction to consider debarment decisions by FSPs taken prior to 1 April 2018. This is as section 230 of the FSR Act came into effect on 1 April 2018 and does not apply retrospectively. These decisions stand and a representative's recourse is to approach a competent court or to be re-appointed as a representative.

It is important to take note of the powers of the Financial Services Tribunal should it find fault with debarment decisions. In doing so, a distinction should be drawn between decisions that are bad because an FSP failed to follow the correct process in terms of section 14 of the FAIS Act and those that are bad because of the merits:

- ☐ **Decisions that are bad because an FSP failed to follow the correct process:** The Financial Services Tribunal has found that it cannot set aside and substitute such a decision. Decisions that are bad because of process are to be set aside and remitted back to the FSP for further consideration. Practically this means that the FSP should go back to follow the correct process.
- ☐ **Decisions that are bad because of its merits:** In these circumstances, the Financial Services Tribunal can remit a decision back to an FSP for further consideration or substitute the decision with its own decision. Whether the Tribunal will remit a decision back or substitute a decision will depend on the facts of each case.

The Financial Services Tribunal's decision to remit a decision back / substitute a decision after setting it aside (whether on the basis of process or merits) only affects a person's debarment status i.e., he is no longer debarred. It does not pronounce on the contractual or labour relationship between the parties (e.g., employment relationship).



## **7.10 ROLE OF THE FSCA UPON RECEIPT OF A NOTIFICATION OF DEBARMENT**

The FSCA does not review, approve or confirm a debarment of a representative by an FSP. The administrative action is complete once the debarring FSP takes a decision.

The FSCA merely records the fact that a debarment has occurred in the register for debarred representatives which is published on the FSCA's web site in terms. Neither the recording of the debarment in the register, nor the publication thereof, translates into an administrative act.

The FSCA is therefore not required to engage with a debarred person in order to afford such person an opportunity to make submissions because the debarment should not be recorded or published.

The FSP is required to inform the FSCA of the reasons for the debarment" to enable the FSCA to-

- ☐ Consider the possible referral of the representative's actions for criminal investigation or enforcement action as contemplated by section 167 of the Financial Sector Regulation (FSR) Act.
- ☐ Have relevant information as to the debarment when confronted with the reappointment of a debarred representative by another FSP and to assess whether or not there has been compliance with all the requirements for the re-appointment.
- ☐ Satisfy itself that due process was followed by the FSP and that the debarment relates to compliance with provisions of the FAIS Act, in the absence of which (i.e. where any form of dishonesty or mala fides on the part of the debarring FSP is detected) possible regulatory action against the FSP may follow.

## **7.11 REAPPOINTMENT OF A DEBARRED REPRESENTATIVE**

A debarred person may only be reappointed by an FSP if the debarred representative complies with the requirements determined by the FSCA for the reappointment of a debarred person as a representative (currently Board Notice 82 of 2003).

Although the FSCA is not empowered to interfere in a reappointment by an FSP of a debarred representative, the FSCA will satisfy itself that the process of reappointment was followed correctly.

Should the FSCA be of the view that a reappointment was not proper or in line with statutory provisions, the FSCA may act under section 9 of the FAIS Act (suspension or withdrawal of licenses) and/or section 153 of the FSR Act (debarment) against the reappointing FSP. Similarly, the FSCA may initiate new debarment proceedings against an unfit person who has been reappointed.

The reappointing FSP, must request the FSCA to remove the debarred representative from the database of debarred representatives. The reappointing FSP must before making such a request, be satisfied that the representative is a person who is honest and has integrity. The FSP must do so by submitting satisfactory evidence, affidavits or testimonials to support the proposition.

The reappointing FSP must be aware of the details of the representative's transgression and be satisfied that the representative will not commit the offence again. The application may still be turned down if the contravention is of such a nature that the profession could not be seen to accommodate the representative.

A debarred representative may be reappointed provided compliance with the following conditions:

- ☐ Twelve (12) months have lapsed since debarment date except when debarment resulted from not meeting the fit and proper requirement. In such an event, the representative may reapply as soon as full competence is reached.
- ☐ All unconcluded business of the debarred representative must have been properly concluded.
- ☐ All complaints or legal proceedings regarding the debarred representative have been properly and lawfully resolved or concluded.
- ☐ The debarred representative must have fully complied with any decision, determination or court order issued regarding the matter.
- ☐ All fit and proper requirements must be met.<sup>152</sup>

## Topic 8 General Code of Conduct

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### 8.1 INTRODUCTION

The FAIS Act provides for the drafting of different Codes of Conduct that are binding on different categories of FSPs. The main aim of the Codes of Conduct is the protection of the clients of FSPs. In particular, clients must be enabled to make informed decisions and their needs must be met suitably and appropriately.<sup>153</sup>

In the financial services industry, ethical conduct can be regarded as conduct that is aligned to the stipulations of the Codes of Conducts as these Codes provide guidance to FSP's and representatives when trying to decide if a specific course of action is right or wrong.

This text is concerned with the General Code of Conduct. The General Code of Conduct imposes general and specific duties on the representative.

### 8.2 GENERAL DUTY OF THE FINANCIAL SERVICES PROVIDER

An FSP and representatives must render financial services in the following manner:

- ☐ Honestly and fairly.
- ☐ With due skill, care and diligence.
- ☐ In the interests of clients.
- ☐ In the interest of the integrity of the financial services industry.

### 8.3 REPRESENTATIONS OF INFORMATION

The following provisions must be considered when rendering a financial service to a client:

- ☐ Information provided must be factually correct, in plain language, avoid uncertainty and not be misleading.
- ☐ Information must be adequate and appropriate for a particular financial service and consider the clients factually established or reasonably assumed level of knowledge of the client.
- ☐ Information must be provided timeously to ensure that the client has sufficient time to make an informed decision.
- ☐ Information may be provided orally and confirmed in writing on request of the client within a reasonable time after such a request.
- ☐ Written information (by standard format or otherwise) must be in a clear and readable print size, spacing and format.
- ☐ Information must be reflected in specific monetary terms regarding all amounts, sums, values, charges, fees, remuneration or monetary obligations mentioned therein or if not reasonably pre-determinable, its basis of calculation must be adequately described.
- ☐ Information need not be duplicated or repeated for the same client unless material changes or significant changes have occurred, or the relevant financial service renders it necessary. Material or significant changes must be disclosed to the client without delay.<sup>154</sup>

### **Definition of Writing**

Writing includes communication by telefax or any appropriate electronic medium that is accurately and readily reducible to written or printed form; and written has a corresponding meaning.

## **8.4 PROHIBITIONS**

An FSP or representative may not indicate or imply that it is authorised, regulated or otherwise supervised by the Financial Sector Conduct Authority (FSCA) in respect of business for which it is not so authorised, regulated or supervised.

An FSP or representative may not in any manner refer to its authorisation or name the Financial Sector Conduct Authority (FSCA) as its regulator in any advertisement relating to products or services that are not financial products or financial services in respect of which it is authorised in such a manner to create the impression that its authorisation extends to such products and services or that its provisions of such products or services is regulated by the FSCA.

An FSP or representative may not describe itself or the financial services it renders as being independent in the following circumstances:

- ☐ The FSP or representative or its associate is a significant owner or any product supplier or its associate in respect of whose product the provider renders financial services.
- ☐ Any product supplier in respect of whose product the FSP or representative renders financial services or an associate of such product supplier is a significant owner of the FSP or representative or its associate.
- ☐ The FSP or representative directly or indirectly receive or is eligible for any financial interest from any product supplier in respect of whose products the FSP or representative renders financial services, other than financial interest permitted under the General Code of Conduct.
- ☐ Any other relationship exists between the FSP or representative and any product supplier in respect of whose product the FSP or representative renders financial services that gives rise to a material conflict of interest.

## **8.5 DUTIES WHEN CONTACTING CLIENTS**

An FSP must act honourably, professionally and with due regard to the convenience of the client when making contact arrangements with a client.

At the commencement of any contact, visit or call initiated by the FSP, the representative must explain the purpose thereof and at the earliest opportunity, provide the client with the required information regarding the FSP.<sup>155</sup>

## **8.6 FURNISHING OF ADVICE**

### **8.6.1 Steps of advice**

Before providing advice to a client, an FSP other than a direct marketer, must prior to provide a client with advice, follow the steps considered in the subsections following:

### **I) Step 1: Gather information**

A financial services provider or representative must prior to providing a client with advice, take reasonable steps to obtain from the client such information regarding the client's needs and objectives, financial situation, risk profile and financial product knowledge and experience as is necessary for the provide to provide the client with appropriate advice, which considers all of the following:

- ☐ The client's ability to financially bear any costs or risks associated with the financial product.
- ☐ The extent to which the client has the necessary experience and knowledge in order to understand the risks involved in the transaction.
- ☐ Where the client is a pension fund, medical scheme, friendly society, employer or other entity that is being advised on entering into a financial product or transaction aimed at providing benefits for its members, employees or other underlying natural persons, the reasonably identified collective needs and circumstances of such members employees or other natural persons.

### **II) Step 2: Needs analysis**

Conduct an analysis based on the information obtained.

In performing the analysis, a financial services provider or representative may, in determining the extent of the client information necessary to provide appropriate advice, consider the following:

- ☐ Any specific objectives or needs of the client that the client has explicitly requested the financial services provider or representative to focus on, or not to focus on, in performing the needs analysis.
- ☐ Any specific objectives or needs of the client that the client and the FSP or representative have explicitly agreed to focus on or not to focus on in performing the needs analysis.
- ☐ Applicable surrounding circumstances that make it clear that the analysis can reasonably be expected by the client to focus only on specific objectives or specific needs of the client.
- ☐ The fact that the client has explicitly declined to provide any information requested by the FSP or representative.

In any of the above-mentioned events, the FSP or representative must alert the client as soon as reasonable possible of all of the following:

- ☐ That a full needs analysis of the client could not be undertaken.
- ☐ Limitations on the appropriateness of the advice provided may exist.
- ☐ The client should take care to consider on its own whether the advice is appropriate considering the client's objectives, financial situation and particular needs, particularly any aspects of such objectives, situation or needs that were not considered in light of the aforementioned circumstances.

### **III) Step 3: Identify product**

Identify the financial product appropriate to the client's risk profile and financial needs, subject to legal or contractual limitations imposed on the FSP. Whereas a result of limitations, the FSP or representative is not able to identify a financial product or products that will be appropriate to the client's needs and objectives, financial situation, risk profile and product knowledge and experience, the FSP or representative must make this clear to the client, decline to recommend a product or transaction and suggest to the client that they should seek advice from another appropriately authorised financial services provider.

#### **IV) Step 4: Replacement disclosures**

Take reasonable steps to establish whether the financial product identified is to replace another financial product of the client and if it is such a replacement, the FSP must comply with the disclosure requirements regarding replacement products.

##### **Definition of Replacement**

Replace or replacement means the action or process of substituting a financial product, wholly or in part, with another financial product or the termination or variation of a financial product and the purchase, entering into, investment in or variation of another financial product with the purpose of meeting the same or similar needs or objectives of the client or in anticipation of, or as a consequence of, effecting the substitution, terminations or variation, irrespective of the sequence of the occurrence of the transactions.

##### **8.6.2 Ensuring that client understands**

An FSP must take reasonable steps to ensure that the client understands the advice and will be able to make an informed decision.<sup>156</sup>

##### **8.6.3 Replacement of long-term insurance policy**

An FSP providing advice to a client to replace an existing long-term insurance policy with any other financial product must at the earliest practical opportunity but not later than the date on which any transaction requirement is submitted to the product supplier, notify the issuer of the long-term insurance contract or policy of such advice.<sup>157</sup>

##### **8.6.4 Special circumstances**

Where the client elects to conclude a transaction that differs from that recommended by the financial services provider or representative or otherwise elects not to follow the advice furnished or elects to receive more limited information or advice than the FSP is able to provide, the FSP must alert the client as soon as reasonably possible of the clear existence of any risk to the client, and must advise the client to take particular care to consider whether any product selected is appropriate to the client's needs, objectives and circumstances.

##### **8.6.5 Other considerations**

An FSP that can provide clients with financial services in respect of a choice of product suppliers, must exercise judgement objectively in the interest of the client concerned.<sup>158</sup>

An FSP may not in dealing with a client, compare different financial products, product suppliers, FSPs or representatives unless the differing characteristics of each are made clear. The requirement relating to the use of comparisons in advertisement apply also to these comparisons.

The FSP may also not make inaccurate, unfair or unsubstantiated criticisms of any financial product, product supplier, FSP or representative.<sup>159</sup>

## 8.7 RECORD OF ADVICE

An FSP must maintain a record of advice furnished to a client if a transaction or contract in respect of a financial product is concluded because of advice furnished. The record must include the following:

- ☐ A summary of the information and material on which advice was based.
- ☐ The financial products which were considered.
- ☐ The financial product or products recommended with an explanation of why the products selected will meet the needs of the client.

The FSCA may determine the format of and the matters to be addressed in the record of advice.

The FSP must provide a client with a copy of the record of advice in writing as soon as a transaction is entered into.<sup>160</sup>

A telemarketer only needs to provide a copy of the record of advice on request within a reasonable time.<sup>161</sup>

## 8.8 MANAGING CONFLICT OF INTEREST

A conflict of interest is defined as any situation in which an FSP or representative has an actual or potential interest that may in the rendering of financial services influence the objective performance of its obligations to that client or prevent an FSP or representative from rendering an unbiased and fair financial service to that client, or from acting in the interest of that client.

A conflict of interest includes one of the following<sup>162</sup>:

- ☐ *Financial Interest*: Any cash, cash equivalent, voucher, gift, service, advantage, benefit, discount, domestic or foreign travel, hospitality, accommodation, sponsorship, other incentive or valuable consideration and training that is not exclusively available to a selected group of FSPs or representatives. Financial interest excludes an ownership interest, training on products - if it is not exclusive (excluding travel and accommodation in relation to the training), legal matters relating to products, general financial and industry information and third-party systems which is needed.
- ☐ *Ownership interest*: Includes any equity or proprietary interest, for which fair value was paid by the owner at the time of acquisition; including any dividend, profit share or similar benefit derived from that equity or ownership interest. Ownership interest excludes equity, or a propriety interest held as an approved nominee or held on behalf of another person<sup>163</sup>
- ☐ *Relationship with a third party*: A relationship with a product supplier, another FSP, an associate of the product supplier or FSP, a distribution channel and any person who in terms of an arrangement with these entities mentioned provides a financial interest to an FSP or its representatives.

### Definition of Fair Value

Fair value has the meaning assigned to it in the financial reporting standards adopted or issued under the Companies Act.

### 8.8.1 Requirement regarding conflict of interest

An FSP and a representative must avoid and where this is not possible mitigate any conflict of interest between the FSP and the client or between the representative and the client.

An FSP or representative must, in writing, at the earliest reasonable opportunity disclose to the client any conflict of interest of respect of the client, including the following:

- ☐ The measures taken, in accordance with conflict-of-interest management policy to avoid or mitigate the conflict.
- ☐ Any ownership interest or financial interest, other than immaterial financial interest, that the FSP or representative may be or become eligible for.
- ☐ The nature of any relationship or arrangement with a third party that gives rise to a conflict of interest, in sufficient detail to a client to enable the client to understand the exact nature of the relationship or arrangement and the conflict of interest.

An FSP or representative must, in writing, at the earliest reasonable opportunity inform the client of the conflict of interest management policy and how it may be accessed.<sup>164</sup>

### 8.8.2 Permitted financial interest

An FSP or representative may only receive or offer the following financial interest from or to a third party:

- ☐ Commission and fees authorised under the Long-term Insurance Act, the Short-term Insurance Act or the Medical Schemes Act.
- ☐ Fees authorised under the Long-term Insurance Act, the Short-term Insurance Act or the Medical Schemes Act.
- ☐ Fees for the rendering of a financial service in respect of which commission or fees referred to above is not paid if the amount, frequency, payment method and recipient of those fees and details of the services that are to be provided by the financial services provider or its representative are specifically agreed to by a client in writing and may be stopped at the discretion of the client.
- ☐ Fees or remuneration for the rendering of a service to a third party.
- ☐ Subject to any other law, any immaterial financial interest.
- ☐ Any financial interest not referred to above for which a consideration, fair value or remuneration that is reasonably commensurate (appropriate) to the value of the financial interest, is paid by that FSP or representative at the time of receipt thereof.<sup>165</sup>

An FSP or representative may only receive or offer the financial interests related to fees above if all of the following is met:

- ☐ Those financial interest are reasonably commensurate with the service being rendered, considering the nature of the service and the resources, skills and competencies reasonably required to perform it.
- ☐ The payment of those financial interest does not result in the financial services provider or representative being remunerated more than once for a performing a similar service.
- ☐ Any action or potential conflicts between the interest of clients and the interest of the person receiving the financial interest are effectively mitigated.
- ☐ The payment of those financial interest does not impede the delivery and fair outcomes to clients.

The above specifications do not apply to representative of an entity if the entity is a product supplier and an FSP.<sup>166</sup>



#### **Definition of immaterial financial interest**

Any financial interest with a determinable monetary value, the aggregate of which does not exceed R1 000 in any calendar year from the same 3<sup>rd</sup> party received by one of the following:

- ☐ A sole proprietor FSP.
- ☐ A representative for direct benefit.
- ☐ An FSP, who for its benefit or that of some or all its representatives, aggregates the immaterial financial interest paid to its representatives.

#### **8.8.3 Payment of incentives or bonuses**

An FSP may not offer any financial interest to a representative that is determined for giving preference for quantity of business secured for the FSP to the exclusion of the quality of the service rendered to clients. The FSP must be able to demonstrate that the determination of and entitlement to the financial interest considers measurable indicators relating to the following:

- ☐ Achievement of minimum service level standards in respect of clients.
- ☐ Delivery of fair outcomes for clients
- ☐ The quality of the representative's compliance with the Financial Advisory and Intermediary Services (FAIS) Act.

The above must be agreed between the FSP and the representative and that sufficient weight is attached to such indicators to materially mitigate the risk of the representative giving preference to the quantity of business secured for the FSP over the fair treatment of clients.

An FSP may not offer any financial interest to a representative that is giving preference for one of the following:

- ☐ A specific product supplier, where a representative may recommend more than one product supplier to a client.
- ☐ A specific product of a product supplier, where a representative may recommend more than one product of that product supplier to a client.<sup>167</sup>

#### **8.8.4 Conflict of interest management policy**

The Amendment Code stipulates that all FSPs must adopt, maintain and implement a conflict-of-interest management policy that complies with the provision of the Financial Advisory and Intermediary Service (FAIS) Act.<sup>168</sup>

The conflict of management policy must provide for the management of conflicts of interest and for the following:

- ☐ Mechanisms for the identification of conflicts of interest.
- ☐ Measures for the avoidance of conflicts of interest, and where avoidance is not possible, the reasons therefore and the measures for the mitigation of such conflicts of interest.
- ☐ Measures for the disclosure of conflicts of interest.
- ☐ Processes, procedures and internal controls to facilitate compliance with the conflict-of-interest management policy.
- ☐ Consequences of non-compliance with the policy by the FSP's employees and representatives.<sup>169</sup>

The conflict of management policy must also include the following:

- ☐ The policy must specify the type of and basis on which representative will qualify for a financial interest and motivate how that financial interest complies with the provisions of the General Code of Conduct.
- ☐ A list of all the FSP's associates.
- ☐ The names of any third parties in which the FSP holds an ownership interest.
- ☐ The names of any third parties that holds an ownership interest in the FSP.
- ☐ The nature and extent of the ownership interest.<sup>170</sup>

## **I) Other requirements regarding the conflict-of-interest management policy**

The conflict of management policy must be in an easily comprehensible form and manner.

The conflict of management policy must be adopted by a sole proprietor FSP, the Board of Directors of an FSP where the FSP is a company or close corporation, and, where not an incorporated entity, the governing body of the FSP

The FSP must ensure that its employees, representatives and (where appropriate) its associates are aware of the contents of its conflict of interest management policy and provide for training and educational material in this regard.

The FSP must publish its conflict of interest management policy in appropriate media and ensure that it is easily accessible for public inspection at all reasonable times.

### **Definition of Publish**

Publish or publication means one of the following:

- ☐ To make generally known.
- ☐ To make a public announcement of.
- ☐ To disseminate to the public.
- ☐ To product or release for distribution.

An FSP must continuously monitor compliance with its conflict of interest management policy and annually conduct a review of the policy.<sup>171</sup>

An FSP or representative may not avoid, limit or circumvent or attempt to avoid, limit or circumvent compliance with these stipulations through an associate or an arrangement involving an associate.<sup>172</sup>

## **II) Reporting obligations in terms of conflict-of-interest management policy**

A compliance officer must include a report on the FSP's conflict of interest management policy in compliance reports submitted to the Commissioner. The report must report at least on the implementation, monitoring and compliance with, and the accessibility of the conflict of interest management policy.<sup>173</sup>

## **8.9 CUSTODY OF FINANCIAL PRODUCTS AND FUNDS**

The General Code of Conduct stipulates the procedures to be followed by an FSP when receiving funds, financial products or premiums from clients. These provisions are subject to any other legislation which may be more prescriptive regarding the custody of financial products and funds<sup>174</sup>.

### 8.9.1 Custody of Funds

The General Code of Conducts provides for the following requirements, regarding client's funds received:

- ☐ An FSP who receives funds into safe custody without the mediation of a bank, must issue a written receipt immediately.<sup>175</sup>
- ☐ The FSP must open and maintain a separate bank account, designated for client funds and must deposit funds received on behalf of clients within one business day into such an account.<sup>176</sup>
- ☐ The bank account is exclusively for client's funds and may not contain funds of the FSP.<sup>177</sup>
- ☐ The FSP is liable for bank charges except those charges directly relating to a client's deposit or withdrawal.<sup>178</sup>
- ☐ Interest accruing in the separate bank account is payable to the client or the owner of the funds.<sup>179</sup>

The provisions are not applicable to short-term insurers if they comply with the requirements stipulated in section 45 of the Short-term Insurance Act, 1998.<sup>180</sup>

In addition, the FSP, must also adhere to the following:

- ☐ The client must readily have access to such funds subject to the deduction of fees and charges allowed by law and subject to any applicable contractual or statutory provisions.<sup>181</sup>
- ☐ The FSP must ensure that funds held by it or by a third party on its behalf are adequately safeguarded.<sup>182</sup>
- ☐ The FSP must take steps to ensure that funds are dealt with strictly in accordance with the mandate.<sup>183</sup>
- ☐ The FSP must take reasonable steps to ensure that client's funds are readily discernible from the FSP's funds.<sup>184</sup>

### 8.9.2 Documents of title

When documents of title are lodged with an FSP on behalf of a client, written confirmation of receipt identifying the documents must be issued immediately.<sup>185</sup>

The FSP must ensure that documents of title held by it or by a third party on its behalf are adequately safeguarded.<sup>186</sup> The documents of title must be readily discernible from the assets of the FSP.<sup>187</sup>

### 8.9.3 Original agreement

The FSP must ensure that any transaction or agreement that has been recorded in writing is delivered to the client for safe custody.<sup>188</sup>

## 8.10 STATEMENT OF ACCOUNTS

An FSP must provide the client with a statement of account relating to any financial service rendered to the client on request<sup>189</sup> or at least annually. The statement must provide brief current details of the following:

- ☐ Any ongoing monetary obligations of the client in respect of such product.
- ☐ The main benefits provided by the product.
- ☐ Where any product was marketed as an investment or having an investment component, the value of the investment and the amount accessible to the client.
- ☐ Any ongoing incentives, remuneration, commission, fee or brokerage payable to the FSP in respect of such products.

The FSP does not need to submit a statement if the client is aware or should be reasonable aware that the FSP concerned no longer render ongoing financial service in respect of the client or the product.<sup>190</sup>

## 8.11 REMUNERATION DISCLOSURES

If the FSP and the relevant product supplier is not the same entity, a representative must disclose the nature, extent and frequency of the following:

- ☐ All applicable remuneration or considerations.
- ☐ All applicable commissions, fees or brokerages.
- ☐ All bonuses or incentives received.

The identity of the product supplier or any other person that provides this must also be disclosed. Where the maximum amount is prescribed by law, the FSP may choose to disclose the actual amount or the prescribed maximum amount.

Remuneration need not to be disclosed by the representative of an entity if the same legal entity is a product supplier and an FSP.

## 8.12 GENERAL DISCLOSURES: FACE TO FACE REPRESENTATIVES

Disclosures is an essential part of ethical conduct in the financial services sector as disclosures assist clients to make informed decision.

FSPs and product suppliers make certain disclosures, as discussed in the subsections following.<sup>191</sup>

Disclosure may be made orally but must be confirmed in writing within 30 days of rendering of the financial services.

### 8.12.1 Information regarding Financial Services Provider

An FSP (other than a direct marketer) must as soon as possible provide the client with the information regarding the FSP outlined in the table following.

*Table 8.1: Information regarding FSP to be disclosed*

Contact details	Contractual agreements	Other disclosures
<input type="checkbox"/> Full business and trade names <input type="checkbox"/> Registration number if any <input type="checkbox"/> Postal and physical address <input type="checkbox"/> Telephone number and cell phone number if applicable <input type="checkbox"/> Internet and e-mail addresses <input type="checkbox"/> The names and contact details of appropriate contact persons or offices <input type="checkbox"/> Contact details of the compliance department	<input type="checkbox"/> Arrangements with product suppliers <input type="checkbox"/> Status of agreements with product suppliers <input type="checkbox"/> Details of the legal and contractual status of the FSP regarding the product supplier clarifying which entity accepts responsibility for the actions of the FSP or representative and the extent to which the client will have to accept such responsibility	<input type="checkbox"/> Financial services and products which the FSP is authorised to provide in terms of its license <input type="checkbox"/> Any condition, restriction or exemptions applicable to the license <input type="checkbox"/> If the FSP or representative holds or does not holds guarantees, professional indemnity or fidelity insurance

### 8.12.2 Information regarding the product suppliers

An FSP must as soon as possible provide the client with the information regarding the product supplier outlined in the table following.

Table 8.2: Information regarding product supplier to be disclosed

Contact details	Contractual agreements	Other disclosures
<input type="checkbox"/> Name of product supplier <input type="checkbox"/> Place of product supplier <input type="checkbox"/> Postal address <input type="checkbox"/> Telephonic contact details <input type="checkbox"/> Contact details of the complaints or compliance department	<input type="checkbox"/> The existence of any conditions or restrictions imposed by the product supplier regarding the types of financial products or services that may be provided by the FSP <input type="checkbox"/> The contractual relationship with the product supplier (if any) <input type="checkbox"/> If there are contractual relationships with other product suppliers as well	<input type="checkbox"/> If FSP directly or indirectly holds more than 10% of the product supplier's shares or has any equivalent substantial interest in the product supplier <input type="checkbox"/> If FSP received more than 30% of total remuneration, including commission, from the product supplier during the last 12 months

The FSP must convey any changes thereafter regarding such information at the earliest opportunity to the client.<sup>192</sup>

A product supplier who is an FSP and which has entered into an intermediary contract with another FSP (not a representative) for the purpose of rendering a financial service, must provide the other FSP with sufficient particulars to enable the FSP to comply with the disclosure requirements of the General Code of Conduct relating to the furnishing of details of the product supplier and product in question.<sup>193</sup>

### 8.12.3 Information regarding the financial service/product

An FSP must provide a client with information regarding the financial service/product as outlined in the subsection following.

An FSP must at the earliest reasonable opportunity after the conclusion of a transaction provide the client with this information and in writing, to the extent that any such information has not already been provided to the client in writing.

#### I) General information

An FSP must disclose the following general information regarding the financial service/product:

- ☐ A reasonable and appropriate general explanation of the nature and material terms of the transaction and such other information that will enable the client to make an informed decision.
- ☐ Full and frank disclosure of any info that would reasonable be expected to enable the client to make an informed decision.
- ☐ Any material contractual information and illustrations, the possession of the FSP, when reasonable and appropriate i.e., any info provided by the product supplier.

## II) Terms and conditions

An FSP must disclose the following regarding the terms and conditions of the financial service/product:

- ☐ Name, class or type of financial product.
- ☐ The nature and extent of benefits to be provided.
- ☐ The way benefits are derived or calculated.
- ☐ The way which benefits will accrue or be paid.
- ☐ Special terms or conditions.
- ☐ Exclusions of liability.
- ☐ Waiting periods.
- ☐ Loadings and penalties.
- ☐ Excesses.
- ☐ Restriction or circumstances in which benefits will not be provided.
- ☐ Any guaranteed minimum benefits or other guarantees.
- ☐ To what extent the product is readily realisable, or the funds concerned are accessible.
- ☐ Any restrictions on or penalties for early termination of the product or other consequences of such termination or withdrawal (if any).
- ☐ Material tax considerations.
- ☐ Whether cooling-off rights are offered and, if so, procedures for the exercise of such rights.
- ☐ Any material investment or other risks associated with the product including any risk of loss of any capital amount invested due to market fluctuations.

## III) Monetary Concerns

An FSP must disclose the following regarding the monetary concerns of the financial service/product:

- ☐ The nature and extent of monetary obligations assumed by the client in favour of the product supplier including the manner of the payment or discharge thereof, the frequency thereof, the consequences of non-compliance and subject to the disclosures pertaining to insurance products, any anticipated or contractual escalations, increases or additions.
- ☐ The nature and extent of monetary obligations assumed by the client, directly or indirectly, in favour of the financial services provider or representative including the following: (The information should, wherever feasible, be included in a written agreement between the client and the financial services provider.)
  - The amount, frequency and payment method thereof.
  - Details of the services that are to be provided by the FSP or its representatives in exchange, therefore.
  - The client's rights in relation to termination those obligations and the consequences of terminating or failing to meet those obligations.

- ☐ The nature, extent and frequency of any incentive, remuneration, consideration, commission, fee or brokerages (valuable consideration), which will or may become payable to the FSP or representative, directly or indirectly, by any product supplier or any person other than the client, or for which the provider may become eligible, as a result of rendering of the financial service, as well as the identity of the product supplier or other person providing or offering the valuable consideration. Provided that where the maximum amount or rate of such valuable consideration is prescribed by a law, the financial services provider may elect to disclose either the actual amount applicable or such prescribed maximum amount or rate.
- ☐ In the case of an insurance product, the amount of the increased premium, if any, for the first five years and thereafter on a five-year basis but not exceeding 20 years

#### **IV) Additional disclosures for investment products**

The following disclosures should be made in addition to the general disclosures where the financial product is an investment or have an investment component:

- ☐ The way the value of the investment is determined, including concise details of any underlying assets or other financial instruments.
- ☐ In a separate disclosure (not a mere disclosure of all-inclusive fees) disclose the following regarding charges and fees:
  - The amount and frequency thereof.
  - The identity of the recipient.
  - The services or other purpose for which each fee or charge is levied.
  - Where any charges are to be levied in respect of investment performance, details of the frequency, performance measurement period (including any part of the period prior to the client's particular investment) and performance benchmarks or other criteria applicable to such charges or fees.
  - Where the specific structure of the product entails other underlying financial products, such details as will enable the client to determine the net investment amount ultimately invested for the benefit of the client.
  - Any rebate arrangements must be disclosed and thereafter on a regular basis, (but not less frequently than annually).
  - Any platform fee arrangements, which may be disclosed by informing the client that a platform fee of up to a stated percentage may be paid by the product supplier to the administrative FSP concerned, rather than disclosing the actual monetary amount.

The FSP must also provide information on request regarding to the past investment performance of the product over periods and at intervals which are reasonable regarding the type of product involved, including a warning that past performances are not necessarily indicative of future performances.

#### **V) Forecasts, illustrations, hypothetical data or projected benefits and past performance data**

The requirements relating to the use of forecasts, illustrations, hypothetical data or projected benefits and past performance data in an advertisement apply with the necessary changes to a financial services provider when making use of forecasts, illustrations, hypothetical data or projected benefits and past performance data in the rendering of a financial service.

An FSP or representative may only make a statement regarding the past performance (including awards and rankings) of a financial product or financial service if the following conditions are all met:

- ☐ The basis on which the performance is measure is clearly stated and the presentation of the performance is accurate, fair and reasonable.
- ☐ The statement is accompanied by a warning that past performance is not indicative of future performance.
- ☐ The past performance is relevant to the financial service being rendered.

An FSP that uses forecasts, illustrations, hypothetical data or projections when rendering financial services must adhere to the following:

- ☐ Furnish the client with support for such forecasts, illustrations, data or projections in the form of clearly stated basic assumptions (including but not limited to any relevant assumptions in respect of performance, returns, costs and charges) with a reasonable prospect of being met under current circumstances.
- ☐ Make it clear that the forecasts, illustrations, hypothetical data or projects are not guaranteed and are provided for illustrative purposes only.
- ☐ Disclose where the return or benefits are dependent on the performance of underlying assets or other variable market factors, clear indications of such dependence.
- ☐ Warn the client about risks involved in buying or selling a financial product based on a forecast, illustration, hypothetical data or projection.

### **8.13 TRANSACTIONAL DISCLOSURES**

A transaction requirement means any application, proposal, order, instruction or other contractual information required to be completed for, or submitted to, a product supplier by or on behalf of a client relating to the purchase of or investment in any financial product, including any amendment thereof or variation thereto.

The representative must inform the client of the following regarding the completion or submission of any transaction requirement by a client:

- ☐ A statement that all material facts must be accurately and properly disclosed, and that the accuracy and completeness of all answers, statements or other information provided by or on behalf of the client, are the client's own responsibility.
- ☐ A statement that if the FSP completes or submits any transaction requirement on behalf of the client, the client should be satisfied as to the accuracy and completeness of the details.
- ☐ A statement of the possible consequences of the misrepresentation or non-disclosure of material facts or the inclusion of incorrect information.
- ☐ The client's right to be supplied, on request, with a copy or written or printed record of any transaction requirement within a reasonable time.<sup>194</sup>



Variation includes one or more of the following:

- An acceleration of the contractual retirement date or other date on which benefits become available.
- Any change to the premium or other periodic investment amount payable in respect of a financial product.
- Making the financial product or investment paid-up.
- The cessation of premiums or other periodic investment amount.
- The application of the policy or investment value as premium or other periodic investment amount payable in respect of a financial product.
- The reduction or removal of any guarantee or benefit in respect of a financial product.
- Any act that results in a change to a material term or condition or the contract term.
- The financial product becoming static because an option to update cover, benefits, premiums or other periodic investment amounts has not been exercised.
- Any transfer from or of one financial product to another financial product.
- A non-renewal of a short-term insurance policy.

## 8.14 DISCLOSURES FOR DIRECT MARKETERS

A direct marketer must furnish a client with the following particulars when rendering a financial service to a client:

- ☐ The business or trade name of the marketer.
- ☐ The telephone number of the direct marketer (unless the contact was initiated by the client).
- ☐ The telephone number of the compliance department.
- ☐ Whether the direct marketer is a licensed FSP and for which products.
- ☐ If any restrictions are applicable to the license under which the FSP provides the service.
- ☐ Whether the direct marketer holds professional indemnity and/or fidelity insurance.

If the direct marketer is a representative, the above information must be provided regarding the FSP to which the representative is authorised by.<sup>195</sup>

A direct marketer advising a client must as soon as possible enquire to establish whether the financial product will be appropriate in the light of the client's risk profile, financial needs and circumstances and furnish the client with the following:

- ☐ Business name or trade name of the product supplier.
- ☐ Legal status and relationship with product supplier.
- ☐ Name, class or type of financial product.
- ☐ Nature and extent of benefits of a financial product and the way benefits are calculated or derived, with reference to underlying assets of any investment component and how the value thereof is determined.
- ☐ Monetary obligations of the client and manner of payment.
- ☐ Whether cooling off rights are offered and if so, procedures for the exercise of such rights.
- ☐ Any material investment and other risks associated with the product.

The direct marketer must also take reasonable steps to establish whether a financial product is wholly or partially a replacement for an existing financial product of the client, and if it is such a replacement, inform the client of actual and potential financial implications, costs and consequences before any transaction is concluded.<sup>196</sup>

A direct marketer must provide a client with the following information prior to or with conclusion of a contract. Where the information was provided orally, it must be confirmed in writing within 30 days thereafter:

- ☐ Telephone number of compliance department of product supplier.
- ☐ To what extent the product is readily realisable or the funds accessible.
- ☐ Way benefits will be paid.
- ☐ Restrictions on or penalties for early termination or withdrawal from the product, or other effects of such termination or withdrawal.
- ☐ Charges and fees to be levied against the product including the amount and frequency thereof.
- ☐ The net amount to be invested if the product has an investment component.
- ☐ Commission, consideration, fees, charges or brokerages payable to the direct marketer by the client, the product supplier or any other person.
- ☐ On request, past performance of the product over periods and at intervals that are reasonable regarding the product concerned.
- ☐ Consequences of non-compliance with monetary obligations assumed by the client.
- ☐ Anticipated or contractual escalations, increases and additions.
- ☐ In the case of an insurance product in respect of which provision is made for premium increases, abbreviated disclosures of contractual increases.
- ☐ Concise details of special terms and conditions, exclusions, waiting periods, loadings, penalties, excesses, restrictions or circumstances under which benefits will not be provided.
- ☐ Guaranteed minimum benefits or other guarantees.
- ☐ That recordings of telephone discussions will be made available to the client on request.<sup>197</sup>

A direct marketer must record all telephone conversations with clients during direct marketing and must have appropriate procedures and systems in place to store and retrieve such recordings.

Notwithstanding the above a direct marketer must at the earliest reasonable opportunity after conclusion of a transaction provide, in writing, the client with all disclosures as required in the General Code of Conduct to the extent that any such information has not already been provided to the client in writing.

An FSP or representative must on request of the client, make recording of telephone discussion available to the client. A direct marketer must provide a client with a written record of advice where appropriate.<sup>198</sup>

## **8.15 DISCLOSURE REQUIREMENTS FOR REPLACEMENT PRODUCTS**

Where the financial product (the replacement product) is to replace another financial product (the terminated product), the FSP or representative must fully disclose to the client the actual and potential consequences of such a replacement including where applicable the following:

- ☐ Fees and charges in respect of the replacement product.
- ☐ Special terms and conditions, exclusions of liability, waiting periods, loadings, penalties, excesses, restrictions or circumstances in which benefits will not be provided, which may be applicable to the replacement product.
- ☐ In the case of an insurance product, the impact of age and health changes on the premium payable.
- ☐ Differences between tax implications of the replacement product.

- ☐ Material differences between the investment risk of the replacement product and the terminated product.
- ☐ Penalties or unrecovered expenses deductible or payable due to termination of the terminated product.
- ☐ To what extent the replacement product is readily realisable or the relevant funds accessible, compared to the terminated product.
- ☐ Vested rights, minimum guaranteed benefits or other guarantees or benefits that will be lost because of the replacement.
- ☐ Any incentive, remuneration, consideration, commission, fee or brokerage received, directly or indirectly, by the FSP on the terminated product or payable, directly or indirectly, to the FSP on the replacement product where the FSP rendered financial services on both the terminated and replacement product.<sup>199</sup>
- ☐ The reasons why the replacement product considered is a more suitable to the client's needs than retaining or modifying the existing product.<sup>200</sup>

## **8.16 CONFIDENTIALITY OF CLIENT INFORMATION**

An FSP may not disclose a client's confidential information unless-

- ☐ The client has given written permission.
- ☐ Disclosure is required in public interest.
- ☐ Disclosure is required in terms of the law.<sup>201</sup>

## **8.17 CONTRACT AND INSTRUCTIONS**

Financial services must be rendered in terms of the contract and instructions must be executed as soon as is reasonably possible.

When providing the financial service, clients' interests must enjoy priority over the FSP's interests.<sup>202</sup>

Transactions of a client must be accurately accounted for.<sup>203</sup>

The FSP or representative may not deal in any financial product for his own benefit based on advance knowledge of pending transactions on behalf or with clients or on any non-public price-sensitive information.<sup>204</sup>

## **8.18 PROHIBITION ON SIGNING OF BLANK FORMS**

No FSP may during the rendering of a financial service request any client to sign any written or printed form or document unless all details required to be inserted thereon by the client or on behalf of the client have already been inserted.<sup>205</sup>

## **8.19 RISK MANAGEMENT**

The Code of Conduct stipulates that an FSP must always have the necessary resources, procedures and technological systems (that can be reasonably expected) to eliminate as far as possible the risk of financial loss to clients, product suppliers and other FSPs or representatives through theft, fraud, other dishonest acts, poor administration, negligence, professional misconduct or culpable omissions.<sup>206</sup>

This implies that the FSP must have proper risk management procedures in place as well as the necessary insurance to protect clients.

### 8.19.1 Risk management procedures

The FSP must develop a risk management policy. The objective of the risk management policy is to ensure that an FSP, other than a representative, structures the internal control procedures as to provide reasonable assurance that-

- ☐ The business can be carried on in an orderly and efficient manner.
- ☐ The financial and other information is reliable.
- ☐ Relevant laws are complied with.<sup>207</sup>

### 8.19.2 Insurance

An FSP must maintain suitable guarantees or professional indemnity or fidelity guarantee insurance if and to the extent required by the Commissioner.<sup>208</sup>

Fidelity insurance pay for losses suffered by a client caused by employee or representative's acts such as embezzlement, fraud etc. Personal indemnity is taken out to protect the FSP from any losses or damages suffered by a client as result of a professional act of the FSP, representatives or its employees, for example where a representative did not make appropriate disclosures. Guarantees provide for a 3<sup>rd</sup> party to accept responsibility for an obligation if the FSP cannot meet the responsibility.

The table following summarises the level of cover applicable to all categories of FSPs.

Table 8.3: Guarantees and insurance cover applicable to all categories of FSPs

	Minimum suitable guarantees	Prescribed type of cover and minimum amount
Category I and IV FSP that does not receive or hold client's assets	R1 million or →	Professional indemnity cover for a minimum of R1 million
Category I and IV FSP that does receive or hold client's assets	R1 million or →	Professional indemnity and fidelity cover for a minimum of R1 million respectively
Category II FSP that does not receive or hold client's assets	R1 million or →	Professional indemnity cover for a minimum of R1 million
Category II FSP that receives funds or securities on behalf of clients	R5 million or →	Professional indemnity and fidelity cover for a minimum of R5 million respectively
Category IIA FSP that does not receive or hold client's assets	R5 million or →	Professional indemnity cover for a minimum of R5 million
Category IIA FSP that receives funds or securities on behalf of clients	R5 million or →	Professional indemnity and fidelity cover for a minimum of R5 million respectively
Category III that receives funds or securities on behalf of clients	R5 million or →	Professional indemnity and fidelity cover for a minimum of R5 million respectively

(Board Notice 123 of 2009. Notice on Requirements for Professional Indemnity and Fidelity Insurance Cover for Providers, 2009)

## 8.20 TERMINATION OF AGREEMENT OR BUSINESS

Subject to the contractual obligations, an FSP must give immediate effect to a request of a client to voluntarily terminate an agreement relating to a financial product or advice.

Where the client makes the request to terminate on the advice of the FSP, the FSP must take reasonable steps to ensure that the client understands all the implications of the termination.<sup>209</sup>

If an FSP (other than a representative) ceases to operate, it must immediately notify all affected clients and take, where reasonably necessary or appropriate in consultation with the clients and product suppliers, reasonable steps to ensure that outstanding business is completed promptly or transferred to another FSP.<sup>210</sup>

If a representative ceases to operate as a representative of an FSP, the FSP must immediately take, where reasonably necessary or appropriate in consultation with the clients and product suppliers, reasonable steps to ensure that outstanding business is completed or transferred to another the FSP or another representative of the FSP.<sup>211</sup>

## 8.21 ADVERTISING

### 8.21.1 Application

For purposes of this duty, client includes the general public.

The principles, requirements and standards contained in this section apply regardless of the medium used to publish an advertisement.

This section applies to any advertisement published on or after the date on which this duty takes effect, regardless of whether the advertisement was also previously published prior to this duty taking effect.

#### Definition of advertisement

An advertisement is defined as any communication published through an medium and in any form itself or together with another communication which is intended to create public interest in the business, financial services, financial products or related services of a provider or to persuade the public (or a part thereof) to transact tin in respect of a financial product, financial service or related service of the provider in an manner but which does not purport to provide detailed information to or for a specific client regarding a specific financial product, financial service or related service.

### 8.21.2 General principles

A financial services provider, other than a financial services provider that is a natural person, and a representative must have documented processes and procedures for the approval of advertisements by a key person or a person of appropriate seniority to whom the key person has delegated the approval.

An FSP must, prior to publishing an advertisement, take reasonable measures to ensure that the information provided in the advertisement is consistent with this section.

Where feasible, measures must provide for an objective review of an advertisement other than by the person that prepared or designed them.

Where an advertisement is produced or published by another person, the FSP must –

- ☐ Where the person producing or publishing the advertisement is the FSP's representative or is otherwise acting on behalf of the FSP in relation to the advertisement, ensure that the advertisement is consistent with this section and have appropriate processes in place to ensure such consistency.
- ☐ Where the person producing or publishing the advertisement is not acting on behalf of the FSP in relation to the advertisement, but the FSP is aware or ought reasonably to be aware of the production or publication, take reasonable steps to mitigate the risk of the advertisement not being consistent with this section.

Where an FSP becomes aware that an advertisement that relates to its business, financial services or related services, whether published by the FSP or any other person, is not consistent with this section, the FSP must as soon as reasonably practicable correct or withdraw the advertisement or take reasonable steps to ensure that it is corrected or withdrawn; and notify any persons who it knows to have relied on the advertisement.

#### **Definition of key person**

In terms of the Financial Sector Regulation Act a key person is defined as follows:

- ☐ A member of the governing body of the financial institution.
- ☐ The chief executive officer or other person in charge of the financial institution.
- ☐ A person other than a member of the governing body of the financial institution who makes or participates in making decisions that affect the whole or a substantial part of the business of the financial institution or have the capacity to significantly affect the financial standing of the financial institution.
- ☐ A person other than a member of the governing body of the financial institution who oversees the enforcement of policies and the implementation of strategies approved or adopted by the governing body of the financial institution.
- ☐ The head of a control function of the financial institution.
- ☐ The head of a function of the financial institution that a financial sector law requires to be performed.

### **8.21.3 Factually correct, balanced and not misleading**

Advertisements must –

- ☐ Be factually correct, excluding aspects of an advertisement constituting puffery.
- ☐ Provide a balanced presentation of key information.
- ☐ Not be misleading.

#### **Definition of Puffery**

Puffery means any value judgement or subjective assessments of quality based solely on the opinion of the evaluator and where there is no pre-established measure or standard.

The subsections follow provide more clarification on what is meant by this stipulation under his point.

#### **1) Factually correct**

If statistics, performance data, achievements or awards are referenced in an advertisement the source and the date thereof must be disclosed and the identity of the grantor of an award ad must make it clear if the award is granted by an associate of the financial services provider or the product supplier.

An advertisement that refers to premiums or other periodic investment amounts must -

- ☐ In the case where the premium will escalate automatically, indicate the escalation rate or basis.
- ☐ Where the premium may change at a future date (with or without automatic escalations) may change at a future date, indicate the period for which the premium is guaranteed.

## **II) Balanced**

Descriptions in an advertisement must not give benefits or return undue prominence compared with risks.

Descriptions in an advertisement must not exaggerate benefits or create expectations regarding policy performance or the performance of related services that the FSP does not reasonably expect to achieve.

Descriptions in an advertisement, in respect of a specific financial product, financial service or related service, must include key limitations, exclusions, risks and charges, which must be clearly explained and must not be worded positively to imply a benefit.

References to a fee or cost must give a realistic impression of the overall level of fees or costs a person is likely to pay, including any direct fees or costs.

However, where an FSP can demonstrate that, due to the nature of the medium used for the advertisement, it is not reasonably practicable for this information to be fully included in the advertisement itself, the advertisement must indicate –

- ☐ That additional information on key limitations, exclusions, risks and charges related to the financial product, financial service or related service being advertised is available.
- ☐ Where and how the additional information may be accessed.

This information must be publicly available and readily accessible to the average client targeted by the advertisement.

## **III) Not misleading**

An advertisement, when examined as a whole, must not be constructed in such a way as to lead the average targeted client to any false conclusions he or she might reasonably rely upon.

An FSP must when constructing an advertisement consider the conclusions likely to be made by clients that are subject to the advertisement, and in doing so have regard to the following:

- ☐ The literal meaning of the words.
- ☐ Impressions from nonverbal portions of the advertisement.
- ☐ Materials and descriptions omitted from the advertisement.

An advertisement relating to a financial product that is targeted at a particular type or group of clients must make this clear.

An advertisement must not obscure information.

Each piece of information in an advertisement must be prominent enough and proximate enough to other information so as not to mislead the average targeted client.

An advertisement must not be designed to exaggerate the need for urgency which could encourage the average targeted client to make unduly hasty decisions.

Warning disclaimers and qualifications contained in an advertisement must not be inconsistent with other content in the advertisement and have sufficient prominence to effectively convey key information.

An advertisement relating to a financial service must adhere to all of the following:

- Disclose any relevant limitations on the extent of the financial service and the range of financial products on which the financial service is based.
- Not create a misleading impression about the nature and extent of a financial services provider's skills, experience, knowledge and expertise insofar it relates to the financial service.
- Not create a misleading impression about the cost of a financial service; including that is free if the service is in fact paid for by the client directly or indirectly through other costs or charges.

#### **8.21.4 Public interest**

An advertisement must not disparage or make inaccurate, unfair or unsubstantiated criticisms about any financial product, financial service, product supplier or financial services provider.

#### **8.21.5 Identification of product supplier or FSP**

An advertisement relating to a financial product or financial service must clearly and prominently must identify the product supplier or FSP or both.

An advertisement must not use the group or parent company name or the name of any other associate of a product supplier or an FSP or a name of another person to create the impression that any other person other than the product supplier FSP is financially liable in relation to a financial product or financial service.

A must does not use the group or parent company name or the name of any other associate of a product supplier or an FSP or a name of another person to or deceive as to the true identity of the product supplier or the FSP.

An advertisement relating to a financial product that is subject to a white labelling arrangement must clearly and prominently identify the product supplier.

##### **Definition of white labelling**

White labelling refers to the marketing of or offering of a specific financial product of a product supplier wholly or partially under the brand of another person who is not the product supplier, in terms of an arrangement between the product supplier and that other person.

#### **8.21.6 Appropriate language and medium**

An advertisement must use plain language. Plain language is communication that, considering the factually established or reasonably assumed level of knowledge of the person or average persons at whom the communication is target –

- ☐ Is clear and easy to understand.
- ☐ Avoids uncertainty or confusion.
- ☐ Is adequate and appropriate in the circumstances.



Terms must be defined or explained if the average targeted client could not reasonably be expected to understand them.

An FSP must consider the appropriateness of the medium to be used to publish any advertisement in relation to the complexity of the features of the financial product or financial service or other information being communicated.

#### **8.21.7 Record keeping of advertisements**

An FSP must keep adequate records of all advertisements. All records must be kept for a period of at least 5 years after publication.

#### **8.21.8 Negative option marketing**

An FSP or any person acting on its behalf may not offer to enter into an agreement in respect of a financial product or financial service on the basis that the agreement will automatically come into existence unless the client explicitly declines the FSP's offer to enter into the agreement.

#### **8.21.9 Unwanted direct advertising**

Where an FSP or any person acting on its behalf uses a telephone or mobile phone call, voice or text message or other electronic communication for an advertisement, it must allow the client during that call or within a reasonable time after receiving the message, the opportunity to demand that the FSP or other person does not publish any further advertisements to the client through any of these mediums.

An FSP or any person acting on its behalf may not charge a client a fee or allow a service provider to charge a client any fee for making such a demand.

#### **8.21.10 Comparative marketing**

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

Where a survey or other financial product or financial service comparison informs a comparative advertisement, the survey or other product or service comparison –

- ☐ Must be undertaken by an independent person or, if it is not reasonably practicable that it is undertaken by an independent person, the advertisement must be so qualified.
- ☐ Must be conducted at regular intervals if relied on or referenced on an on- going basis.
- ☐ Must ensure that financial products, financial services or related services being compared have the same or similar characteristics.
- ☐ Must take account of comparable features across the financial product, financial service or related service offerings included in the sample to ensure that not only the price (e.g., the Rand value of premiums) is being compared, but also the benefits provided under the policies, products or related services concerned.
- ☐ In particular, in the case of comparisons between financial products that are insurance policies must ensure that price comparisons are based on policies with equivalent terms and conditions, including insured events, cover levels, exclusions, waiting periods, excesses and other key features.
- ☐ May not focus on the price of a financial product, financial service or related service to the exclusion of the suitability of the financial product, financial service or related service or its delivery on customer expectations.

The survey or other comparison source and date thereof must be referenced in the advertisement and the methodology applied must be publicly available and readily accessible to the public in an easily understandable format.

#### **8.21.11 Puffery**

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

##### **Provisions related to puffer in the Code of Advertising Practice**

Value judgments, matters of opinion or subjective assessments are permissible provided that it is clear what is being expressed is an opinion and there is no likelihood of the opinion or the way it is expressed, misleading consumers about any aspect of a product or service which is capable of being objectively assessed in the light of generally accepted standards.

The guiding principle is that puffery is true when an expression of opinion, but false when viewed as an expression of fact.

#### **8.21.12 Endorsements**

An endorsement refers to the public statements declaring the virtues of a financial product, financial service or related service of a provider or recommending the entering into of a financial product, financial service or related service.

Testimonials and third-party endorsements used in an advertisement –

- ☐ Must be the genuine opinion and actual experience of the person making the testimonial or endorsement and be properly attributed to such person.
- ☐ Must be based upon actual statements made for testimonial or endorsement purposes.
- ☐ May use a pseudonym instead of the real name of the person making the testimonial or endorsement, provided this is stated in the advertisement concerned.

If the person making the testimonial or endorsement, or their employer or principal or any associate, has any financial interest or relationship to the FSP / product supplier or any associate of the FSP / product supplier or person acting on behalf of the FSP / product supplier, or will or has been compensated for the endorsement by any person (other than through reimbursement of actual costs incurred by the person making the endorsement), this must be disclosed in the advertisement.

Any endorsement in an advertisement must clearly and prominently state that the endorsement does not constitute financial advice.

### 8.21.13 Loyalty benefits or bonuses

Loyalty benefit means any benefit (including a so called cash or premium back bonus) that is directly or indirectly provided or made available to a client by a provider or a product supplier or an associate of the provider or product supplier, which benefit is wholly or partially contingent upon one of the following:

- ☐ The financial product with that FSP or product supplier remaining in place.
- ☐ The client continuing to use a financial service of that FSP or product supplier.
- ☐ The client increasing any benefit to be provided under a financial product.
- ☐ The client entering into any other financial product or benefit or utilising any related services offered by that FSP, product supplier or their associates.

An advertisement that references a loyalty benefit (including so-called cash- or premium-back bonuses in relation to insurance policies) or a no-claim bonus, must not create the impression that such benefit or bonus is free and must adequately -

- ☐ Indicate if the loyalty benefit or no-claim bonus is optional or not.
- ☐ Regardless of whether or not the loyalty benefit or no-claim bonus is optional, express the cost of the benefit or bonus including where applicable the impact that such cost has on the premium, or investment amount unless the impact is negligible and identify the grantor of the benefit or bonus.

The impact is deemed to be negligible if the cost of the loyalty benefit, no-claim bonus or rebate in premium comprises less than 10% of the total premium or investment amount payable under a financial product.

Where the impact of a loyalty benefit, no-claim bonus is not negligible and where the advertisement refers to the actual premium payable or investment amount payable-

- ☐ The cost of the benefit or bonus must be shown as a percentage of that premium or investment amount.
- ☐ The FSP must be able to demonstrate that the premium or investment amount and benefit cost used in the advertisement presents a true reflection of the cost impact for the average targeted client.
- ☐ Where the impact of a loyalty benefit or no claim bonus is not negligible and where the advertisement does not refer to the actual premium or investment amount payable, the average cost of the benefit, or bonus as a percentage of premium must be provided.

#### **Definition: No-claim bonus**

No-claim bonus means any benefit that is directly or indirectly provided or made available to a client by a product supplier in the event that the client does not claim or does not make a certain claim under a financial product within a specified period of time.

Where an advertisement highlights a loyalty benefit or a no-claims bonus as a significant feature of a financial product or financial service and refers to a projected loyalty benefit value or no-claim bonus value that is payable on the expiry of a period in the future, it must also express the value of the projected benefit or bonus present value terms, using reasonable assumptions about inflation.

An advertisement must clearly state whether the availability or extent of a loyalty benefit or no-claims bonus is contingent on future actions of the client or any factors not within the client's control.

An advertisement may not create the impression that the bonus or benefit is guaranteed or more likely to materialise than the FSP or product supplier reasonably expects for the average targeted client.

#### **8.21.14 Prominence**

In determining prominence, whenever information must be disclosed prominently as required by these sections, consideration must, as appropriate, be given to –

- ☐ The target audience of the advertisement.
- ☐ The likely information needs of the average targeted client.
- ☐ Prominence in the context of the advertisement as a whole.
- ☐ Positioning of the text and audibility and speed of speech.
- ☐ The duration of displays of key information.
- ☐ Background; colour and font size.

A statement or information in an advertisement is not regarded as being prominent if, amongst other things, the statement or information is –

- ☐ Obscured through the close proximity of promotional illustrations and/or additional text.
- ☐ Difficult to read due to the use of small font sizes, unclear type styles or the duration for which it is displayed.
- ☐ Likely to be overlooked due to its position.
- ☐ Superimposed across a coloured or patterned background which lessens its visual impact.
- ☐ Difficult to hear or understand due to the volume or speed at which speech is delivered.

In an advertisement relating to a financial product that is subject to a white labelling arrangement, the name of the product supplier must be as frequently mentioned, as audible or as visible as that of the white label and, in respect of written media, must be at least the same font size as that of the white label. This does not apply to an advertisement relating to a policy that is subject to a white labelling arrangement where –

- ☐ The white label arrangement is with a product supplier that is part of the same group of companies that the FSP is part of.
- ☐ The advertisement uses the brand of the other product supplier.
- ☐ All requirements complied with in relation to the identification of the product supplier.

#### **8.21.15 Principles relating to forecasts, illustrations, hypothetical data or projected benefits and past performance data**

No projected benefits (including but not limited to future investment values and, in the case of insurance policies, maturity, income, death, disability or full or partial surrender benefits) may be included in advertisements, if the benefits depend on future unknown investment performance, unless used to demonstrate the benefits of savings generally.

Any reference to project benefits, investment performance or returns must clearly reflect the effect that fees and costs may have on actual returns or benefits.

When past investment performance provided for or referred to in an information, all of the following conditions must be met:

- ☐ All information must be accurate and must be provided in the correct context, and the FSP must be able to substantiate all claims made.
- ☐ A statement must be included that past performance cannot be extrapolated into the future and is not an indication of future performance.

If tax advantages are referenced in an advertisement such advantages must be explained, and any key restrictions, penalties and mitigating circumstances must be disclosed.

Any reference to guaranteed elements or features must indicate whether the guarantee is subject to any requirements and conditions and where disclosure of those requirements and conditions can be found.

Where a financial product comprises participatory interest in an underlying collective investment scheme referred to in the Collective Investment Schemes Control Act no 45 of 2002, or where a financial product provides for an investment of client's funds into collective investment scheme portfolios, any advertisement must, in addition to the applicable required of this section comply with any determination of advertising and marketing requirements for Collective Investment Schemes made under the Collective Investment Schemes Control Act.

## 8.22 COMPLAINTS HANDLING BY FSP

### 8.22.1 Definitions

**Client query** is a request to FSP or the financial services provider's (FSP) service provider by or on behalf of a client, for information regarding the financial services provider's (FSP) financial services or related processes, or to carry out a transaction or action in relation to any such policy or service.

**Complainant** means a person who submits a complaint and includes a –

- ☐ Client.
- ☐ Person nominated as the person in respect of to whom a product supplier should meet financial product benefits or that persons' successor in title.
- ☐ Person whose life is insured under a financial product that is an insurance policy.
- ☐ Person that pays a premium or an investment amount in respect of a financial product.
- ☐ Member.
- ☐ Person whose dissatisfaction relates to the approach, solicitation marketing or advertising material or an advertisement in respect of a financial product, financial service or related service of the FSP.
- ☐ Anyone who has a direct interest in the agreement, financial product or service to which the complaint relates.
- ☐ A person acting on behalf of a person in the aforementioned bullet points.

**Complaint** is an expression of dissatisfaction by a person to an FSP or, to the knowledge of the FSP, to the FSP's service supplier relating to a financial product or service provided or offered by that FSP which indicates or alleges, regardless of whether such an expression of dissatisfaction is submitted together with or in relation to a client query, that -

- ☐ The FSP or its service supplier has contravened or failed to comply with an agreement, a law, a rule, or a code of conduct which is binding on the FSP or to which it subscribes.
- ☐ The FSP or its service provider's maladministration or wilful or negligent action or failure to act, has caused the person harm, prejudice, distress or substantial inconvenience.
- ☐ The FSP or its service has treated the person unfairly.

**Compensation payment** is a payment, whether in monetary form or in the form of a benefit or service, by or on behalf of an FSP to a complainant to compensate the complainant for a proven or estimated financial loss incurred as a result of the financial services provider's (FSP) contravention, non-compliance, action, failure to act, or unfair treatment forming the basis of the complaint, where the FSP accepts liability for having caused the loss concerned, but excludes any -

- ☐ Goodwill payment.
- ☐ Payment contractually due to the complainant in terms of a financial product.
- ☐ Refund of an amount paid by or on behalf of the complainant to the FSP where such payment was not contractually due.

However, compensation does include any interest on late payment of a payment contractually due or a refund as stipulated above.

**Goodwill payment** is a payment, whether in monetary form or in the form of a benefit or service, by or on behalf of an FSP to a complainant as an expression of goodwill aimed at resolving a complaint, where the FSP does not accept liability for any financial loss to the complainant as a result of the matter complained about.

**Member** in relation to a complainant means a member of one of the following:

- ☐ Pension fund as defined in section 1(1) of the Pension Funds Act, 1956 (Act 52 of 1956)
- ☐ Friendly society as defined in section 1(1) of the Friendly Societies Act, 1956 (Act 25 of 1956)
- ☐ Medical scheme as defined in section 1(1) of the Medical Schemes Act, 1998 (Act 131 of 1998)
- ☐ Group scheme as contemplated in the Policyholder Protection Rules made under section 62 of the Long-term Insurance Act, 1998, and section 55 of the Short-term Insurance Act, 1998

**Rejected** in relation to a complaint means that a complaint has not been upheld and the FSP regards the complaint as finalised after advising the complainant that it does not intend to take any further action to resolve the complaint and includes complaints regarded by the FSP as unjustified or invalid, or where the complainant does not accept or respond to the FSP's proposals to resolve the complaint.

**Reportable complaint** means any complaint other than a complaint that has been –

- ☐ Upheld immediately by the person who initially received the complaint.
- ☐ Upheld within the FSP's ordinary processes for handling client queries in relation to the type of financial product or financial service complained about, provided that such process does not take more than five business days from the date the complaint is received.

- ☐ Submitted to or brought to the attention of the FSP in such a manner that the FSP does not have a reasonable opportunity to record such details of the complaint as may be prescribed in relation to reportable complaints.

**Service supplier** means any person (whether or not that person is the agent of the provider), other than a representative, with whom a provider has an arrangement relating to the marketing, distribution, administration or provision of financial products, financial services or related services.

**Upheld** means that a complaint has been finalised wholly or partially in favour of the complainant and that –

- ☐ The complainant has explicitly accepted that the matter is fully resolved.
- ☐ It is reasonable for the FSP to assume that the complainant has so accepted.
- ☐ All undertakings made by the FSP to resolve the complaint have been met or the complainant has explicitly indicated its satisfaction with any arrangements to ensure such undertakings will be met by the FSP within a time acceptable to the complainant.

### 8.22.2 Establishment of complaints management framework

An FSP must establish, maintain and operate an adequate and effective complaints management framework to ensure the fair treatment of complainants that –

- ☐ Is proportionate to the nature, scale and complexity of the FSP's business and risks.
- ☐ Is appropriate for the business model, policies, services and clients of the FSP.
- ☐ Enables complaints to be considered after taking reasonable steps to gather and investigate all relevant and appropriate information and circumstances, with due regard to the fair treatment of complainants.
- ☐ Does not impose unreasonable barriers to complainants.
- ☐ Must address and provide for, at least, the matters provided for in this part.

An FSP must regularly review its complaints management framework and document any changes thereto.

### 8.22.3 Requirements for complaints management framework

The complaints management framework must at least, provide for –

- ☐ Relevant objectives, key principles and the proper allocation of responsibilities for dealing with complaints across the business of the FSP.
- ☐ Appropriate performance standards and remuneration and reward strategies (internally and where any functions are outsourced) for complaints management to ensure objectivity and impartiality.
- ☐ Documented procedures for the appropriate management and categorisation of complaints, including expected timeframes and the circumstances under which any of the timeframes may be extended.
- ☐ Documented procedures which clearly define the escalation, decision- making, monitoring and oversight and review processes within the complaint's management framework.
- ☐ Appropriate complaint record keeping, monitoring and analysis of complaints, and reporting (regular and ad hoc) to executive management, the board of directors and any relevant committee of the board on –
  - Identified risks, trends and actions taken in response thereto. and
  - The effectiveness and outcomes of the complaint's management framework.

- ☐ Appropriate communication with complainants and their authorised representatives on the complaints and the complaints processes and procedures.
- ☐ Appropriate engagement between the FSP and a relevant ombud.
- ☐ Meeting requirements for reporting to the Authority and public reporting in accordance with this part.
- ☐ A process for managing complaints relating to the FSP's service providers, insofar as such complaints relate to services provided in connection with the FSP's policies or related services, which process must -
  - Enable the FSP to reasonably satisfy itself that the FSP has adequate complaints management processes in place to ensure fair treatment of complainants.
  - Provide for monitoring and analysis by the FSP of aggregated complaints data in relation to complaints received by the service provider and their outcomes.
  - Include effective referral processes between the FSP and the service provider for handling and monitoring complaints that are submitted directly to either of them or require referral to the other for resolution.
  - Include processes to ensure that complainants are appropriately informed of the process being followed and the outcome of the complaint.
- ☐ Regular monitoring of the complaint's management framework generally.

#### **8.22.4 Allocation of responsibilities**

The board of directors of an FSP or in the absence of a board the governing body and key individuals of the financial services provider is responsible for effective complaints management and must approve and oversee the effectiveness of the implementation of the FSP's complaints management framework.

Any person that is responsible for making decisions or recommendations in respect of complaints generally or a specific complaint must –

- ☐ Be adequately trained.
- ☐ Have an appropriate mix of experience, knowledge and skills in complaints handling, fair treatment of customers, the subject matter of the complaints concerned and relevant legal and regulatory matters.
- ☐ Not be subject to a conflict of interest.
- ☐ Be adequately empowered to make impartial decisions or recommendations.

#### **8.22.5 Categorisation of complaints**

An FSP must categorize reportable complaints in accordance with the following minimum categories:

- ☐ Complaints relating to the design of a financial product, financial service or related service, including the fees, premiums or other charges related to that financial product or financial service.
- ☐ Complaints relating to information provided to clients.
- ☐ Complaints relating to advice.
- ☐ Complaints relating to financial product or financial service performance.
- ☐ Complaints relating to service to clients, including complaints relating to premium or investment contribution collection or lapsing of a financial product.
- ☐ Complaints relating to financial product accessibility, changes or switches including complaints relating to redemptions of investments.
- ☐ Complaints relating to complaints handling.



- ☐ Complaints relating to insurance risk claims, including non-payment of claims.
- ☐ Other complaints.

An FSP must, in addition to the categorisation, consider additional categories relevant to its chosen business model, financial products, financial services and client base that will support the effectiveness of its complaint management framework in managing conduct risks and effecting improved outcomes and processes for its clients.

An FSP must categorize, record and report on reportable complaints by identifying the category to which a complaint most closely relates and group complaints accordingly.

#### **8.22.6 Complaints escalation and review process**

An FSP must establish and maintain an appropriate internal complaints escalation and review process.

Procedures within the complaints escalation and review process should not be overly complicated or impose unduly burdensome paperwork or other administrative requirements on complainants.

The complaints escalation and review process should -

- ☐ Follow a balanced approach, bearing in mind the legitimate interests of all parties involved including the fair treatment of complainants.
- ☐ Provide for internal escalation of complex or unusual complaints at the instance of the initial complaint handler.
- ☐ Provide for complainants to escalate complaints not resolved to their satisfaction.
- ☐ Be allocated to an impartial, senior functionary within the FSP or appointed by the FSP for managing the escalation or review process of the FSP.

#### **8.22.7 Decisions relating to complaints**

Where a complaint is upheld, any commitment by the FSP to make a compensation payment, goodwill payment or to take any other action must be carried out without undue delay and within any agreed timeframes.

Where a complaint is rejected, the complainant must be provided with clear and adequate reasons for the decision and must be informed of any applicable escalation or review processes, including how to use them and any relevant time limits.

#### **8.22.8 Record keeping, monitoring and analysis of complaints**

An FSP must ensure accurate, efficient and secure recording of complaints-related information.

The following must be recorded in respect of each reportable complaint:

- ☐ All relevant details of the complainant and the subject matter of the complaint.
- ☐ Copies of all relevant evidence, correspondence and decisions.
- ☐ The complaint categorisation.
- ☐ Progress and status of the complaint, including whether such progress is within or outside any set timelines.

An FSP must maintain the following data in relation to reportable complaints categorised on an ongoing basis-

- ☐ Number of complaints received.
- ☐ Number of complaints upheld.
- ☐ Number of rejected complaints and reasons for the rejection.
- ☐ Number of complaints escalated by complainants to the internal complaint's escalation process.
- ☐ Number of complaints referred to an ombud and their outcome.
- ☐ Number and amounts of compensation payments made.
- ☐ Number and amounts of goodwill payments made.
- ☐ Total number of complaints outstanding.

Complaints information recorded in accordance with this part must be scrutinized and analysed by an FSP on an ongoing basis and utilised to manage conduct risks and effect improved outcomes and processes for its clients, and to prevent recurrences of poor outcomes and errors.

An FSP must establish and maintain appropriate processes for reporting of the information referred to in the paragraph above to governing body or executive management.

#### **8.22.9 Communication with complainants**

An FSP must ensure that its complaint processes and procedures are transparent, visible and accessible through channels that are appropriate to the FSP's clients and beneficiaries.

An FSP may not impose any charge for a complainant to make use of complaint processes and procedures.

All communications with a complainant must be in plain language. Plain language means communication that adheres to all of the following standards, considering the factually established or reasonably assumed level of knowledge of the person or average persons at whom the communication is targeted:

- ☐ Is clear and easy to understand.
- ☐ Avoids uncertainty or confusion.
- ☐ Is adequate and appropriate in the circumstances.

An FSP must, wherever feasible, provide clients with a single point of contact for submitting complaints.

An FSP must disclose to a complainant –

- ☐ The type of information required from a complainant.
- ☐ Where, how and to whom a complaint and related information must be submitted.
- ☐ Expected turnaround times in relation to complaints.
- ☐ Any other relevant responsibilities of a complainant.

An FSP must within a reasonable time after receipt of a complaint acknowledge receipt thereof and promptly inform a complainant of the process to be followed in handling the complaint, including –

- ☐ Contact details of the person or department that will be handling the complaint.
- ☐ Indicative and, where applicable, prescribed timelines for addressing the complaint.
- ☐ Details of the internal complaint's escalation and review process if the complainant is not satisfied with the outcome of a complaint.
- ☐ Details of escalation of complaints to the office of a relevant ombud and any applicable timeline.
- ☐ Details of the duties of the financial services provider and rights of the complainant as set out in the rules applicable to the relevant ombud.

Complainants must be kept adequately informed of –

- ☐ The progress of their complaint.
- ☐ Causes of any delay in the finalisation of a complaint and revised timelines. and
- ☐ The FSP's decision in response to the complaint.

#### **8.22.10 Engagement with ombud**

An FSP must –

- ☐ Have appropriate processes in place for engagement with any relevant ombud in relation to its complaints.
- ☐ Clearly and transparently communicate the availability and contact details of the relevant ombud services to complainants at all relevant stages of the insurance relationship, including at point of sale, in relevant periodic communications, and when a complaint is rejected, or a claim is repudiated.
- ☐ Display and/or make available information regarding the availability and contact details of the relevant ombud services at the premises and/or on the web site of the FSP.
- ☐ Maintain specific records and carry out specific analysis of complaints referred to them by the ombud and the outcomes of such complaints. and
- ☐ Monitor determinations, publications and guidance issued by any relevant ombud with a view to identifying failings or risks in their own policies, services or practices.
- ☐ Maintain open and honest communication and co-operation between itself and any ombud with whom it deals.
- ☐ Endeavour to resolve a complaint before a final determination or ruling is made by an ombud, or through its internal escalation process, without impeding or unduly delaying a complainant's access to an ombud.

#### **8.22.11 Reporting complaints information**

An FSP must have appropriate processes in place to ensure compliance with any prescribed requirements for reporting complaints information to any relevant designated authority or to the public as may be required by the Authority.

### **8.23 WAIVER OF RIGHTS**

No FSP may request a client to waive any right or benefit described to a client under the General Code of Conduct. Any such waiver is considered null and void.<sup>212</sup>

## 8.24 PROHIBITION ON SIGN-ON BONUS

A Category I provider that gives advice is not allowed to receive a sign-on bonus from any person.

No person may offer or provide a sign-on bonus to any person, other than a new entrant, as an incentive to become a Category I provider that gives advice. A sign on bonus is any financial interest received as an incentive to become a provider.

A new entrant is a person who has never been authorised as a financial services provider or appointed as a representative by and financial services provider.

### **Definition of sign-on bonus**

A sign-on bonus is any financial interest offered or received directly or indirectly, upfront or deferred, and with or without conditions, as an incentive to become a provider. The financial interest includes but is not limited to the following:

- Compensation for the potential or actual loss of any benefit including any form of income or part thereof.
- Compensation for the cost associated with the establishment of a provider's business or operations, including the sourcing of business, relating to the rendering of financial services.
- A loan, advance, credit facility or any other similar arrangement.

## Topic 9 Financial Intelligence Centre Act

### 9.1 INTRODUCTION

The purpose of the Financial Intelligence Centre Act (FICA) is to combat money laundering activities and the financing of terrorist and related activities.

FICA pursue this objective by establishing the Financial Intelligence Centre (FIC). Furthermore, FICA bestows certain duties on accountable institutions to enable FIC to perform their statutory duties.

#### What is money laundering?

Money laundering is an activity that conceals the nature and source of proceeds that has been obtained illegally.

### 9.2 DEFINITIONS

A client may be regarded as anyone who uses the services of an accountable institution. Client categories include natural persons, companies, close corporations, trusts and partnerships.

A business relationship is an arrangement between a client and an accountable institution for concluding either a single transaction or transactions on a regular basis. Accountable institutions are listed in the table following.

Table 9.1: Accountable institutions

An attorney	Foreign exchange dealer
A board of executors or a trust company or any person that invests, keeps in safe custody, controls or administers trust property	Lender against the security of securities
An estate agent	Financial service providers excluding those registered to provide advice and or intermediary services in short term insurance or health service benefits.
An authorised user of an exchange	Persons who issue, sell or redeem travellers' cheques, money orders or similar instruments
Collective Investment Scheme managers	Postbank
A bank or mutual banks	The Ithala Development Finance Corporation Limited
Long-term insurer	A money remitter
Gambling licensee	

Reporting institutions are any person who carries on the business of dealing in motor vehicles or in Kruger Rands.

### 9.3 OBJECTIVES OF THE FINANCIAL INTELLIGENCE CENTRE

The principal objective of the Financial Intelligence Centre is to assist in the—

- ☐ Identification of the proceeds of unlawful activities.
- ☐ Combating of money laundering activities and the financing of terrorist and related activities.
- ☐ Implementation of financial sanctions pursuant to resolutions adopted by the Security Council of the United Nations.

The other objectives of the Centre are as follows:

- ☐ To make information collected by it available to—
  - An investigating authority
  - the National Prosecuting Authority
  - An intelligence service
  - The South African Revenue Service
  - The Independent Police Investigative Directorate
  - The Intelligence Division of the National Defence Force
  - A Special Investigating Unit
  - The office of the Public Protector
  - An investigative division in an organ of state
  - A supervisory body, to facilitate the administration and enforcement of the laws of South Africa
- ☐ To administer measures requiring accountable institutions to freeze property and transactions pursuant to financial sanctions that may arise from resolutions adopted by the Security Council of the United Nations.
- ☐ To exchange information with bodies with similar objectives in other countries regarding money laundering activities, the financing of terrorist and related activities, and other similar activities.
- ☐ To supervise and enforce compliance with FICA or any directive made in terms of FICA and to facilitate effective supervision and enforcement by supervisory bodies.

### 9.4 DIRECTIVES<sup>213</sup>

The costs incurred in complying with a directive must be borne by the accountable institution, reporting institution or person concerned.

The subsections following considers the different directives that may be issued under FICA.

#### 9.4.1 Directives needing to be published in Government Gazette

The Financial Intelligence Center may, by notice in the Government Gazette, issue a directive to all institutions to whom the provisions of FICA apply regarding the application of FICA which reasonably may be required to give effect to the Financial Intelligence Center objectives.

The Financial Intelligence Center may issue a directive only after consulting with supervisory bodies on that directive.

Before the Financial Intelligence Center issues such a directive, it must publish a draft of the directive in the Government Gazette and invite submissions and consider submissions received.

#### **9.4.2 Directives needing not to be published in the Government Gazette.**

The Financial Intelligence Center or a supervisory body may, in writing, issue a directive to any category of accountable institutions or category of reporting institutions or other category of persons to whom the provisions of FICA apply regarding the application of FICA which reasonably may be required to give effect to the Financial Intelligence Center objectives.

The Financial Intelligence Center only may issue such a directive under one of the following circumstances:

- ☐ If a supervisory body failed to issue a directive despite any recommendation of the Financial Intelligence Center made.
- ☐ After consultation with the relevant supervisory body.

A supervisory body may issue a directive in terms of this section only after consulting the Financial Intelligence Center on that directive.

Before the Financial Intelligence Center or supervisory body concerned issues such a directive, it must publish a draft of the directive by appropriate means of publication and invite submissions and consider submissions received.

#### **9.4.3 Additional directives**

The Financial Intelligence Center or a supervisory body may in writing, over and above any directive, issue a directive to any accountable institution, category of accountable institutions, reporting institution, category of reporting institutions or other person to whom the provisions of FICA apply, to-

- ☐ Provide the Financial Intelligence Center or that supervisory body, as the case may be with the information, reports or statistical returns specified in the notice, at the time or at the intervals specified in the notice within the period specified.
- ☐ Cease or refrain from engaging in any act, omission or conduct in contravention of FICA.
- ☐ Perform acts necessary to remedy an alleged non-compliance with FICA.
- ☐ Perform acts necessary to meet any obligation imposed by FICA.

The Financial Intelligence Center or supervisory body may examine a document submitted to it.

## **9.5 REGISTRATION BY INSTITUTIONS**

Every accountable institution and every reporting institution must, within the prescribed period and in the prescribed manner, register with the Financial Intelligence Center, accompanied by such particulars as the Financial Intelligence Center may require.

A registered accountable institution or reporting institution must notify the Financial Intelligence Center, in writing, of any changes to the particulars furnished within 90 days after such a change.

The Financial Intelligence Center keeps and maintains a register of every accountable institution and reporting institution registered with them.

## 9.6 MAIN DUTIES IMPOSED ON ACCOUNTABLE INSTITUTIONS

To achieve this objective, FICA requires that an accountable institution must comply with the following main duties:

- ☐ Customer due diligence.
- ☐ Keeping of records.
- ☐ Providing the Financial Intelligence Centre access to information.
- ☐ Reporting certain transactions and suspicious activities (Applicable to reporting institutions as well).

### 9.6.1 Customer due diligence<sup>214</sup>

FICA impose certain duties on accountable institutions regarding keeping record of business relationships and transactions. These duties become the duty of a representative associated with an FSP.

FICA stipulates that an accountable institution may not establish a business relationship or conclude a transaction with a client unless the accountable institution has taken the prescribed steps.

When an accountable institution engages with a prospective client to enter into a single transaction or to establish a business relationship, the institution must, in the course of concluding that single transaction or establishing that business relationship and in accordance with its Risk Management and Compliance Programme establish and verify the identity of the client.

If the client is acting on behalf of another person, the identity of that other person must be established and verified as well as the client's authority to conduct business on behalf of the other person.

If another person is acting on behalf of the client, the identity of the other person must be verified as well as the other person's authority to act on behalf of the client.

### 9.6.2 Keeping of records

An accountable institution must keep the following due diligence records:

- ☐ Copies of, or references to, information provided to or obtained by the accountable institution to verify a person's identity.
- ☐ In the case of a business relationship, reflect the information obtained concerning-
  - The nature of that business relationship or transaction.
  - The intended purpose of the business relationship.
  - The source of the funds which the prospective client is expected to use in concluding transactions in the course of the business relationship.



An accountable institution must keep the following transaction records:

- ☐ The amount involved and the currency in which it was denominated.
- ☐ The date on which the transaction was concluded.
- ☐ The parties to the transaction.
- ☐ The nature of the transaction.
- ☐ Business correspondence.
- ☐ If an accountable institution provides account facilities to its clients, the identifying particulars of all accounts and the account files at the accountable institution that are related to the transaction.

### **I) Maintenance of records under FICA**

The following record keeping requirements are applicable in terms of FICA:

- ☐ Records may be kept in electronic format but must be capable of being reproduced in a legible format.<sup>215</sup>
- ☐ Records may be kept by a third-party provider, providing that the accountable institution has free and easy access to the records and the records are readily available to the Financial Intelligence Centre and the relevant supervisory body for the purposes of performing its function. The Financial Intelligence Centre should also be provided with particulars of such third-party provider. Should the third party fail to keep proper records, the accountable institution is liable for that failure.<sup>216</sup>
- ☐ An accountable institution must keep the records which relate to the establishment of a business relationship, for at least 5 years from the date on which the business relationship is terminated.
- ☐ An accountable institution must keep the records which relate to a transaction which is concluded for at least 5 years from the date on which transaction is concluded.<sup>217</sup>
- ☐ An accountable institution must keep records relating to a transaction or activity which gave rise to a report for at least five years from the date on which the report was made.
- ☐ The records (or any extract thereof) are admissible as evidence before a Court.<sup>218</sup>
- ☐ An accountable institution that does not adhere to these prescriptions is guilty of an offence.<sup>219</sup> Any person who wilfully tampers with these records kept or wilfully destroy such records is guilty of an offence.<sup>220</sup>

### **9.6.3 Access to information**

An accountable institution must comply with a request by the Financial Intelligence Center to advise whether-

- ☐ A specified person is or has been a client of the institution.
- ☐ A specified person is acting or has acted on behalf of any client of the institution.
- ☐ A client of the accountable institution is acting or has acted for a specified person.<sup>221</sup>
- ☐ Whether a number specified by the Financial Intelligence Center was allocated by the accountable institution.
- ☐ On the type and status of a business relationship with a client of the accountable institution, reporting institution or person.

An accountable institution that fails to give assistance to a representative of the Financial Intelligence Centre is guilty of an offence.<sup>222</sup>

#### 9.6.4 Reporting certain transactions and suspicious activities

FICA imposes a duty on the FSP to report the following transactions:

- ☐ Cash transactions of more than R49 999.999 or an aggregate of smaller amounts which combine come to exceed this amount paid by the accountable institution or reporting institution to the client or a person on behalf of the client or received by the accountable institution or reporting institution from the client or a person acting on behalf of the client.
- ☐ Property associated with terrorist and related activities and financial sanctions pursuant to the resolutions of the united nations security council.
- ☐ Suspicious and unusual transactions.

In such an event, a report must be sent to the Financial Intelligence Centre as soon as possible but no later than 2 days after it became aware of such an event.

This report must be made in accordance with the format specified by the Financial Intelligence Center and sent electronically by means of the internet-based reporting portal.

The Financial Intelligence Center may request additional information relation to the transactional activity and supporting documentation, concerning the report. The institution must furnish the information in accordance with the format and content specified by the Financial Intelligence Centre by means of the internet-based reporting portal.<sup>223</sup>

An accountable institution, reporting institution or person required to make a report may continue with and carry out the transaction in respect of which the report is required to be made unless the Financial Intelligence Center directs the accountable institution, reporting institution or person not to proceed with the transaction. the Financial Intelligence Center can direct the institution to not continue with the transaction for not longer than 10 working days.<sup>224</sup>

### 9.7 PROHIBITION AGAINST INFORMING A CLIENT THAT A REPORT HAS BEEN MADE

A person that made a report or is about to make a report or who knows or suspects that a report was or is to be made, may not disclose the fact that the report was made or the contents of the report to any other person i.e. the client must not be tipped-off. This includes the person about which the report is made.

FICA allows the reporter to disclose information under the following circumstances:

- If it is within the power and duties of that person in terms of any legislation.
- For carrying out the provisions of FICA.
- For legal proceedings (including proceedings before a judge in chambers).
- In terms of an order of court.

## 9.8 MEASURES TO PROMOTE COMPLIANCE BY ACCOUNTABLE INSTITUTIONS

FICA requires accountable institutions to develop, document, maintain and implement a risk management plan and compliance program as well as provide staff with training to promote compliance with regards to duties imposed by FICA.

### 9.8.1 Risk management plan and compliance program

An accountable institution must develop, document, maintain and implement a risk management plan and compliance program that provides for the following:

- The establishment and verification of identities.
- The information that must be recorded and kept.
- The manner and place in which such records must be kept.
- The steps to be taken to determine when a transaction is reportable.
- Such matters as may be prescribed by the Financial Intelligence Centre.

The risk management plan and compliance program must-

- Enable the accountable institution to identify, assess, monitor, mitigate and manage the risk that the provision by the accountable institution of products or services may involve or facilitate money laundering activities or the financing of terrorist and related activities.
- Provide the way the institution determines if a person is a prospective client in the process of establishing a business relationship or entering into a single transaction with the institution.
- Provide the way the accountable institution may not establish a business relationship or conclude a single transaction with an anonymous client or a client with an apparent false or fictitious name.
- Provide the way and the processes by which the establishment and verification of the identity of persons whom the accountable institution must identify is performed in the institution.
- Provide the way the institution determines whether future transactions that will be performed in the course of the business relationship are consistent with the institution's knowledge of a prospective client.
- Provide the way and the processes by which the institution conducts additional due diligence measures in respect of legal persons, trust and partnerships.
- Provide the way and the processes by which ongoing due diligence and account monitoring in respect of business relationships is conducted by the institution.
- Provide the way the examining of complex or unusually large transactions; and unusual patterns of transactions which have no apparent business or lawful purpose, and keeping of written findings relating thereto, is done by the institution.
- Provide the way and the processes by which the institution will confirm information relating to a client when the institution has doubts about the veracity of previously obtained information.
- Provide the way and the processes by which the institution will perform the customer due diligence requirements during the course of a business relationship, the institution suspects that a transaction or activity is suspicious or unusual.
- Provide the way the accountable institution will terminate an existing business relationship.
- Provide the way and the processes by which the accountable institution determines whether a prospective client is a foreign prominent public official or a domestic prominent influential person.
- Provide the way and the processes by which enhanced due diligence is conducted for higher-risk business relationships and when simplified customer due diligence might be permitted in the institution.

- Provide the way and place at which the records are kept.
- Enable the institution to determine when a transaction or activity is reportable to the Financial Intelligence Center.
- Provide for the processes for reporting information to the Financial Intelligence Center.
- Provide the way the Risk Management and Compliance Programme is implemented in branches, subsidiaries or other operations of the institution in foreign countries so as to enable the institution to comply with its obligations under FICA.
- Provide the way the institution will determine if the host country of a foreign branch or subsidiary permits the implementation of measures required under FICA.
- Provide the way the institution will inform the Financial Intelligence Center and supervisory body concerned if the host country does not permit the implementation of measures required under FICA.
- Provide for the processes for the institution to implement its Risk management and Compliance Program.
- Provide for any other prescribed matter.<sup>225</sup>

An accountable institution must indicate, in its Risk Management and Compliance Programme, if any of the above is not applicable to that accountable institution and the reason why it is not applicable.

The board of directors, senior management or other person or group of persons exercising the highest level of authority in an accountable institution must approve the Risk Management and Compliance Programme of the institution.

An accountable institution must review its Risk Management and Compliance Programme at regular intervals to ensure that the Programme remains relevant to the accountable institution's operations and the achievement of the requirements.

The risk management plan and compliance program must be made available to all employees involved in transactions. An accountable institution must on request make a copy of this risk management plan and compliance program available to the Financial Intelligence Centre or any supervisory body which performs regulatory or supervisory function in respect of the accountable institution e.g. FSCA.<sup>226</sup>

### **9.8.2 Governance of anti-money laundering and counter terrorist financing compliance**

The board of directors of an accountable institution which is a legal person with a board of directors, or the senior management of an accountable institution without a board of directors, must ensure compliance by the accountable institution and its employees with the provisions of FICA and its Risk Management and Compliance Programme.

An accountable institution which is a legal person must have a compliance function to assist the board of directors or the senior management, as the case may be, of the institution in discharging their obligations and must assign a person with sufficient competence and seniority to ensure the effectiveness of the compliance function.

The person or persons exercising the highest level of authority in an accountable institution which is not a legal person must ensure compliance by the employees of the institution with the provisions of FICA and its Risk Management and Compliance Programme, in so far as the functions of those employees relate to the obligations of the institution.

An accountable institution which is not a legal person, except for an accountable institution which is a sole proprietor must appoint a person or persons with sufficient competence to assist the person or persons exercising the highest level of authority in the accountable institution in discharging their obligation.<sup>227</sup>

### 9.8.3 Training regarding compliance

An accountable institution must provide training to its employees to enable them to comply with the provision of the Financial Intelligence Centre Act and the risk management plan and compliance program.

## 9.9 ADMINISTRATIVE SANCTIONS<sup>228</sup>

The financial Intelligence Center or a supervisory body may impose an administrative sanction on any accountable institution, reporting institution or other person to whom FICA applies when satisfied on available facts and information that the institution or person:

- ☐ Has failed to comply with a provision of FICA or any order, determination or directive made in terms of FICA.
- ☐ Has failed to comply with a condition of a licence, registration, approval or authorisation issued or amended.
- ☐ Has failed to comply with a directive issued.
- ☐ Has failed to comply with a non-financial administrative sanction imposed in terms of this section.

The Financial Intelligence Center or a supervisory body may impose any one or more of the following administrative sanctions:

- ☐ A caution not to repeat the conduct which led to the non-compliance.
- ☐ A reprimand.
- ☐ A directive to take remedial action or to make specific arrangements.
- ☐ The restriction or suspension of certain specified business activities.
- ☐ A financial penalty not exceeding R10 million in respect of natural persons and R50 million in respect of any legal person.<sup>229</sup>

Administrative sanctions will be given for the following reasons:

- ☐ Failure to identify persons.
- ☐ Failure to comply with a duty in regard to customer due diligence.
- ☐ Failure to keep records.
- ☐ Failure to comply with direction of the Financial Intelligence Center.
- ☐ Failure to comply with duty in respect of Risk Management and Compliance Programme.
- ☐ Failure to register with the Financial Intelligence Center.
- ☐ Failure to comply with duty in regard to governance.
- ☐ Failure to provide training.
- ☐ Failure to comply with directives of FIC or supervisory body.

## 9.10 PENALTIES

In terms of FICA, two maximum penalties can be awarded for the different offences:

Maximum penalty of R100 million or 15-years' imprisonment can be awarded for the following:

- ☐ Destroying or tampering with records.
- ☐ Failure to give assistance to representative of the Financial Intelligence Center.
- ☐ Contravention of prohibitions relating to persons and entities identified by Security Council of United Nations.
- ☐ Failure to provide the Financial Intelligence Center with requested information.
- ☐ Failure to report cash transactions as prescribed.
- ☐ Failure to report suspicious or unusual transactions.
- ☐ Failure to report property associated with terrorist and related activities and financial sanctions pursuant to Resolutions of United Nations Security Council.
- ☐ Unauthorised disclosure.
- ☐ Failure to report conveyance of cash or bearer negotiable instrument into or out of South Africa.
- ☐ Failure to report electronic transfers.
- ☐ Failure to comply with request.
- ☐ Failure to comply with direction of the Financial Intelligence Center.
- ☐ Failure to comply with monitoring order.
- ☐ Misuse of information.
- ☐ Obstructing of official in performance of functions
- ☐ Conducting transactions to avoid reporting duties.
- ☐ Unauthorised access to computer system or application or data.
- ☐ Unauthorised modification of contents of computer system.

Maximum penalty of R10 million or 5-years' imprisonment can be awarded for the following:

- ☐ Offences relating to inspection.
- ☐ Hindering or obstructing appeal board.
- ☐ Failure to attend when summoned.
- ☐ Failure to answer fully or truthfully.

## 9.11 OTHER MONEY LAUNDERING ACTS

FICA does promote measures to combat money laundering but there are various other acts that criminalises money laundering and other activities and terrorist related activities, they are as follows:

- *Prevention of Organised Crime Act (PoCA)*: This Act criminalises money laundering and defines specific offences in respect of racketeering and participation in criminal gang activities. It allows for civil forfeiture in respect of property involved in such illegal conduct as well as confiscation of any property obtained from the proceeds of unlawful activities.
- *Prevention and Combating of Corrupt Activities Act (PreCCA)*: This Act creates a host of offences relating to corrupt activities and obliges persons in positions of authority to report such offences.
- *Protection of Constitutional Democracy Against Terrorist and Related Activities (PoCDATARA)*: This Act broadened the scope of FICA to include the combating of financing terrorism and provides for measures to prevent and combat terrorist and related activities.

There is a total of 4 money laundering Acts.

## Appendix A: Fit & Proper requirements summary per category

**Must display qualities of honesty, integrity & good standing**

**Operational Ability:** Must have operational ability to effectively function and juristic rep must have at least 1 key individual

**Financial soundness requirements:** Not insolvent or provisionally insolvent | Not under liquidation or provisional liquidation or business rescue

Juristic rep has additional financial soundness requirements.

### Minimum Requirement

- Category I & IV: Grade 12 or qualification equivalent to Grade 12
- Category II, IIA, III & IV: Recognised qualification
- Product Training

Product category name	Cat I Advice Experience	Cat I Intermediary Experience	Cat II/II A Experience
Long-term insurance subcategory A	6 Months	2 Months	N/A
Friendly Society Benefits			
Short-term insurance Personal Lines			
Short-term insurance Personal Lines A 1			
Short-term insurance commercial lines			
Long-term insurance: Subcategory B1	1 Year	6 Months	2 Years
Long-term insurance subcategory C			
Long-term insurance: Subcategory B2			
Long-term insurance: Subcategory B2 A			
Long-term insurance: Subcategory B1 A			
Retail Pensions Benefits	2 Years	1 Years	3 Years
Pension Fund Benefits			
S & I: Shares			
S & I: Money Market instruments			
S & I: Debentures and securitized debt			
S & I: Warrants, certificates and other instruments acknowledging debt			
S & I: Bonds			
S & I: Derivative instruments excluding warrants			
Structured deposits			
Securities and instruments			
Participatory interest in a CIS hedge fund	1 Year	1 Year	2 Years
Collective investment schemes			
Forex investment business			
Health Service Benefits	2 Years	2 Years	N/A
Long-term deposits	6 Months	3 Months	1 Year
Short-term deposits			
Cat II & IIA	N/A	N/A	3 Years
Category III KI	N/A	N/A	
Category IV KI	N/A	N/A	





## Summary of exemptions to requirements

Fit and proper requirement	Exemption applicable
Product specific training	<input type="checkbox"/> Category II representatives
Class of business training	<input type="checkbox"/> Key individuals in Long-term insurance A & Friendly Society Benefits <input type="checkbox"/> Representatives providing execution of sales <input type="checkbox"/> Tier 2 representatives
Recognised qualifications	<input type="checkbox"/> Key individuals in Long-term insurance A & Friendly Society Benefits <input type="checkbox"/> Representatives in Long-term insurance A & Friendly Society Benefits <input type="checkbox"/> Representatives providing execution of sales
Regulatory examination requirement	<input type="checkbox"/> Key individuals in Long-term insurance A & Friendly Society Benefits <input type="checkbox"/> Representatives providing execution of sales <input type="checkbox"/> Tier 2 representatives
Continuous Professional Development	<input type="checkbox"/> Tier 2 representatives <input type="checkbox"/> Representatives providing intermediary services in Tier 1 products

## Appendix B: Knowledge Criteria for representatives

### Task 1: Demonstrate understanding of the FAIS Act as a regulatory framework

Describe the FAIS act and subordinate legislation.	Par 1.1   Par 8.1	<input type="checkbox"/>
Provide an overview of the financial services and different types of financial products a representative can deal with.	Par 1.5	<input type="checkbox"/>
Describe the roles and function of a compliance officer	Par 1.6.10	<input type="checkbox"/>

### Task 2: Contribute towards maintaining an FSP license

Explain the requirements that an FSP must meet to maintain the FSP license.	Par 4.4	<input type="checkbox"/>
Discuss the requirements of the Act around the display of licenses.	Par 4.4.1	<input type="checkbox"/>
Explain what the implications are for representative if an accreditation is suspended or withdrawn or lapsed in terms of the Medical Schemes Act, 1998, or any other enabling legislation such as the Banks or Insurance legislation.	Par 4.9	<input type="checkbox"/>
Explain what is meant by undesirable practices.	Par 3.2	<input type="checkbox"/>
Describe the implication for the representative if the Commissioner publishes an undesirable practice notice.	Par 3.2	<input type="checkbox"/>
Explain the reparation measures available to the Commissioner if the FSP continues with undesirable business practices.	Par 3.2	<input type="checkbox"/>
Describe the offenses prescribed by the FAIS act.	Par 4.5	<input type="checkbox"/>

### Task 3: Define the role of the key individual in terms of the FAIS act

Describe the roles and responsibilities of key individuals as defined in the FAIS act.	Par 1.6.7	<input type="checkbox"/>
Describe the regulated management and oversight responsibilities of a key individual.	Table 1.6	<input type="checkbox"/>

### Task 4: Adhere to the specific Codes of conduct

Describe the general and specific duties of a provider.	Par 8.2	<input type="checkbox"/>
Describe what could possibly be a conflict of interest.	Par 8.8	<input type="checkbox"/>
Discuss the impact and requirements regarding the disclosure rules on the FSP.	Par 8.13	<input type="checkbox"/>
Explain the disclosures that must be before rendering a financial service.	Par 8.5   Par 8.12.1 Table 8.1	<input type="checkbox"/>
Explain the disclosures that need to be made when rendering a financial service.	Par 8.12.2   Par 8.12.3	<input type="checkbox"/>
Describe the disclosure requirements regarding the FSP, product suppliers and financial services.	Par 8.12	<input type="checkbox"/>
Explain the specific disclosure requirements regarding fees and commission.	Par 8.11	<input type="checkbox"/>
Explain the steps that must be taken when providing advice.	Par 8.5   Par 8.7   Par 8.8	<input type="checkbox"/>
Explain the requirements for an FSP when custody of financial products and funds occurs.	Par 8.9	<input type="checkbox"/>
Explain the manner in which complaints are to be handled by the FSP as required by the General Code of Conduct.	Par 8.22	<input type="checkbox"/>
Explain the requirements of the General Code of Conduct for FSPs relating to the termination of an agreement.	Par 8.20	<input type="checkbox"/>

**Task 5: Comply with regulated record keeping requirements**

Explain the record keeping obligations as imposed by the FAIS Act and FIC Acts	Par 4.4.3   Par 9.6.2	<input type="checkbox"/>
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**Task 6: Comply with the requirements of the FIC Act and Money Laundering and Terrorist Financing control regulations, as it applies to the FSP.**

Explain the requirements specific to an FSP prescribed by the FIC Act	Topic 9	<input type="checkbox"/>
Describe how the FIC act impacts a representative's interaction with a client.	Topic 9	<input type="checkbox"/>

**Task 7: Deal with complaints that have been submitted to the Ombud for FSPs**

Explain the role and authority of the Ombud for FSPs.	Topic 2	<input type="checkbox"/>
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**Task 8: Operate as a representative in terms of the FAIS Act.**

Describe the roles, responsibilities regarding representatives.	Par 1.6.8   Par 5.1	<input type="checkbox"/>
Explain the fit and proper requirements that apply to a representative.	Topic 5	<input type="checkbox"/>
Distinguish between advice and intermediary services.	Par 1.2	<input type="checkbox"/>
Describe the purpose and requirements of the register of representatives.	Par 5.2	<input type="checkbox"/>
Explain when representatives can act under supervision.	Topic 6	<input type="checkbox"/>
Explain the disclosure requirements for a representative under supervision.	Topic 6	<input type="checkbox"/>
Describe the implications if a representative no longer meets the fit and proper requirements.	Par 7.2	<input type="checkbox"/>
Define the purpose of debarment.	Par 7.2	<input type="checkbox"/>
Describe when debarment should be considered.	Par 7.2	<input type="checkbox"/>
Explain the debarment process that should be followed in the event of a possible contravention of the FAIS Act.	Par 7.5	<input type="checkbox"/>
Explain what recourse a debarred Representative may have.	Par 7.9	<input type="checkbox"/>