

The Financial Advisory and Intermediary Services (FAIS) Act

6.1 The Aim of the FAIS Legislation

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

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

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

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

6.2 Why the Need for the FAIS Legislation?

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

The Act aims to achieve the following:

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

6.2.1 What is the history behind the legislation?

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

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

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

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

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

6.4 Definition of "ADVICE" and "INTERMEDIARY SERVICE"

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

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

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

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

In terms of the Act, an FSP is defined as

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

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

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

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

Key individuals

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

Representatives

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

Support staff

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

6.6 FSP's and their Representatives

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

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

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

It therefore stands to reason that before an insurer mandates an organisation to perform certain functions on its behalf, it must ensure that such organisation is a registered FSP. This will mean that each FSP takes responsibility for its own employees or representatives, and the insurer is not

held accountable for the behaviour of other organisations that perform certain functions on its behalf. Further, the Act is quite clear on the duties of the FSP regarding its representatives.

An authorised financial services provider must:

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

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

Every authorised financial services provider must maintain a register of representatives, and key individuals of such representatives, which must be regularly updated and be available to the Registrar for reference or inspection purposes. Such register must contain every representative's or key individual's name and business address, and state whether the representative acts for the provider as employee or as mandatory. The register must also specify the categories in which such representatives are competent to render financial services.

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

- In the hypothetical case of ABC Brokerage (Pty) Ltd, with four financial advisors, the brokerage will be the FSP and the advisors, the representatives.
- In another instance, XYZ Life Pty Ltd, is a product supplier and a Financial Services Provider which also uses the services of tied agents to market their products exclusively to XYZ. In this instance, the company would be the FSP (i.e. the product supplier) and its agents would be the representatives of the FSP.

6.7 What should an Authorised FSP do?

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

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

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

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

6.8 Who are FSP's?

6.8.1 FSP Category II (Discretionary FSP)

"Discretionary FSP" means a FSP:

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

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

6.8.2 FSP Category III (Administrative FSP)

"Administrative FSP" means a FSP, other than a discretionary FSP –

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

"bulking" means the aggregation by an administrative FSP of –

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

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

"Financial product" means, subject to subsection (2):

- (a) *securities and instruments, including-*
 - (i) *shares in a company other than a "share block company" as defined in the Share Blocks Control Act, 1980 (Act No. 59 of 1980);*
 - (ii) *debentures and securitised debt;*
 - (iii) *any money-market instrument;*
 - (iv) *any warrant, certificate, and other instrument acknowledging, conferring or creating rights to subscribe to, acquire, dispose of, or convert securities and instruments referred to in subparagraphs (i), (ii) and (iii);*
 - (v) *any "securities" as defined in section 1 of the Securities Services Act, 2002;*
- (b) *a participatory interest in one or more collective investment schemes;*
- (c) *a long-term or a short-term insurance contract or policy, referred to in the Long-term Insurance Act, 1998 (Act No. 52 of 1998), and the Short-term Insurance Act, 1998 (Act No. 53 of 1998), respectively;*
- (d) *a benefit provided by:*
 - (i) *a pension fund organisation as defined in section 1(1) of the Pension Funds Act, 1956 (Act No. 24 of 1956), to the members of the organisation by virtue of membership; or*
 - (ii) *a friendly society referred to in the Friendly Societies Act, 1956 (Act No. 25 of 1956), to the members of the society by virtue of membership;*
- (e) *a foreign currency denominated investment instrument, including a foreign currency deposit;*
- (h) *any other product similar in nature to any financial product referred to in paragraphs (a) to (g), inclusive, declared by the Registrar, after consultation with the Advisory Committee, by notice in the Gazette to be a financial product for the purposes of this Act;*
- (i) *any combined product containing one or more of the financial products referred to in paragraphs (a) to (h), inclusive;*
- (j) *any financial product issued by any foreign product supplier and marketed in the Republic and which in nature and character is essentially similar or corresponding to a financial product referred to in paragraphs (a) to (1), inclusive;*

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

6.8.3 FSP Category I

This Category of FSP has been defined in the Determination of Fit and Proper as:

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

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

6.9 What are the Categories of Financial Products?

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

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

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

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

- (a) risk policies which provide cover in respect of death, disability and health events, and which are not marketed as investment or savings policies;*
- (b) investment/savings policies (including recurring premium retirement annuity policies, but excluding single premium retirement annuity policies and policies issued to and/or in respect of preservation funds) which guarantee a minimum return of capital invested at a specified future date or dates, and where such minimum is ascertainable in Rand terms at inception;*
- (c) annuities which guarantee a minimum annuity for the term of the policy which is ascertainable in Rand terms at inception; and*
- (d) any policy which combines the policy features included in paragraphs (a), (b) or (c), but excludes policies mentioned in Long-term Insurance Category C;*

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

6.10 Other Categories of Products Include

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

6.11 What Measures are Available for Consumer Protection Purposes, as Contained in the Legislation?

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

Further, the Act makes provision that:

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

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

6.12 Client Education

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

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

6.13 What are the Functions of the Role-players?

6.13.1 Financial Services Board

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

6.13.2 Compliance Officer

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

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

- The Compliance Officer must be approved by the Registrar in accordance with the subordinate legislation.
- The approved Compliance Officer must submit reports to the Registrar.

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

6.13.3 Recognised Body

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

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

6.14 The Authorisation Process

The whole authorisation process is based on the application by the FSP to be licensed as an authorised FSP. The FSP persona within FAIS can be one of three categories as was seen earlier – either an FSP I, FSP II or an FSP III. Each of these FSP’s operate in a different sub sector of the Financial Services Industry and therefore have different pieces of legislation which apply to them. While some of this applicable legislation is generic (such as FAIS!), the others are specific (Long Term Insurance Act, Short Term Insurance Act, and Collective Investment Schemes Act).

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

6.15 What are the Minimum Requirements Needed to be Licensed?

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

1. SOUND FINANCIAL SECURITY

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

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

2. HONESTY and INTEGRITY

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

- (1) An applicant must be of good character and integrity.
- (2) In determining whether the applicant is of good character and integrity, the Registrar may refer to any information in possession of the Registrar or brought to the Registrar's attention.
- (3) Without prejudice to the generality of subparagraphs (2) and (4) of this paragraph any of the following factors is prima facie proof that the applicant does not comply with subparagraph (1), namely that the applicant:
 - (a) has within a period of five years preceding the date of application been found guilty in any civil or criminal proceedings by a court of law or other competent authority (whether in the Republic or elsewhere) of having acted fraudulently, dishonestly, unprofessionally, dishonourably or in breach of a fiduciary duty;
 - (b) has within a period of five years preceding the date of application been fined or censured by, or denied membership due to disqualification of, any professional or financial services industry body (whether in the Republic or elsewhere), recognised by the Board, on account of any act of dishonesty, negligence, incompetence or mismanagement;
 - (c) has within a period of five years preceding the date of application been fined or censured by any regulatory body (whether in the Republic or elsewhere), recognised by the Board, or that the applicant's authorisation to carry on business has been refused, suspended or revoked by any such body, because of negligence, incompetence or mismanagement; and
 - (d) has at any time prior to the date of application been disqualified or prohibited by any court of law (whether in the Republic or elsewhere) from taking part in the management of any company or other statutorily created, recognised or regulated body, irrespective of whether such disqualification has since been lifted or not.
- (4) An applicant must in the application be candid, frank and accurate and must of own accord disclose all facts or information at the disposal of or which may be accessible to the applicant and which may be relevant for purposes of a decision by the Registrar that the applicant complies or does not comply with subparagraph (1).

3. OPERATIONAL ABILITY

- (1) An applicant must have and be able to maintain the operational ability to fulfil the responsibilities imposed by the Act on licensees, including the following minimum requirements:
 - (a) A fixed business address from which business is conducted and which can also serve as a *domicilium citandi et executandi* for purposes of entry into contract and any judicial or quasi-judicial proceedings;
 - (b) adequate communication facilities including at least a full-time telephone or cell phone service, and typing and document duplication facilities;
 - (c) adequate storage and filing systems for the safe-keeping of records, and business communications and correspondence; and

- (d) an account with a registered bank including, where necessary, a specific trust account for client moneys.
- (2) An applicant must have in place the appropriate money laundering control systems and provision for training of staff, including identification, record-keeping and reporting procedures required under the Financial Intelligence Centre Act, 2001 (Act No. 38 of 2001).

4. COMPETENCY

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

6.16 Disclosure Rules for a Sub Sector of the Financial Services Industry

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

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

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

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

- the making of adequate disclosures of relevant material information, including disclosures of actual or potential own interests, in relation to dealings with clients;
- adequate and appropriate record-keeping;
- avoidance of fraudulent and misleading advertising, canvassing and marketing;
- proper safe-keeping, separation and protection of funds and transaction documentation of clients;
- where appropriate, suitable guarantees or professional indemnity or fidelity insurance cover, and mechanisms for adjustments of such guarantees or cover by the Registrar in any particular case; and

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

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

6.17 Disclosures

6.17.1 Disclosures by Product Suppliers

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

- (a) Name, physical location, and postal and telephone contact details of the product supplier;
- (b)
 - (i) the contractual relationship with the product supplier (if any), and whether the provider has contractual relationships with other product suppliers;
 - (ii) names and contact details of the relevant compliance department of the product supplier;
 - (iii) details of complaints procedures in respect of complaints by clients maintained by the relevant product supplier;
- (c) the existence of any conditions or restrictions imposed by the product supplier with regard to the types of financial products or services that may be provided or rendered by the provider; and
- (d) where applicable, the fact that the provider:
 - (i) directly or indirectly holds more than 10% of the relevant product supplier's shares, or has any equivalent substantial financial interest in the product supplier;
 - (ii) during the preceding 12 month period received more than 30% of total remuneration, including commission, from the product supplier, and the provider must convey any changes thereafter in regard to such information at the earliest opportunity to the client.

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

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

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

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

6.17.2 Disclosures by Providers

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

- (a) Full business and trade names, registration number (if any), postal and physical addresses, telephone and, where applicable, cellular phone number, and internet and e-mail addresses, in respect of the relevant business carried on, as well as the names and contact details of appropriate contact persons or offices;
- (b) concise details of the legal and contractual status of the provider as regards the relevant product supplier (or, in the case of a representative, as regards the relevant provider and product supplier), to be provided in a manner which can reasonably be expected to make it clear to the client which entity accepts responsibility for the actions of the provider or representative in the rendering of the financial service involved and the extent to which the client will have to accept such responsibility;
- (c) names and contact details of the relevant compliance department or, in the case of a representative, such detail concerning the provider to which the representative is contracted;
- (d) details of the financial services which the provider is authorised to provide in terms of the relevant licence and of any conditions or restrictions applicable thereto; and
- (e) whether the provider holds suitable guarantees or professional indemnity or fidelity insurance cover or not.

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

6.17.3 Disclosures Regarding Financial Services Products

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

- (a) provide a reasonable and appropriate general explanation of the nature and material terms of the relevant contract or transaction to a client, and generally make full and frank disclosure of any information that would reasonably be expected to enable the client to make an informed decision;
- (b) whenever reasonable and appropriate, provide to the client any material contractual information and any material illustrations, projections or forecasts in the possession of the provider;
- (c) in particular, at the earliest reasonable opportunity, provide, where applicable, full and appropriate information of the details of the product and its benefits. This includes information such as:
 - the name, class or type of financial product concerned and the nature and extent of benefits to be provided, including details of the manner in which such benefits are derived or calculated and the manner in which they will accrue or be paid;
 - If the product is positioned as an investment or as having an investment component, the details of the manner in which the value of the investment is determined, including concise details of any underlying assets or other financial instruments.

- The nature and extent of monetary obligations assumed by the client (including commission, consideration, fees, charges or brokerages payable to the provider by the client, or payable by the product supplier or any other person other than the client concerned), as well as the manner of payment or discharge thereof.
 - Concise details of any special terms or conditions, exclusions of liability, waiting periods, loadings, penalties, excesses, restrictions or circumstances in which benefits will not be provided;
 - any guaranteed minimum benefits or other guarantees;
 - to what extent the product is readily realisable or the funds concerned are accessible;
 - any restrictions on or penalties for early termination of or withdrawal from the product, or other effects, if any, of such termination or withdrawal;
 - material tax considerations;
 - whether cooling off rights are offered and, if so, procedures for the exercise of such rights.
- (d) Fully inform a client in regard to the completion or submission of any transaction requirement:
- that all material facts must be accurately and properly disclosed, and that the accuracy and completeness of all answers, statements or other information provided by or on behalf of the client, are the client's own responsibility;
 - that if the provider completes or submits any transaction requirement on behalf of the client, the client should be satisfied as to the accuracy and completeness of the details;
 - of the possible consequences of the misrepresentation or non-disclosure of a material fact or the inclusion of incorrect information; and
 - that the client must on request be supplied with a copy or written or printed record of any transaction requirement within a reasonable time.

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

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

6.18 The Requirements Regarding Record Keeping

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

- Premature cancellations of transactions or financial products by clients of the FSP.
- Complaints received
- Continued compliance with requirements referred to in section 8 (which are licencing requirements)
- Instances of non-compliance with the Act and reasons for such non-compliance
- The continued compliance by representatives with the requirement of the authorisation of the representative to act on behalf of the FSP and ensuring ongoing compliance.

The legislation says the following regarding RECORD KEEPING:

- (a) *A provider must have appropriate procedures and systems in place to:*
- (i) *record, subject to section 14(2), all written communications relating to a financial service rendered to a client, including verbal instructions by the client which the provider must reduce to writing;*
 - (ii) *store and retrieve transaction documentation and all other documentation relating to the client; and*
 - (iii) *keep the client records and documentation safe from destruction*
- (b) *All such records must be kept for a period of five years after termination, to the knowledge of the provider, of the product concerned or, in any other case, after the rendering of the financial service concerned;*
- (c) *Providers are not required to keep the records themselves but must ensure that they are available for inspection within seven days of the Registrar's request.*
- (d) *Records may be kept in an appropriate electronic or recorded format, which are accessible and readily reducible to written or printed form.*

6.19 Compliance Provisions within an Organisation

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

- Control measures
- Specific control objectives
- Insurance
- Advertising

6.19.1 Control Measures

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

6.19.2 Specific Control Objectives

A provider must (without limiting the generality of section 11) structure the internal control procedures concerned so as to provide reasonable assurance that:

- (a) the relevant business can be carried on in an orderly and efficient manner;
- (b) financial and other information used or provided by the provider will be reliable; and
- (c) all applicable laws are complied with.

6.19.3 Insurance

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

6.19.4 Advertising

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

Where a provider advertises a financial service by telephone-

- a) an electronic, voice logged record of all communications must be kept until such time as it becomes clear that no rendering of a financial service to a particular person so addressed by telephone will follow;
- (b) a copy of all such records must be provided on request by the client or the Registrar within seven days of the request;

- (c) all the information required by sections 4(1)(a) and (c) and 5(a) and (c) shall not be required: Provided that the client is provided with basic details (such as business name and telephone number or address) of the provider or relevant product supplier, and of their relevant compliance departments: Provided further that, if the promotion results in the rendering of a financial service, the full details required by those sections are provided to the client in writing within 30 days of the relevant interaction with the client.

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

6.20 The Importance of Timing

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

When a provider renders a financial service—

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

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

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

6.21 The Effect of Disclosure Requirements on Commission

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

When a provider renders a financial service:

- (a) representations made and information provided to a client by the provider:
- (vii) must, as regards all amounts, sums, values, charges, fees, remuneration or monetary obligations mentioned or referred to therein and payable to the product supplier or the provider, be reflected in specific monetary terms: Provided that where any such amount, sum, value, charge, fee, remuneration or monetary obligation is not reasonably pre-determinable, its basis of calculation must be adequately described.

6.22 The Role, Powers and Duties of the Ombud

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

In terms of the Act "Ombud" means:

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

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

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

The Ombud is empowered to:

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

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

6.23 The Role, Powers and Duties of the Registrar

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

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

6.24 The Consequences of Non-Compliance

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

Any person who:

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

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

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

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

6.25 The Role, Duties and Powers of the Courts

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

- (2) The Registrar may institute action in a Court against any person who has contravened or not complied with any provision of this Act, for payment of-
 - (a) an amount determined by the Court as compensation for losses suffered by any other person in consequence of such contravention or non-compliance;
 - (b) a penalty for punitive purposes in a sum determined in the discretion of the Court but not exceeding three times the amount of any profit or gain which may have accrued to the person involved as a direct result of any such act or omission;
 - (c) interest; and
 - (d) costs of suit on such scale as may be determined by the Court.
- (3) Any amount recovered by the Registrar in terms of subsection (2) must be deposited by the Registrar directly into a specially designated trust account established by the Registrar with an appropriate financial institution, and thereupon-
 - (a) the Registrar is, as a first charge against the trust account, entitled to reimbursement of all expenses reasonably incurred in bringing proceedings under subsection (2) and in administering the distributions made to persons in terms of subsection (5);
 - (b) the balance, if any (hereinafter referred to as the "distributable balance") must be distributed by the Registrar to the persons referred to in subsection (5), any funds remaining, accruing to the Registrar in the Registrar's official capacity.
- (4) Any amount not claimed within three years from the date of the first distribution of payments, accrues to the Registrar in the Registrar's official capacity.
- (5) The distributable balance must be distributed on a pro rata basis to all persons who are affected by the occurrences referred to in subsection (2), and who prove to the reasonable satisfaction of the Registrar that they are persons contemplated in that subsection: Provided that no money may be distributed to a person who has contravened or failed to comply with any provision of this Act.
- (6) A Court issuing any order under this section must order it to be published in the Gazette and by such other appropriate public media announcement as the Court considers appropriate.
- (7) The Registrar may withdraw, abandon or compromise any civil proceedings instituted under this section, but any agreement or compromise must be made an order of Court and the amount of any payment made in terms of any such compromise must be published in the Gazette and by such other public media announcement as the Court considers appropriate.
- (8) Where civil proceedings have not been instituted, any agreement or settlement (if any) may, on application to the Court by the Registrar after due notice to the other party, be made an order of Court and must be published in the Gazette and by such other public media announcement as the Court considers appropriate.