Licensing conditions regarding products and services

When a license is issued, there is an attachment which contains the conditions and restrictions that are relate to that particular license. Although these conditions could vary from license to license, there is a standard format, which is as follows:

**Condition 1:** This indicates whether the FSP is licensed to provide advice or intermediary services or both. It also lists the financial products and financial services that the FSP is entitled to render.

**Condition 2:** Condition 2 provides all the further conditions and restrictions. Usually, the first part includes a demand that should any of the business information that was included in the application change, such information should be provided to the registrar within 15 days of it occurring.

The second part refers to key individuals and requires the FSP to retain the key individuals or if not possible to replace them in accordance with the requirements in Section 8 of the Act. Notification of such changes must also be notified to the FSB in accordance with condition 1 above.

The third part deals with the representative’s register (see lesson 3) and requests the FSP to provide the regulator with a complete register of representatives within 1 month of the issue of the license, and thereafter make appropriate changes to the register within 15 days of the change.

The fourth condition states that the FSP cannot change its name or operate in another name without first obtaining permission from the registrar. Before providing permission, the registrar will want to check that the new name is lawful and complies with any other law dealing with registration of companies. The FSP cannot trade in any new name, even if accepted by the registrar, until an appropriately amended license is issued.

The fifth condition states that the FSP must at all times ensure that any financial product in respect of which the FSP intends to render a financial service qualifies as a financial product in terms of the Act, and that the product supplier is authorised to deliver such a product.
The remainder of the conditions relate to specific conditions or restrictions imposed on that particular FSP.

**Condition 3:** This provides a list of any exemptions that apply to the FSP.

In the event of any of these licensing conditions not being met, the registrar can suspend or withdraw the license until such time as the conditions have been met or any other time determined by the registrar.

**The requirements of the Act around the display of licenses**

A FSP must:

- display a certified copy of the license in a prominent and durable manner within every business premises of the licensee;
- ensure that a reference to the fact that such a license is held is contained in all business documentation, advertisements and other promotional material;
- ensure that the license is at all times immediately or within a reasonable time available for production to any person requesting proof of licensed status under authority of a law or for the purpose of entering into a business relationship with the licensee.

A person may not in any manner make use of any license or copy thereof for business purposes where the license has lapsed or has been withdrawn or during any time when the licensee is under provisional or final suspension.

**The reasons why a license can be suspended or withdrawn**

The registrar may, subject to certain requirements, at any time suspend or withdraw any license (including the license of a licensee under provisional or final suspension) if satisfied, on the basis of available facts and information, that the licensee:

- no longer meets the fit and proper requirements;
- did not, when applying for the license, make a full disclosure of all relevant information to the registrar, or furnished false or misleading information;
- failed to comply with any other provision of this Act; or
- is liable for payment of a levy under section 15A of the Financial Services Board Act, 1990 or an amount or penalty imposed in terms of the FAIS Act or Financial Institutions (Protection of Funds) Act.

**What recourse a FSP has in a case where its license has been suspended or withdrawn**
Before suspending or withdrawing any license, the registrar must inform the licensee of the intention to suspend or withdraw and the grounds therefore and must give the licensee a reasonable opportunity to make a submission in response thereto.

Where the registrar contemplates the suspension of any license, the registrar must also inform the licensee of:

- the intended period of the suspension;
- any terms to be attached to the suspension, including a prohibition on concluding any new business by the licensee as from the effective date of the suspension and, in relation to unconcluded business, such measures as the registrar may determine for the protection of the interests of clients of the licensee; and
- terms designed to facilitate the lifting of the suspension.

The registrar must consider any response received, and may thereafter decide to suspend or withdraw, or not to suspend or withdraw, the license and must notify the licensee of the decision.

Notwithstanding this process, where satisfied on reasonable grounds that substantial prejudice to clients or the general public may occur, the registrar may provisionally suspend or withdraw a license and inform the licensee of the grounds therefore and the period and terms of suspension. The registrar must also give the licensee a reasonable opportunity to respond thereto and to provide reasons why the provisional suspension or withdrawal should be lifted or why the period and terms should be changed.

The registrar must, within a reasonable time after receipt of any response, consider the response and may thereafter decide to lift the provisional suspension or withdrawal or render the suspension or withdrawal final. However, whatever is decided the registrar must inform the licensee accordingly and must make known the terms of and reasons for such final suspension or withdrawal, or the lifting thereof, by notice in the Gazette and, if necessary, in any other appropriate public media.

Any person who feels aggrieved by any decision of the registrar may appeal to the board of appeal established by section 26(1) of the Financial Services Board Act.

An appeal must be lodged within 30 days of the person becoming aware of, or ought to have become aware of a decision, in the manner and on payment of the fees prescribed by the Minister.

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 chairperson or a deputy chairperson of the appeal board, on application by a party, directs otherwise.

**The effect of voluntary sequestration, its winding-up or closure of a business on its licensing status**

Section 38 of the FAIS Act states:
“no;

- application for the acceptance of the voluntary surrender of the estate, in terms of section 3 of the Insolvency Act, 1936 (Act No. 24 of 1936); or

- special resolution relating to the winding-up, as contemplated in section 349 of the Companies Act, 1973 (Act No. 61 of 1973), and registered in terms of that Act; or

- written resolution relating to the winding-up, as contemplated in section 67 of the Close Corporations Act, 1984 (Act No. 69 of 1984), and registered in terms of that section; or voluntary closure of business by, any FSP, or representative of such FSP, and no special resolution in terms of the constitution of such a FSP or representative which is not a company, to close its business, have legal force -

unless a copy or notice thereof has been lodged with the registrar and the registrar has, by notice to the FSP or representative concerned, as the case may be, declared that arrangements satisfactory to the registrar have been made to meet all liabilities under transactions entered into with clients prior to sequestration, winding-up or closure, as the case may be; or

if the registrar, by notice to the FSP or representative concerned, as the case may be, declares that the application, resolution or closure, as the case may be, is contrary to the Act.”

The reasons why a FSP would lapse a license

A license lapses where:

- the licensee being a natural person becomes permanently incapable of carrying on any business due to physical or mental disease or serious injury, is finally sequestrated or dies;

- the licensee being any other person, is finally liquidated or dissolved;

- the business of the licensee has become dormant; and

- in any other case, where the licensee voluntarily and finally surrenders the license to the registrar.

The registrar must be advised in writing by the licensee of the lapsing of a license and the reasons therefore and the registrar may make known any such lapsing of a license by notice in the Gazette or any other appropriate public media.

The civil remedies the registrar may impose under FAIS

If the registrar has reason to believe that a person has contravened or not complied with any provision of the Act a Court order can be applied for to restrain that person from continuing to commit any such
act or omission and requiring the person to take such remedial steps as the Court deems necessary to rectify the consequences of the act or omission.

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:

- an amount determined by the Court as compensation for losses suffered by any other person in consequence of such contravention or non-compliance;
- a penalty for punitive purposes in a sum determined in the discretion of the Court;
- interest; and
- costs of suit on such scale as may be determined by the Court.

Any amount recovered for punitive purposes must be deposited by the registrar directly into a specially designated trust account, from which the registrar is entitled to draw reimbursement of all expenses reasonably incurred in bringing proceedings for punitive purposes and in administering the distributions made to the persons who suffered losses.

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.

It should be noted that no money may be distributed to a person who has contravened or failed to comply with any provision of the Act.

A Court issuing any order must publish this fact in the Gazette or any other appropriate public media announcement as the Court considers appropriate.

**Offenses and penalties**

Proceedings by the Ombud must be treated in the same way as any court of law and therefore any person who commits any act in respect of the Ombud or an investigation by the Ombud is guilty of an offence and liable on conviction to any penalty which may be imposed on a conviction of contempt of court.

In the same way a person that attempts to influence a determination of the Ombud or willfully interrupts any proceedings conducted by the Ombud, is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding one year.

The following persons are guilty of an offence and on conviction liable to a fine not exceeding R1m (R1,000,000) or to imprisonment for a period not exceeding 10 years, or to both such fine and such imprisonment:

- A person that is not exempted but acts or offers to act as a FSP and is not licensed;
- A FSP or representative that conducts financial services related business with a person rendering financial services if that other person is not licensed;
• A person that does not display a certified copy of the license in a prominent and durable manner;

• A person that fails to ensure that a reference to the fact that a license is held is contained in all business documentation, advertisements and other promotional material;

• A person that fails to ensure that the license is at all times immediately or within a reasonable time available for production to any person requesting proof of licensed status under authority of a law or for the purpose of entering into a business relationship with the licensee;

• A representative of a FSP that is unable to provide confirmation, certified by the FSP, to clients that a service contract or other mandate to represent the FSP, exists and that the FSP accepts responsibility for those activities of the representative performed within the scope of, or in the course of implementing, any such contract or mandate; and

• A representative that has been debarred and has not been reappointed but renders financial services as though no such debarment has occurred.

A FSP will also be liable to a fine not exceeding R1m (R1,000,000) or to imprisonment for a period not exceeding 10 years, or to both such fine and such imprisonment if the FSP does not comply with the following:

• At all times be satisfied that the FSP’s representatives, and key individuals of such representatives, are, when rendering a financial service on behalf of the FSP, competent to act, and comply with the fit and proper requirements (see lesson 4);

• At all times 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;

• A FSP must ensure that any of its representatives that no longer complies with the fit and proper requirements or that have contravened or failed to comply with any provision of the Act in a material manner, is prohibited from rendering any new financial service by withdrawing any authority to act on its behalf, and that the representative’s name, and the names of the key individuals of the representative, are removed from the representative register subject to ensuring that the debarment does not prejudice the interests of clients;

• A FSP, when required, must submit compliance reports to the registrar;

• A FSP must maintain records for a minimum period of five years regarding -
  o known premature cancellations of transactions or financial products;
  o complaints received together with an indication whether or not any such complaint has been resolved;
  o cases of non-compliance with the Act, and the reasons for such non-compliance;

• A FSP must ensure that its accounts are properly audited and reported on in accordance with auditing pronouncements as defined in section 1 of the Auditing Professions Act, 2005 (Act No. 26 of 2005) by an external auditor approved by the registrar and which must –
  o fairly represent the state of affairs of the FSP’s business;
  o refer to any material matter which has affected or is likely to affect the financial affairs of the FSP; and
be submitted by the FSP to the registrar not later than four months after the end of the FSP’s financial year or such longer period as may be allowed by the registrar.

- If the FSP is requested to discontinue an undesirable practice, the FSP may not carry on the business practice concerned and where requested to do so must make rectification within 60 days after such direction is issued.

In addition, any person that:

- in any application for a license deliberately makes a misleading, false or deceptive statement, or conceals any material fact; or
- gives an appointed auditor or compliance officer information which is false, misleading or conceals any material fact

is guilty of an offence and is on conviction liable to the same fine or imprisonment as mentioned in the earlier paragraphs.

There are also penalties imposed for each day that a specific return, information or document required or requested by the registrar is overdue, limited to R1000 for each day overdue.