



## **GUIDANCE NOTE**

**FINANCIAL ADVISORY AND INTERMEDIARY SERVICES ACT, 2002 (ACT 37 OF 2002)**

**Date of publication: 24 June 2015**

### **GUIDANCE ON THE INTERPRETATION AND APPLICATION OF SECTION 13(1)(c) OF THE FAIS ACT**

#### **1. PURPOSE**

1.1. The purpose of this Guidance Note is to -

- (a) clarify the application of section 13(1)(c) of the Financial Advisory and Intermediary Services Act, 2002 (the FAIS Act), in a manner that is consistent with its purpose; and
- (b) reflect the manner in which the Registrar of Financial Services Providers (Registrar) will apply that section for regulatory purposes.

1.2. Section 13(1)(c) which became operative on 30 May 2014 reads as follows:

*"13(1) A person may not-*

- (a) ...*
- (b) ...*
- (c) render financial services or contract in respect of financial services other than in the name of the financial services provider of which such person is a representative."*

#### **2. BACKGROUND**

2.1. The regulatory architecture of the Act is:

- (a) for the Registrar, on application, to authorise persons to participate as principals in

the rendering of “financial services”<sup>1</sup>. The FAIS Act refers to these persons as “authorised financial services providers”;<sup>2</sup>

- (b) to require of authorised financial services providers (“FSPs”) who wish to conduct financial services business with the assistance of an agent, or a network of agents engaged as their employees or mandatories, to accept vicarious responsibility<sup>3</sup> for the activities of their agents performed within the scope of, or in the course of implementing, the agent’s mandate or service contract; and
- (c) to be responsible for the initial and continuing fitness and propriety of, and adherence to the law by, such persons.<sup>4</sup> The FAIS Act refers to these agents as “representatives” irrespective of whether they are employees or mandatories of the FSP.

2.2. The FAIS Act defines a “representative” as:

*“any person, including a person employed or mandated by such first-mentioned person, who renders a financial service to a client **for or on behalf of a financial services provider**, in terms of conditions of **employment or any other mandate**, but excludes a person rendering clerical, technical, administrative, legal, accounting or other service in a subsidiary or subordinate capacity, which service-*

*(a) does not require judgment on the part of the latter person; or*

*(b) does not lead a client to any specific transaction in respect of a financial product in response to general enquiries;”*

[emphasis added]

2.3. A representative may be either a natural person or a juristic person.

### 3. REPRESENTATIVES ACTING AS AGENTS OF FSPs

3.1. A representative as contemplated by the FAIS Act, on a proper construction and interpretation of the Act and taking cognisance of the purpose of the Act, is an agent of the FSP which it represents when rendering financial services to clients. As a consequence, the principles applicable to agency as entrenched in the common law apply

<sup>1</sup> ‘Financial services’ is defined in s 1(1) of the FAIS Act as the furnishing of advice and/or the rendering of intermediary services.

<sup>2</sup> See s 8 read with s 7 of the FAIS Act.

<sup>3</sup> See s 13(1)(b)(i)(bb) of the FAIS Act.

<sup>4</sup> This is evident from s 13 read with s 8 of the FAIS Act.

to representatives. Although the FAIS Act codifies the common law principles of agency insofar as they relate to the relationship between an FSP and its representatives, it also prescribes additional requirements applicable to that relationship.

- 3.2. An agent (such as a representative) concludes juristic acts<sup>5</sup> (e.g. enters into contracts) or some other acts<sup>6</sup> on behalf of the principal (such as an FSP). The rights and duties arising from such acts are those of the principal and not of the agent although the act itself is concluded by the agent. In other words, if the agent has the requisite authority, it is the principal and not the agent who is the party to the contract.<sup>7</sup>
- 3.3. Whether an agent intends to conclude a juristic act for him- or herself or on behalf of a principal is a question of fact. Since a person who concludes a juristic act ordinarily acts for him- or herself and not for another person, his or her intention to act as agent has to be apparent to the person to whom the expression of intention is addressed.<sup>8</sup>
- 3.4. The FAIS Act, *inter alia*, requires a person who acts as a representative of an FSP, prior to rendering a financial service, to provide to a client confirmation certified by the FSP that a service contract or other mandate to represent the FSP exists and that the FSP accepts responsibility for those activities performed by the representative within the scope or, in the course of implementing or executing, any such contract or mandate<sup>9</sup>.
- 3.5. The FAIS Act, subsequent to the introduction of section 13(1)(c), further provides that a representative may only render financial services or contract in respect of financial services in the name of the FSP of which the person is a representative<sup>10</sup>.

<sup>5</sup> A juristic act is an act whereby legal relationships are created, altered or extinguished by means of an expression of will by one person or expressions of a common will by two or more persons. See LAWSA Vol 1, par 126.

<sup>6</sup> LAWSA Vol 12 Part 2, par 183 – The authors stated that “*the term “agency” in modern law can be used in either a restricted or a wide sense. In the restricted sense it denotes a person who has authority to conclude a juristic act in the name of his or her principal. In the wider sense of the word the term “agent” means any person who has been mandated to carry out a certain task for his or her mandator which includes but is not limited to someone who has been authorised to conclude a juristic act on behalf of his or her mandator.*”

<sup>7</sup> De Wet in LAWSA Vol 1 par 126.

<sup>8</sup> LAWSA Vol 1 par 133

<sup>9</sup> See s 13(b) of the FAIS Act.

<sup>10</sup> In practice a contract concluded by one person in the name of another person is regarded as a contract concluded by the former as the representative of the latter. The expression “in the name of another” can only mean that the person acts as the representative of the other person. See LAWSA Vol 1 par 133.

#### 4. REASONS FOR INSERTION OF SECTION 13(1)(c)

The reasons for the insertion of the requirement in section 13(1)(c) are:

- 4.1. to ensure that consumers of financial services know with whom they are contracting and who will ultimately be responsible to perform in terms of the contract;
- 4.2. to remove any uncertainty as to whether the representative is acting for or on behalf of a principal, or on its own behalf;
- 4.3. to prevent the undesirable business practice of “renting a licence”. It has come to the attention of the Registrar that juristic representatives are, increasingly, contracting in their own names with product suppliers for the distribution of the latter’s products without the FSP being aware of such contracts or with whom such contracts were concluded. The same ignorance applies when thereupon the representative contracts with clients not knowing that the representative actually acts on behalf of an FSP.

For obvious reasons, the latter position is not desirable, is contrary to the legal position of a representative as contemplated by the FAIS Act, and creates uncertainty and the likelihood of disputes that may be prejudicial to clients. In addition, it creates an unacceptable weakness in the governance of the FSP’s business; and

- 4.4. to ensure that all monies received by an FSP and its representatives are reported on by the auditor of the FSP as contemplated by section 19(3) of the FAIS Act<sup>11</sup>.

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<sup>11</sup> Section 19(3) of the FAIS Act provides as follows:

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

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

## APPLICATION OF SECTION 13(1)(c)

### 5. COLLECTION OF PREMIUM<sup>12</sup>

#### 5.1. *May a short-term insurer authorise a representative to deal with premiums thereby sidestepping the representative's FSP?*

- (a) The question at issue is whether a representative (including a juristic representative) may collect premiums in its own name on behalf of a short-term insurer and whether the short-term insurer may authorise a representative to deal with such premiums, in each instance to the exclusion of the representative's FSP? To answer the question cognisance should be taken of section 13(1)(c) of the FAIS Act read with section 45 of the Short-term Insurance Act, 1998 (and the regulations promulgated under that Act).
- (b) Section 13(1)(c) has the effect that a representative will no longer be able to contract directly with or be authorised by the insurer in its own name in respect of the collection of premiums. This is so because the collection of premium constitutes the rendering of financial services as contemplated in section 1(1) of the FAIS Act and a representative may not render financial services or contract in respect of financial services other than in the name of its FSP.
- (c) The insurer, likewise, will not be able to grant authorisation as contemplated by section 45 of the Short-term Insurance Act to a representative to deal with premiums. The representative's principal (i.e. the FSP on whose behalf he/she or it is acting) will have to contract with or be authorised by the insurer for the collection of premiums in accordance with Regulation 4.1 of the Short-term Insurance Regulations<sup>13</sup>.

#### 5.2. *Section 45 Guarantee – Short-term insurance*

- (a) As stated, the representative's principal (i.e. the FSP on whose behalf it acts) is required to contract with the insurer or be authorised by the insurer for the collection of premiums. The effect thereof, having regard to section 45 of the Short-term Insurance Act read with the regulations, is that the IGF cover must be in the name

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<sup>12</sup> For purposes of this Guidance Note, a reference to premiums includes any other monies payable by a client to a product supplier as contemplated in paragraph (b)(ii) of the definition of "intermediary services" in section 1(1) of the FAIS Act.

<sup>13</sup> Regulations under section 70 of the Short-term Insurance Act.

of the FSP as it is the latter who is authorised to collect the premiums. It would be wrong of a representative to arrange IGF cover in its own name as this will contravene section 13(1)(c).

- (b) An FSP who delegates the function of premium collection to its representatives may obtain an IGF guarantee that applies to all its representatives who collect premiums or it may obtain multiple IGF guarantees in the name of the FSP, each relating to a specific representative.

**5.3. *May an FSP authorise a representative to collect premium on the FSP's behalf?***

The FAIS Act does not prohibit an FSP from delegating the function of premium collection to one or more of its representatives. The representative, therefore, may collect premiums in its capacity as a representative of the FSP, but only in the name of the FSP, not in its own name.

**5.4. *May a representative collect or hold premium in its own name?***

- (a) Section 13(1)(c) of the FAIS Act prohibits a representative to render any type of financial service (including the collection of premium) other than in the name of its FSP. The effect thereof is that the representative may not collect or hold premium in respect of a financial product other than in the name of its FSP.
- (b) This also means that premiums collected by a representative must be deposited into the FSP's bank account to make it clear that the service was rendered in the name of the FSP. In addition, all premiums collected or held must be reported on as contemplated by section 19(3) of the FAIS Act.

**6. CONTRACTS WITH PRODUCT SUPPLIERS AND MANDATES WITH CLIENTS**

- 6.1. A representative will not be able to contract with product suppliers regarding the distribution of their products or in respect of any other business relating to the rendering of financial services other than in the name of the FSP of which it is a representative.
- 6.2. A representative further will not be able to enter into a mandate with a client in its own name. The mandate obtained from the client must be in the name of the FSP as represented by the representative.

## **7. BINDER AGREEMENTS (INSURANCE)**

- 7.1. A representative will not, in its own name, be able to enter into a binder agreement as contemplated in sections 49A of the Long-term Insurance Act, 1998, and 48A of the Short-term Insurance Act, 1998, read with Parts 6 of the Regulations made under the Long-term Insurance Act and the Short-term Insurance Act, respectively.
- 7.2. The activities that constitute binder functions are activities that also constitute the rendering of intermediary services as defined in section 1(1) of the FAIS Act. The binder agreement, therefore, must be entered into between the insurer and the FSP as the party who is ultimately responsible to perform in terms of the agreement.
- 7.3. In addition, both the Long-term Insurance Act<sup>14</sup> and the Short-term Insurance Act<sup>15</sup> prohibits a binder-holder from delegating, assigning or subcontracting any of its binder functions<sup>16</sup> to another person.<sup>17</sup>

## **8. BUSINESS DOCUMENTATION AND ADVERTISING**

- 8.1. A representative will not be able to market or advertise any services relating to the rendering of financial services in its own name. All marketing material or advertisements must clearly stipulate that the marketing of the services or any advertisements, relating to the rendering of financial services, are undertaken on behalf of the FSP of which it is a representative.
- 8.2. A representative's business documentation must clearly reflect the position that it is not acting as a principal but as a representative. The business documentation must further clearly and prominently indicate the name of the FSP on whose behalf the representative acts.



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<sup>14</sup> See section 49A(2)(i) of the Long-term Insurance Act.

<sup>15</sup> See section 48A(2)(i) of the Short-term Insurance Act.

<sup>16</sup> See section 49A(1) of the Long-term Insurance Act and section 48A(1) of the Short-term Insurance Act.

<sup>17</sup> The Registrar of Insurance regards "another person" as a person who is not an employee of the binder holder. Therefore, the delegation, assignment or subcontracting of a binder function by an FSP to a person who is not an employee of that FSP will constitute a contravention of those sections respectively, which sections have been in effect since 2008.