



**FINANCIAL ADVISORY AND INTERMEDIARY SERVICES ACT, 2002
(ACT NO. 37 OF 2002)**

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**RESPONSE OF THE REGISTRAR OF FINANCIAL SERVICES PROVIDERS TO
COMMENTS RECEIVED ON PROPOSED GUIDANCE NOTE ON THE INTERPRETATION
AND APPLICATION OF SECTION 13(1)(C) OF THE FAIS ACT**

1. PURPOSE

The purpose of this document is to respond to key issues raised in the comments received on the proposed Guidance Note on the interpretation and application by the Registrar of Financial Services Providers (Registrar) of section 13(1)(c) of the Financial Advisory and Intermediary Services Act, 2002.

The draft Guidance Note was released by the Registrar on 11 September 2014, for comment by or on 13 October 2014.

2. COMMENTATORS

Comments were received from the persons listed in Annexure A.

3. THE COMMENTS

A large number of comments on the proposed Guidance Note were received and considered by the Registrar.

Commentators mostly agreed with the Registrar's interpretation that product suppliers cannot contract directly with representatives. However, some commentators were of the view that the manner in which the Registrar intends to apply section 13(1)(c) was too broad.

The Registrar's response is structured to address the key issues raised on the draft Guidance Note collectively instead of responding individually to each comment received.

4. RESPONSE TO KEY ISSUES

4.1. Does section 19(3) apply to "all monies" held by an FSP

One commentator was concerned that the Registrar intended to apply section 19(3) of the FAIS Act to "all monies" held by an FSP, even those monies owing or belonging to a product supplier.

The Registrar does not intend to apply section 19(3) to "all monies" held by an FSP because that section only applies to an FSP who holds money or assets on behalf of a client. The FAIS Act defines a 'client as "a specific person or group of persons, excluding the general public, to whom a financial service is rendered intentionally, or is the successor in title of such person or the beneficiary of such service".

The FAIS Act encompasses a functional approach to achieving its objective of regulating financial services and protecting the interests of consumers; it is irrelevant in which capacity a person renders the services or the capacity or type of person to whom the services are rendered.

All monies, other than premiums collected in terms of section 45 of the Short-term Insurance Act, 1998, payable to a product supplier and received by an FSP from a client remain the property of the client until such time as the FSP transfers the money to the product supplier and such money is dealt with by the product supplier in accordance with the contractual arrangements with the client. Therefore, until the actual transfer of the money to the product supplier, the FSP is holding money or assets of the client and not the product supplier.

In terms of section 54 of the Short-term Insurance Act, the payment of a premium under a short-term policy to a person authorised as contemplated in section 45 of that Act, shall be deemed to be payment to the short-term insurer. Therefore, an FSP who is subject to section 45 and who holds premium in respect of a short-term policy is not holding such money on behalf of a client. Section 19(3), therefore, does not apply to such money.

4.2. Does the holding of funds on behalf of a product supplier constitute an intermediary service?

Some commentators were of the view that the holding of funds or premiums owing to or belonging to a product supplier does not constitute the rendering of intermediary services.

An FSP can render an intermediary service on behalf of a product supplier. See definition of "intermediary service" in the FAIS Act.

The collection of premium includes the holding of such premium because the activity of collecting premium includes the entire process of such collection. In other words, it includes the activity of calling for, receiving, holding and the payment of the premium to the insurer on whose behalf it was collected.

4.3. Does section 19(3) apply to FSPs receiving premium from clients in respect of insurance policies?

Some commentators were of the view that a premium paid to a person who is authorised by an insurer to collect such premium on its behalf ceases to be the "funds of the client" but becomes funds belonging to a product supplier and as such section 19(3) would not apply as the funds are not those of the client.

The Registrar disagrees with the view expressed by the commentators insofar as it relates to the collection of premium other than premiums collected in terms of section 45 of the Short-term Insurance Act. See paragraph 4.1 above.

4.4. Does a contract for IGF constitute a contract in respect of financial services?

Some commentators were of the view that contracting in respect of IGF falls outside the scope of section 13(1)(c) as it does not constitute contracting in respect of financial services.

The Registrar disagrees with these views. The collection of premiums is listed in the FAIS Act as an activity that constitutes the rendering of an intermediary service. See subparagraph (b)(ii) of the definition of "intermediary service" in section 1(1) of the FAIS Act.

In terms of the Short-term Insurance Act, 1998, a person may only receive, hold or in any other manner deal with premiums payable under a short-term insurance policy if authorised to do so by the short-term insurer and if such authorisation complies with the prescribed regulations. In terms of regulation 4(1)(2) of the Short-term Insurance regulations a person is not authorised to collect premiums unless that person has provided security (IGF). Therefore, the person authorised to collect premiums, in this instance the FSP, must provide the security.

Section 13(3)(1)(c) requires that a person may not contract **in respect of financial services** other than in the name of the FSP of which it is a representative. When applying the ordinary

grammatical meaning of the phrase 'in respect of', it means that a person may not contract with reference to, in relation to, referring to or in connection with financial services other than in the name of the FSP.

The requirement to provide security is essential in order to obtain authorisation to deal with premiums on behalf of an insurer and cannot be divorced from that activity. Therefore, the security relates to or is in connection with financial services as contemplated in the FAIS Act and any contract in respect of such security must comply with section 13(1)(c). However, it is irrelevant whether or not an IGF contract, for purposes of section 45 of the Short-term Insurance Act, constitutes a "contract in respect of financial services". This is so because it is only the FSP who can be authorised by an insurer under that section to collect premium and in order to obtain the required authorisation, the FSP is the person who must provide the security.

4.5. Can a representative contract in respect of IGF in its own name?

No. See paragraph 4.4 above.

Any contract relating to or in connection with financial services must be in the name of the FSP of which the person is a representative, even though the FSP had delegated a particular activity to that representative.

4.6. Do activities that constitute binder functions also constitute intermediary services as contemplated in the FAIS Act?

Some commentators were of the view that binder functions are activities that are rendered on behalf of product suppliers and not clients and that those functions are regulated under the Insurance laws. Any attempt to include binder functions within the scope of the FAIS Act will create duplicated legislation and will result in unintended consequences. Other commentators contended that binder functions do not constitute the rendering of a financial service as defined in the FAIS Act as the Regulations to the Short Term Insurance Act, 1998 and the Long Term Insurance Act, 1998 clearly distinguish between binder functions and intermediary services.

The activities that constitute binder functions as contemplated in the Insurance Laws are simultaneously activities that constitute the rendering of intermediary services as defined in the FAIS Act.

Under the FAIS Act an intermediary service can be rendered either for or on behalf of a client or a product supplier. Therefore, a person that performs any act referred to in the definition of 'intermediary services' in the FAIS Act, for or on behalf of a product supplier, must be authorised as an FSP or appointed as a representative and must comply with all the provisions of the FAIS Act, including section 13(1)(c).

The Insurance laws regulate insurers and impose obligations on insurers, whilst the FAIS Act regulates the persons rendering "financial services". Section 13(1)(c) does not apply to product suppliers (in their capacity as product suppliers) and does not seek to place obligations on them in that capacity. It applies to FSPs and representatives only. The Registrar, therefore, disagrees that there is an inappropriate overlap between the Insurance laws and the FAIS Act or that the application of both sets of requirements gives rise to any unintended consequences.

4.7. Does section 13(1)(c) dilute the insurer's responsibility?

Some commentators expressed the view that in requiring an FSP to hold the binder agreement the Registrar is diluting the insurer's responsibility in that it now becomes the FSPs responsibility to ensure the proper performance of the binder functions. The insurer is in a much stronger position to ensure proper performance of binder functions where the binder agreement is between the insurer and the person actually performing the binder function.

The Registrar disagrees. Section 13(1)(c) does not "dilute" or reduce an insurer's responsibilities or obligations in respect of persons with whom it has binder agreements. The obligations placed on insurers by the Insurance laws regarding binder agreements remain applicable.

The Registrar further disagrees with the statement that the insurer is in a worse position for having the binder agreement with the FSP as opposed to with the representative of that FSP. On the contrary, the Registrar is of the view that the insurer is in a better position as it now directly contracts with the person who is ultimately responsible to the insurer for the binder activities performed on behalf of that insurer.

4.8. Does the "exemption" of product suppliers from the FAIS Act when rendering intermediary services apply to the agents of those product suppliers?

Some commentators argued that the "exemption" of product suppliers from the FAIS Act when rendering intermediary services applies to the agents of those product suppliers as well.

In terms of section 1(2)(b)(ii) of the FAIS Act a product supplier is not subject to the Act when rendering intermediary services if it is authorised under a particular law to conduct business as a financial institution and where the rendering of such services is regulated by or under such law.

The Registrar's previously stated view is that the "exemption" referred to above does not apply to the agents of a product supplier. This is so because an agent acts for or on behalf of a product supplier, and is not the product supplier itself and is also not an organ of the product supplier. Only an organ of a company, for example a director, acts as the company, not as an agent for the company. The "exemption" only applies to a product supplier. The agents of the product supplier are subject to the FAIS Act when rendering an intermediary service for or on behalf of that product supplier.

4.9. May a representative market or advertise in its own name?

One commentator was of the view that a representative may market or advertise in its own name as section 8(8)(b) only applies to an FSP and because the restriction in section 13(1)(c) extends to the rendering of financial services and contracting in respect of financial services only.

The Registrar disagrees with the view expressed. The marketing or advertising of financial services constitutes the rendering of an intermediary service as it may result in a person entering into a transaction. Section 13(1)(c), therefore, applies to a representative that markets or advertises financial services on behalf of its FSP.

In addition, in terms of the General Code of Conduct a representative must when rendering financial services, ensure that the representations made and information provided to a client are factually correct, avoid uncertainty or confusion and must not be misleading. Marketing financial services in its own name creates the incorrect impression with clients that the representative is itself providing the financial service instead of the FSP of which it is a representative.

4.10. May a binder holder be an agent of the insurer and also a representative of an FSP?

Where a person who is an FSP enters into a binder agreement, the agreement must be concluded in the name of that FSP despite it also being a representative of another FSP for the performance of activities not referred to in the binder agreement.

4.11. Does section 13(1)(c) apply to funeral parlours and call centres?

Yes. Section 13(1)(c) applies equally to all representatives irrespective of the nature or type of their business, unless they have been exempted by the Registrar in terms of section 44(4) of the FAIS Act.

It is important to note that the Guidance Note does not create new obligations or requirements that do not already exist in the FAIS Act. The purpose of the Guidance Note is merely to inform industry of the Registrar's interpretation of section 13(1)(c) and how the Registrar intends to apply that interpretation in practice.

4.12. May an FSP delegate a binder function to one of its representatives?

*Some commentators contended that section 13(1)(c) cannot replace, or be interpreted in a way that is inconsistent with other legislation. According to the commentators, in terms of the Insurance laws an insurer must prohibit a binder holder from delegating, assigning or subcontracting any of the binder functions to **another person**. The interpretation suggested in the draft Guidance Note that would require the FSP to delegate, assign or subcontract the binder functions to a separate juristic entity (its juristic representative) would, therefore, be unlawful.*

The sections 49(2)(i) and 48(2)(i) of the Long-term Insurance Act and Short-term Insurance Act respectively prohibit a binder-holder from delegating, assigning or subcontracting any of its binder functions to another person. 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.

4.13. Implementation date of section 13(1)(c)

One commentator was concerned about the constricted timelines to implement the required changes in order to comply with section 13(1)(c).

The proposed insertion of section 13(1)(c) was published in September 2012 in the Financial Services Laws General Amendment Bill [B 29—2012] (FSLGA). No material concerns were raised by industry between the date of publication of that Bill until the Bill was assented to by the President on 14 January 2014.

The FSLGA came into operation on 28 February 2014 except for certain sections with a delayed commencement date. Section 13(1)(c) was one of those sections with a delayed commencement date i.e. 30 May 2014.

On request of industry, the Registrar exempted representatives from complying with section 13(1)(c) until 28 February 2015. The Registrar, therefore, disagrees with the statement that industry did not have sufficient time to ensure compliance with the new requirement or that the implementation date of section 13(1)(c) is unreasonable or unfair.

4.14. Why can the premium collection mandate not be given by the insurer directly to a juristic representative?

Some commentators contended that section 45 and Directive 156 make it clear that there must be a direct relationship between the insurer and the person collecting the premium. There is thus no reason why that activity has to be performed in terms of a mandate from the FSP of the representative as the premium collection mandate can be given directly by the insurer to the juristic representative. The juristic representative is authorised to collect the premium by virtue of being a juristic representative. That does not mean the juristic representative has to collect the premium in the name of the FSP.

The effect of section 13(1)(c) is that a representative can no longer render financial services or contract in respect of financial services other than in the name of the FSP of which it is a representative.

4.15. Why must the premium, collected by a representative, be deposited into the bank account of the FSP if that representative has an IGF guarantee?

It is a requirement of section 13(1)(c). The IGF guarantee cannot be obtained in the name of the representative. It must be obtained in the name of the FSP as it is the latter that is authorised to collect the premiums. However, the FSP 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.

The Regulator has published its intent in the Retail Distribution Review Paper to limit the collection of insurance premium to qualifying intermediaries only.

A number of complex distribution models currently impacted by section 13(1)(c), particularly some of those involving juristic representatives or entities operating on multiple FSP licences, may need to be restructured if the proposals in the Retail Distribution Review Paper are implemented. The Guidance Note, therefore, is only an interim measure designed to clarify issues that will be structurally resolved through the RDR process.

ANNEXURE A

LIST OF COMMENTATORS	
Edward Ions	The Banking Association South Africa
PSG Konsult	Patrick Bracher
Derek Sumption	Independent Dealers Association
Moonstone Compliance (Pty) Ltd	Alan Holton, Compliance Monitoring Systems CC
Alan Holton	National Motor Finance Association
KGA Life Limited	Saxum Insurance Limited / Impac Underwriting Managers (Pty) Limited
O'Keeffe & Swartz Consultants	Outsurance Insurance Co Ltd
Hollard Life Assurance Company Limited The Hollard Insurance Company Limited Hollard Investment Managers	PPS Insurance Company Limited PPS Marketing Services (Pty
National Automobile Dealers' Association	Outsourced FAIS Solutions CC
Craig Ormrod	South African Insurance Association
Liberty Group Ltd	Momentum
Fulcrum Collections (Pty) Ltd	Public Investment Corporation
Maroun Consulting	South Africa Venture Capital Association