

(30 September 2004 – to date)

FINANCIAL ADVISORY AND INTERMEDIARY SERVICES ACT 37 OF 2002

*(Government Notice 1453 in Government Gazette 24079 dated 15 November 2002. Commencement date:
15 November 2002, unless otherwise indicated)*

FINANCIAL ADVISORY AND INTERMEDIARY SERVICES REGULATIONS, 2003

*Government Notice 879 in Government Gazette 25092, dated 13 June 2003. Commencement date:
30 September 2004 [GN 270 in Gazette 26080 dated 5 March 2004]*

As amended by:

*Government Notice 297 in Government Gazette 26112, dated 12 March 2004. Commencement date:
12 March 2004.*

I, Trevor Andrew Manuel, Minister of Finance, hereby after consultation with the Registrar of Financial Services Providers and the Advisory Committee on Financial Services Providers, in terms of section 35 of the Financial Advisory and Intermediary Services Act, 2002 (Act No. 37 of 2002), make the Regulations set out in the attached Schedule.

The Regulations will come into effect on the date determined by the Minister of Finance in terms of section 7(1) of the Financial Advisory and Intermediary Services Act, 2002.

(Signed)

T A MANUEL, MP

MINISTER OF FINANCE

DATE: 20 May 2003

SCHEDULE

FINANCIAL ADVISORY AND INTERMEDIARY SERVICES REGULATIONS, 2003

CHAPTER I DEFINITIONS

1. Definitions

CHAPTER II

MATTERS REQUIRED OR PERMITTED BY ACT TO BE PRESCRIBED (Section 35(1)(a) of Act)

Prepared by:

2. Period contemplated in section 45(2)(b) of Act

CHAPTER III

PROHIBITIONS ON CANVASSING FOR, AND MARKETING OR ADVERTISING OF UNAUTHORISED FINANCIAL SERVICES

(Section 35(1)(b) of Act)

- 3.

CHAPTER IV

COMPLIANCE ARRANGEMENTS

(Section 35(1)(c) of Act)

4. Application for approval
5. Establishment of compliance function

CHAPTER V

MATTERS RELATING TO ADMINISTRATIVE AND DISCRETIONARY FSPS

(Section 35(1)(d) and (e) of Act)

6. Nominee companies of discretionary FSPs
7. Independent nominees of administrative FSPs
8. Written agreement with independent nominee
9. Requirements for independent nominee
10. Duties of independent nominee
11. Enforcing court orders
12. Construction of certain references

CHAPTER VI

MATTERS RELATING TO FOREIGN FOREX SERVICES PROVIDERS AND CLEARING FIRMS

(Section 35(1)(d) and (e) of Act)

13. Definitions
14. Procedure
15. Requirements
16. Granting or refusal of approval
17. Interpretation

CHAPTER VII

MISCELLANEOUS

18. Penalties
19. Powers of registrar to call for information
20. Short title

CHAPTER I DEFINITIONS

1. Definitions

In this Schedule "the Act" means the Financial Advisory and Intermediary Services Act, 2002 (Act No. 37 of 2002), and any word or expression to which a meaning has been assigned in the Act, read with the definition of "this Act" in section 1(1) of the Act, shall have that meaning.

CHAPTER II MATTERS REQUIRED OR PERMITTED BY ACT TO BE PRESCRIBED (Section 35(1)(a) of Act)

2. Period contemplated in section 45(2)(b) of Act

The period contemplated in section 45(2)(b) of the Act for the conclusion of unconcluded business referred to therein, is a period of 12 months with effect from the date determined in terms of section 7(1) of the Act.

CHAPTER III PROHIBITIONS ON CANVASSING FOR, AND MARKETING OR ADVERTISING OF UNAUTHORISED FINANCIAL SERVICES (Section 35(1)(b) of Act)

3. No person -

- (a) may in any manner or by any means, whether within or outside the Republic, canvass for, market or advertise any business related to the rendering of financial services by any person who is not an authorised financial services provider or a representative of such a provider;
- (b) who is not an authorised financial services provider or a representative of such a provider, may in any manner or by any means -
 - (i) publish any advertisement, communication or announcement directed to clients; or
 - (ii) use any name, title or designation,

which implies that such person is an authorised financial services provider or a representative of such a provider.

CHAPTER IV
COMPLIANCE ARRANGEMENTS
(Section 35(1)(c) of Act)

4. Application for approval

An authorised financial services provider must submit an application for the approval of a compliance officer under section 17(2) of the Act to the registrar in writing on a form determined by the registrar from time to time, and must furnish all information required for that purpose by the registrar as indicated on the form, or otherwise requested by the registrar.

5. Establishment of compliance function

- (1) Subject to the provisions of the Act, an authorised financial services provider shall ensure that a compliance function exists or is established as part of the risk management framework of the business, supervised by an approved compliance officer (where required in terms of the Act), or otherwise managed under control and responsibility of the provider alone.
- (2) The compliance function must be exercised with such diligence, care and degree of competency as may reasonably be expected from a person responsible for such function.
- (3) An approved compliance officer (where required by the Act) must provide a provider with written reports on the course of, and progress achieved with, compliance monitoring duties and make recommendations to the provider as regards any aspect of the required compliance or monitoring functions.

CHAPTER V
MATTERS RELATING TO ADMINISTRATIVE AND DISCRETIONARY FSPS
(Section 35(1)(d) and (e) of Act)

6. Nominee companies of discretionary FSPs

- (1) The functions of the nominee company of a discretionary FSP must be limited to its object and to such other functions as may be necessary to achieve the said object.
- (2) A discretionary FSP must, prior to obtaining authorisation, apply to the registrar for approval of its nominee company.
- (3) The Memorandum and Articles of Association of a nominee company must preclude it from incurring any liabilities other than those to persons on whose behalf it holds assets and, if any other liabilities are incurred in the name of the nominee company, the discretionary FSP shall be liable to meet them.

- (4) The nominee company must enter into an agreement with the discretionary FSP in terms of which the provider must pay all expenses for and incidental to its formation, activities, management and liquidation, unless the Memorandum and Articles of Association of the nominee company already provide for such an obligation.

(Regulation 6(4) substituted by Government Notice 297 of 2004)

7. Independent nominees of administrative FSPs

- (1) An administrative FSP must prior to commencing business apply to the registrar for approval of its independent nominee which complies with regulation 9.
- (2) The application must be made in accordance with section 3(2) of the Act and be accompanied by the latest audited annual financial statements relating to the independent nominee.
- (3) The administrative FSP remains responsible for ensuring that its independent nominee executes its duties in accordance with these Regulations.

8. Written agreement with independent nominee

- (1) The written agreement between the administrative FSP and its independent nominee must be approved by the registrar.
- (2) If the administrative FSP gives or receives notice of termination of the agreement for any reason, the FSP must at once inform the registrar thereof.
- (3) The administrative FSP must within 30 days after giving or receiving such notice apply to the registrar in the manner contemplated in section 3(2) of the Act, for approval of a replacement independent nominee.

9. Requirements for independent nominee

- (1) More than 50% of the directors, trustees or other persons responsible for the management and control of the independent nominee, must be persons independent not only from the administrative FSP, but also from companies within the same group as the FSP: Provided that persons holding office in or representing the FSP in a professional or non-professional capacity, excluding a person acting only in a non-executive director capacity in one of the companies within the group, are not deemed independent for the purposes of this subregulation.
- (2) The independent nominee must be structured in such a way that clients' investments are at all times protected from its creditors or those of the administrative FSP and anyone else, especially if the nominee is sequestrated or wound-up.

10. Duties of independent nominee

- (1) The investments of clients, as recorded by a product supplier (excluding cash held in a separate bank account as contemplated in the General Code of Conduct for Authorised Financial Services Providers and Representatives, 2003, as published in the *Gazette*) must be held in the name of the independent nominee on behalf of such clients, except in instances where because of the nature of a specific client, such registration is prohibited by other legislation.
- (2) The independent nominee must satisfy itself and submit a written statement to the registrar, within three months after the financial year end of the administrative FSP for which it acts, that -
 - (a) the FSP has adequate procedures in place for ensuring that proper reconciliation, of the number of investments held in its name and reflected in the client records of the FSP, and the number of investments reflected in the records of the collective investment scheme or company, takes place on an ongoing basis;
 - (b) such procedures are followed by the FSP;
 - (c) procedures are implemented by the independent nominee in order to ensure that the duties stipulated in this regulation are carried out on a continuous basis;
 - (d) summarises the nature of the errors and or difficulties that impacted on the ability of the FSP to conduct its business in accordance with these Regulations during the year under review; and
 - (e) highlights the co-operation or lack thereof extended by the FSP to the independent nominee during the year under review.
- (3) The independent nominee must maintain fidelity guarantee and professional indemnity insurance sufficient to cover the risk of losses due to fraud, dishonesty and negligence that can reasonably be expected in an organisation of the size and complexity of the nominee and with due regard to the relationship with the administrative FSP concerned.
- (4)
 - (a) Where an administrative FSP ceases to conduct business or its authorisation as a financial services provider lapses or is withdrawn, or its business is wound up or liquidated, the independent nominee of the FSP must with regard to investments, transfer the investments out of the bulk account of the independent nominee held with the relevant product supplier, into an account held in the name of a client concerned with that product supplier or the independent nominee of another administrative FSP: Provided that where the client is a long-term insurer as defined in section 1(1) of the Long-term Insurance Act, 1998 (Act No. 52 of 1998), or a pension fund organisation as defined in section 1(1) of the Pension Funds Act, 1956 (Act No. 24 of

1956), the transfer of the investments will be subject to the contract with the relevant insurer and the Long-term Insurance Act, 1998, or the rules of the relevant pension fund organisation and the Pension Funds Act, 1956, as the case may be.

- (b) The provisions of paragraph (a) apply with the necessary changes where the mandate of an administrative FSP is terminated, in which case the FSP must ensure that instructions by clients concerned for the transfers are carried out.

11. Enforcing court orders

The provisions of section 4(4)(b) of the Act apply with the necessary changes to any nominee company and independent nominee where the registrar is of the opinion on the basis of information available to the registrar that prejudice contemplated in that section has occurred or may occur.

12. Construction of certain references

A reference in any law or document to an independent custodian, an investment manager or a linked investment services provider (LISP) must, unless clearly inappropriate or inconsistent with a provision of the Act, be construed as a reference to an independent nominee, a discretionary FSP and an administrative FSP, respectively.

CHAPTER VI

MATTERS RELATING TO FOREIGN FOREX SERVICES PROVIDERS AND CLEARING FIRMS (Section 35(1)(d) and (e) of Act)

13. Definitions

In this Chapter-

"authorisation" means authorised, licensed, approved or registered;

"Forex Code" means the Code of Conduct for Authorised Financial Services Providers, and their Representatives, involved in Forex Investment Business, 2003.

Approval of foreign entities

14. Procedure

A forex services provider seeking, in accordance with a provision of the Forex Code, an approval by the Registrar of a clearing firm or a foreign forex services provider, must submit an application for approval to the Registrar in accordance with section 3(2) of the Act, containing at least the following information:

- (a) Full particulars as regards the name and physical location and all other identification particulars of the relevant clearing firm or foreign forex services provider:
- (b) full particulars as regards any authorisation required by such firm or provider for the conduct of business in the country in which it is located, and of the terms of any such authorisation so granted: and
- (c) full particulars as regards the nature of the regulatory environment under which the firm or provider operates in the country concerned.

15. Requirements

It is a requirement for the granting of approval by the Registrar of any application contemplated in regulation 14, that the regulatory framework of the country in which the clearing firm or provider is located must, to the satisfaction of the Registrar, be substantively of the same nature and standing as that obtaining in respect of the applicant in the Republic.

16. Granting or refusal of approval

- (1) The Registrar may, on consideration of any application contemplated in regulation 14, require any further information from the applicant deemed necessary by the Registrar, and may after consideration of all available information but subject to the provisions of these Regulations, grant or refuse the application.
- (2) Where the Registrar has decided to refuse the application, the Registrar must before finally deciding thereon, afford the applicant concerned a reasonable opportunity to respond to the reasons for refusal as determined by the Registrar and disclosed to the applicant.

17. Interpretation

A reference in any law or document to a forex broker, an introducing forex broker, forex money manager, forex investment manager, forex advisor, forex market maker must, unless clearly inappropriate or inconsistent with a provision of the Act, be construed as a reference to a forex services provider.

(New Chapter VI inserted by Government Notice 297 of 2004)

CHAPTER VII MISCELLANEOUS

18. Penalties

A person who contravenes or fails to comply with a provision of these Regulations is guilty of an offence and liable on conviction to a fine not exceeding R500 000 or imprisonment for a period not exceeding five years, or to both such fine and such imprisonment.

(Regulation 13 renumbered to 18 by Government Notice 297 of 2004)

19. Powers of registrar to call for information

Any authorised financial service provider and any particular nominee company or independent nominee referred to in Chapter V must furnish the registrar with such information regarding the relevant shareholders, directors, trustees and senior employees, or regarding their operations, as the registrar may from time to time in writing reasonably require from any of them.

(Regulation 14 renumbered to 19 by Government Notice 297 of 2004)

20. Short title

These Regulations are called The Financial Advisory and Intermediary Services Regulations, 2003.

(Regulation 15 renumbered to 20 by Government Notice 297 of 2004)

(Chapter VI renumbered to VII by Government Notice 297 of 2004)