

**Draft**  
**FINANCIAL ADVISERS BILL**  
**BILL**

To regulate financial advisers, and to provide for matters incidental thereto

**BE IT ENACTED** by the Parliament of the Republic of South Africa, as follows:

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## **INTRODUCTORY PROVISIONS**

### **Definitions**

1. (1) In this Act, unless the context otherwise indicates -

- (i) "accounting officer" means an accounting officer contemplated in section 59, read with section 60, of the Close Corporations Act, 1984 (Act No 69 of 1984); (x)
- (ii) "advice" or "financial advice" means, subject to subsection (3), advice to a specific client (including a recommendation or comment, or an opinion, guidance or financial planning) on any

transaction in respect of a financial product, communicated to the client by any means or medium whatsoever; (x)

(iii) "Advisory Committee" means the Advisory Committee on Financial Advisers referred to in section 5; (x)

(iv) "auditor" means an auditor registered in terms of the Public Accountants' and Auditors' Act, 1991 (Act No 80 of 1991); (x)

(v) "authorised financial adviser" means a person who or which has been granted an authorisation to act as a financial adviser by the issue to that person of a licence under section 8(4); (x)

(vi) "Board" means the Financial Services Board established by section 2 of the Financial Services Board Act;

(vii) "client" means any natural or juristic person; (x)

(viii) "code of conduct" means a code of conduct of business referred in section 13; (x)

(ix) "collective investment scheme" means a collective investment scheme as defined in the Collective Investment Schemes Control Act, 19 ... (Act No .... of 1999); (x)

(x) "complainant" means, subject to section 25 (1)(a) (ii), a specific client who or which submits a complaint to the Ombudsman;

(xi) "complaint", in relation to an authorised financial adviser or a representative, means a specific complaint of a complainant relating to advice furnished by the adviser or any of the adviser's representatives to the complainant, and in which complaint it alleged -

(a) that the adviser or representative has contravened or failed to comply with a provision of this Act, and that as a result thereof the complainant has suffered or is likely to suffer prejudice or damage; or

(b) that the adviser has wilfully or negligently furnished advice on which the complainant as client has acted in good faith but which has resulted in the complainant suffering prejudice or damage or which in all likelihood will result in such prejudice or damage;

(xii) "compliance officer" means a compliance officer for an authorised financial adviser referred to in section 16 of this Act; (x)

(xiii) "Court" means any court having jurisdiction; (x)

(xiv) "financial adviser" means, subject to subsection (4), any person, excluding a representative, to the extent that the person as part of a regular business furnishes advice for remuneration; (x)

(xv) "financial planning", means the identification and analysis of the financial needs of a client in respect of a financial product in order to determine its suitability for the client, over the short, medium or long term, based on factors such as earning capacity, asset base, investment income expectations, liquidity requirements and tax exposure, including the development of a plan or strategy for the meeting of such needs; (x)

(xvi) "financial product" means, subject to subsection (2) -

(a) transferable securities and instruments, including -

(i) shares and stock in companies;

(ii) debentures and securitised debt;

(iii) money-market instruments, including treasury and other bills, short-dated bonds and certificates of deposit;

(iv) warrants, certificates and other instruments conferring rights to subscribe to, acquire, dispose of, or convert instruments referred to in subparagraphs (i), (ii) and

- (iii) of this paragraph; and
  - (v) futures and options;
  - (b) participatory interests in collective investment schemes;
  - (c) long-term and short-term insurance contracts or policies;
  - (d) benefits provided by pension fund organisations by virtue of membership;
  - (e) foreign currency denominated investments;
  - (f) deposits as defined in section 1(1) of the Banks Act, 1990 (Act No 94 of 1990), and in section 1(1) of the Mutual Banks Act, 1993 (Act No 124 of 1993), respectively; (x)
  - (g) a medical aid benefit provided by a medical scheme;
  - (h) any other product similar in nature to any financial product referred to in paragraphs (a) to (g), inclusive, declared by the registrar by notice in the *Gazette* to be a financial product for the purposes of this Act;
  - (i) any combined product containing two or more of the financial products referred to in paragraphs (a) to (h), inclusive, of this definition; or
  - (j) any financial product issued by any foreign product supplier which is 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 (i) of this definition; (x)
- (xvii) "Financial Services Board Act" means the Financial Services Board Act, 1990 (Act No 97 of 1990);
- (xviii) "key individual", in respect of the information required by virtue of section 8(1)(a) of this Act, means -
- (a) in the case of a close corporation, a company, an unincorporated association or a trust, any person who is responsible for managing or overseeing the activities of the corporation, company, association or trust relating to the provision of advice;
  - (b) in the case of a partnership, any one partner; or
  - (c) in the case of a one-person business, that person; (x)
- (xix) "Minister" means the Minister of Finance; (x)
- (xx) "Office" means the office of the Ombudsman for Financial Advice established by section 19(1);
- (xxi) "Ombudsman" means the Ombudsman for Financial Advice appointed in terms of section 20;
- (xxii) "prescribed" means prescribed by regulation; (x)
- (xxiii) "product supplier" means, subject to subsection (4), any person who or which issues a financial product to clients; (x)
- (xxiv) "registrar" means the registrar of financial advisers referred to in section 2; (x)
- (xxv) "regulation" means a regulation made under section 37 of this Act; (x)
- (xxvi) "remuneration", in relation to the furnishing of advice, means any commission, fee or other benefit, whether pecuniary or not and whether direct or indirect, including a salary or wages of a fixed amount, as consideration for such furnishing of advice; (x)
- (xxvii) "representative", in relation to an authorised financial adviser, means any person in the direct employment of or acting for or by arrangement with the authorised financial adviser irrespective of whether the remuneration of the representative is by way of salary,

wages, commission or otherwise, and who performs for such adviser any of the advisory functions of a financial adviser; and includes any member, director, officer or partner of a juristic person who performs for such juristic person any of those functions (whether or not his or her remuneration is as aforesaid); (x)

(xxviii) "this Act" includes the regulations, rules made by the Board under section 25 and any applicable code of conduct; (x)

(xxix) "unsolicited call" means a personal visit or communication made to a client without the express prior consent or invitation of such client. (x)

(2) For the purposes of this Act a financial product shall not include any financial product exempted by the registrar, after consultation with the Advisory Committee, by notice in the *Gazette* from the provisions of this Act, taking into consideration appropriate criteria indicating whether the product should so be exempted or not, such as the extent to which transactions in respect of the product are regulated by other laws.

(3) For the purposes of this Act advice shall not include -

(a) factual advice given merely -

(i) on the procedure for entering into transactions in respect of any financial product; or

(ii) as regards the description of a financial product; and

(b) any other advisory activity exempted by the registrar, after consultation with the Advisory Committee, by notice in the *Gazette* from the provisions of this Act.

(4) The Minister may by notice in the *Gazette* declare any person or group of persons acting within the scope of official duties in the employ of the State or any parastatal body, to be or to constitute a financial adviser, representative or a product supplier, as the case may be, for the purposes of this Act.

## **CHAPTER I**

### **ADMINISTRATION OF ACT**

#### **Registrar of financial advisers**

2. (1) There shall be a registrar of financial advisers with the powers and duties conferred on or assigned to the registrar by or under this Act or any other law.

(2) The executive officer of the Board shall be the registrar.

#### **General provisions concerning registrar**

3. (1) An approval of, or a determination, directive or decision by, or a notice to be given by or to, the registrar shall, without derogating from legal rules on the making known or the publication thereof, be valid only if it is in writing.

(2) Whenever the approval or, or a determination or decision by, or the performance of any other act by the registrar, is sought by a person under this Act or any other law, application therefor shall be made in writing to the registrar and the application shall -

(a) be made in the form and manner determined by the registrar by notice in the *Gazette* or otherwise required by the registrar;

(b) be accompanied by -

(i) the relevant fees; and

(ii) the information or documents prescribed or otherwise required by the registrar.

**Special provisions concerning powers of registrar**

4. (1) When anything is required or permitted to be done under this Act, within a particular period, the registrar may, before the expiry of that period, extend it.

(2) The registrar may by notice direct a financial adviser or representative to furnish the registrar, within a specified period, with specified information or documents required by the registrar for the purposes of this Act.

(3)

(a) If any advertisement, brochure or similar document which relates to the advice business of a financial adviser, and which is being, or is to be, published by a person, is in the opinion of the registrar misleading or contrary to the public interest or contains an incorrect statement of fact, the registrar may by notice direct that person not to publish it or to cease publishing it or to effect the changes to it which the registrar deems fit.

(b) A notice contemplated in paragraph (a) shall be preceded by a procedure affording the person concerned a reasonable opportunity to be heard, and shall take effect on a date specified in such notice which may be a date prior to the date of the notice.

(4) If the registrar has reason to believe that a person is contravening or failing to comply with a provision of this Act, the registrar may by notice direct that person or any other person -

(a) to furnish the registrar within a specified period with any specified information or documents in the possession or under the control of that person which relate to the matter;

(b) to appear before the registrar at a specified time and place in connection with the matter.

(5)

(a) If a person contravened or is contravening section 7(1) of this Act, the registrar may -

(i) by notice direct that person to make arrangements satisfactory to the registrar to discharge all or any part of the obligations under transactions already entered into by that person with clients; or

(ii) apply to a Court for the sequestration or liquidation of that person, whether he, she or it is solvent or not, in accordance with -

(aa) the Insolvency Act, 1936 (Act No. 24 of 1936);

(bb) the Companies Act, 1973 (Act No. 61 of 1973);

(cc) the Close Corporations Act, 1984 (Act No. 69 of 1984); or

(dd) the law under which that person is incorporated,

as the case may be.

(b) In deciding an application contemplated in paragraph (a)(ii), the Court -

(i) may take into account whether the sequestration or liquidation of the person concerned would be in the interests of the clients concerned;

(ii) may make an order concerning the manner in which claims may be proven by clients; and

(iii) shall (if necessary) appoint as trustee or liquidator a person nominated by the registrar.

**Advisory Committee on Financial Advisers**

5. (1) There shall be an Advisory Committee on Financial Advisers which may on its own

initiative, or shall at the request of the Minister or registrar, investigate and report or advise concerning any matter relating to financial advisers.

(2) The Advisory Committee shall consist of a chairperson and other members, appointed by the Minister after consultation with the Board: Provided financial advisers and clients shall be equally represented on the Committee.

(3) The registrar shall be a member of the Advisory Committee by virtue of his or her office, without any voting power on matters the registrar is to be advised upon by the Advisory Committee.

(4) A member of the Advisory Committee shall hold office for the period determined by the Minister when the appointment is made.

(5) A member of the Advisory Committee who is not in the full-time employment of the State or the Board shall be paid the remuneration and allowances in respect of any expenses incurred in the performance of the functions of the Advisory Committee, as determined by the Board.

(6) The Advisory Committee may meet or otherwise arrange for the performance of its functions, and may regulate its meetings as it thinks fit, after consultation with the Board.

(7) The registrar may submit to the Advisory Committee any information which is in his or her possession, or which he or she may obtain, and which is relevant to any matter which the Advisory Committee is investigating or considering.

(8)

(a) The Advisory Committee may appoint one or more subcommittees for the purposes of considering, and advising on, such matters relating to financial advisers as may be referred to such a subcommittee by the Advisory Committee.

(b) The Advisory Committee shall appoint as members of a subcommittee one or more of its members and, if it deems it necessary, one or more other persons for such periods of office as the Committee may from time to time determine.

(9) The Advisory Committee may call to its assistance such person or persons as it may deem necessary to assist it, or to investigate matters relating to financial advisers.

(10) The registrar shall be responsible for the administrative work incidental to the performance of the functions of the Advisory Committee and any subcommittee.

(11) The expenditure connected with the functions of the Advisory Committee shall be paid out of the funds of the Board, whose approval shall be required for all expenditure proposed to be incurred, or actually incurred, by the Advisory Committee.

(12) The provisions of the Commissions Act, 1947 (Act No 8 of 1947), shall with the necessary changes apply to the Advisory Committee and any subcommittee.

(13) The Advisory Committee shall have the powers and carry out the duties conferred on or assigned to it by or under this Act.

### **Delegation of functions**

**6.** (1) The Minister may delegate any power conferred upon him or her by this Act to the Director-General: Finance, any other official in the Department of Finance or the registrar.

(2) The Board may -

(a) on such conditions as the Board may determine delegate to the chairperson, any other member of the Board or the registrar any power conferred upon the Board by or under this Act; or

(b) authorise the chairperson, any other member of the Board or the registrar to perform any duty assigned to the Board under this Act.

(3) The registrar may -



(a) on such conditions as the registrar may determine delegate to -

- (i) another member of the executive of the Board;
- (ii) any person who has been appointed by the Board; or
- (iii) any person or body recognized by the Board for that purpose,

any power conferred upon the registrar by or under this Act, including a power delegated to the registrar under this Act; or

(b) authorise such member of the executive or person to perform any duty assigned to the registrar by or under this Act.

(4) Any delegation under subsection (1), (2)(a) or (3)(a) does not prohibit the exercise of the power in question by the Minister, Board or registrar, as the case may be.

(5) Anything done or omitted to be done by another member of the executive or person appointed or recognised in the exercise of any power or the performance of any duty delegated or assigned to him, her or it under subsection (3) shall be deemed to have been done or omitted by the registrar.

## CHAPTER II

### AUTHORISATION OF FINANCIAL ADVISERS

#### Authorisation of financial advisers

7. (1) With effect from a date determined by the Minister by notice in the *Gazette*, no person, including but subject to section 10, any product supplier, may act as a financial adviser contemplated in this Act (including pretending or professing to be or holding out as, such an adviser), unless such person has been granted an authorisation by the issuing of a licence by the registrar under section 8(4) of this Act.

(2)

(a) Any transaction concluded on or after the date contemplated in subsection (1) of this section between a product supplier and any client and which has been facilitated by advice furnished by a person who or which is or was not authorised to act as a financial adviser (or by any other person on behalf of such unauthorised person), will merely consequent on such lack of authorisation and without prejudice to any criminal proceedings against such supplier or adviser, not be enforceable: Provided that the client may elect within 30 days or any other period determined by the registrar after the date of the relevant transaction -

(i) to treat the transaction as enforceable in which case the client must immediately in writing inform the product supplier and adviser concerned of the election; or

(ii) to treat the transaction as void in which case the client -

(aa) must immediately in writing inform the product supplier and adviser concerned of the election;

(bb) may claim repayment of any money paid or transferred by the client to either of them; and

(cc) may recover from either of them or both compensation for any loss sustained as a result of having made such payment or transfer.

(b) The amounts recoverable under paragraph (a) (ii) must be determined by agreement between the parties involved or, in the absence of such agreement, by a Court on application by any one of the parties.

(c) Notwithstanding the provisions of paragraph (a), a Court may, on application by the



product supplier or adviser concerned, declare such a transaction to be enforceable if it is satisfied -

- (i) that at the time of concluding the transaction the product supplier or adviser concerned believed on reasonable grounds that the adviser did not need to be authorised;
- (ii) that the fact that the adviser was not duly authorised had not adversely affected the client; and
- (iii) that the behaviour of the adviser concerned had been such as would have been required of a duly authorised adviser and that the adviser displayed the competence reasonably to be expected.

#### **Application for authorisation as adviser**

8. (1) An application for an authorisation referred to in section 7(1) of this Act, including such application by a person not domiciled in the Republic, shall be made to the registrar, and must be accompanied by -

- (a) the prescribed information in regard to the business profile of the applicant, and in regard to the reputation record, financial soundness and competency record of the applicant and key individuals employed by the applicant; and
- (b) information to satisfy the registrar that the applicant is a fit and proper person, taking into consideration the prescribed fit and proper requirements, and that the applicant has not been convicted of any criminal offence, excluding the prescribed offences of a minor or irrelevant nature.

(2) The registrar may in addition -

- (a) require an applicant to furnish any additional information, or require any information to be verified, as the registrar may deem necessary; and
- (b) take into consideration any other information, derived from whatever source including any other regulatory or supervisory authority, as regards the applicant: Provided that such information is disclosed to the applicant and the latter is provided with a reasonable opportunity to respond thereto.

(3)

- (a) The burden of satisfying the registrar that an applicant complies with all relevant requirements for an authorisation to act as financial adviser, shall lie with the applicant.
- (b) The registrar may after consideration of an application grant or refuse the application.

(4)

- (a) Where an application is granted, the registrar shall issue to the applicant a licence to act as an authorised financial adviser.
  - (b)(i) A licence shall lapse after a period of twelve months from the date of its issue, but shall be renewable on application by the authorised financial adviser to the registrar: Provided that where an application for renewal is not made before the date of the lapsing, the licence holder shall have a period of grace of 30 days with effect from the date of the lapsing, to apply for a renewal, and that if the renewal is then granted it shall be deemed to have taken effect on the date of the lapsing.
  - (ii) An application for a renewal of the licence may be granted or refused by the registrar, but shall only be granted if the registrar is satisfied that the applicant for renewal is still a fit and proper person for purposes of acting as an authorised financial adviser, and for which purpose the applicant may be required to confirm or supplement recorded information which served as a basis for the original granting of the authorisation.

(5) Where an application (including an application for renewal) is refused, the applicant shall be notified thereof and shall be furnished with the reasons for refusal.

**Withdrawal and suspension of authorisation**

**9.** (1) The registrar may at any time suspend or withdraw any licence issued or renewed under section 8, if satisfied on the basis of available facts and information, including substantiated complaints by clients, that the authorised financial adviser concerned -

- (a) has since such issue or renewal contravened or not complied with any provision of this Act;
- (b) has furnished the registrar with false or misleading information when making an application for authorisation or for renewal;
- (c) is in a financially unsound position by virtue of an excess or possible excess of liabilities over assets;
- (d) has since the issue or renewal been convicted of any criminal offence, excluding the prescribed offences of a minor or irrelevant nature; or
- (e) is in terms of the provisions of the Companies Act, 1973 (Act No 61 of 1973), disqualified from serving as a director of a company,

and is in consequence of any such conduct, or any other conduct, no longer a fit and proper person.

(2) Before suspending or withdrawing any licence the registrar must inform the authorised financial adviser of the intention to suspend or withdraw, as the case may be, and of the grounds therefor, and provide the adviser with a reasonable opportunity to make a submission in response thereto: Provided that under urgent circumstances where prejudice or ongoing prejudice to clients must be prevented or terminated, the registrar may -

- (a) provisionally suspend or withdraw a licence pending a submission by the authorised financial adviser involved; and
- (b) publish such provisional suspension or withdrawal by notice in the *Gazette* and, if deemed necessary by the registrar, in any other public media statement or announcement the registrar considers appropriate.

(3) Where the registrar thereafter intends to finally decide on a suspension or withdrawal referred to in subsection (2), the registrar -

- (a) must notify the authorised financial adviser of the relevant grounds thereof and, in the case of a suspension, of the period of intended suspension, and of any intended conditions attached thereto, and must provide the adviser with a reasonable opportunity to make a submission in response thereto; and
- (b) may after consideration of such submission decline to proceed with the suspension or withdrawal, or decide to continue therewith in which case the registrar shall publish the suspension or withdrawal by notice in the *Gazette* and, if deemed necessary, in any public media statement or announcement the registrar considers appropriate.

(4) During any period of suspension, including a provisional suspension contemplated in subsection (2)(a), the person involved shall for all purposes of this Act be regarded as a person who is not authorised to act as a financial adviser.

(5) The procedures to be followed as regards the lifting of any suspension shall be determined by the registrar, after consultation with the Advisory Committee.

(6) The procedures to be followed by a person who or which wishes to re-apply for authorisation after a withdrawal contemplated in this section, shall be determined by the registrar.

**Exemptions in respect of product suppliers**

**10.** (1) A product supplier who or which is authorised as a financial institution in terms of specific financial services legislation, and who or which is required to make additional application for authorisation under section 8, will be exempted from submitting all information otherwise required from an applicant: Provided that the product supplier -

- (a) applies for exemption when submitting the application; and
  - (b) complies with the provisions of a directive of the registrar with regard to information still required.
- (2) Authorisation granted to a product supplier referred to in subsection (1) shall be supplementary to its authorisation as a financial institution.

### **CHAPTER III**

#### **REPRESENTATIVES OF AUTHORISED FINANCIAL ADVISERS**

##### **Qualifications of representatives and duties of authorised financial advisers in relation thereto**

**11.** (1) No person may act as a representative in the furnishing of advice on behalf of -

- (a) a person who or which is not an authorised financial adviser; or
- (b) an authorised financial adviser, unless such person is able to provide confirmation, certified by the adviser, to clients that -
  - (i) a service contract or mandate to represent the adviser exists; and
  - (ii) the adviser accepts full responsibility for the advisory activities of the representative as agreed upon with the adviser.

(2) An authorised financial adviser must at all times -

- (a) be satisfied that representatives are fit and proper persons for the purpose of providing advice on behalf of the adviser; and
- (b) ensure that the fit and proper requirements are equal to those that apply in respect of the authorisation of financial advisers in terms of this Act.

(3) In addition, any such adviser must 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.

(4) The authorised financial adviser must maintain a register of representatives which must be regularly updated and be available to the registrar for reference or inspection purposes.

(5) Such register must -

- (a) contain every representative's name and business address, and the capacity in which the representative acts for the adviser;
- (b) specify the financial products and features thereof in which representatives are competent to give advice; and
- (c) record their competencies in terms of qualifications and experience.

(6) The registrar shall require information from authorised financial advisers in a manner that will enable the registrar to maintain and continuously update a central register of all their representatives.

##### **Debarment of representative**

**12.** (1) An authorised financial adviser must ensure that any representative of such adviser who is no longer a fit and proper person is debarred by such adviser from giving advice.

(2) For the purposes of the imposition of a debarment referred to in subsection (1), the authorised financial adviser shall have regard to -

- (a) information on the conduct of the representative as provided by the registrar, the Ombudsman or any other interested person;
- (b) contravention by the representative of a provision of this Act; or
- (c) whether the person is in a financially unsound position by virtue of an excess or possible excess of liabilities over assets, or has been convicted of any criminal offence contemplated in section 8(1)(c) of this Act.

(3) If it is so established that a representative is no longer a fit and proper person, the authorised financial adviser may, after having furnished such representative with a written notification and the reasons therefor, and after having so afforded the representative a reasonable opportunity to respond thereto -

- (a) withdraw the authority in terms of which the representative is providing advice on behalf of the adviser; and
- (b) remove the relevant name from the register referred to in section 11(5).

(4) The authorised financial adviser must within a period of 30 days after removal of the name of a representative from the register inform the registrar thereof.

(5) The registrar -

- (a) must determine whether debarment will have the effect of debarring the relevant representative from giving any further advice in personal capacity or on behalf of any other authorised financial adviser than the financial adviser who or which has withdrawn the authority to provide advice on behalf of the latter;
- (b) must determine the period of debarment;
- (c) must publish the debarment of a representative by notice in the *Gazette*, and if deemed necessary by the registrar, in any other public media statement or announcement the registrar considers appropriate.

(6) Any debarment envisaged in subsection (5) may be lifted by the registrar on application by the affected person and on furnishing of proof by such person to the satisfaction of the authorised financial adviser involved and the registrar that the person again qualifies with reference to the requirements set out in section 11(2) and (3).

## **CHAPTER IV**

### **CODES OF CONDUCT**

#### **Approval of code of conduct**

**13.** (1) The registrar shall in consultation with the Advisory Committee and with such other representatives of the financial services industry and client and consumer bodies determined by the Advisory Committee, draft a code of conduct for authorised financial advisers and their representative which, if approved by that Committee, shall be published by notice in the *Gazette*, and which shall on any such publication become binding on all authorised financial advisers and their representatives.

(2) Different codes of conduct may so be drafted in respect of different categories of authorised financial advisers and their operations in different sectors of the financial services industry, and different categories of representatives, respectively.

(3) Codes of conduct may from time to time be amended or substituted in accordance with the procedure set out in subsection (1).

#### **Principles of code of conduct**

**14.** A code of conduct shall be drafted in such a manner that it ensures that authorised financial advisers and their representatives -

- (a) act honestly and fairly, and with due skill, care and diligence, in the best interests of clients and the integrity of the financial services industry;
- (b) have and employ effectively the resources and procedures necessary for the proper performance of professional activities in the furnishing of advice;
- (c) seek from clients information (where appropriate and available) regarding their financial situations, financial product experience and objectives in connection with the services required;
- (d) make adequate disclosure of relevant material information in transactions with clients;
- (e) avoid conflicts of interests and, where they cannot be avoided, ensure that clients are treated fairly;
- (f) comply with all applicable statutory or common law requirements applicable to the conduct of business,

and that the code otherwise appropriately complies with all requirements as may be prescribed in respect of such code, including -

- (i) adequate disclosure principles and requirements, particularly as regards -
  - (aa) the authorised financial adviser and representatives concerned (including information as regards names and addresses, qualifications, mandates, status and mutual relationships, avenues for complaints, and as regards cash inducements or other indirect benefits derived from product suppliers);
  - (bb) the relevant product supplier (including information as regards names and addresses, type of authorisation under particular laws, other information available on request and avenues for complaints);
  - (cc) the relevant financial products (including information, where applicable, as regards product names, dominant purposes, manner of deriving of financial benefits, inherent risks, obligations of clients in terms of relevant contracts, taxation implications, special additional loadings, fees, charges, commissions, exclusions, excesses, benefits, or terms and conditions, illustrative cash, surrender or paid-up values, relative past performance, including methods of measuring performance, and procedures for obtaining ongoing information);
- (ii) compliance with the following principles -
  - (aa) the code must be directed at enabling a client to make informed decisions;
  - (bb) it must satisfy the reasonable needs of clients;
  - (cc) information documents and transactions must be framed in plain language;
  - (dd) it must promote cost-effectiveness and not impose unwarranted unreasonable expenses on authorised financial advisers;
  - (ee) appropriate records of information disclosed, together with verification of actual disclosures and acceptance by clients involved, must be maintained for the period determined by the registrar;
  - (ff) it must provide for disclosures of actual or potential conflicts of interests;
  - (gg) it must promote the objectivity of authorised financial advisers;
  - (hh) it must promote proper relationships with clients and product suppliers, and in particular an authorised financial adviser's understanding of the needs of clients and the suitability of advice given;
  - (ii) it must facilitate maintenance of proper administrative procedures and systems, and continuous control of the fitness and properness of representatives and their adherence to applicable codes of conduct; and

(jj) it must contain arrangements for completing outstanding business in connection with the furnishing of advice, in cases where authorised financial advisers discontinue the carrying on of business;

(iii) as regards advertising, the avoidance of advertisements or marketing communications which are unclear, unfair or misleading;

(iv) as regards requirements in respect of unsolicited calls (subject to legally permissible instances), including prohibitions and exemptions;

(v) requirements relating to cancellation of transactions in respect of financial products, including a prohibition on the entering into by product suppliers of transactions relating to life and funeral insurance or collective investment schemes unless notification of cancellation rights has been given, the nature and extent of cancellation rights and the consequences of the exercise thereof, including notification of authorised financial advisers involved; and

(vi) financial resource requirements, including the furnishing of security or cover to be maintained by authorised financial advisers, and mechanisms for adjustments of such requirements by the registrar in any particular case.

## **CHAPTER V**

### **DUTIES OF AUTHORISED FINANCIAL ADVISERS**

#### **Confirmation of advice**

**15.** (1) An authorised financial adviser and any representative must summarize in the manner determined by the registrar, advice given to a client by the adviser or representative which summary must also contain the reasons why a recommended product or combination of products is considered to be suitable to the needs of the client.

(2) A client accepting advice given, shall in the manner determined by the registrar confirm acceptance of the advice given on the basis of the information disclosed.

(3) Confirmation of acceptance of advice by a client, as contemplated in subsection (2), shall not be construed as a waiver by the client of any right to seek legal redress as regards the advice given.

#### **Compliance officer and compliance arrangements**

**16.** (1) Any -

(a) authorised financial adviser who appoints one or more representatives; or

(b) group of two or more authorised financial advisers carrying on business in the format of a partnership or body corporate,

must appoint a compliance officer (who may be a director, member, principal officer, public officer, company secretary, auditor or accounting officer of the adviser or group of advisers, or any other person with suitable qualifications and experience), to monitor adherence to the compliance manual referred to hereunder, and to take responsibility for liaison with the registrar and the required reporting of information to the latter.

(2) A compliance officer and the seniority level of such officer in the relevant business, must be approved by the registrar.

(3)

(a) An authorised financial adviser or group of such advisers referred to in subsection (1) must establish and maintain procedures to be followed by the adviser, or the group of advisers, and any representative involved in the giving of advice to clients, in order to ensure that the provisions of this Act, are fully complied with.



(b) Such procedures must be set out in a compliance manual which must be kept available on request for inspection by an inspector appointed under section 2 of the Inspection of Financial Institutions Act, 1998 (Act No 80 of 1998).

(4) The compliance manual must be regularly updated and reviewed every twelve months by the relevant authorised financial adviser or compliance officer in consultation with the authorised financial adviser or group of advisers, as the case may be.

### **Maintenance of records, and reporting**

**17.** (1) An authorised financial adviser must maintain in the manner determined by the registrar records in respect of the adviser and any representative -

(a) of advice given to individual clients, including reasons for the advice given, and confirmation of the acceptance of advice so given;

(b) of dates and the nature of transactions facilitated between clients and product suppliers;

(c) of cancellations of transactions by clients which have come to the attention of the adviser;

(d) of complaints received and the nature of the complaints, together with an indication whether the complaints have been resolved or not;

(e) of debarments of representatives, together with the reasons for the debarment;

(f) which represent an updated business profile, reputation record, financial soundness and competency record as required by or in terms of the provisions of this Act, and any significant changes in the business profile, reputation record, financial soundness record and competency record of the adviser since the original date of authorisation or, where previous reporting has been done, since the date of the last report;

(g) of the general compliance with the applicable code of conduct, stating exceptions relating thereto or specific acts of non-compliance which have come to the attention of the compliance officer or such adviser during the reporting period;

(h) of the continued fitness and properness of representatives of the authorised financial adviser to give advice on the latter's behalf;

(i) to confirm continued compliance with the financial soundness or resource requirements for the adviser required by or in terms of this Act; and

(j) that will enable the drawing up of financial statements.

(2) The compliance officer of an authorised financial adviser or the authorised financial adviser must in the manner determined by the registrar report to the registrar on compliance with the provisions of subsection (1) during the relevant reporting period.

### **Audit requirements**

**18.** (1) An authorised financial adviser must appoint an external auditor or, in the case where the adviser does not operate in the format of a company, may appoint an accounting officer to express an opinion in the manner determined by the registrar on compliance with the financial soundness and resource requirements for the adviser required by or in terms of this Act.

(2) Notwithstanding anything to the contrary in any law contained, the external auditor of an authorised financial adviser must -

(a) whenever the external auditor furnishes copies of a report or other document or particulars contemplated in section 20(5)(b) of the Public Accountants' and Auditors' Act, 1991 (Act No 80 of 1991), also furnish a copy thereof to the registrar; and

(b) if the external auditor's appointment is terminated for any reason -

(i) submit to the registrar a statement of what the external auditor believes to be the



reasons for that termination; and

(ii) if the external auditor would, but for that termination, have had reason to submit to the authorised financial adviser a report contemplated in section 20(5)(a) of the Public Accountants' and Auditors' Act, 1991, submit such a report to the registrar; and

(c) inform the registrar in writing of any irregularity or suspected irregularity in the conduct or the affairs of the authorised financial adviser concerned of which the auditor became aware in performing his functions as auditor and which, in the opinion of the auditor, is material.

(3)

(a) The furnishing, in good faith, by an external auditor of a report or information in terms of this section shall not be deemed to constitute a contravention of a provision of a law or a breach of a provision of a code of professional conduct to which the external auditor is subject.

(b) The failure, in good faith, by an external auditor to furnish a report or information in terms of this section shall not confer upon any person a right of action against the auditor which, but for that failure, the person would not have had.

(4)

(a) The registrar may in writing require an authorised financial adviser to terminate the appointment of an external auditor of that adviser, if the person concerned is no longer fit and proper to hold the office concerned.

(b) When the registrar intends to act as contemplated in paragraph (a), the registrar shall advise to the authorised financial adviser, and, unless it is impracticable to do so, to the person concerned, of the registrar's intention and the reasons therefor, and the person concerned shall thereupon cease to perform the functions of his or her office.

(5) The provisions of subsections (2)(b)(i) and (c), (3) and (4) of this section shall with the necessary changes apply in respect of an accounting officer.

## **CHAPTER VI**

### **ENFORCEMENT**

#### **PART I**

#### **OMBUDSMAN FOR FINANCIAL ADVICE**

##### **Office of Ombudsman for Financial Advice**

**19.** (1) There is hereby established an office to be known as the Office of the Ombudsman for Financial Advice.

(2) The functions of the Office shall be performed by the Ombudsman for Financial Advice.

(3) The object of the Ombudsman is to dispose of a complaint of a complainant received in the Office in a procedurally fair, informal, economical and expeditious manner and by reference to what is, in the opinion of the Ombudsman, reasonable in all the circumstances of the case, with due regard to -

(a) the contractual arrangement or other legal relationship between the complainant and any other party to the complaint; and

(b) the matters as may be specified by the Board under section 25(1)(a)(vi).

##### **Appointment of Ombudsman**

**20.** (1) The Board shall, after consultation with the Advisory Committee, appoint an Ombudsman, who shall be a person qualified to be admitted to practise as an advocate under the Admission of Advocates Act, 1964 (Act No 67 of 1964), or as an attorney under the Attorneys Act, 1979 (Act No 53 of 1979), and -

- (a) has so practised as an advocate or an attorney for an uninterrupted period of at least 10 years;
- (b) was involved for an uninterrupted period of at least 10 years in the tuition of law and has also practised as an advocate or attorney for such period as renders the person suitable for appointment as Ombudsman; or
- (c) possesses such other experience and expertise as renders the person suitable for appointment as Ombudsman.

(2)

(a) The Ombudsman shall be appointed for a period of three years and may on expiry of any such term of office be re appointed.

(b) The remuneration and other terms of appointment of the Ombudsman shall be determined by the Board and shall be paid out of the funds of the Office.

(3) The Ombudsman may at any time resign his or her office by submitting a written resignation to the Board at least three calendar months prior to the intended date of vacation of office, unless the Board allows a shorter period.

(4) The Board may at any time, after consultation with the Advisory Committee, remove the Ombudsman from office on the grounds of misbehaviour, incapacity or incompetence.

#### **Funding of Office**

**21.** (1) The funds of the Office consist of -

- (a) funds provided by the Board on the basis of a budget submitted by the Ombudsman to the Board and approved by the latter; and
- (b) funds accruing to the Ombudsman from any other source.

(2) The Ombudsman must deposit all funds in an account opened with a banking institution registered under the Banks Act, 1990 (Act No 94 of 1990).

(3) The Ombudsman must utilize such funds for the defrayal of expenses incurred in the performance of functions under this Act, and may invest funds which are not required for immediate use.

(4) The financial year of the Ombudsman shall end on 31 March in every year.

(5) Funds standing to the credit of the Ombudsman in the account mentioned in subsection (2) at the close of the financial year, as well as funds invested under subsection (3), must be carried forward to the following financial year.

#### **Accountability**

**22.** (1) The Ombudsman shall be the accounting officer in respect of all funds received and all payments made in respect of expenses incurred in the Office.

(2) The Ombudsman as accounting officer must -

- (a) keep full and correct record of all funds received and payments made, and of all assets, liabilities and financial transactions of the Office;
- (b) as soon as is practicable, but not later than three months after the end of every financial year, prepare annual financial statements reflecting, with appropriate particulars, all funds received and payments made during, and all such assets, liabilities and transactions at the end of, the relevant financial year.

(3) The records and financial statements mentioned in subsection (2) shall be audited by the Auditor-General.

### **General administrative powers of Ombudsman**

**23.** The Ombudsman may for the purposes of performance of functions in the Office, with the prior concurrence of the Board, and as a charge against or for the benefit of the funds of the Office, as the case may be -

- (a) hire, purchase or otherwise acquire movable property, and let, sell or otherwise dispose of property so purchased or acquired;
- (b) enter into an agreement with any person for the performance of any specific act or function or the rendering of specific services;
- (c) insure the Office against any loss, damage, risk or liability;
- (d) employ persons to assist the Ombudsman, determine their terms of appointment and, subject to such conditions as may be determined by the Ombudsman, delegate or transfer to any such employee any administrative function, power or duty vesting in the Ombudsman in terms of this Chapter;
- (e) obtain professional advice as may reasonably be required; and
- (f) in general, do anything which is necessary or expedient for the achievement of the object of the Ombudsman.

### **Disestablishment and liquidation of Office**

**24.** (1) The Office shall not be disestablished or liquidated except by Act of Parliament.

(2) In the event of any such disestablishment or liquidation, the surplus assets of the Office (if any) shall accrue to the Board.

### **Powers of Board**

**25.** (1) The Board may, after consultation with the Advisory Committee, make rules regarding -

- (a)
  - (i) any matter which is required or permitted to be regulated by rule under this Part;
  - (ii) the class of persons eligible as complainants;
  - (iii) the rights of complainants in connection with complaints, including the manner of lodging of a complaint to the authorised financial adviser or representative involved;
  - (iv) the rights and duties of such adviser or representative on receipt of any complaint, particularly in connection with the furnishing of replies to the complainant;
  - (v) the rights of a complainant to submit a complaint to the Ombudsman where the complainant is not satisfied with any replies received from the adviser or representative concerned;
  - (vi) specifying matters which are to be taken into account whether an act or omission was reasonable;
  - (vii) the circumstances under which a complaint may be dismissed without consideration of its merits;
  - (viii) the evidence which may be required or admitted, the extent to which it should be oral or written, and the consequences of a person's failure to produce any information or document which the person has been required to produce;

(ix) allowing the Ombudsman to fix time limits for any aspect of the proceedings and to extend a time limit;

(x) making different provisions in relation to different kinds of complaints;

(b) the payment to the Office of a case fee by the authorised financial adviser involved in any complaint lodged with the Ombudsman against the adviser;

(c) liaison between the Ombudsman and the registrar, and administrative duties of these functionaries as regards mutual administrative support, exchange of information and reports, other regular consultations and avoidance of overlapping of their respective functions; and

(d) any other matter necessary or expedient for the better achievement of the objects of this section.

(2) The Board -

(a) must ensure that no rule is made under subsection (1) which in any material way detracts from or impinges on the independence of the Ombudsman;

(b) must publish in the *Gazette* rules made under subsection (1).

(3) The Board may, after consultation with the Advisory Committee, impose special levies on authorised financial advisers for purposes of the funding of the Office, for which purpose section 15A of the Financial Services Board Act shall, with the necessary changes, apply to such imposition.

**Promotion of client education**

**26.** The registrar may take any step conducive to client education and the promotion of awareness of the nature and availability of complaint procedures established by or in terms of this Act, including arrangements with the Ombudsman, product suppliers, authorised financial advisers, their representatives, other representatives of the financial services industry and client and consumer bodies to assist in the disclosure of information to the general public on such procedures.

**Receipt of complaints, prescription and jurisdiction**

**27.** (1) On submission of a complaint to the Office, the Ombudsman -

(a) must determine whether the requirements of the rules envisaged in section 25(1)(a)(iii) have been complied with;

(b) must in the case of any non-compliance act in accordance with the provisions of the rules made under that section; and

(c) must otherwise, subject to subsection (2), officially receive the complaint if it qualifies as a complaint as defined in section 1(1).

(2) Official receipt of a complaint by the Ombudsman shall interrupt any running of prescription in terms of the Prescription Act, 1969 (Act No 68 of 1969).

(3) The following jurisdictional provisions shall apply to the Ombudsman in respect of complaints:

(a)

(i) The Ombudsman must, but subject to subparagraph (iii), decline to investigate any such complaint if it appears that the complaint relates to an act or omission which occurred on or after the date of commencement of this Act but on a date more than three years before the date of such receipt.

(ii) Where the complainant was unaware of the occurrence of the act or omission contemplated in subparagraph (i), the period of three years shall commence on the date on which the complainant became aware or ought reasonably have become aware of such occurrence, whichever occurs first.

(iii) The Ombudsman may, on good cause shown or of own motion, either before or after expiry of any such period of three years, extend such period.

(b) The Ombudsman must decline to investigate any such complaint if, before the date of official receipt of the complaint, proceedings have been instituted in any civil court in respect of a matter which would constitute the subject-matter of the investigation.

(c) The Ombudsman shall not proceed to investigate a complaint officially received unless the Ombudsman has -

(i) in writing informed any other party to the complaint of the receipt thereof;

(ii) provided all such parties with copies of the complaint and supporting documents (if any); and

(iii) provided all such parties reasonably sufficient and appropriate opportunities to submit to the Ombudsman a response to the complaint, and has received such responses from all relevant parties, or is satisfied that the parties or any particular party do not intend providing the Ombudsman with any responses.

### **Investigation and consideration of complaints**

**28.** (1) The Ombudsman may, in investigating an officially received complaint, follow and implement any procedure, including a procedure in an inquisitorial manner, which the Ombudsman deems appropriate for the achieving of the object of the Ombudsman and may in his or her discretion decline to afford any party in the proceedings a right to legal representation.

(2) The provisions of the Commissions Act, 1947 (Act No 8 of 1947), shall with the necessary changes apply to the Ombudsman.

(3) The Ombudsman must keep or cause to be kept, whether in writing or by mechanical or electronic means, a permanent readable record of the proceedings and of evidence given.

(4) The registrar may, for purposes of the performance of the registrar's functions under this or any other Act, rely on a copy of the record without further proof.

(5) Any person may, subject to section 29(4), obtain a copy of the record on payment of a fee determined by the Ombudsman by notice in the *Gazette*.

### **Determinations by Ombudsman**

**29.** (1) The Ombudsman must after investigation and consideration of a complaint make a finding thereon and a determination by the Ombudsman in connection therewith may include-

(a) an award against the respondent of such amount as the Ombudsman considers fair compensation for distress, inconvenience, prejudice or damage suffered by the complainant (hereinafter referred to as the "money award");

(b) a direction that the respondent takes such steps in relation to the complainant as the Ombudsman considers just and appropriate.

(2)

(a) A money award may provide for the amount payable under the award to bear interest at a rate and as from a date specified by the Ombudsman in the award.

(b) The Board may specify -

(i) the maximum money award which may be regarded as fair compensation for a particular kind of distress, inconvenience, prejudice or damage;

(ii) different maximum money awards in relation to different kinds of complaint.

(c) A money award may not exceed the monetary limit (if any), but the Ombudsman may, if he or she considers that fair compensation requires payment of a larger amount, recommend that the respondent pay the complainant the balance.

(3)

(a) The Board may provide for the Ombudsman to have power, on determining a complaint, to award costs in accordance with the provisions of the rules.

(b) The rules may not provide for the making of an award against the complainant in respect of the respondent's costs: Provided the rules may provide for the making of an award against the complainant in favour of the Office, for the purpose of providing a contribution to resources deployed in dealing with the complaint, if in the opinion of the Ombudsman -

(i) the complainant's conduct was improper or unreasonable; or

(ii) the complainant was responsible for an unreasonable delay.

(c) The rules may authorise the Ombudsman to order that the amount payable under the cost award bears interest at a rate and as from a date specified by the Ombudsman in the order.

(4) The finding, including the reasons for the finding, and determination must be sent by the Ombudsman to all parties to the complaints, as well as the clerk or registrar of the court.

(5) A determination of the ombudsman shall be deemed to be a civil judgment of any court of law had the matter in question been heard by such court, and shall be so noted by the clerk or registrar of the court, as the case may be.

(6) A writ or warrant of execution may be issued by the clerk or the registrar of the court in question and executed by the sheriff of such court after expiration of a period of six weeks after the date of the determination, on condition that no application contemplated in section 30 has been lodged.

#### **Access to Courts**

**30.** (1) Any party to a complaint who feels aggrieved by a determination of the Ombudsman may within six weeks after the date of the determination -

(a) in the case of the complainant, appeal against the determination in the manner and within the period determined by the Board by notice in the *Gazette* to a Court;

(b) in the case of the authorised financial adviser or representative as respondent, take the determination on review to a Court.

(2) In the case of an appeal referred to in subsection (1)(a) -

(a) the Court may allow or disallow the appeal; and

(b) the decision of the Court shall have effect as a decision of the Ombudsman.

#### **Report of Ombudsman**

**31.** The Ombudsman must every year within six months after the end of the financial year of the Ombudsman submit a report to the Board on the affairs and functions of the Ombudsman during the financial year in question, including the audited financial statements.

#### **Penalties**

**32.** Any person who -

(a) insults the Ombudsman;

(b) anticipates a determination of the Ombudsman in any manner calculated to influence the determination;

(c) wilfully interrupts any proceedings conducted by the Ombudsman or misbehaves in any manner in the place where the proceedings are being conducted; or

(d) commits any act in connection with a complaint which, if committed before a court of law, would have constituted contempt of court,

shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding five years.

## **PART 2**

### **OTHER ENFORCEMENT MEASURES**

#### **Special investigations**

**33.** (1) The registrar may cause a special investigation to be undertaken as an inspection by virtue of the provisions of the Inspection of Financial Institutions Act, 1998 (Act No. 80 of 1998), of the affairs of an authorised financial adviser or representative whenever the registrar identifies compliance weaknesses in such affairs through analyses of reports, statements and other information submitted to the registrar under this Act or as a result of complaints received, and may require the adviser or representative to furnish such further information required by the registrar for the purposes of such investigation.

(2) The purpose of any such special investigation is to determine ways in which compliance may be strengthened in the areas identified by the registrar.

(3)

(a) Where, following on any such investigation, the authorised financial adviser or representative involved does not agree with, or does not undertake to comply with, recommendations of the registrar as regards improvements, the registrar may apply to a Court for an order obliging the adviser or representative so to comply in the manner and within the period determined by the Court.

(b) The provisions of section 35(3) and (5) of this Act shall with the necessary changes apply in respect of any such order and an application for renewal of the licence of the authorised financial adviser involved.

#### **Civil remedies**

**34.** (1) Subject to the provisions of section 42 regarding the rights of clients, the registrar may, at any time when it is necessary on the basis of available facts and information with reference to a particular authorised financial adviser, any representative, or other person, and when the registrar is satisfied that such adviser, representative or person -

(a) has contravened or not complied with any provision of this Act or is likely so to contravene or effect non-compliance;

(b) has appointed or is likely to appoint any debarred person as a representative; or

(c) has refused or failed to comply with any notice, directive or request issued by the registrar under, in terms of or pursuant to a provision of this Act,

may apply to a Court for an order restraining any 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) If a person in respect of whom a Court order has been issued under subsection (1) refuses or fails to comply therewith, the registrar may, without prejudice to any other civil or criminal consequences of such refusal or failure, apply to the Court for an order requiring such person to pay to the registrar -

(a) an amount determined by the Court as compensation for losses suffered by any other person in consequence of such refusal or failure;



(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 and gains 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) The amounts referred to in subsection (2) shall be deposited by the registrar directly into a specially designated trust account established with an appropriate financial institution, and thereupon -

(a) the registrar shall, as a first charge against the trust account, be 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); and

(b) the balance, if any (hereinafter referred to as the "distributable balance") shall be distributed by the registrar to the persons referred to in subsection (5), any funds remaining accruing to the registrar in official capacity.

(4) Any amount not claimed within three years from the date of the first distribution of payments, shall accrue to the registrar in official capacity.

(5) The distributable balance referred to in subsection (3)(b) shall be distributed on a pro rata basis to all persons who are affected by the occurrences referred to in subsection (2)(a), and who prove to the reasonable satisfaction of the registrar that they are persons envisaged in that subsection.

(6) A Court issuing any order under this section must order it to be published in the *Gazette* and in any other public media statement or announcement as the Court considers appropriate.

(7) The registrar shall be entitled to withdraw, abandon or compromise any civil proceedings instituted in terms of this section, but any agreement of compromise must be made an order of court and the amount of any payment made in terms of such compromise must be published in the *Gazette* and in a public media statement or announcement as the Court considers appropriate.

(8) Where civil proceedings have not been instituted, any agreement of settlement 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 in any other public media statement or announcement as the Court considers appropriate.

### **Intervention**

**35.** (1) The registrar may, whenever it is necessary on the basis of available facts and information, apply to a Court for an order -

(a) restricting the activities of any authorised financial adviser to clients of a specified category or categories or to advice of a specified nature; or

(b) prohibiting any representative of an authorised financial adviser to carry on activities in relation to the giving of advice with regard to clients in general, or a specified category or categories of clients, or in relation to advice of a specified nature.

(2) The Court may grant an order referred to in subsection (1)(a) or (b) if the Court is satisfied that any such order is necessary for the purpose of achieving the objects of this Act, or to prevent prejudice to specific clients or actual or potential clients in general.

(3) A Court order envisaged in subsection (2) shall lapse on the date of lapsing of the licence of the authorised financial adviser involved in terms of section 8(4)(b), unless the Court limits the order to a shorter period.

(4) A Court issuing any order under this section must order it to be published in the *Gazette* and in any public media statement or announcement as the Court considers appropriate.

(5) The registrar shall, on considering an application for a renewal of the relevant licence in terms of section 8(4)(b), require proof by the applicant for renewal to the satisfaction of the registrar that if the licence is renewed, there will be no need during the period of renewal for any application referred to in subsection (1) of this section.

### **Undesirable practices**

**36.** (1) Notwithstanding anything to the contrary in any law contained, the registrar may, after consultation with the Advisory Committee and in concurrence with the Minister, by notice in the *Gazette* declare a particular business practice to be undesirable for all or a particular category of authorised financial advisers.

(2) The Minister shall not concur to a declaration referred to in subsection (1) unless the registrar has, at least 30 days before that concurrence is requested, by notice in the *Gazette* published an intention to make the declaration and invited interested persons thereby to make written representations concerning the intended declaration so as to reach the registrar within 21 days after the date of publication of that notice.

(3) If the registrar is satisfied that an authorised financial adviser is carrying on a business practice which may become the subject of a declaration under this section, the registrar may, in concurrence with the Minister, by notice direct that authorised financial adviser to suspend that particular business practice for such period, not exceeding three months, as the registrar deems necessary to enable the matter to be dealt with in accordance with subsection (1).

(4) An authorised financial adviser shall not, on or after the date of the notice referred to in subsection (1), or of a directive referred to in subsection (3), carry on the business practice concerned.

(5) The registrar may, by notice, direct an authorised financial adviser who or which, on or after the date of a notice referred to in subsection (1), or of a directive referred to in subsection (3), carries on the business practice concerned, to rectify to the satisfaction of the registrar anything which was caused by or arose out of that carrying on of the business practice concerned within 60 days after the adviser is so directed.

### **Regulations**

**37.** (1) The Minister may, after consultation with the registrar and the Advisory Committee, make regulations relating to -

(a) any matter which is required or permitted to be prescribed under this Act;

(b) information to be furnished on the submission of any application under section 8 of this Act, including information (also as regards key individuals involved) -

(i) relating to the business profile of the applicant, indicating -

(aa) whether or not the applicant is handling or is to handle clients' funds;

(bb) whether the applicant is a product supplier or not, and in what areas of business the applicant is engaged;

(cc) the business format in which the applicant intends to operate, and the number of representatives to be employed; and

(dd) the accounting and information technology systems and auditing arrangements to be utilized;

(ii) relating to the reputation record of the applicant, indicating -

(aa) previous domestic or foreign criminal convictions, adverse civil judgements and professional disciplinary convictions;

(bb) previous official refusals of admittance to or approval of the carrying on of business in terms of the provisions of any

domestic or foreign law;

(cc) involvement in any non-finalized judicial or criminal proceedings;

(dd) employment and business records and references;

(ee) adherence to any formal industry-specific professional code of conduct or ethics; and

(ff) any other factor relevant to the establishment of the applicant's business integrity;

(iii) relating to the financial soundness record of the applicant, indicating-

(aa) involvement in any previous curatorship, liquidation, judicial management or sequestration proceedings;

(bb) current financial soundness certified by an auditor's or accounting officer's certificate; and

(cc) current financial position certified by an auditor's or accounting officer's certificate and the most recent audited financial statements; and

(iv) relating to professional competency, indicating -

(aa) academic and other professional qualifications;

(bb) industry-specific qualifications and experience; and

(cc) compliance with professional competency standards (if any) as developed by the respondent in consultation with the financial services industry;

(c) a prohibition on -

(i) the publication of any advertisement of any nature or any other public communication or announcement by any person who or which is not an authorised financial adviser or a representative of such an adviser, inviting clients to enter into any agreement in regard to financial products; and

(ii) the publication by any person who or which is not an authorised financial adviser or a representative of such an adviser of any advertisement of any nature or public communication or announcement indicating that such person is an authorised financial adviser or a representative of such an adviser, or the use by such person of any name, title or designation indicating that the person is an authorised financial adviser or a representative of such an adviser;

(d) compliance arrangements and compliance monitoring systems;

(e) powers of the registrar to call for information from any person to which this Act, including the powers of the Court to issue orders, on application by the registrar, to enforce obligations in that regard; and

(f) generally, any matter deemed expedient or necessary by the Minister to prescribe for the better achievement of the objects of this Act and codes of conduct, the generality of this provision not being restricted by the provisions of any specific paragraph above.

(2) The regulations may provide for criminal offences in cases of contravention or non-compliance with the provisions thereof, and for penalties not exceeding a fine of R100 000 or such higher amount as prescribed.

(3) Different regulations may be made in respect of different matters or persons, different categories of authorised financial advisers, representatives or product suppliers.

**Offences and penalties**

**38.** Any person who -

(a) contravenes or fails to comply with a provision of sections 7(1), 11(1), (2) or (4), 36(4) or (6), or 43; or

(b) in attempting to obtain any authorisation in terms of a provision of this Act, deliberately makes a misleading, false or deceptive statement, or conceals any material fact,

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

**Assessment of fines and penalties**

**39.** (1) In the assessment of any penalty in terms of section 38, the Court shall take into account any award previously made under section 34 which arises from the same cause.

(2) In the assessment of any award under section 34, the Court shall take into account any penalty previously imposed in terms of section 38 which arises from the same cause.

**Sequestration or winding-up by Court**

**40.** (1)

(a) The registrar shall have the power, notwithstanding anything contrary contained in any law, to apply for the sequestration of the estate or winding-up, as the case may be, of an authorised financial adviser or representative.

(b) The provisions of any law regarding sequestration of the estate or winding-up of an authorised financial adviser or representative shall, subject to this section and with the necessary changes, apply to the application by the registrar for such sequestration or winding-up.

(2) The registrar may, with the written approval of the Minister, make an application for the sequestration of the estate or the winding-up of an authorised representative, if the registrar is satisfied that it is in the interests of the clients of that adviser or representative to do so.

(3) In the application of any law regarding the sequestration of the estate or winding-up of an authorised financial adviser or representative -

(a) a reference which relates to the inability of an authorised financial adviser or representative to pay debts shall be construed as relating also to the inability of the adviser or representative to comply with the financial soundness and resource requirements required by or in terms of this Act;

(b) in addition to the question whether it is just and equitable that the estate of or that an authorised financial advise or representative should be sequestered or wound up, there shall be considered also the question whether it is in the interests of the clients of that adviser or representative that the estate of or that the adviser or representative should be sequestered or wound up;

(c) the following sections of the Insolvency Act, 1936 (Act No 24 of 1936), namely -

(i) section 67(1), the reference to the Attorney-General shall be construed as a reference also to the registrar;

(ii) section 152, the reference to the Master shall be construed as a reference also to the registrar;

(d) section 9(3)(b) of the Insolvency Act, 1936, shall not apply where the registrar makes the application to a Court;

(e) the following sections of the Companies Act, 1973 (Act No. 61 of 1973), namely -

(i) sections 392, 394(5) and 400, the reference to the Master shall be construed as a reference also to the registrar;

(ii) sections 375(5) and 419(1), the reference to the Registrar of Companies shall be construed as a reference also to the registrar; and

(iii) section 400, the reference to a contravention of any provision of that Act shall be construed as a reference also to a contravention of any provision of this Act; and

(f) section 346(3) of the Companies Act, 1973, shall not apply where the registrar makes the application to a Court.

(4) If an application to a Court for or in respect of the sequestration of the estate or winding-up of an authorised financial adviser or representative is made by any person other than the registrar -

(a) it shall not be heard unless copies of the notice of motion and of all accompanying affidavits and other documents filed in support of the application are lodged with the registrar at least 15 days, or such shorter period as the Court may allow on good cause shown, before the application is set down for hearing; and

(b) the registrar may, if satisfied that the application is contrary to the interests of the clients of the adviser or representative concerned, join the application as a party and file affidavits and other documents in opposition to the application.

(5) In the case of an order being issued by a Court for the sequestration of an estate or winding-up of any authorised financial adviser or representative, no provisional trustee or trustee or provisional liquidator or liquidator, shall be appointed except after consultation with the registrar.

### **Voluntary sequestration or winding-up**

**41. No -**

(a) petition for acceptance of the surrender of the estate of an authorised financial adviser or representative in terms of section 3 of the Insolvency Act, 1936 (Act No 24 of 1936);

(b) special resolution relating to the winding-up of an authorised financial adviser or representative as contemplated in section 349 of the Companies Act, (Act No 61 of 1973), shall be registered in terms of that Act, and no special resolution in terms of the constitution of an adviser or representative which is not a company; and

(c) written resolution relating to the winding-up of an authorised financial adviser or representative as contemplated in section 67 of the Close Corporations Act, 1984 (Act No. 69 of 1984), shall be registered in terms of the said section,

shall have legal force -

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

(ii) if the registrar, by notice to the adviser or representative concerned, declares that the resolution or petition is contrary to this Act.

## **CHAPTER VII**

### **MISCELLANEOUS**

#### **Saving of rights of clients**

**42.** (1) No provision of this Act, and no step, action or conduct taken under, in terms of or by virtue of any such provision, shall be construed as affecting any right of a client, or other affected person, to seek appropriate legal redress in respect of any advice or other conduct of any authorised financial adviser, or representative of such adviser, including the institution of an action for damages on the basis of breaches of statutory duties.

(2) This Act shall be construed as being in addition to any other law not inconsistent with its provisions, and not as substituting any such law.

### **Confidentiality of information**

**43.** Subject to the provisions of this Act and of any other law, or any Court order, or any waiver of rights by any person, expressly or by necessary implication providing for or permitting a disclosure, any information regarding the business or financial affairs of any person obtained in the course of performing functions under this Act must be treated as confidential.

### **Fees and penalties**

**44.** (1)

(a) The registrar shall determine the fees payable to the registrar by any person seeking the approval of, or a determination or a decision by, or the performance of any other act by, the registrar under this Act or any other law.

(b) The fees contemplated in paragraph (a) shall be payable in the manner and be subject to the requirements as may be determined by the registrar.

(2)

(a) A person who fails to furnish the registrar with a return, information or document, as provided by this Act, within the specified period or any extension thereof, shall, irrespective of any criminal proceedings instituted against the person under this Act, be liable to a penalty not exceeding R1 000 or the higher prescribed amount for every day during which the failure continues, unless the registrar, on good cause shown, waives the penalty or any part thereof.

(b) A penalty contemplated in paragraph (a) shall be imposed by notice by the registrar on the person concerned, and such imposition shall be preceded by a procedure affording such person a reasonable opportunity to be heard, and shall take effect on a date specified in such notice of the registrar which may be a date prior to the date of the notice.

(3)

(a) A person who or which is liable to pay the fees or a penalty contemplated in subsections (1)(a) or (3)(a) respectively, and who or which fails to pay the amount due on the date or within the period as determined, shall at the rate, and calculated in the manner as may be prescribed, pay interest on the amount outstanding and on unpaid interest.

(b) The fees and penalties, and interest owed in respect thereof, shall be debts due to the Board and may be recovered by the Board in a Court.

### **Exchange of information**

**45.** The registrar may disclose information contemplated in section 43, unless he or she is of the opinion that any such disclosure or rendering of assistance will not be in the public interest, but subject to guidelines (if any) issued by the Board -

(a) to any department or organ of state, foreign financial or investment services regulatory or supervisory authority, or any other regulatory or supervisory authority for financial or investment services in the Republic, including the Registrar of Medical Schemes and a self-regulatory body approved by the Board, if the registrar is of the opinion that such information will be of importance to the relevant department or organ of state, regulatory or supervisory authority, Registrar of Medical Schemes or self-regulatory body; and



(b) to any foreign financial or investment services regulatory or supervisory authority any information required in terms of any agreement, communiqué or memorandum of understanding concluded by the Board or the registrar with any such authority:

Provided that the Board or the registrar may impose conditions relating to the use that may be made of any information and the preservation of confidentiality in respect thereof.

### **Limitation of liability**

**46.** The Minister, the Board, Advisory Committee, the registrar, the Ombudsman, any other officer or employee assisting the Board, the registrar, the Advisory Committee or the Ombudsman, or other body or person performing any function under a provision of this Act, shall not be liable for any loss sustained by or damage caused to any person as a result of anything done or omitted by any of them in the *bona fide*, but not grossly negligent, exercise of any power or carrying out of any duty or performance of any function under, in terms of or by virtue of a provision of this Act.

### **Transitional and other exemption provisions**

**47.** (1) The registrar may after the commencement of this Act, but prior to the date determined by the Minister as provided in section 7(1) of this Act, on application, exempt any person from the provisions of that section if the registrar is satisfied that -

- (a) the rendering of advice as contemplated in this Act by the applicant is already partially or wholly regulated by any other law; or
- (b) the application of the said section to the applicant will cause the applicant or its clients financial or other hardships or prejudice; and
- (c) that the granting of an exemption will not militate against the public interest, will not prejudice the interests of clients and will not frustrate the achievement of the objects of this Act.

(2) The registrar -

- (a) may attach to any exemption so granted reasonable requirements or impose reasonable conditions, having regard to the factors mentioned in subsection 1(a), (b) and (c), with which the applicant shall comply either before or after the effective date of the exemption in the manner and during the period determined by the registrar; and
- (b) shall determine the period of the exemption.

(3) An exemption in respect of which a person has to fulfil requirements or comply with conditions during the period of the exemption, shall lapse whenever the person contravenes or fails to comply with any such requirement or condition: Provided that the registrar may on application condone any such contravention or failure and determine reasonable requirements or conditions with which the applicant shall comply on and after resumption of the exemption as if such requirements or conditions were attached and imposed on the first granting of the exemption.

(4)

- (a) The registrar may in any case not provided for in this Act on written application, exempt any person from any other provision of this Act.
- (b) The provisions of subsections (1)(b) and (c), (2) and (3) of this section shall with the necessary changes apply in respect of any exempt referred to in paragraph (a).

### **Amendment of Financial Services Board Act**

**48.** Section 1 of the Financial Services Board Act is hereby amended by the addition of the following subparagraph to paragraph (a) of the definition of "financial institution":

"(xii) any 'authorised financial adviser' or 'representative' as defined in section 1(1) of the Financial Advisers Act, 1999;"



**Commencement and short title**

**49.** This Act shall be called the Financial Advisers Act, 1999, and shall come into operation on a date fixed by the President by proclamation in the *Gazette*.

**MEMORANDUM ON OBJECTS  
OF THE  
FINANCIAL ADVISERS BILL, 1999**

**Introductory**

**1.** The Financial Advisers Bill ("the Bill") was originally drafted at the initiative of the Policy Board for Financial Services and Regulation.

**2.** The Bill regulates the carrying on of business as adviser to clients as regards certain financial products. In terms of the Bill such advisers need authorisation provided through the mechanism of licensing; entry qualifications are provided for; and professional conduct is controlled through codes of conduct and enforcement measures.

**Guiding principles in drafting the Bill**

**3.** The following principles were considered important in drafting the Bill and were adhered to as far as possible:

(a) Public and industry involvement and input were obtained on an extensive basis. A first draft of the Bill was circulated for comment during March 1999. Several television and radio talk shows on the Bill took place. Public hearings on the Bill were also held at major centres across the country.

(b) The original draft was revised in view of comments received. The revised version was designed to be free-standing and complete as far as possible. Reference is made in the Bill to an envisaged new Collective Investment Schemes Control Act which has been forwarded to the Ministry of Finance for cabinet approval. This Act will deal comprehensively with investment schemes where a pooling of clients' fund occur. It is envisaged that this Act will come into operation before the Bill becomes law.

(c) There was a consistent endeavour to produce a more "user friendly" Bill. The language and content have been simplified to ease interpretation and to promote clarity.

(d) The provisions of the first draft were reconsidered as to their purpose and significance and, unless found sufficient, they were deleted or reformulated.

(e) A deliberate attempt was made to create regulatory flexibility by providing for circumscribed discretionary power.

(f) Where the powers of the Registrar are such as to increase the ability to act swiftly and decisively, sufficient checks and balances were introduced to protect fundamental rights.

(g) Due to the costs associated with compliance, there was an endeavour not to impose any new or more costly regulatory requirements than the ones in the first draft. Wherever unnecessary costs resulted from regulation under the first draft, these have been removed.

(h) It was accepted that it would not be in the public interest if the authorisation and compliance requirements are too strict or burdensome for the authorised financial advisers and their representatives. Consequently provision is firstly being made for consultation with the Advisory Committee on Financial Advisers (advisers and clients to be equally represented) in the making of regulations on the fit and proper requirements for authorisation as well as the drafting of codes of conduct. Provision is secondly being made for phasing in of the authorisation provisions and the granting of exemptions without sacrificing regulatory standards.

(i) Several enforcement provisions already appearing in other Acts of Parliament have with the necessary changes been included in the Bill, e.g. the establishment of a statutory

ombudsman (Part 1 of Chapter VI); the granting of civil remedies to the registrar (Clause 34); the declaration of undesirable practices (Clause 36); and sequestration and winding-up provisions (Clauses 40 and 41).

### **Clause by clause analysis**

#### **4. Introductory provisions (Clause 1): Definitions**

The definitions are contained in Clause 1, particularly those which determine the ambit of the Bill, e.g. "advice", "client", "financial adviser", "product supplier" and "representative".

#### **5. Chapter 1 (Clauses 2 to 6): Administration of Act**

This chapter deals with the general administration of the Bill:

- (a) the creation of the office of the Registrar of Financial Advisers, being the Executive Office of the Financial Services Board ("FSB"), is provided for in Clause 2;
- (b) Clause 3 deals with the way in which the Registrar interacts with the persons to which the Act applies;
- (c) Specific powers for the registrar to intervene swiftly and effectively are provided for in Clause 4;
- (d) The Advisory Committee on Financial Advisers is established in terms of Clause 5 and its general functioning is provided for;
- (e) The delegation of functions by the Minister of Finance, the FSB and the Registrar is provided for in Clause 6.

#### **6. Chapter II (Clauses 7 - 10): Authorisation of financial advisers**

This chapter deals with the authorisation of financial advisers (including product suppliers) to give advice to clients for remuneration:

- (a) Clause 7 prohibits a person from acting as a financial adviser unless authorised by the using of a licence by the Registrar. Provision is also made for the consequences of a transaction concluded by a client with a product supplier which has been facilitated by advice provided by an unauthorised financial adviser;
- (b) Clause 8 deals with the applications of persons wishing to act as financial advisers, setting out the requirements and powers of the Registrar as regards granting or refusal of applications;
- (c) Clause 9 deals with circumstances where authorisations may be withdrawn or suspended;
- (d) Clause 10 deals with the granting of exemptions to product suppliers who or which is authorised as financial institutions in terms of other legislation from submitting all information otherwise required from an applicant.

#### **7. Chapter III (Clauses 11 - 12): Representatives of authorised financial advisers**

This chapter deals with representatives of authorised financial advisers who give advice on behalf of such advisers who, on their part, accept full responsibility for the advisory activities of the representatives:

- (a) Clause 11 sets out their qualifications and authority and obliges authorised financial advisers to keep proper records of them and to ensure that they comply with applicable codes of conduct;
- (b) Clause 12 regulates the debarment of persons to act as representatives of authorised financial advisers where they are no longer fit and proper persons.

#### **8. Chapter IV (Clauses 13 - 14): Codes of Conduct**

This chapter deals with codes of conduct with which authorised financial advisers and their representatives have to comply in the carrying on of their advisory functions:

- (a) Clause 13 empowers the Registrar to draft and publish such codes in consultation with the Advisory Committee and other interested parties;
- (b) Clause 14 deals exhaustively with the principles on which such codes shall be based, comprising inter alia, sound principles of business conduct, and requirements in respect of proper disclosures, advertising, unsolicited calls, cancellations of agreements, and the financial resource requirements of such advisers.

## **9. Chapter V (Clauses 15 -18): Duties of authorised financial advisers**

This chapter deals with a range of duties of authorised financial advisers to be carried out in the course of conducting their businesses as advisers:

- (a) Clause 15 requires confirmation of advices;
- (b) Clause 16 requires the appointment of compliance officers and sets out compliance arrangements;
- (c) Clause 17 requires the maintenance of certain records and imposes certain reporting duties;
- (d) Clause 18 sets out the required auditing requirements.

## **10. Chapter VI (Clauses 19 - 41): Enforcement**

10.1 Part 1 provides for the creation of an independent ombudsman scheme for the speedy and informal resolution of disputes between authorised financial advisers or representatives and their clients:

- (a) Clause 19 provides for the establishment of the Office of the Ombudsman for Financial Advice ("the Office"). It also makes clear that the object of the scheme is to resolve disputes quickly and with minimum formality;
- (b) Clause 20 provides for the appointment of the Ombudsman by the FSB;
- (c) Clause 21 provides for the funding of the Office. The budget is to be approved by the FSB;
- (d) Clause 22 provides for the designation of the Ombudsman as the Accounting Officer for the handling of the funds of the Office;
- (e) General administrative powers for the performance of functions are granted to the Ombudsman in terms of Clause 23;
- (f) Clause 24 determines that the disestablishment and liquidation of the Office may only be done in terms of an Act of Parliament;
- (g) The FSB will in terms of Clause 25 be able to make rules, making clear who can use the scheme and in what circumstances, as well as regarding the procedure to be applied to disputes. The FSB may set case fees and also impose special levies on authorised financial advisers for funding purposes;
- (h) Provision is made in Clause 26 for the promotion by the registrar of client education on complaint procedures;
- (i) Clause 27 deals with the receipt of complaints, prescription requirements and jurisdiction of the Ombudsman in the investigation of complaints;
- (j) Clause 28 provides for investigation powers and the procedures to be followed by the Ombudsman regarding the disposal of complaints;
- (k) Determinations by the Ombudsman is provided for in Clause 29. If a complaint is determined in favour of a complainant, the respondent may be ordered to pay

compensation up to a maximum limit which may be set by the FSB. The limit may be different for different kinds of complaints. The respondent may also be ordered to take steps to rectify the matter complained of. The FSB may make rules authorising the award of costs by the Ombudsman. It is believed that it is prudent to provide the FSB with the ability to make rules giving the Ombudsman the discretion to make a cost award against a complainant in extreme cases. Provision is also made for the enforcement of awards made;

(l) Clause 30 provides that the determinations of the Ombudsman are to be binding upon authorised financial advisers, but the complainant may choose whether or not to accept the Ombudsman's determination and may instead pursue the matter in the Court. Normal court-based procedures can sometimes provide an inherent advantage to the better-resourced party. It is a characteristic of ombudsman scheme (e.g. the ombudsman schemes for short- and long-term insurance in S.A. and four of the five current Ombudsman schemes in the UK) not to allow for an appeal against an Ombudsman's decision by a respondent. Such feature is consistent with the objective of resolving disputes quickly and with minimum formality. The expectation is that the Ombudsman's procedures will be fair and that therefore no external right of appeal will be necessary because of constitutional requirements on fair hearings. The option of judicial review will of course be open to respondents (and complainants) once the ombudsman's determination has been made;

(m) Clause 31 requires the Ombudsman to submit an annual report to the FSB;

(n) Provision is made in Clause 32 for penalties for acts which may result in the Ombudsman not achieving his or her object.

#### 10.2 Part 2 provides for other enforcement measures:

(a) The Registrar may in terms of Clause 33 order a special investigation of the affairs of an authorised financial adviser or representative where the Registrar identifies compliance weaknesses in such affairs;

(b) Clause 34 vests powers in the Registrar to apply to the Court for orders restraining unlawful conduct by authorised financial advisers, representatives and other persons and so to apply, in cases where such orders are disobeyed, for compensation orders in favour of person who suffered damage or losses in consequence of refusal or failure to comply with Court orders and for the imposition of civil fines;

(c) Clause 35 vests intervention powers in the Registrar to apply to the Court for orders restricting the activities of authorised financial advisers and representatives where necessary;

(d) Clause 36 regulates the declaration by the Registrar of undesirable business practices for authorised financial advisers;

(e) Clause 37 grants power to the Minister of Finance to make regulations on a large range of detailed matters relevant to the contents of the Bill, to supplement the substantive provisions of the Bill;

(f) Clauses 38 and 39 regulate the offences under the provisions of the Bill and the assessment of fines and penalties by the Court;

(g) Clauses 40 and 41 provide for the sequestration of estates of and the winding-up of authorised financial advisers or representatives.

### **11. Chapter VII (Clauses 42 - 49): Miscellaneous**

This chapter deals with miscellaneous matters:

(a) Clause 42 saves the common law rights of clients to take civil action against authorised financial advisers or representatives, e.g. actions for damages on the ground of breaches of statutory duties;

(b) Clause 43 regulates the confidentiality of information obtained in the course of performing functions under the Bill;

- (c) Clause 44 regulates fees and penalties payable to the Registrar;
- (d) Clause 45 regulates disclosure of information between the Registrar and other foreign or domestic supervisory or regulatory authorities, and to State departments or organs, and self-regulating bodies;
- (e) Clause 46 contains the customary limitation of liability provisions as regards functionaries acting under the Bill in any *bona fide* but not grossly negligent manner;
- (f) Clause 47 contains transitional and other exemption provisions enabling the Registrar to grant exemptions from the provisions of the Act in cases where the application of the Act, at its commencement, may cause prejudice or hardship to persons suddenly confronted with licensing requirements, and where the granting of exemptions will not be inimical to the public interest;
- (g) Clause 48 provides for an amendment to the definition of "financial institution" in the Financial Services Board Act, 1990 ("the FSB Act") to make the provisions of the FSB Act, the Financial Institutions (Investment of Funds) Act, 1984 and the Inspection of Financial Institutions, 1998 applicable to financial advisers and representatives.
- (h) Clause 49 contains the customary short title and commencement provision of the Bill.