

REPUBLIC OF SOUTH AFRICA

**FINANCIAL MARKETS CONTROL
AMENDMENT BILL**

(As introduced in the National Assembly)

(MINISTER OF FINANCE)

[B 4—98]

REPUBLIEK VAN SUID-AFRIKA

**WYSIGINGSWETSONTWERP OP
BEHEER VAN FINANSIËLE
MARKTE**

(Soos ingedien in die Nasionale Vergadering)

(MINISTER VAN FINANSIES)

[W 4—98]

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GENERAL EXPLANATORY NOTE:

[] Words in bold type in square brackets indicate omissions from existing enactments.

 Words underlined with a solid line indicate insertions in existing enactments.

BILL

To amend the Financial Markets Control Act, 1989, so as to further regulate restrictions on the management of investments; to further regulate undesirable advertising or canvassing relating to financial instruments; to extend the matters which may be disclosed by a financial exchange; and to extend the limitation on the liability of certain persons to a financial exchange and clearing house; and to provide for matters connected therewith.

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

Amendment of section 5 of Act 55 of 1989, as substituted by section 2 of Act 55 of 1995 and amended by section 3 of Act 73 of 1996

1. Section 5 of the Financial Markets Control Act, 1989 (Act No. 55 of 1989) 5
(hereinafter referred to as the principal Act), is hereby amended—

(a) by the substitution for subsection (1) of the following subsection:

“(1) No person [shall] may, as a regular feature of his or her business, undertake the management of investments on behalf of another person, and for such management receive any remuneration in whatever form, 10
[other than fees charged by a member for the buying and selling of financial instruments] unless he or she—

(a) **[is a member authorised in terms of the rules to manage investments on behalf of another person]** is a person who has been approved by the Registrar or is a person who falls within a 15
category of persons approved by the Registrar;

(b) has a written mandate to do so from the other person; and

(c) complies with such conditions as the Registrar may from time to time determine by notice in the *Gazette*, which conditions may—

(i) prohibit the management of investments referred to in subparagraphs (ii) and (iv) of the definition of ‘investments’ in subsection (7), if such investments are not subject to a regulatory regime deemed adequate by the Registrar for the protection of investors; and 20

(ii) differ in respect of different groups or types of investment managers.”; 25

- (b) by the insertion after subsection (1) of the following subsection:
 “(1A) Subsection (1) does not apply to a member authorised in terms of the rules to manage investments on behalf of another person or a company which is registered as a management company in terms of the Unit Trusts Control Act, 1981 (Act No. 54 of 1981).”;
- (c) by the substitution in subsection (6) for subparagraph (iv) of paragraph (a) of the following subparagraph:
 “(iv) of a trust as defined in section 1 of the Trust Property Control Act, 1988 (Act No. 57 of 1988), created *inter vivos*, but not a business trust, and he or she is the trustee concerned or a person administering such trust on behalf of that trustee; or”;
- (d) by the substitution for subsection (7) of the following subsection:
 “(7) For the purposes of this section—
- (a) ‘investments’ means—
- (i) financial instruments **[or]** listed on a financial exchange;
 - (ii) financial instruments listed on a foreign exchange;
 - (iii) units in a unit portfolio as defined in section 1 of the Unit Trusts Control Act, 1981 (Act No. 54 of 1981), or units or any other form of participation in a collective investment scheme approved by the Registrar of Unit Trust Companies in terms of that Act;
 - (iv) units or any other form of participation in a collective investment scheme licensed or registered in a foreign country;
 - (v) any other instruments declared to be **[such]** investments for the purposes of this section by the Registrar by notice in the *Gazette*; or
 - (vi) funds intended for the purchase of such financial instruments, units, participation or other instruments;
- (b) ‘management of investments’ means—
- (i) **[in the case of a member means]** the buying, **[and]** selling **[of financial instruments]** or otherwise dealing with investments on behalf of another person **[in terms of an unlimited mandate to act on behalf of such other person; or];**
 - (ii) **[in the case of a person who is not a member means the buying and selling of financial instruments on behalf of another person in terms of any mandate, whether limited or unlimited, to act on behalf of the other person]** an offer or agreement regarding such buying, selling or dealing, irrespective of whether an investment manager is required to exercise his, her or its discretion; or
 - (iii) the implementation on behalf of another person of a decision to buy, sell or deal with investments,
- but not—
- (aa) the giving of advice on the merits of such transactions without receiving funds or assets from a client; or
 - (bb) the performance of the functions of a company or institution which is registered as a trustee under the Unit Trusts Control Act, 1981 (Act No. 54 of 1981); and
- (c) **[‘an unlimited mandate’ means a mandate to act on behalf of another person without it being necessary to obtain further authority or consent from such other person to effect any transaction in financial instruments under such mandate]** ‘business trust’ means a trust *inter vivos* created for the purpose of carrying on a business for profit-making, which purpose is achieved through the combination of capital contributed by the beneficiaries themselves and through the administration or management of the capital by trustees on behalf of and for the benefit of the beneficiaries.”.

Amendment of section 17 of Act 55 of 1989, as amended by section 25 of Act 54 of 1991, section 18 of Act 7 of 1993, section 65 of Act 104 of 1993, section 12 of Act 55 of 1995 and section 6 of Act 73 of 1996

2. Section 17 of the principal Act is hereby amended by the substitution for paragraph (dC) of subsection (1) of the following paragraph: 5

“(dC) that no member may carry on the business referred to in section 5 [of this Act] unless such member is authorised to do so in terms of the rules [and complies with the provisions of that section];”.

Amendment of section 21A of Act 55 of 1989, as inserted by section 17 of Act 55 of 1995 and amended by section 10 of Act 73 of 1996 10

3. Section 21A of the principal Act is hereby amended—

(a) by the insertion after subsection (1) of the following subsection:

“(1A) (a) No person other than a member of a foreign exchange recognised by the Registrar for the purposes of this section by notice in the *Gazette*, an officer or employee of such a member, such a foreign exchange or an employee of such a foreign exchange, may in any matter or by any means, either for himself, herself or for any other person, directly or indirectly advertise or canvass for any business relating to the buying and selling of financial instruments listed on a foreign exchange so recognised. 15 20

(b) No person may in any matter or by any means, either for himself, herself or for any other person, directly or indirectly advertise or canvass for any business relating to the buying and selling of financial instruments listed on a foreign exchange not recognised by the Registrar in terms of paragraph (a).”; 25

(b) by the substitution for subsection (2) of the following subsection:

“(2) No person other than a person approved by the Registrar in terms of section 5(1) [shall in any matter] or exempted from the provisions of that section by section 5(1A) may by any means [either for himself or for any other person, directly or indirectly] advertise or canvass for or market the business referred to in section 5(1).”; and 30

(c) by the insertion after subsection (2) of the following subsections:

“(2A) (a) No person may, without the approval of the Registrar, advertise or canvass for or market the business referred to in section 5(1), carried on outside the Republic. 35

(b) The Registrar may grant the approval referred to in paragraph (a) subject to such conditions as may be necessary for the protection of investors.

(2B) Any advertisement, marketing material or other means of marketing contemplated in subsections (2) and (2A) shall comply with the requirements determined by the Registrar by notice in the *Gazette*.”. 40

Substitution of section 28A of Act 55 of 1989, as inserted by section 21 of Act 55 of 1995

4. The following section is hereby substituted for section 28A of the principal Act:

“Disclosure of information by financial exchange” 45

28A. Notwithstanding the provisions of any other law a financial exchange may enter into an agreement with any other exchange or organisation of financial exchange supervisors, whether domestic or foreign, to disclose information relating to a financial instrument, a company whose financial instruments are listed on an exchange, a particular transaction, a member, an officer or employee of a member or a buyer and seller of financial instruments if such information will be of importance to the relevant [domestic or foreign] exchange or organisation 50

of financial exchange supervisors and [that] the disclosure will not be against the public interest.”.

Amendment of section 36 of Act 55 of 1989, as amended by section 28 of Act 54 of 1991, section 25 of Act 55 of 1995 and section 12 of Act 73 of 1996

5. Section 36 of the principal Act is hereby amended by the substitution for paragraph (a) of subsection (1) of the following paragraph: 5

“(a) contravenes a provision of section 4(1), 17B, 20, 21, 21A or 22;”.

Substitution of section 37A of Act 55 of 1989, as substituted by section 13 of Act 73 of 1996

6. The following section is hereby substituted for section 37A of the principal Act: 10

“Limitation of liability

37A. No financial exchange, clearing house, executive officer, employee or representative of a financial exchange or of a clearing house, or any member of an executive committee or subcommittee of the executive committee, or of a clearing house, shall be liable for any loss sustained by or damage caused to any person as a result of anything done or omitted by the financial exchange, clearing house, officer, employee, representative or member in the *bona fide* or negligent, but not grossly negligent, exercise of any power or carrying out of any duty or performance of any function under or in terms of this Act or the rules.”. 15
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Short title and commencement

7. This Act shall be called the Financial Markets Control Amendment Act, 1998, and shall come into operation on a date fixed by the President by proclamation in the *Gazette*.

**MEMORANDUM ON THE OBJECTS OF THE FINANCIAL
MARKETS CONTROL AMENDMENT BILL, 1998**

The abovementioned Bill contains proposals for the amendment of the Financial Markets Control Act, 1989 (Act No. 55 of 1989) (“the Act”), and can be explained as follows:

1. Clause 1

- (a) The proposed amendment of section 5(1) further regulates the power of the Registrar to determine conditions in respect of investment managers so as to enable him or her to prohibit the management of foreign investments in specific circumstances.
- (b) Members of a financial exchange and management companies registered under the Unit Trusts Control Act, 1981 (Act No. 54 of 1981), are in the proposed subsection (1A) exempted from the provisions of section 5. The reason for the exemption is that members are regulated by the rules of a financial exchange and management companies have to comply with the strict requirements of the Unit Trusts Control Act, 1981.
- (c) The meaning assigned to the word “trust” in section 1 of the Trust Property Control Act, 1988 (Act No. 57 of 1988), is assigned to the same word in section 5(6)(a)(iv) of the Act. A business trust is, however, excluded from the definition.
- (d) The proposed amendment of section 5(7) seeks to extend the definitions of “investments” and “management of investments” significantly. “Investments” is defined so as to include the following:
 - (i) Financial instruments listed on a financial exchange or listed on a foreign exchange;
 - (ii) units in a unit portfolio as defined in section 1 of the Unit Trusts Control Act, 1981, or units or any other form of participation in a collective investment scheme approved by the Registrar of Unit Trust Companies; and
 - (iii) units or any other form of participation in a collective investment scheme licensed or registered in a foreign country.

Units in a unit portfolio or collective investment scheme are at present not included in the definition of “financial instruments” in section 1. It is, however, common knowledge that a substantial part of the business of investment managers consists of the buying and selling of units on behalf of their clients. Units in off-shore funds or collective investment schemes are included in the definition of investments in the light of the expected upsurge of cross-border activities of investment managers as a result of the relaxation of exchange control.

In the definition of “management of investments” the provision which relates to the case of a member is, for the reason referred to in 1(b) above, deleted. It is proposed that not only the actual buying and selling of investments, but also any dealing with investments on behalf of another person, the offering and agreeing to manage investments, irrespective of whether an investment manager is required to exercise his discretion in such management, and the implementation of a decision to invest, should constitute “management of investments”. The mere giving of advice on the merits of such buying and selling without receiving funds or assets and the performance of the functions of a company or institution which is registered as a trustee under the Unit Trusts Control Act, 1981, are, however, excluded from the ambit of “management of investments”.

The definition of “an unlimited mandate” has become superfluous due to the abovementioned proposed amendments of section 5. It is therefore proposed that the definition be deleted.

As reference is made to a business trust in section 5(6)(a)(iv), it is proposed that that expression be defined.

2. Clause 2

The amendment of section 17 is necessary as a result of the amendments proposed in clause 1.

3. Clause 3

A provision similar to that in section 21A(1) is proposed in respect of the case where the business referred to in that section relates to the buying and selling of listed financial instruments on a foreign exchange. The canvassing without the approval of the Registrar for the business of management of investments carried on outside the Republic is furthermore prohibited. The Registrar may grant his or her approval of such canvassing subject to conditions. Marketing material in respect of the management of investments, whether carried on in or outside the Republic, must comply with the requirements determined by the Registrar by notice in the *Gazette*.

4. Clause 4

The object of the proposed amendment of section 28A is to authorise a financial exchange to also enter into an agreement to disclose information with organisations of financial exchange supervisors. It also seeks to extend the matters which may be so disclosed, to a financial instrument and to a company whose financial instruments are listed on an exchange.

5. Clause 5

The amendment of section 36 is necessary as a result of the amendments proposed in clause 3.

6. Clause 6

The object of the proposed amendment of section 37A is to clarify the fact that a financial exchange and clearing house will not, subject to certain qualifications, be liable for any loss or damage caused to a person as a result of anything done or omitted to be done by that financial exchange or clearing house. The principle of such an amendment is currently contained in section 12(1A) of the Safe Deposit of Securities Act, 1992 (as amended by the Safe Deposit of Securities Amendment Act, 1996 (Act No. 70 of 1996)).

PARLIAMENTARY PROCEDURE

The State Law Advisers are of the opinion that this Bill must be dealt with in accordance with section 75 of the Constitution since it contains no provision to which the procedure set out in section 74 or 76 of the Constitution applies.

PERSONS AND BODIES CONSULTED

- * Association of General Banks;
- * Association of Law Societies of South Africa;
- * Association of Property Unit Trust Management Companies;
- * Association of Unit Trusts;
- * Association of Black Securities and Investments Professionals;
- * Association of Participation Mortgage Scheme Managers;
- * Association for the Advancement of Black Accountants;
- * Bond Exchange of South Africa;
- * Council of South African Banks;
- * Central Depository Limited;
- * Consumer Council;
- * Fund Managers Association of South Africa;
- * Foundation for African Business and Consumer Services;
- * Free Market Foundation;
- * Johannesburg Stock Exchange;
- * Life Offices' Association of Southern Africa;
- * National African Federated Chamber of Commerce;
- * Policy Board for Financial Services and Regulation;
- * Portfolio (Asset) Management Companies;

- * Public Accountants' and Auditors' Board;
- * Public Property Syndication Association;
- * Registrar of Banks;
- * South African Futures Exchange;
- * Shareholders' Association of South Africa;
- * The Association of Trust Companies in South Africa; and
- * The South African Institute of Chartered Accountants.