

THE CAPE LAW SOCIETY

(the statutory body with the jurisdiction to administer the Attorneys' Act in the Northern, Western and Eastern Cape provinces)

Dear Member

FINANCIAL ADVISORY AND INTERMEDIARY SERVICES (FAIS): Guidance Note to Attorneys 01 of August 2016

Pursuant to consideration having been given to the question of whether attorneys attending to financial transactions involving the investment of trust funds on behalf of clients, will be subject to the above Act and need to apply for a licence (register) under Section 8 of the Act, an approach was made to the **Financial Services** Board for some guidance in this regard.

It was indicated by the Board that:

1. The Act is wide in terms of its application and includes, irrespective of the person's profession, all persons who, as a regular feature of their business, give advice and/or render intermediary services to a client in relation to a financial product. An attorney could be such a person.
2. The Act does not affect attorneys who confine their activities to the practising of law. However, if they render **financial services**¹ to the extent that it can be said that such activity has become a regular feature of their practice/business, those attorneys will become subject to the Act and need to apply for a licence under Section 8 of the Act. This includes an attorney who furnishes clients with advice in respect of a financial product, whether or not such advice is furnished in the course of or incidental to financial planning.
3. "Regular feature of business" is not defined and must be given the ordinary common law meaning of the expression. It is important to note that this expression cannot merely indicate dealings with clients on a regular basis in the sense of "daily" or at least frequently. A person who maintains all the required manpower, infrastructure, technical knowledge and availability (at any time) for the carrying on of a particular business (such as rendering intermediary service to clients in respect of a particular financial product) cannot, if only three clients are dealt with during a year argue that "regularity" is not a feature of his/her business and that as regards the

¹ FINANCIAL SERVICES: AS DEFINED IN THE FINANCIAL ADVISORY & INTERMEDIARY SERVICES ACT 32 OF 2002

Act, licensing is not required. The continuous maintenance of infrastructure and the “availability” to clients should be regarded as an indispensable element of the expression “regular feature”.

THE FOLLOWING GUIDELINES WERE MADE AVAILABLE TO THE PROFESSION BY THE BOARD:

- The Registrar agrees that an attorney carrying on the business of an investment practice, where funds are invested on behalf of clients, pursuant to an investment mandate (without there being any underlying transaction), would be required to obtain authorisation under the Act, if it, as a regular feature of its business, renders a financial service in respect of a financial product.

It is the Registrar's understanding that attorneys accepting funds in trust on behalf of clients and their subsequent dealing therewith in terms of Section 78(2A) of the Attorneys Act, 1979, merely invests client funds in a separate trust account in order for the client to obtain the interest for the duration that the client's funds must be kept in trust by an attorney. The money so invested remains part of the trust assets in the attorney's trust account.

- The Registrar further understands that such an investment in a separate interest bearing account for the benefit of a client, does not equate to the conclusion of an agreement between the client and the particular banking institution where the client's money is invested. It amounts to an agreement between the attorney and the bank for the investment of a client's money in what can be termed a “ring-fenced” portion of the attorney's trust account.

Accordingly money disinvested in terms of a Section 78(2A) investment has to be paid back into the attorney's general trust account together with the interest earned thereon for credit of the client.

An attorney's activities, if it falls within the scope of Section 78(2) as understood by the Registrar and if it forms part of the ordinary business of an attorney, would not fall within the ambit of the Act.

- However, if the attorney furnishes advice in respect of any financial product or performs any act referred to in the definition of “intermediary services’ that results or may result in a client

entering into a transaction in respect of a financial product, it will have to be authorised under the Act.

- The Registrar agrees that, if an interim investment in terms of Section 78(2A) was made, but after completion of the underlying transaction, the client instructs the attorney to retain the monies on investment on his/her behalf or make a new investment and the monies are not earmarked for any other transaction except to invest, such investment would not form part of the ordinary business of any attorney and would therefore, be subject to the Act.

MEMBERS MUST, IN VIEW OF THE ABOVE, ENSURE THEIR COMPLIANCE WITH THE ACT AND A BRIEF SUMMARY OF THE PROCEDURE TO BE FOLLOWED IF A LICENCE IS REQUIRED, IS AS FOLLOWS:

- a. An application for a license as a financial services provider must be submitted to the Registrar of Financial Services (the Registrar) pursuant to section 8 of the Act in the form and manner determined by the Registrar by notice on its official website <https://www.fsb.co.za/Departments/fais/registration/Pages/application.aspx> . The application can be completed online.
- b. The application must be supported by information to satisfy the Registrar that the applicant complies with the relevant fit and proper requirements in respect of personal character qualities of honesty and integrity, competence, operational ability and financial soundness. The documents include reference letters from previous employers or product suppliers reflecting the nature and extent of experience gained, certified copy of qualification, business description and financial projections/budget.
- c. The application fee is payable prior to the submission of the application and proof of payment must accompany the application form.
- d. Non-individual applicants with more than one key individual or representative are required to appoint a compliance officer.
- e. The Registrar may either grant the application, if the applicant and its key individual(s) comply with the relevant requirements of the Act or refuse the application, if the application is non-

compliant.

- f. The Registrar may impose conditions and restrictions on the exercise of authority granted by the licence having regard to the factors listed in the Act.

Issued by

The Cape Law Society

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DISCLAIMER:

Members are advised that this advisory serves only as a Guidance Note to assist members and is not to be construed as legal advice.