

## GUIDANCE NOTE

### INTERMEDIARY SERVICES AND REPRESENTATIVES: FINANCIAL ADVISORY AND INTERMEDIARY SERVICES ACT, 2002 (“THE ACT”)

#### 1. Introduction

The Act, in essence, creates a new type of functionary in order to ensure that in future every **person** empowered to render **financial services** to a client, is fully qualified to discharge this responsibility, either acting personally or through other persons.

#### 2. Financial Services

The Act, in section 1 thereof, provides that **financial services** include:

- the furnishing of **advice**; or
- the furnishing of advice and the rendering of an intermediary service; or
- the rendering of an **intermediary service**.

#### 3. Intermediary Services

In the same section of the Act, **intermediary service** is defined as follows: -

“ ‘intermediary service’ means, subject to subsection (3)(b), any act other than the furnishing of advice, performed by a person for or on behalf of a client or product supplier-

(a) the result of which is that a client may enter into, offers to enter into or enters into any transaction in respect of a financial product with a product supplier; or

(b) with a view to-

- (i) buying, selling or otherwise dealing in (whether on a discretionary or non-discretionary basis), managing, administering, keeping in safe custody, maintaining or servicing a financial product purchased by a client from a product supplier or in which the client has invested;
- (ii) collecting or accounting for premiums or other moneys payable by the client to a product supplier in respect of a financial product; or
- (iii) receiving, submitting or processing the claims of a client against a product supplier.”

For purposes of this note, the definition of intermediary service has to be read in conjunction with the definition of **representative**.

#### 4. **Representative**

A representative is defined therein as follows: -

“representative” means any person who renders a financial service to a client for or on behalf of a financial services provider, in terms of conditions of employment or any other mandatory agreement, but excludes a person rendering clerical, technical, administrative, legal, accounting or other service in a subsidiary or subordinate capacity, which service-

(a) does not require judgment on the part of the latter person; or

(b) does not lead a client to any specific transaction in respect of a financial product in response to general enquiries.”

#### 5. **Advice**

Accordingly, any person who provides **advice** (as defined in FAIS) to a client for or on behalf of a financial services provider, in terms of conditions of employment or any other mandatory agreement, will always be a **representative** of that financial services provider. This is so because the exclusions set out in the definition of “representative” are clearly not applicable to the provision of advice, as advice will always require judgment on the part of the person giving the advice. It follows that any such person who provides advice and renders intermediary services, will of necessity be a representative.

#### 6. **Intermediary services (without advice)**

The following question has arisen: Will a person be regarded as a **representative** for FAIS purposes if they provide an **intermediary service** to a client for or on behalf of a financial services provider, in terms of conditions of employment or any other mandatory agreement, but do NOT provide **advice**.

To answer this question, one must take cognisance of the exclusions from the definition of “representative”, set out under paragraphs 4(a) and (b) above. Unless one of these exclusions applies, the person concerned will be a representative.

If, however, either one of the exclusions under paragraph 4(a) and (b) does apply, the person concerned will not be a representative.

The exclusions provided for in the definition of “representative” have the effect of limiting the seemingly wide activities expounded in the definition of “intermediary service”.

## 7. Persons who will not be “representatives”

This means that, provided that they do not provide any **advice**, the following two classes of persons will not be **representatives** for FAIS purposes, notwithstanding the fact that their activities resemble/ are of the kind of those covered by the definition of “intermediary services”:

7.1. A person who renders a financial service to a client for or on behalf of a financial services provider, in terms of conditions of employment or any other mandatory agreement, where the service concerned is –

- clerical
- technical
- administrative
- legal
- accounting; or
- rendered in a subsidiary or subordinate capacity

AND

The service does not require judgment on the part of the person rendering it.

7.2. A person who renders a financial service to a client for or on behalf of a financial services provider, in terms of conditions of employment or any other mandatory agreement, where the service concerned is –

- clerical
- technical
- administrative
- legal
- accounting; or
- rendered in a subsidiary or subordinate capacity

AND

The service does not lead a client to any specific transaction in respect of a financial product in response to general enquiries.

## 8. The financial services provider

It is important to note that paragraph 7 above only applies to persons who, but for the exclusions mentioned in paragraphs 7.1

and 7.2 above, would have fallen within the definition of “**representative**”. In other words, it only applies to persons who render the services concerned “to a client for or on behalf of a financial services provider, in terms of conditions of employment or any other mandatory agreement”.

The person or entity on whose behalf the financial service is rendered (i.e. the employer or mandator of the persons described in paragraph 7) will still fall within the definition of “financial services provider”. This is because, if the services rendered by an employee/mandatory fall within the definition of either “intermediary service” or “advice”, or both, the employer/mandator will itself be rendering a “financial service”.

Accordingly, unless such employer/mandator can show a reason why it should be exempted from FAIS, for example that it does not render the financial services concerned as a regular feature of its business or section 1(3)(b) of the Act applies, or an exemption has been granted in terms of sections 44 and 45 of the Act, it will be obliged to obtain a FAIS licence as a financial services provider, and it and its key individuals will be fully subject to all the applicable provisions of FAIS.

## **9. Conclusion**

Where an employee or other mandatory of a financial services provider falls within the ambit of paragraph 7 above, they will not be regarded as representatives for FAIS purposes, and the financial services provider will accordingly not be required to comply with the provisions of FAIS relating to representatives, in respect of any such employee or mandatory. The financial services provider and its key individuals will however be required to comply with all applicable provisions of FAIS. Note that it is likely that a financial services provider may have some employees or mandatories that fall within the ambit of paragraph 7, and some that do not. It is accordingly incumbent on the financial services provider to carefully assess the functions of its staff members and other persons acting on its behalf to determine whether or not they are to be regarded as representatives for FAIS purposes.