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INSURANCE SECTOR EDUCATION
AND TRAINING AUTHORITY

LEARNER GUIDE

Unit Standard Title:	Demonstrate knowledge and insight of the Financial Advisory and Intermediary Services Act (FAIS) (Act 37 of 2002)
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Demonstrate knowledge and insight of the Financial Advisory and Intermediary Services Act (FAIS) (Act 37 of 2002)

At the end of this module, the qualifying learner should be able to:

- Explain the purpose of the Financial Advisors and Intermediaries Services` legislation (FAIS).
- Describe the authorisation process.
- Apply disclosure and conduct requirements to a selected sub sector.
- Explain the mechanisms for enforcement and the implications for the intermediary and the industry.
- Explain the rights of recourse available to aggrieved clients.

Introduction

FAIS is an abbreviation for the Financial Advisory and Intermediary Services Act (no. 37 of 2002). This legislation was passed on 15 November 2002 and came into force on 1 October 2004, however drafting of the Act (then still termed a Bill) started as early as 1993.

The FAIS Act was introduced to regulate the business of all Financial Service Providers **who give advice or provide intermediary services to clients**, regarding a wide range of financial products. In terms of the Act, such Financial Services Providers need to be licensed, and professional conduct is controlled through Codes of Conduct and enforcement measures.

The Act aims to achieve the following

- Professional conduct
- Better informed clients
- A professional, responsible sector

Any Financial Services Provider (FSP's) that wish to render intermediary services or give advice on any financial product as defined in the Act, such as insurance, retirement, investment products and so forth, must apply to the Financial Services

Board (FSB) for a license. Once approved by the Registrar, the FSP is provided with copies of the license which must be displayed and made mention of in all material and advertisements. FSP's need to abide by the Code of Conduct and provisions in the Act to ensure compliance. Should a representative not comply with the Act, they should be debarred, and should an FSP not comply with the Act, the Registrar can suspend or withdraw the license.

The Act has put in place a cost effective mechanism for aggrieved clients, namely the Ombudsman of FSP's, also called the FSB Ombudsman. The Ombudsman has the same powers as a judge and may impose fines and imprisonment on persons. The determination of the Ombudsman becomes a civil court judgement.

In a nutshell, clients are protected due to the fact that FSP's need to be honest and transparent, conduct a full needs analysis, disclose all information to the client and allow the client sufficient opportunity to make an informed decision.

All communication must be kept for a minimum of 5 years and must be supplied to the Registrar in writing within 7 days from request.

The FSP must have, amongst other documents and processes, an internal complaints handling policy to ensure that complaints are dealt with efficiently and clients are to be informed of all recourses available should the client not be satisfied with the FSP's decision following a complaint.

1. The purpose of the Financial Advisory and Intermediary Services Act (FAIS)

It is a well-known fact that certain companies and individuals exploit people's ignorance in terms of the financial services industry, or simply blatantly lies to clients and steal from them.

There are many well known cases where clients in some cases lost their life savings and companies simply disappeared overnight.

It was therefore important to introduce legislation that will govern the industry in an attempt to ensure that this cannot happen to clients any longer. Should an FSP be guilty of non-compliance, the consequences are severe. It may even lead to imprisonment under certain circumstances and the courts can award heavy fines, over and above the punitive damages that can be awarded.

Of course there had been legislation in place to govern the industry, for instance the Short Term Insurance Act, the Long Term Insurance Act, and so forth. These Acts did cover certain aspects of consumer protection, however there had not been an Act to govern the duties of FSP's and rights of clients in such a manner.

1.1 How does the FAIS legislation fit in with other Acts?

The FAIS Act governs the non-banking financial services industry in South Africa. It therefore governs areas that are governed by their own respective pieces of Legislation, for instance the Medical Aid, Pension Fund and Insurance Industries.

An FSP therefore must comply with the FAIS Act, as well as other pieces of legislation, some governing various industries, such as FICA, Labour Relations Act and so forth, as well as specific legislation, such as the Short Term Insurance Act for Short Term Insurers.

This means that all pieces of legislation must be adhered to, and can be compared to interlocking pieces of a puzzle where each part contributes to the whole picture.

The Act has a FUNCTIONAL and not an INSTITUTIONAL approach in its design. Since it regulates a FUNCTION, and not an INSTITUTION or group of institutions, it is not restrictive as to what institution it applies to.

The applicability of the Act to an organisation depends on the following:

- If a person performs the function of **advice**; or
- **Intermediary service**

Definition: Advice and Intermediary Service

These definitions are broad and all inclusive and apply to a wide range of sectors within the industry.

- **Advice** is defined as any recommendation, guidance or proposal of a financial nature furnished, by any means or medium, to a client or group of clients in respect of the purchase or investment in any financial product, the conclusion of any other transaction aimed at incurring any right or benefit or liability in respect of any financial product (this includes a loan or cession), or the variation, replacement or termination of any financial product.
- **“Intermediary Service”** means any activity other than the furnishing of advice that is performed by a person for or on behalf of a client or product supplier.

In addition, in each instance, the “advice” or “intermediary service” must relate to a “financial product” which has a wide implication in terms of its definition (see section on Financial products).

It is important to bear in mind, when seeing FAIS in context with other pieces of legislation that what it really creates or aims to create is a formal system of regulating financial advisors and intermediaries. As a result of this, aggrieved consumers will be able to seek redress when they have been misled or misrepresented to by a representative or FSP.

It appears that in recent times, compliance and consumer protection have become buzzwords in the financial services industry and certainly FAIS is not the first piece of legislation in this industry to concern itself with the rights of consumers.

So in a nutshell, different pieces of legislation are enacted with different aims in mind.

1.2 The need for the FAIS legislation with reference to the history of the legislation

The FAIS legislation has been enacted with a strong emphasis on consumer protection and aims to achieve effective regulation of the different role-players through a number of mechanisms:

- Financial Services Providers (FSP's) must be licensed in terms of the Act and need to comply with certain prescribed fit and proper criteria, which is discussed in more detail under authorisation process.
- FSP's are responsible for their representatives who also have to comply with fit and proper requirements.
- Further, the Act lays down standards for the market conduct of both FSP's and representatives. Again, the focus here is on the consumer to receive fair treatment and to have full disclosure made to the consumer.

Historically, there was no formal system of regulating financial advisors and intermediaries. Aggrieved clients had very little recourse against dishonest advisors. Further, processes to protect clients such as complaints policies and record keeping systems were not formally regulated.

The Board for Financial Services and Regulation was responsible for conceptualising and designing the basic framework which would become FAIS.

The FAIS Bill (before it was enacted) was drafted on the basis of a framework of specifications (provided by the Policy Board for Financial Services and Regulation), which only covered the furnishing of advice. Since then, the ambit of the Bill has been extended to all intermediary services rendered in respect of financial products (as defined in the legislation) and now has more far-reaching implications.

During the drafting process which lasted for more than 2 years, several drafts of the Bill were put on the Financial Service's Board's (FSB) website, followed by statements in the media, inviting comments. In addition to this, and given the fact that the Bill attracted interest from all the different industry players within the financial services sector, a number of workshops, as well as several road shows, were hosted by the FSB. These events covered discussions around the contents of the then Bill and its possible impact on the industry.

1.3 Terminology used in the legislation

FAIS role player	Acronym	Definition from Act	Possible person/entity
Financial Services Provider	FSP	<p>An “authorised financial services provider” or “provider” means a person, other than a representative, who as a regular feature of the business of such person –</p> <ul style="list-style-type: none"> • Furnishes advice; or • Furnishes advice and renders any intermediary service; or • Renders an intermediary service 	<p>Brokerage, Product Supplier, Administrator etc. and may be a sole proprietor / partnership / CC / company or business trust</p>
Representative	Rep	<p>The term “representative” means any person, including a person employed or mandated by such first-mentioned 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 mandate, but excludes a person rendering clerical, technical, administrative, legal, accounting or other service in a subsidiary or subordinate capacity, which service—</p> <ul style="list-style-type: none"> • does not require judgment on the part of the latter person; or • does not lead a client to any specific transaction in respect of a financial product in response to general enquiries 	<p>Person supplying advice, concluding the sale / contract, person that makes changes to the policy and so forth</p>
Key Individual	K.I.	<p>A “key individual”, in relation to an authorised financial services provider, or a representative, carrying on business as—</p>	<p>Examples are Directors, Heads of Business Units,</p>

FAIS role player	Acronym	Definition from Act	Possible person/entity
		<ul style="list-style-type: none"> • a corporate or unincorporated body, a trust or a partnership, means any natural person responsible for managing or overseeing, either alone or together with other so responsible persons, the activities of the body, trust or partnership relating to the rendering of any financial service; or • a corporate body or trust consisting of only one natural person as member, director, shareholder or trustee, means any such natural person 	Managers (who oversee or manage any activity relating to the rendering of any financial service)
Auditor		The term Auditor means an auditor registered in terms of the Auditing Profession Act, 2005 (Act No. 26 of 2005)	
Product Supplier		Means any person who issues a financial product	Examples include companies such as Liberty, Santam, Discovery and so forth. Also referred to as the underwriter in insurance
Client		Means a specific person or group of persons, excluding the general public, who is or may become the subject to whom a financial service is rendered intentionally, or is the successor in title of such person or the beneficiary of such service	

As mentioned above, the FAIS Act was introduced to regulate the business of all Financial Service Providers who give advice or provide intermediary services to clients, regarding a wide range of financial products. But what is a *Financial Services Provider*?

1.4 The concept of a financial services provider

A financial service provider means any person (other than a representative), who as a regular feature of the business of such person furnishes advice, or renders intermediary service, or both.

Examples could include:

- A broker
- A product supplier (Insurance companies for instance Santam, Mutual & Federal, Auto & General, OUTsurance etc.)
- A sole proprietor / partnership / CC / company or business trust

1.5 The concept of a natural person as defined in the FAIS legislation

It is important, when applying to be licensed as a financial service provider, to distinguish between a 'natural person' and a 'juristic person' since this differentiation affects the assigning of responsibility for actions that are undertaken by the financial service provider. Natural persons are, in this respect, distinguished from juristic persons such as companies, close corporations and trusts which are recognised as separate legal entities existing apart from their members and from the natural persons which form part of the legal entity concerned. While a juristic person necessarily acts through natural persons, it is the juristic person which acquires rights and/or incurs duties and not those natural persons in their personal capacities.

In the Application to be licensed as a Financial Services Provider, under the form FSP 3, beneath the heading "**Type of Person**", it is clearly stated that: "In order to distinguish natural persons from juristic persons, humans are referred to as being natural persons."

It goes on further to read: "A juristic person is recognised as a separate legal entity

apart from its members and natural persons, which form part of it. The juristic person can act through natural persons only, the result of such action being that only the juristic person acquires rights and incurs duties and not such natural persons in their personal capacities e.g. company, close corporation, trust, etc. It is apparent from the above definition that a natural person is a human being, whereas a juristic person is an entity such as a cc, company or trust.”

1.6 FSP's and their Representatives

In terms of FAIS, a person will not be able to act as a representative of an authorised FSP, unless such a person is able to provide confirmation, certified by the FSP, to clients that:

- A service contract or other mandatory agreement, to represent the FSP, exists
- The FSP accepts responsibility for the activities of the representatives falling within the contract or mandate

The Act makes the FSP's liable for the conduct of their representatives. In terms of the Act, a representative engages in the same activities as its principal, but does so for and behalf of the FSP. As outlined above, this relationship is either based on the fact that the representative is an employee of the FSP or holds a mandate from the FSP. The FSP is expected to provide an updated register of its representatives to the Financial Services Board (more specifically, the Registrar).

Examples:

- In the hypothetical case of ABC Brokerage (Pty) Ltd, with four financial advisors, the brokerage will be the FSP and the advisors, the representatives.
- In another instance, XYZ Life Pty Ltd is a Product Supplier and a Financial Services Provider, which also use the services of tied agents to market their products exclusively. In this instance, the company would be the FSP (i.e. the product supplier) and its agents would be the representatives of the FSP.
- In the case of MyInsurance (Pty) Ltd, a direct insurer, with permanent employees that render services via their call centre, walk in centres and

external consultants – the company is an FSP and Product Supplier and the staff that render the services are the representatives.

1.7 What should an authorised FSP do?

An FSP, once authorised, must, amongst others:

- Maintain a register of representatives
- Take reasonable steps to ensure that representatives comply with the applicable codes of conduct as well as other laws relating to the conduct of the business
- Ensure that the FSP, KI's and representatives are Fit and Proper
- Display their FSP License at every business premises
- Disclose the fact that a license is held in all documentation and advertisements
- Maintain proper accounting records that need to be audited
- Maintain records for a minimum of five years

The FSP will have to accept responsibility for:

- Maintaining a representative register
- Compliance with the Codes of Conduct
- Appointment of a Compliance Officer(s)
- Maintenance of various records
- Accounting and auditing
- Regular reporting to the Registrar
- Ongoing FAIS Fit & Proper checks (of their Representatives)
- An internal complaints resolution process and policy
- General compliance with the Act

1.8 What does Financial Products refer to?

A financial product would refer to the following:

- Securities & instruments including: shares, securitised debt, any money-market instrument, any warrant or certificate.

- Collective investment schemes.
- A long-term or short-term insurance contract or policy.
- Benefits provided by pension fund organisations, medical schemes, friendly societies, deposits, foreign currency investment.

1.8.1 *Categories of Products*

Each authorised FSP is licensed to sell certain FAIS products.

FSP's may have various licenses in respect of different product categories. The product category may also have different products falling in the main category and these are called product sub-categories.

The Category descriptions in the FAIS Act are as follows:

- **“Category I”**, in relation to a financial services provider, means all persons, other than persons referred to in Categories II, IIA, III and IV, who are authorised to render the financial services (other than financial services mentioned in Categories II, IIA, III and IV) as set out in the relevant application;
- **“Category II”**, in relation to a financial services provider, means all persons who are authorised as **discretionary FSPs** as set out in the relevant application;
- **“Category IIA”**, in relation to a financial services provider, means all persons who are authorised as **hedge fund FSPs** as set out in the relevant application;
- **“Category III”**, in relation to a financial services provider, means all persons who are authorised as **administrative FSP's** as set out in the relevant application;
- **“Category IV”**, in relation to a financial services provider, means all persons who require licenses as Assistance Business FSP's.

Below is a table with all 20 of the financial products governed by the FAIS Act, which falls into category I

	Financial Product	Explanation
1	CATEGORY I	
1.1	Long-term Insurance subcategory A	Listed as an "Assistance" Policy in the Long term Insurance Act. It covers long term policies that provide up to R18, 000 in total benefits. It has no investment value
1.2	Short-term Insurance Personal Lines	The insurance of possessions owned and used for personal use
1.3	Long-term Insurance subcategory B1	Risk policies which provide cover in respect of death, disability and health events, and do not have any investment or growth <i>Note : "Long Term" insurance is insurance of Life events such as death, disability, reaching a certain age (pensions, endowments and similar)</i>
1.20	Long Term Insurance subcategory B2	Death, disability, health, investment policies, annuities which have a guarantee of a minimum return of premium or a guaranteed pay out
1.4	Long-term Insurance subcategory C	All other Long Term Insurance policies.
1.5	Retail Pension Benefits	Pension, Provident or Preservation fund policies that are sold to individuals
1.6	Short-term Insurance Commercial Lines	The insurance of things owned and used for Commercial purposes
1.7	Pension Fund Benefits (excluding retail pension benefits)	Pension and Provident funds that are designed for groups of people.
1.8	Securities and Instruments: Shares	A person purchases shares in a business and could benefit by being

		<p>paid out on a regular basis from the profits made by the company – called “Dividends”.</p> <p>The company may be listed on a securities exchange (JSE) or can sell shares privately if not listed.</p>
1.9	Securities and Instruments: Money market instruments	<p>This is a bank deposit account where the Banks use the money to do short term investments and loans. The interest received depends on the success of the Bank’s investment and short term loan strategy.</p> <p>There is a high minimum balance required and generally a restriction on withdrawals.</p>
1.10	Securities and Instruments: Debentures and securitised debt	<p>Debentures are used when a business or the official website, needs to borrow money over a long time without having any security or collateral.</p> <p>This type of instrument depends on the integrity of the borrower as to whether people will lend the money.</p> <p>Securitised debt is when a business borrows money which is guaranteed by an asset that the company owns.</p> <p><i>Example</i> a clothing store may have a book of customers which owes them money over 6 months. The company may need all that money immediately to buy more stock so will borrow the</p>

		money based on the value of the money that they should receive over the next 6 months.
1.11	Securities and Instruments: Warrants, certificates and other instruments acknowledging, conferring or creating rights to subscribe to, acquire, dispose of, or convert securities and instruments referred to in subcategory 1.8, 1.9 and 1.10 above.	<p>A Warrant is when a person pays for the right to buy stock or commodities at some future date at a pre-determined price. They may or may not exercise this option.</p> <p>This warrant can be sold to somebody else before the due date.</p>
1.12	Securities and Instruments: Bonds	<p>When a the official website or large corporate wants to borrow a large sum of money for a particular project and repay it over a long term they will sell “bonds”. The buyer will get a guaranteed rate of interest until a maturity date when they can withdraw the original capital (money paid in the beginning).</p> <p><i>Some of the stadiums for the Soccer World Cup were financed by Bonds.</i></p>
1.13	Securities and Instruments: Derivative instruments excluding warrants	Buying an asset which will only have a value at a future date.
1.14	Participatory Interests in Collective Investment Schemes	<p>Often referred to as “Unit Trusts”</p> <p>Shares can be very expensive to buy and many people want to share in the possibilities of investment on a Securities Exchange (e.g. JSE). Collective Schemes mean that many</p>

		<p>people can pay a small amount to an intermediary (Discretionary FSP) sometimes called an investment manager who will then invest the total large sums of money in shares.</p> <p>The interest or dividends paid out will depend on the type of securities invested in and the performance of these.</p>
1.15	Forex Investment Business	<p>Forex is short for Foreign Exchange. This is investment in Foreign denominated currencies.</p> <p>A person may wish to invest in Dollars US in the hope that they go up in value and the SA Rand goes down in value. They would then sell the Dollars US for SA Rands and get more SA Rands than they had before.</p>
1.16	Health Service Benefits	<p>This refers to Medical Aids.</p> <p>A person may only have this if they are also accredited with the Council for Medical Schemes as a Health Schemes Broker. If the Health Schemes Broker accreditation lapses or is withdrawn then the FSP authorisation is as well. And visa versa.</p>
1.17	Long-term Deposits	<p>This is a Bank deposit which cannot be accessed within a 12 month period. e.g. a 36 month deposit</p>
1.18	Short-term Deposits	<p>This is a Bank deposit which can be</p>

		accessed within a 12 month period e.g. a normal transaction bank account, call account and a 32 day call account.
1.19	Friendly Society Benefits	A society in which the members contribute a specific sum of money on a regular basis for a specific purpose – e.g. own retirement fund.

CATEGORY II	
Sub category	Experience requirements for FSP's and Reps
2.1	Long-term Insurance Category B
2.2	Long-term Insurance Category C
2.3	Retail Pension Benefits
2.4	Pension Fund Benefits
2.5	Securities and instruments: Shares
2.6	Securities and Instruments: Money market instruments
2.7	Securities and Instruments: Debentures and securitised debt
2.8	Securities and Instruments: Warrants, certificates and other instruments acknowledging debt
2.9	Securities and Instruments: Bonds
2.10	Securities and Instruments: Derivative instruments excluding warrants
2.11	Participatory Interests in one or more collective Investment schemes
2.12	Forex Investment Business
2.13	Long-term Deposits
2.14	Short-term Deposits
CATEGORY II A	
Hedge Funds	
CATEGORY III	
Administrative FSP who places funds in investments	
CATEGORY IV	
Administration of Funeral Products in terms of an Agreement between the FSP and the Insurer	

1.9 Measures for consumer protection as contained in the legislation

There are certain measures available for consumer protection. These measures are contained in the legislation. Let's have a look at the measures for consumer protection as contained in the legislation.

Clients who receive inappropriate advice could either approach the Ombud or institute civil proceedings based on delictual liability (i.e. a person suing another person, as opposed to the State suing a person), or breach of contract.

Further, the Act makes provision that:

- “No provision of this Act and no act performed under or in terms of any such provision, may be construed as affecting any right of a client, or other affected person, to seek appropriate legal redress in terms of common law or any other statutory law, and whether relating to civil or criminal matters, in respect of the rendering of any financial service by an authorised financial services provider, or representative of such provider, or any act of a person who is not an authorised financial services provider or a representative of such a provider.”

This means that **the FAIS Act** does not prevent a client who has been aggrieved by an FSP or a representative from seeking legal redress in terms of any other law.

The **General Code of Conduct** makes it clear that clients are to be given “reasonable and appropriate general explanations of the nature and material terms of the relevant contract or transaction.” There are many other provisions contained in the General Code of Conduct which are primarily around consumer protection.

1.9.1 Client education

If Consumer Education is seen as a proactive consumer protection measure, then there is further provision in the legislation as can be seen from section 32 below.

It could be argued that client education is client protection since a more educated client makes more educated decisions.

Promotion of client education by registrar

32. The registrar may take any steps conducive to client education and the promotion of awareness of the nature and availability of the Ombud and other enforcement measures established by or in terms of this Act, including arrangements with the Ombud, representative bodies of the financial services industry, client and consumer bodies, or product suppliers and authorised

financial services providers and their representatives to assist in the disclosure of information to the general public on matters dealt with in this Act.

1.10 The relationship between different players in the industry

The different role players include:

- The Financial Services Board
- The Compliance Officer
- The Recognised Body
- The Financial Services Provider
- Key individuals
- Representatives
- Auditor
- Support Staff

We will now have a look at each of the mentioned role players.

- **Financial Services Board**

The Financial Services Board is a unique independent institution established by statute to oversee the South African Non-Banking Financial Services Industry in the public interest.

- **Compliance Officer**

This is the person who embeds compliance within the FSP and reports to the FSB on compliance issues within the FSP. The Compliance Officers conducts on-site compliance assessments at the FSP. They recommend remedial action in respect of areas that need to be addressed and help FSP's to deal with these actions through access to compliance templates and guidelines. They will also assist with the completion of regulatory reports.

The role of a compliance officer can be defined into three main functions namely support, monitoring and training. In terms of the FAIS Act the following roles are explicitly mentioned in the legislation:

- Monitor compliance with the FAIS Act;
- Submit compliance reports and other compliance related reports to the

Registrar;

- Take responsibility for liaison with the Registrar;
- Supervise the compliance function which is established by the FSP;
- Act with diligence, care and degree of competency required from a compliance officer;
- Provide the FSP with written reports at least quarterly indicating the course of, and progress achieved with, compliance monitoring duties and make recommendations to the FSP;

Compliance officers play a very important role in the regulation of FSP's. Their functions complement the Registrar's functions and therefore make it easier for the Registrar to carry out its regulatory functions. Their expected interactions with the FSP's and their knowledge of the business of the FSP places them in a better position to be able to identify issues of non-compliance as they occur and to put in place appropriate controlling and/ or remedial measures.

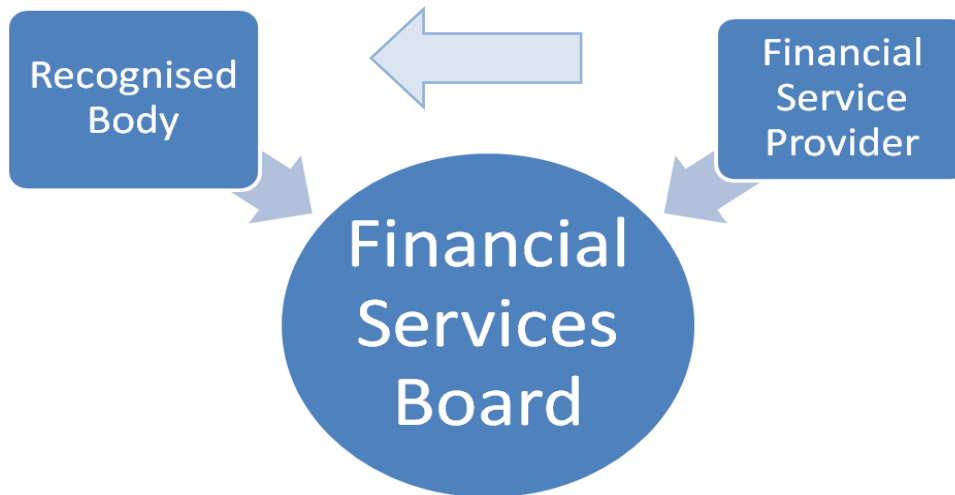
Compliance officers are expected to liaise with the Registrar and report to the Registrar any irregularities or suspected irregularities that they become aware of in the course of performing compliance functions

- **Recognised Body**

This is an entity (usually a representative body), which applies to the FSB to become a recognised body, its function being to assist in the licensing of FSP's.

In order to become a recognised body, representative and membership bodies will have to make an application (special form to apply to be a "recognised body), containing all the details and infrastructure information about the organisation. Once this application form is looked at, the FSB makes a decision and if it is accepted, then the organisation gets approved as a "recognised body" and may act as an agent on behalf of the organisation applying to become an authorised FSP, in submitting the license to the FSB on the FSP's behalf.

As can be seen from the diagram below, the FSP can either go directly to the FSB to be licensed as an Authorised Service Provider, or go via a Recognised Body.



- **Financial Services Provider**

This is an entity/person which is involved either in:

- The rendering of advice or
- The rendering of an intermediary service; or both.

This could be an entity such as a large corporate who is also a product supplier, an independent brokerage who operates as an SMME (small, medium, micro enterprise) or a Sole Proprietor who is a person that trades in his/her personal capacity, for instance John Palmer Insurance Brokerage.

- **Key Individuals**

A Key Individual is a natural person who manages and oversees the activities of the FSP in respect of Financial Services. This person could also be a Sole Proprietor. Key Individuals must ensure and maintain the operational ability of the FSP and fulfil the responsibilities imposed by the Act.

- **Representatives**

Representatives are the persons who render financial services to clients for or on behalf of an FSP, in terms of an employment or any other mandatory agreement. An example of a representative would be a tied agent of a large corporate or a financial advisor who operates under the auspices of an independent brokerage, or call centre advisors in the sales department of a direct insurer, or again, a Sole Proprietor

(broker) which assists clients with their insurance.

The formal definition of a Representative is as follows:

- **Auditor**

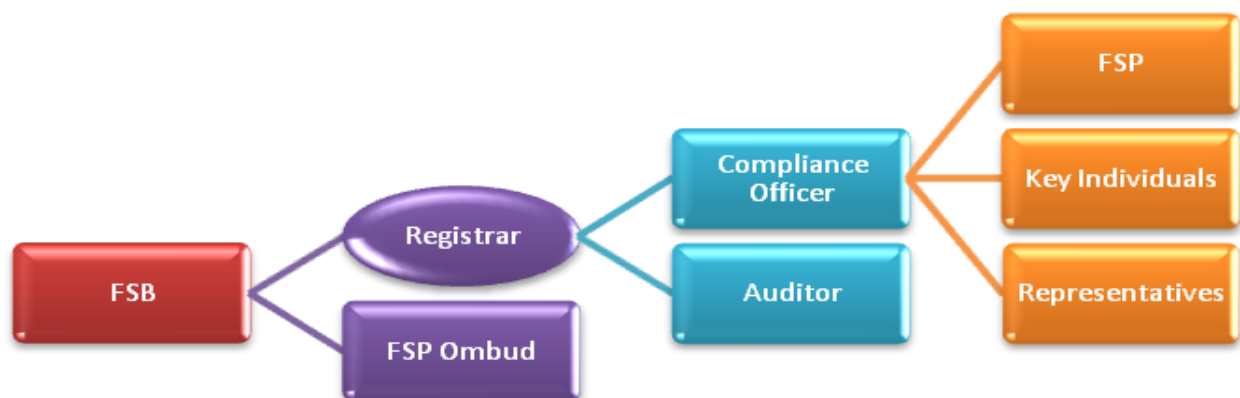
This is the person responsible for the preparation of financial statements of the FSP. They perform an audit on all financial transactions within the FSP. In the case that the FSP requires a “trust account”, which is a separate bank account that the FSP needs to open and maintain for client funds, separate reports need to be prepared over and above the standard financial statements. All of the reports and financials must be submitted to the FSB by the FSP within 4 months from the financial year end of the FSP. The Compliance Officer usually ensures that they are submitted together with the annual compliance report.

Section 19 of the FAIS Act deals with the Accounting and Auditing requirements.

- **Support Staff**

Staff that work within the administrative functions of an FSP. These persons do not provide advice and may provide intermediary services and other administrative functions.

See a diagram on the next page to illustrate the relationship between the different role players



2. The authorisation process

The authorisation process is based on the application by the FSP to be licensed as an authorised FSP. There are many people involved in this process, as can be seen below. The FSP persona within FAIS can be one of three categories as was seen earlier FSP I, FSP II or an FSP III. Each of these FSP's operate in a different sub sector of the Financial Services Industry and therefore have different pieces of legislation which apply to them.

Some of this applicable legislation would be generic (such as FAIS) whilst the others would be specific (Long Term Insurance Act, Short Term Insurance Act, Collective Investment Schemes Act and so forth.) It is important to see FAIS in this way – that it performs the extremely difficult task of regulating a number of very different sub sectors.

More importantly, since FAIS is functional and not institutional in its applicability (it applies to an organisation that is either in the business of rendering an intermediary service or giving of advice, or both), the impact which it has on each of the sub sectors is slightly different, purely by virtue of the fact that the actual sub sectors are different.

The different **COMPETENCY REQUIREMENTS** in the **DETERMINATION OF FIT AND PROPER** for the different categories of FSP's which FAIS refers to, and the different competency licensing requirements for each of them is contained within the FAIS Act and accompanying fit and proper determinations. Should you require more detail, then refer to subordinate legislation, Determination of Fit and Proper requirements.

2.1 Career paths affected by FAIS and requirements for licensing by the Financial Services Board for three different career paths

As mentioned previously, the FAIS Act intends to ensure that:

- **Rendering of intermediary services**

and/or

- **giving of advice** in relation to
- **financial products**

is done in a competent and open manner. If you consider which careers would be affected by FAIS, it would be every career that requires a person to give financial advice or render intermediary services on any financial product regulated by FAIS, as mentioned previously.

Additional legislation which could affect career paths within the financial services industry include the new money laundering legislation (colloquially known as "FICA") and also the consumer protection legislation (the National Credit Act and the Consumer Protection Act). Recent developments in the industry has seen a lot of focus being spent on TCF (Treating Customers Fairly) and certain sections of POPI (Protection of Personal Information Act) that has come into force.

In order to offer advisory and/or intermediary services, providers (both FSP's and their representatives) must be licensed prove that they are "Fit and Proper" in terms of the Determination of Fit and Proper requirements. This means that they have to comply in four different areas:

2.2 The minimum requirements needed to be licensed

The Act requires that competent and qualified persons render services and give advice (Fit and Proper requirements). Fit and Proper requirements of a representative include:

- Honesty and integrity and
- Competence

The Act entitles any client to sound financial advice, services and products that best suit their needs. The financial adviser, therefore, needs to be trustworthy and knowledgeable and understand the client's needs.

The Act entitles any client to complain about any inappropriate advice given, or service rendered, in relation to a particular financial product. Whilst organisations would request the opportunity to resolve any issues internally, the FAIS Ombud has been created by the FSB to handle all FAIS-related complaints in a way that is fast, procedurally fair and economical.

In order to be licensed, Providers (both FSP's and their representatives) must prove that they are "Fit and Proper" in terms of the Determination of Fit and Proper requirements. This means that they have to comply in four different areas:

An easy way to remember the following is using the acronym **SHOC**.

2.2.1 Sound Financial Security (only refers to the FSP)

This refers to the financial soundness of the Financial Services Provider and clearly states that:

- The Provider may not be an un-rehabilitated insolvent, or
- In the case of an FSP II or III, that the assets of the FSP must exceed its liabilities.

2.2.2 Honesty and Integrity

The Determination is quite clear that the following will determine the Honesty and Integrity of the Provider, Representative or Key Individual. Should a person have been found guilty in criminal proceedings or liable in civil proceedings, been denied professional membership etc. for the reasons detailed below within the last 5 years, they cannot be deemed as compliant with Honesty and Integrity and therefore do not meet the Fit and Proper requirements. If however a person was found guilty in the mismanagement of a company, they will never be allowed to operate as a Representative, Key Individual or Provider in terms of the FAIS Act.

- (1) An applicant must be of **good character and integrity**.
- (2) In determining whether the applicant is of good character and integrity, the registrar may refer to any information in possession of the registrar or brought to the registrar's attention.
- (3) Without prejudice to the generality of subparagraphs (2) and (4) of this paragraph any of the following factors is *prima facie* proof that the applicant does not comply with subparagraph (1), namely that the applicant-
- (a) has within a period of five years preceding the date of application been found guilty in any civil or criminal proceedings by a court of law or other competent authority (whether in the Republic or elsewhere) of having acted fraudulently, dishonestly, unprofessionally, dishonourably or in breach of a fiduciary duty;
- (b) has within a period of five years preceding the date of application been fined or censured by, or denied membership due to disqualification of, any professional or financial services industry body (whether in the Republic or elsewhere), recognised by the Board, on account of any act of dishonesty, negligence, incompetence or mismanagement;
- (c) has within a period of five years preceding the date of application been fined or censured by any regulatory body (whether in the Republic or elsewhere), recognised by the Board, or that the applicant's authorisation to carry on business has been refused, suspended or revoked by any such body, because of negligence, incompetence or mismanagement; and
- (d) has at any time prior to the date of application been disqualified or prohibited by any court of law (whether in the Republic or elsewhere) from taking part in the management of any company or other statutorily created, recognised or regulated body, irrespective of whether such disqualification has since been lifted or not.
- (4) An applicant must in the application be candid, frank and accurate and must of own accord disclose all facts or information at the disposal of or which may be accessible to the applicant and which may be relevant for purposes of a decision by the registrar that the applicant complies or does not comply with subparagraph (1).

2.2.3 Operational Ability

In terms of the FAIS Act every provider needs to comply with the requirements of operational ability. It is the responsibility of the KI (Key Individual) to implement and

maintain the operational ability of the FSP. It entails aspects such as a having a fixed business address, communication facilities, storage and filing systems, an account with a registered bank and if an accountable institution, processes and systems to comply with FICA.

The requirement in the determination is as follows:

Operational ability

(1) An applicant must have and be able to maintain the operational ability to fulfil the responsibilities imposed by the Act on licensees, including the following minimum requirements:

(a) A fixed business address from which business is conducted and which can also serve as a *domicilium citandi et executandi* for purposes of entry into contract and any judicial or quasi-judicial proceedings;

(b) adequate communication facilities including at least a full-time telephone or cell phone service, and typing and document duplication facilities;

(c) adequate storage and filing systems for the safe-keeping of records, and business communications and correspondence; and

(d) an account with a registered bank including, where necessary, a specific trust account for client moneys.

(2) An applicant must have in place the appropriate money laundering control systems and provision for training of staff, including identification, record-keeping and reporting procedures required under the Financial Intelligence Centre Act, 2001 (Act No. 38 of 2001).

2.2.4 Competence

The competency requirements are fairly extensive and are based on what type of products the FSP deals with and then go on, for each product type to list the experience levels, academic qualifications and other requirements which the individual must hold to advise on such products.

In summary, Competency requirements cover 4 aspects:

- Full Qualification
 - All persons appointed as a Representative or Key Individual must have/obtain a full qualification which is recognised by the FSB
- Experience
 - All persons must prove relevant experience in the product category in which they are to provide advise
 - The experience could have been obtained outside of South Africa and gained intermittently as long as when it is added together they minimum period required is adhered to at least within the last 5 years
 - For Key Individuals, one year management's experience is required where the rendering of financial services were overseen and managed within or similar to the specific product category
- Regulatory Exam
 - Within a specified period, all persons needed to have obtained the 1st Level of Regulatory Exams which focuses on the FAIS and FIC Acts.
 - At this stage the 2nd Level of Regulatory Exams might not be a requirement and have been placed on hold whilst the FSB investigates and makes a final decision about its necessity
- CPD (Continuous Professional Development)
 - Originally the commencement date would have been after a person passed the second Level Regulatory Exam, but seeing that this has been placed on hold currently, so has the commencement date of CPD
 - A person would need to complete a minimum number of hours / gain points over a 3 year rolling period to prove that they are continuing their

learning

Persons that are appointed as Representatives, that do not have the minimum experience, qualification or CPD (when it commences) must be appointed under supervision on condition that they comply with Honesty and Integrity at the very minimum and holds an entry level qualification, being a Grade 12 certificate or equivalent, or an NQF Level 4 certificate.

Depending on when the Rep was appointed, they either only needed a minimum number of credits, not a full qualification (appointed between 2004 – 2009) which they needed to obtain by certain cut off dates.

However the above 4 competency requirements apply to all persons appointed from January 2010. In the instance that a person is appointed under supervision, they would have 5 years in which to complete a full qualification. 1st Level RE must be written within 2 years from first date of appointment with the FSB. There will be a further 4 years following the 1st Level RE to write all the relevant 2nd Level RE's (should this not be changed by the FSB). Therefore, at this stage, the maximum period that a person can work under supervision will be 6 years. The minimum is 12 months.

2.3 The relationship between Financial Services Providers and representatives as envisaged in the legislation

The Act makes the FSP's liable for the conduct of their representatives. In terms of the Act, a representative engages in the same activities as its principal but does so for and on behalf of the FSP. As outlined above, this relationship is either based on the fact that the representative is an employee of the FSP or holds a mandate from the FSP. The FSP is expected to provide an updated register of its representatives to the Financial Services Board.

In terms of FAIS, a person will not be able to act as a representative of an authorised FSP, unless such person is able to provide confirmation, certified by the FSP, to clients that:

- A service contract or other mandatory agreement, to represent the FSP exists

- The FSP accepts responsibility for the activities of the representatives falling within the contract or mandate.

It therefore stands to reason that before an insurer mandates an organisation to perform certain functions on its behalf, it must ensure that such organisation is an authorised FSP. If an FSP deals with unauthorised FSP's they could face the FAIS penalties. This will mean that each FSP takes responsibility for its own employees or representatives.

Further, the Act is quite clear on the **duties of the FSP regarding its representatives:**

An authorised financial services provider must-

(a) at all times be satisfied that the provider's representatives, and key individuals of such representatives, are, when rendering a financial service on behalf of the provider, competent to act, taking into consideration requirements similar to those contemplated in paragraphs (a) and (b) of section 8(1) and subsection (1)(b)(ii) of this section, where applicable; and

(b) 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.

(3) The authorised financial services provider must maintain a register of representatives, and key individuals of such representatives, which must be regularly updated and be available to the registrar for reference or inspection purposes .

(4) Such register must-

(a) contain every representative's or key individual's name and business address, and state whether the representative acts for the provider as employee or as mandatory; and

(b) specify the categories in which such representatives are competent to render financial services.

(5) The registrar may require information from the authorised financial services provider so as to enable the registrar to maintain and continuously update a central register of all representatives and key individuals.

(6) A person who on the date contemplated in section 7(1) complies with the requirements of this Act for a representative and on such date acts as employee or

mandatory for any person who on or after such date becomes an authorised financial services provider, is, for the purposes of this Act, but subject to the provisions of this Act relating to representatives, regarded as a representative.

2.4 Interrelationships between Financial Service Providers in terms of co-responsibility

As mentioned in the previous paragraph, the Act makes the FSP's liable for the conduct of their representatives. In terms of the Act, a representative engages in the same activities as its principal but does so for and on behalf of the FSP. As outlined above, this relationship is either based on the fact that the representative is an employee of the FSP or holds a mandate from the FSP. The FSP is expected to provide an updated register of its representatives to the Financial Services Board.

It therefore stands to reason that before an insurer mandates an organisation to perform certain functions on its behalf, it must ensure that such organisation is an authorised FSP and each FSP takes responsibility for its own employees or representatives.

2.5 Exemptions that are possible in terms of the legislation in case studies

In terms of **section 44 of the Act**, it is noted that between the commencement of the Act and the date determined by the minister in terms of section 7 of the Act, the Registrar may exempt any person/s from the provisions of that section if the Registrar is satisfied that:

- “ (a) the rendering of any financial service 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 clients of the applicant financial or other hardship or prejudice; and
- (c) the granting of the exemption will not-
 - (i) conflict with the public interest;
 - (ii) prejudice the interests of clients; and
 - (iii) frustrate the achievement of the objects of this Act.”

It should be noted however that **the Registrar may**, having regard to the factors mentioned in subsection (1):

- attach to any exemption so granted, reasonable requirements or impose reasonable conditions with which the applicant must comply either before or after the effective date of the exemption in the manner and during the period specified by the registrar; and
- determine the period for which the exemption will be valid .

Further, equally important to note is that **an exemption in respect of which a person has to comply with requirements or conditions, lapses** whenever the person contravenes or fails to comply with any such requirement or condition.

Also, the registrar may, in any case not provided for in this Act, on reasonable grounds, exempt any person or category of persons from any provision of this Act.

The Minister, after consultation with the registrar, **may, on such conditions as the Minister may determine, by notice in the Gazette exempt a financial services provider or representative, or category of financial services providers or representatives**, from **any provision of the Policyholder Protection Rules** made under section 62 of the Long-term Insurance Act, 1998 and section 55 of the Short-term Insurance Act, 1998 respectively.

2.6 Conditions under which suspensions, withdrawals and reinstatement of authorisation may be imposed

The FAIS Act outlines the following with regards to suspension, withdrawals and reinstatement of authorisation:

2.6.1 Suspension of authorisation:

The Registrar may at any time suspend any license if satisfied (on the basis of available facts and information) that the licensee no longer meets the requirements contemplated in section 8 when:

- Before suspending the license, the registrar must inform the licensee

of-

- The intention to suspend and the grounds for doing so
 - The intended period of the suspension
 - Any terms to be attached to the suspension, including
 - Stopping the licensee to conclude any new business
 - Terms that will be in place in order to lift the suspension, and the licensee must be given the opportunity to respond
 - Registrar must consider any response from licensee, and can then decide to suspend / not suspend and notify the licensee accordingly
 - If the license is suspended, the Registrar must make the terms of suspension and the lifting thereof known in the Gazette or other appropriate media announcement if necessary
- Under urgent circumstances, the Registrar may provisionally suspend the license where the Registrar is satisfied (on reasonable grounds) that substantial prejudice to clients or the general public may occur.
 - If the Registrar receives responses from the licensee, he may decide to either lift the suspension, or render the suspension final, and that decision must be made known in the Gazette or other appropriate media

During ANY period of suspension, whether provisional or final, the licensee is not authorised to act as a FSP.

2.6.2 Withdrawal of authorisation:

The Registrar may at any time withdraw any license if satisfied that the licensee:

- Did not make a full disclosure of all relevant information to the Registrar, or furnished false or misleading information when applying for the license
- Has since the license has been issued, contravened or failed to comply with any provision of this Act in a material manner
- The Registrar may decide to withdraw a suspended license (as per above)
- A person whose license has been withdrawn under this section is debarred for a period specified by the registrar from applying for a new license
- A registrar may vary any such period.

2.6.3 Reinstatement of debarred representatives:

Requirements for the reappointment / reinstatement of a debarred representative must comply with (and must be proven in the form of documents, certified copies or affidavits):

- The representative can only apply after 12 months (UNLESS debarment took place due to the Competence Requirement, which allows the Rep to re-apply as soon as the Competence requirements have been achieved)
- All un-concluded business have been concluded
- All complaints or legal proceedings have been properly and lawfully resolved and concluded, and the applicant has fully complied with any decision or court order
- All fit & proper requirements are complied with
- Section 13(2) of the Act are complied with

2.7 The role of recognised industry bodies in licensing and compliance with reference to the process of licensing and approval of compliance officers

Apart from licensing FSP's, recognised bodies will also be allowed to assist with the licensing and approval of Compliance Officers with the Financial Services Board.

The Recognised Body acts as the "agent" to the Compliance Officer and provides the FSB with information about the applicant Compliance Officer, in exchange for a Compliance Practice Number.

The Act places an immediate responsibility on the financial service providers and their representatives to act in an appropriate manner or face the removal of their license.

2.7.1 The licensing process:

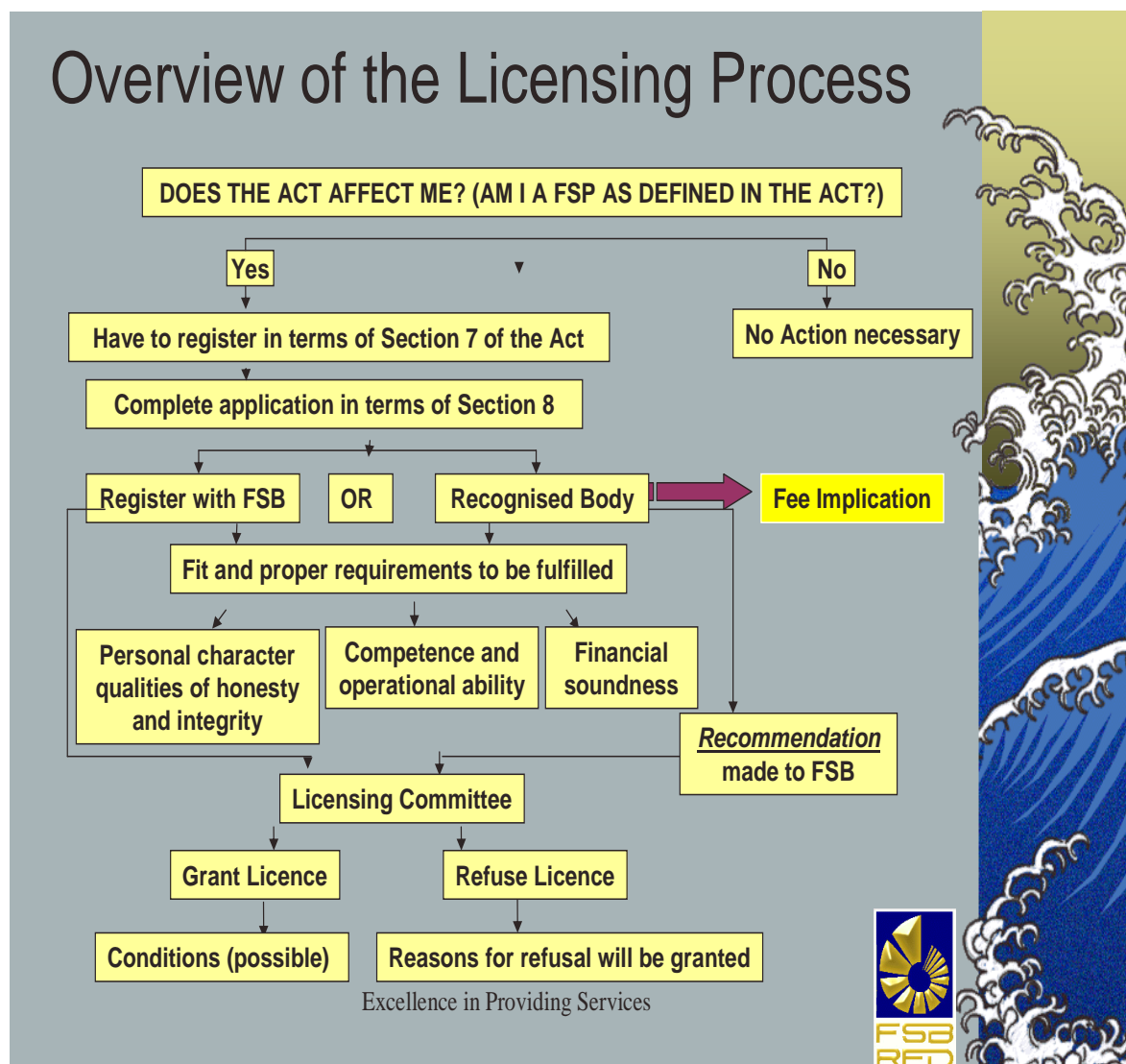
There are three steps to the process:

Step 1 An entity would need to apply for a license to the Financial Services Board, either through a recognised Representative Body or directly. The application form requires statements indicating that the entity meets the Fit and Proper requirements

Step 2 The application then goes before a licensing committee, which will decide whether to grant or refuse the license. They may also ask for additional information.

Step 3 If the license is refused, then the entity will be advised of the reasons for the refusal. If the license is granted, the Registrar may impose certain conditions.

There is a fee payable for each license application, and for each certified copy of the license. The diagram below provides a useful summary of this process.



3 Disclosure and conduct requirements to a selected sub sector

In order to establish professionalism within the FSP's in South Africa, the Act lays down strict standards for the market conduct of both FSP's as well as representatives. Disclosure forms the basis of these standards.

3.1 The disclosure rules for a sub sector of the financial services industry

The publication of the FAIS subordinate legislation does not aim to substitute or replace the existing Act but to supplement it.

These codes of conduct are mechanisms created in line with section 15 of the FAIS Act in order to regulate the market conduct of the FSP's and their Representatives in the rendering of financial services. The codes of conduct must prescribe, amongst other obligations, that the FSP's and their Representatives make the necessary and relevant disclosures to clients in order to enable the clients to make informed decisions regarding the financial services rendered.

The codes of conduct can be categorised into two types:

- the specific codes of conduct and
- the general code of conduct.

The specific codes of conduct have been published and are applicable to specific FSP's rendering financial services in respect of specific financial products. In other words, these are not applicable to all FSP's.

The General Code of Conduct on the other hand is applicable to all FSP's except to the extent to which some are exempted by the Registrar.

The codes of conduct may from time to time be amended or replaced where such amendment or replacement is deemed necessary in order to keep abreast of changes in practice in the industry or the code of conduct has become obsolete.

The principles of the codes of conduct determine that they must be drafted in such a manner that they are easily understood in order to guard against and avoid poor rendering of financial services to clients. The codes of conduct must furthermore be drafted to ensure that clients are ultimately led to make informed decisions and that their reasonable financial needs in respect of financial products will be appropriately and suitably satisfied.

From the **FAIS General Code of Conduct**, certain disclosures have to be made by the Financial Services Provider to the client. It is imperative for the representative to understand the principles behind the code in order for the objectives of this legislation to be achieved.

The purpose of the code is to ensure that the clients receiving financial advice will be able to make informed decisions, that their reasonable financial needs with regards to financial products be appropriately and suitably satisfied. It is for this reason that authorised financial services providers are required to comply with the provisions of the General and other codes and make the disclosures detailed therein.

In so doing the authorised financial services provider is required to at all time;

- Act honestly and fairly, with due skill, diligence and care in the interests of the client and the integrity of the financial services industry
- have and employ effectively the resources, procedures and appropriate technological systems for the proper performance of professional activities;
- seek from clients appropriate and available information regarding their financial situations, financial product experience and objectives in connection with the financial service required;
- act with circumspection and treat clients fairly in a situation of conflicting interests; and
- Comply with all applicable statutory or common law requirements applicable to the conduct of business.

In addition to the General Code of Conduct, there are also specific Codes of Conduct

such as the Short Term Deposit Taking Code of Conduct and the Code of Conduct for Administrative and Discretionary Financial Services Providers.

In addition to the above requirement for professional behaviour, the code of conduct in particular contains provisions relating to;

- the making of adequate disclosures of relevant material information, including disclosures of actual or potential own interests, in relation to dealings with clients;
- adequate and appropriate recordkeeping;
- avoidance of fraudulent and misleading advertising, canvassing and marketing;
- proper safe keeping, separation and protection of funds and transaction documentation of clients;
- where appropriate, suitable guarantees or professional indemnity or fidelity insurance cover, and mechanisms for adjustments of such guarantees or cover by the registrar in any particular case; and
- any other matter which is necessary or expedient to be regulated in such code for the better achievement of the objects of this Act.

3.2 Disclosures

There are various types of disclosures:

- Disclosures by Product Suppliers;
- Disclosures by Financial services providers; or
- Disclosures regarding financial services products.

Let us look at the disclosures in that order.

3.2.1 Disclosures by Product Suppliers;

According to the legislation *a provider must at the earliest reasonable opportunity, and where appropriate, furnish the client with full particulars of the following information about itself, these particulars include:*

- Name, physical location, and postal and telephone contact details of the product supplier;
- The contractual relationship with the product supplier (if any), and whether the provider has contractual relationships with other product suppliers;
- Names and contact details of the relevant compliance department of the product supplier;
- Details of complaints procedures in respect of complaints by clients maintained by the relevant product supplier;
- The existence of any conditions or restrictions imposed by the product supplier with regard to the types of financial products or services that may be provided or rendered by the provider; and
- Where applicable, the fact that the provider –
 - directly or indirectly holds more than 10% of the relevant product supplier's shares, or has any equivalent substantial financial interest in the product supplier;
 - during the preceding 12 month period received more than 30% of total remuneration, including commission, from the product supplier, and the provider must convey any changes thereafter in regard to such information at the earliest opportunity to the client.
- If this information is provided verbally, then the Product Supplier must confirm such information within 30 days in writing.

If a product supplier is also an authorised financial services provider and has entered into an intermediary contract or similar contractual relationship with another provider (not being a representative) – (in this instance, a brokerage), for the purpose of rendering a financial service in respect of its financial products:

- That product supplier must within a reasonable time after being requested to do so by the other provider, provide sufficient particulars to enable the provider to comply with the disclosure requirements of this Code relating to the furnishing of details of the product supplier and the product in question.

Further, the legislation stipulates that a provider must where the relevant license,

terms of employment or mandate enables the provider to provide clients with financial services in respect of a choice of product suppliers,

- exercise judgment objectively in the interest of the client concerned.

Also, a provider may not, in dealing with a client:

- compare different financial products, product suppliers, providers or representatives,
- unless the differing characteristics of each are made clear,
- and may not make inaccurate, unfair or unsubstantiated criticisms of any financial product, product supplier, provider or representative.

3.2.2 Disclosures by Financial services providers

Where a provider renders a financial service to a client, *the provider must at the earliest reasonable opportunity furnish the client with full particulars of the following information:*

- Full business and trade names, registration number (if any), postal and physical addresses, telephone and, where applicable, cellular phone number, and internet and e-mail addresses, in respect of the relevant business carried on, as well as the names and contact details of appropriate contact persons or offices;
- concise details of the legal and contractual status of the provider as regards the relevant product supplier (or, in the case of a representative, as regards the relevant provider and product supplier), to be provided in a manner which can reasonably be expected to make it clear to the client which entity accepts responsibility for the actions of the provider or representative in the rendering of the financial service involved and the extent to which the client will have to accept such responsibility;
- names and contact details of the relevant compliance department or, in the case of a representative, such detail concerning the provider to which the representative is contracted;
- details of the financial services which the provider is authorised to provide in

terms of the relevant license and of any conditions or restrictions applicable thereto; and

- whether the provider holds suitable guarantees or professional indemnity or fidelity insurance cover or not.
- Where such information is provided verbally, the Provider must confirm such information within 30 days in writing.

3.2.3 Disclosures regarding financial services products

As far as a Financial Services Product is concerned, a provider must:

- Provide a reasonable and appropriate general explanation of the nature and material terms of the relevant contract or transaction to a client, and generally make full and frank disclosure of any information that would reasonably be expected to enable the client to make an informed decision;
- Whenever reasonable and appropriate, provide to the client any material contractual information and any material illustrations, projections or forecasts in the possession of the provider;
- In particular, at the earliest reasonable opportunity, provide, where applicable, full and appropriate information of the details of the product and its benefits

This includes information such as

- the name, class or type of financial product concerned and the nature and extent of benefits to be provided, including details of the manner in which such benefits are derived or calculated and the manner in which they will accrue or be paid;
- If the product is positioned as an investment or as having an investment component, the details of the manner in which the value of the investment is determined, including concise details of any underlying assets or other financial instruments
- The nature and extent of monetary obligations assumed by the client (including commission, consideration, fees, charges or brokerages payable to the provider by the client, or payable by the product supplier or any other person other than the client concerned), as well as the manner of payment or discharge thereof.

- concise details of any special terms or conditions, exclusions of liability, waiting periods, loadings, penalties, excesses, restrictions or circumstances in which benefits will not be provided;
- any guaranteed minimum benefits or other guarantees;
- to what extent the product is readily realisable or the funds concerned are accessible;
- any restrictions on or penalties for early termination of or withdrawal from the product, or other effects, if any, of such termination or withdrawal;
- material tax considerations;
- whether cooling off rights are offered and, if so, procedures for the exercise of such rights;

Fully inform a client in regard to the completion or submission of any transaction requirement–

- that all material facts must be accurately and properly disclosed, and that the accuracy and completeness of all answers, statements or other information provided by or on behalf of the client, are the client's own responsibility;
- that if the provider completes or submits any transaction requirement on behalf of the client, the client should be satisfied as to the accuracy and completeness of the details;
- of the possible consequences of the misrepresentation or non-disclosure of a material fact or the inclusion of incorrect information; and
- that the client must on request be supplied with a copy or written or printed record of any transaction requirement within a reasonable time.

No provider may in the course of the rendering of a financial service request any client to sign any written or printed form or document unless all details required to be inserted thereon by the client or on behalf of the client have already been inserted.

A provider must, where applicable, at the request of a client, provide the client with a statement of account in connection with any financial service rendered to the client.

It is easy to identify from the above and from the FAIS General Code of Conduct that timing is of high importance in carrying out the various compliance provisions.

3.3 The importance of timing and extent of disclosure

FSP's and their Representatives must adhere to certain basic principles when rendering services in respect of financial products.

A provider must in making contact arrangements, and in all communications and dealings with a client, act honourably, professionally and with due regard to the convenience of the client. At the commencement of any contract, visit or call initiated by the provider, explain the purpose thereof and at the earliest opportunity provide the information contained in the disclosure section of this module.

3.4 Contacting the client

The following illustrates the point about information provided to a client and the time within which this must be done:

When a provider renders a financial service:

- Representations made and information provided to a client by a provider:
 - Must be factually correct
 - Must be provided in plain language, avoid uncertainty or confusion and not be misleading
 - Must be adequate and appropriate in the circumstances of the particular financial service, taking into account the factually established or reasonably assumed level of knowledge of the client
 - Must be provided timeously so as to afford the client reasonably sufficient time to make an informed decision about the proposed transaction

As stated under the section regarding disclosures by a provider other than a direct marketer, they must at the earliest reasonable opportunity, where appropriate, furnish the client with full particulars of the information about the relevant product supplier and, where such information is supplied orally, must confirm such information within 30 days in writing.

3.4 An example of the code of conduct for a selected sub sector

The legislation is clear that certain compliance provisions, most of which have been covered under the various headings within this manual, have to be met by the Financial Services Provider (being the “organisation”)

The provisions include, amongst others:

- Control measures
- Specific control objectives
- Insurance
- Advertising

In addition to the disclosure requirements of the FAIS General Code of Conduct, each sub-sector registered with a professional body could also have an additional code of conduct from the body that needs to be adhered to. An example would be the Life Offices' Association (LOA). The LOA Code of Conduct is a set of principles that LOA member companies subscribe to. With its 23 chapters, covering various aspects of the business of long-term insurance, the Code of Conduct offers a guide for best practice, some require strict adherence to by member companies.

Below is an example of a code of conduct from a provider who advertises a financial service by telephone in terms of the four provisions:

- **Control Measures:**

A provider must at all times have **and effectively employ the resources, procedures and appropriate technological systems** that can reasonably be expected **to eliminate as far as reasonably possible, the risk that clients, product suppliers and other providers or representatives will suffer financial loss** through theft, fraud, other dishonest acts, poor administration, negligence, professional misconduct or culpable omissions.

- **Specific control objectives:**

A provider must, without limiting the generality of section 11, structure the internal control procedures concerned so as to provide reasonable assurance that:

- (a) the relevant business can be carried on in an orderly and efficient manner;
- (b) financial and other information used or provided by the provider will be reliable; and
- (c) all applicable laws are complied with.

- **Insurance:**

A provider must, if, and to the extent, required by the registrar maintain in force suitable guarantees or professional indemnity or fidelity insurance cover.

- **Advertising:**

An advertisement by any provider must:

- (a) not contain any statement, promise or forecast which is fraudulent, untrue or misleading;

(2) Where a **provider advertises a financial service by telephone-**

- a) an electronic, voice logged record of all communications must be kept until such time as it becomes clear that no rendering of a financial service to a particular person so addressed by telephone will follow;
- (b) a copy of all such records must be provided on request by the client or the registrar within seven days of the request;
- (c) all the information required by sections 4(1)(a) and (c) and 5(a) and (c) shall not be required: Provided that the client is provided with basic details (such as business name and telephone number or address) of the provider or relevant product supplier, and of their relevant compliance departments: Provided further that, if the promotion results in the rendering of a financial service, the full details required by those sections are provided to the client in writing within 30 days of the relevant interaction with the client.

(3) Where a provider advertises a financial service by means of a public radio service, the provisions of subsection (2)(c) apply with the necessary changes.

In terms of operational ability and control requirements sufficient record keeping is required on the part of the financial services provider.

3.5 Requirements regarding record keeping

The Financial Services Provider (FSP), (and by implication, it will be part of the management duties of a key individual) must ensure that records are kept for a minimum of **five (5) years** - except if the Registrar allowed specific exemptions in this regard.

FSPs must ensure that their risk-management models include internal control structures, procedures and controls with disaster recovery and back-up procedures on electronic data, where applicable.

Records could be kept in hard copy on-site or off-site or in an electronic format, as long as records are kept secure and safe from destruction and should the Registrar request documentation, the FSP must be able to supply it to the Registrar in writing within 7 days.

Any records and documentation regarding the following should be stored in terms of the General Code of Conduct for at least five years:

- Premature cancellations of transactions or financial products by clients of the FSP.
- Complaints received
- Continued compliance with requirements referred to in section 8 (which are licensing requirements)
- Instances of non-compliance with the Act and reasons for such non-compliance
- The continued compliance by representatives with the requirement of the authorisation of the representative to act on behalf of the FSP and ensuring ongoing compliance.

The legislation says the following regarding **Record Keeping**:

- (a) A provider must have appropriate procedures and systems in place to:
 - (i) record, subject to section 14(2), all written communications relating to a financial service rendered to a client, including verbal instructions by the client which the provider must reduce to writing;
 - (ii) store and retrieve transaction documentation and all other documentation relating to the client; and
 - (iii) keep the client records and documentation safe from destruction
- (b) All such **records must be kept for a period of five years after termination, to the knowledge of the provider**, of the product concerned or, in any other case, after the rendering of the financial service concerned
- (c) Providers are not required to keep the records themselves but must ensure that they are available for inspection within seven days of the registrar's request.
- (d) Records may be kept in an appropriate electronic or recorded format, which are accessible and readily reducible to written or printed form.

The FAIS General Code of Conduct furthermore extends the disclosure requirements to include requirements on commission.

3.6 The effect of disclosure requirements on commission

In terms of the FAIS General Code of Conduct, the following excerpt covers the issue of disclosure of commission. It is apparent from both excerpts below that the interest of the client are being considered and that the Provider has an obligation to disclose ALL costs and fees the client will be liable for, as a result entering into a particular transaction.

From the legislation:

Specific duties of provider

(1) When a provider renders a financial service—

(a) representations made and information provided to a client by the provider—

(vii) must, as regards **all amounts, sums, values, charges, fees, remuneration or monetary obligations mentioned or referred to therein and payable to the product supplier or the provider, be reflected in specific monetary terms:**

Provided that where any such amount, sum, value, charge, fee, remuneration or monetary obligation is not reasonably predeterminable, its basis of calculation must be adequately described.

PART VI

INFORMATION ABOUT FINANCIAL SERVICE

7. (1) Subject to the provisions of this Code, a provider other than a direct marketer, must—

the nature, extent and frequency of any incentive, remuneration, consideration, commission, fee or brokerages (“valuable consideration”), which will or may become payable to the provider, directly or indirectly, by any product supplier or any person other than the client, or for which the provider may become eligible, as a result of rendering of the financial service, as well as the identity of the product supplier or other person providing or offering the valuable consideration: Provided that where the maximum amount or rate of such valuable consideration is prescribed by any law, the provider may (subject to clause 3(1)(a)(vii)) elect to disclose either the actual amount applicable or such prescribed maximum amount or rate.

The FAIS Act not only affected commission in terms of disclosure but also in terms of regulation and limits. A typical short-term insurance broker's commission averages about 15%: 12, 5% on motor and 20% on non-motor. In the past, these commission rates were capped by regulations. In recent years, the deregulation of commission has resulted in heated debates in the industry. One aspect that is being considered is that if a broker is not servicing a policy monthly, they should not be receiving a monthly commission on the policy.

Deregulation of commission on commercial short-term insurance business commenced on the introduction of codes of conduct under the FAIS Act. Deregulation of single premium long-term policies depends on the successful implementation of the Policyholder Protection Rules and consumer education programme.

Financial services providers will no longer be allowed to receive any non-cash incentives except commission. Gerry Anderson from the FSB noted that “It is in fact a conflict of interest. Before the introduction of FAIS legislation, incentives were often the real motives behind advice offered to clients, but clients had no way of knowing about it,” Offering non-cash incentives such as luxury holidays to intermediaries and advisors who sell certain financial services or products will be regarded as a conflict of interest.

The general codes of conduct under the FAIS Act seek to outlaw this practice. It also calls for full disclosure of the breakdown of commission and fees paid to all parties involved.

3.7 Purpose of the Code of Conduct



The purpose of the Code of Conduct is to ensure that Clients are able to make informed decisions

Their financial needs will be satisfied appropriately and suitably

The Code of Conduct must make provision for

- Making adequate disclosures of relevant information, including own interests (actual or potential)
- Keeping adequate and appropriate records
- Avoiding fraudulent and misleading advertising
- Keeping documents and funds from clients safe and separate
- Suitable guarantees, Professional Indemnity cover or Fidelity Insurance
- Controlling, or prohibiting incentives given, or accepted, by the Provider
- Any other matter which is necessary or expedient to be regulated to better achieve the objects of the Act

The registrar is the principal decision maker in respect of issuing of license and must enforce the act. He/she may by notice direct an authorised financial services provider or representative to furnish them within a specified period with specified information or documents required by them. They may also recall any publication or document that is misleading, to cease publishing it or to effect changes thereto.

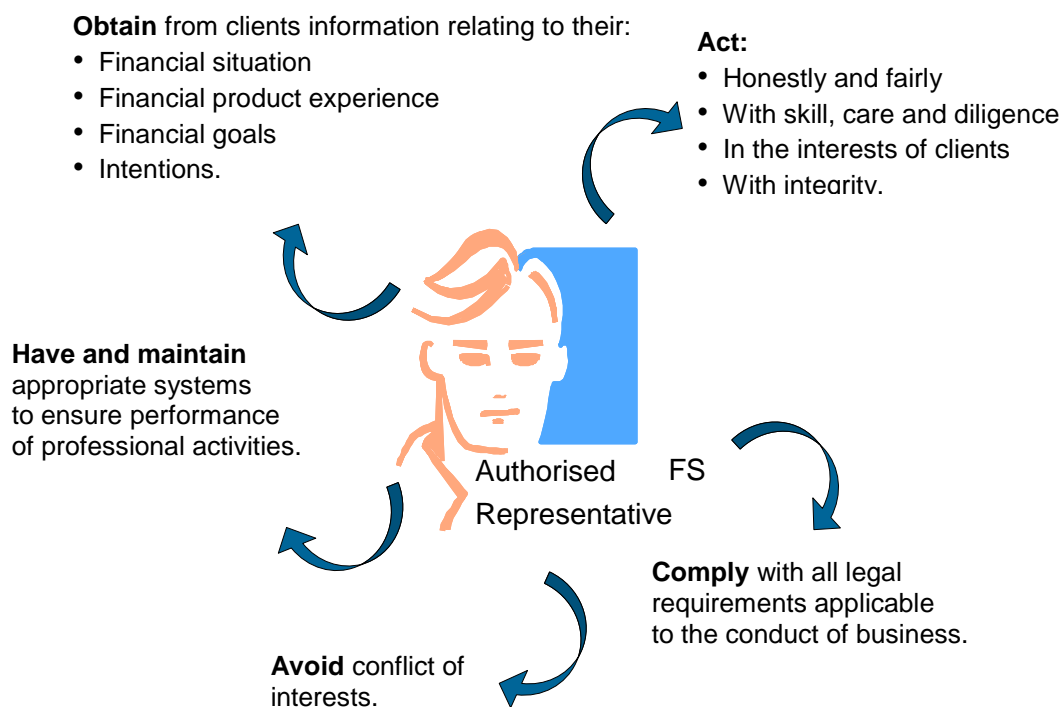
The General Code provides very specific instructions across key areas that impact upon clients.

1. Duties of the FSPs
 - How representations are provided to a client
 - Disclosure of actual or potential conflicts of interest
 - Client's interests take priority over those of the FSP
 - Accurate account for transactions.
2. Information on product suppliers
 - What you need to disclose to your client about the supplier of the product.
3. Information on FSPs
 - What you should tell your client about the FSP.
4. Contacting of clients
 - Disclosure requirements when contacting clients.
5. Information about financial service
 - What information to disclose to your client about the financial services you

- are offering them.
6. Furnishing of advice
 - Establishing your client's financial needs and goals
 - Recommending a financial product that meet the client's needs and goals.
 - Disclosing of information you have to provide to the client when recommending a financial product.
 7. Records
 - Requirements with regard to record keeping.
 - 8 Custody of financial products and funds
 - Requirements applicable to custody of the clients' funds or documents.
 - 9 Risk Management
 - Risk management procedures in order to protect all parties' interests.
 - 10 Direct Marketing
 - Disclosure requirements for financial services provided by direct marketing.
 - 11 Advertising
 - Disclosure requirements when advertising financial products.
 - 12 Complaints
 - Systems and procedures for the recording, managing and resolution of complaints
 - Escalation to Statutory Ombud office.
 - 13 Termination of agreement or business
 - What to do if clients wish to end their business with you
 - What to do if you (the Representative) or the FSP stop operating.
 - 14 Miscellaneous
 - Waiver of rights
 - Client confidentiality
 - Insurance
 - Signing of incomplete forms
 - Comparison to other FSPs.

FSPs and their Representatives must adhere to certain basic principles when rendering services in respect of financial products. The following diagram illustrates

their responsibilities based upon these principles:



Similar to other Acts administered by the FSB, the Act creates a Registrar, being the Executive Officer of the Financial Services Board. There is also an Advisory Committee which is representative of both industry and consumers, with whom the Registrar must consult on important issues affecting the Act and the implementation thereof.

4. The role and functions of the Registrar

In terms of the legislation, the Registrar is empowered to:

- **Approach a court** for an order restraining a person from contravening the Act or requiring a person to take remedial steps.
- **Declare a business practice undesirable** by giving notice in the gazette and thereby prohibit the FSP from continuing the practice. In terms of this, the Registrar could withdraw or suspend the license of an FSP, effectively closing down the business.
- **Institute action in a court of law against any person** who contravenes this Act for payment of compensation on behalf of another person and punitive damages.
- **Institute civil proceedings on behalf of any person against an FSP** and claim compensation plus punitive damages, similar to what is known as a class action.

4.1 The consequences of non-compliance with reference to steps that the Registrar could take in cases of non-compliance

If there is reason to believe that a person is contravening or failing to comply with, or has contravened or failed to comply with the Act, the Registrar may

- By notice direct the person
 - To furnish the Registrar with information or documents related to the contravention or failure
 - To appear before the Registrar to discuss the matter
 - To make arrangements for the discharge of the person's obligations in terms of the Act
- If the Registrar is satisfied that significant prejudice or damage to clients has or may occur, apply to a Court for a restraining order against doing business or dealing with the money or property

- The Registrar may use any of the legal remedies available and if prejudice has occurred, will direct the matter to the Office to be dealt with as a complaint by the client

4.2 Penalties in terms of the Act

- Any person who makes a misleading, false or deceptive statement, or conceals a material fact
- Any person who gives an appointed auditor or compliance officer information which is false, misleading or conceals any material fact
- Any person who is not a Rep mandated or employed by an authorised FSP, and who declares, pretends, gives out, maintains or professes to be authorised to render financial services
- Any person who fails to comply with the Act in terms of
 - Section 7 (May not act as an FSP without a license)
 - Section 8 (Displaying of the license)
 - Section 13 (Rep may not work for an unauthorised FSP and must give certified proof that s/he is employed or mandated and that the FSP takes responsibility and that adequate insurance is in place and the FSP must ensure that Reps and KI's are competent to act and abide with the Code of Conduct)
 - Section 14 (FSP to debar a Rep that do not comply with the Act)
 - Section 17 (Compliance officer, or FSP who does not need to appoint a CO, must submit reports to the Registrar)
 - Section 18 (Maintaining records)
 - Section 19 (Auditing of Financial Statements and Reporting Irregularities)
 - Section 34 (Undesirable business practices)

Is guilty of an offence and is on conviction liable to a fine not exceeding R1 000 000 or to imprisonment for a period not exceeding 10 years, or both fine and imprisonment

4.3 Undesirable Business Practice

- The Registrar may declare a business practice undesirable
- If the practice, directly or indirectly could
 - Harm the relations between authorised FSP's, clients or the general public
 - Unreasonably prejudice any client
 - Deceive any client
 - Unfairly affect any client
- And if the practice is allowed to continue, one or more objects of the Act will or is likely to be defeated
- Firstly, the Registrar may publish
 - in the official website, Gazette that he is of the intention to declare a business practice undesirable,
 - and interested persons may make written representations to the Registrar
 - within 21 days (after publication)
- An FSP may not carry on business from the date of publication of the notice (this refers to the actual declaration, not the intention to declare)

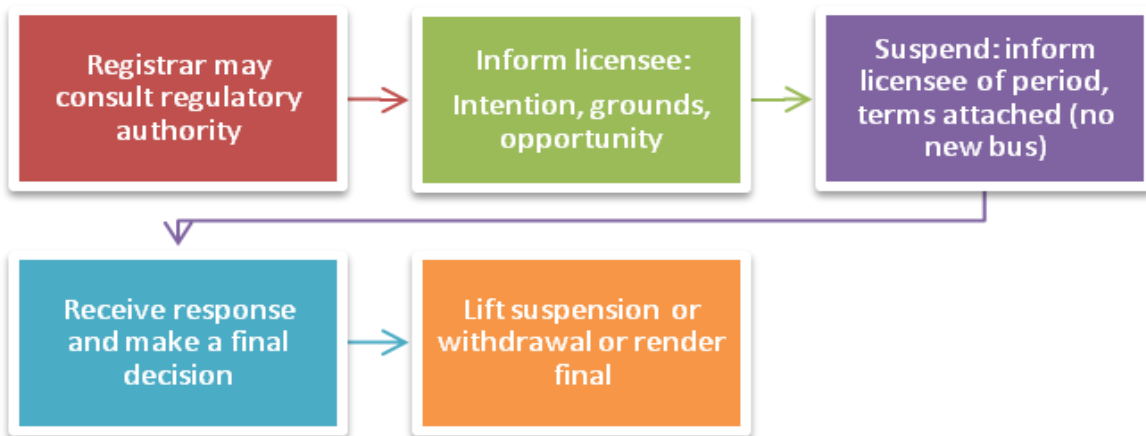
4.4 Suspension or Withdrawal of License



- The Registrar may at any time suspend or withdraw any license if satisfied, based on available facts and information, that the licensee –
 - No longer meets the licensing requirements

- Did not, during application for the license, make full disclosures of all relevant information to the Registrar, or furnished false or misleading information
- Failed to comply with any provisions of the Act
- Is liable for payment of a levy, a penalty (civil remedy) or administrative sanction (undesirable practice)

4.5 The process to be followed when suspending or withdrawing the license



Before suspending or withdrawing the license, the Registrar

- May consult any regulatory authority
- Must inform the licensee of
 - the intention to suspend or withdraw
 - the grounds therefore
 - and give the licensee opportunity to make a submission in response thereto
- Where the Registrar contemplates suspension of the license, the Registrar must inform the licensee of:
 - The intended period to suspend
 - Terms attached to the suspension, including
 - Prohibition on concluding new business
 - Terms to lift the suspension
- The Registrar must consider the response received
 - And may decide to suspend or withdraw
 - Or not to suspend or withdraw the license

- And notify the licensee
- If suspended or withdrawn, reasons will be made known in the Government Gazette and other appropriate media

4.6 The role of the various industry bodies in relation to standard setting for FAIS

As noted above, the Registrar acts as regulator and is empowered to institute action against a Financial Services Provider and its representatives. By implication, the industry bodies also enact certain restrictions or penalties on such representatives and FSP's.

An example would be the Life Offices' Association (Now ASISA) S-Referencing system. During November 2008, 22 financial advisers were S Referenced by the Association for Savings and Investment South Africa (ASISA), the majority for submitting unauthorised policies (policies written without a client's consent). There were also two cases of misappropriation of funds. The S Reference system is one of self-regulation and aims to protect consumers from advisers who are considered unfit to be marketing the products of the long-term insurance industry. Participants in the S Reference system will not employ, accept new business from, or pay commission to an S Referenced financial adviser. An S Referenced person may also not be employed in a position that allows them control over advisers or their training. An S Reference is imposed upon an adviser for five years. This may be reduced to three years if there are special mitigating factors. After the expiry of the period, the S Reference will lapse.

Based on judgements by the industry bodies, the FSP may request the debarment of the representatives by the FSB. However, where a representative has shown a lack of honesty and integrity in terms of the Fit and Proper requirements, the FSB may institute a debarment based on Section 14 of the FAIS Act and would not require a request from the FSP.

Civil or criminal action may be taken against the representative through the judicial system and the courts.

4.7 The role, duties and powers of the courts in terms of judgements against organisations and redress through the courts

4.7.1 Restraining order and remedial steps

The Registrar may, on the basis of available facts that

- A person has contravened or not complied with the Act
- Or is likely to contravene or not comply

Apply to a Court for an order restraining the person to

- Continue or
- To commit the act or omission
- Or from committing it in future

And require the person to take remedial steps to

- rectify the consequences of the act or omission
- including consequences which prejudiced or may prejudice any client

4.7.2 Compensation

The Registrar may institute action in a Court against

- Any person who has contravened or not complied with the act
- For payment of –
 - Compensation for losses suffered as a consequence of the contravention or non-compliance (determined by the Court)
 - Penalty for punitive purposes
 - Interest
 - Cost of suit
- Any amount recovered must be deposited into a specially designated trust account
 - The Registrar, as first charge, is entitled to reimbursement of all expenses in terms of bringing the proceedings
 - The balance (distributable balance) must be distributed by the Registrar to
 - Persons that can prove that they suffered a loss due to the actions by the FSP on a pro rata basis

- Persons that contravened or failed to comply with the Act may not share in the above
 - Any amount not claimed within 3 years from date of 1st distribution, accrues to the Registrar

A court order must be published in the Government Gazette and other appropriate media.

The Registrar may withdraw, abandon or compromise civil proceedings, but any compromise must be made an order of the courts and published in the Government Gazette and other appropriate media.

If civil proceedings have not been instituted, any agreement of settlement may, on application by the Registrar, be made an order of the court and published.

4.8 Remedies available to the industry and avenues for reinstatement

Any person who feels aggrieved by any decision by the

- Registrar or
- Ombudsman

May appeal to the Board of Appeal

4.8.1 Process of Appeal

- An appeal must be lodged within 30 days becoming aware of the decision
- In the manner prescribed by the Minister
- Fees must be paid prescribed by the Minister
- The appeal lodged does not suspend any decision pending the outcome of appeal
 - Unless the chairperson or deputy chairperson directs otherwise

As per the process of suspensions and withdrawals, it is clear that the Registrar, after reviewing the facts and response by the FSP, may lift a suspension, or render the suspension final.

A withdrawn license cannot be reinstated, unless done so by the Board of Appeal.

5. The role and functions of the FAIS Ombud

The Office of the Ombud for Financial Services Providers ('FAIS Ombud') was established by the Financial Advisory and Intermediary Services Act, 37 of 2002 ('FAIS Act'). The FAIS Ombud 's role is to resolve disputes between financial services providers and their clients in a procedurally fair, informal, economical and expeditious manner. The FAIS Ombud 's jurisdiction is limited to violations which occurred on or after 30 September 2004 and to claims not exceeding R800 000.00.

The FAIS Ombud is independent, impartial and performs its functions without fear, favour or prejudice. The Ombud 's services are free and accessible to all consumers.

Since 1 April 2005, the FAIS Ombud was granted the authority to act as Statutory Ombud under the Financial Services Ombud Schemes Act, 37 of 2004 ('FSOS Act'). This means that the Ombud can deal with complaints against financial institutions, which do not fall within the jurisdiction of any other Ombud scheme or where there is uncertainty over jurisdiction.

The office has been set up in such a way that the constitutional requirements of independence and objectivity are achieved.

In terms of the Act:

"Ombud" means:

- (a) the Ombud for Financial Services Providers appointed in terms of section 21(1); and 20
- (b) for the purposes of sections 27, 28, 31 and 39, includes a deputy Ombud;

5.1 Complaints Handling by the Ombudsman

The Ombud will consider and dispose of complaints in a procedurally fair, informal, economical and expeditious manner, with due regard to:

- The contractual and legal relationship between the complainant and the other

party

- The provisions of FAIS

The Ombud is empowered to:

- Award fair compensation for any financial prejudice or damage suffered by the complainant.
- Issue a direction to an FSP to take appropriate steps in relation to the complaint.

It is important to remember that a determination by the Ombud has the effect of a civil judgment and is executable through the ordinary judicial process. In addition to this, civil remedies are available in the form of class actions, as outlined above, and finally, criminal sanctioning is provided for through heavy fines and terms of imprisonment.

The following excerpts contain the rules concerning what the Ombud must do on receipt of the complaint, as well as Determinations by the Ombud:

5.1.1 Submission of a complaint to the Ombud

The Ombud must

- determine whether the “rights of complainants” requirements have been complied with
- In the case of non-compliance, act in accordance with the rules applicable to that section
- Otherwise officially receive the complaint if it qualifies as a complaint

5.1.2 Prescription period

- Only complaints that relates to an act or omission which occurred within the last 3 years must be accepted
- If the complainant only became aware of the act or omission within the last 3 years, even though the act or omission occurred more than 3 years ago, the complaint may be received by the Ombud (the person ought to reasonably have become aware)

- If the act or omission occurred before the FAIS Act was enacted, the Ombud will refuse the case

5.1.3 Decline to investigate

- The Ombud must decline to investigate a complaint if proceedings have been instituted in any Court by the complainant
- Where proceedings are instituted during investigation by the Ombud, the Ombud will not proceed
- The Ombud may decide that the matter be dealt with by a Court, or another dispute resolution process, and decline to entertain the complaint

5.1.4 Investigation of the complaint

- The Ombud must not proceed with a complaint unless:
 - All interested parties have been informed
 - Is satisfied that all interested parties have been provided with the particulars to enable them to respond
 - Has provided all parties the opportunity to respond
- The Ombud may follow and implement any procedure (including mediation) which the Ombud deems appropriate, and may allow any party legal representation
- The Ombud must firstly explore any prospect to resolve the matter by a conciliated settlement acceptable to all parties
- May make a recommendation to the parties
 - Requiring them to confirm whether they accept the recommendation, or not
- Where the recommendation is not accepted,
 - Requiring that party to provide reasons for not accepting it
- May delineate functions of investigations and determinations between various functionaries of the Office
- May mandate any person or tribunal to perform any functions

5.1.5 *Matters not settled or recommendations not accepted by all parties*

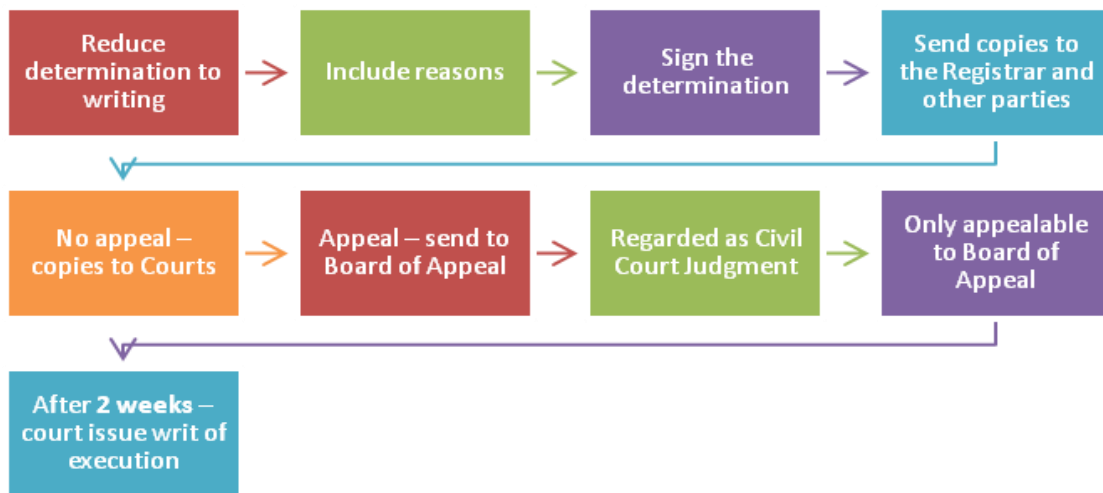
The Ombud could

- Dismiss the complaint
- Uphold the complaint, wholly or partially
 - Award the complainant an amount as fair compensation for financial prejudice or damages suffered
 - Issue a direction against the FSP, Rep or other party concerned
 - May make any order which a Court may make

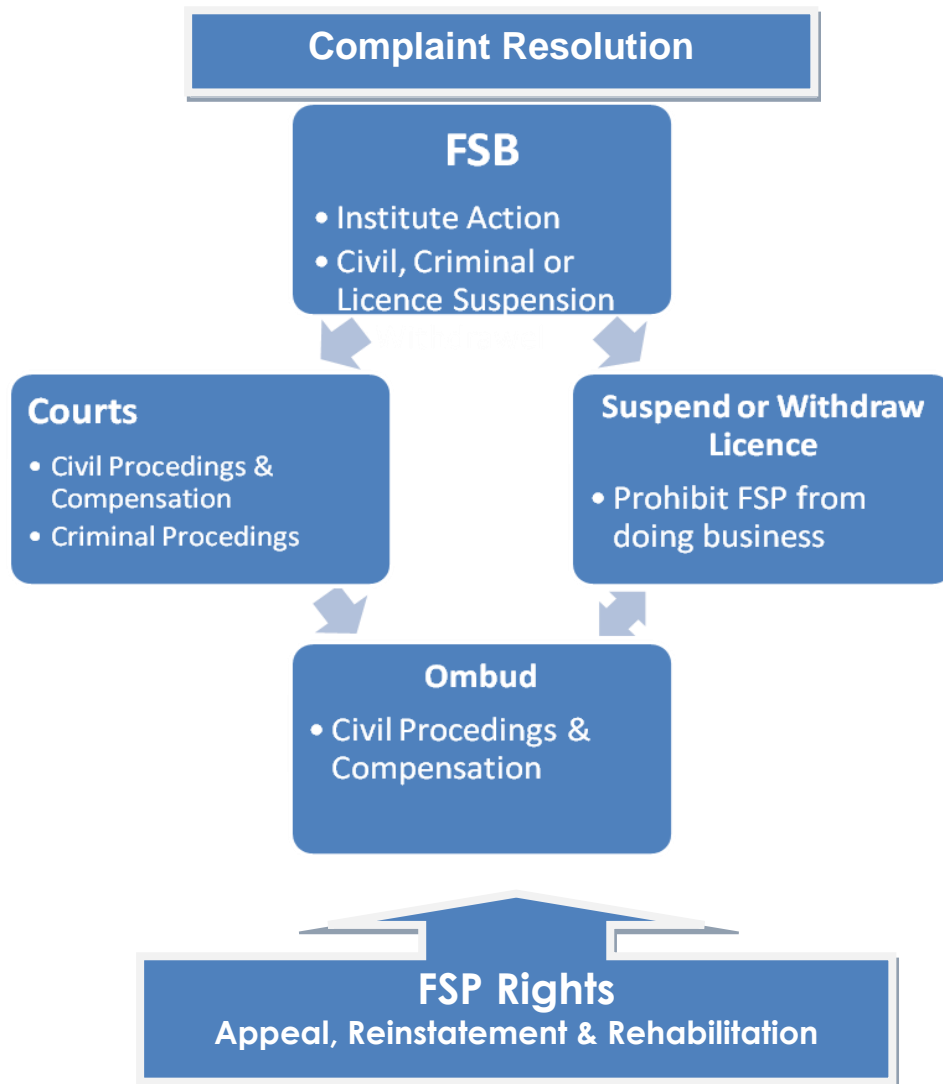
5.1.6 *Monetary awards*

- Monetary awards may bear interest as determined by the Ombud
- The Board may determine –
 - The maximum monetary award for a particular kind of prejudice or damage
 - Different maximum monetary awards for different categories of complaints
 - The granting of costs against a complainant in favour of the respondent, if in the opinion of the Ombud –
 - The conduct of the complainant was improper or unreasonable
 - The complainant was responsible for an unreasonable delay in the finalisation of the investigation
- The monetary award may not exceed the rate which a Court would have entitled an award

5.1.7 *The determination by the Ombud*



- The Ombud will reduce the determination to writing
- Including the reasons therefore
- Sign the determination
- Send copies to the Registrar and all other concerned parties
- If no appeal is lodged in the specified time period, the Ombud will send a copy to the clerk or registrar of court which would have had jurisdiction if the matter had been heard in court
- Where a notice of appeal is lodged, the Ombud must send a copy of the final decision of the Board of Appeal to the clerk or registrar
- The determination by the Ombud or Board of Appeal is regarded as a civil court judgment of a Court
- It is only appealable to the Board of Appeal with the leave of the Ombud, after considering
 - The complexity of the matter
 - The likelihood that the Board of Appeal may reach a different conclusion
 - With the permission of the chairperson of the Board of Appeal, the Ombud may refuse the leave to appeal
- After two weeks following the determination by the Ombud or Board of Appeal, the clerk or registrar of the Court may issue a writ of execution which may be executed by the sheriff of the Court



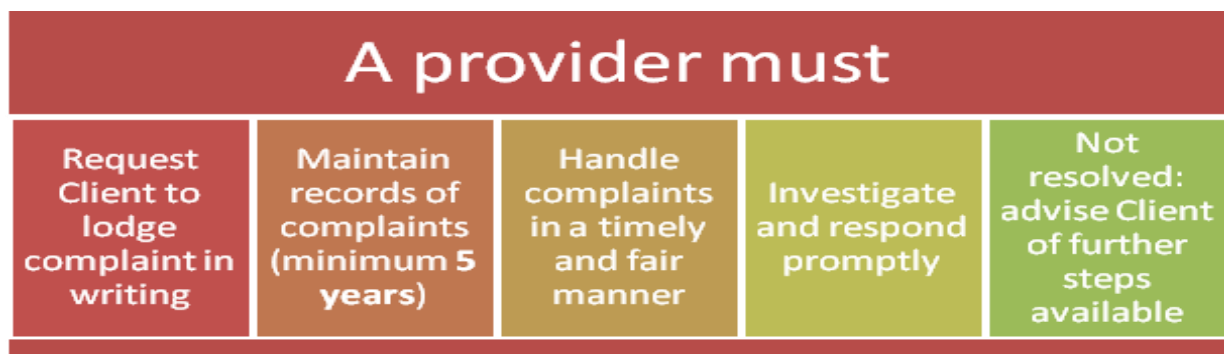
5.2 The manner in which complaints are handled by the industry with reference to Financial Services Board directives

The following definitions from the Act, clearly defines who a complainant is, what a complaint is and what procedures and systems must be in place to ensure compliance with FAIS regarding complaints handling:

COMPLAINANT	COMPLAINT
A specific client who submits a complaint to the Ombud	A specific complaint relating to a financial service rendered by a financial services provider

	<p>or representative to the complainant on or after the date of commencement of this Act, and in which complaint it is alleged that the provider or representative-</p> <p>(a) 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 financial prejudice or damage;</p> <p>(b) has wilfully or negligently rendered a financial service to the complainant which has caused prejudice or damage to the complainant or which is likely to result in such prejudice or damage; or</p> <p>(c) has treated the complainant unfairly.</p>
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The following excerpt from the FAIS General Code of Conduct deals with the handing of complaints by the FSP:



When a client wants to complain, the provider must

- request the client to lodge the complaint in writing
- maintain a record of complaints for a period of 5 years
- handle complaints in a timely and fair manner (a period of 6 weeks is prescribed)
- takes steps to investigate and respond promptly to complaints

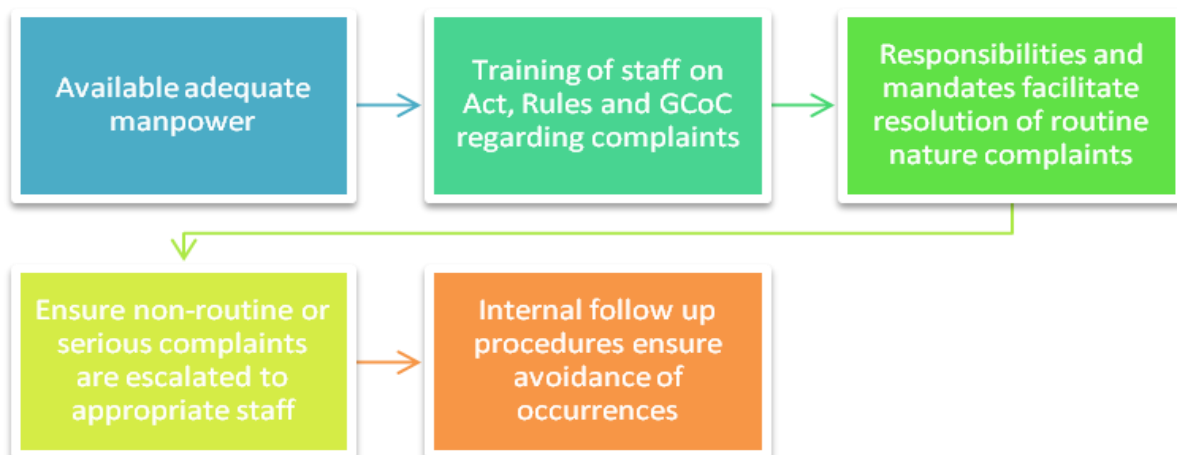
- when the complaint is not resolved to the satisfaction of the client, advise the client of any further steps which may be available to the client in terms of the Act or any other law

5.2.1 *Internal Complaints resolution system*

A provider must maintain an internal complaint resolution system based on the following

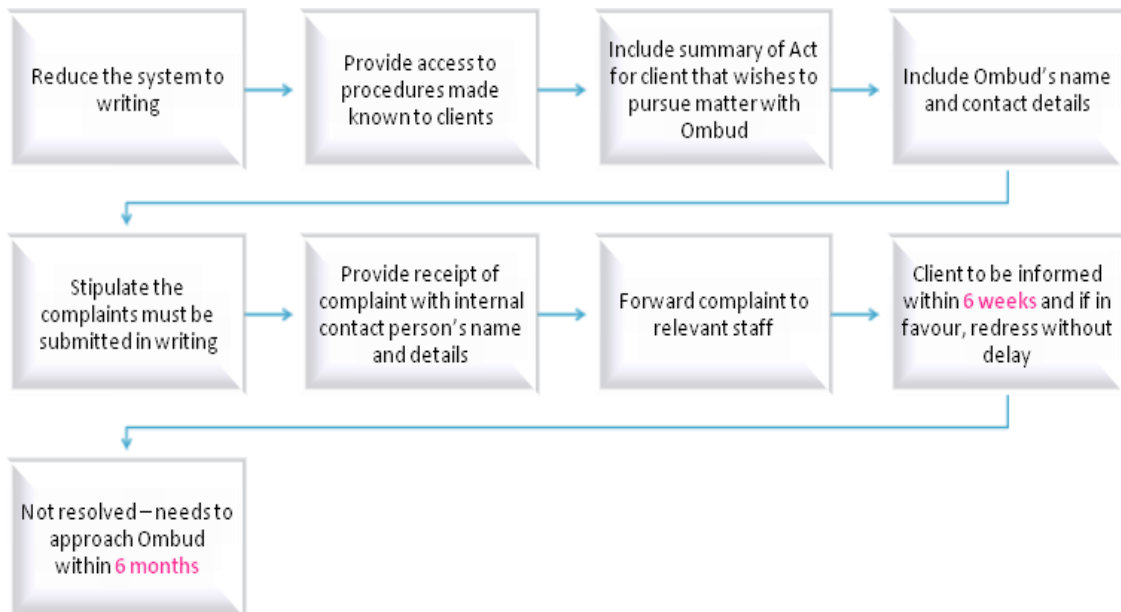
- Maintenance of a policy outlining the provider's commitment, system and procedures for the internal resolution of complaints
- Transparency and visibility – ensuring that clients have full knowledge of the procedures for resolution of their complaints
- Accessibility – easy access to procedures at any office or branch of the provider open to clients, or through post, fax, telephone or electronic helpdesk support
- Fairness – ensuring the resolution of a complaint can be effected which is fair to the client, the provider and its staff

The internal complaint resolution system and procedures of the provider must be designed to ensure the existence and maintenance of at least the following for purposes of effective and fair resolution of complaints



- Available adequate manpower
- Training of staff relating to the Act, the Rules and the General Code of Conduct regarding resolution of complaints

- Ensure that responsibilities and mandates are delegated to facilitate resolution of complaints of a routine nature
- Ensure that non-routine or serious complaints are escalated to staff with adequate expertise
- Internal follow-up procedures to ensure avoidance of occurrences giving rise to complaints, or to improve services and complaint systems

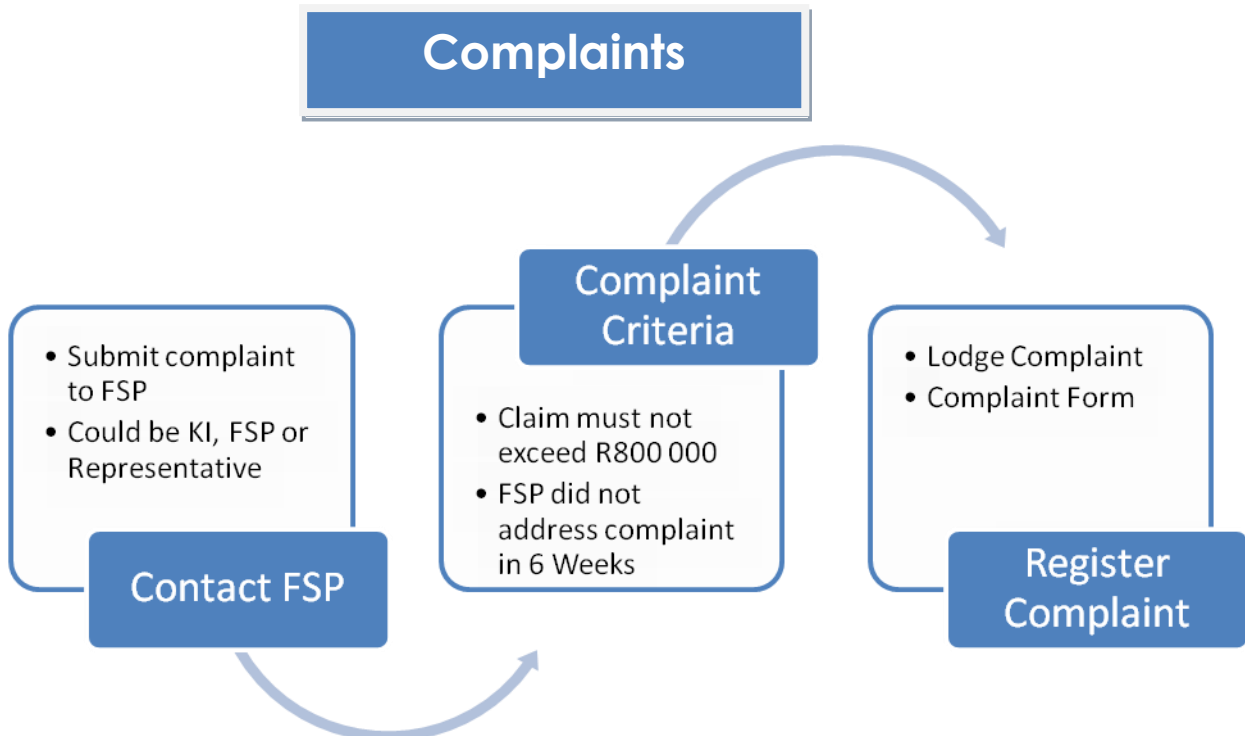


The system and procedures must contain arrangements which –

Must

- Reduce the system to writing
- Provide access to the procedures are available to clients at any branch of office, or electronic medium, and that the availability is made known to clients
- Include a clear summary of the Act which will apply when the client, after the dismissal of a complaint, wishes to pursue further proceedings before the Ombud
- And include the Ombud 's name, address and other contact particulars
- Stipulate that complaints be submitted in writing
- Provide that the receipt of the complaint is acknowledged in writing to the client with details of contact staff and must be recorded internally by the relevant staff

- The complaint to be forwarded to the relevant staff appointed to consider its resolution and that –
 - Complaint receives proper consideration
 - Appropriate management controls are in place to exercise effective control and supervision of the process
 - The client is informed of the result within 6 weeks
 - If the outcome is not favourable to the client
 - Full written reasons must be furnished
 - Advise the client that the complaint can be pursued within 6 months with the Ombud and provide the client with the Ombud 's name, address and other contact particulars
 - If the outcome is resolved in favour of the client, ensure that full and appropriate redress is offered without delay



Complainants have specific rights when submitting FAIS-related complaints.

Persons who qualify as Complainants have the right to:

- Attempt to resolve the complaint with the FSP
- Disagree with the final response of the FSP
- Submit the complaint, along with all relevant documentation, to the Ombud within six months after receiving the final response from the FSP
- Decide to proceed with the complaint irrespective of the FSP's reply to the Ombud
- Submit further facts, information or documentation to the Ombud in connection with the complaint
- Appeal a final determination made by the Ombud.

In summary, FAIS requires that:

- Every FSP has a documented complaints procedure and advises their clients of this
- An Ombud is appointed to deal with complaints that cannot be resolved at FSP level.

The Ombud:

- Acts independently and objectively when handling complaints
- Does not take instructions from any person when exercising authority
- Provides services confined to the investigation and determination of FAIS-related complaints.

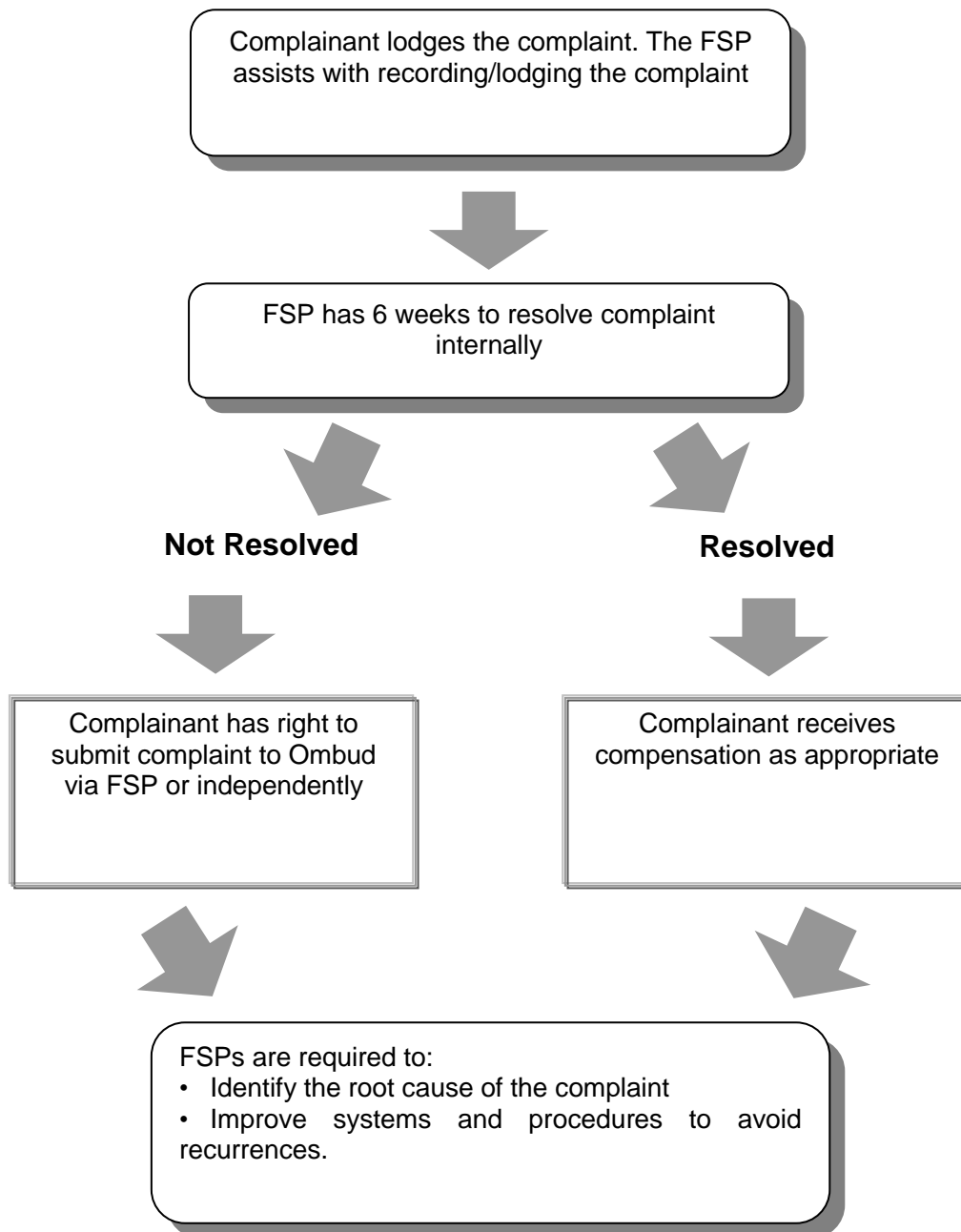
The Registrar of FSPs also plays a role in the complaints process.

If	Then
<p>The Registrar has reason to believe that:</p> <ul style="list-style-type: none"> • a person has contravened or failed to comply with FAIS <i>and</i> • the client has suffered financial prejudice or damage 	<ul style="list-style-type: none"> • The Registrar has the power to <i>refer the matter</i> to the Ombud so that the client can deal with it as a complaint • The Registrar must <i>forward</i> to the Ombud any information or documents in his possession relating to the matter.

The main role players in the complaints resolution process are listed below.

Role Player	Description
Complainant	<ul style="list-style-type: none"> • This is the person who has suffered prejudice by a FSP, KI or Representative and has decided to lodge a complaint against that FSP, KI or Representative • The Complainant seeks some form of relief or monetary award for the financial damage that they have suffered.
Respondent	<ul style="list-style-type: none"> • The person against whom the complaint is made • The Respondent could be a FSP, KI or a Representative of that FSP • It may even be a FSP, KI or Representative that has acted in an unauthorised capacity.
Ombud	<ul style="list-style-type: none"> • This is the Ombud for Financial Services Providers (FSPs) • The Ombud 's main responsibility is to consider and dispose of complaints while acting independently and maintaining neutrality.

This diagram summarises the four steps of the complaints process.



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