

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

GUIDANCE NOTE: INTERMEDIARY SERVICES AND REPRESENTATIVES

(Revised 12/01/2011)

1. Introduction

The Act aims to ensure that every person who renders **financial services** to a client, meets the necessary fit and proper requirements to discharge this responsibility, whether acting personally or through other persons; and does so in accordance with the Act and its Codes of Conduct.

2. “Financial Services”

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

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

3. “Intermediary Service”

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

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

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

4. “Representative”

A representative is defined in the Act as follows –

“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-**

- (a) does not require judgment on the part of the latter person; or
- (b) does not lead a client to any specific transaction in respect of a financial product in response to general enquiries.”

5. “Advice”

It may be inferred from these definitions that any person who provides **advice** (as defined in the Act) to a client for or on behalf of a financial services provider, in terms of conditions of employment or any other mandate, will always be a representative of that financial services provider. This is so because the exclusions set out in the definition of “representative” are clearly not applicable to a person furnishing advice, as such person will not be rendering a clerical, technical, administrative, legal, accounting or other service in a subsidiary or subordinate capacity. In addition, advice will always require judgment on the part of the person giving advice. It follows that any such person who provides advice, will of necessity be a representative.

6. Intermediary service (without advice)

The following question has arisen: When will a person be regarded as a representative for purposes of the Act if that person provides an **intermediary service** to a client for or on behalf of a financial services provider, in terms of conditions of employment or any other mandate, but does **NOT** provide **advice**?

To answer this question one must, apart from analysing the definition of “intermediary service”, take cognisance of the exclusions in the definition of “representative”. If the intermediary service rendered is a clerical, technical, administrative, legal, accounting or other service in a subsidiary or subordinate capacity, and is of the nature set out under paragraphs 4(a) or (b) above, the person concerned will not be a representative as contemplated by the Act.

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

service”, where such service is provided for or on behalf of, and not by, an authorised financial services provider.

7. Which persons are not representatives?

- (a) It is a factual enquiry whether in given circumstances someone acts or has acted as a “representative” or whether that person falls under the exclusions provided for in the definition of “representative”.
- (b) Such an examination must commence with an interpretation of the words of the definition beginning from the exclusion until the end of the definition.
- (c) Types of services are mentioned there, all qualified by being rendered “in a subsidiary or subordinate capacity”, and then being further qualified that the service-
 - does not require judgment on the part of the person; or (*to be interpreted disjunctively*¹)
 - does not lead a client to any specific transaction in respect of a financial product in response to general enquiries.
- (d) The legislature’s obvious intention was to prevent too many categories of persons who, technically, could otherwise be classified as “representatives” from being so classified.
- (e) As stated in the introductory paragraph, the primary objective of the Act was to ensure that financial services rendered to a client, were so rendered by persons fit and proper to discharge their responsibility.

¹ A disjunctive interpretation of the “or” means that if **either one** of the exclusions applies a person rendering an intermediary service will not be regarded as a representative subject to such service being of a clerical, technical, administrative, legal or accounting nature and that it is performed in a subsidiary or subordinate capacity.

- (f) Thus, a person who, for example, performs a “mechanical” service by merely handing over a proposal form to a client, who takes receipt of a claim form from a client, or who performs any other purely clerical interaction with a client, without applying any judgment process in relation to that interaction, is intended to be excluded as a representative. However, this does not mean that an intermediary service is not being rendered. If the actions of the person meet the requirements of the definition of “intermediary service” (see paragraph 3 above), then an intermediary service is being rendered. The person on whose behalf the firstmentioned person acts, is rendering the intermediary service and must therefore be authorised to render such service.

- (g) The exclusions in the definition of “representative” would normally not apply to a person who actively and consciously sells a financial product to a client, as such act cannot be regarded as a service that is of a clerical, technical, administrative, legal or accounting nature and performed in a subsidiary or subordinate capacity. Persons engaged in such active and conscious selling, even where they do not provide advice, therefore need to be either financial services providers or representatives in the true sense.

8. Specific guidance

8.1. Furniture and motorcar dealers

- (a) When facts are to be applied to the law, or vice versa, uncertainty often arises.

- (b) One troublesome area is where insurance is sold, or offered for sale, on “dealer floors”. This practice presents itself in different forms. A proposal

form for assistance business or other insurance may be made available in a retail shop for a customer to uplift. It may even be handed to a customer with or without an indication of what the content is about. No interaction requiring judgment takes place between such person and the client. The client, if interested in the product, merely completes a space of his/her choice and returns it to a given address or hands it to a person. If this leads to a transaction with the customer, such a person will not be regarded as a representative in terms of the definition.

- (c) By contrast, there are dealers who, through their sales persons, actively encourage a customer to accept, or even require a customer to enter into an insurance agreement. This often occurs in respect of a credit insurance agreement providing long-term or short-term cover, as ancillary to the main credit sale agreement.
- (d) In May 2008 “A report by the Panel of Enquiry on CONSUMER CREDIT INSURANCE in SOUTH AFRICA” under chairmanship of Judge PM Nienaber was published. The Report followed a public investigation by the Panel, including evidence submitted by most insurers doing business in the field of credit insurance.
- (e) The undisputed evidence to the Panel led it to conclude that consumer credit insurance was a unique type of insurance. The way it operates is equally unique. In the case of credit insurance sold by furniture dealers, the furniture dealer is often also the credit provider or an associate of the credit provider and the underwriting insurer is often (but not always) also in the same group of companies. Most policies are sold by way of a group scheme administered by the dealer or its associate. The dealer floor can in some instances function as a “mini-branch” office of the insurer. The insurer itself therefore outsources much of the administration of the policies concerned to the dealer or associate concerned. With this structure in place the dealer is paid various fees including commission, administration

fees and fees for other outsourced services rendered. Income thus earned by dealers can exceed that earned from their furniture business. The evidence on behalf of SAIA to the Panel was that in some instances as much as 67% of the insurance premium goes to the dealer.

- (f) The legislature has seen fit to impose certain conditions on credit insurance through provisions in the National Credit Act. This is dealt with in paragraph 1.4 of the Nienaber Report with specific reference to Section 106 of the National Credit Act. This provision requires certain explanations to be given to the consumer, choices to be allowed, and the like.
- (g) It is not feasible to sustain an argument that, where relatively complicated matters regarding insurance cover must be explained to (unsophisticated and often illiterate) consumers, including the exclusions provided for in the policy, and the fact that the consumer has a choice between an existing policy and one offered by the dealer, that the person interacting with the consumer on these matters, does so in an administrative, clerical or technical manner or in a subordinate capacity and does not require the person to exercise judgment. Furthermore, a transaction in respect of a financial product almost invariably results. Accordingly, typically neither of the exclusions from the definition of “representative” will apply in such instances, and the argument that the person concerned should not be required to meet the fit and proper requirements of a representative, cannot be sustained.
- (h) If dealers wish to avoid appointing their salespersons as representatives, they will need to ensure that such salespersons do not interact with customers in respect of insurance transactions in the manner described in paragraphs (c) and (g) above. Instead, they should consider appointing one or more dedicated insurance representatives to be readily available to interact with the customer on the insurance aspect of the transaction.

9. Application of the Act

- (a) In judging whether or not a person dealing with the public in a manner postulated by the definition of “intermediary service” is a representative, the Registrar will look at the surrounding circumstances.
- (b) Where authorised financial services providers claim that the persons rendering financial services on their behalf “*do not exercise any judgment*”, they must be in a position to substantiate such claims.
- (c) If in a given situation judgment by such persons² is **required**, as in (but not limited to) the case of furniture or motorcar dealers selling insurance on their floors and having to explain features of the policy to the customer, the persons concerned will be regarded as representatives for purposes of the Act, irrespective of whether or not they also give advice.



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² In other words, persons who render financial services of a clerical, technical, administrative, legal, accounting or other service in a subsidiary or subordinate capacity.