



FINANCIAL SERVICES BOARD

FINANCIAL ADVISORY AND INTERMEDIARY SERVICES ACT, 2002 (ACT 37 OF 2002)

GUIDANCE NOTE: SOLE PROPRIETORS

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1 st	26 November 2013	26 November 2013	Issued

1. PURPOSE

- 1.1. The purpose of this Notice is to provide guidance with regard to the role of sole proprietors and the applicability of the Financial Advisory and Intermediary Services Act, 2002 (the Act), on such proprietors.

2. WHAT IS A SOLE PROPRIETORSHIP / SOLE PROPRIETOR?

- 2.1. A sole proprietorship is a type of business enterprise which is owned, operated and controlled by one natural person (the sole proprietor). There is no legal distinction between the sole proprietor and the business which he or she conducts. As such, there is also no distinction between the business' assets and liabilities and the sole proprietor's assets and liabilities. The sole proprietor has unlimited responsibility for all losses and debts of the business.
- 2.2. Legally, the sole proprietorship and the sole proprietor are one and the same. Therefore, if a sole proprietor dies, the business enterprise terminates.

3. STATUS OF SOLE PROPRIETOR UNDER THE ACT

- 3.1. The Act does not define what a sole proprietor is. Therefore, its ordinary meaning, ie. a natural person who conducts business in his or her own name or under a trading name, must apply where the phrase is used in the Act.

3.2. Section 1(1) of the Act defines a “financial services provider” as follows-

*“financial services provider” means **any person**, other than a representative, who as a regular feature of the business of such person-*

- (a) furnishes advice; or*
- (b) furnishes advice and renders any intermediary service; or*
- (c) renders an intermediary service;” [Emphasis added]*

3.3. “Person” is defined as-

*“... **any natural person**, partnership or trust and includes-*

- (a) Any organ of state as defined in section 239 of the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996);*
- (b) any company incorporated or registered as such under any law;*
- (c) any body of persons corporate or unincorporated;” [Emphasis added]*

3.4. Therefore, a sole proprietor (natural person) who renders financial services, other than in the capacity as a representative, as a regular feature of his or her business must be authorised as a financial services provider. This is so because section 7(1) of the Act prohibits a **person** from acting as a financial services provider unless issued with a licence.

3.5. A sole proprietor rendering financial services in his/her own name is but one type of financial services provider, i.e. a natural person as opposed to a corporate or unincorporated body, or some other legal structure such as a trust or partnership (hereinafter referred to as corporate persons).

4. IS THERE A DIFFERENCE BETWEEN A SOLE PROPRIETOR, KEY INDIVIDUAL AND REPRESENTATIVE?

4.1. A key individual is defined in section 1(1) of the Act as follows:

*“**key individual**”, in relation to an authorised financial services provider, or a representative, carrying on business as -*

- (a) 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*
- (b) a corporate body or trust consisting of only one natural person as member, director, shareholder or trustee, means any such natural person;”*

4.2. A sole proprietor is not a key individual as defined in the Act but the actual financial services provider.

4.3. Section 8 of the Act distinguishes between an applicant¹ who is a natural person and all others who are corporate persons. The Act requires only corporate persons to have a key individual. The key individual is a natural person designated as such by the corporate entity who can comply with the section 8 requirements.

4.4. A sole proprietor is not a representative² as defined in the Act particularly when regard is had to the definition of 'financial services provider' from which it is apparent that a financial services provider is a person **other than a representative** who as a regular feature of its business renders financial services to clients. Sole proprietors render financial services themselves and not on behalf of others. Therefore, a sole proprietor is not a representative when rendering financial services in his/her own name or under a trading name but is acting as the financial services provider.

5. APPLICATION OF THE ACT

5.1. In light of the above, the requirements in the Act applicable to financial services providers apply to sole proprietors.

5.2. Where the Act distinguishes between financial services providers who are natural persons and those who are corporate persons, only those requirements applicable to natural persons would apply to a sole proprietor. For example, a sole proprietor is not required to appoint a key individual as is the case with a corporate person and certain competency requirements³ only apply to financial services providers who are sole proprietors.

6. MAY A SOLE PROPRIETOR APPOINT REPRESENTATIVES / KEY INDIVIDUALS?

6.1. The Act does not prohibit a sole proprietor who is authorised as a financial services provider to appoint one or more representatives. This is evident from the definition of 'representative'⁴.

¹ Applicant in section 8 of the Act refers to a person who submitted an application for an authorisation as referred to in section 7(1) of the Act.

² Representative is defined in section 1(1) of 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;”

³ See Parts III to VII and Part X of the Determination of Fit and Proper Requirements that specifically refers to FSPs who are sole proprietors.

⁴ See section 1(1) of the Act.

- 6.2. A representative is defined as a person who renders financial services on behalf of a **financial services provider** in terms of a mandate or an employment contract.
- 6.3. There is no provision in the Act that precludes a financial services provider who is a sole proprietor to appoint representatives.
- 6.4. The number of representatives (whether natural or corporate persons) a sole proprietor may appoint depends on his/her operational ability. In other words, it will be determined with reference to the enquiry whether or not the sole proprietor is able to fulfil his/her responsibilities under the Act, given the number of appointed representatives. This is a factual enquiry which will depend on the circumstances of each case.
- 6.5. The Act does not provide for the appointment of a key individual by a sole proprietor, the first-mentioned being a person who manages or oversees the activities of a corporate person⁵ relating to the rendering of financial services. The responsibility to manage and oversee the rendering of financial services by a financial services provider which operates as a sole proprietorship is that of the sole proprietor alone.
- 6.6. However, this does not mean that a juristic representative of a sole proprietor could not have a key individual. In terms of section 13(2) of the Act a financial services provider must ensure that its representatives **and key individuals** of such representatives (in the case of juristic persons), comply with the Determination of Fit and Proper Requirements. The difference is that the key individual of a juristic representative is not required to be approved by the Registrar, but of course has to comply with the requirements pertaining to key individuals.
- 6.7. Representatives of a financial services provider who is a sole proprietor must render financial services on behalf of such proprietor in terms of a mandate or employment contract. Given the purpose and objective of the Act, the FSB is of the view that such representatives cannot render financial services or contract in respect of financial services other than in the name of the sole proprietor.



DEPUTY REGISTRAR: FINANCIAL SERVICES PROVIDERS

⁵ See abbreviation of corporate person in paragraph 3.5 above and the definition of key individual in section 1(1) of the Act.