

**NOTICE CALLING FOR PUBLIC COMMENTS OF DRAFT ADMINISTRATIVE ACTION
PROCEDURES**

FINANCIAL SECTOR REGULATION ACT, 2017

The Financial Sector Conduct Authority hereby invites, in accordance with section 93(1)(a) of the Financial Sector Regulation Act, 2017 (Act No. 9 of 2017), written public comment on the Draft Administrative Action Procedures to be made in terms of section 92(1) of that Act as set out in the Schedule.

The draft Procedures is available on the Financial Sector Conduct Authority's website at <https://www.fsca.co.za>.

Comments on the draft procedures must be submitted in writing on or before 21 June to the Authority at retha.stander@fsca.co.za.



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ACTING COMMISSIONER
FINANCIAL SECTOR CONDUCT AUTHORITY**

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SCHEDULE

DRAFT ADMINISTRATIVE ACTION PROCEDURES

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DRAFT

1. Definitions

In this Schedule, “**the Act**” means the Financial Sector Regulation Act, 2017 (Act No. 9 of 2017), and any word or expression to which a meaning has been assigned in the Act bears the meaning so assigned to it, unless the context otherwise indicates and -

“**administrative action**” means the actions contemplated in paragraph 2.2;

“**affected person**” means a person in relation to whom the Authority takes administrative action;

“**Authority**” means the Financial Sector Conduct established in terms of section 56 of the Act;

“**financial sector laws**” means the financial sector laws for which the Authority is the responsible authority;

“**Interpretation Act**” means the Interpretation Act, 1957 (Act No. 33 of 1957);

“**in writing**” has the same meaning ascribed to it in section 3 of the Interpretation Act;

“**month**” means a calendar month;

“**PAJA**” means the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000); and

“**the Procedures**”, means the Authority’s administrative action procedures contemplated in terms of Part 2, Chapter 6 of the Act as set out in this Schedule.

2. Application and purpose of the Procedures

2.1 The Procedures aims to-

- (a) promote a fair and consistent approach to administrative action taken by the Authority in terms of the financial sector laws;
- (b) be consistent with the principles of PAJA and any applicable requirements of a financial sector law¹, specifically affording affected persons the right to be heard and
- (c) inform affected persons what to expect and what their rights are.

2.2 The Procedures is applicable to the decisions to be taken by the Authority under a financial sector law in relation to a specific person which adversely affects the rights of that person and which has a direct external legal effect.

3. Approach to administrative action

¹ Section 92 of the Act.

3.1 There are a number of principles underlying the Authority's approach to administrative action:

- (a) The effectiveness of the regulatory regime envisaged in the Act depends to a significant extent on maintaining an open and co-operative relationship between the Authority and the financial institutions that it regulates. Regulated persons must have the comfort that the Authority will act in a fair and consistent manner.
- (b) The Authority will seek to take administrative action in a manner that is transparent, proportionate, responsive to the issue, and consistent with its objective and statutory mandate.
- (c) The Authority will seek to achieve a consistent approach to administrative action.
- (d) PAJA applies to any administrative action taken by the Authority in terms of a financial sector law.² Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.³ The Authority will seek to ensure fair administrative action as required by the Constitution and PAJA.
- (e) When administrative action is required to be taken; the Authority will aim to change the behaviour of the *person* who is the subject of its action, to deter future non-compliance by others, to eliminate any financial gain or benefit from non-compliance, and where appropriate, to remedy the harm caused by the non-compliance, and to ultimately protect financial customers.

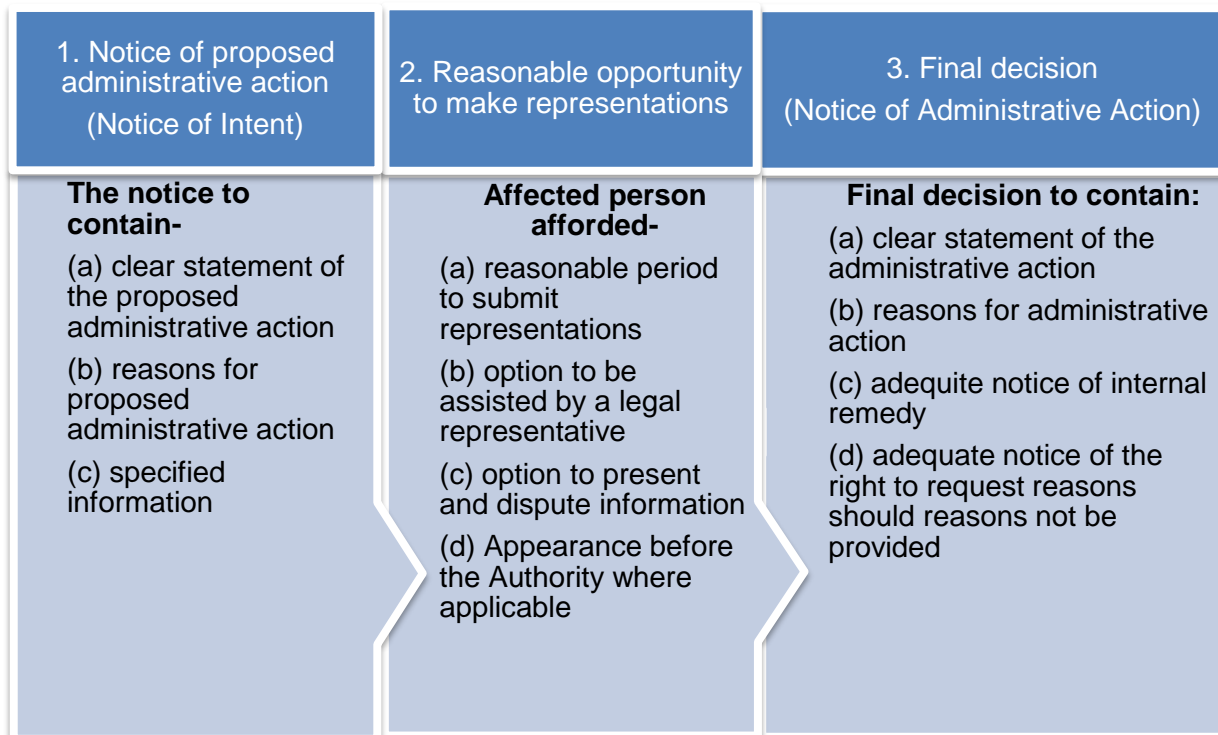
3.2 As the Procedures aim to promote a fair and consistent approach to administrative action taken by the Authority, a uniform approach (as opposed to a diversified approach) has been adopted in respect of different types of administrative actions. This however does not detract from the Authority's discretion to apply different procedures for different types of administrative actions and circumstances as appropriate.

4. Process

² Section 91 of the Act

³ Section 3(1) of PAJA

The following is a schematic presentation of the Authority’s three stepped procedures for administrative action:



5. Notice of intent

5.1 The Authority must provide an affected person **adequate notice of the nature and purpose of proposed administrative action.**

Format of notice

The notice must be in writing and in the format prescribed by a financial sector law, if any. For example, draft debarment orders and proposed directives must be provided to the affected person for consideration together with the Notice of Intent.

Service of notice

- (a) The Act prescribes how notices in terms of, or relating to, financial sector laws must be served or given to a licensed⁴, or previously licensed, person.
 - (i) The notice must be “served on, or given” to the affected person;⁵

⁴ The Act defines ‘licence’ as a written licence, registration, approval, recognition, permission, consent or any other authorisation in terms of a financial sector law, however it is described in that law, to provide a financial product, financial service or a market infrastructure.

⁵ Section 286(1)(a) of the Act

- (ii) In the event that the affected person cannot be found after reasonable inquiry, the Authority must serve or give the notice to some other person apparently involved in the management or control of a place where the person carries or carried on the licensed activities;⁶
 - (iii) The Authority interprets the words “given to” in a wide context which includes electronic means such as e-mail or facsimile. Thus, the Authority may choose to serve the notice at the physical business address or *via* electronic means.
- (b) The Act does not prescribe how notices in terms of, or relating to, the Act and other financial sector laws, must be served or given to a person who is not or was not licensed. For the sake of consistency, the Authority will serve or give a notice to an affected person in the same manner described in sub-paragraph (a) above.
- (c) The Act specifically deals with the manner in which notice of a draft debarment may be served on or given to an affected person. If the Authority after taking all reasonable steps, including through electronic means, cannot locate a person to be given a document or information under section 154 of the Act or a debarment order, it must deliver the document or information to the person’s last known e-mail or physical business or residential address.⁷

Contents

- (a) The notice of intent must set out the nature and purpose of proposed administrative action against an affected person. It must contain the following:
- (i) a clear statement of the proposed administrative action, which encompass the following:
 - (aa) the nature of the proposed administrative action (details of the proposed administrative action). For example, that the Authority intends to issue a debarment order against the affected person or the withdrawal of the affected person’s authorisation;
 - (bb) the intended terms and conditions attached to proposed administrative action, where applicable. For example, any terms to

⁶ Section 286(1)(b) of the Act

⁷ Section 155 of the Act

be attached to the suspension or withdrawal of a licence of an authorised financial services provider;⁸

(cc) reference to applicable administrative consequences of proposed administrative action. For example, the peremptory publication of a debarment order⁹ or the manner of payment of an administrative penalty order.¹⁰

(ii) reasons for the proposed administrative action, which encompass the following: `

(aa) the grounds for the proposed administrative action, otherwise referred to as the jurisdictional factors. For example, the Authority may issue a written directive to a financial institution, if the financial institution has contravened or is likely to contravene a financial sector law. The reliance on this ground and relevant provision that has been contravened must be clearly stipulated;¹¹

(bb) the relevant evidence (facts and information) that informs the grounds for the proposed administrative action. The Authority must disclose, with due regard to any applicable limitations on disclosure of information,¹² the gist or substance of the case against an affected person in as much detail as is necessary to enable an affected person to make meaningful representations to the Authority on the case against the affected person;

(cc) the prescribed factors that the Authority must have regard to before taking the proposed administrative action. For example, the factors the Authority must take into account before imposing a penalty order (e.g. level of co-operation).¹³

(b) The information referred to in paragraph (a) must as a minimum include the information specified in the specific financial sector law, where applicable. For example: -

⁸ Section 9(2)(b) of the Financial Advisory and Intermediary Services Act.

⁹ Section 153(7) of the Act.

¹⁰ Section 168 of the Act.

¹¹ Section 144(1)(d)(i) of the Act.

¹² See for example Chapter 17, Part 1 of the Act.

¹³ Section 167(2)(a) of the Act.

- (i) in the case of a proposed debarment order, “reasons for and other relevant information about the proposed debarment”;¹⁴
- (ii) in the case of a proposed directive, a “statement of the reasons” why the Authority is proposing to issue it, including a “statement of the relevant facts and circumstances”.¹⁵

6. Reasonable opportunity to make representations:

- 6.1 The Authority must afford an affected person a reasonable opportunity to make representations (i.e. to state the person’s case). This means that the Authority must afford an affected person sufficient time to consider a notice of an intended administrative action and to provide a response. What constitutes a “reasonable” opportunity must be determined on a case-by-case basis, where the applicable legislation does not specify a period.
- 6.2 In some instances, a financial sector law may specify a minimum period which the Authority must afford to affected persons. For example, at least one month in respect of the varying, suspending and revoking licences¹⁶ and debarment orders.¹⁷
- 6.3 Affected persons should make written submissions within the specified timeframe. For this reason, they may obtain assistance and legal representation. However, the unavailability of a legal representative is not a ground for an extension of the timeframe within which affected persons are to make representations and which the Authority, in its discretion and for a valid reason, may allow.
- 6.4 The Authority may, in its discretion which will be exercised on a case-by-case basis under exceptional cases or circumstances, afford an affected person an opportunity to make the submissions in in person.

7. Final decision (notice of administrative action):

- (a) The Authority must advise all affected persons of its final decision in respect of proposed administrative action. It must do so: -
 - (i) within the period prescribed or specified in a financial sector law, if applicable; or

¹⁴ Section 154(1)(a) of the Act

¹⁵ Section 146(1)(a) of the Act

¹⁶ Section 123(1)(a)(b) of the Act

¹⁷ Section 154(2) of the Act

- (ii) within a reasonable period. What constitutes a “reasonable” period will be determined on a case-by-case basis (e.g. the complexity of the facts).
- (b) **Format and service:** The same principles apply as with the service of the notice of intent as described in under paragraph (1) above to the Authority’s final decision (notice of administrative action) should it decide to take administrative action against a person.
- (c) **Contents:** The final decision (notice of administrative action) must give: -
- (i) a clear statement of administrative action. The Authority’s final decision (notice of administrative action) will be clearly set out with reference to the specific provision in terms of which the action is taken, for example the notice must state that the Authority is withdrawing the licence of a financial services provider in terms of section 9 of the Financial Advisory and Intermediary Services Act;
 - (ii) reasons for the administrative action. The Authority’s final decision (notice of administrative action) must contain a clear explanation of the reasons for the action and must include the facts and information on which the decision is based.
 - (iii) a clear statement of the consequences where a person does not comply with certain administrative actions, where relevant. For example, the filing of an administrative penalty order in terms of section 167 of the Act with the registrar of a competent court in order to enforce the order similar to a civil judgment.¹⁸
 - (iv) adequate notice an affected person’s right to apply to the Financial Services Tribunal for a reconsideration of the decision.
 - (v) adequate notice of the right to request reasons, should the final decision (notice of the administrative action) not contain the reasons.

¹⁸ Sec 170 of the Act

8. Departure from procedure

The Authority may depart from the process under paragraph 4 above to the extent provided for in a financial sector law. For example:

- (a) The Authority may under urgent circumstances, where it is satisfied on reasonable grounds that substantial prejudice to clients or the general public may occur, provisionally suspend or withdraw a licence without first affording an affected person a reasonable opportunity to submit representations as contemplated in paragraph 4(2) above, provided that the Authority comply with the requirements applicable for such a departure.¹⁹
- (b) The Authority may vary, suspend and revoke a licence without giving the licensee notice of the proposed action and a statement of the reasons for it or inviting the licensee to make submissions, should the delay involved in complying with such procedures be likely to prejudice financial customers, prejudicially affect financial stability or defeat the object of the action.²⁰

9. Commencement

The Procedures comes into operation on the date of publication.

¹⁹ Sec 9(1)(3) of the Financial Advisory and Intermediary Services Act, 2002 (Act No. 37 of 2002)

²⁰ Sec 123(3) of the FSR Act