

BOARD NOTICE 9 OF 2007

FINANCIAL SERVICES BOARD

**FINANCIAL ADVISORY AND INTERMEDIARY SERVICES ACT, 2002
(ACT NO. 37 OF 2002)**

EXEMPTION RELATING TO FOREIGN BASED FINANCIAL SERVICES PROVIDERS

I, RJG Barrow, Registrar of Financial Services Providers, hereby exempt under section 44(4), read with section 44(1)(b) and (c), of the Financial Advisory and Intermediary Services Act, 2002 (Act No. 37 of 2002), foreign financial services providers from certain provisions of the Act, to the extent and subject to the conditions set out in the Schedule.



**Robert James Gourlay Barrow,
Registrar of Financial Services Providers**

SCHEDULE

FINANCIAL ADVISORY AND INTERMEDIARY SERVICES ACT, 2002 (ACT NO. 37 OF 2002)

EXEMPTION RELATING TO FOREIGN BASED FINANCIAL SERVICES PROVIDERS

1. Definitions

In this Schedule, "the Act" means the Financial Advisory and Intermediary Services Act, 2002 (Act No. 37 of 2002), any word or expression to which a meaning has been assigned in the Act shall have that meaning and, unless the context otherwise indicates-

"Fit and Proper Requirements" means the Determination of Fit and Proper Requirements for Financial Services Providers, 2003, published by Board Notice No. 91 of 2003 in *Gazette* No. 25446 of 10 September 2003 as amended;

"Foreign financial services provider" means a financial services provider that is not domiciled the Republic of South Africa;

"Foreign regulator" means the recognised regulatory body supervising the activities of a foreign financial service provider in its home jurisdiction;

"Foreign auditor" means an auditor registered in terms of any law regulating the activity of independent auditors in the country the foreign financial services provider is domiciled in;

"General Code" means the General Code of Conduct for Authorised Financial Services Providers and Representatives, published by Board Notice No. 80 of 2003, in *Gazette* No 25299 of 8 August 2003;

"Regulations" means the Financial Advisory and Intermediary Services Regulations, 2003;

"Qualifications and experience of compliance officers" means the Qualifications and Experience of Compliance Officers in respect of Financial Service Business, published by Board Notice No. 83 of 2003, in *Gazette* No 25299 of 8 August 2003;

2. Objective of exemption

Persons not domiciled in the Republic of South Africa, who wish to act as financial services providers in South Africa in terms of the Act must apply under section 8(1) of the Act to be authorised as financial services providers.

In addition, Regulation 3 of the Regulations provides that no person other than an authorised financial services provider may solicit for business relating to the rendering of financial services in the Republic. This includes persons based outside the Republic that solicit for business within the Republic.

In cases where foreign regulators having a similar function to that of the South African Financial Services Board regulate foreign financial services providers based within their jurisdictions to render such financial services, and their regulatory requirements are deemed to be at an acceptable standard, a duplication of regulation could result. In order to avoid this situation the Registrar has consequently decided that it would be reasonable to exempt an applicant or licensee domiciled outside the Republic from certain requirements of the Act and the Fit and Proper Requirements.

In terms of section 19(1) of the Act, a financial services provider must, *inter alia*, prepare financial statements reflecting the financial position of the business as at the last day of the financial year in question. Section 19(2)(a) requires that these statements be audited and reported on by an external auditor approved by the Registrar and submitted within a required time period to the Registrar. Section 1(1) of the Act defines "auditor" as an auditor registered in terms of the Public Accountants' and Auditors' Act, 1991 (Act No.80 of 1991) which has now been replaced by Auditing Profession Act, 2005 (Act 26 of 2005). Section 19(2)(b)(i) further provides that statements must be prepared in accordance with generally accepted accounting practice.

The Registrar granted an exemption to financial services providers who fall within Category I as defined in paragraph 1(1) of the Fit and Proper requirements, and who do not receive or hold cash or assets on behalf of clients or do not receive premiums as contemplated in the Long-term Insurance or Short-term Insurance Acts, 1998 from complying with section 19(2)(a) and (b)(i) of the Act published by Board Notice No. 96 of 2003, in *Government Gazette* No 25514 of 30 September 2003

Foreign financial services providers that are not subject to the exemption referred to in the previous paragraph are required to comply with section 19(1) of the Act referred to in the penultimate paragraph, which they will clearly be unable to do. Such providers will however, be required to have an auditor recognised in terms of the laws applicable to the jurisdiction that they are domiciled in. The general accepted accounting practice differs from jurisdiction to jurisdiction and the foreign financial services provider's financial statements will be drawn up in accordance with the general accepted accounting practice applicable in the home jurisdiction.

In terms of section 19(3) of the Act, a provider must maintain records in respect of cash and assets held on behalf of clients, and must submit to the Registrar, a report by the auditor in the form and manner determined by the Registrar.

This report is in accordance with the statements of South African Auditing Standards and foreign auditors will thus not be able comply therewith, but with similar requirements laid down in their respective jurisdictions.

On consideration of the application of sub-sections 19(2) and (3) to foreign financial services providers, reasonable grounds appear for the relaxation of such requirements, if not already covered by existing exemptions.

Furthermore paragraph 4(1)(d) of the Fit and Proper Requirements stipulates that an applicant must have an account with a registered bank, including, where required by the Act, a separate bank account. Foreign financial services providers may not operate a bank account in the Republic and will therefore be unable to comply with this requirement.

The exemption contained in this notice is subject to the condition that the foreign financial services provider is subject to similar regulation in the country in which it is domiciled after the Registrar has taken into account the extent of the regulation and the type of financial services that the provider is authorised to render in terms of the laws of its home jurisdiction.

The Registrar is satisfied that this exemption meets the requirements stipulated in section 44(1)(c) of the Act.

3. Extent of exemption and condition

- 3.1 A foreign financial services provider is hereby exempted from section 19(2)(a) and (b)(i) of the Act, with regard to the appointment of an auditor and the preparation of financial statements in conformity with generally accepted accounting practice: Provided that the foreign financial services provider has appointed an auditor approved or recognised by a recognised foreign regulatory and prepares financial statements in conformity with the generally accepted accounting practice of the country it is domiciled in.
- 3.2 A foreign financial services provider is hereby exempted from section 19(3) of the Act, with regard to the submission of a report in the form and manner determined by the Registrar. Provided that the foreign financial services provider maintains a separate bank account into which clients' funds are deposited and that the records relating to client funds are audited by an auditor appointed or recognised in terms of the laws of the country within which it is domiciled and a report containing procedures similar to those in the report determined by the Registrar is submitted to the Registrar in a similar manner as provided for in section 19(3) of the Act.
- 3.3 A foreign financial services provider is hereby exempted from paragraph 4(1)(b) of the Fit and Proper Requirements, with regard to the opening of a registered bank account. Provided that the foreign financial services provider must have a registered bank account in the country in which it is domiciled which conforms to the laws applicable in that country.

4. Amendment and withdrawal

The exemption mentioned in paragraph 3-

- (a) is subject to amendment thereof published by the Registrar in the *Government Gazette*; and
- (b) remains operative until withdrawn in like manner.

5. Short title and commencement

This exemption is called the Exemption relating to Foreign Financial Services Providers, and comes into operation on the date of publication of this Notice in the *Gazette*.
