GUIDANCE NOTE: 'DEPOSIT' IN THE FAIS ACT

The Financial Advisory and Intermediary Services Act, 2002 (Act No. 37 of 2002) ("the FAIS Act") regulates the rendering of financial services to clients in respect of financial products as defined in section 1(1) of the FAIS Act. Insofar as a product is not a defined financial product, it does not matter whether advice is given or an intermediary service is rendered, the FAIS Act does not apply.

Included in the definition of financial product is a "deposit as defined in section 1(1) of the Banks Act, 1990 (Act No. 94 of 1990)". In terms of the said section a deposit may be defined as money paid by one person to another person subject to an agreement that provides for-

(a) the repayment in whole or part, conditionally or unconditionally, by the person having received money from the other person; with or without premiums; on demand, specified or unspecified or in terms of other agreed circumstances; and

(b) with or without the payment of interest.

A money lending transaction, defined in section 1(1) of the Usury Act, 1968 (Act No. 73 of 1968), falls outside the ambit of financial product as defined. Certain bank products/facilities, for example, loans, credit cards and mortgage bonds would be regarded as money lending transactions. The rendering of financial services in respect of such products would therefore fall outside the ambit of the FAIS Act.

Confusion arises where the facility is used or managed by the holder thereof in a manner different from that for which it was initially intended or provided. A classic example would be a so called "access bond" where money is deposited into the bond and the facility is, in essence, used as a savings account.

It is this Office's opinion, after consultation with the Registrar of Banks, that financial products such as access bonds and revolving credit facilities on vehicle finance facilities do not appear to be deposits as contemplated by the definition of a deposit in terms of

the Banks Act, for as long as the payments made into these facilities result in the defrayment of the relevant principle debt. However, once the principle debt has been defrayed, the pre-existing debtor/creditor relationship will be extinguished. Any further amounts received thereafter by the former creditor from the former debtor would constitute deposits in the hands of the former creditor.

We are further of the opinion that it may be that payments on credit card accounts that are utilised by the holders thereof as savings accounts, and “single facility accounts”, which reflect credit values could constitute deposits in terms of the above-mentioned definition. As such, the FAIS Act will be applicable where providers advise clients to save in, for example, their credit card accounts.

Notwithstanding the above, we wish to emphasise that every transaction and product should be evaluated in accordance with its own legal merits.