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BOARD NOTICES

BOARD NOTICE 97 OF 2004

FINANCIAL SERVICES BOARD

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

EXEMPTION IN RESPECT OF CERTAIN OFFICE-HOLDERS

I, Jeffrey van Rooyen, Registrar of Financial Services Providers, hereby exempt under section 44 of the Financial Advisory and Intermediary Services Act, 2002 (Act No. 37 of 2002), certain office-holders from provisions of the Act, as set out in the Schedule.



J VAN ROOYEN,

Registrar of Financial Services Providers

SCHEDULE

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

EXEMPTION IN RESPECT OF CERTAIN OFFICE-HOLDERS

Definitions

1. 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-

"**Code of Conduct for Discretionary FSPs**" means the Code of Conduct for Discretionary FSPs, 2003, contained in Chapter II of the Notice on Codes of Conduct for Administrative and Discretionary FSPs, published by Notice 79 of 2003 in *Gazette* No. 25299 of 8 August 2003, as amended by Notice 3294 of 2003 in *Gazette* No. 25713 of 14 November 2003;

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

"**provider**" means-

- (a) an executor, administrator, trustee of an insolvent estate, curator, liquidator, judicial manager, parent, tutor or guardian referred to in section 45(1)(b) of the Act;
- (b) any trustee of a testamentary trust in a deceased estate, or trustee of an *inter vivos* trust, referred to in section 45(1)(b),

who renders intermediary services as a regular feature of business.

Objective of exemption

2. (a) (i) Providers referred to in paragraph (a) of the definition thereof in this Schedule, fall under section 45(1)(b) within the ambit of the Act.
- (ii) The registrar is satisfied that the rendering of intermediary services by such providers is regulated by other laws as envisaged in section 44(1)(a) of the Act, and that the requirements of section 44(1)(c) are also met. Therefore, such providers qualify for an exemption from section 7(1) of the Act in respect of the rendering of such services.

- (b) (i) Providers referred to in paragraph (b) of the said definition, also fall under section 45(1)(b) within the ambit of the Act.
 - (ii) The registrar is not satisfied that the rendering of intermediary services by such providers is regulated by other laws as envisaged in section 44(1)(a) of the Act. Therefore, there is no ground for an exemption from section 7(1) of the Act. The registrar is also not satisfied that such an exemption can be justified with reference to the requirements of section 44(1)(b) and (c) of the Act.
 - (iii) However, considering the fiduciary obligations applicable by law to trust deeds and wills, and the requirements of section 44(1)(b) and (c) and (4) of the Act, the registrar is of the view that the full application of the General Code or, where relevant, the Code of Conduct for Discretionary FSPs, is not required where such providers render intermediary services.
 - (iv) The registrar is therefore satisfied that these providers qualify for a partial exemption as set out in paragraph 3.
- (c) Any exemption referred to in paragraph (a) and (b) should also only apply to the rendering of intermediary services, and not to the furnishing of advice, as no grounds appear for exemption of a provider from any provision of the Act regarding the furnishing of advice.

Extent of exemption

3. (a) A provider referred to in paragraph (a) of the definition thereof in this Schedule, is exempted under section 44(1) from section 7(1) of the Act.
- (b) A provider referred to in paragraph (b) of the said definition, is exempted under section 44(4) of the Act-
- (i) from Part III of the General Code; and
 - (ii) where applicable, from sections 3.1(b), 4(b) and 5 of the Code of Conduct for Discretionary FSPs.

Conditions of exemption

4. The exemption mentioned in paragraph 3(b) of this Schedule is subject to the conditions that-
- (a) where under the General Code or the Code of Conduct for Discretionary FSPs any reporting or disclosures have to be made by the provider to clients who are-
- (i) minors; or

- (ii) under any other legal disability regarding contractual capacity (excluding any disability flowing from marital status),

such reporting or disclosures must be made to the relevant curator, parent, guardian or tutor of the client;

- (b) where the provider renders intermediary services of a discretionary nature regarding the choice of a particular financial product the provider must subject to any restriction imposed by law-
 - (i) obtain information regarding the client's financial circumstances, needs and objectives and such information that is necessary to enable the provider to render suitable intermediary services to the client;
 - (ii) identify the financial products that best suit the client's objectives, risk profile and needs;
 - (iii) where clients have conflicting or competing interests in relation to the assets administered, endeavour to balance such interests and treat the clients fairly.
- (c) a provider need not do a needs analysis as contemplated in paragraph 4(b) if, in terms of the underlying trust instrument, the provider has no discretion in the allocation of income or capital to beneficiaries of the trust, or in the investment of assets of the trust.

Amendment and withdrawal of exemption and conditions

- 5. The exemption and any condition in paragraphs 3 and 4 may at any time-
 - (a) be amended by the registrar by notice in the *Gazette*;
 - (b) be withdrawn by the registrar in like manner.

Short title and commencement

- 6. This Exemption is called the Exemption in respect of Certain Office-holders, 2004, and comes into operation on the date determined by the Minister in terms of section 7(1) of the Act.